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

+ EFA(OS) 36/2015 and CM No. 16425/2015

ANIL GULATI

..... Appellant

Through: Mr Mehul Gupta, Adv.

versus

PROMILA GULATI

..... Respondent

Through: Mr Rajiv Bajaj, Adv.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

ORDER

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23.02.2016

1. This Court notices that the present appeal is directed against the order of the learned Single Judge directing issuance of warrants for handing over of the possession of the suit property to the Decree Holder.

2. The appellant was arrayed as defendant in a suit for mandatory injunction. He urged that the plaintiff/Decree Holder was in reality a *Benami* owner of the suit property, besides other pleas urged on his behalf. The learned Single Judge by final judgment and order decreed the suit—for mandatory injunction on 12.02.2015 (in CS(OS) No.1381/2010). The appellant/Judgment Debtor's appeal (RFA (OS) No.37/2015) failed and was dismissed. It is not in dispute that the appellant has approached the Supreme Court in Special Leave Petition (C) No.30891/2015 (Anil Gulati vs. Promila Gulati). In that

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petition, the Supreme Court by its order dated 06.11.2015 directed as follows:-

“Issue notice. Mr. Rajiv Bajaj, learned counsel accepts notice on behalf of respondent.

The status quo with regard to the possession of the property, as on today, shall be maintained. However without prejudice to the contentions available to the petitioner, he is directed to deposit an amount of Rs. 12,00,000/- (Rupees Twelve Lakhs) with the Trial Court within a period of one month. On such deposit, the respondent is permitted to withdraw the same on furnishing security to the satisfaction of the Court.

Post on 07.12.2015.”

3. It is urged by the appellant that the impugned order was in error inasmuch as the learned Single Judge could not have issued warrants of possession under Order 21 Rule 35. He relied upon the decision of this Court in ***Sarup Singh vs. Daryodhan Singh*** AIR 1972 Delhi 142 (FB) which had indicated that a decree for mandatory injunction cannot result in warrants of possession—which is covered by Order 21 Rule 35 as opposed to Order 21 Rule 32 CPC which applies to decrees for injunction.

4. We notice that the decision in ***Sarup Singh*** (*supra*) was taken into consideration when this Court issued notice and directed *status quo* in the matter initially. The law (as it stood, (i.e., Order 21 Rule 32) CPC at the stage when ***Sarup Singh*** (*supra*) was decided, read as follows:-

“32. Decree for specific performance for restitution of conjugal rights, or for an injunction.- (1) Where the

party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has willfully failed to obey it he decree may be enforced (in the case of decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction) by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed in a corporation the decree may be enforced by the attachment of the property of the corporation or with the leave of the court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force (six months) ,if the judgment debtor has not obeyed the decree and the decree holder has applied to have attached property sold, such property may be sold; and out of the proceeds the court may award to the decree holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment debtor on his application.

(4) Where the judgment debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of (six months) from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the

court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree holder or some other person appointed by the court, at the cost of the judgment debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and may be recovered as if they were included in the decree.

5. After the judgment in **Sarup Singh** (*supra*) in light of the recommendations of the Law Commission, the provision, i.e., Order 21 Rule 32 was amended and an explanation inserted which reads as follows:-

“Explanation.—For the removal of doubts, it is hereby declared that the expression “the act required to be done” covers prohibitory as well as mandatory injunction.”

6. The effect of the explanation—as well as the earlier view in **Sarup Singh** (*supra*)—was considered by the Punjab and Haryana High Court in **Gurcharan Singh and Anr. vs. Gurudwara Shri Singh Sabha** AIR 2004 P&H 207. The Court pertinently observed as follows:-

“The expression 'act required to be done' has, been extended to prohibitory as well as mandatory injunctions. The view taken by the Full Bench of Delhi High Court has been treated as a narrower view because that was a case, in which the decree against the licensee was to quit and vacate the premises but the High Court by taking a narrower view expressed its inability to invoke Order 21 Rule 32(5). Therefore, the question posed by the Law Commission, which led to the recommendation for

adopting wider view has been accepted by inserting explanation to Sub-rule (5). The decree-holder is not required to file another suit when he has already acquired a decree in his favour by spending much time and expense. The Court, therefore, would be fully competent to direct that the act required to be done may be done so far as practicable either by the decree-holder himself or by some other person appointed by the Court at the cost of judgment-debtor. In the instant execution of the decree for mandatory injunction, where the possession is sought from a licensee. The aforesaid order is consistent with the spirit of law and the explanation added as per the recommendation made by the Law Commission. The direction to vacate the premises situated in the Gurudwara Sahib where the judgment-debtor petitioners were allowed to stay being the sewadars is another form and method to direct hand over of possession.

7. The same view was reiterated later by the Punjab and Haryana High Court in ***Prem Chand vs. Smt. Kamla Devi and Anr.***, Civil Revision No.5553/2008, decided on 18.08.2009. The Court took into account ***Sarup Singh's*** case (*supra*), ***Gurcharan Singh*** (*supra*) and the changes to the Civil Procedure Code. The Court then held as follows:-

“Learned counsel for the petitioner, however, urges that the warrants of possession are liable to be set-aside for the short reason that the same have been issued under Rule 35 which provides procedure for execution of a decree for immovable property which, according to the learned counsel, would mean the execution of a ‘decree of possession’ only. His contention is that Rule 35 CPC does not apply to a decree for mandatory injunction. The

contention cannot be accepted for more than two reasons. Firstly, wrong mentioning of the provision of law does not invalidate an action, if otherwise permissible under an other provision of law. Since the Executing Court was competent to issue warrants of possession under Order 21 Rule 32 (5) CPC, mere mentioning of Rule 35 CPC in the warrant of possession, does not render the process without jurisdiction. Secondly, it appears to me that the scope of Rule 35 also cannot be restrictively construed to be confined to the execution of a decree for possession only. Sub Rule (1) of Rule 35 CPC says that "where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged.....". The nature of decree shall, thus, determine as to whether or not Rule 35 can be invoked. Where a decree of mandatory injunction expressly commands the judgment-debtor to deliver possession of an immovable property, there is nothing to preclude the Executing Court from pressing Rule 35, Order 21 CPC into aid to give effect to the decree."

8. This Court is of the opinion that since the appellant has suffered a decree which was upheld even in appeal, the technical argument urged on his behalf about the form of the decree cannot be accepted, especially in view of the changed law by virtue of amendment brought in after the Full Bench judgment. The appeal, therefore, cannot succeed on merits.

9. This Court had earlier noticed the *status quo* order to the benefit of the present appellant by virtue of the Supreme Court order dated 06.11.2015. In the circumstances, the learned Single Judge is duty-bound not to go ahead and take further steps in the execution

proceedings till the Supreme Court finally decides the Special Leave Petition (preferred by the appellant) before it. It goes without saying that in the event the Supreme Court grants any relief to the appellant, the Executing Court would be bound by it and would give full effect to it. On the other aspects as to the inexecutability of the decree, this Court has already decided upon the merits.

The appeal is disposed of in the above terms.

S. RAVINDRA BHAT, J

DEEPA SHARMA, J

FEBRUARY 23, 2016

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