

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 16.12.2010*
Judgment Delivered on: 21.12.2010

+ **EX.S.A. No.1/2007 & CM Nos.3458/2007 & 22591/2010**

SH.BRIJENDER KUMAR Appellant
Through: Mr.Amit S. Chadha and Mr.Mohit
Gupta and Ms.Neha Jain,
Advocates.

Versus

THAKRI BAI (DECEASED) THROUGH LRS.
.....Respondent
Through: Mr.Sandeep Sethi, Sr. Advocate
with Mr. Lalit Gupta, Advocate.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. This second appeal has impugned the judgment and decree dated 15.12.2006 which had endorsed the finding of the Executing Court dated 16.8.1996; result being that the objections filed by Brijender Kumar/appellant had been dismissed.

2. Briefly stated the factual matrix is as follows:

i.Bishan Dass was allotted shop bearing No.122, Khan
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Market, Lodhi Road, New Delhi from the Ministry of Rehabilitation. Lakshmi Chand was employed by Bishan Dass and later on became a partner in the business of Bishan Dass. On 04.12.1970 this partnership was dissolved by the aforesaid legal notice.

ii. Lakshmi Chand filed application under Section 9 of the Delhi Rent Control Act, 1958 (hereinafter referred to as 'the DRCA') seeking fixation of standard rent, claiming himself to be a tenant in the suit property.

iii. During the pendency of these proceedings Bishan Dass died; his widow Thakri Bai was brought on record as his legal representative.

iv. On 18.4.1973 the Additional Rent Control (ARC) dismissed the application under Section 9 of the DRCA holding that there is no relationship of landlord and tenant between the parties.

v. The first appeal was dismissed on 01.6.1976 by the Rent Control Tribunal.

vi. The second appeal was dismissed on 20.10.1976. The order of the ARC dated 18.4.1973 holding that there was no relationship of landlord and tenant between the parties became final.

vii. On 24.5.1975 Thakri Bai filed the present suit i.e.

Suit No.184/1975 for possession and damages.

vii. On 30.9.1977 the present suit was decreed.

viii. On 27.3.1982 the first appeal was dismissed in RCA No.103/1981.

ix. The second appeal was dismissed by the High Court on 17.02.1983 in RSA No.33/1983.

x. Special Leave Petition No.7130/1983 was dismissed by the Supreme Court on 14.12.1983.

xi. On 19.4.1982 Smt. Thakri Bai filed execution application No.26/1982 to execute the decree dated 30.9.1977. On 22.1.1985 objections were filed by Krishan Kumar S/o Lakshmi Chand as partner of the firm M/s Krishna Brothers Suit Case Sale and Services (hereinafter referred to as 'the KBSSS'). Contention was that a fresh tenancy had been created by Thakri Bai with the said partnership firm.

xii. On 25.5.1996, Krishan Kumar died. On 18.7.1996, the present appellant Brijender Kumar (S/o Lakshmi Chand) filed an application under Order 22 Rule 3 CPC seeking his substitution in place of Krishan Kumar. In this application reliance has been placed upon a will of Krishan Kumar dated 28.1.1994; application averred that Krishan Kumar had bequeathed the tenancy rights of this

suit property in favour of Brijender Kumar. He accordingly sought substitution in place of his deceased brother.

xiii. On 16.8.1996, the Civil Judge dismissed the objections filed by Krishan Kumar holding that the same are not maintainable. It was held that objections made directly by a third party seeking adjudication of his right, title or interest is not maintainable; protest can be lodged only after dispossession under Rule 97 or 99 of Order XXI of the Code of Civil Procedure(hereinafter referred to as 'the Code'). The question of substitution of Brijender Kumar in place of objector Krishan Kumar did not arise; the application of Brijender Kumar for substitution was also accordingly dismissed.

xiv. In appeal the order of the dismissal of the objections was upheld. This was vide the impugned judgment dated 15.12.2006. The Court examined the evidence which had been led before the Executing Court, both oral and documentary. The finding returned was that no new tenancy had been created by Thakri Bai in favour of partnership firm KBSSS. The appellant Brijender Kumar was held to have no locus standi to prefer this appeal; on merits also the finding of the Executing Court was upheld;

result being that the objections of Krishan Kumar stood dismissed.

