

## H.P. State Co-operative Bank Ltd. Vs Smt. Naroo Devi and Others

**Court:** High Court of Himachal Pradesh

**Date of Decision:** May 17, 1978

**Acts Referred:** Arbitration Act, 1940 " Section 14, 46, 47  
Civil Procedure Code, 1908 (CPC) " Order 21 Rule 16, 11  
Co-operative Societies Act, 1912 " Section 39

**Citation:** AIR 1979 HP 1 : (1978) 7 ILR HP 330

**Hon'ble Judges:** C.R. Thakur, J

**Bench:** Single Bench

**Advocate:** Chhabil Dass, for the Appellant; Inder Singh and A.C. Sood, for the Respondent

**Final Decision:** Allowed

### Judgement

1. This appeal has been filed by the Himachal Pradesh State Co-operative Bank Ltd.--decree-holder against the judgment and decree, dated 29th

June, 1965 whereby the learned Senior Sub Judge, Chamba, allowed the objection-petition filed u/s 47 C. P. C. of late Shri Dharam Chand,

judgment debtor filed on 6-11-1963 opposing the execution of the award obtained by the Chamba State Central Cooperative Bank Limited on

31-3-1952.

2. The facts of this case may briefly be stated as under :

3. Sarvshri Brij Lal and Anant Ram principal debtors borrowed Rs. 7,000/- on 14-11-1946 vide agreement Exhibit DB on the sureties of Sarvshri

Madho Ram and Mohan Lal for its due payment, from the Chamba State Central Co-operative Bank Limited. Another loan of Rs. 10,000/- was

taken on 3-2-1947 vide agreement Exhibit DA on the sureties of Sarvshri Dharam Chand and Raghubir Dass, When the debtors failed to make

the payment the matter was referred to the arbitrator by the Registrar, Co-operative Societies, Himachal Pradesh, by his reference order, Exhibit

OF. The arbitrator, vide Exhibit OC, gave a composite award in respect of both these loans against the principal debtors and the aforesaid four

sureties. By this award each of them was held liable severally as well as jointly for the total amount of Rs. 22,000/- and odd, with future interest at

6 per cent in respect of both the debts.

4. The award was executed as a decree. The judgment-debtors or sureties raised several objections, which were partly allowed. Against that

order the decree-holder preferred an appeal in the court of the Judicial Commissioner, Himachal Pradesh, who accepted the same and the result

was that the objections u/s 47, were rejected by order, dated 13th June, 1958, copy of which is Exhibit DH-4.

5. It appears that fresh objections were filed by Dharam Chand in pursuance of notice under Order 21, Rules 22 and 16, C. P. C. These

objections were also decided, culminating in an appeal to the Judicial Commissioner. The appeal was accepted in part by the Judicial

Commissioner vide his order, dated 8th April, 1961, and the copy of the same is Exhibit DHW 2/1.

6. Thereafter it appears Dharam Chand again filed his objections challenging the validity of the award. Further, he pleaded that the award was

wrong, inasmuch as he was found liable exceeding the amount of Rs. 10,000/- for which he actually stood surety. The further objection was that

the award sought to be executed was made in favour of the Chamba State Central Cooperative Bank Limited, but the execution had been taken

out by a third party i.e. Himachal Pradesh State Co-operative Bank Limited, Chamba. It had not been disclosed if the award or the decree had

been transferred in favour of the Himachal Pradesh State Co-operative Bank Limited, Chamba (shortly called the State Co-operative Bank). No

valid assignment of the decree in its favour has been disclosed. The State Co-operative Bank controverted all the objections and also pleaded that

the same were barred by the principle of res judicata because all those objections which were sought to be raised stood already decided by the

judgment of the Judicial Commissioner, dated 13th June, 1958 (Exhibit DH-4). The executing court framed six issues in the case. The first issue

was with regard to the locus standi of the State Co-operative Bank to execute the award. The second issue was with regard to the validity of the

award on various grounds, i.e. (a), (b), (c) and (d) mentioned under issue No. 2. Issue No 3 is not relevant for our purposes. Issue No 4. was

with regard to non-executability of the award. Issue No. 5 was with regard to res judicata and estoppel against the objector,

