CALCUTTA HIGH COURT

Baburam Lal

Vs.

Debdas Lala

A.F.O.O. No. 58 of 1956

(K.C. Das Gupta and Debabrata Mookerjee, JJ.)

04.06.1958

JUDGMENT

K.C. Das Gupta, J.

1. This appeal is against an order allowing an application under Section 47 of the Civil Procedure Code and rejecting an application for amendment of the execution petition. The suit was one for partition and accounts. A preliminary decree was passed on 20-2-1940. The appeal against the preliminary decree was dismissed on 12-1-1944. The final decree was made on 3-12-1946. The application for execution, in which the application for amendment and the objection under Section 47 of the Civil Procedure Code were made, was filed on 8-6-1949. The decretal sum was mentioned there as Rs. 1,483-1-6 pies, this being the amount of the decree on the basis of the Commissioner's report. Certain other sums were asked for as costs of copy of the decree and costs of execution but set off was also given and the net total was mentioned as Rs. 1,342-14-9 pies. By the application for amendment, the plaintiff' wanted to add to the sum realizable on account of the decree itself a sum of Rs. 495/-, said to be due on account of costs of final decree, stamp and other accounts and also the costs of a first appeal amounting to Rs. 278-14-0. It was prayed that in place of Rs. 1,483-1-6 pies should be substituted the sum of Rs. 2,256-15-6 pies. There was a further prayer for adding a prayer for possession of certain movables and also that failing such delivery of possession, the value of the movables amounting to Rs. 1,404/- might be "realised by auction sale of the immovable properties of the judgment debtor." The application for amendment was disallowed. The application under Section 47 was allowed. Looking at the application for amendment itself, it is difficult to make out how the sum of Rs. 495/- sought to be added as due on account of final decree, cost and stamp was made out. In the absence of proper explanation on this, the Court below was, in my opinion, entitled to exercise its discretion against allowing such an amendment. As regards the other sum of Rs. 278-14-0 sought to be added as costs of the first appeal, I am also of opinion that the Court below rightly rejected this application as there is no explanation why this was not included at the time the application for execution was

first made in June 1949.

2. As regards the prayer for possession of the movables, we find that on an earlier occasion there was a previous application for execution and delivery of these movables. That was unsuccessful. The prayer for possession of the movables was not, however, made in the present application for execution as originally framed. Whether or not such an independent application can still be made, it is not necessary for us to consider. I am clearly of opinion, however, that when the appellant did not choose to include this prayer for delivery of possession of the movables in the application as originally made, it will not be proper for us to interfere with the order passed by the executing Court dismissing such an application in the exercise of its discretion. I have, therefore, reached the conclusion that we shall not be justified in interfering with the order refusing the plaintiff's prayer for amendment of the original application for execution.

3. The application of the defendant judgment debtor under Section 47 of the Civil Procedure Code was primarily on the basis that he was entitled to get from the plaintiff a larger sum and so under the provisions of Order 21, Rule 19 of the Civil Procedure Code, the plaintiff's prayer for execution for this smaller sum could not proceed. It appears that this Court on appeal from the final decree held that the defendant was entitled to a sum of Rs. 1,589-0-8 as owelty money instead of the smaller sum decreed by the trial Court, the rest of the decree was affirmed. This Court ordered that a fresh decree should be drawn up. It is unfortunate that the trial Court did not carry out this Court's direction in the way it should have done. Instead of drawing up a decree afresh, it merely amended the decree it had earner drawn up and considered that to be sufficient compliance with this Court's order to draw up a fresh decree. Leaving that out of consideration, however, the position is that under the very decree by which the plaintiff is entitled to a sum of Rs. 1,493-1-6 pies, the defendant is entitled to Rs. 1,589-0-8 pies as owelty money from the decree-holder. If nothing else is looked at, it would certainly appear that the defendant is entitled to the larger sum. One has to take into account, however, the fact that under the very decree, the plaintiff is entitled to a sum of Rs. 349-5-0 from the defendant. The learned Advocate for the respondents tried to persuade us that this sum of Rs. 349-5-0 is included in the sum of Rs. 1,483-1-0 which the plaintiff is entitled to get. After examination of the decree and also the report of the Accounts Commissioner on the basis of which this sum was decided upon, it seems that the sum of Rs. 849-5-0 is not included in the sum of Rs. 1,483-1-6. Looking at the decree, therefore, it would appear that while the plaintiff is entitled to get Rs. 1,832-6-6 from the defendant, the defendant is entitled to get from him a sum of Rs. 1,589/-. It is not clear, therefore, how it can be said that under the decree the defendant is entitled to get a larger sum from the plaintiff. I think the matter requires more careful examination than it has received.

4. As, however, sums of money are under this decree recoverable by the parties from each other, it will be necessary for the Court to examine carefully the question as to the exact amount which remains payable to the plaintiff after deducting the amount which the plaintiff has1 in his turn to pay to the defendant. Execution can, under the law, be taken out by the party entitled to the larger

sum and for so much only as remains after deducting the smaller sum. For the reasons given above, I am of opinion that the learned Judge has fallen into an error in not considering this question. The materials before us are not sufficient for a proper decision thereof. The learned fudge should, therefore, consider the matter carefully and come to a conclusion as to the amounts payable by each party to the other and then proceed in accordance with the provisions of Order 21, Rule 19.

5. Mention should be made of one argument advanced by the learned Advocate for the respondent that the execution proceedings became dead on the passing of a decree by this Court in appeal from the final decree. While it is settled law that the decree of the appellate Court supersedes the original decree passed by the trial Court, it does not, in my opinion, necessarily follow that the execution proceedings already instituted became dead. It is reasonable, in my judgment, to consider that on and from the passing of a decree by the Court of appeal, the application which was originally for execution of the trial Court's decree becomes an application for the execution of the appellate Court's decree. Where the appeal is dismissed, there is obviously no difficulty in the procedure. Where in an appeal the decree is modified in such a manner that the proceedings can still go on, it will be for the Court concerned to decide whether it will allow necessary amendment of the application for execution in order that it may become properly an application for execution of the appellate Court's decree. Where the lower Court's decree has been reversed, the execution proceedings cannot obviously go on.

6. I would, therefore, allow the appeal in part, set aside the order allowing the application under Section 47 of the Civil Procedure Code dismissing the execution case and direct that the execution case should be disposed of by the learned Judge in accordance with law in the light of the directions given above.

7. The parties will bear their own costs in this Court.

Debabrata Mookerjee, J.

8. I agree.

Appeal partly allowed.