(1937) 03 PAT CK 0002

In the Patna High Court

Kissen Gopal Ganwariwala and Others APPELLANT

Vs

Madan Lal RESPONDENT

Date of Decision : 15-03-1937

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1937 Patna 542

Hon'ble Judges : Rowland, J;Dhavle, J

Bench : Full Bench

Judgement

Dhavle, J.—This is an appeal by certain judgment-debtors from an order dismissing their objections in an execution proceeding. The decree under execution was passed on the Original Side of the Calcutta High Court against Kishun Gopal and Rameshwar Lal personally, and also against Sitaram and Gigla, two minors, "out of their share or interest in the assets in or to come to their hands of the joint family estate of the defendants," and it was a decree for over Rs. 19,000 besides interest and costs, the minor Sitaram alone being made liable for the difference between the costs of the suit as a defended suit and the costs as of an undefended suit. Execution was started in the Court of the Subordinate Judge of Purulia in October 1934. Two months afterwards the judgment-debtors filed an objection u/s 47, Civil P.C., which was disallowed in the following April. While that objection was pending, the judgment-debtors filed another objection in February, stating that the decree-holder had been satisfied to the extent of Rs. 12,500 and urging that he was therefore not entitled to proceed in respect of the entire amount decreed. Next month they filed another objection urging among other things, that the decree was a nullity as it was a joint decree and one of the defendants, the minor Gigla, had died before the decree was passed. While these two objections were pending, the parties arrived at a compromise on 29th April 1935 according to which the whole decree was to be treated as satisfied if the judgment-debtors paid Rs. 5,500 to the decree-holder within two months, and the decree-holder was to proceed with the execution if the judgment-debtors did not pay the agreed sum of Rs. 5,500 within the time fixed. This compromise was filed in Court on the following day and the Subordinate Judge stayed the execution proceedings till 29th June 1935. On this day, the decree-holder applied for time to proceed, and on 4th July 1935 he asked for the issue of sale proclamations (certain properties of the judgment-debtors having already been attached) alleging that the judgment-debtors had not paid anything to him and that he was therefore entitled to realize the entire decretal amount. It appears from the order-sheet of the lower Court, which is before us, that on 2nd August 1935 Rameshwar Marwari filed an objection u/s 47, which was allowed on 10th August; we understand that that was an objection regarding valuation. The sale was then fixed for 16th September 1935 on which day an objection was filed by Kishun Gopal urging among other things the old objection that on account of Gigla''s death before the passing of the decree, the decree which was joint was null and void. The sale was not actually held on 16th September, but was "kept on hammer" from day to day till 21st September when the judgment-debtors filed another objection urging among other things that as the decree was against a firm, the personal properties of the judgment-debtors were not liable under it. The learned Subordinate Judge heard this objection and the objection of 16th September, together on 21st September, and finding them untenable allowed the sale to proceed.

2. It is contended for the appellants that under the compromise of 29th April 1935 the decree-holder was not entitled to proceed with the execution. It is not pretended that the decree-holder was paid Rs. 5,500 or any part of it within the stipulated period of two months, but it is urged that time was not of the essence of the contract, that the judgment, debtors were therefore only bound to pay Rs. 5,500 within a reasonable time, that the Court had power to relieve against forfeiture, and that the learned Subordinate Judge should have investigated an allegation made in the judgment-debtors'' petition of the 21st September that the decree-holder was not willing to take Rs. 5,500 though the judgment-debtors had been ready to pay it.

3. According to the terms of the compromise of the 29th April, the judgment-debtors had two months from that day to pay Rs. 5,500 to the decree-holder in full satisfaction of the decree. As I have already stated, the decree-holder moved the Court on the 4th July for the issue of sale proclamations on the ground that the judgment-debtors had not paid anything. It has not been claimed before us that in his objection of the 2nd August, Rameshwar Marwari said anything regarding, the readiness of the defendants to pay and the unwillingness of the decree-holder to receive Rs. 5,500. In his objection of the 16th September Kishun Gopal did urge that the decree-holder was not entitled to take out execution for the entire amount as he had contracted to take Rs. 5,500 in full satisfaction of the decree, but even then he did not say anything about the readiness of the judgment-debtors to pay and the unwillness of the decree-holder to receive that amount. The point was only mentioned for the first time in the judgment-debtors'' objection of the 21st September, five days after the date fixed for the sale and nearly three months after the expiry of the stipulated

period of two months from 29th April. There is no reference to this point in the judgment of the lower Court, nor is it clearly stated in the grounds of appeal that the Subordinate Judge omitted to deal in his judgment with this or any other point that was actually argued before him. It seems to me from all this that the point was not really taken--argued--below. The judgment-debtors had evidently been filing one objection after another without meaning, it, and the compromise petition, after empowering the decree-holder to proceed with the execution in case he was not paid Rs. 5,500 within the stipulated time, went on to say:

In regard to the same (that is to say execution for the decretal amount of Rs. 19,700) the judgment-debtors will not be competent to raise any objection. The judgment-debtors withdraw the objections they have raised regarding valuation, etc., in the execution, and they will not be corn-patent to raise those objections in future.