7. The court below found on issue No. 1 that the State Co-operative Bank had not brought on the record the original documentary evidence with

regard to the assigning of the decree in its favour and as such the State Co-operative Bank was a stranger to the decree and hence not entitled to

execute the decree. In respect of the issue with regard to the validity or otherwise of the award, it was found that the dispute was not referable to

the arbitrator under the relevant rules then prevalent, and the contention was found wholly unfounded. Further, it was not for the executing court to

go behind the decree and it was not within its jurisdiction to hold that the award was made in disregard of the law and rules applicable. It was

further found that the court could not go into the question that it was only a compromise and not an award. Lastly, in respect of the ground that the

award pertaining to the pronote dated 14-11-46 for Rupees 7,000/- against the objecting surety was not warranted as being beyond the scope of

his liability as such, it was held that the objector could have corrected this mistake by approaching a proper authority or forum in this behalf and

may still be able to do so if there is a suitable legal remedy available to him. The executing court is certainly not such a forum. With regard to the

inexecutability of the decree, it was found that the award is incapable of execution, as it has neither been filed in the court nor further necessary

proceedings followed. On the point of res judicata and estoppel it was held that there was no decision on merits, vide order dated 4-12-1962. So,

all matters except the point of jurisdiction on the ground of non-service of the objector before the arbitrator, were open and none is res judicata. In

fine, the learned Senior Sub Judge allowed the objection petition partly which ultimately resulted in the dismissal of the execution application No.

210 filed on 6-5-1963.

8. The first point urged by the learned counsel for the appellant is that the point with regard to the executability of the decree had been decided by

the Judicial Commissioner vide his judgment, Exhibit DH-4, in execution FCA 4/87 dated 13-6-58 and that the decision in that case operated as a

constructive res judicata on the points which have been raised in the objection petition by the respondents.

9. The copy of the judgment of the Hon"ble Judicial Commissioner is Exhibit DH-4. From this judgment it appears that Anant Ram and others had

filed objections u/s 47 in the executing court which were partly accepted with the result that the execution petition was dismissed, against which an

appeal was filed in the court of the Judicial Commissioner, who by his aforesaid judgment allowed the appeal, set aside the order of the court,

dated 6-7-57 dismissing the execution petition and directed the lower court to proceed with, the execution petition against the judgment-debtors,

Anant Ram, Brij Lal, Mohan Lal, Raghubir Dass and Dharam Chand in accordance with law. The objections u/s 47 were rejected. From this

judgment it would appear that the executing court had framed two issues on the objection petition filed by the respondents in that appeal and which

are as under:

1. Whether the award is opposed to law and ineffective and whether the judgment-debtors are competent to raise this objection?

2. Whether the execution petition is within limitation?

From the judgment it would further appear that the executing court had decided that Brij Lal and Dharam Chand did not have notice of

proceedings before the arbitrator and, therefore, the arbitrator had no jurisdiction to pass an award. On this point the Hon"ble Judicial

Commissioner held that Brij Lal and Dharam Chand must be deemed to have notice of the proceedings before the arbitrator. Further, the

executing court could not go behind the decree, it is requested to execute, except within a very narrow sphere, i.e. where the decree, prima facie,

is a nullity, due to inherent lack of jurisdiction. But, there was no such inherent lack of jurisdiction in the case. So these were the only two points

which were considered by the Judicial Commissioner in his judgment, copy of which is Exhibit DH-4.

10. When the decree-holder brought a fresh execution after the decision by the Judicial Commissioner on 13th June, 1958, Raghubir Dass and

Dharam Chand filed their objections against the executability of the decree and it was contended therein that the arbitrator lacked inherent

jurisdiction to make the award, that the award was vague and uncertain, as such was incapable of execution, that the objectors had merely stood

sureties for Rs. 10,000/- and as such they were not liable for any sum that may be found under the pronote executed by Brij Lal and another.

These objections were dismissed by the Senior Sub Judge on the ground that they were barred by the rule of res judicata, inasmuch as similar

objections were raised in response to an earlier execution application and were dismissed by that court. Against, that judgment of the Senior Sub

Judge, Execution First Appeals Nos. 3 and 4 of 1960 were filed by Dharam Chand and Raghubir Dass. The appeals were accepted in part by the

Hon"ble Judicial Commissioner by his order, dated 28th April, 1961, copy of which is Exhibit DHW 2/1. In that case it was decided by the

Judicial Commissioner that the earlier judgment as contained in Exhibit DH-4, dated 13th June, 1958, decided that Brij Lal and Dharam Chand

had notice of the proceedings before the Arbitrator and that this point stood finally decided, that the award did not suffer from inherent lack of

jurisdiction on that ground. The contention of the appellants, Dharam Chand and another, that the finding on the question of jurisdiction did not

operate as res judicata in subsequent case was repelled. Therefore, from the aforesaid two judgments it would appear that this point that Dharam

Chand and Raghubir Dass did not have any notice of the proceedings before the arbitrator stood already decided and this point cannot be raised

again by the objectors.

