
(2004) 3 AWC 2782

Allahabad High Court

Case No: C.M.W.P. No. 40222 of 2001

Janardan Singh Jaiswal

APPELLANT

Vs

IVth Additional District
Judge and Others

RESPONDENT

Date of Decision: May 21, 2004

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 95, Order 21 Rule 96

Citation: (2004) 3 AWC 2782

Hon'ble Judges: Sunil Ambwani, J

Bench: Single Bench

Advocate: H.S. Tripathi, Chandra Prakash and A.P. Srivastava, for the Appellant; S.P. Pandey and Rajiv Singh, S.C., for the Respondent

Judgement

Sunil Ambwani, J.

This writ petition arises out of orders dated 5.4.1997 passed by Civil Judge (Senior Division), Mirzapur in Misc. Case No. 34 of 1986, Janardan Singh Jaiswal v. Ashok Kumar Jaiswal, allowing the application under Order XXI Rule 96, C.P.C. and directing a copy of the sale certificate to be affixed on the house in question and to declare that the interest of the judgment debtor has been vested in Sri Janardan Singh Jaiswal, and the order dated 21.9.2001 passed by Additional District Judge (Court No. 3), Mirzapur, dismissing the Civil Revision No. 19 of 1997, arising out of the order.

2. I have heard Sri A. P. Srivastava for petitioner and Sri S. P. Pandey for respondent No. 3.

3. Brief facts giving rise to this case are, that the property in dispute was auctioned in Execution case No. 58 of 1983, for executing the money decree in Suit No. 4 of 1982. The sale was confirmed on 15.3.1986 and a sale certificate was issued on 4.4.1986 in favour of petitioner Sri Janardan Singh Jaiswal. The Auction Purchaser, filed an

application under Order XXI, Rules 95 and 96 read with Section 151 for delivery of possession of the property purchased by him in auction. An objection was filed by Sri Surendra Pratap Singh stating that he is in occupation of the house with his family for last twenty years. The house was allotted to him by the administrator appointed by the High Court of the properties of M/s. Indo Mineral Corporation. This firm was a family firm of the objector and that after the dissolution of the firm he continued as a tenant of the property. Thereafter a partition took place between the landlord Sri Janardan Singh Jaiswal and Madhusudan Singh. They filed a suit for eviction against the objector u/s 21 of U. P. Act No. 13 of 1972, which was dismissed. An appeal arising out of eviction proceeding was also dismissed, and the objector continued to be a tenant. The decree was obtained and property was purchased behind his back, and in the circumstances auction purchaser cannot be given actual possession, and that only symbolic possession can be given to him under Order XXI Rule 96, C.P.C. In his reply the decree holder denied in his reply that the objector was a tenant or is paying rent. The property purchased in auction was part of property taken on rent by M/s. Indo Mineral Corporation.

4. The executing court, after hearing the parties, recorded a finding that the objector is a valid tenant and that the decree holder can only be given symbolic possession under Order XXI Rule 96, C.P.C. In revision it was submitted that the original decree was passed against defendant Sri Ashok Kumar Jaiswal. In the suit no such statement was made by the defendant that the objector Shri Satyendra Pratap Singh was a tenant, or that he had given possession to him. The dissolved firm M/s. Indo Mineral Corporation was not a firm belonging to joint family property. It was a partnership firm in which persons different from the family were partners, and that after the dissolution of the firm the objector cannot be said to be the tenant, and is not occupying the property as a tenant.

5. The revisional court discussed the evidence on record and found that Sri Janardan Singh Jaiswal and his brother Madhusudan, have admitted in the proceedings that the objector was the tenant. Sri S. P. Singh had deposited rent u/s 30 of U. P. Act No. 13 of 1972 in favour of M/s. Indo Mineral Corporation, and produced receipts up to 1974. The objector was claiming to be the tenant much prior to the decree in the suit, and that the documents on record support his tenancy. The revision was consequently dismissed on 24.9.2001.

