

(1961) 08 P&H CK 0024
In the Punjab And Haryana At Chandigarh
Case No : Ex. First Appeal No. 213 of 1959

Ram Chand Gupta

APPELLANT

Vs

Wazir Chand

RESPONDENT

Date of Decision : 23-08-1961

Acts Referred:

Civil Procedure Code, 1882 — Section 223, 224 , 228, 230
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 2, Order 21 Rule 2(1), Order 21 Rule 2(2), Order 21 Rule 2(3), Order 21 Rule 3(3)
Limitation Act, 1963 — Article 174
Punjab Relief of Indebtedness Act, 1934 — Section 36
Stamp Act, 1899 — Section 35 , 36

Citation : AIR 1962 P&H 293

Hon'ble Judges : Harbans Singh, J

Bench : Single Bench

Judgement

(1) This execution first appeal has arisen in the following circumstances; Wazir Chand decree-holder obtained a decree on 9th of July, 1951, against Ram Chand judgment-debtor for the recovery of a sum of Rs. 10,500/-. He was also awarded costs which were assessed at Rs. 1,221/2/-. This decree was obtained on the basis of a claim which one Prabh Dayal had against the judgment-debtor and which was purchased by Wazir Chand for a sum of Rs. 6,000/-. The case for the judgment-debtor is that after this decree had been passed against him, he contemplated filing an appeal at Simla. But Mr. Ved Vyas, an advocate of Chamba, who is a relation of Ram Chand, being his brother-in-law, and who was also related and intimately known to Wazir Chand decree-holder being the legal adviser of a firm in which Wazir Chand was a partner, tried to persuade Wazir Chand to arrive at a settlement and on 7th of October, 1951 the parties met at Amritsar. There, a settlement is said to have been arrived at by which the decree-holder agreed to accept Rs. 9,500/- in full and final settlement of his decree and out of that Rs. 3,000/- were admittedly paid on that very day. The balance of the amount of Rs. 6,500/- was to be paid as follows:

- (1) Rs. 1,000/- in January, 1952.
- (2) Rs. 1,500/- in April, 1952.
- (3) Rs. 2,000/- in September, 1952.
- (4) Rs. 2,000/- in January, 1953.

It is a common case of the parties that the first instalment of Rs. 1,000/- was paid in time while the balance of the amount was paid as follows:

- (1) Rs. 1,500/- on 7th of May, 1952.
- (2) Rs. 1,000/- on 3rd of October, 1952.
- (3) Rs. 1,000/- 21st of February, 1953.
- (4) Rs. 1,000/- 23rd of July, 1953.
- (5) Rs. 1,000/- in August, 1953.

All these payments were accepted apparently without any demur though there was a provision in the agreement that in case there was a default in payment of any installment, the decree-holder will be entitled to execute and recover the entire balance of the decretal amount. It is further clear from the record that no further payment was made by the judgment-debtor after August, 1953. The decree-holder filed an execution application at Amritsar on 1st of July, 1954. No notice was issued in that application and the same was allowed to be dismissed in default on 7th of August, 1954. The next application was filed on 6th of August, 1956 and the same was also dismissed in default on 24th of August, 1957. Some time later the decree-holder put in another application and got the decree transferred to Kanpur Court where some assets, being bank accounts, of the judgment-debtor (who works as a chartered Accountant there) were attached. An objection was taken on behalf of the judgment-debtor in that Court that by virtue of a compromise, the decree was to stand discharged on payment of Rs. 9,500/- and that the entire amount having been paid, nothing was due. This application was however, dismissed on 25th of May, 1957, on the short ground that in view of sub-rule (3) of Rule 3 of Order 21 or the Code of Civil Procedure, the adjustment of the decree, which in this case, had not been certified could not be taken into consideration by the transferee Court.

