

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

Date of Decision: 19.08.2014

+ CM(M) 313/2013, CM No.4594/2013
RAJINDER KUMAR AND ORS Petitioners
Through: Mr. Mayank Goel, Adv.

versus

PADMAVATI THR LEGAL HEIR & ANR Respondents
Through: Mr. S.B. Aggarwal, Adv.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

% **MR. JUSTICE NAJMI WAZIRI**

1. This petition impugns an order dated 22.02.2013 by the Additional District Judge (East) dismissing the petitioners' appeal which was filed by them against order dated 16.03.2012 of the ACJ (E) in Execution Case No. 45/2007, by way of which the petitioners had sought setting aside/review of an order dated 16.03.2012, which in turn had dismissed the petitioners' application under Order XLVII Rules 1 & 2 CPC seeking review of two earlier orders dated 16.03.2012 and 04.05.2012. This is the sixth round of litigation by the petitioners. They have lost all the previous rounds. Their case is that vide rent note dated 15.09.1970, the father of the petitioners became a tenant in the suit property comprising a *sehan*, *verandah*,

two rooms, one *baithak* in Shop No. 327, Anaj Mandi, Shahdara, Delhi. In 1992, a suit for declaration and permanent injunction was filed by the petitioners seeking restraint of the respondents/defendants illegally dispossessing them from the suit premises. In their counter-claim, the defendants sought an injunction against the petitioners from any interference in the defendants' free ingress and egress to the first floor/roof above the suit premises. On 16.05.2006, the suit was dismissed while the counter-claim of the defendants was decreed. The petitioners' first appeal against the judgment and decree was dismissed on 25.04.2007. Their Regular Second Appeal (RSA) before this Court being RSA No. 253 of 2007 was dismissed on 05.05.2011. In the execution petition filed by the Decree Holders, the Court directed the petitioners to remove the shutter on the ground floor of the shop in terms of the decree. Petitioners' application for review of the said order was dismissed on 04.05.2012. They went in Execution First Appeal which resulted in the impugned order.

2. The petitioners have challenged the said order on the ground that the direction for removal of the door and shutter from the suit premises

would be detrimental to the rights of the JDs as tenant; it would tantamount to dispossessing them from the suit premises; the Court erred in not accepting the alternate staircase offered to be installed by the petitioners/JDs at their own expense, so as to settle the dispute permanently and finally, that substantial loss would be caused by removal of the doors/shutters.

3. In the Regular First Appeal, the Appellate Court found that the rent note of 1970 showed that the only portions which were rented out were *sehan*, *varandah*, two rooms and on *baithak*. There was no mention of any access to the terrace. The Court noted that:

“14.It was also categorically mentioned in the rent note and admitted by Sh. Duli Chand Aggarwal (father of the plaintiffs) that he would have no objection regarding the passage meant for other tenants. This particular fact clearly reveals that the entire shop No. 324 had not been rented out and the passage meant for ingress and egress for other tenants was not to be disturbed by Shri Duli Chand Aggarwal. It means that there were other tenants also at the time of creating tenancy in favour of Shri Duli Chand Aggarwal in the year 1970. Had it not been so, there was no requirement of mentioning about such passage meant for other tenants.

15. I have seen the cross-examination of plaintiff No. 1 Sh. Rajinder Kumar as well and in his cross examination also, he admitted that the rented premises consisted of one Sahin, Verandah, two rooms and one

