

Kamta Prasad Vs. iind Additional District Judge Mainpuri and Others

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Court : Allahabad

Decided On : May-23-1996

Reported in : AIR1997All201

Judge : D.K. Seth, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 40, 11 and 47 - Order 21, Rule 2 - Order 23, Rules 1 and 3; [Indian Contract Act, 1872](#) - Sections 2, 23 and 25; [Evidence Act, 1872](#) - Sections 115; Uttar Pradesh Regulation of Money Lending Act, 1976 - Sections 7(1), 15, 15(1), 18, 26 and 26 (1) & (4); Uttar Pradesh Regulation of Money-Lending (Amendment) Act, 1978; Benami Transactions (Prohibition) Act, 1988

Appeal No. : Civil Misc. Writ Petn. No. 13853 of 1981

Appellant : Kamta Prasad

Respondent : iind Additional District Judge Mainpuri and Others

Advocate for Def. : R.K. Misra, Adv. and Standing Counsel

Advocate for Pet/Ap. : Sri Tej Pal and ;R.K. Goswami, Advs.

Judgement :

ORDER

1. Petitioner as plaintiff filed Suit No. 18 of 1974 against opposite party No. 3 as defendant for the recovery of a sum of Rs.2200/-in the Court of Munsif, Shikohabad. The said suit was decreed on 5th July 1978. Execution Case No. 26 of 1978 was levied for executing the said decree objection under S. 47 of the Civil P. C. hereinafter referred to as 'the Code', filed by the defendant Judgment-debtor was registered as Misc. No. 121 of 1979. By an order dt. 14th August, 1980 passed by the learned Munsif, Shikohabad in Misc. Case No. 121 of 1979, the objection under Section 47 of the Code was allowed. The plaintiff-petitioner filed Civil Revision No. 148 of 1980. By judgment and order dt. 31 st July, 1981, passed by the II Additional District Judge, Mainpuri, the said revision was dismissed and the order dt. 14th August, 1980 was confirmed. It is against these orders the present writ petition has been moved.

2. The learned counsel for the petitioner contends that prior to the filing of the objection registered as Misc. Case No. 121 of 1979, the judgment debtor had filed another objection to the execution which stood dismissed on compromise between the parties which is Annexure '1' to the writ petition in which after the objection having been dismissed, the judgment debtor had agreed to make the payment of the decretal amount on 15th May, 1979 and in default his properties would be sold on auction. Therefore, according to the teamed counsel for the petitioner Mr. R. K. Goswami, the second objection is not maintainable because of the principle of constructive res judicala. It is also contended that the same objections which have been taken in Misc. Case No. 121 of 1979 were also taken in Misc. Case No. 29 of 1979. The judgment debtor having allowed the said objection to be dismissed by agreement, the judgment debtor is estopped from raising the said objection subsequently. He also contends that even on merits, the objection cannot be sustained since S. 18 does not apply to pending suits and it has no manner of retrospective operation in view of the expression used in S. 18 of the U. P. Regulation of Money-lending Act, 1976, herein-after referred to as 'the Act' with those of the Benami Transactions (Prohibition) Act, 1988. In support of his contention, Mr. Goswami relies on the case of R. Rajagopal Reddy v. Padmini Chandrasekharan, (1995) 2 JT (SC) 667 : (1995 AIR SCW 1422).

3. The learned counsel for the opposite party Mr. R. K. Misra, on the other hand, contends that by reason of sub-section (4) of S. 26 of the Act, the decree has rendered inexecutable. According to him, by agreement, a decree rendered inexecutable by operation of statute can not be revived or made executable. Inasmuch as there cannot be any estoppel against statute. According to him, the said agreement was not a compromise. The same was only postponement of execution which was kept alive and in default was to be executed. He further contends that the principle of res judicata, constructive or otherwise, is not attracted in the present facts and circumstances of the case.

4. The alleged compromise cannot be termed to be a compromise within the meaning of Order 23, Rule 3 of the Code. Inasmuch as the decree cannot be varied or altered after the same has been passed by agreement. Therefore, there can not be any compromise with regard to the decree. At best the compromise can be treated to be an agreement of adjustment. If it is an agreement of adjustment, then provision of Order 21, Rule 2 would be attracted. Unless such agreement satisfies the test of certification as contemplated in Order 21, Rule 2, the same can not be treated to be an adjustment. In the present case, the decree-holder has not furnished the adjustment nor the Court has certified the same. It is also not the case of the decree-holder that the same was an adjustment, Then again there was no adjustment of the decree which remained fully executable. It was only a case of postponement of execution of the decree till 15th May 1979 and nothing else.

