

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

Reserved on: 09.05.2014
Date of Decision: 03.12.2014

+ Ex.F.A. No.14 of 2009

GANDHARAV SAINI Appellant
Through: Mr. Virender K. Singh, Adv.

versus

PUSHPA SHARMA & ANR. Respondents
Through: Mr. J.K. Sharma & Mr. Mukesh Sharma,
Advs. for R-1.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J.

1. In this Execution First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC), the appellant impugns the order of the Executing Court dated 14.10.2009 by which the objections filed by respondent No.1 herein, namely Smt. Pushpa Sharma (objector) were allowed and the judgment and decree dated 23.1.2006 was held to be not binding upon her. As a consequence thereof, possession of the suit premises, being Shop No.P-4, Connaught Place, New Delhi (suit premises) was directed to be restored to the objector.
2. The appellant's case is that Shri V.B. Sharma, the husband of respondent No.1 was a tenant in the suit premises. Upon his demise, the tenancy was inherited by his legal heirs including his widow Smt. Pushpa Sharma/the objector/respondent No.1 and her

son Shri Ajay Sharma, respondent No.2 herein. Respondent No. 1 has another son namely Shri Mukesh Sharma. The appellant's case was that he was put in possession of the suit premises by Shri Ajay Sharma, who had represented himself to be its owner. This possession was on a monthly lease of Rs.26,000/- and an amount of Rs.5.00 lacs was also paid as *pagri* to Mr. Ajay Sharma by the appellant in the presence of Shri Sanjay Kumar @ Raju, Shri Shailender Gupta and Smt. Shakuntla. Whereas the case of the objector was that Shri Ajay Sharma was never in possession of the suit premises and only she who was in the exclusive possession of the suit premises. Nonetheless, she pleaded that the appellant was inducted into the suit premises as a salesperson on commission basis by her brother Shri O.P. Sharma, to whom the suit premises had been entrusted merely to look after for the duration when she had gone to meet her other son, Shri Mukesh Sharma in Canada.

3. The appellant had contended that the documents relied upon by the objector to prove her possession of the suit premises were only photocopies whereas the original documents were with Mr. Ajay Sharma, which were filed in the suit for possession instituted by him against Shri Ajay Sharma under Section 6 of the Specific Relief Act, 1963 (hereinafter referred to as the 'Specific Relief Act').
4. The impugned order notes that the suit premises was let out to Shri Bhawani Sahai Sharma by Shri V.V. Gujral in the year 1939 and upon the demise of the said tenant in the year 1985, the tenancy

devolved upon his son Shri V.B. Sharma the objector's husband. After the demise of Shri V.B. Sharma, the objector had claimed that she succeeded into the tenancy and had been carrying on the same business under the name and style of 'New Man & Company', which was duly registered with the Sales Tax Department. She was assisted by her sons namely Shri Ajay Sharma and Mr. Mukesh Sharma. The latter moved to Canada in the year 2000. The former did not keep good habits therefore, the objector did not allow him to participate in the business. The objector visited Canada from 31.3.2003 till 19.11.2003, during which period the suit premises were looked after by her brother Shri O.P. Sharma, who had allowed the appellant to sell readymade garments from the suit premises on commission basis but the possession would remain with Shri O.P. Sharma, in lieu of his sister only for the duration she was away from India. However, upon her return to India, the petitioner had taken control of the business and the suit premises. It was contended that the judgment and decree dated 23.1.2006 was obtained by collusion with her allegedly errant son, Shri Ajay Sharma and it could not be binding upon her since she was the lawful occupier of the suit premises. Therefore, it was argued that its possession ought to be restored to her. The Executing Court had framed the following issues:

“1. Whether the objector is the tenant and in lawful possession of the suit property No.P-4, Connaught Place, New Delhi? (OPO)

2. Whether the objector is not bound by the judgment and decree dated 23.1.2006? (OPO)

3. Whether the objector is entitled to restoration of possession of the suit premises from the decree holder? (OPO)

4. Relief.”

5. In her cross-examination, the objector deposed that her father-in-law was the original tenant and she had denied the suggestion that after the death of her husband, her three children inherited the tenancy rights. Furthermore, she denied the suggestion that Shri O.P. Sharma never managed the business in her absence nor did she admit that her son Shri Ajay Sharma had taken care of her business. The Executing Court was of the view that the appellant had admitted that the rent receipts were in the name of Smt. Pushpa Sharma from Smt. V.V. Gujral, who was the owner of the suit premises and the latter, along with other plaintiffs had filed a suit for recovery of possession as well as damages against the objector and her son, Shri Ajay Sharma and that the latter had held himself to be the attorney of the objector. The Court also noted that the Sales Tax record showed the name of the objector as the proprietor of ‘New Man & Company’ w.e.f. 2002-2003 and the admission of the appellant that he had not paid electricity and water bills for the past about one year but subsequently, came to know that the said bills had already been paid. Pertinently, the Court recorded that although the appellant had contended that his goods were thrown out of the shop on 7.2.2004 by respondent No.2 at the behest of the objector, yet he did not mention her in the

FIR. In view of the evidence and the documents on record, the Court held that the objector was the tenant and in lawful possession of the suit premises on 24.1.2007. Consequently, the Court held that since the objector was not a party to the suit in which the judgment and decree had been passed on 23.1.2006, she would not be bound by it. Accordingly, possession of the suit property which was obtained by the appellant through the bailiff on 24.1.2007 was directed to be restored to the objector.

