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Court : Rajasthan

Decided On : Oct-31-1973

Reported in : 1973(6)WLN804

Judge : B.P. Beri, C.J. and; D.P. Gupta, J.

Appeal No. : D.B. Civil Special Appeal No. 89 of 1970

Appellant : Roop Chand

Respondent : Bhag Chand

Advocate for Def. : Shri. P.N. Dutt

Disposition : Appeal Allowed

Judgement :

B.P. Beri, C.J.

1. A preliminary decree for sale of mortgaged property for a sum of Rs. 13,430/8/6 together with interest and costs of the suit was passed in favour of Bhagchand, plaintiff, by the Court of Senior Civil Judge, Jaipur City, on July 26, 1956. The judgment-debtor was allowed six months' time to make payment of the decretal amount. As he failed to make payment of the aforesaid amount within the stipulated time, a final decree for sale of the mortgaged property was passed on April 24 1957 and sum of Rs. 15,279/9 was declared to be due to the plaintiff from

the defendant. It was also provided in the final decree that the decree-holder shall be entitled to subsequent interest 'as may be payable under Order 34 Rule 11, C.P.C.' The final decree by the learned Senior Civil Judge was not challenged by either of the parties and as such it became final and conclusive.

2. The decree-holder filed an execution application on September 14, 1957, claiming an amount of Rs 473/12/- as due under the decree and made a prayer for sale of the mortgaged property. The judgment-debtor, on receipt of notice under Order 21 Rule 66, C.P.C., submitted some objections, but it appears that he did not press them and the same were dismissed due to his absence. An order for sale of mortgaged property was passed. However, before any further proceeding could take place in the execution case, it was dismissed on May 30, 1960, in default of the decree holder. The judgment-debtor paid a sum of Rs. 8,000/- during the pendency of the aforesaid execution application.

3. A second execution application was filed on July 20, 1962, and a sum of Rs. 10.966/4/- was claimed as the amount then remaining due under the decree. It appears that the judgment-debtor during the pendency of the second execution application sought enlargement of time to make payment of the remaining amount and also made certain payments. This execution application was eventually, dismissed on 17-4-1965, for want of prosecution as the decree holder was absent on that date.

4. Thereafter, the decree holder presented a third execution application on April 29, 1965, and claimed that a sum of Rs. 5, 743/13/- was still due against the judgment debtor. It was mentioned in the execution application that the judgment-debtor had paid a sum of Rs. 16, 500/- from time to time towards the decretal amount. The judgment-debtor filed objection on September 13, 1965, and stated that an account be taken and it may be determined as to what amount was still due and payable under the decree. The judgment debtor filed further objections on December 4, 1965 and submitted that the decree holder had been over paid and he should be directed to refund the amount paid to him in excess of the decretal amount.

5. The Senior Civil Judge No. 1, Jaipur City, by his order dated September 20, 1967, held that the future interest after the date of the final decree, should be calculated on the aggregate amount and not only on the principal amount. On appeal, the learned Single Judge held that as the judgment-debtor sought adjournments from time to time to make payment of the balance amount and was granted time with the consent of the decree-holder, it should be taken that he agreed to make payment of the balance amount, as claimed by decree-holder. Thus the learned Single Judge held that on 14.9.57 the balance due would be taken to be Rs. 15,473/12/ and the decree holder was entitled to get interest on the aggregate amount consisting of the principal sum due under the decree and the costs of the suit and interest thereon from 14-3-64 to 16-5-64, 1-8-64 to 29-8-64 and 13-2-65 to 17-4-65, while he would be entitled to interest only on the principal amount of Rs. 7,999/- for the remaining period. By his order dated 22-7-69, the learned Single Judge directed the parties to work out the amount of interest in the above manner and allowed them one month's time to file their calculations. After the parties had filed the statements of amount calculated by them, in accordance with the aforesaid directions, the learned Single Judge passed a further order on November 20, 1969, that a sum of Rs. 2,194/- remained payable by the judgment-debtor to the decree-holder up to the date of the presentation of the third execution application, viz. upto 29-4-65. He also directed that the order of November 20, 1969, would form part of the judgment in the appeal before him.