5. Now the question arises as to whether the agreement without being a compromise or an adjustment can be binding on the judgment debtor on the face of S. 26(4) of the Act. A reading of Annexure 'I' makes it clear that even if there was an agreement, the agreement had three parts - the first one that the objection shall stand dismissed, the second part is that the judgment debtor would pay the entire amount by 15th May 1979 and the third part is that the execution case shall remain pending and in default the decree shall be executed by pulling the property of the judgment-debtor in auction for sale. The said agreement does not show as to upon which consideration the judgment debtor had agreed to make those concessions which have been made in the said agreement. It does not appear as to what the judgment-debtor has gained by the said agreement. Inasmuch as even

if this objection would have been dismissed on merit, still then the payment would have been postponed even for the period later than 15th May, 1979 and that the decree would be executable in case the judgment debtor did not pay by putting the property of the judgment debtor into auction. Therefore, it is the decree-holder who had gained by removing the obstruction of the objection under S. 47 without conceding any benefit or gain to the judgment debtor. It conclusively proves that the said agreement is without any consideration. Under S. 25 of the Contract Act, an agreement without consideration is void. Therefore, the said agreement being without consideration is also void. The decree holder cannot derive any benefit out of the same. A compromise within the meaning of Order 23, Rule 3 is void for the same reasons relating to contract in view of explanation under Order 23, Rule 3 of the Code.

6. That apart, the execution case was kept alive while the application under S. 47 was allowed to be dismissed for non-prosecution. No issue having been decided, the principle of res judicata, constructive or otherwise, cannot be attracted. At the same time, it is not a case of withdrawal of the application under S. 47 within the meaning of Order 23, Rule 1 attracting mischief of sub-rule (4) thereof prohibiting the judgment-debtor from making any further application under Section 47. In execution proceedings, after the execution is dismissed, a fresh execution can be levied provided the same is not barred by limitation. When the objection under Section 47 is not decided on merits, and the principle of res judicata is not attracted, the dismissal of the application for non-prosecution even by agreement does not preclude the judgment debtor from filing a fresh application under S. 47. Since the execution is still continuing, the same can be objected to by the judgment debtor particularly in view of the observation made by me that the agreement was without consideration. There cannot be any question of estoppel as against the judgment debtor. Even then the nature of the agreement can not create estoppel in the facts and circumstances of the case as against the judgment debtor.

7. Then against Section 26 of the Act lays down:

"26. Particulars of debts and deposits to be furnished by every money-lender.-- (1) Every money-lender carrying on the business of money-lending from before the commencement of this Act shall submit to the Registrar, a statement in the prescribed form within a period of three months from the date of such commencement.

Provided that the Registrar may on an application by such money-lender, for sufficient cause condone the delay and accept the statement submitted within three months from the date of the commencement of the Uttar Pradesh Regulation of Money-Lending (Amendment) Act 1978.

(2) The statement referred to in sub-section (1) shall contain the particulars of debts due to each money-lender and of deposits made with him and such other particulars may be prescribed.

(3) Every such statement shall be countersigned, dated and sealed by the Registrar and shall be kept and maintained in the manner prescribed.

(4) Notwithstanding anything contained in any contract, decree or order or any other law for the time being in force, no money-lender shall be entitled to claim any amount from a debtor in respect of any loan advanced before the commencement of this Act, unless the name of such debtor and the amount due from him has been specified in the statement referred to in subsection (1).'

8. Sub-section (4) clearly lays down that notwithstanding any contract, decree or order, a money-lender is precluded from recovering any amount from a debtor even in respect of loan advanced before the commencement of the said Act unless the amount due from him has been specified in the statement referred to in subsection (1) of Section 26.

