(1955) 11 AP CK 0029

In the Andhra Pradesh High Court

Case No : A. A. O. No''s. 185 and 186 of 1953

Duvvada Balakrishnamma Choudhury and Others — APPELLANT

Vs

Duvvada Kamesam Choudhury and Others — RESPONDENT

Date of Decision : 15-11-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 18, Order 21 Rule 19, Order 21 Rule 20, Order 34 Rule 6, Order 41 Rule 6

Citation : (1955) 11 AP CK 0029

Hon'ble Judges : Subba Rao, C.J;Bhimasankaram, J

Bench : Division Bench

Advocate : E. Venkatesam and P. Kodanda Ramiah, for the Appellant; C.V. Dikshitulu, for the Respondent

Judgement

Bhimasankaram, J.—These two Civil Miscellaneous Appeals arise out of the two E.P. Nos. 54 and 55 of 1952 in O. S. No. 64 of 1945 and O. S. No. 58 of 1949 respectively on the file of the Court of the Subordinate Judge of Srikakulam. The Petitioners in both E. Ps. (Respondents in both the appeals) who are the legal representatives of one Hari Krishnamma sought to set off two decrees in O. S. Nos. 64 of 1945 and 58 of 1949 in their favour against the amount due from them to their judgment-debtors (one Balakrishnamma and his sons) under the decree in O. S. No. 47 of 1915. The Respondents are liable to pay an amount of Rs. 7,243-13-4 jy 23rd of November, 1946 to the Appellants.

Under the decrees in O.S. No. 04 of 1945 and O.S. No. 58 of 1949 llio Appellants owed the Respondents lis. 2,490 towards mesne profits and lis. 1,429-4-0 towards costs in O. S. No. 04 of 1945 and an amount of lis. 5,400 plus an amount of Its. 853-14-0 for costs in O. S, No. 58 of 1949, The decree in O, S. No. 47 of 1,9.15 is a decree against the Respondents in their capacity as the legal representatives of Hari Krishnamma, and as such, of course, limited to the assets of the deceased available in their hands while the decrees in O. S. No. 64 of 1945 and O. S. No. 58 of 1949 are ordinary decrees for money. The lower

Court has allowed the set-off claimed and the applicants against: whom that claim was allowed, impugn the correctness of the lower Court''s order.

2. In the first place, Mr. Venkatesam, learned Counsel for the Appellants contends (hat appeals against the decrees in (). S. Nos. 04 of 1945 and 58 of 1949 are pending in this Court, that the decrees have not become final and that in the circumstances the set-off should not be allowed, at any rate, without security being taken from the Respondents under Order 41, Rule 6 of the Code of Civil Procedure. It is frankly conceded by him however (hat no such direction was sought from tire lower Court. Mr. Venkatesan however says that as the appeals are now pending in this Court, we may as well pass the necessary order. We are not however prepared to do so.

The appeals themselves arc not now before us. It is true that they are pending in this Court; but the matter should be properly considered only in interlocutory applications made in (he respective appeals. Further Order 41, Rule 6, CPC Code, provides for direction as to security being made only on sufficient cause being shown by the Appellant. A mere request for such a relief cannot, in our opinion, constitute "sufficient cause" within the meaning of that phrase.'' The Appellants may, if so advised, take out appropriate applications in the appeals.

3. The next and principal contention raised by the learned advocate for the Appellants is that as the decree which they have obtained against the Respondents is one limited to the assets of the deceased Hari Krishnamma, the parties do not fill the same character in all of them and that the Respondents are not therefore entitled to claim a set-off.

4. Before we examine the decisions cited, we may refer to the relevant provisions of the Code of Civil Procedure. They are contained in Rules 18, 19 and 20 of Order 21. It is enough however to extract for the present purpose Sub-rules (1) and (3) of It. 18 and Rule 20.

