Kaushalendra Pratap Sahi vs Sen And Sanyal on 13 January, 1953

Equivalent citations: AIR1953ALL588, AIR 1953 ALLAHABAD 588

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

V. Bhargava, J.

1. This is a judgment-debtor's appeal arising out of proceedings for execution of a decree. The decree sought to be executed was passed in a suit filed by the respondent against the appellant and one other person J. P. Sahi for recovery of a sum of Rs. 22,765/- in the Court of the Civil Judge of Sultaiipur. The suit was dismissed by the Civil Judge and an appeal was filed by the present respondent in the erstwhile Chief Court of Avadh. During the pendency of the appeal, on 12-12-1944, counsel for the parties made a statement in Court that parties had come to terms and gave the details of the terms on which the parties had agreed requesting that the appeal may be decided in accordance with those terms. Thereupon the Court ordered that "in view of the compromise we order that a decree be passed in terms of the compromise". The terms of the compromise laid down that the suit was to be decreed for a sum of RS. 12000/-against the present appellant alone and the amount was also to be payable in three instalments. The first instalment of Rs. 2000/- was to be paid on or before 12-1-1945. The second instalment of Rs. 4000/- was to be paid on or before 12-5-1945, and the balance on or before 12-11-1945. In case of any default, the whole amount was to become payable and the plaintiff (the present respondent) was to be entitled to execute his decree for the balance remaining due and was also to be entitled to half the costs incurred in both the Courts. There was a stipulation for payment of interest also in case of default. The last paragraph of the terms was as follows :

> "Defendant 1 is the owner of a house known as 'Unity Lodge' on Rai Behari Lal Road, Trans Gomti Area, Lucknow, and it is argeed that the amount of the decree namely Rs. 12000/- shall be a charge on the house."

2. The first two instalments of Rs. 2000/- and Rs. 4000/- were paid but the balance of Rs. 6000/-. which was due on 12-11-1945, remained unpaid. The execution out of which this appeal arises was sought on 5-12-1950, by sale of the house mentioned in the last clause of the terms of the agreement mentioned above.

3. Various objections were taken by the appellant against the execution but we need mention only one objection, as that is the only one which has been argued by the learned Counsel for the appellant before us in this appeal. This objection was that the decree, as it had been passed by the Chief Court of Avadh, was not executable by sale of the house mentioned in the decree. This objection was not accepted by the lower Court, which directed the sale of the house and consequently the appellant has come up to this Court.

4. Learned counsel for the appellant has argued that the language of the terms of the compromise between the parties, which were also the terms of the decree, merely had the effect of declaring that there was a charge on the house in respect of the decretal amount of Rs. 12,000/-and did not specifically grant any right to the decree-holder to proceed to realise the decretal amount by sale of the house in an execution of the decree. He, therefore, contended that if the decree-holder wanted to proceed against the house, he had to institute a suit for enforcement of the charge. In support of this contention learned counsel referred us to two rulings of the Allahabad High Court. The first of these cases is that of 'Posti Mal v. Radhakrishan Lalchand', AIR 1932 All 439 (A), which was decided by a Division Bench. The second case is a decision of the Full Bench of five Judges in -- 'Mahesh Prasad v. Mt. Mundar', AIR 1951 All 141 (FB) (E). Both these cases lay down that unless the decree specifically in so many words grants the right to the decree-holder to proceed to realise the decretal amount by sale of the property charged with the decretal amount in the decree, the decree-holder can only proceed against that property by institution of a separate suit for enforcement of the charge. So far as this principle, as laid down in these cases, is concerned, it does not in our opinion assist the appellant in the present appeal, because that principle was laid down on the interpretation of Rule 15 of Order 34, Civil P. C. as it had been framed by the Allahabad High Court. The ease before us is governed by Rule 15 of Order 34, Civil P. C., as it stood after amendment by the Chief Court of Avadh. The Chief Court of Avadh amended Rule 15, by incorporating in Sub-rule (1) of Rule 15 the provision of which is applicable to the suits within the jurisdiction of the Allahabad High Court before the amalgamation of that Court with the Chief Court of Avadh and by adding Sub-rule (2) which applied only to proceedings pending in the areas forming the jurisdiction of the Chief Court of Avadh. This new sub-rule was as follows :

> "(2) Where a decree orders payment of money and charges it on immovable property on default of payment, the amount can be realised by sale of that property in execution of that very decree."

The very language of this sub-rule shows that the Chief Court of Avadh introduced a drastic change in the method of proceeding in execution of decrees creating charges which resulted in a departure from the procedure followed in the Allahabad High Court. This sub-rule clearly lays down that, if a charge is created by the decree itself, the mere creation of that charge would give the right to the decree-holder to execute the decree by sale of the property charged and would obviate the necessity of filing a separate suit. Since this sub-rule is clearly applicable to the case before us, the view taken in those cases is of no assistance.