3. This is a second appeal. It was admitted on 06.3.2007; the following substantial of law was formulated:

“Whether the right of the stranger has to be decided by the Executing Court.”

4. On behalf of the respondent, it had been contended that a second appeal is not maintainable. Attention has been drawn to the definition of “decree” as contained in Section 2(2) of the Code. It is pointed out that after the Amendment Act of 1976 (w.e.f. 01.2.1977), Section 47 has been omitted from the definition of “decree”; as such an adjudication under Section 47 of the Code does not qualify as a “decree” and is not amenable to the jurisdiction of this Court.

5. This preliminary submission has been countered by the learned counsel for the respondent. Attention has been drawn to the simultaneous amendments which were made by the Amendment Act of 1977, Rule 99, Rule 100 Rule 101, Rule 102, Rule 103, Rule 104 to Order XXI of the Code. It is submitted that these amendments had been necessitated in order that objections to attachment by a party to the suit or his representatives are not relegated to separate suit proceedings but the claim preferred to attached property by third persons

may be decided by the Executing Court itself.

6. The Supreme Court in the case of Brahmdeo Chaudary Vs. Rishikesh Prasad Jaiswal & Anr. JT 1997(1) SC 641 has discussed the scope of these amendments which had come into operation with the Amendment Act 1976. After reproducing the provisions of order XXI Rule 97, Rule 98 and Rule 101, the Court had inter alia held as follows:

“A conjoint reading of Order XXI, Rules 97, 98, 99 and 101 projects the following picture:

(1) If a decree-holder, is resisted or obstructed in execution of the decree for possession with the result that the decree for possession could not be executed in the normal manner by obtaining warrant for possession under Order XXI, Rule 35 then the decree-holder has to move an application under Order XXI, Rule 97 for removal of such obstruction and after hearing the decree-holder and the obstructionist the Court can pass appropriate orders after adjudicating upon the controversy between the parties as enjoined by Order XXI, Rule 97 Sub-rule (2) read with Order XXI, Rule 98. It is obvious that after such adjudication if it is found that the resistance or obstruction was occasioned without just cause by the judgment-debtor or by some other person at his instigation or on his behalf then such obstruction or resistance would be removed as per Order XXI, Rule 98 Sub-rule (2) and the decree-holder would be permitted to be put in possession. Even in such an eventuality the order passed would be treated as a decree under Order XXI, Rule 101 and no separate suit would lie against such order meaning thereby the only remedy would be to prefer an appeal before the appropriate appellate court against such deemed decree.

(2) If for any reason a stranger to the decree is already dispossessed of the suit property relating to which he claims any right, title or interest before his getting any opportunity to resist or offer obstruction on spot on account of his absence from the place or for any other valid reason then his remedy would lie in filing an application under Order XXI, Rule 99, CPC claiming that his dispossession was illegal and that possession deserves to be restored to him. If such an application is allowed after adjudication than as enjoined by Order XXI, Rule 98 Sub-rule (1), CPC the Executing Court can direct the stranger applicant under Order XXI, Rule 99 to be put in possession of the property or if his application is found to be substance less it has to be dismissed. Such an order passed by the Executing Court disposing of the application one way or the other under

Order XXI, Rule 98 Sub-rule (1) would be deemed to be a decree as laid down by Order XXI, Rule 103 and would be appealable before appropriate appellate forum. But no separate suit would lie against such orders as clearly enjoined by Order XXI, Rule 101.

