

Anandi Lal Vs. Smt. Sarju Devi and ors.

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Court : Rajasthan

Decided On : Aug-17-2000

Reported in : 2000(4)WLC547; 2002(1)WLN453

Judge : N.P. Gupta, J.

Appeal No. : S.B. Civil II Appeal No. 316 of 1999

Appellant : Anandi Lal

Respondent : Smt. Sarju Devi and ors.

Disposition : Appeal dismissed

Judgement :

N.P. Gupta, J.

1. This is defendant's second appeal in a suit for eviction of shop on the ground of reasonable and bonafide necessity of the plaintiff decreed by both the learned court below. Of course the suit was also filed on the ground of default but then the defendant was given benefit of Section 13(6) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (hereinafter after referred to as 'the Act'). Hence, I need not refer to facts.

2. A perusal of the judgments and decree shows that the question of reasonable and bonafide necessity and comparative hardship is covered by issues No. 2, 2A

and 3 which was decided by the learned courts below against the defendant. In the pleadings no indication was even given from either side as to 'whether no hardship would be caused either to the tenant or to the landlord by passing a decree in respect of a part of the premises only', (such expression shall hereinafter referred to as 'partial eviction'). Not only this even during evidence nothing was said on this aspect, so much so no such evidence has been led which may even have the effect of providing sufficient indication to the court as to whether no hardship would be caused either to the tenant or to the landlord by passing a decree in respect of a part of the premises only. Likewise even during the course of arguments before both the learned courts below no submissions were made on the said of either parties on this question. Obviously therefore, rightly or wrongly both the learned courts below did not record any finding on this question.

3. When the appeal came up for admission on 22.10.1999, it was admitted on the following substantial question of law:

Whether in absence of there being any finding on the question of partial eviction of the shop in dispute as envisaged Under Sub-section (2) of Section 14 of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 both the courts below have no jurisdiction to pass the decree for eviction on the ground of reasonable and bonafide necessity as envisaged Under Clause (h) of Sub-section (1) of Section 13 of the aforesaid Act?

4. After service of the notices on 27.4.2000 when the matter came up before me for consideration of stay petition, I found that since the finding on the question of bonafide necessity returned in favour of the plaintiff is not under challenge, without going into the question as to whether it was necessary or not. I thought it proper to frame an additional issue as under:

Whether in the facts and circumstances of the case including the size and location of the shop in question, no hardship would be caused either to the tenant or to the landlord by passing a decree in respect of part of the premises in question?

and remitted this issue to the learned trial court Under Order 41 Rule 25 with a direction to return its finding on this issue on the basis of the material which exists

on record only but after hearing both the parties. This order was passed in presence of the learned Counsel for the parties and irrespective of the question as to whether it has any bearing or not, it may be mentioned as a fact that on that day also no request was made by the learned Counsel for the parties for being permitted to lead evidence. Be that as it may.

5. Pursuant to this order, the learned trial court after considering various judgments of this Court observed that in para 1 of the plaint only four boundaries of the shop are given and measurements are not there and that merely on the basis of boundaries, it is not possible to decide as to whether the shop is capable of being divided and that this Court in *Ram Babu v. Padam Chand* 1989 (1) RLW 372 has held that when suit premises cannot be divided, no decree for partial eviction can be passed. However in absence of the measurements the learned court below held that on the basis of the material available on record no opinion can be given on this question.

6. After receipt of this finding the matter was finally heard by me on 10.8.2000.

7. Before me, on 8.8.2000 the learned Counsel for the appellant filed an application Under Section 100(5) C.P.C. and Section 151 CPC seeking to urge that apart from the question framed, other questions formulated in the memo of appeal do also arise in the present appeal, therefore, they should also be framed and decided.

