Jai Narain Ram Lundia

Vs

Kedar Nath Khetan and Others

Civil Appeal No. 206 of 1955

(N. Chandrashekar Aiyar, Syed Jafar Imam, Vivian Bose JJ)

31.01.1956

JUDGMENT

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BOSE J. -

This appeal arises out of certain execution proceedings. The decree which the appellant, Jainarain Ram Lundia, seeks to execute is one that directs specific performance of a contract to sell certain shares in a private limited company known as the Ganga Devi Sugar Mills, together with a five annas share in a partnership firm called the Marwari Brothers, on payment of a sum of Rs. 2,45,000.

The facts are as follows. The partnership firm, known as the Marwari Brothers, was formed on the 29th of February 1936. The partners consisted of two groups called the Bettia Group and the Padrauna Group. The Padrauna Group consisted of (1) Kedarnath Khetan and (2) a firm called Surajmal. These two were the plaintiffs in the suit. Kedarnath was one of the partners of the Surajmal firm. The Bettia Group consisted of (1) Gobardhan Das (2) Jainarain Ram Lundia (3) Badri Prasad and (4) Bisheshwar Nath. On Bisheshwar Nath's death his son Madan Lal Jhunjhunwalla stepped into his shoes. These persons were the defendants.

The Marwari Brothers Firm was formed for the purpose of promoting a company for starting a sugar mill in Champaran and for securing the managing agency of the company for itself for a period of ninety years. This was done. The capital of the company consisted of Rs. 8,00,000 divided into 800 shares of Rs. 1,000 each. The shares were distributed as follows. In the Bettia Group Gobardhan Das and his brother Badri Prasad had 100 shares; Jainarain had 150 and Madan Lal had 100. The Bettia Group thus had 350 shares between them. The other group (Padrauna) held the remaining 450 shares.

About five years later the two sets of partners fell out and, as a result, the Bettia Group agreed, on 1-1-1941, to sell a certain number of their shares in the Ganga Devi Sugar Mills Limited to the Padrauna Group along with a certain share in the Marwari Brothers firm. The exact number of shares agreed to be sold and the extent of the share in the firm was a matter of dispute but that does not concern us at this stage because we are only concerned with the final result embodied in the decree now under execution.

The Padrauna Group sued for specific performance and the dispute was carried as far as the Federal Court. That Court affirmed the decree of the Calcutta High Court on 6-5-1949. The substance of the decree was this :

> 1. "It is declared that upon payment and or tender to the defendants-appellants Jainarain Ram Lundia and Madan Lal Jhunjhunwala of the sum of Rs. 2,45,000...... with interest thereon....... by the plaintiffs, the plaintiffs are entitled to 250 shares belonging to the said defendants in the Ganga Devi Sugar Mills Limited and five annas share belonging to them in the Marwari Brothers....... and to all dividends and profits in respect thereof with effect from 1-2-1941....."
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> 2. "And it is further ordered and decreed that against payment or tender by the plaintiffs to the said defendants...... of the said sum of Rs. 2,45,000 with interest as aforesaid the said defendants-appellants and all proper parties do execute in favour of the plaintiffs proper deed or deeds of transfer or assignment of the said 250 shares in the Ganga Devi Sugar Mills Limited and the said five annas share in the Marwari Brothers......"

This was in slight variation of the first Court's decree. The exact variation does not matter. All that it is necessary to note is that the plaintiffs (that is, the Padrauna Group) tendered the money some time after the first Court's decree and before the Calcutta High Court's decree. The tender was not accepted as the defendants (the Bettia Group) had appealed. It is admitted that there was no second tender after the High Court's decree.

After the Federal Court had settled the matter, one of the defendants, Jainarain Ram Lundia, applied to the Calcutta High Court for execution. The decree was transferred to the Subordinate Judge, Motihari, and the execution proceedings started there on 25-1-1951. One of the plaintiffs, Kedarnath Khetan, filed an objection petition on 20-3-1951. That is the objection we are concerned with. Among other things, one of the objections was that the defendants were not in a position to implement the conditions imposed to them by the decree because the Marwari Brothers firm was dissolved by agreement between the parties before the Federal Court's decree and was no longer in existence. The present appeal turns almost entirely on that fact and on the consequences that flow from it.

The first Court, that is, the Subordinate Judge's Court at Motihari to whom the decree had been transferred, declined to go into this holding that it had no jurisdiction as a transferee Court.

The plaintiff Kedarnath appealed to the High Court and succeeded. The High Court held that the transferee Court had jurisdiction, that the Marwari Brothers had been dissolved and that because of that the defendants could not execute the decree.

The defendants appealed here.

We will first consider the question of fact, namely, whether the Marwari Brothers was still in existence as a firm at the date of the execution application. On this point we agree with the High Court that it was not, for the following reasons.

