

(1936) 12 CAL CK 0028
In the Calcutta High Court

Surput Singh and Others

APPELLANT

Vs

Maharaj Bahadur Sing

RESPONDENT

Date of Decision : 09-12-1936

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(2)

Citation : AIR 1937 Cal 222 : 166 Ind. Cas. 827

Hon'ble Judges : Amber Ali, J

Bench : Division Bench

Judgement

Amber Ali, J.—This is an application by the defendant in this suit to set aside an order for execution and the consequent attachment of 6th August 1936. The papers on that application I desire to see. They will be shown to me in due course.

2. The application raises somewhat curious point and one which as regards this matter is of considerable importance. The facts are shortly these: In this suit a consent decree was passed in May 1936. The decretal amount was Rs. 3,14,944 and the main scheme of the consent decree was as follows: For Rs. 90,000 the decree was to be satisfied by the transfer of certain immovable properties within two months. With regard to this there is a default clause by which, I remember right, the whole amount of the decree would become liable for execution if the immovable properties were not made over within three months. Secondly, certain pledged jewellery, of which the exact whereabouts I am not clear, was to be sold within a month by the Receiver and the amount realized adjusted against the decree. Thirdly, the balance after deducting this amount was to be paid by half-yearly instalments of Rs. 7,500. Lastly, the defendant within three months was to furnish security for the balance, that is, decretal amount minus real property minus value of the jewellery, and to this again there was a default clause. In July, I think, on the basis that one of these default clauses had operated, application for execution was taken out by the decree-holder; and also at some stage or other before the date I am about to mention, a suit was filed by the defendant

against the plaintiff and others in which one of the reliefs claimed was what in effect would have operated as a stay of execution. It is in these circumstances that on 23rd July 1936 certain terms were proposed, put into writing and signed by the defendant. The defendant alleges that he was compelled to sign those terms by coercion, undue influence and so forth—a matter which I am not called upon to deal with on this application, and upon which I express no view in order not to prejudice any case of that kind that may be made by the defendant hereafter. That is to say I express no view save so far as it may be necessary to decide the question of law which has been urged before me.

3. The whole terms, the scheme of them, is as follows: (1) The decretal amount stands. (2) Rs. 40,000 is to be paid immediately, and on payment of that amount the plaintiff was to release the attachment of 11th July 1936, an attachment of certain jewellery which I presume to be distinct from the pledged jewellery. In order to obviate the difficulty of the charge in favour of a third person the immovable property, which was to have been taken in satisfaction. under the consent decree free from encumbrances at Rs. 90,000, was now to be taken subject to the encumbrances at the price of Rs. 46,000, and it was to be made over by 27th July 1936. (3) Payment of Rs. 1,10,000 by 3rd August on payment of which the plaintiffs were to release the pledged jewellery. In default the jewels were to be sold, and secondly, the plaintiff would be entitled "to execute the decree for the full amount due". (4) The balance was to be payable by a sum of Rs. 65,000 on 30th July 1937 and thereafter in a manner which is not material. (5) Security was to be given for the balance and certain parties were to be added for the purposes of making that security effective. There was a default clause with regard to the provision for security.

4. These July terms, it is quite clear, were at first insisted upon by the defendant. They were also part performed. Rupees 40,000 paid. Jewellery released, etc. But the defendant did not join any application, and they were therefore made the subject matter of an application by the plaintiff to enter up satisfaction of the decree under Order 21, Rule 2, Civil P.C. Default did take place of the new terms and fresh execution was taken out, upon what property is again immaterial, on 5th August 1936. That is the execution now attacked. The short, though by no means simple, point which has been very ingeniously argued on behalf of the defendant is that such terms were not the proper subject matter for the operation of Order 21, Rule 2, an argument, which in its more refined form amounts to this: that recorded as an adjustment, assuming the terms to be properly recorded as an adjustment,, they are not in themselves executable. I shall explain more fully what this means. But before I discuss the law I would like to analyse shortly the effect of the July terms.

5. We can call the May terms A, and the July terms B. The amount remains the same in A and B. The default clause in A has operated and its conditions therefore "have become exhausted. B does provide a new manner and new time or times of payment, difference with regard to security, new methods and these

new methods in terms are made part of the decree. Thus B purports to substitute a new decree. In other words "the original decree is altogether superseded". I now deal with the question of law. The matter was admirably argued on both sides and I think it only right therefore that I should give my reasons fully. The first point argued by Mr. Ghose was that there is inherent power in this Court to vary a consent decree by consent. With that argument I do not agree. It is true that Order 20, Rule 3 does not apply in terms to the High Courts, but the principle applies, see definition in Section 2(2), Civil P. C, and the main principle is that a decree once passed is immutable, subject of course to review or to any subsequent order or decree which may be passed on appeal and subject only, as far as I can discover, to one specific provision, Order 20, Rule 11(2). The fact that the decree is by consent makes no difference whatever. It is a fallacy to suppose that because it was "made by consent" that it can be varied by consent. It is a decree and not a contract. So far as the observations in *Lodd Govind Doss Krishna Doss v. Ram Doss Vishnadoss* AIR 1916 Mad 604, a decision of the Madras High Court, are directed to this point, I entirely agree.