8. For this purpose I again went through the questions formulated at page 8 of the memo of appeal. Regarding question No. 2 the learned Counsel utterly failed to point out the courts below to have based their finding on any admission of the defendant. As such this question does not arise. Regarding questions No. 3 and 4 which relate to bonafide necessity and comparative hardship, notwithstanding constraints of Section 100, I heard the learned Counsel at length, and also went through the entire evidence of the parties, and find that these issues have also been rightly decided by the learned courts below, more particularly in view of the principles laid down by Hon'ble Supreme Court in the judgment reported in *Raghunath G. Panhale (dead) by L.Rs. v. Chaganlal Sundarji and Co.* 2000 (1) RCJ 161 and *Shiv Sarup Gupta v. Dr. Mahesh Chand Gupta* : [1999]3SCR1260 .

Regarding 5th question the learned Counsel contended that the learned lower Appellate Court has not mentioned the points arising for determination of the appeal, nor has decided the case issuewise, and therefore, the judgment is vitiated on account of non-compliance of Order 41 Rule 31 CPC. A bare perusal of the judgments of the learned courts below show that both the learned courts below have decided issue No. 2, 2A and 3 together being closely inter-related and before the learned lower Appellate Court also only challenge was to these issues and the same have been decided together. As such the point of determination before the learned court below precisely was about existence of reasonable and bonafide necessity and comparative hardship, and the same have been decided. As such this question also does, not arise.

9. The other contention raised in the application was that since the question of determination of partial eviction requires evidence, the matter should be remitted back to the learned court below with opportunity to the parties to lead evidence and thereafter the question should be decided.

10. Arguing on merits of the appeal also the thrust of the submissions was that since there is no material on record enabling the court to decide the question of partial eviction, the matter is required to be sent back to the court below giving opportunity to the parties to lead evidence on the question of partial eviction, and decision of the suit without finding so also decision of the question of partial eviction without recording evidence of the parties would be rather without jurisdiction. In support of this contention reliance was placed on a judgment of Hon'ble the Supreme Court reported in Rahman Jeo Wangnoo v. Ram Chand : [1978]2SCR380 , L.Rs. of Ibrahim and Ors. v. L.Rs. of Fakruddin and Ors. 1997 DNJ (Raj.) 325 and Bharatpur Whole Sale Sahakari Upbhokta Bhandar v. Sohan Lal 1997 (3) WLC 128. As against this the learned Counsel for the plaintiff respondent relied upon Hanuman Das v. Sanwal Ram 1982 RLR 916 contending that it is not always necessary as a 'Rule of Thumb' that at this stage the parties should be given opportunity to lead evidence for deciding question of partial eviction. It was also submitted that the question can be and should be decided even by this Court on the material on record, as in the submission of learned Counsel it is not a case where no hardship would be caused either to the tenant or

to the landlord by passing decree in respect of a part of the premises only.

11. I have heard learned Counsel for the parties and have gone through the record so also; the available case law on the subject.

12. True it is that Hon'ble the Supreme Court in Rehman's case found that the trial court and the first appellate Court had really not considered the question of partial eviction on merits, not only evidence had not been led on the score but there had been no specific plea in that behalf. It was found that the proviso to Section 11(1)(h) of the J & K Act, 1966 mandates the Court to consider whether partial eviction as contemplated therein should be permitted or the entire holding should be directed to be evicted, and the matter was sent to the first appellate court to go into the question after giving the parties an opportunity to lead evidence, and maintain the decree if the court is satisfied that entire premises must be vacated to fulfil the reasonable requirement of landlord, otherwise to order eviction from part of the premises. Likewise in Krishan Murari Prasad v. Mitra Sen reported in 1993 Supp. (1) SCC 439, considering the provisions of Section 11 of the Bihar Rent Control Act, Hon'ble the Supreme Court directed the matter to be sent to the trial court for examining the matter afresh treating the need of the landlord to be proved. In that case the premises was as huge a premises as 24x22 ft. with a Varrandah attached to it measuring 6 x 22ft.

