
(1983) 09 RAJ CK 0022

In the Rajasthan High Court

Case No : Civil Execution first Appeal No. 11 of 1973

Mukand Das

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 20-09-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2, 47, 82

Citation : (1983) WLN 263

Hon'ble Judges : S.C. Agarwal, J

Bench : Single Bench

Judgement

S.C. Agarwal, J.—This execution appeal has been filed by the decree holder, Mukand Das, against the order dated 25th November, 1972 passed by the Additional District Judge No. 2, Jodhpur in civil execution case No. 2/1972. By the order aforesaid the Addl. District Judge partly allowed the objections that were filed by the respondent judgment debtors and held that the amount payable to the decree holder by the judgment-debtors was Rs. 1343.20.

2. The appellant was an employee of the Government of Rajasthan. By order dated 23-1-1956 passed by the Director Medical and Health Services Jaipur, respondent No. 2 the services of the appellant were terminated. The appellant filed a suit wherein he challenged the aforesaid order terminating his services and in the first appeal arising out of the said suit a compromise decree was passed by this Court on 5-4-1963. By the aforesaid compromise decree it was held that the appellant shall be deemed to be in service and the order of the Director dated 23-1-1966 terminating the services of the appellant would be ineffective and the appellant shall be entitled to his full salary from 28th June 1952 to 23-1-1956, when his services were terminated for the second time, and for the subsequent period he would get half the salary. The compromise decree also contained a direction that the respondent shall post the appellant on a suitable post as soon as it was practicable and the period from 1-7-1952 to such date would not be treated as break in service for any purpose what so ever. On

1st November, 1965 the appellant submitted a petition for execution of decree in the court of Addl. District Judge No. 2, Jodhpur. In the said execution petition the appellant claimed the sum of Rs. 44083.05 and submitted that, after adjusting the sum of Rs. 9319.30 already paid to the appellant by the respondents, the balance amount of Rs. 34763.75 was payable to the appellant which amount may be recovered by attachment and sale of the property of the respondents. After the said execution petition had been filed the Addl. District Judge made a report u/s 82 CPC to the Collector, Jodhpur. Since no action was taken on the basis of the said report the Addl. District Judge on 24th July, 1972 passed an order for the attachment of the property Under Order 21 Rule 30 CPC. Thereafter on 22nd September, 1972 a reply was filed on behalf of the respondents wherein it was submitted that the total amount payable to the decree holder under the decree was Rs. 10774.94 out of which Rs. 9319.30 had already been paid to the appellant and out of the balance the respondents were entitled to deduct a sum of Rs. 1162/- paid as excess to the appellant for the period from 1-4-1963 to 4-4-1963 and that after deducting the aforesaid amount only a sum of Rs. 293.68 was payable to the appellant. Alongwith the said reply a schedule containing the calculations with regard to the amount payable to the appellant was also filed. The appellant submitted his reply to the aforesaid objections filed on behalf of the respondents.

3. Before the Addl. District Judge the dispute between the parties related to the following two matters:

(i) The appellant claimed that he was entitled to be promoted as Compounder First Grade with effect from 1st April, 1950 on which date persons junior to him were promoted to the said grade and his salary from 1st April 1950 should be calculated on that basis. The respondents on the other hand claimed that the appellant was a compounder third grade at the time when he was originally dismissed from service on 27-6-1952 and that he was promoted as compounder First Grade only with effect from 7-6-1961 and that the appellant could not claim salary for compounder grade I prior to 7-6-1961.

(ii) The appellant was paid house rent allowance with effect from 1-9-1961 but he was claiming the said allowance from 24-1-1956 whereas the respondents submitted that the appellant was not entitled to get house rent allowance for the period from 24-1-1956 to 4-4-1963 the period for which he was paid half pay and they were claiming refund for the over payment of the house rent allowance from the period 1-9-1961 to 4-4-1963.

4. The Addl. District Judge held that the appellant was not entitled to claim the grade of compounder first grade with effect from 1-4-1950 in this execution petition and that he could only get the pay and allowance as first grade compounder with effect from 7-6-1961. As regards the house rent allowance, the Additional District Judge held that Under Rule 9 read with note 2 of the Rules for the grant of house rent allowance, the house rent may be drawn for the period of privilege leave and not for the half pay leave period and the appellant was not

entitled to get house rent allowance for the period of half pay, i.e. from 24-1-1956 to -4-1963 and the house rent allowance paid to the appellant from 1-9-1961 to 4-4-1963 which comes to Rs. 336.45 was to be adjusted. The Addl. District Judge held that since the first grade compounder is entitled to get mess allowance of Rs. 40/- per month, he was entitled to be paid mess allowance at this rate from 7-6-1961. In view of the aforesaid findings the Addl. District Judge calculated the amount that was payable to the appellant under the decree as Rs. 10998.95 and after adjusting the sum of Rs. 9319.30 which have been paid to the appellant and after adjusting the sum of Rs. 336.45 the excess amount paid to the appellant on account of house rent allowance from 1-9-1961 to 4-4-1963, the balance amount payable to the appellant was Rs. 1343.20. Being aggrieved by the aforesaid order passed by the Addl. District Judge the appellant has filed this appeal u/s 47 C.P.C.

