
(1970) 11 CAL CK 0014

In the Calcutta High Court

Case No : Appeal No. 131 of 1970 and Suit No. 919 of 1959

Sm. Shanti Devi Mehra and Others

APPELLANT

Vs

Gyan Prakash Mehra

RESPONDENT

Date of Decision : 17-11-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 148, 51

Citation : 75 CWN 162

Hon'ble Judges : S.K. Mukherjea, J;B.C. Mitra, J

Bench : Division Bench

Advocate : M.M. Sen and S. Hazara, for the Appellant;Subimal Chandra Roy and Bishwaroop Gupta, for the Respondent

Final Decision : Allowed

Judgement

B.C. Mitra, J.—The short point involved in this appeal is whether the trial court as the executing Court, could make an order appointing the Official Receiver as the Receiver to sell a property, which was the subject-matter of a partition suit in place and stead of a person, who by the terms of the consent decree in that suit, was directed to sell the property. It was argued on behalf of the appellants that the decree was a consent decree and the appointment of the Official Receiver to sell the property, was a variation of the decree, which could not be done. Secondly it was argued that the executing Court could not go behind the decree and alter its terms by appointing the Official Receiver to sell the property in place of a persona designata, who under the terms of the decree was to sell the property. In order to appreciate the appellants' contention it is necessary to briefly state the facts involved in this appeal. On July 14, 1959, the respondent filed a suit against one Kul Prakash Mehra for a declaration that the respondent was a joint owner, having half share, in premises No. 31, Mission Row Extension (now re-numbered No. 10, Ganesh Chandra Avenue), Calcutta, for a decree for partition and for sale of the premises and for other reliefs. In this suit a decree by consent was passed on September 12, 1962, by which the respondent was

declared the joint owner of the said premises along with the said Kul Prakash Mehra each having 8 annas share. This decree provided that the premises would be sold after expiry of two years from the date of the decree and that Talbot and Co. would make a valuation for the purpose of sale. It was also provided that the property would be auctioned between the parties only, at the first instance, by one Fateh Chand Dhingra of No. 31, Mission Row Extension, and if the reserve price fixed by Talbot and Co. was reached in the auction, the higher bidder would purchase it. But if the reserve price was not reached the property would be put to public auction by the same person. In either case after meeting the costs, charges and expenses the purchase price was to be divided between the parties in equal shares. There were certain other provisions in the consent decree, to which it is not necessary to refer for the purpose of this appeal.

2. Kul Prakash Mehra the defendant in the suit died on July 19, 1967, and thereafter the appellants, who are the widow, sons and daughters of the deceased, were brought on the records of the execution proceedings as the heirs and legal representatives of the deceased,

3. The respondent's solicitor requested the said Fateh Chandra Dhingra to fix a date and place of auction. On May 8, 1968, Dhingra declined to hold the auction in terms of the decree for personal reasons, and requested that other arrangements be made for the purpose of sale. This was followed by an application by the respondent for necessary orders having regard to the situation arising out of Dhingra's refusal to hold the auction. In that application an order was made recording the death of Kul Prakash Mehra and directing that the cause title and the register of the suit be amended by substituting the names and addresses of the appellants, and it was provided that the respondent would be at liberty to apply for the other prayers in the application. This order was followed by an application for execution on a Tabular Statement by the respondent. In this application an order was made on September 30, 1969, whereby the Official Receiver was appointed Receiver for the purpose of holding the auction in place and stead of the said Fateh Chand Dhingra. This appeal is directed against this order.

4. The first contention of Mr, M. M. Sen counsel, for the appellants, was that the Court below, as the executing Court, could not go behind the decree and should have taken the decree as it was, and for that reason the order appointing the Official Receiver for the purpose of sale could not be made by the trial Court. Such an order, it was argued, was really going behind the decree which the executing Court had no jurisdiction to do. In support of this contention Mr. Sen relied on a decision of the Supreme Court in (1) *Topanmal Chhotamal v. M/s. Kundomal Gangaram and Ors.* AIR (1960) SC 388. In that case a suit was filed against a firm for recovery of a sum of money alleged to be due. The firm was sued through one Kodumal alleged to be one of the five partners and the summons was served on him as partner of the firm, the other partners not having been impleaded individually. The suit was decreed against the firm. In the

