

PETITIONER:
SULTANA BEGUM

Vs.

RESPONDENT:
PREM CHAND JAIN

DATE OF JUDGMENT: 10/12/1996

BENCH:
KULDIP SINGH, S. SAGHIR AHMAD

ACT:

HEADNOTE:

JUDGMENT:

THE 10TH DAY OF DECEMBER, 1996

Present:

Hon'ble Mr. Justice Kuldip Singh
Hon'ble Mr. Justice S. Saghir Ahmad
Rajinder Sachhar, Sr. Adv., R.P. Singh and Suman
Kapoor, Advs. with him for the appellant
V.M. Tarkunde, Sr. Adv., S.K. Jain and Mr. Pratibha
Jain, Advs. with him for the Respondent

J U D G M E N T

The following Judgment of the Court was delivered:

J U D G M E N T

S. SAGHIR AHMAD, J.

Appellant before us is the landlady of the premises, "Pink City Hotel", Mumtaz Bagh, Jaipur, which was in occupation of the respondent as a tenant against whom a suit for eviction on various grounds including default in payment of rent, sub-letting, as also for bona fide requirement was filed, which ultimately ended in a compromise on 16.9.1991. The compromise decree which was passed on that date provided that the respondent would vacate the premises and hand-over its possession to the appellant or to her attorney, Ramesh B. Sharma, by 10th of February, 1992, and that he would pay rent @ Rs.3,100/- per month from the date of the suit till the date of delivery of possession.

2. Since the premises were not vacated by the respondent and its possession was not handed over to the appellant in terms of the compromise decree, she filed an application for execution which was resisted by the respondent by means of objections filed under Section 47 of the Code of Civil Procedure, in which it was pleaded by him that possession of the premises in question was handed over to Ramesh B. Sharma on 31.10.1991 who, however, allowed the respondent to remain in possession of the premises as a licence on payment of the licence fee of Rs.5,000/- per month. It was pleaded that since possession of the disputed premises was handed over to Ramesh B. Sharma, who was the legally constituted attorney of the appellant, the decree stood satisfied and as such it could not be executed. It was also pleaded that in terms of the fresh licence, the respondent had already paid the licence fee @ Rs.5,000/- to Ramesh B. Sharma, who had also

issued a receipt to him.

3. The appellant, in reply, pointed out that the power of attorney executed by her in favour of Ramesh B. Sharma was cancelled by notice dated 1.12.1991 and by another notice dated 31st January, 1992 Ramesh B. Sharma was required not to act as the appellant's attorney in any manner whatsoever. It was pleaded that since the power of attorney in favour of Ramesh B. Sharma had already been cancelled, there was no occasion for the respondent to have handed over possession of the premises in question to Ramesh B. Sharma, nor could Ramesh B. Sharma create a fresh licence in his favour.

4. The trial court by its judgment and order dated 23.10.1992 allowed the objections of the respondent in so far as they related to the delivery of possession of the premises in question to the appellant, with the finding that the respondent had already delivered vacant possession to Ramesh B. Sharma who was still the legally-constituted attorney of the appellant on the relevant date, namely the date on which possession was delivered by respondent to Mr. Sharma, which date was pleaded to be 31st of October, 1991, i.e. The date earlier in time than the date on which the power of attorney of Ramesh B. Sharma was said to have been cancelled. It was also found by the trial court that Ramesh B. Sharma could legally create a fresh licence in favour of the respondent and could also issue receipts for the licence fee paid to him @ Rs. 5,00/- per moth. On these facts, it was found by the trial court that the decree had become inexecutable.

5. The appellant filed a Revision before the Rajasthan High Court which, by its judgment and order dated 21.9.1993, dismissed the Revision. The findings recorded by the trial court were upheld and it was further found that Order XXI Rule 2 of the Code of Civil Procedure was not applicable to the facts of the case. It is in these circumstances that the appellant has come up in appeal before us.

6. Learned counsel for the appellant has contended that the agreement set out by the respondent in his objections under Section 47 CPC that possession of the disputed premises was handed over to the appellant's attorney in pursuance of the compromise decree and that the appellant's attorney allowed him to stay on in the premises as a licensee on payment of the licence fee at a rate which was more than the rate at which the rent was paid by the respondent, amounted to an adjustment of the decree within the meaning of Order XXI Rule 2 CPC and, therefore, it could not be recognised by the executing court in view of the bar created by Sub-rule (3). The decree, it is contended, was still executable and should have been executed by the executing court which was in error in relying upon the respondent's plea that possession of the premises in question was delivered to the appellant's attorney and the decree for eviction stood satisfied.

