
(1998) 12 RAJ CK 0011
In the Rajasthan High Court
Case No : Civil First Appeal No. 22/98

Prabhudayal

APPELLANT

Vs

Susheel Kumar and Others

RESPONDENT

Date of Decision : 04-12-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 103, Order 21 Rule 97

Citation : (2000) 1 RLW 277 : (1999) 2 WLC 555 : (1999) 1 WLN 30

Hon'ble Judges : Arun Madan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Arun Madan, J.—This first appeal has been preferred by Prabhu Dayal (landlord) defendant-appellant against the judgment & decree dated 8.10.1997 passed by the learned Additional District Judge No. 3. Jaipur City, Jaipur by which Civil Suit for declaration filed by Sushil Kumar (alleged tenant) plaintiff- respondent has been decreed.

2. The facts giving rise to this appeal in a narrow compass are that suit for eviction was filed by appellant Prabhudayal (landlord) against Satyanarain and Omprakash, who are arrayed as proforma defendants-respondents Nos. 2 and 3 in the present appeal for their eviction from a shop/showroom which was let out by the appellant to the latter, situated at Plot No. 4, near Truck Stand, Transport Nagar, Jaipur. In that eviction Suit No. 129/93 the case of the appellant was that on 1.7.1980 as per rent note dated 10.7.1980 he had let out the suit premises to Satyanarain and Omprakash who started business of automotive parts under the name and style of M/s Delhi Auto Agencies. It was agreed between the parties that monthly rent of the shop premises shall be paid by Sushil Kumar respondent No. 1. who was not arrayed as defendant to the eviction suit by the appellant landlord. In that suit, eviction was sought on the ground of default in payment of arrears of rent w.e.f. 1.8.1992 and so also the reasonable and bona fide necessity was pleaded by the landlord on the assertion that the suit premises

were required for business of Anil Kumar and his brother Sushil Kumar. Another ground asserted was that the tenants have closed the suit shop as they were not using the same for more than six months. During the proceedings in the eviction suit, Sushil kumar (respondent-plaintiff herein) moved an application under Order 1 Rule 10 C.P.C. on the assertion inter-alia that he has been doing business as one of partners of M/s Delhi Auto Agency ever since the inception of the Firm's tenancy in suit premises on whose behalf, the rent was being paid through cheques under his signatures, and that on 5.12.1980, the partnership stood dissolved culminating into formation of a new Partnership Firm established by him and since then he has been proprietor of M/s Delhi Auto Agency having been in possession of the suit shop as tenant but a forged rent note has been executed by defendants Satyanarain and Omprakash in favour of the landlord and therefore, he was a necessary party to the eviction suit. Reply to the aforesaid application of Sushil Kumar was filed by the landlord. The trial Court dismissed the said application under Order 1, Rule 10 CPC by order dated 15.9.1984 (Ex. a/4) by arriving at the conclusion that as is evident from the partnership deed dated 12.8.1980, the suit sho was let out by the landlord w.e.f. 1.7.1980 to the firm through its only two partners namely; Satyanarain and Omprakash and further from the rent note it was borne out that only two persons were described as partners of M/s Delhi Auto Agency, therefore, they being partners had only to be dealt with as tenants, and there was no description of third person and hence the contention of Sushil Kumar (respondent No. 1) was that as he was partner of the firm he had derived tenancy rights on the basis of the said deed and a right to continue as tenant in the suit premises being partner, was rejected outright by the said Court. In the order (Exh.A/4) it was observed that since Sushil kumar (plaintiff herein) had no right or locus-standi to contest the eviction suit, no legal right will float in his favour as regards the suit premises and consequently application of Sushil Kumar under Order 1 Rule 10 CPC was dismissed as being not maintainable since he was not a necessary party to be impleaded to the eviction suit. Against the said order (Exh.A/4) Sushil Kumar preferred revision petition (S.B. Civil revision Petition No. 1395/94) which was dismissed by this court's order dated 6.12.1994 being not maintainable on merits. However, the Suit No. 129/93 for eviction filed by appellant Prabhu Dayal was decreed against Omprakash and Satyanarain by the trial Court by judgment & decree dated 4.2.1995 (Exh. A/2). This decree attained finality because none of the parties affected by it had challenged the same by way of an appeal.

