

Bidhan Nirman Pvt. Ltd. Vs. Dutt and Co. Pvt. Ltd. and Ors.

Bidhan Nirman Pvt. Ltd. Vs. Dutt and Co. Pvt. Ltd. and Ors.

SooperKanoon Citation : sooperkanoon.com/68290

Court : Kolkata

Decided On : Feb-03-2016

Judge : Harish Tandon

Appellant : Bidhan Nirman Pvt. Ltd.

Respondent : Dutt and Co. Pvt. Ltd. and Ors.

Judgement :

ORDER

SHEET EC600of 2015 GA3495of 2015 CS99of 1997 IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction ORIGINAL SIDE BIDHAN NIRMAN PVT.LTD.Versus DUTT & Co.PVT.LTD.& ORS.BEFORE: The Hon'ble JUSTICE HARISH TANDON Date : 3rd February, 2016.

Appearance: Mr.Pramit Roy, Sr.Adv.Mr.A.Banerjee, Adv.Mr.Avirup Mondol, Adv.Mr.A.Mondol, Adv.for the decree holder.

Mr.Dhiraj Trivedi, Adv.Mr.Chayan Gupta, Adv.Mr.Tanraj Ladia, Adv.Mr.Subhranshu Trivedi, Adv.Ms.Abha Tiwari, Adv.for the judgment debtors.The Court : It reminds me of the golden words of Sir Vivian Bose, J.

real trouble starts after getting decree.

This is an apparent example where a successful litigant is still at the doorstep of the Court seeking recovery of possession through process of law.

The decree holder, being the owner of the premises no.76/1, Bidhan Sarani, Kolkata - 700 006, demised the same in favour of the judgment debtor, namely, Dutt & Co.Private Limited on the strength of a deed of lease dated 6th August, 1962 for a period of 30 years. The said lease expired by efflux of time and, therefore, the lessee lost its right to remain in occupation thereof.

Since the expiration of lease by efflux of time is one of the instances of determination of lease under Section 111 of the Transfer of Property Act, a suit was instituted before this Court for recovery of possession, which culminated into a decree.

It further appears that an enquiry was directed to be made on mesne profit under Order XX Rule 12 of the Code and the said proceeding has also reached its logical end.

The challenge to a decree for recovery of possession was made before the Division Bench in an intra-Court appeal, which resulted in dismissal thereof.

The appeal against the mesne profit is pending before the Division Bench.

The present application has been taken out by one Tuk Tuk Garments Private Limited and one Gopal Saraf claiming to be joint tenants in respect of one shop room on the ground floor of the decretal premises at monthly rental of Rs.2,600/(Rupees two thousand and six hundred) payable according to English calendar.

Admittedly, the applicant herein had been inducted by the lessee and the receipts annexed to this application corroborate such fact.

The decree passed against the judgment debtor is sought to be assailed in this application on the plea that both the decree holder and the judgment debtor have secretly agreed and have allowed the decree for recovery of possession to be passed as a consequence whereof the petitioner, who is the bona fide tenant in

respect of a part of the decretal premises, shall be evicted therefrom.

It is submitted on behalf of the applicant that the impugned decree is an outcome of fraud and collusion, which can be deciphered from the observations, recorded in the judgment of the Division Bench wherein the judgment debtor agrees to deliver the possession of the decretal premises.

An attempt is made at the threshold to avoid adjudication of the instant application as the applicant intended to incorporate the factum relating to collusion and fraud which, according to them, is absent in the present application.

I am not unoblivious of the proposition of law that in case of a fraud Order VI Rule 4 of the Code mandates the particulars thereof to be jotted down in the pleading.

There is no hesitation to say that collusion has an element of fraud provided it is extensively pleaded and proved by cogent evidence.

The undisputed facts, which could be culled out from the respective stands of the parties, are that the judgment debtor was the lessee under the decree holder for a period of 30 years and have suffered a decree up to the Division Bench.

However, there appears to be some disagreement on the facts where the lease was for a period of 20 years reserving a renewal clause or not, but such plea as taken by the judgment debtor is foreclosed in view of such plea having not found by the Single Bench as well as the Division Bench.

Even if those facts are taken on record and found to be correct, this Court cannot shut its eyes to the fact that the judgment debtor has suffered a decree for recovery of possession and, therefore, there is no impediment on the part of the executing Court to proceed with the execution proceeding.

The present applicant is undisputedly asserting the right through the judgment debt ORS. Their status is not above the original judgment debtor and remains the sub-lessee.

In the said application they appear to elevate the status above the status of the judgment debtors on the plea that they were inducted as sub-tenants and,

therefore, their rights are protected under the West Bengal Premises Tenancy Act, 1956.

The aforesaid stand is not well founded on legal parameters. This Court reminds of the legal maxim *Nemo dat quod non habet* meaning thereby a person cannot give what he does not have.

If the judgment debtor has been declared as a lessee in respect of the property, the sublessee cannot claim higher status than the judgment debtor and claims protection under the Rent Restriction Act.

He was aware at the time of taking the sub-lessee that the lease has its limited duration and there is a certainty of its expiration.

