SUPREME COURT OF INDIA

Pushpa Sahakari Avas Samiti Ltd.

Vs.

Gangotri Sahakari Avas S. Ltd.

C.A.No.8297-8298 of 2004

(Deepak Verma and Dipak Misra JJ.)

30.03.2012

JUDGMENT

DIPAK MISRA, J.

1. The present appeals by special leave are directed against the judgment and order dated 10.01.2002 and 07.03.2003 passed by the learned Single Judge of the High Court of Judicature at Allahabad in Civil Revision No. 341 of 1997 and Review Application No. 38861 of 2002 respectively. The facts as uncurtained in the two appeals are that the appellant as plaintiff initiated a civil action forming subject matter of suit No. 501 of 1995 against the respondent and others for permanent injunction. In the suit, the parties entered into a compromise and on the basis of the compromise, a decree was drawn up on 06.09.1996. The terms and conditions of the compromise were made a part of the decree. Be it noted, the compromise between the parties stipulated certain conditions and one such condition was that within a span of six months' time, the defendant would pay a certain sum to the plaintiff. For the sake of clarity and convenience, the said clause of the compromise is reproduced hereunder:-

> That the defendant No. 1 acknowledges and undertakes to pay Lacs Rs. 38,38000/- (Rupees Thirty Eight Lacs and Thirty Eight Thousand) only to the plaintiff within six months from the date of this compromise. The payment of the said amount by the defendant No. 1 to the plaintiff shall have the effect of settling entire claim of the plaintiff as against the defendant No. 1 in full and final

2. In the petition for compromise which formed a part of the decree, there were other stipulations but they are not necessary to be stated for the adjudication of these appeals. As has been indicated earlier, the decree was drawn up on 06.09.1996.

3. As the first respondent did not honour the terms of the decree, the appellant filed an application for execution of the decree on 17.02.1997 and the said application was registered as Misc. Case No. 9 of 1997. The respondent No. 1 entered contest and filed an objection under Section 47 of the Code of Civil Procedure (for short, 'the Code') which was registered as Misc. Case No. 43 of 1997. Allegations, counter allegations and rejoinders were put forth before the Executing Court. One of the objections raised in the application under Section 47 of the Code was that as the decree holder had moved the executing court for execution of the decree prior to the expiry of the six months' period, the application was premature and, therefore, entire execution proceeding was vitiated being not maintainable. The learned Civil Judge who dealt with the execution case did not find any merit in any of the objections raised and rejected the same. It is worth noting that by the time the matter was taken up and the order came to be passed, the decree had become mature for execution. After rejection of the objection, the executing court took into consideration the submission of the judgment-debtor and, accordingly, directed that the entire balance money as agreed to in the compromise should be paid to the decree holder.

4. Aggrieved by the aforesaid order, the first respondent preferred Civil Revision No. 341 of 1997. The learned Single Judge noted the contentions and subsequent orders that were passed in the execution petition. The revisional court opined that no other objection could be raised for the first time in the revision and hence, no finding was warranted to be recorded on the said score.

5. As far as the premature filing of the execution petition is concerned, the learned Single Judge expressed his view as under:-

> The question whether the execution was premature or not is to be decided with regard to the date at which the execution was filed. If a suit is found to have been filed premature, it cannot be decreed for the reason that the period has expired during the pendency of the suit. Similar principle will not apply to the execution. If the execution was premature when it was filed, it is liable to be rejected and cannot be proceeded with because it has prematured during the pendency of the case.

> Being of this view, he allowed the revision and set aside the order passed by the learned Civil Judge as a consequence of which the execution case entailed in dismissal.

6. We have heard Mr. Dinesh Dwivedi, learned senior counsel for the appellant, and Mr. S. K. Dubey, learned Senior counsel for the first respondent.

