Taj Begam Vs. Sarvi Begam

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Court : Allahabad

Decided On : Jun-30-1916

Reported in : AIR1917All21; 37Ind.Cas.674

Judge : Walsh and ;Sundar Lal, JJ.

Appellant : Taj Begam

Respondent : Sarvi Begam

Judgement :

Sundar Lal, J.

1. This is an appeal arising out of the execution of a decree made on 31st March 1900, in a suit brought by Musammat Sarvi Begam for her share in the estate of her father Mir Khan Sardar Bahadur. The sons of Mir Khan Sardar Bahadur, his daughters and other heirs were made defendants to the suit. The plaintiff also claimed mesne profits for a period of three years preceding the suit and also future mesne profits. The claim for possession of the property was decreed by compromise, and so also the claim for mesne profits. It was, however, expressly stated in the compromise that the amount of mesne profits would not carry interest. The amount of the mesne profits was to be determined in the execution department. The decree passed in the case embodies the terms of the compromise.

2. An application for the determination of the amount of mesne profits was made to the Court below and Mr. David, the then Subordinate udge, determined the amount of mesne profits by his order dated 28th August 1905. It appears that the other daughters (among whom was Taj Begam) of Mir Khan Sardar Bahadur had also brought their suits for their share of their father's estate and mesne profits and had obtained their respective decrees for possession and mesne profits. Taj Begam got her decree for mesne profits with interest thereon at 12 per cent, per annum. One of the points which Mr. David had to determine in the enquiry was whether the daughters ware liable to pay future mesne profits He held that as the daughters were out of possession, they were not liable for future mesne profits. Musammat Taj Begam was held responsible only for profits for the three years immediately preceding the suit. Mr. David notes on his judgment the fact that in the case of Sarvi Begam the decree for mesne profits in her favour did not carry interest, but that in the case of the decree obtained by Taj Begam interest on mesne profits was allowed at 12 per cent, per annum. A decree for the amount of mesne profits passed by Mr. David was drawn up in accordance with his order. It seems from Mr. David's order that he held an inquiry1 a-bout the mesne profits due to the other daughters of Mir Khan Sardar Bahadur as well. He gives in his order a full history of the litigation. The amount of mesne profits found due to Sarvi Begam was fixed at Rs. 17,061-10-9.

3. On 28th February 1912, an application for the execution of the decree passed it favour of Sarvi Begam was made by the decree-holder against the several judgment-debtors, among whom was Musammat Taj Begam, who is the appellant in this appeal. Execution was sought to recover a sum of Rs. 10,9 0-4-8 by the sale of the property of the judgment-debtors.

The amount of Rs. 10,910-4-8 is stated to have been thus made up:

Rs. a. p.1. On account of the amountshown as due on the previousapplication for execution whichwas struck off on 15th January1912 ... ... 6,514 6 62. An item of costs ... 135 8 23. On account of decreefor proportionate amount-TajBegam, decree-holder v. SarviBegam, No. 295 of 1909. of theCourt of the Additional Judge ofMeerut, realized out of the saleproceeds of the sale of the propertyof the

judgment-debtors amountingto Rs. 10,325 by Taj Begam, the seconddecree-holder in execution Case No. 7of 1906 ... ... 4,159 6 44. Costs ... ... 101 0 0Total 10,900 4 6

4. I have already noted that the amount of mesne profits found due to Sarvi Begam was Rs. 17,064-10-9. In execution of that decree a sum of Rs. 10,325 was realized by sale of some of the property. The money so realized was taken by Musammat Sarvi Begam alone but Taj Begam had applied for a rateable distribution on account of her decree for mesne profits. The application was disallowed. She thereupon brought a regular suit for her share of the money. She obtained a decree for her proportionate part of the mesne profits out of this sum of Rs. 10,325, realized by Sarvi Begam. This is the suit referred to as Suit No. 295 of 1909. The amount decreed to Taj Begam with interest at 12 per cent per annum (which was the rate of interest awarded to her by the decree obtained by her for mesne profits) came up to Rs. 4,159-6-4.

