

(1991) 10 SHI CK 0013

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 70 of 1977

Sadhu Ram

APPELLANT

Vs

R.C. Chopra (deceased) through his L.Rs. Prakash Chopra
and Others

RESPONDENT

Date of Decision : 29-10-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 47
East Punjab Urban Rent Restriction Act, 1949 — Section 14, 17

Citation : (1992) 2 ShimLC 432

Hon'ble Judges : Devinder Gupta, J

Bench : Single Bench

Advocate : Chhabil Dass, for the Appellant; Rajeev Mehta, for the Respondent

Final Decision : Allowed

Judgement

Devinder Gupta, J.—This is Defendant's appeal against the judgment and decree passed on July 23, 1977, by District Judge, Shimla, dismissing his appeal and thereby confirming the judgment and decree passed on November 30, 1974, by Senior Sub-Judge. Shimla, decreeing the suit of the Plaintiffs-Respondents.

2. The facts in brief are that on August 4, 1970, R.C. Chopra, predecessor-in-interest of Plaintiffs-Respondents filed a suit for recovery of possession by ejectment of Defendant from four residential quarters located in Buttermere estate Summer Hiii, Shimla, alongwith recovery of Rs. 610 as compensation for use and occupation against Defendant Appellant. Basis for claim, as disclosed in the plaint was that the property was purchased by the Plaintiff from its previous owner Diwan Chand Bhatia through sale-deed dated June 18, 1957. At the time of purchase of the property, eviction proceedings were pending against the Defendant before Rent Controller, Shimla, under the provisions of the East Punjab Urban Rent Restriction Act, which had been instituted by Shri Bhatia through his son N.L. Bhatia and there was stipulation in the sale-deed that the decision in the proceedings would be binding on the parties. It was further

averred that eviction petition was dismissed by Rent Controller, Shimla and Shri Bhatia preferred an appeal before the Appellate Authority, Ambala. The said appeal was accepted and an order of ejectment was passed against the Defendant. The Defendant then went in revision before the Punjab High Court and his revision was dismissed on September 13, 1958. Two months time was allowed to the Defendant to vacate the premises. Plaintiff further alleged in the plaint that after dismissal of the revision petition, Defendant approached him for accepting him as tenant in the four quarters at the rate of Rs. 5 per quarter, which request of his was accepted and the rent payable was agreed at Rs. 20 per month with effect from January 1, 1959 but the Defendant did not care to pay any amount to the Plaintiff by taking undue advantage of his absence from Shimla as he was in Government Service in Maharashtra. Eviction proceedings were initiated by the Plaintiff against Defendant under the provisions of East Punjab Urban Rent Restriction Act on the ground of non-payment of arrears, in which plea of adverse possession was taken but the Plaintiff was thereafter advised to file a suit for possession on the basis of title. It was averred in the plaint that Defendant's occupation in the premises till November 13, 1958 was held to be that of a tenant since he was allowed on September 13, 1958. two months time by the Punjab High Court to vacate the premises, therefore, his plea that he had acquired title to the property by adverse possession was wholly untenable. On these facts, decree for possession, on the basis of title was claimed. Defendant resisted the suit by urging that in the previous proceedings initiated by Shri Bhatia he had taken up the plea of adverse possession and had not been dispossessed from the premises and, therefore, his possession had matured into ownership. Defendant denied that after the disposal of Court Revision by the Punjab High Court he entered into any fresh lease as contended by the Plaintiff.

3. The trial court decreed the suit of the Plaintiff holding the Defendant's possession till November 30, 1959 as permissive and Plaintiff was held entitled to a decree for possession on the basis of title. The suit filed within a period of twelve years from November 13, 1958 was held to have been filed in time. The appeal preferred by the Defendant was also dismissed by the lower appellate court by affirming the findings of fact. The lower appellate court observed that in terms of the order ultimately passed by Punjab High Court on September 13, 1958, the Defendant was allowed time upto December, 30, 1958 to vacate the premises and since the present suit had been filed on August 5, 1970, much before the expiry of twelve years, therefore, there was no question of Defendant's possession maturing into ownership by holding it adversely, in the present appeal, the judgment and decree passed by the courts below are under challenge.

4. During the course of arguments, learned Counsel for the Appellant raised a plea which had not been raised either in the pleadings or in the Courts below and prayed for being allowed to take up such a plea of maintainability of the suit, which according to him was purely legal one. It was contended that Plaintiff had claimed to have acquired title during the pendency of the earlier litigation, in

which an order of eviction was passed, against the Defendant and since the Plaintiff was claiming title through Shri Bhatia, in whose favour there was an order of eviction, the only remedy available to the Plaintiff was to execute the order and the instant suit for enforcement of the order of ejectment was not maintainable. It was further contended that where there is an executable order of ejectment, no suit would lie for enforcement thereof or for determination of the question relating to execution, discharge or satisfaction of the order of eviction and no suit would lie even if execution of order is barred by limitation. Since as per the provisions of East Punjab Urban Rent Restriction Act, the order of ejectment passed u/s 14 is executable by a Civil Court, as if it was a decree of Civil Court, therefore, in view of Section 47 of the Code of Civil Procedure, the instant suit was not maintainable.

