

Dokku Bhushayya

Vs

Katragadda Ramakrishnayya

Civil Appeal No. 483 of 1957

(A. K. Sarkar, K. Subba Rao, J.R. Mudholkar JJ)

27.04.1962

JUDGMENT

SARKAR, J. –

In 1929, one Bapiiah filed a suit against the appellant, then a minor, his father and another person on a promissory note executed by the two last mentioned persons. The appellant was represented in that suit by his maternal grandfather as his guardian ad litem. A decree was passed in that suit. The decreeholder put the decree in execution and obtained an order for the sale of certain properties which the appellant was interested. The properties were sold in due course in favour, it is said, of a clerk of the decreeholder. Thereafter, the appellant's guardian ad litem made an application under O. 21 r. 90 of the Code of Civil Procedure for setting aside the sale. Later, however, the guardian ad litem came to a settlement with the decreeholder and the auction purchaser that the guardian ad litem would give up the contention regarding the invalidity of the sale and withdraw the petition to set it aside and also give up possession of the properties sold to the auction purchaser and decreeholder and the auction purchaser in their turn would give up their claim for costs of the petition. In pursuance of this agreement the petition was withdrawn and dismissed by order made on August 12, 1932.

After attaining majority, the appellant filed a suit in 1944 to set aside the order of August 12, 1932, and for a re-hearing of the petition which was dismissed by the order of that date. It is from this suit that the present appeal arises. The suit was decreed by the trial Court but on appeal the decision of the trial Court was reversed by the High Court at Madras and the suit was ordered to be dismissed. There is no dispute that the suit was competent and within time.

The only question in this appeal is whether the order of August 12, 1932 is voidable under O. 32, r. 7 of the Code of Civil Procedure, 1908, at the instance of the appellant. That rule forbids the guardian for the suit to "enter into any agreement or compromise on behalf of a minor with reference to the suit" without the leave of the court and provides that the any such agreement or compromise entered into without the leave of the court shall be voidable against all parties other than minor.

Order 32, r. 7 of the present Code corresponds to s. 462 of the Code of 1882. It has been settled since the Code of 1882 was in force that the provision under the consideration applies to proceedings in execution though it only mentions agreement or compromise with reference to the suit. As long ago as 1901, Jenkins C.J. said in Virupakshappa v. Shidappa, [(1901) I.R.L. 26 Bom. 109, 114] "I will first deal with the question whether section 462 applies to a compromise of execution proceedings. On the words of the section I think it does; applications in execution are

proceedings in the suit, so that a compromise of such a proceeding would be a compromise with reference to the suit. This view has been followed ever since.

The High Court took the view that a compromise of an execution proceeding would be within O. 32, r. 7 only when it affected directly the rights and liabilities created by the decree. It observed that the compromise in the present case was not affected by the rule as it concerned only the rights and liabilities under the auction sale and not those arising under the decree.

I am unable to agree with this view. The High Court rested itself on the fact that all that reported decisions dealt with cases in which the agreements had directly affected the rights and liabilities under the decree. This does not to my mind furnish sufficient justification for the High Court's view. No decision has been brought to our notice in which it has been held that O. 32, r. 7 does not apply to a compromise of execution proceedings which does not directly affect the rights and liabilities created by the decree. It does not seem to me that on principle the High Court's view can be justified.

It is true that O. 32, r. 7 does not apply to all agreements. In *Bhodes v. Swithenbank* [(1889) L.R. 22 Q.B.D. 577, 578] it was observed, "This is an action by an infant by means of her next friend, who undoubtedly has the conduct of the action in his hands. If, however, the next friend does anything in the action beyond the mere conduct, of it, whatever is so done must be for the benefit of the infant, and if, in opinion of the Court it is not so, the infant is not bound". It may therefore be said that an agreement concerning the conduct of the proceeding does not require the sanction of the Court.

