

Radhey Shyam Gupta vs Punjab National Bank & Anr on 4 November, 2008

Equivalent citations: AIR 2009 SUPREME COURT 930, 2008 AIR SCW 8284, (2009) 1 CLR 282 (SC), (2009) 2 CIVILCOURTC 529, 2008 (15) SCALE 24, 2009 (1) SCC 376, 2009 (1) CLR 282, (2009) 3 MAD LW 937, (2008) 15 SCALE 24, (2009) 1 ANDHLD 79, (2009) 4 MAD LJ 1121, (2009) 3 MAH LJ 146, (2009) 2 MPLJ 386, (2009) 2 RAJ LW 1783, (2009) 1 BANKCAS 139, (2009) 1 RECCIVR 844, (2009) 1 CAL HN 125, (2009) 2 CIVLJ 249, (2009) 1 CURCC 50, (2009) 4 BOM CR 490

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Bench: Markandey Katju, Altamas Kabir

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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

Civil Appeal Nos 6440-41 of 2008

SPECIAL LEAVE PETITION (C) NOS.797-798 of 2006

Radhey Shyam Gupta

..Appellant

Vs.

Punjab National Bank & Anr.

...Respondents

J U D G M E N T

ALTAMAS KABIR,J.

1. Leave granted.

2. On 28th May, 1986, the Respondent No.1 Bank sanctioned a loan of Rs.83,000/- to Shri Durga Prasad, the Respondent No.2 herein. The appellant stood guarantee for the Principal Debtor for

repayment of the loan.

3. As the loan was not repaid by the Principal Debtor, Durga Prasad, the Bank in 1992 filed Suit No.66 of 1992 for recovery of its dues against the respondent No.2 in his capacity as the loanee and against the appellant in his capacity as guarantor. The suit was decreed on 19th December, 1994, by the learned Additional District and Sessions Judge, Bayana, District- Bharatpur, in favour of the respondent No.1 ` Bank for a sum of Rs.1,10,360/-, together with interest at the rate of 12.5% per annum from the date of institution of the suit till realization. While decreeing the suit, the trial Court directed as follows :-

"The plaintiff shall be entitled to recover this amount by auction sale of the hypothecated Matador Mahindra FC RRD/1851. The plaintiff shall also be entitled for cost of litigation. If any amount remains to be paid even after auction sale of the Matador, then the same shall be recovered from other properties of the defendants. The suit of the plaintiff is hereby decreed against the defendants in the aforesaid terms."

4. The aforesaid directions have created some confusion in the execution of the decree.

5. For the purpose of executing the decree the respondent No.1 Bank initiated execution proceedings and though warrants for attachment of the Matador were issued, the same were not executed by the Bank on the ground that the vehicle was not traceable and instead the Bank sought attachment of the appellant's Fixed Deposits with the said Bank made with the amounts received by him by way of pension and gratuity. The Executing Court allowed the Bank's application and ordered attachment of the appellant's Fixed Deposit Receipts, hereinafter referred to as "FDRs". The appellant moved the High Court against the order of attachment and the High Court while allowing the appellant's application, directed the trial Court to pass appropriate orders in the light of the specific directions given in the judgment and decree dated 19th December, 1994, for recovery of the decretal amount. The Executing Court by its order dated 1st November, 2002, directed release of the appellant's F.D.Rs and the pension amount with a further direction that the hypothecated Matador was to be auctioned first in terms of the directions contained in paragraph 11 of the Judgment dated 19th December, 1994. The Executing Court also took the view that amounts paid towards gratuity and pension could not be attached in view of the provisions of proviso

(g) of Section 60(1) of the Code of Civil Procedure, hereinafter referred to as "the Code".

6. The Bank filed a Revision Petition against the said order of the Executing Court dated 1st November, 2002, and also applied for interim orders therein. On 15th October, 2003, when the matter came up before the High Court, the appellant herein was directed to forthwith deposit a sum of Rs.50,000/- with the Bank. He was also directed to furnish the complete details of the movable and immovable properties of the principal debtor with the stipulation that in the event the Bank's revision petition failed, the amount to be deposited by the appellant herein would be refunded to him with interest at the rate of 9% per annum. Instead of complying with the said direction, the appellant herein moved an application indicating that two Fixed Deposit Receipts belonging to him

of over a total value of Rs.50,000/- were lying with the Bank and instead of cash deposit of Rs.50,000/- the said two Fixed Deposit Receipts could be adjusted against the said sum to be deposited and the balance, if any, could be returned to the appellant herein.