11. Objections were filed by Dharam Chand on 6-11-1963. The objections taken therein were that there was no valid assignment of the decree in

favour, of the decree-holder, i.e. the State Cooperative Bank, so as to entitle them to apply for execution of the decree. Further that if there was

any transfer of the decree, the same was also invalid because it was not in accordance with law, and the State Co-operative Bank did not have the

locus standi to maintain the execution petition. The award suffered from inherent lack of jurisdiction in the arbitrator and that the award was void

and a nullity and as such inexecutable. The very reference to the arbitrator under Rule 18 of the Rules and u/s 43 (2)(i) of the Co-operative

Societies Act, 1912 was bad because the objector was only a surety to the pronote of Rs. 10,000/-, dated 3-2-1947 and as such there was no

dispute between him and the bank as could be referable to arbitration. The award is incapable of execution as a decree because no decree has

been obtained from the court. The executing court has no jurisdiction to entertain the execution of the award u/s 38 of the CPC unless a decree in

pursuance thereof had been passed by itself or sent for execution u/s 39, C. P. C. Further, the award was not an award as such but it was merely

a compromise between the bank and Anant Ram and, therefore, it was not enforceable as a decree. Further the award is uncertain, vague and

indefinite. The objector being a surety for payment of Rs. 10,000/-he was liable only to that extent and not beyond that limit and that also after all

the remedies for recovery of the amount from the principal debtor are exhausted and have proved infructuous. Therefore, from the above it would

appear that what was decided in the earlier execution petition which culminated in an appeal to the court of Judicial Commissioner was that

Dharam Chand and Raghubir Dass were deemed to have notice of the proceedings and that the executing court cannot go behind the decree

unless the award or the decree prima facie is a nullity due to inherent lack of jurisdiction, but there was no such inherent lack of jurisdiction in the

case. Therefore, these two points stood already decided. The objector had taken this objection about the inherent lack of jurisdiction of the

arbitrator in para. 6 (1) of the objections and the same were further elucidated under various heads (a), (b), (c), (d) and (e). Therefore, this

objection with regard to the jurisdiction of the arbitrator cannot be reagitated by the objector-respondents, The learned counsel for the appellant,

therefore, is right in canvassing that this point is barred by the principle of constructive res judicata. Once it is decided that the previous judgments

operate as res judicata on the point of inherent jurisdiction of the arbitrator to go into the matter then the further point that arises for determination

is whether the award made by the arbitrator was executable as such or it had to be made a rule of the court before that award can be made

executable.

12. The learned Senior Sub Judge has dealt with this point under issue No. 4 and he has come to the conclusion that though the Sub-rule (k) under Rule 18 framed u/s 43 of the Co-operative Societies Act did provide that a decision or award shall on application

to any court having jurisdiction in the area in which the Society operates, be enforced in the same manner as a decree of such Court. But in the

present case, the Registrar had attached further limitations for making the award per instructions inscribed overleaf to the reference order, vide

copy Exhibit OF. So to the extent of those special Instructions, applicable to the reference of this case, the sub-rules under Rule 18 aforesaid, have

to be read with these special instructions. And that the instruction No. 8 provides that the award has to be handed over to the party in whose

favour it is made, to be filed in court. That in the instant case, the award has not been filed in the court by the decree-holder nor was in pursuance

to any such filing any opportunity given to the parties inviting their objections ..... So, these instructions are special instructions, qualifying the

ordinary general rules as provided under Rule 18 aforesaid".

Further on, the court observed,

In my opinion the non-compliance of instruction No. 8 regarding the filing of the award in the court by the decree-holder goes to the root of the

matter and the award cannot be enforced and executed in such a situation .....So, I hold that the award in hand is incapable of execution as

it has neither been filed in the court nor further necessary proceedings followed.

The learned counsel for the appellant contends that this point also has been decided previously between the parties, but he has not been able to

point out to any judgment where this point has been decided either by the trial court or by the Judicial Commissioner in the two appeals preferred

by the bank. From the judgment of the Senior Sub Judge, Exhibit JD-4, it would appear that it was on the point of limitation that the Senior Sub

Judge had in his previous judgment, dated 6-7-1957 held that

Article 178 requires an award to be filed within 90 days of the service of the notice of making of the award. But this article as seen above does

not apply to awards made under the Societies Act. That award is required to be executed as a decree of a Civil Court. Period of limitation for

such decrees is prescribed by Article 182 of the Lim. Act. That period is three years from the date of the decree, i.e. the award or date of the last

order in an execution petition.

So, it was on the point of limitation that he happened to observe that an award is required to be executed as a decree of the civil court. However,

there was no issue raised on this point. It appears from the order that the objectors had not taken up this specific point in their objections, decided

by this judgment, copy of which is Exhibit JD-4 that this decree cannot be executed as the award had not been made a rule of the court. In that

objection petition they had only raised the point that the award was opposed to law and was ineffective and that the execution petition was time

barred. The learned counsel urged that even if the objection was not specifically taken and decided previously it shall be deemed to have been

decided if the objector could and ought to have raised this objection.