7. Learned counsel for the respondent, on the contrary, contended that in view of Section 47 CPC, which specifically lays down that all questions relating to execution, discharge or satisfaction of decree shall be determined by the court executing the decree, it was open to the respondent to raise the plea regarding the inexecutability of the decree and the executing court was under an obligation to decide the question whether the decree was inexecutable as possession had already been delivered to the attorney who had reinducted him in the premises in question as a licensee.

8. Section 47 and Order XXI Rule 2 of the Code of Civil Procedure provide as under:

"47. Questions to be determined by the Court executing decree:

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2)

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall for the purposes of this section, be determined by the Court.

Explanation I -- For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II - (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and (b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section."

"ORDER XII - EXECUTION OF DECREES AND ORDERS

2. Payment out of Court to decree-holder: (1) Where any money payable under a decree of any kind is paid out of Court, or the decree of any kind is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

(2) The judgment-debtor or any person who has become surety for the judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment

should not be recorded as certified, the Court shall record the same accordingly.

(2-A) No payment or adjustment shall be recorded at the instance of the judgment-debtor unless ----

(a) the payment is made in the manner, provided in Rule 1; or

(b) the payment or adjustment is proved by documentary evidence; or

(c) the payment or adjustment is admitted by, or on behalf of, the decree-holder in his reply to the notice given under sub-rule (2) of Rule 1, or before, the Court.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any Court executing the decree."

9. It is contended by the learned counsel for the respondent that since it is specifically provided by Section 47 that questions relating to the execution, discharge or satisfaction of the decree shall be determined by the executing court, it would prevail over Order XXI Rule 2 including Sub-rule (3) which prohibits the executing court from recognising any payment or adjustment which has not been certified or recorded under Order XXI Rule 2. It is contended that there is an obvious conflict between the two provisions and, therefore, the only way in which the conflict can be resolved is to hold that Section 47 would prevail over Order XXI Rule 2. We do not agree.

10. Part II of the Code of Civil Procedure, comprising of Sections 36 to 74, as also the whole of Order XXI consisting of Rules 1 to 106, deal with the execution of decree. Section 47, as also Order XXI Rule 2 are, therefore, part of the same legal or statutory system dealing with the same subject, namely, execution of decree. That being so, the rule of interpretation requires that while interpreting two inconsistent, or, obviously repugnant provisions of an Act, the courts should make an effort to so interpret the provisions as to harmonise them so that the purpose of the Act may be given effect to and both the provisions may be allowed to operate without rendering either of them otiose.

11. The statute has to be read as a whole to find out the real intention of the legislature.

12. In *Canada Sugar Refining Co. vs. R.* (1898) AC 735, Lord Davy observed:-

"Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

This Court has adopted the same rule in *M. Pentiah vs. Veeramallappa Muddala* AIR 1961 SC 1107; *Gamman India Ltd. vs. Union of India* AIR 1974 SC 960 = (1974) 1 SCC 596; *Mysore State Road Transports Corporation vs. Mirza Khasim All Beg* AIR 1977 SC 747; *Vaddeboyina Tulsamme vs. Vaddeboyina Sesha Reddi* AIR 1977 SC 1944 = (1977) 3 SCC 99; *Punjab Beverages Pvt. Ltd. vs. Suresh Chand* AIR 1978 SC 995; *Commissioner of Income-tax vs. National Tai Traders* AIR 1980 SC 485; *Calcutta Gas Co. (Proprietary) Ltd. vs. State of*

West Bengal AIR 1962 SC 1044 and J.K. Cotton Spinning & Weaving Mills vs. State of U.P. AIR 1961 SC 1170.

This rule of construction which is also spoken of as "ex visceribus actus" helps in avoiding any inconsistency either within a Section or between two different Section or provisions of the same statute.

On a conspectus of the case law indicated above, the following principles are clearly discernible:

(1) It is the duty of the courts to avoid a head-on clash between two Sections of the Act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonise them.

(2) The provisions of one Section of a statute cannot be used to defeat the other provisions unless the court, in spite of its efforts, finds it impossible to effect reconciliation between them.

(3) It has to be borne in mind by all the courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is the essence of the rule of "harmonious construction".

(4) The courts have also to keep in mind that an interpretation which reduces one of the provisions as a "dead letter" or "useless lumber" is not harmonious construction.

(5) To harmonise is not to destroy any statutory provision or to render it otiose.

