BOMBAY HIGH COURT

Gangaram Govind Pashankar

Vs

Sardar K.R. Vinchurkar

(Macklin and Bavdekar, JJ.)

26.08.1946

JUDGMENT

Macklin, J.

1. These three applications relate to the modification of a scheme which was framed on appeal by this Court. In effect it is the scheme of the Court, and in view of the fact that the scheme itself contains no clause giving liberty to apply for a modification of the scheme, a preliminary objection has been taken to the effect that this Court has no jurisdiction to entertain the applications. The matter is not free from difficulty. In support of the application we have been referred to certain remarks of various learned Judges to the effect that the Court has an inherent jurisdiction to entertain an application of this sort, even though the scheme does not provide for liberty to apply in such a matter. But the difficulty of following those decisions blindly lies in the fact that they do not refer to Order XX, Rule 3, which has the effect of preventing Courts from altering their own decrees except in accordance with the provisions of Section 152 or the rules relating to review; and it cannot be denied that, in so far as a scheme framed by this Court on appeal is in effect a decree of this Court, what we are being asked to do is to alter our decree otherwise than in accordance with the provisions of Section 152 and the provisions for review.

2. It is, however, argued that it is within our competence to do so. In England it is undoubtedly the practice of the Courts to modify their own schemes on mere application, even though it may be that the application is in practice made by the Attorney General and the scheme as framed ought to be regarded no less as the decree of the Court than it would be if it were a decree of an Indian Court; and it is also clear that this Court has the powers of the English Courts subject only to such modifications as may be necessary in view of Indian statutory provisions. It is also clear that in India we have to be guided by the Civil Procedure Code, in particular by Order XX, Rule 3, and that in England there is no such statute as the Civil Procedure Code. Nevertheless it cannot be suggested that in England the principles underlying Order XX, Rule 3, relating to the alteration of decrees do not hold good in spite of their not having been reduced to writing, and it follows that, in BO far as the Court of Chancery in England is prepared to act on applications to

modify its own schemes, it does so in spite of a principle which is as much applicable to England as it is to India.

3. The question then is whether it is open to us to follow the English practice in spite of the existence of Order XX, Rule 3. It is argued that so far as this case is concerned we have at any rate no power to do so, because the scheme which was framed was a scheme framed by this Court only on appeal, and therefore we are to regard ourselves as exercising appellate jurisdiction and as such confined to the powers of a Court of Appeal. But we are unable to see that it makes any difference whether the scheme which we framed was framed on appeal or was framed in the exercise of some other jurisdiction. Whatever may have been the powers under which the original scheme was framed, it remains a scheme of this Court, and the question still is whether this Court can modify it on an application. It is also argued that the suit came to an end with the framing of the scheme (which is certainly correct) and that this Court's functions have therefore ceased. But, as was pointed out by Mr. Justice Broom field in Chandraprasad v. Jinabharthi (1930) 33 Bom. L.R. 520, although the suit ought to be regarded as being at an end, any subsequent orders that might be passed in connection with the scheme should be regarded as orders passed in the scheme and not as orders passed in the suit. It was also suggested that applications of this kind ought to be at least discouraged in view of the fact that a suit under Section 92 could be filed provided the consent of the Advocate General were obtained, and that applications of this kind might well be no more than a device to avoid obtaining the consent of the Advocate General. It is pointed out that in England in practice such applications are made by the Attorney General, so that there is no question of avoiding the ordinary procedure, and that that may well be the origin of the English practice, since it makes no difference whether an application is made by the Attorney General or a suit is brought by the Attorney General; in each case the Attorney General sets his seal upon the proceedings. It is, however, equally arguable that once the Advocate General has given his consent to a suit under Section 92, that consent may be deemed to remain with reference to any modifications of the decree that may afterwards be made. After all when the Advocate General gives his consent to a suit under Section 92, what he consents to is not any particular order by the Court but any order that the Court may see fit to make in the suit. All that he has done is to give sanction to the Court's entertaining a matter relating to a charitable trust, which would otherwise not come within the scope of the Court. We do not think that any valid objection to this application can be made on that score.