mean time owing to partition of India the Chief Court of Sind, which passed the decree, became a foreign court, and the decree could not be executed. Thereafter another suit was filed in the Court of the Civil Judge, Agra on the basis of the foreign judgment and in this suit the firm was made the first defendant represented by Kodumal and the other partners of the firm were also impleaded as defendants. The Agra Court decreed the suit with interest against the defendant No. 1 and such property of the firm as might be found in the hands of the other partners who were parties in the suit. The executing court held that the assets sought to be attached were not assets of the firm and that though the shares of the other partners were not liable to attachment, the one-fifth share of Kundomal in the firm was validly attached. It is to be noted that in execution of the said decree the assets of another firm at Agra in which the same persons were partners were sought to be attached. It is also to be noted that the trial court which passed the decree refused to pass a personal decree against the partners who were defendants Nos. 2 to 6 and confined the decree-holder's relief to the assets of the judgment-debtor firm in the hands of the partners. It was in these facts that it was held by the Supreme Court that it was a well-settled principle that a court executing a decree could not go behind the decree and must take the decree as it stood for the decree was binding and conclusive between the parties. It is clear that in this case what was sought to be done in execution proceedings was something which was specifically refused by the court passing the decree namely a claim to execute the decree personally against the partners of the firm and what the decree-holder sought to do through the executing court was to enforce this claim which was refused by the trial court namely a right to proceed personally against the partners. The liability of the partners under the decree was confined only to the assets of the judgment-debtor firm in their hands. The lower appellate court quite clearly was seeking to give to the decree-holder something which the trial court had refused. This case, to our mind, is of no assistance to the appellants inasmuch as the rights conferred by the consent decree have in no way been affected by the order under appeal. On the other hand the executing court by appointing the Official Receiver was merely trying to give effect to the terms of the decree.

5. Mr. Sen next relied upon another decision of the Supreme Court in (2) *Hukamchand Vs. Bansilal and Others*, for the proposition that the executing court could not vary the terms of a consent decree. In that case a sale of the mortgaged property was held in execution of a mortgage decree. An application was made by the judgment-debtor for setting aside the sale u/o. 21 r. 90 of the Civil Procedure Code. By consent of parties this application was dismissed and time was given to the judgment-debtor until November 21, 1958, to deposit the entire decretal amount along with the auction-purchaser's commission. On November 20, 1958, the judgment-debtor made an application that time to make the deposit be extended by one day until November 22, 1958, as November 21, 1958, was a holiday. But even on the next day namely November 22 no deposit was made, and on that day a prayer was made on behalf of the judgment-debtor

for extension of time by a fortnight. The executing court rejected the prayer on the ground that the decree-holder and the auction-purchasers were unwilling to the extension prayed for and confirmed the sale under order 21 rule 92 of the Civil Procedure Code. It was held that the order refusing extension and confirming the sale was rightly made and that Section 148 of the CPC had no application in that case. This case again, to our mind, is of no assistance to the appellants because an extension of time by the court would have affected the substantive rights of the parties acquired under the consent order which fixed a date for deposit of the decretal amount. If such deposit was not made on the date appointed by consent of parties, the decree-holder and the auction-purchaser acquired a valuable right to have the sale confirmed by an order of court and it was this right which was sought to be interfered with by an extension of time to make the deposit. The next case relied upon by Mr. Sen was a decision of the Judicial Committee in (3)" Raja of Killikota v. Chaitana Sahu and ors-, LR 47 IA 200. In that case a suit was brought on an account stated, which was found to be fabricated and but for the fabrication each item of claim would have been barred by limitation. The defendant, however, consented to a decree being passed for a particular sum. On appeal the High Court increased the amount of the decree and it was held by the Judicial Committee that the original decree was a decree by consent and such a decree could not be interfered with except by consent. This case does not help Sen's client because the variation of the consent decree amounted to interference with the substantive rights of the judgment-debtor, who had given his consent to a decree being passed against him for a particular sum, although even a decree for such a sum could not have been passed but for the consent, as the claim was barred by limitation. Quite clearly the substantive rights of the parties under a consent decree could not be interfered with unless the parties agreed to the variation.

6. The next contention of Mr. Sen was that the decree being one by consent it could be set aside or varied on any of the grounds which would invalidate an agreement namely misrepresentation, fraud or mistake and this could only be done by a suit duly framed for that purpose. We cannot accept this contention of Mr. Sen either because, as we will presently see, what was done by the trial court was by no means a variation of the decree, so as to affect the substantive rights of the parties created by the sale but an order was made appointing the Official Receiver to hold the auction sale, as the machinery provided by the consent decree failed to function. As has been repeatedly stated a consent decree is a contract between the parties with the sanctity of the seal of the court superadded to it. The parties in this case agreed to the sale of the properties and such sale was to be held by a named individual who declined the commission. There was therefore a mere failure of the machinery provided by the consent decree for working out the same. By the order under appeal the court below has sought to cure the impasse caused by the failure of the machinery and has in no way interfered with the rights created and acquired by the parties under the decree.

