

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

% *Date of Judgment: 20.07.2011*

+ **CM(M) No. 2601/2005**

SH. M.L. DAWAR Petitioner
Through: Mr. J.P. Sengh, Sr. Advocate
with Mr. Rajiv Vig, Advocate.

Versus

SH. M.L. SETH Respondent
Through: Mr. Rama Chandra, Sr.
Advocate with Mr. A.K. Tandon
and Mrs. R. Ratham Nagar,
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. (Oral)

1 This petition has impugned the order dated 14.10.2005 whereby the objections filed by the judgment debtor against the judgment and decree dated 31.08.1966 had been dismissed.

2 The parties are at logger-heads and are litigating against one another since 1962. The present suit had been filed in a representative capacity under Order 1 Rule 8 of the Code of Civil Procedure (hereinafter referred to as the 'Code') for permanent injunction and for eviction of the respondent from the suit premises. The plaintiff had described himself as Rajeshwar Dayal for self and on behalf of other members of the Jamna Lodge. The defendant had been described as the Honorary Secretary for self and on behalf of other members of the Masonic Club. Contention was that the plaintiff owned a building known as Freemasons Lodge and is in possession of the suit property since the last several years. In 1944, the defendant club was allowed to use a part of the premises of Freemasons Hall as a licensee on a monthly fee of ₹50/-; that license was initially up to 31.12.1945; license was thereafter terminated; the secretary of the defendant club vide letter dated 13.12.1961 refused to vacate the premises; contention being that club was a tenant under the Lodge. The following issues were framed by the trial Court:-

1. Whether the defendant is a licensee of the plaintiff? If so, the terms, thereof?
2. Whether the license is irrevocable?

3. Whether the property being used by the defendant is not premises as defined by the Delhi Rent Control Act and that the relationship between the parties is governed by the common law of landlord and tenant only?
4. Relief.

3 Oral and documentary evidence was led. All the four issues were decided in favour of the plaintiff and against the defendant; it was held that the defendant is a licensee of the plaintiff; there is no bar of the Delhi Rent Control Act (DRCA); the license of the defendant having been revoked, the plaintiff was entitled to the relief. The judgment dated 31.08.1966 granted a decree of permanent injunction in favour of the plaintiff and against the defendant; the defendant club was restrained from entering into the property in dispute.

4 This decree was assailed in appeal and thereafter in a second appeal. The findings of the trial Judge were affirmed right up to the second appeal. The second appeal had been disposed of on 05.03.1970. RSA was dismissed with observations of the High Court that the parties might eventually settle the matter. Letter Patent Appeal preferred against the Regular Second Appeal was dismissed on 07.08.1970. The contention of the judgment debtor that a suit for permanent injunction is not maintainable against a

licensee who refuses to vacate the premises had also been noted; this petition as also the appeal had been dismissed.

5 Execution petition had been filed by the decree holder in the year 1985. Those proceedings were kept in abeyance as the parties had thereafter sought time to compromise the matter and in fact an application under Order 23 Rule 3 of the Code had also been filed before the executing court wherein the judgment debtor had agreed to enhance the license fee which was initially fixed at ₹50/- per month; it stood enhanced to ₹1,450/-per month. This execution petition thus remained in abeyance up to 1998 when it was again revived.

6 On 17.07.2000, the Land and Building Office (L&DO) sent a notice to the defendant/judgment debtor/Masonic Club wherein damages in the sum of ₹2,66,12,260/- were levied upon the Masonic Club; contention was that the Masonic Club was sitting on Government land and he had failed to pay any user charges; damages were imposed upon the judgment debtor/Masonic club in the aforementioned amount. Vide of the same day, eviction order was also passed against the Masonic club under Section 5 (1) of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971. This order was assailed by the defendant/judgment debtor before

the Appellate Authority whereby as an interim measure the petitioner club had been directed to pay 10% of the impugned demand of ₹2.66 crores and to further pay a sum of ₹75,000/- on or before 17th day of each calendar month. This order of the appellate body was assailed in a writ petition being W.P.(C) No.5434/2000. This writ petition was disposed of on 21.07.2003. The relevant extract of the said order which has been highlighted by learned counsel for the petitioner reads as under:-

