

---

**(2009) 01 AHC CK 0109**

**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Writ Petition No. 1378 of 1987

Vidyawati And Others

APPELLANT

Vs

1st Additional District Judge, Bulandshahr and Others

RESPONDENT

---

**Date of Decision :** 19-01-2009

**Acts Referred:**

Uttar Pradesh Encumbered Estates Act, 1934 — Section 4

**Citation :** (2009) 01 AHC CK 0109

**Hon'ble Judges :** S.U.Khan, J

**Final Decision :** Allowed

---

## Judgement

S.U. Khan, J.—Heard learned counsel for the parties.

2. The dispute relates to the share of Deen Dayal(original respondent No. 2 in the writ petition since deceased and survived by legal representatives) in the properties in dispute which consist of a big house (Haweli) and three shops. It is admitted to the parties that in the shops Deen Dayal had 5/6 share. The main dispute is regarding his share in the Haweli. According to the petitioners Deen Dayal had only 1/3rd share in the Haweli however according to Deen Dayal his share in the Haweli was also 5/6.

3. Deen Dayal in the year 1936 instituted a suit for partition of the properties in dispute being O.S. No. 97 of 1936 (hereinafter referred to as partition suit). A preliminary decree was passed in the partition suit on 16.9.1937 holding that Deen Dayal had 5/6 share in the shops and 1/3 share in the Haweli. Two first appeals being First appeal No. 417 of 1937 and 28 of 1938 were filed against the preliminary decree in this High Court. In the appeals Deen Dayal also filed his cross objections contending therein that his share in the Haweli should also be declared to be 5/6. Division Bench of this Court on 1.12.1941 dismissed both the appeals as well as crossobjections filed by Deen Dayal holding that claim of Deen Dayal that his share in the Haweli was also 5/6 was not tenable.

4. Before filing of the partition suit, Deen Dayal had filed an application under

Section 4 of U.P. Encumbered Estate Act, 1934 (hereinafter referred to as E.E. Act). Said proceedings were initiated in the year 1935. The Collector referred the matter to Special Judge where it was registered as case No. 99 of 1935. Proceedings under E.E. Act remained stayed due to pendency of the partition suit. After decision of the partition suit and the appeals directed against preliminary decree passed therein by the trial Court, Special Judge under E.E. Act decided case No. 99 of 1935 through judgment and order dated 28.8.1943. In the said judgment it was stated that share of Deen Dayal in the properties in dispute was same as determined in the partition suit. The Judge hearing the case under E.E. Act merely based its decision regarding share of Deen Dayal on the basis of findings given in the partition suit. It is important to note that it did not attempt to decide the share of Deen Dayal. It merely treated the judgment passed in the partition suit to be binding and conclusive. The question as to whether the Judge under E.E. Act could or could not treat the decree passed in partition suit to be binding in proceedings under E.E. Act is not involved in this writ petition. In so far as it followed the partition decree in respect of determination of share of Deen Dayal, no one questioned the judgment dated 28.8.1943 passed under E.E. Act. Deen Dayal filed appeal against that part of order dated 28.8.1943 through which claim of Murari Lal in respect of middle shop was upheld. The appeal being appeal No. 17 of 1943 was dismissed on 22.12.1945 and Second appeal being Second appeal No. 2603 of 1946 was also dismissed by this High Court on 16.9.1955. In the appeal Deen Dayal did not raise the objection that the Special Judge under E.E. Act should not have followed the partition decree. However, through the judgment dated 28.8.1943 even though it was observed that the share of Deen Dayal would be the same as determined in the partition decree however in the operative portion it was held and mentioned that in view of judgment in the partition suit, share of Deen Dayal in both the properties i.e. Haweli as well as the three shops was 5/6.

5. Thereafter, proceedings were initiated for preparation of final decree in the partition suit. Deen Dayal filed objections that his share in the Haweli should also be held to be 5/6 in view of order passed under E.E. Act. The plea was rejected by the trial Court on 20.12.1943 and appeal filed against the said order was also dismissed by this Court on 8.4.1954. Thereafter it appears that on 27.8.1957 execution application of Deen Dayal was allowed and he was given 1/3rd share in the Haweli.

