Mr.Narendra Kumar Vs. Mrs.Sumathi

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Court : Chennai

Decided On : Jan-12-2012

Judge : T.S.Sivagnanam, J.

Acts : Constitution of India - Article 227; Code of Civil Procedure (CPC) - Sections 47, 34, 115 - Order 21

Appeal No. : CRP (NPD) No.2105 of 2005

Appellant : Mr.Narendra Kumar

Respondent : Mrs.Sumathi

Advocate for Def. : Mr.B.S.Jothi Raman, Adv.

Advocate for Pet/Ap. : Mr.N.Nagu Sah, Adv.

Judgement :

This revision filed under Article 227 of the Constitution of India is directed against the order and decreetal order dated 19.09.2005, passed by the IX Judge, City Civil Court, Chennai partly allowing E.A.No.3965 of 2005 in E.P.No.643 of 2005 as far as it disallowed the decree-holder's claim for interest at 36% per annum from November 1999 to 01.01.2001 and for the pendente lite period from 02.01.2001 to 21.09.2003, the date of decree.

2. The respondent/plaintiff filed a suit in O.S.No.86 of 2001 for recovery of the advance amount of Rs.45,000/- paid for purchase of the property bearing door No.49, NSC Bose Road, Chennai 79 together with interest at the rate of 36% per annum. The petitioner/defendant contested the suit claim and filed a written statement. The trial Court granted a decree in favour of the respondent/plaintiff by judgment and decree dated 22.09.2003. The respondent/decree-holder filed E.P.No.643 of 2005, to recover the decree amount by arrest and detention of the petitioner/judgment-debtor. The petitioner filed an application under Section 47 of the Civil Procedure Code (CPC) in E.A.No.3945 of 2005, stating that the trial Court passed the decree without considering the legal position as regards the rate of interest under Section 34 CPC and since the transaction is not a commercial transaction, the trial court has no jurisdiction to award interest more than 6% per annum during pendente lite period and after the decree. Therefore, it was contended that the decree dated 22.09.2003, is a nullity. The petitioner relied upon a decision of the Punjab and Haryana High Court in AIR 1991 P&H 187[Taria alias Tara Chand vs. Amar Singh and another].

3. The decree-holder resisted the said application by filing a counter affidavit by raising a preliminary objection stating that an application under Section 47 CPC is not maintainable. Further it was stated that the decree is not a nullity and on facts, it was categorically pointed out that the petitioner agreed to pay 36% interest on Rs.45,000/- as the amount was used by the petitioner in his Silver business and the pleadings made by the plaintiff were not controverted by the petitioner/defendant and therefore, the petitioner cannot question the decree. Further, it was contended that the trial Court after considering the evidence on record, exercised discretion and awarded 36% interest and the Executing Court cannot go behind the decree and the Appellate Court alone has jurisdiction to set aside the decree, if it is found to be beyond the scope of law. It was further stated that the decision of the Punjab and Haryana High Court, does not state that the decree awarding interest at 36% is void. Further, the respondent contended that the petitioner was fully aware about the proceedings before the trial Court and his counsel cross examined the plaintiff, however the petitioner did not chose to give evidence despite several opportunities granted by the trial Court. With the above contentions, the decree-holder prayed for dismissal of the application filed Under

Section 47 CPC.

4. The Executing Court solely relying upon the decision of the Punjab and Haryana High Court, referred supra, granted partial relief to the petitioner, by scaling down the interest to 6% from 22.09.2003 and denied the relief for the other periods as sought for by the petitioner. Aggrieved by such order, the petitioner has filed this revision petition.

5. The learned counsel for the petitioner reiterated the stand taken before the Executing Court and contended that the Executing Court having scaled down the interest from 22.09.2003 to 6% ought to have granted the full relief i.e. the interest for the period from November 1999 to January 2001and for the pendente lite period from 02.01.2001 to 21.09.2003. The learned counsel further submitted that the transaction between the petitioner and the respondent not being commercial in nature, the trial Court did not have jurisdiction to grant interest more than 6%. Therefore, the decree itself was a nullity and therefore, the trial Court ought to have granted full relief as sought for by the petitioner.