13. This award was made on 31st March, 1952 as is evident from the document Exhibit OC. The award came to be executed for the first time by

execution petition dated 29-2-1956 which, however, is not exhibited. The principal debtor as also Raghubir Dass filed their objections against the

execution on 22-5-1956. However, Dharam Chand did not file his objections. The objection petition is Exhibit DH-4 on the record. It shows that

the objectors had only taken up the objections with regard to limitation and that the arbitrator had given the award without giving notice to them as

such the award was without jurisdiction and a nullity. These objections were disposed of by judgment of the Senior Sub Judge, copy of which is

Exhibit JD-4, and against which an appeal was filed and was disposed of vide Exhibit DH-4. Again, objections were filed by Dharam Chand

objector on 7-4-1959, and copy of which is on the record. From this it would appear that he had not taken any objection that the award had to be

made a rule of the court before it could be made executable. Again it appears that Dharam Chand filed his objections, dated 4-5-1963, copy of

which is Exhibit JDW7/A, out of which this appeal has arisen. In this, however, Dharam Chand has raised this objection as under ;

Because no decree as contemplated under the Indian Arbitration Act which applies to all arbitrations including arbitration under the Co-operative

Societies Act has been obtained from the court, under the aforesaid Act, and as such no opportunity to challenge the award and to have it set

aside has been afforded to the objector.....

But, this objection was nowhere taken in the earlier objection petitions by any of the parties. If the appellant had not taken those objections in the

previous objection petitions whether they can take up this objection in subsequent executions. Section 11, C. P. C. deals (with the doctrine of res

judicata. The principle of res judicata is based on the need of giving a finality to judicial decisions. When a matter whether on a question of fact or

a question of law has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a

higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same

parties to canvass the matter again. Even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose

of achieving finality in litigation. (See Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, This section though uses the word "suit

and not "execution proceedings" would equally apply to the execution proceedings because the objections u/s 47 are also to be treated as a suit.

Therefore, the principle of Section 11 will also be applicable to execution proceedings. The objectors did not previously raise this specific point

which was raised in the last objection petition out of which the present appeal has arisen. It was for them to have raised this question at the initial

time when they raised the question of jurisdiction as also of limitation before the court. Therefore, in these circumstances, the principle of

constructive res judicata would definitely apply in the subsequent stages of the execution proceedings if the objections could be raised but had not

been raised in the previous objection petitions. Once order is passed in an execution proceeding the judgment-debtor or the surety cannot be

allowed to raise a second objection in the same proceeding, the principle being that the objection which might and ought to have been raised at the

first instance not having been raised is deemed in the eye of law to have been decided by the court. The parties had filed their objections but they

did not choose to raise this objection which they have now raised in the year 1963. The objectors it appears had been taking piecemeal objections

at different stages of the execution proceedings and, therefore, if they could have raised these objections in the earlier execution petitions and which

they ought to have done then admittedly the principle of constructive res judicata would be applicable in the case and the objections would,

therefore, be deemed to be barred.

14. The Supreme Court in Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others, has held (at p. 71) :

Thus where neither at the time when the execution application was made and a notice served upon the judgment-debtor, nor in the application for

setting aside the two sales made by him does the judgment-debtor raise any objection to execution being proceeded with on the ground that the

execution Court had no jurisdiction to execute the decree, the failure to raise such an objection which goes to the root of the matter precludes him

from raising the plea of jurisdiction on the principle of constructive "res judicata" after the property has been sold to the auction-purchaser who has

entered into possession.

15. The Madras High Court in Shanmugavelu Pillai Vs. Karupannaswami Pillai, also held that where the appellant not having raised any objection



that the respondent, acquired no rights under the court sale and had consequently no right to execute the decree is precluded by the principle of res

judicata from putting forward that objection at a later stage of the execution proceedings. It has been further laid down in this authority that the

essential principle underlying the doctrine of res judicata is that there should be finality of proceedings. The judgment-debtor ought not to be

permitted to protract the execution proceedings indefinitely by putting forward objections piecemeal. Even if for argument's sake it may be held

that the objections are not barred by the principle of res judicata, it is argued by the learned counsel for the appellant that it was not necessary to

have the award made a rule of the court. The Arbitration Act will not apply to an award given under the Co-operative Societies Act, and in

support of this the learned counsel has referred me to a few authorities, which, it is not necessary to quote.

