
(2000) 08 CAL CK 0022

In the Calcutta High Court

Case No : G.A. No's. 4273 of 1998 and 76 of 1999 and Suit No. 684 of 1985

Shaikh Habibullah

APPELLANT

Vs

Md. Sultan Khan and Others

RESPONDENT

Date of Decision : 18-08-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151, 152, 47

Citation : AIR 2001 Cal 22 : 105 CWN 605

Hon'ble Judges : K.J. Sengupta, J

Bench : Single Bench

Judgement

K.J. Sengupta, J.—Both these two applications are taken up for hearing for convenience sake. One is taken out by Mr. Rudradeo Chowdhury's client being sole widow of one of the judgment-debtors being the defendant No. 1 since deceased challenging the executability of the decree, and also setting aside and/or recalling of the reference case, and another application is taken put by Mr. Som's client for extension of time to put in deficit Court-fees in terms of the decree passed in the above suit and for redrawing up of the decree dated 16th June, 1937.

2. Mr. Rudradeb Chowdhury, learned Advocate submits that the decree passed is a nullity because the Court had no jurisdiction to proceed with the suit in view of provisions of Section 10 of the West Bengal Court-fees Act, 1970 consequently to pass decree when admittedly deficit Court-fees was not paid. Moreover, amended copy of the plaint and the writ of summons were not served upon the substituted defendant. As such the decree was passed without any writ of summons being served.

3. He argues that the Court having proceeded with the suit and decreed the same contrary to the express bar imposed by law. In such a situation decree is a nullity, not enforceable, and cannot be executed.

4. In support of the aforesaid submission he relies on two decisions reported in

Swapan Kumar Acharjya and Others Vs. Subhas Chandra Bhattacharjee and Others,

5. He contends further that the decree which has been passed without having any Jurisdiction on the subject-matter as well as provision of law such a decree is a coram non Judice. It can be challenged at any time even at a collateral proceedings. He draws my attention to a judgment of the Apex Court reported in Chiranjilal Shrilal Goenka (Deceased) through Lrs. Vs. Jasjit Singh and Others, .

6. Alternatively he argues even if it is assumed the decree is a valid one the time stipulated for putting in deficit Court-fees cannot be extended as the Court can exercise powers under Sections 148 and 149 of the CPC when the Us is pending. After the judgment is delivered and decree having been drawn up the Court cannot grant extension under the aforesaid sections.

7. In support of his submission he relies on the decisions of this Court, reported Syed Muhammed Asraf Ali Vs. Nabejan Bibi and Another, : Kshetra Mohan Ghose and Another Vs. Gour Mohan Kapali, and Ramesh Chandra Talukdar and Others Vs. Pramatha Nath Sanyal, . He also places reliance on Dharmaraja Iyer and Another Vs. K.G. Sreenivasa Mudaliar and Others, . On the same principle decisions of other High Court viz., Banta Singh and Others Vs. Union of India and Others, and Chhota Singh, etc. Vs. Union of India, have also been relied on.

8. He also argues that even in exercise of inherent power u/s 151 the Court cannot grant extension, it would be contrary to express statutory provision which is not permissible under the law as it has been laid down by the Apex Court in a decision reported in Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others, .

9. The learned lawyer appearing on behalf of the daughter of the deceased defendant No. 1 adopts the argument of Mr. Chowdhury.

10. Mr. Som, learned Advocate appearing for the decree holder submits that there was no laches and negligence on part of his client to put in deficit Court-fees as his client was misled after the decree was drawn up and certified copy was made available which says sufficient stamp having been paid. But, he submits the, aforesaid portion of the decree was not drawn up in accordance with the Judgment. So, it was not the fault of his client. However, when it was dictated by previous order of the appeal Court his client has been advised to make the instant application.

11. He submits that the objection raised by Mr. Chowdhury's client is mala fide and mischievous. His client wanted to frustrate the decree on earlier occasion by preferring appeal successively in all possible proceedings initiated by him. But the decree was not set aside. Because of non-payment of the Court-fees the execution of the decree could not be proceeded with. His client in terms of the decree has already deposited the entire consideration money with the Registrar, Original Side. As such this Court in exercise of its discretion should grant

extension of time to put in deficit Court-fees for the operation of the decree.

12. Upon hearing the learned Advocates and having considered the material placed before me I find a suit for specific performance for sale of immovable property was filed.

13. After filing of the suit it was discovered that one of the properties was left out so it was included later on by amendment. Naturally the valuation of the suit property vis-a-vis valuation of the suit for the purpose of Court-fee was increased. But Court-fee was not paid in accordance with the increased valuation of the suit. As such at the time of pronouncing Judgment and passing decree the Court stipulated time for payment of additional Court-fees because of increase of valuation of the suit by the aforesaid judgment and decree dated 16th June, 1987.