(2) On 12th of October, 1957, the application, out of which the present appeal has arisen, was filed on behalf of the judgment-debtor in the Court of the Senior Subordinate Judge which had granted the decree (thereinafter referred to as the parent Court) alleging once again the settlement aforesaid and the fact that the decree had been entirely satisfied. This application purported to be under order 21, Rule 2 of the CPC and S. 151 of the Code, and the prayer made was that after issue of a notice to the decree-holder, the satisfaction of the decree may be certified in view of the compromise and the payment of Court. In this application details were given to the effect that the compromise was brought

about through the intervention of Mr. Ved Vyas advocate, who was a common relation and friend, and that the terms of the settlement were reduced to writing and deposited with one Bhagwan Dass Mahajan, who was an attesting witness. Wazir Chand decree-holder in his reply on 25th of November, 1957 raised two preliminary objections. First that in view of the fact that a similar application under Order 21, Rule 2, filed in the Court of the Civil Judge, Kanpur, had been dismissed on 25th of May, 1957, the matter was *res judicata* and that the present application did not lie, and, consequently, the parent Court had no jurisdiction to deal with this matter because execution had been transferred to the transferee Court and was still pending there. On merits it was denied that there had been a compromise as alleged or any compromise whatever, and that the payments received by the decree-holder were towards the decree and not by virtue of any compromise or settlement. He also denied the authenticity or the correctness of a receipt, which has been produced by the judgment-debtor, in which the decree-holder is purported to have acknowledged the payment of the last Rs. 1,000/- and had stated that the was in full and final settlement of the decree. As a result of these pleadings, the executing Court framed the following three issues:

- (1) Whether the decree has been wholly adjusted as alleged?
- (2) Whether the present objections are barred by *res judicata*?
- (3) Whether this Court has no jurisdiction?

Before taking up these issues, the learned trial Court *suo motu* took up the question of limitation. He held that though by virtue S. 36 of the Punjab Relief of Indebtedness Act, sub-rule (3) of Rule 2 of order 21 has been omitted, yet the present application being on under Order 21, Rule 2 for certification of the adjustment outside the Court, the same should have been brought within ninety days of the adjustment as provided under Article 174 of the Limitation Act. He, however, went into the other issues and held that there was a compromise as alleged and that the payments had been made in pursuance of the settlement. Yet he held that there was no waiver by the decree-holder and that the defaults were made in the payment of the instalments on due dates and, consequently, the decree cannot be said to have been adjusted. Issue No. 2 was also held against the judgment-debtor. But on issue No. 3 it was held that the Court had jurisdiction to go into the question. In view of this, the application was dismissed but the parties were left to bear their own costs.

(3) This appeal raises a number of points and the counsel for the parties argued each one of them at great length. Before the executing Court as well as here it was vehemently urged that the parent Court at Amritsar had no jurisdiction to deal with the matter because the transferee Court had not yet sent to that Court the certificate with regard to the satisfaction or otherwise of the execution sent to that Court. The Court below, however, held that the parent Court retained powers to deal with the matter arising out of execution. This finding was

challenged on behalf of the respondent decree-holder. The reliance for this was placed on behalf of the respondent on the wording of S. 38 of the CPC which runs as follows:

"A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution".

(4) The basic authority is the Privy Council's decision reported in *Maharajah of Bobbili v. Narasaraju Peda* ILR 39 Mad 640: (AIR 1916 PC 16). In that case Court of the District Judge, Vizagapatam which had granted the decree transferred the same, with the requisite certificate of non-satisfaction to Munsiff Parvatipur in whose jurisdiction immovable property of the judgment-debtor was situated. Munsiff attached the Immovable property but took no further action. Thereafter the decree-holder made an application to the District Judge, Vizagapatam requesting for the sale of the property which had been attached by the Court of the Munsiff. No action was taken on that and thereafter he presented another application later for the same purpose. During this period the papers had not yet been returned by the transferee Court nor was any certificate sent under S. 41 of the satisfaction or otherwise of the execution. When third application was later given in the Court of the District Judge after the certificate had been received, an objection was taken that the application for execution was barred by time and the sole question was whether the previous two applications were given to a "proper Court" and could be taken as steps in aid of the execution. It was held by their Lordships of the Privy Council that these two applications were not presented to the proper Court. (At page 644 of ILR Mad): (at p. 18 of AIR) it is observed as follows:

"Their Lordships, having regard particularly to Ss. 223, 224, 228 and 230 of the Code of Civil Procedure, 1882, are satisfied that when that petition of the 13th December, 1907, was presented to the Court of the District Judge that Court was not the proper Court to which the application to execute the decree by sale of the immovable property which had been attached by the Court of the Munsiff should have been made, and that the proper Court to which that application should have been made was the Court of the Munsiff of Parvatipur, as that was the Court whose duty it then was to execute the decree so far as it could be executed by that Court".

