Harakh Narain vs Mst. Kalwati And Anr. on 3 December, 1952

Equivalent citations: AIR1953ALL335, AIR 1953 ALLAHABAD 335

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Bench: V. Bhargava

JUDGMENT

V. Bhargava, J.

1. This second appeal arises out of proceedings for execution of a decree obtained by the deeree-holders-respondents against the judg-ment-debtor-appellant on 23-8-1933. The decree was for money. An amendment of the decree took place on 2-7-1936 and there on 6-1-1937, there was an adjustment. After this adjustment the amount remaining due under the decree was Rs. 678-4-6. At that time, the decree was converted into an instalment decree and it was laid down that the amount must be paid in ten instalments, the first nine instalments being of Rs. 67 and the tenth one of Rs. 75-4-6. The instalments were to fall due on 31st December of each year so that the first installment of Rs. 67 fell due on 31-12-1937. There was an additional clause that in case oil default in payment of three instalments, the entire amount then unrealised under the decree was to become due. It is the admitted case of the parties that not a single instalment was paid so that three defaults had been committed by 31-12-1939. The first application as a step in aid of execution was presented to Court on 15-12-1944. But in that application, the only prayer was that the decree-holder having died, his daughters might be substituted as his legal representatives in the decree. That application was allowed and substitution of names was granted.

Tho present execution application was present, ed on 23-11-1945, with the request that the entire amount under the decree might be realised by attachment of the property of the judgment-debtor, claiming that the entire amount had fallen duo because of default of payment of three instalments. On 7-1-1946, an objection was filed by the appellant contending that the application for execution was barred by time. The objection relating to the limitation for execution for the whole amount under the decree under the default clause was upheld by both the lower Courts, but both, those Courts held that the decree-holders were entitled to execute the decree in respect of those instalments which had fallen due within three-years preceding the date of the application, i. e., within three years of 23-11-1945. They further held that the amount of the instalments which had not yet fallen due on 23-11-1945, could not be realised in this execution as the execution application in respect of those instalments was premature. The decree-holders have submitted to this order passed by the lower appellate Court, but the judgment, debtor has come up in appeal contending that the whole execution is time-barred and the execution application should have been dismissed in toto.

2. The first contention that has been raised by the learned counsel for the appellant in this second appeal is that since the present execution application was not for realisation of instalments as such but was for realisation of the whole amount due under the decree on the basis of the default clause, the lower Courts should not have allowed realisation of the instalments, even though execution in respect of them might be within time, computing the limitation in respect of each instalment from the date on which that instalment fell due.

The decree sought to be executed was only one single decree and was for a sum of Rs. 678-4-6. After the compromise and adjustment of 6-1-1937, it permitted the judgment-debtor to pay the amount in instalments and consequently granted the right to the decree holders to realise those instalments as and when they fell due. A second optional right was given to the decree-holders to realise the whole amount due if there was default in payment of three instalments. Thus the decree gave two alternative modes of realisation of the decretal amount to the decree-holders and as long as the decree-holders applied for execution for the whole amount, it was certainly within the competence of the Courts to permit the realisation of a smaller amount, as the prayer for realisation of the larger amount covers the prayer for realisation of the smaller amount. It is true that in the application, the prayer for realisation was based on the ground that the whole amount of the decree had become due as a result of default in payment of three instalments, but that whole amount was made up of the sum which was payable in nine instalments of Rs. 67 and the tenth instalment of Rs. 75-4-6; and consequently, when dealing with the execution application, the Court could competently break up that amount and allow execution in respect of those items making up the whole amount sought to be realised which the decree-holders could competently realise in this execution application. This preliminary objection that the lower Courts were wrong in treating this application as an application for realisation of the amounts of individual instalments therefore fails.

3. A very similar case came up before a Bench of the erstwhile Chief Court of Oudh in Peoples Bank of Northern India Ltd. v. Aijaz Ali, 17 Luck. 449. In that case there had similarly been default in paying the instalments and four applications for realisation of the amount were presented in the year 1923. Then again a fifth appli-cation for execution in respect of the whole amount of the decree was presented on 20-4-1937. The Court allowed execution of this fifth application only in respect of the instalments which were within time on 20-4-1937. The view I have taken is thus fully supported by that decision.

