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KRISHNA GOPAL CHAWLA AND ORS.

v.

STATE OF U.P. AND ANR.

OCTOBER 11, 2001

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[D.P. MOHAPATRA AND SHIVARAJ V. PATIL, JJ.]

Code of Civil procedure, 1908 : Order XXI Rules 10 and 11(2)(d).

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Execution—Application for—Maintainability of—Merging of decree in appellate court—Fresh application—Necessity of—Eviction suit decreed in second appeal—Decree holder moved execution application—However, on appeal Supreme Court stayed execution proceedings—Ultimately appeal dismissed without any modification or alteration of decree—Decree-holder continued execution proceedings—But High Court held that the execution application was not maintainable as the decree merged in the decree passed by Supreme Court and that a fresh application for execution had to be filed—Correctness of—Held : In a pending execution case an amendment can be sought, if needed, under R.11(2)(d) after dismissal of appeal—There is no need to file a fresh application for execution after a decree is passed by the appellate court more so when the decree is neither modified nor altered—The pending execution proceedings can be continued—Hence, High Court's order set aside.

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The appellants filed a suit for eviction of the respondents from the suit property. The suit was decreed by the High Court in second appeal. Thereafter, the appellants filed an execution application under Order XXI Rule 10 of the Code of Civil Procedure, 1908. In the meanwhile, the respondents filed an appeal before this Court and this Court stayed the execution proceedings pending in the executing court. Ultimately, the appeal was dismissed by this Court without any alteration or modification of the decree passed by the High Court.

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The appellants, after dismissal of the appeal by this Court, continued the execution proceedings. The respondents filed various objections before the executing court including the objection with regard to the ownership of the suit property. The executing court allowed the application for execution. The civil revision petition filed by the respondents was

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dismissed.

Thereafter, the respondents filed a writ petition before the High Court which was allowed on the ground that the decree passed by the High Court, in second appeal, was not capable of execution since it merged in the decree passed by this Court and that the appellants were required to file a fresh application for execution. Hence this appeal.

Allowing the appeal, the Court

HELD : 1.1. After the disposal of the appeal by this Court, there was no impediment or bar to continue the execution proceedings on the application moved by the appellants to proceed with the execution. The High Court erred in holding that a fresh execution petition should be filed after the dismissal of the appeal by this Court as the decree passed by the High Court had merged with the decree of this Court and the execution petition filed earlier which was pending was not maintainable. [69-A; E]

1.2. This Court, in appeal, only confirmed the decree passed by the High Court without any alteration or modification. Even otherwise, in a pending execution case, amendment could be sought, if it was needed, after dismissal of the appeal by this Court. Under Order XXI Rule 11(2)(d) of the Code of Civil Procedure, 1908, in the execution application the particular as to whether any appeal has been preferred from the decree is to be mentioned. If an appeal has been preferred from a decree and after disposal of the appeal, necessary information can be given by filing an application, if need be seeking an amendment. It is one thing to say that the earlier decree passed gets merged in the decree passed by the appellate court, yet it is a different thing to say that an execution petition filed earlier is not maintainable and that there is a need to file a fresh application for execution after a decree is passed by the appellate court, particularly in the present case, when this Court had stayed the execution proceedings filed earlier. It was obvious that the execution proceedings could be continued after dismissal of the appeal by this Court affirming the decree passed by this Court without any alteration. [69-F-H; 70-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7104 of 2001.

From the Judgment and Order dated 17.11.98 of the Allahabad High Court in C.M.W.P. No. 34383 of 1997.

Gopal Subramaniam, C. Mukand, Bijoy Kumar Jain, A.K. Jain, Rakesh

A Jain and Deepak Jain for the Appellants.

S. Markandeya, Ms. Chitra Markandeya and Ms. Feroza Bano for the Respondents.

The Judgment of the Court was delivered by

B **SHIVARAJ V. PATIL, J.** Leave granted.

C The appellants are before this Court, aggrieved by the order dated 17.11.1998 passed by the Allahabad High Court in Civil Misc. Writ Petition No. 34383/97. In brief, the relevant and necessary facts for disposing of this appeal are the following:

D The property in dispute is premises No. 7/86 along with the land, which forms part of Nazul plot No. 12 situated in Block-7, Tilak Nagar, Kanpur. This property was leased for a maximum period of 90 years in December, 1904 by Secretary of State in favour of one Khan Bahadur Hafij Mohd. Halim; the lease was to be renewed after 30 years from the date of its commencement with increase of 50% in rent; the lease also permitted construction of building over the land; the lessee accordingly constructed a dwelling house on the leased land; he let out the constructed premises to the State of U.P. on 3.5.1937. By that time the lessee had already got renewed the lease on 2.3.1935 in favour of Haji Mohd. Sadiq, the son of the original lessee for a further period of 30 years upto 4.12.1964. Thereafter, legal representatives of the original lessee migrated to Pakistan. Consequently, the said property was declared evacuee property by the Notification dated 3.10.1952. Later, it was put to auction by the Manager, Custodian of Evacuee Property. One Gian Chand and others purchased the said property i.e. the land and building through auction sale. They in turn sold the same to Krishna Gopal Chawla and others (appellants herein) through registered sale deeds in 1959.