7. While disposing of the Revision Petition of the Bank, the High Court noted in its judgment that the appellant herein had undertaken that he would furnish the Matador in question to the Bank for the purpose of auction within a period of one week and the Bank would be free to auction the same in accordance with the terms of the decree. It was also noted that the appellant herein was prepared to submit a solvent security for realization of the balance decretal amount, which may still remain due after the adjustment of 50,000/- and the sale price that would be fetched from the sale of the matador.

8. In the light of the above, the order of the Executing Court was set aside and in terms of the decree as also the order passed by the High Court on 15th October, 2003, the amount of Rs.50,000/- out of the appellant's Fixed Deposit Receipts was directed to be adjusted in the first instance. It was also directed that on the Matador being furnished along with solvent security before the learned Executing Court by the appellant herein, the remaining amount under the Fixed Deposit Receipt would be released to him. It was further directed that on the Matador being produced, the decree holder Bank would be entitled to realize the decretal amount by sale of the Matador and while realizing the balance of the decretal amount, if any, through the solvent security to be furnished by the appellant herein, the Fixed Deposit Receipts, which were accepted to be the appellant's retirement benefits, were to be returned to him.

9. On 5th April, 2005, the appellant filed a Review Petition before the High Court in respect of the order dated 28th February, 2005, on the ground that the Revisional Court had wrongly proceeded on the basis that the appellant had given an undertaking to furnish the Matador to the Bank and that he would also submit a solvent security for realization of the decretal amount, if any amount remained to be recovered by the Bank after sale of the Matador. The Review Petition filed by the appellant was dismissed in limine by the High Court on 24th August, 2005, holding that no case had been made out in the Review Petition for review of the order dated 28th February, 2005.

10. The Special Leave Petition is directed against the said orders of the High Court dated 28th February, 2005 and 24th August, 2005.

11. Ms. Shobha, learned advocate, who appeared for the appellant, questioned the judgment and order of the High Court mainly on three grounds. Her first ground for challenge was that the direction of the trial Court in its decree was quite clear and there was no ambiguity whatsoever which called for any clarification by the High Court. She submitted that the direction of the trial Court entitled the decree holder Bank to recover the decretal amount as well as the cost of litigation by auction sale of the hypothecated vehicle, and if any amount remained to be paid even after the auction sale of the Matador, then the same could be recovered from the other properties of the defendants. According to Ms. Shobha, the plain meaning which emerges from such direction entails the sale of the Matador first and after adjustment of the sale price with the amount to be recovered under the decree, any amount still unpaid, could, at the second stage, be recovered from the other

properties of the defendant. Ms. Shobha submitted that it was clearly the intention of the trial Court that the sale proceed of the hypothecated vehicle should first be utilized for realization of the decretal amount before touching the other properties of the defendants for recovery of the said dues.

12. In this regard Ms. Shobha referred to and relied upon the decision of this Court in the case of Industrial Credit and Development Syndicate vs. Smithaben H. Patel and Ors., [1999 (3) SCC 80], wherein faced with a situation where the trial Court had not prescribed any mode for payment of the decretal amount, except for fixing of instalments, it was, inter alia, held that the general rule of appropriation of payments towards a decretal amount was that such an amount has to be adjusted firstly, directly in accordance with the direction contained in the decree, and in the absence of such direction, adjustments are to be made firstly in payment of interest and costs and thereafter in payment of the principal amount, subject to the exception that the parties could agree to the adjustment of the payment in any other manner despite the decree.

13. The second ground urged by Ms. Shobha was that although initially the appellant's Fixed Deposit Receipts were attached by the Executing Court, ultimately, on objections being filed on behalf of the appellant, the Executing Court by its order dated 1.11.2002 came to the finding that the appellant's Fixed Deposit Receipts could not be attached in view of proviso (g) to Sub-Section (1) of Section 60 of the Code of Civil Procedure (hereinafter referred to as 'the Code'). Ms. Shobha submitted that in the revision filed by the Bank against the said order of the Executing Court it was erroneously recorded by the High Court that the appellant had undertaken to produce the Matador before the Bank so that the same could be sold for recovery of the Bank's dues and the balance dues, if any, could then be recovered from a solvent security to be provided by the appellant. It was submitted that since such an undertaking had not been given to the High Court, a Review Petition was filed on behalf of the appellant which was dismissed in limine. Ms. Shobha also added that without making any attempt to locate the Matador, so that the same could be sold in keeping with the directions given by the Trial Court for satisfaction of the decree, the Decree Holder proceeded only against the appellant since it held the Fixed Deposit Receipts of the appellant in respect of the fixed deposit made out of the retiral benefits, including gratuity received by the appellant at the time of his retirement from service. Ms. Shobha reiterated her submission that, as had been rightly held by the Executing Court, the appellant's Fixed Deposits which represented his retiral benefits could not be attached or sold to satisfy the decree obtained by the Decree Holder Bank. She urged that even after the retiral benefits obtained by the appellant had been converted into Fixed Deposits it did not lose its essential character of comprising the retiral benefits of the appellant, and could not, therefore, be attached in view of proviso (g) to Section 60 (1) of the Code.