3. Thereafter, Sushil Kumar plaintiff (respondent No. 1 herein) filed an eviction suit against the appellant on afore stated grounds for declaration and permanent injunction on 7.2.1995 asserting therein that rent note dated 10.7.1980 being void be declared to be inoperative against him and thereby he being in possession of the suit premises as a lawful tenant of the firm M/s Delhi Auto Agency cannot be dispossessed without due process of law. The present appellant being only contesting defendant No. 2 denied the case of the plaintiff asserting inter-alia that the plaintiff (respondent No. 1) was not tenant of the

suit premises which was not let out to M/s. Delhi Auto Agency but to Satyanarain and Omprakash in their individual personal capacity. It had been asserted in written-statement by the appellant that from the deed of dissolution of partnership of M/s. Delhi Auto Agency produced by the plaintiff it is evident that the partnership constituted on 17.7.1980 under the deed executed on 12.8.1980 stood dissolved on 5.12.1980, thereby plaintiff Sushil Kumar could not have derived any tenancy rights on the basis of the alleged partnership and that apart, even if a decree for eviction against one partner of the Firm to whom suit premises had been let out is passed, then all partners of the said Firm are bound by decree of eviction.

4. The trial Court framed eight issues. Thereupon, the evidence was led by both the parties to substantiate their respective claims in their pleadings. After hearing the parties, the learned trial Court decreed the plaintiffs suit by its order dated 8.10.1997 and issued declaration by way of injunction that plaintiff Sushil Kumar being partner of M/s Delhi Auto Agency and after dissolution of its partnership having become its sole proprietor, was tenant of the appellant (landlord) in the suit premises and thereafter, the appellant has got no right to challenge the tenancy of Sushil Kumar. Hence, being aggrieved by the impugned decree and judgment the appellant-defendant No. 1 has come up by way of this first appeal.

5. After having heard the learned Counsel for the parties and perused the material on record, I find the following questions arising for consideration in the present appeal-

(1) Whether under dissolution deed dated 5.12.1980 (Exh. A/6) by which the original partnership of M/s Delhi Auto Agency constituted on 12.8.1980 between Om Prakash, Satyanarain and Sushil Kumar by Exh. A/2 was dissolved would confer by itself ipso-facto any tenancy rights in favour of Sushil Kumar (plaintiff) on the ground that having become Sole proprietor of the reconstituted Firm M/s Delhi Auto Agency, he had derived legal right to continue as tenant of the appellant in the suit premises?

(2) Whether in the absence of any evidence of reconstitution of the Firm M/s Delhi Auto Agency with Sushil Kumar as its Sole Proprietor, the claim of Sole proprietorship could be taken into consideration by the trial Court so as to issue declaration in his favour on the strength of his having derived legal right of tenancy which was originally between Prabhu Dayal (appellant landlord). Satyanarain and Om Prakash as tenants notwithstanding by Order Ex. A.4 Sushil Kumar's application under Order 1. Rule 10 CPC for impleadment stood decided and rejected on merits to the eviction suit?

(3) Whether mere acceptance of rent by itself by the landlord Prabhudayal (appellant) on behalf of M/s Delhi Auto Agency which stood dissolved, creates/ vests any tenancy rights in favour of respondent Sushil Kumar more particularly, after dissolution of the original partnership firm culminating into sole Proprietor

Firm, such tenancy rights stood finally determined w.e.f. 5.12.1980 and in that event, whether fresh evidence of tenancy was required to be looked into by the trial Court?

(4) Whether Sushil Kumar was entitled as of right to seek declaration from the trial Court as tenant of the appellant notwithstanding the evidence on record with regard to a decree of eviction (Exh.A/2) dated 4.2.1995 having been lawfully passed by the competent civil court to which Sushil Kumar was neither a party nor permitted to be impleaded as party, could be brushed aside by a civil court so as to frustrate the decree lawfully passed?