13. Interpreting the provisions of Section 47 and Order XXI Rule 2 in the light of the above principles, there does not appear to be any antithesis between the two provisions. Section 47 deals with the power of the court executing the decree with Order XXI Rule 2 deals with the procedure which a court whose duty it is to execute the decree has to follow in a limited class of cases relating to the discharge or satisfaction of decrees either by payment of money (payable under the decree) out of court or adjustment in any other manner by consensual arrangement.

14. Since Section 47 provides that the question relating to the execution, discharge or satisfaction of the decrees shall be determined by the court executing the decree, it clearly confers a specific jurisdiction for the determination of those questions on the executing court.

15. Under Section 38 of the Code, a decree may be executed either by the court which passed it or by the court to which it is sent for execution. The court which passed the decree has been defined in Section 37. Transfer of decree to another court for its execution has been provided for in Section 39. Section 40 provides for transfer of decree to a court in another State. Section 42 lays down that the court to which a decree is transferred for execution shall have the same powers in executing that decree as if the decree was passed by itself. These provisions including Section 37 thus clearly speak of the powers and jurisdiction of the court executing the decree.

16. Order XXI Rule 2 applies to a specific set of

circumstances. If any money is payable under a decree, irrespective of the nature of decree, and such money is paid out of court, the decree-holder has to certify such payment to the court whose duty it is to execute the decree and that court has to record the same accordingly. Similarly if a decree, irrespective of its nature, is adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder has to certify such adjustment to that court which has to record the adjustment accordingly. If the payment or adjustment is not reported by the decree-holder, the judgment-debtor has been given the right to inform the court of such payment or adjustment and to apply to that court for certifying that payment or adjustment after notice to the decree-holder. Then comes Sub-rule (3) which provides that a payment or adjustment which has not been certified or recorded under Sub-rule (1) or (2), shall not be recognised by the court executing the decree.

17. The words "or the decree of any kind is otherwise adjusted" are of wide amplitude. It is open to the parties namely, the decree-holder and the judgment-debtor to enter into a contract or compromise in regard to their rights and obligations under the decree. If such contract or compromise amounts to an adjustment of the decree, it has to be recorded by the court under Rule 2 of Order XXI. It may be pointed out that an agreement, contract or compromise which has the effect of extinguishing the decree in whole or in part on account of decree being satisfied to that extent will amount to an adjustment of the decree within the meaning of this Rule and the Court, if approached, will issue the certificate of adjustment. An uncertified payment of money or adjustment which is not recorded by the court under Order XXI Rule 2 cannot be recognised by the executing court. In a situation like this, the only enquiry that the executing court can do is to find out whether the plea taken on its face value, amounts to adjustment or satisfaction of decree, wholly or in part, and whether such adjustment or satisfaction had the effect of extinguishing the decree to that extent. If the executing court comes to the conclusion that the decree was adjusted wholly or in part but the compromise or adjustment or satisfaction was not recorded and/or certified by the court, the executing court would not recognise them and will proceed to execute the decree.

18. The problem can be looked into from another angle on the basis of the maxim "*generalia speciallibus non derogant*."

19. Section 47, as pointed out earlier, gives full jurisdiction and power to the executing court to decide all questions relating to execution, discharge and satisfaction of the decree. Order XXI Rule 3, however, places a restraint on the exercise of that power by providing that the executing court shall not recognise or look into any uncertified payment of money or any adjustment of decree. If any such adjustment or payment is pleaded by the judgment-debtor before the executing court, the latter, in view of the legislative mandate, has to ignore it if it has not been certified or recorded by the court.

20. The general power of deciding questions relating to execution, discharge or satisfaction of decree under Section 47 can thus be exercised subject to the restriction placed by Order XXI Rule 2 including Sub-rule (3) which contain special provisions regulating payment or money due under a decree outside the court or in any other manner adjusting the decree. The general provision under Section 47 has, therefore, to yield to that extent to the special provisions contained in Order XXI Rule 2 which have been enacted to

prevent a judgment-debtor from setting up false, or cooked-up pleas so as to prolong or delay the execution proceedings.

21. If Section 45 and Order XXI Rule 2 are read together, as has been done by us in this case, the so-called conflict (we say "so-called" as, in fact, there is none) stands dispelled by employing the rule of 'harmonious construction' or the other rule that the general provision must yield to the special provision.

22. Coming now to the instant case, the respondent set up before the executing court in his objection under Section 47 that he had delivered possession to the appellant's attorney who had granted him the status of a licensee so that he may stay on in the premises on payment of licence fee which was more than the rent he had earlier paid. In pursuance of the licence granted by the attorney, the respondent allegedly paid the licence fee to the attorney who also issued receipts to him.

