
(2009) 03 P&H CK 0124
In the Punjab And Haryana At Chandigarh

Kuldip Singh

APPELLANT

Vs

Central Bank of India

RESPONDENT

Date of Decision : 02-03-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 2

Citation : (2009) 154 PLR 223 : (2010) 8 RCR(Civil) 282

Hon'ble Judges : Rajesh Bindal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rajesh Bindal, J.—Challenge in the present petition is to the order dated 14.10.2004, passed by the learned court below, whereby the objections filed by the petitioner in execution of the decree filed by the respondent-Bank, have been dismissed.

2. Briefly, the facts are that the respondent-Bank filed a suit for recovery of Rs. 55,338.02 along with interest against the petitioner with the plea that way back in April, 1973, the petitioner took a loan of Rs. 23,400/- for purchase of Vicor JFMS-70 COMBINE HARVESTER. To secure the loan, the petitioner mortgaged his land. The petitioner having failed to repay the amount, the respondent-bank filed a suit under Order 34 of the Code of Civil Procedure. The same was decreed on 22.11.1993 for an amount of Rs. 55,338.02 along with future interest @ 9% per annum. Preliminary decree was drawn on 22.11.1993 granting the petitioner 3 months time to pay the amount. In case of failure, the bank was held entitled to move the court for passing of the final decree. In appeal, the judgment and decree of the trial court dated 22.11.1993 was upheld vide judgment and decree dated 24.5.1995, passed by the learned lower appellate court. Though no document is on record, however, it was stated by counsel for the petitioner that the respondent-bank filed execution of the decree passed in its favour. However, that was dismissed considering the fact that final decree against the petitioner had not been passed. On 2.11.1999, the respondent-bank filed an application

before the learned trial court for passing of final decree. The application was disposed of by the learned trial court vide order dated 14.10.2004 opining that the application filed by the respondent-bank for passing of final decree was beyond limitation. However, as only a remedy was lost and not the right, it was directed that the decree so passed earlier be considered not as a decree against mortgaged property, but a simple money decree and is executable as such. The order attained finality as the petitioner did not challenge the same in any further proceedings. It is in execution petition filed thereafter by the respondent bank in which the petitioner filed objections, which were dismissed vide impugned order.

3. Learned Counsel for the petitioner submitted that the decree which was passed in favour of the respondent-bank on 22.11.1993 was preliminary decree. Thereafter, no final decree having been passed in favour of the respondent bank, in terms of the settled position of law a preliminary decree was not executable and therefore, the learned court had gone wrong in dismissing the objections filed by the petitioner. He further submitted that even the order dated 14.10.2004 also does not come to the rescue of the respondent-bank because even as per that, the decree of the trial court dated 22.11.1993 merged with the judgment and decree of the learned lower appellate court passed on 24.5.1995 and it is that decree which could be executed and not as was passed by the trial court. Still further, the submission was that even after the order passed by the learned trial court on 14.10.2004, there was no decree passed in terms thereof which could be executed against the petitioner. On the other hand, learned Counsel for the respondent-bank submitted that the suit filed by the petitioner was simplicitor a suit for recovery. In the application, which was filed by the respondent-bank for passing of final decree, the learned trial court had specifically directed that the same judgment and decree could be treated as a simple money decree and the respondent-bank was not entitled to proceed against the mortgaged property. The order having not been challenged by the petitioner, he could not raise any objection during the execution proceedings, once the decree was sought to be executed as a simple money decree in terms of the order dated 14.10.2004.

