Haji T. J. Abdul Shakoor and Others

Vs

Bijay Kumar Kapur and Others

Civil Appeal No. 176 of 1960

(Syed Jafar Imam, K. Subha Rao, J. R. Mudholkar, N. Rajgopala Ayyangar JJ)

14.11.1962

JUDGMENT

AYYANGAR, J. –

On March 27, 1954, the three Kapurs - who are the respondents before us - filed original Suit No. 29 of 1954 before the District Judge, Bangalore, against the 3 appellants who are brothers, for the recovery of over Rs. 50,000/- and subsequent interest and costs due on a simple mortgage. Before the suit came on for trial the parties filed a memo of compromise dated September 30, 1955, and they prayed that the suit may be decreed in terms thereof. The Court accepted the application and passed a decree as prayed for, the order reading :

> "It is ordered and decreed that the plaintiff's suit be and the same is hereby decreed as per terms of the compromise, the copy of which is hereunto annexed".

The terms of the Razinama ran as follows :

> "1. That the defendants herein agree to a decree being passed as prayed for.
>
> 2. That the mortgaged properties are hereby sold for the amount of the decree in full satisfaction thereof. The defendants will execute a regular sale and within ten days from this date.
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> 3. That the mortgaged properties are hereby put in possession of the plaintiff (decree-holder) by the 3rd defendant (judgment debtor) and judgment debtors 1 & 2 agreeing to pay rent at Rs. 75 each for the two shops bearing Nos. 12 and 14 respectively, Godown Street, Bangalore City in their actual occupation and by attornment of the other properties in the occupation of the other tenants.
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> 4. That on the judgment-debtors or their nominees tendering the aforesaid decree amount through court or otherwise within the aforesaid one year from the date of the decree, the decree-holders bind themselves to reconvey the properties which are sold to them under this rajinama at their cost provided it is distinctly agreed that time is essence of the contract and provided also that if the judgment-debtors default in paying the rents as aforesaid on or before the 15th of any month they will lose the concession hereby offered to them of having reconveyance of the properties in one years' time.

> 5. Attachment on the properties belonging to the 2nd and 3rd defendants obtained before judgment stands hereby raised.
>
> 6. The defendants hereby assure that the properties hereby sold are not subject to any attachment. In the event of any attachment subsisting on the properties, it is hereby agreed that the mortgage security shall not be merged by the sale."

Broadly stated, the question raised in this appeal relates to the executability of cl. 2 of this compromise decree but before examining this contention it is necessary to state a few facts. It would be noticed that under the second sentence of cl. 2 the appellants had to execute a regular sale-deed within ten days from September 30, 1955. They, however, did not do so and thereupon the respondents filed, on October 31, 1955, Interlocutory application No. 6 of 1955 (later numbered as Execution Application No. 83 of 1956) for directing the appellants to execute the sale-deed and they annexed to their application a draft sale-deed in which cls. 3 to 6 of the razinama were recited. Apparently there were disputes between the parties each accusing the other that it had not conformed to its undertaking under the compromise, but with these we are not now concerned. Thereafter the appellants filed an application in the suit on March 16, 1956, praying that a sale-deed might be executed in favour of a third party to the proceedings who had agreed to purchase the property on terms of paying the full decree-amount as provided for by cl. 4 of the Razinama. This application was opposed by the respondents and there were further applications of a similar type which it is not necessary to detail except to point out that they all proceeded on the basis that the compromise-decree was capable of execution without any necessity for a further suit. The appellants did not succeed in these applications. It is sufficient if hereafter attention were confined to the application by the respondents - E.A. 83 of 1956 by which they sought to get the appellants to execute a sale-deed in their favour in accordance with the opening sentence of cl. 2 of the compromise. The appellants opposed this application on the technical ground that the relief sought could not be had in execution but only by a separate suit in as much as the same did not "relate to the suit" within O. XXIII, r. 3, Code of Civil Procedure, to whose terms we shall refer presently. This objection was upheld by the learned District Judge of Bangalore and the prayer of the respondents for directing the appellants to execute a sale-deed in their favour was rejected. This order has been reversed by the learned Judges of the High Court on appeal by the respondents and it is the correctness of this judgment that is canvassed in this appeal which comes before us on a certificate of fitness granted by the High Court under Art. 133(1)(a) of the Constitution.

It would be seen from this narration that the point involved in the appeal is very narrow and turns on the question whether the High Court was justified in directing the appellants to executed a sale-deed conveying the suit properties to the respondents in the proceedings in execution of the decree in original suit No. 29 of 1954 or whether the respondents could obtain that relief only in an independant suit instituted for that purpose. It is common ground that the decree embodied the entire razinama including all its terms. The relevant statutory provision for the passing of decrees by compromise is O. XXIII, r. 3, Code of Civil Procedure, which runs :

> "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith, so far as it relates to the suit."