6. Per Contra, the learned counsel appearing for the respondent submitted that the application under Section 47 CPC in E.A.No.3961 of 2005, was not maintainable and the Executing Court had no jurisdiction to go behind the decree and the relief granted to the petitioner was erroneous and the trial Court award interest at 36% after examining the transaction and the evidence available on record and the money obtained was used by the petitioner in his silver business and the decree was passed considering the evidence available on record, the Executing Court exercising power under Section 47 CPC cannot re-write the decree and ought to have dismissed E.A.No.3961 of 2005. In support of his contention, the learned counsel referred to a decision of the Bombay High Court in The Industrial Credit and Investment Corporation of India vs. Sharad Kanna [AIR 1993 Bombay 304].

7. It is on these rival contentions, it has to be decided as to whether the application filed by the petitioner/judgment debtor in E.A.No.3961 of 2005 under Section 47 CPC, for scaling down the percentage of the interest awarded by the trial Court in judgment and decree dated 22.09.2003 is maintainable and proper.

8. The judgment-debtor's contention is that the transaction between the parties was not a commercial transaction and therefore, the trial Court has no jurisdiction to award 36% interest and by awarding 36% interest, the trial Court exceeded its jurisdiction in the matter of award of interest as laid down under Section 34 CPC and therefore, the decree is a nullity. Since the decree is a nullity, the Executing Court has sufficient jurisdiction under Section 47 CPC to decide all questions between the parties to the suit in which the decree was passed relating to execution, discharge or satisfaction of the decree and the same has to be determined by the Court executing the decree and not by a separate suit.

9. Therefore, it has to be seen whether the application under Section 47 CPC for the relief sought for by the judgment-debtor was maintainable.

10. In The Industrial Credit and Investment Corporation of India vs. sharad Kanna [AIR 1993 Bombay 304], an identical question came up for consideration. In the said case, the defendant by way of chamber summons sought for declaring an exparte decree passed by the Bombay High Court to be a nullity and/or non executable with the further prayer that the said exparte decree be set aside. The defendant contended that the Court has no jurisdiction under Section 34 CPC to direct interest to be awarded upon interest in the suit claim. The Bombay High Court in the aforementioned decision, after taking note of the various decisions of the Hon'ble Supreme Court held that the decree was not passed by a Court which lacked inherent jurisdiction and a situation where a statute mandates the Court to do or not to do something and the Court breaches the mandate, cannot be equated with a situation where the Court inherently lacks jurisdiction to adjudicate upon the subject matter of the dispute or with the case of a special forum of limited jurisdiction acting out of bounds of its jurisdictional limits and the former results in an erroneous decree; the later in a decree which is a nullity. It was further held that if a Court while exercising jurisdiction under Section 34 CPC awards interest on the aggregate of principle sum plus interest, it would be an exercise lacking in inherent jurisdiction and not merely of an erroneous exercise within its jurisdiction and a Court which otherwise has jurisdiction to entertain a dispute equally have jurisdiction to decide it erroneously and the remedy in such a situation is by way of appeal against such order. Therefore, Bombay High Court held that a decree

which grants interest upon interest cannot be said to be nullity nor can the Court which passes the decree, be said to be coram non-judice. The Bombay High Court also took note of the decision of this Court in Ganapathy vs. Balasubramania Goundar, [AIR 1987 Madras 124], wherein it has been held that the question of validity of a decree is not one which can be agitated in execution, because it does not relate to the satisfactory discharge of the decree. It is only where a decree is passed by a Court, which lacks inherent jurisdiction to pass the decree, that the objection to the validity of the decree may be raised in a proceeding in execution, if such an objection appears on the face of the record. At this stage, it would be useful to refer to the relevant paragraphs of the decision of the Bombay High Court:

20. In the case of the defendants, however, the decree was not passed by a Court which lacked inherent jurisdiction. It is not disputed, indeed it could not be, that this Court had jurisdiction to entertain the summary suit, in which the ex parte order was passed. What is, however, contended is that, under S. 34 of the Code of Civil Procedure, 1908, as expounded by the Full Bench, this Court lacked inherent power to award interest upon interest, and, therefore, this situation was no different from the situation of lack of jurisdiction, which was considered by the Supreme Court in the cases cited hereinabove.

