Mehfuj Husain Ahmad and Another Vs Kiran Bano

Court: Madhya Pradesh High Court (Gwalior Bench)

Date of Decision: Sept. 12, 1990

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 47

Citation: (1993) 38 MPLJ 452 : (1993) MPLJ 452

Hon'ble Judges: S.K. Dubey, J

Bench: Single Bench

Advocate: V.K. Bharadwaj, for the Appellant; M.L. Gupta, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S.K. Dubey, J.

The judgment-debtors have approached this Court for the sixth time, aggrieved of an order passed on 10-8-1990 by the executing Court in

Execution Case No. 8-A/1983x83, complaining that the executing Court illegally did not decide the objection u/s 47, Civil Procedure Code, about

the executability of the decree, which according to the judgment-debtors, is a nullity.

The execution case arose out of a decree passed in a suit instituted by the wife of judgment-debtor No. 1, who has deserted her. The suit was for

recovery of the articles worth Rs. 80,000/-, which were illegally retained by the husband. The plaintiff averred that her marriage with judgment-

debtor No. 1 took place on 25th September, 1981, according to Muslim rites by Nikah" in which Mahr (dower) of Rs. 20,500/- was agreed

upon by judgment-debtor No. 1; because . the husband misbehaved with her, ill-treated her and created such circumstances that it was impossible

for her to live with the husband, the plaintiff came to stay with her mother, where on 11-8-1982 she gave birth to a daughter from the wedlock. It

was alleged that the husband never tried to improve, nor their relations became cordial, nor the husband came to take her back to his house. As

such, the plaintiff continued to remain with her mother. The plaintiff averred that the articles or untensils, ornaments, jewellery, clothings, etc., which

were given to her by her mother and the relations from the mother"s side at the time of the marriage, have been illegally and unauthorisedly retained

by the defendants. The defendants did not appear and ex parte decree was passed with interest. When the decree was put in execution, objection

was raised u/s 47, Civil Procedure Code, that there was no ""statement A"" with the decree and, as such, the decree is not executable. On this

objection the decree was amended vide order dated 20-3-1987 and ""Ext.P-1"" was substituted by ""statement A"", and the objection was dismissed.

Against this order, again a revision (C.R. No. 68/1987) was preferred, which was heard by this Court, and at the time of hearing the revision, this

Court for satisfying itself called for the original document and compared the same with Ext. P-1, which was exhibited at the trial on 13-1-1983, to

dispel /all doubts of the petitioners/judgment-debtors. While dismissing the revision, this Court observed that though the plaintiff computed her

claim at Rs. 80,000/-, in her statement the plaintiff proved the value of the articles to be at Rs. 72,085/-. It was further held that the executing

Court rightly exercised its jurisdiction u/s 152, Civil Procedure Code.

The petitioner taking benefit of the amendment in the decree, preferred First Appeal No. 35/1987, which was decided by a Division Bench of this

Court of which I was a party. In the appeal the challenge was that as the marriage has not been dissolved and as divorce has not taken place, the

plaintiff is not entitled to the decree for return of the articles; the marriage subsisted, and during the continuance of the marriage there is no right of

retention with the wife, of the property or to claim possession of the same, placing reliance on Section 299, Chapter XV of the Principles of

Mahomedan Law by Mulla. The Division Bench repelling the contentions, held that Section 299 does not apply in this case, as the Chapter relates

to Mahr (dower) and the articles claimed in the suit are her personal property and not the property received by her in dowry and that the decree

was rightly amended. In appeal, the contention of the learned counsel for the petitioners was also not accepted that if the articles are not delivered,

the Court is powerless, and the decree-holder under Order 21, Rule 31(2) cannot realise such compensation as the Court may think fit as an

alternative to delivery of possessiom of the movable properties. In appeal, the plaintiff/decree-holder was held to be entitled to recover the amount

of Rs. 72,085/- with interest thereon at the rate of 6% per annum from the date of the amended decree till realisation of the amount. This judgment

and decree was not challenged by the petitioners before the Supreme Court.

