

Chen Shen Ling

Vs

Nand Kishore Jhajharia

Civil Appeal No. 557 of 1967

(K. S. Hegde, P. Jagmohan Reddy, D. G. Palekar JJ)

20.01.1972

JUDGMENT

JAGANMOHAN REDDY, J. -

1. This appeal is by certificate against the judgment of the Calcutta High Court allowing the appeal from an order made on an application for execution at the instance of the decree-holder giving the judgment-debtor an opportunity to take appropriate proceedings for execution of some clauses in the decree which were apparently in his favour. The respondent is ex parte.

2. The appellant who was carrying on business under the name and style of C.S. Ling & Co., in Hongkong, filed a suit in the Supreme Court of Hongkong and obtained a decree against the respondent on the basis of which he filed a suit in the Calcutta High Court, being O.S. No. 3459/54 for the recovery of Rs. 15,73,161 lent and advanced by the appellant to the respondent. The parties compromised and a consent memo was filed in terms of which a decree was passed on February 22, 1961, for Rs. 5,44,554.45 P. equivalent to 6,60,000 HKS. The consent decree provided as follows :

"(1) There will be a decree in favour of the plaintiff for the sum of HKS. 6,60,000 Hong Kong Dollars equivalent to Rs. 5,44,554.45 P. at the rate of HKS. 120.20 Rs. 100 in full and final settlement of all claims, subject to the following terms and conditions.

(2) The said sum of Hong Kong Dollars HKS. 6,60,000 equivalent to Rs. 5,44,554.45. P will be paid by the defendant Nand Kishore Jhajharia to the plaintiff Chen Shen Ling, subject always to the permission of the Reserve Bank being first obtained in the manner following -

(a) The sum HKS. 50,000.00 Hong Kong Dollars equivalent to Indian Rupees of 41,254.12 nP. will be paid immediately to Messrs. Sandersons and Morgans after receipt of authority from the Reserve Bank for the said Messrs. Sandersons and Morgans to hold the same pending the Reserve Bank's permission being obtained to pay the same to the plaintiff.

(b) The balance amount will be paid by the defendant to the plaintiff by instalments thereafter at the rate of Hone Kong Dollars HKS. 50,000.00 equivalent to Indian Rupees 41,254.12 nP. payable six monthly, the first of such payment to be made six months after the first payment and thereafter at six monthly intervals until the whole amount provided in Clause 1 hereof has been paid and discharged. All such payments

shall be made by the defendant N. K. Jhajharia in Indian Rupees as referred to above.

(c) The last instalment shall be of such amount as may be necessary to discharge the said sum referred to in Clause 1 hereof.

(d) The subsequent payments provided for in these terms shall be made by the defendant N. K. Jhajharia in the United Commercial Bank Ltd., Calcutta to the credit of the plaintiff C.S. Ling's Block Account.

(e) If any of the instalments is in default and remains unpaid for three months or more, execution may be issued in respect of such instalment, and if any one instalment is in default and is unpaid for six months or more, execution shall issue for the whole amount of the balance sum that may remain due. Provided that if the defendant is prevented from payment of the amount on account of delay in obtaining the permission of the Reserve Bank by the plaintiff the defendant will not be treated in default.

(f) Immediately on payment of the first instalment of Hong Kong Dollars HK\$. 50,000.00 equivalent to Indian Rupees 41,254.12 nP. in the manner as aforesaid by the defendant, the plaintiff will unconditionally make delivery available to Mr. N. K. Jhajharia or his nominee of 4,557 rubber tyres which are the subject-matter of the above suit and fully mentioned in the written statement filed by the defendant free from all lien, claims, charges, encumbrances of any kind whatsoever.

(g) The proceeds of sale of the tyres referred to in sub-paragraph (f) hereon when received by the defendant after deduction of the expenses incidental to the sale thereof, shall be paid immediately after receipt to the plaintiff in the manner aforesaid in reduction of the balance sum as may be due and in pro tanto satisfaction thereof.