14. The decree was drawn up after nine years of passing of the decree by the Court and by this time the decree-holder lost his two successive learned Advocates on record who might have been out in requisition for drawing up. When the decree was drawn up it was found that it was recorded Court-fees having been paid. Such drawn up decree was not in conformity with the judgment passed by the Court. So the decree-holder was misled. After obtaining the drawn up decree the decree-holder applied for rectification of the decree so as to bring it about in conformity with the judgment.

15. The learned interlocutory Judge however was pleased to pass an order on such application without granting rectification but treating the drawn up decree as decree, not as pronounced.

16. An appeal was preferred against the order of the learned interlocutory Judge on 19th June, 1998. The appellate Court, however, did not interfere with that order.

17. It appears that the judgment-debtor subsequently resisted the execution of the decree by taking out a separate application on the plea that the decree could not be executed as sufficient Court-fees having not been paid and the appellant had not been served with certified copy of the decree in terms of the decree. An interim stay of execution of decree was prayed for before the learned interlocutory Judge but prayer was refused.

18. An appeal was preferred against the said order of refusal. Upon hearing, the appellate Court has remanded the matter for rehearing of all the issues including the question of executability of the decree and also for granting extension of time to put in deficit Court-fees in terms of the decree as pronounced.

19. Now the enquiry which is required to be undertaken by me on these two matters is as to whether at this stage the plaintiff decree-holder should be allowed to put in deficit Court-fees at all either by way of extension and further whether I should set aside the reference case or not.

20. Before that it is my duty to examine as to whether the decree is executable on the point raised by the judgment-debtor.

21. I shall deal with the contention of Mr. Chowdhury that the decree is nullity as the same was passed in contravention of Section 10 of the West Bengal Court-fees Act, 1970. In my view this submission is fallacious and it is nothing but misreading of Section 10 of the West Bengal Court-fees Act, 1970. The said section does not prohibit absolutely to proceed with the suit nor does to pass decree, rather proviso in Sub-section (2)(a) of Section 10 of the said Act permits to proceed with the suit in certain situation. So it is appropriate to reproduce Section 10 of the said Act.

"10. Procedure where insufficient Court-fee is filed on plaint or memorandum of appeal.-- (1) In every suit in which a Court-fee is payable under this Act on the plaint or memorandum of appeal the Court shall, on the date fixed for appearance of the opposite party or as soon as may be thereafter, and in every case before proceeding to deliver Judgment, record a finding whether a sufficient Court-fee has been paid.

(2) If the Court records a finding that an insufficient Court-fee has been paid on the plaint or memorandum of appeal the Court shall--

(a) stay all further proceedings in suit until it has determined the proper amount of such Court-fee payable and the plaintiff or the appellant, as the case may be, has paid such amount or until the date referred to in Clause (b), as the case may be:

Provided that if the plaintiff or appellant gives, within such time as the Court may allow, security, to the satisfaction of the Court, for the payment of any additional amount for which he may be found liable, the Court may proceed with the suit,

(b) fix a date before which the plaintiff or appellant shall pay the amount of Court-fee due from him, as determined by the Court under Clause (a).

(8) If the plaintiff or appellant fails to give the security referred to in Clause (a) of Sub-section (2) or to pay the amount referred to in Clause (b) of that sub-section within the time allowed, or before the date fixed, by the Court, as the case may be, the suit shall be dismissed."

22. From the aforesaid Section 10 upon careful reading it is clear that there is no bar to proceed with the suit nor to pass decree so as to render the Court powerless or without jurisdiction. I hold that the Court has jurisdiction to proceed on certain situation or condition being fulfilled. Sub-section (2) proviso makes it clear if the plaintiff, in case of trial of suit, within such time Court may allow to give security, to the satisfaction of the Court, for the payment of any additional amount for which he may be found liable, the Court may proceed with the suit. Sub-section (3) makes it clear if in case of trial of suit plaintiff fails to give the security referred to in Clause (a) of Sub-section (2) or to pay the amount referred to in Clause (b) of that sub-section within the time allowed, or before

the date fixed, by the Court, as the case may be, the suit shall be dismissed. Sub-section (3) visualizes a situation when the Court is yet to pass a decree.

23. In this case Court while passing a decree stipulated time to pay additional Court-fees. Therefore in this case there was nothing left for further proceedings, as by passing conditional decree and order the suit itself has been disposed of. So, the decision cited by Mr. Chowdhury in support of the aforesaid contention, viz., Swapan Kumar Acharjya and Others Vs. Subhas Chandra Bhattacharjee and Others, , Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another, and Chiranjilal Shrilal Goenka (Deceased) through Lrs. Vs. Jasjit Singh and Others, are not at all applicable in this case,

24. As far as the question of, the decree being nullity is concerned, admittedly the decree was tested twice once by making application for setting aside of the decree unsuccessfully right up to the appeal Court; again preferring appeal from the decree itself that too unsuccessfully again. So this question has been adjudicated so to say and it is not open for the judgment-debtor on the self-same point at this stage of execution.

