Mt. Phool Kuer vs Manohar Mal And Anr. on 12 October, 1954

Equivalent citations: AIR1955ALL223, AIR 1955 ALLAHABAD 223

JUDGMENT

Desai, J.

1. This is an appeal from an order passed by a Civil Judge, Agra, directing the appellant-judgment-debtor to pay Rs. 5,425/- to the respondents-decree-holders. The appeal arises in the following circumstances :

2. In 1936 the respondents' mother, Srimati Pem Kuer, instituted a suit for possession over property including two houses, one situated in village Semra and the other in village Kheria; the suit was decreed with costs by this Court on appeal on 26-10-1943. On 16-11-1943, she applied for execution of the decree through delivery of possession over the property. The appellant wanted to file an appeal against the decree to the Privy Council and on her furnishing security for the due performance of the decree under Order 45, Rule 13, Civil P. C., this Court stayed execution of the decree on 3-1-1944. In August, 1947, the security furnished by the appellant was found to be insufficient. Oil 20-8-1947, Pem Kuer applied for execution of the decree stating that the appellant was not going to furnish security and alleging that she (appellant) was damaging the property. Pem Kuer alleged that the damage already caused to the house in Kheria was of Rs. 1,865/- and that done to the house in Semra was of Rs. 4,000/-. She, therefore, claimed not only possession over the houses but also damages of Rs. 5,865/-.

She requested the executing court to appoint an Amin to assess the damage done to the houses and to deliver possession over them at the spot. The lower court appointed an Amin to assess the damage and deliver, possession. On 17-9-1947, Pem Kuer applied under Section 47, Civil P. C., stating that the appellant had deposited some amount of money as security with the court, that part of it was attached in execution of the decree for costs an her favour and that after passing a formal order for Rs. 5,865/-, if deemed necessary, the balance of the deposited amount be attached and paid to her and that the appellant be ordered to pay up the balance of the amount of damages.

While the matter was pending Pem Kuer died and the respondents, who are her sons, "became her legal representatives. The Amin submitted his report stating that both the houses were damaged and that the damage to the Kheria house was of Rs. 1,425/- and that to the other house was of Rs. 4,000/-. The appellant objected to the application of Pem Kuer and the Amin's report on the grounds that she had not caused any damage to the houses, that they had not been repaired for the last thirty years, that if they were found in ruined or dilapidated condition that was due to natural causes, that she had not removed any fittings from the houses and that she herself was entitled to recover a sum of money from the respondents who had taken possession of her property which was in the houses at the time when the respondents obtained delivery of possession over them.

3. The lower court held that the claim of the respondents was covered by Section 47, Civil P. C., that the two houses were damaged by the appellant, that the respondents were entitled to recover Rs. 1,425/- on account of the damage to one house and Rs. 4,000/- on account of the damage to the other and that the claim made by the appellant was not maintainable under Section 47. Accordingly it passed the order under appeal.

4. The first question that arises is whether it was open to the lower court to enter into the question of the damage done by the appellant to the houses in dispute in execution proceedings under Section 47, Civil P. C. Under that section all questions relating to the execution, discharge or satisfaction of a decree must be determined by the court executing the decree and not by a separate suit. The allegations of the respondents are that after the decree was passed in their favour for possession over the houses, the appellant-judgment-debtor damaged them and that consequently they are entitled to be compensated for the damage. There is no question of the execution of the decree; the decree has been executed by delivery of possession over the houses.

The contention of the respondents comes to this that though they have obtained possession over the houses, their decree is not completely satisfied because the houses at the time of the delivery of possession were not in the condition in which they were at the time when the decree was passed and that unless they are paid a certain sum of money, by spending which the houses can be restored to the condition in which they were at the time of the passing of the decree, the decree cannot be said to be fully satisfied. There can be no doubt that when a decree directs possession to be delivered over a property, it intends that possession should be delivered over it in the same condition in which it was on the date of the decree. It follows that if the condition of the property is altered to the prejudice of the decree-holder by the time possession is delivered to him in execution, the decree is not fully satisfied, and whether the condition is altered or not to the prejudice of the decree-holder and to what extent, if at all, he should be compensated are questions relating to the satisfaction of the decree within the meaning of Section 47, Civil P. C.

5. In -- 'Hari Shridhar v. Sakharam', AIR 1923 Bom 391 (A) Macleod, C. J. and Crump, J. stated at p. 392 "The appellant is entitled under the decree to the property of which possession was directed to be given to him. If the property has depreciated in value or been damaged since the decree, owing to the wilful action of the defendants, it is a question in execution whether defendants are liable to make good the loss."

