(1947) 10 AHC CK 0014

Allahabad High Court

Case No: None

Mt. Chandeshwari Kuer	APPELLANT
Vs	
Vireshwar Banerji and Others	RESPONDENT

Date of Decision: Oct. 10, 1947

Citation: AIR 1948 All 317 : (1948) 18 AWR 34

Hon'ble Judges: Sinha, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Sinha, J.

This is an application in revision u/s 115, Civil P.C., against an order of the learned Civil Judge of Ghazipur. The facts, which have led up to this application, are these : One Rai Bahadur Sada Nand Pande died leaving him surviving, a widow, Mt. Chandeshwari Kuer, and two sons, Ishwar Dayal Pande and Prem Dayal Pande, and considerable fortune. Under an agreement arrived at between the parties, the two sons were entitled to get six annas each and the lady a four anna share in the estate. Prem Dayal Pande sold his six annas to one Panchanan Banerji and Mt. Chandeshwari Kuer, by a usufructuary mortgage, dated 23rd January 1929, conveyed her four anna share to him.

2. In 1932 the mortgagee brought a suit for arrears of rent against certain tenants. Mt. Chandeshwari Kuer applied to be made a party. She was made a party. The suit was dismissed and the decision was affirmed, on appeal.

3. The suit, which has given rise to this application in revision, was brought by the sons of Panchanan Banerji on 5th October 1938, for possession of the property and also for recovery of Rs. 7090 on account of damages for the year 1343 to 1345 Fasli. The cause of action was alleged to be the act of dispossession caused by Mt. Chandeshwari Kuer.

4. Before the suit, an application u/s 4, U.P. Encumbered Estates Act, had been pre-sented by Mt. Chandeshwari Kuer. Among the debts mentioned by her was the debt evidenced by the usufructuary mortgage and, among the pleas raised, was a plea that the mortgage was wholly fictitious.

5. Mt. Chandeshwari Kuer made an application before the learned Civil Judge for stay of the proceedings in the suit based on the mortgage u/s 7(1)(b), U.P. Encumbered Estates Act (Act 25 [XXV] of 1934).

6. The learned Civil Judge framed an issue on the question and held adversely to her. It is this order of the learned Civil Judge which is being challenged before us.

7. Section 7(1) says:

When the Collector has passed an order u/s 6 the following consequences shall ensue:

(a)....

(b) no fresh suit or other proceedings other than an appeal, review or revision against a decree or order, or a process for ejectment for arrears of rent shall, except as hereinafter provided, be instituted in any civil or revenue Court in the United Provinces in respect of any debts incurred before the passing of the said order". (The italics are ours.)

8. The learned Counsel for the applicant argues that the suit, which was instituted by the ,sons of Panehanan Banerji was one "in respect of a debt," which, inter alia, was the subject-matter of the application presented u/s 4, Encumbered Estates Act, and no suit on the basis of the mortgage could be instituted.

9. Section 2(a) says:

''debt'' includes any pecuniary liability except a liability for unliquidated damages;

It is ''obvious that all suits or proceedings in respect of a debt'' are, after the Collector has passed an order u/s 6, forbidden. The question is whether a suit for possession comes within the bar.

10. The learned Counsel for the applicant argues that, if the expression used in Clause (b) of Section 7(1) is so wide and general, there is no justification for holding that, while a suit or proceeding ''in respect of a debt'' is forbidden, a suit for possession is not so forbidden, even though its fate depends upon the existence of the debt evidenced by the mortgage.

11. The learned Counsel for the opposite party contends, in reply, that, as this provision of law amounts to a restriction upon the right of a party to seek his redress in a Court of law, it should be strictly construed and, if a suit or a proceeding for possession is not expressly brought within its scope, there is no reason why its progress should be interfered with or stopped.