13. In my humble view the question as to when, and in what circumstances, the matter should be remitted back for deciding the question of partial eviction has different facts, and it is to be seen as to whether it is always a 'rule of thumb' that wherever and whenever there is no pleading of either of the parties nor any evidence has been led by either of the parties and no submissions are made by either of the parties still in the event of suit being decreed on the ground of reasonable and bonafide necessity the tenant should always be free to force High Court to remit the matter to the trial court or lower appellate court, to give the parties opportunity of leading evidence and for a fresh decision.

14. It is a different story that there are judgments after judgments of various learned Single Benches of this Court wherein on facts in some cases, after framing additional issue matter has been remitted with giving opportunity to the

parties to lead evidence, so also are cases to the effect where this Court considered whatever material was available on record where on the basis of which it was glaringly clear that partial eviction is not possible and maintained the decree. In this sequence there is one judgment of this Court in the case of Vishvapriya Nagar v. Immamuddin Tailor 1996 DNJ (Raj.) 482, wherein my learned brother Aran Madan, J. in para 5 held as under:..The law has been well settled by this Court as well as by other High Courts in series of judgments that the question of partial eviction of such small shop cannot be considered at all and; (iii) that in a judgment of far reaching consequence the Division Bench of this Court has settled the law on the question of partial eviction and the matter is no longer res-integra. In the order dt. 2.7.1991 while answering the reference made by the learned Single Judge vide order dt. 6.5.1991 in SBCSA No. 19/1992, Lal Chand v. Shyam Lal and Ors. the learned D.B. of this Court has held as under:.... If there is already material on record, the satisfaction of the Court as required Under Sub-section (2) of Section 14 can be there and it may not be necessary to frame issue and remit record for recording evidence....

15. Thus according to this judgment this much is clear that if there is material on record, the satisfaction of the Court as required by Section 14(2) can be there and it may not be necessary to frame the issue and remit record for recording evidence.

16. Thereafter even recently this Court (Hon'ble Mr. Justice V.S. Kokje) in Purshottam Lal v. Gangadas reported in 1998 WLC (UC) 92 after referring to any relying upon Rahman's case has held that 'while deciding the appeal after considering the evidence or record the court shall apply its mind to this aspect of the matter also if it finds on the evidence on record that partial eviction will satisfy the need of the landlord, it shall grant relief accordingly.' It obviously goes without saying that if it does not find or if there is no material on record that the partial eviction will satisfy need of the landlord then a decree for eviction of entire premises has to be passed. Similarly in Girdharilal v. Smt Kanta and Ors. reported in 2000(1) RLW 306 again this Court (Hon'ble Mr. Justice S.K. Sharma) after considering Rehman's case, himself went into the matter holding that 'undoubtedly, even in absence of specific pleading, court has to act in compliance

of the mandate and give a finding.' In the instant case the plaintiff instituted suit in respect of one shop and it was required for the purpose of running hotel along with the other articles the requirement was properly considered on the basis of pleading of the parties by both the courts below. On careful perusal of the material on record reveals that the entire shop is reasonably and bonafidely needed by the plaintiff for the purpose of ingress and installation of the counter. It is well settled law that the landlord is the best judge of his requirement and if landlord desires to beneficially enjoy his own property, his requirement cannot be termed as unreasonable. In view of the requirement of plaintiff as indicated hereinabove, I am of the view that non giving of any finding by the courts below, on the question of partial eviction, does not affect the root of the matter as in the facts and circumstances of the case the partial eviction is not possible.

17. It is different story that in the present case, in my view, on putting some stress, and on a close scrutiny of record I am able to come to the conclusion that it is not a case where no hardship would be caused either to the tenant or the landlord by passing a decree in respect of part of the premises only. The reasons for this satisfaction I shall record in the later part of the judgment.

18. But then, the larger question is of finding out the proper solution, of the prevalent affairs of litigation, off and on giving rise to such question.

