
(1937) 01 AHC CK 0025
In the Allahabad High Court

Amir Uddin and Another

APPELLANT

Vs

Panchaiti Akhara Bara Udasi Nanak Shahi

RESPONDENT

Date of Decision : 08-01-1937

Acts Referred:

Citation : (1937) 01 AHC CK 0025

Hon'ble Judges : Sulaiman, C.J.;Bennet, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Bennet, J.—This is an execution first appeal by the judgment-debtors against an order of the execution Court appointing a receiver. The circumstances are that the appellants originally owned a zamindari share and certain occupancy holdings and their Jamindari share was mortgaged and the opposite party, the mortgagee, brought a suit for sale on a simple mortgage and obtained a decree and put the property up for sale and bought the property himself and is now owner of the zamindari property and is one co-sharer out of several co-sharers. In connexion with that transaction of sale an exproprietary tenancy arose which is held by the appellants in addition to their occupancy holdings. As the decree was not fully satisfied, a personal decree was prepared under Order 34, Rule 6 and in execution of that decree an application was made for the appointment of a receiver to take possession of the occupancy tenancies and the exproprietary tenancies. The Court below has granted the application. It is set out that the occupancy tenancy is about one hundred bighas and the order appoints the decree-holder as receiver and states that one-quarter of the occupancy tenancy will remain for the maintenance of the judgment-debtor which should include those plots in the actual possession of the judgment-debtors and that in regard to the remaining three-quarter the receiver will have a right of collecting rent, ejecting sub-tenants and admitting fresh tenants on better terms and higher rent. The ground of appeal is whether such an order appointing a receiver is legal. Learned Counsel for the respondent contended that a receiver was

appointed in execution u/s 51(d) and that there was no condition or limitation in the Code on the appointment of receiver. Section 51 states:

Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree...(d) by appointing a receiver.

2. Now the word "prescribed" is defined in Section 2(16) as meaning "prescribed by rules". Order 40 is headed "appointment of receivers". It was argued that this would only apply to receivers who are not appointed in execution, but Rule 1(1) (a) states that, "The Court may appoint a receiver of any property before or after decree". Clearly therefore, Order 40 governs the appointment of receivers appointed by an execution Court. Order 40, Rule 1(2), states:

Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

3. The question before us is whether this sub-rule bars the appointment of a receiver of occupancy tenancy and of exproprietary tenancy. In this connexion reference must be made to another provision of the Code, that is Section 60. Section 60(1) states in regard to land:

The following property is liable to attachment and sale in execution of a decree, namely lands...and...all other saleable property, moveable and immovable, belonging to the judgment debtor, etc.

4. Now in regard to lands it appears to us that two conditions must be satisfied. The lands must be held saleable and they must belong to the judgment-debtor. In the present case it is argued for the appellants that the interest of the judgment, debtors in the lands is not saleable and that the lands do not in fact belong to the judgment-debtors but that the judgment-debtors only have a non-transferable interest in the lands. In the Agra Tenancy Act (Act 3 of 1926) Section 23 provides in Sub-section (1):

The interest of an exproprietary tenant, of an occupancy tenant...is not transferable either in execution of a decree of a civil or revenue Court or otherwise.

5. The argument for the appellants therefore is that the interest of the appellants in these exproprietary and occupancy holdings is not transferable in execution of a decree and therefore that their interest is one to which Section 60(1) would not apply and therefore their interest is one which is not subject to attainment and therefore under Order 40, Rule 1(2) a receiver cannot be appointed to take possession or custody of their interest. Learned Counsel for the appellants endeavoured to draw a distinction between taking possession of the tenancy and collecting the rents from sub-tenants. There is no doubt that the provisions of the order of the lower Court indicate taking possession as the order provides that the receiver will collect the rent, eject sub-tenants and admit fresh tenants. This

