

RAJASTHAN HIGH COURT

Ramanlal

Vs.

LR's Of Rukmani

S.B. Civil Execution 2nd Appeal No. 20 of 1992

(Prakash Tatia, J.)

04.08.2003

JUDGMENT

Prakash Tatia, J.

1. Heard learned counsel for the parties.
2. The facts of the case are that the plaintiff Ramanlal filed suit No. CO17/1965 in the court of Munsif, Banswara against his tenant Harish Chandra, which was decreed for arrears of rent but relief of eviction was refused as notice for eviction was not legal.
3. The landlord Ramanlal filed another Suit No. 20/1967 which was decreed on 14.11.1968. Ramanlal instituted execution petition wherein Dhurilal (who was father of the decree-holder Ramanlal) resisted delivery of possession of the suit property in execution of the decree obtained by plaintiff Raman Lal against Harish Chandra on the ground that objector Dhuri Lal is owner of the property in dispute and he is in possession of the shop in dispute and not bound by the decree passed in Suit No. 20/1967.
4. Faced with this objection, the plaintiff Raman Lal submitted petition under Order 21, Rule 97 Civil Procedure Code in the executing court. The executing court rejected the objection of Dhuri Lal and directed to deliver possession of the property to the decree holder by order dated 6.12.1977. Dhuri Lal preferred appeal against the order dated 6.12.1977 but that was dismissed by the District Judge, Banswara on 14.3.1978. It appears that Dhuri Lal expired, therefore, legal representatives of Dhuri Lal preferred second appeal before this Court which was allowed by this Court by judgment dated 24.11.1980 and matter was remanded to the executing court with the direction to the executing court to permit parties to lead evidence and decide the

petition under Order 21 Rule 97 afresh.

5. The trial court, after remand from the High Court, framed the following three issues:-

(i) Whether Harish Chandra was the tenant of Ramanlal or of Dhurilal ?

(ii) Whether Ramanlal (decree-holder) is the sole owner of the disputed premises ?

(iii) Whether Ramanlal let out the property in dispute as member of the undivided Hindu family to Harish Chandra and Harish Chandra handed over the possession of the property to head of the family Dhurilal (father of the decree holler and objector in execution petition), therefore, the decree stand satisfied and possession warrant cannot be issued in the execution petition by the decree holder Ramanlal ?

6. The executing court, after giving opportunity to lead evidence to the parties, recorded the finding that the suit property was let out by Ramanlal, plaintiff to Harish Chandra, defendant and not by Dhurilal, objector. In the issue No. 2, the executing court found that the suit property is not the sole ownership property of Ramanlal, plaintiff. In issue No. 3, the executing court held that since the possession of the suit property has been handed over to Dhurilal (father of decree-holder), i.e. the head of the family, therefore, Dhurilal has right to object against issuance of possession warrant. On these reasons, the executing court dismissed the execution petition filed by the decree-holder Ramanlal under Order 21 Rule 97 Civil Procedure Code by order dated 20.7.1982.

7. Aggrieved against the order of the executing court dated 20.7.1982, Ramanlal preferred appeal, which was registered as Civil Appeal No. 7/82. The first appellate court confirmed the finding of the executing court recorded on issue No. 1 and, therefore, this is concurrent finding of fact that the suit premises was let out by Ramanlal to Harish Chandra and not by Dhurilal. This is also concurrent finding of fact that the property in dispute is undivided Hindu family property. However, while considering the finding on issue No. 3, the appellate court also found that there is no evidence available on record by which it can be said that Ramanlal let out the property to the tenant Harish Chandra in the capacity of member of the joint Hindu family and on behalf of joint Hindu family. However, just after this, the first appellate court observed that property in dispute is joint Hindu family property and despite the fact

that property was let out by Ramanlal, it will be deemed that property was let out for the benefit of joint Hindu family of the decree- holder including the objector, Dhurilal. In these circumstances, the decree- holder Ramanlal preferred this second appeal against the judgment and decree of the trial court dated 17.11.1990. However, it may be relevant to mention here that admittedly a suit for partition for the joint Hindu family property was filed and presently the appeals are pending against the decree for partition. Therefore, at this stage, it is to be presumed that the property in dispute is yet to be partitioned by meets and bounds by final decree.

