

**IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE**

**EC No. 364 of 2021
JASPAL SINGH CHANDHOK.
VS.
SRI GOBIN CHAND SEAL**

Before: The Hon'ble Justice Apurba Sinha Ray

For Decree-Holder : Mr. Swatarup Banerjee, Adv.
Ms. Somali Mukhopadhyay, Adv.

For Judgment-Debtor : Mr. Anirban Kar, Adv.
Mr. Munshi Ashiq Elahi, Adv.
Mr. Parimal Bhattacharya, Adv.
Ms. Snigdha Das, Adv.

CAV On : 20.02.2024

Judgment On : 03.05.2024

Apurba Sinha Ray, J. :-

1. The instant execution proceeding is being resisted from the side of the judgment-debtor contending that the instant execution

proceeding is not maintainable. The original suit being CS No. 922 of 1986 was decreed on consent and according to the judgment-debtor, he has surrendered his tenancy in respect of shop room no. 1A and thereafter was inducted as a tenant in respect of a different shop room being shop room no. 1A/1 on the ground floor of premise no. 30, Ganesh Chandra Avenue, Kolkata – 700013 and as such there was a fresh induction of the judgment-debtor by the terms of settlement concluded before the Learned Court.

2. The judgment-debtor has further submitted that the decree dated 23.06.2014 stood satisfied upon the induction of the judgment-debtor as per terms of settlement and the incident of such subsequent tenancy would be governed by the provisions of West Bengal Premises Tenancy Act, 1997 irrespective of contrary contention in the terms of settlement.

3. He has further submitted that when there is a fresh induction the relation between the tenancy should be governed by the West Bengal Premises Tenancy Act, 1997 and the tenant cannot be evicted without due process of law. In this regard he has referred to a decision reported in **(1980) 1 SCC 185 (Biswabani Pvt. Ltd vs. Santosh Kumar Dutta & Ors.)**. As the decree-holder refused to receive the rent

the judgment-debtor has been depositing the rent with the Rent Controller.

4. The decree-holder, on the other hand, has submitted that the decree which is being executed was not a decree for eviction. According to him for non-compliance of certain terms of consent decree, the eviction of judgment-debtor was sought for. Initially, there was a suit for possession and in such suit a consent decree was passed which contends, inter alia, that if the judgment-debtor makes default in payment of rent he can be evicted from the suit premises by executing such consent decree without adopting any other process of law. As the judgment-debtor had defaulted in payment of rent the instant execution proceeding was brought. The judgment-debtor did not challenge the decree nor the decree has been declared by any court of law as null and void. The receiver was appointed in this proceeding on 03.07.2023. The learned counsel for the decree-holder has also drawn the attention of this court to the order dated 27.01.2016 passed by His Lordship Hon'ble Justice Harish Tandon. The judgment-debtor never challenged the decree and therefore the same attained its finality.

5. The learned counsel for the decree-holder, Mr. Banerjee, has further pointed out that the judgment-debtor took the defence that the

plaintiff have refused to receive the rents. By referring to several pages of the affidavit-in-opposition, the learned counsel has drawn the attention of this court to the fact that though Gobin Chand Seal was the proprietor, rent was sent through cheques by one Subhashis Nandi. Neither he is the proprietor of judgment-debtor nor there is any intimation about the change of ownership of the said firm. The decree-holder is certainly bound to accept rent from an authorized person but acceptance of such rent from an unauthorized person would unnecessarily complicate the matter and therefore the decree-holder rightly refused to accept the same. Though the said Subhashis Nandi signed the relevant affidavit there is no authorization of Subhashis Nandi from the side of the judgment-debtor firm and, therefore, the provisions of West Bengal Premises Tenancy Act, 1997 would not apply in such a situation.

6. There is no application or affidavit for agitating the question of maintainability of the instant execution proceeding. Neither a petition for setting aside the relevant decree nor a petition under Section 47 of the Code of Civil Procedure, 1908 was filed on behalf of the judgment-debtor. The point of maintainability has been taken only on the basis of affidavit-in-opposition. The Executing Court cannot go into the core of the decree.

7. It is also brought to the notice of this court that once the judgment-debtor filed an execution case on the basis of decree but when the decree-holder files the execution proceeding on the basis of self-same decree, he is resisting such execution proceeding on the ground that it is not maintainable.