is clearly the possession of the tenancies. But learned Counsel argued that some order might be framed which would avoid these difficulties and he suggested that an order might be framed by which the receiver would merely collect the rent and would not be in any kind of possession of the tenancies. We consider that it would not be possible to frame such an order. If a receiver is to collect rent from sub-tenants, he would have to have power to do so through the revenue Court and he would have to be empowered to bring suits for arrears of rent in the capacity of the landholder of the subtenants within the meaning of Section 3(6), Agra Tenancy Act. To put the receiver in such a position undoubtedly implies dispossession of the appellants from their position as tenants. There is therefore the necessity in framing any such order for a receiver that there should be a removal of the appellants from the possession of the tenancy. Learned Counsel for the respondent has not shown any ruling of any High Court in which it has ever been held that a receiver can be appointed to hold occupancy tenancy. The cases on which he relied are as follows : Kirtarth Gir Vs. Mathura Prasad Ram and Others, This was a case of the year 1924 and the judgment-debtor was a permanent lessee or the kadar paying a certain rent to the zamindar. In execution the Subordinate Judge had appointed a receiver to collect rents recoverable by the thekadar from occupancy and non-occupancy tenants and the thekadar appealed and argued that he was in the position of a non-occupancy tenant and that his interest in the holding could not be transferred except by way of lease for one year. He relied on the provisions of the Agra Tenancy Act, (Act 2 of 1901), Section 20(3). Now in that Act a distinction was drawn in that Section 20 between exproprietary tenants and occupancy tenants and non-occupancy tenants other than thekaders who come u/s 20(2) and in regard to these classes it was provided that their interest was not transferable in execution of a decree of a civil or revenue Court, or otherwise than by a voluntary transfer between persons in favour of whom as co-sharers in the tenancy such right originally arose. The provision in regard to the interest of thekaders was merely that it was subject to the terms of his lease, heritable but not transferable. There was no provision that the interest of a thekadar was not transferable in execution of a decree of a civil or revenue Court. This distinction in Act 2 of 1901, in our opinion, renders this particular case no authority for the proposition that a receiver can be appointed for an occupancy tenancy or an exproprietary tenancy. The Court held that the appointment of a receiver made by the Court below was valid. The Court proceeded to state that Order 40 does not specifically refer to execution proceedings and that when in execution proceedings a receiver is appointed, it was assumed that he was put into the position of a judgment-debtor and there was no transfer of property from the judgment-debtor to him and that all that the Court had done was to appoint a person who should, whenever rents accrued, recover them and utilise them on behalf of the judgment-debtor in payment of the decree. The words actually used in Order 40 are not "transfer" but "remove from the possession or custody of the property" which are words considerably wider than "transfer". As indicated above, this sub-rule does in our opinion apply in the present case and the prohibition against

taking possession and custody applies because the property is not property which can be attached u/s 60, Civil P.C., and it is property for which there is a special provision against transfer in execution of a civil Court decree. As regards the particular case of a thekadar, it is to be observed that the present Tenancy Act (Act 3 of 1926) in Section 203(1) states:

Except as may be otherwise provided by the terms of the theka, the interest of a thekadar shall not be transferable, or be saleable in execution of a decree.

6. The language is slightly different from the language used in Section 23 which is in regard to the interest of exproprietary or occupancy tenants that their interest is not transferable in execution of a decree. Moreover as regards the thekadar, both in the present Act and in the former Act there is a provision that an exception may arise from special provisions in the terms of the theka. We are not told what were the terms of the permanent lease in the ruling under consideration. The next ruling on which reliance was placed is *Manohar Singh and Others Vs. Hakim Riazuddin* That however was a case where a decree-holder had obtained a simple money decree against the judgment-debtors who were agriculturists in Bundelkhand. The civil Court had appointed a receiver for the tenancy or the zamindari share held by the judgment-debtors. It was provided in Section 16(1), Bundelkhand Land Alienation Act, (Act 2 of 1903) that:

No land belonging to a member of an agriculturist tribe shall be sold in execution of any decree or order of any civil or revenue Court, made after the commencement of this Act.

