
(1952) 04 RAJ CK 0001

In the Rajasthan High Court

Case No : Civil (Ijlas-i-Khas) Appeal No. 44 of 1950

Prakash Mal and Others

APPELLANT

Vs

Vakil Thikana Khatu

RESPONDENT

Date of Decision : 15-04-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1954 Raj 54 : (1952) RLW 250

Hon'ble Judges : Wanchoo, C.J;Bapna, J

Bench : Division Bench

Advocate : Hastimal, for the Appellant; Bal Kishan Acharya, for the Respondent

Final Decision : Allowed

Judgement

Bapna, J.—This is an Ijlas-i-khas appeal presented to this Court against the decision of the former High Court of Jodhpur dated 10-2-1949. An application for leave to appeal had been presented prior to the Rajasthan Appeals and Petitions (Discontinuance) Ordinance 1949, and after the certificate had been granted, this appeal was filed to this Court under Ordinance No. 40 of 1949 read with Ordinance No. 12 of 1950.

2. The facts which have given rise to this appeal are that a decree for Rs. 47,000/- was passed in favour of, Jitmal Ghasimal of Nagaur on 4-2-1910 against Thikana Khatu by the Mehkma Khas of the former covenanting State of Jodhpur, payable by instalments. Various attempts were made to realize the decree and the last application was filed by the decree-holders on 19-1-1946 claiming Rs. 29,991/10/3 as follows:

Rs. R. P.

Amount of decree 47,000-0-0

Interest in respect of instalments remaining unpaid. 058,324-0-0

Total 105,324-0-0

Less received in execution proceedings 75,332-5-9

Balance recoverable 29,921-10-3

3. On 24-9-1947, the judgment-debtor filed an application that on the occasion of the earlier petition for execution in 1936, the judgment-debtor had filed an account showing that only Rs. 2,126/9/9 remained due, but no enquiry could be made as the Thikana was taken under "Zabti", and the matter may now be enquired into. It was also mentioned that the decree-holders should be called upon to give a detail of the interest claimed by them and to show which instalments had fallen into arrears. It was mentioned that the Thikana had always paid the instalments on due dates and no interest was, therefore, claimable. It was urged that the judgment-debtor had already deposited Rs. 20,000/- and that the entire accounts be scrutinized and the excess amount realized by the decree-holders should, be ordered to be repaid to him.

The learned District Judge after enquiry held on 5-8-1948 that the principal amount of the decree remaining unpaid was Rs. 10,137/4/3 and interest on instalments remaining unpaid amounted to Rs. 28,065/12/-. He reserved two items of Rs. 471/8 and Rs. 600/-, alleged to have been paid by the judgment-debtor, but whose receipt was denied by the decree-holders, for further enquiry. He found that Rs. 18,974/8/6 had been deposited by the judgment-debtor and he directed this amount to be paid to the two decree-holders in certain proportions according to their interest in the decree,

4. The decree-holders filed an appeal challenging the accounts made up by the lower court, and urged that the lower court had erred in not allowing the full interest claimed. They also urged that the amount received from the judgment-debtor should have been credited towards the interest which had fallen due, and prayed for further scrutiny of accounts in accordance with the mode set out by the decree-holders. The judgment-debtor filed cross-objections and prayed that the lower court had allowed an excessive amount of interest to the decree-holders who were not entitled to any interest. It was urged that the original decree of Rs. 47,000/- included more than half the amount as interest and the lower court had erred in allowing further interest on the decree. The respondent judgment-debtor also urged that the lower court erred in fixing the amount due without waiting for the decision on the two items reserved for further enquiry.

5. The learned single Judge of the former Jodhpur High Court was of opinion that interest had not been awarded by the decree. He also held that as far back as 12-1-1917 the Chief Court had disallowed interest in certain proceedings coming before that court, and that, therefore, no interest was claimable by the decree-holders in case of default of any of the instalments. The appeal of the decree-holders was dismissed and the cross-objections of the judgment-debtor were allowed, and the lower court was directed to make up fresh accounts in the light of the interpretation of the decree made by that court and any excess received by the decree-holders was to be refunded.

6. In this appeal, it is urged that the lower court has come to an erroneous conclusion in holding that the decree did not allow any interest. It was urged that the decree was based on the award which allowed interest on overdue instalments.

