

CASE NO.:
Appeal (civil) 3831 of 2000

PETITIONER:
Padma Ben Banushali & Anr.

RESPONDENT:
Yogendra Rathore & Ors.

DATE OF JUDGMENT: 25/04/2006

BENCH:
ARIJIT PASAYAT & TARUN CHATTERJEE

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

Challenge in this appeal is to the order passed by a learned Single Judge of the Madhya Pradesh High Court at Jabalpur in a Civil Revision filed under Section 115 of the Code of Civil Procedure, 1908 (in short 'CPC'). By the impugned order the High Court held that the petitioner who was the plaintiff in the suit and the decree-holder in an earlier suit was not entitled to execute the same. Background facts in a nutshell are as follows:

The plaintiffs had filed a civil suit for eviction of the father of respondents (Sri Narayanbhai) who was the tenant in the disputed premises. In the suit, pleadings were to the effect that suit property originally belonged to one Dhanji Bhai. Narayan had taken suit premises on rent from Dhanji Bhai. Appellant No.2 Kanji Bhai purchased the suit property in the name of his wife Padma Ben (Appellant No.1), by registered sale deed on 25.8.1980. Decree was granted in favour of the landlords. Tenant filed an appeal before the District Judge. Before the matter could be decided on merits an application purported to be under Order XXIII Rule 1 CPC was filed before the Appellate Court. The application was signed by the plaintiff-landlord and the defendant. The appeal was dismissed in terms of the application. Later on, the present appellants tried to execute the decree which was resisted by the defendants on the ground that (1) the decree has become in-executable; (2) the landlords were not ready and willing to perform their part of the contract and (3) a suit for specific performance had already been instituted. The execution application filed was pressed by the present appellants on the grounds that adjustments in terms of Order XXI Rule 2 CPC was not recorded. In any event the Court cannot take cognizance of the adjustment under Sub-rule (3) of Rule 2, Order XXI CPC and there was never any readiness or willingness to perform their part of the defendants and as such the decree was executable. The respondents raised another plea that since the landlords have given up their rights to execute the decree, the same amounted to conscious waiver on their part and, therefore, the decree had become in-executable. The Executing Court came to hold that the application filed under Order XXIII Rule 1 CPC was an application for withdrawal of the appeal, it led to adjustment and as said adjustment was not certified by the Executing Court, no claim of adjustment can be taken note of. No question regarding executability of the decree would arise for

consideration under Section 47 CPC. Said order was challenged in Civil Revision by the present respondents. In the Civil Revision, the stand taken before the Executing Court were reiterated by the parties.

The High Court came to hold that there was no adjustment between the parties. In fact it was a case where in view of the agreement between the parties, the decree became in-executable as there was a conscious waiver.

In support of the appeal, learned counsel for the appellants submitted that the High Court proceeded to examine the issue involved on erroneous premises. The application which was filed under Order XXIII Rule 1 CPC did not in essence make the decree passed in favour of the decree-holder in-executable. Strong reliance was placed on a decision of this Court in *Sultan Begum v. Prem Chand Jain* (1997 (1) SCC 373) to contend that there was no question of any conscious waiver as concluded by the High Court. There was in reality adjustment which was required to be certified. The suit for specific performance filed by the respondents has already been dismissed and appeal is pending. That itself shows that the conditional acceptance not to execute the decree was not fulfilled.

In response, learned counsel for the respondent submitted that the High Court's judgment suffers from no infirmity. In any event, there were two parts of the agreement \026 one was withdrawal of the appeal filed by the present respondents and the second was the agreement by the present appellants not to execute the decree. There was no question of any adjustment as claimed by the appellants, and the High Court has rightly observed that there was conscious waiver.

The scope and ambit of Section 47 and Order XXI Rule 2 CPC need to be noted:

"47. Questions to be determined by the Court executing decree. -

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) * * *

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation I. - For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II. - (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the

meaning of this section.

