

M. and Vs. Rupchand Jitaji and ors.

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Court : Mumbai

Decided On : Oct-30-1947

Reported in : AIR1950Bom155

Judge : Rajadhyaksha and ;Jahagirdar, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 38, 47, 60 and 151;
[Contract Act, 1872](#) - Sections 23; [Transfer of Property Act, 1882](#) - Sections 6

Appeal No. : Civil Revn. Appln. No. 596 of 1946

Appellant : M. and ;s.M. Rly.

Respondent : Rupchand Jitaji and ors.

Advocate for Def. : B. Moropanth and ;Homi Engineer, Advs. for Opposite Party
Nos. 1 and 3

Advocate for Pet/Ap. : G.N. Joshi and ;A.A. Adarkar, Advs.

Judgement :

Jahagirdar, J.

1. The facts out of which this application arises are simple and undisputed.
2. Opponents Nos. 1-3 filed Suit no. 733 of 1944 in the Small Causes Court at Poona against opponent No. 4 who is an employee of the Madras & Southern

Mahratra Railway on a monthly salary of Rs. 32 to recover a sum of money. In the said suit a decree by consent of parties was passed on 5th June 1944. The decree is in the following terms :

'The defendant should pay Rs. 90 and all costs of the suit to the plaintiff at Rs. 2 instalment per month. The plaintiff is at liberty to recover his amount from the salary of the defendant at Rs. 2 per month by an attachment to that affect.'

Opponents 1-3 applied for execution of the said decree and prayed for an order directing the applicant, i. e., M. & S. M. Railway Company, to withhold Rs. 2 every month from the salary of opponent No. 4 until the decree was satisfied on the basis of the consent decree and to remit the same to the Court. The Court issued the order of attachment on 9th September 1944. The applicant thereupon filed Miscellaneous Application No. 196 of 1945 in the Small Causes Court at Poona praying for raising the said attachment and vacating the said order on the ground that it was contrary to Section 60(i), Civil P. C., and Section 23, Contract Act, and also Section 6(f), T. P. Act. The executing Court, however, held that it cannot go behind the consent decree in execution proceedings and dismissed the application with costs on 31st August 1946. Being aggrieved by the said order the applicant has come in revision under Section 25, Provincial Small Causes Courts Act.

3. Mr. Adarkar the learned advocate for the applicant contends that the Small Causes Court had no jurisdiction to pass a decree in terms of the compromise as it offended against the provisions of Section 60(i), Civil P. C., and Section 23, Contract Act and that the decree was therefore, unlawful, and that this question can be gone into even in execution proceedings. He relies upon the case of Lakshmanswami Naidu v. Rangamma, 26 Mad. 31 and the case of Prem Prakash v. Mohan Lal I. L. R. (1944) 25 Lah. 379: A. I. R 1943 Lah. 268 . The point whether the executing Court can go behind the decree and question the jurisdiction of the Court that passed the decree is not free from difficulty. In Jagannath v. Shivnarayan 88 Bom. L. R. 1023: A.I.R 1937 Bom. 19, a Division Bench of this Court has held that 'an executing Court has no right to question the jurisdiction of the Court passing the decree.' Mr. Adarkar wants to get over this difficulty by suggesting that the rule may hold good in decrees obtained after contest and not

in decrees passed in terms of compromise. His argument is that a contract between the parties is not the less a contract and subject to the incidents of a contract because there is superadded to it the command of a Judge, If the compromise or contract in the terms of which the decree is passed is shown to be unlawful, the decree itself becomes unenforceable and the validity of such a decree can be challenged in execution. The decision in *Lakshmanaswami Naidu v. Rangamma* 26 Mad. 31, referred to above supports such a contention.

4. On the other hand, it is urged by Mr. B. Moropanth, the learned counsel for the opponents, that the moment a decree is passed in terms of compromise, the latter ceases to be a contract and is merged in the decree which can be enforced at the will of the decree holder. The executing Court cannot be allowed to exercise the appellate powers over the decree of the Court (that passed the decree), and in support of this contention he relies upon the case of *Ambalal Chunthabhai v. Somabhai Bakorbhai* : AIR1944 Bom46 , and the decision of N. J. Wadia J., in *Magniram v. Khandu* (C. R. A. No. 446 of 1941, dated 20th July 1942). But it is not necessary in this case to decide this point of competency of the executing Court to question the validity of the decree in execution proceedings. The principle that the executing Court cannot challenge the validity of the decree holds good only between the parties to the decree. In the present case, the applicant was not a party to the decree. He is a complete stranger, and it cannot be said that he is claiming through the judgment-debtor. It has been laid down in *Post Master General, Bombay v. Chenmal Mayachand* 43 Bom. L. R. 758: A. I. R 1941 Bom. 389 that (p.769) :

'Where an order is made against Government or a public body, and when the law imposes liability in case the order is not obeyed, as is the position here, it would be unreasonable and unjust to hold that it is not open to Government or to the public body as the case may be to move the Court and contend that the order is not justified by the law, and there must be inherent power in the Court to consider such an application.'

5. If it is once held that a person not being a party to the decree against whom such an order is served can move the Court and challenge the validity of the order,

and that the Court can entertain such an application under its inherent jurisdiction, the whole difficulty is solved. The decree under execution is not binding upon the applicant as he was not a party.

6. The question that now falls to be considered is this, viz., whether the Small Causes Court had jurisdiction to pass a decree in terms of the compromise which according to the applicant was unlawful.

7. Under Section 60(i), Civil P. C., the salary of a servant of a railway company to the extent of Rs. 100 is not liable for attachment. The prohibition of a transfer by a railway servant is based on the ground of public policy, and it is not open to such a person to contract himself out of such a provision or to waive its benefit because the public is interested not only in the performance from time to time of the duties but also in the fit state of preparation of the party having to perform them.