5. Musammat Sarvi Begam had, however, en the realization of Rs. 10,325 credited the whole of that amount against the mesne profits awarded to her (i.e., Rs. 17,064,-10-9) and with that credit the decree was left outstanding for Rs. 6,514-6-9. This expLalns item No. 1 of the details given above, showing how the amount claimed in the application of 28th February 1912 was made up. Items Nos. 2 and 4 of the said detail require no explanation. When Taj Begam obtained a decree for her proportionate share of the mesne profits (which with interest awarded to Taj Begam by her decree amounted to Rs. 4, 159-6-4), Musammat Sarvi Begam bad to refund that amount; which she, therefore, became entitled to add to the sum of Rs. 6,514-6-6 mentioned under the first item, as still due. At the bearing of the appeal Dr. Tej Bahadur Sapru, on behalf of the appellant, stated that on the application for execution of 28th February 1912, no interest had been claimed by Sarvi Begam on the amount of mesne profits in accordance with the terms of the compromise decree and Mr. David's decree. Mr. Peary Lal Banerji was unable to make any statement on this point on that date. We, therefore, adjourned the case to enable him to examine the execution record and make his statement on the point. We have also examined the execution file. When the case came up again for hearing some weeks afterwards, Mr. Peary Lal Banerji was unable to point out

from the record that any interest was actually claimed on the mesne profits. He asked us, however, for leave to file an affidavit on behalf of his client's agent to prove that interest was claimed as a matter of fact. The point under enquiry was one to be ascertained from an examination of the record itself. The record certainly does not show that interest was claimed on mesne profits. We cannot admit the version of the application for execution given in the form of an affidavit by the client's agent. It is the gloss put by him on the application for execution. This is a matter for the Court to determine for itself on an examination of the application for execution-and we held that the affidavit was irrelevant upon this point. The agent's reading of the application as put in the form of the affidavit could not be put in as evidence and we, therefore, refused to give leave to file the belated affidavit. Mr. Peary Lal Banerji then attempted to show that the application of 28th February 1912 did in fact claim interest on mesne profits. The details showing how the claim was made up certainly do not show that any claim for interest on mesne profits was made. It is true that in the third item of the detail, viz., Rs. 4, 15-9-6-4d due to Taj Begam for her share on rateable distribution on account of her decree as explained above, included interest awarded by her decree to her at 12 per cent, per annum. This was the amount awarded to Taj Begam on her decree and this was her share out of Rs. 10,325 realized by execution. The balance left was all that was payable to Sarvi Begam. A refund of the rateable share of mesne profits to Taj Begam with interest awarded to her by her decree does not imply a claim-by Sarvi Begam for interest on the mesne profits awarded to her. It is clear from the account that no in terest, as a matter of fact, was claimed in the application for execution of 28th February 1912. Under a misapprehension, however, of the application Taj Begam among other abjections urged that no interest should have been claimed on mesne profits. I will now state what happened under this erroneous impression.

6. Objections were filed to the execution of the said decree on 20th June 1912, We are not concerned with any objection other than the 9th objection in that case, which ran in the following terms, vie:

(9). No interest was awarded in the decree sought to be executed, but the decree-holder has executed it having charged interest there-on.

2. The decree-holder filed a reply to this objection on 20th January 1912, the 7th paragraph of which runs as follows:

(7). The word mesne profits includes interest also, which should be awarded according, to law and justice.

7. Rai Bahadur Pandit Mohan Lal Hakka who heard the objections held that though, no express order about the payment of interest on mesne profits was made in the decree, yet under the Code of Civil Procedure the term mesne profits includes intereste on mesne profits. He concludes his judgment by holding that Sarvi Begam was entitled to recover from Taj Begam and others a sum of 'Rs. 7,460-4-0 mesne profits up to the date of plaint. This set of defendants are liable to pay the amount of mesne profits with interest and proportionate costs.'

8. He, however, passed no final orders but directed the decree-holders to furnish certain information. The formal order prepared in this order runs as follows:

It is ordered that Sarvi Begam, decree-holder, applicant, do state what amount or amounts are due by each party of judgment-debtors and show what sum has already been realized from Taj Begam's share in Barant and other property and what amount Taj Begam is now liable to pay.

9. I have examined the execution records. I find that in the earlier stages of execution several applications are filed in which it is stated that the decree for mesne profits did not carry any interest, but by this time the old Pleaders who had appeared in the original suit had all died or retired. New men unacquainted with the history of the execution and the terms of the decree had taken their place, and a new officer was now presiding over the Court. I am not, therefore, surprised at the terms of the decree being overlooked both by the Pleaders and by Rai Bahadur Pandit Mohan Lal Hukku who decided the objection. They also overlooked the fact that in the application of 28th February 1912, no interest had in fact been claimed on the mesne profits. This order, however, was not a final order on the objection. The learned Subordinate Judge required the plaintiff to state what amount Musimmat Taj Begam was liable for on the application. He further required the decree-holder to state what amount or amounts were due by each

party of judgment-debtors, and what sum had already been realized by the sale of Baraut and other properties of Taj Begam.