16. u/s 14 of the Indian Arbitration Act the arbitrator is required to pronounce the award, to sign it and to give notice to the parties of the making

and signing of the award. Thereafter the arbitrator at the request of any party to the arbitration agreement or any person claiming under such party

or if so directed by the court cause the award together with depositions and documents to be filed in court and the court shall thereupon give notice

to the parties of the filing of the award and then the objections are, invited and after the disposal of the objections, etc. the court may make the

award a rule of the court, it may remit the award, it may set aside the award or it may modify the award. Section 46 of the Arbitration Act says

that the provisions of this Act, except Sub-section (1) of Section 6 and Sections 7, 12, 36 and 37 shall apply to every arbitration under any other

enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an

arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder. Section 47 reads as

under :

Subject to the provisions of Section 44, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this

Act shall apply to all arbitrations and to all proceedings thereunder :

Provided that an arbitration award otherwise obtained may," with the consent of all the parties interested, be taken into consideration as a

compromise or adjustment of a suit by any Court before which the suit is pending.

Section 47 says that the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder subject to the provisions of Section

46 and save in so far as is otherwise provided by any law for the tune being in force. In my opinion, without dilating on the point whether the

provisions of the Arbitration Act are applicable or not it would be pertinent to note the relevant instructions contained at the back of document

Exhibit OF under which the reference was made, to the arbitrator for his decision. Paras 8 to 11 of these instructions are relevant for our purposes

and they are quoted as under :--

8. The award when made should be handed over to the party in whose favour it was given, to be filed in court;

9. The award is exempt from stamp duty under Punjab Govt Notification Finance No. 80 of 15th Jan. 1917, and the fact has been noted on the

back of the award form for the convenience of the executing Court;

10. Under Rule 18 (f) of Notification No. 13819 of 23rd June 1917 an appeal, may be made to the Registrar, within one month. The arbitrator

should inform the Daries of this and

11. Under Rule 18 (8) an award cannot be called in question in any Civil or Revenue Court and shall be in all respect final and conclusive except

on proof of the receipt of a corrupt gratification by the arbitrator. Evidence of such a corrupt gratification cannot be taken in the course of

execution proceedings, but the aggrieved party must sue under the Specific Relief Act and obtain an order under that Act prohibiting execution of

the decree.

Therefore, the cumulative effect of the aforesaid instructions which are statutory and form part of the rules, it is evident that under the award an

appeal is provided to the Registrar and there is no appeal under the Arbitration. Act. It is further mentioned that the award cannot be called in

question in any civil or revenue court and shall be final and conclusive in all respects. From para 9 it would be apparent that the award has been

made exempt from stamp duty vide notification dated 15th Jan, 1917 and this fact is to be noted on the back of the award for the convenience of

the executing court. This would further show that the award is not to be made a rule of the court rather the same is to be filed in the court for the

purpose of execution by the party in whose favour it is made. The intention is not to file the same in order to make it a rule of the court; rather the

intention is to file it for purposes of execution. Therefore, in my opinion, the provisions of Sections 46 and 47, as also Section 14 of the Arbitration

Act will not be applicable to the present case,

17. Shri O.P. Sharma, learned counsel for the respondents has relied on Satish Kumar and Others Vs. Surinder Kumar and Others, to show that

the award does create rights in property,, but those rights cannot be enforced until the award is made a decree of the Court. This ruling has got no

bearing on the facts of the present case, inasmuch as that was a reference made by the parties themselves to the arbitrator, whereas here the

reference was made by the Registrar, Co-operative Societies under the provisions of Rule 18 (b) of the rules framed under the Co-operative

Societies Act 1912 and which contain instructions for the guidance of the arbitrator as to the giving of award and how, when and by whom the

award is to be presented in the court for execution. The instructions as contained in the rules clearly oust the jurisdiction of the civil court as per

para 11 of these instructions. The procedure indicated by these instructions is totally inconsistent with the provisions of Chap. II of the Arbitration

Act and as such the provisions of Chapter II are not attracted to the facts of this case and hence the finding recorded by the trial court that it is not

enforceable unless it is made a rule of the court is not correct and I, therefore, uphold the plea raised by the learned counsel for the appellant that

the award does not require to be made a rule of the court. The award itself as such is executable. In so far as the objections raised by the

respondents are concerned the same are barred by the principle of constructive res judicata inasmuch as they failed to take up these objections in

their previous objection petitions. They chose a very convenient way to raise piecemeal objections. When the execution proceedings were taken

out afresh the objectors came out with fresh set of objections. These objections could and ought to have been raised at one and the same time.

Therefore, the objectors shall be deemed to have given up those objections and now they are estopped by their conduct to re-open and raise fresh

objections and thereby prolong the execution of the award indefinitely because the decree was passed in the year 1952 and now it is full 26 years

since the award was made and the first execution was taken. out in the year 1956, objections were filed against the same, they were disposed of,

fresh objections were filed in 1959, they were also disposed of and again objections were filed in 1963 which gave rise to this appeal Therefore,

the objections are barred by the principle of constructive res judicata and the respondents are estopped from reagitating fresh points and

objections each time the execution is taken out.

18. The second point is that of locus standi. The learned Senior Sub-Judge framed the issue as under:

Whether this decree-holder is not entitled to apply for execution of the decree? OPJD.

