

(2012) 03 KL CK 0051
In the High Court Of Kerala
Case No : C.R.P.No. 546 of 2006

George, A. J. Revision

APPELLANT

Vs

State Bank of Travancore

RESPONDENT

Date of Decision : 09-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 3A, Order 21 Rule 1, Order 21 Rule 2, Order 34 Rule 11, 34

Citation : AIR 2013 Ker 13 : (2013) 3 BC 116 : (2012) 2 ILR (Ker) 700 : (2012) 2 KLJ 568

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : P.C. Chacko Parathanam, Smt. Asha Kuriakose and Smt. Praseetha, K. for revision petitioner, for the Appellant; Santhosh Mathew and Sri Sathish Ninan, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Justice K.T. Sankaran

1. The judgment-debtor in O.S.No. 551 of 1987 on the file of the Court of the Principal Subordinate Judge, Kottayam is the revision petitioner. He challenges the order dated 7-4-2006 in E.A.No. 163 of 2002 in E.P.No. 249 of 1990, by which the prayer to refund a sum of Rs. 78,431 as alleged excess payment, was dismissed by the court below. The suit was decreed on 17-8-1989 for realization of a sum of Rs. 78,738.90 with interest at 16.5%. E.P.No. 249 of 1990 was filed by the decree-holder bank for realization of a sum of Rs. 1,24,813.07. On 29-11-1999, the decree-holder filed a statement showing the balance amount as Rs. 78,431. On that basis, the judgment-debtor paid that amount on 7-12-1999. On 14-12-1999, the Execution Petition was closed after recording full satisfaction of the decree. The case of the judgment-debtor is that even after payment of Rs. 78,431, the original title deeds were not returned by the decree-holder bank.

2. On 20-1-2000, the decree-holder filed E.A.No. 45 of 2000 to review the order

recording full satisfaction of the decree. In that application, the decree-holder stated that interest was not calculated for the period from 12-9-1997 to 14-12-1999.

3. While E.A.No. 45 of 2000 was pending, it would appear that the judgment-debtor agreed to sell the property to a third party. According to the decree-holder, Rs. 45,000 was still due to the bank at that time. The third party purchaser deposited that Rs. 45,000 before the executing court on 21-7-2001.

4. Meanwhile, the judgment-debtor filed O.S.No. 164 of 2000 before the Munsiff's Court, Kottayam against the decree-holder bank claiming a sum of Rs. 78,738.90 allegedly collected in excess by the decree-holder bank. That suit was dismissed on 18-12-2003 on the ground that the suit was not maintainable and if at all the plaintiff therein was aggrieved, his remedy was only to file an application before the executing court u/s 47 of the Code of Civil Procedure.

5. Thereafter on 11-6-2002, the judgment-debtor filed E.A.No. 163 of 2002 for the following reliefs:

For the reasons stated in the accompanying affidavit filed along with this petition, it is humbly prayed that the Hon"ble court may be pleased to restore the execution petition No. 249/90 in O.S.No. 551/87 and to call for the ledger containing the folio of the petitioner's loan account maintained by the plaintiff/decree-holder bank for favour of scrutiny to ascertain whether the amount of Rs. 78,431 paid on demand by the petitioner out of court on 7-12-1999 to decree-holder was legally due to it in addition of Rs. 1,24,813 paid by the petitioner towards decree debt.

The decree-holder bank filed objections in E.A.No. 163 of 2002 and contended that no excess amount was collected from the judgment-debtor. The decree-holder stated that it has no objection to reopen the Execution Petition. Statements as to payments and adjustments were also filed by the Bank. On 5-10-2005, the Execution Petition was restored to file.

6. The judgment-debtor filed W.P.(C) No. 7962 of 2006 before the High Court against the decree-holder bank for a direction to the latter not to realize any further amount from the judgment-debtor. That Writ Petition was disposed of permitting the judgment-debtor to raise all the objections before the executing court. The executing court was also directed to look into the question whether the bank could be permitted to realize any further amount from the judgment-debtor.

7. After the stranger purchaser deposited Rs. 45,000 before Court, E.A.No. 45 of 2000 filed by the decree-holder praying to review the order of the executing court recording full satisfaction of the decree was take up for hearing and the following order was passed on 23-3-2002:

It is submitted by both sides that the entire amount has been paid. The learned counsel for the decree-holder is also heard. It is submitted that EA can be closed.

EA closed.