7. The litigation started by the application by Thikana Khatu to the "Mehakma-Khas of the Jodhpur State that accounts of the money dealings between the Thikana and Jitmal Ghasimal be directed to be taken and an order was passed on 6-6-1902 by the "Mehakma-Khas" that the Thikana's petition may be treated as a suit for taking of accounts between the parties and be disposed of by the "Court Sardaran" (a Civil Court). The "Court Sardaran" held that the accounts had already been settled by various documents executed by or on behalf of the Thikana and could not be reopened, and accordingly dismissed the suit. The same judgment was upheld by the Council and by the Mehakma-Khas on 30-3-1906.

It appears that the proceedings did not end there and certain persons were appointed arbitrators by an order of the "Mehakma-khas" and the arbitrators gave an award on 25-5-1909 (Jeth Sudi 7, Smt. 1965). According to the preamble in the award, the Senior Member ("Mehakma-Khas") had ordered the Council on 10-7-1907 to appoint arbitrators who should find out the amount due to the creditors from the Thikana and should recommend the mode of realization of the debt, and whatever amount may be directed to be paid in cash should be got paid from the surety of the Thikana, and it was further ordered that the accounts already made up between the parties should be taken as the basis of accounting. The arbitrators found that the principal and interest due on the various accounts between the parties was Rs. 47,000/- consisting of Rs. 24,198/15/3 as principal and Rs. 22,801/-/9 as interest.

They directed that Rs. 9,000/- should be paid in cash to the creditors by Asadh Vadi 7, Smt. 1965. The balance was made recoverable by instalments of Rs. 1,500/- each, the first instalment to be paid on Mah Sudi 15, Smt. 1966 and thereafter on every succeeding Mah Sudi 15, till Smt. 1990. On Mah Sudi 15, Smt. 1991, the Thikana was to pay the remaining amount of Rs. 500/-. They also directed that the Thikana should pay these instalments on the due date every year till the amount was recovered but if any instalment remained unpaid on the due date, the judgment-debtor would pay interest at the rate of 1 per cent, per mensem. They suggested that an arrangement similar to that observed by the Haisiat Court (Court dealing with Encumbered Estates) in recovering its dues may be followed in this case by calling upon the Jagirdar to furnish a surety every year along with the dues of the Government if the Jagirdar wanted to retain possession of his estate.

8. The arbitrators sent their award to the Council , who forwarded their views to the "Mehakma-Khas" and the relevant portion is as follows:

"The Panches have given an award, the substance whereof is that Rs. 47,000/-

were due on account of principal and interest and Rs. 9,000/-are to be paid in cash up to Asadh Vadi 7 by the surety and Rs. 38,000/- are to be paid by instalments of Rs. 1,500/- a year from Smt. 1966 Mah Sudi 15, to Smt. 1991 Mah Sudi 15. The Council agrees with the opinion of the Panches. The surety objects to payment but the objections are of no avail. The order of the Senior Member was that whatever the Panches decided for payment in cash the surety was to pay, and if the surety has not received the amount from the Thikana, he has to file a proper suit. The objections of the Vakil that the accounts had not been made up by comparison of the Thikana accounts and in accordance with the rules of the Haisiat (court), are false. No law has been laid down in Haisiat Court regarding interest, and the file remained with the Panches for 12 months and the Thikana should have pointed out the differences in accounts, if any, during this period." (9) The Senior Member ("Mehakma-Khas"), thereupon, passed the following order on 4-2-1910: "Plaintiff and surety"s Vakil present. The opinion of the Council was read. The Council has decided in accordance with the award of the Panches for payment of Rs. 9,000/- in cash and Rs. 38,000/- by instalments, and these Rs. 9,000/-are to be paid by the surety. As the original agreement of surety is not forthcoming and the surety has also died and his son is minor, and the plaintiff also concedes that at the time of giving surety, the Jagirdar had only paid Rs. 5,000/- to the surety, it is, therefore, proper that the surety should only be ordered to pay Rs. 5,000/- to the plaintiffs and the remaining Rs. 4,000/- should be recovered from the Jegir-dar from such movable property which may be pointed out by the plaintiffs, and the remaining Rs. 38,000/- should be recoverable according to the decision of the Council."

In arriving at the conclusion that the decree did not provide any interest on Instalments remaining unpaid on due date, the learned Judge of the former High Court of the covenanting State of Jodhpur has laid stress on the fact that while the arbitrators had awarded interest on the instalments in default, the said clause was omitted in the decision of the Council as also of the Senior Member.

