

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

Date of Decision: August 29, 2016

+ **EX.S.A. 5/2016 & C.M.No.30380/2016 (Stay)**

PARAS RAM & ANR.

.....Appellants

Through: Mr. Neeraj Malhotra, Mr. Manish
Kumar Saryal & Mr. Ruptal
Luthra, Advocates

versus

RAJINDER KUMAR & ORS

.....Respondents

Through: Mr. Hemant Gupta &
Ms. Geetanjali Mohan, Advocates

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT
(ORAL)

1. In the restitution proceedings, trial court vide order of 3rd February, 2014 (*Annexure P-5*) has allowed the application under Section 144 CPC thereby directing appellants-plaintiffs to restore the possession of the suit property as per the site plan annexed with the plaint. Undisputedly, the suit property is measuring around 7X6 sq. ft., which is a shop on the ground floor in the suit property.

2. The First Appellate Court vide impugned order of 11th July, 2016 (*Annexure P-1*) upholds the trial court's order by observing as under:-

"14. Admittedly, appellant/JD came into the possession of the said portion on the ground floor of the property pursuant to the ex-parte decree passed by the Ld. Civil Judge. Appellants had

no independent possession of the roof of the said portion of the property nor any independent possessory right or interest was claimed. The suit property consisted of one room without there being any constructed portion on it. It is also an admitted fact that the construction was carried out by the defendants after taking possession of the same pursuant to the said room ex-parte decree was passed in the year 1995. So, once the ex-parte decree was set aside any benefit obtained by the appellants has to be restored to the respondents.

15. There is no gainsaying that respondents are not entitled to the constructed portion on the first floor and the same does not form part of the suit property. The plaintiff would have to either give the possession of the first room constructed by them after the said decree or restore the property to original status by demolishing the said constructed structure on the roof of the room (shop).”

3. The impugned order directs the respondents herein to give the necessary expenses incurred for construction of the first floor in the suit property to the appellants before taking its possession as the construction on the first floor was carried out by the appellants during the subsistence of the *ex parte* decree.

4. The challenge to the impugned order and the trial court's order by learned counsel for appellants is on the ground that respondents in the application for restitution had prayed for restoring the possession of the suit property, as shown in the site plan. It is pointed out that in the site plan, there is nothing about construction on the roof and so, the restoration has to be confined to the decree, which only talks of the property as defined in the site plan. To submit that in proceedings under Section 144 CPC, the court cannot go beyond the decree, reliance is

placed by appellants' counsel upon decision in *State of Punjab & Anr. Vs. Buta Singh* 1995 Supp (3) SCC 684. It is vehemently submitted that in the instant case both the Courts have erroneously gone beyond the decree and so, impugned order and trial court's order ought to be set aside.

5. To support the impugned order, it is submitted by learned counsel for respondents that in the earlier round of litigation between the parties, order of 4th June, 2014 (*Annexure P-6*) directs appellants herein to put the respondents back in the same status as the pre decree status and since the roof rights form an integral part of the suit property, therefore, the construction thereon has to be restituted to the respondents and thus, it is submitted that the impugned orders are perfectly legal and justified and so, this appeal deserves to be dismissed.

6. To controvert the stand on behalf of the respondents, learned counsel for appellants has drawn the attention of this Court to the possession letter (*Annexure P-11*) to show that the possession of the shop on the ground floor in the suit property was handed over by the appellants herein to the first respondent herein, who had accepted it on behalf of other respondents as well, without any murmur regarding the roof rights or construction on the roof, which is now being agitated. It is submitted by appellants' counsel that consequent upon the death of plaintiff- *Laxmi Devi*, appellants' suit has been erroneously dismissed by the trial court as abated after the *ex parte* decree was set aside and the abatement is sub-judice before the Appellate court in South-East District, Saket Courts, New Delhi. It is asserted that appellants are in possession of the room on the roof since the year 1996 and so, their dispossession from the roof by impugned order despite pendency of the abatement proceedings would be

highly prejudicial and so, impugned order is unjustified on facts, as there are good chances of appellants succeeding in get the abatement proceedings set aside.