5. Learned Counsel appearing for the Respondents, however, maintained that since the plea sought to be raised had not been raised at the earliest opportunity nor it was urged in the Courts below, therefore, the Appellant cannot be permitted to raise the same in Regular Second Appeal. It was further contended that the plea sought to be raised was not purely a legal plea but was based upon facts, since the question of existence of relationship of landlord and tenant is a mixed question of law and fact and this Court will have to go into the same and further that even if the plea is held to be a purely legal one, Appellant cannot be permitted to take up this plea, since it will make the Plaintiff-Respondent remedyless. In other words, to do substantial justice it was urged that the plea deserves to be rejected.

6. In order to appreciate the submissions made by the learned Counsel for the parties and to arrive at a just conclusion, it would be necessary to make a brief reference to the evidence on record.

7. On July 19, 1955, petition for eviction was filed against Defendant by Diwan Chand Bhatia in which proceedings also the Defendant had taken up a plea of adverse possession. On September 25, 1956, petition for eviction was dismissed. The appeal preferred by Shri Bhatia was accepted by the Appellate Authority on September 30, 1957, holding the Defendant to be a tenant upon the suit property and liable to be evicted. The plea of adverse possession was negatived. On January 2, 1958, Civil Revision was preferred in the High Court. While preferring Civil Revision, an application for staying the order of ejectment was also moved. The Civil Revision was dismissed on September 19, 1958. While dismissing the revision, three months time was allowed to vacate the premises. Admittedly, as per the provisions of Section 17 of the East Punjab Urban Rent Restriction Act, order passed by Rent Controller was executable by a civil court having jurisdiction in the area as if it was a decree of that court. The Plaintiff purchased the property by means of sale-deed copy Ex. PA on June 18, 1957, that is, after dismissal of petition of eviction and before acceptance of the appeal of Shri Bhatia. The Plaintiff did not get himself impleaded as a party in proceedings for eviction. A stipulation was got inserted in the sale-deed on the

basis of which he had agreed to abide by the decision of the appeal and also take necessary steps to fight the case himself in the civil court. Neither Shri Bhatia nor the Plaintiff filed any application before the Controller seeking to execute the order of eviction. Further the Plaintiff in his plaint, after making reference to the earlier litigation took up a plea that after the disposal of Civil Revision by the High Court, Defendant approached him for being allowed to continue occupying the premises as tenant on payment of rent. In other words, what was pleaded by the Plaintiff was entering into a fresh contract of tenancy with the Defendant, but while taking up this plea, the Plaintiff in para 11 of his plaint specifically averred that cause of action had accrued to him against the Defendant on November 13, 1958, when he failed to vacate the premises as ordered by the High Court and on each date thereafter. The suit is not founded on a cause of action on the alleged fresh contract of tenancy. The claim in the suit was not for arrears of rent but for mesne profits at the rate of Rs. 4 p.m. per quarter. Reading of the entire plaint would show that Plaintiff claimed a decree for possession by virtually praying to enforce the order of ejectment and not on the basis of the plea of Defendant being a tenant in the premises by virtue of fresh contract of tenancy. Both the courts below have not returned any findings on the plea of fresh tenancy that after the decision of the civil revision by the Punjab High Court, Defendant had approached the Plaintiff and entered into a fresh contract of tenancy. The reason for not returning any finding on this plea is absence of any proof on record. Nowhere in his statement, while appearing as PW-2 Plaintiff stated that there was fresh contract of tenancy entered into between him and the Defendant. Defendant appeared as DW-3. Even no suggestion was put to him that after the Plaintiff had purchased the property, at any time thereafter, there was fresh agreement of lease between him and the Plaintiff. In view of there being no evidence on record, the courts below were right in not returning any finding on this plea, which was never sought to be made the subject-matter of an issue. Otherwise also, there is nothing on the record to show or suggest that any fresh agreement was ever entered into between the Plaintiff and Defendant.

8. Section 47 of the Code of Civil Procedure, as it stood prior to the coming into force of the CPC (Amendment) Act, 1976, reads as under:

47. Question to be determined by the Court executing decree.—(1) All question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this Section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this Section, be determined by the Court.

Explanation. For the purposes of this Section, a Plaintiff whose suit has been dismissed and a Defendant against whom a suit has been dismissed are parties to the suit.