21. It is difficult to agree with this contention advanced by the learned counsel. A situation, where a statute mandates the Court of plenary jurisdiction to do or not to do something, and the Court breaches the mandate, cannot be equated with a situation where the Court inherently lacks jurisdiction to adjudicate upon the subject-matter of the dispute or with the case of a special forum of limited jurisdiction acting out of bounds of its jurisdictional limits. The former results in an erroneous decree; the latter in a decree which is a nullity.

25. It is difficult to agree with the contention of the learned counsel for the defendants that, if a Court, while exercising jurisdiction under S. 34, awards interest on the aggregate of the principal sum plus interest, it would be an exercise lacking in inherent jurisdiction and not one merely of an erroneous exercise within its jurisdiction. A Court, which otherwise has jurisdiction to entertain a dispute,

equally has jurisdiction to decide it erroneously. The remedy, in such a situation, is by way of appeal, if one is provided, or other constitutional one. If there is no resort to them, or, as in the instant case, the resort to them draws a blank, the order of the Court becomes final and it is not capable of being ignored on the ground of its being noh est or a nullity. In my view, the Court, in such a situation, cannot and does not became coram non judice.

26. It would be useful, at this juncture, to refer to a judgment of the Supreme Court in Hiralal v. Kali. Nath, MANU/SC/0041/1961 : [1962]2SCR747 , This was a case where the decision of the High Court was challenged on the ground that the suit filed on the Original. Side was wholly incompetent for want of territorial jurisdiction, and, therefore, the award which followed on the reference to arbitration, and the decree of the Court under execution, were all null and void. The Supreme Court, repelling the contention, observed (at page 200): “The validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seized of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in' respect of the subject matter of the suit or over the parties to it.” The Supreme Court turned down the objection based on territorial jurisdiction as deemed to have been waived and held that the parties were estopped from raising such objection at the execution stage.

29. For a moment, even assuming the correctness of the contention of Mr. Diwan that the Full Bench judgment has expounded the law and held that the “power” of the Court under S. 34 of the Code of Civil Procedure is “restricted” and that the Court is “prohibited” from granting interest upon interest, a Court, which acts contrary thereto, does not act without inherent jurisdiction; it may act erroneously. Thus, a decree, which grants interest upon interest, cannot be said to be a nullity, nor can the Court, which passes the decree, be said to be coram non judice. In my view, therefore, the ex parte decree dated 5th November, 1990, made by Agarwal, J., does not amount to nullity, nor is it “non est”; much less can be Court be said to have been coram non judice.

34. Mr. Doctor also relied on a judgment of the learned single Judge of the Madras High Court in Ganapathi v. Balasubramania Gounder MANU/TN/0127/1987 : AIR1987 Mad124 , which takes the view that the question of validity of a decree is not one which can be agitated in execution, because it does not relate to the satisfactory discharge of the decree. It is only where a decree is passed by a Court, which lacks inherent jurisdiction to pass the decree, that the objection to the validity of the decree may be raised in a proceeding in execution, if such an objection appears on the face of the record.

37. In the result, I hold that the ex parte Decree dated 5th November, 1990, made by Agarwal, J., is not a nullity, nor is it non est. The Court which passed the said decree was not coram non judice. Consequently, it is not open to the defendants in these proceedings or in other collateral proceedings to object to the validity of the said decree.

11. In the instant case, the only objection raised by the judgment-debtor in the application filed under Section 47 CPC, is by stating that the transaction between the parties is not a commercial transaction and therefore, interest cannot be ordered to be paid at 36%. In my view this is the question of fact, which was considered and a decree was passed by the trial Court giving certain reasons for exercise of discretion in directing interest at 36%.

