Parbati Debi and Others

Vs

Mahadeo Prasad Tibrewalla

Civil Appeal No. 2494 of 1969

(N. L. Untwalia, A. P. Sen JJ)

31.07.1979

JUDGMENT

UNTWALIA, J. –

1. This is an appeal by certificate filed by the judgment-debtors from the decision of the Calcutta High Court given in appeal from that of a learned single Judge of that Court. The facts of the case clearly demonstrate the fighting attitude of the judgment-debtors to gain time for the satisfaction of the decree.

2. On August 15, 1925 one Indera Chand Kejriwal instituted on the original side of the Calcutta High Court a suit on the basis of a mortgage against Ram Chander Saraogi, Sewbux Saraogi and Tejpal Saraogi for recovery of Rs. 38,000 as principal and Rs. 6082,8 annas as interest. By an equitable mortgage the property mortgaged consisted of two houses (1) No. 126, Harrison Road, and (2) No. 13/2, Syed Salley Lane in the town of Calcutta. On November 26, 1926 a consent decree was passed for a sum of Rs. 41,000 together with interest thereon at 6 3/4% per annum. On failure of the judgment-debtors to pay the amount the mortgaged properties were to be sold. On January 3, 1929 it was ordered and decreed that the mortgaged property be sold. On April 16, 1934 Indera Chand Kejriwal by a deed of assignment assigned his interest in the decree to Mahadeo Prasad Tibrewalla, the respondent in this appeal. On the application of the assignee decree holder an order was made on May 8, 1934 substituting his name in place of the original decree holder and recording some terms of settlement between him and the judgment-debtors. The amount with interest qualified on that date was Rs. 60,023.12 annas which was to carry an interest of 6 3/4% per annum. Subsequently on an application of the decree holder one Anandilal Poddar was appointed on June 14, 1938 a receiver of rents and profits of the mortgaged properties. A sum of Rs. 10,000 was paid to the decree holder on September 7, 1939 towards part satisfaction of the decree. On the death of Ram Chander Saraogi, one of the judgment-debtors, by order dated August 7, 1945 Smt. Parbati Devi, Ananta Kumar Saraogi and Suraj Kumar Saraogi, his heirs and legal representatives, were substituted. They are appellants 1 to 3 in this appeal.

3. No further payment was made to the decree holder and eventually a consent order was passed by the Court on June 17, 1953 on the basis of the terms of settlement arrived at between the parties which were incorporated in the letter written by the solicitor of the judgment-debtors to the solicitor of the decree holder. The terms of settlement are quoted in full in the appellate judgment of the High Court. The salient terms of the settlement may be stated as follows :

(1) That the total dues on the date came to Rs. 1,10,000.

(2) That Shri Anandilal Poddar, the receiver was to pay Rs. 35,000.

(3) That a sum of Rs. 40,000 was to be paid by conveying premises No. 13/2 Syed Salley Lane to the decree holder, and

(4) That a sum of Rs. 36,000 was to be paid in cash by raising money by execution of another mortgage of premises No. 126, Harrison Road.

4. Anandilal Poddar paid the sum of Rs. 35,000. But nothing further was done by the judgment-debtors pursuant to the settlement arrived at on June 17, 1953. Sewbux Saraogi, one of the judgment-debtors, died leaving a Will in which the universal legatee was his daughter Smt. Kapurbai and the sole executor appointed therein was Motilal Jhunjhunwalla, husband of Kapurbai. On June 7, 1965 the respondent affirmed a tabular statement for execution of the decree. A learned Single Judge of the Calcutta High Court dismissed that application mainly on two grounds : (1) that the terms of bargain between the parties recorded on June 17, 1953 were entirely different from the original decree and had the effect of superseding it; the former decree, therefore, was not executable; (2) that the factum of the death of Sewbux Saraogi was not recorded and his heirs were not substituted in the tabular statement. In passing, the learned Single Judge also expressed the view that the execution was barred under Section 48 of the Code of Civil Procedure. On appeal by the decree holder the Appellate Bench has reversed the decision of the learned Single Judge on all the points. Hence this appeal by the judgment-debtors.

5. We shall first dispose of the point of limitation. From the facts stated above it is abundantly clear that there was no bar of limitation in present execution instituted in the year 1965. At no point of time the mortgage decree had been fully satisfied. All through steps were being taken and it was not a case where the execution was barred either under Section 48 of the Code of Civil Procedure or Article 183 of the Limitation Act 1908. It was conceded and rightly so by learned Counsel for the appellants that the execution was not barred under Article 136 of the Limitation Act, 1963. But the submission was that it was already barred when that Act came into force on January 1, 1964 under Article 183 of the old Act. We have no difficulty in rejecting the argument of limitation. All through steps had been taken by the decree holder. The case was not lying dormant at any point of time for a period of more than 12 years. When in the year 1929 there was an order for sale of the mortgaged properties it appears some payments were made and finally accounts were settled in the year 1934. Thereafter the mode of execution proceeded by appointment of a receiver. A sum of Rs. 10,000 was paid in the year 1939. In the year 1945 steps were taken for substitution of the heirs and legal representatives of Ram Chander Saraogi, one of the deceased judgment-debtors. Parbati Debi, appellant 1, was allowed to take some steps for the satisfaction of the decree. But nothing was done. Eventually a settlement was again arrived at on June 17, 1953 for satisfaction of the decree but on the judgment-debtors' failure to fulfil the settlement the present proceedings were started by filing the tabular statement on June 7, 1965 well within 12 years of June 17, 1953. The point of limitation raised on behalf of the appellants, therefore, must be rejected.

6. A statement had been made in the tabulator statement that Sewbux Saraogi, one of the judgment-debtors, was dead. Kapurbai, his daughter along with others were sought to be substituted in his place. Later on it transpired that she was a universal legatee under a Will executed by Sewbux Saraogi. She was, therefore, undoubtedly a legal representative competent to represent the estate of Sewbux Saraogi. Even in absence of the substitution of Motilal Jhunjhunwalla, the sole executor of the Will, the execution was not defective. Reference in this connection may be made to the decision of this Court in the case of Andhra Bank Ltd. v. R. Srinivasan ((1962) 2 SCR 391 : AIR 1962 SC

232 : (1962) 2 SCJ 676) a decision relied upon by the appellate Bench.

7. Coming to the third and the last point it may be mentioned that the settlement arrived at on June 17, 1953 was not an altogether renovation of the old decree. The amount due was quantified and the mode of satisfaction was prescribed giving liberty to the judgment-debtors to satisfy the decree by conveying one of the two mortgaged houses and by paying a sum of Rs. 35,000 in cash by raising the money by mortgage of the other house. The judgment-debtors did neither. The terms of settlement were silent as to what was to happen on the failure of the judgment-debtors to satisfy the decree in the manner agreed upon. In such a situation it was quite legitimate to assume that the parties intended that the decree holders would be entitled to realise the dues by execution of the original mortgage decree. Reading the terms of settlement in the context of the letter of the Solicitor of the judgment-debtors it is plain to us that the order dated June 17, 1953 had not the effect of passing a new decree in substitution of the old one. It had merely the effect of giving facility to the judgment-debtors for the satisfaction of the decretal dues. On their failure to do so they were liable to be proceeded with in execution of the original mortgage decree.

8. For the reasons stated above, we hold that there is no substance in any of the points arising in this appeal. We accordingly dismiss this appeal with costs.

</html