

(2013) 02 CAL CK 0027

In the Calcutta High Court

Case No : A.P.O. No. 387 of 2011, G.A. No. 2239 of 2007, C.S. No. 486 of 1991
and A.P.O. No. 388 of 2011, G.A. No. 3392 of 2011, E.C. No. 83 of
2007, C.S. No. 486 of 1991

Prabir Roy Chowdhury

APPELLANT

Vs

AGR Plantations Private Limited
 AGR Plantations
Private Limited Vs Khem Chand Dhingra

RESPONDENT

Date of Decision : 18-02-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 21, Order 23 Rule 3, 47
Companies Act, 1956 — Section 293
Contract Act, 1872 — Section 52
Income Tax Act, 1961 — Section 230A

Citation : (2013) 2 CHN 485

Hon'ble Judges : Shukla Kabir (Sinha), J;Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : S.B. Mookherjee and Samit Talukdar in APO 387 of 2011 and Sourav Sengupta and Sahin Parveen in APO 388 of 2011, for the Appellant;Jayanta Mitra, Jaydip Kar and Billadal Bhattacharya (in APO 387 of 2011), for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Banerjee, J.

PREFACE

1. These two appeals would relate to a challenge to the order dated September 28, 2011 whereby the learned Single Judge dismissed the application for order of injunction restraining registration of conveyance in favour of AGR Plantation as also the other application for setting aside of the decree directing execution of conveyance in favour of AGR Plantation. FACT INVOLVED

One Bhupatish Roy Choudhury was the owner of Toonbarrie Tea Estate. Bhupatish entered into an agreement for sale dated March 12, 1988 with one

Khem Chand Dhingra. Bhupatish failed and neglected to conclude the sale. Dhingra filed a suit for specific performance being suit C.S. No. 486 of 1991. However, as per the agreement for sale, Bhupatish handed over possession of the tea estate to Dhingra and executed an irrevocable power of attorney in his favour empowering him to run and manage the tea estate. Under the agreement for sale, sale would be concluded upon permission being taken from the appropriate authorities. Bhupatish contended, he could not get permission as Dhingra did not assist him properly. It later on transpired, M/s. AGR Plantation, a company run by one Santosh Kumar Agarwala took over the tea estate from Dhingra. AGR and Santosh were added as party defendant. The parties settled the suit. Santosh claimed interest in the tea estate on the basis of an agreement executed by Bhupatish in his favour on April 30, 1991. The suit ended in a compromise on a Terms of Settlement being executed by Bhupatish on one hand and Dhingra, Santosh and AGR on the other hand. Dhingra went out and AGR was substituted in place of Dhingra. AGR and Santosh agreed to meet up the bank liabilities whereas Bhupatish was to convey the garden in their favour. The compromise was recorded in a decree passed on April 5, 2000. AGR filed an execution case being Execution Case No. 83,2007 after about seven years. Santosh filed an application inter alia, stating that AGR Plantation was a family company and his younger brother forcibly ousted him from the garden on November 2, 2005. In the meantime, Bhupatish died leaving him surviving the present appellant Prabir Roy Chowdhury as his heir who filed application for recall of the compromise decree on the ground, the decree was not enforceable; firstly because of not obtaining permission from the appropriate authority and secondly in absence of meeting of the bank liability. The learned Single Judge found both the applications being devoid on merit. Being aggrieved, Prabir filed the appeal as his application was dismissed. AGR filed appeal as His Lordship did not direct the Receiver to take physical possession of the Tea Estate for being handed over to AGR Plantation. We heard both the appeals analogously.

CONTENTIONS

2. Appearing for the appellant in APO No. 387, Mr. Sumit Talukdar, learned senior counsel raised four issues:

- i) The compromise decree would record reciprocal obligations of the parties, unless the parties would discharge the reciprocal obligations, the decree could not be put to execution.
- ii) The decree would provide no default clause hence, not enforceable.
- iii) The vendor having failed to obtain any permission from the appropriate authority, decree for specific performance was not liable to be enforced.
- iv) Under the appropriate statute of 1993 being the West Bengal Land (Regulation of Transfer) Act, 1993 no tea estate could be transferred without permission from the appropriate authority. Hence, in absence of the appropriate permission from the State authorities the decree could not be executed.