19. It need not be over stressed that the rent control legislation is enacted for ameliorating the conditions of the tenants by protecting them against frivolous evictions, on account of prevalent housing accommodation problem. But then, it is not required to be stretched to the extent of proving counter productive, by interpreting it in such a manner as to arm unscrupulous obstructionist tenants with an unending armory to go on harassing even the genuine landlord endlessly. Section 13 of the Act provided special protection to the tenants by making it obligatory for the landlord to make out one or more of the grounds mentioned in Clause (a) to (1) of Sub-section 1 of Section 13 as a sine qua none for being entitled to evict the tenant notwithstanding any law or contract. Then, came the amendment on 29.9.1975 putting still additional fetters on this right of the landlord, inasmuch as in cases on eviction being sought on the ground set forth in Section

13(l)(b), the Court was additionally required to be satisfied that after taking all the facts and circumstances into consideration, it is reasonable to allow such eviction. Likewise, in cases of decree being sought on the ground set forth in Section 13(l)(h), two requirements were enacted, one being known as 'comparative hardship' and the other, commonly known as 'partial eviction' as mentioned above, and the third being that where the premises are let out for business purposes no suit shall lie before expiry of five years from the date the premises were let out to the tenant.

20. There was a long drawn debate in various judgments of this Court on the question as to whether these additional fetters enacted in Section 14 are retrospective or prospective, in the sense that they apply to the pending suits or pending appeals etc. or not? and ultimately, the position settled in favour of the tenant by deciding that they are retrospective. Here I am not on the question whether they are retrospective or prospective, but this resume, I have given for the purpose of deciding the precise question about the requirement of framing additional issue and its remittance to the court below for decision after recording evidence?

21. Before proceeding ahead. I make myself clear that I should not be understood to mean not to follow the judgments of the Hon'ble Supreme Court, referred to above, or to even observe much less find anything, which may not be in line with those judgments. I am simply trying to understand as to whether those judgments do mean to lay it down as a 'rule of thumb' that irrespective of any fact and circumstances, in every case wherever the parties may not have taken any pleading or may not have led any evidence, any may not even invite the attention of the two courts below, in the appeal of the tenant, always an additional issue is required to be framed and over and above all that the defendant should be given an opportunity to lead evidence for deciding that issue.

22. To start with, I may only recapitulate that it is established law that no amount of evidence, even if is led, by any of the parties, can even be looked into in absence of any pleading being there is that regard. Judged on this principle, if the questions of partial eviction were to be taken to be question going to that deep root of the

case, it obviously would require pleadings on the side of the parties and in absence of pleading, no evidence can be led. However, respecting the pronouncements of Hon'ble the Apex Court, I proceed with assumption that since the requirement of deciding the question of partial eviction being basically a matter of satisfaction of the court, it may not require any specific pleading in this regard.

23. Then, coming to the question of evidence and satisfaction, I am unable to resist myself from attempting to trace the basic reason for enactment of this provision of the partial eviction. The answer that I find is in the judgment of Hon'ble the Supreme Court in *Miss S. Sanyal v. Gian Chand* : [1968]1SCR536 .

24. In that case (*S. Sanyal's case*), the appellant had been the tenant of a house since 1942, a part of which was used for girls school and the rest for residential purposes. The plaintiff purchased the house from the owners in 1956 and commenced an action for ejectment in respect of the house inter alia on the ground of bonafide requirement of the plaintiff. The learned trial court dismissed the suit. The Senior Subordinate Judge also dismissed the appeal, holding that the house being let for the purposes of non-residential as well as residential, a decree for ejectment could not be granted Under Section 13(1)(e) of the Delhi Act. The High Court in revision of the plaintiff held that, on the findings recorded by the first Appellate Court a decree for ejectment limited to that portion of the house which was used for residential purposes could be granted and remanded the matter to the Rent Control Authority for demarcating those portions which were being used for residence and to pass a decree for ejectment from those specific portions of the house. Against this order the tenant appealed to Hon'ble the Supreme Court. It was in those facts, Hon'ble the Supreme Court considered that on the language of Section 13(1)(e) of Delhi Act, if premise are not let for residential purposes, Clause (e) has no application, nor on the express term of the statute, does not clause apply where letting is for purposes residential and non-residential. The High Court had held that where there is a composite letting it is open to the court to disintegrate the contract of tenancy, and if the landlord proves his case of bonafide requirement for his own occupation, to pass a decree for ejectment limited to that part which is being used by tenant for residential purposes. This finding was set aside by Hon'ble the Supreme Court by holding that the jurisdiction of the Court