23. There are three components of this plea. The first is the delivery of possession by the respondent to the appellant's attorney; the second is the conferment of the status of a licensee on the respondent so that he may continue to occupy the premises in question on payment of licence fee at a higher rate; and the third is the actual payment against receipt indicating that the agreement was acted upon.

24. The decree was for eviction and the respondent himself had agreed in the compromise decree to deliver possession to the appellant by 10th of February, 1992. The plea relating to the delivery of possession pursuant to the compromise decree, it accepted, would amount to an adjustment of the decree which shall consequently to an adjustment of the decree which shall consequently be treated to have been partially satisfied to the extent of eviction of the respondent as a tenant from the disputed property. That being so, it had to be recorded and certified under Order XXI Rule 2. Since this was not done, the provisions of Order XXI Rule 2(3) prohibiting the executing court from giving effect to the said plea were applicable and the executing court acted erroneously in refusing to execute the decree for eviction of the respondent on the ground that possession having been delivered to the appellant's attorney, the decree, to that extent, stood satisfied.

25. P. Narsaiah vs. P. Rajoo Reddy AIR 1989 AP 164, Bhabani Dasia vs. Tulsi Ram Keot AIR 1990 Guwahati 90 as also a full Bench decision of the Madhya Pradesh High Court in Rajeev Khandelwal vs. Arun Pannalal AIR 1987 MP 262 are cases which have taken the view that uncertified payment or adjustment cannot be entertained under Section 47. The High Courts have gone to the extent of saying that even if judgment-debtor pleaded fraud, the executing court would not look into a payment or adjustment which had not been recorded or certified under Order XXI Rule 2.

Same view was also taken in Krishna Gobind Patil vs. Moolchand AIR 1941 Bombay 302, and by the Calcutta High Court in Sham Lal Chatterjee & Ors. vs. Hazarimal Babu 15 Calcutta Law Journal 451 and in Biroo Gorain & Ors. vs. Musstt, Jaimurat Koer 16 Calcutta Weekly Notes 923. Even this Court in Moti Lal Bankers vs. Mohd. Hassan Khan AIR 1968 SC 1087 was of the same opinion as it laid down as under:

"It is open to the parties to enter into a compromise with reference to their rights and obligations under a decree. There is nothing in the

Code of Civil Procedure which prevents the parties from entering into such a compromise. If the compromise amounts to an adjustment of the decree, it must be recorded under 0.21, R.2 and if not so recorded, it cannot be recognised by any Court executing the decree."

Where an application is given by a decree-holder for certification of payment or recording an adjustment. Order XXI Rule 2 presents no difficulty. Where, however, an application is given by the judgment-debtor to the court for the certification, the court has to act judicially. It was observed by the Privy Council in *Shri Prakash Singh vs. Allahabad Bank Ltd.* AIR 1929 PC 19 as under:

"Sub-rule 2 therefore does contemplate an application by the judgment-debtor; further, it provides for notice being given to the decree-holder, it affords an opportunity for the decree-holder to appear, and it involves a judicial decision by the Court whether the payment should be recorded."

Proceedings under Order XXI Rule 2 are, therefore, not mere empty formality as contended by the respondent, but they are judicial proceedings.

The High Court has relied upon its own decision in *Indra vs. Narayan Chand* 1979 (2) RCR 1 and a decision of the Allahabad High Court in *M/s Chitra Talkies vs. Durga Dass Mehta* AIR 1973 Allahabad 40. In both the cases, it was a fresh tenancy which was granted to the judgment-debtor and not a licence as in the instant case. That apart, on principles of law, both the decisions, in our opinion, have not been correctly decided. As observed by us earlier, it is no doubt open to the parties to adjust or compromise their rights under the decree, but if it amounts to adjustment of decree, it must be reported to the court whose duty it is to execute the decree so that that court may record or certify the same. If it is not done, the court before whom the execution proceedings are initiated will proceed to execute the decree. It is not every time that the decree-holder and judgment-debtor enter into a compromise after the decree. The judgment-debtor may even set up a false case of compromise and creation of fresh tenancy after the decree. It is in order to prevent such judgment-debtors that Order XXI Rule 2 has been enacted so that if such compromise or creation of fresh tenancy has not been recorded, the judgment-debtor be not encouraged to initiate another round of litigation under Section 47 CPC.