5. I have heard Shri G.N. Gaur, the learned counsel for the appellant and the learned Dy. Government Advocate for the State.

6. The first contention urged by Shri Gaur was that the objection petition that was filed by the respondents could not be entertained in as much as it was barred by res judicata. In this regard the submission of Shri Gaur was that after the filing of the execution petition, the Addl. District Judge had made a report to the Collector Jodhpur u/s 82 CPC and that in spite of the said report no action was taken by the Collector, Jodhpur within the prescribed period of three months and no objection petition was filed and that thereupon on 24th July, 1972 the Addl. District Judge had passed an order for attachment Under Order 21 Rule 30 CPC and that the said order dated 24th July, 1972 operates as res judicata and that after the passing of the said order it was not open to the respondents to file an objection petition. In this regard Shri Gaur has submitted that the report that was made by the Addl. District Judge to the Collector u/s 82 CP should be equated to the notice contemplated Under Order 21 Rule 22 CP and the order dated 24th July 1974 should be treated as an order passed Under Order 21 Rule 23(1) CPC and in regards orders passed Under Order 21 Rule 23(1) CPC it is a settled law that principle of res-judicata applies in respect of such orders. In support of his aforesaid submission Shri Gaur has placed reliance on the decision of this Court in Amar Singh Vs. Gulab Chand, and Ghanshyamdas Vs. Gambhir Mal and Others, as well as the decisions of the Gujarat High Court in Ganchi Laxmichand Ambaram v. Tulsidas Madhavdas AIR 1963 Guj. 1 and the decision of the Andhra Pradesh High Court in P. Sainath Reddy and Others Vs. G. Narayana Reddy,

7. In Amarsingh v. Gulab Chand (supra) a Division Bench of this Court has laid down that the principle of constructive res judicata was applicable to execution proceedings and that the failure on the part of the judgment-debtor to raise an objection in earlier proceedings preclude the judgment debtor from raising the said objection in subsequent execution proceedings. To the same effect is the decision of the Single Judge of this Court in Ghanshyam Das v. Gambhirmal

(supra). In *Ganchi Laxmi Chand Ambirom v. Tulsidas Madhavdas* (supra) a learned Single Judge of the Gujarat High Court (P.N. Bhagwati J. as he then was) has held that the principle of constructive res judicata would be applicable at a subsequent stage of the same execution proceedings and held that if on a notice issued Under Order 22 Rule 23 CPC the judgment debtor remained absent and the court passed an order Under Order 21 Rule 23 CPC for the execution of the decree the said order operates as res judicata between the parties and bars any contention against execution of the decree by the judgment debtor. In *Sainath Ready and Ors. v. Narayan Reddy*, the Division Bench, of the Andhra Pradesh has taken the same view as that taken by the Gujarat High Court in *Ganchi Laxmi Chand Ambaram v. Tulsidas Madhavdas*. In my view the aforesaid decisions can have application in the present case only if the order dated 24th July 1972 passed by the Additional District Judge whereby he directed that attachment be made can be regarded as an order passed Under Order 21 Rule 23 CPC. In the present case admittedly no notice had been issued to the respondents Under Order 21 Rule 23 CPC. The submission of Shri Gaur was that the report that was made by the Addl. District Judge to the Collector, Jodhpur u/s 82 CPC should be treated as a notice issued Under Order 21 Rule 22 CPC and, therefore, the order dated 24th July, 1972 passed by the Addl District Judge should be treated as an order passed Under Order 21 Rule 23 CPC. I am unable to agree with the aforesaid contention. Section 82 CPC as it stood at the relevant time, laid down that where in a suit by or against the Government or by or against a Public Officer in respect of any such act as aforesaid a decree is passed against the Union of India or a State or as the case may be a time shall be specified in the decree within which it shall be satisfied and if the decree is not satisfied within the time so specified or within three months from the date of the decree where no time is so specified, the Court shall make a report of the case to the State Government and execution shall not be issued on any such decree unless it remains unsatisfied for a period of three months computed from the date of such report. As pointed out by the Calcutta High Court in *Asmaboo Kurban Hossain and Others Vs. Province of Bengal*, the object of Section 82 CPC is to allow time and opportunity to the State or Public Officers to satisfy the decree amicably before execution proceedings are allowed to be started against them. It is also true, as observed by this Court in *Ummed Mal Vs. Kundanmal and Another*, that the object of the notice issued Under Order 21 Rule 22 CPC is to give a fair notice of the execution to the judgment debtor. But in my view a report that is made by the court to the Government u/s 82 CPC cannot be equated to the notice issued to the judgment debtor Under Order 21 Rule 22 CPC. The report that is made u/s 82 CPC is required to be made by the Court before issuing execution on a decree passed against the State whereas a notice which is issued Under Order 21 Rule 22 CPC is part of the process of execution. This would imply that the report u/s 82 CPC is to be followed by a notice to the judgment debtors Under Order 21 Rule 22 CPC. It may be that in a particular case where the executing court makes a report u/s 82 CPC and in spite of the said report no steps are taken by the State for the satisfaction of the decree, the court may dispense with the notice

