

Tara Chand and ors. Vs. Smt. Shakuntala Devi and ors.

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SooperKanoon Citation : sooperkanoon.com/889268

Court : Himachal Pradesh

Decided On : Nov-10-1981

Reported in : AIR1982HP75

Judge : Vyas Dev Misra, C.J. and; H.S. Thakur, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 20, Rule 18

Appeal No. : First Appeal No. 143 of 1980

Appellant : Tara Chand and ors.

Respondent : Smt. Shakuntala Devi and ors.

Advocate for Def. : K.D. Sud, Adv.

Advocate for Pet/Ap. : Inder Singh and; H.M. Sharma, Adv.

Judgement :

H.S. Thakur, J.

1. Smt. Shakuntala Devi filed Suit No. 50 of 1970 in the court of the Senior Sub Judge, Simla for right to enforce partition. The property known as 'House No. 2, Alley No. 15 The Mall Simla' was prayed to be partitioned by metes and bounds in which the plaintiff claimed half a share. A preliminary decree for right to enforce partition by metes and bounds was passed on 24th Sept., 1973. It was also

ordered in the decree that Shri Kailash Chand Sood, Advocate, as the Commissioner would make partition according to the preliminary decree. A final decree was passed on 28th of Feb., 1979. The defendant/appellants have preferred this appeal. On 16th of Dec., 1980, the learned counsel for the parties stated that there is a possibility of a compromise between the parties. Consequently, on 5th Jan., 1981, this Court passed the following orders:

'5-1-1981.

Present: Mr. Hari Mohan Sharma, counsel for the appellants.

Mr. Kapil Dev Sud, counsel for respondent No. 1.

Mr. Vidya Sagar Sud, counsel for respondents 2 and 3.

Mr. Nirmal Chand respondent in person and also as General Attorney for respondents No. 5 to 8.

The parties state that the matter in controversy has since been amicably settled. Let the statement of Mr. Hari Mohan Sharma, Advocate, be recorded.

Sd/-

(V. D. Misra) C. J.

Sd/-

(H. S. Thakur) J.

5-1-1981.

ORDER

In terms of the agreement arrived at between the parties and separately recorded today, the impugned decree is hereby set aside. Mr. Kailash Chand Sud is directed to submit his report to this court by 25th March, 1981. Matter to be listed on that date.

Copy of this order be given to Mr. Kailash Chand Sud.

Sd/-

January 5, 1981

(V. D. Misra) C. J.

Sd/-

(H. S. Thakur) J.'

2. Shri Kailash Chand Sood submitted his report dated 23rd Mar., 1981 to this Court, suggesting the partition. On 14th Apr., 1981, the parties agreed to the partition as suggested. The learned counsel for Shakuntla Devi plaintiff/respondent (hereinafter referred to as 'the plaintiff) pointed out that the plaintiff is entitled to the possession of the portion in possession of the appellants that has fallen to her share. On the contrary, it was contended by the learned counsel for the appellants that since the suit was only for partition and not for possession, accordingly the plaintiff could not claim the physical possession of the portion which fell to her share. As such, the only question which remains for determination is whether the plaintiff (respondent No. 1) is entitled to the possession of such portion,

3. We have heard the learned counsel for the parties. It is contended by Shri K. D. Sud, learned counsel for the plaintiff, that the plaintiff is entitled to the physical possession of the portion which has admittedly fallen to her share. It is not disputed even by the learned counsel for the appellants that a portion of the property which has fallen to the share of the plaintiff is in possession of the appellants. The learned counsel has referred to a decision in *Ram Lakhan Tewari v. Ram Samuih Tewari*, (AIR 1981 All 211) to show that after allotment of separate portions of property to the separating co-sharers, in accordance with their shares, by the final decree in a suit for partition, they can ask the Court to put them into separate possession over the portions of the property allotted to them. The learned counsel has also drawn our attention to two more decisions in *Bishnupada Mondoi v. Rani-bala Mondoi*, ((1967-68) 72 Cal WN 238) and *Shankar Shaw v.*

Anukul Ch. Bose,((1966-67) 71 Cal WN 174). In Bishnupada Mondol's case (supra), a Division Bench of Calcutta High Court observed as under:

'A suit for partition involves and implies a claim for separate possession of the claimants-co-sharers' allotments. The final partition decree, to the extent it decrees the suit and allows the claim for partition, in the absence of any provision Or indication to the contrary, entitles the decree-holder or the party concerned to possession of his allotment in execution of the decree.....The law, on the other hand, is just the opposite and, in the absence of any provision or indication in the decree to the contrary, a final partition decree entitles the decree-holder or the party concerned to possession of his allotment and can be executed for the purpose. That has always been well recognised in theory and in practice.'

