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

\+ CM(M) No.1220/2013 & CM No.17876/2013 (for stay) and CM No.8755/2016 (u/O XXII R-4 CPC).

VIJAY NANDA & ANR. ..... Petitioners

Through: Mr. Shailendra Paul, Adv.

Versus

RAMESHWAR PAL NANDA & ORS. ..... Respondents

Through: Mr. Vinod Tyagi, Adv. for R-1.
Mr. Harish Katyal, Adv. for R-2.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **20.11.2017**

1. The following order was passed in this petition on 9th November, 2017 after hearing the appearing counsels:-

> *"1. This petition, under Article 227 of the Constitution of India, impugns the order [dated 22nd July, 2013 in Ex.M.No.14/2012 of the Court of Additional District Judge-01 (ADJ), District Central, Tis Hazari Courts, Delhi] dismissing the application of the two petitioners viz. Vijay Nanda and Atul Nanda under Section 144 read with Section 151 of the Code of Civil Procedure, 1908 (CPC).*
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> *2. The petition was entertained and notice thereof ordered to be issued. Though all the respondents are reported to be served but only the counsel for respondent no.2 Excel Industries Pvt. Ltd. (supposedly incorrect for Excel Industries Ltd.) and the counsel for the respondent no.1 Rajni Kapoor appear.*
>
> *3. The counsels have been heard.*
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> *4. What emerges is as under:*
>
> *(i) one Rameshwar Pal Nanda instituted a suit against Excel Industries Ltd. for ejectment of Excel Industries Ltd. from Flat No.904, 9th Floor, Ansal Bhawan, 16 Kasturba Gandhi Marg, New Delhi, for recovery of arrears of rent and for recovery of*

mesne profits;

(ii) *the said suit was decreed ex parte for the relief of ejectement as well as for the reliefs of recovery of arrears of rent and for mesne profits;*

(iii) *the aforesaid Rameshwar Pal Nanda filed for execution of the aforesaid decree;*

(iv) *Excel Industries Ltd. filed an application under Order IX Rule 13 of the CPC for setting aside of the ex parte decree;*

(v) *the said Rameshwar Pal Nanda died during the pendency of the aforesaid proceedings;*

(vi) *the said Rameshwar Pal Nanda was unmarried and issueless and Rajni Kapoor aforesaid is his sister and the two petitioners and the respondents no.3(a) to (g) in this petition are his other living brothers, sisters and heirs of the other brothers and sisters who have since died, of the said, of the said Rameshwar Pal Nanda;*

(vii) *Rajni Kapoor claims that Rameshwar Pal Nanda left a Will bequeathing the aforesaid flat in favour of Rajni Kapoor exclusively; the counsel for Rajni Kapoor on enquiry states that under the said Will, the other decretal amounts also have been bequeathed to Rajni Kapoor only;*

(viii) *Rajni Kapoor applied for substitution in place of Rameshwar Pal Nanda in the pending proceedings aforesaid but the Court, instead of substituting Rajni Kapoor only, substituted all the natural heirs i.e. the petitioners and the respondents no.3(a) to (g) as well, in place of Rameshwar Pal Nanda;*

(ix) *Sant Kumar Kapoor, being the husband of Rajni Kapoor, filed Test Case No.4/2000 in this Court for probate of the document claimed to be the Will of Rameshwar Pal Nanda and in which document Sant Kumar Kapoor was named as the executor;*

(x) notice of the aforesaid Probate Case also was issued to the petitioners and respondents no.3(a) to (g) and some of them have filed objections to the said Probate Case and which are still pending adjudication;

(xi) the application aforesaid of Excel Industries Ltd. under Order IX Rule 13 of the CPC was dismissed and the appeal preferred thereagainst was also dismissed as abated and upon Excel Industries Ltd. approaching the Supreme Court against orders on their application for setting aside of the abatement and restoration of appeal etc., the said proceedings were disposed of on the undertaking of Excel Industries Ltd. to hand over possession of the flat;

