
(2004) 08 AHC CK 0289
In the Allahabad High Court
Case No : F.A.F.O. No. 1384 of 2000

Jagat Narain Jaiswal and Another

APPELLANT

Vs

Tota Ram and Others

RESPONDENT

Date of Decision : 11-08-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, Order 9 Rule 13, 47
Constitution of India, 1950 — Article 227
Uttar Pradesh (Temporary) Control of Rent and Eviction Act, 1947 — Section 3(1), 7(3)

Citation : (2005) 1 AWC 774

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Advocate : V.K.S. Chaudhary, O.P. Misra and R.K. Singh, for the Appellant; P.K. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Prakash Krishna, J.—It is a shocking case.

2. It is unfortunate that although 30 years are going to expire shortly, but the decree holders/respondents have not been able to reap the fruits of the decree and to get the possession over the property in question. The present appeal arises out of proceedings under Order IX Rule 13, C.P.C. Two persons namely, Jagat Narain Jaiswal appellant No. 1 and Amrit Lal Gupta, appellant No. 2 who were impleaded as defendants in the suit being sub-tenants in the Court below filed two separate applications for setting aside the ex parte decree in the Court below. These miscellaneous applications have been decided by a common order dated 2nd of September, 2000.

3. Tota Ram and others instituted Suit No. 175 of 1968 for possession and for recovery of arrears of rent and damages against the defendants. It was pleaded that the plaintiffs are owners and landlords of the premises No. 85/47, Cooperganj, Kanpur. The said premises was originally let out to Sri Chandra Shekhar and Chandra Bhal on monthly rent of Rs. 175. Shri Chandra Shekhar

expired and his sons stepped in his shoes and were impleaded as defendant Nos. 2 and 3. The tenancy was terminated by a registered notice dated 28.12.1967 given u/s 3 (1) (a) of U. P. Act No. 3 of 1947. Shri Chandra Bhal and defendant Nos. 2 to 4 illegally sublet the various portions of the tenanted accommodation to the several sub-tenants and they were impleaded as defendant Nos. 5 to 12. The defendants were served and some of them filed written statement. They contested the suit up to the framing of issues. Thereafter the suit proceeded ex parte and it was ultimately decreed on 24th September, 1974.

4. When the decree was put into execution certain objections u/s 47, C.P.C. were filed by some of the defendants. In due course of time those objections have been rejected by the Court below and the order rejecting the objections u/s 47 of the C.P.C. have attained finality.

5. It appears that faced with this situation two separate applications purported to be under Order IX Rule 13, C.P.C. were filed by the present appellants. The applications for condonation of delay in filing the application for setting aside the ex parte decree were also filed by these persons. The Court below has come to the conclusion that no case for condonation of delay has been made out and the appellants were not prevented by sufficient cause. The appellants were duly served with the summons of the suit and no case for setting aside the ex parte decree has been made out by them.

6. Shri Jagat Narain Jaiswal, appellant No. 1 claims himself to be the proprietor of M/s. Soorajbali Ram and Sons. He filed the application on the allegations that on receiving information from one Shri Vinay Dixit, the legal heir of Smt. Putta Devi (defendant No. 1) that summons has been published in a newspaper, dated 3.2.1999, for appearance in Execution Case No. 3 of 1987, got inspected the file of the case. From the inspection of the file of the suit he learnt that M/s. Soorajbali & Co. has been impleaded, a firm carrying on the business at premises No. 85/47 as defendant No. 9. The name of his firm is Soorajbali Ram and Sons and earlier to this the name of firm was Sumer Ram Sooraj Bali Ram. In the next sentence in paragraph No. 6 (B) of the affidavit it has been stated that M/s. Soorajbali Ram and Sons was a partnership firm till 18th December, 1993 and after death of the partner this firm became proprietorship firm. In subsequent paragraphs it has been stated that no summons under Order V, C.P.C. were issued either to him or to M/s. Soorajbali Ram and Sons or even Soorajbali and Co., which is defendant No. 9 in the suit. Therefore, he could not get information of the suit. In paragraph 10 of the affidavit it has been stated that his firm has been a sub-tenant of shop in question namely shop No. 85/47 for a monthly rent of Rs. 65 with the consent and knowledge of the landlord. On these facts he prayed that the ex parte decree against him be set aside and delay in filing the application for setting aside the ex parte decree be condoned.