In appeal the State Co-operative Bank filed an application for additional evidence in the High Court under Order 41 Rule 27 C.P.C., and Andlay,

J., by his order, dated 4th Dec. 1968 re-framed issue No. 1 in the following terms:

Whether the Himachal Pradesh State Co-operative Bank Limited are the assignees of the Chamba State Central Cooperative Bank Limited in

respect of the award in question? If so, are they not entitled to execute the award?" (Onus of the first part of the issue is on the appellant Bank and

of the second part on the judgment-debtors).

The case was sent back to the Senior Sub-Judge, Chamba for recording evidence and giving findings and then to transmit those findings to this

Court.

19. The Senior Sub-Judge recorded evidence and he found that the Chamba State Central Co-operative Bank was amalgamated with the State

Co-operative Bank on 16-4-1955, and secondly that Shri N.S. Gautam was appointed as the liquidator of the Chamba Bank. The general body

meeting of the share-holders of the Chamba Bank passed a resolution for amalgamation of the Bank with the State Co-operative Bank. The

constitution of the Chamba Bank provided for its liquidation in bye-law No. 39, A liquidator was duly appointed in the person of Shri N.S.

Gautam and all the assets and liabilities of the bank vested in him after 16-4-1955. The award in favour of old Chamba Bank was therefore,

vested in the liquidator after 16-4-1955 and it was he, who could get it executed by a civil court. An award or a decree of a civil court is not like

pothor movable property which passes by simple delivery of possession, It can be transferred in terms of Order 21 Rule 16 C.P.C. either by

assignment in writing or by operation of law. By the amalgamation of the old Chamba Bank with the State Co-operative Bank the award did not

pass to the latter bank. It vested in the liquidator and after 16-4-1955 it was the liquidator alone who could assign it to the State Co-operative

Bank. The amalgamation was a voluntary act of the two banks and it could not have the force of law so as to bind the third parties. There was

nothing on the record to show if the award was transferred in writing and he, therefore, held that the State Co-operative Bank was not the assignee

of the Chamba State Central Co-operative Bank Limited in respect of the award in question,

20. On this finding and report of the Senior Sub-Judge objections were filed by the appellant that the findings of the Senior Sub-Judge were wrong

that the assignment was not in writing. According to them, there was no proper form of writing required. The previous resolutions and the

documents produced on the record proved that there was assignment in writing, In any case it was an assignment by operation of law because the

State Co-operative Bank was an assignee both in law as also by operation of law and was thus competent to execute the decree. It was wrong to

say that it was the liquidator alone who could assign the decree. The appointment of the liquidator was redundant inasmuch as it was because of

merger of assets and liabilities of the two institutions and that there was no question of appointment of the liquidator. These objections were filed on

26-3-1971.

21. From the order, dated 11-8-1971 it appears that during the course of arguments in the case it appeared that the provisions of Order 13 Rule

4, C.P.C, had not been complied with by the learned Senior Sub-Judge to whom the issue was remitted under Order 41, Rule 27 C.P.C.

inasmuch as one of the resolutions dated 12-4-1955 had not been exhibited and this Court by its order, dated 11th Aug. 1971 allowed the

appellant opportunity to produce evidence to prove the documents and, therefore, the appellant examined Kailash Chand, M.D. Kaushik and

D.C. Kapoor to prove the documents and the documents marked as Exhibits DW1/1 to DW1/7 are the various resolutions passed by the

shareholders of the Chamba State Central Co-operative Bank.

22. Now the point requiring consideration is whether there had been an assignment of the decree within the intendment of Order 21, Rule 16

C.P.C. so as to entitle the State Co-operative Bank to execute the decree. The learned Senior Sub-Judge who decided the objection petition has

found that the decree-holder had failed to allege and to aver his capacity to execute the decree either in the execution application or by separate

statement in the shape of affidavit. Further, there was no evidence beyond the statement of Shri A.P. Jain on this point. He had no personal

knowledge of the merger. The evidence of merger had not been brought on the record, so the non-production of the best and the primary evidence

raised an adverse inference against the present decree-holder. Shri S.S. Mittal, who tried the issue as framed by the High Court while remanding

the case, reported that there was no writing to show that the decree was transferred and that the amalgamation did not amount to assignment

because the award in favour of the Chamba Bank vested in the liquidator after 16-4-1955 and it was he who could get it executed by the civil

court and that it could also be transferred or assigned only by the liquidator to the present appellant,

23. It is no doubt true that it is a common case between the parties that the Chamba Bank has been merged on 16-4-1955 in the State Co-

operative Bank, Now we have to see whether that merger amounted to assignment of the assets and liabilities of the former bank to the latter

bank. Rule 16 of Order 21 C.P.C. reads as under:

16. Application for execution by transferee of decree.--Where a decree or, if a decree has been passed jointly in favour of two or more persons,

the Interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for

execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if

the application were made by such decree-holder:

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the

transferor and the judgment-debtor and the decree shall not be executed until the Court has heard their objections (if any) to its execution:

Provided also that where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be

executed against the others.

