ALLAHABAD HIGH COURT

Chitra Talkies

Vs.

Durga Dass Mehta

Execution Second Appeal No. 2243 of 1970. against judgment and decree of A.P. Bhatnagar, Dist J. Saharanpur

(K.B. Asthana, J.)

23.09.1970. 21.04.1972

JUDGMENT

K.B. Asthana, J

1. This second appeal of the decree-holder arises out of an execution proceeding taken for delivery of possession by eviction of the judgment-debtor from a Cinema building known as Chitra Talkies in the city of Haradwar. In order to appreciate the controversy arising in this appeal it is necessary to refer to certain facts. The decree-holder M/s. Chitra Talkies (Buildings) is a registered partnership. Its original partners were Mahant Shankaranand having 5/16 share, Achroo Ram 3/16 share, D. P. Chopra 5/32 share, B. L. Chopra 5/32 share and Sansar Chand Goel 3/16 share. Durgadas Mehta, the judgment-debtor, took on lease the Chitra Talkies buildings from the decree-holder at a monthly rent of Rs. 1150/- for exhibiting films. It appears that he fell into arrears. The Chitra Talkies (Buildings) through Sansar Chand Gohal then filed a suit against Durgadas Mehta, the tenant, for recovery of arrears of rent, damages and for his eviction having terminated the tenancy by a notice. This suit was registered as Suit No. 60 of 1959 in the Court of Civil Judge of Rookie. The suit was contested by Durgadas Mehta but was decreed on 29-9-1961. Durgadas Mehta filed an appeal in the High Court from the decree but got it dismissed without pursuing it. The dismissal order was passed by the High Court on 17-5-1963. The decree-holder through Sansar Chand Gohal put the decree in execution but for one reason or the other successive executions were not successful. Then on 23-8-1966 fresh execution proceedings were started for eviction of the judgment-debtor and it is these proceedings which have given rise to this appeal. The execution was resisted by the judgment-debtor by filing objections

under Section 47 of the C. P. Code. The main grounds raised by the judgment-debtor were: (1) that Sansar Chand Gohal having sold away his interest in the partnership was no longer competent to execute the decree, (2) that the judgment-debtor himself having acquired one-half interest in the partnership could not be dispossessed and (3) that in July 1965 a fresh contract of tenancy came into existence between the parties and the execution of the decree for eviction was barred.

2. The learned executing Court on the evidence on record held that Sansar Chand Gohal had a right to execute the decree he being a partner of the decree-holder firm when the suit was filed and the judgment-debtor himself filed appeal in the High Court against the decree-holder through Sansar Chand Gohal; that the judgment-debtor by acquiring some interest in the partnership business by purchasing the shares of the original partners did not cease to be subject to the decree for eviction and was liable to be dispossessed under the decree and that the new arrangement between the partners of the decree-holder firm and the judgment-debtor in July, 1965 under which the judgment-debtor was allowed to retain possession on payment of rent amounted to an adjustment of the decree and the judgment-debtor was not entitled to set up such arrangement against execution of the decree as it was not got certified by the Court within time as required by Order 21 Rule 2 of the C. P. Code. The result was that the objection of the judgment-debtor under Section 47 of the C. P. Code was dismissed and the decree for dispossession of judgment-debtor from the Chitra Talkies (Buildings) was directed to be executed.
The judgment-debtor then filed an appeal before the District Judge of Saharanpur. While affirming the findings of the executing Court on the question of competency of Sansar Chand Gohal to represent the decree-holder and on the question of the excitability of the decree against the decree-holder though he had acquired an interest in the partnership business, the learned District Judge differed from the view taken by the executing Court on the third point. The learned Judge held that the arrangement entered into between the parties in July, 1965 was not an adjustment of the decree in execution but was a fresh contract of tenancy which operated as a bar to the execution of the decree for dispossession of the judgment-debtor with the result that the appeal was allowed and the decree-holder's application for execution was dismissed. The decree-holder has now come before this Court in second appeal from the decree passed

by the lower appellate Court.

3. I have heard Sri K. C. Saksena, learned counsel appearing for the decree-holder appellant, and Sri Rajeshwari Prasad, learned counsel appearing for the judgment-debtor respondent.