7. The prohibition therefore was merely against a sale and not against the transfer of the proprietary interest in the land. The receiver was appointed to receive the rents and profits of this zamindari share. Now the Act itself contains provisions in Section 17 for a civil Court decree passed on a mortgage made before the commencement of this Act in Section 17, or in Section 17-A, for a revenue Court passing a decree under certain section of the Tenancy Act, as a result of which the Collector offers the decree-holder a mortgage to hold possession of the land for a period not exceeding 20 years. This is by way of an appointment of a receiver. In the particular case before this Court it was not a decree under the Tenancy Act or a decree in a mortgage suit but a simple money decree. There is nothing whatever in the Bundelkhand Land Alienation Act which would militate against the appointment of a receiver by the civil Court in a manner which was analogous to the provisions of the Act in Sections 17 and 17-A. The mere provision that the land could not be sold was not in any way violated by such an appointment. We consider therefore that the rule laid down in this ruling that a receiver would be appointed under those conditions for the property of a judgment-debtor which was subject to the Bundelkhand Land Alienation Act is no authority for the contention advanced by learned Counsel for the respondent in the present case, as the case of exproprietary and occupancy holdings stands on an entirely different footing.

8. Learned Counsel for the respondent then referred to a ruling AIR 1925 176 (Privy Council) of their Lordships of the Privy Council. That however was an entirely different case where the respondent had obtained a money decree against the appellant and applied to attach and sell 16 villages in execution. The appellant held the villages under the terms of a compromise deed which provided that he was to hold and possess the villages, yielding a profit of Rs. 8,000 a year, in lieu of his maintenance, without power of transfer, during the lifetime of his brother, to whom he was to pay Rs. 7,872 a year in respect of the Government revenue, cesses and malikana. The prohibition against transfer of course could not be used as a shield against the decree held by his brother as the prohibition was that it was not to be transferred to other persons. Their Lordships held that a receiver could be appointed. The property however in that case was zamindari property and their Lordships held that Section 60(1)(n), precluded application for sale of property which was for a right of maintenance. We do not consider that that case is an authority for the present proposition. Reference was then made to the case in AIR 1931 160 (Privy Council) That was a case in which it was held that the Courts were competent to appoint a receiver of certain income which arose to the appellant on his relinquishing his title of Nawab Nizam of Murshidabad on an agreement between the appellant and the Secretary of State for India. On p. 498 it is stated:

Before their Lordships the additional point was taken on behalf of the appellant that the rents in question formed part of a political pension and were thus exempt from attachment under head (g) of the Code of Civil Procedure. This belated attempt to assimilate the rents to a political pension plainly fails.

9. Their Lordships therefore held that this property was not property against which there was a prohibition against attachment and sale under the provisions of Section 60, Civil P.C., and therefore the ruling is no authority for the present case in which there is a statutory provision. For these reasons, we consider that the present case is one in which provisions of Order 40, Rule 1(2), do not authorize the Court to remove the appellants from the possession of their occupancy and exproprietary tenancies and therefore the Court has nor right to appoint a receiver. The appeal is accordingly allowed with costs.

Sulaiman, C.J.

10. I concur in the order proposed by my learned brother. The question in this is whether a receiver can be appointed for realizing the income from the occupancy and exproprietary tenancies of the debtor. It is conceded by learned Counsel for the respondent that the tenant does not possess any lands which can be attached u/s 60, Civil P.C. It is further conceded that any interest which he possesses is not transferable or attachable or saleable under the Tenancy Act. It is however contended that Section 51, Civil P.C., confers a general power on an execution Court to appoint a receiver in every case where it is just and equitable and that the appointment of such a receiver neither amounts to a transfer of the interest of the judgment-debtor to the receiver nor even his dispossession. So far

