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Court : Rajasthan

Decided On : Nov-24-1982

Reported in : 1982WLN603

Judge : M.C. Jain, J.

Appeal No. : S.B. Civil Revision No. 58 of 1978

Appellant : Jugal Kishore

Respondent : Deonarayan

Advocate for Pet/Ap. : Shri. C.D. Mundhra

Disposition : Petition dismissed

Judgement :

M.C. Jain, J.

1. This revision petition arises from the appellate order passed in execution proceedings.

2. A decree for eviction of certain premises was passed in favour of the decree-holder Deo Narayan and against the judgment-debtor Jugal Kishore. In execution of that decree, the decree-holder was put into possession of part of the premises on 4.11.1970 and on 9.11.70 the decree-holder moved an application that the

judgment-debtor on the night intervening 8th and 9th November, 1970, had removed certain permanent fixtures, including 30 to 40 tin-sheets. He prayed that an inquiry into the removal of fixtures may be made and the judgment-debtor may be bound down not to remove the fixtures. On this application on 10.11.1970 a restraint order was passed by the executing court, whereby the judgment-debtor was directed not to remove any thing, which is permanently fixed in the premises and it was also ordered that if any thing belongs to him, he can remove it only after inquiry. For the remaining part of the premises the warrant of possession was executed and the decree-holder was put into possession thereof on 10-11-1970. The Sale Amin in his report dated 10-11.1970 stated that the judgment-debtor had removed Chhaper of Chhinas etc. which were permanently fixed; prior to their visit of the spot for delivery of possession of the remaining part of the premises. The decree-holder then submitted an application on 14-8-1971 in which he stated that the judgment-debtor before delivery of possession of the property, has damaged the property and despite restraint order of the court, removed the permanent fixtures. A statement of the permanent fixtures removed along with their total valuation amounting to Rs. 5,450/- was appended with the application. He prayed that the articles removed be got from the judgment-debtor and at his expenses the property may be repaired or in case the judgment-debtor does not pay the necessary expenses, the decree-holder may be allowed to get the property repaired at the expense of the judgment-debtor and the expenses so incurred may be allowed to be recovered from the judgment-debtor.

3. A reply to this application was submitted by the judgment-debtor, in which he denied the decree-holder's case and in additional pleas, it was averred that the judgment-debtor has not removed any article belonging to the decree-holder. An objection was also raised that such an application, as has been moved by the decree-holder, is not maintainable in the execution proceedings. The executing court framed as many as four issues. Issue No. 2 related to causing of damage to the suit property and removal of the permanent fixtures by the judgment-debtor and issue No. 2 also covered the question as to whether the decree-holder is entitled to recover a sum of Rs. 5,450/- from the judgment-debtor. Issue No. 3 was to the effect as to whether the aforesaid amount cannot be awarded in execution proceedings. The executing court heard the parties on issue No. 3 and he

answered issue No. 3 against the decree-holder and expressed that the decree-holder should bring a fresh suit to claim the amount of compensation. Dissatisfied with this finding on issue No. 3, the decree-holder went in appeal. The learned Civil Judge, Bikaner, who heard the appeal, accepted the same and reversed the view taken by the learned Munsif, Bikaner, and held that the question of compensation is covered under Section 47 of the Code of Civil Procedure, as it related to the execution, discharge or satisfaction of the decree and an inquiry for award of compensation on account of removal of permanent fixtures, can be conducted by the executing court under Section 47 C. P. C. After setting aside the order of the executing court, he sent the case back to the executing court for deciding the decree-holders's claim on merits. Dissatisfied with the order of the Civil Judge, the judgment debtor has come up in revision before this Court.

4. I have heard Shri C.D. Mundhra, learned Counsel for the petitioner-judgment-debtor and Shri Parmatma Sharan, learned Counsel for the decree-holder-non-petitioner.

5. Mr. CD. Mundhra, first of all contended that the appeal preferred by the decree-holder before the first appellate court, was incompetent, as no certified copy of the decree was filed along with the appeal and simply a certified copy of the order was filed. Reliance was placed by him on a decision of this Court in Labhmal v. Lal Chand .

6. With regard to this contention Shri Parmatma Sharan, learned Counsel for the decree-holder-non-petitioner, submitted that firstly this objection was not raised before the first appellate court and further in view of the later decision of this Court in Mohan das and Ors. v. Kamla Devi an order passed under Section 47 C.P.C , itself amounted to a decree, so it was not necessary to submit the certified copy of the decree at all.