6. Petitioners in the year 1965 filed an application for correction of judgment, order and decree passed under E.E. Act which was registered as application No. 134 of 1965. According to the petitioners the occasion to file the said application arose as Deen Dayal had again started asserting his 5/6 share in the Haweli on the basis of the judgment passed under the said Act on 28.8.1943. Meanwhile Deen Dayal had filed O.S. No. 450 of 1966 for declaration of his 5/6 share in the house. Suit was dismissed, First appeal was dismissed and second appeal (second appeal No. 515 of 1972) was also dismissed by this Court on 25.1.1980.

7. Petitioners' application for correction of judgment and order dated 28.8.1943 passed under E.E. Act was allowed on 5.2.1972 by 1st Munsif, Bulandshahar holding that in the operative portion of order dated 28.8.1943, mentioning of 5/6 share of Deen Dayal in the Haweli was a clerical error. Against the order dated 5.2.1972 Deen Dayal filed Appeal No. 1 of 1972 under E. E. Act. 1st Additional District Judge, Bulandshahar set aside the order dated 5.2.1972 allowed the appeal on 25.9.1986. The said order has been challenged through this writ petition.

8. In para6 of the writ petition it has been stated that Deen Dayal was delivered possession on 1/3<sup>rd</sup> portion of the Haweli in dispute on his execution application filed in pursuance of preliminary and final decree passed in the partition suit on 28.7.1957. This fact has been admitted in para4 of the counter affidavit.

9. In the impugned order passed by the appellate Court it is mentioned that the observation of the trial Court that Deen Dayal did not challenge the basic order passed under E.E. Act i.e. order dated 28.8.1943 was wrong as appeal and second appeal both were filed by Deen Dayal. The crucial finding of the appellate Court in the impugned order contained in para10 is quoted below:

"It is also noteworthy that a perusal of the partition decree and a perusal of the judgment of the Special Judge (under E. E. Act) as referred to in the body of the impugned order nowhere shows that the Special Judge relied upon the partition decree wholly while giving his finding in the aforesaid case E.E. Suit No. 99 of 1935, Deen Dayal v. Madhusudan Lal and others.....and thus it is also noteworthy that a perusal of the aforesaid entire judgment of the learned Special Judge dated 28.8.1943 as well as a perusal of the partition decree in suit No. 97 of 1936 Din Dayal v. Girdhar Swamp and others which was decided on 16.9.1937 by the Civil Judge, Bulandshahar, nowhere shows that the aforesaid learned Special Judge has based his aforesaid judgment dated 28.8.1943 wholly on the basis of his aforesaid partition decree."

10. Annexure1 to the writ petition is copy of judgment dated 28.8.1943 passed under E.E. Act. Issue No. 4 is the relevant issue. Relevant portion of finding on the said point (under issue No. 4) in the judgment dated 28.8.1943 are quoted below:

"I heard Vakils of the parties on the point. Copy of judgment dated 16.12.1937 in suit No. 97 of 1936 of the Court of Civil Judge, Bulandshahar is on the record.

It finally decides this point between the parties. Counsels of the judgment support the contention made by the applicant in his application 377C. In the light of the judgment I hold that Banarsi Pass is owner of mortgagee rights in 1/18th of the house with Chabutra and shops set out in his claim. (underlining supplied for emphasis)

11. In the entire judgment there is no independent discussion of share of Deen Dayal in the Haweli or the shops. However, ultimately in the operative portion of

the order dated 28.8.1943 it was mentioned as follows :

"5/6th of full proportionary right in the house and two shops are in the east and the other in the west including the middle shop which belongs to Murari Lal."

12. From the above quoted portion it is crystal clear that the Judge under E.E. Act simply followed partition decree.

13. The contrary finding recorded in the impugned appellate Court judgment are therefore legally not correct.

14. Accordingly, writ petition is allowed. Order passed by the lower appellate Court dated 25.9.1986 is set aside.

Order passed by the trial Court dated 15.2.1972 is restored.