

(1959) 08 MP CK 0014

In the Madhya Pradesh High Court

Case No : Civil Miscellaneous Appeal No. 32 of 1957

Firm Ramnath Ramgopal Gattani and Others

APPELLANT

Vs

Firm Ramnath Moolchand and Others

RESPONDENT

Date of Decision : 21-08-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 2, 47

Citation : AIR 1960 MP 257 : (1960) JLJ 639 : (1960) 5 MPLJ 95

Hon'ble Judges : V.R. Newaskar, J

Bench : Single Bench

Advocate : S.L. Dubey, for the Appellant; R.G. Waghmare, for the Respondent

Final Decision : Allowed

Judgement

V.R. Newaskar, J.

This appeal arises out of execution proceedings. The circumstances leading to it are as follows:

On 23-12-1943 the appellant decree-holder obtained a money decree against the respondent for money. The appeal preferred by the respondent against that decree was dismissed on 10-1-1945. Thereafter an execution petition was filed by the appellant for realisation of the decretal amount. In the course of this execution petition a compromise was arrived at between the parties on 12-8-1948 whereby the decree-holder settled the entire claim under the decree for a consideration of Rs. 15000/- and the respondents sold two of his houses for consideration of Rs. 8000/- and 5000/- to the appellant and the satisfaction was thus obtained by his decree by the appellant to the extent of that sum of Rs. 13000/-.

The balance of the amount of Rs. 2000/- was agreed to. He paid within two months. The respondent had also borrowed Rs. 200/- from the appellant for meeting the expenses of stamps required for executing the sale-deeds of the aforesaid two houses. This sum of Rs. 200/- was also agreed to be repaid within

two months along with the sum of Rs. 2000/- and it was further agreed that until the balance of decretal amount of Rupees 2000/- and the additional sum of Rs. 200/- borrowed by the respondent was paid the third house of the respondent which had already been attached in execution prior to the settlement was to continue under attachment and in default of payment as stipulated the appellant decree-holder was entitled to have that house sold in realisation of his dues.

The aforesaid sum of Rs. 2200/- was to carry interest at Rs. 0-8-0 per cent P. M. Prior to the filing of this compromise petition in court the sale-deeds in respect of two houses had already been executed by the respondent. The respondent after filing the compromise petition did not pay the balance as well as Rs. 200/- which he had borrowed.

The appellant thereupon tiled the present execution petition No. 12 of 1952 for the recovery of the whole sum of Rs. 2200/- together with interest thereon.

The respondent objected to this execution on the ground that the amount sought to be recovered cannot be done in the course of execution and that a separate suit for the purpose was necessary. There were other questions raised with regard to the compromise petition being fictitious and without consideration.

At the hearing only the contention regarding non-executability of the decree in the present context" appears to have been raised. The learned Additional District Judge on hearing arguments held that inasmuch as liability extraneous to the decree was sought to be included in the compromise the decree was extinguished in its entirety. The agreement to pay Rs. 2200/- at interest of annas 8 per cent P. M. according to the learned Judge constituted a fresh contract and the liability thereunder could not be enforced in execution. Consequently he dismissed the execution petition.

The present appeal is directed against that decision. "

It is contended by Mr. Dubey for the decree-holder that so far as the sum of Rs. 2000/-, (which remained unpaid) until the realisation of which a house already attached in execution was to continue under attachment, was concerned the parties clearly had intended that the amount ought to be enforced in execution by the sale of the attached house. There is no doubt a fresh borrowing of Rs. 200/- and that sum was also agreed to be repaid by 12-10-1948 but there is nothing in the compromise petition to suggest that the decree-holder's right under the decree was extinguished forthwith and a fresh and new right was created which could only have been enforced by means of a separate suit. It was also contended that the term regarding repayment of Rs. 200/- is clearly severable from the rest of the terms and that therefore there was no legal impediment in enforcing realisation of the balance of Rs. 2000/- payable under the decree together with interest thereon. Learned Counsel relied upon the decision in AIR 1948 35 (Nagpur) , in support of his contention.

In my opinion the order of the lower court, holding the decree to have become

totally unexecutable due to the compromise of 12-8-1948 even with regard to the sum of Rs. 2000/- payable under the decree and interest thereon, is erroneous.