7. After considering the necessary submissions on the above contention, I am of the opinion that in this revision petition the appellant cannot be allowed to raise such an objection for the first time. It is now too late in the day to raise this point. The only contention, which was advanced before the first appellate court, was that the appeal was not maintainable, as the final order was not passed by the

executing court. The objection relating to non-maintainability of appeal on account of non-production of certified copy of the decree, was not raised, though I may state that Labhmal's case does lay down that in the absence of the certified copy of the decree, order under Sec 47, C.P.C. is not appealable. The appeal against an order under Section 47, should be accompanied with a copy of the decree. The case, on which reliance has been placed by Shri Parmatma Sharan does not in my opinion, deal with this question, so it is not of any assistance.

8. It is next contended by Shri C.D. Mundhra, learned Counsel for the judgment-debtor-petitioner, that under Section 108(h) of the Transfer of Property Act, the lessee is entitled to remove all things which he has attached to the earth whilst he is in possession of the property leased, but not afterwards and he is only required to leave the property in the state in which he received it. The lessee-judgment-debtor was within his right, if he has removed his property. It may be stated that reference to Section 108(h) of the Transfer of Property Act, at this stage is not relevant. What properties have been removed and to whom they belong, are questions of fact and on these questions of fact, no opinion can be expressed without evidence of the parties. The findings on these questions of fact would be based on evidence which the parties are required to adduce. The simple question, which arises, is as to whether such an inquiry can be conducted under Section 47, C.P.C., or not or the decree-holder should be driven to have recourse to a fresh suit. Mr. Mundhra submitted that such an inquiry cannot be conducted under Section 47. C P.C. In support of his contention he referred to a decision of the Allahabad High Court in Smt. Mana Devi v. Maliki Ram and Anr. : AIR1961 All84 . I have perused this authority and in my opinion this authority cannot be pressed into service as on facts in that case there was no dispute between the parties that the temporary constructions were made by the sub-lessee. In the light of the facts, the learned judge observed that, 'the question arises whether such a controversy between the decree-holder and the judgment-debtor was one which was covered by the provisions of Sec, 47. C.P.C. Obviously, it does not relate to the execution, satisfaction or discharge of a decree If that is so, it will not come within the four corners of the aforesaid section.' In that case reliance was placed by the learned judge on an earlier decision of the Allahabad High Court in Panchoo Jolha v. Mohmmad Ismail : AIR1949 All263 . In Panchoo Jolaha's case (supra) in

execution of the decree cattle-shed was demolished and it was observed that in demolishing the cattle-shed, the court officer and the decree-holder were not carrying out either the orders of any court or the terms of any decree. For the act of tort committed by them the only remedy available was a suit and not an application under Section 47.

9. Mr. Parmatma Sharan, learned Counsel for the decree-holder-non-petitioner, referred to Clause (m) of Section 108. of the Transfer of Property Act and submitted that the lessee was bound to restore the property in as good condition as it was at the time when the lessee was not in possession and when the property is not restored in that condition, the decree-holder has a right to claim compensation in execution of the decree for eviction. In support of his contention he referred to some case law.

10. In Poomalai v. Ramalingam : AIR1977 Mad411 after considering the two earlier decisions of the Madras High Court and two decisions of the Bombay High Court the learned Judge observed as under in para 7 of the report:

On a due consideration of the matter, am of the view that the latter decision of this Court in Dhanarajagerji v. Parthasarthy : AIR1933 Mad325 lays down the correct principle and the earlier decision in Ram Shettithi v. Maniappa Shettithi 32 Ind Cas 520 : AIR 1917 Mad 79, I cannot be taken to lay down correctly the law on the point. On the passing of a decree for the possession of the property, the judgment-debtor is under liability to hand over possession of the property as it was on the date of the decree. If at the time of the date of the decree. If at the time of the delivery it is found that the property decreed has depreciated in value by the positive and wilful conduct of the judgment debtor then the question how far the judgment-debtor will be liable for causing such depreciation in the value of the property can be dealt with as an issue arising in execution, as it falls within the scope of the expression 'discharge or satisfaction of the decree'. I am, therefore, of the view that the lower appellate court is not right in holding that the respondent's application claiming damages is not maintainable under Section 47.

The learned Judge placed reliance on the Bombay decisions namely, Harishridhar Prabh v. Shankaram Padmanna Magdum AIR 1923 Bombay 391 and Bai Ladu v.

Mohanlal AIR 1925 Bombay 385. In the first Bombay case at page 392, it was observed as under.:

But we think that the question with regards to the waste committed by the judgment debtor after decree was a question arising between the parties relating to the execution, discharge or satisfaction of the decree, and must be determined by the court executing the decree, and not by a separate suit. The appellant is entitled under the decree to the property of which possession was directed to be given to him. If the property has depreciated in value or been damaged since the decree, owing to the wilful action of the defendant, it is a question in execution whether the defendants are liable to make good the loss.