4. The decree-holder, it is plain, agreed to take the Rs. 5,500 within a limited time in order to avoid the delay to be apprehended from what looked like the habit of the judgment-debtors of raising objections from time to time. The objections actually urged before the learned Subordinate Judge and dealt with by him relate to the death of Gigla as affecting what is claimed to be a joint decree, and the decree being against a firm and not against the individuals constituting the firm. What I have already -stated about the details of the decree is sufficient to show how palpably untenable the objections actually urged were. Although it is urged in appeal that the lower Court should have investigated the judgment-debtors'' allegation that though they had been ready to pay, the decree-holder was unwilling to receive Rs. 5,500, it does not appear that the Subordinate Judge was asked--moved--to do so, or that any evidence was offered or any adjournment asked for to enable them to produce it. The mere allegation was no proof, and this was probably one of the reasons why the point was not actually urged before the learned Subordinate Judge. I am not prepared in these circumstances to hold that an investigation should have been made by the lower Court. As regards the power of the Court to relieve against forfeiture, it is to be remembered that equity only interferes to do complete justice between the parties:

No doubt, If forfeiture is occasioned by accident, fraud, surprise, or ignorance, a Court of Equity will interpose and relieve against forfeiture so caused; but it is equally clear that a Court of Equity will refuse to aid a defaulter if the forfeiture is wilful or is the result of gross negligence: as Mookerjee, J. observed in Harakh Singh v. Saheb Singh (1907) CriLJ 176.

5. Nor does this appear to be a case of forfeiture of the kind that equity would have relieved against, even if the judgment-debtors had made a serious attempt to pay according to the compromise into which they have entered and the attempt had failed for no fault of theirs. Where the creditor agrees to accept part of the debt in full satisfaction if paid within a stated time, equity will not relieve against the provision as to timer- Ford v. Earl of Chesterfield (1854) 19 Beav

428, cited and distinguished by Lord Kingsdown in Ram Gopal Mookerjea v. Samuel Masseyk (1859) 8 MIA 239. In such a case there is no scope for the application of the doctrine of penalties (Ex parte Burden; In re Neil, (1881) 16 Ch D 675 or forfeitures. The contention of the appellants that time was not of the essence of the contract is also plainly untenable on the facts of this case. The judgment-debtors had been repeatedly filing objections to the execution, when the decree-holder agreed to accept in full satisfaction Rs. 5,500 if paid in two months, the agreement further being that if not paid within time, he was to proceed with the execution without the judgment-debtors being "competent to raise any objection". This provision in the circumstances makes it clear that the parties intended time to be of the essence of the contract; for it cannot be reasonably supposed that the decree-holder who had a decree for over Rs. 19,700 would agree to be satisfied with a much smaller sum not within the time stipulated, but within such period as the Court may on evidence find to be reasonable.

6. In this view of the matter it is unnecessary to consider the larger question of the power of the executing Court in such circumstances to extend the time of payment without the consent of the decree-holder. A similar question, we were informed, had arisen in a Pull Bench reference which was pending. That reference has since been decided, Bhagwat Narain Singh v. Srinivas, AIR 1937 Pat 113, without pronouncing on the general question. It may be added that the view seems to have been taken in at least two cases in this Court, Chaudhry Rameshwar Misser Vs. Choudhry Sureshwar Misser, and Jadab Chandra Poddar v. Rameshwar Marwari, AIR 1930 Pat 308, that time fixed for payment by consent of the parties in execution proceedings cannot be extended by the Court without their consent. These were cases where payment was to be made in order to get an execution sale set aside or nullified. The same view was taken in Sheo Prasad Lal v. Tapeshwar Mahto AIR 1983 Pat 563 which was a case where the decree-holder was to proceed to realize the entire decree without any remission in case he was not paid certain instalments punctually. In Mt. Nand Rani Kuer v. Durga Dass Narain AIR 1924 Pat 387 however, Mullick, J. referred to Australian Automatic Weighing Machine Co. v. Walter CWN 170 and the exhaustive discussion of the question in Kandarpa Nag v. Banwari Lal Nag AIR 1921 Cal 356 and took it as settled that

where the agreement is for the payment of money on a prescribed date and that on default of payment on that date money is to be, forfeited, time is not of the essence of the contract,

and that in every case the Court must determine upon the facts of that case whether relief against forfeiture is to be given or not. This would imply that the Court has power to extend time if it should hold that there was a forfeiture involved in the agreement. In formulating his general rule about the forfeiture of money--the rule which was adopted by Mullick, J.--Mookerjee, J. in Kandarpa''s case Kandarpa Nag v. Banwari Lal Nag AIR 1921 Cal 356 proceeded on Ram