4. After hearing learned Counsel for the parties, I do not find any merit in the submissions made by learned Counsel for the petitioner. The undisputed facts on record are that the petitioner, who is shown to be a Member of Legislative Assembly in the judgment of the trial court, raised loan of Rs. 23,400/- from the respondent-Bank for purchase of Vicor JFMS-70 COMBINE HARVESTER. The same was sanctioned on 17.4.1973 and requisite documents were executed by the petitioner. The petitioner having failed to repay the loan, the respondent-bank filed a suit for recovery of Rs. 55,338.02 along with interest @ 9.5% with half yearly rests on 23.12.1987. After contest the learned trial court decreed the suit along with future interest @ 9% per annum on the decretal amount of Rs. 55,338.02 from the date of filing of the suit till repayment. The judgment and decree was passed on 22.11.1993. As it was a suit filed under Order 34 CPC, the bank having been secured for the debt by way of mortgage of property, in terms

of provisions of Order 34 Rule 4 CPC, the petitioner was granted 3 months" time to pay the decretal amount and in case of failure, the respondent-bank was at liberty to move the court in terms of Order 34 Rules 5 and 6 CPC.

5. Aggrieved against the judgment and decree, the petitioner filed appeal before the learned lower appellate court, which was dismissed vide judgment and decree dated 24.5.1995. Meaning thereby, as far as decree for recovery of a sum of Rs. 55,338.02 along with future interest is concerned, the same attained finality.

6. In terms of the stipulation contained in the decree passed by the learned trial court, regarding granting of time to the petitioner for payment of the decretal amount before his property was to be put to auction or dealt with in the manner prescribed in law, the petitioner having failed to pay the amount, the bank was entitled to move the court for passing of final decree to debar the petitioner from getting the mortgaged redeemed and also put the bank in possession of the property or sell the property mortgaged with the bank for the recovery of the decretal amount, the quantum of which had already attained finality.

7. The bank filed application for passing of final decree on 2.11.1999.

8. The learned Additional Civil Judge (Senior Division), vide order dated 14.10.2004 finding that the application filed by the respondent-bank was beyond limitation, did not pass final decree. However, it was directed therein that the decree already passed for recovery of money along with interest can very well be executed as a simple money decree and the bank had lost right to proceed against the mortgaged property, which was subject to passing of the final decree. The aforesaid order attained finality as the petitioner did not challenge the same in any proceedings.

9. The present petition was filed before this Court challenging the order passed by the learned executing court, whereby the objections filed by the petitioner to the effect that the preliminary decree passed in favour of the respondent-bank could not be executed, were dismissed. While dismissing the objections, the learned executing court observed that vide order dated 14.10.2004, the court had already opined that the decree passed in favour of the respondent bank had to be executed as a simple money decree. Once that order had attained finality, there was no merit in the objection raised regarding non-passing of the final decree.

10. It is a case where the petitioner, being a public figure and at one time representing the people in the State Assembly, raised a loan, which was not repaid in time. The bank had to file a civil suit for recovery. In spite of the decree having been passed against him way back on 22.11.1993, all efforts are being made to avoid even execution of the decree.

11. To appreciate the contentions raised by learned Counsel for the parties, it would be appropriate to refer to the provisions of Section 2(2) CPC defining the

term "decree" and Order XXXIV Rules 2 and 3 CPC:

Section 2(2) of the CPC:

2. Definitions.- In this Act, unless there is anything repugnant in the subject or context,

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(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be other preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include,:

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default.

Explanation.- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;

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Order XXXIV Rules 2 and 3 CPC

Suits Relating to Mortgages of Immovable Property

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2. Preliminary decree in foreclosure suit.- (1) In a suit for foreclosure, if the plaintiff succeeds, the court shall pass a preliminary decree,:

(a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for:

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage-security, together with interest thereon, or

(b) declaring the amount so due at that date; and

(c) directing:

(1) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under Clause (a), or from the date on which such amount is declared in Court under Clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in Rule 10,

together with subsequent interest on such sums respectively as provided in Rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant at his cost free from the mortgage and from all incumbrances created by the plaintiff of any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

3. Final decree in foreclosure suit.- (1) Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under subrule (1) of Rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree,:

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary-(b) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree, and also, if necessary,:

(c) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the, plaintiff in possession of the property.

(3) On the passing of a final decree under sub-rule (2), all liabilities to which the

defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged.

