

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

% *Judgment Reserved on:18.03.2013*
Judgment Delivered on:22.03.2013

+ **FAO(OS) 293/2012**

MOHD FAROOQ KHAN Appellant
Through Mr. Tarique Siddiqui, Adv. with
appellant-in-person.

versus

ZUBEDA KHATOON AND ORS Respondents
Through Mr. S.D. Ansari, Adv. with
respondents No. 1 and husband
of R-5-in-person.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 The plaintiff (Mohd. Farooq Khan) has filed a suit for partition and injunction. He is the son of Abdul Waheed Khan who was the owner of a double storied house bearing No. C-24/A, Block-C, Okhla Vihar, New Delhi-110025. Abdul Waheed Khan had died on 05.08.2006 leaving behind his widow, two sons and three daughters. Defendant No. 1 who is the widow of late Abdul Waheed Khan and defendant No. 5, her daughter are occupying a part of the suit property. Defendants No. 2, 3 and 4 the other legal heirs are stated to be residing separately. Plaintiff claims to be in occupation of two rooms, one kitchen, toilet and

bathroom on the ground floor. The averment made in the plaint decipher that the plaintiff is apprehensive that defendants No. 1 and 5 would disturb his peaceful possession in the suit property. The present suit has been filed seeking a partition of the suit premises as also a decree of injunction restraining defendants No. 1 and 5 from interfering with his peaceful possession in the suit property.

2 The impugned order had disposed of two applications filed by the plaintiff.

3 I.A. No. 3987/2011 had been filed by the plaintiff under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure (CPC); interim relief had been sought qua the suit property. Prayer being that defendants No. 1 and 5 had built a wall in the suit premises as a result of which plaintiff was not in a position to access the kitchen and the bathroom; he had sought removal of the wall in the suit premises.

4 I.A. 3988/2011 was the second application filed by the plaintiff seeking a restoration of the electricity connection in the premises. Submission being that defendants No.1 and 5 have dis-connected his electricity and this being an essential requirement for the plaintiff, the defendants be directed to restore the electricity connection; oral submission being that in the alternative the plaintiff be granted permission to install his own electricity meter.

5 Both these applications were disposed of by a common order. The impugned order reads herein as under:-

“The former application, being I.A. No. 3987/2011, is filed under Order XXXIX Rules 1 and 2 read with Section 151 CPC for

removal of a wall in the suit premises while the latter, being I.A. No. 3988/2011, is for restoration of the electricity connection in the suit premises. Both the aforesaid applications are contested by the counsel for the defendants No. 1 and 5, who has filed replies that the plaintiff is not in possession of the suit premises. The counsel for the plaintiff has not been able to point out any documents to establish his possession as on date.”

6 The appellant is aggrieved by the impugned order. His submission is that it is not a reasoned order and while not granting relief to the plaintiff on any count no reasons have been given in the impugned order.

7 On behalf of the appellant, it is submitted that the order of the trial court suffers from a gross infirmity; attention has been drawn to the report of the Station House Officer (SHO) dated 30.06.2010 of the concerned police station wherein it has been noted that the appellant was in possession of the property and was occupying two rooms at the ground floor having an entrance from the back side and the bathroom and the toilets were in common usage of the plaintiff and the tenants of defendant No. 1. Submission is that this report has been ignored; the appellant being in physical possession of the suit property could not have been denied the right of the essential service of electricity without which no human being can live with dignity. Impugned order has also failed to note that the appellant is a natural legal heir of the deceased Abdul Waheed Khan and the property admittedly was owned by him; the deceased under Mohammedan law could not have bequeathed more than 1/3rd of his share in his property; on all counts, the appellant is

entitled to a share in the property and not granting interim relief at that stage has caused a grave injustice to the appellant.

8 Arguments have been countered. On behalf of the respondents, it is pointed out that the appellant had come into possession of the suit premises only 20-22 days before the filing of the suit; he is a wrong doer and if interim relief is granted, it would be a classic case where a wrong doer comes to the Court and gets the advantage of getting his possession legalized. Impugned order does not suffer from any infirmity.