7. Shri Amrit Lal Gupta, appellant No. 2 has filed the separate application for setting aside the ex parte decree and for condonation of delay in its filing on the similar lines except that he was neither a tenant nor a sub-tenant. It has been

stated that in the plaint the defendant No. 11 has been described as Bihari Lal Amrit Lal, He came out with the case that neither he nor his firm has ever been the tenant of the plaintiff in premises No. 85/47, Cooperganj, Kanpur. He put forth a plea that his firm is a licensee of Nazool plot No. 26 and has been regularly paying the rent to the department. He took on licence a shop from Nazool Department in the year, 1978 and is still in possession of the same as lawful tenant and up to date rent has been paid.

8. These applications were contested by the plaintiff/decree holders on the pleas that these defendants were validly served and had full knowledge about filing of the suit and the decree passed therein. The applications are mala fide and have been filed only to delay the execution of the decree. They have no right to maintain these applications as they were the sub-tenants. The objections of the Chief tenants u/s 47, C.P.C. having been rejected, these objections have been filed in collusion with the Chief tenants.

9. The court below by its judgment and order dated 2nd September, 2000, has come to the conclusion that the allegation that the applicants acquired knowledge through Vinay Dixit could not be substantiated, On the other hand, Vinay Dixit is legal representative of Smt. Putta Devi, who had filed written statement in the suit and at whose instance the objections u/s 47, C.P.C. being Misc. Case No. 47 of 1988 has been dismissed on 16.5.1994. The interest of the present applicants is the same as that of other judgment debtors whose objections have been rejected.

10. Heard Shri V.K.S. Chaudhary, learned senior counsel for the appellants and Shri P.K. Sinha, learned counsel for the respondents.

11. Shri Chaudhary, learned senior counsel for the appellant submitted that in view of the changed circumstances, the decree cannot be executed. Elaborating his argument it was submitted that the appellants were not the parties in the suit and therefore, they cannot be ejected in the execution of the decree passed in Suit No. 175 of 1968. In the alternative if it is found that they were parties to the suit the decree is not executable as by lapse of time the topography of the land in question has been changed. During the course of argument he has placed reliance upon the report of Court Amin, dated 20.3.2004, issued by the executing court in the execution proceedings relating the decree in question. It was submitted that there "used to be the Railway line in Cooperganj, Kanpur. By explosion of population in Kanpur City the said Railway line has been disappeared and presently the decree holder cannot be put into possession with respect to the boundaries of premises No. 85/47, Cooperganj, Kanpur, as described in the plaint.

12. In contra, Sri P.K. Sinha, learned counsel for the decree holder submitted that no interference in appeal by this Court is called for. The present applications are wholly mala fide and vexatious as the judgment debtors are in league with each other. Being unsuccessful in the objections u/s 47, C.P.C. the present

applications have been got filed by them. The applicants being the subtenants have no independent right or a better right than the Chief tenants. He further submitted that the present appeal is not maintainable. Firstly, two separate appeals should have been filed by them. Secondly, the Court below has refused to condone the delay in filing the application under Order IX Rule 13, C.P.C. The said order is not appealable under Order XLIII Rule 1 (d) of the Civil Procedure Code.

13. First I will take the case as set up by Jagat Narain Jaiswal, appellant No. 1 for setting aside the ex parte decree, passed in Suit No. 175 of 1968. He has sought setting aside of the ex parte decree principally on the ground that no summons under Order V of the CPC was issued either to him or to M/s. Soorajbali Ram and Sons, or even Soorajbali and Co. The defendant against whom an ex parte decree has been passed may apply to set aside the said decree (i) the summons was not duly served ; (ii) that he was prevented by any sufficient cause for appearing when the suit was called on for hearing. An ex parte decree thus, can be set aside only upon either of the grounds mentioned above. Shri Chaudhary, learned senior counsel laid much emphasis in his argument that since the decree is not executable in view of the report of the Court Amin, dated 20.3.2004, the decree should be set aside. I find no substance in the said argument. The said argument is not at all relevant for the purpose of disposal of an application under Order IX Rule 13, C.P.C. These objections are frivolous and worthless. Admittedly, the objections u/s 47, C.P.C. have been rejected by the court below long back. I find no substance in the arguments of the learned senior counsel that the topography of the property covered under a decree having been changed the decree is not executable. It is wrong to say that topography has been changed. There is no material to show that the property under decree is not identifiable on the spot. In the plaint the property number is given as 85/47, Cooperganj, Kanpur. The boundaries of premises No. 85/47, Cooperganj, Kanpur, have been described as follows :

East -- Public Road West -- public Road North -- House No. 85/46 South -- House No. 85/48

14. The decree holder has to be put in possession over the aforesaid premises No. 85/47 as described in the plaint. There is no evidence worth name on record to show that there has been any change in the boundaries of premises No. 85/47, Cooperganj, Kanpur.