Beyond this, I find no justification for limiting the operation of the rule. I observe that Jenkins C.J. in what I have earlier read from his judgment, said that the rule "applies to a compromise of execution proceedings". Therefore, it seems to me that according to the learned Chief Justice it applies to all compromises of execution proceedings, excepting, of course, compromises concerning the conduct of them, and this whether the compromise directly affects the rights or liabilities under the decree or not. I think the principle of the rule was correctly stated by Heaton J. when dealing with s. 462 of the Code of 1882 he observed in *Gurmallapa v. Mallappa* [(1920) I.L.R. 44 Bom. 574, 581], "That section, I think, necessarily implies that during the continuance of proceedings in Court, the dispute between the minor and another party which the Court had to decide could not be compromised except by the guardian ad litem of the minor, and by him only with the leave of the Court." I think that any compromise of a proceeding which concerns the dispute involved in it would require the sanction of the Court. I should also point out that sub. r. (5) of r. 3 of O. 32 provides that a person appointed guardian for the suit for a minor shall unless his appointment is terminated, continue as such throughout all the proceedings arising out of the suit including the proceedings in execution of a decree.

The object behind O. 32 seems to me to be that when an infant is involved in a legal proceeding, he should have a guardian assigned to him and that guardian should be under the control of the Court before which the proceedings is pending so as not to be able to affect the rights and liabilities of the infant, the subject matter of the proceedings, by a compromise which the Court has not approved as one for the benefit of the infant. If this is the principle, as I think it is, there would be no justification for limiting the operation of the rule in its application to execution proceedings, only to compromises which directly affect the rights and liabilities under the decree. The rule, in my view, would apply, among others, to compromises which bring a proceeding to an end and thereby affect the rights or liabilities of the infant involved in it. I think this view receives support from the observations of Varadachariar J. in *Katneni Venkatakrishnayya v. Ganapati China Kanakayya*

[(1938) I.L.R. Mad. 819, 828] that, "Rule 7 deals with the conduct of a 'next friend' as such who, as pointed out in *Bhodes v. Swithenbank* [(1889) L.R. 22 Q.B.D. 577, 578] is an officer of the Court to conduct the suit; and the principle underlying are 7 is that whenever he proposes to do anything beyond the normal conduct of the suit, he has to obtain the leave of the Court to do so." Quite obviously the word "suit" in this observation would include a proceeding in execution.

It is of some interest to point out that the learned Judges of the High Court were careful to use the word "directly"; they said the agreement or compromise in the present case did "not directly deal with or regulate the extent and nature of the rights and liabilities under the decree, which stand intact and unaffected as before." This seems to me to indicate that the learned Judges were conscious that the compromise in this case affected the rights and liabilities of the appellant under the decree at least indirectly. It seems to me that if the rule prohibits an agreement which directly affects the rights and liabilities of an infant under a decree, there would be no reason to think that it would not similarly prohibit an agreement deliberately made to affect the same rights and liabilities indirectly. The agreement challenged in this case, is, as I shall endeavour to show, of this kind.

Turning now to the facts of this case I think the proceeding in which the compromise was arrived at was in the course of execution of the decree. It was a proceeding to challenge the validity of an execution sale. It was therefore a proceeding, a compromise in reference to which would be governed by O. 32, r. 7 under the rule laid down in *Virupakshappa's case* [(1901) I.L.R. 26 Bom. 109, 114] .

It also seems to me clear that the compromise was not concerning the conduct of the proceeding. It brought the proceeding to an end and its result was that the appellant's right to question the validity of the sale was lost. He became bound by the sale, good or bad. His liability under the decree was reduced only by the amount of the proceeds of the sale, however, inadequate a price might have been fetched in it. It may be that if the proceeding to set aside the sale had been continued and not abandoned, the sale might have been set aside and a fresh sale, if one took place, might have fetched a larger price and thereby diminished the liability under the decree to a greater extent. Such a compromise cannot be said to be one relating to the conduct of the proceeding. It seems to me also to be one affecting seriously the liability of the appellant under the decree since it deprived him of his right to have that liability reduced by a larger amount by a sale properly held. It is a compromise which from all points of view, should have been made with the sanction of the Court.

Before concluding I think it right to say that the decreeholder and auction purchaser can derive no assistance from *Jitendra Nath Rao v. Samarandra Nath Mitter* [(1943) L.R. 70 I.A. 68]. In that case the Judicial Committee held that the agreement contemplated by O. 32, r. 7 is one which is made with a party to the suit or proceeding. Here the agreement was in the execution proceeding and it was made with the decreeholder and the auction purchaser both of whom were parties to it, the former having been a part to the suit itself out of which the execution proceeding arose.

I think this appeal should be allowed.

SUBBA RAO, J. –

This appeal raises the question of the construction of the provisions of Order XXXII, r. 7 of the Code of Civil Procedure.

