

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 03.04.2014

+ CM(M) 314/2014, CM Nos.5913(for Stay) & 5914/2014(for Exemption), Cav. No. 296/2014

SAIRA HAFEEZ & ANR

..... Petitioners

Through: Mr. Shahid Azad with Mr Ashutosh Rana,
Mr. Shabbir Ali, Ms. Shabana Ahmed
& Mr. Mohd. Aslam, Advocates.

Versus

MS PARVEEN REHMAN & ORS

..... Respondents

Through: Mr. Rajiv Duggal, Advocate

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

% **MR. JUSTICE NAJMI WAZIRI (Oral)**

Caveat Petition No.296/2014

Mr. Rajiv Duggal, Advocate, enters appearance on behalf of the Caveators/respondents. The Caveat Petition No. 296/2014 stands discharged.

CM(M) 314/2014 & CMs 5913 & 5914 of 2014

1. At the request of learned counsel for the parties, the case is being taken up for final hearing.

2. This petition under Section 115 of the Code of Civil Procedure impugns an order dated 14.03.2014 in Execution Petition No. 189 of 2008 whereby the petitioners' objection application was dismissed as being not maintainable in law. The petitioners/objectors had sought the dismissal of the Execution Petition. The respondent No. 1/plaintiff/Decree Holder (DH) had filed the aforesaid Execution Petition for recovery of the suit premises as well as mesne profits in terms of the judgment and decree dated 02.07.2005 in Suit No. 96/2002 in which the JD was declared to be in unauthorized occupation of the suit property No. D-190, Abul Fazal Enclave, Okhla, Delhi-110025 and an amount of Rs.10,000/- per month was directed to be paid as mesne profit till the handing over of the possession. Warrants of Possession with respect to the suit premises had been issued on 19.07.2008, but on 01.10.2008, the present petitioners filed objections to the execution petition. They claimed that they were the Legal Representatives (LRs) of the JD, therefore, they ought to be heard in the Execution Petition. They claimed that much before his demise on 25.02.2008, the JD had registered a *Will* on 28.02.2002 bequeathing the suit property to them, hence, they were entitled to it and since they were not parties to the suit, they were not bound by the judgment and the decree. They argued that, therefore, the Execution Petition ought to be dismissed.

3. The respondent/plaintiff had sought a decree of possession of the suit property and mesne profit against the defendant for the occupation of the premises. The JD preferred an appeal in this Court,

bearing RFA No. 25 of 2006 but the same was withdrawn by his LRs on 05.05.2008. However, during the pendency of the case, he expired on 25.02.2008. The RFA was later dismissed as withdrawn by order of 05.05.2008. The respondent/DH claimed that therefore, the judgment and decree had attained finality as of that day, and neither the JD nor anybody claiming through him would have any right, title or interest in the suit property nor could he part with possession of the same in favour of anybody else except for the plaintiff/DH as had been decreed, and the JD and all claiming through him would be unauthorized occupants of the premises.

4. Sometime later, the present petitioners sought impleadment in the appeal, which already stood withdrawn before this Court. Their applications were dismissed on 07.07.2010 by the following order:

“By this application filed under Section 151 CPC the applicants, namely, Ms. Saira Hafeez and Mr. Syed Hameedullah seek their substitution in the present proceedings based on the registered will dated 28.2.2002. Counsel for the applicants submits that these applicants are seeking the substitution based on the said registered will. Counsel further submits that these applicants are also in possession of the property in question. The application is strongly opposed by the respondent and counsel representing the legal heirs of the deceased appellant.

I have heard learned counsel for the parties.

The present appeal was withdrawn by the legal heirs of the deceased appellant vide orders dated 5.5.2008. It is quite evident that the legal heirs of the deceased were not prepared to contest the judgment and decree dated 2.7.2005 passed by the Lower Court in Suit No. 96/2002. The present applicants who are admittedly not the legal heirs of the deceased appellant are claiming their rights in the property in question based on the registered will. The genuineness and authenticity of the said will is seriously being disputed by the respondent as well as the legal heirs of the deceased. The validity and genuineness of the will cannot be gone into by this court in the present appeal and more particularly when the legal heirs are not willing to contest the said judgment and decree in question. In the peculiar facts and circumstances of the case, the liberty is given to the applicants to take their appropriate legal remedy for claiming their alleged right before appropriate court of law. Reserving the said liberty the present application is dismissed as withdrawn. Dasti.”

5. From the aforesaid order, it is clear that the judgment and decree had become final apropos the JD and logically upon those who claimed through him. No other remedies were pursued by the applicants/petitioners herein, instead they filed the objection before the executing Court which has resulted in the impugned order. The fact that the JD in the decree was declared as an unauthorized occupant in the suit premises and his appeal against the judgment and decree was withdrawn, therefore, the decree had attained finality.

