

B. V. Patankar and Others

Vs

C. G. Sastry

Civil Appeal No. 302 of 1955

(CJI B.P. Sinha, J.L. Kapur, P.B. Gajendragadkar, K. Subha Rao, K. N. Wanchoo JJ)

08.09.1960

JUDGMENT

KAPUR J. -

This appeal has little substance and must, therefore, be dismissed. The appellants are the decree-holders and the respondent is the judgment debtor. On February 3, 1941, by a registered deed the father of the appellants leased to the respondent the house in dispute for a period of 10 years with an option of renewal for further periods for as long as the respondent wanted. This house was used by the respondent for his hotel.

The father died on January 25, 1945. On December 21, 1945, the appellants filed a suit for a declaration that the deed of lease of February 3, 1941, executed by their father was not for legal necessity or for the benefit of the family, that the alienation was not binding on them and the option of renewal under the lease was void and unenforceable on account of uncertainty. The appellants further prayed for delivery of possession and for a decree for a sum of Rs. 2,655 as past mesne profits and future mesne profits at Rs. 250 per mensem as from December 1, 1945. The respondent filed his written statement on March 11, 1946, and an additional written statement on November 26, 1946, whereby he raised an objection to the jurisdiction of the court by reason of the Mysore House Rent Control Order of 1945. The trial judge upheld the preliminary objection and dismissed the suit. On appeal, the High Court set aside the decree on the ground that the nature and scope of the suit has been misconceived by the trial court and that it was not based on relationship of landlord and tenant and therefore s. 8(1) of the Mysore house Rent Control Order was inapplicable and the case was remanded for retrial.

On August 23, 1948, the suit was decreed. The trial court held that the lease was binding for the first period of ten years as from May 1, 1941, as it was supported by legal necessity; but the option of renewal was void and unenforceable for uncertainty and therefore a decree for possession was passed to be operative on the expiry of ten years, i.e., May 1, 1951. On appeal the High Court confirmed that decree on August 22, 1950.

On July 9, 1951, the appellants took out execution of the decree and on July 22, 1951, possession was delivered to them. The order for delivery was made without notice to and in the absence of the respondent. The proceedings, "sport mahazar" that the respondent came to the spot after delivery of the major portion of the property in dispute had been delivered to the appellants.

On August 13, 1951, the respondent made an application in the Executing Court, the District Judge, under ss. 47, 144 and 151 of the Code of Civil Procedure for setting said the ex parte order of

delivery and for redelivery of possession of the house to him and in the alternative for an order to the appellants to give facilities to him (respondent) to remove the various moveables and articles mentioned in the petition. The appellants pleaded that the application was not maintainable. The District Judge, on November 14, 1951, upheld this contention and dismissed the application. An appeal was taken to the High Court and it reversed the order of the Executing Court and directed the appellants to return possession of the house in dispute to the respondent along with the moveables which were in the house at the time respondent was evicted. The High Court held that the Executing Court had no jurisdiction to order the eviction of the respondent because of the provisions of Mysore House Rent and Accommodation Control Order, 1948, which was in operation on the date of eviction. The High Court having refused to give a certificate under art. 133 the appellants obtained special leave to appeal from this Court on January 12, 1955, and this is how the matter has come to this Court.

The question for decision mainly turns upon the applicability of the provisions of the two house Rent Control Orders of 1945 and 1948 and how far they were applicable to the proceedings in the suit and execution. The Mysore House Rent Control Order of 1945 came into force on November 6, 1945, and by s. 8(1) of this Act a restriction was imposed on the eviction of tenants and the relevant part of this section was :-

Section 8 "(1) A tenant in possession of a house shall not be evicted therefrom, whether in execution of a decree or otherwise before or after the termination of the tenancy, except in accordance with the provisions of this clause;

(2) A landlord wishing to evict a tenant in possession shall apply to the Controller for a direction in that behalf. If the controller after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied,". This Order was replaced by the Mysore Rent and Accommodation Control order of 1948 which came into force on July 1, 1948. The relevant provisions of this Order, i.e., ss. 9 and 16 which are applicable to the present appeal are as follows :-

Section 9 "(1) A tenant in possession of a house shall not be evicted therefrom whether in execution of a decree or otherwise except in accordance with the provision of this clause

(2) A landlord who seeks to evict a tenant in possession shall apply to the Controller for a direction in that behalf. If the Controller, after giving tenant a suitable opportunity of showing cause against such application, is satisfied :-
.....".

Section 16 "Nothing in this Order shall prevent a landlord from filing a suit for eviction of a tenant before a competent civil court, provided that no decree for eviction of a tenant, passed by a civil court shall be executed unless a certificate to that effect is obtained from the Controller".

It was argued on behalf of the appellants before the High Court and that argument was repeated before us that the Mysore House Rent Control Order of 1948 was repugnant to the provisions of the Transfer of Property Act (Act IV of 1882) which was brought into force in the State of Mysore by Part B States (Laws) Act, 1951 (Act III of 1951). This Act was enacted on February 22, 1951, and

