

(1978) 06 CAL CK 0021

Calcutta High Court

Case No: None

Indian Scientific
Accessories co. Pvt.
Ltd

APPELLANT

Vs

Anil Dey and Ors

RESPONDENT

Date of Decision: June 26, 1978

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 47

Citation: 83 CWN 281

Hon'ble Judges: A. K. Sen, J

Bench: Single Bench

Advocate: Sudhir Das Gupta and Pradipta Ray, for the Appellant; Bankim Chandra Dutt, P. K. Sen Gupta, Partha Datta and Samarjit Gupta, for the Respondent

Final Decision: Dismissed

Judgement

1. This miscellaneous appeal is at the instance of the judgment debtor whose objection u/s 47 to the execution of a decree for eviction on the ground of landlords' requirement has been concurrently overruled by the two courts below. It is unfortunate that such an execution it self is pending for nearly 8 years having been initiated on September 10, 1970.

2. Six sons of Late Jnanendra Nath Dey and his widow instituted a suit for ejectment as against the present appellant from premises No. 8, Abhoy Sankar Lane, P.S. Bhowanipore, District-24 Parganas on the ground that they reasonably require the said premises for occupation themselves and their family members numbering 12 besides other dependants on them. In pleading their requirement, they further pleaded that for dearth of accommodation the family members were living apart in two rented houses differently situated and the accommodation available in such rented houses also was insufficient. That suit was instituted on September 3, 1963. It

had a chequered career but was ultimately decreed by the trial court on March 12, 1969. The present appellant preferred an appeal, which, however, was dismissed on July 1, 1970, and a second appeal to this court was also dismissed on March 28, 1974.

3. The said decree was put into execution in Title Execution Case No. 106 of 1970 on September 10, 1970, but under the orders of these court further proceedings thereof was stayed pending the disposal of the second appeal. After the disposal of the second appeal the decree holders applied for issue of a writ for delivery of possession, which, however, could not be executed due to resistance. On January 17, 1975, the decree holders prayed for delivery of possession with police help, which was allowed on February 6, 1975. Before however, the writ of delivery of possession could be executed with police help the present appellant the judgment debtor filed an application on March 10, 1975, for granting him time till expiry of August 1975, on an undertaking that he would vacate the suit premises and shall deliver peaceful khas possession thereof to the decree holders in terms of the decree within August 1975. In this application it was further represented that in case of default the decree holders shall be entitled to recover khas possession in the execution case itself and that he shall not be entitled to raise any objection to the same. On the under taking so given, the decree holders consented to the giving of the time prayed for and the court allowed the prayer.

4. The appellant, however, breached the undertaking so given by him and on the other hand filed an objection u/s 47 of the CPC on August 30, 1975, notwithstanding his previous representation that he shall not be entitled to raise any objection to the execution. The objections raised were twofold. Firstly, it was pleaded that the decree under execution is a nullity because the plaintiffs had not amended their plaint in terms of the amendment provision of section 13(1) (ff) - such amendment had been incorporated in 1969, with retrospective effect, nor had made out such a ground in support of their claim for eviction. Secondly, it was claimed that 1/7th share of one of the decree holders having been sold in money execution on May 31, 1975, and having been purchased by a third party the decree holders are not entitled to continue with the proceedings for execution. Both these objections have been concurrently overruled by the two courts below. The court of appeal below has taken the view that the first objection even if it be taken to be correct would not render the decree a nullity, the court having jurisdiction to pass a decree for eviction on the ground of requirement. According to the learned judge that may be an error but the executing court cannot go behind the decree and question the validity thereof. So far as the second objection is concerned, the learned judge in the court of appeal below took the view that even if 1/7th share in the suit premises of one of the decree holders had been sold and purchased by a third party that cannot stand in the way of the other decree holders of proceeding with the execution. Feeling aggrieved by the concurrent decision of the two courts below, the judgment debtor has preferred the present appeal.