9. The above provisions in the Code like Section 11 thereof has been enacted for the purpose of adjudicating endless litigation and with a view to enable the parties or their representatives to obtain adjudication of the questions relating to execution without unnecessary expenses of delay. Rule of res-judicata enshrined in Section 11 of the Code deals with the finality of a decision of a court on matters actually or constructively in issue before it and bars a fresh trial of any kind of such questions in subsequent proceedings between the same parties, while Section 47 deals with the enforcement of such decisions, namely, questions relating to the execution, discharge or satisfaction of the decree which has to be determined by the court executing the decree and not by a separate suit.

10. Considering the provisions of Section 47 of the Code of Civil Procedure, in *Dhanraj Singh and Others Vs. Musammat Lakhrani Kuar*, a Division Bench of Allahabad High Court held that the mere fact that a Plaintiff obtained a decree for possession of a certain land, would not entitle him to get possession of that land by filing a second suit if he had never been in possession within twelve years. It was further held that if after the decree the Plaintiff gets into possession, otherwise than in execution and is dispossessed within twelve years of the second suit, he has a cause of action irrespective of previous decree and is entitled to bring a second suit for possession, the previous decree being part of his title. Following this judgment a Division Bench of the same Court in *Ramanand and Others Vs. Jai Ram and Others* held second suit for possession to be barred under the provisions of Section 47 of the Code of Civil Procedure, when the Plaintiff had failed to obtain possession through court or privately and when the second suit was filed after lapse of the period of limitation for the execution of decree passed in the earlier suit.

11. A Division Bench of the Madras High Court in *Grandhe Gangayya Vs. Grandhe Venkataramiah and Others*, after considering the scheme of the CPC held that when a Plaintiff has obtained in one suit, based on some legal title, a decree for the reliefs which he was entitled to as against the Defendant and has allowed that decree to become barred, he cannot be allowed to bring another suit for obtaining the very same relief against the very same Defendant. The bar for filing fresh suit was held to be based upon the principle that when a man has a cause of action and brings the suit upon it, that cause of action is merged in the decree, transit in rem-judication; and then his remedy is in execution and if he does not enforce his remedy and allows it to become barred, his rights are gone. A Division Bench of Bombay High Court in *Dinu Yesu Desai Vs. Shripad Baji Garware*, held a fresh suit for redemption brought after the period for executing the decree in earlier suit had expired not maintainable.

12. A Division Bench of Patna High Court in *Kanhai Raut v. Jogendra Rout* AIR 1922 Pat 406 held the second suit for possession to be barred u/s 47 of the Code

which suit had been filed after a decree for possession in an earlier suit remained unexecuted and an allegation was made that after the decree he had obtained possession in execution whereafter he had been dispossessed by the Defendant. It was found that actually he had not obtained possession under the first decree and in view of Section 47, the second suit to enforce the decree in the earlier suit was held not maintainable.

13. Following the decision of Allahabad High Court in Ramanand's case (supra), the Punjab and Haryana High Court in Mal Singh Bika Singh and Others Vs. Mohinder Singh Mehar Singh, held that if the nature of a decree requires that it should be executed, a decree-holder cannot, after allowing the period of limitation to lapse without issuing process of execution, ask by a fresh suit on the decree to obtain that which he should have sought for by execution.

14. The aforementioned legal position is founded, as observed above, on the principle that enforcement of decisions in earlier litigation between the same parties or their representatives and questions relating to execution, discharge or satisfaction shall be tried in execution and not by way of separate suit. The object of the provision is to save unnecessary expenses and delay and to afford relief to the parties finally without the necessity of fresh suit.

15. There is no reason to depart from the policy enshrined in the law. The Plaintiff in the instant suit having failed to prove the fresh contract of lease, as alleged by him, the present suit for enforcing the order of eviction in the earlier eviction proceedings in view of clear bar contained in Section 47 of the Code has to be held as not maintainable.

16. The answer to the question as to whether the plea sought to be raised is a pure legal plea or a plea for which any evidence is required, poses no difficulty. The plea is a purely legal plea for which no evidence is required. The evidence, if any, is already on record, namely, the earlier order of eviction. Maintainability of the suit has to be seen on the averments made in the plaint. Plaintiff is a person claiming title through Shri Bhatia, who had obtained orders of eviction. Since the provisions contained in Section 47 of the Code are peremptory in nature, full regard must be given to the same. The plea of learned Counsel for the Respondents that allowing this plea to be raised will cause material prejudice to them has also no force. Nothing prevented the Plaintiff from enforcing the order of eviction. Since the suit was not maintainable, in view of the clear bar contained in Section 47 of the Code of Civil Procedure, there is no option but to set aside the judgment and decree passed by the courts below.

17. In the result, the appeal succeeds and is allowed. The judgment and decree of the courts below are set aside. The suit of the Plaintiff is dismissed as not maintainable, leaving the parties to bear their own costs.