7. Mr. Subimal Roy contended, and we think rightly, that the consent decree in

this case could quite clearly be classified into two parts, one part dealing with the substantive rights of the parties, while the other part dealt with the machinery for the purpose of working out the decree. Clause V of the terms of settlement which provided that the auction was to be held by Fateh Chand Dhingra, he argued, was the machinery provided for the purpose of working out the decree. It was this machinery provided by the decree, he argued, that failed because of the refusal of Dhingra to hold the sale. It was argued that where a machinery provided by a consent decree failed, it was the duty of the court to fill up the gap caused by such failure so that the consent decree might be worked out according to the contract between the parties. In support of this contention Mr. Roy relied upon a Bench Decision of this court reported in (4) 33 CWN, 1023. In that case also there was a partition suit and the parties agreed to settle their differences on certain terms and a petition was filed in court. On the basis of that agreement a preliminary decree was passed. The first portion of the petition of compromise adjusted the rights of the parties and the latter portion of the petition related to the procedure which was to be adopted for the purpose of working out the rights of the parties. It was provided that the division of properties was to be made by two arbitrators within six months. The compromise petition, however, was not followed by a joint petition for reference to arbitration, but only one of the parties made an ex parte application for a formal order of reference. An order was made for reference to the arbitrators and this order was challenged on the ground that the application was not made by both the parties as it should have been made. This order of reference was set aside upon an application being made by the opposite-party. The Division Bench in upholding the setting aside of the ex parte order held following an English decision in (5) *Camaran v. Cuddy*, 1914 AC 651 that all stipulations in an agreement formed integral part of the same, but it was possible to divide it into two parts and treat the first part as relating to the rights of the parties and the subsequent part as relating to the machinery by which those rights were to be worked out. We respectfully agree with the views of the Division Bench and we have no hesitation in coming to the conclusion that where the machinery provided for working out a consent decree fails, it is the duty of the court to fill up the gap caused by such failure by making necessary orders in order that the consent decree may be worked out as agreed between the parties. The substantive rights of the parties acquired under the terms of a consent decree cannot in any event be interfered with except by consent of the parties, or in proper cases by a duly constituted suit. But where the machinery provided by the consent decree has failed, and due to such failure the rights acquired by the parties under the decree cannot be worked out, it is the duty of the Court to see that the rights acquired by the parties under a consent decree are not rendered altogether infructuous merely because the method of working out the decree has failed. It is to be borne in mind that Fateh Chand Dhingra was not required to exercise any special skill, or for the matter of that exercise any discretion in the matter of holding the auction sale. Even the reserve price was to be fixed on the basis of the valuation prepared by an appointed valuer. All that he was required to do under the consent decree was to

hold the auction sale between the parties in the first instance, and if the reserve price was not reached in such sale, he was to put up the property to sale by public auction. That being all that he was required to do, we do not see why the court should not appoint a Receiver to hold the sale since Dhingra declined to hold it.

8. There is, however, another point which must be taken note of. The application was an application for execution on a Tabular Statement and the order under appeal was an order made by appointing a Receiver in execution Clause (d) of Section 51 of the CPC unequivocally confers on the court the power to appoint a Receiver in execution and that is precisely what has been done by the court below. In our view the order appointing the Receiver for holding the auction sale was rightly made by the court below and cannot be interfered with.

9. There is, however, one matter to which we must refer before we conclude. The consent decree provided that the auction should be held in the first instance between the parties to the suit, and if the reserve price fixed by the valuer was not reached, the sale was to be held by public auction. The order made by the learned Judge makes it clear that the Official Receiver was appointed Receiver in terms of Clause 10 of the Tabular Statement. Sub-clause (b) of Clause 10 of the Tabular Statement quite clearly states that the sale was to be held in the manner mentioned in the decree. But strangely enough, in the order as drawn up, it appears that the Official Receiver is appointed Receiver to sell the property by public auction to the best purchaser or purchasers. There is thus a manifest variance between the order made by the learned Judge and the order as drawn up. It is difficult to imagine how this could happen. Mr. Roy submitted that this variation was made at the instance of the appellants. There is, however, no evidence on record to substantiate this contention of Mr. Roy. What is clear to us is that the order as drawn up is not only at variance with the order made by the learned Judge, but is also at variance with the terms of the consent decree.

We therefore hold that the Official Receiver in conducting the sale of the properties must do so in accordance with the terms of the consent decree and the auction sale must be held between the parties in the first instance as provided in Clause V of the terms of settlement. The order as drawn up is therefore modified to the extent mentioned above. In the result, the judgment of the court below is upheld but the order as drawn up on the basis of the judgment is to be modified to the extent mentioned above. The appeal therefore is allowed in part. In the facts of this case each party to pay its own costs.

S.K. Mukherjea, J.

I agree.