8. After passing the order dated 23-3-2002 in E.A.No. 45 of 2000, the judgment-debtor moved E.A.No. 163 of 2002 on 11-6-2002 claiming that excess amount was paid and that "there is something rotten somewhere". In E.A.No. 163 of 2002, the judgment-debtor raised a contention that the decree-holder was not entitled to realize any interest beyond the period of three months from the date of the decree, in view of the specific terms in the decree. This contention was rejected by the executing court. On a fair reading of E.A.No. 163 of 2002, the main thrust is on the contention that no interest was payable after three months from the date of the decree and the interest having been collected, the judgment-debtor was entitled to get refund of the amount collected from him in excess of the amount due.

9. The decree provides thus:

That the defendant is directed to pay to the plaintiff Rs. 78,738.90 with interest at 16.5% from 3-11-1987, within three months.

The defendant do pay the cost to the plaintiff, failing which the plaintiff is to recover the same by sale of plaint "A" schedule hypothecated movables and plaint "B" schedule immovable properties.

And if they are not sufficient against the defendant personally.

10. The issues raised in the suit were the following:

1. Whether the defendant is entitled to an installment decree?
2. What is the rate of future interest to be awarded?

11. The relevant portion of the judgment answering these issues reads as follows:

6. The defendant has only prayed for an installment decree and restricted interest at the rate of 6% per annum from the date of suit. The plaintiff is not agreeable for the said proposal. The suit is one for realisation of the amount by sale of the mortgaged properties. As this is a mortgage decree and not a simple money decree the defendant is not entitled to get an installment decree. Moreover the conduct of the defendant shows that he does not deserve an installment decree. Then the question is only about future interest. The transaction is admittedly a commercial transaction. Therefore u/s 34 and Order XXXIV, Rule 11 of the CPC plaintiff is entitled to get future interest at the contract rate. Nothing has been pointed out to depart from this provision and to grant only a lesser interest. Therefore I hold that the plaintiff is entitled to get future interest at the rate of 16.5% per annum from the date of suit till realisation.

In the result the suit is decreed as follows: The defendant is directed to pay to the plaintiff Rs. 78,738.90 with interest at 16.5% from 3-11-1987 and cost of the suit within 3 months from this date failing which the plaintiff is entitled to

realise the same by sale of plaint "A" schedule hypothicated movables and plaint B schedule immovable properties and if they are not sufficient against the defendant personally.

It is clearly stated in the judgment that the plaintiff is entitled to get future interest at the rate of 16.5% per annum from the date of suit till realization. However, in the last paragraph of the judgment, a period of three months is mentioned. According to the judgment-debtor, the decree-holder is entitled to get interest only for a period of three months and not thereafter. Such an interpretation is not possible on a fair reading of the judgment. The contention of the defendant was that interest was payable only at 6% per annum from the date of the suit. That contention was negatived by the trial court and it was held that the defendant was liable to pay interest at the contractual rate. The Court did not restrict payment of interest for a period of three months. On the other hand, the judgment is clear to the effect that future interest is payable till realization. The mention of three months" period in the last paragraph of the judgment would only indicate that the judgment-debtor was granted a period of three months to pay the decree amount. During the said period of three months, the decree-holder would not be entitled to execute the decree. A facility granted to the judgment-debtor is being misinterpreted by him to claim exemption from payment of interest. Though the judgment and decree were passed on 17th August, 1989, the judgment-debtor did not pay the decree amount in full till 2001. Such a person claims that he is not liable to pay any interest at all after the expiry of three months from the date of the decree.

12. The learned counsel appearing for the petitioner/judgment-debtor submitted that the executing court need look into the decree alone and it is not proper to make an enquiry as to what was meant by the terms of the decree. Even if the decree alone is taken into account, the interpretation sought to be placed by the judgment-debtor is not liable to be accepted. That the defendant was directed to pay the amount within three months does not mean that he need pay interest only upto that period. That direction to pay interest within three months is followed by the default clause enabling the decree-holder to recover the amount in the manner indicated in the decree. Therefore, I hold that even if the decree alone is taken into account, the judgment-debtor is liable to pay interest even after the expiry of three months from the date of the decree.

13. It is well-settled that if there is ambiguity in the decree, for the purpose of construing the terms of the decree, the judgment also can be looked into. There is no case for the judgment-debtor that going by the judgment, he is not liable to pay interest from the date of decree till realization.

14. It is seen from the records that the judgment-debtor filed E.A. No. 94 of 2003 on 10-2-2003 claiming refund of the alleged excess payment of Rs. 1,53,901.50. In that application, the judgment-debtor put forward the very same contention as raised in E.A.No. 163 of 2002 that he was not liable to pay interest beyond the period of three months from the date of decree. E.A.No. 94 of 2003

was filed after E.A.No. 163 of 2002 (from which the Revision arises) was filed. However, when E.A.No. 94 of 2003 came up for hearing on 5-4-2005, the judgment-debtor did not press that application and it was, accordingly, dismissed as not pressed. Though he abandoned E.A.No. 94 of 2003, the judgment-debtor pursued E.A.No. 163 of 2003.