9. Now according to sub-section (1), a moneylender is supposed to submit his return within three months from the date of commencement of the said Act in case he is carrying on such business since before the commencement of the said Act. The said three months' period can also be extended by the Registrar upon an application so made showing sufficient cause. Admittedly in the present case, no

such statement has been filed. It is not the case of the plaintiff-decree holder that any such statement has been filed. On the other hand, it is the case of the decree-holder that he ceased to carry money-lending business after the commencement of the said Act and, therefore, the provisions of the said Act are not attracted. But the Courts below had found to the contrary. The said findings are concluded by concurrent findings of fact (that the decree-holder is a moneylender. This Court in revision cannot reassess the evidence nor can it reappraise the same. In exercise of writ jurisdiction, the High Court cannot undertake exercise on the finding of fact. Therefore, on the basis of the finding of both the Courts below that (the decree-holder was a money-lender and that he has not complied with S. 26(1), S. 26(4) is attracted in full force. Even if the said compromise is said to be a contract, even then by virtue of such contract, the decree-holder is prohibited from recovering the debt by reason of sub-section (4) of S. 26. On the other hand by reason of S. 26(4), the decree-holder cannot recover the debt despite the decree having been in his favour.

10. Therefore, it is crystal clear, in the facts and circumstances of the present case, that neither the contract contained in Annexure ' 1' nor the decree could be enforced by the decree-holder, the money-lender, for recovering his debts. This situation is brought into being by operation of the statute. The right of the judgment-debtor flows from the statute. By agreement the statute cannot be silenced. Even then such agreement may be contrary to law and as such void in view of Section 23 of the Contract Act. A decree which has been rendered inexecutable by reason of the statute cannot be put back to life by agreement of the parties. By reason of sub-section (4), the jurisdiction of the Court to execute such decrees which helps recovering the debts otherwise prohibited under sub-section (4) has been taken away. By agreement the Courts cannot be conferred jurisdiction which otherwise it does not have.

11. Now the contention of Mr. Goswami to the extent that sub-section (4) of Section 26 is eclipsed by reason of S. 18 may be attended to. According to him, S. 18 preceding S. 26 would be preferred to S. 26 in case of contradiction. He contends that S. 26 is ultra vires to S. 18. Section 18 provides as follows:

'18. Bar on certain suits by money-lender. (1) No suit on the basis of any loan, agreement or security referred to in sub-section (1) of Section 15 shall be instituted by a money-lender, unless at the time of advancing such loan or making such agreement or taking such security--

(a) such money-lender held a valid certificate of registration; or

(b) such money-lender had applied for such certificate and the same had not been refused, or

(c) the period specified in the proviso to subsection (1) of section 7 had not expired.

12. The contention that S. 26 is ultra vires to S. 18 is wholly misconceived. The (wo sections cannot be ultra vires to each other. In case there is any contradiction, the same are to be reconciled and interpreted harmoniously. Even the vires of S. 26 has not been challenged in the present petition. I have also not been informed of any decision holding S. 26 to be ultra vires lo S. 18 or that any such petition for such declaration is pending. In rny view, however, S. 18 and S. 26 operates in two different fields in respect of money lending. The same never come in conflict with each other. Section 18 deals with suits which shall be instituted afterthe commencement of the present Act. Section 15 of the said Act provides that the provisions of Chapter V will apply to every suit by a money-lender for recovery of loan advanced after the commencement of the Act or in respce! of any enforcement of any security taken or any agreement made after the commencement of the Act in respect of any loan advanced either before orafter such commencement or for redemption of any security given to the money-lender after the commencement of the Act in respect of any loan advanced either before or afier such commencement. Therefore, the case contemplated in S. 18 deals with the suits based on loan, agreemeni or security referred to in sub-section (1) of S. 15. Therefore, only suits based on sub-section (1) of S. 15 are hit by S. 18. But in the present case, the suit was filed before (he commencement of the Act (hough the decree was obtained after the commencement. It appears, however, that S. 18 operates only in respee! of suits that shall be instituted after the commencement.