After the judgment in appeal, the executing Court started executing the decree. Warrant of attachment of a house was issued by order dated 7-11-

1989. Against this order a revision (C.R. No. 201/1989) was preferred before this Court challenging the order of attachment, that the money value

of the articles could not have been recovered without holding any enquiry and the house could not have been attached. This Court dismissed the

revision on 3-1-1990 holding the order of attachment valid. After this order the petitioner came with a case and offered to return all the articles as

per Ext. P-1, which were deposited in the Court. But, the decree-holder refused to take delivery of the articles, as they were not the original

documents or of the same value. The executing court, after hearing parties, again passed on 28-3-1990 an order for issuing warrant of attachment.

Feeling aggrieved, the petitioners preferred another revision (C.R. No. 66/1990) before this Court, which was dismissed on 19-6-1990, holding

that the husband/judgment-debtor did not exercise his option which he had to elect, and as the articles are not the same, which, even if same,

underwent devaluation and deterioration, the decree-holder was right to execute the decree for money value in view of the provisions of Order 20,

Rule 10, Civil Procedure Code. A direction was also given that the judgment-debtor is free to take back the articles, which he can sell in the

market and deposit the sale proceeds, which shall be adjusted towards satisfaction of the decree. Against the order dated 19-6-1990 passed in

C.R. No. 66/1990 the petitioners preferred a SLP (Civil) before the Supreme Court, which has been dismissed as stated by the learned counsel

for the petitioners.

After this order in revision, the petitioners raised an objection that as the decree passed was without jurisdiction, the decree cannot be executed.

For that the petitioners placed reliance on Section 283 of the Principles of Mahomedan Law (for short, ''Mahomedan Law''). Another objection

raised was that Ext. P-1, which was substituted by ""statement A"", is not the same document, as the original signed by the husband/judgment-

debtor is available with him, where the quantity of the ornaments and the value differ; therefore, it was contended that the decree-holder played a

fraud and obtained the ex parte decree. It was also alleged that the value of the items of ""Salam"" according to Mahomedan Law could not have

been included in the decree. The other objection was that according sacrosanct Quran charging or taking of interest is prohibited. On these

objections it was challenged that the decree is a nullity and cannot be executed. Overruling the objections, the executing Court ordered to issue

sale warrant of the property vide order dated 10-8-1990. It is this order which has been challenged in this revision.

Shri V.K. Bharadwaj, learned counsel for the petitioners, and Shri M.L. Gupta, learned counsel for the decree-holder, who was present in Court

and filed memo of appearance on 3-9-1990, to oppose the admission or the revision, both agree that the revision be disposed of finally at the

admission stage. Hence, counsel were heard on merits.

Shri Bharadwaj placing reliance on Section 283 of Mahomedan Law, submitted that according to ""Ayat"" of holy Quran as contained in ""Soore

Baker"", third para, P. 64, Hindi translation of which was read by the learned counsel, charging or taking of interest is prohibited and interest is

considered as ""Haram"". It was also contended that now the original of Ext. P-1 has been traced out by the petitioner/husband and bears the

signature of the decree-holder; some items do not tally in quantity, weight and price with those shown in Ext. P-1, therefore, the executing Court

was bound to investigate the objection about the decree being a nullity. Reliance was placed on two decisions of the apex Court : Bhavan Vaja

and Others Vs. Solanki Hanuji Khodaji Mansang and Another, and Sunder Dass Vs. Ram Prakash, Three decisions of this Court : Bherusingh v.

Ramgopal 1972 MPLJ 347 : 1973 LLJ 218; Sheikh Rasool 1977 (2) MPWN 206 and Jitbandhan 1973 MPWN 17, were also pressed into

service.

Shri M.L. Gupta, learned counsel for the decree-holder, contended that the decree has become final, and now even if the decree is erroneous on

fact or in law, the executing Court cannot go behind the decree, and the decree cannot be declared as a nullity. Learned counsel also contended

that the objections are nothing but dilatory tactics adopted by the judgment-debtors to delay and/or defeat the execution, so that the decree-holder

who is the wife of petitioner No. 1, may not get the fruits of the decree, which has been passed in her favour as long back as in the year 1983.

