
(2003) 11 MP CK 0051
In the Madhya Pradesh High Court
Case No : First Appeal No. 50/98

Oriental Bank of Commerce	Vs	APPELLANT
Mrs. Rajrani		RESPONDENT

Date of Decision : 18-11-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 52

Citation : AIR 2005 MP 49 : (2004) 1 MPHT 462 : (2004) 1 MPJR 228 : (2004) 1 MPLJ 470

Hon'ble Judges : Chandresh Bhushan, J

Bench : Single Bench

Advocate : D.S. Chauhan, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Aggrieved by the judgment and decree dated 8-8-1997 by IXth Additional District Judge, Gwalior, dismissing its suit for recovery of Rs. 25,234.92 paise from the respondent this appeal has been preferred by the appellant/Creditor.

This appeal is heard ex-parte as the respondent after service of notice of final hearing of this appeal initially appointed a lawyer to represent her but later on chose to remain absent and failed to appear in spite of S.P.C.

Facts giving rise to this appeal in brief are that one Shyam Behal had taken a loan of Rs. 20,000/- from the appellant/Bank. He had agreed to pay interest on it at the rate of 12% per annum with quarterly rest. He also agreed to refund the amount in sixty instalments. Various documents were executed by that debtor Shyam Behal in favour of the appellant/Bank. The said Shyam Behal did make certain payments last of which was of Rs. 500/-, made on 10-12-1986. Thereafter, no payments were made by him till his death on 26-3-1988. The respondent being mother of the said Shyam Behal was his only heir as that Shyam Behal died unmarried. She also did not pay anything, therefore, a suit was filed by the appellant on 25-8-1990 for recovery of Rs. 25,234.92 paise from

her as the amount due on date. This suit was contested by the respondent. Besides other grounds she contested it also on the ground that she has no assets left by her son Shyam Behal to her and, therefore, was not liable for the said debt of Shyam Behal.

The learned Trial Court after taking evidence of both the parties as adduced by them and after hearing them pronounced the impugned judgment on 8-8-97 holding that the said amount was due from Shyam Behal but the respondent was not liable for its payment because the deceased Shyam Behal had not left any movable or immovable property to the respondent. Therefore, the learned Trial Court dismissed the suit of appellant/Bank.

The main grievance of the appellant against the impugned judgment and decree is that in view of Section 52 of the CPC the legal representative of the debtor could have only raised the objection regarding the deceased having left no property in her hand in the execution proceedings and the learned Trial Court should not have considered the same in the suit. According to him the learned Trial Court and have decreed the suit after finding that the said amount was due from the said Shyam Behal and the respondent was his legal representative.

Therefore, the only question that arises for determination is whether the plea that the defendant was not in possession of the assets of the deceased was available to the defendant in the suit or not ? On a similar question in the case of Sheonarayan Harilal v. Kanhaiyalal Devidin, reported in AIR 1948 Nagpur 168, following observations were made by Justice Bosc J., as he then was:--

"..... a difference of opinion emerges. Some Judges hold that in such a case the plaintiff is entitled to a decree the moment he proves that the defendant is an heir and that the correct stage at which to ascertain whether there are assets is in execution. Others hold that the existence of assets must be disclosed in the trial itself. I need not decide this matter in revision. All that is necessary to state in this case is that there is a difference of opinion on this point which has not been settled in this Province."

But then it was further observed by him :

"..... I think the plaintiff ought to have been told that he would be required to establish this in the suit and that it would not be enough to leave the matter to the execution stage. I think this was all the more necessary in a case where the defendant did not appear."

In the present case a plea was taken by the respondent that she was not liable to pay the said debt because the deceased had left no assets to her. The appellant/Bank had full knowledge of this plea and even evidence was adduced in the Trial Court to that extent. The respondent had categorically averred that her son Shyam Behal has not left any movable or immovable property which remained uncontroverted. In such a circumstance agreeing by the opinion expressed by Hon''ble Bose, J., in the above referred case of Sheonarayan Harilal

this Court is of the considered opinion that it would not be proper to grant any decree in favour of the appellant/Bank leaving the respondent to reagitate the matter in execution proceedings.

In the case of *Tamiz Bano v. Nand Kishore*, reported in AIR 1927 Allahabad 459, Justice Ashworth after discussing the English Law on this very question observed :

"Is this plea to be denied to a legal representative in India merely on the ground that (while Section 52 of the CPC specifically permits it to a legal representative in execution proceedings there is no section of any Indian Act which either specifically or by implication, provides for the plea being taken in the course of the suit on the debt ? To hold this would be straining beyond all measures maxim of "unius inclusio alterius exclusio est." The fact that the plea of "plene administravi" can be taken in execution proceedings when events justifying such a plea may have occurred subsequent to the decree is no reason why it can not be taken in the suit as a reason for no decree being passed.....

Indeed it would appear that a person sued for a debt as legal representative can resist the suit either on the plea that as the deceased left no assets, he can have no legal representative (since the expression has reference to some estate and does not mean merely a relation who would have been the heir if any property had been left) or again on the plea that he has duly applied all the assets available or proved to be available."

Agreeing with the above referred opinions for the reasons mentioned therein, it is held that the respondent was well within her rights to raise the plea that she has not inherited any property from her son, by way of defence in a suit for recovery of a debt of her deceased-son. The plea that the respondent was not in possession of any property left by the deceased was available to the respondent in the suit itself. The impugned judgment, therefore, suffers with no legal infirmity.

The appeal is accordingly dismissed as one without any merits. However, in the peculiar circumstances of the case, it is ordered that as far as the costs of this appeal in this Court is concerned, both the parties shall bear their own costs. The impugned decree passed by the learned Trial Court is accordingly confirmed.