7. Criticizing the impugned order passed in Civil Revision, Mr. Dwivedi, learned senior counsel, has contended that when a suit is premature on the date of its institution and the Court can grant relief to the plaintiff if no manifest injustice or prejudice is caused to the party proceeded against, there is no reason or justification for not applying the said principle to an execution proceeding. It is urged by him that the question of a suit being premature does not go to the root of the jurisdiction of the Court, but the Court in its judicial discretion may grant a decree or refuse to do so and, therefore, in the case at hand, when the executing court had proceeded after the expiry of the stipulated period in the decree, there was no warrant on the part of the revisional court to interfere with the same, for the said order did not suffer from lack of appropriate exercise of jurisdiction or exercise of jurisdiction that the court did not possess. It is canvassed by him that if the petition filed under Section 47 of the Code is scrutinized, it will clearly reveal that objections have been raised in a routine manner to delay the execution proceeding and such dilatory tactics by a judgment-debtor should, in all circumstances, be deprecated and decried. In support of his contentions, he has placed reliance on Vithalbhai (P) Ltd. v. Union Bank of India[1].

8. Mr. Dubey, learned senior counsel for the first respondent, per contra, contended that the executing court could not have entertained the application as it was filed prior to the expiration of the period. In support of his stand, he has placed reliance on Lal Ram v. Hari Ram[2]. The next submission of Mr. Dubey is that as the execution was levied in a premature manner before the expiry of the period, the decree lost its potentiality of executability. Elaborating the said submission, it is canvassed that the compromise decree could not have been taken up for the purpose of execution and hence, the objection under Section 47 of the Code should have been accepted by the executing court, but as it failed to do so, the High Court, in exercise of the supervisory jurisdiction, has rectified the jurisdictional error.

> The learned senior counsel further urged that when the compromise decree imposed mutual obligations on both sides some of which were conditional, no execution could be ordered unless the party seeking execution not only offered to perform his part but also satisfied the executing court that he was

> in a position to do so. In essence, the proponement of Mr. Dubey is that by levying the execution in a premature manner, the stipulations in the compromise decree have been totally overlooked and the real construction of the terms of the decree have been given an indecent burial. To bolster the said submissions, he has commended us to the decisions in Jai Narain Ram Lundia v. Kedar Nath Khetan[3] and Chen Shen Ling v. Nand Kishore Jhajharia[4].

9. At the very outset, it may be stated that it is an admitted position that the execution was levied prior to the expiration of the period stipulated in the decree. The executing court, as is evident, has addressed itself to all the objections that were raised in the application and rejected the same. The principal objection relating to the maintainability of the proceeding on the foundation that it was instituted prematurely did not find favour with it. The learned Single Judge has observed that if an execution is premature when it is filed, it is liable to be rejected. Mr. Dwivedi has drawn an analogy between a premature suit and premature execution by placing heavy reliance on the authority in Vithalbhai (P) Ltd. (supra). In Vithalbhai (supra), while dealing with the premature filing of a suit, a two-Judge Bench of this Court, after referring to a number of decisions of various High Courts and this Court, came to hold as follows:-

> The question of suit being premature does not go to the root of jurisdiction of the court; the court entertaining such a suit and passing decree therein is not acting without jurisdiction but it is in the judicial discretion of the court to grant decree or not. The court would examine whether any irreparable prejudice was caused to the defendant on account of the suit having been filed a little before the date on which the plaintiff's entitlement to relief became due and whether by granting the relief in such suit a manifest injustice would be caused to the defendant. Taking into consideration the explanation offered by the plaintiff for filing the suit before the date of maturity of cause of action, the court may deny the plaintiff his costs or may make such other order adjusting equities and satisfying the ends of justice as it may deem fit in its discretion. The conduct of the parties and unmerited advantage to the plaintiff or disadvantage amounting to prejudice to the defendant, if any, would be relevant factors.
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> After so stating, the Bench ruled that the plea as regards the maintainability of the suit on the ground of its being premature should be promptly raised and it will be equally the responsibility of the Court to dispose of such a plea. Thereafter, it was observed as follows:-

> However, the court shall not exercise its discretion in favour of decreeing a premature suit in the following cases: (i) when there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event; (ii) when the institution of the suit before the lapse of a particular time or occurrence of a particular event would have the effect of defeating a public policy or public purpose; (iii) if such premature institution renders the presentation itself patently void and the invalidity is incurable such as when it goes to the root of the court's jurisdiction; and (iv) where the lis is not confined to parties alone and affects and involves persons other than those arrayed as parties, such as in an election petition which affects and involves the entire constituency. (See Samar Singh v. Kedar Nath 13.) One more category of suits which may be added to the above, is: where leave of the court or some authority is mandatorily required to be obtained before the institution of the suit and was not so obtained.