Under Order 21 Rule 22 CPC and may proceed with the execution of the decree. In such a case the order passed by the executing court for the execution of the decree has to be regarded as an order passed Under Order 21 Rule 23 CPC. But this does not mean that in every case the report made u/s 82 CPC must be equated with a notice Under Order 21 Rule 22 CPC and in absence of an express order dispensing with the notice Under Order 21 Rule 22 CPC, the order passed by the executing court for execution of the decree after the expiry of the period of three months mentioned in the report should be treated as an order passed Under Order 21 Rule 23 CPC. In the present case the Addl. District Judge did not pass any order dispensing with the notice Under Order 21 Rule 22 CPC. In the circumstances, the order passed by the Addl. District Judge on 20th July, 1972 cannot be treated as an order passed Under Order 21 Rule 28 CPC and on the basis of the said order the principle of res judicata cannot be invoked so as to preclude the respondents from filing objections against the execution of the decree after passing of the said order dated 24th July, 1972. The first contention urged by Shri Gaur is, therefore rejected.

8. The second contention that was urged by Shri Gaur was that Under Clause (4) of the compromise decree the respondents were directed to post the appellant on a suitable post as soon as it was practicable. The submission of Shri Gaur was that the aforesaid direction in the compromise decree postulates that the appellant should be posted on a post to which he would be entitled if the order terminating the service which was set aside by the compromise decree had not been passed. The submission of Shri Gaur was that if the order terminating the services had not been passed the appellant would have been promoted as compounder grade I from the same date on which persons junior to him were so promoted and since persons junior to him were promoted to the post of compounder grade I from 1st April, 1950 the appellant is also entitled to be promoted as compounder grade I with effect from 1st April, 1950, and the salary payable to him in the compromise decree should, therefore, be computed on the basis that the appellant had been promoted as compounder grade I with effect from 1st April, 1955 . In support of his aforesaid submission Shri Gaur has placed reliance on the definition of the word, "suitable" as contained in Stroud's Judicial Dictionary I Supplement 4th Edn. Shri Gaur has also placed reliance on the decision of the Supreme Court in P.R. Nayak Vs. Union of India (UOI), In my view there is no substance in the aforesaid contention of Shri Gaur Under the compromise decree the appellant is entitled to his full pay from 28th June, 1952 to 23-1-1956 the date of the passing of the order of the Director terminating his services and for the period subsequent to 23-1-1956 the appellant was to get half the salary upto the date of the passing of the compromise decree and the appellant was entitled to be posted on a suitable post as soon as it was practicable. In my opinion the aforesaid direction contained in the compromise decree does not postulate that the appellant should be posted on a post to which he would be entitled to be promoted if his services had not been terminated under order dated 23-1-1956. If the appellant felt that he was entitled to be

promoted as compounder grade I with effect from 1st April, 1950, he ought to have agitated this matter at the time of the passing of the compromise decree. Since no mention has been made in the compromise decree about the right of the appellant to be promoted as compounder grade I, the aforesaid question cannot be agitated by the appellant in the execution proceedings. In my view the term "suitable post" contained in Clause (4) of the compromise decree cannot be construed to mean that the appellant should be given promotions which were due to him before the passing of the compromise decree. The question as to whether the appellant is entitled to be promoted as compounder grade I with effect from 1st April, 1950 is a matter which will depend on the terms and conditions of service of the appellant as to whether the appellant was fit for promotion to such grade. The aforesaid matters which involve a separate and independent cause of action cannot be considered in these execution proceedings. The definition of "suitable post" contained in Stroud's Judicial Dictionary and the decision of the Supreme Court in *P.R.Nayak v. Union of India*, have, therefore, no application to the present case.

