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Court : Allahabad

Decided On : Dec-09-2002

Reported in : 2003(1)AWC230

Judge : Anjani Kumar, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 47

Appeal No. : C.M.W.P. No. 7646 of 1998

Appellant : Smt. Hasina Bibi and ors.

Respondent : Vith Additional District Judge and ors.

Advocate for Def. : K.K. Nirkhi, Adv. and ;S.C.

Advocate for Pet/Ap. : M. Islam, Adv.

Disposition : Petition allowed

Judgement :

Anjani Kumar, J.

1. By means of present writ petition under Article 226 of the Constitution of India petitioners, who were the opposite parties before the revisional court, have challenged the order passed by the revisional court dated 13.11.1997, copy of which has been annexed as Annexure-4 to the writ petition, whereby the revisional

court has allowed the revision filed by the revisionist permitting the execution of the compromise decree, which has been arrived at between the parties during the pendency of the revision before the revisional court.

2. The facts leading to the filing of present writ petition are that petitioners-landlord filed Suit No. 642 of 1977 for arrears of rent and ejectment against the respondent No. 3, (defendant in the suit). The aforesaid suit was decreed for arrears of rent and ejectment on 22.9.1982 by the Small Causes Court, Aggrieved by the aforesaid decree dated 22.9.1982, revisionist-respondent No. 3 filed Revision No. 715 of 1982 before the revisional court under Section 25 of the Provincial Small Causes Courts Act, which was pending before the revisional court when a compromise has been arrived at between the parties and the revision was dismissed by VIIth Additional District Judge, Allahabad, vide order dated 24.5.1998 in terms of the compromise and the decree passed by the trial court is modified as compromise decree. On 2.1.1990, the landlord-decree-holder filed an application for execution of the compromise decree wherein it has been agreed upon that the defendant-respondent No. 3 shall not be liable for ejectment. The respondent No. 3 filed objection against the compromise decree and its execution, which was rejected by the executing court under Section 47 of Code of Civil Procedure vide its order dated 5.2.1994. Thereafter respondent No. 3 filed Civil Revision No. 67 of 1994 against the order dated 5.2.1994 stating therein that this decree being a compromise decree and has been given effect to and thus has become un-executable. The revisional court allowed the revision filed by the judgment debtor vide its order dated 13.11.1997 and held that the rejection of the objection by the executing court is not in consonance with the law. The revisional court has held that in view of the compromise, which has resulted into compromise decree created a new tenancy and therefore, the compromise decree has exhausted and is no more open for execution and after setting aside the order passed by the trial court allowed the revision.

3. Sri M. Islam, learned counsel appearing on behalf of the petitioners has challenged the order passed by the revisional court dated 13.11.1997, on the ground that it is clear from the perusal of the compromise decree that in case the defendant defaults in complying with the condition of the compromise decree

passed which was a special matter of the revision before the revisional court before whom the said compromise was arrived at. It will be open and available for execution, therefore, the view taken by the revisional court in allowing the revision suffers from manifest error of law. On the contrary, learned counsel appearing on behalf of the contesting respondents relied upon a decision of this Court in Chitra Talkies v. Darga Dass Mehta : AIR1973 All40 of the aforesaid judgment, which has been relied upon by learned counsel for the petitioners are quoted below :

'7. I am inclined to agree with the contention of the learned counsel for the judgment-debtor respondent that the new contract of tenancy entered into between the decree-holder and the judgment-debtor by which a fresh tenancy in the cinema building was created in the latter's favour with effect from 1.8.1965 was not an adjustment of the decree in execution. My initial reaction was that the provisions of Rule 2, Order XXI of the Civil Procedure Code were applicable only to a decree of any kind under which money was payable and the decree in execution in the instant case being one for the delivery of possession, those provisions were not attracted to it. This view of mine found support from a decision of the Madras High Court in the case of Narayanaswami Naidu v. Rangaswami Naidu AIR 1926 Mad 749. But my attention was drawn to the Division Bench decision of our Court in Sri Ram v. Lakhraj : AIR1952 All814 , in which the Madras view was dissented from and it was held that provisions of Order XXI, Rule 2 applied to all kinds of decree or decrees under which money was payable.