8. According to him, in fact there is no fresh tenancy and it is a continuation of old tenancy although the extent of tenancy has been reduced. As per Section 2(g) of West Bengal Premises Tenancy Act, 1997 the judgment-debtor will not be a tenant since the decree of eviction was passed, and he is not a tenant. He will not come within the scope of the definition of 'tenant' under the West Bengal Premises Tenancy Act, 1997 and, therefore, the entire proceeding before the Rent Controller is null and void. Not a single document authorizing Subhashis Nandi as agent, is produced before this court. The learned counsel after drawing the attention of the relevant terms of the consent decree has vociferously argued that there is no need to go to the ordinary court for eviction.

9. In reply, the learned counsel for the judgment-debtor Mr. Anirban Kar, has submitted that agent has certain power to act on behalf of his principal. In this regard, the learned counsel has referred

to **(2016) 3 SCC 296 (Kasthuri Radhakrishnan & Ors. Vs. M. Chinniyan & Anr.)** and **(2012) 1 SCC 656 (Suraj Lamp & Industries Pvt. Ltd. through Director Vs. State of Haryana & Anr.)**.

10. The learned counsel has also placed reliance on **2002 (2) Mh.L.J. 924 Krishna Kashinath Patil Vs. S. Mohandas Kamath**) in support of his contention that when a consent decree creates a new tenancy, old tenancy has become redundant or discontinued. When a compromise takes place in the course of execution of a decree for eviction, the compromise may extinguish the decree and create a fresh lease or the compromise may provide a mere mode for the discharge of the decree.

11. The learned counsel appearing for the decree-holder has distinguished the said case laws by contending that the case law reported in **Biswabani Pvt. Ltd (supra)** is not applicable. In the present case in our hand the judgment-debtor did not challenge the decree on nullity or lacking of inherent jurisdiction. In our case the decree spells out what would happen in case of default. The judgment-debtor is only in permissive possession during the terms of the decree. The learned counsel has also distinguished the case law of **Suraj Lamp & Industries Pvt. Ltd. through Director (supra)** by contending

that in the present case, there is no authorization of Subhashis Nandi at all. No power of attorney has been filed on behalf of the judgment-debtor to show that Subhashis Nandi was actually authorized to remit the rents on behalf of the judgment-debtor. Similar attack was made to distinguish the case law reported at **Kasthuri Radhakrishnan & Ors. (supra)**.

12. The learned counsel, Mr. Banerjee, on the other hand, has submitted two case laws reported at **(1974) 1 SCC 242 (Nagindas Ramdas Vs. Dalpatram Ichharam alias Brijram & Ors.)** and **(1982) 1 SCC 633 (Smt. Kalloo & Ors. Vs. Dhakadevi & Ors.)** in support of his contention that Executing Court cannot go beyond the decree excepting where the decree has been challenged as a nullity. He has further submitted what actually the tenure of consent decree depends on the intention of the parties to compromise and such intention has to be gathered from the terms of compromise and surrounding circumstances including the order recorded by the court on the basis of compromise.

13. The learned counsel of the decree-holder has also relied upon the case law reported in **2023 SCC OnLine SC 1378 (Mumtaz Yarud Dowla Wakf Vs. Badam Balakrsihna Hotel Pvt. Ltd. & Ors.)** to

buttress his view that the judgment-debtor should not be allowed to approbate and reprobate. As the judgment-debtor himself launched an execution proceeding on the basis of consent decree as aforesaid he cannot resist the present proceeding.

14. The learned counsel has also pointed out that the Learned Receiver has already taken the symbolic possession of the suit premises. Neither the said order was challenged nor the said order was set aside in any other proceeding. Tabular statement prayer (a) has already been granted and now the court should allow the prayer (b) and (c) of the tabular statement.

15. The learned counsel, Mr. Kar, appearing on behalf of the judgment-debtor has submitted that the case law reported at **Smt. Kalloo & Ors. (supra)** helps the judgment-debtor and not the decree-holder. There is no new induction in that case. It was in the execution proceeding a compromise petition was filed but that is not the case in our matter. The consent decree was passed in the suit for possession on consent. The effect of compromise decree is up to the date of induction. Moreover, the case law reported in **Nagindas Ramdas (supra)** is also not applicable since judgment-debtor's case is that compromise decree has already been satisfied as soon as induction is

complete. As the rents have been deposited there is no question of default and, further, there is no question of eviction. As per Section 21(5) of West Bengal Premises Tenancy Act, 1997 only the existing tenant can deposit the rent and as per Section 22(3) of West Bengal Premises Tenancy Act, 1997 there was a valid legal tender. The case law of **Mumtaz Yarud Dowla Wakf (surpa)**, according to the learned counsel of the judgment-debtor, is not applicable since in our case the court was not asked to go beyond the decree. The question is whether there is a new induction or continuation. Moreover, as there was a problem regarding demarcation of tenancy, the judgment-debtor filed one execution case. However, upto the stage of induction the Executing Court can pass order in an execution proceeding but post induction, it has no jurisdiction. Therefore, as there is no default of rent and further as there was induction of fresh tenancy, the instant execution proceeding is not maintainable.