A perusal of the definition of decree, as referred to above, shows that the same is formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in suit and may be either preliminary or final. Explanation to the aforesaid section shows that a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. A decree can be partly preliminary and partly final.

12. Order XXXIV CPC provides for suits relating to mortgage of immovable property. Rule 2 of Order XXXIV CPC provides for decree in a foreclosure suit. It provides that in case the plaintiff succeeds, the Court shall pass a preliminary decree ordering as to what amount is due to the plaintiff on account of principal, interest, costs and other charges/ expenses in respect of the mortgage. The Court will declare the amount so due on the date of passing of the decree and further direct the defendant in the suit that in case he pays the amount so declared due on or before such date, as may be fixed, the charge on the property shall be deemed to be released and in case the plaintiff is in possession of the mortgaged property, the possession thereof shall be delivered to the mortgagee. Order XXXIV Rule 2(c)(ii) CPC further provides that if the payment of amount found or declared due under the preliminary decree is not made on or before the date so fixed, the plaintiff shall be entitled to apply for a final decree debarring the defendant/mortgagor from all right to redeem the property. Order XXXIV Rule 3 CPC provides that where before a final decree is passed debarring the defendant/mortgagor from all right to redeem the mortgaged property, the defendant makes payment of the amount due in the Court, on an application filed by the defendant in this behalf, the Court shall pass a final decree for release of mortgaged property along with documents/possession thereof from the plaintiff mortgagee. However, in case of failure, on application made by the plaintiff, the Court shall pass a final decree declaring that the defendant-mortgagor and all persons through or under him are debarred-from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

13. A perusal of the aforesaid scheme of the provisions clearly establish that a decree can be partly preliminary and partly final. Further, in a suit for foreclosure, a preliminary decree is passed determining the amount due from the mortgagor and before a final decree is passed, debarring him from getting the mortgaged property redeemed, he is given opportunity to pay the amount determined to be due against him. In my considered opinion, in a suit for foreclosure, where the decree determines an amount due to be payable by the defendant therein on account of loan raised against the mortgaged property, part of the decree qua that is final. It is only preliminary to the extent that the

defendant-mortgagor is given opportunity by the court to pay back the amount in a certain specified period to get the property released. In case of non-compliance of the terms of the decree in that regard, the Court is entitled to pass a final decree debarring the mortgagor to get the property redeemed. It is only qua this part of the decree in a foreclosure suit for which a final decree is required to be pass, as in the preliminary decree certain act is still required to be done in the hands of the mortgagor and the subsequent order of the court, which is given the nomenclature of a final decree, is dependent on the action of the mortgagor-Judgment Debtor as in case of compliance with the terms of the preliminary decree, the mortgaged property is released from all encumbrances and in case of failure, the Judgment Debtor-mortgagor loses his right to get the property redeemed.

14. In the present case, the petitioner had mortgaged his property to secure the loan raised from the bank, for the recovery of which the suit was filed against the petitioner, which was decreed for a sum of Rs. 55,338.02 with future interest. The petitioner filed appeal against the judgment and decree of the trial court and failed. The challenge in the appeal was only with regard to the claim of the amount by the bank from the petitioner, meaning thereby as far as the part of the decree determining the amount due from the petitioner is concerned, the same was upheld.

15. As far as the second part of the decree is concerned, it is undisputed position on record that the petitioner had failed to comply with the terms of the decree requiring him to pay the amount due within 3 months to get the charge on the property released. No doubt, the application tiled by the respondent-bank for passing of final decree was dismissed by the learned court below vide order dated 14.10.2004 holding the application to be beyond limitation. However, in my opinion, no illegality as such was committed by the learned court below while directing in the aforesaid order that the decree passed against the petitioner on 22.11.1993 can still be executed as a simple money decree, as what the decree holder/respondent-bank had lost was its right to get possession of the property mortgaged with it. Another important fact is that even the petitioner was not aggrieved against the aforesaid order passed against him, as no further remedy was taken by him.

For the reasons mentioned above, I do not find any merit in the present petition. Accordingly, the same is dismissed.