15. Even assuming for the sake of argument that due to lapse of time certain developments have taken place in the area, that will not nullify the decree. If the said argument of the learned counsel is accepted the same thing may happen when a fresh decree is passed and it may become a never ending process.

16. What is more significant is that no such plea was raised in the application filed under Order IX Rule 13, C.P.C. giving rise to the present appeal. This plea has been raised for the first time during the course of argument and is not

tenable. The basis of the argument is the report of Court Amin of the year 2004. The said report was obviously, not there when the impugned order was passed in the year 2000. It is clear that the appellants are taking shifting stand to somehow remain stick with the premises in question, notwithstanding the fact that the decree for eviction has been passed against him as way back as on 24th September, 1974.

17. The appellant No. 1 in paragraph 10 of his affidavit filed in support of the application for setting aside the ex parte decree has admitted that his firm has been a sub-tenant of shop No. 85/47 on a monthly rental of Rs. 65 with the consent and knowledge of the landlords. The said paragraph is quoted below :

"The deponent's firm has been a sub-tenant of the shop in 85/47 for a monthly rental of Rs. 65 with the consent and knowledge of the landlords and the consent was given by the then landlord to the deponent's father and to the firm M/s. Chandra Shekhar Chandra Bhal and is also at present a tenant. The tenancy of the deponent's firm has not been determined till date."

18. Thus, the appellant has admitted the sub-tenancy of the shop in dispute. Although he came out with the case that the sub-tenancy was with the consent of the landlord. The said sub-tenancy on the face of it is illegal and will not confer any right on appellant No. 1. Under the provisions of U.P. (Temporary) Control of Rent and Eviction Act, 1947, sub-letting is completely barred u/s 7(3) of the aforesaid Act. It prohibits a tenant to sub-let any portion of the accommodation in his tenancy except with the permission in writing of the landlord and that of the District Magistrate previously obtained. Taking the averments of para 10 of the affidavit on their face value, there is no allegation that the permission for sub-letting was obtained (i) in writing from the landlord (ii) from the District Magistrate. Therefore, Jagat Narain Jaiswal has got no case even on merits.

19. It is fairly well-settled that under the ordinary law, as held by the Apex Court in Importers and Manufacturers Ltd. Vs. Pheroze Framroze Taraporewala and Others, a decree for possession passed against a tenant in a suit for ejectment is binding on a person claiming title under or through that tenant and is executable against such persons whether or not he was or was not a party to the suit. The non-joinder of such a person does not render a decree any less binding on him. In this sense, therefore, that he is not a necessary party to an ejectment suit against the tenant.

20. A Division Bench of this Court in the case of Mohan Lal Garg v. Suresh Chand Jain and Ors. 1994 (1) ARC 211, it has been held that a decree as against a lease binds under tenant also provided the under tenant has no right independent of the right of the lessor meaning thereby that if a sub-tenant claims a right independent of the tenant then only in such cases, such a decree would not be binding.

21. In the back drop of the legal position stated above, the appellant No. 1 who

claims himself to be a sub-tenant of the property in question is bound by the ex parte decree passed against the chief tenant.

22. On the question of service of summons on the appellant No. 1, the Court below has recorded a finding that from the endorsement of the Presiding Officer on the order sheet, dated 20.11.1968, it is clear that all the defendants except defendant Nos. 1 to 3 were served on that date. The said endorsement made by the Prescribed Authority has not been challenged by appellant No. 1 in any manner. In view of this it is fully established that the appellant No. 1 was duly served with the summons of the suit and as such the application has been rightly rejected by the Court below.

23. An attempt has been made by appellant No. 1 to take advantage from the fact that in the plaint the defendant No. 9 was described as M/s. Soorajbali and Company, while according to him it should be Soorajbali Ram and Sons. A specific query was put by me to Shri V.K.S. Chaudhary, learned senior counsel as to substantiate the plea that the name of the firm was Soorajbali Ram and Sons at the relevant time. He could not refer any evidence in support thereof. It was for the appellant No. 1 to prove by the evidence that the name of the firm was Soorajbali Ram and Sons. The appellant No. 1 having failed to discharge the said burden, it cannot be said that defendant No. 9 was not correctly described in the array of the parties.