16. The learned counsel of the decree-holder on the other hand has contended that no plea of new tenancy was taken in the affidavit-in-opposition. The judgment-debtor did not act according to the decree, the affidavit of judgment-debtor does not show that any plea of sub-tenancy, new tenancy, fresh tenancy was taken. There is no scope of application of Section 2(g) of the Act 1997 as decree has already been

passed. The learned counsel has also contended that Hon'ble Justice Ravi Krishan Kapur's orders reached its finality. There is no date of induction or new tenancy as alleged.

Court's view

17. Each case is to be judged on its own merits. The factual matrix of this case is unique and materially different from the case laws cited by the parties.

17.1. The dispute regarding the executability of the instant execution proceeding revolves round the terms of settlement between the parties which culminated into a consent decree. It is true that the judgment-debtor did not whisper in its affidavit-in-opposition regarding creation of new tenancy or surrender of old tenancy. But it appears that the consent decree contains certain terms like 'surrender of tenancy', 'induction of monthly tenant' etc. Let us examine the terms of the consent decree and intention of the parties underlying the said decree:-

"1. The tenancy of the defendant as per the agreement dated 7th May, 1971 in respect of one shop room being No. 1A, on the ground floor at premises no. 30, Ganesh Chandra Avenue, Kolkata measuring about 1014 sqft build up area

is hereby surrendered by the defendant to the plaintiff/landlord.

2. Simultaneously with such surrender of the said tenancy to the plaintiff as stated above, the plaintiff/landlord shall and induct the defendant as the monthly tenant in respect of all that shop room being no. 1A/1, measuring about 507 sq.ft. (being the fifty percent of the room no. 1A) and the wooden mezzanine floor in the shop room on the ground floor of premises no. 30, Ganesh Chandra Avenue Police station Bowbazar, Kolkata – 700 013, morefully and particularly shown and delineated in red colour in the plan and/or sketch annexed hereto. The said shop room being no. 1A/1, shall also contain a toilet and two western side doors having inside opening of the said shop room being no. 1A/1 shall be use by the defendant, his men, agent and employees for ingress and egress only but not for any customers or for brining in or taking out any heavy materials through the said doors and passage. It is further clarified by that the western side passage of the building shall not be encroached upon the keeping any materials or otherwise.

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4. It is agreed by the parties that the monthly rent for the said premises shall be Rs. 2,000/- (Rupees Two Thousand) payable according to the English Calendar month by the defendant to the plaintiff/landlord.

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8. A wall will be constructed on the southern side of the porch to make the

said porch an enclosure for the use and enjoyment of the landlord.

9. The name, style and status of the tenancy shall remain as G.C. Seal and company, as proprietorship firm of the defendant Gobin Chand Seal as usual and the same will be continued for a period of 10 years (Ten Years) without any alternation and/or amendment. It is agreed and made clear that the said tenancy will not be terminated prior to the stipulated period of ten years provided the terms and conditions as stipulated herein and also the grounds as provided in W.B. Premises Tenancy Act, 1997 are complied with strictly by tenant/defendant. It is agreed that at the expiry of ten years from the date of these terms of settlement, the defendant shall hand over peaceful vacant possession of the demise premises to the plaintiff and/or his successors in interest and or default thereof or in case of any other default by the defendant the plaintiff and/his successor in interest will be entitled to execute the decree to be drawn up herein and seek recovery of vacant possession without filing any fresh proceeding.

10. For the purpose of implementation of the instant terms of settlement of the plaintiff and the defendant will co-operate with each other in all respect.