“In view of these facts and circumstances, it appears that there would be no useful purpose for keeping the present writ petition pending before this Court. All the issues, particularly the issue as to whether the petitioner is the owner of the premises in question at all and other related questions have to be decided on facts before the learned Additional District Judge in the pending Section 9 appeal. It would be heard and disposed of as expeditiously as possible and without requiring the petitioner to deposit any further sum during the pendency of the appeal as a condition for stay of eviction and of recovery of the purposed damages”

7 It is not in dispute that the appeal is yet pending before the ADJ and the matter has not been decided. At the outset, learned counsel for the petitioner has pointed out that this matter may be adjourned till the disposal of the appeal. This has been opposed by learned counsel for the respondent who has pointed out that has

already been considered and although specific directions have been given to the court below to expeditiously decide the appeal yet the appeal remains still undecided. This petition was thereafter directed to be listed for hearing.

8 With the consent of counsel for the parties, the matter has now been taken up for final disposal.

9 The order impugned before this Court as noted supra is the order dated 14.10.2005 vide which the objections filed by judgment debtor/Masonic Club before the executing Court had been dismissed. Counsel for the petitioner has pointed out that the order suffers from an infirmity and it has not noted the contentions of the petitioner in the correct perspective. First contention raised by learned counsel for the petitioner is that although the suit had been titled as a suit for permanent injunction yet it was a suit for mandatory injunction and this was clear from the observations made by the High Court while disposing of the Regular Second Appeal in its judgment and decree dated 05.03.1970. It is pointed out that while disposing of the petition, the Court had noted that the relief claimed is in substance of relief for mandatory injunction; suit in the form in which it was filed was not maintainable. Execution filed after 12

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years was time-barred. This argument has not been considered by the executing court. It has secondly been contended that a representative suit filed under Order 1 Rule 8 of the Code (which was so in the present case) is not binding upon the person who is not a party to the suit; M.L. Dawar the objector before the Court was admittedly not a party in the trial proceedings; decree dated 31.08.1966 was not binding upon him. To support this submission reliance has been placed upon a judgment of this Court reported in Vol. III 1967 DLT 459 Darshan Singh Vs. Hari Nath which in turn had also relied a judgment of the Madras High Court reported in AIR 1955 Madras 281 Kodia Goundar and another Vs. Velandi Goundar and other. Contention is that although a decree obtained in a suit instituted in accordance with the provisions of Order 1 Rule 8 of the Code will be binding on all the members that belong to the class who are sought to be represented, by operation of the principle of res-judicata as contained in Section 11, Explanation VI of the Code but the mere fact that such a decree would be binding as “res-judicata” on others who were sought to be represented cannot make such a decree enforceable as and by way of execution; such a decree cannot be executed. The third contention of learned counsel for the petitioner is that the role of the landlord has since changed; admittedly this was a lease

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hold property and the licensor was the L&DO who had granted the lease in favour of the judgment debtor; the superior lessor i.e. L& DO has now by an eviction order dated 17.08.2000 passed an eviction order against the Masonic Club/judgment debtor; the contention of the L& DO is that this is a Government land; Masonic Club is sitting in Government land; it does not belong to decree holder; there is thus no relationship of lessor and licensee between the plaintiff and the defendant i.e. between Jamna Lodge and Masonic Club. It is contended that the doctrine of estoppel as contained in Section 116 of the Evidence Act carves out an exception; exception being where there is a threat to the tenant of eviction by the paramount lessor; the tenant is not precluded from challenging the title of the landlord For this proposition reliance has been placed upon AIR 1987 Supreme Court 2192 D. Satyanarayana Vs. P. Jagadish. It is submitted that these objections have not been considered by the executing court; the impugned order is liable to be set aside.

10 Arguments have been refuted. It is submitted that the impugned order suffers from no infirmity.

11 Arguments of learned counsel for the petitioner are bereft of force. The record shows that the RSA was disposed of on CM (M) No.2601/2005

05.03.1970. While disposing of that appeal, the Court had noted that the plaintiff in substance is seeking a relief of mandatory injunction; it had relied upon a judgment of the Punjab High Court reported as AIR 1962 Punjab 370 Delhi Gate Service Ltd. Vs. M/s Caltex (India) Ltd. to hold that a suit against a licensee on the termination of his license asking him to vacate his premises is maintainable; the present plaint asking the members of the Club to remove their moveable lying in the premises was well covered by the ratio of the aforementioned judgment; the suit was maintainable. This judgment had also noted that the objection raised by the defendant/judgment debtor that the suit as framed was not maintainable was never a defence taken in the pleadings in court below and therefore it could not be urged in a second appeal. This contention after having been noted had been rejected. Since this objection about the maintainability of the suit was dismissed in second appeal, the question of the judgment debtor raising it before the executing court again does not arise. His contention that the present suit is essentially to be treated as a s suit for mandatory injunction for which there is a limitation of 12 years, a decree passed on 31.08.1966 can be executed only up to 12 years is thus an objection without any merit. The proviso of

suit for perpetual injunction (which was the suit filed by the plaintiff) there is no period of limitation which is prescribed. This argument of learned counsel for the petitioner is rejected.