10. A final order on this objection could only be made when the figures were supplied to, and examined by, the Judge. What happened is analogous to what is often done, viz., recording a judgment on some of the issues in the case, the final judgment being passed later on when the remaining issues were decided. Although there was no final order in execution yet made to afford ground for an appeal under Section 47 of the Code, Taj Begam preferred an appeal against the decision of some of the issues to this Court. No appeal lay at that stage, and it was clearly premature for her to file the appeal. The order of Pandit Mohan Lal Hukku (if it be pleaded as an authority under which alone the interest is claimable) did not mention the rate of interest awarded, nor the period of time for which interest was payable. He would have probably recorded orders dealing with all these points as soon as the decree-holder had furnished the figures.

11. Before however this was or could be done, Taj Begam preferred an appeal to this Court from the expression of views recorded by the Court below, on some of the points in issue, for this is all that was in effect done by this time, and the further stage necessary to give a right of appeal had not arrived yet.

12. This was First Appeal No. 94 of 1913. The appeal came up before a Bench of this Court presided over by the Hon'ble Sir Pramada Charan Banerji and the Hon'ble Mr Justice Ryves on 24th July 1913.

13. The judgment of their Lordships opens by saying that the appeal was premature. They observe that certain objections were made by the judgment-debtor in the Court below which the Court below had disposed of, but they pointed oat that 'that Court, however, has not made any final order in the matter, and it consequently seems to us that this appeal is premature.'

14. After coming to that conclusion their Lordships, proceed to consider certain points of principle decided by the Court below and dismiss the appeal. The decree prepared in this Court on the appeal confirms the decree of the Court below and dismisses the appeal. One of the questions in this appeal is, whether it precludes

the appellant from raising the question of interest on mesne profits which was raised in the Court below. Before, however, dealing with the points arising in the appeal, I will refer to two other matters which have some bearing on the appeal. An application for review of the judgment was made by Musammat Taj Begam. It was rejected on the 24th July 1913. On 27th May 1914, Mummmt Taj Begam applied to Babu Bans Gopal, Subordinate Judge of Meerut, to amend the decree made by Mr. David on 28th August il905, by adding words to the effect that the degree-bolder will not be entitled to future interest: on mesne profits. The application was made under Sections 152 and 153 of the Code. It was rejected on 28th August 1914.

14. The application of 28th February 1912 is still pending. The decree-holder has now claimed interest on mesne profits. The -judgment-debtor objected to the claim for interest on 31st August 1914. The Court below disallowed the objections on 22nd September 1914. It has supplied the deficiencies in the order of Pandit Mohan Lal Hukku and has directed that interest prior to the date of the determination of the mesne profits, should be calculated at the rate of 12 percent per annum, and thereafter at six per cent, per annum. It is against this order that the present appeal has been lodged.

14. On the facts I have stated, which are evident on the examination of the decree of 31st March 1910 and Mr. David's order of 28th August 1905, it is clear that no interest was payable on the mesne profits. The decree expressly says so, and so does Mr. David's order He has not calculated and awarded any such interest for the period prior to the date of the determination of mesne profits. The order itself is conclusive on the point. Pandit Mohan Lal Hukku did not, in his order of 2nd September; 1912, hold that interest for that period was payable. The order of Babu Bans Gopal awarding interest at 12 cent, per annum for the said period is erroneous, and contrary to the terms of the original decree and the decree or order by which the amount of mesne profits was determined. There i9 also no order in the decree or in Mr. David's order for the payment of future interest. Looking, therefore, to the merits of the claim, it is entirely untenable and is in the teeth of the compromise decree. The Question before as, however, is whether by reason of any subsequent order the judgment-debtor is precluded from setting up the true

state of things.