11. The allegations and counter allegations made between the parties if any be and are hereby withdrawn.

12. Each party will pay and bear its own cost of the suit.

13. Liberty to apply.”

18. The terms of the above consent decree are confusing, ambiguous, contradictory and unclear. On one hand surrender of tenancy of the year 1971 has been mentioned and simultaneously, a further induction of the judgment-debtor in a monthly tenancy is said to have been done by such terms of settlement, and, on the other hand, the plaintiff has been given authority to execute the said decree without filing any fresh proceeding in case of default made by the defendant/tenant. It is further found that in case of default made by the plaintiff, there is no specific provision that the defendant can execute the said decree. In spite of absence of such condition, it appears from the record that the judgment-debtor has once taken steps for implementation of the decree by filing an application for execution.

19. From the said decree, it is found that area of the tenanted premises as well as number of the tenanted premises are not those of the previous tenanted portion. It has been clearly mentioned in the said terms that after such surrender of the tenancy, the defendant shall be inducted as a monthly tenant simultaneously in respect of shop room being no. 1A/1 measuring about 507 sq.ft. According to the decree-holder, actually the area of tenanted premises has been reduced from 1014 sq.ft. to 507 sq.ft. and a new number has been

allotted to such area. According to him, it is the old tenancy which has been allowed to be continued in a reduced area. But the use of words such as 'surrender of tenancy', 'induction of the defendant' etc. do not support such contention of the learned counsel of the decree-holder. The term 'surrender of tenancy' denotes a voluntary agreement, written or oral, between the landlord and tenant that the tenancy has come to an end. On the other hand, the term 'induction of tenancy', in the context hereinabove discussed, implies 'introduction to a monthly tenancy' or 'initiation of a monthly tenancy'.

19.1. From the record it appears that the use of words such as 'surrender of tenancy' or 'induction of monthly tenant' in the terms of settlement is not accidental or slip of pen. Such words were used consciously and cannot be said to have been used inattentively. There was intention of the parties that old tenancy of 1971 was required to be surrendered. This intention is clear from the execution case filed by the decree-holder being EC No. 84 of 2015. The order dated 9th April, 2015 passed by the Hon'ble Justice Soumen Sen, recorded the submission of the learned counsel of the decree-holder which is required to be quoted herein below:-

"This is an application filed by the plaintiff/decree holder for enforcement of a consent decree passed on 23rd June, 2014.

Mr. Dhruba Ghosh, learned counsel appearing on behalf of the decree holder submits that by reason of failure on the part of the defendant to surrender the portion in his occupation, the wall to be constructed in terms of Clause 2 of the Terms of Settlement could not be constructed. This however is disputed by the defendant.”

19.2. From the above paragraph, it is transpired that the learned counsel of the decree-holder has categorically submitted that the defendant/ judgment-debtor had failed to surrender the portion in his occupation and for that reason the relevant wall could not be constructed. Therefore, there should not be any iota of doubt that surrender of old tenancy was done by virtue of the said agreement and simultaneously the judgment-debtor was inducted as a monthly tenant in respect of 507 sq.ft. of the premises as discussed above. However, the contention of the learned counsel of the decree-holder that no date of alleged surrender has been mentioned by the judgment-debtor, does not seem to be correct. If we peruse the opening words of the said consent decree we shall find that it has been mentioned therein that tenancy of the defendant as per agreement dated 7th May, 1971 in respect of one shop room measuring about 1014 sq.ft. built up area is **hereby surrendered** by the defendant to

the plaintiff/landlord. This goes to show that such surrender of tenancy was done on the date of execution of the consent decree.

20. It is true that in Para 9 of the said consent decree it has been mentioned that the name, style and status of the tenancy shall remain as G.C. Seal and Company as proprietorship firm of the defendant Gobin Chand Seal and the same will be continued for a period of 10 years without any alteration and/or amendment. But in my view the same is referred to only in respect of the tenanted premises measuring about 507 sq.ft and nothing more than that. Para 9 of the said consent decree has referred only to the tenancy which came into being after surrender of the old tenancy as mentioned in Paras 1 and 2 of the consent decree. It is agreed between the parties by virtue of clause 9 that the name and style and status of tenancy in respect of the tenanted portion measuring 507 sq.ft. shall remain as G.C. Seal and the same will be continued for a period of 10 years without any change. This does not clearly show that it refers to the old tenancy or the original tenanted portion.

