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Court : Kolkata

Decided On : Jan-16-1924

Reported in : 78Ind.Cas.317

Judge : Suhrawardy, J.

Appellant : Aejun Kapali and ors.

Respondent : Asvini Kumar Kapali and ors.

Judgement :

Suhrawardy, J.

1. The point raised in this Rule is whether the plaintiff was entitled to maintain a suit for the recovery of the amount claimed or his only remedy is to execute the compromise-decree to enforce delivery of the articles or payment of their value. The facts are that the plaintiff had brought a suit for partition and khas possession of certain lands against the defendants and others in the Court of the 2nd Subordinate Judge of Comilla. That suit was decreed on compromise. One of the terms of it was that the plaintiff was to get from the defendant four maunds of Jub and ten maunds of paddy. These articles not having been delivered by the defendant to the plaintiff, he has brought the present suit for recovery of the price thereof in the Court of the Munsif of Nabinagar exercising Small Cause Court jurisdiction. The defendant, amongst other defences, raised the plea that no suit would lie in the Small Cause Court-by virtue of the provisions of Section 47, Civil

Procednie Code and that such claim could be made only in execution of the compromise-decree. The Small Cause Court Judge has overruled this plea and gave a decree to the plaintiff for the amount claimed. This Rule has been issued under section 25 of the Provincial Small Cause Courts Act. It is admitted by both the plaintiff and the defendant, as is observed by the learned Munsif, that the subject-matter of this suit was extraneous to the subject-matter of the partition suit. The partition, suit related only to lands held in common by the parties, but no partition was claimed of the crops standing on the land. The compromise-decree allowed a partition of the crop to the claimant as one of the considerations for the compromise. In the first place, it is argued, that the subject-matter was included in the previous litigation. But, as I have remarked, both the parties in the Court below proceeded on the assumption that it was not so; and, on the face of the plaint in the partition suit which has been placed before me, I am of the same opinion.

2. The next question that arises is as to even if the subject-matter of the present suit was not included in the previous suit, the consent decree in the previous suit would bar a separate suit to enforce one' of the terms of the compromise though beyond the scope of that suit under section 47, Civil Procedure Code, Reliance has been placed for this contention on behalf of the petitioner on the decisions of the Allahabad and Madras High Courts in the cases of Mombulla v. Imami 9 A. 229 ; A.W.N. (1887) 19 : 5 Ind. Dec. (N.S.) 587, The Manager of Sri Meenakshi Devasthanam v. Abdul Kasim 80 M. 421 : 2 M.L.T. 849 : 17 M.L.J. 255, Joti Kuruvetappa v. Izari Sivuseppa 80 M. 178 : 16 M.L.J. 354;, and Sabapathy Pillay v. Vanmahalinga Pillay 23 Ind. Cas. 581 : 38 M. 959 : 15 M.L.T. 208 : 26 M.L.J. 381 ; (1914) M.W.N. 256. There is no doubt that the High Courts of Allahabad and Bombay have adopted the view that, when a suit is decreed by consent and the terms of the compromise are embodied in the decree the only way to get relief under that decree in respect of any matter included in the suit or outside its scope is by way of execution. But this view has not been accepted by this Court. Reference may be made to the case of Jasimuddin Biswas v. Bhuvan Jelini 84 Order 456 ;. The expressions of opinion there seem to be in favour of the proposition that a consent decree including matters covered by the suit as well as matters extraneous to it can only be executed to the extent it relates to matters in suit. I may here quote the observations of the Court, which are as follows: ' We

think that in execution of the decree itself the amount agreed to be paid as damages could alone be recovered from the defendants. The Court executing the decree would not have been empowered under it to compel the defendants to execute a kabulyat in favour of the plaintiffs or to accept a lease on the terms agreed to.' One of the terms of the compromise in that suit was that the defendants should execute a kabulyat in favour of the plaintiff and accept a lease on certain terms. It was held that this covenant could not be enforced by the Court executing the compromise decree. The point did not form an issue in that Case but the observations that I have quoted were material for the decision of that suit. In the case of Puma Chandra Sarkar v. Nil Madhab Nandi 5 C.W.N. 485 the question arose whether the decree having comprised terms outside the scope of the suit was ultra vires or not. It was held that a decree passed on compromise cannot be regarded as ultra vires simply because it goes beyond the scope of the suit and contains other matters; but if those other conditions are independent of the suit they may be regarded as surplusage. In coming to that finding Pratt, J., observed as follows: 'Therefore, whether the whole of the decree is capable of execution or not, it is evident that it is a good decree at least so far as regards the validity of the kabulyat.' Ghose, J. agreeing in the judgment, says: 'It seems to me that these other conditions were either the consideration for the affirmance of the kabulyat for which the suit was brought or they were conditions independent thereof. In the first mentioned case, the whole of the conditions must be incorporated in the decree : in the latter case, the decree, according to the view presented by the learned Vakil himself so far as it incorporates only the first condition, namely, as to the kabulyat must be upheld and, therefore, the portion of the decree incorporating the other conditions may be regarded as surplusage.' The point seems to have been set at rest by the recent decision of the Judicial Committee in the case of Bani He- mania Kumari Debi v. Midnapur Zamindari Co. 53 Ind. Cas 534 : 46 I.A. 240 : 37 M.L.J. 525 : 17 A.L.J. 1117 : 24 C.W.N. 177; (1920) M.W.N. 66 : 27 M.L.T. 42 : 11 L.W. 301 : 31 C.L.J. 298 : 22 Bom. L.R. 488 : 47 C. 485 (P.C.).

3. The question that is now before me was not directly in issue in that case, but their Lordships of the Judicial Committee have examined the characteristics of a compromise decree containing matters within and outside the scope of the suit. In

construing Section 375 of the Code of 1882 (corresponding to Order XXIII, Rule 3), their Lordships observe as follows: 'The terms of this section need careful scrutiny. In the first place, it is plain that the agreement or compromise, in whole and not in part, is to be recorded, and the decree is then to confine its operation to so much of the subject-matter of the suit as is dealt with by the agreement. Their Lordships are not aware of the exact system by which documents are recorded in the Courts in India, but a perfectly proper and effectual method of carrying out the terms of the section would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree; but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation, the decree taken as a whole would include the agreement. This, in fact, is what the decree did in the present case. It may be that as a decree it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents.' These observations clearly indicate that such a decree is capable of being executed only in reference to the subject-matter of the suit; and it necessarily follows that it cannot be executed with reference to matters outside the scope of the suit. The provisions of the law as contained in Order XXIII, Rule 3, throw a great deal of light upon this point. The Court is empowered when a suit has been brought, upon any lawful agreement or compromise, to pass a decree in accordance therewith, 'so far as it relates to the suit.' Apparently, the power of the Court in passing a decree is restricted to the matters covered by the suit. But it has been held in the Cases referred to that where the agreement refers to matters extraneous to the suit forming consideration for the compromise or settlement of the matters included in the suit, such extraneous terms should also be recorded in the decree; but it does not follow that such terms can be enforced in execution of that decree. Reference has been made on behalf of the petitioner to the case of *Gobinda Chandra Pal v. Dwarka Nath Pal* 35 C. 887 : 12 C.W.N. 849 : 7 C.L.J. 492. That case may be dismissed by the observation that the plaintiff had instituted a separate suit under the provisions of the Small Cause Courts Act to enforce a mortgage created by the compromise in a previous litigation in respect of properties outside its scope.

4. In my judgment, the view taken by the Small Cause Court Judge is correct and this Rule is discharged with costs. I assess the hearing-fee at one gold mohur.

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