6. Sri A. P. Srivastava, counsel for the petitioner submits that both the courts below have committed gross error of law in appreciating the evidence. The rent receipt of firm M/s. Indo Mineral Corporation dissolved in 1978, and other documents of tenancy could not be relied upon as the tenancy did not exist after the dissolution of partnership firm, The Administrator has no power to accept the objector as tenant and that after dissolution of firm, the petitioner as an auction purchaser is entitled to actual possession under Order XXI Rule 95, C.P.C. Sri A.P. Srivastava submits that the property namely House No. 695, Ward No. 3 situate in Mohalla Muzaffarganj, Mirzapur city was under the tenancy of M/s. Indo Mineral Corporation, a duly registered firm. Form 7 disclosed the names and

addresses of the partners Nand Lal Jalan as karta of Durga Prasad Jalan HUF. Durga Prasad Jalan expired on 31.7.1969. Sri Nand Lal Jalan and Sri Prakash Kumar Jalan HUF retired on 31.7.1969, Sri Shyam Lal Jalan retired on 31.7.1969 and Sri Nand Lal Jalan as karta of Dwarika Prasad Jalan HUF joined on 1.8.1969. Sri Preetam Kumar Jalan (Minor) joined the firm on 1.8.1969. There were six other partners of the firm disclosed in the return. The firm dissolved on the death of one of the partners Sri Tej Narain Singh. The objector respondent No. 3 is the son of Sri Tej Narain Singh, one of the partners of the firm M/s. Indo Mineral Corporation. All the receipts of deposit of rent as well as application u/s 30 of U. P. Act No. 13 of 1972 in Misc. Case No. 3 of 1979, Indo Mineral Corporation v. Madhusudan Singh Jaiswal and Janardan Singh Jaiswal dated 19.1.1979 are in the name of M/s. Indo Mineral Corporation. The rent receipt namely paper Nos. 13Ga, 16Ga, 12Ga, 15Ga and 14Ga for May, 1974, July, 1974, August, 1974, January, 1978 and February and March, 1978 are in the name of M/s. Indo Mineral Corporation and tenant. The Money Order of Rs. 150 dated 28.6.1986 on behalf of M/s. Indo Mineral Corporation by objector Surendra Pratap Singh was sent after the auction of the property. These are clear unambiguous and decisive admissions made by the objector, These admissions have neither been withdrawn nor explained. The admission is the best evidence for recording any finding. A dissolved firm cannot create a tenancy. The firm was dissolved on the death of one of the partners and thus it is evident that the firm was not a Hindu Undivided Family firm. There were other partners who were not the family members and were not the parties to HUF. Sri A. P. Srivastava claims that Sri Surendra Pratap Singh/objector had admitted in these proceedings in his statement that the firm M/s. Indo Mineral Corporation was the tenant, which is still continuing and further it is his family firm and not a partnership firm and that the rent was deposited in the name of M/s. Indo Mineral Corporation. There is no other rent receipt which may establish the tenancy of the objector.

7. He has relied upon the judgment in Harish Tandon v. Additional District Magistrate, Allahabad and Ors. 1995 (1) AWC 106 : 1995 (25) ALR 184. in which it was held that after the death of original tenant all the heirs will be joint tenant. The building shall be deemed to be vacant u/s 12(1) (b) of the U. P. Act No. 13 of 1972 as it was allowed to be occupied by a person who is not a member of the family. The objector had no authority to occupy the building after the dissolution of the firm and that the building shall be deemed to be vacant. He has also relied upon the judgment of this Court in [Smt. Minoti Mazumdar Vs. Tara Chand and another](#), in which this Court held that so long the purchaser is not put into possession, even by removing the person in occupation who refused to vacate, the auction purchaser has a right to make an application for delivery of possession. If such an application is made, it is the duty of the Court to put him into possession. The symbolic delivery of possession does not exhaust the scope of Rule 95 which creates an obligation on the Court to deliver actual physical possession.

8. Sri S.P. Pandey has supported the contention in submitting that the findings recorded by the court below are findings of fact this Court cannot interfere with such findings. The

executing court as well as the revisional court found that the objector respondent No. 3 is the tenant of the property and thus only symbolic possession could be given to the auction purchaser.

9. I have considered the respective submissions and the findings recorded by the executing court as well as the revisional court. It is admitted to both the parties that the property in dispute was under tenancy of M/s. Indo Mineral Corporation which was a registered firm. The firm was dissolved in 1978. Sri Surendra Pratap Singh son of Sri Tej Narain Singh, a partner of the firm continued to occupy the property even after the dissolution of the firm. There is no evidence on record by which the tenancy was created in his favour. The trial court after discussing the evidence, found that Sri Janardan Singh Jaiswal had filed suit for eviction under U. P. Act No. 13 of 1972. In his statement dated 8.9.1993 Janardan Singh Jaiswal stated that M/s. Indo Mineral Corporation was dissolved 25 years ago and that the suit was filed by him treating objector as tenant u/s 21 of the Act. This admission has been treated to be the evidence to establish that the objector, the respondent No. 3 is the tenant of the property and that the admission was made by the petitioner Janardan Singh Jaiswal, about his tenancy more than 20 years ago.