can be exercised Under Section 13(1)(e) only when the premises are let for residential purposes, and not when the premises being let for composite purposes are used in specific portions for purposes residential and non-residential. What is significant here is the reasoning given by Hon'ble the Supreme Court being 'the contract of tenancy is a single and indivisible contract, and in absence of any statutory provision to that effect it is not open to the court to divide it into two contracts one by letting for residential purposes and the other for non-residential purposes, and to grant relief Under Section 13(1)(e) of the Act limited to the portion of the demised property 'which is being used for residential purposes.' Then again in para 6, approving another judgment of Division Bench of Punjab and Haryana High Court reported in 1966 Punjab-481 it was held as under:

In our view that judgment of Punjab High Court was right on the fundamental ground that in the absence of specific provision incorporated in the statute the court has no power to break up a unit of the contract of letting and attribute instance and applications to a part of the subject matter of the contract which are not applicable to the rest.

25. On the basis of this finding the tenant's appeal was allowed and the dismissal of the suit was restored. Then I may also refer to a recent judgment of Hon'ble the Supreme Court in *Habibunnisa Begum and Ors. v. G. Doraikannu Chettiar (D) by Lrs. and Ors.* reported in : AIR 2000 SC152 . In this case it was a landlord's appeal regarding premises which originally had one municipal number but was subsequently numbered as doors No. 27 and 28, which entire premises was leased out by a single rent deed alongwith same structures on door No. 27. Subsequently in terms of the lease deed the tenant raised certain construction on the doors No. 27 as well as 28. Subsequently a portion of the land was acquired for construction of road, with the result that the premises was separated by a road and thus the premises were assigned separate numbers. It is on these facts that the suit was filed on the basis of default, as well as denial of the title of the landlord, which was decreed by the learned trial court so also the learned lower Appellate Court. However in revision the High Court partly allowed the same and modified the decree, while affirming the findings about denial of title of the landlord. Accordingly the High Court upheld the decree of ejectment upto the

portion of 608 sq. ft. at door No. 27, and set aside the decree to the extent of two grounds and 2182 sq. ft. at door No. 28. It is in that appeal that referring to and following the earlier judgment in S. Sanyal's case, it was reiterated that 'where there is single indivisible contract of tenancy, it can not be split by a Court unless there is statutory provision to that effect.' It was found that, in that case in hand the contract of tenancy was single indivisible and that there is no provision in T.N. Rent Act permitting the court to order partial ejectment of a tenant from the premises by splitting a single indivisible tenancy. With the result that the order of splitting tenancy and partial eviction was set aside, the appeal was allowed and the decree of the trial court was affirmed i.e. decreeing the entire suit for the entire premises.

26. A look at the provisions of Section 13(1)(h) of the Act shows that it does not restricts its applicability to any particular nature of premises i.e. whether to residential or to non-residential, as is in the case of Delhi Rent Act. It is in this view of the matter that in absence of the provision about partial eviction in Section 14(2) of the Act, the things were playing unimaginable havoc on the tenants, inasmuch as even in cases where a big chunk of property is held by a tenant and even on the face of plaintiffs own showing, he required only a small part of it, still on his establishing that requirement, since the court cannot split the single tenancy by ordering partial ejectment, the entire premises had to be ordered to be vacated. Obviously such a course of action was causing severe hardship to both the parties being landlord and the tenant as the landlord had to get entire premises vacated, despite not requiring it, and may be despite being satisfied with the existing tenant, as against which the tenant was also forced to vacate the entire premises despite the fact that the landlord require only a part of it, at times, may be even wholly insignificant part. To illustrate there may be building consisting of 3 stories with four big shops on the ground floor being used by the tenant as one shop and the tenant also residing on the first floor while the landlord on the second floor, in that case either on his own requirement or on his son growing up of age, or on landlord retiring from job, or for like reason, looking to the landlord's poor financial resources he simply requires small patch on the ground floor to start a betle vendor's shop for himself, or for his son, still in view of the above legal position he had to get vacated the entire premises, might be that it may put the landlord in a

servere financially miserable condition, being deprived of rental income. Such possibilities, should be assumed to have been in the back drop of enactment of the provisions of partial eviction, so that no hardship should be caused whether to the tenant or to the landlord, if it can be avoided by passing a decree in respect of a part of the premises only.

