

CASE NO.:
Appeal (civil) 5670-5671 of 2000

PETITIONER:
Lagan Jute Machineries Co. Ltd

RESPONDENT:
Candlewood Holdings Ltd. & Ors

DATE OF JUDGMENT: 28/09/2007

BENCH:
Dr. ARIJIT PASAYAT & LOKEHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NOS.5670-5671OF 2000

Dr. ARIJIT PASAYAT, J.

1. Challenge in these appeals is to the order passed by a Division Bench of the Calcutta High Court in an appeal which was directed against the order of the learned Single Judge dated 23.3.2000. By the said order, the learned Single Judge in that application for execution appointed Receiver for realization of commercial charges and consolidated rates and taxes in terms of prayer (e) of column 10 of the tabular statement. The order was passed on 9.2.2000 wherein it was recorded in terms of earlier order dated 18.5.1999 that the judgment debtor did not pay any instalment and in that view the decree dated 13.10.1982 had become executable. The second order dated 9.2.2000 was not challenged in any proceedings. The application was made by the tabular statement before the learned Single Judge for execution of the decree dated 13.10.1982. The said decree was passed by consent of the parties and parties filed their terms of settlement in the Court on the basis of which the said consent decree was made. The decree was subsequently modified by consent of parties by order dated 26.4.1990 and subsequently the decree was transferred by the then decree-holder in favour of the applicant-respondent for execution proceedings. The execution proceedings were related to recovery of the immovable property and money on account of rates, taxes and commercial surcharge levied by the Municipal Corporation of Calcutta (in short 'Corporation') under the Municipal Corporation Act, 1980 (in short the 'Corporation Act') which operated prospectively from 4.1.1984. An order was made in terms of prayer (b) of the tabular statement on the earlier occasion and also in terms of prayer (f) as recorded in the order dated 2.9.2000. By another order dated 30.3.2000 application was rejected.

2. Stand of the appellant was that the learned Single Judge was incorrect in passing the order directing execution by way of appointment of Receiver since the commercial surcharge is not payable according to Corporation Act and the consolidated rates and taxes are determined by the Corporation. Stand before the High Court was that since no rate had been produced and it was not so as determined by the Corporation, there is no question of paying any amount by way of surcharge. It was urged that the Corporation Act envisages one consolidated rate bill payable by the owner which is

recoverable by the owner from the occupier. It was urged that the earlier order dated 10.3.1999 as well as the order of the Division Bench did not consider this aspect. Therefore, it was submitted that the application should not have been disposed of under Section 47 of Code of Civil Procedure, 1908 (in short 'CPC').

3. Stand of the respondents, on the other hand, was that there was no dispute with regard to amount payable and the appellant had in fact paid the amount. The question was considered by the earlier Division Bench by an order dated 18.5.1999. The order was challenged before this Court by SLP which was not accepted. Reference was also made to a letter dated 10.12.1999, which clearly indicated the liability for commercial surcharge. The Division Bench considered the respective stand. It was noted that the claim can be divided into two parts. One part of the claim is from 1976 upto 4.1.1984, when the Corporation Act came into force and the second portion of the claim is subsequent to coming into operation of the said Act.

4. So far as the first portion is concerned, there was no argument on behalf of the appellant. It was not explained as to what would be its stand for non-payment of the dues prior to the operation of the Act. It was, however, submitted by the appellant that under law prevalent at the relevant time, the rate bill should have been presented to the occupier for payment and since there was no such presentation, the question of non-payment does not arise. The High Court did not accept this stand with reference to the consent decree. The High Court also did not accept this stand that after the Corporation Act came into operation, there was one consolidated rate bill and amount was not determined and the primary obligation "Owner to pay and thereafter recover from appellant", and as such the appellant is not liable. It was noted that it all along made payment in terms of clause 7 of the terms of the settlement before the High Court on the basis of which the consent decree was passed. There was no dispute with regard to the amount raised at any point of time.

5. The Division Bench also did not find any relevance of the fact that letter dated 10.12.1999 was issued under the heading "without prejudice". The High Court was of the view that it is clear from the letter that there was no dispute with regard to the amount and the expression "without prejudice" referred to any other contention that could have been raised by the appellant. Since the appellant was paying the amount without any dispute, the stands raised were not acceptable. In the earlier round also, the Division Bench noted this stand which was indicated in the memorandum of appeal and SLP before this Court was withdrawn. The appeal was accordingly dismissed.

6. In support of the appeals, it has been contended as follows:

(1) Commercial surcharge only becomes payable after the same is determined by the Corporation. Since that has not been done and there is no assessment and no demand by the Corporation, the question of any liability does not arise.

