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RATAN LAL JAIN AND ORS.

v.

UMA SHANKAR VYAS AND ORS.

JANUARY 30, 2002

B

[R.C. LAHOTI AND BRIJESH KUMAR, JJ.]

C

*Code of Civil Procedure, 1908—Order 21, Rules 35(1) and 36—Suit—Decree for possession immovable property—Property occupied by sub-tenants—Delivery of possession—Held, decree holder not entitled to demand actual physical possession from sub-tenants by evicting them but entitled to only symbolic possession—Transfer of Property Act, 1882—S.108(h).*

D

Plaintiff-appellants owners of certain plot of land created a lease deed in favour of defendant-respondents. Respondents constructed a commercial complex consisting of shops on the leased land which were let out to different tenants, some of whom sub-leased the shops to others. Some of the sub-lessees had further inducted their own tenants. Respondent-principal tenants committed default in payment of premium whereupon plaintiff-appellants filed a suit for recovery of arrears and for eviction. Trial Court decreed the suit and ordered actual delivery of portion of property which were in possession of the respondents and only symbolic possession to the extent occupied by the sub-tenants. However, the Executing Court went beyond the decree and directed some of the sub-tenants also to hand over actual physical possession of property by dismissing their objection petitions. On revision, High Court held that the decree holders were only entitled to symbolic possession in respect of portion of property owned by sub-tenants without actually evicting them. Hence the present appeals by plaintiff-appellants.

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Dismissing the appeals, the Court

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HELD : 1. High Court was justified in holding that the decree holders were entitled to execute the decree by demanding actual physical possession only against the principal tenants and neither the objectors nor any person holding the property on their behalf could be actually evicted.

[755-G-H]

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2. Rule 35(1) of the Civil Procedure Code provides that where a

decree is for the delivery of any immoveable property, possession thereof shall be delivered to the party to whom it has been adjudged, or his agent, by removing any person bound by the decree who refuses to vacate the property, if it becomes necessary to do so. Rule 36 of the Code provides that where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property. The former is known as actual or physical delivery of possession while the later is known as delivery of formal, or symbolic possession. In the latter case, the person in actual occupation is not physically dispossessed from his possession of the decretal property. Still delivery of possession in the manner contemplated by Rule 36 remains delivery of formal or symbolic possession so far as the person in actual possession is concerned but as against the person bound by the decree, it amounts to actual delivery of possession. The rights of the person bound by the decree stand extinguished, he is removed from the property in the eye of law and his right and entitlement whatever it may be qua the person in actual possession and not bound by the decree stand vested in the decree holders. [756-B-C-D-E-F]

*Juggobundhu Mukherjee and Ors., v. Rani Chunder Bysack, 1880 ILR 5 Calcutta 584 and Jayagopal Mundra v. Gulab Chand Agarwalla and Ors., AIR (1974) Orissa 173, approved.*

3. The Executing Court was not justified in dismissing the objection petitions. In the instant case, the objectors were sub-tenants of principal tenants. They have further sub-let the shops and they are not in actual possession. Nevertheless, the persons in actual possession are holding such possession on behalf of the objectors. Objectors were therefore justified in preferring the objection petitions. The Executing Court could not have gone behind the decree and overruled the objections preferred by the objectors who invited the attention of the Executing Court to execute the decree as it stands and not to physically throw them out though the decree directs delivery of only symbolic possession in so far as the shops in their occupation are concerned. The objectors were not rank trespassers but entitled to hold the shops as sub-tenants of tenants in the shops though they might have been so inducted in breach of the terms of the lease

A created by respondent in favour of tenants in shops. They are not the persons bound by the decree. [757-F-G-H]

B 4. Clause (h) of Section 108 of the Transfer of Property Act, 1882 confers a right on the lessee to remove either during or even after the determination of the lease, at any time whilst he is in possession of the property leased but not afterwards, all things which he has attached to the earth which will include any building raised by him on the leased land. However, such right is subject to a contract or local usage to the contrary. In the present case, Clause 16 of the Lease Deed obliges the lessee to hand-over, at the end of the lease, all the construction with fittings and with tenancy to the owners. So, at the end of the lease, the things attached to earth by the tenants pass over to lessor-owners of land in accordance with the contract. On determination of lease, as entered into between the parties the consequences which follow are: (i) the lease of land comes to an end, (ii) the ownership of building raised by principal tenants stand vested in the lessor-owners of land, the building goes with the land, (iii) the principal tenants have to physically vacate the property, and (iv) the lessor-owners stand subrogated in place of principal tenants. [756-G-H; 757-A-B-C]

*Dr. A.K. Dhairyawan and Ors. v. J.R. Thakur and Ors.*, AIR (1958) SC 789, relied on.

E CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 10235-10241 of 1996.

From the Judgment and Order dated 6.2.96 of the Rajasthan High Court in S.B.C.R.P. Nos. 951-957 of 1995.

F K.N. Nagpal for Rakesh Uttamchandra Upadhyay for the Appellants.

Shiv Pujan Singh and Ms. Nidhi Pandey for the Respondent Nos. 3-12.

G The Judgment of the Court was delivered by

H **R.C. LAHOTI, J.** Plot No. A-1-B, situated at Sawai Jaisingh Highway, Banipark, Jaipur, is owned by plaintiff-appellants and admeasures 1545 sq. yards. With effect from 31.1.1986, a lease in respect of 6100 sq. ft. area, out of the total area of the said plot, was created by the plaintiff-appellants in favour of Smt. Shiv Kumari Vyas and Shri Uma Shankar Vyas (hereafter

referred to collectively as 'Vyas', for short) for a period of 51 years. The purpose of lease was to allow Vyas to construct basement and ground floor on the leased land for the period of lease, that is, 51 years. The terms and conditions of the lease are incorporated in a registered deed of lease executed on 20.12.1986, wherefrom the relevant and material for the purpose of this order, are extracted and reproduced hereunder:-

“xxx            xxx                    xxx                    xxx

3. That the second party will be entitled to construct in the leased premises according to his choice and in accordance with the law and will construct shops in basement and on it ground floor and the second party will make the stairs to go upstairs (Upper floor) to first party according to map.

4. That the lessees will construct shops on the leased property and can sublet the shops to other persons on rent for the period less than the period of lease and will be entitled to receive the rent and the lessors will not object to that.

16. That at the end of lease the second party will hand over all the construction with fittings and with tenancy to first party and will obtain a receipt for handing over and advance premium first party will pay to second party without interest.

18. That if the second party commits default in payment of lease premium for six months the lease will end automatically and resultingly the first party will be entitled to lease amount from sub tenants and possession will automatically revert to first party and the second party will not have any objection in case the lease amount is obtained directly from sub tenants and if the money received from sub tenant is less than lease premium then the rest of the amount by second party or sub tenants. Lease will continue otherwise it will end.

22. That the lease premium of the lease i.e. for basement and ground floor total will be Rs. 5.50 paise per sq. ft. per month and the lease premium could be increased after five years with mutual consent and parties can make agreement for this.