(5) This judgment has given rise to conflicting decisions by different High Courts. These have been summarised in Chitaley's Code of Civil Procedure, Volume 1 at page 706-7. According to one set of decisions the parent Court retains power to deal with the execution matters and the Privy Council's decision is distinguished on the ground that in that case the parent Court had no jurisdiction to sell immovable property which was situated outside its jurisdiction and which had been attached by the transferee Court. The other view is that so long as the transferee Court does not return the certificate under S. 41 the parent Court has no jurisdiction to deal with the execution matters and simultaneous executions are not possible. The latter view apparently is opposed to an earlier Privy

Council's pronouncement reported in *Saroda Prosaud Mullick v. LutchmEEPut Singh* 14 IA 529(PC), where it was held that there was nothing in the provisions of CPC to prevent a decree being transferred for execution to three Courts concurrently, and that for the protection of the debtor there was discretion vested in the Judge who may refuse to issue transfer certificates simultaneously to different Courts if there was sufficient reason for doing so and may put a condition that the decree-holder should not proceed with the sale of the property in the second or third Court till sale had been effected by the first transferee Court. There being some conflict, in the Lahore High Court the matter was referred to a Full Bench in *Kanti Narain v. Madan Gopal* 37 PLR 636: (AIR 1935 Lah 465)(FB). The majority judgment was delivered by Jai Lal J. and after discussing the various conflicting decisions it was held as follows:

"I would hold that when a money decree has been transferred by the Court which passed it for execution to another Court, an application to the first Court (a) to execute the decree, (b) to transfer it to another Court for execution and (c) to transfer it for execution to the same Court is a valid application even if such an application is made before the proceedings taken in the other Court have first been reported and certified by that Court".

(6) In *Jang Bahadur v. Bank of Upper India Ltd.* AIR 1928 PC 162 while dealing with the question whether an application for substitution of the legal representative made to the transferee Court would not be to a proper Court in view of the provisions of S. 50 of the Civil Procedure Code, it was clearly observed that the Court which passed the decree, may transfer the same for purposes of execution to the Court within whose jurisdiction immovable property is situated but on such transfer the former Court "does not altogether lose seisin of the decree." In *Shiva Prasad Gupta Vs. Gokul Chand and Others*, , a Full Bench of the Allahabad High Court relying on the abovementioned Privy Council's case held that

"When a Court passing a decree sends a certificate of execution to another Court, as long as the certificate is outstanding there is a pending proceedings for execution going on in the Court which passed the decree."

In that case the Court in the United Provinces which passed the decree sent the same for execution outside the United Provinces to a Court within whose jurisdiction immovable property of the judgment-debtor was situated and in view of the provisions of U. P. Encumbered Estates Act the U. P. Court which had passed the decree received a stay order. It was held that on receipt of such stay order the U. P. Court should recall the certificate sent to the other Court outside the State.

(7) In view of all these authorities it is obvious that the parent Court notwithstanding that it has transferred the execution to another Court retains seisin of the execution and is not deprived of its jurisdiction pending the receipt of a report from the transferee Court. In fact it was not denied that if the parent

Court found that due to some clerical mistake or otherwise transfer certificate had been issued for a wrong amount the Court could recall the certificate and correct the amount. If that was possible, there can be no reason why the same Court cannot go into the question whether the decree has been satisfied by payment out of Court and if it is satisfied that the same has been adjusted, recall the transfer certificate.