In AIR 1939 80 (Privy Council) , their Lordships of the Privy Council had to deal with an adjustment arrived at between the parties whereby the decretal amount under a mortgage-decree was agreed to be paid by certain instalments contrary to the terms of the original decree on consideration of judgment-debtor's agreement to pay enhanced interest. Question arose whether a bargain such as that, which had been recorded by the court could be enforced by means of execution or not. Their Lordships observed in that connection:

""They do not consider that it takes sufficient account of the facts that the Code contains no general restriction of the parties" liberty of contract with reference to their rights and obligations under the decree and that if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of Section. 47 involve that questions relating to such terms may fall to be determined by the executing Court. ""Amendment," or alteration of the decree whether u/s 152 or by review is a different matter under the Code. No doubt an adjustment, if not recorded under Order 21, Rule 2, cannot be recognised by any Court executing the decree. The compromise of 1927 however was recorded: it was an adjustment even if it was something more, and it contained the terms upon which the adjustment was agreed to. It was not an attempt to bring under the decree a liability extraneous to the mortgage or the mortgage suit : AIR 1937 256 (Privy Council) at p. 308. Their Lordships see nothing in the Code requiring them to hold that had the judgment-debtor paid the agreed instalments punctually the appellants, after 1927, could have executed the decree for the whole sum outstanding contrary to the terms of the compromise. Nor do they think it reasonable that such a compromise, if enforced by the executing Court, should not be enforced as a whole. They are not prepared to regard a fair and ordinary bargain for time in consideration of a reasonable rate of interest as an attempt to give jurisdiction to a Court to amend or vary the decree. Such a bargain has its effect upon the parties" rights under the decree and the executing Court u/s 47 has jurisdiction to ascertain its legal effect and to order accordingly."

It is clear from this decision that where there is adjustment of the decree in part and time is given to the judgment-debtor to pay the rest and there is stipulation to pay interest it depends upon the intention of the parties whether the amount remaining unpaid could or could not be enforced in the course of execution proceedings. There is nothing, according to their Lordships in the Code, to prevent the parties to agree to have such payment enforced in the course of execution proceedings. If a liability extraneous to the decree is sought to be made a part of the decree then there may perhaps be a question whether such a compromise decree can be executed or not. But where all that is done is to provide for payment of balance of the decretal amount by a certain date

indicated in the agreement with interest by means of execution and a distinct and separate agreement to pay an additional sum borrowed the agreement is clearly severable and parties can well be taken to have intended that so far as the liability remaining undischarged under the decree could be enforced in execution in terms of the adjustment and so far as the other liability is concerned the decree-holder should be left to his remedy by having recourse to a suit.

In the present case this appears to be the intention of the parties. Because it was clearly provided that the house which was attached should remain under attachment until the amount was paid. There is nothing in the wording of the agreement to suggest that the sum of Rs. 200/- should also be recovered by means of execution. In case the parties had intended total extinguishment of their rights under the decree there could be no term for continuance of attachment. The mere circumstance that the respondent judgment-debtor agreed to pay the amount of Rs. 200/- borrowed by him afresh before the attachment was removed does not mean that the said amount was made a part of the decree. The agreement only provided that the balance of decretal amount of Rs. 2000/- as also this amount of Rs. 200/- would be paid within two months and on payment the attachment should cease.

The decree-holder no doubt has sought to recover Rs. 200/- with interest thereon as well in the present execution, But the learned counsel for the appellant conceded that this was wrong and all that the decree-holder could recover in execution was the amount payable under the decree which had been satisfied in its major part. In AIR 1948 35 (Nagpur) the Division Bench of this Court took the view that it was open for the parties to a decree to agree that in view of a decree for rent, the decree-holder might be put in possession of the rented house and that the executing court could give effect to such an agreement. Learned counsel for the respondent contended that this view was not in accord with the decision in (AIR 1939 80 (Privy Council)). It is not necessary for the purpose of the present case whether the view taken in the aforesaid case is or is not in accord with the view taken in the two Privy Council decisions in AIR 1937 256 (Privy Council) and (AIR 1939 80 (Privy Council)).

In the case under consideration since, it was agreed between the parties that time of two months might be given to the judgment-debtor to pay the balance of the amount of Rs. 2000/- payable under the decree and that till then the attachment might continue and in default the decree-holder might realise his dues by the sale of the property, the case clearly fell within principle enunciated by their Lordships of the Privy Council in, 66 Ind App 54; (AIR 1939 80 (Privy Council)). The parties' clearly intended that there should be no immediate satisfaction of the entire decree. They in fact intended that the decree-holder on commission of the default might proceed further in his execution by securing the sale of the property already attached.

The mention made in this agreement to an independent transaction of loan of Rs. 200/- and assurance given by the judgment-debtor that sum too would be paid

at one and the same time when Rs. 2000/- were paid did not mean that there was an attempt to include a liability extraneous to the decree. AH that happened was to roll two distinct and separable agreements into one and the court before whom the same was submitted should be taken to have recorded certification in respect of that part which related to the decree leaving the parties to their remedy as regards the extraneous part.

The learned Lower Court was therefore in error in dismissing the execution of the decree even as regards the sum of Rs. 2000/- with interest agreed upon which could lawfully have been realised by the decree-holder in execution.

The appeal is therefore allowed. The order of the lower court dismissing the execution petition is set aside and the case is sent back. The executing court shall secure realisation of the balance of Rs. 2000/- together with interest referred to in the compromise agreement. The appellant is entitled to costs both of this court as well as of the court below from the respondent who shall bear his own costs.