

Pukh Raj Vs. Ghewar Chand

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Court : Rajasthan

Decided On : Nov-29-1973

Reported in : AIR1974Raj183; 1973()WLN836

Judge : R.D. Gattani, J.

Acts : Code of Civil Procedure (CPC) - Sections 47 - Order 21, Rule 95

Appeal No. : Civil Revn No. 160 of 1971

Appellant : Pukh Raj

Respondent : Ghewar Chand

Advocate for Def. : Jaswant Mal Bhandari, Adv.

Advocate for Pet/Ap. : S.K. Mal Lodha, Adv.

Disposition : Revision dismissed

Judgement :

ORDER

R.D. Gattani, J.

1. This a revision against the order of Munsiff, Jalore, dated 4-1-1971, whereby he disallowed the petitioner's application under Order 21, Rule 95, Civil Procedure Code.

2. The litigation between the parties has no doubt a very chequered history starting as long back as the year 1955 but for the purposes of this revision suffice it to say that the petitioner obtained a decree on 9-5-1955 for arrears of rent, possession of the rented property which had been mortgaged with the petitioner and taken back on rent and for future rent as well. In execution of that decree another house of the judgment-debtor was got attached and put to sale. The sale of the house in favour of the decree-holder-petitioner was confirmed on 12-7-1965 and a sale certificate in his favour was also issued by the executing Court on 16-7-1965. In between the passing of the decree and the issue of sale certificate several litigations between the parties took place in connection with that decree but they can safely be ignored for the purposes of this revision. So also after the issue of the sale certificate some more litigation took place but the relevant facts for our purpose are that eventually on 29-4-1970 the decree-holder-purchaser i.e., the petitioner applied for obtaining the possession of the house. That application was resisted by the judgment-debtor mainly

on the ground that the decree in the execution of which the house was auctioned by the Court and purchased by the decree-holder had been held to be inexecutable by that very Court on 16-4-1970 in a suit between the parties. The Executing Court, therefore, dismissed the application on 4-1-1971. Hence this revision.

3. When the revision came to be heard Mr. Bhandari appearing on behalf of the respondent-judgment-debtor raised a preliminary point about the entertainability of the revision itself. It was urged by him that the impugned order of the Executing Court being appealable under Section 47, Civil Procedure Code the remedy open to the petitioner was to file an appeal against this order and having failed to do so, the revision is not maintainable. It is admitted by Mr. Lodha appearing for the petitioner that appeal against the impugned order did not lie to this Court. Mr. Lodha however has relied upon three judgments of this very Court two of which are reported and the third is unreported in support of his contention that proceedings under Order 21, Rule 95 being not in the matter of execution, discharge or satisfaction of a decree the provisions of Section 47, Civil Procedure Code are not attracted to this case.

4. Till now there was a conflict of judicial opinion on the point whether a matter directing delivery of possession under Order 21, Rule 95, Civil Procedure Code to an auction purchaser is one of execution, discharge or satisfaction of the decree or not. The High Courts of Madras, *Meyyappa v. Chidambaram*, AIR 1920 Mad 979, Calcutta, *Kailash v. Gopal*, AIR 1926 Cal 798 (FB); Kerala, *State v. Lakshmi Animal*, AIR 1958 Ker 309 and Madhya Pradesh, *Ram Ratan V. Chauwamal*, AIR 1959 Madh Pra 348 have held that it is a matter of execution, discharge or satisfaction of decree and the High Courts of Patna, *Tribeni v. Ramasray*, AIR 1931 Pat 241 (FB); Rangoon, *Ko Taik On v. N.A.S.R. Firm*, AIR 1936 Rang 298; Lahore, *Ram Singh v. Abdullah Habib*, AIR 1944 Lah 402 (FB); Bombay, *Savlaram v. Viswanath*, AIR 1945 Bom 386 and Allahabad, *Suraj Dei v. Gulab Dei*, AIR 1955 All 49 (FB), have taken the other view. Our High Court in *Mohanlal v. Bhagwan Chand*, 1965 Raj LW 474 has preferred to follow the latter view. This view has been further followed in *Dayashanker v. Khubchand*, AIR 1973 Raj 304. In an unreported case of this Court namely Second Appeal No. 456 of 1962, *Ghisulal v. Chunia*, decided on 31-8-1970 the same view was taken.

5. Though this conflict of judicial opinion among the Indian High Courts is very old, the matter did not reach the Privy Council or the Supreme Court earlier than 1967. Happily the conflict has now been set at rest by the Supreme Court with the decision of Civil Appeal No. 1323 of 1967 decided on 4-5-1973 and reported in *Harnandrai Badridas v. Debidutt Bhagwati Prasad*, AIR 1973 SC 2423. The view taken in *Kailash v. Gopal*, AIR 1926 Cal 798 (FB) has been approved. It will be useful to quote paras Nos. 6 and 8 of the judgment of their Lordships of the Supreme Court in verbatim.

'6. Section 47 in our view should be construed liberally. As for that in (1892) 19 Ind. App 166 (PC) the Privy Council spoke strongly in favour of putting a liberal construction on Section 244 of the Code of Civil Procedure of 1882 which corresponded to present Section 47 of the Code of 1908. The Privy Council reiterated this in *Ganapathy v. Krishnamachariar*, 45 Ind App 54 --(AIR 1917 PC 121). If a liberal construction be put upon Section 47 it is difficult to understand, why a decree-holder who has been a party to the decree will shed his character as such party merely upon purchasing the property at the execution sale. After all, a decree-holder purchases the property in execution of his decree with the permission of the Court. There is no reason why he should not retain his character of a party to the suit until the delivery

of possession to him of the property purchased by him. Having regard to this consideration, if any question is raised by the judgment-debtor at the time of delivery of possession concerning the nature of the rights purchased and if the judgment-debtor offers any resistance to delivery of possession the question must be one which in our view relates to the execution, discharge and satisfaction of the decree and arises between the parties to the suit.'

'8. It is important to remember that after the decision of the Privy Council in Ganapathy's case, 45 Ind App 54 = (AIR 1917 PC 121) there has been an amendment of Section 47 as a result of which the purchaser at a sale in execution of a decree, whether he is the decree-holder or not, is unquestionably a party to the suit for the purpose of Section 47. Having regard to this, all questions arising between the auction-purchaser and the judgment-debtor must in our view be determined by the executing Court and not by a separate suit.'

6. In view of this clear finding of the Supreme Court the view hitherto taken by this Court in the cases mentioned above can no longer be said to be good law. Since the question of delivery of possession under Order 21, Rule 95, Civil Procedure Code is, in view of the Supreme Court decision one relating to the execution, discharge and satisfaction of the decree, the course open to petitioner in the present case was to have filed an appeal against the impugned order whereby his application under Order 21, Rule 95, Civil Procedure Code was disallowed.

7. The preliminary objection is, therefore, upheld and the revision being not entertainable the same is dismissed but with no order as to costs.

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