ORDER XXI - EXECUTION OF DECREES AND ORDERS

2. Payment out of Court to decree - holder. -

(1) Where any money payable under a decree of any kind is paid out of Court, or a decree of any kind is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

(2) The judgment-debtor or any person who has become surety for the judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(2-A) No payment or adjustment shall be recorded at the instance of the judgment-debtor unless -

(a) the payment is made in the manner provided in Rule 1; or

(b) the payment or adjustment is proved by documentary evidence; or

(c) the payment or adjustment is admitted by, or on behalf of, the decree-holder in his reply to the notice given under sub-rule (2) of Rule 1, or before the Court.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any Court executing the decree."

It is contended by the learned counsel for the appellants that since it is specifically provided by Section 47 that questions relating to the execution, discharge or satisfaction of the decree shall be determined by the executing court, it would prevail over Order XXI Rule 2 including sub-rule (3) which prohibits the executing court from recognising any payment or adjustment which has not been certified or recorded under Order XXI Rule 2.

Part II of the Code of Civil Procedure, comprising Sections 36 to 74, as also the whole of Order XXI consisting of Rules 1 to 106, deal with the execution of decree. Section 47, as also Order XXI Rule 2 are, therefore, part of the same legal or statutory system dealing with the same subject, namely, execution of decree. That being so, the rule of interpretation requires that while interpreting two inconsistent, or, obviously repugnant provisions of an Act, Courts should make an effort to so interpret the provisions as to harmonise them so that the purpose of the Act may be given effect to and both the provisions may be allowed to operate without rendering either of them otiose.

The statute has to be read as a whole to find out the real intention of the legislature.

In *Canada Sugar Refining Co. v. R.* [1898 AC 735 : 67 LJPC 126], Lord Davy observed :

"Every clause of a statute should be construed

with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

The Court has adopted the same rule in *M. Pentiah v. Muddala Veeramallappa* [AIR 1961 SC 1107]; *Gammon India Ltd. v. Union of India* [(1974) 1 SCC 596], *Mysore SRTC v. Mirja Khasim Ali Beg* [(1977) 2 SCC 457], *V. Tulasamma v. Sesha Reddy* [(1977) 3 SCC 99], *Punjab Beverages (P) Ltd. v. Suresh Chand* [(1978) 2 SCC 144], *CIT v. National Taj Traders* [(1980) 1 SCC 370], *Calcutta Gas Co. (Proprietary) Ltd. v. State of W.B.* [AIR 1962 SC 1044] and *J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. State of U.P.* [AIR 1961 SC 1170].

This rule of construction which is also spoken of as "ex visceribus actus" helps in avoiding any inconsistency either within a section or between two different sections or provisions of the same statute.

On a conspectus of the case-law indicated above, the following principles are clearly discernible :

- (1) It is the duty of the courts to avoid a head-on clash between two sections of the Act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonise them.
- (2) The provisions of one section of a statute cannot be used to defeat the other provisions unless the court, in spite of its efforts, finds it impossible to effect reconciliation between them.
- (3) It has to be borne in mind by all the courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. That is the essence of the rule of "harmonious construction".
- (4) The courts have also to keep in mind that an interpretation which reduces one of the provisions as a "dead letter" or "useless lumber" is not harmonious construction.
- (5) To harmonise is not to destroy any statutory provision or to render it otiose.

Interpreting the provisions of Section 47 and Order XXI Rule 2 in the light of the above principles, there does not appear to be any antithesis between the two provisions. Section 47 deals with the power of the court executing the decree while Order XXI Rule 2 deals with the procedure which a court whose duty it is to execute the decree has to follow in a limited class of cases relating to the discharge or satisfaction of decrees either by payment of money (payable under the decree) out of court or adjustment in any other manner by consensual arrangement.

Since Section 47 provides that the question relating to the execution, discharge or satisfaction of the decrees shall be determined by the court executing the decree, it clearly confers a specific jurisdiction for the determination of those questions on the executing court.

Under Section 38 CPC, a decree may be executed either by the court which passed it or by the court to which it is sent for execution. The court which passed the decree has been defined in Section 37. Transfer of decree to another court for its execution has been provided for in Section 39. Section 40 provides for transfer of decree to a court in another State. Section 42 lays down that the court to which a decree is transferred for execution shall have the same powers in executing that decree as if the decree was passed by itself. These provisions including Section 37 thus clearly speak of the powers and jurisdiction of the court executing the decree.

