Brijratan Vs. Jaynarain

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Court : Kolkata

Decided On : Jan-24-1910

Reported in : (1910)ILR37Cal649

Judge : Chitty, J.

Appellant : Brijratan

Respondent : Jaynarain

Judgement :

Chttty, J.

1. These are two rules obtained by the defendants in suit No. 85 of 1909, calling on the plaintiffs to show cause (i) why the decree in the suit should not be amended by inserting a clause as to the payment by the plaintiffs to the defendants of interest accumulated on certain Government promissory notes up to the 22nd September 1909and (ii) why the execution issued in this suit against the effects of the defendants should not be set aside and the attached property released. The facts are shortly as follows: The plaintiffs and the defendants are members of a Marwari family, and the matters at issue between them were in respect of the various businesses carried on by members of the family in partnership. In the early part of 1909 the present suit was filed in the names of the plaintiffs, who are minors, by Musammat Gota, their mother and next friend. Buldeo Dass, father of the present defendant Jaynarain, and grandfather of the

two minor defendants, was the original defendant. I am told that the terms of settlement which were eventually come to were in the main proposed and arranged by him. In July 1909 Buldeo Dass died, and the present defendants on the record were substituted. Later on, the defendant Jaynarain was appointed guardian ad litem of the minor defendants. In August 1909 the appointment of Rai Bahadur Kustoor Chand Daga as guardian of the property of the minor plaintiffs was completed. After the long vacation, terms of settlement were finally arrived at between the parties. A petition for compromise was drafted by the plaintiffs' attorneys and sent to the defendants' attorneys for approval. It was extensively altered by Mr. McNair in red ink. In paragraph 16 he added to the statement that 'the accounts of the said partnership businesses were made up and adjusted 'the following words' up to the 22nd September 1909, and upon the footing that all interest up to and including the said date on the said Government paper of the par value of Rs. 8,00,000 mentioned in the 13th paragraph hereof, and also on the Government paper of the par value of Rs. 1,75,000 mentioned in the 23rd paragraph hereof as purchased on the 25th September 1909, should be paid to your petitioner (i.e., Musammat Gota). At the same time, as it was the intention of the parties that the settlement should date as from 22nd September 1909, it was necessary that the plaintiffs should make good to the defendants the interest on the Government paper up to that date which they would draw on the notes, and Mr. McNair accordingly added in the prayer of the petition to the words 'that a decree be made in terms thereof' the words 'and in particular for the endorsement and delivery by the defendant Jaynarain to your petitioners of the said Government promissory notes (giving the numbers and amounts) upon your petitioners paying to the defendants the equivalent of all accumulated interest on the said Government paper up to and inclusive of the 22nd September 1909,' etc. The alterations by Mr. McNair were accepted in toto by the plaintiffs' attorney. The petition so altered was engrossed in his office and signed by Mothura Dass Pachesia for Musammat Gota and by Jaynarain as well as by the respective attorneys. To Mothura Dass Pachesia and Jaynarain it was explained by the Court Interpreter. The petition must therefore be taken to represent the terms to which the parties consented at that time, and I cannot accept the present statement of Mr. A.C. Bose that he noticed that nothing had been added by Mr. McNair in

