

(1970) 09 PAT CK 0006
In the Patna High Court
Case No : A.F.A.O. No. 262 of 1968

Harihar Prasad Sah and Others	Vs	APPELLANT
Sardar Jodh Singh and Others		RESPONDENT

Date of Decision : 24-09-1970

Acts Referred:

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 — Section 11
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35, 11

Citation : AIR 1971 Patna 284

Hon'ble Judges : B.N. Jha, J

Bench : Single Bench

Advocate : A.C. Roy and Bimal Bhushan Sen, for the Appellant; Tara Kant Jha and Karuna Nidhan Keshava, for the Respondent

Final Decision : Allowed

Judgement

B.N. Jha, J.—The appellants brought a redemption suit No. 78 of 1955 on October 11. 1955 in the Court of First Subordinate Judge, Muzaffarpur, against the mortgagee Babulal Jiwarajka, respondent No. 4 and respondents 1 to 3. It was alleged in paragraph 13 of the plaint that the defendants second party i. e. respondents 1 to 3 being tenants of defendant No. 1 (respondent No. 4) were bound by the terms settled between the plaintiffs and defendant No. 1 and were also bound by the decree of redemption to be passed in favour of the plaintiffs and, as such, they were impleaded as defendants to avoid future objections. In Clause (d) of paragraph 14 of the plaint it was prayed that a time be given to the defendants to give up possession of the disputed house mentioned in Schedule 1 and on expiry of the time the plaintiffs be given possession over the same. There is no denying the fact that the redemption suit which was brought against the defendants i. e. against the respondents of the present appeal was also a suit for khas possession. Respondents 1 to 3 who were defendants second party filed written statement in the suit. It was alleged that the defendants second party had taken settlement of the shops on the monthly rental basis from defendant No. 1 and were paying rent to him. Therefore, they were not necessary parties in

the suit. No specific plea was taken by them in their written statement that no decree for possession could be passed against them and they could be ejected only on the grounds as mentioned in Section 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act of 1947 (hereinafter referred to as the Act).

2. It appears that the tenant defendants did not contest the suit and the suit was decreed against the mortgagee defendant on contest and ex parte against the other defendants. A preliminary decree was directed to be drawn up and thereafter a final decree followed according to which the defendants were directed to deliver quiet and peaceful possession of the mortgaged property to the plaintiffs. The appellants levied the execution of their decree and prayed for delivery of khas possession of the mortgaged property. The defendant respondents 1 to 3 raised objection to the execution of the decree before the executing court to the effect that they could not be evicted from the suit premises save and except in execution of a decree obtained under the provisions of the Bihar Buildings (Lease, Rent & Eviction) Control Act. The decree-holder appellants were only entitled to constructive delivery of possession under Order 21, Rule 36 of the Code of Civil Procedure. In support of their contention they relied on a decision of this court in *Hira Lal Gupta v. Brijkishore Prasad Verma* (1959 PLR 234). That plea has succeeded before the two courts below. Hence, the decree-holders have come up to this court.

3. Mr. A. C. Roy, learned counsel for the appellants contended that the tenant respondents 1 to 3 were parties to the redemption suit. They filed their written statement in the suit but never resisted the claim of the appellants for khas possession of the suit premises after redemption. They never put forward a claim that they being monthly tenants of the suit premises could be only ejected under the terms and circumstances as laid down in Section 11 of the Act. That plea they never put forward in the suit and that being the position, they cannot be allowed to raise that plea at the execution stage as it is barred by the principles of constructive res judicata.

In support of this contention, he relied on a Bench decision of this court in *Jainarayan Sah and Another Vs. Mt. Surat Kuer* and thereafter *Mt. Radhika Devi and Others*, . On the other hand, Mr. Tara Kant Jha, learned counsel for the tenant respondents reiterated the objection that as there was no decree for eviction against the tenant respondents in the manner and under the conditions as laid down u/s 11 of the Act, they cannot be ejected from the suit premises: In support of his contention he relied on the decisions of this court in *Mrs. Dharamshila Lall Vs. Bibi Amna*, ; *Bhagwati Prasad Sah Vs. Radha Kishun Sah and Others*, .

4. There is no dispute of the fact in this case that the tenant respondents were inducted by the mortgagee judgment-debtor respondent as monthly tenants in the portions of the suit premises. Section 11 of the Act provides that notwithstanding anything contained in any contract or law to the contrary but subject to the provisions of the Industrial Disputes Act, 1947 and to those of

Section 12, where a tenant is in possession of any building, he shall not be liable to eviction therefrom except in execution of a decree passed by the court on one or more of the grounds as mentioned in Clauses (a), (b), (c), (d) and (e) of Section 11(1) of the Act. The plea that the tenants could not be ejected from the suit premises and no decree for possession against them could be passed, could have been put forward as a defence in the suit itself. The appellants had clearly prayed for a decree for possession against all the defendants in the suit.

