Mt. Shamshunnissa And Anr. vs Latafat Husain And Anr. on 11 May, 1950

Equivalent citations: AIR1950ALL688, AIR 1950 ALLAHABAD 688

JUDGMENT

Sapru, J.

1. This appeal has been preferred to this Court by the decree-holders in a suit for partition of a house.

2. Two brothers, Abdul Hamid Khan and Abdul Majid Khan, who were owners of a seven anna share in a certain house brought a suit for partition of their share against one Mohammad Atiq to whom the remaining nine anna share belonged. The lower storey of this house is in the occupation of one Latafat Husain. In the upper room of this house, a woman of the name of Fayazan resides. In the suit which was brought by the brothers, Latafat Husain and Fayazan were made parties. Mohammad Atiq contested it, however, on the ground that the house was not capable of partition by metes and bounds. Its width is 11 ft. and length 13 ft. and, therefore, to partition it conveniently is an impossibility. It was urged by Mohammad Atiq that the Court should take proceedings under Sections 2 and 3, Partition Act. The Munsif, however, decreed the claim for partition on 8th October 1912, and directed preparation of a final decree. Dissatisfied with the decree of the learned Munsif, Mohammad Atiq went in appeal to the learned Civil Judge. Cross-objections were filed by the two brothers, objecting to the conditions laid down for partition by the trial Court. To the appeal Latafat Husain and Fayazan were not made parties. The learned Civil Judge dismissed the appeal and the cross objections filed by the plaintiffs were partially allowed. The amin was directed to demarcate the two portions by clearly defined lines or mark stones. The amin submitted his report on 19th October 1943. Thereafter, the final decree was prepared and the amin's report was made a part of it. By this final decree, the plaintiffs were allotted the portion marked A and Mohammad Atiq, portion marked B. To the final decree Latafat Husain and Fayazan were not parties. Subsequently, on 7th February 1944, the plaintiff-decree, holders applied to the execution Court praying that they be put in separate possession over the portion marked A. On 28th February 1944, the decree-holders executed a dakhalnama and possession over the portion marked A was delivered. On 27th May 1944 the execution case was struck off.

3. Subsequent to the passing of this order another application in the execution department was made by the plaintiff decree-holders against three persons who were the original defendants to the suit on 4th January 1945. The relief sought by them was that the share allotted to the decree-holders be partitioned by erecting a screen wall and that possession be delivered to them after this had been done. To this application Latafat Husain and Fayazan objected on 27th January 1945. Their case as disclosed in the objection was that the erection of the partition wall would make the room in the

upper storey and the shop in the first floor uninhabitable and would virtually amount to an ejectment of the defendant. Both of them took their stand on the House Control Order under which as ejectment of tenants had been prohibited. The learned Munsif came to the conclusion that there was no force in those objections and he dismissed them with the remark that the decree-holders were within their rights to have a wall constructed. Against that order, the two tenants, Latafat Husain and Fayazan went in appeal to the learned Civil Judge. Objections preferred by the tenants to the execution of the decree were allowed by the learned Civil Judge on the ground that the decree would defeat the objects for which the House Control Order was meant. It was farther held by him that a division of a house 13 ft. on one side and 11 ft. on the other would make the house unfit for human inhabitation. It was further held by the learned Judge that the erection of a wall in the middle of the house would leave no access to the owner of the nine anna share in it. The main ground on which the learned Judge came to the conclusion that the decree was not capable of execution was that the division of the house into seven anna and nine anna portions would result in a virtual ejectment of Latafat Husain and Fayazan. The view that he took was that it was not open to the Court to eject a tenant without the previously obtained written permission of the rationing officer. The view of the learned Judge is that where a house is in possession of a tenant, it cannot be altered in any way or interfered with by the landlord, except with the permission of the town rationing officer. For this reason the learned Judge allowed the appeal filed by the tenant-objectors. The decree-holders have come up in appeal against the order of the learned Civil Judge. One of the tenants, Latafat Husain, has entered into a compromise with the decree-holders. The other tenant, Fayazan, has not been able to arrive at any settlement with the decree-holders.