We do not, having regard to the facts of this case, consider it necessary to examine the position

whether, when a decree has been passed embodying all the terms as part of the decree, an objection as to the executability of any particular term could be raised in execution proceedings, but shall proceed on the basis that it could be. There is no dispute that the agreement was lawful and an executable decree could be passed "so far as it related to the suit". Though in the courts below most of the argument turned on the import of the expression "so far as it relates to the suit" occuring in r. 3 learned Counsel for the appellants did not stress that contention before us, but rather on the construction of the several clauses of the compromise and their inter-relation to which we shall advert presently. We might, however, point out that the learned Judges were right in the view they took that the terms of the compromise "related" to the suit. The property which was to be conveyed consisted entirely of property included in the mortgage and which was therefore liable to be sold in execution of the mortgage decree which was the relief sought in the plaint. The sale price for the conveyance under the Razinama was the sum for the recovery of which the suit was laid. There was therefore nothings which was outside the scope of the suit. Besides all this, the conveyance was the consideration for the compromise. In these circumstances, it is not a matter for surprise that learned Counsel for the appellants laid little emphasis on the point which persuaded the learned District Judge to dismiss the respondents' application.

Learned Counsel for the appellants however raised before us two contentions in the alternative. His first and primary contention was that on a proper construction of the compromise, the consideration therefor was not the actual execution of the conveyance by the judgment-debtor to the decree-holder but merely the agreement to execute such a conveyance. He pointed out that under cl. 1 of the compromise the defendants had agreed to a decree being passed as prayed for, which meant that a mortgage decree drawn up in the usual form had to be passed. That decree, it was submitted, was under the compromise agreed to be treated as satisfied and full satisfaction to be recorded immediately on the filing of the compromise, and he suggested that the opening words in cl. 2 "The mortgaged properties are hereby sold for the amount of the decree in full satisfaction thereof" was a reference to the agreement to execute the conveyance. There were other clauses in the compromise - cls. 3 to 6 - but these, he submitted, related to the inter se right between the parties. The contention was that these other clauses of the razinama including the second limb of cl. 2 were intended to be enforced or implemented not by way of execution of the decree in this suit but that the decree to be passed under cl. 1 was to be treated as fully satisfied on the filing into court of the memo of compromise and the same being recorded by the court with the result that thereafter no portion of the decree remained alive. We find ourselves wholly unable to accept this argument. No doubt, under cl. 1 there was to be a simple mortgage decree as prayed for in the suit, but it would, however, not be a proper construction of the 1st sentence of cl. 2 to say that the mere agreement to convey and not an actual conveyance was intended to operate as a satisfaction of the decree passed or to be passed under cl. 1. Learned Counsel is, no doubt, right in his submission that the sale of the property to the decree-holders under cl. 2 was not to be absolute in the sense of conferring a right to an unconditional conveyance since the title to be obtained under the sale was subject to the conditions contained in cls. 3 to 6 and particularly cl. 4 under which it was stipulated that the title to the property might, on the happening of certain contingencies, be divested from decree-holders to whom it had been conveyed under cl. 2. In that sense cls. 2 to 6 might constitute an integrated scheme for adjusting the right of parties but on that account it would not be open to the construction that the mere agreement to convey contained in cl. 2 (subject to the conditions stipulated in cls. 3 to 6) by itself amounted to a satisfaction of the decree.

The other submission of learned Counsel was that the learned Judges should not have directed the execution of a conveyance in favour of the respondents without attaching to it the conditions laid down in cls. 3 to 6 and also without an examination of the question whether the appellants were

entitled to enforce the reconveyance provided by those clauses. On this matter the learned Judges expressed themselves thus :

> "The decree-holder is entitled to execute the decree in respect of clause 2 of the compromise. No opinion is expressed as to the executability of the other clauses of the compromise as that question has not been raised before us."

The fact, therefore, was that this point about either the inter-relation between cl. 2 on the one hand and cls. 3 to 6 on the other or the contention of the appellants that they were entitled to relief under cls. 3 to 6 was not raised before the High Court and the matter was therefore left open. The appellants can in the circumstances obviously have no cause for complaint that the High Court did not deal with it. The question as to whether the appellants are entitled to relief under cls. 3 to 6 or whether they had lost their right to do so, is one which would have to be investigated on facts and cannot therefore be urged before us. We do not, therefore, propose to pronounce upon it either. It would, of course, be open to the appellants to agitate their rights in appropriate proceedings if they are so advised. No other point has been urged before us.

The appeal fails and is dismissed with costs.

Appeal dismissed.

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