As the tenant defendants did not resist the suit of the plaintiffs for recovery of possession and allowed a decree for possession to be passed against them also, in my opinion, they cannot be allowed at the execution stage to resist the claim of the decree-holders for getting khas possession over the suit premises under the provisions of Order 21, Rule 35 of the Code of Civil Procedure. Under the provisions of this rule, where a decree is for the delivery of an immovable property, possession thereof shall be delivered to the party to whom it had been adjudged or to such person as he may appoint to receive delivery on his behalf and, if necessary, by removing any person bound by the decree who refuses to vacate the property. Therefore, in terms of the decree, the executing court has to execute the decree and it is bound to deliver possession to the decree-holder appellants. The tenant respondents are bound by the decree.

5. Learned counsel for the respondents contended that though this plea was not taken at the trial stage they can be allowed to raise his plea during the execution stage and placed reliance on the aforesaid three decisions of this court as referred to above. It is true that in the case of *Mrs. Dharamshila Lall Vs. Bibi Amna*, and in *Bhagwati Prasad Sah Vs. Radha Kishun Sah and Others*, the tenants were allowed to take the objection that they could be only ejected from the suit premises under the conditions as laid down in Section 11 of the Act, but it is remarkable to note that the decree for ejectment had been passed in those cases before the Act came into force and on account of the retrospective operation of Section 11 of the Act it was held that in spite of the decree of the Civil Court the tenants could not be ejected and the tenants were allowed to raise this plea in execution of the decree on account of the passing of the Act which gave them new rights and privileges.

In the case of (1959 PLR 234) though the tenant was impleaded in the redemption suit against the mortgagee but no relief for possession was prayed against the tenant defendant. According to the terms of the mortgage the mortgagee was authorised to induct a tenant. Therefore, if the mortgagee inducted a tenant that was binding on the mortgagor. In such circumstances though the plea that the tenant defendant could not be ejected from the suit premises in view of the provisions of Section 11 of the Act, was not taken at the trial, he was allowed to resist the claim of the decree-holder for possession of the suit premises in execution of the decree for redemption.

6. In the present case, the mortgagee was not authorised under the terms of the mortgage deed to induct a tenant. In the suit itself, as I have stated above, a

claim was made for possession against the tenant defendants also. The suit was instituted after the commencement of the Act. Therefore, the plea that the tenants could not be ejected save and except in the manner as laid down in Section 11 of the Act could have been put forward in the suit itself. In the instant case, the decision in the case of Hira Lal Gupta 1959 PLR 234 (referred to above) cannot be of any assistance to the respondents.

Moreover, the decision of a Full Bench of this court in Baijnath Prasad Sah Vs. Ramphal Sahni and Another, lays down that the principle of constructive res judicata applies in execution proceedings also. It was pointed out in that case that even when a decree is passed ex parte, it must be deemed to have decided against the defendants those facts which, if raised and established, would have induced the court to dismiss the suit or to pass a different order. Therefore, in my opinion, the principle of constructive res judicata is applicable on the facts and in the circumstances of this case and the tenant defendants having not put forward the defence that they could not be ejected from the suit premises otherwise than in the manner and conditions laid down in Section 11 of the Act, they cannot be allowed to raise this plea at the execution stage.

7. A similar question arose in the case of 1964 BLJR 507 = (Jainarayan Sah and Another Vs. Mt. Surat Kuer and thereafter Mt. Radhika Devi and Others,). The tenant defendants were impleaded in the redemption suit and decree was passed in favour of the mortgagor for possession against, all the defendants. The tenant defendants, raised a plea at the execution stage that they could not be ejected otherwise than under the conditions and in the manner as laid down in Section 11 of the Act. It was held in that case that the tenant, defendants were precluded from putting forward such objection at the execution stage as no such objection was taken in the suit itself and the plea was barred by the principles of constructive res judicata. The case of Hira LAL Gupta 1959 BLJR 234 was also considered in this case and was distinguished. The present case is on all fours with Jainarayan Sah and Another Vs. Mt. Surat Kuer and thereafter Mt. Radhika Devi and Others, and the principle laid down in that case is applicable to the facts and circumstances of this case. Therefore, in my judgment, the courts below were not right in allowing the tenant respondents 1 to 3 putting forward a claim that they could not be ejected from the suit premises.

8. For the reasons stated above, the appeal is allowed with costs throughout, the judgment and order of the courts below are hereby set aside and the objection raised by the tenant defendants is dismissed. The appellants are directed to be put in possession of the suit premises forthwith.