

Hati Pratihari and anr. Vs. Alekh Mohapatra and ors.

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Court : Orissa

Decided On : Dec-08-1953

Reported in : AIR1954Ori136; 20(1954)CLT324

Judge : Narasimham and ;Mohapatra, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 148 and 151 - Order 32, Rule 4, 4(4); Specific Relief Act, 1877 - Sections 15

Appeal No. : Second Appeal No. 415 of 1949

Appellant : Hati Pratihari and anr.

Respondent : Alekh Mohapatra and ors.

Advocate for Def. : G.C. Das and ;P.C. Chatterjee, Advs.

Advocate for Pet/Ap. : H. Mohapatra, Adv.

Disposition : Appeal dismissed

Judgement :

Mohapatra, J.

1. This is an appeal against the judgment dated 20-7-1949 of Sri S. K. Mohapatra, Additional Subordinate Judge of Puri, confirming the decree dated 8-9-1948 of Sri N. K. Das, Munsif of Puri, arising out of a suit brought by the plaintiffs for specific

performance of contract alleged to have been entered into between the plaintiffs and the original defendant 1 (Jagabandhu Mohapatra) as manager of the Hindu joint family consisting of himself, and his minor sons and nephews (defendants 2 to 8).

Jagabandhu and Dinabandhu were two brothers. Dinabandhu predeceased Jagabandhu in a state of jointness leaving his widow Suryamani and his two minor sons (defendants 7 and 8). The original defendants 2 to 6 are the sons of Jagabandhu who were minors at the first date of the contract, that is, 20-6-1942 but defendant 2 attained majority in the meantime and defendant 1 (Jagabandhu) died during the pendency of the suit. The plaintiffs' case is that the said Jagabandhu executed an agreement in favour of the plaintiffs on 20-6-1942 on a plain paper and received a sum of Rs. 50/- as advance of the consideration for the sale of a homestead land with a house thereon, the area of the homestead being .055 Situate in the town of Puri. The consideration was settled at Rs. 800/-.

On 30-9-1942 Jagabandhu purchased stamps worth Rs. 12/- and handed over the same to the plaintiffs. On 18-6-1945 both defendant 1 and his son defendant 2 (who had by then attained majority) jointly executed a sale-deed in pursuance of the aforesaid contract in favour of the plaintiffs. The sale-deed was executed by defendant 1 on his own behalf and on behalf of his minor sons and nephews. The sale-deed in favour of the plaintiffs however could not be registered as the plaintiffs fell ill and on account of other reasons. Thereafter Suryamani, as mother guardian of defendants 7 and 8, executed a sale-deed in favour of defendant 9 on 5-1-1946 for a consideration of Rs. 1000/- in respect of half of the property and defendant 1 for self and as guardian of his minor sons and defendant 2 both executed a sale-deed in favour of defendant 10 on 23-1-1946 for a consideration of Rs. 1100/- in respect of the other half of the property.

The plaintiffs have therefore brought the suit, for specific performance of contract on the allegation that the Kabalas in favour of defendants 9 and 10 are bogus transactions, or in any event they (defendants 9 and 10) having notice of previous contract the plaintiffs are entitled to a decree for specific performance against all the defendants.

2. The defence taken was that the contract for sale in favour of the plaintiffs was not bona fide and genuine and did not take place prior to the Kabalas in favour of defendants 9 and 10.

3. Before the hearing of the appeal commenced, a preliminary point was taken on behalf of the respondents by reference to previous order passed by this Court on 12-9-1950 that the present appeal could not proceed. The order dated 12-9-1950 is as follows:

'We direct that the Deputy Registrar be appointed the guardian of the minors. The plaintiffs must pay a sum of Rs. 20/12/- as guardian cost within two weeks hence, failing, which the appeal shall stand dismissed as against minor respondents 2 to 6 without further reference to a Bench.'

In fact the plaintiffs failed to comply with the present order and a subsequent order was passed by the Deputy Registrar on 27-9-1950 to the effect that

'Guardian's cost for minor respondents 2 to 6 not having been deposited in time, appeal against the said minor respondents stands dismissed in pursuance of Order No. 8, dated 12-9-1950.'