(8) The next connected question is whether the application given by the judgment-debtor which purported to be under Order 21, Rule 2, sub-rule (2) was barred by limitation. This point was not taken in the Court below by either party, but was taken suo motu by the Court, and was argued at length before me. Sub-rule (1) of Rs. 2, O. 21 casts a duty on the decree-holder to certify payment of any money payable under the decree or adjustment of the same otherwise, Sub-rule (2) gives authority to the judgment-debtor also to give information to the Court of any such payment or adjustment and the Court after giving notice to the decree-holder if satisfied that the payment of adjustment has been made shall record the same Sub-rule (3) runs as follows:

"(3) A payment or adjustment, which has not been certified or recorded as aforesaid shall not be recognised by any Court executing the decree.

(9) Under Article 174 a judgment-debtor can move the Court under sub-rule (2) within ninety days of the adjustment or the payment. If the judgment-debtor does not move the Court within ninety days of the adjustment and the decree-holder fails to do the duty cast upon him under sub-rule (1) the judgment-debtor cannot plead adjustment or payment in view of sub-rule (3). He has, therefore, to make the payment afresh though he might later on file a suit for the recovery of overpayment made by him. It was in view of this provision of sub-rule (3) that the Court at Kanpur refused to go into the question of adjustment pleaded by the judgment-debtor. In Punjab sub-rule (3) has been omitted by section 36 of the Punjab Relief of Indebtedness Act and the result of this is that if the decree-holder files an application for execution the judgment-debtor notwithstanding that he did not move the Court under sub-rule (2) for the adjustment being certified within ninety days, could take up the plea that the execution should not be allowed because of adjustment. See in this connection *Murli Dhar v. Firm Baseshar Lal Motilal* AIR 1938 Lah 126, and *Daru Mal v. Todar* AIR 1938 Lah 602. This was in fact not disputed on behalf of the decree-holder but it was urged that the application out of which the present appeal has arisen, was one made by the judgment-debtor under Order 21, Rule 2 and it was not taken by way of any defence. As I have already held the execution application must be deemed to be pending in the parent Court though the transfer certificate had been issued to Kanpur and consequently the present application in substance was one requesting the Court to recall the transfer from Kanpur Court on the ground that no amount was due on the decree and that the same had been fully satisfied. Although the application was badly drafted and purported to be under Order 21, Rule 2, sub-rule (2) the court must look to the substance and not the mere form.

I have, therefore, no doubt in my mind that not only the parent Court had jurisdiction to go into this matter but the point raised by the judgment-debtor could have been gone into by that Court and relief given if the same was due.

(10) The next point is whether the decision of the Kanpur Court (copy Exhibit D. H. 2) barred the parent Court at Amritsar to go into the question of adjustment. The rule of *res judicata* embodied in Section 11 is not directly applicable to the execution proceedings but principles underlying the rule are applied to such proceedings. It is to be considered whether the matter in issue in the present application was substantially in issue in the previous one and was heard and finally decided by the Court at Kanpur. The matter in issue was the same but it is obvious that the point in issue, namely, whether there has been any adjustment of the decree, was never heard or finally decided by that Court because it refused to go into the question on the short ground that the application was barred by time.

(11) The question whether there was a compromise as alleged by the judgment-debtor and whether the decree had been adjusted in terms of the compromise, depends upon the appreciation of the evidence. The trial Court came to the conclusion that there was a compromise as alleged by the judgment-debtor though according to him payments were not made in accordance with the terms of the compromise and consequently there was no adjustment. (After discussion of some evidence His Lordship proceeded.)

(12) Apart from this, we have the clear statement of Mr. Ved Vyas, who is a senior Advocate and President of the Bar Association at Chamba. He is corroborated by other witnesses, for example, Dharu Dev, D.W. 2 at whose house the settlement is said to have been arrived at. The terms of the settlement were reduced to writing by Bhagwan Das and it is stated that this document is not forthcoming. Bhagwan Das was examined as J. D.W. 5 and he denied that he knew anything about the compromise or that the document was deposited with him. It was urged that according to the judgment-debtor and his other witnesses, in July, 1957 on a demand being made from him of the aforesaid document, he said that the same had been torn by his grandson. Some time earlier, however, the judgment-debtor had copied out the document and the copy has been produced as Exhibit J.D./14, which contains the terms as given in the earlier part of this judgment.