12. Undoubtedly the Executing Court does not have jurisdiction to go behind the decree, unless, there was lack of inherent jurisdiction and the Executing Court cannot go behind the decree in cases of erroneous exercise of jurisdiction. The only remedy in cases of erroneous exercise of jurisdiction is to challenge the same by filing an appeal. The Executing Court cannot travel beyond the decree under execution and an erroneous decree cannot be said to be a nullity nor can a decree based on an error be a nullity. The Hon'ble Supreme Court in Urban Improvement Trust, Jodhpur v. Gokul Narain, AIR 1996 SC 1819 (1996 4 SCC 178), considered this very question and held as follows:-

15......a decree passed by a court without jurisdiction over the subject-matter or on any other ground which goes to the root of its exercise of jurisdiction or inherent jurisdiction, is a nullity. A decree passed by such a court is a nullity and is non est.

Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the authority of the court to pass a decree which cannot be cured by consent or waiver of the party. If the court has jurisdiction but there is any defect in its exercise of jurisdiction it does not go to the root of its authority. Such a defect like territorial jurisdiction could be waived by the party which could be corrected only by way of an appeal or revision. In that case it was held that since the decree was a nullity the validity was upheld in execution.

13. The Full Bench decision of Kerala High Court in K.P.Antony vs. Thandiyode Plantations (Pvt) Ltd. (FB) [AIR 1996 Kerala 37 (FB) held as follows:

10. The Supreme Court in Sunder Dass v. Ram Prakash AIR 1977 SC 1201 has laid down that the validity of a decee can be challenged in execution proceedings only on the ground that the court which passed the decree lacked inherent jurisdiction. A court is said to be lacking in jurisdiction when it could not have seisin of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time of institution of the suit or when the suit was decreed. Inherent lack of jurisdiction means a power or jurisdiction which does not at all exist or vest in a court. A court lacks inherent jurisdiction when the subject matter is wholly foreign to its ambit and is totally unconnected with its recognised jurisdiction. So long as it-cannot be said that the court lacked inherent jurisdiction to entertain the petition contention of the respondents does not deserve acceptance. In V. Appannammanayuralu v. B. Sreeramulu, AIR 1978 Andh Pra 160 the Andhra Pradesh High Court held: “The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction. It can be said that the court, which has passed a decree, is lacking in inherent jurisdiction only when it could not have seisin of the case because the subject matter was wholly foreign to its jurisdiction, or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it.” As the question of jurisdiction has already been decided by the Division Bench of this Court and as that has become final, it cannot

be reagitated when the judgment is sought to be enforced. In other words, as the judgment in M.P.A. has been confirmed by the Supreme Court when the Special Leave Petition was dismissed respondent cannot advance the contention that the court lacked jurisdiction in entertaining the petition.

11. The settled legal position is that the executing court can go behind a decree only if there was lack of inherent jurisdiction and not on the ground that there was erroneous exercise of jurisdiction. It will not be open to a party to challenge a judgment when it is sought to be enforced on the ground that the judgment is based on wrong conclusions or on erroneous findings or on wrong application of law. As the remedy of the aggrieved party in such cases is to challenge the same in appeal or revision as the case may be and not to challenge it when it is sought to be enforced, the respondent's challenge in this case against the judgment can be sustained. In the present case, lack of jurisdiction was pleaded by the respondents and that has been considered and found against them. So they cannot raise the very same point in the executing court.

14. An identical question as in the case on hand, arose before the Bombay Court in Joaquim Joao Fernandes vs. Nazario Pinto [2006 AIHC 2116 (Bombay) and the Bombay High Court after taking note of the various decisions on the point including the decisions of this Court held that the Executing Court could not have reduced the interest. At this stage, it would be useful to refer the relevant paragraph of the said decision:-

5. Undoubtedly, Section 47 of the Code of Civil Procedure empowers the Executing Court to decide all the questions arising between the parties to the suit in which the decree is passed when such question relates to the execution, discharge or satisfaction of the decree. In other words, the Executing Court is empowered to deal with all the points relating to execution or discharge or satisfaction of a decree. The provision speaks of eventualities subsequent to issuance of the decree. It does not relate to the causes arising prior to issuance of the decree. It does not include questions like entitlement or right of the parties to get the decree of the nature passed. The question to be dealt with by the Executing Court, therefore, should, be necessarily relating to the execution part of

the decree, albeit lawful and executable decree and not the one which is a nullity.