10. Learned counsel for the appellants, however, urges that the Council had unmistakably recorded that it agreed with the award and the Senior Member also except in respect of the extent of the surety"s liability agreed with the views, of the Council whose decision was stated to be in accordance with the award, and, therefore, it must be held that the "Mahkma-Khas" impliedly upheld the remaining terms of the award including the grant of interest on overdue instalments of the decretal amount.

11. In our opinion, the contention of the learned counsel for the appellants is correct. The award of the Panches without doubt provided for running of interest on instalments falling in arrears. The Council mentioned only the substance of the award in the recital portion of their judgment, but in their operative portion clearly said that they agreed with the award of the Panches. The rule of interpretation in such matters is that

"it is impossible by a recital to cut down the plain effect of the operative part of a

deed. A recital does not control the operative part of a deed where the operative part is clear." (Odgers on the Construction of Deeds and Statutes, 1946 Edition, Page 99).

Lord Esher, M. R., enunciated three rules of interpretation in *Ex parte "Dawes; In re Moon (1886)"*, 17 QBD 275, at p. 286 (A):

"(1) If the operative part is ambiguous, the recitals govern the construction

(2) If the recitals are ambiguous and the operative part is clear, the operative part must prevail; and

(3) If both the recitals and the operative part are clear but inconsistent with each other, the operative part is to be preferred."

12. In the recital, the Council only purported to state the substance of what the arbitrators decided, and in the operative portion clearly said that they agreed with the opinion of the Panches. If the Council intended that they disagreed with the Panches in respect of awarding interest, on overdue instalments, one would have expected the Council to say so. In our opinion, therefore, the Council, in so far as they said that they agreed with the award of the arbitrators, purported to incorporate in their decision all the terms of the award including one for interest on overdue instalments. The Senior Member except on one point agreed with the opinion of the Council mentioning that the Council had given decision in accordance with the award of the Panches.

If the Senior Member also thought it necessary, not to award interest, he would have said so, just as he disagreed as to the amount to be paid by the surety. It was observed in -- AIR 1940 70 (Privy Council) that if a decree was ordered to be passed in terms of the compromise but the actual terms of the compromise were not textually incorporated therein, the decree was nevertheless one recording the compromise. The same principle appears to be applicable in this case so that by upholding the award all the terms thereof became incorporated in the decision of the Council and except as to one particular matter specified therein the remaining terms of the award also became incorporated in the orders of the "Mahkma-khas" as well.

13. At one stage of the arguments, the words in the order of the Council "Haisiat men byaj babat koi kanun mukrar nahin hai" appeared to be of doubtful import. While the simple translation would be that "no law had been laid down in Haisiat court regarding interest" it could be contended that it meant that "there was no law in Haisiat Court for grant of interest", or further "that the law in Haisiat Court did not provide for grant of interest". On reference, however, to the order of "Mankma-khas" dated 30-3-1906 immediately prior to the award it became clear that the correct meaning was as indicated by the literal translation that "no law had been laid down in Haisiat Court regarding interest". A perusal of the aforesaid order discloses that the Thikana wanted to reopen the previous accounts on the allegation that at some previous date certain items had been

accepted by the then Haisiat Court and thereafter the creditors had further dealings and had debited the Thikana with interest on the outstanding sum inclusive of the previous debt. Certain settlements of accounts took place from time to time but they were sought to be reopened on the ground that the interest on the sum admitted by the Haisiat Court on an earlier occasion was not chargeable. The contention was, however, rejected by the "Mahkama-khas" on 30-3-1906.

The observations of the Council -- "Haisiat men byaj babat koi kanun mukrar nahin hai" -- repelled the contention of the judgment-debtor for reduction of interest and thus meant "that no law had been laid down in Haisiat Court regarding interest" and covered the further implication that the subsequent settlement of accounts between the parties in which interest had been added" could not be reopened. It may also be pointed out that the matter was being dealt with as if it was a suit in the "Court Sardaran" for taking of accounts between the parties and not as one pending in any Haisiat Court.

14. It appears from a reference to the various proceedings that took place from time to time after the decision of the Senior Member dated 4-2-1910, that at no time was it contended by the judgment-debtor that interest had not been awarded on the instalments falling in arrears, while so far as the decree-holders were concerned they at all times claimed interest on instalments falling in arrears. The first proceeding taken by the decree-holders was by a petition to "Court Sardaran" on 7-7-1910 for recovery of Rs. 4,000/- forming a portion of the amount payable cash down by attachment of the movable property of the judgment-debtor and for taking of a surety for Rs. 1,500/- which amount had fallen due on Mah Sudi 15, Smt. 1966.