27. Thus, the provision of Section 14(2), in my humble view is required to read and understood in the light of the law as propounded by Hon'ble the Supreme Court in S. Sanyal's case so also in Habibunnisa's case in a reasonable and rational manner.

28. If the provision of Section 14(2) is read in this spirit, the real object of enactment would be achieved being of protecting avoidable eviction of the tenant from the entire premises, and also satisfying the needs of the landlord by evicting the tenant from the part of the premises only viz. in a manner so as to proceed free from the fetters of indivisibility of the contract of letting. It is established law that the landlord is best Judge of his requirement and once he establishes his requirement and court finds the requirement to be reasonable as well as bonafide, he is thereafter not to be subjected to any further rationing under the garb of provisions of Section 14(2) 'partial eviction' simply because somehow the tenant is continuing there even at the cost of seeing that the plaintiff is simply lead any evidence in this regard or not. While deciding the question of reasonable and bonafide necessity, it should very much become clear to the courts as to what the tenant is doing in the premises, what are his requirements and correspondingly for what purpose the landlord wants the premises or what are his requirements. It is on consideration of these circumstances and facts that the Court has to place itself in the arm chair of the landlord, as well as in that of the tenant, and decide as to whether for the requirement of the tenant as proved by him and found by the Court to be reasonable and bonafide, the Court should venture to break the contract of letting or should maintain the indivisibility and thus should see as to whether ordering partial eviction would not cause any hardship to either of the parties. Then only it should order partial eviction otherwise the decree for eviction for entire premises is to be passed. In my this view I am also supported by a judgment of Hon'ble the Supreme Court in Satwant Kaur v. Dhund Singh : AIR 1983 SC623

which again was a case of single shop having openings on both sides, front and the back which were already separated by a wall wherein the High Court had directed partial eviction, and Hon'ble the Supreme Court considered the situation of shop viz. it having more than one opening and capable of being partitioned to satisfy the needs of both the tenant as well as the landlord, and affirmed the findings of the High Court in the peculiar circumstances of that case. If Hon'ble the Supreme Court were meaning to lay it down as a rule of thumb as is sought to be contended by the learned Counsel for the appellant, then the Apex Court would not have gone on that question and would have straightway remitted the matter.

29. There is yet another aspect of the matter viz. that the provision of Section 14 were added way back in the year 1975 and obviously when it was interpreted to be retrospective, it had to be assumed that the parties could not, and did not, either take pleadings, or lead evidence, or bring material on record to enable the court to decide the question of partial eviction. In my feeling it is more likely that the two cases decided by Hon'ble Supreme Court being Rahman Jeo Wangnoo v. Ram Chand and Ors. (supra) and Krishan Murari Prasad v. Mitra Sen (supra) also appear to be the out come of this very situation, inasmuch as Rahman's case was decided by Hon'ble the Supreme Court on 7.12.1977. The appeal filed before Hon'ble the Supreme Court was barred by time which delay was condoned and as found above the parties had litigated in that case in the three courts below being the trial court, the first appellate court and the High Court. The legislation in that case is of the year 1966. Likewise in Krishan Murari's case the appeal was decided by Hon'ble Supreme Court on 15.1.1992. There also the matter was litigated out in the courts below and the legislation in that case was of the year 1982. As against this, in the present case, the legislation is of the year 1975 and the suit was decreed by the learned trial court also as late as on 24.11.1993. The suit was filed of course on 31.5.1984, but then it was also around 9 years after commencement of the legislation, by which time enough law at least including the judgment of Hon'ble the Supreme Court in Rahman's case was very much available. In this view of the matter, if the present case were to be considered, my apprehensions gets strengthened, inasmuch as after litigating the suit for around 16 years and without even inviting attention of the courts below, on this question, the tenant approached this Court as if it is his indefeasible right to sleep over the

