
(2004) 12 BOM CK 0017

In the Bombay High Court

Case No : Civil Rev. Application No's. 292 and 933 of 1994

Ramchandra Ramgopal through Jugalkishore Kothari

APPELLANT

Vs

Kamalkishore Rungta and Others

RESPONDENT

Date of Decision : 01-12-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5, Order 9 Rule 11, Order 9 Rule 13, 151

Contract Act, 1872 — Section 44

Citation : (2005) 2 MhLj 623

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : V.P. Panpalia, for the Appellant; A.S. Mardikar, for the Respondent

Final Decision : Allowed

Judgement

B.P. Dharmadhikari, J.—Heard Shri Panpalia, Advocate for the petitioner and Shri Mardikar, AGP for the respondents.

2. By these revision applications, the original plaintiff challenges the order dated 14-12-1993 by which the Court below has set aside the judgment and decree dated 12-4-1993 delivered by it in Special Civil Suit No. 168 of 1991 treating it to be an ex parte decree.

3. The applicant original plaintiff filed Special Civil Suit No. 168 of 1991 against present revision applicant and its partners for recovery of Rs. 2,95,526/- towards the settlement of account which the revision applicant had opened with it. The contention of revision applicant is that the said account was opened by respondent No. 1 firm on 10-4-1989 and the revision applicant - plaintiff made payments against Hundi to the original defendants. The details of these payments are mentioned in the plaint and it is mentioned that on making credit debit entries on 1-4-1990, sum of Rs. 2,27,696/- was found due against the original defendants. The defendants had issued four cheques in the month of May, 1991 but those cheques were returned by the Bank with endorsement

"Account closed". The trial Court has decreed this Suit on 12-4-1993 and in the heading of judgment itself, it is mentioned that it is judgment under Order 17, Rule 3(a) of Civil Procedure Code. The operating part of judgment further mentions that it is joint and several decree against the defendants ordering them to pay sum of Rs. 2,95,526/- to the plaintiff firm with future interest at 21% per annum from the date of suit till its realisation.

4. On 7-6-1993, respondent No. 1 filed MJC No. 76 of 1993 under the provisions of Order 9, Rule 13 read with Section 151 of CPC for setting aside said judgment and decree by mentioning that on 12-4-1993, he was present in the Court throughout the day with his counsel but the trial Court did not call out his case. He has contended that the trial Court, therefore, could not have proceeded to deliver ex parte judgment and decree. The trial Court has thereafter passed the impugned order (judgment) in MJC on 14-12-1993. The trial Court has found that the judgment is not under the provisions of Order 17, Rule 3(a) of CPC and it has accepted the version that on 12-4-1993. Respondent No. 1 was present in the Court. In this background, the ex parte judgment and decree dated 12-4-1993 is set aside and the suit has been restored back to file without any order as to costs.

5. I have heard Shri Panpalia, learned counsel for the revision applicant and Shri Mardikar, learned counsel for respondent No. 1. Shri Panpalia, has contended that it is not an ex parte decree at all and as such proceedings under Order 9, Rule 13 were not tenable. He has further contended that when the trial Court expressly mentioned that it is a decree under Order 17, Rule 3(a) of Civil Procedure Code, it was not open to the said Court to review that finding in MJC to hold that it was not a case falling under Order 17, Rule 3(a) of Civil Procedure Code. He has further contended that the decree was joint and several and as such it was not necessary for the trial Court to set aside the entire judgment and decree and it could have been set aside only against respondent No. 1 and the rest of the judgment and decree should have been maintained. He has relied upon the rulings in the case of Tejbai Tejshi and Others Vs. Gangubai Dinanath Ulvekar, ; in the case of Adalat Prasad Vs. Rooplal Jindal and Others, to contend that it is a decree under 17, Rule 3(a) and therefore, proceedings under Order 9, Rule 13 were not tenable. He has further relied upon the ruling in the case of Leena v. Chandrakant reported in 2000(2) Mh.L.J. 1 to contend that only operative part of the judgment is to be looked into and not reasoning. He has, therefore, contended that when the trial Court has mentioned a judgment to be under Order 17, Rule 3(a) of CPC it was not open to the trial Court to review those findings in subsequent proceedings. He has further relied upon the judgment in the case of Vasant v. Tukaram, reported in AIR 1960 Bom 485; in the case of Devilal Vs. Himat Ram and Others, and in the case of Jodh Singh v. Kehar Singh, reported in AIR 1959 J & K 96, to contend that money decree is joint and several and as such in view of the proviso of Order 9, Rule 13, it was not necessary to set aside the entire judgment and decree.