15. The learned counsel for the petitioner/judgment-debtor submitted that the extracts of the loan accounts were directed to be produced by the bank. Ext.A-1 is the account ledger folio maintained by the decree-holder with respect to the account of the judgment-debtor. On 12-9-1997, the entry therein is "nil". The judgment-debtor contended that when the ledger folio shows "nil", no amount would be due to the decree-holder as on that date. Therefore, the demand of Rs. 78,431 on 29-11-1999 and further demand of Rs. 45,000 thereafter were illegal and unjust. It is contended that in the peculiar circumstances, the judgment-debtor was compelled to pay the amount. However, the decree-holder is not entitled to retain the same. The executing court is bound to protect the interests of the judgment-debtor and to direct refund of the excess amount realized by the decree-holder.

16. It is submitted by the learned counsel appearing for the decree-holder bank that after a suit is filed in respect of a nonperforming asset, interest would not be calculated and entered in the ledger folio kept by the bank. A protested bill account would be maintained by the bank in such cases, in which the interest would not be entered. The protested bill account would never reveal the actual amount due to the bank, after filing the suit. It is submitted that when a decree is passed, the amount payable to the decree-holder would be governed by the decree and not by the ledger folio in respect of the loan account kept by the bank. The account kept by the bank after filing the suit and the entries made therein are intended only for the internal accounting purpose of the bank. The learned counsel submitted that such method of accounting is being made on the basis of the circulars issued by the Reserve Bank of India.

17. In the matter of execution of the decree, the parties are governed by the decree and not by the account maintained by the decree-holder whether it is a bank or a private individual. What is the amount due under the decree is to be computed with reference to the decree and the payments, if any, made thereafter. The payments are to be made and certified as provided in Rules 1 and 2 of Order XXI of the Code of Civil Procedure. For the purpose of such proof, probably the ledger account maintained by the bank may be relevant. But the ledger account maintained by the bank for the period after the decree is not relevant at all for computing the actual amount due as per the terms of the decree. The judgment-debtor was not entitled to rely on the entries in the ledger folio kept by the bank. I am inclined to accept the submission made by the learned counsel appearing for the decree-holder that the entry "nil" in the ledger folio was as stated by the decree-holder in evidence and that it does not mean that no amount was due as on that date from the judgment-debtor.

18. In this case, the judgment-debtor examined himself not as PW.1, but as PW.2. He examined the Manager of the decree-holder bank as PW.1. It is strange to note that the same person who was examined as PW.1 was also examined on the side of the decree-holder as PW.1. A reading of the deposition of PW.1 would show that the questions put to him in the chief examination were in the nature of the questions which are generally put in cross-examination. The practice of citing the opposite party as a witness is deprecated in various judicial pronouncements. It is not a healthy trend to examine the same person as a witness for the petitioner and as a witness for the respondent. The petitioner cannot say that he cited the respondent as a witness for the petitioner since he apprehended that the respondent would not examine himself. Even if the respondent does not adduce any evidence, that does not enable the petitioner to cite the respondent as a witness in normal circumstances. In such circumstances, the petitioner can only say that an adverse inference should be drawn against the respondent to the extent possible. Rule 3A of Order XVIII of the CPC provides that where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage. In the present case, no such permission was sought for by the petitioner/judgment-debtor.

19. Though the decree was passed on 17-8-1989 and the Execution Petition was filed in 1990, matters have not come to an end even now. All sorts of untenable contentions were raised by the judgment-debtor at every point of time, wherever possible. The contentions put forward by the judgment-debtor are devoid of merit. The learned counsel for the petitioner/judgment-debtor submitted that going by the statement filed by the bank in the present proceedings, a sum of Rs. 2,346 would be due to the bank and the bank is likely to proceed against him for realization of that amount together with interest. I do not think that the bank would request for such a relief after the various proceedings mentioned above were over. The Execution Petition was closed after recording full satisfaction. Pointing out a mistake on their part the bank applied to review that order. Now on payment of the last installment of Rs. 45,000, the Execution Petition was closed on 23-3-2002, after recording the statements of both sides. Therefore, there is no question of a fresh Execution Petition being filed by the bank.

For the aforesaid reasons, the Civil Revision Petition is dismissed with costs.