CALCUTTA HIGH COURT

Hurrybux Deora

Vs

Johurmull Bhotoria

(Rankin ,J.)

18.04.1929

JUDGMENT

Rankin, C.J.

1. In this case the appeal has been set down for hearing on a preliminary point. In 1911 the plaintiff executed a mortgage of the suit lands to the defendants whom he put in possession and empowered to realize rents from the tenants. In 1915, the plaintiff claimed to redeem the mortgage. There was a dispute as to the amount due thereunder and on 11th February 1916 the plaintiff filed his suit for redemption of the mortgage and possession of property. It appears that under an order made on 17th March 1916, the plaintiff paid to the defendants Rs. 43,000 and the defendants made over possession of the property to the plaintiff. On 17th May 1922, it was referred to the Assistant Referee to take the mortgage account on the basis of wilful default and neglect and after protracted proceedings before the Assistant Referee, he reported that the defendants were liable to pay to the plaintiff Rs. 38,918. The defendants filed exceptions to this report and ultimately Page, J. allowed certain of the exceptions and disallowed certain others. On 19bh September 1928 a decree was passed in favor of the plaintiff for Rs. 12,946-4-3 with certain costs. The decree continued: And it appearing that there is now in the hands of the Registrar of this Court standing to thecredit of the account in this suit 3 1/2 per cent Government Promissory Notes of the face value of Rs. 60,000 deposited by the defendant Sobha Chand Bhutoria as security under an order made in this suit dated 25th November 1924, it is further ordered and decreed that the said Registrar do out of the said sum in his hands pay to the plaintiff the said sum of Rs. 12,946-4-3 and to the defendants the balance thereof.

2. Under this decree the plaintiff has drawn out of Court Rs. 12,946-4-3 and has brought this appeal to establish his right to the balance of the amount found by the Assistant Referee to be due to him as also for certain costs not awarded to him by the decree. The defendant Sobha Chand Bhutoria has filed a cross-objection disputing the amount found to be due by the decree.

3. As the matters in controversy concern a voluminous and protracted account, and as the defendants desired to take a preliminary objection to the competency of the appeal, this Court ordered the appeal to be set down for hearing on the preliminary point.

4. The objection taken by the defendants is that the appellant having taken out of Court the sum of money awarded to him by the decree, he is incompetent to proceed with his appeal. They rely

upon a decision in this Court in the case of *Banku Chandra Bose v. Mariam Begum*[1] and upon *Manilal Guzrati v. Harendra Lal Roy*[2] *Tinkler v. Hilder*[3] *and Kenard v. Harris*[4]

5. I find that in Second Appeal No. 2676 of 1920 decided in this Court by Chatterjee and Cuming, JJ. in December 1922 of. Jogendra Nath v. Khoda Bakhsh the cases on this subject were carefully reviewed. In that case the suit was upon a registered bond for a money debt bearing compound interest at 18 per cent per annum. The trial Court allowed simple interest at 18 per cent and directed the decretal amount to be paid in three installments with costs of the suit the costs to be paid by Jaista 1326, and the principal and interest in two equal installments thereafter. The District Judge on appeal disallowed compound interest on the ground inter alia that the plaintiff had accepted Rs. 65-10-0 being the first installment, namely the installment in respect of the costs, under the decree. This Court reversed the decision of the District Judge and, upon a review of all the cases, held as follows: It will appear that in the English cases as also in the case in *Banhu Chandra Bose v. Mariam Begam*[5] cited above, the opposite party having accepted the benefit which he would not have obtained otherwise than under such order, was held to be precluded from challenging the validity of the order. In the case before us, there was no such thing. The plaintiff appealed against the decree in so far as it disallowed compound interest. After the appeal had been filed, against that part of the decree which disallowed compound interest, he accepted the costs (deposited by the respondent) and which was decreed by the lower Court on the basis of simple interest as to which there was no dispute and which the plaintiff would have got in any event whether the appeal succeeded or failed. In these circumstances, the principle of the oases referred to above does not apply to the present case.

6. In my opinion the principle of the cases relied upon by the defendants does not apply to the case before us and I agree in the observations that were made by Chatterjee, J. in the unreported case which I have cited.

7. To deal with the English eases first, we must distinguish cases which have reference to awards in arbitration. *Kenard v. Harris*[6] is a case of this type and in England under the Work-men's Compensation Act, 1906, the principle contended for by the defendants has been applied to awards made by County Court Judges sitting as arbitrator under the Act. It is true that the principle appears to have worked some injustice and its results to have been regretted by Pickford, L. J. in the case of *Josey v. Vincent*[7], but the principle is well established : see *Harris v. Minister of Munitions*[8] *Johnson v. Newton Fire Extinguisher Co*[9]. An award is bad unless it deals with the whole matter submitted and prima facie cannot be set aside in part only. A person who accepts costs payable under an award or any other sum of money given to him by an award is held to be precluded from asking the Court to set aside the award.

