Mool Chand And Ors. vs Smt. Brijmani Devi And Ors. on 22 February, 1955

Equivalent citations: AIR1955ALL680, AIR 1955 ALLAHABAD 680

JUDGMENT

Agarwala, J.

1. This is an application for leave to appeal to the Supreme Court. The facts, briefly stated, are as follows:

2. Certain plots of land were let out by three persons, Govind Prasad Sen, Krishna Prasad Sen & Ram Prasad Sen, brothers, to one Moolchand by means of a deed of lease D/- 30-9-35 for a period of ten years on a monthly rent of Rs. 52/8/-. The lease was renewable at the expiration of ten years for another period of ten years. There was a condition in the lease that in case of default of payment of rent for six months the lease was to determine and the lessors were given a right of re-entry over the land. The lessee Mool Chand made costly constructions over the land and it is alleged that this was done under an agreement of sale between the lessors and the lessee which, however, did not materialise.

Later on Moolchand sublet the land and the buildings to the applicant before us, namely, Sri Theatres Limited, on an annual rent of Rs. 1350/-. Moolchand did not pay the monthly rent as agreed upon in the lease, and consequently the Sens gave him notice on 7-8-1952 determining his teancy and requiring him to vacate the land.

On 27-9-1943 the Sens sold the land and all their rights over it in favour of Brijmani Devi, plaintiff-opposite party in the present application. Brij Mani Devi gave a fresh notice to Moolchand on 21-10-1944 in which she stated after reciting the facts and that Moolchand had paid rent for only one year to her predecessors-in-interest and no rent thereafter, that Moolchand had contravened the conditions embodied in the lease and that the tenancy had been terminated by means of the notice dated 7-8-1942.

She went on to state that "your tenancy has been and is hereby terminated, and now yon have no right or title to remain a tenant of the land aforesaid", but demanding the arrears of rent (instead of damages) for the past six years amounting to Rs. 3780/- with interest, and also the removal of the constructions which had been made as provided under the lease.

Moolchand did not comply with the request contained in the notice, whereupon Brijmani Devi filed

the suit, which has given rise to these proceedings, on 30-11-1944. In the plaint it was stated that Moolchand had paid rent only for one year and did not pay anything else by way of rent and that accordingly the vendors of the plaintiff had sent a notice under the provisions of Section 111(G), Transfer of Property Act on 7-8-1942 terminating the tenancy, and that the plaintiff herself had sent a fresh notice to Moolchand on 21-10-1944 reminding him of the termination of the tenancy and terminating his tenancy under the provisions of Section 111 (G), Transfer of Property Act.

The first two reliefs claimed in the plaint were that:

> (a) A decree may be passed for ejectment of the defendants and for awarding possession and occupation to the plaintiff in respect of the property specified below (that is to say, the land). Defendant 1 may be directed to remove his materials from the property specified below within the time fixed by the Court, otherwise the plaintiff may be put in possession and occupation thereof (obviously the constructions), valued at Rs. 630/-, arrears of rent for one year.
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> (b) A sum of Rs. 3780/- on account of principal amount of arrears of rent for the past six years and Rs. 415/- interest at the rate of annas 8 per cent per mensem by way of damages, in all Rs. 4195/- may be awarded as against the person and property of defendant 1.

It is not necessary to detail the other reliefs claimed in the plaint. It is also not necessary to state what the defence to the suit was.

3. Moolchand filed a counter-suit for the specific performance of the contract of sale on the basis of the agreement which was alleged to have been entered into between the Sens and himself. The plaintiff was a party to the suit and it was alleged that the plaintiff had notice of the agreement. The applicant was not a party to that suit. He was a party, however, to the suit for ejectment. The trial Court dismissed the suit of Moolchand for specific performance, and its decree was confirmed by this Court. Moolchand has submitted to the decree and there is no longer any question of specific performance of the contract entered into between him and the Sens.

The trial Court decreed the plaintiff's suit for ejectment as against Moolchand and the present applicant. No express direction was, however, given in the decree about the plaintiff being entitled, if the defendant did not remove the materials within the time fixed by the Court, to have them removed through Court. Further, the decree did not specifically mention that the plaintiff was to obtain possession over the materials if they were not removed by the defendant within the time fixed. In the judgment it was ordered that the defendant was to remove the constructions within six months, but as in the judgment there was no direction as to what would happen if the defendant failed to comply with this direction, so the decree passed in pursuance of the judgment was also silent about it.

Against this judgment and the decree there was an appeal to this Court both by Moolchand and by the present applicant. In the appeal one of the points urged was that the determination of the

tenancy by means of the notice dated 7-8-1942 must be deemed to have been waived by the second notice dated 21-10-1944 and the fresh determination of the tenancy by means of that notice must be deemed to have been waived by the plaint in the present suit itself.

The reasoning was that both in the second notice, as well as in the plaint of the present suit, the plaintiff had claimed not damages but rent for the period after the tenancy had been determined by the first notice, and that, therefore, she had accepted the plaintiff as a tenant for the period prior to the suit and had waived the forfeiture of tenancy.

The Bench hearing the appeal repelled this contention and held that neither by means of the second notice, nor by means of the plaint, had the determination of tenancy been waived or cancelled. It was urged on behalf of the plaintiff that the Court had awarded to the plaintiff not only a decree for possession over the land, but also a decree for possession over the materials since the defendant had failed to remove the materials within the period fixed by the Court. This contention also was repelled by the Court and the decree of the Court below was in substance affirmed by this Court.