Therefore, he had nothing to transfer to anybody. In the absence of the JD having any rights with respect to the suit premises, he could not have conferred upon or bequeathed anything in his *Will* apropos the suit property, to the petitioners.

6. On 11.11.2011, the following issues were framed on the objection application:

“(i) Whether the objection application filed by the objectors is maintainable in law? OP on Objector.

(ii) Whether the Will dated 28.02.2002 was validly executed by the executants as per law? If yes, what will be its effect? OP on Objector.

(iii) Relief.”

7. The DH had argued that the judgment and decree dated 02.07.2005 had already declared the JD as an unauthorized occupant in the suit premises, the so called *Will* executed by him in favour of the Objector would be of no consequence, hence, any objection on the basis of the *Will* apropos the suit premises would not be maintainable in law. The Trial Court, however, proceeded to test that issue on the presumption, only for the sake of argument, that even if the JD had validly executed the *Will*, what would be the effect of the judgment and the decree in deciding the rights of the JD in the suit premises, on the objection application and its sustainability in law. Therefore, the aforesaid issue No. 1 was treated as a preliminary issue. The objectors had contended that they were the LRs of the JD to the exclusion of the

DH and her sons, therefore they had the right, title and interest in the suit property and to defend the same and the fact that they were not the party to the suit, they were not bound by the decree. However, the Trial Court addressed each of the issues raised by the objectors and held that the objection was not maintainable in law. The preliminary issue was decided against the Objectors and in favour of the DH. The Trial Court reasoned as under:

“Main thrust of the arguments of counsel for the objectors is that the objectors are third party to the suit and therefore they are not bound by the decree. Firstly, this submission is contrary to the own case of the Objectors that they are the legal representatives of JD. As such, an adverse inference can be drawn against the Objectors. Secondly, paras No. 21 and 31 of the subject judgment reveal that the Objector Ms. Saira Hafeez appeared as the special power of attorney of JD in the said suit and also deposed as DW-1 before the Trial Court. The said judgment nowhere reveals that either the JD or the Objectors pleaded the fact of the said Will executed in their favour. It implies that the Objectors had the knowledge of the suit and had been contesting the same on behalf of the JD. Thirdly, the Objectors relied upon the said will which was executed by JD and not by third party. Therefore, whatever right the Objectors claimed in the suit property on the basis of the said Will that is only through JD and not through any third party. As such, the Objectors stepped into the shoes of JD w.r.t. the suit property. Therefore, once JD was held to be unauthorized occupant of the suit property, the Objectors cannot claim a better title than JD himself had. As such, it can be

held that the Objectors are not the third party to the suit and are bound by the decree under Order 21 Rule 35 of CPC. Therefore, the present Objection application cannot be treated under Order 21 Rule 97 of CPC. Consequently, no question of trial of the application arises at all.”

It further held that:

“Now the question arises what shall be effect of the subject judgment and the decree on the alleged right of the Objectors. The objection application was moved on 01.10.2008. As discussed above, the objectors are bound by the decree. Further, it is the own case of the objectors that JD was the owner of the suit property and they are aggrieved by the judgment and decree. In that eventuality, the Objectors should have prayed for declaration of ownership right of JD in the suit property and also that the judgment and decree dated 02.07.2005 be declared null and void. No such reliefs are prayed in the present application. It is settled law that a relief which is not prayed cannot be granted by the Court. As such, even in the present objection application, the Objectors have not prayed for any relief against the judgment and decree. As such, the same has attained finality. Hence, the findings of the Trial Court that JD had been the unauthorized occupant in the suit property, having become final, shall operate as res-judicata in the present application.”

8. The petitioners have reiterated the same arguments before this Court. Mr. Shahid Azad the learned counsel for the petitioners submits that if Order 21 Rule 101 of the CPC is followed, it would render the aggrieved petitioners remediless. He argued that the principle of resjudicata would not be binding upon the petitioners

since they were not party to the suit. He relies upon a judgment by the Chhattisgarh High Court in ***Ram Kumar Tiwari and others v. Deenanath and others***, AIR 2002 Chhat. 1 which held that in an execution proceeding for possession of immovable property where the objection application of obstructing party was dismissed at its threshold on the ground of maintainability and no inquiry into the right, title or interest of the parties was made, then such order would not be termed to be a decree, hence, revision and not appeal will be maintainable against that order. Learned counsel further submitted that the principle of *lis pendens* could not apply to the execution of a decree for possession of immovable property in a case where the suit property was purchased prior to institution of the suit and not during its pendency, hence Section 52 of the Transfer of Property Act would not be applicable to the present case. However, this Court is of the view that a person can transfer only something which the person possesses. Insofar as the JD was declared to be an unauthorized occupant of the suit premises, he clearly had no right, title or interest in the said property. Consequently he could not have transferred or bequeathed anything to the objectors/petitioners apropos the suit property. Therefore, the said case would not be applicable.