12. The case law on this subject is scanty. The Court below has relied upon Mt. Champa Devi Vs. Mt. Asa Devi, and M. Mukand Sarup Vs. Th. Krishna Chandra Singh and Others . The learned Counsel for the applicant has taken his stand principally on L. Mukat Bihari Lal Vs. B. Manmohan Lal and Another, and Kanhya Lal Vs. Maheshwar Narain and Others, .

13. We propose first to examine the authorities on which the learned Civil Judge has based his decision. The facts of Champa Devi were briefly these: Under a family arrangement of 17th August 1908, between Shambhu Nath and his aunt, Asa Devi, it was provided that the former was to get all the immovable property and was to pay the latter a sum of Rs. 16,000 forthwith, and a sum of Rs. 1300 per year on account of her maintenance in two equal instalments. In the event of default of three consecutive instalments, Asa Devi was entitled:

to put an end to the family arrangement and take possession of the properties specified in the deed and to realise the instalments due with interest.

Shambhu Nath died sometime later. The lady was regularly paid till 15th August 1933, after which there was default in the payment of three consecutive instalments. Asa Devi accordingly brought a suit for (a) possession of the Immovable property; (b) in the alternative, for a decree for a sum of Rs. 5000 principal and Rs. 375-interest; (c) a decree for a sum of Rs. 2144 on account of the arrears of instalments; and (d) a decree for Rs. 3000 on account of past mesne profits. Champa Devi, the widow of Shambhu Nath, who had presented an application u/s 4, Encumbered Estates Act prayed for the stay of proceedings u/s 7(1)(b). The learned Civil Judge passedanorder rejecting the claim for Rs. 2144 and directed the rest of the suit to proceed. This Court held that the reliefs for the recovery of Rs. 6375 and the arrears of the instalments fell within the purview of Section 7(1)(b) of the Act. The rest of the claim, it held, was maintainable. In other words, it held that the suit with regard to the reliefs for possession and mesne profits, because they "were in the nature of unliquidated damages, could proceed.

14. The learned Counsel for the applicant seeks to distinguish this case on the ground that the right of Asa Devi to claim maintenance or possession in lieu thereof, was not a right based upon the family arrangement, in that there was an express provision that, in the event of a default, the lady was entitled "to put an end to the family arrangement." He also relies upon the general principle of law that a family arrangement, by itself, does not create any title. It merely ''recognises'' and is based upon antecedent title.

15. This is no doubt true, but once the parties have settled their dispute and a family arrangement has been arrived at, even though it may be in recognition of an antecedent title, to it and it alone must the parties look as the charter of their rights. Every family arrangement presupposes some ''give and take'' if it is permissible to use the expression--on both sides. If the parties could be allowed to prefer claims

upon title such as it was prior to the arrangement, there will be no point in arriving at a family settlement.

16. One thing, however, is not quite clear from the report. Asa Devi was given some amount on account of maintenance. She was given, in the event of default of payment, a further right to maintenance. We do not know if, in the proceedings before the Special Judge, Champa Devi merely mentioned the maintenance allowance as a debt due from the estate in her possession, or she also repudiated the arrangement. If she merely showed it as a debt, Asa Devi''s right was never in jeopardy, though Section 14 entitled her, like other creditors--secured or unsecured--merely to a simple money decree. If, on the other hand, the arrangement was challenged and the judgment went against her, Asa Devi was entitled to no relief.

