

PATNA HIGH COURT

Bhagwati Prasad Sah

Vs

Radhal Kishun Sah

A.P.A.O.No. 204 of 1949

(Sinha and Rai, JJ.)

13.02.1950

JUDGMENT

Rai, J.

1. This is an appeal by the decree-holder against the order passed by the District Judge of Saran reversing that of the Munsif First Court, Chapra.
2. The appellant as plaintiff obtained a decree for ejection against the defendants who were tenants of the premises in question. The decree has been executed, and, in the execution proceedings, the tenant respondents have taken up a plea that Section 11, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1917, is a bar to the decree-holder evicting them by these proceedings.
3. The trial Court dismissed the objection of the tenants respondents on the ground of their having not taken such objection in the suit itself which would disentitle them from raising such objection in the execution proceedings by virtue of the principles of constructive res judicata, as contemplated by Section 11, Expl.4, Civil Procedure Code. The executing Court was also of opinion that the provisions of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, do not apply to the facts of this case, as the notice to quit had been served before Act in (3 of 1947) came in force.
4. On appeal, the lower appellate Court has taken another view of the matter. It has held that the provisions of Section 11, Bihar Act (3 of 1947) are wide enough to entitle the tenants to raise this objection during the execution proceedings. It has held that there is no bar against statute. In arriving at the judgment, the lower appellate Court has referred to the oases of *Mrs. Dharamshila Lall v. Bibi Amna*¹, and *Sant Kuer v. Ganesh*², Their Lordships have held in those cases that the tenants have a statutory right to remain in possession of the premises unless the landlord takes

recourse to proper proceedings as enjoined by Bihar Act (3 of 1947) for their eviction, and, unless that is done, no Court had jurisdiction to evict them. Mr. Saran, appearing for the appellant, has raised the point that, as this plea was not granted to the tenants in the suit in ejectment itself, they are not entitled to raise this plea at the execution stage, and their right, if any, is barred by res judicata. Section 11, Bihar Act (3 of 1947), runs as follows:

"Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of Section 12, where a tenant is in possession of any building, he shall not be liable to be evicted there from, whether in execution of a decree or otherwise, except

Then there are certain exceptions noted in that section. Now, this Section 11, in very clear terms lays down that a tenant cannot be evicted even during the execution proceedings until steps are taken under that Act for his eviction, and, in spite of the fact that in the title suit this objection was not pressed on behalf of the tenants, the tenants will not be debarred from raising this objection in the execution proceedings. In my judgment, EL 11, Bihar Act 3 of 1947) is effective enough to grant relief to the tenants. It steers clear of any bar of constructive res judicata, as raised by the learned counsel for the appellant.

5. Mr. Saran, further, raised a point that, during the execution proceedings, the tenants filed an objection that they were not liable to be evicted by virtue of the provisions of 8.11, Bihar Act (In 3 of 1947), on which objection a miscellaneous case was started which was ultimately dismissed for default on 6th February 1949. The tenants respondents filed another objection petition on 9th February 1949, which has ultimately succeeded. Dismissal of the first objection petition is a further bar, according to him, in the way of the tenants raising the same objection over again. From the order sheet of the executing Court, it appears that the previous miscellaneous case that was filed by the tenants objecting to their eviction had been stayed by an order from this Court, and, on the ground of such stay, the miscellaneous case was postponed from date to date. On 6th February 1949, the decree-holder produced a certified copy of the judgment of this Court passed in the second appeal arising out of the title suit. The executing Court, thereupon, called out the case and, as the tenants were not present, dismissed the miscellaneous case for default. When the tenants-respondent came to know of this dismissal, they filed another application on 9th February 1949. The second application might be considered as one in continuation of the previous application. It was in respect of the same relief about which the executing Court had not adjudicated. Under the circumstances of the present case, there would not arise any bar of res judicata while giving relief to the tenants on the application dated 9th February 1949.

6. As I have said above, there is no estoppel against statute. The contention of the learned counsel for the appellant, therefore, that the tenants-respondents are not entitled to raise this objection, because the same is barred by constructive res judicata, has no force, and must be rejected.

7. The result is that the appeal fails, and is dismissed with costs.

8. Sinha, J.-I agree. I wish to add some observations of my own. Assuming for the sake of argument that the previous application of the judgment-debtors objecting to the execution was dismissed for default, that dismissal could not bar the hearing on merits of a second objection, if the statute conferred a substantive right on a tenant who had been ordered to be evicted from his tenancy as a result of a decree of a Civil Court. Section 11 of the Act has secured a very valuable right to a tenant to continue in occupation of his tenancy until a Court specially constituted under the Act has exercised its powers to order eviction of the tenant on certain grounds specified in the section itself. So long as that condition precedent has not been fulfilled, it is not open to the landlord to put his decree for eviction into execution. The civil Court, acting as the Court of execution, can only execute the orders of the special Court constituted under the Act if that Court directs that the tenant should be evicted. In the present case it is common ground that such an order has not been obtained by the landlord.

9. Another reason why the plea of res judicata is not available to the decree-holder is that there can be no estoppel against the provisions of a statute. Res judicata is a species of estoppel, that is to say, it is an estoppel by judgment. Hence, even res judicata cannot bar the rights of a tenant to avail of the special protection given to him by the statute. It must, therefore, be held that the orders of the lower appellate Court giving effect to the provisions of the Act and refusing execution of the decree of the civil Court are perfectly justified in law.

G.M.J.

Appeal dismissed.

Cases Referred.

¹ AIR (36) 1948 Pat. 269: (26 Fat. 693)

² AIR (36) 1949 Pat.137: (27 Pat. 695)