3. Elaborating his argument, Mr. Talukdar would contend, the compromise decree even if put to execution, the statutory liabilities having not discharged, the purchaser was not entitled to claim execution of the conveyance. According to Mr. Talukdar, the bank dues were not cleared by AGR. Moreover, under the agreement Bhupatish was entitled to rupees fifty thousand per month. Such payment was made up to May 2001. AGR defaulted in making any further payment to Bhupatish or Prabir after his death as his heir. Hence, the decree could not be executed. He also submitted, land would belong to State of West Bengal. As per the Deed of Lease executed by the State in favour of the company, the land could not be transferred. Moreover, the said Act of 1993 would impose a clear fetter in this regard. On factual matrix, Mr. Talukdar would contend, AGR could not run the garden, hence, surrendered it to the owner and since then owners have been running the garden. AGR failed and neglected to discharge the liability. After taking it over, the owners cleared off the bank dues. He relied upon the following decisions:--

- i) Pulavarthi Venkata Subba Rao and Others Vs. Valluri Jagannadha Rao and Others,
- ii) Baldevdas Shivilal and Another Vs. Filmistan Distributors (India) P. Ltd. and Others,
- iii) Prithvichand Ramchand Sablok Vs. S.Y. Shinde,
- iv) Hajee S.V.M. Mohamed Jamaludeen Bros. and Co. Vs. Govt. of T.N.,
- v) Escorts Farms Ltd., Previously known as Escorts Farms (Ramgarh) Ltd. Vs. The Commissioner, Kumaon Division, Nainital, U.P. and Others,

4. Mr. S.B. Mookherjee, learned senior counsel also appearing for the appellant/owners restricted his argument on the issue of reciprocal obligations. According to Mr. Mookherjee, under the agreement AGR was to discharge their reciprocal obligations mainly clearing off the bank dues. They failed to do so. Hence, the decree could not be executed. He relied on the following decisions in this regard

- i) Jai Narain Ram Lundia Vs. Kedar Nath Khetan and Others,
- ii) Chen Shen Ling Vs. Nand Kishore Jhajharia,
- iii) Hungerford Investment Trust Ltd. (in voluntary Liquidation) Vs. Haridas Mundhra and Others,

5. Per contra, Mr. Jayanta Kumar Mitra, learned senior counsel appearing for AGR Plantation would refer to section 47 of the CPC to discuss the scope and effect of the said provision. According to Mr. Mitra, the scope of the said provision was microscopic in nature as observed by the Apex Court in the case of Dhurandhar Prasad Singh Vs. Jai Prakash University and Others, . He emphatically refuted the charge of non-discharge of the liability. According to him, the so-called discharge of the liability by the owners occurred during running of the garden by themselves. The past liabilities were duly cleared by AGR till the date when they

were forcibly dispossessed. On the question of payment to Bhupatish, Mr. Mitra would contend, the payment was duly made up to April 2001 when AGR stopped making any further payment as Bhupatish failed to obtain appropriate permission from the relevant authorities delaying the execution of the conveyance. Even if this would amount to failure or neglect on their part, it could at best give rise to a monetary claim by Bhupatish or his heirs, however, this could not be co-related with transfer of the garden in favour of AGR that was agreed to as per the decree of compromise. On the issue of surrender, Mr. Mitra would contend, the letter was forcibly obtained by the Manager of the adjacent tea garden who forcibly took over possession with the help of anti-social elements. He referred to a police complaint made on June 20, 2007 and June 22, 2007 appearing at pages 135 to 144 (A.P.O. 388 of 2011). According to him, the execution case was filed soon after AGR had been dispossessed. The learned Judge appointed Receiver for making an inventory however, did not direct physical possession that resulted in the other appeal. Mr. Mitra referred to pages 142 and 143 of the Paper Book to show, in the Affidavit-in-Opposition, AGR duly dealt with the allegation made against them. Mr. Mitra particularly referred to paragraph 11 of the Affidavit-in-Opposition appearing at page 141-142 to show the steps taken by AGR as per the compromise decree whereas Bhupatish failed and neglected to perform his part of the obligations under the decree. He referred to the order dated July 26, 2007 by which the learned Single Judge appointed Special Officer. He also referred to the report of the Special Officer to show, the tea leaves were diverted to Malandi Tea Estate belonging to Ranaut who forcibly took possession of the tea estate and running the same.