[Emphasis Supplied]

10. We have referred to the aforesaid dictum in extenso as we find that the Bench has given emphasis on various aspects, namely, an issue getting into the root of the jurisdiction of the Court; causing of irreparable and manifest injustice; adjustment of equities; concept of statutory bar; presentation that invites a void action and anything that affects the rights of the other party; and obtaining of leave of the Court or authority where it is a mandatory requirement, etc. On a perusal of the various provisions relating to execution as enshrined under Order XXI of the Code, we do not find anything which lays down that premature filing of an execution would entail its rejection. The principles that have been laid down for filing of a premature suit, in our considered opinion, do throw certain light while dealing with an application for execution that is filed prematurely and we are disposed to think that the same can safely be applied to the case at hand.

11. Presently, we shall advert to the submission of Mr. Dubey that the executing court could not have entertained the application as it was filed before the expiration of the period. The learned senior counsel has relied on the decision rendered in Lala Ram (supra). In the said case, an order of acquittal passed -by the learned Magistrate was assailed before the High Court by seeking leave under Section 417(3) of the Code of Criminal Procedure, 1898 and the High Court granted leave as a consequence of which the appeal came to be filed eventually. The High Court accepted the appeal and convicted the accused. It was contended before this Court

that the appeal could not have been entertained by the High Court having been filed beyond the expiry of sixty days in view of the language employed under Section 417(4) of the Code. Emphasis was laid on the term entertain. Repelling the contention, this court held as follows: -

> The learned counsel also suggests that the word entertain which occurs in Section 417 (4) means to deal with or hear and in this connection he relies on the judgment of this Court in Lakshmi Rattan Engineering Works v. Asst. Commr., Sales Tax, (1968) 1 SCR 505 = (AIR 1968 SC 488). It seems to us that in this context entertain means file or received by the Court and it has no reference to the actual hearing of the application for leave to appeal; otherwise the result would be that in many cases applications for leave to appeal would be barred because the applications have not been put up for hearing before the High Court within 60 days of the order of acquittal
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> On a perusal of the aforesaid passage, it is vivid that the three-Judge Bench interpreted the terms 'were entertained' in the context they were used under the old Code and did not accept the submission 'to deal with or hear'. Regard being had to the context, we have no shadow of doubt that the said decision is distinguishable and not applicable to the obtaining factual matrix.

12. In this context, we may refer with profit to the two-Judge Bench decision in Martin Harris Ltd. v. VIth Additional Distt. Judge and others[5]. In the said Case, the Court was interpreting the language employed in the proviso to Section 21(1) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. The proviso stipulated that where the building was in occupation of a tenant before its purchase by the landlord, such purchase being made after the commencement of the Act, no application shall be entertained on the grounds mentioned in Clause (a) of the said Section unless three years' period had lapsed since the date of purchase. A contention was canvassed that filing of an application before the expiry of the three years' period was barred by the provision contained in the said proviso. Repelling the said submission, the Bench opined thus: -

> It must be kept in view that the proviso nowhere lays down that no application on the grounds mentioned in clause (a) of Section 21(1) could be instituted within a period of three years from the date of purchase. On the contrary, the proviso lays down that such application on the said grounds cannot be entertained by the authority before the expiry of that period. Consequently it is not possible to agree with the extreme contention canvassed by the learned Senior Counsel for the appellant that such an

> application could not have been filed at all within the said period of three years.
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> After so stating, the Bench distinguished the decision rendered in Anandilal Bhanwarlal v. Kasturi Devi Ganeriwala[6] which dealt with institution and eventually came to hold as follows: -
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> Thus the word entertain mentioned in the first proviso to Section 21(1) in connection with grounds mentioned in clause (a) would necessarily mean entertaining the ground for consideration for the purpose of adjudication on merits and not at any stage prior thereto as tried to be submitted by learned Senior Counsel, Shri Rao, for the appellant. Neither at the stage at which the application is filed in the office of the authority nor at the stage when summons is issued to the tenant the question of entertaining such application by the prescribed authority would arise for consideration.