18. (1) Where applications are made to a Court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between die same parties and capable of execution at the same time by such Court, then-

(a) If the two sums are equal, satisfaction shall be entered upon both decrees; and jv Ho) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum and satisfaction for the (smaller sum shall be entered on the decree for the D. KAMKSAM (Bhimasankaram J.) [Pas. 1-6] Andhra Pradash 521 larger sum as well as satisfaction on the decree of the smaller sum.

2. * * * * * *

3. This rule shall not be deemed to apply unless

(a) tire decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party has the same character in body

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suits; and (b) the sums due under the decrees are definite.

19. * * * * * *

20. The provisions contained in Rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge.

5. Reliance is placed for the Appellant on Sheo Shankar v. Chunni Lal, ILR 38 All 669: AIR 1916 AH 290 and Mohammad Tahar and Another Vs. Mt. Intizar Fatima, . In ILR 38 All 669: Sheo Shankar and Others Vs. Chunni Lal and Others, , one Sheo Shankar obtained two decrees against Chunni Lai while Chunni Lal had three decrees for sale on the basis of three mortgages against a number of persons, among whom was Sheo Shankar, who had been impleaded as a purchaser of a very small portion of the mortgaged property. When Sheo Shankar applied for the execution of his decrees against Chunni Lai, . Chunni Lal claimed that the amount of his three decrees should be set off against Sheo Shankar''s decrees. It was held that Sheo Shankar''s character as judgment-debtor of Chunni Lal was different from that in which he held decrees against Chunni Lal.

Sheo Shankar''s decrees were obtained by him-in his individual and personal capacity while under Chunni Lal''s decrees he was not a judgment-debtor in his individual and personal capacity but was only given an option to pay a certain sum of money if he liked to save some property in which he was interested. Their Lordships therefore held drat R. 18 of Order 21 would not apply and diat Chunni Lal was not entitled to claim a set-off. It will be seen that in the case before us, the persons occupying the position of Chunni Lal are objecting to the claim-made by the persons standing in the position of Sheo Shankar. We merely notice the distinction now and we shall discuss its importance later.

6. In Mohammad Tahar and Another Vs. Mt. Intizar Fatima, , a single Judge of the Allahabad High Court took a similar view. The facts in that case are: One Q had two wives, F and U. lit; had two children by the former and two by the latter. On Q''s death, F and her children instituted a suit against U and her children for a declaration that U was not a legally wedded wife of Q. This suit was dismissed. There was a decree passed in favour of U and her children for costs against the Plaintiffs. Meanwhile F filed Anr. suit against all the heirs of Q including U and her children for recovery of her dower debt and a decree was obtained in her favour therein against the assets of Q in the hands of the Defendants. When U and her children sought execution of their decree for costs against F and her children, the latter sought a set-off of the amount they owed for costs against the decree in their favour.

The learned Judge points out that it could not be done as the Appellants were liable to satisfy the decree against them only if they had any assets of Q in their possession, while the decree for costs which they had obtained was a personal decree against F and her children. He therefore held that the Appellants before him did not fill the same character in both the suits as required by Order 21, Rule

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18, Code of Civil Procedure, and that therefore the two decrees could not be legally set-off Against each other. The facts in this case are exactly like the facts in the present case, except that the objection is taken not by the persons against whom the ?scope of the decree is limited but by persons who are liable in their individual and personal capacity to pay the whole of the sum decreed.

7. The case in Sheo Shankar and Others Vs. Chunni Lal and Others, , was referred to and distinguished in the case reported in Venkata Reddi Vs. T.V. Dorasami Pillai, It was held therein by a Bench of the Madras High Court .that

a mortgagee against whom a money decree has been obtained by his mortgagor can claim to set off that decree against a decree for sale obtained by him against his mortgagor on foot of his mortgage in a ease in which, under the decree for sale, the mortgagor is liable for all the deficiency that may remain after the sale.