6. The power to decide about the executability of the decree cannot and does not include the power to alter the decree merely because the Executing Court has different opinion about the right of the parties regarding the subject-matter in relation to which the decree is sought to be executed. While dealing with the issue relating to the executability of the decree, the Executing Court cannot re-adjudicate upon the rights of the parties to obtain the decree already passed.

7. The Executing Court has jurisdiction only to execute the decree in accordance with the procedure laid down under Order 21 of the Code of Civil Procedure. The Apex Court in (Rameshwar Das Gupta v. State of U.P. and Anr.) , while dealing with a

matter relating to money claim based on computation of arrears of salary, gratuity and pension in accordance with the service law, and wherein the decree was for a specific amount without any direction for payment of interest thereon, and dealing with the question that in such cases whether the Executing Court could step out and grant a decree for execution on the ground of delay in payment or for unreasonable stand taken in execution, clearly held that: “the Executing Court has exceeded its jurisdiction and the order is one without jurisdiction and is thereby a void order. It is true that the High Court normally exercises its revisional jurisdiction under Section 115, C.P.C. but once it is held that the Executing Court has exceeded its jurisdiction, it is but the duty of the High Court to correct the same. Therefore, we do not find any illegality in the order passed by the High Court in interfering with and setting aside the order directing payment of interest. In the said case, the Executing Court had granted interest on the decretal amount on the ground that there was delay in payment of amount in view of the unreasonable stand taken by the judgment-debtor in denying the legitimate claim of the petitioner.

8. Similarly, in (State of Punjab and Ors. v. Krishan Dayal Sharma) , it was clearly held that the decree

which does not contain any order or direction for payment of any interest on the amount which is payable to the decree holder, it is not open to the Executing Court to award interest and the Executing Court is bound by the terms of the decree and cannot add or alter the decree on its notion of fairness or justice. The right of the decree holder to obtain relief is determined in accordance with the terms of the decree.

9. In fact, it is a settled principle of law that the Executing Court cannot go beyond the decree and the issues which can be dealt with in exercise of powers under Section 47 of the C.P.C. are strictly related to the executability of the decree.

10. In (V. Chinna Lakshmaiah v. Samurla Ramaiah and Ors.) , while dealing with the powers of the Executing Court under Section 47 of the C.P.C., it was held that, it is not for the Executing Court to decide whether the decree passed is legal or illegal or whether it is erroneous or not, though it is open to the Executing Court to consider whether the decree sought to be executed is void or not.

11. In (Hira Devi and Ors. v. Harinath Chaurasiya and Ors.) , it was held that, if the defendant rails to raise the plea of the suit being barred under Section 16(c) of the Specific Relief Act, and the decree is passed and becomes final in all respect, he is not entitled to raise such objection at the stage of execution of the decree nor the Executing Court can assume jurisdiction to deal with such objections. Such objections do not relate to execution or discharge or satisfaction of the decree. The term “execution” means carrying into operation the effect of the decree and, therefore, such an issue relating to bar under Section 16(c) of the Specific Relief Act cannot be dealt with in exercise of powers under Section 47 of the C.P.C. by the Executing Court.