6. The learned counsel for the appellant submits that 'New Man & Company' was a proprietorship firm, which upon the demise of its proprietor Shri V.B. Sharma devolved upon his three legal heirs i.e., his wife, the objector and the two sons, Shri Ajay Sharma & Shri Mukesh Sharma because a contractual tenancy devolves equally upon all the legal heirs. He further submits that in the event of the demise of a tenant, all the legal heirs of the deceased tenant become joint tenants and the act done by one would be binding on the other(s). In support of his contentions, he relied upon the dicta of the Supreme Court in ***Ashok Chintaman Juker & Ors. v. Kishore Pandurang Mantri & Anr. (2001) 5 SCC 1***, in particular on paragraphs 11 & 12, which read as under:

“11. The question that arises for consideration in such cases is whether the tenancy is joint or separate. In the former case notice on any one of the tenants is valid and a suit impleading one of them as a defendant is maintainable. A decree passed in such a suit is binding on all the tenants. Determination of the question depends on the facts and circumstances of the case. No inflexible rule or straight-jacket formula can be laid down for the purpose. Therefore,

the case in hand is to be decided in the facts and circumstances thereof.

12. In the case of Ganpath Ladha vs. Sashikant Vishnu Shinde (1978 (3) SCR 198) a Bench of three learned Judges of this Court construing the provision of section 5(11)(c) of the Bombay Rent Act, 1947 held :

“The Act interferes with the landlords right to property and freedom of contract only for the limited purpose of protecting tenants against exercise of the landlords power to evict them in these days of scarcity of accommodation by asserting superior rights in property or trying to exploit his position by extracting too high rents from helpless tenants. The object was not to deprive the landlord altogether of his rights in property which have also to be respected.”

7. He further submits that the objector had failed to prove that she was the exclusive tenant of the suit premises upon the demise of her husband. He also submits that the objector had not denied that the entry of the petitioner into the suit premises was legal.
8. In reply, the learned counsel for the objector submits that the possession of the premises was given to the appellant on 24.1.2007 pursuant to a Court Decree, which was not binding upon the objector since she was not a party to the suit. He submits that the tenancy was in the name of ‘New Man & Company’ and Shri Ajay Sharma was nobody as he did not have any right to further confer upon anybody else. Accordingly, he could not have legitimately inducted the appellant as a tenant in the suit premises. In the context of FIR No.62/2004, the police had verified that the objector was in possession of the suit premises and that the appellant was merely a Salesman in the shop and after the incident

of 6.2.2004, he took away all his goods and never returned back. Subsequently, the objector went to Canada from 1.3.2004 till 7.9.2004, when again the property remained in the possession of the objector's brother, Shri O.P. Sharma; the objector had disowned her younger son, Shri Ajay Sharma, through a public notice published in a newspaper.

9. The learned counsel for the objector further refers to the testimony of the appellant wherein he had admitted that he knew that Smt. V.V. Gujral was the owner of the suit premises yet, she was not impleaded as a party nor was she mentioned in the complaint dated 6.9.2005. Furthermore, the objector was not made a party to the suit seeking possession of the suit premises and that collusion between respondent No.2 and the appellant is apparent from the fact that respondent No.2 did not file any WS which would bring out the truth before the Court nor did he cross-examine the witnesses of appellant. Thus, respondent No. 2 did not lead any evidence and the proceedings were pursued only to deprive the objector of the suit premises of which she was in lawful possession. He submits that the decree which was obtained by collusion and fraud was liable to be declared as null & void. He further submits that the objector had every right to file objections under Rule 101 of Order XXI well as Section 47 of the Code. He relies upon the judgement of the Supreme Court in *N.S.S. Narayana Sarma & Ors. v. Goldstone Exports (P) Ltd. & Ors. (2002) 1 SCC 662*, which dealt with the procedure when an execution of a decree is resisted or obstructed by any person in

obtaining possession of the property. The relevant paragraphs of the said judgement read as under:

“8.The relevant provisions of the CPC material for the case are Rules 97 to 103 of Order 21 of the Code. Rule 97 provides that:

“97(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction”

Such an application is to be dealt with by the Court in accordance with the provisions contained in the Code.

9. Under Rule 98 provision is made regarding the order to be passed by the Court in accordance with the determination either making it to be allowing the application and directing that the applicant be put into the possession of the property or dismissing the application or passing such other order as, in the circumstances of the case, it may deem fit.

10. Under Rule 99(1) it is laid down:

“Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.”

Under sub-rule (2) thereof it is provided that where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions contained in the Code.

11. Under Rule 100 it is laid down that:

“Order to be passed upon application complaining of dispossession. – Upon the determination of the questions referred to in Rule 101, the Court shall, in accordance with such determination. –

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.”