9. The learned counsel for the petitioner then relied upon the judgment in ***Smt.Tahera Sayeed v. M.Shanmugam and others***, AIR 1987 AP 206 which held that when the third party, not bound by the decree, approaches the Court to protect his independent right, title or interest before he is actually dispossessed from immovable property

and files an application under Order XXI Rule 97, it must be treated to be an intimation to the Court as caveat to the decree-holder or purchaser or a person claiming through him and the Court is to treat it as a complaint or a counter in opposition, as an application for the purpose of Order XXI Rule 97 and to adjudicate it under Rule 98 or Rule 101 which shall be final and conclusive between the parties. It shall be treated to be a decree for the purpose of Rule 103. It is subject to appeal and further subject to the result in the prior pending suit under Rule 104. This approach is consistent with *ubi jus ibi remedium*, shortens the litigation, and prevents needless protraction and expenditure. Accordingly, application under Order XXI Rule 97 is maintainable. In the present case, however, in view of the fact that the petitioners are not asserting any independent right, title or interest in the suit property, but something which they claim to have devolved upon them from the JD, who as has been afore, has been declared to be an unauthorised occupant in the suit property and not possessing any right in it, therefore the aforesaid judgment too cannot be of any assistance to them.

10. Lastly, the learned counsel for the petitioners relied upon the Supreme Court dicta in ***Niyamat Ali Molla vs. Sonargon Housing Cooperative Society Ltd. and others*, AIR 2008 SC 225** which in the facts of that case, held that “*so far as the application for impleadment of the applicants is concerned, they not being parties to the suit were not bound by the decree. They would, thus, be entitled to take recourse to such remedies which are available to them in law*

including filing of an application under Order XXI Rules 97 and 99 of the Code of Civil Procedure, if any occasion arises therefor. As and when the said applicants take recourse to law, the same has to be determined in accordance with law.”

11. As stated hereinabove, the said recourse would be available to the Objectors if they had an independent right to claim any interest or title in the suit premises. However, since they claim it through the JD who was declared to have no right in the premises, the said remedy in law would obviously not be available to the petitioners.

12. Per contra, refuting contentions of the petitioners, Mr.Rajiv Duggal, the learned counsel for the respondents submits that the petition is not maintainable. He contends that the petitioners were fully aware of the suit and indeed have participated in the proceedings, therefore, they could not be said to be strangers to the suit. In any case, they cannot have any better title than what the landlord, who in turn had been declared to be an unauthorized occupant of the suit premises. He further relies upon the followings judgments in support of his arguments that this petition is not maintainable and it deserves to be rejected out rightly:

- (i) ***Silverline Forum Pvt. Ltd. v. Rajiv Trust and another, AIR 1998 SC 1754;***
- (ii) ***S. Rajeswari v. S.N. Kulasekaran and ors., (2006) 3 SCR 610; and***
- (iii) ***Surender Kumar Jain & Anr. v. Attar Chand Jain & Ors. 112 (2004) DLT 914 (DB).***

13. The case of *Silverline Forum Pvt. Ltd.* (a decision by three Judges of the Supreme Court) concerned resistance to an execution of decree by a sub-tenant who was not a party to the decree for eviction. The Court held that:

“10. It is true that Rule 99 of Order 21 is not available to any person until he is dispossessed of immovable property by the decree-holder. Rule 101 stipulates that all questions "arising between the parties to a proceeding on an application under rule 97 or rule 99" shall be determined by the executing court, if such questions are "relevant to the adjudication of the application". A third party to the decree who offers resistance would thus fall within the ambit of Rule 101 if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree. No doubt if the resistance was made by a transferee pendente lite of the judgment debtor, the scope of the adjudication would be shrunk to the limited question whether he is such transferee and on a finding in the affirmative regarding that point the execution court has to hold that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further contentions is based on the salutary principle adumbrated in Section [52](#) of the Transfer of Property Act.

When a decree-holder complains of resistance to the execution of a decree it is incumbent on the execution court to adjudicate upon it. But while making adjudication, the court is obliged to determine only such question as may

be arising between the parties to a proceeding on such complaint and that such questions must be relevant to the adjudication of the complaint.