From the perusal of this rule it is apparent that no one can execute a decree except the decree-holder or a person to whom the decree has been

transferred by assignment in writing or by operation of law. A third person cannot apply for execution of a decree unless there is a transfer to him

of the decree from the original decree-holder. In the instant case there is no other writing except the resolution whereby the Chamba Bank was

merged with the State Co-operative Bank. Before the Senior Sub-Judge, who disposed of the objections, the resolutions were not produced

whereby the merger of the Chamba Bank with the State Co-operative Bank took place, whereas Shri S. S. Mittal who gave his finding on the

issue as reframed by the High Court for finding and report held that there was no assignment in writing. The learned counsel for the appellant

submits that there is no particular form of writing by which assignment can be made but, according to him, the fact remains that there is a resolution

of merger whereby all the assets and liabilities of the Chamba Bank had been assigned to the State Co-operative Bank and my attention has been

invited to Exhibit DH-2, a memorandum by Shri M. R. Chauhan, District Co-operative and Supplies Officer, Chamba. By this document Shri

Mast Ram had written to the Honorary .Secretary of the Chamba State Central Co-operative Bank Ltd. Chamba about the policy of the

Government and also the advice of the Reserve Bank to have a State Co-operative Bank at the headquarters of the State and to merge the existing

banks in the State into it which would form the branches of the bank at the local places and specially at the district headquarters. Again, there is a

copy of the resolution Exhibit DHW4/ A, dated 11th Sept. 1951 The agenda before the joint meeting of the shareholders of the Chamba Bank

was to consider the letter aforementioned in connection with amalgamation. A resolution was unanimously passed to the effect that a sub-

committee of the shareholders, i.e. S. Gurbachan Singh, L. Ved Vyas Mahajan, L. Hari Ram, L. Partap Chand, L. Jagdish Chand and Shri Rattan

Chand be constituted, who may go through the bye-laws of the State Bank and put their detailed report in the next general meeting for

consideration. The sub-committee it appears submitted its report which was considered by the general meeting of the shareholders on 4th March

1955 at 4.30 P.M. in which it was resolved,

The report of the Sub-Committee was read out and considered in the House. The amendments and clarifications supplied by the Department

were also explained and discussed in the General House. The House then unanimously decided to seek its merger with the Himachal Pradesh State

Co-op, Bank Ltd., Simla and further decided that the Registrar, Co-operative Societies, H.P. be informed with copy of the resolution to get the

needful done at a very early date.

Therefore, from the aforesaid documents it is quite obvious that the Chamba Bank had merged with the State Co-operative Bank and the Chamba

Bank after merger became a branch of the State Co-operative Bank. Now the question is whether these documents whereby the Chamba Bank

was merged would amount to a writing or not. In my opinion, these documents which were not proved before the Senior Sub-Judge while deciding

the objections clearly go to show that merger did take place by the resolution, and this resolution transferred the rights and liabilities of the Chamba

Bank to the State Co-operative Bank. The assets include any decree, etc, passed in favour of the bank which had merged, and it was not

necessary to indicate the individual decrees, etc. in the assets transferred or assigned by this writing because it was the very extinction of this bank

as a separate entity which was wiped out and had become a part and parcel of the bank at the apex, i.e. State Co-operative Bank and, therefore,

all rights and liabilities consequent to the merger became the rights, and liabilities of the State Co-operative Bank. Therefore, there was no other

writing needed for accomplishing and transferring the decree by assignment. It could be by writing or by operation of law. The writing is admittedly

there. There is no specific form of writing, it may be in any form, and in the instant case the writing is there. Therefore, on a construction of these

documents it would appear that these documents actually operate to transfer the decree in existence and as such by these deeds itself the decree is

transferred by an assignment in writing. The decree at the time when this Chamba Bank was merged or amalgamated with the State Co-operative

Bank was in existence, therefore, it was an asset of the transferee bank which was transferred to it along with all the rights and consequent to the

merger of the Chamba Bank.

24. Then there is a document Exhibit DA-3, which is a gazette for 21st May 1955. From this gazette it would appear that by notification issued on

16th May 1955, the Chamba Bank had been amalgamated with the State Co-operative Bank with effect from 16th April, 1955 and it has been

specifically mentioned therein that the State Co-operative Bank had taken over the assets and liabilities of the Chamba Bank, at par along with its

establishment, and had begun to function as District Branch of the State Co-operative Bank from the aforesaid date. A Local Board of Directors

to look to the day-to-day business of the Chamba District Branch had been appointed by the Management of the State Co-operative Bank. This is

issued under the signatures of Fateh Singh, Secretary of the Co-operative Department. Therefore, this would leave no manner of doubt that there

is an assignment of the decree in writing consequent to the merger or amalgamation of the bank.