21. In fact there is no clear cut decree of eviction passed by the learned Trial Court. The decree stipulates that in case of default made by the defendant the plaintiff shall be entitled to execute the decree to

be drawn up and to seek recovery of vacant possession of the premises without filing any fresh proceeding. Needleless to mention that a contract or terms of settlement which restrain(s) the parties from brining legal proceedings is void. The principle of law has been clearly laid down in Section 28 of Indian Contract Act, 1872. For the sake of convenience Section 28 of the Act, 1872 is reproduced herein below:-

“28. Agreements in restraint of legal proceedings, void.— Every agreement,—

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to the extent.”

22. From the provisions of above section it has been laid down that any agreement by which any party is restricted from enforcing his right by legal proceedings in ordinary tribunal or which extinguishes the right of any party to enforce the same through legal process etc. is void to that extent.

23. In the instant proceeding it appears that the plaintiff has kept the right reserved for himself for eviction of the defendant without taking any eviction proceeding under the relevant laws in case there is any default on the part of the defendant in carrying out the conditions as mentioned in consent decree. This is clear violation of the provision of section 28 of the Indian Contract Act, 1872 or in other words the said terms of the agreement have come into a direct conflict with the settled principle of law. If the defendant is debarred from contesting in ordinary tribunal by stipulating that his eviction process shall be carried out without following the provisions of West Bengal Premises Tenancy Act, 1997, or any other appropriate tenancy law, such an agreement is violative of Section 28 of the Act, 1872. Therefore, as the said agreement is violative of the provisions of the enactment of 1872, I find that the prayer for eviction through this execution process without availing the procedure laid down for eviction of tenant under tenancy laws cannot be implemented, particularly when there are sufficient materials to show that the old tenancy of the year 1971 came to end and the judgment-debtor was inducted in another monthly tenancy simultaneously with such surrender. The condition for proceeding with the execution process without availing the prescribed provisions for eviction of tenants under the tenancy laws is nothing but a nullity, and therefore the proposed execution of the eviction decree against the

judgment-debtor cannot be proceeded with as the said relevant term is nothing but a void one.

24. It is true that the learned counsel has pointed out that the judgment-debtor had defaulted in payment of rent and as such his eviction has been sought for in terms of the consent decree. On the other hand the judgment-debtor has submitted that payment of rent was tendered but the lessor refused to accept the same on the ground that the rent was tendered by the unauthorized agent of the judgment-debtor. The decree-holder, on the other hand, contends that there is no intimation that one Subhashis Nandi was the authorized agent of G.C. Seal proprietor firm of the judgment-debtor and therefore he did not receive the payment of rent since it might complicate the issue.

24.1. There may be thousands valid reasons for refusal to accept the rent on the part of the decree-holder but it is very much apparent that attempts were made from the side of the judgment-debtor to pay the monthly rent by sending cheques. May be the same were sent by an agent of the judgment-debtor firm who was not authorized in strict sense, but the judgment-debtor had tried to remit the monthly rent by post to the decree-holder. At least, it can be said at this stage that the judgment-debtor had no malafide intention to make any default in

payment of rent otherwise, it could not have sent such monthly rents through one Subhashis Nandi. Whether or not complication will arise for payment of rent through Subhashis Nandi is a different issue but the judgment-debtor has been able to show that it had no mala fide intention to make default in payment of rent. As the payment of rent was tendered from the side of the judgment-debtor firm and was deposited with the Rent Controller, this court cannot treat the judgment-debtor as a defaulter in making payment of rents. Although, such payment of rent can be assailed as not a valid, legal tender of rent but so far as intention of the judgment-debtor is concerned, this court can overlook such irregularity in the factual circumstances of the case. Moreover, the question whether a tenant is a defaulter or not or the question whether the tenant is entitled to protection from eviction after rent being deposited with Rent Controller, can be decided by availing the detailed procedures laid down in Act of 1997. The Executing Court may consider the genuineness of the parties in the matters of payment of rent on the basis of prima facie materials brought on record, and nothing more than that.

24.2. Last but not the least, Section 47 of the Code of Civil Procedure, 1908 does not mandate filing of any separate application to agitate the relevant issue under the said section.

25. In view of the above discussion, I find that the instant execution case is not maintainable. The Learned Receiver/ Special Officer is directed to hand over the symbolic possession of the premises in question to the judgment-debtor within 7 days from the date of this order. The instant execution case being not maintainable is disposed of accordingly. No costs.

26. On completion of the process of handing over of symbolic possession to the judgment-debtor, the Learned Receiver shall be discharged.

27. Urgent Photostat certified copies of this Judgment, if applied for, be supplied to the parties on compliance of all necessary formalities.

(APURBA SINHA RAY, J.)