

Brahm Sarup Vs. Dhapi Nahata

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Court : Delhi

Decided On : Nov-13-1981

Reported in : 1982RLR118

Judge : Yogeshwer Dayal, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 47

Appeal No. : Civil R. Appeal No. 550 of 1981

Appellant : Brahm Sarup

Respondent : Dhapi Nahata

Advocate for Pet/Ap. : N.R. Suri and; C.M. Oberoi, Advs

Judgement :

Yogeshwer Dayal, J.

(1) This revision petition is directed against the order of the learned Subordinate Judge, 1st Class, Delhi, dated 10.4.81 whereby the learned Subordinate Judge dismissed the application filed by the petitioners-defendants u/s 151 of the Civil Procedure Code for staying the operation of the ex-parte decree for injunction 14.11.80.

(2) It appears that on or about 15.1.80, an application was filed by Smt. Dhapi Mahata against Shri Brahm Satup Uppal for ejectment from a miani situated in premises No. 41. U. A. Jawahar Nagar, Delhi on various grounds including the ground of non-payment of rent. On 15.3.1980 written statement was filed by Shri Brahm Satup Uppal inter alias pleading that the premises were not let out to him alone but were let out to a firm M/s Brahm Sarup Krishan Lal of which apart from him there were two other partners, Shri Des Raj and Shri Krishan Lal. Replication was filed on or about 24.4.1980. On 11.8.1980 the Additional Rent Controller deferred passing interim order u/s 15(1) of the Delhi Rent Control Act for the reason that there is a substantial dispute between the parties as to whether Shri Brahm Sarup Uppal is a tenant or the firm M/s Brahm Sarup Krishan Lal is the tenant.

(3) Three months thereafter, on 5.11.80 a suit was filed for permanent injunction against Shri Brahm Sarup Uppal and his son Narinder Kumar for restraining them from using the bath room and latrine which is situated in between the first floor and the ground floor of the aforesaid building.

(4) The suit was assigned to the trial court on 6.11.80. The trial court declined to issue an ex-parte interim injunction but ordered the

(5) On 13.11.80 when the suit came up before the trial court, the trial court noticed that the defendants in the suit have not been served and as per the report of the process-server it appears that the defendants are avoiding service intentionally and thereafter, the trial court directed that substituted service may be effected by way of beat of drum for 14.11.80. On 14.11.80 the trial court noticed that no-body has appeared for the defendants and service has been effected by way of beat of drum, accordingly the trial court proceeded ex-parte and directed the recording of ex-parte evidence. After recording the evidence ex-parte on the same date the decree was passed.

(6) After obtaining the ex-parte decree, the decree-holder remained quiet and after allowing the period for limitation he got a notice issued from the executing court and served on the petitioner on 9.2.81 bringing to their notice the passing of the ex-parte decree.

(7) On receipt of the notice Brahm Sarup Uppal and his son filed an application for setting aside the ex-parte decree under the provisions of Order 9 rule 13 of the CPC. Along with the application, an application was filed for staying the execution of the decree. This application has been dismissed by the impugned order dt. 10.4.80. Before deciding this application, the learned trial court had heard arguments for staying the operation of the decree and directed the plaintiff-decree holder to file an affidavit regarding the existence of latrine on the first floor. It is also noticed that the affidavit which has been filed was not specific and the plaintiff was directed to file affidavit regarding existence of latrine and baths on all the three floors including the mezzanine floor also and similarly the defendants in the suit were also directed to file an affidavit regarding the existence of latrines and baths in whole of the premises and the arguments were adjourned to 11.3.81. It transpired that both the parties had filed their affidavits regarding existence of latrine and baths. The trial court found that there were discrepancies in the two affidavits and in order to apprise itself of the correct position of the baths and latrines at each floor, the trial court found it expedient to appoint a Local Commissioner and accordingly Miss Manju Sharma was appointed as Local Commissioner was directed to take the help of the drafts-man for preparing a site plan regarding the existence of the latrines and bath rooms on each floor including the disputed latrine and bath room. The Local Commissioner accordingly took help of one drafts-man and filed her report and plan prepared by the drafts-man.

