NAGPUR HIGH COURT

D.D. Bilimoria, Electric Contractor

Vs

Central Bank of India Ltd

(Sen, J.)

27.09.1943

JUDGMENT

Sen, J.

1. The point referred to us for decision is: "Was not *Hari v. Indian Cotton Company Ltd., Bombay*[1] rightly decided?" The decision depends on the interpretation of Section 11, Central Provinces Money-lenders Act, 1934 (13 of 1934). The section, as originally enacted, was in these terms:

> 11. Power to direct payment of decretal amount by installments. The Court may, at any time, on the application of a judgment-debtor, after notice to the decree-holder, direct that the amount of any decree passed against him, whether before or after this Act comes into force, in respect of a loan shall be paid in such number of installments and subject to such conditions on the dates fixed by it as, having regard to the circumstances of the judgment-debtor and the amount of the decree, it considers fit.

2. The section was amended by Act 19 of 1937 by the insertion of the sentences:

3. During the pendency of the inquiry under this-section the Court may order the stay of execution of the decree subject to such conditions as it may impose. Such order shall be deemed to have been passed under Section 47, Civil Procedure Code, 1908 (5 of 1908).

4. The point is whether the "Court" referred to in the section means solely the Court which passed the decree or does it also include the Court to which a decree is sent for execution. On this point, there is a conflict of decisions in this High Court. In *D.B. Jiwandas v. Lilawanti Narindas*[2], the decree was passed by the Bombay High Court. It was transferred for execution to the Jubbulpore Court. An application was made to the executing Court for grant of installments. It was rejected. In appeal, the view taken was that in cases to which the Central Provinces Money-lenders Act, Section 11 applies, the executing Court has the power to direct payment by installments. In *Ganpatrao v. Jagannathrao*[3], the question was whether the Court had the power to grant installments in the case of decrees obtained in mortgage suits. This turned on

[1](1942) I.L.R.Nag. 777
[2] AIR 1937 Nag 409
[3] AIR 1940 Nag 196

the interpretation of the word "loan" usedin Section 11, Central Provinces Money-lenders Act, 1984. The word "loan" has been defined in Section 2(vii)(f) of the Act. It has been amended from time to time. "Loan" as defined originally excluded a mortgage. The effect of the amendment introduced by Act 24 of 1937 was that it did not exclude a mortgage. Act 17 of 1989 enacted that the amendment made by the Central Provinces Money-lenders (Second Amendment) Act 1937, (24 of 1987), which was in force with effect from 19th March 1937 shall be deemed to be in force with effect from 1st April 1935. The order in *Ganpatrao v. Jagannathrao, AIR 1940 Nagpur 196(SUPRA)* governed the decision in a large number of cases. In all the cases preliminary decrees on mortgages were passed prior to 19th March 1937 on which date Act 24 of 1937 came into operation whereby a mortgage was included within the definition of "loan." In these cases, the judgment-debtors had applied for installments under Section 11 of the Act. It was held that the several amendments effected in the definition of the word "loan" did not affect pending proceedings and that the judgment-debtors were not entitled to installments under Section 11 of the Act.

5. The question whether the Court which passed the decree or the executing Court has the power to grant installments was not directly in issue In one of the cases, an objection was raised that the application of the judgment-debtor for installments made to the trial Court was incompetent. The Bench at page 482 observed that this kind of application must be made to the civil Court exercising ordinary jurisdiction. There is no reference to the decision in *D.B. Jiwandas v. Lilawanti Narindas, AIR 1937 Nagpur 409(SUPRA)*. Apparently, the attention of the Bench was not invited to this case. In *Hari v. Indian Cotton Company Ltd., Bombay I.L.R. (1942) Nag. 777(SUPRA)* the Bombay High Court transferred its decree for execution to the Court of the Additional District Judge, Amraoti. An application was made to the executing Court for grant of installments under Section 11 of the Act. Installments were granted, the installments being 4000 a year. The judgment-debtor filed an appeal asking that they be reduced to ₹ 1700 a year. The Bench was of the opinion that the executing Court exercised its discretion judicially, and that there was no ground for interference. This was sufficient for the disposal of the appeal. At pages 778-779 in the concluding paragraph the Bench observed:

> It was brought to our attention, however, by counsel for the respondent that in *D.B. Jiwandas v. Lilawanti Narindas, AIR 1937 Nagpur 409(SUPRA)* the view was expressed that the proper Court for exercising powers under Section 11, Moneylenders Act, was the executing Court while in *Ganpatrao v. Jagannathrao*[4] the same Bench held that the power was conferred upon the decree Court. The Bench that decided those two cases was composed of the Chief Justice and Bose, J. We have discussed the matter with Bose J., in the light of those conflicting decisions and he has expressed the view, with which we agree, that the second is the correct view, that is to say, that these applications should be made to the decree Court. Owing to the ambiguous wording of the section we do not think that the fact that applications have been made to the executing Court should be treated as fatal to the resulting order-and indeed in this case the appeal having failed and there being no cross-objection or appeal this point does not really arise-but as we apprehend that a

[4] I.L.R. (1940) Nag 468

> certain amount of confusion must have been caused as a consequence of those conflicting

> decisions we desire to observe that in our opinion the correct course is to proceed before the decree Court when making applications under Section 11, Moneylenders Act.

6. In the case under reference, the decree was passed by the Bombay High Court. This decree has been transferred by the Bombay High Court to the Nagpur Court for execution. The judgment debtor applied for grant of installments. This was rejected by the Court of the Second Subordinate Judge, first class, Nagpur, by the order dated 3rd March 1943. The judgment-debtor filed an appeal in the High Court. The matter came up for hearing before Bose J. who has made this reference to the Pull Bench in order that the conflict may be resolved and the law may be stated authoritatively. In addition to the cases referred to in the order of reference our attention has been invited to the decision in *Seth Mulchand v. Seth Birdichand*[5] It was decided by one of us Grille C.J. and Puranick J. A consent installment decree had been passed by the Bombay High Court. It was transferred to the Hoshangabad Court for execution, the executing Court had rejected the application of the judgment-debtor for grant of easier installments. The judgment-debtor filed an appeal in the High Court against the order. The point was whether the executing Court had the power to direct the payment of the decretal amount by installments. After consideration of the relevant provisions of the Act, the Bench came to the conclusion that under Section 11, the Court which passed the decree had the power to grant installments under Section 11, but the executing Court had no such power.

7. Five Judges of this Court have taken the view that the "Court" referred to in Section 11 of the Act, means a Court which passed the decree and that the executing Court to which a decree is transferred for execution is not empowered to grant installments. The statements in *Ganpatrao v. Jagannathrao*[6], and in *Hari v. Indian Cotton Company Ltd., Bombay I.L.R. (1942) Nag. 777(SUPRA)* are obiter and are not binding as precedents. The decision in *Seth Mulchand v. Seth Birdichand Misc. First Appeal No 278 of 1940, decided on 12-2-1943(SUPRA)*, has not been published in the Indian Law Reports Nagpur Series. It is, however, a clear authority for the proposition that the executing Court has no power to grant installments under Section 11, C.P. Money-lenders Act. Lord Halsbury in *Quinn v. Leathem*[7] lays down the following propositions:

> Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an [authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.

8. Viscount Haldane in *Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd*[8]. has stated that the binding force of previous decisions, unless the facts are

[5] Misc. First Appeal No. 278 of 1940, decided on 12-2-1943
[6] AIR 1940 Nag 196
[7] 1901 A.C. 195
[8] 1914 A.C. 25

indistinguishable, depends on whether they establish a principle. To follow previous authorities, so far as they lay down principles, is essential if the law is to be preserved from becoming unsettled and vague. In this respect the previous decisions of a Court of co-ordinate jurisdiction are more binding in a system of jurisprudence such as ours than in systems where the paramount

authority is that of a Code.