issue for an indefinite time, and then put this Court in a helpless condition, to simply bow to the dictates of the tenant to frame an additional issue and give opportunity to the parties to lead evidence, and thereby practically reopen the specific part of the trial. Not only this in the ordinary course of circumstances if this appeal were to come up for hearing in due course, it would have taken another 15 years, and then the poor landlord would have been at 'square one'. The miseries of the landlord are writ large inasmuch as he wanted the suit shop for starting his business as one of the brothers in the array of plaintiffs, unfortunately suffered an accident way back in 1982, attracting invalidity, and who was in his 30's at the time of filing of the suit. It is in this background that even when, on 27.4.2000, the issue was being remitted, no request was made for any permission to lead evidence. While hearing arguments on 10.8.2000 learned Counsel for the appellant categorically admitted that no request was made by him on 27.4.2000, for any permission to lead evidence. It is thus clear that the present is a case where the tenant is out and out to claim this Court to have become helpless, except to bow to the dictates of the tenant, to remit the case again for recording evidence, inasmuch as on being pointedly asked as to why did the learned Counsel not ask for opportunity to lead evidence, the astonishing answer was, that it is of no consequence, and the court is bound to remit the matter back for leading evidence at the pain of vitiating the decree for eviction as 'Without Jurisdiction.' I am also reminded of similar other incident, being in S.B. Civil Second Appeal No. 77/1996 where was decided by me on 11.7.2000, wherein also no issue was framed on the question of partial eviction, and no evidence was led. However, the learned lower appellate court, after itself making search of the record, could locate the dimensions of the shop, situation thereof, and placement of the doors etc. and therefore, declined to request of the tenant to remit the matter to the learned trial court for evidence and decreed the entire suit for eviction. Against that decree while hearing the appeal, despite my persistently asking the learned Counsel for the appellant did not and could not point out any counter balancing circumstance, and simply stressed on this very submission, that this Court has no option but to direct an additional issue to be framed and to remit it for fresh decision after recording evidence. It is a different story that appreciating the finding of fact on the question of partial eviction, and being supported by material on record, relying

upon the various judgments of this court the appeal was dismissed. But then in my view, in view of this growing tendency of the tenants, such indefeasible claim cannot be conceded to the tenant.

30. However in the present case having gone through the plaint, I find that the shop in question has only one opening in its south, inasmuch as according to undisputed boundaries as mentioned in para 1 of the plaint, in the east there is shop of some other person, in west is the shop of Shankerlal, then in the back (north) there is Nohara of goldsmiths' and in south there is main road. The tenancy is of November, 1976 on a monthly rent of Rs. 37.50. While according to the defendant despite regular increase of rent in Samvat 2033 to 2036 then 2038 and Samvat 2039, the rent was increased to Rs. 50/-. The shop is situated in main market of township of Nawa. These circumstances are sufficient to enable me to conclude that the shop is not of as huge a size as may be capable of further division, leaving enough size for the plaintiff to sit and carry on the grocery shop, which obviously requires sufficient space for storage as well as display of merchandise, sitting of the shopkeeper, so also at times for the customers, and thus in my view since it is not a case where no hardship would be caused either to the tenant or to the landlord by passing a decree in respect of a part of the premises only, there is no ground to interfere with the impugned decree for eviction, merely because no issue was framed on the question of partial eviction, or on the ground that the appellant is necessarily required to be given opportunity to lead evidence on the issue of partial eviction by remitting it to the court below.

31. The net result is that the substantial question of law framed is answered against the appellant in the peculiar circumstances of the present case. The appeal thus has no force and is hereby dismissed.