14. Although, the law is well-settled on the point, various decisions were cited by Ms. Shobha in support of her submission that the Executing Court could not go behind the decree or to alter the provisions thereof. The first decision cited by her in this regard is the decision of this Court in Rajasthan Financial Corporation v. Man Industrial Corporation Limited [(2003) 7 SCC 522], wherein while construing the provisions of Section 47 and Order XXI of the Code, this Court held that an Executing Court cannot go beyond the decree and that the Executing Court must take the decree according to its tenor. Ms. Shobha also referred to the decision of this Court in State Bank of India v M/s. Indexport Registered and others [(1992) 3 SCC 159], wherein the same principle had

earlier been dealt with.

15. Ms. Shobha's submission finds support in the decision of this Court in *Calcutta Dock Labour Board and another v Smt. Sandhya Mitra and Others* [(1985) 2 SCC 1], wherein it was reaffirmed that gratuity payable to dock workers under a scheme in absence of a Notification under Section 5 of the Payment of Gratuity Act, 1972, would not be liable to attachment for satisfaction of a Court's decree.

16. The same principle was reiterated by this Court in *Union of India v Wing Commander R. R. Hingorani* [(1987) 1 SCC 551] and *Gorakhpur University and others v Dr. Shitla Prasad Nagendera and others* [(2001) 6 SCC 591].

17. However, in all fairness, Ms. Shobha also cited the decision of this Court in *Union of India vs. Jyoti Chit Fund and Finance and Others* [(1976) 3 SCC 607], where while dealing with the provisions of Sections 3 and 4 of the Provident Funds Act, 1925, prohibiting attachment of sums held by the Government, as well as proviso (g) to Section 60(1) of the Code, this Court held that till such time as amounts payable by way of provident fund, compulsory deposits and pensionary benefits did not reach the hands of the employee they retained their character as such and could not, therefore, be attached. However, once the amounts were received by the employee they ceased to retain their original character and, were, therefore, capable of being attached. Ms. Shobha urged that the aforesaid decision had been rendered long before the other decisions cited by her and the subsequent decisions would prevail over the earlier decision.

18. In addition to her two aforesaid grounds, Ms. Shobha lastly submitted that the revision petition filed by the Bank before the High Court was in itself not maintainable in view of the provisions of Section 115 of the Code, as amended, which makes it clear that if an order in favour of a party applying for revision decides the matter finally then only a revision would be maintainable, but if the same did not decide the suit or other proceeding finally, then such revision would not be maintainable. Ms. Shobha urged that in the instant case the Bank had filed a revision against an interlocutory order which did not have the effect of finally disposing of the execution proceedings and consequently the revision filed on behalf of the Bank should have been dismissed by the High Court. In this regard, Ms. Shobha referred to the decision of this Court in *Shiv Shakti Coop. Housing Society, Nagpur v Swaraj Developers and others* [(2003) 6 SCC 659] and also in *Surya Dev Rai v Ram Chander Rai and others* [(2003) 6 SCC 675] reported in the same volume at page 675.

19. Ms. Shobha urged that the High Court had erred in interfering with the judgment and order passed by the Executing Court and its judgment and order impugned in these proceedings were liable to be set aside.

20. On behalf of the Bank, Mr. Dhruv Mehta submitted that despite several attempts having been made to locate the Matador, the same could not be traced and the Bank, therefore, had no alternative but to proceed against the appellant in his capacity as the guarantor for recovery of its dues. Mr. Mehta urged that the provision of proviso (g) to Section 60(1) of the Code would apply only to the source of the amounts received by way of retiral benefit, such as pension and gratuity,

but not to payments made in respect thereof. On the other hand, once such payments were made, their character stood altered as they became mixed with the other assets of the concerned employee. In support of his submission, Mr. Mehta also relied on the case of Wing Commander R.R. Hingorani (supra) which had been referred to by Ms. Shobha, wherein in the context of Section 11 of the Pensions Act, 1871, which provided for exemption of pension from attachment, this Court referred to the decision in the Jyoti Chit Fund case (supra) where Krishna Iyer, J., speaking for the Bench, had indicated that once the monies covered by the provisions of the proviso to Section 60(1) of the Code had been paid to the concerned employee, they no longer retained their original character and were, therefore, amenable to attachment.