5. In view of this position learned counsel for the appellant had to argue the alternative point raised by him, viz., that in this particular case the charge had not been created by the decree but by the

compromise which had been entered into between parties and which was brought before the Court through their counsel. The question whether the charge was created by the decree itself or by the compromise stated by the counsel before the Court is naturally a question of fact which has to be decided on the interpretation of the statement which was made by the counsel. The learned Civil Judge in dismissing the objection has carefully considered the language and has held that a reading of the terms of the compromise as a whole makes it clear that what was agreed upon between the parties was "that the decree should charge the amount for which it was to be passed on the house". On an examination of the terms of the compromise, we are of the opinion that the interpretation placed by the learned Civil Judge is perfectly correct. The compromise first laid down that the suit was to be decreed for a sum of Rs. 12,000/- only and not for the full amount of Rs. 22,765/- which was the amount claimed in the suit. The charge on the house was created in respect of this reduced amount of Rs. 12,000/- and not in respect of the amount claimed by the plaintiff in the suit. The creation of the charge was itself clearly dependent on the reduction of the amount which was to be decreed in favour of the plaintiff. If the parties had chosen to embody the above terms in a written petition of compromise and had got it registered before presenting it to the Court for passing a decree on its basis, it might have been possible to urge that the charge was created by the compromise. In this case, it seems to us that the parties purposely avoided adopting this course and left it to the Court to pass a decree for the reduced amount of Rs. 12,000/- and then to declare and create a charge on the house. It was not the compromise but the decree which was registered on the footing that it created the charge on the immovable property. In these circumstances, the contention of the learned counsel that the charge was created by the compromise itself and not by the decree cannot have any force.

6. Learned counsel, in support of his argument, relied on the decision in the case of -- 'Posti Mal v. Radhakishan Lalchand (A)', mentioned above, where also there was first a compromise followed by a decree in terms of the compromise and a charge was created on certain property and it was held that the charge was created by the compromise and not by the decree. The report of the case does not, however, clearly bring out all the terms of the compromise. The facts given in the judgment show that the parties entered into a compromise "which provided that an instalment decree for Rs. 31007- be passed in favour of the respondent. Rs. 5007- was made payable every half year; on non-payment of the first instalment, interest at the rate of 9 per cent. per annum was made payable. In default of payment of two consecutive instalments, the decree-holder was declared entitled to obtain execution of his decree in respect of the entire decretal amount remaining unpaid. The defendant (the appellant in this Court) further hypothecated certain properties which were detailed in the compromise. A decree was passed on foot of the compromise and embodied all its terms."

This recitation of facts merely indicates that the defendant had hypothecated certain properties, which were detailed in the compromise. In what language this hypothecation was expressed has not been brought out in the judgment. The language in which the facts have been put by the Court is indicative of the fact that the defendant had himself hypothecated the properties and that the compromise was not so worded as to leave it to the Court to create the charge. There was no such circumstance of reduction of the amount claimed and its conversion into decretal amount before the charge could become effective, as exists in the case before us. We do not think, therefore, that the case relied upon by learned counsel is of assistance to him.

7. Learned counsel also referred in to a paragraph in the judgment of Agarwala J. in the Pull Bench decision in the case of -- 'Mahesh Prasad v. Mt. Mundar (B)', where he mentioned the case of -- 'Posti Mal v. Radhakishan Lalchand (A)'. Agarwala J. remarked that "in -- 'Posti Mal v. Radhakishan Lalchand (A)', the charge was not created by the decree itself but was created by the compromise on the basis of which the decree was passed."

Learned counsel cited this paragraph from the judgment of Agarwala J. in support of his argument that the Full Bench had also held that in the case of -- 'Posti Mal v. Radhakishan Lalchand (A)', the charge had been created by the compromise and not by the decree. We do not think that this remark can be interpreted in this manner. The context in which this remark was made shows that the learned Judge did not enter into the question whether in that case the charge had been created by the compromise or by the decree. He only recited it as a fact that, in that case, it had been found that the charge had been created by the compromise and not by the decree. The judgment, which was delivered by Agarwala J., was not assented to in its entirety by all the other Judges constituting the Full Bench. The learned Chief Justice wrote a separate judgment, though on the question before the Pull Bench he arrived at the same conclusion as Agarwala J. Two other learned Judges, Waliullah and Wanchoo JJ., agreed entirely with the learned Chief Justice, whereas the fifth learned Judge, Seth J., merely agreed to the dismissal of the appeals without expressing any opinion as to whether he agreed with the reasoning given by the learned Chief Justice or by Agarwala J. In his judgment, the learned Chief Justice nowhere made any comments which would show that he even considered the decision in the case of -- 'Posti Mal v. Radhakishan Lalchand (A)'. It cannot, therefore, be said that the decision in --'Posti Mal v. Radhakishan Lalchand (A)', was approved by the Full Bench in its entirety.

8. In any case, even if it be held that the decision in -- 'Posti Mal v. Radhakishan Lalchand (A)', is correct and has to be followed by us, we are unable to hold that that decision is applicable to the case before us. We have already pointed out the distinction on facts which exists between that case and the case before in. In this case, we can see no reason to differ from the view taken by the learned Civil Judge that the charge on the house was created by the decree and not by the compromise which was earlier than the decree. There is the additional circumstance supporting this conclusion that, after the decree had been passed, it was registered on the ground that it created a charge on the movable property. If the charge had been created by the compromise embodied in the statement of the counsel itself, that, compromise should have been registered. The registration of the decree is a clear indication of the fact that the charge was created by the decree and not earlier by the compromise. Since the charge was created by the decree, Sub-rule (2), Rule 15, Order 34, C. P. C. is clearly applicable and even though the decree does not directly and specifically empower the decree-holder to ask for sale of the charged property in execution of the decree, that right accrues to him under the sub-rule.

9. The appeal consequently fails and is dismissed with costs.

Hari Shankar, J.

10. I agree and have nothing to add.