The case in Sheo Shankar and Others Vs. Chunni Lal and Others, , was distinguished on the ground that in that case, the person against whom the decree was sought to be set off was the purchaser of a portion only of the mortgaged property who was under no personal liability and that he was rightly held to be filling a different character in the mortgage suit from tire one in the decree sought to be set-off. But it was pointed out however that the fact that one of the two decrees is a mortgage decree does not by itself amount to an objection to the set-oil claimed. Order 21, Rule 20 which provides that the provisions contained in Rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge was interpreted in a liberal .sense and it was pointed out that a set-off is permissible even though one decree is simply for money and Anr. a mortgage decree, though it was said that in the latter case there should also be the personal liability of the mortgagor in order that the set-off may be allowed. The observations made in that case as regards mortgage decrees without personal liability are however obiter.

8. A few years later, these rules came up for consideration by the Privy Council in the case reported in Hazariram Marwari v. Bansidhar Dhandhania, ILR 16 Pat 127: AIR 1937 PC 39 It was contended before their Lordships that R. 20 applied only where both the decrees were mortgage decrees or charge decrees. Their Lordships repelled the argument in these terms:

The contention that Rule 20 only applies where both decrees are mortgage decrees was repeated before this Board, but their Lordships agree with the High Court in rejecting it. Rule 20 was new in 1908 and was intended to settle, as regards set-off, a conflict of decisions as to whether a mortgage decree was within the description of "decree for the payment of money" or "money decree.

There is nothing in the language of the rule and nothing in the reason of the matter to justify the interpretation contended for. In the absence of personal liability on each side, to set-off two mortgage decrees may be just as much or as little inequitable; as to set-off a mortgage decree against a decree for money

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9. The words of Rule 20.

decrees for sale in enforcement of a mortgage or charge cannot be restricted to personal judgments such as may be given under Order 34, Rule 6.

But their Lordships in that case were actually dealing with a mortgage decree in which though there was no personal decree, the right to a personal judgment against the mortgagors still subsisted and was not barred. They therefore did not "embark upon a discussion of the difficulties that may arise if a mortgage decree be set off against a money decree in the absence of any personal liability on the part of the mortgage who holds the money decree.'''' They proceeded to say "Mr. Dunne for the Respondents contested the view taken, in the High Court as to personal liability being a condition of set-off, but as this important question does not here arise for decision and calls for careful discussion, their Lordships do not think fit to pronounce upon it.

They then referred to the cases in Venkata Reddi Vs. T.V. Dorasami Pillai, : Burma Oil Co. Ltd. v. Ma Tin, ILR 7 Rang 505: AIR 1930 Rang 68 (F) and ILR 50 Mad 339:AIR 1933 Mad 63) as being relevant to the consideration of the question. But there are certain observations of their Lordships in'' that decision as to the construction of Rules 18 to 20 which are in point to the present discussion. They observe at page 148 (of ILR Pat): (at p. 41 of AIR), thus:

If X has a decree against A and A and B have a decree against X, it is clear from illustration (b) lo Rule 18, as well as on principle, that X cannot insist on a set-off. Their Lordships will assume without deciding, that the rights of B make it equally impossible for A alone to claim set-off against X. But if 15 and A both as for the set-off must it necessarily be refused? And even if it appears that A incurred the debt to X on behalf of himself and B? Their Lordships think not. It is true that under Rules 18 to 20 the set-off of decree is not a discretionary matter depending upon equitable considerations such as may emerge from the circumstances that both decrees arise out of the same transaction. Whatever they arise from, circuit of proceedings thereunder can be avoided and should be avoided - this is the principle of the rules. But if the assignee can insist upon set-off as provided by Clause 2 of Rule 18, then to refuse the application of A and B to have the set-off allowed, would be the height of technicality.