If the head lease goes, it annuls all sub-leases.

It is a settled law that the decree for eviction passed against the lessee binds the sub-lessee and, therefore, they cannot resist the execution taking a plea that they are not bound by it.

So far as the plea of collusion is concerned, the legal proposition has long been settled by the Supreme Court in case of *Rupchand Gupta versus Raghuvanshi (Private) Limited* and Another reported in AIR 1964 SC 1889 in the following : 10.

Thus the mere fact that the defendant agrees with the plaintiff that if a suit is brought he would not defend it, would not necessarily prove collusion.

It is only if this agreement is done improperly in the sense that a dishonest purpose is intended to be achieved that they can be said to have colluded. On the proposition whether the sub-lessee is bound by the decree passed against the lessee, the observation of the Supreme Court in the said report in paragraph 12 should be noticed which runs thus : 12.

Taking the last action *fiRs.viz.*

Raghuvanshi's omission to implead the appellant, it is quite clear that the law does not require that the sub-lessee need be made a party.

It has been rightly pointed out by the High Court that in all cases where the landlord institutes a suit against the lessee for possession of the land on the basis of a valid notice to quit served on the lessee and does not implead the sub-lessee as a party to the suit, the object of the landlord is to eject the sub-lessee from the land in execution of the decree and such an object is quite legitimate.

The decree in such a suit would bind the sub-lessee.

This may act harshly on the sub-lessee; but this is a position well understood by him when he took the sub-lessee.

The law allows this and so the omission cannot be said to be an improper act.

The only exception which this Court could gather from the decision is that in the event the lessee has a plausible defence and have not taken such defence and allowed the plaintiff to have a walkover, the plea of collusion could have been a ground on which the Court can determine the rights of the parties.

In the instant case an ex parte decree was passed against the judgment debtors which was assailed under Order IX Rule 13 of the Code taking the defence available to them.

On contest the said application was dismissed by the Court, which was further assailed before the Division Bench.

The Division Bench, however, did not find any infirmity and/or illegality in the said order and directed the possession to be handed over to the decree-holder and it is not undisputed that the possession has been given in respect of a part of the decretal premises in terms of the order of the Division Bench.

From the submission made before this Court by the judgment-debtors it does not appear that the judgment-debtors had a plausible defence once the lease expired by efflux of time.

A person who has agreed with its eyes open and agreed to remain in the premises for a limited period cannot defend his right to remain for all times to come after the expiration of the period agreed upon.

This Court does not find there is any plausible defence which was available to the judgment-debtors after the expiration of period by efflux of time.

This Court, therefore, does not find that the applicant has been able to make out a case within the exception indicated on the said report.

It is high time when the decree-holder should enjoy the usufruct of the decree and cannot be allowed to remain in doldrums and go on constantly knocking the door of the Court to get the possession in execution of the said decree.

The learned Advocate for the applicant heavily relies upon a judgment of the Supreme Court in the case of Tirath Ram Gupta versus Gurubachan Singh & Anr., reported in AIR 1987 SC770 on the proposition that if the surrender is done by the lessee, the sub-lessee can not be bound by such Act.

The shelter appears to have been taken under Section 115 of the Transfer of Property Act.

In the said report the subtenancy was created before the Rent Restriction Act came into force.

The embargo of the sub-tenancy was incorporated in the Act and, therefore, the sub-tenant inducted before coming in the said Act cannot be brought within the purview of the said Act.

It further appears that a suit was filed by them against the tenant and the sub-tenant and a point arose whether the sub-tenant can assail the decree before the Appellate Court.

In the above backdrop, paragraph 8 being relevant herein is quoted below : 8.

These authorities cannot advance the case of the appellant in any manner.

The sub-tenancies which were respectively impugned in the cited cases had come into existence after the Rent Control Act in the respective States had come into force and hence they are distinguishable on facts.

As regards the right of a sub-tenant to file an appeal independently of the tenant this Court has ruled in *Karam Singh v.*

Pratap Chand, AIR 1964 SC1305 that against a common decree of ejectment passed against a tenant and the sub-tenant, the sub-tenant alone can appeal in his own right against the decree and have the same set aside even though the tenant decides not to file an appeal.

Section 115 of the Transfer of Property Act can only be activated when the surrender of the right under the lease is done by the lessee which has a consequential effect upon sub-lessee.

If the lease has expired after running the term agreed upon, it is inconceivable that Section 115 can have any manner of role to play.

This Court, therefore, does not find that the judgment rendered in the case of *Tirath Ram Gupta* (*supra*) can be of any assistance to the applicant.

So far as plea of fraud is concerned, it is a settled law that the fraud vitiates all solemn act.

Mere using the term fraud does not invalidate an action which is legally recognized and an order or decree passed by the Court having competence to do so.

No judgment and order of the Court can be allowed to stand if obtained by fraud.

The judgment relied upon by the applicant in the case of *Ram Chandra Singh versus Savitri Devi & Ors.*, reported in (2003) 8 SCC319 has no manner of application on the factual matrix of the instant case.