12 The second contention of learned counsel for the petitioner that a suit under Order 1 Rule 8 of the Code which is a representative suit is binding upon the parties inter-se under the doctrine of res-judicata but it cannot be executed against a non-party to the suit has also been set at rest by a judgment of the Apex Court relied upon by learned counsel for the respondent and reported in AIR 1996 Supreme Court 1211 Singhai Lal Chand Jain Vs. Rashtriya Swayam Sewak Sangh, Panna and other. In this context the following observations of the Apex Court are relevant:-

“Held further that the Sangh having been duly represented in the suit and the President, manager and Member had conducted the litigation on behalf of the Sangh bona fide, the decree of ejectment binds every member of the Sangh. No one on behalf of the Sangh could lay any objection in the execution nor plead nullity of the decree. The doctrine of res-judicata prohibits the members of the Sangh to obstruct the execution of the decree.”

13 This sets at rest this vehement argument of learned counsel for the petitioner. The decree dated 31.08.1966 was thus binding upon all the members of the Club and doctrine of res-judicata prohibited the members of the Club to obstruct the execution of

the decree on this count. The second argument is also answered against the petitioner.

14 The last contention urged by learned counsel for the petitioner was based upon the judgment of Satyanarayan (Supra); contention being that judgment debtor/Masonic Club has an independent relationship with the L& DO who had passed an eviction order against him on 17.08.2000 and in view of the exception carved out by Section 116 of the Evidence Act nothing precluded the judgment debtor/Masonic Club from challenging the title of the landlord. This contention of the petitioner has been answered by the Apex Court in the judgment reported in JT 2002 (1) SC 97 Vasu Deo Vs. Bal Kishan; the judgment of the Satyanarayan was also considered in this judgment wherein it was noted that Satyanarayan was distinct on its peculiar facts. The Supreme Court while dealing with the defence raised by a tenant for eviction by the title paramount had laid down the following three conditions which must co-exist before this defence can be established. In this context the Supreme Court had noted as follows:-

“To constitute eviction by title paramount so as to discharge the obligation of the tenant to put his lessor into possession of the leased premises three

conditions must be satisfied: (i) the party evicting must have a good and present title to the property; (ii) the tenant must have quitted or directly attorned to the paramount title holder against his will; (iii) either the landlord must be willing or be a consenting party to such direct attornment by his tenant to the paramount title holder or there must be an event, such as a change in law or passing of decree by a competent court, which would dispense with the need of consent or willingness on the part of the landlord and so bind him as would enable the tenant handing over possession or attorning in favour of the paramount title holder directly; or, in other words, the paramount title holder must be armed with such legal process for eviction as cannot be lawfully resisted. The burden of raising such a plea and substantiating the same, so as to make out a clear case of eviction by paramount title holder, lies on the party relying on such defence."

15 It is admitted by the plaintiff that these conditions do not co-exist; it is admitted by him that he has not attorned to the paramount title holder i.e. to the L & DO. This admission by itself throws out this defence set up by the petitioner. In this factual scenario, the petitioner is estopped from challenging the title of his landlord i.e. Jamna Lodge. Admittedly the L& DO had not come into the picture at all till the year 2000 when for the first time an eviction notice had been received by the judgment debtor/Masonic Club which was on 17.07.2000. Decree has been passed in this case on 31.08.1966; judgment debtor/Masonic Club has been held

to be a licensee in the suit property. Challenge to the title of the plaintiff as landlord is now not a defence available to the petitioner. This argument is also bereft of any force.

16 No other argument has been urged by learned counsel for the petitioner. The order dated 14.10.2005 impugned before this Court calls for no interference. It suffers from no error either jurisdictional or otherwise. Petition is without any merit.

17 Dismissed.

JULY 20, 2011
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INDERMEET KAUR, J.