Order XXI Rule 2 applies to a specific set of circumstances. If any money is payable under a decree, irrespective of the nature of decree, and such money is paid out of court, the decree-holder, has to certify such payment to the court whose duty it is to execute the decree and that court has to record the same accordingly. Similarly if a decree, irrespective of its nature, is adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder has to certify such adjustment to that court which has to record the adjustment accordingly. If the payment or adjustment is not reported by the decree-holder, the judgment-debtor has been given the right to inform the court of such payment or adjustment and to apply to that court for certifying that payment or adjustment after notice to the decree-holder. Then comes sub-rule (3) which provides that a payment or adjustment which has not been certified or recorded under sub-rule (1) or (2), shall not be recognised by the court executing decree.

The expression "or the decree of any kind is otherwise adjusted" are of wide amplitude. It is open to the parties namely, the decree-holder and the judgment-debtor to enter into a contract or compromise in regard to their rights and obligations under the decree. If such contract or compromise amounts to an adjustment of the decree, it has to be recorded by the court under Rule 2 of Order XXI. It may be pointed out that an agreement, contract or compromise which has the effect of extinguishing the decree in whole or in part on account of decree being satisfied to that extent will amount to an adjustment of the decree within the meaning of the Rule and the Court, if approached, will issue the certificate of adjustment. An uncertified payment of money or adjustment which is not recorded by the court under Order XXI Rule 2 cannot be recognised by the executing court. In a situation like this, the only enquiry that the executing court can do is to find out whether the plea taken on its face value, amounts to adjustment or satisfaction of decree, wholly or in part, and whether such adjustment or satisfaction had the effect of extinguishing the decree to that extent. If the executing court comes to the conclusion that the decree was adjusted wholly or in part but the compromise or adjustment or satisfaction was not recorded and/or certified by the court, the executing court would not recognise them and will proceed to execute the decree.

The problem can be looked into from another angle on the basis of the maxim "*generalalia specialibus non derogant*". Section 47, as pointed out earlier, gives full jurisdiction and power to the executing court to decide all questions relating to execution, discharge and satisfaction of the decree. Order XXI Rule 3, however, places a restraint on the exercise of that power by providing that the executing court shall not recognise or look into any uncertified payment of money or any adjustment of decree. If any such adjustment or payment is pleaded by the judgment-debtor before the executing court, the latter, in view of the legislative mandate, has to ignore it if it has not been certified or recorded by the court.

The general power of deciding questions relating to execution, discharge or satisfaction of decree under Section 47 can thus be exercised subject to the restriction placed by Order XXI Rule 2 including sub-rule (3) containing special provisions regulating payment of money due under a decree outside the court or in any other manner adjusting the decree. The general provision under Section 47 has, therefore, to yield to that extent to the special provisions contained in Order XXI Rule 2 which have been enacted to prevent a judgment-debtor from setting up false or cooked-up pleas so as to prolong or

delay the execution proceedings.

The aforesaid aspects were highlighted in Sultan Begum's case (supra).

As emphasized by learned counsel for the appellants, the agreement of the appellants who were respondents in the earlier appeal not to execute the decree was conditional on the appellants in the said appeal executing a sale-deed after receiving the amounts agreed upon. In other words, there were two components of the agreement. Second part related to the agreement not to execute the decree which was dependant upon the execution of the sale-deed. Undisputedly, the same has not been executed and on the other hand suit for specific performance of the agreement has been filed, and that matter is pending in appeal.

We do not think it necessary to express any opinion on the merits of the said suit. But the facts remain that there was no certificate as needed under Order XXI Rule 2 CPC. The question of conscious waiver, in the circumstances does not arise. Ultimately, it has to be decided on the facts and circumstances of this case as to what was the intention of the parties and to determine as to whether rights on the decree were given up or not. On the facts, the rights had not been surrendered and the decree remained preserved. That being so, the High Court's order is indefensible and set aside. The appeal is allowed but with no order as to costs.