4. The second point which has been urged by learned counsel is that, in the first execution application dated 15-2-1944, as well as in the present application, the decree-holders had already exercised the option given to them of realising the whole amount on the default clause and consequently the decree holders had no further rights to realise the instalments as such. So far as the application of 15 12.1944, is concerned, in that application there was obviously no exercise of any option to realise on the default clause. That was an application merely for substitution of the legal representatives of the decree-holder. It was men-tioned in that application that the entire decretal amount of es. 678-4-6 was realisable in accordance with the compromise of 6-1-1937, in ten instalments. There was also a mention that, in case of default of three instalments the entire amount was to become due. That application consequently mentioned all the terms of the amended decree and the mere prayer for substitution cannot therefore bo read as an indication that the

decreeholders intended to rely on the default clause when applying subsequently for realisation of the amount due under the decree and were not intending to realise the amounts of the instalments as such.

Learned counsel for the appellant has pointed out that, in that application dated 15-12-1944, there was a mention that that application was within time because the judgment-debtor was an agriculturist and U. P. Act 10 of 1937 was applicable to the execution application. His argument is that this mention of the protection in U. P. Act 10 of 1937 was only necessary in case the decree-holders wanted to execute the decree for the entire sum relying on the default clause and this mention must, therefore, be considered as indicating that the decree-holders had exercised the option to realise the decretal amount under the default clause. Firstly, even if the decree-holders had intended to realise the amounts of the instalments as such, it would probably have been necessary to mention U. P. Act 10 of 1937 so as to show that the application, even in respect of the instalments which had fallen due more than 3 years before 15-12-1944, was within time. Consequently this mention of U. P. Act 10 of 1937 was necessary as the decree-holders wanted to show that their execution for the entire amount realisable under the default clause would be within time if they in future wanted to proceed in that manner and this protection sought by the decree-holders could in no way be interpreted as showing that they were entirely giving up their other right of realising the instalments as such. The application of 15-12-1944, provides no basis for the argument that the decree-holders, having exercised their option to realise the amount under the default clause, were no longer competent to realise the instalments as such. So far as the present application of 23-11-1945, is concerned, I have already had occasion to say earlier that, even though the execution was sought on the basis of the default clause, it was competent for the Courts during the pendency of the execution application to permit the decree-holders to treat it as an application for execution in respect of individual instalments that were due and the execution in respect of which was within time.

4a. Learned counsel contended that, once the decree-holders have exercised the option to realise on the default clause, the decree subsequently ceases to remain an instalment decree and the only remedy thereafter loft to the decree-holders is to realise the entire amount under the default clause. In support of this contention learned counsel has referred me to two decisions of the Bombay High Court in Hanmant Bhimrao v. Gururao Swamirao, a. i. R. 1943 Bom. 36 and in Lakshman Krishna v. Parvatibai, A. I. R. 1943 Bom. 63. In the former case there was a difference of opinion between two learned Judges of the Bombay High Court and the case was referred on difference to the learned Chief Justice, held as follows :

> "That decree was originally a decree for payment by annual instalments. As soon as default was made, the decree-holder was given two inconsistent rights; he could continue under the decree to recover' the amount hy instalments, or he could recover the whole amount at once; but he could not do both. Ho was bound to limit his darkhast to a principal sum either of Rs. 1850 or Rs. 300. He had alternative rights and the debtor was subject to alternative obligations. The creditor having elected to enforce his right to recover the whole debt in one lump sum, the future obligation of the debtor was fixed accordingly, and, in my opinion, it was not open to the creditor

> subsequently to turn round, and seek to enforce the decree as an instalment decree."

In the latter case the judgment of the Divisional Bench was delivered by Broom field J. who agreed with the decision of the Chief Justice in the case cited above in the following words :

> "What has been decided in that case is that if a decree-holder elects to take advantage of a default clause such as that with which we are concerned and applies in execution to recover the whole amount of the decree, he cannot afterwards, even though his darkhast is infractuous, treat the decree as an instalment decree. Several English cases wore referred to in the judgment, but bvieily the ratio decidendi was that the decree holder in such a case has alternative but inconsistent rights. It is not a case merely of alternative remedies. If he chooses to exercise one of the two inconsistent rights, he ceases to bo able to exercise the other."

In both these cases no reason, at all is given why the learned Judges of the Bombay High Court held that, on the exercise of the option to proceed on the default clause, the primary right to realise the instalments as such became extinguished. In the former case, the learned Chief Justice merely expressed it as his opinion that, the creditor having elected to enforce his right to recover the whole debt in one lump sum it was not open to him subsequently to turn round and :seek to enforce the decree as an instalment decree. If two alternative modes of realising the money are granted by the decree to the decree-holder and no limitation is placed hy the decree itself that, on the pursuance of one mode of realisation the other mode would no longer be open to him, there is no reason to hold that the discretion of the decree-holder to proceed to realise the money by one mode at one time and by a different mode at another time is in any way fettered. In the second case, the learned Judges proceeded on the assumption that the two modes of recovery, viz. recovery of amounts of individual instalments as such and the recovery of the whole amount on the basis of the default clause, were two inconsistent rights. How and why they were hold to be inconsistent does not appear to have been explained.

