

Jagdish Dutt

Vs

Dharam Pal

Special Leave Petition (C) No. 2590 of 1997

(B.N. Kirpal, S. Rajendra Babu JJ)

12.04.1999

JUDGMENT

S. Rajendra Babu, J.

1. A suit for ejection was instituted by the appellants on the grounds of arrears of rent and sub-letting by Dharam Pal (Respondent No. 1) and Sat Pal (Respondent No. 2). The suit was decreed by the trial court on March 31, 1987. Appeal against that decree, second appeal thereafter and further special leave petition to this Court against the decree in second appeal stood dismissed. The appellants herein levied execution on February 5, 1991 and certain objections thereto were raised that Judgment Debtor No. 1 was unnecessarily arrayed as a party in the proceedings and he was not in possession of the disputed premises. Judgment Debtor No. 2 claimed that he was a tenant in respect of the shop in question and his tenancy was not terminated in accordance with law. This contention was belied by the finding recorded by the High Court in second appeal that the said Sat Pal (Respondent No. 2) was not a tenant but a trespasser of the shop. Hence the objections were overruled. Against that order a revision petition was filed which was also dismissed, of course, granting some time to vacate the premises subject to certain conditions.

2. In the execution petition respondent No. 2 claimed that he had purchased the undivided interest of the coparceners in the Hindu Undivided Family of the decree holder and, therefore, actual physical possession cannot be given but only symbolic possession can be given to the appellant-decree holder. The Executing Court, after inquiry, upheld this contention. That order was challenged in the High Court. The High Court set aside the order made by the executing court and remitted the matter to it to investigate the quantum of share purchased by respondent No. 2. If a good or larger share as opposed to an insignificant share had been purchased by respondent No. 2 khas possession cannot be given to the appellant and if only an insignificant portion had been purchased by him, the khas possession shall be given to the appellant. It is against this order the present special leave petitions are preferred.

3. The learned counsel for the appellants contended that it is not open to the respondents during the subsistence of tenancy or in the suit for recovery of possession of the property after termination of tenancy to set up title in himself or in any other person. Respondents had to surrender possession and seek remedy, if any, separately in case he acquires title subsequently through some other person and he placed strong reliance in support of this proposition on the decision of this Court in *Sant Lal Jain v. Avtar Singh*, 1985(2) SCC 332 : 1985(1) RCR 696 (SC);. He also contended that in a case of this nature where only a portion of the undivided interest had been purchased by the judgment debtor there would be no merger of interest in terms of Section 111(d) of the Transfer of Property Act, 1882 and submitted that the concept of merger would arise only if no property remains outside

the sale. In the present case only 1/3rd undivided share having been purchased the judgment debtor cannot resist the recovery of possession and placed reliance on the decision of this Court in *Shah Mathuradas Maganlal and Co. v. Nagappa Shankarappa Malage and others*, 1976(3) SCC 660 : 1976 RCR 865 (SC); and *Parmar Kanaksinh Bhagwansinh (Dead) by LRs. v. Makwana Shanabhai Bhikhabhai and another*, 1995(2) SCC 501 : 1995(2) RCR 287 (SC);.

4. On the other hand, the learned counsel for the respondents submitted that a lease of immovable property determines in case the interests of lessee and lessor in the whole of the property becomes vested in one person and in the present case such an event having taken place to the extent of the undivided share of the copartners of the joint family, decree passed in favour of the appellants cannot be executed. If that is so, the possession of the entire property cannot be obtained by the appellants and, therefore, only symbolic possession can be given and placed reliance on the decisions in *Hasimathunnisa Begum v. Vithall Rao Gangaji and Another*, A.I.R. 1979 Andhra Pradesh 273; *Milkhi Ram and others v. Raghunandan and others*, A.I.R. 1982 H.P. 87 and *Bawa Maharaj Singh v. Bawa Gurmukh Singh and others*, A.I.R. 1965 Punjab 166.

5. We will first deal with the contention that a judgment debtor has to surrender his possession and thereafter seek his remedy in case he acquires any subsequent right in the disputed property is attracted or not. A careful reading of the decision in Sant Lal Jain case (supra) would reveal that during the term of tenancy or in the suit for recovery of possession thereof after termination of such tenancy the tenant cannot set up title in himself and he has to surrender possession on tenancy being terminated and he has to seek his remedy separately in case he acquires title subsequent to the decree through some other person. It is also made clear therein that he need not do so if he had acquired title to the property from the lessor or some one claiming through him in which case there would be merger of two rights. In that case, the facts were that the original owner had leased the property which was held by the licensee through the lessee; that a sale had been effected in favour of the licensee but the lease in favour of the original lessor was continued; that his interest was different from that of the original owner which was transferred to the licensee and thus there would be no merger of interests. In that view of the matter the decision in Sant Lal Jain case (supra) will not be of any assistance to the appellants.

6. We need not examine the scope of Section 111(d) of the Transfer of Property Act inasmuch as respondent No. 2 is held to be a trespasser and not a lessee. We have to find out the effect of the purchase of undivided interest of some of the copartners in family of the decree holder in respect of the property which is the subject-matter of execution.

7. When a decree is passed in favour of a joint family the same has to be treated as a decree in favour of all the members of the joint family in which event it becomes a joint decree. Where a joint decree for actual possession of immovable property is passed and one of the copartners assigns or transfers his interest in the subject matter of the decree in favour of the judgment debtor, the decree gets extinguished to the extent of the interest so assigned and execution could lie only to the extent of remaining part of the decree. In case where the interest of the copartners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, a decree cannot be given effect to before ascertaining the rights of the parties by an appropriate decree in a partition suit. It is no doubt true that the purchaser of the undivided interest of a copartner in an immovable property cannot claim to be in joint possession of that property with all the other copartners. However, in case where he is already in possession of the property, unless the rights are appropriately ascertained, he cannot be deprived of the possession thereof for a joint decree holder can seek for execution of a decree in the whole and not in part of the property. A joint decree can be

executed as a whole since it is not divisible and it can be executed in part only where the shares of the decree holders are defined or those shares can be predicted or the share is not in dispute. Otherwise the executing court cannot find out the shares of the decree holders and dispute between joint decree holders is foreign to the provisions of Section 47, CPC. Order XXI, Rule 15, CPC enables a joint decree holder to execute a decree in its entirety but if whole of the decree cannot be executed, this provision cannot be of any avail. In that event also, the decree holder will have to work out his rights in an appropriate suit for partition and obtain necessary relief thereto. Various decisions cited by either side to which we have referred to do not detract us from the principle stated by us as aforesaid. Therefore, a detailed reference to them is not required. In this view of the matter, we think the High Court was justified in making the order under appeal. Hence the special leave petitions stand dismissed. No orders as to costs.

SLP dismissed.