10. Order XXI Rule 96, C.P.C. provides that where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under Rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment debtor has been transferred to the purchaser. The word "tenancy" under Rule 96 means tenancy recognised in law. Both the parties admit that M/s. Indo Mineral Corporation was registered as firm with permanent address 3/1 Queen Park, Calcutta-19 was a tenant of the property. Sri Tej Narain Singh was one of the partners of the firm. Sri Surendra Pratap Singh, respondent No. 3, claiming to be tenant is son of Sri Tej Narain Singh. The firm was dissolved in 1978 and an Administrator was appointed. The deed of dissolution of the firm has not been brought on record. The objector/ respondent No. 3, continued to occupy the property. He has relied upon rent receipts, as well as the proceedings of suit filed by Janardan Singh Jaiswal against him as tenant of the property. It is alleged by the objector that he is tenant but he has not established as to how the tenancy was created. The Misc. Case No. 14 of 1974 in Appeal No. 168 of 1978, Madhusudan Singh v. Surendra Singh was abated on the death of Madhusudan Singh. The Court rejected the objection that Sri Janardan Singh as landlord can maintain the Misc. case and abated the entire proceedings.

11. The property purchased by Janardan Singh Jaiswal/auction purchaser, is a part of the house which was jointly owned by Janardan Singh Jaiswal and Sri Madhusudan Singh Jaiswal. Under the partnership deed, the disputed portion fell to the share of Late Madhusudan Singh who had given the property on rent to M/s. Indo Mineral Corporation, and that he was realising rent from the firm. At best he was occupying the property with

the consent of the firm.

12. The courts below have decided the application for possession under Order XXI Rule 95, C.P.C. only on the basis of admission made by the auction purchaser in the suit for eviction, notice and proceedings u/s 30 of the U. P. Act No. 13 of 1972. I have gone through these documents and find that Sri Janardan Singh Jaiswal had not admitted that the objector Sri Surendra Pratap Singh as tenant of the property. The rent receipts are in the name of M/s. Indo Mineral Corporation. The Money Order dated 28.6.1986 by which the rent for April, May and June, 1986 was sent by M/s. Indo Mineral Corporation through Surendra Pratap Singh son of Sri Tej Narain Singh resident of Narghat (gate house) Mirzapur City for Rs. 150 per month. Sri Surendra Pratap Singh appeared and deposed in these proceedings that M/s. Indo Mineral Corporation is tenant of the property for the last 40-45 years. There is no allotment order. He claims that this firm is his family firm in which initially, the business was carried out in stone, and thereafter a brick klin was set up. He was not in a position to state whether it was a family firm from the beginning. He stated that Vijay Narain Singh, Tej Narain Singh and Shyam Narain Singh, were partners of the firm. He had not seen the documents with regard to registration of the firm. The rent was paid to both Janaradan Singh Jaiswal and Madhusudan Singh. Janaradan Singh Jaiswal used to issue receipt and there was no case pending. The firm stopped the business about 40-45 years ago. He admitted that he was never a partner of the firm. His father and his uncle were partners and they have died. This property was earlier in the management of the Administrator. He does not know as to why the Administrator was appointed or that Sri Chaturbhuj Singh Jaiswal or Sri Sahdeo Singh Jaiswal were the Administrators. He used to give rent in the name of M/s. Indo Mineral Corporation, and after a suit was filed by Janardan Singh Jaiswal and Sri Madhusudan Singh Jaiswal against him, he started depositing rent u/s 30 and is now depositing in Case No. 102 of 1986 before the Munsif Mirzapur. He denied that Sri Nand Lal Jalan or Vishnu Saran Jalan were the partners. The Corporation had taken the property on rent both for business and for residence.

13. The documents relating to registration of firm, the Money Order sent by objector Sri Surendra Pratap Singh and his statement establishes that the firm M/s. Indo Mineral Corporation was the tenant of the part of the property owned by Janardan Singh Jaiswal and Madhusudan Singh Jaiswal. The objector's father Sri Tej Narain Singh was one of the partners of the firm and that the objector is in occupation of the property through his father.