12. In (Ganapathi and Anr. v. Balasubramania Gounder) , it was held that, the Executing Court must execute the decree as it stands and it cannot go into the correctness or validity of the decree except when the decree is a nullity and if the decree is of a Court with jurisdiction, the Executing Court is bound to execute the decree as it stands. The question as to the validity of the cannot be agitated in execution proceedings because it is not a question which relates to the discharge or the satisfaction of the decree. It is only where a decree is passed by Court

which lacks inherent jurisdiction to pass the decree that the objection to the validity of the decree may be raised in a proceeding in execution. Reliance was placed by the Madras High Court in the decision of the Apex Court in the matter of (Vosudev Dhanjibhoi Modi v. Rajabhai Abdul Rehman) . In the said case before the Madras High Court, in execution of a mortgage decree the judgment debtors prayed for the relief that the decree in respect of certain properties be so modified as to make it ineffective and inoperative in respect of those properties and, thus the dispute was sought to be raised whether the decree in respect of some of the properties was a valid decree or not. It was held that such a question could not be said to relate to the construction of the decree and the objection raised being frivolous, ought to have been rejected when there was no dispute as to the identify of the properties.

13. In (Gopal Ch. Paul v. Smt. Amala Mondal) reported in A.I.R. 1990 Calcutta 105, while accepting the contention on behalf of the decree holder that while exercising the powers under Section 47, it is not open to the Executing Court to go into the question of validity of the decree passed by the competent Court unless it is shown that there was any legal impediment to pass such a decree, and while holding that an Executing Court cannot go beyond the decree, also observed, that if it could be shown that the decree is a nullity, certainly the Executing Court can go into the said question and hold that the decree is a nullity because it is the fundamental principle that the decree passed by a Court without jurisdiction is a nullity and its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon and even at the stage of execution as well as in collateral proceedings,

14. Similarly, the Apex Court in (Sunder Doss v. Ram Parkash) , held that, the Executing Court cannot go beyond the decree nor can it question its legality or correctness. But there is one exception to this general rule and, that is, that where the decree sought to be executed is a nullity for lack of inherent jurisdiction in the Court passing it, its invalidity can be set up even in an execution proceedings.

15. The law on the point that the Executing Court cannot go beyond the decree is well-settled. The Executing Court cannot sit in appeal over the decree passed by the Court nor is entitled to pass an order which will virtually result in affecting the

rights of the parties already settled under the decree. Once under the decree the trial Court had adjudicated the issue relating to entitlement of interest and fixed the rate of interest to be 21%, the remedy to the aggrieved being available in the form of an appeal and the Executing Court being not entitled to go beyond the decree, certainly the Executing Court could not have reduced the interest from +21% to 6%. It apparently discloses total arbitrary exercise of power as also apparent error in exercise of the jurisdiction by the Executing Court, ignoring its limitation.

15. The impugned order in this revision was passed by the Executing court solely relying upon the decision of the Punjab and Haryana High Court, referred supra, in the said decision, the Punjab and Haryana High Court exercised its jurisdiction by taking note of the pleadings and judgment preceding the decree and rendered a factual finding that the transaction in the said case did not relate to any commercial transaction and therefore, the proviso to Section 34 CPC was not attracted to the facts of the said case in any manner. However, in the case on hand, the Executing Court did not embark upon any such exercise, but merely quoted the judgment and granted partial relief to the judgment-debtor. In my view, the Punjab and Haryana High Court did not have an occasion to consider the legal aspect of the matter as discussed in the aforementioned paragraphs of this order and hence, this Court is of the view that the decision of the Punjab and Haryana High Court cannot be made applicable to the facts of this case, that apart the Court did not consider the effect of the decisions of the Hon'ble Supreme Court which have been relied on by the Full Bench of the Kerala High Court.

16. In view of the above legal principle, this Court has no hesitation to hold that the executing Court has no jurisdiction to entertain the said application in E.A.No.3961 of 2005 and the said application itself was not maintainable. The Executing Court ought to have rejected such application and left it open to the judgment-debtor to file an appeal against decree, if so advised. Thus the very application itself being not maintainable, the Civil Revision petition is dismissed, consequently in E.A.No.3965 of 2005 in E.P.No.643 of 2005 on the file of IX Judge, City Civil Court, Chennai, stands dismissed and it is held that the petitioner is not entitled for any relief. No costs.