In the said judgment a consent order was passed upon suppression of material fact from the Court.

The material fact was subsequently surfaced and was found to be of such magnitude that if those was disclosed before the Court, the order as proposed by the party on consent could not have been passed.

The plea of fraud was considered on the above facts and it was held that any order obtained on the anvil of fraud cannot get legal sanction and such order or judgment can be challenged before the Court even collaterally.

I am still in a fix whether the facts disclosed at the bar can constitute the fraud and vitiates the judgment and decree passed by this Court.

The sub-tenant cannot claim a better title than his inducing landlord and once the decree has been passed by a Court, competent to do so, it cannot be challenged that such decree is an outcome of collusion and fraud without disclosing the elements of fraud and collusion.

So far as the judgment rendered in the case of Mehta Suraya versus United Investment Corporation, reported in AIR2002 Cal.

108 is concerned, this Court does not find that the ratio laid down therein can be of any help to the applicants.

There is no hesitation to say that the collusion is one of the ingredients of the fraud unless it is proved by cogent evidence.

Mere using the expression collusion or fraud does not vitiate the judgment and the order.

It would be profitable to quote the observations recorded in paragraph 19 wherein the Bench held that it is only when the sub-tenant has an independent right dehors the tenant if successfully demonstrates that by virtue of a collusion a decree has been obtained and he is liable to be evicted from his portion, the Court may interfere with such decree.

The observations run thus : 19.

Collusion : 19.1 A decree for eviction against the lessee/tenant is binding on the sublessee/tenant.

But there are some exceptions to it.

One such exception is that the sub-tenant/lessee has a right independent of the lessee/tenant.

In case the sub-lessee/tenant is able to prove collusion then the sub-lessee/tenant is said to have right independent of the lessee/tenant.

In this case collusion is alleged in this application as well as in the suit.

The question can be properly and comprehensively dealt with in the suit.

It would not be wise to decide the said question at this stage.

But for a decision on these applications, a prima facie case is required to be found out.

Apparently it appears that the lease rent payable for the land is meagre.

The lessee was permitted to raise construction and to sub-let the same.

UIC constructed the building on the land.

It is, admittedly, a ten storeyed building.

The cost of construction of such building must be substantial.

UIC had sub-let the building to various tenants and has been receiving rent.

The income appears to be substantial.

There cannot be any earthly reason to surrender the lease or to quit.

It would be a normal presumption having regard to the allegations made in the plaint, the face value whereof is to be taken into account, that there is every likelihood of existence of collusion between the parties.

It appears to be confirmed by reason of the fact that the judgement-debtor did not oppose the amendment of the plaint, application for decree on admission and the decree by the trial Court, after the decree had merged with that of the appeal Court, and that the decree-holder has not opposed to the continuation of collection

of rent by the Judgement-Debtor.

Thus, there appears to be a very strong prima facie case of collusion between the lessor and the lessee.

19.2 Thus, prima facie, the decree as it stood is inexecutable in respect of the building as against the intervenors IPM and others though sub-lessee/tenants, despite the principle that the decree against the lessee is binding on sub-lessee/tenants.

19.3 Collusion : Cannot be gone into now: The ground that the decree was collusive or otherwise, cannot be gone into in the present application being GA No.3750 of 2000.

Such question is the subject matter of CS No.171 of 2001.

Therefore, I refrain from entering into the said question at this stage.

The subject matter as to whether the decree, passed against the lessee, does also not require to be gone into at this stage.

The subject matter as to whether the sub-lessee/tenants would be bound by the decree, passed against the lessee, does also not require to be gone into at this stage.

It is kept open to be decided in the execution of the unamended decree itself, subject to any order that might have been or passed in CS No.171 of 2001.

The question, whether it was a case of surrender or it was a case of notice to quit, can also not be gone into at this stage, within the scope and ambit in the present application.

This is also a subject matter, which is to be finally determined in the suit itself.

Therefore, I need not go into this question at this stage.

19.4 So far as the question of collusion or the question that the notice was a notice to quit or to surrender, are all matters which could be considered before the

decree is passed.

The executing Court cannot go behind the decree.

As such it is not open to be decided by this Court on the basis of GA No.3 of 2001, made in the execution proceedings.

Therefore, the executability of that decree, as it stood prior to its amendment, cannot be questioned in these proceedings.

The decree, as it stood prior to its amendment, appears to be executable and can be executed as against the judgment-debtor.

This Court, therefore, does not find there is any material far to speak of sufficient material produced by the applicant on the plea of collusion and fraud warranting this Court to interfere with the decree passed against the lessee/judgmentdebtor.

The Executing Court cannot go behind the decree.

The Executing Court cannot re-visit and/or re-write the judgment passed in a suit.

This Court, therefore, cannot find that any interference with the decree is called for.

The application filed by the applicants stands dismissed with costs assessed at Rs.20,000/- to be paid to the State Legal Services Authority, West Bengal, within a week from date.

The said amount shall be kept by the SLSA in an account earmarked for juvenile.

(HARISH TANDON, J.) sp2/sd.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com