(h) The defendant shall, as from the date of delivery of the said tyres being made available in the manner set out in sub-paragraph (f) herein be responsible for all storage charges in respect of the said tyres and shall be free to deal with the same in such manner as he deems fit without any interference by or on behalf of the plaintiff.

(i) The plaintiff above-named undertakes to Court to have the rights in respect of the Hong Kong judgment by him modified as per these terms within one month from the date hereof and hereby surrenders all his rights for payment of any amount as provided in the Hong Kong Judgment in excess of the amount mentioned in these terms and undertakes to court not to execute the Hong Kong decree or take any other steps in respect of the Hong Kong judgment except in the event of the failure by the defendant to comply with these terms, and such execution may be levied for recovery only of any amount remaining due and payable under these terms.

(j) Nothing in the foregoing terms and conditions of settlement shall be taken to extinguish in any way plaintiff's rights under the Hong Kong Judgment as duly modified by reasons of sub-paragraph (i) herein for as much as may still then be owing and payable by the defendant to the plaintiff under these terms of settlement in the event of the Reserve Bank of India refusing within a reasonable period to grant

the requisite permission referred to in sub-paragraph (a) herein."

3. The sole question that arises for consideration is whether the respondent who has paid Rs. 41,254.12 nP. in terms of Clause 2(a), can successfully urge that as the appellant had failed to comply with Clause 2(f) by failing to make available to him or his nominee 4,557 rubber tyres the decree could not be executed. The appellant's contention is that the conditions in Clause 2(f) not having been fulfilled as the respondent had not paid the instalment of Rs. 41,254.12 nP. mentioned in Clause 2(b) on the fulfillment of which alone he was required to make available the said tyres, the decree could be executed against the respondent. In other words, according to the appellant the payment of Rs. 41,254.12 nP. to the respondent in terms of Clause 2(a) was not the first instalment referred to in Clause 2(f), as it does not say that the amount was an instalment but was merely a payment. According to this contention the first instalment payable under the decree in fact is that payable under Clause 2(b) and arises only after the payment mentioned in Clause 2(a). We do not think that on the terms of the decree the submission made on behalf of the appellant has any validity. It may be noted that the amount of Rs. 41,254.12 nP. which was to be paid under Clause 2(a) is equal to the amounts payable as instalments under Clause (b) at six monthly intervals. Reading Clauses 2(a), (b) and (c) together the amount of Rs. 5,44,554.45 has to be paid in equal instalments of Rs. 41,254.12 nP. in six monthly intervals, the first of such instalments being payable immediately to M/s. Sandersons and Morgans after the receipt of the authority from the Reserve Bank in terms of Clause 2(a). The first instalment referred to in Clause 2(f), therefore, is the first instalment payable under Clause 2(a). That this is the understanding of the parties becomes amply clear from the correspondence between M/s. Sandersons and Morgans and the respondent's solicitors M/s. M. G. Poddar. It is not denied that the terms of the compromise were also drafted by M/s. M. G. Poddar. It is not denied that the terms of the compromise were also drafted by M/s. Sandersons and Morgans and agreed to by the respondent's solicitors, and, therefore, the understanding of these solicitors as to the terms of the compromise lends added support to the construction placed by us on the terms of the compromise decree. M/s. Sandersons and Morgans in their letter, dated May 20, 1961, write to the Respondent's solicitors as follows :

"..... We have not yet received payment of the sum of Rs. 41,254.12 nP. in compliance with the Terms of Settlement even though the permission from the Reserve Bank of India Exchange Control Department for payment of this amount has long been given. We send herewith two original letters of November 1, 1960 and January 14, 1961, respectively addressed by our client Mr. Ling to the Mart Warehouse & Co., Hong Kong, for unconditional delivery of the tyres. It may, however, be noted that the deliver of the tyres would be made subject to the payment of the above amount in compliance with the Terms of Settlement. Please arrange for payment of the amount without further delay and then make arrangement for taking delivery of the tyres. If, however, the payment is not immediately made, the godown charges and other expenses, that would be incurred for the maintenance of the tyres, should be borne by your client."