G Krishna Gopal Chawla and others, claiming themselves to be the landlords of the property, filed original civil suit No. 1714/1963 for arrears of rent, ejectment and for damages for use and occupation against the State of U.P. in the court of Munsif City, Kanpur. The said suit was later transferred to IVth Additional Civil Judge, Kanpur, who dismissed the said suit on 19.4.1965. The appellants preferred First Civil Appeal No. 305/1965 before the District Judge, Kanpur, which was also dismissed on 21.3.1969. Aggrieved H by the same, the appellants filed Second Appeal No. 2565/1969 before the

High Court. During the pendency of the second appeal, U.P. Jal Nigam was substituted in place of State of U.P. as the disputed property was in possession of Jal Nigam as tenant on behalf of State. The High Court allowed the appeal, decreed the suit of the appellants on 20.9.1979 for arrears of rent, ejection as well as for damages for use and occupation. On the basis of the said decree passed by the High Court, the appellants filed Execution Case No. 179/1980 in the court of Munsif City, Kanpur, for execution of the decree against U.P. Jal Nigam.

The respondents approached this Court in Civil Appeal No. 1365/1980, aggrieved by the decree passed by the High Court in the second appeal. This Court stayed the execution of the decree passed by the High Court till the disposal of the appeal and dismissed the appeal on 1.3.1994, confirming the judgment and decree passed by the High Court. However, with the consent of the parties, U.P. Jal Nigam was allowed to remain in possession of the disputed premises for one year from the date of judgment on filing undertaking on usual terms. U.P. Jal Nigam filed undertaking before this Court on 28.3.1994.

The appellants, after the dismissal of the appeal by this Court, moved an application in the court of Munsif City, Kanpur (now Civil Judge, Junior Division, Kanpur Nagar) to proceed with the execution of the decree. U.P. Jal Nigam and State of U.P. filed separate but similar objections under Sections 47, 37, 38, 39 and 151 CPC resisting execution. The objections were that the decree passed by the High Court merged in final judgment passed by this Court; hence the decree of this Court dated 1.3.1994 alone could be executed and not that of the High Court; the court of Civil Judge, Junior Division, Kanpur Nagar, has got no jurisdiction to execute the decree; the court of Civil Judge, Junior Division, Kanpur Nagar, is not court of first instance. Further, it was contended that original lessee, Khan Bahadur Hafij Mohd. Halim, was a lessee of the disputed property; his legal representatives had only leasehold rights; hence only leasehold rights were purchased by Gian Chand and others in auction; since the original lessee was not the owner of the disputed property, it could not become evacuee property; the maximum lease period of 90 years expired on 4.12.1994 and as such the decree-holders had no interest in the property and they have ceased to be landlord of the disputed property. It was contended that as per the undertaking given to this Court on 28.3.1994, U.P. Jal Nigam handed over possession of the disputed premises to the State of U.P., the real owner of the property after expiry of the lease period; thus the decree

A of this Court stood satisfied in terms of the undertaking.

B The executing court (court of Civil Judge, Junior Division, Kanpur) after hearing, by a detailed order dated 5.9.95, rejected all the objections raised by the U.P. Jal Nigam and State of U.P. and directed for delivery of possession. The U.P. Jal Nigam as well as State of U.P., aggrieved by the said order of the executing court, filed civil revision petitions in the court of IVth Additional District Judge, Kanpur. After hearing the parties and having considered all objections including additional objections raised in the revision petitions, the learned District Judge dismissed them by a well considered order dated 12.8.1997.

C It is thereafter that the State of U.P. filed Civil Misc. Writ Petition No. 34383/97 for quashing the orders of executing court dated 5.9.1995 and the order of the Addl. District Court dated 12.8.1997 passed in revision. The said writ petition was allowed by the High Court and the impugned orders were quashed. The High Court raised following three questions for consideration in the writ petition (1) whether the decree passed by the High Court in the second appeal was capable of execution even if it merged in the decree passed by this Court in an appeal preferred against the decree passed by the High Court; (2) whether Civil Judge (Senior Division) Kanpur Nagar, was competent to entertain the execution application and (3) whether the decree-holder ceased to have any interest in the decree owing to termination of lease by efflux of time. The first question was answered in the negative. The second question was answered in affirmative and the third question was left open to be decided in a fresh execution petition if filed by the decree-holder seeking execution of the decree passed by this Court. Hence, this appeal.

