IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.818 OF 2019

Mr. Antonio Ernesto Pereira & Anr. ... Petitioners

Versus

Mr. Grayson de Jesus Serrao ... Respondent

Shri S.M. Singbal, Advocate for the Petitioners.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 22nd January 2020

ORAL ORDER :

The petitioners are the defendants in Special Civil Suit No.43 of 2009, before the Civil Judge Senior Division, Margao. The respondent, as the plaintiff, pleaded that the first petitioner's husband initially had entrusted a civil work to him. That is, he was asked to prepare a construction plan for their property. At that time, the petitioner promised to sell a piece of that property to the respondent.

2. As part of that promised sale, the petitioners are said to have taken 17 lakh rupees as advance from the respondent. It was on 17th February 2006. But the transaction did not materialize; so the petitioners returned the money. Then, on 31st March 2006 and on 5th March 2006, the petitioners took as a hand loan 13 lakhs and 1.75 lakhs rupees, respectively, from the respondent. As they did not repay the amount, the respondent filed the suit. In the suit, on 20th October 2009, the petitioners

filed their written statement. Later, the trial Court framed the following issues and, eventually, decreed the suit on 12th February 2014. The issues read thus:

> 1. Has the plaintiff proved that he is entitled to recover ₹10,00,000/- and ₹1,75,000/- with interest @12% on the same or, in the alternative, is he entitled to a direction to the defendant to pay ₹1,25,000/-, ₹8,00,00/-, ₹3,75,000/-, and ₹3,00,000/- with interest @12%?
> 2. Has the plaintiff proved that he is entitled to the interest @18% p.a. on the above amounts until actual payment?

3. To realise the decreetal amount, the respondent laid execution in Special Execution Application No.1/2015. In that execution petition, the petitioners took a plea that the respondent has lent money and charged interest. Therefore, the activity amounted to money lending and, thus, the transaction stands prohibited under the Goa Money-Lenders Act, 2001 ("the Money Lenders Act"). They have also contended before the executing Court that the execution should fail. But the executing Court, through its order dated 12th April 2019, refused to entertain that plea. Aggrieved, the petitioners have filed this Writ Petition.

4. Shri S.M. Singbal, the learned counsel for the petitioners, has submitted that the Money Lenders Act puts an absolute embargo against any unlicensed person indulging in money lending. According to him, if at all any money is lent in violation of the Money Lenders Act, it amounts to a void transaction. Therefore, he has urged this Court to reverse the executing Court's order.

5. In the alternative, Shri Singbal has drawn my attention to Section

35 of the Act, to contend that under a few specified circumstances, the trial Court has the power to reopen the suit. To justify that option, he has submitted that, now, under the decree the interest is more than the principal. At least, the interest should be scaled down.

6. To support his contention that the executing Court can travel beyond the decree and declare it inexecutable, Shri Singbal has relied on the Supreme Court judgment in *Balvant N. Viswamitra v. Yadav Sadashiv Mule*[1], decided on 13th August 2004.

7. Despite service of notice, the respondent has not entered appearance.

8. Indeed, the petitioners' Council has fairly admitted that the petitioners have not raised before the trial Court the plea that the suit has been barred under the Money Lenders Act. So, there was no issue framed. The petitioners, as the defendants, have not led any evidence in the suit. Nor have they filed any First Appeal. Thus, the judgment has attained finality.

9. Indisputably, if a decree is *void ab initio* for any reason, including that the Court passing the decree lacks jurisdiction, the executing Court can go beyond the decree and declare it inexecutable. But an erroneous decision, even a decision on misapplication of law, does not amount to a void decree. Here, the Civil Judge, Senior Division, had the inherent jurisdiction to try the matter. Had there been a plea of prohibition under

1 (2004) 8 SCC 706

the Money Lenders Act and if that plea merited the trial Court's acceptance; then, the plaintiff could have been non-suited. Thus, he could have failed to recover the money. But all this is conjectural for the petitioners never contested the respondent's claim, save their filing the written statement. Even there, too, they raised no plea about how the Money Lenders Act affects the case.