24. That the ownership of the land which is leased will be of first party and second party will remain Lessees.

Note (a) That the leased property 6168 sq. ft. for underground and

- A ground floor on 6100 sq. ft. The lease premium is Rs. 5.50 paise per sq. ft. per month i.e. basement for Rs. 2/- per month. Lease premium and ground floor Rs. 3.50 paise per sq. ft. per month the first party has given to second party for 51 years on lease which will be read with the terms of above lease deed.”
- B Vyas constructed a commercial complex consisting of 105 shops on the leased land. They were let out to different tenants. It appears that sometime in the year 1989, 28 tenants of Vyas sub-leased the shops in favour of others. Some of these sub-lessees have further inducted their own tenants. Vyas committed default in payment of premium (the term as used in the lease deed) for more than six months whereupon the plaintiff-appellants filed a suit
- C for recovery of arrears and for eviction impleading Shri Uma Shankar & Smt. Shiv Kumari, the tenants under the lease deed, as defendants. One of the pleas taken in the written statement by the tenants was that the sub-tenants and the tenants of sub-tenants in actual possession of the shops were necessary parties to the suit. Applications under Order 7 Rule 11 and Order 1 Rule 10
- D of CPC were also filed by the two defendants seeking rejection of the plaint for non-joinder of necessary parties or in the alternative a direction for impleadment of the sub-tenants. The applications were resisted by the plaintiffs and were rejected by the trial court forming an opinion that the sub-tenants were not necessary parties to the suit. This order was upheld by the High Court in Civil Revision No. 925 of 1991 decided on 4.11.1991. The suit was then tried between the parties as impleaded by plaintiffs. The trial court, while deciding the suit, recorded the same finding on issue No. 7, relating to
- E suit being bad for non-joinder of necessary parties and held that as no relief was sought for against the sub-tenants in the suit, they were not necessary parties. To quote from the decision of the trial court, it was held, - “In the
- F present suit no relief is sought against the sub-tenants nor cause of action is there. If the defendants fail to pay the rent then the plaintiffs are entitled to recover rent directly from the sub-tenants and thus they become their direct tenants. The sub-tenants are inducted with the consent of the plaintiffs. Therefore, it will be presumed that sub-tenants are the tenants of the plaintiffs and though they will not be entitled to evict them in this decree but will be
- G entitled to receive the rent directly. In this situation the rights of the sub-tenants will not be affected by this suit.” As the principal issue was decided against the lessee-defendants, holding them to be defaulter and hence liable to be evicted, the trial court passed a decree to the following effect:-
- H “.....the suit of the plaintiffs is decreed with costs against the defendants. The plaintiffs will be entitled to possession from defendants

of those shops and land which is in actual possession of defendants and *the remaining shops which are in possession of sub tenants they will be entitled to only symbolic possession.* The plaintiffs are entitled to Rs. 33,686 per months as compensation for use and occupation from the date of filing of the suit till recovery after paying the court fees. The defendants are restrained that they will not demolish or to make unlawful construction in the disputed property, nor they will alienate or transfer or sell through him or through their agent or servant.”

(underlining by us)

The abovesaid decree has achieved a finality.

The plaintiff-appellants i.e. the decree holders put the decree to execution. It appears that the decree holders were successful in securing possession over 77 shops but could not execute the decree to the extent of 28 shops in possession of sub-tenants or tenants of sub-tenants. Out of these 28, seven persons, who were inducted as tenants or sub-tenants in the shops but had further parted with possession in favour of their own sub-lessees, resisted delivery of possession by filing petitions under Section 47 read with Order 21 Rule 97 of the CPC. These are the persons referable to shop Nos. B-8, M-13, M-14, M-15, G-22, G-27 and G-37. The sub-tenants in actual possession of the premises are Vijai Chaudhary, Arun Sharma, Tarun Agarwal, Bal Chand Purohit, Hitesh Arora, Virender Punia and Liladhar Gupta. By order dated 27.7.1995, the executing court rejected the objection petitions forming an opinion that the objectors were themselves the sub-tenants having been inducted into possession of the respective shops in violation of the terms of the lease deed and in any case they had further sub-let the respective shops and being not themselves in actual possession, were not entitled to offer resistance to the delivery of possession to the decree holders. Seven civil revisions were preferred by the seven objectors before the High Court which have been allowed. The High Court has held that the persons in actual possession of the property were holding the possession on behalf of the objectors and their dispossession would certainly cause injury to the objectors. The decree passed in the suit directs symbolic possession being delivered by the persons in possession other than the lessees to the decree holders and, therefore, the decree holders were entitled to execute the decree by demanding actual physical possession only against the principal tenants and while doing so neither the objectors nor any person holding the property on their behalf could be actually ejected. The decree holders have preferred these appeals by

A special leave feeling aggrieved by the revisional orders of the High Court.

Having heard the learned counsel for the parties, we are of the opinion that the appeals are devoid of any merit and no fault can be found with the view taken by the High Court. Rules 35 and 36 of Order 21 of the CPC are relevant and clinch the issue arising for decision. Where a decree is for the delivery of any immoveable property, possession thereof shall be delivered to the party to whom it has been adjudged, or his agent, by removing any person bound by the decree who refuses to vacate the property, if it becomes necessary to do so. (Rule 35, sub-rule 1). Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property. (Rule 36) The former is known as actual or physical delivery of possession while the latter is known as delivery of formal or symbolic possession. In the latter case, the person in actual occupation is not physically dispossessed from his possession of the decretal property. Still delivery of possession in the manner contemplated by Rule 36 remains delivery of formal or symbolic possession so far as the person in actual possession is concerned but as against the person bound by the decree, it amounts to actual delivery of possession. (See five-Judge Bench decision in *Juggobundhu Mukerjee and Ors. v. Ram Chunder Bysack*, (1880) ILR 5 Calcutta 584 and Full Bench decision in *Jayagopal Mundra v. Gulab Chand Agarwalla and Ors.*, AIR (1974) Orissa 173. The rights of the person bound by the decree stand extinguished, he is removed from the property in the eye of law and his right and entitlement whatever it may be qua the person in actual possession and not bound by the decree stand vested in the decree holder.