21. On the construction of the directions of the trial Court, which were subsequently altered by the High Court, Mr. Mehta urged that when the hypothecated vehicle was not traceable, the Bank could not be left without remedy and it could not have been the intention of the Trial Court that even if the vehicle could not be apprehended the decree of the Bank would remain unsatisfied. If a pragmatic meaning is to be given to the language of the decree, it would have to be interpreted to mean that an attempt should first be made to realise the decretal dues by sale of the Matador, and, thereafter, to realise the balance dues, if any, from the solvent security to be produced by the appellant herein. The decree does not indicate that in the event the Matador could not be sold, the decree could not be executed at all against the other assets either of the Judgment Debtor or the guarantor.

22. Mr. Mehta urged that in Hingorani's case (supra) the High Court was considering the question as to whether the Executing Court could go behind the decree in coming to the finding that the same was not executable against the appellant on account of proviso (g) to Section 60(1) of the Code, and in that context the directions given by the High Court in the revision petition were justified.

23. Mr. Mehta lastly contended that the order passed by the learned Executing Court on 1st November, 2002, impugned in revision by the respondent Bank, was final in nature and did not, therefore, attract the bar under the proviso to Section 115(1) of the Code.

24. Having considered the submissions made on behalf of the respective parties, we are inclined to accept Mr. Mehta's submission that the order impugned in the revision petition before the High Court did not attract the bar of the proviso to sub-section (1) of Section 115 of the Code as it sought to finally decide the manner in which the decree passed in Suit No.66 of 1992 by the learned Additional and Sessions Judge, Bayana, Rajasthan, was to be satisfied. However, we are also of the view that having regard to proviso (g) to Section 60 (1) of the Code, the High court committed a jurisdictional error in directing that a portion of the decretal amount be satisfied from the fixed deposit receipts of the appellant held by the Bank. The High Court also erred in placing the onus on the appellant to produce the Matador in question for being auctioned for recovery of the decretal dues. In other words, the High Court erred in altering the decree of the Trial Court in its revisional jurisdiction, particularly when the pension and gratuity of the appellant, which had been converted into Fixed Deposits, could not be attached under the provisions of the Code of Civil Procedure. The decision in the Jyoti Chit Fund case (supra) has been considerably watered down by later decisions which have been indicated in paragraphs 15 and 16 hereinbefore and it has been held that gratuity

payable would not be liable to attachment for satisfaction of a Court decree in view of proviso (g) to Section 60(1) of the Code.

25. We also agree with Ms. Shobha that the High Court could not have gone behind the decree in the execution proceedings and the alteration in the manner of recovery of the decretal amount was erroneous and cannot be sustained. We also agree with Ms. Shobha that even after the retiral benefits, such as pension and gratuity, had been received by the appellant, they did not lose their character and continued to be covered by proviso (g) to Section 60(1) of the Code. Except for the decision in the Jyoti Chit Fund and Finance case (supra), where a contrary view was taken, the consistent view taken thereafter support the contention that merely because of the fact that gratuity and pensionary benefits had been received by the appellant in cash, it could no longer be identified as such retiral benefits paid to the appellant.

26. The High Court, in our view, erroneously proceeded on the basis that a concession had been made by the appellant that he was willing to have the decretal amount adjusted partly from his fixed deposits, which represented his retiral benefits and that he had also volunteered to produce the vehicle before the Bank so that the same could be sold to recover the major portion of the dues. Further-more, although the Bank was entitled to proceed both against the principal-debtor and the guarantor for recovery of its dues, the mode of recovery was prescribed by the Trial Court, which, in our view, clearly indicates that the Bank should at first recover whatever amount it can from the sale of the Matador. The right of the Bank to proceed against either the principal- debtor or the guarantor stood restricted by the directions of the Trial Court. Except for recording that the vehicle was not traceable, nothing is recorded in the impugned judgment of the High Court as to what steps were actually taken by the Bank for recovery of the Matador for sale in order to recover its decretal dues. In our view, instead of disturbing the order of the Executing Court, which was passed in consonance with the provisions of the Code of Civil Procedure, the High Court should have directed the respondent Bank and the Executing Court to seriously pursue the recovery of the Matador or against any other property of the principal-debtor, having particular regard to the finding of the Executing Court that the said fixed deposits represented the retiral benefits of the appellant.

27. We, therefore, allow the appeals, set aside the order passed by the High Court and restore that of the Executing Court. The respondent Bank may take appropriate steps for recovery of the Matador for recovery of its dues in the manner indicated in the judgment and in the decree of the Trial Court. Consequently, let the fixed deposit receipts of the appellant be released to him as per the directions of the Executing Court while disposing of the application dated 6.2.1999 and 27.7.2001 by its order dated 1.11.02.

_____.J.

(ALTAMAS KABIR) _____J.

(MARKANDEY KATJU) New Delhi Dated: 4th November, 2008