25. Exhibit DH-X which had not been exhibited in the trial court and which was allowed to be adduced as additional evidence on an application

under Order 41, Rule 27 C.P.C. shows that by this resolution it was resolved unanimously that in view of the merger of this bank having been

accepted by the State Co-operative Bank at par the assets and liabilities of the bank on the 16th April 1955 be transferred to the State Co-

operative Bank. Then the second portion of this resolution requires that an advertisement in regard to the merger of this bank be given in the

Tribune and Hindustan Times. It, is further mentioned therein that it was to be notified for the information of all constituents and the public that with

effect from 16-4-1955 all banking business heretofore done by this bank will be done under the name and style of the State Co-operative Bank

(H.O. Simla) Branch Office Chamba. Therefore, this document clinches the matter and this is nothing but a writing by which the assignment of the

decree was made. Therefore, even if a liquidator had been appointed that is not going to affect the merits of the case. The rights and liabilities had

vested in the State Co-operative Bank and there was no question of appointment of any liquidator. It has been held in Ramdas Sah and Another

Vs. Jagarnath Prasad and Others,

Under Order 21, Rule 16, no particular form of assignment is required; on the contrary, any document in writing which clearly shows that the

intention was to assign the decree is sufficient compliance of Order 21, Rule 16, C.P.C.

26. Further, it can be said that this transfer was by operation of law, inasmuch as the registration of the Chamba bank was cancelled in exercise of

the powers u/s 39 of the Co-operative Societies Act 1912 by the Registrar and the assets and liabilities thereafter stood transferred to the State

Co-operative Bank and, therefore, this can further be said that it was a transfer by operation of law. It is laid down by a Division Bench of the

Madras High Court in Periakatha Nadar Vs. Mahalingam alias Katteri Malayapillai Nadar (deceased) and Others,

No particular form of assignment is prescribed in the case of decree either under Order 21, Rule 16, or by any other provision of law. Anything in



writing which transfers a decree and clearly shows that the intention was to assign the decree is sufficient. What is required is an assignment in

substance which is in writing.

27. Further, it is evident from Exhibit JDW-1/6 that the registration of the Chamba bank was cancelled by the orders of the Registrar, Co-

operative Societies on 3rd May 1955. That means that this bank in whose favour the decree was passed had merged with the State Co-operative

Bank and had become non-existent because all the assets and liabilities had vested in the State Cooperative Bank, as such this was quite a valid

transfer in writing.

28. The further submission is that there was no prayer for recognition of the transfer. In my opinion, there was no need to make any such statement

or prayer when, the bank itself had merged with the transferee bank and there is already a notice issued by the court upon which these objections

were filed. Therefore, this application for execution by the State Co-operative Bank, who is the successor of the Chamba Bank by virtue of its

merger is the decree-holder under Order 21, Rule 16 C.P.C., and, which does not contain a specific prayer for recognition, would nevertheless be

an application in accordance with law,

29. Therefore, on the basis of the aforesaid discussion it is quite apparent that the State Co-operative Bank has locus standi to execute the decree,

30. Shri O. P. Sharma, learned counsel for the respondents had contended that under Sections 23 and 24 of the Co-operative Societies Act the

liability of a past member for the debts of a registered society shall continue only for a period of two years from the date of its ceasing to be a

member. Further that the estate of deceased member shall be liable for a period of one year from the time of his decease for the debts of a

registered society. But, it may be stated that this objection could be taken up before the executing court. This objection cannot be permitted to be

taken in this Court and it was for the objectors if this objection was available to them at that time to have taken it in their objection petition or they

may raise it now if they may be so advised that this objection is now available to them.

31. Shri Amar Chand, learned counsel for Raghubir Dass has contended that he had died and that his wife has only a residential house and which

is exempt u/s 60 C.P.C. Further Raghubir Dass was only a surety and the amount can be realised only from the principal debtor though the

responsibility may be co-extensive. Further that the debt was, avayharika debt and that the same cannot be realised from the ancestral property in

the hands of his heirs and he has cited some authorities, as also relied on para 298 (5) of the Hindu Law by Mulla to substantiate his argument.

But, it may be stated that these objections will be available to the respondent before the executing court when the property is attached and this

Court cannot go into this question unless these objections are raised and are decided by the executing court.

32. The result, therefore, is that this appeal is allowed and the order accepting the objections and dismissing the execution petition is set aside, and

the objections are also rejected. However, I pass no orders as to costs.