

(1974) 11 AHC CK 0004
In the Allahabad High Court
Case No : Civil Revision No. 317 of 1974

Ganesh Prasad Varma

APPELLANT

Vs

Goverdhan Dass and Others

RESPONDENT

Date of Decision : 21-11-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, 11, 17(1), 2(12)
Court Fees Act, 1870 — Section 11, 12

Citation : AIR 1975 All 146

Hon'ble Judges : G.C. Mathur, J

Bench : Single Bench

Advocate : H.B. Singh and Shanti Bhushan, for the Appellant; P.N. Kaushik, V. Swarup and J. Swarup, for the Respondent

Final Decision : Dismissed

Judgement

G.C. Mathur, J.—This is a revision by the judgment-debtor against the order of the Second Civil Judge, Kanpur, rejecting his objection that the execution of the decree was barred by Section 11 of the Court-fees Act.

2. The applicant was a tenant of premises known as "Jai Hind Cinema Building" at Kanpur and the contesting opposite parties were the landlords thereof. The landlords filed a number of suits against the tenant of which Suit No. 70 of 1958 was for ejectment, for recovery of arrears of rent and for mesne profits for use and occupation. The other suits were for recovery of arrears of rent, for mesne profits for use and occupation for certain periods and for recovery of insurance charges. The disputes in all the suits were settled by a compromise dated October 7, 1966 which was filed in Suit No. 70 of 1958 and all the suits were decreed in terms of this compromise. Under the compromise, the plaintiff decree-holder was awarded :

(i) A decree for the ejectment of the judgment-debtor from the premises with a stipulation that the judgment-debtor will hand over possession by December 31, 1972;

(ii) A decree for Rs. 83,473 for damages or compensation for use and occupation of the premises upto September 30, 1966, and for costs, the amount was payable in instalments.

(iii) A decree for the payment of damages for use and occupation at the rate of Rs. 3,000 per month from October 1, 1966 till December 31, 1972. In case the judgment-debtor failed to deliver possession of the premises by December 31, 1972, the decree-holder was held entitled to recover damages for use and occupation at the rate of Rs. 500 per day till the date of actual delivery of possession.

2-A. Admittedly, all the amounts due upto December 31, 1972 have been paid by the judgment-debtors to the decree-holders. Since the judgment-debtors did not hand over possession by December 31, 1972, the decree-holders demanded possession on January 1, 1973, and on their refusal to deliver possession, the decree-holders filed an execution application for ejectment of the judgment-debtors from the premises and for damages at the rate of Rs. 500 per day from January 1, 1973 upto the date of the delivery of possession. The decree-holders tentatively paid court-fees on an amount of Rs. 7,500, the damages due for 15 days. The judgment-debtors raised a preliminary objection that, since court-fees had not been paid by the decree-holders on the decree for mesne profits, the execution of the decree was barred by the first part of Section 11 of the Court-fees Act. This objection has been rejected by the Civil Judge.

3. Paragraph 2 of Section 11, in its application to Uttar Pradesh, was amended by U. P. Act No. XIX of 1938. Paragraph 1 in its original form is applicable not only in Uttar Pradesh but also in all other States. This Section as applicable to our State, reads thus:--

"11. Procedure in suits for mesne profits or account when amount decreed exceeds amount claimed--

In suits for mesne profits or for immovable property and mesne profits or for an account if the profits or amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed shall have been paid to the proper officer.

Where a decree directs an inquiry as to mesne profits which have accrued on the property during a period prior to the institution of the suit, if the profits ascertained on such inquiry exceed the profits claimed no final decree shall be passed till the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the claim for the excess shall be dismissed, unless the Court, for sufficient cause, extends the time for payment.

Where a decree directs an inquiry as to mesne profits from the institution of the suit and a final decree is passed in accordance with the result of such inquiry, the decree shall not be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted thereof."

4. It is not disputed that the amount of damages for use and occupation decreed under the compromise decree is much larger than the amounts claimed in the various suits and that the difference in the court-fees payable on the amount decreed and the amounts claimed has not been paid by the plaintiff-decree-holders. The judgment-debtors' objection was that the decree was a decree for immovable property and mesne profits and that since the difference between the court-fees actually paid and the court-fees payable had not been paid, no part of the decree could be executed. The contention of the decree-holders, on the other hand, was that the first para of Section 11 only prohibited the execution of the decree for mesne profits and not the execution of the decree for ejectment. On the arguments addressed to me, the following three points arise for decision:

(i) Whether this revision which involves the question of payment of court-fees is not maintainable at the instance of the judgment-debtors?

(ii) Whether the decree in question is a decree for immovable property and for mesne profits? and

(iii) Whether "Section 11 of the Court-fees Act bars the execution of a decree for immovable property and mesne profits only in respect of the mesne profits or also in respect of the immovable property?