15. The first contention urged on behalf of Sarvi Begam, respondent, is that Pandit Mohan Lal Hukku's order of 2nd September 1912 has put a construction on the decree of 31st March 1900, which is binding upon the parties. Pandit Mohan Lal Hukku never looked at that decree, nor attempted to construe it. He only considered a hypothetical case, where the decree was silent upon the point (but this decree is not silent upon the point, and expressly states that no interest will run on the mesne profits). There was no claim made by Sarvi Begam for interest; and the discussion was purely academical. The adjudication was also defective and incomplete in that it did not state the rate of interest, nor the period of time for which it was payable, and lastly no final order was made on the application. All that was done was to call for certain particulars which were to be supplied as a necessary preliminary to the pausing of final orders on the application. There was nothing to preclude Pandit Mohan Lal Hukku, on the true state of facts being brought to his notice at any time before he made his final order, from correcting his previous orders on the issues provisionally decided by him. What has happened in this case is analogous to what sometimes happens in a Court of Appeal, A Judge hears an appeal and remits certain issues for trial by the Court below. Before the receipt of the findings the Judge who made the order is transferred. His successor may disregard the order remitting issues and rehear and decide the whole case. Mubarak Husain v. Bihari 16 A. 306 : A. W. N. (1894) 97 : 8 Ind. Dec. (N.S.) 199., per Edge, C. J., and Burkitt, J., affirming Aikman, J., in appeal under Letters Patent; Lachman Prasad v. Jamna Prasad 10 A. 162 : A. W. N. 1887 : 295 : 6 Ind. Dec. (N.S.) 109. : Ganentra Nath Roy Chowdhury v. Surja Kanta Roy Chowdhuri 15 Ind. Cas. 39 : 17 C.W.N. 462,.

16. In the last mentioned case, even the Judge who had pronounced his views in an earlier stage of the appeal was not held bound to adhere to his views, if later on, before he had decided the appeal he saw reason to change them What Pandi Mohan Lal Hukku did on and September 1912, does not stand on a higher footing.

17. The next question which arises is, what effect has the decree of this Court in appeal against the order of Pandit Mohan Lal Hukku? The moment his judgment

was appealed against, it ceased to be res judicata by reason of the pendency of the appeal. It has been argued that the decree of this Court affirmed the decree of the Court below. This is so. The decree of the Court below directs the decree-holder to supply certain information and that is all that is confirmed by the decree of this Court. If no other papers are to be referred to to ascertain what was decided and the question is to be decided on a perusal of the decrees alone, there is nothing in them to show that the question of interest payable on mesne profits was decided. It is, however, not enough to look at the decree alone. As observed by their Lordships of the Privy Council in the case of Kali Krishna Tagore v. Secretary of State 15 I.A. 186 : 16 C. 173 : 12 Ind. Jun. 4 3 : 5 Sar. P.C.J. 237 : 8.1nd. Dec. (N.S.) 145. 'In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at. The decree, according to the Code of Procedure, is only to state the relief granted, or other determination of the suit. The determination may be on various grounds, but the decree does not show on what ground, and does not afford any information as to the matters which were in issue or have been-decided.' In a later case, Amriteswari Debi v. Secretary of State 24 C. 604 at p. 519 : 24 T. A 83 : 1 C.W.N. 249 : 7 Sar P.C.J. 101 : 12 Ind. Dec. (N.S.) 1603. their Lordships again observed: 'And they cannot avoid the observation that m the Court below sufficient attention has not been paid-to the Rule that, in cases where a final decree is couched in general terms, the extent to which: it ought to be regarded as res judicata can only be determined by ascertaining what were the real matters of controversy in the cause;' The question in this case is of course not one of res judicata. We have merely to determine whether the question now before the Court has really been finally decided by a previous order made in the same execution proceeding. The same principles apply to a case like this, when it is necessary to ascertain what has been really finally decided on the previous occasion.

18. Looking to the judgment of this Court and reading the decree in the light of that judgment, it is clear that the appeal was dismissed on the ground that it was premature. It is true that the judgment of this Court proceeds to discuss a few other matters which had been placed before it by the parties. But if the appeal was premature, any discussion of those matters was no less premature and any-pronouncement made upon, them, though entitled to the highest-weight and

respect, is really not upon the same footing as; matters, disposed, of which rightly arose and were decided in an appeal which this Court had jurisdiction to entertain. The; observations were made more to help the parties and the Court below to arrive at the final decree and to save the; necessity of a further appeal to obtain an expression of the view of this Court upon those points. The Court was, however, not invited to express any views on the question of interest on mesne profits (though it was the subject of a plea in the appeal). If an appeal lay to this Court, the failure to press that plea would have perhaps amounted to an, implied adjudication of the point and affirmation of the views of the Court below. But where no appeal lies at all at that stage, the failure to invite this Court to express its views Upon that point also does not stand upon the same footing. There was no legal obligation upon the appellant to invoke the decisian of any point by a Court of Appeal, when no appeal by to it. He may, as he was entitled to do, reserve it for decision when) it arose in a proper appeal, and when the matter had become ripe for appeal late? On. Even if there was an appeal to this Court at this stage, and the Court had decided all these points, according to-the view taken in this Court in the case of Shib Charan Lal v, Raghu Nath 17 A. 174 : A. W. N, (1895) 47 : 8 Ind. Dec, (N.S.) 437., the decision of the Court upon the point first arising in order will be taken to be one upon which the decree is based. It is not necessary for us to go so far in this case; when no appeal lay to this Court, it had no jurisdiction to affirm, reverse or modify the, decree or order of the Court below.