After several exchange of letters between the "Court Sardaran" and the Court of Haisiat, the "Court Sardaran" ordered on 6-7-1911 that the the may be sent to the Haisiat Court for further proceedings. Realizations began to take place and it appears that the decree-holders were called, upon to make a statement of their claim. They did so on 4-4-1916 and claimed Rs. 44,8397- as balance of the decretal amount plus interest on instalments remaining in arrears. They admitted having received Rs. 11,1117- by that time.

The Vakil of the Thikana Khatu admitted that the original decree was for Rs. 47,000/- but submitted that "Byaz chidi kiston ka purva nahin" (the Thikana was not in a position to bear the burden of interest of overdue instalments). The Haisiat court by its order dated 12-1-1917 found that Rs. 11.33778/- had been paid to the decree-holders and the balance due under the original decree was only Rs. 35,612/8/-. It did not allow interest on the ground that the instalments had been fixed from Smt. 1966 and thereafter the instalments were more or less paid in time.

15. The decree-holders filed an appeal which according to the rules then in force lay to the Chief Court. They claimed interest on the deficit of the amount ordered

to be paid in cash as also interest .on overdue instalments and also objected to the adjustment of an item of Rs. 1,178/13/- towards repayment. The Chief Court by its decision dated 8-4-1917 decided that the decree-holders had got nearly the sums due to them under the decree. A further observation was made that in Haisiat Court interest was not allowed on overdue instalments after the amount due was settled and for that reason also the court would not allow interest. As regards the item of Rs. 1,178/13/- the case was remanded-with certain directions. On remand the debt was admitted by the Haisiat Court to be Rs. 36,791/6/- by an order dated 22-12-1920.

The effect of the decision of the Chief Court will be noticed at a later stage but the importance of these proceedings in the Court Sardaran and the Haisiat Court lies in the fact that the Thikana did not challenge the claim of the decree-holders for allowing interest on the ground that no interest was allowed under the decree but on other grounds which have been noticed above. Various execution petitions were submitted thereafter from 25-9-1924 to 16-1-1946, in each of which the decree-holders claimed interest on overdue instalments and it was conceded by learned counsel for the judgment-debtor that an objection was never taken by the judgment-debtor that no interest had been allowed under the decree on overdue instalments.

Learned counsel for the appellants contended that the point should be deemed to be concluded on the principle of constructive "res judicata" more particularly as on one occasion when the decree-holders took out execution proceedings claiming certain overdue instalments and interest thereon and attached a particular house of the judgment-debtor, the court disallowed the objection of the judgment-debtor that no amount was due, and in passing that order made a mention that a certain amount of principal and interest was then due. This order is dated 5-12-1927 in execution file No. 152 of 1925-26. According to that order Rs. 2,000/- in cash (balance of the amount to be paid in cash according to the terms of the decree) Rs. 8,595/- on account of overdue instalments, and Rs. 10,595/- as interest on such instalments, were due.

But this was only an interim order refusing to stay execution and the only point relevant at the time was whether some amount was due against the judgment-debtor and execution could proceed. So long as the principal decretal amount was due, the execution could proceed and, therefore, any mention in the order that interest was due on overdue instalments would not be a point directly and substantially in issue between the parties. So long as the principal amount was due, the judgment-debtor could not resist execution even if the interest was not due. The order, therefore, does not bar the plea of the judgment-debtor by any principle of constructive "res judicata".

16. Learned counsel for the respondent contended that the order under appeal could be supported on the other ground that as far back as 8-4-1917, the Chief Court had decided on an appeal from the order of the Haisiat Court that no interest could be allowed on overdue instalments. In respect of this argument, it

was contended by learned counsel for the appellants that the order of the Chief Court was on appeal from the Haisiat Court and, therefore, it was not an order in execution proceedings but in the capacity of a court dealing with Encumbered Estates. The Notification or Order in pursuance of which the Chief Court could hear appeals from the Haisiat Court has not been referred by counsel on either side and it is difficult to say what sort of jurisdiction was exercised by the Chief Court in dealing with the appeals from the Haisiat Court.

Be that as it may, the two grounds on which the Chief Court proceeded were that the instalments had been paid, more or less on the due dates and secondly that interest could not be allowed by the Haisiat Court after ascertainment of the amount due to the creditor. The court did not purport to hold that under the terms of the decree, no interest was claimable on overdue instalments. On the other hand, the first ground assumed that the decree awarded interest on overdue instalments but even on that assumption, the decree-holders were held not entitled to interest as in the opinion of the court the instalments had been paid when they fell due.

