

(1982) 12 CAL CK 0025

Calcutta High Court

Case No: Civil Order No. 2670 of 1982

Krishna Gopal Saha

APPELLANT

Vs

Nityananda Saha and Others

RESPONDENT

Date of Decision: Dec. 24, 1982

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 47, 60
- West Bengal Premises Tenancy Act, 1956 - Section 14, 30

Hon'ble Judges: S.N. Sanyal, J; Anil K. Sen, J

Bench: Division Bench

Advocate: M.P. Banerjee and S.K. Seal, for the Appellant; Rabindra Nath Mitra, Susanta Chatterjee for opposite party No 1, for the Respondent

Final Decision: Allowed

Judgement

Anil K. Sen, J.

This is a revisional application at the instance of the judgment debtor in Commercial Execution Case No. 142/79 of the 4th Bench of the City Civil Court, Calcutta. The order impugned is the one dated July 31, 1982, passed by the learned Judge in Misc. Case No. 392/82. The decree holder opposite party in executing a money decree against the judgment debtor prayed for sale of tenancy right of the judgment debtor in a shop and a godown. Such tenancy being governed by the provisions of the West Bengal premises Tenancy Act (hereinafter referred to as the said Act), as objection was raised on behalf of the Judgement-debtor under S. 47 of the CPC to the effect that such a tenancy not being transferable cannot be put to sale in execution of the decree. That objection was overruled by the learned Judge when, relying on a decision of this Court in the case of [Dulaldas Mullick and Others Vs. Ganesh Das Damani and Others](#), when it was held that such a tenancy being a part of the goodwill of the judgment-debtor's business, can be sold in execution of the decree. The said decision is being challenged now before us in the present revisional application.

2. Mr. Banerjee appearing in support of this revisional application has contended that under the special provisions of the said Act the tenant's right to transfer or assign the tenancy or any part of it being barred by law, the executing court acted beyond jurisdiction in directing sale of such a tenancy contrary to law. Reliance is placed by Mr. Banerjee on the provisions of S. 14(1) and S. 30(3) of the said Act.

3. Mr. Mitra appearing on behalf of the decree-holder has contended in support of the order passed by the learned Judge that the amended provision of S. 60(1) of the CPC would show that such a tenancy in respect of a non-residential building can be attached and/or sold in execution of a decree. Referring to clause (kc) of S. 60(1) of the Code, it has been contended by Mr. Mitra that when the interest of a lessee of a residential building can be attached and/or sold in execution of a decree. Referring to clause (kc) of S. 60(1) of the Code, it has been contended by Mr. Mitra that when the interest of a lessee of a residential building governed by the rent restriction laws alone has been exempted from attachment and sale, it establishes by necessary implication that the interest of a lessee of a non-residential building is not so exempted and as such, can be attached or sold in execution of a decree.

4. We have carefully considered the contention put forward by Mr. Mitra. It appears to us that the learned Judge in the executing court in coming to his conclusion also relied upon the aforesaid clause (kc) of S. 60(1) of the Code and drew an implication as suggested by Mr. Mitra. In our considered opinion, however, such an implication does not necessarily follow in every case. We find there is a fallacy in the process of reasonings. Sub-section (1) of S. 60 of the Code provides what can be attached and/or sold in execution of a decree. Having provided as such, the legislature provided certain exemptions set out in the different clauses of the proviso. Hence, the basic requirement of S. 60(1) of the Code has to be fulfilled before the property in question can be attached or sold in execution of a decree. The exemptions contemplate that they would otherwise be liable to be attached and/or sold under sub-s.(1) but for the specific protection given by the exemption clauses. But a property, which does not come within the purview of S. 60(1) of the Code, cannot be attached and or sold not because it is exempted but because it is not capable of being attached or sold in law. Now one of the basic requirements of S. 60(1) of the Code is that the saleable property must belong to the judgment-debtor and that "he has a disposing power which he may exercise for his own benefit. Here in the present case the judgment-debtor's right to transfer or assign the tenancy being barred by S. 14(1) of the said Act, he has no disposing power which he can exercise for his own benefit. In case of a rent restriction statute which does not provide for such total bar, the tenancy right may be capable of being attached or sold in execution of a decree and in that case a tenancy in respect of a residential building would enjoy the special protection provided by clause (kc). The decision of this Court relied on by the learned Judge merely held that leasehold interest being a part of the goodwill of a business, can be put to sale in execution of a decree. But in that case there was no statutory bar to the lessee's right to transfer or assign as in the

present case and hence, the objection in the manner now raised before us was neither raised nor decided in that case. On the other hand, a learned single Judge of this Court has taken the same view as we take in the case of [Dhirendra Nath Nrogi Vs. Pronab Kumar Nrogi and Others](#), . We may take note of the fact that the Supreme Court too in the case of [Ramesh Himmatlal Shah Vs. Harsukh Jadhavji Joshi](#), pointed out that it is only when the law does not prohibit the transfer of an interest in a property, that such an interest can be attached and sold in execution of a decree. We think the decision supports the view we have taken.

5. For the foregoing reasons, we are unable to sustain the other impugned. The revisional application, therefore, succeeds. The impugned order being set aside, the judgment-debtor's objection under S. 47 of the Code succeeds to the extent that his tenancy right in respect of the shop and the go down cannot be put to sale in execution of the decree.

The revisional application is thus allowed without any order as to costs.

S.N. Sanyal, J.

6. I agree.