

(1987) 11 OHC CK 0023

In the Orissa High Court

Case No : Civil Revision No. 389 of 1984

Nrusingha Charan Baisakh

APPELLANT

Vs

State Bank of India, Dhenkanal

RESPONDENT

Date of Decision : 03-11-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 11, Order 20 Rule 11(2), 151
Orissa Money Lenders Act, 1939 — Section 13

Citation : AIR 1988 Ori 132

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

Bench : Single Bench

Advocate : G.H. Panda, A. Routray, Ranjita Das and P. Ch. Mohapatra, for the Appellant; S.N. Sinha, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—Judgment-debtor is the petitioner in this civil revision. In the execution proceeding, he filed an application for allowing him to pay the decretal dues under execution by instalment of Rs. 400/-per month. Executing court having refused the prayer, the order is impugned.

2. In the year 1970, judgment-debtor took a loan from the State Bank of India, Dhenkanal Branch (hereinafter referred to as "the decree-holder"), an amount to Rule 10,000/- carrying interest "14% per annum. Immovable property of the judgment-debtor was charged against this loan. Decree-holder filed the suit in the year 1974 for realisation of the loan amount with the stipulated interest which was decreed on 3-7-1976. Waiting for three years, application for execution was filed on 21-7-1979. Notice was served on the judgment-debtor on 24-9-1979. On 29-10-1979 writ for attachment of the properties of the petitioner was issued. It was returned unexecuted for want of identifier. Till 26-8-1983 the writs issued for attachment returned unserved each time for want of identifier. On the next date the Court directing, the decree-holder for taking steps for warrant of arrest against the judgment-debtor, i.e. on 5-9-1983 judgment-debtor

deposited Rs. 500/-and prayed for time to pay the balance. In view of the application, warrant was not issued. Judgement-debtor remained silent thereafter and on 3-10-1983, warrant of arrest was directed to be issued. Immediately thereafter, an application was filed by the judgment-debtor to recall the order. Executing court recalled the order and directed the judgment-debtor to pay the balance decretal dues at a time by 14-11-1983. Although no payment was made, decree-holder took time till 21-12-1983 to take steps and on 19-1-1984 although appeared did not take any steps. Executing court, however, adjourned the proceeding till 17-2-1984 when decree-holder again took time. Steps for warrant of arrest was taken on 18-2-1984 whereafter, notice was issued to the judgment-debtor to show cause. The same returned unserved. Again steps were taken. Thereafter, the judgment-debtor appeared and filed an application on 13-7-1984 to pay the decretal amount by instalments of Rs. 400/- per month without showing any cause. This having been rejected by the impugned order, the present civil revision has been filed.

3. Case of the petitioner is that he is a very poor man and his only source of monthly income of Rs. 1200/- is from the profit from his readymade cloth shop for which he took the loan and from which he maintains twelve members of his family. Accordingly, he prayed for payment in monthly instalments. No objection was filed by the decree-holder disputing the facts. In the impugned order the executing court rejected the prayer being devoid of merit since the decree is of the year 1976 and the execution case is pending against him for five years.

4. The petition for grant of instalment is purported to be under Order 20, Rule 11(2), C.P.C. which has been amended by this Court substituting the term "consent of the decree-holder" in the sub-rule by the term "after notice to the decree-holder". Thus, to give benefit to the debtors, this Court removed the rigid precondition of consent by the decree-holder and intended that notice to him would be proper. However, the power under this provision is of the trial court in the suit and not of the executing court in execution proceeding. Under Article 126 of the Limitation Act, the period within which this application is to be filed is thirty days of the date of decree. This application was neither filed in the trial court nor was within thirty days. No explanation has been given for the delay. On all these grounds, Order 20, Rule 11(2), C.P.C. is not applicable. However, wrong nomenclature in a petition would not be a ground to refuse the relief where otherwise the Court would have power.

5. There is no specific provision under which this relief can be granted by the executing court. Orissa Money-Lenders Act which provides for such a relief is not applicable to the loans by Banking Organisations. Accordingly, the relief, if at all, can be granted under the inherent power of the Court u/s 151, C.P.C. Age of the decree or long pendency of the execution case would not justify refusal of the relief if the circumstances justify exercise of inherent power otherwise. Executing Court having rejected the application on grounds which are not tenable without considering the merit of the assertions in the application, the order suffers from

exercise of jurisdiction with material irregularity and on this short ground, the impugned order is liable to be vacated. In case, there would have been challenge to the facts asserted in the petition, I would have directed the executing court to make an enquiry. Since the facts have not been challenged without causing further delay to the execution proceeding, it is desirable that I dispose of the application on merit.

