CALCUTTA HIGH COURT

Bishwanath Kundu

Vs.

Subala Dassi

A.F.O.O. No. 371 of 1958

(P.N. Mookerjee and Amaresh Roy, JJ.)

05.07.1961

JUDGMENT

P. N. Mookerjee, J.

1. This is an unfortunate proceeding between a mother and her son. Under a partition decree, the mother, who is the respondent before us, was declared to be the owner of one-fifth share of the properties, involved in the said partition suit. This decree, which was in the nature of a preliminary decree for partition was made on May 22, 1947, in the aforesaid partition suit (Title Suit No.39 of 1946 of the Second Court of the Subordinate Judge of Howrah). This preliminary decree was adjusted by a subsequent consent order, dated October 1, 1948, whereby the mother decree-holder, who is the respondent before us agreed to take a monthly allowance of Rs. 90/-per month from the appellant son in lieu of her aforesaid one-fifth share making the said allowance a charge on the said son's allotment. In the said order for adjustment, there was a provision also for maintenance and marriage expenses of the four sisters of the appellant.

2. On February, 10, 1949, there appears to be a further agreement between the parties whereunder, the mother decree-holder before us, became prima facie entitled to claim payment of the aforesaid monthly allowance at double the rate, fixed above, in case of default for three consecutive months. This agreement was incorporated in a petition described as a petition of compromise, filed before the Court below with a prayer that the Commissioner for Partition be directed to incorporate a term to the above effect in his report. Thereafter, the Commissioner for partition submitted his report, making, inter alia, a provision therein to the above effect and, in terms of the same a final partition decree was made on August 20, 1949.

3. There does not appear to have been much trouble between the present parties with regara to the payment of the aforesaid monthly allowance of the decree-holder respondent until about the year 1954, although, there were several other proceedings between the parties to the partition suit in the mean time. Of thesis proceedings, it is necessary to mention one, which will be relevant for purposes of our decision of the present appeal.

4. On January 31, 1951, the present appellant and his co-receiver in the partition suit were

directed to deposit at the rate of Rs. 25/-per month for the several minor daughters of the present respondent to whom maintenance had been allowed under the first adjustment on consent, referred to hereinbefore, from December, 1949 to September, 1950 within 10 days. This, however, was not done and, thereafter, on February 28, 1951, there was an order on the present appellant to pay Rs. 1250/- on the above account. This order also does not appear to have been complied with and. on March 3, 1951, the Court gave liberty to the claimants of the said amount to proceed against the present appellant and actually, on April 12, 1951, an application was made by the present respondent on behalf of her aforesaid minor daughters in Title Execution Case No.17 of 1951, for realization of the above amount of Rs. 1250/- from the personal property of the present appellant. The matter, eventually, came up to this Court in appeal and, under an interim order of this Court, the above amount had to be deposited by the present appellant in the Court below and. therefore, the present decree-holder respondent on execution of a personal bond and on furnishing security, was allowed to withdraw the said amount in terms of an order of this Court. The present appellant's appeal in the said proceeding was, eventually, allowed and he obtained an order for restitution of the above sum of Rs. 1250/- against the decree-holders concerned, namely, the present respondent's minor daughters aforesaid, represented by her and possibly against herself also, on July 24, 1954. On February 5, 1955, a sum of Rs. 360/-appears to have been adjusted by an order of Court against the present respondent's dues on account of the monthly allowance, payable to her as aforesaid, under the above partition decree from June to September, 1954. On July 6 1955, the present execution case (Title Execution Case No.31 of 1955) was filed by the decree-holder respondent for realisation of arrears of allowance from June 1954, to May, 1955, claiming the same at double the rate, as provided in the subsequent adjustment or agreement between the parties, referred to hereinbefore, on which inter alia the Partition Commissioner's report and the final decree in the partition suit were eventually based.

5. To this execution, objections were filed by the present appellant. The first objection, which gave rise to Misc. Case No.54 of 1955, was eventually dismissed for default on April 6, 1957 and, therefore, on April 22, 1957, the present appellant applied for restoration of the said Misc. Case. The present appellant also filed a second objection, containing, inter alia, the grounds, taken in the earlier objection petition before the Executing Court. It is this second objection petition under Section 47 of the Code of Civil Procedure , which has given rise to the present appeal upon its dismissal by the learned Subordinate judge.

