

BALAK SINGH

v.

**WAQF ALEE ALLAH KAYAM KARDA AHMAD ULLAH
KHAN SAHEB**

March 20, 1969

[S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.]

U.P. Tenancy Act 1939, ss. 168 and 271(2)—Order under s. 168 whether an order in execution of a decree—Whether appealable to District Judge under s. 271(2).

The appellant was the tenant of the respondent Wakf. The respondent obtained a decree for arrears of rent against the appellant but failed to execute it by attachment of crops as they had already been removed by the appellant. The respondent then made an application under s. 168 of the U.P. Tenancy Act, 1939 praying that the amount of the decree be got paid under that section or, in default of payment, the appellant may be dispossessed. Objections were raised by the appellant to this application but they were ultimately rejected by the Assistant Collector. The District Judge allowed the appeal against the Assistant Collector's order. In further appeal by the respondent, the High Court held that proceedings under s. 168 were proceedings in the original suit and not in execution and therefore no appeal lay to the District Judge under s. 271(2) of the Act. Against the High Court's decision, the appellant, by special leave, came to this Court.

HELD : An examination of the scheme of s. 168 shows that an application under that section is a step in the execution, discharge, or satisfaction of the decree. The fact that the application is to the court which passed the decree does not necessarily show that the order passed on the application is not one relating to the execution, discharge or satisfaction of the decree, for under s. 38 of the Civil Procedure Code a decree may be executed either by the Court which passed it, or by the court to which it is sent for execution. [50A-B]

While s. 168 deals with a decree for arrears of rent against an ex-proprietary, an occupancy or hereditary tenant, s. 170 of the Act deals with a decree passed for arrears of rent against a non-occupancy tenant. A similar application is provided for in s. 170 and the legislature clearly contemplates that this is a mode of execution for it uses the words "the landholder may, in addition to any other mode of execution, apply to the court which passed the decree for issue of a notice." A mode similar to the mode or proceeding under s. 168 is thus treated as a mode of execution. [50D-E]

The High Court therefore erred in holding that the appeal to the District Judge was incompetent on the ground that the order under s. 168 was not one relating to the execution, discharge or satisfaction of the decree. [50 D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 706 of 1966.

Appeal by special leave from the judgment and decree dated January 7, 1965 of the Allahabad High Court in F.A.F.O. No. 254 of 1960.

S. P. Sinha, J. P. Goyal and S. P. Singh, for the appellant.

C. B. Agarwala and S. Shaukat Hussain, for the respondent.

A The Judgment of the Court was delivered by

Sikri, J. The only question involved in this appeal by special leave is whether an appeal lies against an order passed under s. 168 of the U.P. Tenancy Act, 1939, hereinafter referred to as the Act. Before we deal this point it is necessary to give a few facts.

B Balak Singh, appellant before us, was a tenant of the respondent Waqf. The respondent had obtained a decree on May 17, 1956, for Rs. 752 against Balak Singh for arrears of rent. The respondent tried to execute the decree by attachment of crops, but Balak Singh had apparently removed the crops. Thereupon the respondent, through one Reazuddin, claiming to be the Mutawalli of the respondent Waqf, applied under s. 168 of the Act, praying that the amount of the decree be got paid under s. 168 and in default of payment of the decretal amount Balak Singh may be dispossessed. This application was filed on July 4, 1957. On April 3, 1958, notice was issued under s. 168 for May 2, 1958. On the latter date *Parwana Dakhil* (Warrant of Possession) in favour of the decree holder was issued, and it was directed that the file be put up on June 13, 1958. On May 30, 1958, Balak Singh put in a petition raising various objections, one of them being that no notice of the proceedings taken under s. 168 had been served on him. He further contended that Reazuddin had no right to file the application under s. 168. On July 12, 1958, the Assistant Collector, 1st Class, cancelled the order dated May 2, 1958, and directed that fresh notice be issued under s. 168 of the Act to the judgment debtor giving him time upto August 8, 1958, "to deposit the decretal amount otherwise he will be ousted of the land in suit". He also directed that the decree holder should file evidence of the succession of Reazuddin to Abdul Latif who was the previous Mutawalli.

F On August 8, 1958, Balak Singh raised some more objections, including the objection that he should be granted 120 days time for payment of the decretal amount in execution as provided in s. 168. On August 8, 1958, the Assistant Collector held that he had already given a long time to pay the due and no question of granting further time arose. He further held that Reazuddin had filed papers to prove that he had a right to continue the proceedings. The Assistant Collector confirmed the order previously passed regarding delivery of possession to the decree holder. He noted that possession had already been delivered.

H Against this order Balak Singh filed an appeal to the District Judge. The District Judge held that it had not been established that Reazuddin was a legal representative or agent of the decree holder and that, at any rate, no proper notice under s. 168 of the Act had been served on Balak Singh and it was not right for the

Court to have confirmed the previous order without complying with the mandatory provisions of s. 168. He accordingly allowed the appeal and sent the case back to the execution court with a direction to readmit it and deal with it according to law.