6. The judgment-debtor has filed the present special appeal against the aforesaid decision of the learned Single Judge. A preliminary objection has been raised by Shri P.N. Dutt, learned Counsel for the respondent decree-holder that the present appeal is barred by limitation. His contention is that the first appeal before this Court was decided by the learned Single Judge by his order dated July 22, 1969, and the special appeal under Section 18 of the Rajasthan High Court Ordinance 1949, should have been preferred within 30 days of the date of the aforesaid order. As it was not done and the appeal was filed on December 18, 1969, it is barred by time. Mr. M.N. Kasliwal on behalf of the appellant contended that the order of the learned Single Judge dated July 22, 1969, did not dispose of the execution first appeal, but the same was finally decided by the order dated

November 20, 1969, passed by the learned Single Judge and that the special appeal is, therefore, within time.

7. The order passed by the learned Single Judge on July 22, 1969, was not conclusive as regards the rights of the parties in respect of the matter in appeal before him. It directed the making of the calculations and working out of the amount due and payable under the decree. The appeal was not completely disposed of, but an inquiry about the amount remaining due, if any, for which the execution case was to proceed further, was to be made and the amount was to be determined finally by the learned Single Judge after the parties had filed their respective calculations. Thus, the appeal before the learned Single Judge came to be disposed of finally by his order dated November 20, 1969. The learned Single judge himself directed that the later order dated November 20, 1969, would form part of the judgment in the appeal before him. Thus order of November 20, 1969, was the order finally disposing of the appeal and the present special appeal having been filed within 30 days of the said order, it is within limitation. The preliminary objection, therefore, fails.

8. The learned Counsel for the judgment-debtor appellant has argued that merely because the judgment-debtor sought adjournments for making payment, it should not have been held by the learned Single Judge that he was debarred from challenging the amount due under the decree. His contention is that under Order 34 Rule 11, CPC (as amended by the Code of Civil Procedure (Amendment) Act 1956) and in terms of the final decree, the judgment-debtor was liable to make payment of subsequent interest from the date of the final decree only on the principal sum due and no interest on costs and interest could be claimed by the decree-holder. On the other hand it was submitted by the learned Counsel for the respondent that on account of the fact that the judgment-debtor sought adjournments from time to time to time to pay the balance amount, he was estopped from challenging the correctness of the amount for which the execution was levied and his act of seeking adjournments should be construed as a promise to pay interest on the aggregate amount consisting of principal, costs of the suit and interest. Reliance was placed on behalf of the respondent on *Narayan Vithal Mawal v. Raoji Bin Moroji Dhole* ILR 28 Bom 393. In that case the decree was

silent as to interest and the decree-holder could not have claimed it as a matter of right. In the execution of the decree, the judgment-debtor presented several 'darkhasts' (applications) seeking extension of time for payment of the debt and adjournments were granted from time to time. Later on October 12, 1900, the judgment-debtor submitted an application in which he made 'a distinct promise' to pay interest and sought adjournment on that basis which was allowed. Subsequently the judgment-debtor disputed the right of the decree-holder to claim interest on the ground that the decree did not award any interest. Two contentions were raised on behalf of the decree-holder before the Bombay High Court namely, (1) that the conduct of the judgment-debtor in seeking extension of time for payment of the amount due under the decree estopped him from disputing the decree-holder's right to claim interest, and (2) that in his application dated October 12, 1900, the judgment-debtor made 'a distinct promise to pay interest' and on the strength of that representation and promise he obtained adjournment from the court and as such he was liable to pay interest on the decretal amount from October 12, 1900. Repelling the first contention Chandavarkar, J., observed as follows:

It is contended for him by Mr. Rao that, having regard to the plaintiff's conduct, disclosed by his applications presented to the Subordinate Judge, the plaintiff is estopped from disputing the defendant's right to claim interest. But the difficulty in applying the principle of estoppel to the facts of the case lies in this, that it cannot be said, that it was plaintiff's act of declaration that he is liable to pay interest according to the terms of the decree, which caused the defendant to believe that the decree had awarded interest. Before any act was done or declaration made to that effect by the plaintiff, the defendant himself had in his darkhast presented to the Court asserted his right to claim interest, believing that the decree had awarded it. Under these circumstances it cannot be said that the statement of the plaintiff that he was liable to pay interest was the proximate cause which led the defendant into the mistaken belief that the decree awarded interest. Moreover, both parties must be treated as having known the terms of the decree which were clear and there can be no estoppel when the truth of the matter appears, as it does in the present case, on the face of the proceeding.