baithak. He categorically claimed in his cross examination that at the time of inception of tenancy, the tenanted premises was comprising of one verandah, sahin, baithak and two rooms on the ground floor. He also admitted that there was a staircase at the backside leading to the roof. He also claimed that there was provision of addition or alteration in the rent deed dated 15.09.1970 and he also admitted that no written permissible regarding any addition or alteration was ever sought. I am of the opinion that the wordings as mentioned in the rent note clearly clinch the issue in favour of the defendants. Plaintiffs had been given a specific portion as mentioned in the rent note and the wordings used clearly reveal the intention of the parties. Since the original tenant Sh. Duli Chand Aggarwal clearly undertook in the rent note that he would not disturb the passage meant for the ingress and egress of the other tenants, the only natural and logical inference which can be deduced is to the effect that he had been given only ground floor portion as specifically mentioned and described in the rent note and that the staircase and the roof of any constructed portion over the such roof had not been part of the tenancy as created on 15.09.1970. Ld. Civil Judge was fully justified in placing his reliance upon the rent note and was perfectly accurate in considering the rent note in the manner it has been done. From the tone and language of the rent note, intention of the parties is very much palpable and it becomes evident that the entire shop along with roof rights had never been rented out and only the ground floor portion as specifically described in the rent note had been rented out to Shri Duli Chand Aggarwal. Passage meant for other tenants had been protected. Since there was no other occupant or tenant at ground floor, it automatically reveals that such occupant and tenants were at the first floor and stand of plaintiffs thus stand falsified. Plaintiffs had sought declaration with respect

to the entire property including the first floor portion and ld. Trial Court was justified in refusing to grant such declaration. In the garb of such declaration, plaintiffs want to usurp the first floor portion also which was rightly declined by the Ld. Trial Court. During the course of the arguments, ld. Counsel for the appellants had contended that commercial tenancy is heritable and declaration could not have been denied and at least the plaintiffs were bound to be declared tenants with respect to the ground floor portion. However, there is no requirement of any grant of declaration even in this regard as defendants never disputed status of plaintiffs as that of tenant with respect of such ground floor portion. More so, defendants have themselves come up with a counter claim and have rather sought to recover rent from them. Once they are seeking recovery of rent from them through the court the only commonsensical inference is that they admit plaintiffs to be tenant under them.”

4. The Court took in consideration the report of the Local Commissioner, as commissioned by the Trial Court, which showed that defendant No. 3 Smt. Usha Rani occupied a *chhappar* of the size of 10 x 5 ft. on the first floor above the tenanted premises. She claimed that there was a tea shop, which the plaintiff had removed and thrown out her articles from the said abode. The Court noted the observations of the Local Commissioner, that the goods mentioned by the lady were such that they could be accommodated in the shop and a small family could reside therein. The Appellate Court finally passed the following amended decree:

“28. Let amended decree be accordingly prepared in following terms:

(i) Suit of the plaintiffs is dismissed.

(ii) Counter Claim of defendant No. 3 is decreed and a decree is passed in favour of all defendants and against the plaintiffs directing the plaintiffs to pay rent @ Rs.225/- per month for the period of 36 months preceding 07.10.2002 and also rent at the same rate for the subsequent period till disposal of the suit along with interest @ 6% per annum from the date of filing of the counter-claim till realization. Let Court fee be accordingly deposited within three weeks.”

5. The Regular Second Appeal was dismissed by this Court on the ground that there was no perversity in the order of the Appellate Court; first that the widow daughter defendant No. 3 was residing on the roof. The Court noted:

“11. Admittedly the father of the plaintiff namely Duli Chand had been let out the demised premises; a rent note Ex. PW1/1 dated 15.07.1970 had been executed between the father of the plaintiff and the father of the defendants. In terms of this rent note the tenanted property had been described; it comprised of one sahan, verandah, two rooms and one baithak; rate of rent was Rs.65/- per month; rent would be paid in advance; statement of the father of the plaintiffs (Duli Chand) was also to the effect that he would have no objection to the passage left for the ingress and egress of the other tenants. This document has been

interpreted by both the two facts finding courts. Both the courts below have noted that the reference made by the father of the plaintiffs that he would have no objection to the passage which is available for the ingress and egress of the other tenants means that there were other tenants in the suit property and the plaintiff was not the sole tenant. Moreover this document EX PW-1/1 had specifically described the tenanted premises which have been described hereinabove. Admittedly there is no reference to the roof rights.