17. The case in M. Mukand Sarup Vs. Th. Krishna Chandra Singh and Others is, in our opinion, distinguishable. The facts, which we have gathered from M. Mukand Sarup Vs. Th. Krishna Chandra Singh and Others , an offshoot of the main case, and which are very complicated, stripped of unnecessary details, appear to be these : On 30-11-1904, Haidar Shah and others made a usufructuary mortgage of four villages in favour of Makund Swarup and Ghafoor Bakhsh in proportion of 3/5ths and 2/5ths. Ghafoor Baksh subsequently sold his rights to Makund Swarup with the result that the latter became the sole mortgagee. On 18-8-1909, Makund Swarup granted a theka of three villages to Girwar Singh and Tulshi Ram, who were first cousins, for a term of fifteen years. OH 18-9-1920, Makund Swarup sold two-fifths of the mortgagee rights in all the four villages to Kishun Chand, Somraj and Raghubir. These three belonged to the family of Girwar and Tulshi. The term of the theka expired on 30-6-1924. On 10-7-1924, Makund Swarup applied for mutation. It was opposed. On 21-10-1924, an agreement was drawn up between Makund Swarup, the mortgagee of three-fifths, on one side, and Kishun Chand, Somraj and Raghubir, the mortgagees of the two-fifths, on the other, under which (a) it was agreed that the term of the theka had expired; (b) of the three villages convered by the theka one entire village was to be retained by Kishun Chand, Somraj and Raghubir, who, as mentioned above, belonged to the same family as Girwar and Tulshi, the original lessees, and will deliver possession of the remaining two villages to Makund Swarup by a certain date; (c) Makund Swarup was also to get from Kishun Chand, Somraj and Raghubir a certain amount, the details of which it is not necessary to pursue. Possession of the two villages was not delivered to Makund Swarup and on 28-4-1928, he brought a suit for recovery of money, possession and mesne profits.

17a. The suit was resisted on the ground that the agreement was, for reasons, which are not relevant to the point in issue, not enforceable; it was invalid; and the suit could not be maintained in the civil Court, because the relation of landlord and tenant existed between the parties.

18. The Subordinate Judge, on 15-11-1930, held that the relation of landlord and tenant existed between the parties and he had no jurisdiction to try the suit. The High Court, Kisch and Bajpai JJ. on 20-12-1934, held that no such relation subsisfed, the suit could be tried by the civil Court and the agreement was enforceable. The question of its validity was left open. The case was remanded for trial on the merits.

19. Sometime later, Kishun Chand applied under the Encumbered Estates Act and applied for stay of the suit. The Civil Judge stayed it. The High Court, Niamat Ullah and Ismail JJ. held, that the suit, so far as the reliefs for possession and mesne profits were concerned, should not be held up.

20. The important point is that the mortgagors were no party to the suit. The mortgage to which the rights of the parties could be ultimately traced, was never in jeopardy. It was a contest between rival mortgagees. Nor does it appear if the validity of the agreement was denied before the Special Judge by Kishun Chand and others. In the case before us the validity of the mortgage has been challenged by Mt. Chandeshwari Kuer in the proceedings under the Encumbered Estates Act. In other words, the fate of the mortgage, the basis of the suit, hangs in the balance and is dependent upon the result of the proceedings before the Special Judge.

21. Coming now to the two authorities, on which reliance has been placed by the learned Counsel for the applicant, we think that the case, which is the nearest approach to the case before us, is that in Kanhya Lal Vs. Maheshwar Narain and Others, although the other case is also in point. In L. Mukat Bihari Lal Vs. B. Manmohan Lal and Another, the facts, very briefly, were these : Manmohan Lal brought a suit for ejectment of Mukat Bihari Lal and Kam Swarup from two houses, on the allegation that he purchased them from them under a sale deed, dated 4-4-1935, that they took the houses on rent from him under a rent agreement, executed by them on the same date, i.e., 4-4-1935, and although they agreed to pay him Rs. 25 as rent, they paid nothing. The failure to pay rent involved, according to the plaintiff, a forfeiture and he was entitled to a decree for ejectment.

22. The defendants, Mukat Behari Lal and Ram Swarup, had made an application u/s 4, U.P. Encumbered Estates Act. They also said that the sale in the plaintiff''s favour was a fictitious transaction. The Court below refused to accede to the defendants'' prayer. This Court, however, held that the suit for ejectment could not, in the circumstances, proceed.

23. This case, therefore, is authority for the proposition that, if the fate of the suit for ejectment depended on the result of the proceedings before the learned Special Judge, it must be stayed. This case bears a family likeness to the case before us.