Bhushayya, the appellant, and respondents 7 and 8 herein are the sons of one Dokka Adeyya (since

died). On the basis of a promissory note executed by Dokku Adeyya and respondent 5 in favour of one Bapayya, the latter filed C.S. No. 88 of 1929 in the Court of the Subordinate Judge Bapatla, and obtained a decree therein. In that suit, the appellant, who was then a minor, was a defendant and was represented by his maternal grandfather as his guardian. In execution of the said decree, properties of Dokku Adeyya were brought to sale and were purchased by the decree-holder's clerk, Bapiraju, subject to the mortgage in favour of the decree-holder. Before the sale was confirmed, on March 29, 1932, the appellant, represented by his maternal grandfather, filed E.A. No. 136 of 1932 to set aside the sale under Order XXI, r. 90 of the Code of Civil Procedure. The said petition was posted for inquiry to August 12, 1932. On that day, a memorandum was filed in the court by the guardian of the appellant to the effect that the matter was adjusted and that the petition should be dismissed as having been withdrawn. No sanction of the court was obtained by the guardian for withdrawing the petition. On the said day, the court passed an order dismissing the application. Subsequently, the sale was confirmed. On October 9, 1944, the appellant, who had then attained majority, filed a suit, O. 8. No. 80 of 1944, on the file of the Subordinate Judge, Tenali, for setting aside the order dated August 12, 1932 and to try the application for setting aside the sale on market. It was, inter alia pleaded that the said order was void in as much as the guardian of the appellant withdrew the application without the sanction of the court as he should do under Order XXXII, r. 7 of the Code of Civil Procedure, hereinafter referred to as the Code. The contesting defendants, some of them being the subsequent alienees, filed written statements seeking to sustain the validity of the said order. For the purpose of this appeal we need not notice any other point. The learned Subordinate Judge held that the withdrawal of the said petition and the consequent dismissal thereof was void, as the guardian did not obtain the sanction of the Court under Order XXXII, r. 7 of the Code. On appeal, the High Court came to the conclusion that Order XXXII, r. 7 of the Code had not relevance to an application for setting aside the sale in the circumstances of the case. Hence the appeal.

The only question that arises in this appeal is whether the withdrawal of the said petition by the guardian was in contravention of Order XXXII r. 7 of the Code. Before construing the provisions of the said Order, it would be convenient to notice what exactly were the terms of the agreement. The High Court in its judgment summarised the factual position on that date thus :

"The agreement is that the guardian-ad-litem should give up the contentions regarding the invalidity of the auction sale and should withdraw the petition to set aside the sale and also deliver up possession of the properties purchased, to the auction-purchaser and that the decree-holder and auction-purchaser should give up their claim for costs of the said petition. It was in pursuance of this agreement that the petition was withdrawn and dismissed (no costs being given)".

This is the correct petition, and we need not elaborate further on it. Order XXXII, r. 7, clauses (1) and (2) read as follow :

Clause (1) "No next friend or guardian for the suit shall, without the leave of the Court expressly recorded in the proceedings enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

Clause (2). "Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

In Madras, there is also another clause, viz., cl. (1-A) introduced by an amendment made in 1910

and reads :

"Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability. A decree of other for the compromise of a suit, appeal or matter to which a minor or other person under disability is a party shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in Form No. 24 in Appendix D to this schedule."

Under this Order, no guardian shall enter into an agreement or compromise on behalf of a minor with reference to suit in which he acts as next friend or guardian. The short question is, what is the meaning to be given to the words "an agreement or compromise with reference to the suit" ? Mr. Viswanatha Sastri, learned counsel for the appellant, raised two contentions, namely : (1) That the execution proceedings are proceedings with reference to the suit and therefore any compromise or agreement entered into or effected by a guardian of a minor in execution proceedings affecting his rights procedural or substantive, whether in issue in the suit or declared by the decree or not would require the sanction of the court and an agreement entered into without that sanction would be void. (2) An application to set aside a sale is a proceeding within the meaning of s. 141 of the Code, and, therefore, O. XXXII, r. 7, as far as it can be made applicable, would apply to such proceeding; as the compromise was entered into by the guardian in such a proceeding without the leave of the Court, the said compromise as well as the order made pursuant thereto was void.