The plaintiff Kedarnath asserted in his objection petition that the firm had been dissolved by agreement between the parties "including the plaintiffs and the defendants". This fact was not denied by the defendant Jainarain Ram Lundia in his rejoinder though the fact was specifically alleged to be within his personal knowledge. Even if he did not know whether the firm had been dissolved or not (a fact which cannot be the case for reasons that we shall give later) he was certainly in a position to admit or deny whether the fact was within his personal knowledge. His

silence can therefore only have one meaning.

The defendant's learned counsel contended before us that the fact had been denied by implication because Kedarnath stated that his side was, and had always been, ready to perform their part of the decree. Counsel argued that as the plaintiffs contended that performance was not possible after the dissolution of the Marwari Brothers firm this meant that the firm was still in existence. We reject this contention and remark in passing that this is inconsistent with another argument which was also urged in this Court, namely that the fact of dissolution was no bar to performance on the defendant's part.

Quite apart from the language of the rejoinder, the defendant Jainarain said in paragraph 15 of his application dated 12-7-1954 made to the High Court for leave to appeal here that

> "the said Marwari Brothers was in existence on the date of the said conveyance, namely 14th September 1950, and died a natural death on the conveyance of the Ganga Devi Sugar Mills to North Bihar Sugar Mills".

This is a clear admission that the firm was dissolved, at any rate, on 14-9-1950. The plaintiff's contention is that it was dissolved much earlier but whether that was so or not will make no difference to this appeal because 14-9-1950 is also before the date of the application for execution.

The defendant's learned counsel tried to explain this away also. He said that the defendant did not mean that the firm was dissolved on that date but that as the only purpose for which the firm existed, namely, the managing agency of the Ganga Devi Sugar Mills, had gone the firm could no longer function.

In order to understand this, some further facts will be necessary. While the plaintiff's appeal was being heard in the High Court, the defendants made an application to that Court on 14-4-1954 asking for permission to adduce further evidence in the shape of a sale deed dated 14-9-1950. The defendant contended that he had only "recently" come to know that the Ganga Devi Sugar Mills had sold all its land, machinery, etc. to the North Bihar Sugar Mills on 14-9-1950. This terminated the managing agency, and as the only business of the firm was this managing agency and as that was the only purpose for which the firm was formed, it was no longer able to function. But he said that this deed would show conclusively that the firm was in existence on that date. The High Court refused to accept this document because it considered that the only ground on which additional evidence can be admitted in appeal is when the Court is unable to pronounce judgment on the material already before it; as that was not the case here it rejected the document.

We need not decide whether there is any conflict of view between the Privy Council decisions in Kessowji Issur v. G. I. P. Rly. [[1907] L. R. 34 I. A. 115, 122.] and Parsotim v. Lal Mohar [[1931] L. R. 58 I. A. 254.] on the one hand and Indrajit Pratap Sahi v. Amar Singh [[1923] L. R. 50 I. A. 183, 190, 191.] on the other because, even if this evidence were to be admitted and were to be accepted as true, there would still be the defendant's admission in the High Court that the firm stood dissolved at least on 14-9-1950. We are not able to construe the statement in any other way. The plaintiff says that the dissolution was much earlier and that the firm mentioned in the sale deed now sought to be filed was not the same firm but another firm of the same name, but even if the defendant's version be accepted the fact still remains that even according to his statement there was a dissolution before his application for execution and that therefore the defendants were not in a position to assign their five annas share in the Marwari Brothers firm. We now have to consider the

effect of that.

Much of the argument about this revolved round the question whether the equitable rules that obtain before decree in a suit for specific performance continue at the stage of execution. It is not necessary for us to go into that here because the position in the present case is much simpler. When a decree imposes obligations on both sides which are so conditioned that performance by one is conditional on performance by the other execution will not be ordered unless the party seeking execution not only offers to perform his side but, when objection is raised, satisfies the executing Court that he is in a position to do so. Any other rule would have the effect of varying the conditions of the decree : a thing that an executing Court cannot do. There may of course be decrees where the obligations imposed on each side are distinct and severable and in such a case each party might well be left to its own execution. But when the obligations are reciprocal and are interlinked so that they cannot be separated, any attempt to enforce performance unilaterally would be to defeat the directions in the decree and to go behind them which, of course, an executing Court cannot do. The only question therefore is whether the decree in the present case is of this nature. We are clear that it is.

The relevant part of the decree has already been quoted. It directs that

> "against payment or tender by the plaintiffs... the said defendants.... do execute in favour of the plaintiffs proper deed or deeds of transfer of... five annas share in the Marwari Brothers..."

