

## **Mani Shanker vs Niranjan Swarup on 23 August, 1954**

**Equivalent citations: AIR1955ALL686, AIR 1955 ALLAHABAD 686**

**Author: Raghubar Dayal**

**Bench: Raghubar Dayal**

### **JUDGMENT**

Agarwala, J.

1. This is a judgment-debtor's appeal arising out of execution proceedings. A decree for possession over a house and for arrears of rent was passed against the judgment-debtor appellant. The decree-holder applied for the execution of the decree and obtained possession over the house. After having obtained possession, the decree-holder found that some materials of the house had been removed and damage had been done to it after the passing of the decree.

He then applied to the execution court for compensation to be awarded against the judgment-debtor appellant to the extent of Rs. 10,000/-. The application was made under Section 47, Civil P. C. The judgment-debtor objected that such an application did not lie under Section 47, Civil P. C., and that if at all, the decree-holder could file a separate suit to obtain the relief claimed by him.

The learned Munsif held that an application did lie under Section 47, Civil P. C. but, because the application was of a high valuation, he directed that the application be converted into a plaint and then presented for trial to the proper court. The decree-holder appealed against this order to the lower appellate court on the ground that in the circumstances of the case the learned Munsif had no jurisdiction to order the conversion of the application into a plaint and that he should have entertained the application and tried it himself.

The lower appellate court held that the application under Section 47, Civil P. C. was entertainable by the learned Munsif and that he was in error in ordering that it be converted into a plaint. A preliminary objection was also raised before the lower appellate court against the order of the Munsif. That was also decided by it against the appellant. The lower appellate court, therefore, allowed the appeal and directed the Munsif to proceed with the execution application according to law.

Against this order the judgment-debtor has come up in appeal to this Court.

2. Three points have been raised by the learned counsel for the appellant in this appeal. Firstly, it

has been contended that the order of the Munsif directing the conversion of the execution application into a plaint was not appealable to the court below. This objection has no force. The learned Munsif, though holding that the execution application was maintainable, in effect refused to execute the decree by ordering that the execution application be converted into a plaint.

The refusal to execute a decree is a question relating to the execution, discharge or satisfaction of the decree within the meaning of Section 47, Civil P. C. As defined in Sub-section (2) of Section 2, Civil P. C., such an 'order' is a 'decree'. Learned counsel for the appellant relied upon a decision of the Madras High Court in -- 'Ramanuja v. Soliappa', AIR 1931 Mad 270 (A).

It was held in that case that no appeal lies from an order merely allowing the conversion of an execution petition into a suit as permitted by Section 47(2). Though the order was passed under Section 47 it was not one relating to the execution, discharge or satisfaction of the decree. The facts of that case were different from the facts of the present case.

There both the parties agreed that the execution application did not lie in respect of a particular relief. The first court refused to exercise the discretion vested in it for converting the execution application qua the relief which was not entertainable under Section 47, Civil P. C., into a plaint. In these circumstances, it was observed that no appeal lay from such an order.

The Madras case was, therefore, purely one in which the exercise of the discretion under Sub-section (2) of Section 47 was in question in the appeal.

In the present case what the learned Munsif did was that after holding that the execution application did lie to him, ordered the execution application to be converted into a plaint. In substance, his order amounted to a refusal to execute the decree.

The appeal, therefore, by the decree-holder to the lower appellate court was really against an order refusing to execute the decree and not against the mere exercise of the discretion vested in the execution court to convert or not to convert the execution application into a plaint.

The discretion vested in the execution court under Sub-section (2) of Section 47 is to be exercised when the execution court finds that it has no jurisdiction to execute the decree, but that by some 'bona fide' mistake or oversight the decree-holder instead of instituting a suit has filed an execution application. The discretion cannot be exercised to convert an execution application into a plaint when no suit lies and when the matter must be decided in the execution department.

The discretion vested in the execution court is a discretion in aid of the law and not to contravene it. There was really no exercise of discretion under Sub-section (2) of Section 47 in the present case. It was in substance a refusal to execute the decree. Against an order refusing to execute a decree, an appeal certainly lies.