14. A local commissioner had also been appointed in the trial court to give his report on the factum of possession in the suit property. He had given his report on 3.12.1992 wherein it had been noted that the defendant no.3 was found present at the spot; the 'Chapper' i.e, the roof could accommodate a small family. Objections to the said report have been filed to which reply had also been filed by the non-applicants. Impugned judgment had dealt with this contention of the learned counsel for the appellant that the objections had not been decided one way or the other. In para 16 of the impugned judgment the court had examined the report of the local commissioner and had accepted it in favour of the defendants; court had noted that the local commissioner found the presence of Usha at the spot; further PW-1 Rajinder Kumar had come into witness box and in his cross-examination he had admitted that he had not filed any objection to the report of the local commissioner. At this stage learned counsel for the appellant has drawn attention of this Court to the said objections which had been filed by the brother of Rajinder Kumar namely Ashok Kumar who was arrayed as plaintiff No. 2. Be that as it may, the very fact that the court had accepted the report of the local commissioner and had relied upon it, it is implicit that the objections stood rejected. There is no perversity on this score.

15. All these fact findings have been done into deep

detail by the two courts below. Unless and until a perversity is pointed out a second appeal court cannot interfere with findings of fact. The courts below had noted that the documentary evidence adduced by the plaintiff evidenced that what had been let out to him was only a sahan, baithak, verandah and two rooms; he was not entitled to the roof rights; Panchayat Faisla had also noted the statement of the plaintiff that he would have no objection to the ingress and egress for the passage of the other tenants meaning thereby he was not the sole occupant of this property. Case of the defendants was that the roof rights were being leased out periodically; at present their widowed daughter Usha is residing therein. This has also been supported by the report of the local commissioner. This finding in no manner can be said to be perverse and this finding in no manner calls for any interference. Status of the plaintiffs is admittedly recognized as a tenant on the ground floor i.e. in the sahan, baithak, verandah and two rooms as aforementioned i.e. excluding the roof. They, however, have no roof rights.”

6. The respondents’/Decree Holders’ petition seeking execution of the decree resulting in the first order of 16.03.2012, which directed the petitioners/JDs to remove the shutter/door from the ground floor portion within 15 days, as the same caused hindrance/obstruction in the use of the staircase which led to the first floor. The petitioners’/JDs’ review application against the said order was dismissed, on the ground that the decree of injunction passed in favour of LRs of DH and against the petitioners/JDs, did not put any

restriction for free egress and ingress in the use of the staircase leading to first floor; LR of JD himself stated that they could not allow the LR of DH for free access to the first floor for all 24 hours which also was not the spirit of the decree passed by the Court. The Court further noted that the learned ADJ while passing a decree of permanent injunction had categorically held that “*plaintiff (JD) are directed not to interfere the defendant (DH) with respect to free ingress and egress and use of staircase leading to the first floor portion and also use of such first floor by the defendant (DH) in the manner they like.*”

7. Learned counsel for the petitioners submits that the impugned order has travelled beyond the scope of the decree and asks for removal of the shutter/door which would result in impairing the rights of the petitioners i.e. their goods and materials lying on the ground floor would be open to serious threat if the “protection” is removed from *sehan* and unhindered access is provided to the respondents. He submits that shutter is essential for the protection of the property and goods stored in the tenanted premises. He further submits that the order passed by this Court on 31.07.2009 in RSA No. 253 of 2007,

which according to the learned counsel appreciated the fact, that access to the roof is from the inside of the tenanted shop and such access could be only during day time. The order passed by this Court on 31.07.2009 reads as under:

“CM Nos. 13492/2007 (stay) and 2447/2009 (vacation of stay)

It is a common case of the parties that excess to the terrace is from the staircase which opens in the tenancy premises and the respondents have to first intrude into the tenancy premises to go to the terrace. The grievance of the respondents is that since the appellant puts down the shutter at night and locks the same, respondents are denied access to the terrace. Perusal of site plan Ex. PW1/2, copy of which is on record, shows that no construction exists on the open terrace which the respondents may require to utilise during the night. Appellants are not denying access of the respondents to the terrace during the day time which the appellants also undertake not to do. However, keeping in mind the safety and security of the goods kept by the appellant in the demised premises they cannot be asked to remove the shutter which they put down during the night as it does not prejudice the rights of the respondents to have an access to the terrace in any manner. Under these circumstances I find no merit in CM No.245/2009. Same is dismissed.