24. The other case is that of Kanhya Lal Vs. Maheshwar Narain and Others, . One Kanhya Lal brought a suit for specific performance of a contract made by Maheshwar Narain and his sons. Before the date of the suit or, at any rate, before the date of hearing, Maheshwar Narain had made the usual application u/s 4,

Encumbered Estates Act. An application was made for stay of proceedings u/s 7(1)(b). The consideration for the sale, in respect of which the suit for specific performance was brought consisted of a number of items : (a) Rs. 1200 were paid as earnest money; (b) Rs. 6800 were to be set off against certain mhundis in favour of Kanhya Lal; (c) the balance of Rs. 2250 was to be paid at the time of registration.

25. It was contended by the plaintiff that the suit did not fall within the mischief of Section 7(1)(b) and the proceedings should not be stayed. The learned Civil Judge, however, ultimately, stayed the proceedings. It is significant that there is nothing in the report to suggest that, before the learned Civil Judge, Maheshwar Narain and others repudiated the debt for the discharge of which Rs. 6800 were left in the hands of Kanhya Lai, but still the learned Judges affirmed the decision and, in so doing, they observed as follows:

There can be no doubt that in the majority of oases a suit for specific performance of contract would not be a proceeding "in respect of a debt"; but, as we have already shown, in the present cage the greater part of the consideration for the sale which was agreed upon between the parties was in lieu of prior debts which were due from Maheshwar Narain to Kanhaiya Lal, Section 7(1)(a) of the Act is not confined to proceedings for the recovery of a debt; the words used are in respect of any debt, and this is a very wide expression. Having regard to the terms of the alleged contract between Kanhaiya Lal and Maheshwar Narain it cannot be said that the latter suit was not in the nature of a proceeding in respect of a debt, since the main object of the covenant was to liquidate debts which were due from Maheshwar Narain to Kanhaiya Lal.

26. It is, therefore, obvious, that, although the contract of sale in respect of which specific performance was sought was, in a sense, separate and distinct from and independent of the debt, in respect of which the application under the Encumbered Estates Act had been made, never the less the learned Judges affirmed the conclusion of the Court below staying the proceedings. The ratio appears to be that, if the fate of the suit or the proceedings in respect of which stay is sought is linked with and determined or affected by the proceedings before the Special Judge, it is incumbent upon the Court to stay them.

27. It is contended by the learned Counsel for the opposite party that a suit for specific performance differs from a suit for possession. We do not see any real difference. The object of a suit for specific performance is also possession. The only difference is that, in one case, the object is immediate; in the other it is ultimate--capable of accomplishment after certain preliminary steps have been completed.

28. The choice, therefore, lies between L. Mukat Bihari Lal Vs. B. Manmohan Lal and Another, and Kanhya Lal Vs. Maheshwar Narain and Others, , on the one side, and 1937 A.L.J. 945 and M. Mukand Sarup Vs. Th. Krishna Chandra Singh and Others , on

the other. The latter differ, as we have already indicated, in certain essentials, from the case before us. They also seem to militate against the spirit--we are not sure that they do not violate even the--letter of the section.

29. There is another reason. Section 7(1)(b) is general in its terms. It does not, in as so many words, exclude, barring "a process for ejectment for arrears of rent" any particular class of cases. It merely speaks of suits or proceedings "in respect of any debts". When we bear in mind that the intention of the legislature is to avoid multiplicity of proceedings, is there any justification for us to introduce a limitation" which is not to be found, in terms in the section itself? Collister, J. at the end of his judgment, makes the following observation:

We think, moreover, that this view is in consonance with the scope and object of the Act, and we do not think that it can have been within the intention or contemplation of the Legislature that one creditor should thus obtain an unfair advantage as against the debtor and as against the other creditors.