8. If, however, we put on one side cases of this character, we find a series of cases which have reference to interlocutory orders of Courts of law. In Banhu Chandra Bose's case (supra) an order was made setting aside the dismissal of a suit for non-prosecution and giving to the defendants certain costs of and incidental to the plaintiff's application. The defendants had their bill taxed and obtained an allocatur for the amount. They also received under the order the sum of Rs. 250 on account of their costs. In that case the defendants had no right to the costs except under the order and the Court purported to follow the principle of *Tinkler v. Hilder*[10] In the previous case, *Mani Lal Guzrati v. Harendra*[11] the plaintiff was given leave to amend his plaint upon payment of Rs. 150 as costs to the defendants. The costs were paid at once and were received by the

defendants under protest. The defendants on appeal contended that the Subordinate Judge ought not to have allowed the amendment. This Court held that as the defendants had no option but to accept the payment of the costs and did so under protest, they had not debarred themselves from questioning the order, but it was said that if the Judge had directed the costs to be paid into Court to the credit of the defendants and they had voluntarily withdrawn the sum deposited they might have been debarred from questioning the validity of the order. It is clear that in this case the payment of the sum of Rs. 150 was really a term or condition of the liberty given to amend the plaint.

9. Coming now to the English cases, Tinkler v. Hilder [1849] 4 Ex. 191(Supra) was a case in which the Judge on summons made an order to stay an action for trespass on payment of the costs of the day and of the execution of a certain writ of enquiry. These costs had been taxed and paid. On a motion to rescind the order, it was contended that the plaintiff could not now question the order after having adopted it and acted under it by accepting the costs. *King v. Simmonds*[12] and *Pearce v. Chaplin*[13] were cited. In reply it was argued that in these cases the costs were given by the order and could not otherwise have been obtained whereas in the present case they would have followed the judgment. Parke, B. replied:you have obtained them more speedily by means of the order which gives you the advantage. You have therefore received the benefit under the order and cannot now say it is valid for one purpose and invalid for another.

10. In King v. Simmonds [1845] 7 Q.B. 289(Supra) the Judge having ordered on summons by the plaintiffs that the plaintiffs should be at liberty to amend the record and also that they should pay the defendant his costs occasioned by such amendment, it was held that the defendant could not, after taxing and receiving his costs, apply to set aside the order. In Pearce v. Chaplin [1845] 9 Q.B. 802(supra) the judgment and execution were set aside on summons and it was ordered that no action should be brought. The Sheriff who had taken the defendant's goods relinquished them on being served with the Judge's order. The defendant objected to that part of the order which precluded him from bringing an action. It was held that the order of the learned Judge was not shown to proceed upon the basis of irregularity in obtaining the judgment and that the order did not appear to have been made ex debito justitiate, but should be construed to mean that the Judge was not prepared to make the order unless the defendant agreed to bring no action. Lord Denham, C.J. said: There is no case which shows that when a party has acted upon such an order and has availed himself of the benefit under it, he is not bound by all its terms.

11. A similar case was *Hayward v. Duff*[14]

12. It appears to me that the English cases are clearly inapplicable except upon the basis that the defendant is seeking to challenge an order after accepting the benefit of a term or condition imposed upon the opposite party at whose instance the order was made. So far as the final decree in a suit is concerned, there is no reason for saying that the plaintiff cannot approbate the decree in respect of the sum which it awards to him and reprobate it in respect of the sum which it refuses to him. The plaintiff in the present case was not awarded the sum which he has drawn out of Court as a term upon which the defendants were considered to be entitled to the dismissal of part of his claim. In the Irish cases of *Mc Cullough v. Munn [1908] 2 I.R. 194(suupra) and Mc Hugh v. Mc Goldrick [1921] 2 Ir.R. 163(supra),* another principle may be discerned. The former was a very clear case, and in the latter a suit in the King's Bench Division had been remitted for trial before the Recorder unless the plaintiff within ten days gave security for costs to the

satisfaction of a Master. The plaintiff applied to a Master to fix the amount of the security and an order was made fixing it at £100. The plaintiff then appealed against the order remitting the action. It was held that the plaintiff had accepted and adopted the order and could not appeal from it. Whether that decision was right or wrong, it has no application in my opinion to such a case as the present. There, if the appeal succeeded the proceedings before the Master would have become idle and the course adopted by the plaintiff was at least inconsistent and would have made the Court's action inconsistent : Contrast Anlaby v. Proetorius [1888] 20 Q.B.D. 764.(Supra) I do not accept as a sound proposition that acting in any way on any order necessarily debars a party from appealing against the order on any point. In my opinion there is no such rule and the language used in the decided cases must be taken with reference to the substance of the matter before the Court.

13. For these reasons it does not appear to me that the preliminary objection has any weight and the appeal must therefore proceed in the usual course.

C.C. Ghose, J.

14. I agree.

Cases Referred.

1[1916] 21 C.W.N. 232
2[1910] 12 C.L.J. 556
3[1849] 4 Ex. 191
4[1824] 2 B. & C. 801
5[1916] 21 C.W.N. 232
6[1824] 2 B. & C. 801
7 9 B.W. C.C. 474
8[1921] 124 L.T. 489
9[1918] 2 K.B. 111
10[1849] 4 Ex. 191
11[1910] 12 C.L.J. 556
12[1845] 7 Q.B. 289
13[1845] 9 Q.B. 802
14[1862] 12 C.B. (n.s.) 364