4. On November 17, 1961, the respondent's solicitor reply to M/s. Sandersons and Morgans as under :

"With reference to the previous correspondence, I have been instructed to write to you as follows:

My client has paid Rs. 41,254.12 nP. for payment to you towards first payment under

Clause 2(a) of the Terms of Settlement.

You have however not informed us as to whether your client has got the Hong Kong judgment modified. Immediately on hearing from you that has been done my instructions are to send you the amount.

Please also confirm that your client will unconditionally make delivery available to my client or his nominee of 4,557 tyres which are the subject-matter of the suit free from all lien, claims, charges, encumbrances of any kind, immediately on the amount being paid to you by us.... The delivery orders sent by you did not specify the tyres nor that the delivery was to be free from all lien, claims, charges, encumbrances of any kind.

Please therefore arrange to have delivery made available to my client or his nominee immediately on payment of the amount as aforesaid."

5. Again the same solicitor on behalf of the respondent is writing on December 29, 1961, as follows :

"My client's representative who went to Hong Kong to arrange to take delivery of the tyres in terms of the Delivery Order sent by you, as intimated to my client that when he went to take delivery at the address given in the Delivery Order, delivery was not given to him, and he was directed to contact the Hong Kong Solicitors of your client. He went to the office of your client's Hong King Solicitors where however, he could not meet Mr. How as he was not there but an assistant in the office advised him that until the entire dues are paid and the H.C. Court suit has been settled, the tyres cannot be delivered to him. This, you will appreciate, is directly contrary to the Clause 2(f) of the Terms of Settlement. Please therefore advise your client to effect delivery of the tyres in question immediately to my client's representative, as otherwise, my client will take such steps as he may be advised at your client's risk as to costs and consequences....."

6. It is unnecessary to read any further correspondence in this regard but from what has been extracted above, there is not a shred of doubt that both the appellant's solicitors as well as the respondent's solicitors were clear in their mind that once the payment under Clause 2(a) is made, the terms under Clause 2(f) have to be complied with inasmuch as that payment is the first instalment.

7. In our view the terms of the decree required that the judgment debtor himself shall pay immediately after the signing of the decree a sum of Rs. 41,254.12 nP. and that after every six months thereafter he was to go on making payments of identical amounts until the entire decretal amount was paid up, and although the word 'instalment' has been used in sub-clause (b) of Clause 2, it does not mean that the initial payment of Rs. 41,254.12 nP. was not to be taken as an instalment for the purpose of sub-clause (f) of the said clause. Any other construction would, as pointed out by the High Court, lead to the absurd conclusion that if the judgment-debtor made a default in making the initial payment, the decree could not be executed for that amount even within three months subject to the decreeholder's getting the permission of the Reserve Bank as stated in the compromise terms or that he could not take out execution for the decretal amount in case there was a default for making the payment for six months. There is nothing to distinguish the initial payment of Rs. 41,254.12 nP. from the other like amounts to be paid subsequently. It is clear from what we have

stated that the decree imposes mutual obligations on both the appellant and respondent in such a way that the performance by one is conditional on the performance by the other and accordingly no execution can be ordered unless the party seeking execution not only offers to perform his part but when objection was taken, satisfy the executing court that he was in a position to do so. This Court had in *Jai Narain Ram Lundia v. Kedar Nath Khetan and Others*, (1956 SCR 601 : 1956 SCJ 301 : AIR 1956 SC 359 : ILR 26 Cal. 414) observed at pages 68-69 :

"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 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.... 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 later that and allow something else to be substituted for the thing ordered to be given."

8. As the decree has to be executed as a whole, the non-compliance with the terms thereof by the appellant precludes him from executing that part of it against the respondent and in that view, the appeal fails and is dismissed.

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