(1996) 03 SHI CK 0008

In the High Court Of Himachal Pradesh

Case No : O.M.P. No. 37 of 1996 in Ex. Petition No. 32 of 1993

PNB Dharamshala APPELLANT

Vs

Sh. Prem Sagar Chaudhary and Others RESPONDENT

Date of Decision : 08-03-1996

Acts Referred:

Contract Act, 1872 — Section 60
Limitation Act, 1963 — Article 136

Citation : AIR 1996 HP 86 : (1996) 2 ShimLC 359

Hon'ble Judges : Arun Kumar Goel, J

Bench : Single Bench

Advocate : Ajay Kumar, for the D.H. Bank, for the Appellant; S.S. Kanwar and Mahinder Sodhi, for the Respondent

Final Decision : Dismissed

Judgement

Arun Kumar Goel, J.—Facts regarding which the parties are not in variance, are that civil suit No, 60 fo 1979, titled Punjab National Bank v. Sh. Prem Sagar Chaudhary and others, was filed in this court, wherein a compromise decree was passed as far back as on 19-3-1981, and the suit was decreed for the entire decretal amount of Rs. 2,02,331.30 with costs against all the defendants and while decreeing the suit, it was ordered that a sum of Rs. l,40,000/-shall carry future interest from the date of filing of the suit till the date of payment at the rate of 12% per annum.

2. Since the judgment-debtors failed to pay the amount in terms of the aforesaid decree, pecree holder Bank sued execution petition No. 19 of 1986, which was finally disposed of by this court on 14-3-1989. Again the present execution petition No. 32 of 1993, has been sued which was filed on 13-9-1993 and a sum of Rs. 1,20,444.39 was claimed to be due, outstanding and recoverable from the judgment-debtors as on 5-2-1990.

3. When the execution petition came up for consideration, the judgment-debtors filed objections, which have been registered as OM P No. 37 of 1996 in execution

petition No. 32 of 1996 amongst other things plea of limitation, the decree having been adjusted as well as fully satisfied have been raised, it is the case of the objector that the objector judgment debtor-3 has paid huge amount to the decree holder bank and he also arrived at a settlement and according to the objector, he had agreed to pay the amount due to the decree holder Bank by instalments. Statements of the parties were recorded and according to the objector while certifying the payment of Rs. 30,000/- this court had taken on record the settlement and the execution petition No. 19 of 1986 was dismissed by speaking order of 14-3-1989. Case of the objector further is that payments have not been appropriated as per instructions and he is not liable for the payment of the remaining amount for which the present execution, has been levied. According to the objector the amounts ought to have been appropriated towards principal first and particularly against the interest carrying pan of the decree and not in the manner as those have been appropriated by the decree holder-Bank. These objections have been duly replied to pay the decree-holder bank and according to them all the amounts paid by the judgment debtor 3 objector have been duly adjusted and accounted for in the statement of account filed with the execution; the execution is within limitation and there is no legal impediment to proceed with the execution in the present case. It was further averred by the decree-holder bank that the judgment debtor 3 objector did not make payment as per compromise (Ex. R-2) which was basis of disposal of execution petition No. 19 of 1986, as such the decree-holder Bank is well within its right to maintain this execution and to recover the amount as claimed in the execution petition. Case of the decree holder bank further is that the statement of account otherwise is correct and the amount is due from the judgment-debtors to the decree holder bank.

4. On the aforesaid pleadings, the parties went to trial in following issues on 19-7-1994;

1. Whether the execution petition is not within time? O.P. ObJ.

2. Whether the-decree stands adjusted in view of the compromise dated 14-3-1989? O.P. ObJ.

3. If Issue No. 2 is not proved, what is the amount recoverable from the objector/ J.D.? O.P.DH.

4. Relief.

5. I have heard the learned counsel for the parties appearing in this case and also perused the record of the civil suit No. 60 of 1979 and execution petition No. 19 fo 1986, this was done with the consent of the parties who also have referred the same during the course of the arguments of this case.