25. Next question raised by Mr. Chowdhury that even assuming the decree being valid one still at this stage Court cannot grant extension for paying additional Court-fees since the Court has no jurisdiction after the decree being drawn up and perfected. This argument is not acceptable to me for the reasons as stated hereunder.

26. The judgment was pronounced passing a decree stipulating time to put in additional Court-fees. Parties are to act on the basis of the decree not on the basis of the judgment. Therefore, until and unless certified copy of the decree is made available and for that purpose until the decree is drawn up by the Court question of compliance of any terms of the decree does not arise. It is the duty of the Court, as well as, the learned Advocates-on-record to see that the decree is drawn up in conformity with the judgment. Admittedly the decree was not drawn up in conformity with the judgment so far as it relates to payment of additional Court-fees. It is well settled principle of law until and unless the decree is drawn up the Court retains power and jurisdiction to pass appropriate orders and to grant appropriate relief so much so that the final pronouncement of the Court is not rendered infructuous.

27. I am unable to subscribe the views expressed by Mr. Chowdhury on this score. Sections 151 and 152 of the CPC gives me authority to do the needful in this case. Therefore, authorities cited by Mr. Chowdhury on this point, viz. Syed Muhammed Asraf Ali Vs. Nabejan Bibi and Another, : Kshetra Mohan Ghose and Another Vs. Gour Mohan Kapali, : Dharmaraja Iyer and Another Vs. K.G. Sreenivasa Mudaliar and Others, are not applicable in this case. All those cases are factually distinguishable. Those cases were decided on a fact where there was no conflict between the judgment and decree and in those cases decrees were perfectly drawn up. In this case as I have already observed the decree as

far as payment of Court-fee is concerned was not drawn up correctly. Therefore there is no finality until the decree is corrected in consonance with the judgment.

28. Similarly, the decisions cited by Mr. Chowdhury on the point that the Court's power after passing decree, viz., Banta Singh and Others Vs. Union of India and Others, , Chhota Singh, etc. Vs. Union of India, and Ramesh Chandra Talukdar and Others Vs. Pramatha Nath Sanyal, are not applicable in this case.

29. I find from the fact that decree-holder is not at fault. The exercise of drawing up of decree in conformity with the judgment is undertaken by the Court and/or its instrumentality. The decree-holder did everything necessary. So the lapses or fault for the decree not being drawn up in conformity with the judgment is attributable to the Court. Therefore maxim actus curiae neminem gravabit applies with full force here.

30. u/s 148 read with Section 151 read with Chapter 38, Rule 46 of High Court Original Side Rules the Court has every power to grant extension for time to put in additional Court-fees and/or condone the delay in putting additional Court-fees if already paid. Mere extension of time to put in additional Court-fee does not change the nature and character of the decree and such decree remains as it is as decree passed was in for specific performance. Moreover the appellate Court in its order dated 21st December, 1998 also observed that it was not the fault of the litigant and further the Court u/s 152 of the CPC has the power to correct the decree as drawn up. If it is found the decree has not been drawn up correctly, then in exercise of my inherent power which I can do on the strength of the decision of Supreme Court reported to The Commissioner of Income Tax New Delhi Vs. Chuni Lal Moonga Ram, , I allow the application taken out by the decree-holder, I accept the submission of Mr. Som that it is a fit case where I should exercise my discretion. Therefore, the objection raised by Mr. Chowdhury fails so also the objection raised by learned lawyer supporting the judgment-debtor does not stand to the scrutiny.

31. Accordingly there will be order in terms of prayers (a), (b), (c), (d) and (e) of the Notice of Motion dated 4th January, 1990 taken out by Mr. Somenath Mustaphy for decree-holder in S.A. No. 76 of 1999. The application being S.A. No. 4273 of 1998 is dismissed. Therefore, I direct the reference case be proceeded expeditiously.

32. So far the application u/s 340 of the Criminal Procedure Code is concerned, in view of the aforesaid reasoning I do not find there is any mala fide or mis-statement on part of Mr. Som's client. Therefore, this application stands dismissed.

33. There will be no order as to costs.

34. Mr. Rudra's client will be entitled to costs and such cost is assessed at 60 gms. to be paid by the petitioner within seven days from date. Mr. Rudra prays for stay of the operation of the judgment. Mr. Som opposes such prayer, I grant

stay of operation of this judgment and order for a period of seven days from date.

35. Leave is given to inspect the judgment on Tuesday 22-8-2000.

36. Xerox certified copy of this judgment be made available to the parties.