(13) When this document was sought to be brought on the record in the evidence of the judgment-debtor objection was taken to its admissibility only on the ground that the loss of original had not been established. This objection was overruled and the document admitted. Before the trial Court as well as before me it was vehemently urged that this document amounted to an agreement which required stamp and the original being unstamped no secondary evidence of that document was admissible. The trial Court, however, held that the document having been once admitted the same could not be kept out of consideration because he could not review his own order. In the first place, it was urged on

behalf of the appellant that a compromise was in fact a modification of the decree and consequently, it could not be stated as an agreement. Apart from that, it was urged that by virtue of Section 36 of the Indian Stamp Act, any document--whether an original or a copy--which is once admitted could not be rejected after. On behalf of the respondent it was urged that section 36 relates only to original documents and not to their copies and that this objection about the non-admissibility of a copy, the original of which is unstamped and is non-existent, can be taken at any time. For this, reliance was mainly placed on *Mst. Haliman v. Emperor* ILR 1946 Pun 532: (AIR 1947 Lah 306). Some of the observations made in this case do support the contention of the learned counsel but interpretation of section 36 was not directly in issue and the case was decided on another point. Section 35 of the Stamp Act deals with the instruments which are not duly stamped and are, therefore, inadmissible in evidence but can be admitted into evidence, if they are not of a certain type on payment of duty and penalty. This section obviously relates to the originals and has no reference to the copies. Section 36 runs as follows;

"Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

It was urged that this also relates to an original instrument and does not relate to its copy. This question directly came up for consideration in *Vishram Arjun Vs. Irukulla Shankariah and Another*, . After referring to some of the authorities on the point a Division Bench of that Court came to the conclusion as follows;

"Having regard to the trend of the authorities even if the copy of the instrument has been filed and admitted in evidence, the admissibility of the document on the question of insufficient stamp cannot be subsequently questioned in the same proceedings."

The various cases taking slightly different view on the point were referred to by Rao, J. in *Sheik Meera Sahib Vs. Akkalaneni Venkatapathi Naidu*, , and it was observed as follows:

"In view of the several decisions which have taken a view in favour of making the admission of a copy final even if the original instrument was not properly stamped, I am not prepared to accept the view of the Peshawar Court"

and it was held that where secondary evidence of an original instrument not properly stamped has been admitted in evidence such admission cannot be called in question in view of Section 36. With great respect I am inclined to agree with the view taken by Madras and Andhra High Courts. A more or less similar view has been taken by a Division Bench of the Lahore High Court in *Mohammad Yusaf v. Abdul Khaliq* AIR 1944 Lah 9, where copy of a copy was admitted into evidence and the other party was not allowed to take objection to its admissibility later. This case however did not involve the question of stamp

directly. So far as the question of stamp of concerned, in the words of Rankin, C. J. in *Nirode Basini Mitra Vs. Sital Chandra Ghatak*, ,

"these stamp matters are really no concern of the parties and if the objection was taken at the time when the record was made by the trial Court, there it might be rejected, if not, the matter stopped there".

In view of the above, therefore, I am of the opinion that the copy of the original settlement produced in Court is not inadmissible. In any case, the original has either been lost or is being deliberately withheld by Bhagwan Das. Of this there is ample evidence on the record and in view of that secondary evidence in the nature of oral statements of Mr. Ved Vyas and the judgment-debtor are sufficient to prove the contents of the settlement.

(14) There are further circumstances which go to indicate that the settlement had involved the payment of a sum of Rs. 9,500/- in full satisfaction of the decree. The last payment of Rs. 1,000/- making a total of Rs. 9,500/- was made in 1953. No steps were taken whatever by the decree-holder thereafter for a number of years. Admittedly not even a letter was sent to Ram Chand protesting that he had stopped the payment of further installments. Between 1951 and 1953, Ram Chand had been making payments more or less at short intervals. If not payment was made by him thereafter and no steps were taken by the decree-holder to get further installments, the conclusion is inevitable that it was because no further payment was due, according to the compromise. It is further significant that the two application that were made, one on the 1st of July, 1954 and the other on the 6th of August, 1956, were not prosecuted. Decree-holder absented himself on both the occasions and allowed the same to be dismissed. These two applications could hardly amount to serious attempt for recovery of the balance of the amount and were made only to keep the limitation alive. The further fact that even according to judgment-debtor himself he did not make the payments on the dates as agreed to in the compromise but the payments were delayed by a few days or a few months each time, also goes to show that the terms of the compromise as set up by the judgment-debtor could not be an afterthought. If there had been no compromise in the terms as now put forward there was nothing to prevent the judgment-debtor to put forward a compromise with the dates more or less coinciding with the actual payments made by him. The fact that even according to the judgment-debtor's own case, as set up in Court, he had committed defaults and incurred the penalty, goes to show that he is telling the truth.