Thus it was held that the judgment-debtor was not estopped from disputing the right of the decree-holder to claim interest because of his conduct in seeking enlargement of time for making payment of the decretal amount. It was only with regard to the other contention relating to the application dated 12th October, 1900, that the learned Judge held that the judgment-debtor must be treated as having contracted an obligation to pay interest on the decretal amount as he had made 'a distinct promise' in that application to pay interest.

9. In the present case there is no such express promise by the judgment-debtor to pay interest on the amount of costs and interest, but the principle of estoppel is sought to be applied merely on the basis of conduct of the judgment-debtor in seeking adjournments for making payment. Chandavarkar, J, himself repelled the contention on the basis of conduct and as such the aforesaid decision does not help the respondent. In the case of *Mohori Bibee v. Dhurmodas Ghose* 30 Indian Appeals 114 their Lordships of the Privy Council held that Section 115 of the Evidence Act does not apply where the statement relied upon is made to person who knows the real facts and is not misled by the untrue statement.

10. In *Prakash Mal and Ors. v. Vakil Thikana Khatu* ILR (1952) 2 Raj 322 various execution applications were submitted by the decree-holder in each of which interest on over-due instalments was claimed but on objection that that no interest has been allowed in the decree was never taken by the judgment-debtor. When an objection was taken in the last execution case on behalf of the judgment-debtor that interest could not be recovered on over-due instalments, it was contended that the judgment-debtor should not be allowed to raise the objection on the principle of constructive res judicata. It was held by this Court that so long as the principal decretal amount was due, execution could proceed and the judgment-debtor could not resist execution even if the interest on over-due instalments could not be claimed under the decree. The plea of judgment debtor was not barred by the principle of constructive res judicata.

11. In *Raja Babu Kothari v. Syed Mohammed* ILR 11 Raj 829 it was held that the judgment debtor did not object that the amount for which the execution was taken out was in excess of the decree itself, did not debar him from raising the question

at a subsequent stage. Relying on a Bench decision of the Madras High Court in *Azagappa Chetti v. S.A. Ramanathan Chettiar* AIR 1933 Mad 466, Bhargava, J., held that the judgment-debtor is not estopped on the principle of constructive res judicata from raising the question that the decree-holders have realised more than what was due under the decree.

12. It appears from the record that after seeking time to make payment of the amount of 1-8-64, the judgment-debtor paid a sum of Rs. 500/- to the decree-holder on 29-8-64 and further sums of Rs. 500/- on 24-10-64 and Rs. 600/- on 16-12-65. Similarly after seeking time for making payment on 13th February, 1965, the judgment-debtor paid Rs. 500/- on 15-3-65 to the decree-holder during the execution proceedings. Both the parties were well aware of the fact that under the amended provisions of Order 34 Rule 11, CPC, as also under the terms of the final decree, interest was payable on the principal amount only and not on the aggregate amount and merely because the decree-holder chose to levy execution for an inflated sum, the judgment-debtor by his conduct of taking adjournments for the purpose of making payment cannot be said to have misled the decree-holder acting under any mistaken belief on the basis of an erroneous representation of the judgment debtor, because the decree-holder had claimed interest on the aggregate sum even in the execution application filed by him.

13. In these circumstances, we hold that merely on account of seeking enlargement of time for making payment during the course of execution proceedings, the judgment-debtor is not precluded on the principle of estoppel nor that of constructive res judicata from raising the question that interest on the principal sum only could be claimed by the decree-holder and not on the aggregate amount. The decree-holder is entitled to get interest from the date of the final decree, that is, from 24-4-57 on the principal amount of Rs. 7,999/- only at the rate of Rs. 6/ per cent per annum. The executing court shall calculate the amount due under the decree up to the date of the presentation of the last execution application, viz., 29-4-65 on the aforesaid basis and proceed to execute the decree for such amount as may be found due, if any. If no amount is found due under the decree by working out the interest in the aforesaid manner the execution application shall be dismissed.

14. In the result we allow the appeal and modify the order passed by the learned Single Judge in the manner indicated above. The parties shall bear their own costs.

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