4. The first contention raised by Sri Saksena for the appellant was that there was no legal evidence on record establishing the fact that a new contract of tenancy was entered into between the decree-holder and the judgment-debtor in July 1965 and the finding of the Court below that such a contract came into existence is vitiated. It was submitted that the learned Judge of the Court below did not take into consideration the evidence of Sansar Chand Gohal who had denied any such transaction having been entered into between the parties in July 1965. No doubt the learned Judge of the Court below has not referred to the oral evidence of Sansar Chand Gohal who had stated that no arrangement of conferring of any tenancy rights on Durgadas Mehta, the judgment-debtor, was entered into by him on behalf of the decree-holder and the judgment-debtor was never treated by him as tenant. The witness further stated that he had always been giving receipts to the judgment-debtor for whatever sum was paid as mesne profits or under orders of the Court but never received any amount as rent. The judgment-debtor Durgadas Mehta in his evidence stated that there was a meeting of the partners in July 1965 at which the decision was taken admitting him to the tenancy of the Chitra Talkies (Buildings) with effect from 1-8-1965 and thereafter he had been paying rent every month to Sansar Chand Gohal and other partners against receipts signed by them. It is not the case of the judgment-debtor that any written lease was executed. He pleaded an oral contract of tenancy. It may be stated that in July 1965 the original partners who have been named above had ceased to be partners some having gone out transferring their interest and some having died. There was some controversy about Sansar Chand Gohal himself remaining a partner as he had also sold his interest to a third person from whom his sons are said to have re-purchased the shares. However, for purposes of this appeal I would take that Sansar Chand Gohal was a partner of the firm in July 1965. The share of Mahant Shankara Nand and Achroo Ram admittedly has been purchased by the judgment-debtor Durgadas Mehta, thus he acquired half interest in the decree-holder firm. The other partners at the relevant time were Dharatnpal Chopra and Ashok Kumar

Chopra. I would assume for the purpose of this case that Ashok Kumar Chopra was a partner though it can be disputed that he in his own capacity became a partner as the son of the deceased partner Basant Lal Chopra. Dharampal filed an application before the executing Court in which he stated that in July 1965 the partners of the decree-holder firm decided to admit Durgadas Mehta as a tenant Chopra also filed an application making a similar statement. Then there is on the record overwhelming documentary evidence in the shape of letters and receipts showing that Sansar Chand Gohal himself after July 1965 corresponded with the judgment-debtor as a tenant and signed a number of receipts for the rent received. One of the letters which he wrote to Durga das Mehta was to the effect that the latter should pay some money on behalf of the partnership and set it off towards future rent. It is significant to note that on the record there are a number of receipts for amounts received from the judgment-debtor Durgadas Mehta for the period prior to July 1965 which showed that the amounts were not received as rent but as mesne profits or as paid under orders of the Court. Many of such receipts were signed by Sansar Chand Gohal. It is clear from this that Sansar Chand Gohal knew the difference between rent and mesne profits. That would be a circumstance militating against his bald denial in the witness-box that no arrangement was reached between the parties in July 1965 admitting the judgment-debtor to fresh tenancy of the Chitra Talkies (Buildings) for it is only after July 1965 that the receipts signed by Sansar Chand Gohal show that the amounts were received as rent. The statement of Durgadas Mehta, the judgment-debtor, made in the witness-box that he was admitted to a fresh tenancy with effect from 1-8-1965 appears to be true as it is supported by two other persons intimately connected with the partnership affairs in July 1965 and is corroborated by the documentary evidence on record in the shape of letters, cheques and receipts. I do not think by not specifically discussing the oral testimony of Sansar Chand Gohal and of Durga Das Mehta the finding of the learned District Judge can be said to have become vitiated inasmuch as he has in great detail scrutinized the documentary evidence on record and then recorded the finding that there was a fresh tenancy created in favor of the judgment-debtor from 1-8-1965. I have no hesitation in endorsing the finding recorded by the learned District Judge that a fresh contract of tenancy took place between the decree-holder and the judgment-debtor in July 1965 and the judgment-debtor was re-settled as a tenant with effect from 1-8-1965.

5. It was then suggested by Sri Saksena for the decree-holder appellant that the judgment-debtor had not raised any plea in his objections based on creation of a new tenancy with effect from 1-8-1965 in his favor and whatever he alleged in his application was vague and did not amount to setting up of a contract of tenancy as no particulars as required by law were supplied. I do not find any substance in this argument. I think the allegations made in the replication sufficiently indicated to the decree-holder that a bar to the execution was being pleaded on the basis of a new tenancy. The parties fully understood each other's case and adduced evidence. Learned counsel for the appellant was not able to show me that the vagueness of the plea in any way prejudiced the decree-holder.