24. Assuming for the sake of argument that the name of the firm was M/s. Soorajbali Ram and Sons it would be a case of mere mis-description of defendant No. 9. The address of defendant No. 9 has been correctly given in the plaint. It is not the case of appellant No. 1 that there is another firm in the name of M/s. Soorajbali and Company in premises No. 85/47. Therefore, I am of the view that the summons of the suit was duly served on the appellant. This is further fortified from the facts that the Presiding Officer has held the service sufficient on the appellant No. 1 by the order dated 20.11.1968 and the said entry in the order sheet has not been disputed by appellant No. 1.

25. Another argument raised by Sri Chaudhary, learned senior counsel was that besides the tenancy appellant No. 1 is also a licensee of Nazool land in plot No. 26, Cooperganj, Kanpur, as stated in para 9 of the affidavit. He submitted that appellant No. 1 has applied for conversion of Nazool land into free hold land before the District Magistrate and has made the requisite deposit. This was disputed by the learned counsel for the decree holder. But the said controversy is not at all germane for the disposal of the application to set aside the ex parte decree because appellant No. 1 has claimed himself as a licensee of the Nazool land in plot No. 26, which has no concern with the property in question. However, it may be noticed that on record there is nothing to show that a licence has ever been granted to appellant No. 1 with respect to Nazool land in plot No. 26, Cooperganj, Kanpur.

26. In the result, I find no illegality in the order of the Court below in rejecting

application filed by the appellant No. 1 to set aside the ex parte decree.

The case of Amrit Lal Gupta, (appellant No. 2) :

27. Amrit Lal Gupta, appellant No. 2 also raised identical pleas as raised by appellant No. 1, except that he has denied that either he or his firm was ever a tenant of premises No. 85/47, Cooperganj, Kanpur. He has not disputed that he is proprietor of M/s. Bihari Lal Amrit Lal, defendant No. 11 in the suit. He came out with the case that he is licensee of Nazool plot No. 26 and has been regularly paying the rent to the department. The relevant para 9 of his affidavit is quoted below :

"That the suit framed against the deponent's firm is not maintainable. The plaintiff was wrongly impleaded with the deponent's firm as a party to the above case. The deponent or his firm has never been the tenant of the plaintiff in premise No. 85/47, Cooperganj, Kanpur, nor is their tenant. It appears that the deponent's firm is a licensee in Nazool land plot No. 26 and has been regularly paying the rent to the department. The proceedings relate to the year 1968 and at that time the deponent's firm was having its office at 82/10 Cooperganj, Kanpur, which has no concern with the plaintiff. In the year 1978 the deponent took on licence a shop from Nazool Department and still in possession of the same as lawful tenant and up to date rent has been paid."

28. The plea of appellant No. 2 Amrit Lal Gupta that he took a licence in Nazool plot No. 26 and has been regularly paying the rent to the department is without any basis. Shri Chaudhary, learned senior counsel for the appellant was specifically asked as to whether any document in support of the aforesaid plea was filed by appellant No. 2, before the Court pr not. In reply he submitted that even if no document has been filed by the appellant No. 2 to show the grant of licence of Nazool land, it will not make any difference. Thus, he evaded replying the query. He submitted that he has denied the tenancy of the premises in question and, therefore, the decree cannot be executed against him. If appellant No. 2 is not in occupation of any portion of premises No, 85/47, Cooperganj, Kanpur, I fail to understand how he would be suffered, if the decree for possession is executed. It is not the case of the appellant No. 2 that he has any right, title or interest over the premises No. 85/47, Cooperganj, Kanpur.

29. In the earlier part of this judgment, while considering the case of appellant No. 1, I have found that the summons of the suit were served on him vide entry made by the Court in the order sheet, dated 26th November, 1968. There is endorsement by the Presiding Officer on the order sheet dated 20.11.1968 that all the defendants except defendant Nos. 1, 2 and 3 were served on that date. This entry has not been disputed by appellant No. 2 as incorrect. Therefore, I am of the view that appellant No. 2 was duly served with the summons of the suit.