(8) After examining the affidavits as well as the report of the Local Commissioner, trial court took the view that unless and until the decree is set aside the operation of the decree cannot be legally stayed. It also took the view that there is no irreparable injury being caused to the judgment debtors because the judgment-debtors are the tenant of the ground floor also and they can use the latrine and bath room on the ground floor, which is also in their possession and accordingly dismissed the application.

(9) This order was impugned before me by way of revision petition and I issued notice to show cause why the revision petition be not admitted. Today in reply to show cause. Mr. C. M. Oberoi, Advocate, has appeared and the parties counsel agree that the revision petition itself may be disposed of.

(10) The case of the petitioner before the trial court was that the premises in dispute, namely the messanine floor has been used along with the bath room and latrine right from the very beginning when the room on the messanine floor was let out by the landlord. Whereas the case of the decree- holder is that the disputed bath room and latrine were part of the tenancy of the tenant of the first floor and after the tenant of the first floor was evicted through the process of the court, the possession of the first floor including the disputed latrine and bathroom was obtained by the landlord.

(11) Mass of documentary evidence has been filed on behalf of the landlord to show that merely one miani was let out on a monthly rent of Rs. 25.00 per month.

(12) It appears to me that the approach of the learned trial court that the operation of the decree cannot be stayed unless it is set aside is totally erroneous. There is ample powers in the executing court to stay the operation of the decree pending decision of an application under O.9 R.13, CPC. The trial court was totally erroneous in its approach in assuming that the operation of the decree could not be stayed till it was set aside.

(13) The other reason given by trial court is that the petitioners will not suffer any irreparable loss since there is bath room and latrine already available to them on the ground floor which is also in the possession of the petitioners herein.

(14) Though we all expect justice to be administered with unnecessary delay. There are certain features in this case which show of undue haste. There was already litigation pending between the parties on the question whether the bath room and latrine in dispute was part of the tenancy and who was the tenant thereof and the matter was being hotly contested in the court of an authority under the Rent Control Act.

(15) It is true that the trial court did not grant any ex-parte order but had instead issued summons for a date within a week No orders were passed by the trial court under rule 19-A of Order 5 of the Civil Procedure Code for service being effected also by registered post. When the case came at the stage when the report was of 'avoiding service' it ordered service again by best of drum.

(16) This is not the stage to go into the question whether the service was effected or not but the fact remains that the pendency of the proceedings before the Rent Controller were not brought to the notice of the trial court when the orders were being passed for effecting service on the defendants in the suit. However, nothing need to be said further in this regard since the application for setting aside the ex-parte decree is still pending and I am sure the trial court will examine all facts and circumstances in that regard and nothing stated herein should be treated as an expression of opinion in regard to the application for setting aside the ex-parte decree.

(17) However, in relation to the application u/s 151 of the Civil Procedure Code for ad interim relief one has really to examine the question of prima facie nature of the case, balance of convenience and irreparable loss. In examining prima facie nature of the case, the court can examine prima facie the circumstances on which the decree was obtained, the prima facie nature of the claim of the tenant that the premises in dispute, namely latrine and bath room were part of the tenancy in relation to room on the messaine floor. It appears to me that this aspect of the case has been completely overlooked by the learned trial court and instead application was rejected on the ground that it was premature and on the principle of lack of irreparable loss without going into the question of prima facie nature of the case and balance of convenience. Since the grounds on which the application was rejected are erroneous, I am constrained to set aside the order.

(18) Looking at all circumstances of the case I also direct in exercise of suo motu powers of this court that the application for setting aside the ex-parte decree be transferred to another court and further direct that the application filed u/s 151, Civil Procedure Code for staying of the ex-parte decree shall be heard again by the transferee court and decided afresh. Revision allowed.