14. It is admitted to the parties that the firm was dissolved in the year 1978 and that upto 1986, the rent was paid by the objector in the name of the dissolved firm. There is no evidence on record to show that Sri Tej Narain Singh had occupied the property as tenant under any arrangement or under the terms and conditions of the dissolution of the firm, nor any document has been brought on record to establish that the Administrator had created the tenancy or had treated the objector's father or the objector as a tenant. The deposit of rent u/s 30 of U. P. Act No, 13 of 1972 does not establish tenancy. It is a

protection given to the tenant against the landlord against an action of default. In the facts and circumstances of the case and on the evidence on record, I find that the trial court as well as revisional court erred in exercise of their jurisdiction in finding that the objector Sri Surendra Pratap Singh was the tenant of the property and that only symbolic possession can be given to the decree holder.

15. In order to resist possession under Order XXI Rule 95, C.P.C. the occupier must establish his right to occupy the property as a tenant. In the present case, and that the facts and circumstances of the case clearly establish that the objector's father Sri Tej Narain Singh was not the tenant of the property. The petitioner did not become tenant on the death of his father and there is no evidence with regard to his tenancy. In *Deo Raj Dagra v. Gyan Chandra Jain* 1981 (2) ACC 615 the Supreme Court held that where the objector claims to be tenant, the question of validity or otherwise of the tenancy may have to be considered and determined in an appropriate proceedings. Order XXI Rule 97, C.P.C. was amended and that Sub-rule (2) provides that where any application is made under Sub-rule (1) by a person resisting and obstructing the possession of immovable property made by the holder of the decree for possession, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained. The object of the amendment made by C.P.C. (Amendment) Act, 1976 was to decide all questions including the right of the tenancy, in the execution proceedings itself. The obstructer must prove not only his possession but has also to establish that he has a right to protect his possession from the auction purchaser. Where he claims tenancy, he must establish the same. In [Noorduddin Vs. Dr K.L. Anand](#), the Supreme Court held that the scheme of the Code clearly adumbrates that when an application has been made under Order XXI Rule 97, the Court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties, to a proceeding or between the decree holder and the persons claiming independent right, title or interest in the immovable property and an order in that behalf shall be made. The determination shall be conclusive between the parties as if it was a decree subject to right of an appeal and not a matter to be agitated by a separate suit. The object is to render substantial justice and to prevent resistance to a decree by a person who has no right to occupy the property. Adjudication before execution is a sufficient remedy to prevent the fraud, abuse of the process of the Court or miscarriage of justice.

16. In the present case, having gone through the findings and discussed the evidence, I find that the objector Sri Surendra Pratap Singh is occupying the property after death of his father Sri Tej Narain Singh. There is a dispute whether Sri Tej Narain was a partner or an employee of the firm but that need not detain the Court as the firm was dissolved. There is no evidence to establish that under the deed of dissolution the tenancy came to the share of any of the partners or that the Administrator appointed for dissolution gave the property on rent to the objector. The rent in 1986 was paid by objector Sri Surendra Pratap Singh on behalf of the dissolved firm. The objector was not able to establish as to how his father and after him, he became tenant of the property. The deposit of rent under

the Act No. 30 of 1972 does not establish tenancy. Even otherwise the objector has not given the account of rent which he deposited in the proceedings. No such tenancy could be created or regularised u/s 14 of U. P. Act No. 13 of 1972, as there was no consent of the landlord for occupancy by the objector who admitted that he has no knowledge about the proceedings after the dissolution of the firm and that the firm used to pay rent to both the brothers namely, Janardan Singh Jaiswal and Madhusudan Singh Jaiswal.

17. On these facts and evidence on record, I find that the findings of both the trial court and the appellate court suffer from gross errors of law. They have not appreciated the evidence and have not recorded a clear finding that the objector was the tenant of the property. In fact there was no evidence to come to such finding.

18. For the aforesaid reasons, the writ petition is allowed. The orders dated 24.2.2001 and 5.4.1997, passed by the Additional District Judge VII, Mirzapur and Civil Judge (Senior Division), Mirzapur accepting the objection of Sri Surendra Pratap Singh to the application for possession made by the petitioner of the property purchased by him in auction vide sale certificate dated 4.4.1986, are set aside. The objections against the execution are rejected. The trial court shall take steps to deliver the possession of the property to the auction purchaser, without any further delay. There shall be no order as to costs.