

(1986) 04 CAL CK 0002

Calcutta High Court

Case No: Second Appeal No. 32 of 1977

Phani Bhusan Gupta

APPELLANT

Vs

Sm. Mira Roy

RESPONDENT

Date of Decision: April 28, 1986**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 47
- Contract Act, 1872 - Section 62

Citation: 90 CWN 1144**Hon'ble Judges:** Sankar Bhattacharyya, J**Bench:** Single Bench**Advocate:** Aditya Narayan Ray, Mukti Prasanna Mukherjee and Binod Behari Giri, for the Appellant; D. Pal, Ashok Banerjee and Ashim Kumar Mukherjee, for the Respondent**Final Decision:** Dismissed

Judgement

Sankar Bhattacharyya, J.

This appeal is directed against an order of reversal passed by the learned Additional District Judge, 5th Court, Alipore, in Misc. Appeal No. 662 of 1976 dismissing Misc. Case No.37 of 1975 on the file of the learned Munsif, 4th Court, Alipore, under S. 47, Civil Procedure Code.

2. The respondent Mira Roy bought Title Suit No.319 of 1963 subsequently re-numbered as Title Suit No.195 of 1969, for ejectment of the appellant from the suit premises and for recovery of arrear rents and mesne profits. The ground on which the suit was brought was default in payment of rent by the appellant. Ultimately, the parties reached a compromise and the suit was decreed in terms of the compromise petition which was made a part of the decree. It will be sufficient for our purpose to mention that the compromise petition set out the matter in which the arrear rents, together with mesne profits, were to be paid by monthly instalments. It also contained that if payments were made in accordance with the

terms of the compromise petition, the decree would not be executed at any point of time but in case of default of payment of any two successive instalments the decree would be executable forthwith.

3. The appellant having failed to make payment in terms of the compromise petition, the respondent put the decree into execution in Title Execution Case No.92 of 1970 for recovery of possession of the suit premises and decretal dues. The appellant filed an objection under S.47, CPC alleging that the execution case could not proceed as there was novation of the original contract by a subsequent contract between the parties. The objection under S.47, CPC was registered as Misc. Case No.83, which was allowed by the learned Munsif and the execution case was dismissed. The reason for allowing the objection under S.47, Civil Procedure Code, as stated by the learned Munsif, was that there was novation of the original contract by a subsequent contract between the parties under which the appellant was allowed time till 6.8.71 for payment of the arrear rents. As, however, the execution proceeding was commenced on 24.5.71, i.e. before the expiry of the period allowed for payment it was premature. No appeal was preferred by the respondent against the said decision of the learned Munsif.

4. Subsequently, the respondent again put the decree into execution in Title Execution Case No.13 of 1975. Again an objection under S.47, Civil Procedure Code, was filed by the appellant which was registered as Misc. Case No. 37 of 1975. The objection taken was that by a contract dated 6.6.71 there had been a novation of the original contract contained in compromise petition and the execution case could not, therefore, proceed on the basis of the said contract.

5. The objection was upheld by the learned Munsif who dismissed the execution case. There was an appeal by the respondent which was allowed by the learned Additional District Judge on the ground that the subsequent contract even if any could not affect the compromise decree and that S. 62 of the Contract Act had no application to the case. The present appeal, as stated already, seeks to assail the above decision of the learned Additional District Judge.

6. In assailing the judgment and order of the learned Additional District Judge, Mr. Ray, learned Advocate for the appellant, has placed strong reliance upon two documents admittedly signed by the respondent. The first one is dated 6.2.71 (vide : Ext.3g) and the next one is dated 6.6.71 (vide : ext.3h). According to Mr. Ray, these are the subsequent contracts which brought about a novation of the contract contained in the compromise petition.

7. Ext.3g indicates that on 6.2.71 the respondent received a sum of Rs.500/- from the appellant towards the decretal dues on the latter's undertaking to pay the balance of Rs.1,400/- within May 7, 1971. She agreed not to proceed with the execution case (Title Execution Case No.92 of 1970) for the time being but reserved her right to continue with the case if the entire amount was not paid off within two months, i.e.

within 6.4.71.

8. On 6.6.71 the respondent received a further sum of Rs.400/- from the appellant towards the decretal dues as the appellant undertook to pay off the balance of Rs.1,000/- within July 1971. If the amount was so paid, the respondent was not to proceed with the execution case for the time being. But this time also she reserved her right to proceed with the case unless the said amount was paid off within two months from 6.6.71 (vide: Ext.3h).

9. It may be recalled that the learned Judge dismissed Title Execution Case No.92 of 1970 on the ground that although the respondent granted time to the appellant to pay off the balance of Rs.1,000/- within 6.8.71, she commenced the execution proceeding before the expiry of the said date.

10. The important question that falls for determination is whether Ext.3h amounted to a notation of the contract embodied in the compromise petition.

11. Section 62 of the Contract Act lays down that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. This is known as "notation" of a contract and there is no quarrel about this proposition.

12. The lower appellate court took the view and, in my opinion, rightly that since the first contract in the shape of compromise was made a part of the decree and received the imprimatur of the court, there could be no notation of such contract.

13. As pointed out above, under S. 62 of the Contract Act, there may be notation of a contract by a subsequent contract between the parties. In the instant case, however, after the compromise decree was passed, the contract embodied in the compromise petition lost its character as a contract and got merged in the decree. In other words, it became a part of the decree which could not be altered by a subsequent agreement between the parties. Moreover, as held by a Division Bench of this Court in the case of *Monohar Koyal v. Thakur Das Naskar*, reported in ILR 15 Cal 319, the provisions of S. 62 have no application to a case where there has been a breach of the original contract before the subsequent agreement is come to. Therefore, even assuming that there could be a notation of the original contract, the compromise decree notwithstanding, still S.62 of the Contract Act cannot be invoked by the appellant as there was a breach of the contract long before the alleged notation.

14. In my view, apart from the legal position stated above, there could be no notation of the original contract. The decree was put into execution for non-compliance of the terms of the original contract and the respondent merely agreed not to proceed with the execution case for the time being the amount mentioned in the document (vide: Ext. 3h) was paid off within the time allowed by her. Therefore, nothing could prevent the respondent from executing the decree if the payment was not made within the stipulated time.

15. Title execution Case No.92 of 1970 was dismissed by the learned Judge as it was commenced before the time fixed for the payment. In other words, it was dismissed as being premature. The above decision, though not appealed against cannot operate as res judicata so as to prevent the respondent from commencing a fresh execution case for realization of the decretal dues and eviction of the appellant from the suit premises.

16. It may be mentioned in this connection that though the appellant resisting the second execution case, being Title Execution Case No.13 of 1975, the admitted position is that after the dismissal of the first execution case he has not paid any amount whatsoever to the respondent either before or after 6.8.71. In such circumstances, it is not understandable how the appellant can question the maintainability of the execution case even though he himself has not complied with the terms of the so-called subsequent contract (Ext.3h) on which he relies so much.

17. For the foregoing reasons, I find no substance in the appeal and must be dismissed.

18. In the result, the appeal is dismissed and the judgment and order of the learned Additional District Judge passed in Misc. Appeal No.662 of 1976 are affirmed.

Stay earlier granted by this Court is hereby vacated.

In the circumstances of the case, there will be no order as to costs.

19. On the oral prayer of Mr. Ray, learned Advocate for the appellant operation of this judgment shall remain stayed for six weeks from date.