

(1977) 05 CAL CK 0005

Calcutta High Court

Case No: F.M.A. No. 780/806/827 of 1976

Purban Pvt. Ltd.

APPELLANT

Vs

Deb Kumar Shaw

RESPONDENT

Date of Decision: May 25, 1977

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10, 148, 47, 60

Citation: 81 CWN 953

Hon'ble Judges: N.C. Mukherjee, J; B.C. Ray, J

Bench: Division Bench

Advocate: Sankardas Banerjee, P.K. Roy, Sibaji Sen and N.C. Bhattacharyya, for the Appellant; Bankim Chandra Dutta, Chandra Nath Mukherji and Sudhindra Kumar Kar, for the Respondent

Judgement

B.C. Ray, J.

These three appeals arise out of three orders being Order No. 50 passed in Misc. Case No. 21 of 1976, Order No. 51 passed in Misc. Case No. 19 of 1976 and Order No. 49 passed in Misc. Case No. 20 of 1976 respectively on 19.5.76, dismissing the said Miscellaneous cases filed u/s 47 of the CPC in Title Execution Case No. 16 of 1975. The petitioner, M/s. Purban Pvt. Ltd., a company incorporated under the Companies Act, has been in occupation of the basement, first floor and fourth floor of premises no. P--5, C. I. T. Scheme --IV, Calcutta as a tenant under the respondent Deb Kumar Shaw. The petitioner Company defaulted in payment of rents. The respondent filed three ejectment suits being Title Suit No. 67 of 73, 68 of 73 and 69 of 73 in the 9th Court of Subordinate Judge at Alipore in respect of the said three flats. The said suits were decreed on compromise on December 5, 1974. The compromise decree provided that the total sum of Rs. 1,17,000/- on account of arrears of rent and mesne profits would be paid by the defendant in the following manner :--a sum of Rs. 30,000/- to be paid by 31st December, 1974 and the balance amount of Rs. 87,000/- to be paid in 17 quarterly installments of Rs. 5,000-each

except the last installment which should consist of Rs. 2,000/-. It was further provided in the said decree that the company, that is, the petitioner, would also go on paying a total sum of Rs. 2,250/- per month within 15th of the month succeeding as current mesne profits in respect of the said three tenancies. There is also a default clause which provides that in case of default the decree holder will be entitled to execute the decree and take possession of the suit premises. It has also been provided in the compromise decree that if all the arrears and the current mesne profits are made in the manner provided in the compromise decree the old tenancy will continue. The defendant petitioner defaulted in making payment in terms of the said decree. The plaintiff put the said decrees into execution in Title Execution Case No. 16 of 1975. In the said execution case an objection was filed on behalf of the judgment-debtor petitioners that the decree has become inexecutable as the State of West Bengal has declared the petitioner Company as a State Undertaking. Unless the State of West Bengal is made a party in the execution proceedings the writ of possession cannot be executed. It has also been stated that the I. R. C. I. is also a necessary party as they advanced a huge sum of money for running the business in the suit premise. Similar objections were filed in the other Title Execution cases and these objections were registered as Misc. Case Nos. 19, 20 and 21. On May, 19, 1976 all these misc. cases were dismissed by the Subordinate Judge, 9th Court, Alipore holding that the State of West Bengal was not a necessary party and this had been held by an earlier order dated February 20, 1976 as the notification-in-question had no application to the instant decree. It was also held that the I.R.C.I. in spite of given time to file application under order 1, Rule 10 of the CPC did not appear in the misc. case and as such it was not a party interested and a necessary party. It was further held that Section 148 C. P. Code did not apply inasmuch as the executing court cannot go behind the decree except for the purpose of dissolving any ambiguity. The compromise decree is unambiguous and as such the executing court cannot extend time for making the deposits as provided in the compromise decree.

2. Against these orders three appeals being F.M.A. Nos. 780 of 1976, 806 of 1976 and 827 of 1976 have been filed and in connection with the said appeals three Rules were issued being Civil Rule No. 2224(H) of 1976, 2223 (M) of 1976 and 2222 (M) of 1976 were issued staying the Title Execution Case Nos. 16 of 1975 and 17 of 1975 pending the hearing of the Rule.

3. Mr. P. K. Roy, learned Advocate appearing on behalf of the petitioner has submitted that the consent decree created a fresh tenancy in favour of the appellant and as such the appellant cannot be evicted from the demised property in execution of the said decree without recourse to a fresh suit for eviction. It has been submitted by Mr. Roy that the compromise decree provides for payment of certain amount as rent per month and there is no time limit for payment of such rent. As such the monthly rent that have been paid by the appellant to the respondent creates a new tenancy in favour of the appellant. The appellant cannot be evicted

from the demised property in execution of the compromise decree. In support of his submission Mr. Roy has cited the decisions reported in [Babulal Gulabchand Vs. Nathulal Badrilal](#), .