6. Issue-wise findings are as under:

Issue No. 1

7. Shri S.S. Kanwar, learned counsel for the objector, has submitted that in terms of Ex. R-2, while passing the order Ex. R-3, this court has not modified the original decree when the OMP No. 22/1989 and execution were disposed of and according to him the decree stands adjusted. It has further been argued on behalf of the objector that the decree holder Bank has no cause to maintain the present execution and if it can legally enforce Ex. R-2, it may do so. However, that will also be subject to rights and defences available to the objector-judgment debtor-3. The decree holder Bank was well aware that it cannot enforce the terms of Ex. R-2 while executing the decree and for this reason OMP No. 449 of 1993 was filed, although the same was dismissed by this Court on 25-3-1994. He further submits that the terms of compromise Ex, R-2 cannot and should not be read in the order Ex. R-3, whereby execution petition No, 19 of 1986 was disposed of.

8. On the other hand, Shri Ajay Kumar, learned counsel appearing for the decree holder Bank while controverting the submissions made on behalf of the objector, has submitted that his case is fully covered by Article 136 of the Limitation Act in view of Ex. R-2 and Ex. R-3, which are there on the file. Besides this, he submits that OMP No. 22/1989 in execution petition No. 19 of 1986 also supports his case and a cumulative effect of reading all the three together would cover his case under Article 136, particularly or any subsequent order directs any payment of money ...." According to him, Ex. R-3 for all intents and purposes has to be read in conjunction with Ex.R-2 on the basis thereof the said order was passed while disposing of the execution. He has submitted that the objector cannot be permitted to urge that the compromise should be read in isolation to the order Ex. R-3. According to him, compromise for all intents and purposes is an integral part of this order and he has laid thrust on the operative portion of the said order Ex. R-3. In support of this submission, he has pressed into service AIR 1974 Mys 4 , Vasamma Appellants v. S.K. Jayadeviah, Respondent, and according to him the execution is within limitation in terms of Ex.R-2 and Ex. R-3 and on the basis of payment made by JD-3 objector and accordingly the decree holder Bank is entitled to execut the same.

9. After considering the respective submissions made on behalf of the parties present in the court, this court is of the view that the execution is well within time because Ex.R-2 clearly ''Stipulates the terms on "the basis of which OMP No. 22 of 1989 was filed by the judgment debtor which finally resulted into the passing of the order Ex. R-3. At this stage, it is necessary to extract the operative portion of the order dated 14-3-1989 in execution petition No. 19/86, to the following effect:

"......... The learned counsel for the decree holder Bank, states that he has instructions so far as the deposit of Rs. 30,000/- is concerned, but not with regard to the other terms of this compromise and he wants some more time for this purpose. This letter, in original, has been shown to the learned counsel and in fact he states that he has got a certified copy of the same as well and in view of the fact that the terms of the compromise are quite clear, 1 do not think the request for time should be allowed. The payment of Rs. 30,000/- is hereby certified and the OMP and the Execution Petition are disposed of in terms of the compromise."

10. This is clearly indicative of the fact that while disposing of Execution Petition No. 19/86, the court had taken into account not only OMP No. 22/89 but has also taken into account the terms of compromise Ex. R-2 and accordingly this have to be read together. It can safely be inferred that in terms of compromise Ex. R-2, the judgment debtor was to make payment and thus it can be presumed that there is subsequent order directing payment of money as embodied in Ex. R-2 and thus the execution is well within time. In this context, it may not be out of place to clarify here that as per Ex.R-2, judgment debtor-3 objector was to pay Rs.30,000/- which in fact he actually paid and was to further keep on paying Rs. 3000/-per month commencing from 7-3-1989. and thus starting point of limitation would be when the default committed in the payment of such payment in terms of Ex. R-2. Accordingly, Issue No. I is decided against the judgment debtor-3 objector, and in favour of the decree-holder Bank.