8. Under Section 23, Contract Act, every agreement of which the object or consideration is unlawful is void. The consideration for the compromise is an agreement on the part of opponent 4 to waive the benefit conferred upon him under Section 60(i), Civil P. C., on the ground of public policy. The agreement is, therefore, void Which means that it is not enforceable in law and the Small Causes Court had no jurisdiction to pass a decree in terms of compromise Which was unlawful and void.

9. We are supported in this view by the decision of a division bench of our own Court in *Post Master General, Bombay v. Chenmal Mayachand* 43 Bom. L. R. 758: A. I. R 1941 Bom. 389. There one Mayachand had obtained a decree for Rs. 236 against a postman, whose salary was Rs. 41 per month, in the Small Causes Court at Poona. In execution of that decree he asked for the arrest of the judgment debtor, and then there was a compromise between him and the decree-holder whereby it was agreed that Rs. 6 should be withheld every month from his salary by his superior officer and paid to him until the decretal amount was satisfied. The Court ordered the compromise to be recorded. In execution of this adjusted decree, the Small Causes Court at Poona sent an order under Order 21, Rule 48, Civil P. C., to the Post Master General, Bombay, directing him to send Rs. 6 every month to the Court in satisfaction of the decree against Gangaram. The Post

Master applied to the Small Causes Court under Order 21, R. 58, to raise the attachment and cancel the order of attachment served upon him. It was held in that case that the Court had an inherent power to entertain such an application and that a public servant whose salary is exempt from attachment under Section 60(i), Civil P. C., cannot contract himself out of this statutory provision. Such a contract is opposed to public policy and is void under Section 6(f), T. P. Act and Section 23, Contract Act, and that the principle of waiver does not apply to the statutory prohibition based on public policy.

10. It will be seen that the facts in this case are on all fours with the facts in the case in *Post, Master General, Bombay v. Chenmal Mayachand* 43 Bom. L. R. 758 : A. I. R 1941 Bom. 389.

11. The learned trial Judge, however, has relied upon a decision of N. J. Wadia J. in *Magniram v. Khandu*, (Cr. A. No. 446 of 1941 dated 20th July 1942). That case is distinguishable from the present case. In that case the G. I. P. Railway did not make any application for raising the attachment: the Court of its own accord raised the attachment in view of the decision in *Post Master General, Bombay v. Chenmal Mayachand* 48 Bom. L., R. 758 : : AIR1941 Bom339 the case above referred to. The decree, holder came in revision against that order making the G. I. P. Railway also as opponent No. 2. There N. J. Wadia J. held that the executing Court cannot go behind the decree and held that the decree was illegal, and made the rule absolute. It must, however, be borne in mind that a third party had not intervened with an application to raise the attachment in that case. That decision, therefore, cannot help the opponent.

12. It is contended by Mr. B. Moropanth that the question of competency of the executing Court to challenge the validity of the decree was not at all considered in the case of *Post Master General, Bombay v. Chenmal Mayachand* 43 Bom. L. R. 758: A.I.R 1941 Bom 389. That, however, does not appear to be correct. At p. 764 there are these observations:

'Order 21, Rule 48, is expressly subject to the provisions of Section 60 and all that he was doing was to bring to the Court's notice the illegality of the order especially as the Government would be liable for any sum, paid in contravention of this rule.

That would not amount to sitting in judgment over the order. It is only an application by a person who would be affected by the order that it should be vacated on the ground of illegality.' And further at p. 767 it is observed:

'... the compromise being opposed to public policy, a decree giving effect to it is also vitiated and cannot be executed by attachment of the salary.'

From these observations it is clear that this point was present before the minds of the learned Judges who decided the case and they held that the executing Court can decide the point about the validity of the decree on an application by a third party. The view taken by our High Court in *Post Master General, Bombay v. Chenmal Mayachand* 43 Bom. L. R. 758 : A. I. R 1941 Bom. 389 has been approved of and followed in *Subramaniam v. Satyanadham* I. L. R. (1942) Mad. 640: A. I. R 1942 Mad. 391. There a decree had been passed against a municipal employee, and after the decree was passed, there was a compromise between the municipal employee and the decree-holder that Rs. 15 every month should be got attached from his salary and when the decree-holder attempted to get the decree adjusted in terms of the compromise, the Court refused to pass a decree in terms of the compromise. As against that order, the decree-holder came in revision and their Lordships following the ruling in *Post Master General, Bombay v. Chenmal Mayachand* 43 Bom. L. R. 758 : A. I. R 1941 Bom. 389 held that

'the provisions of that Section (Section 60), ... are imperative, are intended to give protection to persons, like the employee ... on grounds of public policy and not merely to confer a personal benefit upon them; and so the employee cannot waive the privilege given to him by the section.'

13. It is next contended by Mr. B. Moropanth that the exemptions from attachments under Section 60, Civil P. C. are not mandatory, and in support of this contention he relies upon the case in *Bhagvandas v. Hathibai*, 4 Bom. 25 wherein a house resided in by an agriculturist was mortgaged by him to his creditors, and there was a decree for the sale of the mortgaged property, and it was held that

'the sale could be justified in spite of Section 60, Civil P. C. or Section 266, old Civil P. C. on the ground that that property was specifically mortgaged by the

agriculturist.'

But in Radhakisan Hakumji v. Balvant Ramji, 7 Bom. 530 it has been held by our Court that the house of an agriculturist was exempt from attachment Therefore, the contention that the exemption was not mandatory does not appear to be sound.

14. We, therefore, hold that the order of attachment issued by the Small Causes Court, Poona, on 9th September 1944, is illegal and reverse the decision of the trial Court and make the rule absolute with costs throughout.

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