F Mr. Gopal Subramaniam, learned senior counsel for the appellants strongly contended that this is a case, which shows how the appellants are not able to execute the decree obtained in 1979 in spite of an undertaking given in this Court by the respondents; the respondents never raised question of title in the original suit or in further appeals and, as stated, it was not open to raise in the execution proceedings or before the High Court in the writ petition; admittedly the decree was passed in favour of the appellants as landlords against the respondents for their eviction, payment of arrears of rent and damages for use and occupation of the premises; executing court cannot go beyond the decree; hence the objections filed by the respondents were rejected and the order passed by the executing court was confirmed in the revision

before the District Court; the High Court committed a serious error in holding that the execution petition filed earlier by the appellants was not maintainable as the decree passed by the High Court merged in the decree passed by this Court when the appeal was dismissed and that the appellants had to file a fresh application for execution subject to law of limitation; the High Court was also not right in saying that the question of title could be decided afresh in the event of fresh execution petition is filed as stated above.

On the other hand, Mr. S. Markendaya, learned senior counsel for the respondents made submissions supporting the impugned order of the High Court.

We have carefully considered the submissions made by the learned counsel for the parties. This is yet another case, which confirms a general feeling that the real trouble starts after obtaining a decree and when it is put to execution. In this case the suit was filed in 1963 and the decree was passed in favour of the appellants in 1979. The execution petition was filed in 1980. Almost 21 years have passed after filing the execution petition. Still the appellants are not able to get benefit of the-decree. Admittedly the suit was filed by the appellants as the landlords seeking eviction of the respondents from the disputed property in addition to claiming for arrears of rent and damages for the use and occupation of the property. The suit was decreed by the High Court in second appeal. Thereafter, execution petition No. 179/80 was filed. In the meanwhile the respondents approached this Court by filing the appeal and in the appeal order was passed staying the execution proceedings pending in the executing court. Ultimately, the appeal was dismissed by this Court on 1.3.1994 in the following terms: -

“The courts below are correct. No interference is called for. The appeal is dismissed. However, as agreed by both the learned counsel one years time from today is granted to the appellant to hand over vacant possession. This shall be subject to the filing of the usual undertaking within four weeks from today.”

Formal order prepared pursuant to the said judgment passed by this Court is reproduced in the impugned judgment passed by the High Court. From its reading it is clear that the appeal was dismissed without altering the decree in any way passed by the High Court. The respondents were allowed time to vacate the premises with the consent of the parties till 1.3.1995 subject to

A filing of undertaking to the effect that the respondents shall not induct any other person in the suit premises and shall hand over vacation and peaceful possession of the said premises to the appellants on or before 1.3.1995, etc. Further in para 2 it is stated that on the respondents failing to comply with the undertaking, decree for eviction shall become executable forthwith.

B Although the respondents filed an undertaking on 28.3.1994 but not consistent with the terms aforementioned. It appears that the respondents at the time of giving undertaking itself had a definite design to defeat or frustrate the execution of the decree itself. The relevant portion of the undertaking to demonstrate the same is extracted below: -

C (A) The U.P. Jal Nigam shall hand over on or before 28.2.1995, the vacant and peaceful possession of the disputed premises to either the respondents or *their vendees or the State Govt. of U.P. in the event it is found that the lease in favour of the respondents had already stood extinguished with effect from 4.12.1964.*

D (B)

(C) The U.P. Jal Nigam shall not induct anyone else into the disputed premises.

E Underlined portion in clause (A) extracted above indicates that from the beginning the intention of the respondents was not *bona fide*.

When the order of this Court was clear in directing that the disputed premises was to be handed over to the appellants and undertaking was to be given accordingly the respondents choose to give an undertaking incorporating different terms to suit their purpose to defeat or frustrate the execution of the decree. Neither the State of U.P. nor U.P. Jal Nigam ever successfully raised in the suit and appeals what is sought to be made out in the undertaking. It appears even review petition filed seeking review of the judgment of this Court was also rejected. In our view, the twist given in the undertaking by the respondents appears to even overreach the order of this Court.

G This Court on 26.4.1990 passed the following order: -

H "This appeal is directed against the decree of ejection passed against the appellant on the ground of arrears of rent. After the appeal was argued for some time, the learned counsel for the appellant, Mr.