In -- 'Bai Lalbu v. Mohanlal', AIR 1925 Bom 385 (B) Macleod, C. J. and Coyajee, J. reiterated the law and stated :

> "The question is really whether a successful party can be said to get possession of what was directed to be given to him by the decree, if the party in possession deliberately has caused damage to the property."

The same law was laid down by Dawson Miller, C. J: and Jwala Prasad, J. in 'Mahadeo Prasad Sahu v. Gajadhar Prasad Sahu', AIR 1924 Pat 362 (C). They proceeded on the basis that the decree having once been passed the judgment-

debtor was bound under its terms to hand over the property as it then existed and that if before doing so he damaged it he acted in breach of the obligation and was bound to compensate the decree-bolder. In 'Dhanarajagerji v. Parthasarathy' AIR 1933 Mad 825 (D), a Bench of the Madras High Court followed -- 'Hari Shridhar v. Sakharam (A),' and -- Bai Lalbu v. Mohanlal (B)'. Beasley, C. J. and King J. followed 'Dhanarajagerji v. Parthasarathy (D)', in -- 'Varadaraja Ayyar v. Parame-swara Ayyar' AIR 1935 Mad 280 (E), and observed that an executing court cannot refer the decree-holder, who complains that the property at the time of his obtaining possession over it, was not in the same state in which it was at the time of the decree and had deteriorated, to file a regular suit to recover damages for the deterioration.

6. A contrary view was taken in some Lahore and Madras cases. In --'Ghulam Ali v. 'Sultan Muhammad Khan' AIR 1933 Lah 168 (F), Tapp, J. thought that whether such a question relates to the execution, discharge or satisfaction of a decree. was not free from doubt and was inclined to think that if a decree-holder complained that the property had been damaged by the judgment-debtor after the passing of the decree, his remedy was to file a suit and not to claim compensation in execution. But he did not decide the matter definitely. His observation, therefore, was nothing but 'obiter'. In--'Ramu Shettithi v. Maniappu Shettithi', AIR 1917 Mad 79 (1) (G),' Sadasiva Aiyer and Moore, JJ. observed that : "as regards damages for the defendants, alleged negligence in having allowed the decreed house to be burnt down, that is riot a matter to be dealt with in execution of the decree." No reasons are stated in support of the view; nor are the facts given. It is not known when the house was burnt down, whether before, or after the passing of the decree. Moreover, it was a case of negligence and not of deliberate or malicious damage.

There is no doubt about the liability when the damage is deliberate or malicious, but when the damage is said to be the result of negligence, there arises the serious question whether the negligence was actionable. The case was not followed by the Division Benches in the cases of -- 'Dhanara-

jagerji (D), and Varadaraja Ayyar (E), but was approved of by Varadachariar, J. in -- 'Gangamma v. Mahabala Bhatta' AIR 1937 Mad 879 (H), though the learned Judge actually did not record a dissent from the cases of 'Dhanarajagerji (D)', and 'Hari Shridhar (A)', and confirmed the dismissal of the suit for damages on account of waste committed by the Judgment-debtor after the passing of the decree and before the delivery of possession. Therefore, what the learned Judge observed was no better than 'obiter dictum'.

'Kunhikoye Thangal v. Ahmad Kutty' AIR 1952 Mad 59 (I), was also referred to us, but it did not lay down that a decree-holder cannot recover in execution compensation for damage done to the property between the date of the decree and the date of the delivery of possession. It was stated in that case that attempt to restrain acts of waste is not a matter governed by Section 47, Civil P. C. It appears that the decree was not put into execution in that case and therefore the question whether the matter is governed by Section 47 of the Code did not arise. Moreover, there was no reference to the previous decisions of the court. We do not consider that the decision in that case militates against what we have said.

7. Once the execution court finds that the property at the time of the delivery was not in the same state in which it should have been under the decree, it must hold that the decree is not fully satisfied by the mere delivery of possession. It is under an obligation to give full satisfaction to the decree-holder; therefore it must compensate him so that he can put the property in the same state in which he should have got it. It means that it is for the executing court to recover money from the judgment-debtor and pay it to the decree-holder by way of compensation. It can also direct the judgment-debtor to put the property in the condition in which it should have been, but this may cause further disputes and the better alternative is to assess the damage done to the property and to compensate the decree-holder fully. Since the judgment-debtor himself would have spent the same amount in restoring the property to its pre-decretal condition, he does not stand to suffer by the adoption of this alternative. The decree-holder paid court-fee on the full valuation of the property when he sued for possession and is entitled, on his claim being proved, to receive the property in the condition in which it was at the time of the suit without any further payment in the form of court-fee or otherwise.