9. The ratio decidendi of a case alone is a [binding authority as a precedent. The statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand, have no binding authority on another Court, though they may have some merely persuasive efficacy. (Halsbury's Laws of England, vol. 19, Edn. 2 para. 656 at pp. 251-252; Salmond on Jurisprudence, Edn. 9, pp. 215-216; Allen's Law in the Making-Precedent, pp. 118 and 191.) Viewed in the light of the principles enunciated above, the statements of law in *Ganpatrao v. Jagannathrao, AIR 1940 Nagpur 196(SUPRA)* and in *Hari v. Indian Cotton Company Ltd., Bombay I.L.R. (1942) Nag. 777(SUPRA)* are obiter. They are entitled to respect but are not binding as authorities. In *Ganpatrao v. Jagannathrao, AIR 1940 Nagpur 196(SUPRA)* the previous decision in *D.B. Jiwandas v. Lilawanti Narindas, AIR 1937 Nagpur 409(SUPRA)* was overlooked. In this connection, a reference may be made to the observations of Professor Allen in "Law in the Making" at page 190:

> A more serious difficulty, and one likely to increase in future with the ceaseless growth of recorded cases, is that exact and comprehensive citation cannot be ensured. If the Judge is to be bound by precedents he should have all the relevant authorities at his command. But he cannot carry them all in his head, nor is it always easy to find them, in spite of the many modern devices for facilitating the search. He must depend largely on the assistance of counsel, and since the industry and acumen of the Bar are also fallible, it is not uncommon to meet with cases which might have been decided otherwise, or are even overruled later, because pertinent decisions have not been taken into consideration.

10. In England, the decisions of the Divisional Courts upon questions of law are binding upon Courts of first instance, and are, as a general rule, followed by other Divisional Courts as a matter of judicial comity, but where there are conflicting decisions, it is the duty of the Divisional Court to form its own opinion: Halsbury's Laws of England, vol. 19, Edn. 2, para. 556 at p. 255, The Vera Cruz (No. 2) (1884) 9 P.D. 96, *Harrison v. Ridgway*[9] *Ratkinsky v. Jacobs*[10] and *Phillips v. Copping (1935) 1 K.B. 15*. The same principle is followed in India. In *Seshamma v. Venkata Narasimharao*[11] it is observed:

> The Division Bench is the final Court of appeal in an Indian High Court, unless the case is referred to a Full Bench, and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law.... If a Division Bench does not accept as correct the decision on a

[9] 133 L.T. 238

[10] (1929) 1 K.B. 24

[11] A.I.R. 1940 Mad. 356

> question of law of another Division Bench the only right and proper course to adopt is to refer the matter to a Full Bench, for which the rules of this Court provide. If this course is not adopted, the Courts subordinate to the High Court are left without guidance. Apart from the impropriety of an appellate Bench refusing to regard itself bound by a previous decision on a question of law of an appellate Bench of equal strength and the difficulty placed in the way of subordinate Courts administering justice there are the additional

factors of the loss of money and the waste of judicial time.

11. These observations have our respectful concurrence. Similar observations are to be found in *Emperor v. Nga Lun Thoung*[12] *Mahadeo Prasad Singh v. Jagannath Prasad*[13], *Mahabir Das v. Udit Narain Verma*[14], The convention of our High Court is that where a Bench of two Judges considers that the decision of the proceedings pending before them involves reconsideration of a decision of two or more Judges published in the Central Provinces Law Reports, the Nagpur Law Reports or the Indian Law Reports, Nagpur Series, they may refer the matter to the Chief Justice with a recommendation that it be placed before a Pull Bench: see Rule 12, ch. l, High Court Rules and the observations of Pollock J. in second Appeal No. 626 of 1940. Second Appeal No. 626 of 1940, decided on 12th July 1943, *Mohd. Ikramullakhan v. Mohd. Allimullah* The statement of law in *Hari v. Indian Cotton Company Ltd., Bombay (1942) I.L.R.Nag. 777(SUPRA)* reflects the views of three Judges but it remains a statement of the Division Bench consisting of two Judges and cannot be taken as a decision of a Pull Bench. A Court of co-ordinate jurisdiction may refuse to follow a previous decision of another Court of co-ordinate jurisdiction if it considers it to be wrong. *Virjiban Dass Moolji v. Biseswar Lal Hargovind A.I.R. 1921 Cal. 169(SUPRA)*. But it cannot overrule such decisions:

> Overruling is an act of superior jurisdiction. A precedent overruled is definitely and formally deprived of all authority. It becomes null and void, like a repealed statute, and a new principle is authoritatively substituted for the old. A refusal to follow a precedent, on the other hand, is an act of co-ordinate, not of superior jurisdiction. Two Courts of equal authority have no power to overrule each other's decisions. Where a precedent is merely not followed, the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other, and the law remains in doubt until settled by some higher authority: Salmond on Jurisprudence, 9 Edn. pp. 240, 241.

12. *Hari v. Indian Cotton Company Ltd., Bombay I.L.R. (1942) Nag. 777(SUPRA)* was a decision on a question of fact, viz., that the judgment debtor was not entitled to easier installments. This was sufficient for the disposal of the case. The observations made at pages 778-779 were not necessary for the purpose of that case and cannot be treated as a decision on that point. In order to settle the conflict of decisions of this High Court and to void uncertainty in the future it is desirable to resettle the points for our decision. They may be formulated in these terms: (1) Whether the Court mentioned in Section 11, C.P. Money-lenders Act. 1934, is the Court which passes

[12] A.I.R. 1935 Rang. 370
[13] AIR 1934 Pat 173
[14] AIR 1938 Pat 613

the decree or does it include the Court to which the decree is transferred for execution. (2) Whether the executing Court has power to direct payment of the decretal amount by installments under Section 11 of the Act. (3) Whether *D.B. Jiwandas v. Lilawanti Narindas, AIR 1937 Nagpur 409(SUPRA)* was correctly decided. (4) Whether *Seth Mulchand v. Seth Birdichand Misc. First Appeal No 278 of 1940, decided on 12-2-1943(SUPRA)*, was correctly decided. (5) Whether the statements of law in *Ganpatrao v. Jagannathrao, AIR 1940 Nagpur 196* (SUPRA) and *Hari v. Indian Cotton Company Ltd., Bombay I.L.R.(1942) Nag. 777(SUPRA)* are based on a correct interpretation of Section 11 of the Act.

13. The decision depends on a correct interpretation of Section 11, C.P. Money-lenders Act, 1934. The problem is to find out the meaning to be given to the word 'Court' used in that section. Does it mean solely the Court which passed the decree or does it also include the Court to which the decree is transferred for execution? The definition of the word given in Section 2(iv) does not help us in arriving at a conclusion. Under the Civil Procedure Code the Court which passes a decree has power to amend a decree Under Section 152 and 153 of the Code. Under Order 20, Rule 11(1) the Court may at the time of passing the decree order that the payment of the decretal amount shall be postponed or shall be made by installments. Under Order 20, Rule 11(2) as amended by a rule of our High Court, the Court, after passing the decree, may on the application of the judgment-debtor and after notice to the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by installments on such terms as to payment of interest, attachment of property of the judgment debtor or the taking of security as it thinks fit. The order granting installments passed by the Court under this sub-section is appealable. See *Shree Jagruteshwar Deosthan v. Atmaram A.I.R. 1943 Nag. 155(SUPRA)* Section. 11, Money-lenders Act, is a provision similar to Order 20, Rule 11(2), Civil Procedure Code