8. The basic question, therefore, that remains to be considered is whether the creation of a new tenancy in favour of the judgment-debtor was an adjustment of the decree in execution. The decree in execution in the instant case was for delivery of possession by eviction of the judgment-debtor. The process of execution is nothing but an assistance given by the Court to the decree-holder varying from case to case depending on the nature of the decree. The judgment-debtor in the instant case in execution through the assistance of the officers of the Court was liable to be dispossessed physically. Once the judgment-debtor was dispossessed through the process of the Court full satisfaction would be accorded to the decree-holder and the decree will stand fully satisfied. The adjustment contemplated under Rule 2 of Order XXI, Civil Procedure Code is the satisfaction

of the decree wholly or in part. As pointed out above, under the decree in execution in the instant case satisfaction could only be accorded to the decree-holder by dispossession of the judgment-debtor, that is, his physical removal from the cinema building by the assistance of the officers of the Court. If without the assistance of the officers of the Court the judgment-debtor vacates either at his own initiative or at the initiative of the decree-holder, then that would amount to according satisfaction to the decree-holder outside the Court, that is, without the assistance of the machinery of the Court. It would then be an adjustment within the meaning of Rule 2 of Order XXI of the decree in execution. Viewed in this light, I fail to understand how the decree in the instant case can be said to have been adjusted when there has been no vacating of the possession of the cinema building by the judgment-debtor at all and his right to remain in possession is recognised by the decree-holder on the basis of a fresh contract of lease. What the decree-holder in fact has done is saying to the judgment-debtor that 'I do not want you to vacate the premises and with effect from 1.8.1965 I recognise your occupation as a tenant under the contract of lease.' in doing so I do not think that the decree holder could be said to have been intending to accord satisfaction to the decree in execution when under some arrangement arrived at between the decree-holder and the judgment-debtor new rights are created by entering into a fresh contract quite inconsistent with the rights determined under the decree in execution. The right which was determined in the decree in execution was that the tenancy had stood legally terminated and the decree-holder as landlord was entitled to the delivery of vacant possession by the judgment-debtor, in thearrangement arrived at between the decree-holder firm and thejudgment-debtor to the decree-holder, but on the other hand a situation to the contrary came intoexistence, namely, as a lessor the decree-holder was to put inpossession the judgment-debtor who had become a new tenant. It does not make any material difference, to my mind, that thejudgment-debtor was in occupation from before. Under thearrangement between the decree-holder and the judgment-debtorby which a new tenancy was created in favour of the latter, thedecree in execution was not being adjusted in the sense asexplained by me above. On the other hand an arrangement anewbetween the parties on contractual basis, quite foreign tothe rights determined by the decree in execution, was arrivedat between the parties. I

may illustrate my point. A decree forpossession is obtained by the owner of a land against atrespasser. The owner puts that decree in execution but pending the execution the owner decree-holder sells the land on which the trespass was committed to thejudgment-debtor and a sale deed is executed and duly registeredevidencing the transaction. The decree-holder owner admits tohave sold the property. The judgment-debtor does not apply tothe Court, neither the decree-holder brings it to the notice of theCourt that a sale of the property in suit had taken place by which the said property stands transferred to the judgment-debtor. The question is, can the owner decree-holder still in execution through the assistance of the Court dispossess the judgment-debtor?The obvious answer is in the negative. If such transactions wereto amount to adjustment of the decree in execution requiringcertification by the executing court, then much difficulty will arise. I do not think the authorities cited by the learned counsel for the decree-holder appellant lay down any such wide proposition of law that in no case a transaction which makes a decree ineffective entered into between the decree-holder and the judgment-debtor can be set up as a bar to the execution unless it has been got certified under Rule 2 of Order XXI, Civil Procedure Code. Indeed faced with such a situation in the case of : AIR1952 All814 (supra) relied on by the learned counsel for the appellant the learned Judges observed as follows : 'Order XXI, Rule 2 of the Civil Procedure Code is a counter-part of Order XXIII, Rule 3 in the execution proceedings. The provisions of Order XXIII, Rule 3, Civil Procedure Code can be extended to the execution proceedings. It is manifestly unjust that after the parties have arrived at an agreement or the adjustment of a decree and one of them has even performed a part of the agreement the Court should not give recognition to such an agreement and allow any party to resile from It.'

4. In reply Sri M. Islam, learned counsel appearing on behalf of the petitioners has relied upon a decision in Smt. Nai Bahu v. Lala Ramnarayan and Ors. : [1978]1SCR723 . Paragraphs 14 and 15 are relevant for the purposes of present controversy, which are reproduced below :

'14. It is true that a decree for eviction of a tenant cannot be passed solely on the basis of a compromise between the parties (See K. K. Cha v. R. M. Seshadri. : [1973]3SCR691 The Court is to be satisfied whether a statutory ground for eviction

has been pleaded which the tenant has admitted by the compromise. Thus, dispensing with further proof, on account of the compromise, the Court is to be satisfied about compliance with the statutory requirement on the totality of fact of a particular case bearing in mind the entire circumstances from the stage of pleadings up to the stage when the compromise is effected.