Maintainability of the appeal :

30. Learned counsel for the respondent challenged the maintainability of appeal

and submitted that since the Court below has refused to condone the delay, in filing the appeal for setting aside the ex parte decree, the present appeal is not maintainable under Order XLIII Rule 1 (d) of the Civil Procedure Code. The appellants came out with the case that they came to know through Sri Vinay Dixit, legal representative of Smt. Putta Devi that summons was published in Kanpur Ujala, Newspaper, dated 3.2.1999, for appearance in Execution Case No. 3 of 1987 on 18.2.1999. They appeared before the executing court on 18.2.1999. The case was adjourned for 13.3.1999 and thereafter to 13.4.1999 and it was again adjourned to 4.9.1999. The file was got inspected on 16.4.1999 and thereafter the application was filed on 4.5.1999. The Court below has disbelieved the assertions made on behalf of the appellants as no affidavit of Vinay Dixit was filed to prove these facts. Vinay Dixit has not filed any affidavit that he informed the appellants about the summons published in the newspaper. The Court below has rightly taken into consideration that after disposal of the objections u/s 47, C.P.C. the notice was sent to the present appellants in Execution Case No. 3 of 1987. There is endorsement of the process server that he went to the disputed premises on 11.1.1988 for service. The persons present there refused to sign the notice after reading it on the pretext that the name of the firm has not been properly written. The Court below has rightly come to the conclusion that the applicants had the knowledge in the year 1988 about the judgment and decree passed in Original Suit No. 175 of 1968 and filing of the application after about eleven years is without any explanation. The delay in filing the application for setting aside the ex parte decree has not been properly explained by the appellants ; therefore, I find no error in the order of the court below on this point. Learned counsel for the appellant could not point out any error in the aforesaid finding of the court below that the appellants acquired the knowledge of the ex parte decree in the year 1988 itself. According to the own showing of the appellants, the applications were filed after inspection of the record, but they could not say anything disputing the aforesaid endorsement of the process server. There is not even a whisper in the application disputing the correctness of the aforesaid endorsement of the process server. Thus, the finding of the court below that the appellants had acquired knowledge of the ex parte decree in the year 1988 itself is on terra-firma. The applications to set aside the ex parte decree are clearly barred by time.

31. The matter was heard on merits at length. I find that there is no error in the order of the court below. Therefore, it is not necessary for me to adjudicate as to whether the present appeal is maintainable or not. The point is left open.

32. Before parting with the appeal it is necessary to issue certain directions to the court below for execution of the decree. It is unfortunate that the court below has not been able to put the decree holders in possession over the premises in suit over a period of about 30 years, due to dilatory tactics adopted by the judgment debtors. The delay erodes the faith of people in the judicial system prompting them to take recourse to extra-judicial methods to recover possession over their property. It has come on record that the objections u/s 47,

C.P.C. have been dismissed on 16.5.1994 being Misc. Case No. 46 of 1988. I have been informed by Sri P. K. Sinha, learned counsel for the decree holder that the said order has attained finality. In view of this fact the executing court shall take up this matter on priority basis and the proceedings should go on day-to-day basis. The executing court shall not entertain adjournment applications filed by the judgment debtors except in extraordinary circumstances. The execution should proceed on day to day basis in accordance with law. The decree is in two parts. It consists of ejectment of the defendants and also for recovery of Rs. 6,474 as arrears of rent of Rs. 771.50 as Bhumi and Bhawan Kar and Rs. 175 as damages per month pendente lite and future. The payment of money part under the decree should be enforced by attachment and sale of the movable and immovables of the judgment debtors, in accordance with law, without any further delay. To avoid the frivolous and vexatious objections and hindrances in the execution of decree, the executing court may insist to deposit at least the decretal amount up to date, as a condition precedent for the entertainment of objections if any. The executing court shall see that the decree is executed, preferably by the end of November, 2004. The executing court shall also send a compliance report of this judgment. If the executing court is - unable to execute the decree within the aforesaid period, it shall submit a report along with the reasons for its failure.

33. The office is directed to return the record of the case to the Court concerned forthwith, but not later by seven days from the date of the judgment.

34. The above directions have been issued in exercise of powers conferred under Article 227 of the Constitution of India as clarified by the Apex Court in Surya Dev Rai Vs. Ram Chander Rai and Others, , Smt. Shail v. Manoj Kumar and Ors., decided on 29.3.2004.

35. In the result there is no force in the appeal and the appeal is liable to be dismissed with costs. Each appellant shall pay Rs. 5,000 as costs to the decree holders. The costs shall be deposited by the appellants within the period of one month before the executing court.

36. The appeal is dismissed with costs of Rs. 5,000, payable by each appellant.