14. A Court executing the decree has no power to alter or vary the terms of the decree. Theiorder directing payment of the decretal amount by instalment is an order which varies the decree. It is not within the competence of the Court executing the decree to alter or vary it. *Mahadeo Prasad Singh v. Jagannath Prasad A.I.R. 1934 Rang. 165(SUPRA)* is a clear authority for the proposition that the Court which passes the decree alone has power to grant installments under Order 20, Rule 11(2) and that it is not within the power of the executing Court to do so. Under Section 42 the Court executing the decree sent to it has the same powers in executing such decree as if it had been passed by itself. But this-does not clothe the executing Court with the power to vary or alter the decree by directing payment of the decretal amount by installments. If the Legislature intended to depart from this well-established principle and desired to clothe the executing Courts with the power to grant installments under Section 11, C.P. Money-lenders Act, it would have stated so in clear and unambiguous terms. If we closely scrutinize the last sentence it furnishes us with a clue for the solution of the questions which we have to decide. The sentence runs thus: "such order shall be deemed to have been passed under Section 47, Civil Procedure Code" We have underlined (here italicized) the opening words with a purpose; "such order" may refer to the order staying execution of a decree or it may refer to an order directing payment of the decretal amount by installments. Grammatically, it would refer to an order for stay of execution but that would not convey any sensible meaning of the expression "shall be deemed to have been passed under Section 47, Civil Procedure Code" Such order has been interpreted to mean an order directing payment of the decretal amount by installments in *Khwaja Gulam Rubbansi S/o Khwaja Fayajuddin v. Abdul Kadir S/o Abdul Samad*[15], If the executing Court directs stay of execution of the decree it is, in reality, an order under Section 47. It cannot be deemed to be an order under that section. The use of the expression shall be deemed to have been" involves a fiction. It is not in reality an order under the section but is treated as one passed under that section. As observed in *Ganpatrao v. Jagannathrao, AIR 1940 Nagpur 196(SUPRA)* the provision is merely a compendious way of providing the various rights given where an order is made under Section 47, e.g., a right of appeal. See *Commissioner of Income Tax, Bombay Presidency v. Bombay Trust Corporation, Ltd*[16]*.,* for the interpretation of the expression "is deemed to be.")

15. If the order is passed by the executing Court in execution, it will be an order under Section

47. If, however, the order is passed by the Court which passed the decree it would not be an order in execution and would not be an order under Section 47. The Legislature intended that an order granting installments by the Court should be appealable and, therefore, it was necessary to introduce a statutory fiction and to treat it as an order under Section 47, Civil Procedure Code This makes it clear that the order contemplated under Section 11 is an order passed by the Court which passed the decree and not by the executing Court in execution.

16. If we look to the scheme of the Act that strengthens this conclusion. The "Court" under Section 7 would necessarily mean the Court which tries the suit. Section 9, as originally enacted referred to the Court which meant the Court which passed the decree. It was subsequently amended by Act 24 of 1937 by the words 'original or appellate' in order to enable the appellate Court also to exercise the power conferred on the original Court. Section 10 will necessarily refer to the Court which is passing the decree. Section 11 follows Section 10 and the expression 'Court' must bear the same meaning which it has in Section 10. The matter has been very elaborately reviewed and discussed in a recent decision in *Seth Mulchand v. Seth Birdichand Misc. First Appeal No 278 of 1940, decided on 12-2-1943(SUPRA)*, We agree with the conclusion reached in that case and with the reasoning on which it is based. Our decisions on the points formulated in para. 19 may be stated in these terms: (1) The word 'Court' used in Section 11, Money-lenders Act, 1934, has a restricted meaning. It refers to the Court which passed the decree and not to the Court to which the decree is transferred for execution. (2) The execution Court has no power to grant installments under Section 11 of the Act. (3) The case in *D.B. Jiwandas v. Lilawanti Narindas, AIR 1937 Nagpur 409* (SUPRA)was not correctly decided and we overrule it. (4) The case in *Seth Mulchand v. Seth Birdichand Misc. First Appeal No 278 of 1940, decided on 12-2-1943(SU0PRA)*, was correctly decided and is approved. (5) The statements of law in *Ganpatrao v. Jagannathrao, AIR 1940 Nagpur 196(SUPRA)* and in *Hari v. Indian Cotton Company Ltd., Bombay I.L.R. (1942) Nag. 777* (SUPRA) are based on a correct interpretation and are approved.

[15] AIR 1942 Nag 140 : [1942] ILR Nag 772 17

[16] AIR 1930 PC 54 : 121 Ind. Cas. 532 : 1930-31-LW 582

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