

(2002) 06 BOM CK 0127

In the Bombay High Court

Case No : Appeal against Order No. 14 of 2002

Mohanlal Baid and Another

APPELLANT

Vs

Khandelwal Brothers Ltd.

RESPONDENT

Date of Decision : 12-06-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 47

Citation : (2002) 5 BomCR 648 : (2002) 3 BOMLR 618 : (2003) 1 CivCC 24 : (2002) 3 MhLj 835

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : P.A. Deshmukh, for the Appellant; V.R. Thakur, for the Respondent

Final Decision : Allowed

Judgement

D.Y. Chandrachud, J.—Heard both the sides.

2. Admit. By consent of the learned counsel for the parties, the appeal is taken up for hearing forthwith.

3. The appellants filed Special Civil Suit No. 1297 of 1997 against the respondent and against one Rajiv Khandelwal for the recovery of money and it is common ground that on 3rd January, 2000, the suit came to be decreed by the learned 3rd Joint Civil Judge, Senior Division, Nagpur. The decree of the Trial Court was an ex parte decree in the amount of Rs. 5,08,530/- inclusive of interest. The appellants instituted Special Darkhast No. 268 of 2001 against the judgment-debtors. The respondent, who is one of the judgment-debtors, has now instituted Special Civil Suit No. 862 of 2001 against the appellants for setting aside the decree, which has been obtained in Special Civil Suit No. 1297 of 1997. In the said suit, an application for temporary injunction was moved vide Exhibit 5 for an order restraining the appellants from taking steps in the execution proceedings, being Special Darkhast No. 268 of 2001 arising out of Special Civil Suit No. 1297 of 1997 pending before the learned 3rd Joint Civil Judge, Senior Division, Nagpur.

By the impugned order dated 28th January, 2002, the learned Trial Judge allowed the application for temporary injunction and restrained the appellants from executing the decree passed by the Court in Special Civil Suit No. 1297 of 1997.

4. In allowing the application for the grant of injunction as prayed for, the learned Trial Judge has furnished two reasons in support of the order, viz. (1) The respondent herein, who is the plaintiff in Special Civil Suit No. 862 of 2001 had been impleaded as a party to the earlier suit "as an abundant precaution" in case the first defendant to the earlier suit contended that the amount was utilised for the benefit of the second defendant (the respondent herein). The learned Judge held that the plaint in the earlier suit does not refer to the delivery of any amount to the respondent herein and that in fact the amount was given to Shri Rajiv Khandelwal, the Director of the respondent, and (2) The suit had been instituted on 5th December, 1997, while the alleged cheque of Rs. 75,000/- was issued on 30-4-1994. There was, therefore, "some substance" found by the learned Trial Judge in the contention raised by the respondent on the point of limitation.

5. The learned counsel appearing on behalf of the appellants urged that the reasons that weighed with the learned Trial Judge in allowing the application *ex facie* are erroneous. Firstly, it was submitted by the learned counsel for the appellants that the learned Trial Judge, by the impugned order date 28th January, 2002, has restrained the appellants from executing the decree passed in the earlier suit and this is a blanket injunction against the execution of the decree not merely against the respondent, who was the second defendant in the earlier suit, but as against the first defendant in the earlier suit also. The first defendant is not a party to the subsequent suit, which has been instituted by the respondent herein. Secondly, it was urged that a separate suit was not maintainable and the remedy of the respondent is to file a substantive appeal against the *ex parte* decree or to move an application for setting aside the decree. It is also urged that the contention of the respondent that the decree is a nullity, can be raised in the execution proceedings u/s 47 of the Code of Civil Procedure. Finally, it was submitted that in any case neither of the two reasons, which weighed with the learned Trial Judge, can be regarded as constituting a *prima facie* case of the alleged decree being obtained by fraud.

6. The learned counsel appearing on behalf of the respondent sought to sustain the order of the Court below by relying upon the judgment of the learned Single Judge of this Court in the case of Narayanrao Marotirao Pimpalkar Vs. Waman Nathuji Wankhade and Another, , wherein it was held that the power to protect the interest of a litigant can be invoked under the inherent jurisdiction of the Court which is exercised u/s 151, Civil Procedure Code.

7. Having heard the learned counsel for the parties, I am of the view that the impugned order passed by the learned 3rd Joint Civil Judge, Senior Division, Nagpur, is completely unsustainable in law. An *ex parte* decree has been passed against the respondent, who was the second defendant, as well as against one

Rajiv Khandelwal, who was the first defendant, in Special Civil Suit No. 1297 of 1997. The subsequent suit for setting aside the decree passed in the earlier suit has been instituted by the respondent alone. Therefore, there is merit in the contention of the learned counsel for the appellants that in any event, it was not open to the learned Trial Judge to injunct the appellants from executing the decree passed in the earlier suit, atleast as against the first defendant to the earlier suit, Shri Rajiv Khandelwal. But quite apart from this consideration, there is merit in the plea, which has been raised by the learned counsel for the appellants, that any order of this nature, which has been passed by the learned Trial Judge, could not be passed consistent with the well settled legal position. u/s 47 of the Code of Civil Procedure, 1908, all questions whatsoever between the parties to the suit in which a decree has been passed, have to be determined by the Court executing the decree in the same suit and not by way of a separate suit. A separate suit is not maintainable. Moreover, the grounds put forth by the respondent for challenging the decree obtained by the appellants in Special Civil Suit No. 1297 of 1997 do not by any means amount to even a prima facie case of fraud. The fact that the respondent was impleaded as a party to the earlier suit as and by way of "abundant precaution", is a circumstance, which can well be urged by the respondent either before the executing court as provided in Section 47 of the Code of Civil Procedure, or while pursuing any other remedies which the respondent may have against the judgment of the Trial Court decreeing the earlier suit. The respondent has a remedy under Order 9, Rule 13 of the CPC for setting aside the ex pane decree or, the respondent can file a substantive first appeal against the decree. Neither of these two courses of action have been adopted by the respondent. Instead, the respondent has followed a patently misconceived remedy of instituting a separate suit.

8. Lastly, as regards the contention of the respondent that the earlier suit was barred by limitation, this would not render the decree a nullity or one without jurisdiction. This point is well settled by the judgment of the Supreme Court in the case of Urban Improvement Trust, Jodhpur Vs. Gokul Narain and another, .

9. Having regard to these circumstances, I am of the view that the order of the learned Trial Judge impugned in this case is not sustainable in law.

10. Accordingly, the appeal is allowed. The order passed by the learned 3rd Joint Civil Judge, Senior Division, Nagpur, is set aside. It is clarified that it will be open to the respondent, if it is aggrieved by the ex parte decree, to pursue its remedy under Order 9, Rule 13 of the Code of Civil Procedure, or as the case may be, to file a substantive first appeal. Similarly, the respondent may, if it is so advised, raise an appropriate defence in the execution proceedings u/s 47 of the Civil Procedure Code.

11. The appeal from order is accordingly disposed of.