30. With the above we respectfully agree. The proceedings under the Encumbered Estates Act are akin to a proceeding in insolvency, for both provide the machinery for, in the words of Braund J. "the administration of the assets," in one case of the landlord, and, in the other, of the insolvent: vide Benares Bank Ltd. v. Bhagwan Das AIR 1947 All. 18. A judgment passed under this Act is a judgment in rein. The scheme of the Act is that all the creditors, who have any claims against the landlord-applicant, should be before the Court. It is not desirable, in the words of Collister J. that

one creditor should thus obtain an unfair advantage as against the debtor and as against the other creditors

by pursuing his remedy independently.

31. There is yet another aspect of the matter. The Legislature excluded from the operation of the section a particular proceeding--a process for ejectment for arrears of rent. In so doing, it merely followed the principle laid down in a certain class of cases of which Kalka Das v. Gajju Singh AIR 1921 All. 13 is a type. Exclusion is only another name for exception, as was held in Churchill v. Crease (1828) 5 Bin. 177. Referring to this case Craies, in his Statute Law (Edn. 4) at p. 200, says:

So in Churchill v. Crease (1828) 5 Bin. 177 the question was whether a payment made by a bankrupt before the issuing of "the commission against him was protected by 6 Geo, IV Ch. 16, Section 82, which enacted that ''all payments really and bona fide made, or which hereafter shall be made, to any creditor, by a bankrupt, before the issuing of the commission against him, shall be deemed valid.'' It was argued that, as by Section 136 the Act was not to come into force until the September then next, and the payment in question was made before the September, the Act would not apply to that payment so as to protect it. The Court,

however, held that the payment was protected. ''I should have thought'', said Best C.J., ''that Section 136 was conclusive if there had been no conflicting intention to be collected from the Act, but the rule is that where a general intention is expressed (as here, that the Act should not come into force until September), and the Act expresses also a particular intention incompatible with the general intention (as here, that all payments bona fide made i.e., heretofore made shall be protected), the particular intention is to be considered in the nature of an exception.

If it is an exception, it must be construed strictly. In Gaya Prasad v. Kalap Nath AIR 1929 Oudh 389 Wazir Hasan, A.C.J. observes as follows:

The provision in the same section that there shall be no third appeal to the Chief Court from a decree passed by a District Judge as a Court of second appeal is stated in the form of an exception and therefore according to the well recognized principles of interpretation the exception does not affect the general rule. It must be confined within its own limits and strictly to the subject matter embraced within it.

To the same effect is the observation of Din Mohammad J. in Madho Singh v. James Skinner AIR Lah. 243

One fundamental principle that governs the interpretation of statutes is that an exception must be construed strictly.

32. If it is permissible to borrow light horn analogy, we might refer to the Agriculturists'' Relief Act (Act XXVII of 1934), which was passed "to make provision for the relief of agriculturists from indebtedness." The Encumbered Estates Act (Act xxv of 1934) was passed "to provide for the relief of Encumbered Estates in the United Provinces." Both the classes the zamindar and the tenant--depend for their livelihood, upon land. Speaking of the Agriculurists Relief Act, their Lordships of the Judicial Committee in the now well-known case in AIR 1944 35 (Privy Council) said that the words of a remedial statute

must be construed so far as they reasonably admit so as to secure that the relief contemplated by the statute shall not be denied to the class intended to be relieved.

If the U.P. Encumbered Estates Act is also a remedial statute, providing for the relief of a particular class, the above principle will equally apply to the case before us.

33. We have cited the above authority only to meet the argument of the learned Counsel for the opposite party that, as it is a provision of law which interferes with the general right of a party to pursue his own remedy recognised by the law, it should be very strictly construed. It is true their Lordships were considering the question of reduction of interest and instalments, some of the principal methods devised by the legislature for the relief of the agriculturists. But it is no small relief to a litigant to be saved the trouble inherent in multiplicity of proceedings.

34. We, therefore, allow this application in revision, set aside the order of the learned Civil Judge and direct the stay of proceedings in Suit No. 20 of 1938 pending before the learned Civil Judge of Ghazipur until the conclusion of the Encumbered Estates Act proceedings. Costs on parties.