5. In short the aforesaid statutory provisions of Order XXI lay down a complete code for resolving all disputes pertaining to execution of decree for possession obtained by a decree-holder and whose attempts at executing the said decree meet with rough weather. Once resistance is offered by a purported stranger to the decree and which comes to be noted by the Executing Court as well as by the decree-holder the remedy available to the decree-holder against such an obstructionist is only under Order XXI, Rule 97 Sub-rule (1) and he cannot by-pass such obstruction and insist on re-issuance of warrant for possession under Order XXI, Rule 35 with the help of police force, as that course would amount to by-passing and circumventing the procedure laid down under Order XXI, Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the Executing Court it is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order XXI, Rule 99, CPC and pray for restoration of possession. The High Court by the impugned order and judgment has taken the view that the only remedy available to a stranger to the decree who claims any independent right, title or interest in the decretal property is to go by Order XXI, Rule 99. This view of the High Court on the aforesaid Statutory scheme is clearly unsustainable. It is easy to visualise that a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order XXI, Rule 99. Order XXI, Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree-holder. While Order XXI, Rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest dehors the interest of the judgment-debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of Order XXI and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before it if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him. With respect the High Court has totally ignored the scheme of

Order XXI, Rule 97 in this connection by taking the view that only remedy of such stranger to the decree lies under Order XXI, Rule 99 and he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree-holder in the execution proceedings. The view taken by the High Court in this connection also results in patent breach of principles of natural justice as the obstructionist who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is actually executed, would be told off the gates and his grievance would not be considered or heard on merits and he would be thrown off lock, stock and barrel by use of police force by the decree-holder. That would obviously result in irreparable injury to such obstructionist whose grievance would go overboard without being considered on merits and such obstructionist would be condemned totally unheard. Such an order of the Executing Court, therefore, would fail also on the ground of non-compliance with basic principles of natural justice. On the contrary the statutory scheme envisaged by Order XXI, Rule 97, CPC as discussed earlier clearly guards against such a pitfall and provides a statutory remedy both to the decree-holder as well as to the obstructionist to have their respective say in the matter and to get proper adjudication before the Executing Court and it is that adjudication which subject to the hierarchy of appeals would remain binding between the parties to such proceedings and separate suit would be barred with a view to seeing that multiplicity of proceedings and parallel proceedings are avoided and the gamut laid down by Order XXI, Rules 97 to 103 would remain a complete code and the sole remedy for the concerned parties to have their grievances once and for all finally resolved in execution proceedings themselves."

7. There is no doubt that the objections in the instant case had been filed under Order XXI Rule 97, Rule 99 and Rule 101 but the questions to be determined arose under Rule 101 and the orders were passed under Rule 100 of the Order XXI. Under Rule 103 of Order XXI wherein adjudication has been made either under Rule 98 and Rule 100 the order made thereon shall have a same force and subject to the same conditions as to an order otherwise if it were a decree.

8. In view of these statutory provisions as also the ratio of the judgment of this Court reported in Brahmdeo Chaudary (supra), the objections of the learned counsel for the respondent about the maintainability of the present petition is answered in the negative. A second appeal was maintainable.

9. On merits, the submission of the learned counsel for the respondent has force. Admittedly the objections before the Executing Court had been filed by Krishan Kumar as partner of KBSSS; this was on 21.1.1985 thereafter on 15.5.1996 Krishan Kumar had died. The application under Order 22 Rule 3 of the Code had been filed by Brijender Kumar as brother of the deceased Krishan Kumar. This application was filed on 18.7.1996. It clearly stated that Brijender Kumar had sought substitution in place of deceased Krishan Kumar on the basis of a will left by Krishan Kumar which was dated 28.01.1994 duly registered with the Sub-Registrar on 31.01.1994. There was no averment that Brijender Kumar was a partner of the firm KBSSS and as another partner of the said firm; as one partner had died he sought to continue these proceedings. These averments are clearly missing. In fact, as has been rightly contended by learned counsel for the respondent, if Brijender Kumar was continuing the objections on behalf of the partnership firm, it would not have been necessary for him to file an application

under Order 22 Rule 3 of the Code; in this scenario, he could have relied upon the provisions of Order 30 Rules 1 (2) & 4. Support from this provision cannot now be taken. Brijender Kumar could have continued these objections on behalf of the partnership firm only if he had so averred; he did not do so. His contention was that he is the legal representative of his deceased brother on the basis of a will. He did not claim or seek any right or even mention that there was any such partnership firm of himself and his deceased brother and he was claiming as another partner of the said firm. The memo of appeal before the first Appellate Court was also filed by Brijender Kumar in his individual capacity. There was no averment or any evidence before any Court that after the death of Krishan Kumar the firm was reconstituted and Brijender Kumar was continuing in his capacity as partner of the reconstituted firm. After the death of Krishan Kumar who was allegedly one of the partners of KBSSS, under Section 42 of the Indian Partnership Act, 1932, the firm automatically stood dissolved. Brijender Kumar claiming title to the suit property through the will left by deceased Krishan Kumar did not derive any continuation of the right to sue as the partnership stood dissolved on the death of Krishan Kumar.