6. Mr. S. N. Sinha, the learned counsel for the decree-holder submitted that there being specific provisions relating to grant of instalment at two stages under Order 20, Rule 11, C.P.C. inherent power ought not to be exercised since the judgment-debtor did not avail of the opportunity at that stage and has not explained the cause of not availing the same. Mr. Sinha relied upon a decision of Bombay High Court reported in *Venubai Annantrao Vs. Prabhabai Govindrao Jamkar and Others*, , Principle in this decision has no application to the present case. In the said decision, instalment was granted in a money decree under Order 20, Rule 1 i, C.P.C. Later, the defendant prayed in the suit for extension of time. It was held that Section 148, C.P.C. cannot be invoked and inherent power is also not available to be invoked. Mr. Sinha also relied upon the decision reported in *Central Bank of India, Kutch Vs. P.R. Garments Industries Pvt. Ltd., Surendranagar and Others*, . and submitted that in commercial transactions by Public Financial Institutions where money is advanced on security including personal guarantees, the granting of instalment even under Order 20, Rule 11, C.P.C. is ruled out because that would frustrate the very purpose of taking security. The reason given in the Gujarat decision does not persuade me. In the absence of specific provision in statute, excluding operation of Order 20, Rule 11, C.P.C. in respect of Banking Organisation as in Orissa Money-Lenders Act, power of the Court is not taken away merely because the creditor is a public financing institution and the debt is protected by security. When the provision is a benevolent provision to give protection to deserving debtors, Order 20, Rule 11, C.P.C. applies to all decrees for payment of money. The condition of the debtor and the circumstances under which the decretal dues cannot be paid by him are the main considerations for exercise of power under Order 20, Rule 11, C.P.C. which are to be weighed with the effect of payment by instalment on the decree-holder. However, as has been stated earlier, Order 20, 11, C.P.C. has no application to a petition for instalment in the execution proceeding.

7. Mr. S. N. Sinha, is correct in his submission that the power u/s 151, C.P.C. being very wide in its nature, is to be sparingly used only in rarest of rare cases and should not be a usual feature. Section 151, C.P.C. having vested wide power on the Courts, great restraint should be observed in exercise of such power. Whether to exercise such power being dependent on the facts and circumstances of each case, the decisions of the Courts while considering to exercise such power would have no direct application. Principles laid down are to be kept in mind while considering to exercise such power. One such principle is that the power should not be exercised where specific provision is there in the statute. In respect of benevolent provisions where all the preconditions for application of

such provision in a statute are not satisfied and a party would suffer if no protection is given, inherent power can be exercised. Legislative intent and public policy are to be kept in mind while exercising the inherent power in a particular situation.

8. Normal public policy is that a debtor is to follow the creditor. Whatever might be the dispute earlier, on passing of the decree, the debtor should clear up the dues of the creditor. Law extends helping hand to the deserving debtors who have desire to follow the normal public policy but the situation does not permit him. At the time of passing the decree, on the materials available Court can suo motu extend the helping hand and after passing of the decree Court can assist a debtor if he makes an application within thirty days or explain the cause where there is delay after issue of notice to the decree-holder. This was also extended to subsequent stages by Section 13 of the Orissa Money-Lenders Act and the order was made appealable. Thus, the legislative intent is that the debtors should get protection in deserving cases. Orissa Money-Lenders Act being regulatory measure, Banks and other Public Lending Organisations including the decree-holder are excluded from being accepted as money-lenders under the Act. In such cases, the inherent power of the Court can be exercised in the absence of specific bar to exercise such power to grant instalments.

9. In our Republic, crime is also excused and power has been given to courts not to impose sentences. Judicial notice can be taken that opportunity is given to criminals to rehabilitate themselves and be members of the society. Thus, while not ignoring the crime, due considerations are given to maintain the homogeneity and integrity of the society. Past conduct though taken into account is not to be made capital to lead to the ruin of an individual. With that object the decree-holder a statutory organisation lends money to deserving debtors for their economic stability or progress. In the present case also the loan had been given to the petitioner for the purpose of his trade. It is not that the decree-holder would close the transactions of money lending in future. It continues to accomodate the borrowers.

10. Speed and alertness are the essential requirements expected of Public Organisations. Though the execution proceeding would not be barred by limitation," since a decree can be executed within twelve years, there was no justification for the decree-holder to wait for three years even when the contracted rate of interest of 14% per annum was reduced in case of pendente lite and future interest to only 6% per annum. Negligence on both sides is writ large. While the petitioner avoids to discharge the normal duty, the decree-holder is not vigilant. The property could not be attached for want of an identifier. This does not speak well of a statutory organisation. Court is also not alert in this case. The notice to show cause why warrant of arrest would not be issued could have been issued much before. I cannot keep it out of my mind that even the offer to pay Rs. 400/- per month was not suo motu complied by the petitioner. This Court while directing interim stay of further proceeding in the execution case

ex parte did not impose the condition that at least the amount offered should be deposited. On notice in the Civil Revision, decree-holder also did not move either to vacate the order or to modify the same and for three years the Civil Revision remained pending.

11. In such background, taking a drastic step should be avoided in case the petitioner can get protection while not affecting the interest of the decree-holder. Decree-holder is a banking organisation and one of the purposes of banking is to advance loan with interest. The rate of interest for commercial purposes is 16.5% per annum. In case the decree-holder is protected to get that rate of interest, it will not be affected. The entire decretal dues with costs would have been the principal in the hand of the decree-holder. In case it is directed all money payable by the judgment-debtor would carry interest " 16.5% per annum, while protecting the petitioner the decree-holder can also be protected. In the circumstances, in exercise of inherent power, I direct as follows : --

(a) The entire dues as on date shall carry interest at the rate of 16.5% per annum from today;

(b) Judgment-debtor shall pay a sum of Rs. 5,000/- by 15th of December, 1987;

(c) In every first week of the month beginning from Jan., 1988 at least a sum of Rs. 1,000/- shall be paid by the petitioner until the entire amount is cleared;

(d) Judgment-debtor shall not challenge that interest on interest is being charged, since I am accommodating him by protecting him from arrest and also his property from sale; and

(e) On failure to make the payment of any instalment as directed above, the entire decretal amount shall be recovered and this order shall be ineffective.

12. In the result, the civil revision is allowed. No costs.