On the other hand, Mr. Bhimasankaram, learned counsel for the respondents, while supporting the test laid down by the High Court, namely, that an agreement to fall within the mischief of the said Order shall be such as deals directly with the rights and liabilities involved in the suit or defined by the decree, attempted to abridge the scope of the test further by trying to make a distinction between an agreement relating to rights conferred by the decree and that only relating to liabilities imposed thereunder.

Order XXXII, r. 7, is one of the provisions designed to safeguard the interests of a minor during the pendency of a suit against hostile, negligent or collusive acts of a guardian. The scope of the provisions is implicit in the phraseology used therein. The crucial words are "any agreement or compromise... with reference to the suit". The word "with reference", if taken out of the context, are of the widest import. They may take in every procedural step in the conduct of a suit, such as adjournment, admission of documents, interlocutories, inspection etc., and obviously it could not have been the intention of the Legislature that agreements in respect of such procedural steps should conform to the requirements of the rule. If that be not so, the rule instead of protecting the interests of minor would easily become a major obstacle in disposing of suits in which a minor is ranged as party on one side or the other. So consistent with the purpose of the rule the words "with reference to the suit" must be limited to the rights put in issue in the suit.

The next limitation is that the protection is only during the pendency of the suit. When does a suit come to an end ? It has been held that for the purpose of the said rule an execution proceeding is a continuation of a suit : see *Virupakshappa v. Shidappa and Basappa* [(1901) I.L.R. 26 Bom. 110], *Arunachellam Chetty v. Ramanadhan Chetty* [(1906) I.L.R. 29 Mad. 309], and *Muthalakkammal*

Chetty v. Narappa Reddiar [(1933) I.L.R. 56 Mad. 430]. If it was a continuation, the rule would also apply to an agreement or compromise with reference to the said execution proceeding. But, just like in the case of a suit, in the case of execution proceedings also, the agreement or compromise shall be one affecting rights or liabilities ascertained or declared by the decree put in execution. As in the case of a suit, so also in the case of an execution of a decree, mere procedural steps not affecting the rights or liabilities so declared are not governed by the provision. The guardian may agree to an adjournment of a sale, to a waiver of a fresh proclamation, to a reduction of upset price etc. It could not have been the intention of the Legislature that every time such a step is taken, the procedure laid down in Order XXXIII, r. 7, of the Code should be complied with.

The next limitation is that the agreement or compromise shall be entered into with a party to a suit or his legal representative. The rule does not provide for dealings of a guardian with persons not parties to a suit. The question directly arose in a case which went up to the Privy Council, viz., in Jitendra Nath Roy v. Samarandra Nath Mitter [(1943) L.R. 70 I.A. 68, 72]. There, a decree obtained in favour of a minor, represented by his guardian, was assigned by the guardian for consideration to another without obtained the leave of the court. Advertising to the question of validity of such an assignment, Lord Atkin observed :

"They (the Judges of the High Court) took the view that in the rule in the phrase "agreement or compromise.... with reference to the suit" the words mean agreement with a party to the suit and do not cover a transfer of a decree to someone then unconnected with the suit, even assuming that such transfer could properly be described as an agreement. They expressed their agreement on this point with a decision of the Full Bench of the Madras High Court in Katneni Venkatakrishnayya Garapati China Kanakayya [I.L.R. 1938 Mad. 819], which is precisely in point. It appears to their Lordships that it cannot have been intended to require the leave of the court to an agreement, for example, made with a non-party to finance a suit, whether with a stipulation to receive part of the proceeds or not. The conjunction of the word "agreement" with the word "compromise" appears to indicate the kind of agreement intended."

We agree with these observations. The result is that Order XXXII, r. 7, of the Code will apply to only to an agreement or compromise entered into by a guardian of a party to the suit, who is a minor, with another party thereof during the pendency of the suit and the execution proceedings.

The next question is whether the application for setting aside a sale is a proceeding in execution of a decree. Order XXI of the Code prescribes, among others, the different modes of execution, one of them being execution against the property of a judgment-debtor. The Order also prescribes a procedure for sale of the said property and for setting aside a sale obtained by fraud or material irregularity. Under Order XXI, r. 92, where no application is made under r. 89, r. 90, or r. 91 to set aside a sale or where the application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute; under sub-r. (3) of r. 92 of the said Order, "No suit to set aside an order made under this rule shall be brought by any person against whom such order made." It is, therefore, clear that Order XXI provides a self-contained machinery for executing a decree and for deciding disputes that may arise in connection with the execution. The execution is not closed till the decree is discharged or barred by limitation. In this view, we must hold that an application filed by a judgment-debtor to set aside a sale is an application in execution of a decree.