7. Qua the possession letter (*Annexure P-11*), it is submitted by learned counsel for respondents that it was subject matter of the Regular Second Appeal, which stands withdrawn by the appellants herein vide order of 29th April, 2015 (*Annexure P-12*) in which liberty has been granted to respondents herein to take recourse to law to agitate the claim over the roof rights. Learned counsel for respondents relies upon decisions in *Kunhayammed & ors. Vs. State of Kerala & anr.* (2000) 6 SCC 359 and *State of Kerala & anr. Vs. Kondottyparambanmoosa & ors.* 2008 (11) SCALE 136 to submit that the trial court's order of 3rd February, 2014 directing restoration of the same status as per the pre-decree status gets merged with the order of 4th June, 2014 (*Annexure P-6*) of the Appellate Court and the said order has attained finality.

8. Upon considering the submissions advanced by both the sides and on perusal of the impugned order, material on record and the decisions cited, it becomes evident that upon strict interpretation, respondents are entitled to be restored to the pre-decree status only. Admittedly, at the time of passing of the decree, there was no construction over the terrace. It was raised after the decree was passed in favour of appellants who are residing in small portion above the terrace for last about two decades. It is no doubt true that in the absence of anything to the contrary, the roof right is integral part of the decreed portion of the suit property. However, since the rights of the parties are required to be established after a contest, therefore, it is deemed equitable to ensure to get the abatement

proceedings expedited, as in the event of appellants succeeding in the abatement proceedings, the *status quo* in respect of construction over the terrace is required to be maintained during the pendency of the suit. Such a view is being taken in the peculiarity of this case, as possession letter (*Annexure P-11*) is conspicuously silent about the roof rights. The respondents without any protest have already obtained possession of the decreed suit property.

9. The substantial question of law which arises in this appeal is whether Executing Court can go beyond the decree? The dispute now only remains about the construction over the terrace. The order in the earlier round of litigation requires respondents to be put in the pre-decree status, which has been done. The literal interpretation of the fact situation made in the impugned order appears to be quite harsh in the background facts of this case. Otherwise also, it is a settled legal position that the Executing Court cannot go beyond the decree. Undisputedly, the decree is in respect of the ground floor of the suit property. So far as first floor of the suit property (*which was constructed after the decree is passed*) is concerned, a pragmatic approach needs to be adopted to balance the equities and to ensure an even handed contest between the parties, which is yet to take place.

10. Technically, since the suit proceedings are not pending as abatement proceedings are subjudice before the Appellate Court, therefore, to adopt an equitable approach, impugned order cannot be allowed to stand. Accordingly, the impugned order is set aside so far it requires appellants to restore possession over the terrace to the respondents after obtaining the cost of construction from the respondents.

The appropriate approach in such a situation would be to permit the appellants to remain in possession of the constructed portion over the terrace in the suit property during the pendency of the abatement proceedings subject to their furnishing an undertaking by way of affidavit that in the event of abatement proceedings attaining finality, appellants shall pay the market rent of the constructed portion over the terrace to the respondents from date of abatement till upholding of abatement, if it so happens and the execution of their undertaking shall forthwith take place if they do not succeed in the abatement proceedings. In the event of appellants succeeding in the abatement proceedings, *status quo* qua their possession over the construction on the terrace shall prevail during pendency of the suit proceedings without any rider.

11. Consequentially, the substantial question of law raised in this appeal is answered in view of dictum of Supreme Court in *Buta Singh (Supra)* with reiteration that Executing Court cannot go beyond the decree. In the peculiarity of facts and circumstances of this case, the Appellate Court at South East District, Saket Courts, New Delhi shall render the decision qua the abatement proceedings within three months from the date already fixed in the appeal.

12. With aforesaid directions, this appeal and application are disposed of while not commenting on the merits of the case.

(SUNIL GAUR)
JUDGE

AUGUST 29, 2016

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