19. The decree of this Court cannot, therefore, betaken to be an affirmance of the; views of the Court below on the question of interest, and upon this ground alone I would prefer to base my judgment. I think that the cafe had not reached a stage at which Pandit Mohan Lal Hukku could or did pass a final order. When the particulars required were furnished later on to his successor he was in a position to pass a final order in the case: This event has only happened now, and the present appeal has been preferred from that decision.

20. In the course of his able argument, Mr. Peary Lal Banerji relied upon the decision of their Lordships of the Privy Council in the case of Ram Kirpal v. Rup Kuari 6 A. 269: 11. I.A. 37 : 4 Sar, P.C.J. 483 : 3 Ind. Dec. (M.S.) 718. In that case the plaintiff had claimed possession of certain property with mesne profits. The

Court of first instance had made a decree in plaintiff's favour as claimed. That decree was affirmed by the Court of Sadar Diwani Adalat. On 20th December 1867 a question arose as to whether the decree awarded mesne profits, and the District Judge (Mr. Probyn) held that it did. No appeal was preferred against the said order. The parties had apparently accepted the order and execution proceedings had gone on for eleven years on foot of that order. It was then sought to re-open the question. Their Lordships of course refused to permit this being done. In that case Mr. Probyn, the District Judge, had made a final order which was open to appeal, but it had not been appealed against. In this case Mr. Mohan Lal Hukku had made no such order. He had reserved the making of a final order to a later date when the particulars required were supplied. In that ease the judgment-debtor accepted the order. In this case the judgment-debtor did not do SO but even preferred an infructuous appeal before the matter had become ripe for appeal. She lifts ever since been contesting it, and now that the matter has been finally decided by the Court below, she has preferred this appeal. We are, therefore, entitled to consider the question of the interpretation of this decree unaffected by the order of this Court and to regard the matter as now open to appeal for the first time.

21. There remain two other matters for consideration. The first is the effect of the order rejecting the application for review of the Order of Pandit Mohan Lal Hukku. There was no final order open to review, and in any case a refusal, to entertain an application for review leaves the order sought to be reviswed standing on its own legs. It does not give it a firmer or better footing. The other order is the one passed on an application to amend the decree of Mr. David, dated 28th August 1905, determining the amount of mesne profits. The application was rightly, rejected. Mr. David's order did not award any interest either for the past or in future, and the addition of the words proposed to be added was not required. The order as it stands does not award any interest on mesne profits, and it could not do so contrary to the terms of the decree on which it is based. The proceedings to determine mesne profits reserved for decision by the decree in the suit are proceedings in continuation of and supplementary to the proceedings in the original suit. The decree in the suit is supplemented by the order and the two must be read together. The refusal to amend the decree does not place the appellant in

a were footing.

22. We think that the decree under execution does not award any interest on mesne profits, either before or after decree. The order of the Court below, therefore, in so far as it awards such interest must be set aside. I would allow the appeal and set aside the order of the Court below awarding interest on mesne profits either before or after decree. The appellant will get his costs in this appeal.

Walsh, J.

23. I do not desire to add any thing to what Mr. Justice Sundar Lal has so fully said in this case, except to draw attention to the state of the authorities with regard to the construction of decrees. I think it desirable to reiterate what appears to me to have been Laid down as the law for a very long time by the highest authority, and also by this Court. It is well established that you cannot construe a decree in a suit without looking at the issues and ascertaining what was really determined, and it may be that you cannot arrive at a satisfactory conclusion without looking at the judgment as well. In the same way you cannot arrive at a satisfactory conclusion as to what was determined by an appellate decree without looking at the grounds raised in appeal, and in some way or another ascertaining what issues were actually diseussed and decided. It is sometimes said that an execution Court cannot go behind a decree. That is perfectly true in the sense that it cannot alter, modify or amend its terms. But it is untrue, in the sense that it cannot go behind it to ascertain what the decree operates upon. The matter could not be more clearly stated than in the passage from the judgment of the Privy Council which my brother has just read.

By the Court.

24. We allow the appeal and set aside the order of the Court below awarding interest on mesne profits either before or after decree. The appellant will get his costs in this appeal.