6. Referring to the discharge of the liability, Mr. Mitra would rely upon page 208 to show, the dues of the bank was paid off and the bank issued certificate in this regard. He would also refer to page 140 and 143 to show the detail steps taken to clear off the dues. According to Mr. Mitra, the respondent stopped paying the monthly honorarium to Bhupatish or his successor, as the case may be, as they failed to take steps for execution of the conveyance. Mr. Mitra would contend, as per the settlement, the respondent was to pay the balance price. They would pay it simultaneously on execution of conveyance. The amount shown as outstanding by the appellant might have accrued when the appellant or his nominee were in the helm of the affairs.

7. On the reciprocal obligation, Mr. Mitra would contend, respondent cleared all the bank dues, provident fund dues and other statutory dues. They also obtained necessary clearance certificate u/s 230A of the Income Tax Act. Hence it was the duty of the vendor to convey the property as per the agreement. At best, the respondent would be entitled to claim the monthly amount of Rs. 50,000/- for the period falling in arrears. They were not entitled to rescind the contract. He referred to the Apex Court decision in the case of Shankar Sitaram Sontakke and Another Vs. Balkrishna Sitaram Sontakke and Others, wherein the Apex Court would observe that the compromise would have binding force upon parties concerning the compromise.

8. Distinguishing the decision in the case of Pulavarthi Venkata Subba Rao (supra) Mr. Mitra would contend, the power to reopen the compromise decree, would only be available, in case decree would remain unsatisfied. This proposition of law would have no application in the instant case. Similarly, the decision in the case of Jai Narain Ram Lundia (supra) would be of no assistance to the appellant. The Apex Court would observe, when the decree imposes obligation on both sides which are so conditioned that performance by one is conditional on performance by the other, execution will not be ordered unless the parties seeking execution not only offers to perform his side but, when objection is raised, satisfies the executing Court that he is in the position to do so. Mr. Mitra would contend, the respondent failed to perform the execution that would be apparent on the face of the record. Hence, this decision would rather help the respondent.

9. Distinguishing the decision in the case of Baldevdas Shivilal and another (supra), Mr. Mitra relied on the latter decision of the Apex Court in the case of Byram Pestonji Gariwala Vs. Union Bank of India and others, and contended, once the consent decree remain unchallenged as none expressed any doubt as to its validity or genuineness the parties must adhere to the same and the same was liable to be satisfied.

10. Distinguishing the decision in the case of Prithivichand Ramchand Sablok (supra) he contended the decision was rendered in a suit for eviction where consent was sought to have been obtained for vacating of the premises. The Court observed, despite such consent Court should reach independent satisfaction that rent proposed is just and reasonable. Consent decree passed otherwise would not operate as res judicata. Mr. Mitra would contend, this decision would be of no assistance to the present case.

11. Distinguishing the other decisions cited at the Bar, Mr. Mitra would contend, once the respondent was ready and willing to perform the obligation question of denial of the respondent to perform reciprocal obligation would not arise at all. In this regard he referred to section 52 of the Indian Contract Act, 1872.

12. He would lastly contend, the provision of Government grant Act would have no application in the instant case.

13. He prayed for dismissal of the appeal.

14. While replying, Mr. S.B. Mookherjee learned senior counsel distinguishing the decision of the Apex Court in the case of Dhurandhar Prasad Singh (supra) contended, in a suit for specific performance the decree was in the nature of a preliminary decree and the Court was not powerless to examine the decree again in case occasion would arise and such consideration could be made through the application under the section 47 of Code of Civil Procedure. He reiterated, the dues appearing at page 85 was not cleared. Factum of outstanding monthly honorarium was also not in dispute. The criminal case referred to by Mr. Mitra, ended in acquittal. Hence, the story being projected by appellant was far from

truth.

15. Resuming his reply, Mr. Mookherjee would contend, section 47 of the CPC was one of the recognized modes to deal with the issue of the like nature. According to him, in a suit for specific performance the Court would still retain its jurisdiction even after passing of the decree so long the controversy would not reach a complete finality.

16. He would reiterate, AGR abandoned the garden, voluntarily handed over the same to the owner. The alleged criminal contempt ended in a final report as would appear in the Supplementary Affidavit used by him. AGR, although filed application for execution in 2007, did not take any effective step till 2012 that would demonstrate their conduct. According to Mr. Mookherjee, AGR was not at all ready and willing to perform their obligation under the consent decree. Hence, they would not be entitled to raise such issue at this belated stage.