4. The short question before me is whether it was open to the executing Court to go behind the decree dated 19th October 1943. The general principle of law is that it is not competent to an executing Court to go behind the decree.

5. The argument of learned counsel for the respondents is that what his client is doing is not to attack the decree but to urge that the decree, though properly made, has, by reason of subsequent events, become incapable of execution. In other words, be is not attacking the validity of the decree or seeking to have it reopened. All that he is asking the Court to do is to take note of a new Act, called the United Provinces (Temporary) Control of Rent and Eviction Act, 1947, the provisions of which in effect render the execution of the decree virtually impossible. For this proposition, he has relied upon two authorities, namely, Chinna Goundan v. Kalyanasundaram Iyer, A. I. R. (28) 1941 Mad. 126 : (1940-2 M. L. J. 881) and Mt. Punjab Kaur v. Mana Singh, A. I. R. (20) 1933 Lah. 396 : (149 I. C. 511). Learned counsel for the respondents further contends that his client was not a party to the decree which was passed in appeal, though it is conceded by him that she was a party to the original suit. As the original decree was modified by the appellate Court, his contention is that his client is not bound by the decree which was passed by the appellate Court.

6. Learned counsel for the appellants con tends that to look upon his suit as a suit for ejectment would be to misconceive nature. What he wanted and what he has been conceded by the decree is, as part owner, to have his part of the house partitioned. It may be that the partition will have the effect of virtual ejectment. But it is ejectment of tenants which has been ruled out by Sections 3 and 10 of Act III [3] of 1947. To go further and deny the owners the right of partition would be to extend very

much the scope of Act III [3] of 1947. Section 10 of that Act lays down that:

> "Any order made or deemed to be made under this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of enactment other than this Act."

It is quite obvious that Section 10 applies only to an order made under Act III [3] of 1947. The decree appealed against is not an order which can be said to have been made under Act III [3] of 1947.

7. As regards Section 3, the position is that under this section no suit can be filed in the civil Court by the landlord for the eviction of a tenant unless previously to the filing of it he obtains a permission to do so from the District Magistrate. It further lays down that in order to obtain a decree for ejectment the landlord must substantiate his case on one or more of the grounds enumerated in the section. It is clear that it does not apply to suits for partition between co-owners. That Section 3 has no reference to a suit brought by one co-owner against another is quite clear. It is, however, urged that though the suit for partition was properly brought and the decree properly made, yet by reason of this Act the decree had become incapable of execution. For partition will have in this case the effect of eviction of a tenant.

8. The point raised by Mr. Shukla is whether by seeking the remedy of partition, the landlord can force the tenant, notwithstanding that there is an Act to protect his interest, to evict him out of the premises occupied by him.

9. The answer to this line of argument is that it is for the respondent to substantiate that there is a legal bar to the execution of the decree which has been passed against him. It has been repeatedly held that it is not competent for the executing Court to alter, vary or add to the terms of a decree: vide Dambar Singh v. Kalian Singh, 44 ALL. 350 : (A. I. R. (9) 1922 ALL. 27). It cannot be said that the decree passed by the Court was a decree without jurisdiction. I do not think that the executing Court would be justified in embarking on an enquiry into facts which, if established, would go to show that the decree itself was invalid : vide Brijmohan Das v. Mt. Piari, A. I. R. (24) 1937 ALL. 667 : (I. L. R. (1937) ALL. 761) and Bhag Singh v. Govind Ram, A. I. R. (30) 1943 Nag. 325 : (I. L. R. (1943) Nag. 757). I find that no subsequent events have happened to vary the shares fixed by the partition decree. All that has happened is that a tenant is in possession of a portion of the house.

10. For the reasons given above, this appeal must be allowed with costs. The result is that I allow this appeal with costs and set aside the judgment of the appellate Court.

11. Leave to appeal to a Division Bench is refused.