6. Having considered the rival contentions of the parties and legal aspects of the matter I am prima facie of the view that the impugned decree in suit for permanent injunction and declaration is not sustainable in the eyes of law. As regards first contention of the appellant that the plaintiff had sought declaration as a tenant in respect of the suit shop which was let out to him by the present appellant as well as other defendant Nos. 2 and 3 for carrying on business in the name and style of M/s. Delhi Auto Agency under the rent note executed by defendant Nos. 2 and 3 on 10.7.1980 which is not effective so far as the plaintiff is concerned. I am of the view that since original tenancy was on the basis of duly executed partnership between Om Prakash and Satyanarain under Exh. A/4 dt. 12.8.1980, which stood dissolved on 5.12.1980 vide dissolution deed Exh. A/6, the question as to Sushil Kumar having derived any tenancy rights on the strength of the said dissolution deed would not arise in absence of any cogent, consistent and reliable evidence with regard to Sushil Kumar having derived sole proprietorship right in M/s Delhi Auto Agency unless and until he was able to administer before the trial Court that he had become sole proprietor of newly constituted firm M/s Delhi Auto Agency in his own right and that the present appellant had attorned his tenancy to continue as his lawful tenant and prior to the said attornment by the landlord, a notice by way of an intimation was duly served on the landlord-appellant that he had accepted the attornment of tenancy rights in favour of Sushil Kumar and in the event of refusal by the landlord to attorn the tenancy of Sushil Kumar (plaintiff) notwithstanding his alleged tenancy as Sole proprietor of M/s Delhi Auto Agency, he had to get his tenancy rights determined by a competent court and merely in the absence of any determination of tenancy rights between the parties. I am of the view that no right, or interest could be created in favour of Sushil Kumar as tenant of newly constituted Proprietorship Firm and he was not entitled to seek any declaration from the civil court so as to frustrate the execution of an eviction decree lawfully passed against respondents Satya Narain & Om Prakash, to which he was to a party. There is no iota of evidence to suggest that Prabhudayal had either by way of oral or documentary evidence attorned the tenancy rights of Sushil Kumar by virtue of acceptance of the rent directly from Sushil Kumar as Sole proprietor of the new Firm or even in his individual capacity, since what is relevant to be examined on due appreciation of the evidence of both the parties is not any evidence of tenancy prior to the dissolution of original partnership firm which

stood dissolved w.e.f. 5.12.1980, but what Sushil Kumar was required to have established before the trial Court was evidence of tenancy either by way of execution of fresh rent note in his favour by landlord or by way of acceptance of rent from Sushil Kumar or even on account of refusal by him with regard to acceptance of rent, it was open to Sushil Kumar (alleged tenant) to have sought permission of the Rent Controller/Competent Court under the rent control legislation (Rajasthan premises (Control of rent & eviction) Act. 1950) that he was tenant of the landlord (appellant) on reconstitution of Proprietor Firm M/s Delhi Auto Agency and the appellant was not justified in refusing to accept the rent or to attorn him as tenant and on refusal to attorn the latter as newly constituted proprietorship Firm. Hence he was left with no option but to resort to proceedings for determination of tenancy as also the rent as required by the Rent Control legislation in order to escape consequences of his eviction from the suit premises, which admittedly has not been done in the instant case. Therefore, irresistible conclusion which emerges as a result of the above discussion is that the plaintiff Sushil Kumar as proprietor of M/s Delhi Auto Agency had no legal right vested in him to have sought declaration from the competent court by restraining appellant from dispossessing him from the suit premises on the basis of the impugned rent note executed by Satyanarain and Omprakash original tenants of landlord Prabhudayal (appellant) nor the Civil Court in the facts and circumstances of the case was justified to entertain the instant suit by decreeing the same in favour of Sushil Kumar by the impugned judgment and decree dated 8.10.97 so as to frustrate the decree in eviction suit lawfully passed against respondent tenants namely Om Prakash and Satya Narain and which had attained finality having not been challenged by way of an appeal by the said tenants and had remained unexecuted till date.

7. I am further of the view that Sushil Kumar admittedly was stranger to the decree for eviction sought by the landlord Prabhudayal against Omprakash and Satyanarain and as the decree dated 4.12.1995 (Exh. A/2) in eviction suit No. 129/93 has attained its finality on having not been challenged in any appeal preferred by either of the affected parties, the decree holder Prabhu Dayal (appellant landlord) on the strength of the said decree was entitled to-execute the same against Sushil Kumar and Om Prakash who alone could have resisted its execution in accordance with the provisions contained in Order 21 Rules 97, 101, 103 and 104 CPC. by filing their objections, if any, and nonelse. Rules 97, 101, 103 and 104 of Order 21 CPC provides, as under-

Resistance or obstruction to possession of immovable property.