17. Commenting on the legal issue, Mr. Mookherjee would contend, in view of the change in the position of law, decree would no more be enforceable making the execution application not maintainable.

18. He summed up by contending, the situation changed a lot. When the tea industry was in difficult times AGR surrendered the garden putting it in difficulty. Now the owners were running it effectively by discharging all liabilities AGR was not entitled to put the decree into execution and insist on conveying the property to them.

19. He distinguished the decisions cited by Mr. Mitra. Referring to the decision in the case of Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others, Mr. Mookherjee would contend, the said decision was rendered at the post decree stage that would have hardly any relevance in the instant case. Similarly, the decision in the case of Baldevdas Shivilal (Supra) would have no application in the instant case as the facts would completely differ. Referring to the decision in the case of Byram Pestonji Gariwala (Supra), Mr. Mookherjee would contend, the Apex Court observed that the compromise decree even if vitiated by fraud or misrepresentation, would be binding upon the parties. In the instant case, the AGR did not perform their obligation. Hence, this decision would be of no assistance to them. Similarly, the decision in the case of Prithivichand Ramchand Sablok (supra) would be of no assistance as the subject decree would be hit by the provisions of law as elaborately contended by him earlier.

20. As a rejoinder, Mr. Mitra would contend, the issue of recession of contract was not argued before the learned Single Judge. No such plea was taken by the appellant in their appeal. Hence, they should not be allowed to urge such point that too, while giving reply. Contradicting Mr. Mookherjee on the issue of stale, he would contend, AGR contemporaneously applied for execution soon after they had been dispossessed and an advocate of this Court was appointed Receiver, orders were passed monitoring the act of the Receiver. It would be too late in the day to contend, issue was stale. According to Mr. Mitra, there was no delay at all.

The story of voluntary handing over was far from truth, even if accepted, that would be hit by the provisions of section 293 of the Companies Act, 1956 as the Manager did not have the authority to hand over the tea estate being the only undertaking of the company to Ranaut or any other person, prejudicial to the interest of the company.

OUR VIEW

JUDGMENT ANALYSIS

21. We scanned the judgment and order impugned. We would find, learned Judge dealt with the issue of power of the executing Court. The learned Judge referred to the argument made by the parties on the execution application. However, we do not find any decision on the said issue. From the Cause Title we find, the execution case was mentioned. We are not sure whether the said application was, in fact, taken up for hearing. Two applications were listed that were heard and disposed of, one being G.A. No. 2238 of 2007 filed by one Santosh Agarwala making the grievance that would have no direct effect on the decree and the other being G.A. No. 2239 of 2007 filed by the owner for setting aside of the decree, in the alternative for a declaration that the decree was null and void. The learned Judge dismissed both the applications. Santosh did not file any appeal. Hence, the order of dismissal in G.A. No. 2238 attained finality. We need not deliberate on the same. G.A. No. 2239 was, in fact, an application u/s 47 of the Civil Procedure Code. The learned Judge considered the rival contentions. His Lordship also considered the law on the subject particularly, the true purport of Order 23 Rule 3 of the Code. The learned Judge ultimately came to the following findings:

- i) "Thus, in view of the ratio laid down in the above-noted reports the compromise consent decree cannot be said to be a mere recording of the averments of the parties but as a trapping of a decree capable of being executed under Order 21 of the Code of Civil Procedure".
- ii) "The compromise/consent decree cannot be said to be a mere agreement affecting the immovable property so as to attract the provisions of the Indian Stamp Act."
- iii) "The decree cannot be said to be unlawful in view of the embargo created in the lease deed or under the West Bengal Estate Acquisition Rules 1954."
- iv) "The scope of section 47 is limited and microscopic. It relates to the discharge, satisfaction and execution of a decree. Anything beyond these three parameters set up u/s 47 of the Code could not be entertained by the executing Court."
- v) "None of the parties have raised objection to the grant of the compromise decree being unlawful under the Indian contract Act. What is sought to be contended is that the parties are not performing their obligation under the compromise/consent decree. For such reason the decree cannot be set aside u/s

47 of the Code of Civil Procedure.

22. While arriving at the findings as above, the learned Judge considered most of the decisions now cited before us that were also cited before the learned Single Judge.