Respondents 2 to 6 are minors and were represented in the lower Court by a pleader guardian ad litem. The pleader guardian having intimated in an application by post to the Court on 22-6-1950 that he might be excused from representing the minors in the High Court, the Registrar passed an order on 28-8-1950, at the request of the appellants for time to take necessary steps for change of guardian for the minor respondents 2 to 6, that failing compliance of necessary steps, that, is, Court guardian may be appointed for the said minors on the appellants depositing Rs. 20/12/- as guardian's cost--vide office note, D/- 19-8-1950 --within ten days the case should be placed before the Bench for orders.

Accordingly the case was placed before the Bench on 12-9-1950 and order No. 8, dated 12-9-1950, as quoted above, was passed. The respondents' contention is that the appeal having been dismissed as against respondents 2 to 6 and as the case arises out of a suit for specific performance of contract, the entire appeal

must fail, or else it will lead to inconsistent decrees.

4. Mr. Mohapatra, appearing on behalf of the appellants, takes up the first point that the order No. 8 dated 12-9-1950 is without jurisdiction inasmuch as the Court has no power to pass an anticipatory conditional order of dismissal. He further contends that the Court has no power to order the appellants to deposit costs for the guardian of the minors and to make it a condition precedent for the appeal to proceed further. He argues that there is no provision of law authorising such an act of the Court.

5. To our mind, it is clear that under the provisions of Order 32, Rule 4(4) the Court has power to pass an order calling upon the appellants to deposit the costs of the minor guardian. The present case, indeed, as we have indicated above, comes within the language of Sub-clause (4) of Rule 4 which runs as follows:

'Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.'

In the present case there was no other person fit and willing to act as guardian of the minor respondents. Therefore the Court appointed the Deputy Registrar as the guardian of the minors and in so appointing, they give the direction of calling upon the appellants to deposit Rs. 20/12/- as the costs for the guardian in the performance of his duties as such guardian. Clearly, therefore, the Court is empowered under the law to pass such an order calling upon the appellants to make the aforesaid deposit. But the further question that remains is whether the Court can make the order as a condition precedent for further proceedings of the appeal to continue as against the minor-respondents.

In our opinion, the Court in such cases has inherent power to make it a condition precedent for the non-compliance of which the Court could pass an order that the

appeal should stand dismissed without reference to a Bench, otherwise further proceedings in the appeal as against the minor respondents would be unworkable and may lead to further complications. If the costs of the guardian are not deposited, the Court cannot reasonably compel due diligence on the part of the guardian of the minors in the conduct of the appeal on their behalf. This practice of passing peremptory order, that a party is to deposit a particular sum in accordance with the order passed by the Court within a fixed time, failing which the appeal will stand dismissed without further reference to a Bench, is very well recognised in the Courts both in England and in India.

We may in this connection refer to a decision in the case of -- 'Collinson v. Jeffery', reported in 1896-1 Ch 644 (A). A passage appearing in the judgment of Kekewich J. at page 647 is worth being quoted in this connection :

'There is another form of order available and appropriate where the Court thinks that severe terms should be imposed -- namely, that on failure to do certain acts within a specified time then 'the action do stand dismissed without further order'.'

In that case before Kekewich J. in a redemption action an order was made giving the plaintiff leave to lodge the mortgage money in Court, and that, in default of such lodgment within two months from the date of this order, the action be dismissed with costs. Under a bona fide mistake the plaintiff failed to lodge the money in Court until after two months fixed by the Court. It was held that notwithstanding the expiration of the two months, the action was not dead, but that the Court had jurisdiction, at the instance of the plaintiff, to extend the time limited by the order.

Much significance was attached in that case to the absence of the clause in that order 'that the action do stand dismissed 'without further orders' '. Therefore, it was held that

'it is comatose; it is moribund; but a final stroke is required to effect death. That final stroke has not been delivered, and therefore in my opinion, the application is properly made and the order asked for may be granted.'

In that case, therefore, it was necessary to pass a final order of dismissal. But it clearly appears from that decision that a peremptory order of the nature of the present case is quite permissible in law.

This decision came up for examination before Odgers and Curgenven JJ. in the case of -- 'Balakrishna v. Parvathammal', reported in AIR 1928 Mad 154 (B), and the principle laid down there was fully approved. Curgenven J. observes as follows in the passage appearing at page 157:

'It has not been contended before us that it is beyond the competence of a Court to pass an order allowing an application upon certain terms and providing that, if within the time allowed these terms are not complied with, the application shall automatically, and without further interposition by the Court, stand dismissed. If any such contention were raised it could be met by a reference to a number of cases, English and Indian, where orders of this nature have been recognised by the Courts.'