The words "all questions arising between the parties to a proceeding on an application under Rule 97" would envelop only such questions as would legally arise for determination between those parties. In other words, the court is not obliged to determine a question merely because the resistor raised it. The questions which executing court is obliged to determine under rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties, e.g. if the obstructer admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. Hence, it is necessary that the questions raised by the resistor or the obstructer must legally arise between him and the decree-holder. In the adjudication process envisaged in Order 21 Rule 97(2) of the Code, execution court can decide whether the question raised by a resistor or obstructer legally arises between the parties. An answer to the said question also would be the result of the adjudication contemplated in the sub-section."

The Court held that the sub-tenant would be bound by the decree of ejectment, although he was not a party to the suit in which the decree was passed.

14. In *Surender Kumar Jain* (supra) this Court relied upon *Silverline Forum Pvt. Ltd.* which held that “*it is clear that Executing Court can decide whether the resister or obstructer is a person bound by the decree and if he refuses, the adjudication mentioned in Order 21 Rule 97(2) need not necessarily involve a detailed inquiry or collection of evidence. The Court can make the adjudication on admitted facts or even on averments made by the resister. In other words the question of permitting the party to adduce the evidence would primarily be decided on the facts and circumstances of each case.*”

15. This Court notices that the judgment dated 02.07.2005 records that Ms. Saira Hafeez, the first petitioner herein, had appeared as a witness for the defendant/JD. Para 21 of the judgment reads as under:

“The defendant produced five witnesses in all. DW1 Ms Saira Hafeez who is attorney of the defendant, DW-2 Sh. Kanwar Singh, LDC, Central Administrative Office, New Delhi, DW-3 Sh. Suresh Kumar, Architect/valuer/estimator/building supervisor with MCD license. DW-4 is Sh. Azmal Khan, Advocate and DW5 is Sh. Devi Ram, Patwari of the Sub Division, Defence Colony. The statements of witnesses of the defendant were recorded by the learned Local Commissioner appointed by the court.”

16. From the aforesaid, it is clear that the petitioner who had deposed on behalf of and or in favour of the defendant/JD she was fully aware of the nature of the case and the *lis* between the parties. Furthermore, regarding issue No. 2, the Court records as under:

“The written statement is signed by DW-1 Ms. Saira Hafeez. She has proved the Special Power of Attorney executed in her favour by the defendant as Ex.DW-1/1. This special Power of Attorney Ex. DW1/1 shows that defendant being a person of unsound health and due to deadly ailment known as hepatitis B has authorized Ms. Saira Hafeez to do all the necessary acts for the purpose of the present suit on behalf of the defendant including signing of the written statement, applications etc. The written statement being signed and verified by Ms. Saira Hafeez on behalf of the defendant is therefore signed and verified by a competent person by virtue of Special Power of Attorney Ex. DW1/1.

In view of the above issue No. 2 is decided in favour of the defendant and against the plaintiff.”

Apropos issue No. 3 the Court further records in para 33 as under:

“Similarly, the defendant through attorney though stated in the affidavit of DW-1 that entire construction of the suit property a considerable amount of approximately amount of more than Rs. 5 lakhs was spent by the defendant and suit property is valued now exceeding Rs.20.00 lakhs. She admitted it correct that other properties in the vicinity of the suit property have been sold. She stated that it was correct that she does not have a copy of the sale deed of the other properties which have been sold in the vicinity nor she has made any attempt to obtain the same. Therefore DW1 or other witnesses of the defendant have not stated anything convincing to show that value of the suit property was more than Rs. 20 lakhs as on the date of the filing of the suit.”

17. The aforesaid record of authorization by the defendant/JD to petitioner No. 1 and her active participation in the suit proceedings

clearly shows that she was not a stranger to the proceedings and had indeed participated in defence/support of the defendant's/JD's case. She could therefore not raise the contention of being stranger to the suit.

18. This Court is of the view that the petitioners were fully aware of the suit. They participated in it. They defended it. The *Will* would come into effect only after the demise of the JD. However, in his lifetime itself the JD had been declared an unauthorized occupant of the suit premises hence devoid of any right, title or interest in it. He possessed nothing apropos the suit property which he could transfer or bequeath in a Will hence nothing would flow to the petitioners by virtue of the Will. Even the appeal filed before this Court by the Judgement Debtor against the judgment and decree was withdrawn, thus stamping a finality to the judgement and the decree. Once there is finality by the judgement apropos the ownership of the suit premises the issue cannot be reopened at the behest of parties claiming through Judgement Debtor. The petitioners too do not have any right in the suit premises. The impugned order does not suffer from any material irregularity nor has the Trial Court failed to exercise the jurisdiction vested in it or otherwise exercised jurisdiction not vested in it. There is no merit in this petition. Accordingly it is dismissed.

**NAJMI WAZIRI
(JUDGE)**

April 03, 2014/acm