

(1959) 03 AP CK 0028

In the Andhra Pradesh High Court

Case No : A.A.O. (First Appeal) No. 168/1 of 1954-55

Seth Harak Chandas

APPELLANT

Vs

Hyderabad State Bank, Hyderabad

RESPONDENT

Date of Decision : 02-03-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, Order 34 Rule 1, Order 34 Rule 14, 38

Citation : AIR 1960 AP 56

Hon'ble Judges : Mohd. Ahmed Ansari, J; Manohar Pershad, J

Bench : Division Bench

Advocate : Jaleel Ahmed, for the Appellant; N.N. Ayyangar, for the Respondent

Final Decision : Dismissed

Judgement

Manohar Pershad, J.—The judgment-debtor is the appellant. His appeal arises out of execution proceedings started by, the respondent herein. The plaintiff-respondent on the basis of a mortgage filed a suit for recovery of the mortgage amount. In that suit, a compromise was effected between the appellant and the respondent. The relevant terms of the compromise were ;

"1. The defendant do pay to the plaintiff a sum of Rs. O. S. 1,01,566-2-4 and full costs of this suit together with interest at 6 per cent and 1/2 per cent per annum compoundable quarterly on both sums from date of suit till date of payment.

2. The said sum shall be paid by the defendant to the plaintiff in six monthly instalments of I. G. Rs. 22,000/- and the first of such instalments shall become payable on the 12th day of November 1953 and thereafter on the following dates namely 12th May 1954 and 12th November 1954 and the whole of the balance due under the decree on or before 12th May 1955.

3. As the properties already mortgaged are said to be not sufficient security the defendant has this day mortgaged by way of further security his building Nos. 7-5-41 to 7-5-41/4 situated at Nizamabad as per registered deed of mortgage

dated 27-6-1953, registered in the office of the Sub-Registrar, Nizamabad.

4. In default of the payment of any one instalment on the due date the plaintiffs will be entitled to cause the properties already mortgaged and those mortgaged by way of further security and referred to in para above to be sold in any order and appropriate the net sale proceeds towards the satisfaction of the mortgage decree in this suit.

5. If the sale proceeds of the properties already mortgaged and subsequently mortgaged as further security are found to be insufficient the plaintiff will be entitled to a personal decree against the defendant and recover such balance from the mortgagor personally and from his other properties both movable and immovable."

2. On the basis of this compromise, a decree was passed and when the plaintiff-respondent herein started execution proceedings the appellant raised objection to the execution of the decree on various grounds. His first objection was that the decree was declaratory in nature and as such it was not executable. The second objection raised on his behalf was that as the decree-holder has accepted instalments the remedy of the respondent was by way of suit. The Court below has repelled these contentions of the judgment-debtor and directed execution of the decree. It is this order of the executing Court that is now challenged in this appeal by the judgment-debtor.

Shri Vasant Rao Mukhedkar, the learned counsel for the appellant, contended that the decree passed was only a declaratory one and was not capable of execution. The second contention advanced is that as the decree-holder has accepted instalments his remedy was by way of suit as provided under Order 34, Rule 14, C.P.C. The question whether a decree is a declaratory one or is one capable of execution depends on the terms of the compromise, and the intention of the parties ought to be deduced from the language used in the compromise without any aid from oral evidence. In the case of an ordinary decree in a mortgage suit not based on a compromise a decree will be drawn up in the form printed under Rule 2 of Order 34, C. P. C., and will then be followed by a final decree under Rule 3.

The provisions of Rule 2 of Order 34 show that they are intended to give an opportunity to the mortgagor to pay the money under the decree. Similarly, the provisions of Order 34, Rule 14 are intended for the benefit of the mortgagor. There is nothing whatever therein to show that it is not open to the mortgagor to waive the benefit of that provision and thereby do away with the necessity of requiring the mortgagee to file a separate suit. It is not denied that it is open to the parties to contract themselves out of the provisions of Order 34 by means of - a compromise and to have a decree passed in such terms as to operate as a final decree automatically, or to agree that in default of payment of money by a stipulated date the decree shall operate as a final decree. We are supported in this view by the cases of Qazi Ghulam Amir Vs. Mt. Masuda Khatun and Others,

and Venkatarama Reddy v. Kamsetty Venkat Sharbhaiah, A. S. No. 107/1 of 1956 on the file of this Court.