This is not a case of two independent and severable directions in the same decree but of one set of reciprocal conditions indissolubly linked together so that they cannot exist without each other. The fact that it is a decree for specific performance where the decree itself cannot be given unless the side seeking performance is ready and willing to perform his side of the bargain and is in a position to do so, only strengthens the conclusion that that was the meaning and intendment of the language used. But the principle on which we are founding is not confined to cases of specific performance. It will apply whenever a decree is so conditioned that the right of one party to seek performance from the other is conditional on his readiness and ability to perform his own obligations. The reason is, as we have explained, that to hold otherwise would be to permit an executing Court to go behind the decree and vary its terms by splitting up what was fashioned as an indivisible whole into distinct and divisible parts having separate and severable existence without any interrelation between them just as if they had been separate decrees in separate and distinct suits.

Fry on Specific Performance was quoted to us (6th edition, Chapter IV, pages 546 onwards) where the learned author states that relief can often be obtained after judgment along much the same lines as before : thus a party to a contract may, in a proper case, apply for rescission of the contract and so forth. It was urged by the other side that even if that can be done it can only be done by the Court which passed the decree and not in execution. We do not intend to examine this because even it these remedies also exist, provided application is made to the proper Court, it does not affect the basic principle in execution that the executing Court must take the decree as it stands and cannot go behind it. If the decree says that on payment being made some definite and specific thing is to be given to the other side, the executing Court cannot alter that and allow something else to be substituted for the thing ordered to be given.

The learned counsel for the defendant-appellant contended that even if the Marwari Brothers had ceased to exist as a firm the plaintiff was still entitled to a five annas share in its assets on dissolution. But a five annas share in the assets of a dissolved firm which has ceased to exist is a

very different thing from a five annas share in a going partnership concern; and to permit this substitution in the decree would be to alter it in a very material particular. The defendant may or may not have the right to ask the Court which passed the decree to vary it in that way but he can certainly not ask the executing Court to do so. The decree must either be executed as it stands in one of the ways allowed by law or not at all.

In the High Court, and also before us, much was made of the fact that the plaintiff had not re-tendered the money after the decree was varied by the High Court and it was argued that that precluded him from contesting the defendant's right to attach his property under Order XXI, rule 32(1), of the Civil Procedure Code. The remedy provided in Order XXI, rule 32(1), is, of course, one of the remedies available in execution of a decree for specific performance but it can only be used by a person who is entitled to execute the decree, and if, by reason of his own incapacity to perform his part, he is precluded from seeking execution, Order XXI, rule 32(1), cannot apply.

The only question that remains is whether the executing Court can consider whether the defendant is in a position to perform his part of the decree. But of course it can. If the executing Court cannot consider this question who can ? The executing Court has to see that the defendant gives the plaintiff the very thing that the decree directs and not something else, so if there is any dispute about its identity or substance nobody but the Court executing the decree can determine it. It is a matter distinctly relating to the execution, discharge and satisfaction of the decree and so, under section 47 of the Civil Procedure Code, it can only be determined by the Court executing the decree. And as for the first Court's conclusion that it could not decide these matters because it was not the Court that passed the decree, it is enough to say, as the High Court did, that section 42 of the Code expressly gives the Court executing a decree sent to it the same powers in executing such decree as if it had been passed by itself.

The next point urged by the appellant was that as the plaintiff did not raise the present objection before the Federal Court when it passed its decree he is precluded from doing so now. It is true this would have been a good ground for resisting a decree for specific performance but is no answer to the objection to execution. The defendant undertook to perform his part when the decree was passed and he must make good that undertaking before he can seek execution because the decree, in view of its language and intendment, must either be executed as a whole or not at all; it cannot be split up into different and uncorrelated parts and be executed unilaterally. It may be observed in passing that it was as much the duty of the defendant to seek modification of the contract by the Court which passed the decree, or modification of the terms of the decree later if he did not know these facts at the time, as he says, it was of the plaintiff. The fact remains that the decree was passed in these terms and it must either be executed as it stands or not at all unless the Court which passed it alters or modifies it.

Then it was argued that this objection to execution should have been taken by the plaintiff in the Calcutta High Court when the defendant asked for transfer of the decree to Motihari and that as that was not done it is too late now. But here also the answer is the same. The only question before the Culcutta High Court on the application made to it was whether the decree should be transferred or not. Whether the plaintiff might or could have taken the objection in the High Court is beside the point because it is evident that he need not have done so on the only issue which the application for transfer raised, namely, whether the decree should be transferred or not; at best it could only be said that the plaintiff had a choice of two forums. If the appellant's contention is pushed to its logical conclusion it would mean that whenever a decree is transferred all objection to execution must cease unless the order of the Court directing the transfer expressly enumerates the issues that the

transferring Court is at liberty to determine. In our opinion section 42 of the Civil Procedure Code is a complete answer to this contention.

The appeal fails and is dismissed with costs.

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