10. The proceedings before the Civil Judge Senior Division could not have been void even if we were to assume that the petitioners took a plea about the Money Lenders Act. That plea must have been sustained on evidence; a bald assertion does not prove itself.

11. In *Balvant N. Viswamitra*, the tenant died, and his legal heirs remained at large. On the ground that the successor tenants had not been paying the rent, the landlord wanted to evict them. All the notices sent were returned unserved. Notices were affixed on the leased property. Thus, unable to ascertain who the present tenants were, the landlord sued the "the legal heirs and successors" of the original tenant. As was with the notice, the summonses, too, could not be served. They were affixed, though.

12. The so-called legal heirs engaged a counsel, cross examined the plaintiff, but later abandoned the case. The suit was decreed. In execution, third parties obstructed. Their appeal was dismissed but reversed by the High Court. Finally, the Supreme Court upheld the decree.

13. In the above context, *Balvant N. Viswamitra* elucidated on what

amounts to a void decree. The distinction between a decree which is void and a decree which is wrong, incorrect, irregular, or not in accordance with law cannot be overlooked or ignored. Where a court lacks inherent jurisdiction in passing a decree or making an order, that court's decree or order would be without jurisdiction, *non est*, and void *ab initio*. For a court's lacking the inherent jurisdiction goes to the root of the matter and strikes at the very authority of the court to pass a decree or order. Such defect has always been treated as basic and fundamental. Validity of such decree or order can be challenged at any stage, even in execution, or in collateral proceedings. On the other hand, an irregular or a wrong decree or order is not *necessarily* null and void. Thus, an erroneous or illegal decision, which is not void, cannot be objected to in execution or collateral proceedings.

14. Here, in the absence of any plea and countervailing evidence by the defendants, we cannot conclude that the Civil Court inherently lacked jurisdiction. So, I am afraid, *Balvant N. Viswamitra* cannot rescue the petitioners.

15. The petitioners have advanced an alternative plea: that there should be a direction to the trial Court to reopen the case under Section 35 of the Money lenders Act, for scaling down the interest. That provision reads thus:

> **35. Reopening of transactions.—** Notwithstanding anything contained in any law for time being in force, *the Court shall, in any suit to which this Act applies*, whether heard ex-parte or otherwise—
> (a) reopen any transaction, or any account already taken between the party;

> (b) take an account between the parties;
> (c) reduce the amount charged to the debtor in respect of any excessive interest;
> (d) if on taking accounts it is found that the money-lender has received more than what is due to him, pass a decree in favour of the debtor in respect of such amount:
> Provided that in exercise of these power, *the Court shall not*—
> (i) reopen any adjustment or agreement purporting to close previous dealings and to create new obligations which have been entered into by the parties or any person through whom they claim *at a date more than six years from the date of this suit*;
> (ii) *do anything which affects any decree of Court.*
>
> (italics supplied)

16. True, in any suit to which this Act applies, whether heard ex parte or otherwise, the Court shall reopen any transaction, or any account already taken between the parties and reduce the amount charged to the debtor if the interest is charged excessively. On the other hand, after taking accounts, if it is found that the moneylender has received more than what is due to him, the Court will pass a decree in the debtor's favour concerning that amount. These measures, however, cannot be taken beyond six years from the date of the suit. Nor such measures affect the decree that has already been passed.

17. That is, the plaintiff must have been an acknowledged, licenced moneylender and the suit must have been instituted in tune with the Money Lenders Act. That is not the case. Further, no transaction should be reopened or disturbed after more than six years from the date of the suit. Here, it is beyond six years. And finally, a decree already passed cannot be disturbed. Here, a decree has already been passed.

Thus, looked from any perspective, the Writ Petition fails. So I dismiss it. No order on costs.

DAMA SESHADRI NAIDU, J.

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