In the second Bombay case it was laid down that where the question is whether a successful party had got possession of what was directed to be given to him by the decree, if the property, while in the judgment-debtor's possession, suffered deterioration by damage subsequent to the decree, the claim for compensation can be considered in execution under Section 47.

11. Apart from the view taken by the Madras and Bombay High Courts, reference may also be made to the view of the Allahabad High Court in *Mani Shanker v. Niranjana Swarup* : AIR 1955 All 686 . The Division Bench of the Allahabad High Court followed the view to the Bombay High Court and Madras High Court in *Harishridhar Parabhu v. Shakharam Padmanna Magdum* (supra), *Bai Lalbu v. Mohanlal* (supra), *Dhana Rajagerji v. Parthasarathy* AIR 1933 Madras 825 and *Ramanatha Ayyar v. S. Abdul Salam Sahib* AIR 1945 Madras 179. The case of *Panchoo Jolaha v. Mohammed Ismail* (supra) was distinguished. In that case it was observed as under:

The decree was for possession of certain property. The decree-holder was entitled to get possession over the property in the state in which it was on the date of the decree subject to such wear and tear or depreciation as would happen in the course of nature. If the judgment-debtor misappropriates or wilfully causes loss to the property, the decree-holder is not getting the fruits of his decree because he is not getting the property in the state in which he was entitled to get it under the decree.

A claim for compensation in such cases is a claim for the delivery to the decree holder of that part of the subject-matter of the decree which has not been delivered to him or its equivalent in money value.

An express power is conferred on the execution court in respect of moveable property under Order 21, Rule 31. Civil P.C. which provides that in the case of a decree for possession of specific moveable property if the decree is not complied with, the execution court may attach the property of the judgment debtor and within six months of such an attachment the decree has not been obeyed the attached property may be sold and out of the proceeds the court may award to the decree holder compensation for the specific moveable property.

This provision shows that the execution court has got the power to determine the amount of compensation payable to a decree-holder in case the property which he is to obtain under the decree is not delivered to him in the same condition in which he was entitled to get it.

The principle of the rule applicable to the cases of specific moveable property may well be applied to the casts of immoveable property. The majority of the High Courts in India have accepted this view.

12. Reference may also be made to a Full Bench decision of the Travancore-Cochin High Court in *Kumaran Bame Panicker v. Variathu Ocuseph Panicker v. Variatha Ouseph* AIR 1953 Tra. Co. 77. In that case there was a decree for possession in a suit for mortgage. In execution of the decree, claim for damages was made by the mortgagor for waste. The majority of the Court observed as under:

However, if such a decree awards recovery of possession of the property to the plaintiff mortgagor, it means that the decree-holder is entitled to get the property in the state in which it was when the decree was passed. And, therefore, any deterioration caused by the wilful negligence or wilful act of the defendant-mortgagee is something that detracts from the decree and compensation on that account should be provided for. Such compensation would come within the scope of the word 'discharge' or 'satisfaction, To the extent to which there is a diminution

in value it should taken to be discharge or satisfaction of the decree as loss has to be adjusted against what is payable under the decree to the defendant mortgagee.

The view of the Bombay High Court and the Madras High Court was relied upon.

13. It may be stated that when a decree for eviction or for possession is passed, the decree-holder is entitled to get back the possession of the property in the same condition in which the judgment-debtor-tenant was put into possession and if after passing of the decree for eviction, the property has been damaged or permanent fixtures in the property belonging to the decree-holder have been removed, then the decree-holder is entitled to claim compensation in respect thereof, as he would not be getting possession of the property in the condition, in which he should have obtained the possession. There would be no satisfaction of the decree, if the decree-holder is not put into possession of the property in the same condition. Merely putting the decree-holder in possession, is insufficient. He should be put into possession of the property in the condition in which it was at the time of the passing of the decree and if the decree-holder is not put into possession of the property in that condition, then it cannot be said that the decree is satisfied. I agree with the view taken by the Bombay, Madras, Allahabad and Travancore-Cochin High Courts, considered above, and in my opinion the question as to the claim of compensation by the decree holder, when the property is damaged, wasted or unauthorisedly removed belonging to the decree-holder, would be covered under Section 47, C.P.C. In this view of the matter, first appellate court was justified in sending the case back for inquiry and reversing the finding on issue No. 3 recorded by the executing court. However, I may make it clear that the decree-holder would get the compensation only in case it is found that the property removed belonged to the decree-holder and not to be judgment-debtor, or that the judgment-debtor has damaged the property.

14. In the result, I find no force in this revision petition. The revision petition is therefore, hereby dismissed with no order as to costs.