4. Mr. Roy has next submitted that the court has jurisdiction u/s 148 of the CPC to extend time for making the payments or deposits as provided in the compromise decree. In this connection Mr. Roy has referred to certain decisions.

5. Mr. Bankim Chandra Datta, learned Advocate appearing on behalf of the respondent has, on the other hand, submitted that the appellant cannot be permitted to raise a new point regarding the creation of tenancy by the compromise decree for the first time in this Court as the same was not raised in his objection petition filed in the said execution case. Mr. Dutt, has next submitted that the appellant cannot raise an objection in the appellate court which has not been raised in the misc. case (C) before the executing court. Mr. Dutt has also submitted that the clause in the compromise decree cannot be said to create a new tenancy and he referred to a decision reported in [Bai Chanchal and Others Vs. Syed Jalaluddin and Others](#), on this point. Mr. Dutt has lastly submitted that it is not an application u/s 148 of C. P. Code but an objection filed in execution proceeding and as such the executing court cannot consider the question of extension of time and cannot extend time to make payments in terms as provided in the compromise decree.

6. Before proceeding to decide the merits of the first contention advanced on behalf of the learned counsel for the petitioner that the terms the compromise decree creates a fresh tenancy in favour of the defendant appellant, it is pertinent to decide the preliminary objection that has been taken against the raising of this contention on the ground that this contention having not been raised in the objection petition u/s 47 of the CPC before the executing court cannot be raised for the first time in the appellate court. This contention as to whether the terms of the compromise decree creates a fresh tenancy involves purely a question of law and it does not require any investigation of facts and as such the appellant cannot be precluded from raising this point of law for the first time in this court. In A. I. R, 1966 Rajasthan 187 Kanmal v. Hukumchand, a similar question arose and it was held that the preliminary objection was not tenable as it involved a question of a proper construction of the decree only which was a question of law. In A. I. R. 1964 Allahabad 34 Prabhu Lal and others v. Babu Singh, a preliminary objection was taken that the contention as to the executability of the mortgage decree for sale of the residential house of an agriculturist in view of the amendment of Section 60 C. P. Code by U. P. Legislature on the ground that though the said section was enforced before when two earlier execution petitions were rejected and this objection was not taken therein and so it could not be raised being barred by constructive resjudicata. It was held that the plea of res judicata could not be raised in view of the bar created by Section 60 C. P. Code preventing execution of decree directing sale of house of an agriculturist. In view of the decisions mentioned above this preliminary

objection is overruled.

7. In order to decide the question whether the clause in the compromise decree regarding the payment of monthly mesne profits on the due date has created a fresh tenancy in favour of the defendant appellant it is necessary to scrutinise the relevant terms of the decree. The suit has been decreed both for ejectment and for mesne profits without costs. It has been provided that the decree for ejectment and mesne profits will not be executed if the defendant complies strictly with the terms and conditions. Clause (b) of the terms No. 3 provides that the defendant will pay the arrears of rents and mesne profits by quarterly installments of Rs. 1500/-, the 1st such payment has to be made on or before March 31, 1975 and so on. Clause (c) provides that the defendant has to pay also mesne profits every month. Clause (d) provides that if the defendant fails to comply with any of the terms strictly in time then the plaintiffs will be entitled to execute the decree and to take khas possession and to realise the decree for rents and mesne profits. Term No. 4 says that if the defendant strictly complies with all the terms aforesaid and all the arrears are paid the ejectment decree will be deemed to have been fully satisfied and the plaintiff will recognize the defendant as his tenant under the old terms and conditions. Thus it is evident from the decree that a definite time has been fixed for the payment of decial dues during which period the defendant will have to pay mesne profits per month at the due time and there is also a default clause which will entitle the plaintiff respondent to execute the decree if the said payments are not made in accordance with the terms of the decree. It cannot be said that the terms of the decree provides for payment of monthly rent and for remaining in possession of the suit premises for an indefinite period. In A. I. R. 1954 Bombay 370 Ramjibhai Virpal Shah v. Gordhandas Magan Lal Bhagat an ejectment suit was decreed on compromise on 22.10.47. The decree provided that the defendant would vacate the suit premises by 12.10.49 and the defendant would pay arrears of rent and mesne profits within that period. The defendant would also pay monthly mesne profits until the house-in-suit was handed over. The plaintiff was given a right to execute the decree and to take possession of the suit house. It was held that "the scheme of the agreement, the absence of any words indicating demise as such, the emphasis on the defendant's undertaking to vacate on or before the specified date, the use of the words "mesne profits", liberty left to the defendant to vacate as soon as he liked, coupled with the circumstances under which the contract came to be made, lead to the inference that the document does not evidence the creation of a leasehold right; it only enabled the defendant to remain in possession of the property permissively at the latest untill 22.10.49."