6. This question was carefully considered hy a learned Judge of the Nagpur High Court in Firm Hardeo Dwarkadas v. Firm Binjraj Hariram, a. i. r. 1943 Nag. 170, and I may say with respect that I entirely agree with the view of the learned Judge that the only principle on which it can be iield that the decree-holder, having exercised the right to realise the money by one mode cannot proceed to realize by the other mode will be one based on the law of estoppel. If the decree-holder by proceeding by one mode gives reason to the judgment-debtor to believe that he is finally exercising his option, and the judgment-debtor actually acts on that belief, it may be held that the decree-holder would be estopped from going back on that understanding given by him and it would not be open to him to proceed by the alternative mode.

The point also came up before a learned single Judge of the erstwhile Chief Court of Oudh in Gurdin Bkant v. Chhedi Bhant, 16 Luck. 495. The learned Judge held :

> "In my opinion, even to that extent his appeal would have been entirely without force because, the moment the decree-holder exercised successfully the option to execute

> his decree for the whole amount, he at once converted the decree from being an instalment decree into an ordinary decree for the realisation of the full decretal amount. He could not again claim to realise any of the instalments as they fell due or rather within three years from the date on which they fell due."

It is to be noticed that the learned Judge emphasised the fact that the decree-holder had successfully exercised the option to execute the decree for the whole amount. A successful exercise of that option would bring the principle of estoppel into play. But where there has been no successful exercise of the option that principle would not apply.

A case which came before the erstwhile Chief Court of Oudh which was very similar in fact to the case before me is that of Peoples Bank of Northern India Ltd. v. Aijas Ali, 17 Luck. 449, which has already been cited by me above in another connection. In that case, preceding the application which came up for consideration before the Court, there had been four earlier applications in which the decree-holder had sought to realise the whole amount due under the decree on the basis of the default clause. In the fifth application, one of the questions that was urged before the Bench was as to whether having once elected to ask for one kind of relief provided by the decree, the decree-holder could afterwards change his mind and ask for the other. The first point that was raised before the Bench was that, since the decree made it obligatory on the decree-holder to execute on the first default; he had no option in the matter and could not subsequently rely on provisions for payment by instalments which by reason of the default had ceased to be operative. The other contention was put in the alternative on the ground that this first one would become immaterial if it could be held that the decree-holder having elected to proceed to realise the entire amount on the basis of the default clause, he was thereafter debarred from changing his mind and asking for the instalments as such. This second point was overruled by the Bench, though in the judgment the learned Judges did not specifically mention why they were overruling this contention. The learned Judges relied on a Full Bench decision of the Allahabad High Court in Joti Prasad v. Sri Chand, 51 all. 237, and on a Full Bench decision of the Chief Court of Oudh in Ajodhia Prasad v. Bansi Lal, 11 Luck. 276. The decision in that case supports the'view that I have taken in the case under consideration. It is also supported by the decision of the Nagpur High Court in the case mentioned above.

6. The rights of a decree-holder under an instalment decree came up for consideration very recently before a Full Bench of this Court, of which I was a member, in Sheo Lal v. L. 'Devi Das, 1952 all. l. ,t, 583. The point which is raised in the present case before me did not arise there, but one aspect of the decision in that case is relevant arid may be mentioned. In answering one of the questions referred, the Full Bench held that "the decree-holder will have a right to apply for realisation of each successive instalment as it falls due, provided the decree is not so worded that the only right left to the decree-holder after the first default is to realise the whole decretal amount."

This decision shows that, wheve the right to realise the whole amount on the basis of default is granted to the decree-holder on occurring of the default it does not extinguish his right to continue to realise each successive instalment as it falls due, unless there is a specific provision to that effect in the decree. I consider that tb-is same principle can be applied when considering the effect of the exercise of the option to proceed under one clause of the decree instead of the other. If the

occurrence of the default does not extinguish the right to realise the instalment the exercise of the option should not also affect the right to realise the instalments unless there is something in the decree itself indicating that the exercise of the option would extinguish the primary right granted by the decree to realise the amount in instalments. Of course if additional circumstances come into existence and the principle of estoppel stands in the way of the decree-holder, the position may be different; but while there are no other considerations as in the case before me, the right of the decree-holder to proceed to realise instalments cannot be affected by the circumstance that at one time he might have expressed his intention to proceed on the default clause.

7. In these circumstances, the order passed by the lower appellate Court is correct. The appeal fails and is dismissed with costs.

8. The stay order dated 23-2-1949 is vacated.

9. Leave to appeal to a Bench is granted.