8. According to the learned counsel for the appellant, in view of the finding of the courts below that the property in dispute was let out to Harish Chandra by Ramanlal and this letting out was not on behalf of the joint Hindu family and in view of the finding of the fact that the property was let out by Ramanlal in his personal capacity, the judgment-debtor or any person claiming through him, is bound to restore the possession to the landlord only and none of the persons, namely, tenant or any person claiming through him or even a person in the capacity of co-sharer but getting possession through the tenant cannot have any right to keep possession of the property except for the purpose to deliver the possession of the property to the landlord. It is also submitted that even a co-sharer, if enters into possession of the property through a tenant, still he cannot take any benefit of his title to protect possession of the property.

9. Learned counsel for the respondent vehemently submitted that in view of the concurrent findings of facts of both the courts below that the property was handed over to one of the co-sharer, that too to the eldest member of the family and furthermore, to the father of the decree-holder by the tenant, then it is a delivery of possession to the owner of the property and Dhuri Lal as owner of the property has right to protect his possession on the basis of his title to the property. Otherwise also, decree is against tenant only and not against Dhuri Lal, therefore, neither Dhuri Lal is bound by the decree nor he can be evicted in execution of the decree which is not against him. It is also submitted that in view of the law laid down by the Hon'ble Supreme Court that no co-owner can claim adverse possession in the property as the possession of one of the co-owners is possession on behalf of co-owners, therefore, even if the premises was let out by Ramanlal, still possession has been redelivered to one of the co-owners who is landlord in view of the definition of the landlord given in sub-section (3) of Section 3. Therefore, if the possession of the property has been handed over to Dhurilal, then it is a valid discharge of obligation of tenant and nothing survives in the execution. Learned counsel for the respondent has placed reliance on the judgment of the Hon'ble

Supreme Court in *Karbalai Begun v. Mohd. Sayeed and another*.¹

10. I have considered the facts of the case and the submissions of the learned Senior Advocate Shri D.S. Shishodia and learned counsel Shri D.R. Bhandari. It may be worthwhile to mention here that the Hon'ble Supreme Court examined the same controversy in its recent decision in detail which is involved in this case is the case of *T. Lakshmipathi and ors. v. P. Nithyananda Reddy & ors.*,² wherein Hon'ble Supreme Court, after narrating facts in detail and after considering the various earlier judgments of the Hon'ble Supreme Court held as under :-

"Where any property is held by several co-owners, each co-owner has interest in every inch of common property, but his interest is qualified and limited by similar interest of the other co-owners. One co-owner cannot take exclusive possession of the property nor commit an act of waste, ouster or illegitimate use, and if he does so he may be restrained by an injunction."

The above settled legal position is having one exception and is recognized by the same above judgment of the Hon'ble Supreme Court. It will be relevant to quote the relevant portion from the judgment of the Hon'ble Supreme Court :-

"A co-owner may, by an arrangement, express or implied, with his other co-owners, possess and enjoy any property exclusively. Such a co-owner can also protect his possession against the other co-owners and if he is dispossessed by the latter, he can recover exclusive possession."

In view of the law laid down by the Hon'ble Supreme Court referred above, now it is settled that a co-owner may, by an arrangement, express or implied, with other co-owners, possess and enjoy the property exclusively. The Hon'ble Supreme Court also held that such a co-owner in possession of joint family property exclusively by arrangement can protect his possession against other co-owners. Not only this, but if he is dispossessed, he can recover the exclusive possession from the co-owner. This concept recognizes the exclusive possession of a co-owner irrespective of unity of the title to the property and despite the fact of deemed joint possession for certain purposes and despite fact of being member of co-owners' fraternity.

11. This proposition was applied in a matter where the property is let out or possession is delivered to third party by one of the co-sharers exclusively by arrangement with other co-sharer express or implied. As held by the Hon'ble Supreme Court in above referred case, such co-sharer, not only can protect his exclusive possession in joint

family property but even if dispossessed by other co-sharers, he can recover possession of the property from other co-sharer. Same principle can be applied in cases where one of the co-sharers enjoying exclusive possession of the property, puts in possession another person in any manner, the co-sharer in possession keeps his right to seek possession from that person who was put in possession by the said co-sharer in exclusive possession. Person in occupation in such circumstances is entitled to protect his possession as per the terms only under which he was put in possession by the said co-sharer. Unless contract contrary between such co-sharer and the person to whom the possession was given, the person in possession is bound to deliver possession to the said co-sharer only and all persons claiming possession through such person in possession cannot claim better or contrary right than the right which the original person in possession had irrespective of the fact that such person put in possession of the property handed over possession of the property to other co-sharer with the person who was in exclusive possession of the property as per arrangement (express or implied) with other co-sharers. The reason is that once right to keep possession exclusively of a co-sharer is recognized, it is recognized for all purposes and cannot be destroyed simply because said co-sharer is keeping possession through someone else. Other co-sharer can get possession of the property in accordance with law by following procedure of law by which co-sharer can get the possession of property from other co-sharer and when third party is put in possession by impleading that party as party in the proceeding for recovery of possession.

