

Dena Bank Vs. Bertram Scott (India) Ltd. (In Liqn.)

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Court : Kolkata

Decided On : May-21-1986

Reported in : AIR1987Cal134,[1989]65CompCas70(Cal)

Judge : Bimal Chandra Basak and ;Sachi Kanta Hazari, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 104 and 151

Appeal No. : Appeal No. 37 of 1984

Appellant : Dena Bank

Respondent : Bertram Scott (India) Ltd. (In Liqn.)

Disposition : Appeal dismissed

Judgement :

Bimal Chandra Basak, J.

1. This appeal arises out of an order passed by the learned Trial Judge dismissing an application filed by the plaintiff/appellant for amendment of the decree D/- 21st Feb., 1979 passed in the Suit No. 276 of 1978.

2. The facts of this case are peculiar and it shows how a nationalised bank in our country functions while granting loans. We shall set out such facts from the application of the appellant-plaintiffs themselves.

3. Various properties belonging to the defendant were mortgaged in favour of the West Bengal Financial Corporation of India (hereinafter referred to as the said Corporation) to secure a loan by a registered indenture of mortgage on 9th Feb. 1972. The properties mortgaged were described in the several schedules to the said deed of mortgage. Thereafter with the object of creating a second mortgage in favour of the petitioner, an indenture of mortgage was created on 13th Feb. 1975. It is stated that this was done with the object of creating second mortgage in favour of the petitioner in respect of very same properties over which the said Corporation had first mortgage under the said Indenture DA Feb. 9, 1972 and in this context reference is made to a Board Resolution D/- 10th Oct. 1974 and Clause 3 of the recital of the agreement D/- 13th Feb. 1975. It is stated that the parties all along had the intention that all the properties covered by the first mortgage would be the subject matter of the second mortgage. What actually happened was that in spite of such alleged object and intention, the schedule to the second mortgage did not include all the properties contained in the first mortgage. The plaintiff bank entered into a loan transaction involving several lakhs of rupees but they did not bother to check up the relevant schedule to the document. This 'mistake' remained undetected even when the suit was filed against the defendant with the following prayers :

a) A decree for Rs. 1,18,82,286.77 p.

b) Interim interest and interest on judgment at the current Nationalised Bank lending rate of 15% per annum.

c) A decree for the sale of the hypothecation mentioned in Annexure 'B' to the plaint with direction for the appropriation of the net sale proceeds thereof in pro tanto satisfaction of the dues of the plaintiff;

d) A decree for the sale of the pledged goods mentioned in Annexure 'F' to the plaint with direction of appropriation of net sale proceeds thereof in pro tanto satisfaction of the dues of the plaintiff;

e) A decree under Order XXXIV, Rule 4 of the Civil P.C. in Form No. 5A of Appendix 'D' in the first Schedule thereto relating to the mortgage security

mentioned in Annexure 'M' to the plaint'.

4. They were asking for relief in respect of the properties mentioned in the schedule and even at that point of time, no one on behalf of the bank detected the 'mistake' in the schedule. The suit was allowed to be filed in that manner on 2nd of May, 1978. On 21st Feb. 1979 a preliminary decree was passed in the said suit. No one discovered such 'mistake' even at that point of time. It is stated that such mistake was discovered on 21st March, 1981, and on 21st April, 1981 this application for amendment was made. By an order D/- 14th Sep. 1983 the application was dismissed. It took two years after the preliminary decree for the appellant-plaintiff to find out such 'mistake'. It is stated that such 'mistake' was discovered on Mar., 21, 1981 at the meeting of the Official Liquidator held on that date. Meanwhile, the plaintiff bank has realised a sum of Rs. 59,79,000/- on the basis of the decree and it is stated that the present dues of the petitioner exceeds Rs. 1,40,00,000/-.

5. In support of this appeal on the question of the jurisdiction of the Court to pass such an order, reliance was placed on a decision of this Court in the case of Lakshrni Nath Sarma v. Ghanakanti Kalitani reported in ILR (1951) 2 Cal 407 wherein there was an application under Sections 151 and 152 of the Civil P.C. for amending a decree passed by the Court. There the mistake was regarding the plot number of a land as given in the plaint. The particular plot number was given as 2742, correct number being 2752. The High Court held that this Court had jurisdiction to make such correction in the decree.

6. On behalf of the respondent it was submitted, inter alia, that this appeal is not maintainable as this is an order passed under Section 151 read with Section 152 of the Code and such order is not an appealable order. In this context reliance was placed on a decision in the case of Ganpat Rai Hiralal v. Aggarwal Chamber of Commerce Ltd. reported in : [1953]4SCR752 wherein the Supreme Court pointed out that there is no appeal provided under the Civil P.C. from an order amending or refusing to amend a judgment, decree or order, though an appeal would lie from the amended decree or order. It was held that there is no warrant for the view that the amendment petition is a continuation of the suit or proceedings therein. It was

also held that it was in the nature of an independent proceeding, though connected with the order of which amendment is sought.

7. In our opinion, the objection regarding the maintainability of the appeal has been correctly taken. It is not an appealable order within the meaning of Section 104 of the Civil P.C. In our opinion, it cannot also be said that it determines any right in the facts and circumstances of this case and, accordingly, it is not also a 'judgment' within the meaning of Clause 15 of the Letters Patent.

8. Though we have held that the appeal is not maintainable, on the merits also we shall give our views. In our opinion, the question of Section 152 of the Code cannot and does not at all arise. So far as Section 151 is concerned, it is to be remembered that in this particular case it is not a mere and simple mistake of the nature like mistake in the description of land in the plaint as in the case of *Lakshmi Nath Sarma v. Ghanakanti Kalitani*, (ILR (1951) 2 Cal 407) (supra). This is a case where even, according to the plaintiff-appellant, the whole schedule was given wrong; that is not a mere mistake or mutual mistake. The mistake arises out of something before the plaint was filed. The mistake, according to the plaintiff, is in the agreement of 1975. The suit has been filed on the basis of such instrument of 1975. As long as that instrument stands in that fashion it is not merely a wrong description in the plaint and the amendment of the decree cannot be made accordingly. The parties have entered into certain agreement on the basis of which the suit has been tiled. Such position stands. There is no question of wrong description in the plaint. So far as the properties mortgaged are concerned, description of the properties given in the plaint is in accordance with 1975 agreement itself. It is according to the schedule of 1975 agreement. Accordingly, the case cited has no application. We are of the opinion that this Court cannot exercise its power of amending a decree the result of which would be creating a new agreement between the parties by changing the schedule as such, which is not the function or duty of and not within the power of this court.

9. Accordingly this appeal is dismissed with costs. All, interim orders are vacated.

10. We shall only add one observation. As we have stated this is a public financial institution being a nationalised bank. Because of their laches and negligence in

checking up the schedule at the time of execution of 1975 Agreement, the Bank is in such a predicament. It is a question of loss of public money and ultimately it is a loss by the public at large. Not only that there was a 'mistake', such 'mistake' was not discovered for a period of six years. We strongly condemn such an attitude on the part of the bank concerned.

11. The Official Liquidator will retain his costs out of the assets in his hands.

12. A prayer is made for certificate for leave to appeal to the Supreme Court, which prayer is rejected inasmuch as in our opinion, there is no question of any substantial law of public importance being involved in this case and in our opinion there is no question which need be decided by the Supreme Court. The prayer for stay of operation of this order is also rejected as no ground has been put forward in support of such prayer.

Sachi Kanta Hazari, J.

13. I agree.

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