13. In the case of R. Rajagopal Reddy (1995 AIR SCW 1422) (supra), the question arose as to whether S. 4(1) of the Benami Transactions (Prohibition) Act, 1988 could be applied in respect of cases where claims were made prior to the enforcement of S. 4(1) of the said Act. In the said case, it was held, after considering various provisions of the Act, that the operation of S. 4(1) was prospective and not retrospective and, as such, was not attracted in respect of claims mentioned prior to the commencement of S. 4(1) in respect of actions taken before its enforcement. On the same analogy, the scheme of the present Act clearly reveals that S. 18 applies only prospectively to suits to be filed after the commencement of the Act by reason of specific provision provided in S. 15 which specifies the cases in respect whereof the provision of Chapter V will apply. Section 15(1) does not include pending suits because it deals with in clause (a) with loan advanced after the commencement of the Act and Clause (b) deals with enforcement of any security taken or any agreement made after commencement of the Act though loan may be advanced prior to the agreement. In Clause (c), the redemption of security is given after the commencement of the Act is contemplated (though the loan might have been given either before or after the commencement). Therefore, the suit as contemplated in Clauses (a), (b) and (c) of Section 15(1) are suits which enforce loan, security, agreement, redemption arising after the commencement of the said Act. Though clauses (b) and (c) may relate to loan advanced prior to the commencement but the cause of action in both the cases are enforcement of security, agreement, redemption arising after the commencement. Therefore undoubtedly there is no scope for applying S. 18 in any pending suits since the operation of S. 18 is confined only to suits mentioned in S. 15(1) in respect whereof Chapter V is applicable.

14. Whereas S. 26 deals with cases in respect of business of money-lending from before the commencement of the Act in respect whereof statement is to be submitted. The statement made contains such business which took place prior to the commencement including those in the suits instituted prior to the commencement. Only when the statement as contemplated under sub-sec. (1) of S. 26 is complied with, that too within a period of three months which contemplates that it deals with business carried on prior to the commencement of the said Act, the mischief of sub-section (4) shall not be attracted; Section 26(1)

does not contemplate of any business transacted after the commencement of the Act which will govern by the provisions of the said Act. Sub-section (4) clearly indicates that contract, decree in respect of loan advanced before the commencement of the Act are subject matter of sub-section (4). Therefore, the contract or decree in respect of loans advanced before the commencement of the Act outside the provision of Section 15(1) are subject matter of S. 26(4) which were altogether distinguished from each other. Therefore, the operation of the field being different, there is no conflict or contradiction in between S. 18 and S. 26.

15. Mr. Misra relies on the judgment in the case of RamGopal v. Kailash Narain Misra, 1980 All LJ 606, in support of his contention that unless the name of the debtor is included in the statement filed by the money-lender, the claim of the moneylender fails. In the said case, it was held that unless the name of the debtor is registered under S. 26(1) and the statement is filed thereunder, the debt is irrecoverable. According to the ratio decided in the said case, such an objection can very well be taken even in Second Appeal and that S. 26(4) is retrospective in the sense that it applies to the loans taken before the commencement of the Act and which have not been recovered till the date of the commencement of the Act. The suit for the recovery of such loan pending in the trial Court stage or in the appellate stage on the date of the commencement of the Act would come within the purview of S. 26(4) of the Act. If once the suit has been filed and a decree has been obtained, the provision of S. 26(4) shall be equally applicable. Thus it appears by reason of S. 26(4), a decree passed in suit for recovery of loan advanced prior to the commencement of the Act in contravention of S. 26(1), read with S. 26(4) is a nullity. Therefore, such a decree is non est in the eye of law and cannot be executed. As such objection can be taken at any point of time.

16. That apart, when the statute allows such decree or contract unenforceable by operation of law even if no application is made and the attention of the Court is drawn to such a situation, it is the duty of the executing Court to examine and find out as to whether the decree is executable. Inasmuch as it goes to the root of the jurisdiction of the executing Court, namely, as to whether the executing Court has jurisdiction to execute the same.

17. An executing Court has jurisdiction while executing the decree to examine the executability of the decree. Thus it appears that the alleged agreement is neither a compromise nor an agreement nor creates estoppel as against the statute so far as the judgment debtor is concerned. At the same time, the principle of res judicata is also not attracted in view of the specific provision of S. 26(4) even if the earlier objection under S. 47 was allowed to be dismissed for non-prosecution apart from the grounds upon which I had negated the contention earlier. Admittedly it is also not saved by compliance of S. 26(1) of the said Act.

18. For all these reasons, I am unable to agree with the contention of Mr. Goswami. Nothing transpires to bring the case within the ambit of the violation of fundamental principles of law in order to activate writ jurisdiction for interfering with the impugned order in the facts and circumstances of the present case as has been held in the case of Ganga Saran v. District Judge Hapur (3)(sic).

19. In the result, the application fails and is dismissed. There will, however, be no order as to costs.

20. Petition dismissed.