
(1984) 07 AHC CK 0012
In the Allahabad High Court
Case No : Writ Petition No. 4015 of 1982

Farukh and Others

APPELLANT

Vs

District Judge and Others

RESPONDENT

Date of Decision : 11-07-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 11, Order 21 Rule 11(2), Order 21 Rule 17(1), Order 21 Rule 17(1A), Order 21 Rule 22(1)

Citation : AIR 1984 All 393

Hon'ble Judges : K.N. Goyal, J

Bench : Single Bench

Advocate : V.C. Verma and A.R. Khan, for the Appellant; A.P. Singh and Z. Jilani, for the Respondent

Final Decision : Dismissed

Judgement

K.N. Goyal, J.—This writ petition has been filed by three of the judgment-debtors against execution proceedings pending against them in the Court of the Munsif North, Lucknow.

2. Opposite party No. 3 as the landlady of the certain accommodation situated in the city of Lucknow filed a suit for ejectment in the Court of Munsif North. This was suit No. 492 of 1967. The tenant was one Najmur Rahman. He was defendant No. 1 in the suit. Four other persons were impleaded as defendants, namely, Mohammad Hasnain, Karam Khan Farukh, and Imran son of Mohammad Hasnain. Out of them Karam Khan has died and is represented by Srimati Noor Jehan petitioner No. 2, Imran is opposite party No. 4. Petitioner No. 3 and opposite parties 5 and 8 are other heirs of Mohammad Hasnain. Opposite parties 9 to 17 are the heirs of Najmur Rahman.

3. The contention of the plaintiff, was that the tenant, namely, Najmur Rahman had committed a willful default in payment of arrears of rent and had also sublet the premises to the other defendants mentioned above. The trial Court upheld both these pleas and decreed the suit for ejectment and rent. The lower

appellate Court upheld the finding of wilful default but did not uphold the finding of illegal subletting. It, however, maintained the decree against all the defendants. The trial Court's decree is dated 20-5-69 and the order of the lower appellate Court is dated 1-12-75. The plaintiff-decree-holder then filed an execution application on 20-4-76, vide Annexure 1 to the writ petition, mentioning that no second appeal was filed till then. A second appeal was, however, filed by the defendants other than Najmur Rahman soon thereafter. During the pendency of that second appeal Najmur Rahman died and his heirs were brought on the record.

4. Ultimately the Second Appeal was dismissed on 18-5-81. During the pendency of the Second Appeal a stay order had been passed by this Court. As a result of the stay order execution proceedings remained pending. On 22-5-81. vide Annexure 2 to the writ petition, the following order was passed by the execution Court :--

"22/5/81

C-16-Appin. along with copy of order of Hon"ble High Court for proceeding the execution filed.

ORDER

Execution to proceed As stay order has been vacated

Issue warrant u/s 21-B5 fixing 14-8-81 for Report."

Copy of the application No. C-16 referred to in this Court is not available, as the record of the execution Court appears to have been misplaced and each party has blamed the other for the loss of the record

5. An objection u/s 47 C. P.C. was thereupon filed by the present petitioners. A copy of this objection is Annexure 3 to the petition. Among the pleas taken were the follows :--

" 7. That no decree for ejectment has been passed or could legally be proved against the objector. It is further stated that no decree was even claimed against the objectors.

That Sri Najmur Rahman against whom the decree was passed died on 4-3-1976 and his heirs have neither been impleaded nor they are living in the premises in dispute. It is further stated that no execution application has been moved against them."

6. In the reply to this objection filed by the decree-holder, vide Annexure 5, it was stated in para 10 of the accompanying affidavit as follows : -

"10. That it will be wrong to state that the objectors are living under their independent rights and the judgment-debtor No. 1 has nothing to do. Sri Najmur Rahman had already died and their heirs had been brought on the record before the Hon"ble High Court, Lucknow Bench, in the Second appeal during its

pendency.

7. The objection of the petitioners was dismissed by the learned Munsif on 29-7-81, vide Annexure 7. A revision was filed in the court of the District Judge, vide memo, Annexure 8. The revision was dismissed on 11-8-82 by the 6th Additional District Judge, vide order, Annexure 9. Aggrieved thereby the petitioners have come to this Court.

8. Learned counsel for the petitioners Sri V.C. Verma who has ably argued the case has pressed before me several contentions, which are being dealt with seriatim.

9. The first contention is that no notice of the execution application was given to the heirs of Najmur Rahman as required by Order 21, Rule 22(1)(b) C.P.C., not only this, no attempt was made to amend the execution application by even mentioning the names of the heirs of Najmur Rahman who had already been brought on the record of the Second appeal as mentioned earlier. Thus, the application was defective for want of compliance with Clause (i) of Order 21 Rule 11(2). Accordingly, the Court was bound to reject the application in view of the provisions of Order 21, Rule 17(1A) as inserted by Act No. 104 of 1976. The execution application was thus without jurisdiction. His further contention is that in view of the provisions of Rule 17(1A), the provisions of Rule 11 must be deemed to be mandatory and not merely directory.