6. The main objections which were taken to the respondent's application for execution, were that the present appellant was entitled to a set off of the amount of Rs. 1250/-, for which he had obtained a restitution order against the present respondent, as stated hereinbefore; (2) that he was also entitled to set off or adjustment of the payments, received by the present respondent in connection with the execution cases, levied by her for realization of her daughters' claims in connection with which the above amount of Rs. 1250/- was withdrawn by her.

7. It was also categorically urged by the appellant before the Court below, that, in any event, the respondent decree-holder was not entitled to realize arrears of monthly allowance at double the rate, namely at the rate of Rs. 180/-per month, in lieu of the original rate of Rs. 90/-per month, as the same was obviously, under a stipulation by way of penalty and against which the appellant was entitled to relief in the executing Court.

8. To the appellant's above objection petition, the decree-holder respondent raised a plea of initial bar, based on the dismissal for default of the appellant's earlier objection petition and contended

that, by virtue of the said dismissal, the present objection petition was barred. The learned Subordinate Judge appears to have accepted the decree-holder's above contention and he has further held that the appellant wag not entitled to any set off in the present proceeding on account of the restitution order in respect of the sum of Rs. 1250/- mentioned hereinbefore and that the appellant's contention that the stipulation for payment at double the rate (which had been incorporated in the decree of Court) was a stipulation by way of penalty was not entertain able by the executing court. Aggrieved by this decision, the appellant judgment-debtor has filed the present appeal.

9. Before us, Mr. Sen has contended that the learned Subordinate Judge was wrong in holding that his objection was barred in limine by reason of the dismissal for default of his previous objection. So far as this matter is concerned, we are inclined to the view that the learned Subordinate Judge's order cannot be supported. A dismissal for default would not certainly operate as res judicata and would not conclude the matter even by way of finality of litigation which is no more than the analogous rule or general principle of res judicata. A dismissal for default of a particular objection, which involves no decision on the merits, either expressly or impliedly, that is, by necessary implication, cannot, there fore, be held to bar a subsequent objection, either similar or different. It is unnecessary, for our present purpose, to discuss any of the cases, cited before us on this point, as those cases are all distinguishable and none of them lays down any firm rule that a dismissal for default of an objection under Section 47 of the Code of Civil Procedure would operate as a bar to a subsequent objection under the said section. On the other hand the view, we have taken above, will be amply supported, by, amongst others, the two decisions of this Court reported in *Babir Das Pal v. Girish Chandra Pal*[1], and *Bir Bikaram Kishore v. Khaliler Rahaman*[2], The contrary observations in *Akhoy Kumar v. Krishna Chandra*[3], cannot be regarded as anything more than mere obiter dicta and, far from receiving any support from *Khosal Chandra v. Ukiladdi*[4], therein relied on for the purpose, they appear, in truth, to be opposed to the same.

10. We think also that Mr. Sen's contention on the question of set off cannot be accepted. The relevant restitution order was in respect of an amount (Rs. 1250/-), which had been received by the present decree-holder respondent on account of her minor daughters aforesaid and as their guardian and, possibly, on behalf of herself also and although, it is true there was an order for restitution in respect of the said amount possibly against herself also along with her said minor daughters, it is difficult to bring the case within either Order 21 rule 18 or order 21 rule 19 of the Code of Civil Procedure or within any permissible extension of the same on equitable grounds, that is, under the Court's inherent powers under the Code. The three cases, cited by Mr. Sen on the point namely *Hazari Ram v. Bansidhar Dhandhania*[5], *Krishna Chandra Bhowmick v. Pabna Dhanabhandar Co Ltd*[6]., *Bank of Dacca Ltd. v. Gour Gopal Saha*[7], are obviously distinguishable and, indeed, the instant case on the facts, stated above, would, plainly fall within the exception, noted by the Privy Council in the above-cited case, 64 Ind App 67 at p.73 : (AIR 1937 PC 39 at p.41)