In that case, an order was passed allowing an application upon certain terms and providing that if within the time allowed those terms are not complied with, the application shall automatically, and without further interposition by the Court, stand dismissed. Their Lordships in the face of that order observed that they had no power to further extend the time fixed by the Court.

6. A similar point for extension of time under the provisions of Section 148, Civil P. C., arose in the case of -- 'Surajmal v. Bhubaneswar', reported in AIR 1940 Pat 50 (C). There the Court decreed the plaintiff's suit and ordered to pay deficit court-fees in the following terms :

'The plaintiffs must file deficit Court-fees within a fortnight from to-day otherwise the suit will be dismissed.'

It was held that final order had not been passed in the suit and so the Court having still retained control over the proceeding had jurisdiction to accept the deficit court-fees after the period fixed. It is to be noted that the above mentioned cases reported in -- '(1896) 1 Ch 644 (A)' and -- 'AIR 1928 Mad 154 (B)', were fully considered and

the principle laid down was approved.

Fazl Ali J. (as he then was) quoted with approval the passage from the Chancery Division case which we have quoted above. But while accepting the principle laid down in those two cases their Lordships (Harries C. J. and Fazl Ali J.) distinguished the case before them that the order in that case was not of a peremptory nature to mean that the suit had to be dismissed automatically without further reference to the Court but that a final order of dismissal had to be passed. On a discussion of the above three cases, it is clear to us that it is a well recognised principle, both in England and in India, that the Court has got power to pass such a peremptory order calling upon a party to make a deposit or to do some other acts within a particular time failing which the action before the Court may stand dismissed without further reference to a Bench. The Order No. 8 dated 12-9-1950, therefore, is legal and within the powers of the Court, we should also refer to a passage appearing at page 481 of 12th Edition of Mulla's Civil Procedure Code wherein it is laid down that the Court has inherent power

'to strike off the defence and proceed ex parte where a suit is adjourned on the conditions that the defendant should pay the costs of the adjournment within a prescribed period and he fails to do so.'

This may be taken by way of analogy and a parallel case.

7. The next point raised by Mr. Mohapatra is by referring us to the provisions of Section 15, Specific Relief Act, which runs as follows :

'Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.'

At the outset he undertakes to pay the entire consideration if he is allowed a decree in respect of the share of respondent 1 alone. It also appears that the part which must be left unperformed forms a considerable portion of the whole. The present case might have come within the language of Section 15 and there would be some force in the contention of Mr. Mohapatra but for the position that here the contract is being enforced against a member of a joint family. It is very well known that the undivided interest of a coparcener of a joint Mitakshara family under the School to which we belong cannot be the subject matter of alienation be it for consideration or gratuitous. In view of this settled position, the plaintiffs in the present suit cannot obtain a decree for specific performance of contract to sell undivided interest of a coparcener, i.e., the interest of defendant 1.

We would simply quote a passage from the Indian Contract and Specific Relief Act, Seventh Edition, by Pollock and Mulla at p. 676 :

'It is submitted that in Bengal and the United Provinces where the law does not recognise an alienation by a Hindu coparcener of his undivided coparcenary interest, no specific performance should be decreed in respect of a coparcener's interest. And. even in Bombay and Madras, where the law allows such an alienation, the Court,' it is submitted, should not decree such performance. The reason is that such alienations are 'inconsistent with the strict theory of a joint and undivided Hindu family and the law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes'.'

The view of the Madras High Court as expressed in the Pull Bench decision reported in the case of -- 'Baluswami v. Lakshmana Aiyar', AIR 1921 Mad 172 (D), is that in Madras in such a case, Section 15, Specific Relief Act, may apply and the Court may pass a decree in respect of the interest of one or more of the coparceners relying on the position that in Madras the interest of a coparcener is alienable. But the position of law of alienation in respect of the undivided interest of a coparcener in our province is entirely different. The plaintiffs cannot place reliance on the provisions of Section 15.

8. In conclusion, therefore, the preliminary point taken on behalf of the respondent must preva and the appeal, therefore, fails and is dismissed with costs.

Narasimham, J.

9. I agree.

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