SCOPE OF THE APPEAL

23. The appeal of Prabir Roychowdhury would relate to the order of dismissal of his application made u/s 47. The learned Judge held, the scope was microscopic. His Lordship held so considering the Apex Court decisions cited at the Bar on the issue. If we go by the plain reading of the provision we would find, all questions arising between the parties to the decree or any person claiming interest from the decree, relating to execution, discharge or satisfaction may be determined by the executing Court without filing a suit. In our view, that would infer a prerequisite, the applicant must recognize the decree and then would raise question as to its extent of execution or discharge or satisfaction. In the instant case, the petitioner prayed for setting aside of the decree that, in our view, not possible in an application u/s 47. Similarly, a blanket prayer for declaration that the decree was null and void, was also not maintainable in an application u/s 47. We would definitely agree with Mr. Mookherjee on his submissions on reciprocal obligations. Mr. Mitra also did not join issue on that score. The question would thus arise whether the parties to the decree performed their obligation and to what extent it is still outstanding. That question would certainly arise and could be determined u/s 47. The executing Court is the appropriate authority to decide such question and give directions on that score. The executing Court, in our considered view, is competent enough to examine all facets of decree so that it could be properly enforced to the extent permissible. It would have otherwise no right to call it a nullity or set aside the same as prayed for, herein.

24. The other appeal filed by AGR was principally on the ground of refusal to pass further order on the execution application by the learned Judge. The Learned Judge discussed the execution application in detail, however, did not pass any order or dispose of the same. The observations made by His Lordship were to the extent of power of the executing Court in the application u/s 47 in the context of the subject decree and nothing else. We feel, learned Judge should be given a free hand to consider the execution application and dispose of the same by passing appropriate order. The learned Judge while doing so would certainly consider the extent of obligation still left for the rival parties to be discharged. Once a decree is based upon a reciprocal obligation its satisfaction would only be recorded when both parties would discharge their respective obligations. We thus feel, the second appeal was premature as the learned Judge is yet to take up the execution application for hearing.

CONCLUSION

25. The law as discussed above is based upon the well-settled principles of law as we find from the decisions cited at the Bar. Let us now apply the same in the

present circumstance.

26. If we bring the facts in a narrow compass we would find, the parties filed a term of settlement comprising the suit whereby both the parties would have reciprocal obligation to discharge to have complete satisfaction of the decree. Under the terms of settlement the owner was to convey tea estate upon payment of the agreed price whereas the purchaser would have obligation to discharge the liability pertaining to the tea estate more particularly described in the terms of settlement. Mr. Mookherjee contended, AGR did not discharge their obligation. Mr. Mitra, in his usual fairness, would not seriously dispute such contentions. Even if we give credence to such issue, would it be right for the executing Court to set aside a decree that was passed by consent? Significant to note, no fraud was alleged. No duress was alleged. We fail to appreciate, how the executing Court in an application u/s 47 could set aside the consent decree or declare it as null and void. As observed hereinbefore, the scope of section 47 is microscopic in nature. It would only empower the executing Court to examine the decree, not going behind it, to find out the difficulties, if any, in discharge and/or satisfaction of the said decree. It would rather an enabling provision empowering the executing Court in furtherance of proceeding to have the decree in a logical conclusion after recording appropriate satisfaction. In a decree of the like nature, where parties would have reciprocal obligation to discharge in having the complete satisfaction of the decree, the executing Court was competent to examine whether the parties in fact discharged their obligation and in case there is any lapses the executing Court is well within its power to see to it that such obligations are discharged by the defaulting parties so that the decree could reach a logical conclusion through satisfaction. Section 47 would have no role to play particularly empowering the Court to have the decree set aside or declaring it as null and void. As observed hereinbefore, the executing Court did not have power to go behind the decree or declare it null and void or set aside the same. In the instant case the learned Judge, although discussed execution case in detail, did not formally pass any order in the execution application. The learned Judge dismissed the application u/s 47 and, in our view; very rightly, it is now the turn of the learned Judge to dispose of the execution application by passing appropriate order on the same. We do not find any scope to interfere with the ultimate finding of the learned Judge. We leave it open to the parties to raise identical contentions on reciprocal obligations before the learned Judge when execution application would be taken up for hearing.

RESULT

27. The appeals fail and are hereby dismissed. We would humbly request the learned Single Judge to dispose of the execution application in accordance with law at an early date subject to His Lordship's preoccupation and convenience.

28. There would be no order as to costs. Urgent certified copy of this judgment, if applied for, be given to the parties on their usual undertaking.

Shukla Kabir (Sinha), J.

I agree.