6. That brings me to the second point argued which is this: Was B properly recorded as an adjustment under Order 21, Rule 2? On this point there is a considerable mass of case law which will be found set out in Chitale's Commentary on the CPC from which no doubt Mr. Ghose and Mr. Mazumdar got their assistance (Note No. 6 to O. 21, Rule 2). Counsel however were considerate enough not to cite them all. They rely upon the case I have referred to in *Lodd Govind Doss Krishna Doss v. Ram Doss Vishnadoss* AIR 1916 Mad 604 and upon the case in this Court which follows it, a decision of Mukherjee, J. in *Azizur Rahman Choudhury and Others Vs. Aliraja Choudhry and Others*, . With regard to the latter case, in order to appreciate the effect of the decision, it should be borne in mind that there were two adjustments to be considered. The decision is with regard to the second adjustment referred to by the learned Judge "the adjustment on the spot" following *Lodd Govind Doss Krishna Doss v. Ram Doss Vishnadoss* AIR 1916 Mad 604, which is a decision to the effect that an agreement to be executed, an executory agreement is not proper subject matter of an adjustment. At the same time it is to be remembered that in both these cases the parties were seeking to execute an executory agreement as if it were a decree. My own view is as follows, and I am merely repeating what I said on the last occasion: In my opinion a decree can be adjusted or satisfied by the making of an agreement between the decree-holder and the judgment-debtor. An obvious instance is the taking of a negotiable instrument which is nothing but a particular form of promise. In my opinion the decree-holder may accept and the parties may have recorded in lieu of the performance of the terms of the decree an agreement to perform something else. In that case it is the new agreement itself which has been accepted and which is recorded and not the performance or the terms of the agreement; the latter would be substituting a new decree. This is the view taken in a later case in Madras (*Rama Narasu v. Venkata Reddi* AIR 1933 Mad 28 at p. 208). There is therefore authority for this view, and I cannot

see that it can be otherwise on principle.

7. There remains the third question argued. Is the new agreement, the adjustment so recorded, capable of execution? It would seem to me that since the main principle is that a decree once made is not to be varied, to make this subsequent agreement capable of execution will automatically vary the decree. Prima facie therefore the answer would appear to me to be in the negative. The further question arises as to what is the position if the decree-holder has accepted in satisfaction an agreement which itself contains a condition or term that the subsequent agreement shall be capable of execution. Logically again it seems to me that if the effect of the subsequent agreement containing such a clause is as it must be, to vary the old decree it is not the proper subject matter of an application to record an adjustment because it produces in effect what the law precludes. Put otherwise, the agreement is capable of being recorded as an adjustment but incapable of being the subject matter of execution. Perfectly good satisfaction therefore, but as I have indicated, satisfaction by the substitution of an agreement merely. Such is my opinion; as a matter of pure theory it remains to consider the authorities. I know of no case where the judgment-debtor in such circumstances has, as here, repudiated the new agreement or adjustment and at the time has raised some bar to the execution of the original decree but the case has frequently arisen with regard to the limitation, where the judgment-debtor, having failed to carry out the terms of the adjustment, has pleaded limitation in execution of the original decree. Such a case is *Ganga Bishun Marwari and Others Vs. Lala Raghunath Prasad*, , and as far as I recollect in that case the adjustment having been acted upon and the decree-holder having thus altered his position, the matter was dealt with on the basis or analogy of estoppel.

8. Again the question has been dealt with on the basis that the parties having agreed that the subsequent agreement be executable the parties are bound by this incidental or ancillary agreement, notwithstanding the main rule of immutability of decree. Such a case is *Hridoymohan Sanyal Vs. Khagendra Nath Sanyal and Others*, , the principle of decision being that the parties having agreed to a particular form of procedure they are bound by that agreement. This was a case where the "original decree was altogether superseded" and a new arrangement had been entered into which contained the term that new arrangement itself should be capable of execution. That is the situation here. Speaking for myself it seems to me that by allowing the parties to tie themselves and incidentally the Court by this ancillary agreement to make the subsequent adjustment executable, we do impinge upon the principle that decrees are not capable of variation. Logically the two things are difficult to reconcile. On the other hand, I see so much sense in the view that has been taken and so much injustice in departing from it that I for one, apart from the fact that the decision is one which I should have followed I would not differ from it.

9. The matter stood over for counsel to deal with another point raised by me on

the facts which affords to my mind an additional ground for refusing relief to the applicant in this case. It is to be remembered that this is an application to set aside an attachment which has issued and for an injunction restraining that attachment. The judgment-debtor repudiates the adjustment. Can he say therefore that the (original) decree should not be executed? To return to the symbols I have adopted: He repudiates B. Can he say that A should not be executed? On this point I wished to see the tabular statement, and secondly I wished to hear counsel for the applicant. With regard to counsel, Mr. M.N. Ghose addressed me and his answer was this: the decree-holder has not accepted the repudiation; he is asserting B; he therefore cannot rely on A. That is true. At the same time it is the judgment-debtor that is seeking relief and assuming that the application was to execute A, he would have to rely on B, an agreement which he repudiates. With regard to the form of the application, that is purely a technical matter. It is not before me, so far as I remember. Although it seeks execution of the original decree it treats the two as one, leaving the matter in a somewhat equivocal state. However, on these facts, even apart from the point of law, I should have hesitated to interfere. The application must be dismissed.