6. As against this Advocate Shri Mardikar has contended that the trial Court has correctly entertained the proceedings under Order 9, Rule 13 and has correctly allowed the same. He contends that provisions of Order 17, Rule 3(a) have no application in the facts and circumstances of the case. He further mentions that after these proceedings, there were subsequent proceedings instituted by some other defendants and in those proceedings, again the entire judgment and decree has been quashed and set aside by expressly observing that in view of this subsequent order passed in MJC No. 77 of 1993 the present challenge has become infructuous. In reply Advocate Shri Panpalia, has pointed out that another Civil Revision Application bearing No. 292 of 1994 is also filed against the said order in MJC No. 77 of 1993. He points out that said order is dated 7-2-1994 and in that order, in operative part the trial Court has only granted relief to the applicant Jugalkishor Rungta before it. The said Jugalkishor is respondent No. 1 in Civil Revision Application No. 292 of 1994. He is respondent No. 3 in C.R.A. No. 933 of 1994. That is how both these revisions are taken up for hearing and decision simultaneously.

7. Having heard both the sides, the fact which is apparent on record is that in its judgment dated 12-4-1993, the trial Court has mentioned that it is a judgment under Order 17, Rule 3(a) of the Civil Procedure Code. The trial Court has further mentioned that it would be beneficial to point out the circumstances in which it has proceeded under Order 17, Rule 3(a). It has considered all this in para 6 while considering the issue No. 1 and it has pointed out that the original defendants wanted to delay the adjudication. It has further mentioned the conduct of original defendants in avoiding to adduce the evidence and about hindrances put by them in suit trial, the trial Court has passed different orders on different applications which are filed by those defendants vide Exs. 174, 176, 180, 185 and 188. It has observed that while rejecting adjournment application at 188 which was filed before the Commissioner, who was acting on behalf of the Court and had gone to house of original defendant No. 2 i.e. Jugalkishor, it was found by the trial Court that it is free to proceed further under Order 17, Rule 3(a) as though Jugalkishor was present before the Commissioner, he did not adduce any evidence. It has further held that there is no evidence on behalf of the respondent in rebuttal and thereafter he has proceeded to analyse the evidence adduced by the plaintiff before it alone.

8. Perusal of judgment reported at 2002(I) Mh.L.J. 350, particularly para 6 clearly shows that if the impugned order makes reference to particular provision under which the trial Court has proceeded to pass it, then it is not open to the superior Court to hold that the order is passed under some other provisions. The said observations in para 6 read as under :

"To my mind, the moot question that arises for consideration is, when the impugned order makes specific reference to a particular provision under which the subordinate Court proceeded to pass the same, then is it open to the superior Court before which the matter is in appeal to infer that the said order is

not passed under that provision but some other provision so as to justify the maintainability of the appeal filed before it? In my view, such an approach would be impermissible. If the impugned order makes reference to a specific provision under which it is purported to have been passed, then the justness and appropriateness of that order can be questioned only in the manner provided for by the provisions of the Code of Civil Procedure. Merely because the Court is a superior Court that would not permit this Court to infer a fact contrary to the one mentioned in the impugned order by the subordinate Court that would not permit this Court to infer a fact contrary to the one mentioned in the impugned order by the subordinate Court that it had passed the same under Order 8, Rule 5 of Code of Civil Procedure. It will be apposite to advert to the enunciation of the Apex Court in *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another*, . Moreover, indubitably, Right of Appeal or for that matter right to file application under Order 9, Rule 13 is a creature of statute and the same can be availed only in manner and in the circumstances provided for under the said provisions."

9. In para 7 of the judgment, the Court has further observed that in facts before it, the order was passed under Order 8, Rule 5 and therefore, it would not be permissible for it in appeal from Order against order passed on Notice of Motion filed under Order 9, Rule 13 to infer that said order has not been passed under that provision but under some other provision. It has held that in such circumstances remedy was to file First Appeal. In para 9, after considering the authorities, the learned Judge of this Court has held that when the ex parte decree passed by the trial Court specifically recorded that it has been passed in exercise of powers under Order 8, Rule 5 of CPC against such a decree, the remedy is only by way of first appeal and provisions of Order 9, Rule 13 are not attracted. Thus, it is to be seen that here the trial Court has expressly mentioned that judgment is under Order 17, Rule 3(a) and therefore, it is not possible for this Court or to the trial Court to draw any other inference to hold that it is an order/judgment passed under any other provision.

10. This Court in judgment reported in judgment in the case of *Himachal Pradesh Co-operative Marketing and Development Federation Limited Vs. M/s. MAFCO Limited*, , has considered the situation in which the defendant had filed written statement and the Court had framed the issues and thereafter adjudicated upon those on the basis of material available. This Court has held that provisions of Order 9, Rule 13 are not attracted as it is only an ex parte decree. In the facts of present case, this ruling squarely covers the situation inasmuch as the defendants had filed their written statement and the trial Court had framed issues. Thereafter, it has considered the evidence adduced by the original plaintiff by expressly mentioning that it is a joint and several judgment and decree. In such a situation, it cannot be said that it is a ex parte judgment or decree to which provisions of Order 9, Rule 13 are applicable. The provisions of Order 9, Rule 11 permit the Court to proceed further with the suit when one or more of the defendants do not appear and provisions of Order 9, Rule 13 permit the defendants to move for setting aside the decree if it is against him/them. Perusal