(2) Commercial surcharge payable under the Act since 4.1.1984 and the same is not payable.

7. In the consent decree, clause (vii) is of considerable relevance in the present dispute. The same reads as follows:

"The defendant further undertakes and agrees to punctually and regularly pay commercial surcharge on consolidated rates @ 50% of the amount of corporation tax or at such rate as Municipal Corporation of Calcutta may determine as and when the same is determined and becomes payable and the defendant shall keep the plaintiff or person claiming through the plaintiff fully discharged and indemnified."

8. Reference also needs to be made to letter dated 10.12.1999. The said reads as follows:

"M/s Candlewood Holdings Limited,
24, Park Street,
CALCUTTA 700 016.

Dear Sir,

Sub: Payment of Rent for the month of October, 1999
without prejudice.

Enclosed please find the four Manager's Cheque No. 056083, 056084, 056085, 056086 dated 09.12.99 payable at UCO Bank, Free School Street Branch for Rs.1,53,182/- on account of Rent Payable for October, 1999. The amount in the Cheque is arrived as below.

Rent

Rs.1,26,943.00

Corporation Tax

Rs. 46,270.84

Commercial Surcharge @ 50% of
Corpn. Tax.

Rs. 23,135.44

Rs.1,96,349.00

Less: 1. Tax 20% on Rs.1,26,943.50

=Rs. 25,389.00

2. Surcharge 10% on I.Tax.

=Rs. 2,539.00

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Rs. 27,928.00

Rs.1,68,421.78

Less: Arrear I.Tax and surcharge:

Actual I.Tax and surcharge

since April, 1999 to Sept. 99

=Rs.1,67,568.00

Less: Deducted during earlier

Said months =Rs.1,52,328.00

Net amount:

Rs. 15,240.00

Rs.1,53,181.78

With best regards,

Yours faithfully,

For THE LAGAN JUTE MACHINERY CO. LTD.
Sd/- B.B. CHAKRABORTY
SUPERVISOR (Cashier)

Encl: As above."

9. At this juncture, it would be appropriate to take note of what was stated in Kamlabai and Ors. v. Mangilal Dulichand Mantri (1987 (4) SCC 585), it was noted as follows:

28. The next question which is of some importance is about raising of the objections at the earlier stage. Admittedly when the award was filed in the court, notice was served and no objection was raised. If the tenant intended to raise the objection that this decree on the basis of the award could not be passed as it was in contravention of Clause 13 of the Rent Act and therefore was absolutely without jurisdiction, such an objection could have been raised there and then. The tenant admittedly did not raise this objection which was open to him. In this view of the matter, the contention on behalf of the appellant about the constructive res judicata also is of some significance. This question of constructive res judicata in execution proceedings came before this Court in Mohanlal Goenka v. Benoy Krishna Mukherjee. In this decision following the earlier decision of the Privy Council, this Court ruled that the principles of constructive res judicata will be applicable even in execution proceedings.

29. It is also clear that when the decree was passed on the basis of award and notice was issued to the judgment-debtor respondent no such objection was raised. It is also clear that the decree was put in execution on more than one occasions and this objection was for the first time raised only in 1983. In this view of the matter also the contention of the learned counsel for the appellant that by not raising this objection earlier the judgment-debtor has lost his right to raise this objection and he is estopped, deserves to be accepted, although in the light of what we have discussed earlier, it is not necessary to go into this question, having come to the conclusion on the first question against the respondent."

10. It is to be noted that in the earlier SLP the stand was that there was no liability prior to 1984. In other words the dispute related to post-1984 and also there is no dispute after 1997. It is also to be noted that there was no point raised relating to interest before the High Court.

11. Admittedly, Municipal Corporation was not a party before the High Court and was subsequently impleaded. It is stated before this Court that so far as the appellant is concerned, the Corporation has completed the assessment proceedings and bills amounting to Rs.1,02,23,706.88, have been raised.

12. It is pointed out that in terms of the order dated 24.7.2000 of the Deputy Municipal Commissioner (Revenue HQ) the said premises were surveyed and assessed. The assessment was made from April 1974 to March 2001, when it was found that a total amount of tax payable, in respect of the said premises, as assessed is Rs.26,47,07,167/- out of which approximately Rs.7.70 crores, which includes Rs.1,10,50,624.51 p. in Suspense A/c., have been realized. However, more than Rs.18.7 Crores of tax is due from the premises. The details of year wise valuation and tax liability contained in a Summary Report on Annual Valuation with Tax Liabilities of premises No.24, Park Street, Kolkata. A copy of the report has been filed.

13. The High Court has referred to all the relevant factors and has kept in view the correct position in law. That being so, there is no merit in these appeals which are accordingly dismissed.