Even so, as we have already indicated, to attract Order XXXII, r. 7, of the Code the agreement or compromise entered into between the guardian and the auction-purchaser shall be an agreement or a compromise affecting the rights or liabilities declared by the decree. Can it be said that in the present case the agreement affected any such right or liability ? The suit was on the basis of a promissory note executed by the father and the brother of the appellant. The appellant was also a party to the suit. The decree was for recovery of the amount covered by the promissory note with interest. It did not in any way affect the title of the appellant to the entire or to any part of the property of the family sold in execution of the decree. The appellant, by his guardian, filed an application to set aside the sale on the ground of fraud and material irregularity in the conduct of the sale. The guardian agreed to withdraw the said application on certain conditions. The agreement also did not in any way affect the rights or liabilities declared under the decree. Notwithstanding the agreement, the decree was left intact. It is said that if the sale was set aside, the decree would have to be executed afresh, but as it was not set aside on the basis of the said agreement, the sale price in discharge of the decree; therefore, the argument proceeds, the agreement affected the discharge of the decree. The father of appellant could have sold the family property out of court and could have out of the sale proceeds, discharged the decree. In that event it could not be said that the sale affected the rights or liabilities decree. If so, the sale of property through court cannot equally affect any such rights or liabilities declared by the decree. We, therefore, hold that the agreement or compromise entered into by the guardian in respect of such a sale did not affect the rights ascertained and declared by the decree, and, therefore, the leave of court under Order XXXII, r. 7, of the Code was not necessary.

Before leaving this part of the case, we should make it clear that it is not our intention to lay down that under no circumstances an agreement or compromise entered into by a guardian to withdraw an application filed for setting aside a sale would be governed by Order XXXII, r. 7, of the Code. There may be arrangements or compromises in respect of such a petition whereunder the rights declared by decrees are affected. We also assumed for the purpose of this case that the auction-purchaser was a party to the suit, as there was some controversy on the question whether he was benamidar for the decree-holder.

Lastly it was contended that by reason of s. 141 of the Code, the procedure provided under Order XXXII, r. 7, should be extended to an agreement or a compromise entered into by a guardian in respect of an application to set aside a sale under Order XXI, r. 90, of the Code. The argument is that an application under Order XXI, r. 90, is an independent proceeding, and as the agreement for withdrawing the said proceeding affects the right created by the sale, it falls within the meaning of the said rule. Section 141 of the Code reads:

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

The corresponding s. 646 of the Code of 1882 read as follows :

"The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals".

There was a conflict on the question whether the said section applied to proceedings in execution. To steer clear of the conflict the following Explanation was added to the section by the Civil Procedure Code Amendment Act 6 of 1892 :

"Explanation :- This section does not apply to applications for the execution of decrees which are proceedings in suits" : But the section was construed by the Privy Council even without the said of the Explanation in Thakur Prasad v. Sheikh Fakir Ullah [[1894] L.R. 22 I.A. 44, 49], wherein it observed :

"It is not suggested that s. 373 of the Civil Procedure Code (Order XXIII, r. 1 of the present Code) would of its own force apply to execution proceedings. The suggestion is that it is applied by force of s. 647 (s. 141 of the present Code). But the whole of Chapter XIX of the Code, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that procedure for suits should be followed as far as applicable. Their Lordships think that the proceedings spoken of in s. 647 include original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, and do not include executions."

This view has ever since been followed. We have already held that the application by the judgment-debtor to set aside the sale is a proceeding in execution and, therefore, s. 141 of the Code will not apply for two reasons, namely, (1) as execution proceedings were continuation of suit within the meaning of Order XXXII, r. 7 of the Code, and as the Code provided specifically for suits, s. 141 could not be invoked; and (2) as we have held, an application by a judgment-debtor to set aside a sale is a proceeding in execution and therefore s. 141, which applies only to original proceedings, does not apply to such proceedings.

In the result, the appeal fails and is dismissed with costs of the contesting respondent.

BY COURT.

In accordance with the opinion of the majority the appeal is dismissed with costs of the contesting respondents.

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