8. The facts in A. I. R. 1966 Rajasthan 178 Kanmal and others v. Hukum Chand in short is that a suit for eviction for default in payment of rent was decreed on compromise. Two of the terms of the decree which are relevant are to the effect that the defendant will pay the arrears of rent and half of the costs of the suit by six monthly installments and the defendant will pay Rs. 251/- as rent per month on the

first of every month and in default of compliance of any of the terms the plaintiff will be entitled to evict the Defendant from the shop. Defendant having defaulted in payment of monthly rent an application for execution was filed by the decree-holder. It was held that as the defendant was to remain in possession for an indefinite period on payment of monthly rent regularly the clauses in compromise decree created a fresh tenancy which did not come within the scope of the suit. As such the defendant could not be evicted by executing the said decree except by a separate suit. It was also observed that the decision in A. I. R. 1954 Bombay 370 did not apply as in that case a decree for eviction was passed though the date of eviction was postponed.

9. In [Bai Chanchal and Others Vs. Syed Jalaluddin and Others](#), a suit for ejectment was decreed on compromise. It was agreed that the defendants would remain in possession of suit premises for a period of five years and would handover possession after expiry of the said period. It was also provided in the decree that the defendants would pay certain mesne profits monthly during this period. There was a clause that in case of default of payment of mesne profits the judgment-debtors could be immediately called upon to vacate the suit premises. It was held by their Lordships of the Supreme Court that these terms did not create a new tenancy nor a licence. The decree-holders merely allowed the judgment-debtor to continue in possession for five years on payment of mesne profits as a concession for entering into compromise. The decisions in [Bai Chanchal and Others Vs. Syed Jalaluddin and Others](#), are applicable to the instant case as the facts are almost similar. I have already held that the terms of the decree provides a definite period within of which all arrears of rents and mesne profits as mentioned in the decree are to be paid and during this period the tenant defendant has to pay monthly mesne profits for this period and in default of non-compliance with any of the terms the plaintiff respondent will be entitled to execute the decree for ejectment and arrears of rents and mesne profits. This payment of monthly mesne profits for a definite period cannot be treated as creating a fresh tenancy. This position becomes very clear from terms No. 4 of the compromise petition which says that in case of due compliance with the terms of the decree and on full payment of the decretal dues the ejectment decree will be deemed to have been satisfied and the defendant will be recognized as a tenant under old terms and conditions. The decision in A. I. R. 1966 Rajasthan 178 does not apply to this case as in that case the stipulation in the compromise decree was to pay monthly rent for an indefinite period and not mesne profits.

10. In the instant case it is apparent from the terms of the compromise decree that the decree for ejectment and for arrears of rents and mesne profits was passed against the tenant-defdt. By the terms of the decree only a concession has been made do the effect that the plaintiff will not execute the decree if the arrears of rents and mesne profits be paid within a certain period of time and the defendant has been permitted to stay in the suit premises till that time on payment of monthly mesne profits. These terms in the compromise decree can not in any way be

interpreted as creating a demise of the suit premises in favour of the defendant and a fresh tenancy is created thereby.

11. With regard to the submission as to extension of time to make the payments as required to be made under the terms of the decree this petition of objection whereon the Misc. Case has been started is not an application u/s 148 of the CPC nor does it contain any prayer for extension of time specified in the decree for making payment of monthly mesne profits. Moreover, it appears that in the said Execution Case No. 16 of 1975 an application dated 5.8.75 was filed praying for extension of time to make the deposit. The said application was rejected by order No. 6 dated August 21, 1975 and it was held that the judgment-debtor was not diligent and no sufficient cause was made out for extension of time. The learned Subordinate Judge has held that the executing court cannot go behind the decree except for the purpose of resolving any ambiguity in the language of the decree and the executing court cannot extend the time as fixed in the decree. We do not find any infirmity in this finding. It is, therefore, not necessary to consider the question whether the court can extend time fixed in a compromise decree for making certain payments u/s 148 of the CPC and whether time for payment fixed in the decree is not the essence of the contract and as such on equitable consideration the time can be extended by court. For all the reasons aforesaid we dismiss the appeals and affirm the orders of the court below. In the circumstances of the case there will be no order as to costs. The three revision cases viz. C. R. 3773 to C. R. 3775 of 75 are also discharged without costs. Let the records be sent down to the court below immediately. Let the operation of the order be stayed for two weeks as prayed for by the learned Advocate for the appellants.

N.C. Mukherji, J.

I agree.