15. When a compromise decree is challenged as a nullity in the course of its execution the executing court can examine relevant materials to find out whether statutory grounds for eviction existed in law. If the pleadings and other materials on the record make out a prima facie case about the existence of statutory grounds for eviction, a compromise decree cannot be held to be invalid and the executing court will have to give effect to it.'

5. Learned counsel for the contesting respondent relied upon a decision in Rashid Ahmad v. Munsif, Muzaffarnagar and Ors. 1985 ALJ 108. The Division Bench of this Court in paragraphs 10 and 13, which has been relied upon by learned counsel for the contesting respondent, has held as under :

'10. The last contention of the petitioner was that the effect of compromise was that a new tenancy had been created and, therefore, a decree for eviction of the tenant in the present suit could not be passed. This contention on the facts of the present case is untenable. Reference was made to a decision of this Court in Shri Gandhi Ashram, Meerut v. Ram Gupta, 1983 All LJ 300. In that case a compromise decree had been passed in a suit for eviction prior to the commencement of U. P. Act No. 13 of 1972 and that decree provided for enhancement of rent. It also provided that the tenancy shall commence on the first of each calendar month and the accommodation shall stand vacated after the stipulated period. The decree, however, did not provide that either in case of default of payment of rent or on non-delivery of possession after the stipulated period, the decree-holder shall be entitled to execute the decree. The decree was sought to be executed after the commencement of U. P. Act No. 13 of 1972. It was held on interpretation of the terms of the decree that the decree created a new tenancy and the action taken for eviction of the tenant stood exhausted. Therefore, the eviction of the defendant could not be made by execution of the decree in face

of the new tenancy. The terms of the compromise decree passed in the present case are radically different. Here the compromise recites that if rent at the enhanced rate was not paid within the stipulated time, a decree for eviction would be deemed to have been passed. This unmistakably reflects the intention of the decree-holder not to create a fresh tenancy. This was the crucial test according to the Supreme Court in Konchada Ramamurty Subudhi (dead by his legal representatives) v. Gopinath Naik : [1967]2SCR559 , for determining whether on the terms of the compromise it was possible to impute to the decree-holder an intention to create a fresh tenancy. In that case in a suit for ejectment the compromise decree was passed by the appellate court enabling the decree-holder by its terms to execute the decree after the judgment-debtor failed to pay 'rent' for any three consecutive months. The Court held that the compromise deed did not create a lease, likewise in Smt. Kalloo v. Dhaka Devi : [1982]3SCR201 a compromise took place in the course of execution of the decree for eviction which, inter alia, recited that the judgment-debtor had already vacated half of the shop and was granted time till December 31, 1972, for vacating and delivering possession of the other half of the shop. Interpreting these terms it was held by the Supreme Court that the intention of the parties was not to create a fresh lease in respect of the half of the shop but to help the judgment-debtor to find out not in a hurry alternative accommodation for his shop so that his established business was not ruined.

13. The position therefore, which emerges is that the parties should be relegated to the position which they held prior to the filing of the compromise and the status quo ante be restored. The finding of fact recorded in the case is that the conditions of Section 20 (4) of U. P. Act No. 13 of 1972 were not fulfilled, the arrears of rent from 1.8.1975 to 22.1.1976 (the date of the compromise) were never paid, the petitioner had committed default in payment of rent and had made himself liable for eviction. Hence, in our opinion the decree for eviction and arrears of rent was rightly passed against the petitioner it was a valid and executable decree and the objections raised by the petitioner in execution were rightly dismissed. The impugned order is not vitiated by any error law.'

6. Be that as it may, in view of the rival contentions, the decision of the revisional court deserves to be set aside on the ground that the court below should consider the relevant contentions and the law referred to above and thereafter record a finding, which has not been done in the order impugned in the present writ petition while allowing the revision and dismissing the objection. There is yet another reason that the revisional court while exercising the revisional power for setting aside the finding recorded by the trial court should have remanded the matter to the trial court, which has not been done. For this reason alone, the order impugned in the present petition deserves to be set aside and is hereby set aside.

7. In view of what has been stated above, this writ petition deserves to be allowed and is hereby allowed. The order dated 13.11.1997, Annexure-4 to the writ petition is set aside. The order passed by the revisional court is modified that the matter is remanded back to the trial court with a direction to decide the matter in the light of the observations made above. However, the parties shall bear their own costs.

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