6. The more serious question that arises will be whether the decree obtained by the decree-holder in Suit No. 20 of 1949, could still be executed against the judgment-debtor by bis eviction from the Chitra Talkies (Buildings). Sri Saksena for the decree-holder appellant contended that this new arrangement amounted to an adjustment of the decree in execution within the meaning of Order 21, Rule 2 of the C. P. Code and the judgment-debtor having failed to have the adjustment recorded as certified by the Court within the time allowed by law, the Court below legally erred in recognizing the arrangement set up by the judgment-debtor as a bar to the execution. Sri Rajeshwari Prasad for the judgment-debtor respondent in reply submitted that the new contract of tenancy entered into by the parties in July 1965 by which a fresh tenancy in favor of Durgadas Mehta started from 1-8-1965 would not, in law, be an adjustment of the decree in execution it being an independent transaction giving rise to new rights quite independent of the decree in execution, therefore, even without having it recorded as certified by the Court the judgment-debtor was within his rights to set it up as a bar to the execution. Alternatively it was argued by Sri Rajeshwari Prasad that it was always open to the decree-holder to certify such an adjustment at any time before the Court and the bar of limitation under Article 125 of the Schedule to the Limitation Act, 1963 will not apply. The submission was that the two applications filed before the executing Court by two partners of the decree-holder was nothing but bringing to the notice of the Court that an adjustment had taken place and it amounted to the certificate by the decree-holder within the meaning of sub-rule (1) of Rule 2 of Order 21, C P. Code.

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 favor 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 21 of the C. P. 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,* [1] But my attention was drawn to the Division Bench decision of our Court in *Sri Ram v. Lekhraj,* [2] in which the Madras view was dissented from and it was held that provisions of Order 21, Rule 2 applied to all kinds of decrees and were not confined to money decrees 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 favor 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 21, C. P. 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 21 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 recognized 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 recognize 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 the arrangement arrived at between the decree-holder firm and the judgment-debtor in July 1965 nothing concerned the delivery of possession by the judgment-debtor to the decree-holder but on the other hand a situation to the contrary came into existence, namely, as a lessor the decree-holder was to put in possession the judgment-debtor who had become a new tenant. It does not make any material difference, to my mind, that the judgment-debtor was in occupation from before. Under the arrangement between the decree-holder and the judgment-debtor by which a new tenancy was created in favor of the latter, the decree in execution was not being adjusted in the sense as explained by me above. On the other hand an arrangement anew between the parties on contractual basis, quite foreign to the rights determined by the decree in execution, was arrived at between the parties. I may illustrate my point. A decree for possession is obtained by the owner of a land against a trespasser. 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 the judgment-debtor and a sale-deed is executed and duly registered evidencing the transaction. The decree-holder owner admits to have sold the property. The judgment-debtor does not apply to the Court, neither the decree-holder brings it to the notice of the Court 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 were to amount to adjustment of the decree in execution requiring certification 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 21, C. P. Code. Indeed faced with such a situation in the case of AIR 1952 Allahabad 814 (supra) relied on by the learned counsel for the appellant the learned Judges observed as follows:-

> "Order 21, Rule 2 of the Civil Procedure Code is a counter-part of Order 23. Rule 3 in the execution proceedings. The provisions of Order 23, 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"

9. A similar view was taken by Dhavan, J. in the case of *Bhagwati Mahraj v. Shambhu Nath,* [3] I have no doubt in my mind that the judgment-debtor was entitled to set up a plea under Section 47 of the C. P. Code that the new tenancy created in his favor with effect from 1-8-1965 by the decree-holder rendered the decree in executable. The Privy Council in the case of *Oudh Commercial Bank Ltd. v. Thakurani Bind Basni,* [4] has ruled that such objections can be raised under Section 47 of the C. P. Code.

10. For the reasons given above I find no force in this appeal and dismiss it with costs.

Appeal dismissed.

Cases Referred.

1. AIR 1926 Mad 749
2. AIR 1952 All 814
3. AIR 1960 All 562

4. AIR 1939, PC 80