But in two respects the decree passed by this Court differed from the decree of the Court below. Firstly, the ambiguity in the decree of the Court below was removed by inserting in the decree a clause to the effect that if the defendant failed to remove the materials within the time fixed the plaintiff was to have the liberty to have the materials removed through the agency of the Court. Secondly, the time fixed for the removal of the materials by the trial Court was enlarged by this Court from six months from the date of the trial Court's decree to one year from the date of this Court's decree. There was no other variation in the decree as passed by this Court. The valuation of the suit was Rs. 5025/-, including Rs. 4195/-as arrears of rent with interest.

4. The applicant now seeks to obtain leave for appeal to the Supreme Court as of right on the ground that this Court has not affirmed the decree of the trial Court, and that the valuation of the subject-matter of the dispute in the Court of first instance, as also in the proposed appeal to the Supreme Court, is over Rs. 20,000/-. He also claims that in case it is held that this Court's decree is one of affirmance, then there is a substantial question of law involved in the appeal and on that ground certificate may be granted under Article 133(i)(b) of the Constitution.

5. After hearing the arguments of the learned counsel for the parties we have come to the conclusion that there is no force in any of the contentions of the applicant and the application is liable to be dismissed.

6. As regards the valuation of the subject-matter of the dispute in the Court of the first instance and in the proposed appeal to the Supreme Court, we have no doubt that it is over Rs. 20,000/-. Though ostensibly the suit was for possession over the land there was also a prayer for the demolition of the constructions. The constructions admittedly are valued at over Rs. 20,000/-. The dispute in the ease therefore affects property of the value of over Rs. 20,000/-.

7. We are, however, not prepared to say that this Court's decree was not one of affirmance. As we have stated already, all the contentions on the matters in dispute between the parties were decided

against the applicant so far as the decree for ejectment and recovery of arrears of rent and damages was concerned. It is alleged that the two variations made by this Court -- namely, the enlargement of the period fixed for the removal of the constructions and the grant of a right to move the Court for the removal of the constructions through the agency of the Court in case the defendant failed to remove the materials within the time fixed by the Court -- render the judgment one of variance and not affirmance.

So far as the enlargement of the period fixed for the removal of the constructions is concerned it was a point which was not really one of the issues in the case but arose incidentally in the course of passing the final order in the case. The date fixed for the removal of the constructions by the trial Court had already elapsed during the pendency of the appeal and it would have been unfair if that date had been stuck to and so this Court enlarged the period for the removal of the materials for the sole benefit of the applicant himself.

This, in our opinion, cannot be said to be such a variation in the decree of the Court below as to lead to the conclusion that the decree of this Court was not one of affirmance when the decree of this Court affirmed all the findings of the Court below. A decree of variance must be one where there is variation in the substantive relief in respect of the whole or part of a party's claim. A variation such as was made in the present case cannot be said to be of that nature. Such, a variation might very well be termed as incidental or consequential.

We are supported in our view by a decision of the Patna High Court in -- 'Mohammad Tabarak Ali Khan v. Dalip Narain Singh', AIR 1927 Fat 379 (A). (See also -- 'Mahdeo Lal v. Dalip Narain Singh', AIR 1928 Pat 190 (B)). The decree against which the application for leave to appeal to the Privy Council was made in the Patna case is printed as -- 'Basiram Saha Ray v. Ham Ratan Roy', AIR 1927 PC 117 (C). In that case also there was a variation in the period of grace for the payment of the mortgage amount.

It was obseved that for purposes of Section 110, Civil P. C. the substance of the matter has to be looked at. It was held that the variation made in that case was not a variation of the trial Court's decree within the meaning of that section.

8. As regards the second variation, namely the mention of the right of the plaintiff to get the materials removed through the agency of the Court if the defendant failed to do the same himself, it cannot be said to be a variation at all. This was in reality the clarification of what was implicit in the judgment of the trial Court. The trial Court had clearly ordered the defendant to remove the materials within the period of six months. If this order was not complied with by the defendant what was the Court to do?

Obviously the Court must be deemed to have the power to have that done what was required by its order to be done. This power of the Court is based on the principle that where power is vested to do or to require a certain thing to be done, in some Court or other authority, that Court or authority must have the incidental and necessary power to effectuate its orders. If we were to assume that the Court had no power to have the constructions removed through its own agents, we would in effect be

nullifying the very order of the Court.

This Court in making it explicit that the plaintiff could ask the Court to have the materials removed merely did what the trial Court could have itself done under the decree as was passed by it without the addition of that direction. Therefore, in our opinion no variation in substance was made by this Court. The applicant, therefore, cannot claim that he is entitled to appeal to the Supreme Court as a matter of right.

9. We have then to consider whether there is any substantial question of law involved in the proposed appeal. The only point urged before us is that on the question whether on the facts of the present case the forfeiture would be deemed to have been waived, there is a difference of opinion in the Courts in India. The matter has been, dealt with at length by the Bench of this Court deciding the appeal, and in our opinion the matter can admit of no doubt. The use of the word' 'rent' in the second notice and in the plaint of the present suit instead of 'damages' is a loose way of expressing the idea of 'rent by way of damages'. It may be noted that the amount of past and future damages claimed in respect of the use of the property till the date of delivery of possession is also the same as the amount of rent, vide relief (d) in the plaint.

10. Waiver of one's rights cannot be inferred when a clear intention not to waive a right already acquired is ascertainable. Both in the second notice and in the plaint the plaintiff had made it clear that the tenancy had been forfeited under the first notice and it is plain to us upon a reading of these documents, that it was not at all the intention of the plaintiff to waive the forfeiture that had already been incurred. We do not think that any substantial question arises in the proposed appeal.

11. We, therefore, find no force in this application and we dismiss it, but in the circumstances of the case we make no order as to the costs of this application.