9 Record establishes that late Abdul Waheed Khan was the owner of the suit property. He had died on 05.08.2006. He had left behind his widow, two sons and three daughters. The legal position is undisputed; a deceased Mohammedan cannot by Will bequeath more than 1/3rd of his share in his properties. The remaining has to devolve by the law of Muslim succession. A specific query had been put to the learned counsel for the respondents as to how the widow-Zubeda Khaton has become the exclusive owner of the suit property; learned counsel for the respondents on this count has submitted that the widow had become owner of the property by virtue of a Will of the deceased, in the alternate if this Will is not to be relied upon, she would become the owner by virtue of the fact that this property had been given as a 'Meher' by the deceased to his widow.

10 The written statement as also the replies to the present applications filed by the contesting defendants i.e. defendants No. 1 and 5 has been perused. The defence is predicated upon the Will purported to have been left by the deceased in favour of his widow; further

defence being set up that the deceased had in fact executed a relinquishment deed on 24.08.2000 and since then his widow/defendant No. 1 has been dealing with the property; she has been letting out the property to the students of Jamia Milia Islamia University and has been receiving rent from them; she has even sold a portion of the property to defendant no.5; the plaintiff had never objected to this arrangement and implicitly by his conduct, he has waived all his rights in the suit property. There is no defence qua the alternate submission made before this Court which is to the effect that this property had been given by the deceased as a 'Mehtar' to his widow.

11 Admittedly the suit property was originally owned by late Abdul Waheed Khan. The whole defence of the defendants/respondents is founded upon the Will purported to have been executed by the deceased in favour of defendant No.1. The Muslim law of inheritance does not permit a deceased Mohammedan to bequeath more than $\frac{1}{3}^{\text{rd}}$ of his share in his property and a bequest made beyond $\frac{1}{3}^{\text{rd}}$ is not a valid bequest. There is no quarrel to this proposition.

12 It has also come on record that the appellant is in occupation and physical possession of two rooms on the ground floor of the suit property. The toilet and bathroom facility was also in common usage by the appellant and the tenants of respondent No. 1. This is prima facie established from the report of the SHO dated 30.06.2010. Even otherwise the factum of the possession of the appellant in the suit property is also not disputed by the learned counsel for the respondents.

13 In this background, the submission of the appellant that he has been denied the bare minimum i.e. the right of a human being to live with dignity as his electricity has been dis-connected and he having no independent electric meter is not in a position to obtain electricity is a submission which has force. There is no doubt that in today's world, life without electricity is impossible. The appellant cannot be expected to live in the dark without this basic minimum facility which is his right to electricity in the premises which were originally owned by his father and upon which an exclusive claim is now sought to be set up by his mother. The defence of the respondents predicated on the Will bequeathing the entire property in favour respondent No. 1 is also against the Mohammedan dictates.

14 In this background, the impugned order not granting him this essential service cannot be sustained. Prima facie possession having been established by the appellant; irreparable loss and injury would be caused to him in case he is not permitted to obtain electricity as admittedly the appellant has a family comprising of his school going children and it would be an extreme hardship to expect him to live his life without this basic facility. It being an essential amenity, the appellant cannot be deprived of the same. Even in the reply filed to IA No.3988/2012 it has not been specifically disputed that the appellant was not earlier enjoying this facility or that the same has not been disconnected by the respondent.

15 A suggestion has been put to the learned counsel for the respondents that a sub-meter can be affixed for the appellant and he can

pay his separate electricity charges. This suggestion having been negatived; accordingly, the appellant is permitted to get a sub-meter installed in the premises at his expense. Needless to state that the electricity charges will be borne by the appellant. The appellant also admittedly being in common use of the toilet and bathroom which were being shared by the appellant, his family and the tenants of defendant No.1, the appellant and his family are permitted to continue to use this facility and the access of the appellant and his family to this portion of the property will be from the back side of the suit property. This arrangement was also noted in the status report filed by the concerned SHO. Status quo ante is accordingly restored. This being only a prima facie view, the aforesaid arrangement shall continue during the pendency of the suit.

16 Appeal is disposed of in the above terms. No orders as to costs.

CM Nos. 11450/2012 (stay) & 11451/2012 (for direction)

17 In view of the orders passed in the appeal, these applications stand disposed of.

INDERMEET KAUR, J.

SANJAY KISHAN KAUL, J.

MARCH 22, 2013/rb