5. Mr. Dasgupta appearing in support of this appeal has pressed the very same two objections, which were raised, u/s 47 of the CPC in this appeal. He has further contended that since one of the decree holders has died pending the present appeal, the decree under execution must be held to have lapsed, and as such, no longer executable. In elaborating the first two objections Mr. Dasgupta has contended that the court of appeal below is in error in thinking that a decree for eviction passed in a case where a ground in terms of the amended provision of section 13 (1) (ff) had neither been pleaded nor proved is merely an erroneous decree. Such a decree, according to Mr. Dasgupta is a nullity because the court can assume the jurisdiction to pass such a decree as and when such a ground is made out. Mr. Dasgupta has next contended that the learned judge in the court of appeal below is in error in thinking that notwithstanding the sale of 1/7th share in the suit property belonging to one of the decree holders the decree could still be executed by the others. According to Mr. Dasgupta when the decree is passed on the joint requirement of the 7 landlords, on auction sale of the interest of one of them and the death of the others, the decree must be held to have lapsed since no such joint requirement can any further be said to subsist.

6. The points thus raised by Mr. Dasgupta have been strongly contested by Mr. P. K. Sengupta, the learned advocate who is appearing on behalf of the decree holder/respondents. According to Mr. Sengupta the decree under execution cannot be said to be one not based on a ground contemplated by the statute even after its 1969 amendment. Mr. Sengupta has taken pain to take me through the judgment of this court of appeal below in the original suit to show that the courts were quite conscious of the amendment introduced in the year 1969 and in upholding the decree they were of the view that a ground within the meaning of the amended provision, namely, section 13(1) (ff) had been made out. According to Mr. Sengupta though the suit itself was tried and disposed of by the trial court at a time when the amendment had not come into force, yet if on the existing pleadings and evidence the courts of appeal could come to hold that a ground in terms of the amended provision had been made out by the plaintiffs, the courts of appeal could very well uphold the decree and amendment of the pleadings is not a mandatory pre-requisite in every case. So far as the second objection rose by Mr. Dasgupta is concerned. Mr. Sengupta has strongly contested the claim that on the death of one of the decree holders or on the sale of the share of one of the decree holders the decree based on the requirement of all would lapse. According to Mr. Sengupta such a decree can still be executed in terms of Order 21 Rule 15 of the Civil Procedure Code. Mr. Sengupta has further pleaded that in any event in the present case the objection preferred by the appellant should not be entertained since such an objection has been filed in breach of an under taking given to the court and on which the decree holders altered their position to their prejudice by not proceeding prayed for by the appellant.

7. On a careful consideration of the objections raised by Mr. Dasgupta I have come to the conclusion that such objections have no merits. Under the provision of section 13 (1) (f) as it stood prior to the 1969 amendment court could pass a decree for eviction in favour of a landlord where the premises were reasonably required by the landlord either for the purpose of building or rebuilding or for his own occupation if he is the owner or for the occupation of any person for whose benefit the premises were held. By the 1969 amendment this clause was made into two, namely, clause (f) and (ff). Clause (f) after the amendment speaks of reasonable requirement for the purpose of building or rebuilding while clause (ff) provides for reasonable requirement for the landlord's own occupation or the occupation of any person for whose benefit the premises are held. On the amendment, both clauses (f) and (ff) are subject to sub-section (3A) which debars a transferee-landlord from claiming any eviction or either of the two grounds before the expiration of a period of 3 years from the date of acquisition of any property. Clause (ff) further provided that in order to claim eviction on this ground, the person for whose occupation the premises is required must not himself be in possession of any reasonably suitable accommodation. Now in the present case there is no dispute that sub-section (3A) has no application, and as such, the prohibition thereunder could not have affected the decree under execution. According to Mr. Dasgupta, the plaintiffs in their original plaint had merely pleaded reasonable requirement for their own occupation but had not pleaded that they were not in possession of any reasonably suitable accommodation. Therefore, when section 13 was amended in the manner aforesaid with retrospective effect, the plaintiffs should have amended the plaint to plead absence of reasonably suitable alternative accommodation in their possession and should have also proved by evidence-adduced absence of such accommodation to bring the case within the amended provision. But that not having been done, the decree under execution must be held to be one not based on a ground sanctioned by section 13, and as such, it is a nullity. I am, however, unable to accept this contention of Mr. Dasgupta. In my view a decree would be nullity if it is wholly dehors any of the grounds specified by section 13 of the Act. If the court in passing the decree be found to be conscious of the statutory requirement in this regard and satisfied itself about the existence and/or fulfillment of one or more of the statutory grounds specified in section 13, any error or irregularity in the process of arriving at such a satisfaction would not render the decree a nullity. That may render the decision erroneous, but an erroneous decision is not necessarily a nullity. Such an error is only to be set at right on an appeal. It would appear from the judgment of this Court in the second appeal that this very objection was raised on behalf of the appellant in that appeal when it was contended that the decree of the lower appellate court is erroneous as the same was not based on consideration of section 13 (1) (ff). In repelling the said contention this Court found :
The courts below have not in so many words mentioned clauses (ff) in their judgment, but their discussion on the question of reasonable requirement clearly