12. Rule 101 contains provisions regarding questions to be determined. It reads as follows:

“101. All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.”

13. Under Rule 102 it is provided:

“Nothing in Rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any person.”

14. Under Rule 103 any order made by the Court upon adjudication under Rule 98 or Rule 100 shall have the same

force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.”

15. Provision is made in the Civil Procedure Code for delivery of possession of immovable property in execution of a decree and matters relating thereto. In Order 21 Rule 35 provisions are made empowering the executing court to deliver possession of the property to the decree holder if necessary, by removing any person bound by the decree who refuses to vacate the property. In Rule 36 provision is made for delivery of formal or symbolical possession of the property in occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy. Rules 97 to 101 of Order 21 contain the provisions enabling the executing court to deal with a situation when a decree holder entitled to possession of the property encounters obstruction from any person. From the provisions in these rules which have been quoted earlier the scheme is clear that the legislature has vested wide powers in the executing court to deal with all issues relating to such matters. It is a general impression prevailing amongst the litigant public that difficulties of a litigant are by no means over on his getting a decree for immovable property in his favour. Indeed, his difficulties in real and practical sense, arise after getting the decree. Presumably, to tackle such a situation and to allay the apprehension in the minds of litigant public that it takes years and years for the decree holder to enjoy fruits of the decree, the legislature made drastic amendments in provisions in the aforementioned Rules, particularly, the provision in Rule 101 in which it is categorically declared that all questions including questions relating to right, title or interest in the property arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide

such questions. On a fair reading of the rule it is manifest that the legislature has enacted the provision with a view to remove, as far as possible, technical objections to an application filed by the aggrieved party whether he is the decree holder or any other person in possession of the immovable property under execution and has vested the power in the executing court to deal with all questions arising in the matter irrespective of whether the Court otherwise has jurisdiction to entertain a dispute of the nature. This clear statutory mandate and the object and purpose of the provisions should not be lost sight of by the Courts seized of an execution proceeding. The Court cannot shirk its responsibility by skirting the relevant issues arising in the case.”

10. The issue before this Court is as to who was in lawful possession of the suit premises. From the record, it is evident that the suit premises was in possession of ‘New Man & Company’, whose proprietor is recorded as Smt. Pushpa Sharma in the records of the Sales Tax Department. Furthermore, she had been paying for the electricity and water supplies. Therefore clearly, Shri Ajay Sharma (respondent No. 2) could not be acknowledged as a tenant in the suit premises. Additionally, the tenancy receipts were in the name of ‘New Man & Company’, the proprietorship firm, yet the appellant had not impleaded neither Smt. Pushpa Sharma, the objector nor ‘New Man & Company’ or the owner of the premises Smt. V.V. Gujral as a party to the suit for restoration of possession under Section 6 of the Specific Relief Act.
11. In the cross-examination held on 20.10.2008, the petitioner had admitted that respondent No.2 and the objector were the ones who

dispossessed him from the suit property. Yet surprisingly, he did not name the objector in the FIR. He deposed that:

“On 07.02.04 I came to know that my articles were thrown out from the shop by the JD at the behest of his mother i.e. Smt. Pushpa Sharma. I only named the accused in my FIR No. 62/04. Once again in my FIR No. 409/04 I only named JD as an accused. I did not mention Smt. Pushpa Sharma in my said FIRs. I have not lodged any complaint against Smt. Pushpa Sharma.”

12. The appellant may well be a legal entrant into the suit premises but he was never a lessee or licensee but only as a salesman on commission basis because the person through whom he claims a right namely Mr. Ajay Sharma, had yet to establish his right in the premises. Therefore, no rights would accrue in his favour apropos the suit premises. As regards the contention that respondent No.2, Shri Ajay Sharma was a co-tenant in the suit premises and all the more because he had filed various original documents in the suit filed by the appellant, this Court is of the view that the same would not confer any right in favour of respondent No.2 as a co-tenant especially since the possession was with ‘New Man & Company’ of which the objector was the proprietor. Therefore, Shri Ajay Sharma, respondent No.2 did not have any right in the suit premises as a co-tenant.
13. Now, if Smt. Pushpa Sharma, the objector was the person who had dispossessed the appellant, she ought to have been made a party to the suit. Knowing fully well that she was in possession and not

having made her a party to the suit would clearly be a collusive act against her. Any order, judgment or decree seeking restoration of the premises from a third person would obviously not be binding upon Smt. Pushpa Sharma the objector, who was not a party to such proceeding which ordered restoration of possession to the appellant. Furthermore, the records have shown the proprietorship of 'New Man & Company' in the name of the objector; therefore, respondent No.2 would not have any say in the matter. This Court finds that the impugned order is based upon the facts on record and the reasoning for and the conclusion arrived at in allowing the objection of the objector is sound and a correct position in law. The consequent restoration of possession in favour of the objector/Smt. Pushpa Sharma also was justified. This Court finds no infirmity in the impugned order warranting the interference of this Court in its Appellate Jurisdiction. Accordingly, the appeal is dismissed being devoid of any merit. No orders as to costs.

DECEMBER 03, 2014
b'nesh

NAJMI WAZIRI, J.