10 The finding in the impugned judgment qua this issue reads as follows:

“(iv) This court, during the course of oral arguments asked the appellant as to what is the present status of M/s Krishna Brothers Suitcase Sales & Services and in response it was explained that as on today M/s Verma Brothers are operating the premises, however this fact was never brought on the record on appeal.

(v)(a) As per section 42 of Indian Partnership Act 1932, partnership firm dissolves on happening of certain contingency and one of the contingency is death of the partner. After the death of partner the firm may be reconstituted. Sh. Krishan Kumar was stated to be partner of M/s Krishan Brothers Suitcase Sales & Services and Sh. Krishan Kumar had expired on 25.05.1996. Whether there was a reconstitution of partnership firm M/s Krishan Brothers Suitcase Sales & Services, the appeal does not answer. Otherwise if M/s Krishan Brothers Suitcase Sales & Services were the objector and one of its partner Sh. Krishan Kumar had expired, the competent person aggrieved from the impugned order 16.08.1996 could be the objector i.e M/s Krishan Brothers Suitcase Sales & Services through its reconstituted partners. However the present appeal has been preferred by Sh. Bijender Kumar if he is aggrieved from the order dated 16.08.1996 as an objector. If the M/s Krishan Brothers Suitcase Sales & Services was reconstituted, the objections could have been contested by the objector M/s Krishan Brothers Suitcase Sales & Services comprising its new partner. The appeal is silent on this aspect.

V(b) Since the objections were by M/s Krishan Brothers Suitcase Sales & Services and as alleged Sh. Krishan Kumar was one of its partners, however after his death if the objections are to be continued the same could be by the reconstituted firm, otherwise the objections do not survive. To say who could be the aggrieved person from order dated

16.08.1986, the answer is that the objector could be the aggrieved person in respect of order dated 16.08.1986. Whereas the appeal has been filed by Sh. Bijender Kumar in his personal capacity and not as objector or on behalf of objector M/s Krishan Brothers Suitcase Sales & Services or being partner of M/s Krishan Brothers Suitcase Sales & Services. Therefore in the light of discussion in paragraph, V(a) & V(b) above, Sh. Bijender Kumar has no locus standi even to prefer the present appeal as he cannot term himself as aggrieved person merely for the reason that he is son of Krishan Kumar who was a partner of M/s Krishan Brothers Suitcase Sales & Services.

(VI) The trial court has properly adjudicated on the point of application for impleadment of legal representative of the objector. It is not out of place to say that if and when a party expires during the pendency of the proceedings in the case of firms or companies or legal entities, the law takes course of assignment of rights or right to sue, whereas on demise of Sh. Krishan Kumar partner of M/s Krishan Brothers Suitcase Sales & Services, the appellant failed to establish as to how right to sue survives in his favour if there was a partnership firm of M/s Krishan Brothers Suitcase Sales & Services in existence prior to the death of Sh. Krishan Kumar.

6. Thus considering totality of circumstances and in the light of my detailed discussion in paragraph 4 & 5, the appellant Sh. Bijender Kumar has no locus standi even to prefer the appeal and for the reason discussed in the aforementioned paragraph, I do not find any merits to perverse the opinion or findings returned by the executing court/the court of Ld Civil Judge, Delhi. Accordingly appeal is dismissed."

11. There is no perversity in this finding. It does not call for any interference. Brijender Kumar was only a stranger; he was not an aggrieved person. Expression "aggrieved person"

necessarily means a person who has got a legal grievance i.e. a person who is wrongly deprived of any right to which he is legally entitled. Brijender Kumar has failed to fall in this category.

12. There is no merit in the appeal. The appeal as also the applications are dismissed.

INDERMEET KAUR, J.

DECEMBER 21, 2010
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