shows that this clause was also considered. It has been held that the plaintiffs have not in their possession reasonably suitable accommodation..... I am unable to say the finding made by the two courts below is in any way wrong on this score. This contention also fails".

8. Though Mr. Dasgupta has strongly assailed the correctness of the finding so arrived at by the learned judge who disposed of the second appeal and though Mr. Dasgupta has strongly contended that the learned judge in disposing of the second appeal had himself refused to take additional evidence sought to be tendered on behalf of his client to show that the plaintiffs since then had taken another house on rent to that they can be said to be having their possession a suitable alternative accommodation for them, yet those are at the worse illegalities and irregularities committed by this court. But notwithstanding such illegalities or irregularities, the fact remains that in disposing of the second appeal this court did come to a finding that the plaintiffs have made out a case of requirement within the four corners of section 13 (1) (ff). If the learned Judge had done so without requiring any amendment of the pleading or without allowing the parties to adduce evidence that would not render his judgment a nullity and the consequent decree wholly without jurisdiction. The appellant should have challenged such a decree as an erroneous one on a further appeal. In this view, I overrule the first contention raised by Mr. Dasgupta that the decree under execution is a nullity, and as such, is not executable.

9. So far as the second objection raised by Mr. Dasgupta is concerned, it is not disputed that one of the sons of Janendra Nath Dey has died pending the present miscellaneous appeal to this court. It is also not in dispute that 1/7th share in the suit property belonging to another decree holder was sold in money execution in May 1975. The question is what is the effect of such death of one of the decree holders and sale of the right title and interest of another. It would not be necessary for me to enter into any controversy as to whether a decree obtained by a landlord on a ground of requirement specified in section 13 (1) (ff) is entirely personal or not though it has been claimed to be not personal by Mr. Sengupta on the authority of the later decision of the Supreme Court in the case of [Shantilal Thakordas and Others Vs. Chimanlal Maganlal Telwala](#), . Even if it be personal there can be no dispute that such a decree was obtained by the seven decree holders of whom one is dead and the other's interest in the property had been sold. Still the decree is there and so also the requirement of five other decree holders. I am unable to agree with Mr. Dasgupta that the decree as passed is based on such a joint and individual requirement of all that on the death of one or the transfer of the interest of the other the requirement must lapse as a whole and if the other plaintiffs decree holders are to get eviction on their requirement they have to institute a fresh suit. In my view, the plaintiffs in the present case being the co-sharer landlords the sum-total of their individual requirements constitute the foundation of the decree and mere lapse of such requirement in respect of one or two would not lead to the position that the requirement would lapse, and so also the decree. I, therefore,

accept the contention of Mr. Sengupta in this regard and overrule the second objection raised by Mr. Dasgupta.

10. Before I conclude I cannot but accept the further contention of Mr. Sengupta that the two courts below should not have entertained the present objection raised u/s 47. On the facts set out hereinbefore, it is quite evident that the present appellant induced the decree holders not to recover possession in execution of the writ of delivery of possession with police help only on an undertaking given by him that he would vacate by August 31, 1975, and on a further assurance that he would not arise any objection to the execution of the decree thereafter. Had they not been so induced, circumstances leading to the second objection would not have arisen at all. In such circumstances, in my view, not only is the appellant stopped from raising the objections that are now being raised but really the appellant is doing so in breach of an undertaking given to the court and no court should allow such a breach to be perpetrated. In any way raising the objection is a contumacious act and on that account the objections should have been dismissed.

11. In the result, the appeal fails and is dismissed with costs, hearing fee being assessed at 10 Gold Mohurs. In dismissing this appeal I would direct the executing court to forthwith issue the writ for delivery of possession with police help and that the same should be done at the earliest opportunity.

But the records be sent down at the earliest through special messenger at the cost of the respondent.