Subodh Markandaya, for the U.P. Jal Nigam made an offer to the effect that the U.P. Jal Nigam is prepared to purchase the property in question at the rate specified by the Kanpur Development Authority or at the price to be determined by a valuer appointed by the parties and failing that by the Court. The learned counsel for the respondents seeks time to consider this offer. Let the matter come up on 4th May, 1990.”

We see in the records placed before us a letter No. 7565/M-B1-I/57 dated 26.12.1957 from the Superintendent Engineer, III Circle, L.S.G.E.D., Lucknow to Gian Chand, i.e., the vendor of the appellants offering to purchase this very property for the reasonable amount. If the State of U.P. had become or was the owner of the property, there was no need to write such a letter treating Gian Chand as the owner of the property and similarly there was no necessity to make an offer for purchasing the property by the U.P. Jal Nigam as recorded in the aforesaid order of this Court.

As is evident from the facts narrated above, the execution petition No. 179/80 filed in the executing court to execute the decree passed by the High Court, was pending. This Court had stayed the said execution proceedings pending disposal of the Civil Appeal No. 1365/80. After the disposal of the appeal, there was no impediment or bar to continue the execution proceedings on the application moved by the appellants to proceed with the execution. The High Court committed a manifest error in taking a view that a fresh execution petition should be filed after the dismissal of the appeal by this Court as the decree passed by the High Court had merged with the decree of this Court and the execution petition filed earlier which was pending, was not maintainable. As already noticed above, this Court in appeal only confirmed the decree passed by the High Court without any alteration or modification. Even otherwise, in a pending execution case, amendment could be sought if it was needed after dismissal of the appeal by this Court. Under Order XXI Rule 11 (2)(d) CPC, in the execution application the particular as to whether any appeal has been preferred from the decree is to be mentioned. If an appeal has been preferred from a decree and after disposal of the appeal, necessary information can be given by filing an application, if need be seeking an amendment. It is one thing to say that the earlier decree passed gets merged in the decree passed by the appellate court, yet it is different thing to say that an execution petition filed earlier is not maintainable and that there is a need to file a fresh application for execution after a decree is passed by the appellate

A Court, particularly in the present case, when this Court had stayed the execution proceedings filed earlier, it was obvious that the execution proceedings could be continued after dismissal of the appeal by this Court affirming the decree passed by this Court without any alteration.

B The learned Addl. District Judge in his revisional order noticed that the disputed property was declared as evacuee property and it vested in the Central Government, free of all encumbrances; the said property was sold in public auction and a sale certificate was issued by the Custodian, Evacuee Property, as free-hold property as early as 1959. The learned Addl. District Judge has

C further stated in his order as to whether the State Government is the owner of the disputed property or the decree-holders are the owners of it, was not at all called for consideration in the execution proceedings; the question was whether the decree-holders have ceased to be landlord of the disputed property after the expiration of lease on 4.12.1994. It was further noticed that the

D respondents did not take the plea before first appellate court or the High Court in the second appeal or before this Court in appeal that the appellants had ceased to be landlords of the disputed property. Even otherwise, the interest of the appellants on the disputed property did not become unauthorized; admittedly the constructions in the suit property belong to the decree-holders. In this view, the learned Addl. District Judge held that the objection with regard

E to the ownership of the disputed property could not be raised under Section 47 CPC. However, he observed that the question of ownership was not in dispute before him and, therefore, he did not go into that question as to which party is the owner of the disputed property. Ultimately holding the appellants as landlords, eviction decree was passed against the respondents but the High Court in the impugned judgment found fault with this part of the order stating

F that the executing court as well as the District Court did not correctly decide the question as to the ownership of the property and the same could be decided by the courts in a case fresh execution petition is filed by the appellants on the basis of the decree passed by this Court in Civil Appeal No. 1365/80. We find it difficult to accept the finding of the High Court in this regard.

G It is unfortunate that the High Court failed to see the conduct of the respondents, facts and circumstances of the case and the correct legal position before quashing the concurrent findings recorded by the executing court as well as the revisional court. The High Court while exercising writ jurisdiction has acted as a court of appeal in allowing the writ petition filed by the

H respondent No. 1, that too taking a technical view. Interest of justice in the

fact-situation warranted dismissal of writ petition.

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Thus, in view of what is stated above, we have no hesitation in holding that the impugned order of the High Court suffers from irreparable infirmity and it is patently unsustainable. Consequently, we set aside the same. The appeal is allowed accordingly with cost of Rs.10,000/- to be paid to the appellants by the respondents.

B

V.S.S.

Appeal allowed.