The interim order dated 5.11.2008 passed in CM No. 13492/2007 is hereby made absolute till the final disposal of the appeal on merits. The parties shall maintain status quo in respect of the suit property so as to avoid any further litigation.

RSA 253/2007

List for consideration and for formulation of substantial questions of law, if any, on 27th January, 2010.”

8. Learned counsel for the respondents however, submits that the petition is without merit. It is frivolous and therefore deserves to be dismissed with exemplary costs. He submits that the petitioners have tried to occupy the portion of the first floor which was not in their tenancy as per the rent agreement/note dated 15.09.1970. He submits that the petitioners had thrown out the goods of the owner/landlady on 23.11.1992, from the first floor. This by itself meant that respondents were residing on the first floor and had possession thereof. According to him, it would also mean that they had free access to the staircase without hindrance or obstruction from anyone.
9. From the aforesaid narration, what emerges clearly in the previous five adjudications is, that the respondents had possession of the first floor where Smt. Usha Rani, defendant No. 3 (now respondent No. 2) was residing. The decree directed the plaintiffs/petitioners/JDs from dispossessing the respondents/defendants/DHs from the first floor, which clearly means that the defendants were in possession of the first floor. The decree further restrained and directed the petitioners from

interfering with their free ingress and egress i.e. access to the first floor portion and the use of the staircase leading to the first floor. There was a further restraint upon the petitioners/JDs from interfering with the use of the first floor by the defendants, in the manner the defendants liked/desired. The counter-claim was decreed with costs. The decree is clear and specific, that the defendants would have free ingress and egress to and use of the staircase, leading to the first floor. It further says that the defendants could use the first floor in whichever manner they desired. The expression “manner” would include access to the first floor by the defendants at any time, by themselves as well as by their friends, visitors, relatives, etc. The overriding condition and defining nature of the right being, that the access would be unhindered and free. If there is any obstruction in the form of a shutter or a door, such construction/obstruction would need to be removed, as otherwise the existence of such hindrance would be against the letter and spirit of the decree. No restriction, hindrance or limiting could be interpreted or read into the decree which directs an unhindered access at all times. The offer of the petitioners to install/construct an alternate staircase to provide access to the

respondents/Decree Holders to the first floor could at best be regarded as an offer of compromise. However, it is not an argument in the alternative, for challenge of the impugned order. A Decree Holder cannot be coerced by the Court to accept the option offered by the JD. An executing Court has to enforce the decree in its fullest sense, and that is what the impugned order does. The order passed by this Court dated 31.07.2009 was of interim nature. It got subsumed in the final order of dismissal dated 05.05.2011. Therefore, the interim order could be of no consequence. This Court is of the view that the impugned order has only granted the effect of decree as per the terms of the decree. The decree does not in any way restrict or qualify ingress and egress for the respondents/Decree Holders to the first floor by use of the staircase, hence any endeavour to qualify it would not be as per the terms of the decree and logically would have to be removed. If the Court have to accept the offer of the petitioners, of (i) providing an alternate staircase or (ii) to restrict the ingress and egress of the defendants to access the first floor from the existing staircase, only during the day time, it would tantamount to re-writing the judgment and decree. This indeed would not be permissible in law.

10. In view of the above, this Court is not persuaded by the arguments on behalf of the petitioners. The petition is without merit and is dismissed. Keeping in view the fact that the petitioners have consistently lost five rounds of litigations and now even the sixth one in the last 22 years, this petition is dismissed with a cost of Rs.20,000/- to be paid to the respondents within two weeks of this order.

NAJMI WAZIRI, J

AUGUST 19, 2014/acm