of Order 17, Rule 2 reveal that when the suit is fixed for hearing and adjourned and any of the parties fail to appear on such date, the Court has option to dispose of the suit in the mode and manner specified in Order 9 or it can make such Order as it thinks fit. Provisions of Order 17, Rule 3 permit the Court to proceed further in suit where any party to a suit to whom time has been granted fails to produce his evidence, or witnesses or fails to perform such other acts as is necessary for further prosecution of the suit for which time had been allotted to him. Under Sub-rule 3(a), if the parties are present, the Court can proceed to decide the suit forthwith. If the parties or any one of them is absent, the Court can proceed under Order 17, Rule 2. Here, the trial Court has found that original defendant No. 2 Jugalkishore, a partner of firm - respondent No. 1 in C.R.A. No. 933 of 1994 and respondent No. 1 in C.R.A. No. 292 of 1994 was present before the Commissioner who had gone to his residence for recording his evidence but he did not adduce any evidence before the Commissioner. The Court has, therefore, proceeded further under Order 17, Rule 3(a) of CPC and has decided the suit forthwith after appreciation of evidence available on record. It is, therefore, clear that it is not an ex parte judgment and decree and as such the trial Court was not correct in setting it aside as ex parte judgment and decree. Once, this view is taken, it is clear that the judgment dated 14-12-1993 in MJC No. 76 of 1993 is unsustainable and said judgment is liable to be quashed and set aside and the MJC deserves to be dismissed. The same also stands true in relation to order dated 7-2-1994 passed below Ex. 20 in MJC No. 77 of 1993.

11. Insofar as order dated 7-2-1994 is concerned, in para 6, the trial Court has observed that decree in question was passed against Jugalkishore in his capacity as partner in the firm and as such decree is not divisible at all. In this connection, Shri Panpalia, learned counsel for the Revision Applicant in both the revisions has contained that the trial Court itself has said that the decree is passed in joint and several capacity. He has invited attention of this Court to proviso of Order 9, Rule 13 which reads as under :

"Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also; (Bombay amendment)"

He states that this proviso is not applicable as this judgment and decree is joint and several and original plaintiff is free to execute the decree against the other defendants who have not filed proceedings under Order 9, Rule 13. He has relied upon the judgment reported at AIR 1960 Bom 485, particularly para 8 thereof to urge that money decrees against firm are joint and several and are indivisible decrees. Perusal of para 8 of the judgment clearly supports his argument and proviso to Order 9, Rule 13 reveals that it is not sufficient that there was possibility of inconsistent decrees but what is necessary is that the original decree, which is being set aside at the instance of only one defendant, is of such a nature that it cannot be set aside as against that defendant only; if there is such an infirmity in the original decree, then only action as per above proviso of

Order 9, Rule 13 is warranted.

12. In view of the discussion above, it is apparent that the impugned judgment and decree dated 12-4-1993 is not a judgment and decree with such infirmity and therefore, action as required by above proviso is not / was not necessary. He has also relied upon the judgment reported at *Devilal Vs. Himat Ram and Others*, of this Rajasthan judgment, again supports his contention. The learned Single Judge of the Rajasthan High Court has found that the plaintiff has claimed a money decree against all the defendants jointly and severally for the amount which may be found due to the plaintiff from the partnership. The learned Single Judge has pointed" out Section 44 of Indian Contract Act where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors. It has been held that consequently, the appellant before the Rajasthan High Court could have proceeded against the remaining respondents even though one of the joint promisor had died and his legal representatives were not brought on record. Shri Panpalia, learned counsel for the petitioner has also relied upon the judgment reported at AIR 1959 J & K 96 for the same purpose.

13. It is thus apparent that insofar as observations made by the trial Court in para 6 of the order dated 7-2-1994 that the decree in question is not divisible at all are misconceived. In the alternative, the advocate for the revision applicant had contended that these observations are made in para 6 only but while passing effective order, in operative part, the trial Court has set aside the decree only against J. and K. By placing reliance upon 2000(2) Mh.L.J. 1, he has contended that the Court has to look into only operative part of the decree or order and not the reasoning. He has further invoked extra ordinary jurisdiction of "dependent orders" by relying upon the judgment reported in AIR 1988 SC 897 to contend that he could have straightway proceeded to execute judgment and decree against the other defendants. He has contended that as the revision was already filed before this Court and was pending subsequent orders made by the trial Court in this respect are all subject to final adjudication in these revisions. However, such question does not arise in both the orders i.e. the order dated 14-12-1993 passed in MJC No. 76 of 1993 and the order dated 7-2-1994 passed in MJC No. 77 of J 993 which are challenged before this Court.

14. For the reasons mentioned above, both the orders are quashed and set aside. Civil Revision Applications are allowed. Rule is made absolute in above terms. There shall be no orders to costs.