97. (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) Where any application is made under Sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein

contained.

Question to be determined.

101. All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application, and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

Orders to be treated as decrees.

103. Where any application has been adjudicated upon under Rule 98 or Rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.

Order Under Rule 101 or Rule 103 to be subject to the result of pending suit.

104. Every order made under Rule 101 or Rule 103 shall be subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such order is made, if in such suit the party against whom the order under Rule 101 or Rule 103 is made has been sought to establish a right which he claims to the present possession of the property.

8. From a perusal of the above provisions, it is evident that the right to resist execution of the decree lawfully passed by the competent court is only open to a person, who has right, title or interest in the property question arisen between the parties to a proceeding on an application having been moved in accordance with requirements under Rules 97 or 99, CPC, either the parties to the proceedings or their representatives have a right to resist through objections provided they are relevant and germane to the questions in controversy to be adjudicated upon by the Civil Court and the said question on objections being filed by the objector, having a right to resist the execution of decree lawfully passed, alone has a right to claim determination of such questions by the Court dealing with the objection petition which may either be filed by a decree holder or a party in possession of the suit property and the said questions are mandatorily required to be determined by the Court dealing with the execution of the decree and such questions even if required to be adjudicated by way of objection of the objector cannot be made subject matter of adjudication so as to frustrate the execution of a decree lawfully passed by the competent civil court by seeking declaration in a separate suit. The statutory requirements of law postulate that all, questions relating to the execution, discharge or satisfaction of the decree including questions relating to the right, title or interest in the suit property arising between the parties to a proceeding on an application moved by the decree holder Under Rules 97 or 99 of Order 21, CPC which are relevant to the adjudication of the said application shall be determined by the Court

executing the decree as per requirements of Rule 101 of Order 21, CPC and not by way of a separate suit as has been erroneously done in the present case in blatant disregard of the statutory provisions of law as aforesaid, which are binding on competent civil court and which the trial Court should have taken judicial notice of before decreeing the plaintiffs suit giving rise to the present first appeal. Having failed to do so, in my considered opinion, the impugned decree deserves to be quashed and set aside by this Court.

9. I find support from the observations of the Apex court in *Brahmdeo Chaudhary, Adv. Vs. Rishikesh Prasad Jaiswal and another*, which are quoted herein below -

5. In short, the aforesaid statutory provisions of Order XXI lay down a complete code for resolving all disputes pertaining to execution of decree for possession obtained by a decree holder and whose attempts at executing all said decree meet with rough weather. Once resistance is offered by a purported stranger to the decree and which comes to be noted by the Executing Court as well as by the decree holder the remedy available to the decree holder against such an obstructionist is only under Order XXI, Rule 97 Sub-rule (1) and he cannot bypass such obstruction and insist on re-issuance of warrant for possession under Order XXI. Rule 35 with under Order XXI, Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the Executing Court it is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order XXI, Rule 99, CPC and pray for restoration of possession. The High Court by the impugned order and judgment has taken the view that the only remedy available to a stranger to the decree who claims any independent right, title or interest in the decretal property is to go by Order XXI, Rule 99. This view of the High Court on the aforesaid statutory scheme is clearly unsustainable. It is easy to visualise that a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for and interest in the decretal property even after losing possession as per Order XXI, Rule 99. Order XXI, Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree holder. While Order XXI, Rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest...the interest of the judgment debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of Order XXI and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before it if he is vigilant enough to raise his objection and obstruction before the

warrant for possession gets actually executed against him. With respect the High Court has totally ignored the scheme of Order XXI, Rule 97 in this connection by taking the view that only remedy of such stranger to the decree lies under Order XXI, Rule 99 and he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree holder in the execution proceedings. The view taken by the High Court in this connection also results in patent breach of principles of natural justice as the obstructionist who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is actually executed, would be told off the gates and his grievance would not be considered or heard on merits and he would be thrown off lock, stock and barrel by use of police force by the decree holder. That would obviously result in irreparable injury to such obstructionists whose grievance would go overboard without being considered on merits and such obstructionist would be condemned totally unheard. Such an order of the Executing Court, therefore, would fail also on the ground of non compliance with basic principles of natural justice. On the contrary the statutory scheme envisaged by Order XXI, Rule 97, CPC as discussed earlier clearly guards against such a pitfall and provides a statutory remedy both to the decree holder as well as to the obstructionist to have their respective say in the matter and to get proper adjudication before the Executing Court and it is that adjudication which subject to the hierarchy of appeals would remain binding between the parties to such proceedings and separate suit would be barred with a view to seeing that multiplicity of proceedings and parallel proceedings are avoided and the gamut laid down by Order XXI, Rules 97 to 103 would remain a complete code and the sole remedy for the concerned parties to have their grievances once and for all finally resolved in execution proceedings themselves.