Similarly in Shankar Shaw's case (supra), a Division Bench of the said Court also observed as under:

'It will be too much to say that partition is not transfer so as to confer exclusive title on the allottee in respect of his portion. Indeed, the effect of partition, when there is a valid partition, is to convert joint title of the parties into the exclusive title of the particular allottee, to whom the particular property is allotted and along with it, to convert joint possession into his exclusive possession.'

The learned counsel for the plaintiff has also referred to Mitra's Co-ownership and Partition Commentary (5th Edition) page 456. The relevant portion is reproduced as under:

'But a regular partition, either amicably made or through court effected, stands on a different footing. On such a partition each of the former co-owners becomes the sole and exclusive owner of the plot allotted to him and is deprived of his title to the other portions, which are allotted to the other parties. The right to possession also follows from title, so that each of them is entitled to possess the portion allotted to him to the exclusion of the others.'

4. On the contrary, the learned counsel for the appellants has referred to the provisions contained in Order 20, Rule 18 C. P. C. On the basis of these

provisions, it is contended that in order that an allottee may be held entitled to the possession of the portion of the property allotted to him, it is necessary that the decree should be for separate possession of the share so allotted. The learned counsel has also pointed out that there is nothing in the preliminary decree to give separate possession to the plaintiff of the portion that he allotted to the plaintiff and that in the final decree such a relief cannot be given to the plaintiff. He has also referred in *Muthangi Ayyana v. Muthangi Jaggarao* (AIR 1977 SC 292). It is convenient to reproduce the relevant observations (at p. 294):

'This appeal, coming up before us from the final decree, raises the question whether the preliminary decree, confines, as the learned counsel for the appellant-defendant No. 4 submits, accounting to the claims made by and against individual parties mentioned in the preliminary decree. He urges that it cannot be extended to all parties, including the defendant No. 4, if the terms of the preliminary decree are binding. The contention is based on the well recognised proposition that a final decree cannot amend or go behind the preliminary decree on a matter determined by the preliminary decree.'

5. We have considered the respective contentions by the learned counsel for the parties. It may be pointed out that the provisions contained in Order 20 Rule 18 C. P. C. do not help the appellants. What is provided under the said provisions is the procedure for effecting the partition of property when the Court passes a decree for partition or for the separate possession of a share therein. It may be noticed that after a preliminary decree has been passed in a partition suit, the proper course for the plaintiff desiring an absolute separation of his share is to apply for a final decree and not to bring a fresh suit for that purpose. In the instant case, on the agreement of the parties, the final decree passed by the trial court has been set aside. Shri Kailash Chand Sood, Advocate, was appointed as an umpire to effect the partition. The partition suggested by the umpire has been accepted by the parties. A perusal of the plaint shows that in the prayer clause the plaintiff has claimed a decree for right to enforce partition of the property in dispute. The trial court has also passed a preliminary decree for right to enforce partition by metes and bounds of the property to the extent of half share infavour of the plaintiff. As such, the court under Order 20, Rule 18 C. P. C. has otherwise also powers to

give such further directions as may be required. In our view, the preliminary decree implies that the partition is to be enforced by metes and bounds meaning thereby that possession of the share allotted to the plaintiff is to be delivered. The aforesaid view is fully supported by the decisions and commentary referred to above, as pointed out by the learned counsel for the plaintiff.

6. For the foregoing reasons, we are of the view that the plaintiff is entitled to the exclusive possession of the portion that has fallen to her share. Accordingly the relief for the possession of the portion that has fallen to the share of the plaintiff, according to the report of the umpire, can be given to the plaintiff in the final decree. The parties shall also be bound by the terms and conditions, as reflected in the report of the umpire. The report of the umpire and the map attached thereto shall also form part of the final decree. The appeal is accordingly disposed of but with no order as to costs.