10. Now, in the present case, the decree against the Respondents is just like an ordinary mortgage decree without personal liability because it is a decree against the judgment-debtors in their capacity as the legal representatives of Harikrishnamma and therefore limited to the assets of Harikrishnamma in their hands. Out of the amount decreed;, the holders of this decree (who are the present Appellants) can recover from their judgment-debtors no more than the value of such assets. . That being so, it is true! that the sum actually ''''due'''' in the sense of being I realisable under the decree, is not "definite'''' within; the meaning of Clause (b) of Rule (3) of 11. 18. But if; the judgment-debtors are prepared to pay the whole of the sum decreed against them irrespective of the

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value of the assets of the deceased in their hands, surely tho same can be described as definite. Then again a person against whom a decree is passed in his character as a legal representative can certainly at his option extend the scope of the decree to his own prejudice by expressing a willingness to have it treated as a decree personally against him. Rule IS cannot be interpreted so as to prevent a judgment-debtor from saying to his decree-holder.

It is true that you cannot proceed personally against mo, and that though you may have a large sum of money, you cannot recover in execution of it more than the value of the property of the deceased in my hands. But I am willing to pay the whole of the money for which you. have got a decree without reference to the value of such assets.'''' In taking up such an attitude he does nothing to prejudice his decree-holder. Rule 18 only prevents his decree-holder from insisting on a set-off and is conceived in the interests of such a kind of a judgment-debtor. It cannot however preclude the judgment-debtor from taking upon himself a character which he need not take and which may operate to his prejudice. But it would be "the height of technicality" j to use the phrase of their Lordships, so to read R. 18 as to disable him from acting in a manner which cannot, in any conceivable circumstances, tend to the detriment of the decree-holder.

11. It has indeed been held in Krishna Chandra Bhoumick Vs. Pabna Dhanabhandar Co. Ltd., , that there is inherent power in the Court to allow a set-off in case not falling strictly within the terms of Order 21, Rule 19, a view which received subsequent approval by Anr. Division Bench of I he same (Joint in the decision reported in Bank of Dacca, Ltd. Vs. Gour Gopal Saha, . But it is unnecessary, for our present purpose, to invoke any such inherent power.

12. A case on all fours with the present one came up for decision before a single judge of the Madras High Court in Nachiinuthu Chetty v. Balani Ammal, 1943 2 Mad LJ 596: AIR 1941 Mad 149. Somayya J., held in that case that "Where one person has obtained a mortgage decree for a certain sum against the property in the hands of Anr. and the latter holds a money decree against the former for a large sum, the money-decree-holder can under Order 21, Rules 18 to 20 of the CPC have the whole of the amount of the mortgage decree set oil as against his own decree.'''' The learned Judge pointed out that if a set-off is not allowed, where the money-decree-holder is willing to have the whole of the amount of the mortgage decree set-off as against his decree, the very object of Order 21, Rules. 18 to 20 of the Code designed to avoid circuitry of proceedings, which is prominently mentioned by the Judicial Committee as the reason for the rules would be defeated. This view does not conflict with the rules laid down in Sheo Shankar and Others Vs. Chunni Lal and Others, and in Mohammad Tahar and Another Vs. Mt. Intizar Fatima, , that the holder of a mortgage decree for sale without personal liability of the mortgagor or of a decree against the legal representatives of a deceased period son limited to his assets in their hands cannot, at his option, claim a set-off against tins money due from him under a

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liability which can be enforced personally against him, A mortgages decrees cannot (1 be treated as a personal decree unless the mortgagor such a case cannot say to his judgment-debtor, "My decree against you is limited in scope. Your decree against me is unlimited. Therefore one cannot be set-off against the other."

13. For these reasons, we are clearly of the opinion that the Respondents were entitled to claim a set-off. By so doing, they were in no way acting to the prejudice of the Appellants. They were only acting on the footing that the decree against them might be treated as a decree under which a definite sum (the whole of the decretal amount) is due and as one under which they were personally (and not merely to the extent of the property in their hands o! the deceased whom they represented) liable - the 2 conditions, requisite for bringing the case under R. 18. The result therefore is that both the appeals tie dismissed with costs in C. M. A. No. 185 fail and of 1953

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