paragraph 23 regarding the interest prior to 22nd September 1909, but did not notice what Mr. McNair had added about the interest in the prayer of the petition, or that, if he had noticed it, he would not have consented to its being made a condition precedent to the delivery of the securities. The matter came before me in Court on 29th November 1909, and after determining that the settlement was for the benefit of the several minors concerned, I passed judgment in terms of the petition. The Court minute is-' Decree in terms of petition. Certified that the terms are for benefit of infants. All securities and promissory notes will be paid to the guardian appointed by the Court to be endorsed in the name of the guardian.' There appears to have been some little delay in drawing up the decree. I am told by the Registrar that it was at first drafted by the defendants' counsel and subsequently re-drafted in the office. However this may be, it was certainly submitted to counsel on both sides for settlement, the point before counsel being not so much the form of the decree, as the legality of the order on Jaynarain to endorse and deliver over the Government promissory notes and his capacity to do so effectively. The decree as drawn contained no stipulation as to the payment by the plaintiffs to the defendants of the interest accumulated upon the Government promissory notes up to 22nd September 1909. The decree was signed by me on 7th January 1910. It directed (inter alia) that Jaynarain should endorse and deliver over to Dewan Kustoor Chand Bahadur, C.I.E., the guardian of the property of the plaintiffs, Government promissory notes of the aggregate par value of Rs. 7,25,000, and on behalf of himself and the other members of the partnership other Government promissory notes of the aggregate par value of Rs. 2,50,000, and should also pay to the same person the sum of Rs. 96,700-12-9, and that upon the endorsements and payments aforesaid being made, satisfaction in respect of the decree should be entered up. It may be stated that prior to the signing and filing of the decree the plaintiffs' attorney had been calling upon the defendants' attorneys to have this portion of the decree carried out. Mr. McNair had, however, declined to act on his own responsibility in this respect, or to advise his client to do anything until the decree was filed; at the same time there was no actual refusal on the part of the defendants to carry out the decree. On the contrary, the fact that the notes, when seized, were found tied up together and endorsed in blank, shows that they were ready for delivery, when the time arrived. The decree having been filed on

7th January 1910, the plaintiffs' attorneys on that day sent to Messrs. Morgan & Co. a letter and one copy of the decree, and to Babu R.M. Chatterjee the attorney on record for the infant defendants and an assistant in Messrs. Morgan and Co.'s office, a second copy of the decree. By what appears to have been gross carelessness on the part of the clerks in Messrs. Morgan & Co.'s office, both copies of the decree and the letter were laid on the table of Babu R.M. Chatterjee who was absent from Calcutta. Mr. McNair was thus not formally apprised of the intention of the plaintiffs to apply for the execution of the decree at once. He seems to have heard some rumour of it on the 8th, but naturally did not pay much attention to it. The letter, though addressed to Messrs. Morgan & Co., was not found by him until the 11th, when he had seen Mr. A.C. Bose, and, having heard of it from him, made a search for it. Meanwhile, on the 8th January, the plaintiffs applied to the Registrar for execution of their decree by attachment of the safes and cash-boxes containing moneys belonging to the defendants at the guddi of the defendants. The Registrar expressed a doubt whether execution in this way could issue at the instance of the plaintiffs' next friend, as the decree ordered endorsement and delivery and payment of the moneys to plaintiffs' guardian Kustoor Chand Daga. He directed the application to be made to the Court. On Monday, the 10th January, counsel for the plaintiffs applied to me to issue execution. He did not fully state the facts of the case, and I understood from him that the sole point was whether, in the case of a decree for money in favour of infant plaintiffs, which ordered the money to be paid to the plaintiffs' guardian, the next friend was competent to apply for the execution. I expressed an opinion, which I still hold, that he was. Only the decree-holder can apply for execution, and the question of payment out to the correct person could easily be arranged when the money, or any part of it, was realised. I do not absolve myself from blame for not looking more carefully into the matter, but at the same time I must say that, in a case of this nature, it was counsel's duty to have placed the full facts before the Court and not to have taken the order without doing so. I should never have allowed the execution by attachment to go had I been put in possession of the full facts, and the order must in this respect be taken to have been made per incuriam. On the 11th January the writ was handed to the Sheriff and was executed that afternoon by the seizure of the contents of a safe at the defendants' guddi. These