5. The contention that this revision is not maintainable is based on the observations of the Supreme Court in *Sri Ratnavaramaraja Vs. Smt. Vimla*, . The Supreme Court held that the question whether proper court-fee has been paid on a plaint is primarily a question between the plaintiff and the State and that even if the defendant believed honestly that proper court-fee had not been paid by the plaintiff, he has no right to move the superior courts by appeal or in revision against the order adjudging payment of court-fees payable on the plaint. This case was explained by the Supreme Court in *Shamsher Singh Vs. Rajinder Prasad and Others*, : it was said that the ratio of the 1961 decision was that no revision on a question of court-fee lay where no question of jurisdiction was involved. It was further held in this case that if the question of court-fee involved a question of jurisdiction then the defendant could assail the decision in a revision. In the case before me the decision on the question which was raised before the trial court affected its jurisdiction to execute the decree for possession. The order of the court below was one which could legitimately be said to relate to the jurisdiction of that court. On the interpretation put on Section 11 of the Court-fees Act by the lower court, it held that it had jurisdiction to execute the decree. If the decision were otherwise, then the lower court would not have had the jurisdiction to execute the decree. Since the order of the court

below involved the question of jurisdiction, the revision is clearly maintainable. That apart, in the present case a question of court-fees in the sense in which it was considered in the 1961 case does not arise. Here, there has been no determination of the amount of court-fees and no demand for court-fees. It is not a case where the quantum of court-fees determined by the court below is being challenged in this Court. In this case the question is whether the jurisdiction of the lower court to execute the decree for possession of the immovable property is or is not barred by Section 11 on account of non-payment of court-fees on the excess amount of mesne profits decreed. This can hardly be called a question relating to court-fees. It is much more a question relating to the executability of the decree. The preliminary objection to the maintainability of the revision has to lie rejected.

6. The next question which arises for consideration is whether the decree in the present case was a decree for immovable property and mesne profits. It is urged by Sri Rajeshwari Prasad, learned counsel for the decree-holder, that it was not a decree for mesne profits at all. Under the compromise the amount decreed was for damages for use and occupation of the cinema building. It is urged that the judgment-debtor was allowed to remain in possession under the compromise upto December 31, 1972, and the damages for use and occupation upto that date could not be equated with compensation or damages for wrongful possession. Section 2(12) of the CPC defines mesne profits thus:--

" Mesne profits of property" means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

It is, thus, clear that a decree for mesne profits can only be passed in respect of profits received by a person in wrongful possession. I have been taken through the relevant terms of the compromise by the learned counsel for the parties. Under this compromise a decree for ejectment was passed, but time was granted to the judgment-debtor to vacate by December 31, 1972. After a decree for ejectment has been passed the possession of the judgment-debtor cannot be said to be permissive, even if time is granted to vacate. After the passing of the decree for ejectment the possession of the judgment-debtor is wrongful, even though the execution of the decree for ejectment is postponed. It is also true that mesne profits are related to profits actually received from the property on account of wrongful possession or profits which might with ordinary diligence have been received therefrom. But it was open to the parties to quantify the amount instead of leaving it to further enquiry, that is what has been done in the present case. In my opinion, the compromise decree was a decree for immovable property and mesne profits. This disposes of the second point.

7. The third point may now be considered. Section 11 has been quoted in full in the earlier part of this judgment. The first paragraph of Section 11 refers to three types of suits, namely, suits for mesne profits, suits for immovable property and

mesne profits and suits for accounts. Leaving out suits for accounts with which we are not concerned in the present case, the paragraph provides that, if the amount of mesne profits decreed is larger than the amount claimed in the plaint, then the decree shall not be executed till the proper court-fee is paid on the excess amount. The second paragraph deals with a case where the decree directs inquiry into past mesne profits due upto the date of the suit. Where, after the inquiry has been made, it is found that an amount larger than that on which court-fee has been paid in the plaint is payable, no final decree shall be passed until the court-fee on the excess amount has been paid. It further provides that, if the court-fee on the excess amount is not paid within the time allowed, the claim for the excess amount shall be dismissed. It is to be noticed that, for non-payment of court-fee on the excess amount of mesne profits found due, the suit cannot be dismissed for other reliefs that may have been claimed in the suit. A decree for other relief can still be passed and executed. The third paragraph deals with a case where the decree directs inquiry into future mesne profits and & final decree is passed for the entire amount found due without payment of court-fees on the excess amount. This paragraph prohibits the execution of the decree until the deficiency in court-fees is made good. This paragraph prohibits the execution of the decree for mesne profits only. If the decree is for ejectment from immovable property and for future mesne profits, the decree for ejectment can be executed even though the court-fee due on the mesne profits decreed has not been paid.