12. The tenant admitted himself to be a tenant of the co-sharer and when decree for eviction against that tenant was resisted by some persons, as a co-owner or by virtue of sale in their favor after becoming the co-owner, the Hon'ble Supreme Court held that those persons have no right to resist the decree for possession against the tenant on the principle that the tenant is under legal obligation to restore the possession of the premises to the landlord. The Hon'ble Supreme Court held as under :-

".....by operation of Section 116 of by Evidence Act, they were estopped from challenging or denying the ownership of respondent No. 1 and his rights in the tenancy premises. As held in *Vashu Deo v. Balkishan*, the rule of estoppel between landlord and tenant continued and unless the tenant has surrendered possession to the landlord. The estoppel would cease to operate only on the tenant openly restoring possession by surrender to the landlord."

13. In view of the reasons given in the judgment in T. Lakshmipathi's case (supra), it is clear that the judgments of both the courts below dated 20.7.1992 and 17.11.1990

cannot be allowed to stand. In this case, there is specific finding of both the courts below that property in dispute was let out by the decree-holder Ramanlal in his own personal capacity. In view of the decree, it can be said that Harish Chandra (tenant) or any person claiming through Harish Chandra (tenant) cannot resist the decree for eviction against the tenant even if he is one of the co-sharers and may be one of the members of the joint Hindu family. It will be worthwhile to mention here that in family dispute, winning over the tenant for getting the possession of the property rented out by other is not unknown, rather it is becoming more common with the change of values. By this one cannot be permitted to prompt the tenant to indulge in such tactics to either protect his possession against the lawful right of the person who put him in possession or to oblige rival claimant to the person by whose indulgence only he occupied the property. The tenant is under legal obligation to hand over the possession of the property to his landlord.

14. In view of the above reasoning given by the courts below on assumption that since the property in dispute is joint Hindu family property and, therefore, letting out of the property by Ramanlal is to be treated as on behalf of the joint Hindu family is contrary to law as well is self contradictory inasmuch as that the courts below, while deciding issue No. 3, specifically recorded finding that the property was let out by Ramanlal only. The finding recorded by both the courts below on issue No. 3, so far as it relates that property was deemed to have been let out by Ramanlal on behalf of the joint Hindu family, hence deserves to be set aside.

15. In view of the above reasons, the appeal of the appellant is allowed. The finding of both the courts below on issue No. 3 in the judgments dated 20.7.1982 and 17.11.1990 recognizing the right of Dhurilal or his successor to protect their possession and resist the warrant of possession in the execution petition filed by Ramanlal, decree-holder is set aside.

16. It appears that the executing court dismissed the execution petition as a whole by the above judgments and did not permit to proceed for recovery of arrears of rent. Therefore, a revision petition was preferred by the decree- holder, which was registered as S.B. Civil Revision Petition No. 39/1983. The said revision petition was decided by this Court by order dated 28.4.1993 holding that since the question of execution about the arrears of recovery of the rent is also under challenge in S.B. Civil Second Appeal No. 20/1992, therefore, the revision petition has become in fructuous. In view of the decision of this Court delivered in revision petition No. 30/1983, this Court can look into this aspect of execution about the recovery of arrears of rent as

well as the relief of recovery of the future rent in pursuance of the decree. Since, it has been held that the decree-holder is entitled to possession not only from the tenant but from the objector Dhurilal, therefore, the plea that the rent was paid to Dhurilal cannot be accepted. Therefore, the decree-holder can execute the decree for recovery of rent in terms of the decree. The application for recalling the order dated 28.4.1992 is disposed of as the controversy is decided in the appeal.

17. In the results S.B. Civil Execution Second Appeal No. 20/1992 is allowed and the S.B. Civil Misc. Misc. Application No. 114/1997 is disposed of. No order as to cost.

Appeal allowed.

Cases Referred.

1. AIR 1981 SC 77

2. 2003(3) R.C.R. (Civil) 305 : 2003(2) R.C.R.(Rent) 117 : (2003)5 SCC 150