came into force on April 1, 1951, which was termed the appointed day. It was contended therefore that the House Control Order could not operate on the rights of the parties on the day when the Executing Court made the order for delivery of possession to the appellants, i.e., July 9, 1951, or when the delivery was actually given, i.e., on July 22, 1951. To test the force of this argument it is necessary to examine the provisions of Part B States (Laws) Act and how and when as a consequence of it the Transfer of Property Act became effective and operative in the State of Mysore. Section 3 of that Act deals with the extension and amendment of certain Acts and Ordinances. The Acts and the Ordinances specified in the Schedule were amended and became applicable as specified and as a consequence the fourth paragraph of s. 1 for the words "Bombay, Punjab or Delhi", the words "that the said States" were substituted. Therefore the effect of the part B States (Laws) Act merely was that qua the Transfer of Property Act, the State of Mysore was placed on the same footing as the States of Bombay, Punjab or Delhi. It was by virtue of a Notification No. 2676-Cts. 46-51-5 dated September 12, 1951, that the Transfer of Property Act was extended to the State of Mysore as from October 1, 1951. Consequently the laws of the State applying to leases which would include the Mysore House Rent Control Order of 1948 continued to be in force and applicable to cases that were pending till it was repealed by the Mysore Rent Control Act of 1951 which received the President's assent on August 16, 1951. The argument, therefore, that as from April 1, 1951, as a result of repugnancy the House Rent Control order of 1948 stood repealed must be repelled as unsound and cannot be sustained, because it was an existing law which was saved by art. 372 of the Constitution and remained unaffected by art. 254. The Punjab High Court in *M/s. Tilakram Rambaksh v. Bank of Patiala* (A.I.R. 1959 Pb. 440, 447) discussing the effect of part B States (Laws) Act on the application of the Transfer of Property Act to PEPSU said :

"All that Central Act III of 1951 has done is to make it possible for Part B States to extend the Act to any part of territory by notification. Actually, however, this was never done by PEPSU or Punjab and the Transfer of Property Act is not as such in force there. It is Unnecessary in the circumstances to examine the argument further".

Although the question of repugnancy was raised in the High Court at that time of the hearing of the appeal, the true effect of s. 3 of the Part B States (Laws) Act was not brought to the notice of the learned Judges nor was the Notification placed before them, but it was discussed by the High Court in its order refusing certificate under art. 133(1) of the Constitution. The argument of repugnancy, therefore, is wholly inefficacious in this appeal.

The inapplicability of s. 47 to the proceedings out of which the appeal has arisen was also raised before us, but that contention is equally unsubstantial because the question whether the decree was completely satisfied and therefore the court became *functus officio* is a matter relating to execution, satisfaction and discharge of the decree. It was held by this Court in *Ramanna v. Nallaparaju* (A.I.R. 1956 S.C. 87, 91) that :

"When a sale in execution of a decree is impugned on the ground that it is not warranted by the terms thereof, that question could be agitated, when it arises between parties to the decree, only on an application under s. 47, and not in a separate suit".

See also *J. Marret v. Mohammad Shirazi & Sons* (A.I.R. 1930 P.C. 86) where the facts were that an order was made by the the Executing Court directing contrary to the terms of the decree the payment of a certain fund to the decree-holder. The Madras High Court in *K. Mohammad Sikri Sahib v. Madhava Kurup* (A.I.R. 1949 Mad. 809) held that where the Executing Court was not

aware of the amendment of the Rent Restriction Sahib v. Madhava Kurup (A.I.R. 1949 Mad. 809) held that where the Executing Court was not aware of the amendment of the Rent Restriction Act by which the execution of a decree was prohibited and passed an ejectment order against a tenant, the Executing Court could not execute the decree and any possession given under an ex parte order passed in execution of such a decree, could be set aside under s. 151 of the Code of Civil Procedure. The prohibition is equally puissant in the present case and s. 47 read with s. 151 would be equally effective to sustain the order of redelivery made in favour of the respondent.

The applicability of res judicata and the defences of waiver and estoppel were also raised by the appellants. The contention of res judicata was based on the plea taken by the respondent in his written statement, dated March 11, 1946, where he pleaded that the civil court had no jurisdiction to order eviction because of the House Rent Control Order, 1945, to which the reply of the appellants was that considering the nature of the suit and the consequential remedy that were seeking, the plea of jurisdiction of the court was not open to the respondent. Thereupon the trial court raised a new issue "whether this court has jurisdiction to try the suit, in view of the House Rent Control Order" which was decided against the respondent and a decree in favour of the appellants was passed on August 23, 1945. This judgment formed the basis of the argument before us that the plea of inexecutability of the decree could not be raised because it was barred on the principle of res judicata. The plea of res judicata is not available to the appellants as the prohibition on account of the House Rent Control Order was not against the passing of the decree but against its execution and therefore the objection to the executability could only be taken at the time of the execution of the decree which in the instant case could not be done because the order for delivery by the Executing Court was passed without notice to the respondent. We must, therefore, repel the contention based on the ground of res judicata.

The argument of waiver and estoppel is also devoid of force. This plea was based on a letter which the respondent's lawyer sent in reply to the respondent asking to make arrangements to put the appellants in possession. The former replied thereto that his client was making arrangements and as soon as he could do so, he would hand over possession to the appellants. This is slender basis for the sustainability of the plea of waiver and estoppel. There is no conduct on the part of the respondent which has induced the appellants to change their position or has in any way affected their rights and the plea of non executability which has been taken is based on statute and against statute there cannot be an estoppel. This ground taken by the appellants is equally unsound and must be rejected.

The contention raised that ignoring ss. 9(1) and 16 of the 1948 House Rent Control Order is no more than an error in the exercise of jurisdiction does not appear to be sound because those sections are a fetter on the executability of the decree and not merely an error in the exercise of the jurisdiction. In the present case the two sections mentioned above were a restriction on the power of the court to execute the decree and therefore this argument must also be rejected.

In the result this appeal fails and is dismissed with costs.

Appeal dismissed.

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