3. In the light of this, we may refer to the terms of the compromise before us. In para 2, the parties have agreed that the decretal amount would be paid by instalments. In para 4, there is a recital that the mortgaged property is not sufficient security for the mortgage amount. In para 5, it is stated that in default of payment of any one instalment on the due date the plaintiff would be entitled to cause the sale of the property already mortgaged and those mortgaged by way of further security and referred to in para 5 in any order and appropriate the net sale proceeds towards the satisfaction of the mortgage decree.

In para 6 there is a further agreement that if the sale proceeds of the property mortgaged and subsequently mortgaged as further security are found to be insufficient, the plaintiff would be entitled to a personal decree and recover such balance from the mortgagor personally and from his other properties both movable and immovable. What is contended by the learned counsel for the appellant is that property subsequently mortgaged by way of further security was not the subject-matter of the suit and the Court was not justified in passing a decree to that extent, and the decree embodying the terms of the compromise under Order 23, Rule 3, C. P. C., would only have an effect of an agreement enforceable by a regular suit and not by way of execution on.

It is true that having regard to the provisions of Order 23, Rule 3, C. P. C., the decree has to be passed only so far as the compromise relates to the suit. But a compromise which includes matters extraneous to the suit is not unlawful and cannot be rejected in its entirety. Vide *Ranjit Singh v. Gobardhan Chandra* 50 Cal WN 447 and *Hari Chand v. Magi Mal* AIR 1917 Lah 282 (2). The proper course for the Court in cases where the compromise comprises matters unconnected with the suit is to recite the compromise as a whole in its decree or in the form as a schedule to the decree for purposes of reference; but to restrict the operative part of the decree to those terms of the compromise which relate to the suit. We agree with the contention of the learned counsel for the appellant that in such a case the decree would be executable only in respect of the matters that relate to the suit and the remaining terms of the compromise, i.e. those which are not incorporated in the operative part of the decree may be enforced by means of a separate suit. We may in this connection refer to *Hernanta Kumari v. Midnapur Zamindari Co.* AIR 1919 PC 79, *Shankar Balakrishna v. Shree Copal Krishna Sansthan*, AIR 1941 Nag 197, *Balesar Misir Vs. Tekesar Misir and Others*, ; *Makhan Lal Samadder Vs. Khagendra Nath Chakravarty and Another*, *Rajagopalan v. Subbarama* AIR 1919 Mad 305 and *Vishnu Sitaram Achat Vs. Ramchandra Govind Joshi*, But where the operative part of the decree gives effect to terms of a compromise which do not relate to the suit, question arises whether the executing Court is entitled and bound to refuse to execute the decree. On this question, there is a conflict of decisions. On the one hand, it has been held by the High Courts of Madras, Allahabad, Lahore, and Fatna that the

executing Court cannot refuse to execute the decree in such a case: Vide Manager of Sri Meenakshi Devasthanam, Madura v. Abdul Kasim Sahib ILR Mad 421, (Sahu) Shyam Lal Vs. M. Shayamlal, Lal Singh v. Mohan Singh AIR 1934 Lah 623, and Muhammad Ismail Vs. Bibi Shaima, The reason according to the Madras High Court is that an objection to the decree cannot be allowed to be raised in the executing court, but must be taken by way of appeal : Sabapathi v. Vanmahaltnga AIR 1915 Mad 210. The High Court of Calcutta and the High Court of Bombay have held on the other hand that such a decree is inoperative and invalid and cannot be executed in so far as it gives effect to the terms of a compromise not relating to the suit. Vishnu Sitaram Auchat Vs. Ramchandra Govind Joshi, We find ourselves in agreement with the view expressed by the High Court of Madras that such an objection cannot be raised in the executing court and must be taken by way of appeal.

4. The question whether any particular term of the compromise relates to a suit or is covered by the subject-matter must be decided from the form of the suit, the relief claimed and the relief granted. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down, and each case must be governed by its own facts. The relief granted in a compromise decree need not be confined to the relief prayed for in the plaint.

The fact that the compromise relates to property, not the subject-matter of the suit, is not in all cases decisive of the question whether the compromise does not relate to the suit. In our opinion, all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit, or not, become related to the suit and can be embodied in the decree, We are supported in this view by Byomkesh Mukherjee Vs. Bhupendra Narayan Sinha Bahadur and Another, and Umashankar v. Shivshankar AIR 1944 Bom 239 (2). In the light of this, if we were to consider the terms of the agreement in the instant case, we find that the original suit was for the recovery of the money on the basis of a mortgage.