The second ground only purported to show that after the debt had been ascertained by the Haisiat Court and instalments fixed, interest would not run on the amount. But this was the first occasion when amount had been ascertained by the Haisiat Court to be Rs. 35,612/8/- and the aforesaid observations were beside the point. It must be remembered that the ascertainment of the debt at Rs. 47,000/- and the mode of repayment by instalments was arrived at in the course of a suit in a civil court ending in a decree and not in proceeding's in the Haisiat Court. The order of the Chief Court thus did not relate to the interpretation of the decree and the decision would only be held good as to the amount declared to be then due to the creditor decree-holder.

17. As to whether the instalments falling due after ascertainment of debt by Haisiat Court would carry interest would depend upon the law applicable to such proceedings. We have already seen that at the time of the passing of the decree the Council said that no law was laid down regarding interest in Haisiat Court. Next we have the above observation in the order of the Chief Court that interest will not run on instalments after ascertainment of debt in Haisiat Court. Learned counsel for the parties were unable to throw any light on the state of law then in force but in view of certain events that followed, it is unnecessary to pursue the matter further.

18. The law relating to proceedings in Haisiat Court lay scattered in various notifications issued by the then Government of Jodhpur from time to time until it was consolidated by an Act known as the Marwar Jagirdars Encumbered Estates Act, 1922, which was brought into force from 1-10-1922. This Act was a comprehensive one and provided for certain procedure for proof of debts and their liquidation and for certain disabilities to which the Estate holders were to be subjected to until repayment of the debts. Under Ss. 40 and 41 of the Act, the

Government was authorized to make rules for the purpose of carrying out the objects of the Act and for regulating the procedure for dealing with the Estates already under Haisiat. These rules were published in the Marwar Gazette of 3-2-1923 and they allowed an option to the Jagirdars then under Haisiat to intimate whether they desired that their estates should be brought under the provisions of the new Act or to be excluded therefrom. Certain conditions were laid down for opting for the exclusion which are mentioned in the schedule. Learned counsel for the respondent stated that the judgment-debtor of this decree opted for exclusion of his estate from the provisions of the Act and this appears to be correct as in the application of the decree-holders dated 25-9-1924 it is mentioned that the Thikana of the judgment-debtor came out of Haisiat Court on 30-9-1923. It may be laid down that under the provisions of the Act, a Jagirdar could only get his estate excluded from the Haisiat either when he discharged his debts or by opting for exclusion and in the present case the Jagirdar had obviously not discharged his debts.

The conditions under which the Thikana's exclusion from the Haisiat could take place are mentioned in rule 3 to Section 41, and under clause "(b) of that rule

"the amount of the debts due to each creditor shall be deemed to be the sums declared to be due by the Haisiat Court when it scrutinized the claims against the estate".

In the present case, the debt was scrutinised by the Haisiat Court and was ascertained at Rs. 36,791/6/- by order dated 22-12-1920. Clause (c) of R. 3 provided that interest on debts during the period in which any estate was in Haisiat Court shall not be allowed and future interest shall not accrue unless in case of scrutinised debts and fixation of instalments, the instalments were not paid on due date. Under clause (d) the rate of interest allowed by Sub-section (c) was not to exceed 5 per cent, per annum.

19. These provisions of law when applied to the present case make it quite clear that upto 30-9-1923 when the estate got excluded from the Haisiat Court, no interest could accrue. As the decretal debt was payable by instalments and the Haisiat Court also purported to repay the debt by instalments and the same mode was agreed to by the parties, the case came within the ambit of clause (c) of rule 3 and the contingency of the accrual of interest arose on the instalments not being paid on due dates after 30-9-1923. But the rate of interest would be governed by Clause (d) and would not exceed 6 per cent. per annum.

20. The District Judge will have to make enquiry as to what instalments remained overdue after 30-9-1923 and, if so, to decide what rate of interest not exceeding 6 per cent, per annum should be allowed to the decree-holders on such overdue instalments. The appeal is, therefore, accepted, the judgment of the Chief Court of Jodhpur dated 10-2-1949 is set aside and the case is remanded to the District Judge for a fresh accounting in the light of the decision, of the points in dispute as aforesaid. The parties will bear their own costs in this

Court and in the lower Appellate Court.