8. Section 11 is thus concerned with the recovery of court-fee payable on the relief for mesne profits when the decree passed or to be passed is for an amount larger than that on which court-fee has been paid in the plaint. The section relates only to the passing of decrees for mesne profits and to the execution of such decrees. Paragraphs 2 and 3 mention decrees for mesne profits only. Under paragraph 2, if the court-fee is not paid on the excess amount of mesne profits found payable, the suit can be dismissed for the relief of mesne profits only and not for any other relief that may have been claimed in the suit. Under paragraph 3, if court-fee is not paid on the excess amount of mesne profits decreed, the decree for mesne profits shall not be executable but, if there is a decree for any other relief in the same suit, that part of the decree will be executable, is there then any good reason to hold that, under paragraph 1, the execution of a decree for reliefs other than mesne profits can be refused for non-payment of court-fee on the excess amount of mesne profits decreed? It is argued by Sri Shanti Bhushan, learned counsel for the applicant, that the entire decree passed in a suit of the type specified in Section 11 has to be stayed. It is urged that, in one suit, there can be only one decree passed for all reliefs (vide Order XX, Rule 12) and, therefore, the word "decree" in paragraph 1 of the Section 11 also refers to the decree in respect of all the reliefs prayed for in the type of suits specified therein. I am unable to accept this argument. It assumes that paragraph 1 applies only to the suits specified therein and not to other suits. There are many types of suits in which mesne profits are claimed in addition to other reliefs

which are not specified in paragraph 1. A suit for the cancellation of a lease or a sale deed, for possession of immovable property and for mesne profits and a suit for possession of immovable property, for possession of movable property and for mesne profits are examples of such suits. It cannot seriously be urged that paragraph I of Section 11 will not apply to these two types of suits. If paragraph 1 applies to them, there is no basis on which it can be urged that the execution of the decree for reliefs other than that of mesne profits can also be refused until court-fee is paid on the excess amount of mesne profits decreed. It is clear that, in these two types of suits which are not specified in paragraph 1, only the execution of the decree for mesne profits can be refused and not that of the decree for other reliefs.

9. Paragraph 1 also mentions suit for accounts simpliciter. If a decree is parsed for a larger amount than that on which court-fee has been paid in the plaint, the decree cannot be executed until court-fee on the excess amount decreed is paid. Suppose a suit is filed for immovable property and accounts and is decreed for the immovable property and for an amount in excess of that on which court-fee has been paid in the plaint. Surely, paragraph 1 of Section 11 will apply to this decree and the decree for the decretal amount cannot be executed until the court-fee on the excess amount decreed is paid. But the execution of the decree for immovable property cannot be refused merely on the ground that proper court-fee on the excess decretal amount has not been paid.

10. An examination of the various provisions of Section 11 shows that the scheme of the section is to affect decrees for mesne profits only. The provisions of paragraph 3 are similar to those of paragraph 1. Both prohibit execution of a decree when court-fee has not been paid on the full amount decreed. The main difference is that while paragraph 3 is applicable to a final decree passed after inquiry under a preliminary decree, paragraph 1 is applicable to a final decree passed without such inquiry. But the object of both the provisions is the same, that is to say to secure payment of court-fees on the excess amount decreed by denying execution until this is paid. If the decree is for immovable property and mesne profits and paragraph 3 applies to it, the execution of the decree for immovable property will not be refused as "the decree" here refers to a decree for mesne profits only. It is reasonable to hold that, if paragraph 1 applies to such a decree, then also the same result should follow.

11. The matter may be examined from another angle. Section 17 of the Court-fees Act, as applicable to Uttar Pradesh, reads thus:--

"17 (1) In any suit in which two or more separate and distinct causes of action are joined, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees with which the plaints or memorandum of appeal would be chargeable under this Act if separate suits were instituted in respect of each such cause of action:

Provided that nothing in this sub-section shall be deemed to affect any power

conferred by or under the CPC to order separate trials.

(2) When more reliefs than one based on the same cause of action are sought in the alternative, the fee shall be paid according to the value of the relief in respect of which the largest fee is payable."

The language of Section 17 shows that, for purposes of court-fee, a suit, in which two or more separate and distinct causes of action are joined, is to be deemed to be a collection of distinct suits relating to several causes of action combined in it. If, in such a suit, a decree is passed for more than one distinct relief, then it will be deemed that separate decrees have been passed in distinct suits for the distinct reliefs. Paragraph 1 of Section 11 has to be read in this light. So read, it is clear that where it refers to a suit for immovable property and mesne profits, it contemplates two decrees--one for immovable property and the other for mesne profits, and by the later part of this paragraph, it prohibits the execution of the decree for mesne profits.

12. For these reasons, I am of opinion that where a decree is for immovable property and mesne profits, paragraph 1 of Section 11 will not bar the execution of the decree for immovable property, even if the difference in the court-fee paid on the plaint and the fee payable on the mesne profits decreed has not been paid. In this view, I am supported by the decision of a Division Bench of the Bombay High Court in *Fulchand v. Bai Ichha*. ILR (1888) 12 Bom 98 and by the decision of a Division Bench of the Madras High Court in *Ramalinga Sethupati Ambalam v. Andaippan Ambalam* AIR 1931 Mad 717. The view taken by the Civil Judge is correct.

13. The revision is without merit and is hereby dismissed with costs. The stay order is vacated.