Learned counsel also criticised the conduct of the petitioners and submitted that the objection is nothing but creating an obstruction in the execution

of the decree, which is an abuse of the process of the Court.

After hearing counsel, I am of the opinion that this revision has no merit and deserves to be dismissed for the following reasons.

It is trite law that a Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree

according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate

proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties. (See Vasudev Dhanjibhai Modi Vs. Rajabhai

Abdul Rehman and Others,

The petitioners though not preferred any appeal against the ex parte decree, after the amendment of the decree which was confirmed in revision,

taking advantage of the amendment in the decree, preferred an appeal, which was heard and disposed of by the Division Bench. In the said appeal

the objections raised were entirely different; the correctness of Ext. P-1 was challenged and contentions were advanced relying on Mahomedan

Law, but all those contentions were repelled. In the appeal, the contentions which are now raised in relation to executability of the decree, were

not raised, though they were available to the petitioners. After the judgment and decree in appeal, the petitioners raised different contentions at

different stages, and the matter came up twice before this Court, after the order of the executing Court in respect of attachment of the house. The

petitioners even at this stage could not demonstrate by placing reliance on any section or provision of Mahomedan Law, that a decree for return of

the articles, or in the alternative, compensation in money value, not given in Mahr (dower) but received by a Mahomedan wife at the time of her

marriage from her mother or from the ralation of the mother''s side, and the said articles having been illegally or unauthorisedly retained, cannot be

executed and such a wife cannot claim back the articles from her husband, who, without dissolution of the marriage in accordance with law, has

deserted her and compelled her to stay separately.

Reliance on Section 283 of the Mahomedan Law is misconceived. Section 283 reads as under : --

283. Suit for breach of promise to marry. In a suit by a Mahomedan for damages of breach of promise to marry, the plaintiff is not entitled to

damages peculiar to an action for breach of promise of marriage under the English law, but to a return merely of presents of money, ornaments,

clothes and other things.

The present decree is not arising out of a suit by a Mahomedan for damages for breach of promise to marry. Therefore, this provision cannot be of

any help to the petitioners. Similarly, a bare reading of ""Ayat"" 274 of the holy Quran indicates that ""Ayat"" 274 is an ethics of morality and lays

down that a Mahomedan should not earn interest; to charge, realise or take interest is considered as a sin, and is a disrespect to Allah (God), and

such person is considered to be a man of hell living in hell. But this ethics does not come in the way of the Court''s jurisdiction to grant interest

either under the statute which makes a provision for grant of interest, or in the discretion of the Court u/s 34, Civil Procedure Code.

Chapter I of Mahomedan Law by. Mulla deals with ""Introduction of Mahomedan Law into India."" Section 1 deals with administration of

Mahomedan Law, which speaks that the power of Courts to apply Mahomedan law to Mahomedans is derived from and regulated partly by

Statutes of the Imperial Parliament read with Article 225 of the Constitution of India but mostly by Indian legislation. Section 2 deals with extent of

application, and, as regards India, the rules of Mahomedan law fall under three divisions, namely : (i) those which have been expressly directed by

the Legislature to be applied to Mahomedans, such as rules of Succession and Inheritance; (ii) those which are applied to Mahomedans as a

matter of justice, equity and good conscience, such as the rules of the Mahomedan law of Pre-emption, and (iii) those which are not applied at all,

though the parties are Mahomedans, such as the Mahomedan Criminal Law, and the Mahomedan Law of Evidence. Clauses (i) and (ii) are

applied by the Courts in India to Mahomedans. In other respects, Mahomedans in India are governed by the general law of India. It is worthwhile

to mention here that the present decree, which has been put in execution, was not based on any statute falling under Clause (i) or Clause (ii) of

Section 2 of Mahomedan Law. Section 3 speaks that the rules of Mahomedan law that have been expressly directed to be applied to

Mahomedans are to be applied except in so far as they have been altered or abolished by legislative enactment. Section 4 speaks that no rules of

Mahomedan law that have not been expressly directed to be applied to Mahomedans can be applied if they have been excluded either expressly

or by implication by legislative enactment.