4. In *Sakharam Daji v. Ganu Raghu*[1] Mr. Justice Shah observed (p. 693):

It has been accepted before us at the Bar that it is open to any one interested in this fund to apply to the District Court which framed the scheme to supplement or modify the same. It is not suggested that a separate suit under Section 92 is necessary. Though no liberty to apply is reserved under the scheme, such a reservation can be always implied.And this dictum was cited with approval by Mr, Justice Patkar in Chandraprasad's case already referred to. The difficulty in accepting these remarks blindly is that in each case they were made obiter. In the former case the

finding was that the suit had to be rejected because it was barred as a suit by the provisions of Section 92, it not having been brought in accordance with the provisions of Section 92; and that was all that was necessary for the decision of the case. In the latter case the scheme itself provided for application to the Court for alteration if any were found necessary, and the question of the Court's powers in the event of there being no provisions in the scheme for applications of this sort did not arise. There is, however, the direct authority of the High Court of Allahabad in Sri *Swami Rangacharya v. Ganga Ram*[2] The scheme in that case had provided for application to the Court in certain circumstances and for certain purposes, and the Court was dealing with an application of that sort. But the application went further than the liberty to apply given under the scheme, and one of the questions before the High Court was the extent to which it was possible to regard the Court as having an inherent power to deal with applications of that kind when they were not specifically provided for by the scheme. The Court thought that the only section in the Civil Procedure Code which could justify it in amending the scheme was Section 151, and their Lordships came to the conclusion that, provided a modification of a scheme prepared by itself were necessary to prevent abuse of the process of the Court or to meet the ends of justice, they could modify it under the inherent powers of the Court recognised in Section 161. But in effect they came to the conclusion in that case that it was not correct for them to modify the scheme in the manner proposed, and to that extent they rejected the application. I should mention that neither in the two cases which I have cited from this High Court nor in the case decided by the Allahabad High Court was any reference made to the existence of Order XX, Rule 3.

5. We have the authority of a bench of this Court to say that the Court can exercise its powers under Section 151 even though another remedy may be open to the parties: see Bhimappasaheb Gireppasaheb v. Ramappa . And we have been referred to a number of other decisions in which decrees have been altered otherwise than in accordance with Section 152 or the provisions relating to review: see for example *Debi Bakhsh Singh v. Habib Shah*[3] *P.C., Bharmal v. Bai Vishnabai*[4]*, Basangowda v.* Churchigirigowda[5] But all these are cases where justice plainly required some alteration in the decree. On the whole we are inclined to think that the true view to take of Order XX, Rule 3, is that its primary object is to prevent alterations being made merely because the Court which passed the decree had made a mistake. What we are being asked to do in this case is to alter a scheme not because it was a mistaken scheme in the first instance but because circumstances have now arisen which make it desirable for it to be altered; and looking at the matter from that point of view the obstacle that seems to be presented by Order XX, Rule 3, becomes much less formidable. We think that in view of the various authorities which have held that the Court has inherent power to alter its own scheme even in the absence of a clause to that effect in the scheme and of the undoubted practice in England by which in a proper case a Court would always be prepared to alter its own scheme, we too ought to hold that the Court has an inherent power under Section 151 to alter its scheme on proper cause being shown and for the purposes mentioned in Section 151, namely the doing of justice and the prevention of abuse of the process of the Court. It is pointed out to us that in England the Courts are slow to modify their own schemes, and will never do so except with the utmost caution and upon the most

substantial grounds and the clearest evidence not only that the scheme does not operate beneficially but that it can by alteration be made to do so consistently with the object of the foundation, and that incalculable mischief would ensue to all charities if this rule were not strictly observed: see Tudor on Charities, 5th edition, p. 190. But, subject to that limitation, we think that the Courts in India have power to modify their schemes even in the absence of a clause in the scheme itself to that effect.

6. The next question is whether on the merits this is a case in which the Court ought to interfere. This is a point which we feel unable to decide for ourselves, since it depends largely upon evidence. We send the papers to the District Judge and direct him to issue notice to the parties, to frame necessary issues, and to come to a conclusion on the issues and report his conclusion to us. We do not propose to impose any time limit; but we ask that the matter should be dealt with expeditiously. The question of costs is reserved.

Cases Referred.

1(1980) I.L.R. 45 Bom. 683, s.c. 23 Bom. L.R. 125
2(1935) I.L.R. 58 All. 538
3(1913) I.L.R. 35 All. 331, s.c. 15 Bom. L.R. 640
4(1932) 35 Bom. L.R. 365
5(1910) I.L.R. 34 Bom. 408, s.c. 12 Bom. L.R. 223