13. In this context, we may usefully refer to the decision in Hindusthan Commercial Bank Ltd. v. Punnu Sahu (Dead) Through Legal Representatives[7]. In the said case, this Court was interpreting Rule 90 of Order XXI of the Code of Civil Procedure as amended by the Allahabad High Court. The amended proviso to Rule 90 stipulated the circumstances under which no application to set aside the sale shall be entertained. It was contended before this Court that the expression entertain found in the proviso referred to the initiation of the proceedings and not to the stage when the Court had taken up the application for consideration. This Court referred to the earlier decision in Lakshmiratan Engineering Works Ltd. v. Asst. Comm., Sales Tax, Kanpur[8] and opined that the expression entertain conveys the meaning adjudicate upon or proceed to consider on merits.

14. In State of Haryana v. Maruti Udyog Ltd. and Others [9], this Court was dealing with Section 39 (5) of the Haryana General Sales Tax Act, 1973 which stipulated that no appeal shall be entertained unless it is filed within sixty days from the date of the order appealed against and the appellate authority was satisfied that the amount of tax assessed and the penalty and interest, if any, recoverable from the persons had been paid. The Bench interpreting the term entertainment of the appeal ruled that when the first proviso to Section 39 (5) speaks of the entertainment of the appeal, it means that the appeal will not be admitted for consideration unless there is satisfactory proof available of the making of the deposit of admitted tax.

15. In view of the aforesaid authorities in the field, the submission of Mr. Dubey that the executing court could not have entertained the execution proceeding solely because it was instituted before the expiry of the period stipulated in the compromised decree despite the factum that by the time the Court adverted to the petition the said period was over, is absolutely unacceptable.

16. The next limb of proponement of Mr. Dubey is that the decree had lost its potentiality of executability having been filed on a premature date. On a first flush, the aforesaid submission looks quite attractive but on a deeper probe and keener scrutiny, it melts into insignificance. In Dhurandhar Prasad Singh v. Jai Prakash University and Others[10], while dealing with the power of the executing court under Section 47 of the Code of Civil Procedure, a two-Judge Bench has expressed thus:-

> The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing

17. Tested on the anvil of the aforesaid principle, it is difficult to accept the stand that the decree had become inexecutable, and, accordingly, we repel the same.

18. The learned senior counsel for the respondent has further propounded that the executing court could not have passed any order on the application for execution as it was filed prior to the expiry of the period. Pyramiding the said submission, it is urged by him that such advertence in an execution proceeding frustrates the construction of the terms of the decree. Mr. Dubey has drawn immense inspiration from the verdict in Chen Shen Ling (supra). On a careful perusal of the aforesaid decision, it is plain and patent that the three-Judge Bench had dealt with the consideration of the terms of the decree and eventually, placing reliance on the decision in Jai Narain Ram Lundia (supra), expressed the view that no execution can be ordered unless the party seeking execution not only offered to perform his part but, also when objection was taken, satisfied the executing court that he was in a position to do so. Be it noted, in the case Jai Narain Ram Lundia (supra), this Court has adverted to the reciprocal application, their inter-linking and the indivisibility of the terms of the decree and opined that the executing court cannot go behind the decree and it cannot defeat the directions in the decree. In both the

decisions, the issue pertained to the nature of order to be passed by the executing court or the type of direction to be issued by it. The ratio enunciated therein does not remotely deal with the filing of an execution petition in respect of a compromise decree prior to the expiry of the date as stipulated in the terms and conditions of the decree. Hence, we have no scintilla of doubt that the said authorities do not support the stand so vehemently put forth by Mr. Dubey, learned senior counsel for the first respondent.

19. In view of our aforesaid premised reasons, we arrive at the irresistible conclusion that the executing court did not commit any error by entertaining the execution petition. The learned Single Judge in civil revision has annulled the said order without any justification. While so doing, he had not dealt with other objections raised by the Judgment-debtor on the ground that they are raised for the first time. On a query being made, Mr Dwivedi, learned senior counsel for the petitioner, fairly stated that the said objections were raised in a different manner in the objection filed under Section 47 of the Code and the revisional court should have been well advised to deal with the same on merits. Regard being had to the aforesaid analysis, we set aside the order passed in civil revision and remit the matter to the High Court to deal with the objections on merits. As it is an old matter, we request the learned Chief Justice of the High Court of Allahabad to nominate a learned Judge to dispose of the civil revision within a period of six months. It is hereby made clear that the parties shall not seek unnecessary adjournment before the revisional court and should cooperate so that the revision shall be disposed of within the timeframe.

20. Consequently, the appeals are allowed to the extent indicated hereinabove leaving the parties to bear their respective costs.