Gopal Mookerjea v. Samuel Masseyk (1859) 8 MIA 239 as a case where relief against forfeiture was given to a defendant who was indebted to the plaintiff in a certain sum which the defendant agreed to pay, upon a remission by the plaintiff of part of his claim, in two instalments on specified dates. But, as pointed out by Lord Kingsdown, that was

not the case of a creditor engaging to remit to his debtor a portion of his demand in consideration of his making payment of smaller sums punctually at fixed periods, in which case the punctuality of the payment is the only consideration which the creditor receives for his indulgence: Ford v. Chesterfield; Ford v. Earl of Chesterfield (1854) 19 Bea 428

but

a case in which a third person, being under no liability consents to incur that liability and binds himself in a penalty for the due performance of his engagement.

7. The general rule about forfeiture of money laid down by Mookerjee, J. in Kandarpa Nag v. Banwari Lal, Kandarpa Nag v. Banwari Lal Nag AIR 1921 Cal 356 on which Mr. Manohar Lal has laid so much stress, and which was applied by Mullick, J. in Mt. Nand Rani Kuer v. Durga Dass Narain AIR 1924 Pat 387 to a case where no debt was established apart from the compromise which terminated the suit, is thus of no help to the appellants, because, as I have already shown, the present case falls within the principle of Ford v. Chesterfield. Ford v. Earl of Chesterfield (1854) 19 Beav 428 In cases of this kind there is hardly any question of penalty or forfeiture or the analogous principle on which equity relieves against mere lapse of time where it is consistent with the substance of justice to do so, if from the contract or from the nature of the case time is not shown to be of the essence of the contrast. It is true that if the judgment-debtor does not pay in time, he becomes liable for the entire decretal amount. But the liability arises from the decretal debt and default in the punctual payment of the smaller sum which the decree-holder had agreed to accept in full satisfaction, subject to payment within a fixed period, merely operates to remove an essentially temporary bar to execution. In the analogous case of an agreement under which an execution sale is to be set aside if the judgment-debtor pays a certain amount within a certain time, but is to stand confirmed if he does not, Mookerjee, J. himself held in Chandanbala v. Probodh (1909) 36 Cal 422 that the executing Court had no jurisdiction to extend the time "except by the assent of each and every one" of the parties to the agreement, not merely because time is of the essence of the contract in such cases but also because any modification of the agreement required the concurrence of all the consenting parties. In that case there was no question of any forfeiture: see Hansraj v. Jogeehar AIR 1925 Pat 691; but in Akkach Mondal v. Aminuddi AIR 1919 Cal 68 Teunon and Newbould, JJ. only extended the time fixed for payment by a compromise decree in a mortgage suit because the mortgagee did not seriously press his objection as regards the jurisdiction of the Court to extend time.

8. Assuming however in favour of the appellants that the Court may in some oases have jurisdiction to vary a consent order as regards time without the concurrence of all the parties, it is clear that in the present case the contention that time was not of the essence of the contract and that the judgment-debtors were entitled to have the decree satisfied by paying Rs. 5,500 within a reasonable time, is untenable and must be overruled. It follows that the decree-holder was entitled to proceed with the execution. It was also urged incidentally that the compromise only entitled the decree-holder, in case the judgment debtors did not pay the Rs. 5,500 within the stipulated time, to levy execution for Rs. 5,500 only. This contention is raised on the words of the compromise:

Tabe decreedar tahar decree babat prapya ar that 19700 takar jarite sampatti nilam bikray mate aday karia leite paribe.

9. The translation of this clause in the paper book is entirely against the appellants'' contention. The learned Subordinate Judge was a Bengali, and the contention was not raised before him. It is also not raised in the grounds of appeal. Nor is it easy to see any meaning in the interpretation suggested before us, namely that the decree-holder was to realise Rs. 5,500 by levying execution for Rs. 19,700. It was also similarly urged that according to the com promise the decree-holder was entitled to levy execution for Rs. 19,700 only. The decree was for Rs. 19,767-7-3. We do not know for what amount execution was actually levied after the failure of the appellant to pay, nor is the point really raised in the grounds of appeal. It was not raised below. I would therefore decline to entertain it. In my opinion the appeal should be dismissed with costs.

Rowland, J.

10. I agree. The observation of Khaja Mohammad Noor, J. in Bhagwat Narain Singh v. Srinivas AIR 1937 Pat 113 that

The wording of the contract clearly shows that the parties meant that the benefit which was to accrue to the judgment-debtors would be lost to them if the payment was not made within the specified time, or in other words time was of the essence of the contract,

applies in its entirety to this case. The question what a Court can or should do, if it thinks time not to be of the essence, hardly seems to arise. The appeal was in my view nothing better than a frivolous device to delay the execution proceedings.