(Emphasis added)

10. In support of his contentions, the learned Counsel for the respondent placed reliance upon the decisions in (1) *Murli Dhar v. Chuni Lal* 1969 RCR 563 (SC). (2) *Smt. Saraswati Devi v. L. Gian Chand* 1970 RCR 874 (Del) (DB). (3) *Agya Wati v. Hira Singh* 1985 (2) RCR 376. (4) *Asha Iron Traders v. Ahmed Bhai* 1988 (2) RCR 376 . (5) *Niranjan Kumar and Others Vs. Dhyan Singh and Another*, (6) *A.S. Sulochana Vs. C. Dharmalingam*, , and (7) *Raunak Ram Vs. Pishori Singh*, . I have examined the ratio of the aforesaid decisions, which are neither attracted nor applicable to the facts and circumstances of the case keeping in view the controversy involved in this first appeal in the light of the statutory provisions of Order XXI and the gamut laid down by Order XXI, Rules 97 to 103, CPC, discussed above and the dictum of law enunciated by the Apex Court in *Brahmdeo Chaudhary's* case (supra), quoted above.

11. That apart, in the absence of any cogent and reliable material on record in the suit giving rise to the present appeal as to the creation of fresh tenancy in favour of plaintiff Sushilkumar by the present appellant (landlord), no right, title

or interest arises in favour of the plaintiff with regard to the suit premises and moreso on the face of the decree having been lawfully passed by the trial Court in the eviction suit, which remains unexecuted till date in view of the declaration having been sought by the plaintiff, and on the said suit having been decreed, the appellant landlord has been deprived of his rights/ fruits of the decree lawfully passed against the respondent/ judgment debtors, who are bound by the said decree. I am further of the opinion that the very purpose of passing a decree by competent civil court in favour of the appellant would be set at naught, if the same is allowed to be frustrated or pre-empted by virtue of an order obtained by respondent No. 1 plaintiff in declaratory suit giving rise to the present appeal, since if the same is permitted to be done then any party, who is aggrieved to the decree lawfully passed against the judgment debtor would make every possible attempt to get the same frustrated by not allowing its execution affected and by raising obstruction, which the legislature in its wisdom had never intended to be done in the light of the provisions contained under Order 21, Rules 91 to 103, CPC. The Apex Court in its decision in *Brahmdeo Chaudhary's* case (supra) has also highlighted this vital aspect of the matter, which should invariably be taken into consideration by any civil court before granting any relief including declaration under the Code of Civil Procedure, which aspect of the matter has not been taken by the learned trial Court before decreeing the present suit in favour of the plaintiff respondent No. 1.

12. In my considered opinion, the said decree of eviction deserves to be lawfully executed by having resort to the proceedings or the gamut of law laid down by Order XXI, Rules 97 to 103, CPC. discussed above in the light of the dictum of law enunciated by the Apex Court in *Brahmdeo Chaudhary's* case (supra) as the sole remedy for the concerned parties to have their grievances once and for all finally resolved in execution proceedings themselves and not by way of initiating proceedings arising out of a declaratory suit giving rise to this first appeal because remedy by way of instituting a separate suit is barred with a view to avoid the multiplicity of parallel proceedings. Thus, it shall be open to the decree holder to resort to such recourse as may be available to him for getting the decree lawfully executed in accordance with law. The questions as referred to above in para 5 accordingly stand answered.

15. As a result of the above discussion, this appeal is allowed. The impugned judgment and decree passed by the learned Additional District Judge No. 3, Jaipur City in Civil Suit No. 15/1995 are set aside and the plaintiffs suit for declaration is dismissed. The parties would bear their own costs throughout.