The decision of this court in *M.P. Shreevastava vs. Mrs. Veena* 1967(1) SCR 147 was a case where the husband had obtained a decree for restitution of conjugal rights against his wife, who, after the decree, returned to the residence of the appellant and offered to live with him. She also wrote letters to the appellant requesting him to allow her to go to his house and live with him as his wife. Even the attempts of certain friends of the family to persuade the appellant to take the respondent back into the marital home also proved to be unsuccessful. The wife then moved an application under Order XXI Rule 2 that the decree be recorded as satisfied as the appellant had failed to allow the respondent to resume conjugal relations even after she went to his house, which was allowed and it was held by the

District Judge, Delhi, that the decree stood satisfied. This order was upheld by the High Court. In this Court, the principal question raised was that the application filed by the wife was not maintainable because an application for execution of the decree had not, till then, been filed by the appellant and, therefore, the court was not the executing court. This was not accepted by this Court and it was laid down that the application was maintainable under Section 47 CPC even though execution proceedings had not been initiated. The court held that even objection under Section 47 could be filed before the court even though application for execution had not been filed.

The Full Bench of the Madhya Pradesh High Court has already considered this decision and, in our opinion, has rightly distinguished and explained it.

26. Without entering into any factual controversy, either here or in the suit for specific performance filed against the appellant, and assuming, for the moment, that the agreement pleaded by the respondent did take place between him and the appellant's attorney, it is still to be seen whether the rights under the decree passed in favour of the appellant for the eviction of the respondent from the premises in question were intended to be given up and, therefore, the decree could not be executed socially in view of the fresh agreement between the respondent and the appellant through her attorney. The answer is that the rights available to the appellant under the decree were preserved and not given up.

27. Tenant or lessee of a premises is a person in whose favour an interest in the specific immovable property is transferred, who, therefore, comes to occupy the demised property exclusively in his own rights. The right to exclusive possession is the basic feature of the tenancy created by lease. Licencee's possession, on the contrary, is only permissive and he can be thrown out at any time. He does not also get the right to exclusive possession. Since the decree for eviction was passed against the respondent in his capacity as tenant of the premises in question, he could have, if at all, avoided that decree only by getting a fresh lease of that premises and not a licence which cannot have the effect of avoiding the decree or superseding or substituting the decree. The intention of the parties clearly was not to extinguish the decree for eviction but to create only a licence allowing the respondent to stay in the premises for a while.

28. In *Konchada Ramamurty Subudhi vs. Gopinath Naik & Ors.* 1968 (2) SCR 559 = AIR 1968 SC 919, this Court relied upon the theory of intention and held that the intention of the parties was the decisive test as to whether the rights under the decree were given up or not. In that case, the landlord had filed a suit for eviction of the tenant which was dismissed by the trial court, but was compromised at the appellate stage. The decree was passed in terms of the compromise which provided that the tenant could continue in possession for five years but if he did not pay rent for three consecutive months he would be evicted by executing the decree. When execution proceedings were initiated against the tenant, an objection was raised by him that the compromise decree created a fresh lease and, therefore, the decree was inexecutable. This plea was rejected and it was held that the intention of the parties, which was the decisive test, was not to enter into the relationship of landlord and tenant. Reliance in this case was placed on the decision of *Subba Rao, J. (as he then was) in Associated Hotels of India Ltd. vs. R.N. Kapur* 1960 (1) SCR 368 = AIR

1959 SC 1262, in which one of the propositions laid down was:

"The real test is the intention of the parties; whether they intended to create a lease or a licence."

Reliance was also placed on the observations of Lord Greene. M.R. in *Booker vs. Palmer* 1942(2) All ER 674, which is quoted below:

"There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationship where the circumstances and the conduct of the parties negative any intention of the kind."

Ramamurty's case was followed by this Court in *Smt. Kalloo & Ors. vs. Dhakadevi & Ors.* AIR 1982 SC 813, in which again the intention of the parties was held to be the decisive test and it was laid down whether a fresh lease was intended to be created would depend upon the intention of the parties.

29. In the instant case, the respondent himself says that it was only a licence which was created in his favour and that he had to pay the licence fee. This itself is indicative of the fact that a fresh lease was not created in his favour and consequently the rights under the decree were neither intended to be surrendered nor were they actually surrendered. The decree remained preserved and the creation of a licence had not the effect of destroying it.

30. In view of the above, the appeal is allowed, the judgment and order passed by the executing court as also by the High Court are set aside and the objections filed by the respondent under Section 47 CPC are dismissed with a direction to the executing court to proceed with the execution of the decree and deliver possession to the appellant.

31. The appellant shall be entitled to her costs throughout from the respondent.