as the point of view that there has been no transfer of any interest is concerned, it may be accepted. This was the main point argued before the Division Bench in *Kirtarth Gir Vs. Mathura Prasad Ram and Others*, where it was laid down that the appointment of a receiver did not bring about any transfer of an interest of the thekadar or perpetual lessee who was the judgment debtor in that case. It is not quite clear whether the further point was also argued before" the Bench or not that the appointment of a receiver amounts to dispossession of the judgment-debtor for there is no specific reference to such a plea. If the learned Judges meant to hold that the appointment of a receiver does not amount even to a dispossession of the receiver, then that view must now be deemed to have been overruled by the pronouncement of the Pull Bench in *Anandi Lal and Others Vs. Ram Sarup and Others*, . In this Full Bench case it was pointed out on pages 614 to 615 that Section 51 does not confer any such powers and that having regard to the definition of the word "prescribed," it is subject to the rules in Schedule 1 and that Section 51 and Order 40, Rule 1 go together and that in the same way Section 94(d) does not confer any such wide powers and is in itself subject to the rules prescribed in the Schedule. It was also made clear at pp. 613 to 614 that the appointment of a receiver amounts to a dispossession of the judgment-debtor within the meaning of Order 40, Rule 1(2). The case in *Kirtarth Gir Vs. Mathura Prasad Ram and Others*, was a case of a thekadar whose position, as pointed out by my learned brother, was not identical with that of an occupancy or exproprietary tenant.

11. The other case relied upon on behalf of the respondent is *Manohar Singh and Others Vs. Hakim Riazuddin* But there the property of which the receiver had been appointed consisted of agricultural lands in Bundelkhand which were inalienable, and the only prohibition in the Bundelkhand Act was against a sale in execution of a decree or order. The case in AIR 1931 160 (Privy Council) related to a pension and the case in AIR 1925 176 (Privy Council) related to maintenance allowance, in neither of which there was any question of a dispossession from any property at all. Section 51 empowers a Court to order execution by appointing a receiver which is one of the modes of execution.

12. It does not authorize the Court to appoint a receiver of all properties. On the other hand Order 40 makes it clear that the Court may by order appoint a receiver of any property, subject to the condition that the Court is not authorized to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove. The appointment of a receiver of occupancy or exproprietary tenancies is certainly tantamount to the removal of these tenancies from the possession and custody of the tenant. The appointment will have the effect of preventing the tenant from cultivating his lands or manuring it. In case of default of payment of rent there is a risk of the tenancy being forfeited and the tenant losing the tenancy. Again there may be difficulty if the receiver goes to the revenue Court to institute suits for recovery of rents from sub-tenants. Generally the profits of tenancies accrue after money and labour have been spent. It is not a case where there is any fixed income like

pension or maintenance allowance which accrues regularly. It seems to me that it will be contrary to the spirit of the Tenancy Act to hold that although the tenancy lands cannot be attached or sold nor can even a lease be granted for a longer period than is prescribed, the dispossession of the tenant can be brought about in an indirect way by appointing a receiver of such tenancies and thereby dispossessing the tenants for an indefinite period until all the debts due from him have been paid up. This may be tantamount to an ejectment of the tenant, which is not allowed except in accordance with the Act, and is certainly introducing a stranger into the village which the landholder may not like. When a simple loan is advanced on personal credit, it is not in the contemplation of the parties that the debt would be recovered out of tenancy lands in the possession of the tenant. There is no equity in favour of the creditor which would compel a Court to order the dispossession of the tenant from his agricultural lands, which have been expressly made inalienable by statute.

13. Learned Counsel for the respondent has almost to concede that so far as the tenancy lands which are actually in the cultivation of the tenant are concerned, it would be very difficult to appoint a receiver because he would have to dispossess the tenant. It is however suggested that the receiver may be appointed in respect of the tenancy lands which are sub-let to sub-tenants so long as the sub-tenants continue to remain in possession. But the sub-tenancies may be for a temporary period and the tenant must be deemed to be in possession of the land in the same way as when there were no sub-tenants. I do not think that there is any valid distinction to be drawn between these cases.