9. The third contention urged by Shri Gaur was that even if it be held that the appellant is not entitled to claim salary of compounder grade I, he is entitled to claim the increments that were given to other persons in the same grade in which the appellant was working at the time of the passing of the order terminating his services and that the Addl. District Judge while calculating the amount payable to the appellant under the decree has failed to take into account the increments in the pay which were allowable to the appellant in the grade held by him. I find considerable force in the aforesaid contention of Shri Gaur. From the schedule that has been annexed to the objections filed on behalf of the respondents it appears that the appellant was given the benefit of the revision of pay scales upto 23-1-1956 but for the period subsequent to 23-1-1956 the appellant has not been given the benefit of the revision in the pay scales and the salary has been calculated on the basis of Rs. 100/- and D.A. Rs. 30/- that was payable to him on 23-1-1966 and on that basis the half salary of the appellant for the period subsequent from the period 23-1-1956 has been calculated. In my opinion the direction given in the compromise decree with regard to payment of full pay to the appellant from the period from 28-6-1952 to 23-1-1956 and half pay for the period subsequent to 23-1-1956 does entitle the appellant to have his salary calculated on the basis of the pay which the appellant would have drawn if his services had not been terminated. It was not open to the respondents to deny the increments that were given by them to persons holding the same post as the appellant. The respondents did give the appellant the benefit of increments for the purpose of calculating his full pay from 28-6-1952 to 23-1-1956 but did not take into account the said increments while calculating the half salary Payable to the appellant for the period subsequent to 23-1-1956. The learned Dy. Government Advocate had not been able to show any provision justifying the making of this distinction in the matter of calculation of full salary and half salary of the appellant. In my opinion, therefore, the Appellant is

entitled to claim half salary for the period subsequent to 22-1-1956 after taking into account increments and revision of pay scales that were granted to other persons holding the same post as the appellant.

10. Shri Gaur has lastly submitted that the District Judge was not justified in disallowing the house rent allowance to the appellant Shri Gaur has submitted that rule 9 of the Rules for the grant of House Rent Allowance on which reliance has been placed by the learned Addl. District Judge is applicable only to these cases where a Government servant is on leave and that the period from 23-1-1956 till 4-4-1963 could not be treated as the period on which the appellant was on leave. In my opinion the aforesaid contention of Shri Gaur merits acceptance. Rule 9 of the Rules for the grant of House Rent Allowance relates to payment of house rent allowance during the period of leave or temporary transfer. Note-2 of the said Rule indicates that leave means privilege leave taken other than leave preparatory to retirement. The aforesaid rule Can have no application to the present case because the period from 23-1-1956 to 4th April, 1963 in respect of which the appellant was entitled to get half the salary cannot be treated as the period spent on leave. There is nothing in the compromise decree to indicate that the said period was to be treated as the period spent on leave, The compromise decree proceeds on that from the period 28-6-1952 to 23-1-1956 when the services of the appellant were terminated for the second time the appellant should be paid his full salary and for the subsequent period he should be paid half the salary. The payment of full salary for the period from 28-6-1952 to 23-1-1956 and half salary for the period subsequent to 23-1-1956 till the passing of the compromise decree was only a matter of mutual adjustment between the parties for the purpose of arriving at the compromise. It does not mean that the entire period from 28-6-1952 till the date of the passing of the compromise decree or the period subsequent to 23-1-1955 till the date of the passing of the compromise decree was to be treated as period spent on leave. It may be observed that the schedule that has been annexed to the objections filed on behalf of the respondents shows that House rent allowance has been included in the calculation of the salary of the appellant for the period upto 23-1-1956. If the appellant was awarded house rent allowance for the period from 28-6-1952 to 23-1-1956 I find no reason why the house rent allowance should not be taken into consideration for the purpose of calculating his half salary for the period subsequent to 23-1-1956. In my opinion, therefore the direction given by the Addl. District Judge disallowing the house rent allowance to the appellant for the period from 24-1-1956 to 4-4-1963 and also the direction given by him for the deduction of a sum of Rs. 336.35 on account of excess payment of house rent allowance for the period 1-9-1961 to 4-4-1963 cannot be sustained and must be set aside.

11. In the result the appeal is partly allowed and it is held that the appellant is entitled to payment of half salary for the period from 23-1-1956 to 4-4-1963 by taking into account the increments and revision of pay granted to other employees holding the same post as the appellant and that the appellant would

also be entitled to calculation of his half pay for the period from 23-1-1956 till 4-4-1963 by taking into account the house rent allowance payable to the employees holding the same post. The matter is remanded to the Addl. District Judge No. 2, Jodhpur for further proceedings in the light of the judgment of this Court. In the facts and circumstances of the case, the parties are left to bear their own costs.