10. It has been seen above that the execution application had been given before the death of Najmur Rahman. At the time the application was given, it was in order. Neither at that time nor after the dismissal of the second appeal when execution proceedings were sought to be revived did the Court ever ask the decree-holder to remedy any defects under Rule 17(1). The decree-holder did bring to the notice of the execution Court the fact that the heirs of Najmur Rahman had already been brought on the record in the second appeal. Those heirs were themselves thus parties to the decree and they cannot be treated as merely legal representatives of a party to the decree. Thus, Rule 22(1)(b) is, strictly speaking, not attracted to the case at all because after the decision of the appeal it was only the appellate decree which was executable and not the decree of the trial Court which stood superseded by the appellate decree. Thus the only defect was that although the fact that Najmur Rahman's heirs had been brought on the record was placed before the execution Court, the application under Rule 11 was not sought to be amended by having their names inserted and the name of Najmur Rahman deleted. But a copy of the order of the High Court was no doubt placed before the execution court as is evident from the order of that Court dated 22-5-81 reproduced earlier. Thus, the defect in the execution application was only of a formal nature and cannot be regarded as fatal. It is well established, vide *Kunwar Bhagwat Pratap Singh v. Keshav Shukla*, 1970 All LJ 56, para 26 and *Jugalkishore Saraf v. Rao Cotton Co. Ltd* AIR 1955 SC 376, (Paras 41, 60 and 61) that mere formal defects in an execution application are not fatal

11. Learned counsel for the petitioners has, however, contended that these authorities cannot hold good after the insertion of Sub-rule (1A) of Rule 17 by Act No. 104 of 1976. After the legislature has provided for rejection of the defective application, it cannot be contended, so the learned counsel argues, that the provisions of Rule 11 are not mandatory. I find no merit in this contention. The amendment merely provides for rejection of the application after the decree-holder has been given an opportunity to rectify a defect and the decree-holder has in spite of such opportunity failed to rectify the defect. As no such opportunity was given in the instant case, Sub-rule (1A) never came into play. There is no provision, even after the said amendment, which may be to the effect that an application which is not in conformity with Rule 11 shall be rejected. Thus, the mere insertion of the said Sub-rule (1A) does not make the provisions of Rule 11 mandatory instead of directory.

12. The second contention of the learned counsel for the petitioners is that after the appellate decision of this Court it was only the decree of this Court that could be executed and not the decree of the trial Court. The decree-holder had applied merely for execution of the trial Court's decree which already stood wiped out by the appellate decision. He has relied on, *Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh*, . He is no doubt right in contending that the principle of merger is applicable even to a decree passed by the appellate Court affirming the trial Court's decree. There could not be said to be simultaneously in existence two decrees, namely, one of the trial Court and the other of the appellate Court. It is only the decree of the High Court passed in second appeal that was executable. It does not, however, follow that the execution application which had already been given before the decision of the second appeal should be treated as having become infructuous. Execution proceedings had been stayed by the High Court until the decision of the second appeal. As soon as the second appeal was dismissed, it was certainly open to the decree-holder to have sought the revival of the execution. Of course, the revival would be in respect of the decree passed by the High Court and not of the original decree passed by the trial Court. As the two decrees were identical in terms so far the ejectment is concerned, it was open to the decree-holder to bring the appellate order to the notice of the execution court and then to have asked for restarting of execution proceedings. In substance and effect the application for restarting of proceedings was one for restarting of execution on the basis of the appellate decree which superseded the original decree earlier sought to be executed. The only defect for which the decree-holder can be said to be accountable was her failure to apply for amendment of the execution application for substituting the date of the appellate decree in place of the date of the original decree. As held earlier, such defect could only be treated to be a formal defect, and as it did not prejudice the judgment-debtor in any manner, it cannot be held to be fatal.

13. Learned counsel for the petitioners has, however, further contended that the decree-holder had also failed to produce before the execution Court a certified copy of the decree passed by the High Court in second appeal. The opposite

party contends that it did file a copy of the decree of the High Court. While the petitioner disputes this. The factual position in this regard cannot be ascertained because of the loss of the record. However that may be, the fact remains that a copy of the order of the High Court was produced before the execution court as noted in Annexure 2. A copy of the order means either a copy of the judgment or a copy of the decree. It is not obligatory to file a copy of the decree. Order 22 Rule 11(3) lays down that the execution Court may require the applicant to produce a certified copy of the decree. This implies that it is not obligatory on the decree-holder to produce a certified copy of the decree sought to be executed until he or she is so required. Thus, nothing turns on the alleged non-production of a certified copy of the High Court decree by the decree-holder.

14. It is significant that Najmur Rahman had not even preferred the second appeal. His heirs also did not file any objection against execution. It is only the petitioners who have been prosecuting the proceedings, namely, the appeal and the objection to execution. Learned counsel for the petitioners, however, contends that as the petitioners were in occupation of the house on behalf of Najmur Rahman and not through any independent right, they are entitled to take any objection which was open to the heirs of Najmur Rahman. This contention, again is, without any substance. Title to property or to possession over property is one thing "while entitlement to file objections is another. If Najmur Rahman's heirs have no objection to execution, even though the application may be defective as against them, it is not open to the petitioners to raise those objections. Petitioners own pleas in para 8 of their objections show that Najmur Rahman or his heirs were not actually living in the premises in question. It seems that it is for this very reason that they did not file any objection or appeal. They were no longer interested in the matter. It was only the petitioners who were interested. There is no defect in the application for execution as against the petitioners. The decree-holder can very well confine her relief in execution proceedings to the ejection of the petitioners or any one in possession on behalf of the petitioners.

15. The contention of the learned counsel for the petitioners is that the execution application being one whole, it could not be split into two by treating the same as one against Najmur Rahman and his heirs and the other against the petitioners. The execution application is no doubt one, but if effective relief can be received by petitioners without impleading the heirs of Najmur Rahman, there can be no legal bar to the decree-holder pursuing the proceedings to that end.

16. No other point was urged or pressed before me.

17. In the result, I find no force in this writ petition which is hereby dismissed with costs. The stay order stands discharged.