Issue No. 2

11. Shri S.S. Kanwar has vehemently urged that decree in the present case stands fully adjusted in the face of Ex. R-3 and therefore nothing is due outstanding and payable by his client and the execution merits dismissal. He has further submitted that even otherwise, the sums paid by his client have not been appropriated in terms of Punjab National Bank, Delhi and etc. Vs. Prem Sagar Choudhary and Others, Judgment-debtors, i.e. by firstly appropriating those towards principal then towards the interest carrying part of the decretal amount and lastly towards costs and other expenses as well as non interest carrying part of the decree. According to him, if this amount is firstly appropriated towards the principal then towards the interest carrying part of the decree, then there will be nothing due and outstanding and payable by the objector in terms of the decree. While appearing as OW-2 Tilak Raj objector has stated that despite his instructions and requests to the decree holder bank to adjust the payment against principal amount those have been adjusted against interest amount and other charges and according to him this could not have been done. He has gone on record to say that in terms of order dated 14-3-1989 the execution was dismissed as fully satisfied. When cross-examined to state before the court as to what instructions were given and to whom those instructions were given, then he states that he had given oral instructions and except the name; of one Manager, he does not remember the name of any other person. This court has no hesitation in holding that the decree does not stand fully satisfied in terms of the order dated 14-3-1989 which is not only incorrect, but is contrary to record also. According to him at the time of recording of compromise, statements of parties were also recorded.

12. On the other hand, Shri Subhash Chand Sharma, Assistant Manager of the

decree holder Bank has appeared and accord- ing to him earlier execution was compromised he has placed on record Ex. R-2 the compromise and Ex. R-3 copy of the order passed in the previous execution. In his cross-examination, he has stated that the amount worked out is on the basis of compound interest. This court is constrained to remark in this behalf that the Bank has not been reasonable in calculating the amount and allowing the matter in litigation to drag on un-necessarily on this ground. Needless to clarify that after passing of the decree in civil suit No. 60 of 1979, the decree holder Bank has no business much less authority in law to have calculated any amount over and above as well as beyond the terms of the decree. This is high time that before filing execution in such a callous manner some responsible officer of the Bank looks into the matter.

13. At the same time, judgment debtor-3 objector has also not come to the court with clean hands. He has not hesitated in stating that the earlier execution was dismissed as fully satisfied and thus his submissions neither inspire confidence nor is based on correct facts. In the absence of there being express instructions, the decree holder Bank was well within its rights to have appropriated the amount in accordance with the provisions of Section 60 of the Contract Act. Shri S.S. Kanwar, again at this stage has pressed into service the judgment of this court Punjab National Bank, Delhi and etc. Vs. Prem Sagar Choudhary and Others, At this stage it is necessary to refer to Mathunni Mathai Vs. Hindustan Organic Chemicals Limited and another, wherein the provisions of Order 21, Rule 1 (as amended by Act 104 of 1976) have been considered and in the face of this judgment, with respect it is submitted that AIR 1988 HP 3 docs not hold the ground. Shri Kanwar submits that since the aforesaid judgment of Himachal Pradesh of 1988 had arisen out of the present execution on the objections of his client, as such amount had to be worked out in terms of the said judgment. In the face of the latest pronouncement of the Supreme Court, it can safely be said that now the appropriation of the amount deposited by the decree holder Bank has to be made in consonance with the latest mandate of the apex court and it is ordered accordingly. In the face of this position, Issue No. 2 is decided against judgment debtor-3 objector.

Issue No. 3

14. The decree holder-Bank has been totally unjust in calculating the interest as its witness Subhash Chand Sharma admits in no. uncertain terms that in the statement of account the interest calculated is compound interest, on what basis and what is the legal sanction behind it, has not been explained. It is very strange that despite there being specific decree in civil suit No. 60 of 1979, the decree holder Bank without scrutiny had been working out the amount of its own. While deciding Issue No. 3, it is held that the decree holder bank though entitled to execute the decree for its balance outstanding amount, however, it can only be done after it calculates the amount strictly in terms of the decree in civil suit No. 60 of 1979 without adding anything over and above to the decretal amount and after appropriating the amount paid by the judgment debtor-3

objector as detailed in this order.

For the foregoing reasons, the objection petition is dismissed leaving the parties to bear their own costs of this objection petition. Decree holder-Bank is directed to place on record the statement of account strictly in accordance with the decree in civil suit No. 60 of 1979 as well as after appropriating the amounts paid by the objector as ordered herein this order, thereafter, the decree holder-bank will take further steps for executing the decree. It is hoped that the Bank authorities will look into the matter as to how and in what circumstances the amount was not worked out in terms of the decree and will be cautious in future.