[1] AIR 1923 Cal 287 : 67 Ind Cas 663
[2] AIR 1935 Cal 664 : 39 Cal WN 1206
[3] 36 Cal WN 367 at pp.369-70 : (AIR 1932 Cal 569 at pp.570-571)
[4] 14 Cal WN 114
[5] 64 Ind App 67, at p.73 : (ATR 1937; PC 39 at p 41)
[6] 89 Cal WN 106, at p.109 : (AIR 1935 Cal 225 at p.227)
[7] AIR 1936 Cal 409 at p.412

to which, their Lordship, categorically held, the plea of set-off would be utterly inapplicable, both on statute and on principle. We do not think, therefore, that Mr. Sen's contention that the

appellant is entitled to a set off in respect of the amount, covered by the above restitution order, can be accepted in the present case and the learned Subordinate Judge appears to have been right in over-ruling the same.

11. On the main question. however, namely, that the stipulation for payment of double the amount in case of default for three consecutive months was a stipulation by way of penalty and that, although the same forms part of a decree of Court, as the said term was really incorporated under a compromise, it cannot be regarded except as part of a compromise decree so as to be subject to relief even in the executing court, Mr. Sen's client ought to succeed. The appellant, therefore, would be entitled to relief in respect of the same as part of a contract, providing for penalty, even though the said contract has been incorporated in a decree of court. This indeed, is clear from the series of decisions starting from *Surendra Nath v. Secretary of State*[8], and ending with *Kartick Chandra v. Anila Bala Devi*[9], The underlying principle has been fully discussed by this Court in, at least, three of the aforesaid decisions', namely, 24 Cal WN 545 : AIR 1920 Calcutta 716, *Kandarpa Nag v. Banwarilal Nag*[10], and *Gopal Krishna v. Hari Nath*[11], and it is unnecessary to add anything to the said discussion of the above cases, again, 24 Cal WN 545 : AIR 1920 Calcutta 716 and 34 Cal LJ 157 : AIR 1921 Calcutta 565 are two instances where the relief was given by the executing court which was executing the particular decree (See also in this connection *Mohiuddin v. Mt. Kashmiro Bibi*[12], We do not think that the Patna decision (*Jitendra Nath v Mt. Jasoda Sahun*[13],) to the contrary is good law on the subject just as the Bombay case or cases, therein relied upon namely, *Shirekuli Timapa v. Mahablya*[14], and *Bal-prasad v. Dharanidhar,*[15] , cannot be said to be good law in the face of the later Bombay decision *Balambhat v. Vinayak*[16], directly in point and the Full Bench decision of the said High Court in *Krishnabai v. Hari*[17], which was given in the meantime and which was relied upon and explained in the aforesaid case, (ILR 35 Bom 239).

12. In the present case, the term of double payment was, undoubtedly, a term of penalty. The appellant, therefore, would be entitled to relief under Section 74 of the Indian Contract Act. The respondent, however, even under that section would be entitled to reasonable compensation even in the absence of proof of special damage.

13. Taking into consideration, the facts and circumstances of the instant case we think that reasonable compensation should be assessed, as and by way of interest, at the rate of 8 per cent per annum on the amount of monthly allowance in arrears and under execution in the present case, from the date of default until payment or until adjustment, recognized and accepted by the Court.

14. We would, therefore, decree this appeal only to this extent that the respondent's claim for recovery of arrears of monthly allowance in the present execution at double the rate, namely, at Rs. 180/- per month, in place of the original rate of Rs. 90/- per month, would be allowed at the aforesaid original or reduced rate of Rs. 90/- Per month with interest at

[8]24 Cal WN 545 : AIR 1920 Cal 716
[9]54 Cal WN 17
[10]33 Cal LJ 244 : AIR 1921 Cal 356
[11]34 Cal LJ 157 : (AIR 1921 Cal 565
[12] AIR 1933 All 252 (FB)
[13] AIR 1926 Pat 122, 125
[14] ILR 10 Bom 435
[15] ILR 10 Bom 437n
[16] ILR 35 Bom 239
[17] ILR 31 Bom *15*

the rate of 8 per cent per annum from the date of default until payment or adjustment as aforesaid. The order of the learned Subordinate Judge will be modified accordingly.

15. Taking the entire circumstances into consideration, we would direct the parties to bear their own costs in this Court.

Amaresh Roy, J.

1. 16. I agree.

Order accordingly.