contents consisted of the identical Government promissory notes the subject matter of this decree, certain hundies and receipts for money, and a sum of Rs. 260 in currency notes. On the 13th January 1910, on the application of the defendants' counsel, I granted both the present rules, and both questions, i.e., as to the amendment of the decree and as to the attachment have been fully argued before me. The affidavits are very voluminous, but I do not think that I need go more fully into the facts. There is no question as to the facts as above stated. I will first deal with the question of the amendment of the decree, as the question whether the decree is correct in form must have an important bearing on the regularity of the execution'. It was argued by the plaintiffs' counsel that the procedure now adopted was incorrect, that the decree could not be amended on motion, but that the plaintiffs must file a separate suit for that purpose. To that contention I cannot possibly accede. What is sought is to bring the decree into accordance with the judgment of the Court and with what it intended. Now it was clearly intended that the decree should be in terms of the petition. It was suggested that the prayer was no part of the petition, but that appears to me absurd. The prayer is the actual petition for relief, though it may refer back to the body of the document to avoid unnecessary repetition. It is only in respect of the provisions as to interest on the Government paper prior to the 22nd September 1909 that the decree does not accurately embody what the parties asked for in their petition. The case of Ainsworth v. Wilding [1896] 1 Ch. 673, cited by the plaintiffs' counsel, was a totally different case, the motion there being to discharge a decree. It has been held in England that the Court has an inherent power to amend or vary a perfected order when it finds that the judgment as drawn up does not correctly state what the Court actually decided and intended, even if the matter does not fall within Order XXVIII, rule II, which corresponds to Section 152 of the Civil Procedure Code, and such a result is obtained on motion: In re Swire, Mellor v. Swire (1885) 30 Ch. D. 239. In my opinion the Courts in India have the same inherent power, and I cannot see why a separate suit should be necessary here any more than in England. It is common ground that the plaintiffs were to be responsible to the defendants for the interest up to 22nd September 1909, and I see no reason whatever to suppose that the stipulation regarding it was not an integral part of the settlement to which by the petition they asked the Court to give

effect. The plaintiffs' attorney, Mr. A.C. Bose, cannot now be heard to say that was not a term of the settlement, when I find it embodied in the petition, which was accepted by him, and by Mothura Dass Pachesia, the munim gomasta of his client. I am, therefore, of opinion that the decree must be amended so as to bring it into accordance with the judgment of the Court. There is a slip in the petition for amendment, and consequently in the rule, the request being to add the stipulation as to interest after not only the direction to endorse and deliver the Government promissory notes, but also after the order for the payment of the Rs. 96,700-12-9. It should of course come, as in the prayer of the petition of compromise, immediately after the direction to endorse and deliver the two lots of Government promissory notes, but with reference to both. With this correction the first rule will be made absolute.

2. I now turn to the question of the execution and attachment. I have already said that my order for execution in the form in which it was issued was made per incuriam, and on that ground alone it would be equitable that it should be set aside. There are, however, other reasons. The plaintiffs' counsel argued that it could only be set aside on the ground of fraud or some irregularity. To this the defendants' counsel replied by charging the plaintiffs and their attorney with having perpetrated a fraud upon the Court and snatched the order by a trick. I do not think that what was done amounted to fraud. In the first place the plaintiffs' attorney had given notice to the defendants' attorneys that he would apply for execution at once. It was through the fault of his own clerks that Mr. McNair did not receive that intimation at once. It can hardly, however, be called fraudulent if the plaintiffs' attorney receiving no reply from the other side proceeded with his avowed intention. I have already stated that I ought to have been more fully informed by counsel as to the nature of the case, and in this respect both counsel and the attorney instructing him were to blame, but I do not think that I need say more than this. I was also in fault in not looking more carefully into the matter, and I do not forget that though these matters were settled between the parties and the suit decreed on 29th November 1909, the defendant Jaynarain had shown no great eagerness to carry the matter through, and the plaintiffs' people were not unreasonably indignant at the idea that there would be further delay, which would keep the plaintiffs out of their money and also prevent them from carrying on the

business as arranged by the decree.

3. On the ground of irregularity, however, I am clearly of opinion that the execution was bad. In the first place the decree sought to be executed was not the true decree between the parties. A very important provision had been omitted, which, if it had appeared in the decree, would have been fatal to the issue of the execution in the present manner and form. The precise amount of the accumulated interest has not been stated, but it must have been very considerable. Even a quarter's interest would amount to nearly Rs. 10,000. Whether the payment of this sum by the plaintiffs be regarded as a condition precedent to the endorsement and delivery of the Government promissory notes, or an act to be performed simultaneously with the endorsement and delivery and payment by Jaynarain, it is obvious that execution against the effects of the defendants could not have issued until the plaintiffs had paid or given some assurance for the payment of what was due by them to the defendants.