The relief granted was that in default of payment of any instalment on the due date the plaintiff will be entitled to cause the sale of the properties already mortgaged and those mortgaged by way of further security, and if such sale proceeds are not sufficient the plaintiff will be entitled to a personal decree against the defendant and to recover such balance from the mortgagor personally and from his other properties both movable and immovable. It is clear from this that apart from the mortgage property certain other properties were also given by way of further security because the original mortgaged property was not sufficient to meet the entire claim of the plaintiff. In other words, a charge has been created on the other property for the payment of the amount. Such an agreement by the parties would, in our opinion, relate to the suit. Identical question had arisen in the Madras High Court in the case of

Ramaswamy Nayudu Vs. K.N.S. Subbaraya Thevar and Others, , where it has been held;

"The words "so far as it relates to the suit" cannot be said to have reference only to the subject-matter of the suit. The language used is wide and general and it is obvious that it would be highly inconvenient if the parties should not be allowed to settle their disputes on such lawful terms as they might agree to, without being restricted to such relief as one of the parties had chosen to claim in the plaint. The terms in a compromise decree which form the consideration for the compromise of the suit must be deemed to be part of the decree" and can be enforced in execution proceedings. A decree passed on a compromise cannot be regarded as ultra vires simply because it goes beyond the subject-matter of the suit and contains other conditions. If those other conditions are the consideration for the compromise of the subject-matter of the suit, they must be incorporated in the decree."

The same view has been taken by the Bombay High Court in the case of Vishnu Moreshwar Dabholkar Vs. Sadashiv Shivram Nisale, There it has been held :

"A compromise decree in a mortgage suit by which the parties agree that the amount decreed according to the compromise should be a charge on certain properties, in addition to the mortgaged property, is "lawful" and "relates to the suit" within Rule 3 so as to be embodied in the decree."

In this case, their Lordships have followed Kuruvetappa v. Izari Sirusappa ILR 30 Mad 478. This was a case arising under S. 375 of the old Code of Civil Procedure. There it has been held :

"The language of Section 375 of the CPC is wide and general and does not preclude parties from settling their disputes on such lawful terms as they might agree to without being restricted to such relief as one only of the parties had chosen to claim in the plaint.

5. In a suit for money, where the plaint prays for a simple money decree, an agreement, by which the parties agree that the amount decreed according to the compromise should be a charge on certain properties, is "lawful" and "relates to the suit" so as to be embodied in the decree."

6. It is not denied that the plaintiff-respondent could execute the decree so far as the earlier mortgage property is concerned, but the contention is that in so far as the other property which was not originally the subject-matter of the suit is concerned, the decree-holder has to institute a suit under Order 34, Rule 14, C.P.C. and cannot proceed by means of execution. In view of the above discussion, this argument loses its force. That apart, Clause 5 of the compromise is very clear in this respect. The words "cause the property already mortgaged and those mortgaged by way of further security to be sold in any order and appropriate the sale proceeds towards) the satisfaction of the mortgage debt in the suit" are very material.

The words "in any order" mean that the plaintiff-respondent can put to sale the property subsequently mortgaged first or the earlier mortgaged property. It is also clear from the said para that he is entitled to realise the decretal amount by sale. To accept the contention of the appellant would mean that so far as the mortgage property is concerned, the plaintiff-respondent could recover the property by sale of the property, but he could not do so with regard to the subsequent mortgage. This, in our opinion, is neither the intention, nor" do the words used in the para indicate that meaning and intention. Further, there does not appear to be any distinction made by the parties in this regard. It is not denied that the property mortgaged was not sufficient to discharge the mortgage-debt.

The mortgagee was entitled to claim a personal decree against the mortgagor and could execute the decree in execution alone. When the mortgagee could claim a personal decree and execute the same in execution, we fail to understand why he would agree with the mortgagor in terms detrimental to his interest. That does not seem to be the intention of the parties. Clauses 5 and 6 read together only lead to this conclusion that it was the intention of the parties that the mortgaged property and the other property which was given By way of further security should be put to sale by the mortgagee in execution of the decree.

That apart, as stated earlier, Order 34, Rule 14, C.P.C., is for the benefit of the appellant and there is nothing to stop him from waiving that right. As discussed above, the said provision being for his benefit and he having waived it, it is very difficult to accept the contention of the learned counsel for the appellant that the plaintiff-respondent should file a suit in so far as the subsequent mortgage of the property was concerned and not realise the same in the execution itself.

7. In the result, we do not see any force in this appeal. It is dismissed with costs.