

# CALCUTTA HIGH COURT

Iswar Gopal Jew

Vs.

Bhagwandas

Suits Nos. 1788 of 1967 and 2740 of 1968

(Mrs. Pratibha Bonnerjea, J.)

14.07.1981

## ORDER

### **Mrs. Pratibha Bonnerjea, J.**

1. The above suit was instituted by the plaintiff for eviction of the defendant from the suit property as a trespasser and a decree for Rupees 1,09,600/- by way of mesne profit etc. The plaintiff alleged that pursuant to an agreement for lease by and between the parties the plaintiff agreed to let out the suit property to the defendant for 86 years on terms and conditions contained in the draft approved lease and the defendant deposited Rupees 1,00,000/- with the plaintiff by way of salami to be forfeited on failure of the defendant to execute the lease. The possession of the suit property was delivered to the defendant pursuant to the said agreement. The defendant failed and neglected to execute the lease. Therefore the said deposit was forfeited by the plaintiff in terms of the agreement and the suit was instituted for recovery of possession. In the written statement the defendant alleged that he was in possession of the suit property as a thika tenant prior to the agreement for lease. It was denied that there was any failure or negligence on the part of the defendant to execute the lease. A cross suit was filed by the defendant against the plaintiff, being Suit No. 2740 of 1968 for specific performance of the said lease. This suit was also ready for hearing. The evidence in the above suit was closed and the matter was adjourned for argument. After several adjournments the above matter was taken up on 2-2-1981 when I enquired of the counsel for both the parties whether any settlement was possible. Thereafter discussions were held between Mr. R.C. Deb of M/s. G.C. Chunder and Co., the Advocate on record of the plaintiff and Mr. P.K. Roy, senior counsel for the defendant in open Court. The junior counsel of the plaintiff Mr. Prabir Roy Chowdhury also was present. Certain terms were agreed between the parties and on that basis I dictated the said agreed terms and a consent decree was passed by consolidating the two suits.

2. The present petition has been taken out on behalf of the plaintiff in the above suit for setting aside or amending the said consent decree and this petition is supported by the supporting affidavit of Mr. R.C. Deb affirmed on 6-3-1981. The case made out in the petition was that Mr. R.C. Deb was under a mistaken apprehension that the dictated terms would be the basis of further negotiation between his client and the defendant. Mr. Deb never consented to a decree

being passed. Another point taken by the petitioner in his affidavit-in-reply was that the consent decree was not in writing nor the same was signed by the parties. Therefore it was not binding. In the affidavit-in- opposition, the defendant categorically denied the petitioner's allegations and alleged that a consent decree was passed by agreement between the parties of which Mr. R.C. Deb had full knowledge and in proof thereof, several documents were annexed to the affidavit-in-opposition.

3. According to Mr. P.K. Roy, the counsel for the defendant, a suit is the proper proceeding for setting aside a consent decree and a review under Order 47 Civil Procedure Code or an application under Section 151 of Civil Procedure Code would not lie. In support of his contention he relied on (*Mussammat Gulab Koer v. Badshah Bahadur*<sup>1</sup>) and (*J.C. Galstaun v. Pramatha Nath Roy*<sup>2</sup>). Mr. N.C. Roy Chowdhury, counsel for the petitioner submitted, that law had since been changed due to the amendment of the Civil Procedure Code in 1976 Under Order 23 Rule 3A, of Civil Procedure Code no suit will lie to set aside a consent decree if the same is unlawful. To appreciate his argument it is necessary to look into the amended provisions of Order 23, Rules 3 and 3A :-

"Rule 3. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise (in writing and signed by parties), or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject- matter of the suit the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith (so far as it relates to the parties to the suit whether or not the subject- matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit: )

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation: An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.

Rule 3A. No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."

4. According to the petitioner's counsel, the present consent decree was not in writing or signed by the parties as required under Order 23 Rule 3 of the Civil Procedure Code Hence it was against the express provisions of law and was unlawful. The consent decree was passed due to the mistake or misapprehension of the Advocate-on-record of the petitioner. This allegation will bring the case within the scope of the explanation to Rule 3 and would be deemed to be unlawful. If so, a suit for setting aside a consent decree would be barred under the provision of Rule 3-A. I accept this submission on behalf of the petitioner that on the basis of the facts alleged in the petition no suit could be filed for the relief claimed in the petition. An application under Section 151 of the Civil Procedure Code or a review is the proper procedure.

<sup>1</sup>(1909) 13 Cal WN 1197

<sup>2</sup> AIR 1929 Cal 470

5. The next point urged by the counsel for the defendant is that this application was not by the deity and should be dismissed on that ground alone. The present application was taken out by the managing shebait, who has the power to manage the state of the deity. He is also a party to the suit. Hence this irregularity if any, is not material and I hold that the application is maintainable.

6. The third point taken on behalf of the defendant is that the application is barred by the law of limitation. According to the counsel for the petitioner, the application is governed by the residuary article of the Limitation Act as there was no express provision for the same. I accept this submission on behalf of the petitioner.

7. The provisions of Order 23, Rule 3 of the Civil Procedure Code should be considered carefully. It appears that the Court's jurisdiction to pass the consent decree under Order 23 Rule 3 of the Civil Procedure Code would depend on the satisfactory proof of the agreement between the parties to the suit and such agreement must be in writing and signed by the parties. This express provision has been incorporate by amendment in 1976 with the object to exclude the oral agreements. What had happened on 2-2-1981 was that an oral agreement was entered into between the counsel for both the parties, in Court, and on the basis of that oral agreement the Court dictated the consent decree. On careful consideration of the provisions of Order 23, Rule 3 it appears, that Court has no jurisdiction to pass a consent decree on the basis of an oral agreement between the parties. In this view of the matter the consent decree dated 2-2- 1981 was bad being unlawful and should be set aside. In the premises aforesaid the question of going into the merit of the case does not arise. The consent decree dated 12-2-1981 is therefore, set aside. There will be no order as to cost.  
Order accordingly.