4. Then there is the important circumstance that Kustoor Chand Daga was not in Calcutta and had not been here since the decree was passed. Jaynarain also was absent, but this does not seem to me of so much importance. He could not be allowed by staying away to avoid performance of the Court's order. But Kustoor Chand Daga's absence is a different matter. The order was for endorsement and delivery to him and also for payment to him. So far as the endorsement and delivery are concerned this must mean an endorsement into his name and a personal delivery. In this respect the case is one of a decree for specific moveable property and falls under Order XXI, Rule 31. It does not, as was suggested by counsel for the defendants, fall under Rule 34, which contemplates a decree for endorsement only, and further contemplates the negotiable instrument being in the possession of the decree-holder, or at any rate of the Court. I do not mean to say that if Jaynarain had refused to endorse and deliver over these Government promissory notes as ordered by the Court, the Court's order might not have been enforced by seizure of the notes, and if necessary by an endorsement by the Court itself. But in this case matters had never reached that stage. I do not think that it was open to the plaintiffs to seek to enforce by the attachment of the defendants' effects, a decree of the Court which, in the circumstances, it was

physically impossible for the defendant Jaynarain to carry out. It was argued that the defendants' people might have handed over the Government promissory notes and made the payment of Rs. 96,700-12-9 to Madan Gopal Daga who, it was said, held a general power-of-attorney from Kustoor Chand Daga. To this the answer is that it is not proved that Madan Gopal Daga does in fact hold any such power. Still less does it appear that it would authorise him to receive these Government promissory notes or this payment for Kustoor Chand Daga as guardian of the infant plaintiffs. The power-of-attorney probably has reference only to Kustoor Chand Daga's business. So far as the Government promissory notes are concerned, Order XXI, Rule 31, requires delivery of the specific moveable to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf. That points, in my opinion, to a special authority for the particular purpose. It is noticeable that Madan Gopal Daga has not come forward to say what power, if any, he holds from Kustoor Chand Daga, nor has he made any affidavit in this case.

5. For these reasons, I am of opinion that the execution proceedings cannot be supported and must be set aside ab initio. A question was raised by the Deputy Sheriff as to the Sheriff's right of poundage, and he asked by his counsel that the property attached might not be ordered to be restored to the defendants without notice to him and his being heard. If I had any doubt in the matter I might perhaps have taken that course, but I am unable to see that the Sheriff is entitled to poundage in this case. In the list of fees and charges to be allowed to the Sheriff, I find No. 21, 'Poundage on sums levied by the Sheriff in execution for the first 1,000 rupees at 5 per cent and for the rest at 2 1/2 per cent.' The same rule applies in England, and it is clear that the Sheriff is only entitled to poundage on sums levied. Here there has been no levy, only a seizure of the defendants' effects; and the authorities are clear that where the seizure is wrongful and is withdrawn by direction of law the Sheriff receives no poundage: Mortimore v. Cragg (1878) 3 C.P.D. 216 In re Ludmore (1884) 13 Q.B.D. 415, and In re Thomas [1809] 1 Q.B. 460. In any case I fail to see how the defendants' property, which is to be released, could be made liable for the Sheriff's poundage. I do not think, therefore, that I should be justified in ordering the property, or any part of it, to be detained in Court pending an investigation of the Sheriff's claim. He has his

remedy by suit, if he be advised to bring one.

6. I accordingly make the rule for amendment of the decree absolute, with this correction that the clause to be inserted must come in its proper place after the directions to endorse and deliver the Government promissory notes, but applying of course to both sets of Government promissory notes. As the omission of this provision in the decree was due as much to the fault of one party as of the other, each party must bear their own costs of this rule.

7. The rule for the setting aside of the attachment is also made absolute, with costs against the plaintiffs. The property seized must be restored to the defendants.