3. The next contention of the learned counsel is that the relief for awarding compensation for the loss caused to the property in respect of which a decree for possession had been passed in favour of

the decree-holder, the loss having been caused after the passing of the decree and before the date of the delivery of possession cannot be obtained in the execution department and that it can be obtained by means of a suit alone.

This contention also in our opinion has no force. The decree was for possession of certain property. The decree-holder was entitled to get possession over the property in the state in which it was on the date of the decree subject to such wear or tear or depreciation as would happen in the course of nature. If the judgment-debtor misappropriates or wilfully causes loss to the property, the decree-holder is not getting the fruits of his decree because he is not getting the property in the state in which he was entitled to get it under the decree.

A claim for compensation in such cases is a claim for the delivery to the decree-holder of that part of the subject-matter of the decree which has not been delivered to him or its equivalent in money value.

An express power is conferred on the execution court in respect of moveable property under Order 21, Rule 31, Civil P. C. which provides that in the case of a decree for possession of specific moveable property if the decree is not complied with, the execution court may attach the property of the judgment-debtor and if within six months of such an attachment the decree has not been obeyed the attached property may be sold and out of the proceeds the court may award to the decree-holder compensation for the specific moveable property.

This provision shows that the execution court has got the power to determine the amount of compensation payable to a decree-holder in case the property which he is to obtain under the decree is not delivered to him in the same condition in which he was entitled to get it.

1The principle of the rule applicable to the cases of specific moveable property may well be applied to the cases of immoveable property. The majority of the High Courts in India have accepted this view; vide -- 'Hari Shridhar v. Sakharan Padmanna Magdum', AIR 1923 Bom 391 (B); --'Bai Lalbu v. Mohanlal Gokaldas', AIR 1925 Bom 385 (C); -- 'Dhana Rajagerji v. Parthasarathy', AIR 1933 Mad 825 (D); -- 'Ramanatha Ayyar v. S. Abdul Salam Sahib', AIR 1945 Mad 179 (E).

4. In -- 'Gangamma v. Mahabala Bhatta', AIR 1937 Mad 879 (F), Varadachariar J. expressed a doubt as to the soundness of this view, but he did not decide the case against this view because he thought that the previous rulings of the Court should be followed by him, especially when the case before him involved a small amount. The doubt expressed by the learned Judge was adversely commented upon in the subsequent Madras case reported in AIR 1945 Mad 179 (E), already quoted.

In the Lahore case -- 'Kanshi Ram v. Diwan Chand', AIR 1933 Lab 169 (G), a learned Single Judge expressed similar doubt about the soundness of the view expressed in the Bombay and Madras cases. But he decided the case on other points and his observations were merely obiter dicta. No case of this Court has been brought to our notice in which the point now in dispute was considered and decided.

Our attention has been drawn to a Single Judge decision of this Court in -- 'Panchoo Jolaha v. Mohammad Ismail', AIR 1949 All 263 (H). The facts of that case were different. That was a case in which the judgment-debtor claimed compensation from the decree-holder for losses caused to him by the decree-holder in demolishing a cattleshed which was not the subject-matter of the decree in execution of decree for possession over land.

The learned Single Judge held that this was a matter entirely outside the scope of the execution of the decree. We are not here concerned with the compensation in respect of something which was not included in the decree. We are concerned with the compensation for losses caused to the property which was the subject-matter of the decree.

5. The last contention of the learned counsel for the appellant is that the trial court was within its jurisdiction to order the conversion of the execution application into a plaint on the ground that the execution application raised complicated questions.

No authority has been cited to us in support of this contention and we can discover no reason why the execution court should not be able to tackle complicated questions though we doubt very much that there were any complicated questions in, the present case. The execution court, to our mind, has to determine each and every question whether complicated or not, if it relates to the execution, discharge or satisfaction of a decree. No other point was urged.

6. There is no force in this appeal. It is dismissed with costs.