If the property suffers damage during the pendency of the suit at the hands of the defendant, the plaintiff can amend the plaint and claim damages in addition to possession of the property; in that event he would be entitled to get possession of the property in the condition in which it would be at the date of the decree. Since he has already paid court-fee for receiving possession of the property, he should not be required to pay another court-fee, even if temporarily (to be recovered from the defendant along with other costs in the event of the suit being decreed) by being asked to file another suit for damages. We confirm the finding of the lower court that the respondents' claim was covered by Section 47, Civil P. C:

8. It was argued that it was not proved satisfactorily that the houses were damaged after the decree for possession. The question was not raised at all in the pleadings in the lower court. It was definitely alleged by the respondents that the appellant damaged the houses after the passing of the decree; what the appellant denied was that she damaged them and not that she damaged them after the passing of the decree. The sole question before the trial court, therefore, was whether the appellant damaged the houses or not. The appellant did not plead even in the alternative that she had damaged them before the passing of the decree and that the respondents should have claimed damages in the suit itself. We, therefore, cannot permit the appellant to raise the question, which is essentially of fact, for the first time in appeal. We are supported by -- 'Shankarlal Narayandas v. New Mofussil Co. Ltd.', AIR 1946 PC 97 (J).

9. Now we come to the question of the amount of damages. The respondents have produced no evidence whatsoever to prove that the Semra house was damaged by the appellant. We find it strange that they could not produce a single witness to prove that the appellant or her servants or agents demolished the house and removed its material. Surely the acts of demolition and removing the material of a house could not have been done secretly. The Amin had not seen the house in its original condition. When he saw it, he found it in a demolished condition. Naturally he could not say how it fell down, whether through human agency or through natural causes and admitted the fact in his report.

There is evidence of a witness to the fact that he saw some material being removed to the appellant's village Sista, but that evidence does not prove that either the house was damaged by the appellant or that the material was of that house. He did not see from where the material was brought and to which place it was taken. We are surprised that the lower court without any evidence accepted the respondent's claim for as much as Rs. 4,000 for the damage to the Semra house. On the meagre evidence that is on the record the claim could not have been accepted for any amount. Our surprise becomes greater when we take notice of the fact that the respondents themselves valued the Semra house at Rs. 200. Surely a house worth Rs. 200 could not have suffered a damage of Rs. 4,000.

10. The evidence regarding the damage to the other house in Kheria is better. The Amin has found that a 'kotha' of the house was deliberately pulled down and did not fall down on account of lack of repairs. That the 'kotha' is in a ruined condition is accepted by the appellant. Her case, as put in cross-examination to the respondents' witnesses, was that it had been constructed temporarily on the occasion of a marriage in the family. The Amin found that it was not a temporary construction. Chunni Lal, a witness for the respondents, deposed that the appellant left occupation of the house seven or eight days before the delivery of possession and that though he did not see the actual demolition, he saw the material being removed to Sista. There is no evidence that the 'kotha' fell down on account of natural causes, barring the statement of the solitary witness of the appellant, Misri Lal. He stated that the 'kotha' was built temporarily in 1942-43 with puccka bricks and that there must be accounts of the expenditure, but no accounts were produced. We are not prepared to rely upon his interested testimony.

We are satisfied from the evidence that the 'kotha' was a permanent construction and that it was pulled down by the appellant. As regards the amount of damages we find that the house was valued at Rs. 500 in the plaint. It may be that prices of houses have increased after the institution of the suit, but we do not know to what extent they have Increased. Moreover, against the increase must be set off the depreciation in the condition of the house in the period between the date of the institution of the suit and the date of the delivery of possession. There are no data on the record on account of which we can give effect to the general increase in prices of houses and to the depreciation in the condition of the house and we cannot act arbitrarily without any data. The Amin's estimate of the damage must necessarily be a very rough one and based principally upon hearsay. Not having seen the house in its pre-decretal condition he could not assess the damage without acting upon what he heard from the respondents and others.

In the circumstances not much reliance can be placed upon his estimate. We do not think we would be justified in allowing more than Rs. 200 to the respondents for the damage of the Kheria house. We see no force in the contention of the appellant that as she claimed title to the house as a widow of the family as against Pem Kuer who claimed it as a sister and was contemplating an appeal to the Privy Council against the decree, she would not have damaged the houses.

11. We partly allow the appeal, confirm the lower court's finding that the appellant must pay damages to the respondents in execution and re-duce the amount of the damages from Rs. 5,425 to Rs. 200. As the main controversy in the lower court was about the application of Section 47, Civil P. C., to the claim and not so much about the amount of the damages, as the lower court's decision on

it is upheld by us and as the respondents are allowed by us some damages, we consider that it would be better to allow the costs of both the courts to be borne by the parties and declare so, The stay order is discharged.