Learned counsel for the petitioners, except for Section 283, could not point out that the suit as framed was falling in any of the provisions as

contained in Mahomedan law. When the suit does not fall either in Clause (i) or Clause (ii) of Section 2, or in any of the matters expressly

enumerated or not expressly enumerated or it is not contrary to justice, equity and good conscience, the Courts in India in such suits are governed

by the general law, both substantive and procedural, for granting relief, because for such a suit no remedy is available under Mahomedan Law.

There is no difficulty in holding so in respect of cases governing procedure, as the Privy Council in AIR 1938 80 (Privy Council) said that even

where Mahomedan Law applies to the subject matter, the Courts in India are governed by their own method and procedure and do not apply

those rules of the Mahomedan Law which are described as ""Provisions which go only to the remedy ad lites ordinationeum, being matters purely of

procedure as to array of parties, production of evidence, res judicata, and review of judgment, etc.

The apex Court in case of N.K. Mohammad Sulaiman Vs. N.C. Mohammad Ismail and Others, observed that where on account of a bona fide

error, the plaintiff seeking relief institutes his suit against a person who is not representing the estate of a deceased person against whom the plaintiff

has a claim either at all or even partially, in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the

persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record. This principle applies

to all parties irrespective of their personal law.

Therefore, so far as the question of award of interest on the amount is concerned, it was rightly awarded in view of the provisions as contained in

the CPC and considering the peculiar circumstances of the case. As regards the applicability of the general law for return of the articles illegally

retained, the suit was not governed by any of the provisions as contained in Mahomedan Law, the decree was passed not under Mahomedan Law

but under general law for which there is no bar under the personal law governing the parties. Therefore, in my opinion, there was no inherent lack

of jurisdiction, and the executing Court rightly said that the decree is binding and it cannot go behind the decree and, hence, it has to execute the

decree as it stands.

The other contention that as the list (Ext. P-1) did not tally, the executing Court was bound to investigate the objection, has also no merit, as said

by the apex Court in the case of Vasudev Dhanjibhai (supra) that where the objection as to jurisdiction of the Court to pass the decree does not

appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not

been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of

jurisdiction. The petitioners had full opportunity even in appeal to raise the said objection, but they took different and changing stands at different

stages, which were nothing but to protract and harass the decree-holder. The way in which the petitioners are raising objections by changing their

stand clearly points out their mala fides and litigative attitude so as to set at naught the decree put in execution proceedings. It is clearly an abuse of

the process of the Court. The petitioners having failed at all stages up to the apex Court, now cannot be allowed to say that the decree is a nullity

and, hence, cannot to executed. Reliance of the cases of Bhavan Vaia: Sunder Dass (supra) and Bherusingh: Sheikh Rasool and Jitbhandhan

(supra) have no application, as I have held that the decree is not a nullity and, therefore, the executing Court rightly did not investigate the

objections by going through the pleadings of the parties and the proceedings up to the date of the decree. In case of Sunder Dass (supra) the apex

Court has reiterated the general rule that a Court executing a decree cannot go behind the decree between the parties or their representatives; it

must take the decree according to its tenor and cannot entertain any objection that the decree was incorrect in law or on facts. The only exception

to this general rule is that where the decree sought to be executed is a nullity for lack of inherent jurisdiction in the Court passing it, the objection

about invalidity of the decree can be raised in the proceeding for execution of the decree, which is not the case here.

In the result, the revision is dismissed with costs. Counsel''s fee Rs. 300/- if already certified.

The executing Court is directed to proceed with the execution expeditiously so that the decree-holder, a destitute wife can, after having a number

of rounds of litigation, get the fruits of the decree.