
(1961) 05 GAU CK 0003

In the Gauhati High Court

Case No : Misc. Appeal (First) No. 19 of 1959

Bajinath More Agarwalla and Others

APPELLANT

Vs

Tikaram Chand Bhajanka and Others

RESPONDENT

Date of Decision : 03-05-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1961 Guw 157

Hon'ble Judges : Haliram Deka, C.J.;G. Mehrotra, J

Bench : Division Bench

Advocate : J.C. Medhi, for the Appellant; S.M. Lahiri and N.M. Lahiri, for the Respondent

Judgement

H. Deka, C.J.—This is an appeal from the order of the learned Subordinate Judge, Lower Assam Districts at Gauhati in Title Execution Case No. 8 of 1958.

2. The material facts are that the appellants obtained a compromise decree against the respondents in Title Suit No. 26 of 1956 and the compromise decree was arrived at on the 11th April 1957 on the basis of the terms of compromise filed by the parties, namely defendants 1 and 2 and the plaintiffs in the court. The material terms were plaintiffs in the suit would be decreed against defendants No. 1 and 2 for a total amount of Rs. 6,300/- inclusive of all arrear rent for a particular house which the defendants possessed as tenants of the Plaintiffs. In the terms of the compromise it was shown how the kists were to be paid and the default-clause (paragraph 5 of those terms) was in the following words:

In case the defendants 1/2 fail to pay the said decretal amount and arrear rent according to kists, the defendants 1/2 will be ejected and the balance kist money and the arrear rent will be realised at a time by filing execution case after deducting the realised money, and the plaintiffs will be entitled to eject the defendants, by filing execution case.

In paragraph 6 of those terms there was reference as to possession of the suit premises for the year 2014 Sambat, and the clause ran as follows:

After this the defendants will have to make separate written contract for 2014 Sambat corresponding to 1957-58 A. D. Therefore the plaintiff and the defendants 1/2 pray for passing decree of the plaintiffs' claim in terms of the above compromise.

3. On the 27th February 1958 the decree-holders applied for execution of the decree for a sum of Rs. 3,500/- and for eviction of the judgment-debtors. They alleged that out of the decretal amount, Rs. 2,800/- had been realised and due to their default in payment of kists the decree for eviction should be given effect to. The judgment-debtors who are respondents before us, on the other hand filed an objection to the effect that they had been regularly paying the stipulated kists in terms of the compromise petition to the decree-holders and that there had been no default as pleaded by the decree-holders and the judgment-debtors were not liable to be evicted.

They further pleaded that Clause 5 of the terms of compromise was inoperative as it was a penal clause. They filed Anr. statement wherein they raised the identical plea and contended that because of their paying rent for the identical house for a period of seven months in 2014 Sambat, a fresh tenancy was created and the judgment-debtors could not be evicted in execution of the decree even if there was default in payment of kists.

4. The learned Subordinate Judge in the order under appeal held that there was an arrear of Rs. 3,500/- out of the decretal amount and that the judgment-debtors were not liable, to be evicted because a new tenancy was created in favour of the judgment-debtors by virtue of their receiving rent at the rate of Rs. 215/- per month from them for a period of seven months for the year 2014 Sambat. In the opinion of the learned Judge this new tenancy unless terminated, was a bar to the delivery of possession of the suit premises to the decree-holders even though there was default in the payment of kist as incorporated in the compromise decree.

5. Dr. Medhi for the appellant decree-holders has contended before us that the payment of rent for seven months at the rate of Rs. 215/- per month for the suit premises did not as a matter of fact amount to acceptance of rent or create a new tenancy, but this sum was received by the landlords for the use and occupation of the premises, -- by the judgment debtors when they were clearing the decretal dues. His second contention was that this payment by itself could not create a new tenancy unless there was an understanding to that effect and that could not be pleaded as a bar to the execution of the decree for eviction.

6. Mr. Lahiri appearing for the respondent judgment-debtors has contended on the other hand that the finding of the learned Subordinate Judge that there was a balance of Rs. 3,500/- to be paid to the decree-holders by the judgment-debtors out of the decretal amount is based on no evidence and the judgment-

debtors" plea of payment of the entire amount has not been considered on merits. His second contention is that payment and acceptance of rent for the year 2014 Sambat by itself created a tenancy in favour of the judgment-debtors and unless that tenancy was terminated, the judgment-debtors could not be evicted from the suit premises by execution of the decree.

7. We have given our best consideration to the contentions raised and in our opinion the execution of the decree cannot be stayed unless there be a distinct waiver of the rights accrued to the decree-holders under the terms of the compromise decree. Whether this payment and acceptance of the amount of alleged rent for seven months amounted to waiver of the rights of eviction obtained under the decree is to be judged in the light of the intention of the parties gathered from the evidence on the record.

Mere payment of the amount as rent by itself might or might not create a tenancy but that cannot be a subject for consideration in executing a decree if otherwise enforceable since it does not come within the scope; of Section 47 of the Civil Procedure Code. In our opinion the learned Subordinate Judge was not right in assuming that the receipt of Rs. 215/- per month for the period of seven months for occupation of the suit premises by the decree-holders amounted to "giving a go by to the ejectment clause in the decree".

The decree for eviction can be denied if it is found by the court that the decree-holders have forfeited the right of enforcing the decree either by virtue of receiving the entire decretal amount as per kist, Or by waiving the rights under the decree. The learned Subordinate judge has of course used the word "waiver" but he has not considered the circumstances as to whether this receipt of the amount indicated above actually amounted to a waiver in the eye of law and this must be decided on evidence produced by the parties before; the court and mere assertion by itself is not enough.

None of the parties adduced any evidence, We therefore, direct that the matter should go back to the executing court to decide as to whether there was waiver of any of the terms of the decree for eviction and whether there was default in payment of kists as pleaded by the decree-holders and denied by the judgment-debtors. We therefore, set aside the order appealed against and remand the case to the lower court for adjudication in the light of the direction which we have already made. Parties will be entitled to give such evidence as they choose.

8. We need not consider in this connection as to what rights accrued to the judgment-debtors by Virtue of the payment of rent which we do not consider essential for the purpose of the execution of the decree, as not coming within the scope of Section 47 of the Civil Procedure Code.

9. The costs will abide the result.

G. Mehrotra. J.

10. I agree.