Clause (h) of Section 108 of the Transfer of Property Act, 1882 confers a right on the lessee to remove either during or even after the determination of the lease, at any time whilst he is in possession of the property leased but not afterwards, all things which he has attached to the earth which will include any building raised by him on the leased land. However, such right is subject to a contract or local usage to the contrary. In the present case, Clause 16 of the Lease Deed obliges the lessee to hand-over, at the end of the lease, all the construction with fittings and with tenancy to the owners.

H In the facts very similar to those before us, this Court held in *Dr. A.K.*

*Dhairyawar and Ors. v. J.R. Thakur and Ors.*, AIR (1958) SC 789 that although under Section 108 of the T.P. Act, the lessee had the right to remove the building but by the contract he had agreed to handover the same to the lessors without the right to receive compensation at the end of the lease. The matter would be governed by the contract between the parties. Such a contract did not transfer the ownership in the building to the lessors only while the lease subsisted. Obviously at the end of the lease, the things attached to earth by the tenants pass over to lessor-owners of land in accordance with the contract. On determination of lease, as entered into between the parties the consequences which follow are: (i) the lease of land comes to an end, (ii) the ownership of building raised by principal tenants stand vested in the lessor-owners of land, the building goes with the land, (iii) the principal tenants have to physically vacate the property, and (iv) the lessor-owners stand subrogated in place of principal tenants.

In the earlier part of the judgment we have extracted and reproduced the relevant terms of the lease. 'Vyas' were inducted into possession of the land as tenants with permission from the owners of the land to raise construction, also to induct tenants in the shops constructed by them on the leased property but the duration thereof could not extend beyond 51 years from the date of the lease. In the event of default by the tenant, i.e., the 'Vyas' in payment of lease premium for six months, the lease would be terminated by forfeiture entitling the owners of the property to recover lease amount from the sub-tenants in possession directly. The objectors are sub-tenants of the tenants in the shops. They have further sub-let the shops and they are not in actual possession. Nevertheless, the persons in actual possession are holding such possession on behalf of the objectors. Objectors were therefore justified in preferring the objection petitions. The Executing Court was not right in dismissing the petitions for two reasons. Firstly, the Executing Court could not have gone behind the decree and overruled the objections preferred by the said seven objectors who invited the attention of the Executing Court to execute the decree as it stands and not to physically throw them out though the decree directs delivery of only symbolic possession in so far as the shops in their occupation are concerned. Secondly, the objectors were not rank trespassers but entitled to hold the shops as sub-tenants of tenants in the shops though they might have been so inducted in breach of the terms of the lease created by 'Vyas' in favour of tenants in shops. Whether they were authorized or unauthorized sub-tenants is a question that has not been adjudicated upon so far and will be decided in appropriate proceedings wherein they would be parties. The fact remains that they are not the persons bound

- A by the decree. 'Vyas', the tenants of the land had insisted on the sub-lessees of the shops and further sub-lessees in actual possession being joined as parties to the suit but the plaintiffs resisted such prayer and were successful in their resistance. Conscious of these facts and the relevant law, the Trial Court passed a decree taking care to specify that actual possession shall be delivered to the decree-holders only on such part of the property as would be in actual possession of the defendants before it; so far as the remaining shops are concerned which are not in actual possession of the tenants of the plaintiff-decree-holders but in actual possession of the sub-tenants, the mode of execution of decree would be by delivering only symbolic possession. The High Court has rightly allowed the revisions preferred before it and made direction which is in accordance with law.
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The appeals are devoid of any merit and are dismissed though without any order as to costs.

S.V.K.I.

Appeals dismissed.

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