The respondent then filed an appeal to the High Court. Mathur, J., came to the conclusion that the appeal to the District Judge was incompetent as no appeal lay against an order passed under s. 168 of the Act. He was of the view that an order under s. 168 was passed in the main suit and not in execution.

Section 168 of the Act reads thus :

"168. (1) When a decree for arrears of rent against an ex-proprietary, an occupancy or hereditary tenant has not been completely satisfied within one year from the date of such decree by any mode of execution other than sale of holdings, the landholder may apply to the court, which passed the decree, for the issue of a notice to the tenant for payment of the amount outstanding and for his ejectment in case of the default and the court shall thereupon issue such notice.

(2) The notice shall require the tenant to appear within thirty days of the service of the notice, and either to show cause why he should not be ejected from the holding, or to admit the claim and obtain leave to pay the amount into the court within one hundred and twenty days from the date of his appearance in the court.

(3) If the tenant does not appear in accordance with the terms of the notice, or having appeared either does not show cause why he should not be ejected or does not ask for leave to pay, the court shall immediately order his ejectment from the holding.

(4) If the tenant appears and obtains leave to pay, then, unless within one hundred and twenty days from the date of his appearance in the court, the tenant has paid the amount or payment thereof has been certified to the court in accordance with Rule 2, Order XXI of the Code of Civil Procedure, 1908, the court shall on the 31st of May next following, order his ejectment.

(5) The order of ejectment shall be executed on or after the first day of June next following the date of the order. If within one month after the delivery of possession, the tenant deposits the decretal amount, the ejectment order shall be cancelled and possession restored forthwith to the tenant.

- A** (6) No extension of time for payment shall be allowed :

Provided that the tenant shall be ejected only from such portion of the holding the rent of which does not exceed one-sixth of the decretal amount."

- B** The learned counsel for the appellant contends that an appeal lies under s. 271(2) of the Act, which reads as follows :

"An appeal shall lie from an order mentioned in section 47 or section 104 or section 144 or in Order XLIII, Rule 1 of the Code of Civil Procedure, 1908, and made by an assistant collector of the first class or a collector.

- C** Such appeal shall lie to the court, if any, having jurisdiction under section 265 of this Act to hear an appeal from the decree in the suit, or in the case of an application for execution, to the court having jurisdiction to hear an appeal from the decree which is being executed."

- D** The answer to the question depends on whether the order under s. 168 of the Act can be said to be an order relating to the execution, discharge or satisfaction of the decree. It seems to us that the order dated August 8, 1958, was an order relating to the execution, discharge or satisfaction of the decree for rent, dated May 17, 1956.

- E** It will be noticed that sub-s. (1) of s. 168 contemplates the decree holder having tried to execute the decree by other modes of execution. If the decree has not been satisfied within one year of the date of the decree, the decree holder is entitled to apply to the Court which passed the decree for the issue of the notice to the tenant for payment of the amount outstanding and for ejectment in case of default. Once the conditions are satisfied the Court had no option but to issue a notice. The object of the application is satisfaction of the decree; it may be satisfied by payment of the amount outstanding or failing that by ejectment in case of default. Under sub-s. (2) the tenant is entitled to apply and obtain leave to pay the amount in Court within 120 days from the date of appearance in the Court. He is also entitled to show cause why he should not be ejected. Under sub-s. (3) the Court is entitled to immediately order his ejectment from the holding if the tenant does not appear in accordance with the terms of notice or having appeared either does not show cause why he should not be ejected or does not ask leave to pay. Under sub-s. (4) in default of payment or certification to the Court in accordance r. 20. XXI of the Code of Civil Procedure, the Court is entitled to order his ejectment on May 31, next following. Then sub-s. (5) provides for the execution of the order of ejectment.
- F**
- G**
- H**

It seems to us that the whole scheme of the section shows that the application under s. 168 of the Act is a step in the execution, discharge or satisfaction of the decree. The learned counsel for the respondent contends that the application is to the court which passed the decree. But this does not necessarily show that the order passed on the application is not one relating to the execution, discharge or satisfaction of the decree. As provided in s. 38 of the Civil Procedure Code, "a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution."

While s. 168 deals with a decree for arrears of rent against an ex-proprietary, an occupancy or hereditary tenant, s. 170 of the Act deals with a decree passed for arrears of rent against a non-occupancy tenant. A similar application is provided for in s. 170 and the legislature clearly contemplates that this is a mode of execution for it uses the words "the landholder may, in addition to any other mode of execution, apply to the Court which passed the decree for issue of a notice". A mode similar to the mode or proceeding under s. 168 is thus treated as a mode of execution.

In the result we hold that the High Court erred in holding that the appeal to the District Judge was not competent. Various other questions arise in the appeal to the High Court. In the circumstances we set aside the judgment and order passed by the High Court and remit the case to it to dispose of it in accordance with law. The appellant will have his costs of this appeal.

G.C.

Appeal allowed.