(15) There having been defaults in the payments of the installments the next question that arises is whether the decree-holder had waived his right to recover the entire amount on default of any installment. There is a receipt Exhibit J.D./14. According to the judgment-debtor, when he sent the last sum of Rs. 1,000/- he asked for the receipt. The decree-holder sent this receipt to his brother Tralok Nath and Tarlok Nath, in turn, sent the same to Mr. Ved Vyas under registered letter. According to Mr. Ved Vyas this Exhibit J.D./14 is the

receipt clearly recites the factum of the entire Rs. 9,500/- having been received and the decree having been discharged. Wazir Chand however, denied that this receipt, which is a typed one and only purported to be signed by Wazir Chand, was signed by him. The evidence of the handwriting expert goes to show that this does not bear the signature of Wazir Chand. Tarlok Nath while admitting that he did send a receipt acknowledging the receipt of Rs. 1,000/-, denied that this was that receipt. It was urged that there was no reason to disbelieve Mr. Ved Vyas when he stated that this was the receipt received by him from Tarlok Nath and, in addition, reference was made to the evidence of Churanji Lal Advocate, Gurdspur, J. D.W. 6, and Dharam Pal, Advocate, Amristar, J. D.W. 8, according to whom it was admitted by Wazir Chand when they had gone to him after he had put in an application for execution and got the same transferred to Kanpur that he had in fact received the entire amount, but he had filed the execution application because some relation of Ram Chand, who was a police officer in Jammu, had refused to help him in certain matters. I am inclined to accept the evidence of Mr. Ved Vyas and even if the evidence of the other two witnesses with regard to the admission of Wazir Chand is excluded that would show that this receipt was sent by Tarlok Nath having been received from Wazir Chand and it was rightly urged that even if this receipt does not bear the signatures of Wazir Chand, the same must be deemed to have been executed at his instance if the same was sent by him to Tarlok Nath and by the latter to Mr. Ved Vyas. It is, however, unnecessary to base the decision of this case on this receipt, because the decree-holder had been accepting the overdue installments and took no effective steps to enforce his penalty till late in 1956 and this in my view would amount to waiver of the default clause. See in this respect *Gopal Mal v. Gopal Singh Hira Singh* AIR 1928 Lah 378. The head-note runs as follows:

"It is open to the decree-holder to expressly state when accepting the installment that he does so without prejudice to his right which have already accrued owing to the default or to show by his conduct at the time of accepting the installment that he does not waive his right under the default clause. But in the absence of proof to the contrary tender by the debtor and acceptance by the creditor of an overdue installment must be deemed to amount to a waiver and condonation of the default."

To the same effect in *Gokhul Mahton and Others Vs. Sheoprasad Lal Seth and Others*, . The relevant portion of the head-note (d) is as follows:

"Where the promise has accepted an overdue installment it must be held that he has waived his rights which accrued to him on that default and that the starting point of limitation would be from the next default if not waived."

The question under consideration was the question of limitation, but the observations are relevant. In the present case no action was taken by the decree-holder on any one of the defaults and, consequently, he must be deemed to have waived all his rights arising from the default.

(16) In view of the above, therefore, I accept this appeal and find that there was a compromise under which the entire agreed amount of Rs. 9,500/- was paid to the decree-holder and was accepted by him in full satisfaction of the decree. The decree stands fully discharged and no further amount is due to the decree-holder. In the peculiar circumstances of this case, however, the parties are left to bear their own costs in these proceedings.

(17) Appeal allowed.