(xii) Execution Petition aforesaid filed by Rameshwar Pal Nanda was not pursued and after the dismissal orders aforesaid of the High Court in the appeals / applications preferred by Excel Industries Ltd., Rajni Kapoor applied for execution of the decree; and,

(xiii) in the said execution, Excel Industries Ltd., in terms of the undertaking given before the Supreme Court, handed over possession of the flat to Rajni Kapoor and on 30th April, 2012 a settlement was arrived at between Excel Industries Ltd. and Rajni Kapoor whereunder Rajni Kapoor accepted an amount of approximately Rs.21.84 lacs as against the decretal amount due according to the counsel for the petitioners herein of over Rs.70 lacs.

5. The petitioner herein filed the application aforesaid under Section 144 read with Section 151 of the CPC alleging collusion between Rajni Kapoor and Sant Kumar Kapoor on the one hand and Excel Industries Ltd. on the other hand and seeking the relief of recall of the order dated 30th April, 2012 in the Execution Proceedings aforesaid filed by Rajni Kapoor recording the settlement arrived at between Rajni Kapoor on the one hand and Excel Industries Ltd. on the other hand and *for revival of the Execution Petition.*

6. The counsel for the petitioners has argued i) that in the Probate Case aforesaid, Sant Kumar Kapoor was represented by the same advocate who was representing Rajni Kapoor in the Execution Proceedings aforesaid in which compromise was arrived at; ii) that in the Probate Case aforesaid, an order was passed appointing an Administrator for taking steps for executing the decree aforesaid; and, iii) however, instead of allowing the Administrator to execute the decree, Rajni Kapoor was who fully aware of the order of appointment of the Administrator, from her husband who was the petitioner in the Probate Case and also from the advocate who was common to both the proceedings, surreptitiously filed for execution and of the decree as acted to the detriment of the estate of Rameshwar Pal Nanda.

7. The counsel for Rajni Kapoor firstly contended that against an order on an application under Section 144 of the CPC, an appeal under Section 96 of the CPC lies. Reliance is placed on ***Gnanada Sundari Mojumdar Vs. Chandra Kumar De*** *AIR 1927 Calcutta 285,* ***Sheonandanlal Gurudayal Shrivastava Vs. Gopal babaji Nafde*** *AIR 1943 Nagpur 172 and* ***Gopal Laskar Vs. Harihar Mukherjee*** *AIR 1948 Calcutta 37. It is further contended that even where the application is nomenclatured as under Section 151 CPC but is filed on the analogy of jurisdiction under Section 144 of the CPC, even then an appeal would be maintainable. It is argued that since the order impugned in this petition under Article 227 of the Constitution of India is appealable, the petition under Article 227 would not lie.*

8. Section 144 of the CPC titled "Application for restitution" provides that ***"****where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which* *they would have occupied but for such decree or order..........."*

9. *On a reading of the said provision, though the petitioners nomenclatured their application, against dismissal whereof this petition has been preferred, as under Section 144 of the CPC, Section 144 of the CPC is not found to be applicable in the facts aforesaid. Here, all that the petitioners are claiming is that the compromise arrived at by Rajni Kapoor with the judgment-debtor does not bind the estate of Rameshwar Pal Nanda inasmuch as Rajni Kapoor was not entitled to arrive at a settlement with the judgment-debtor and to the detriment of the estate.*

10. *Thus, this petition filed under Article 227 of the Constitution of India is indeed maintainable.*

11. *Even otherwise, the Rule of availability of alternative remedy being a bar to exercise of constitutional remedy is not an absolute rule and is a rule of discretion. If this Court finds indeed a course correction to be required in the proceedings within the supervisory jurisdiction of this Court and / or any party to the litigation abusing the process of the Courts, as appears to be the case, the Court can certainly interfere.*

12. *I have thus enquired from the counsel for Rajni Kapoor, whether he has any other argument.*

13. *The counsel for Rajni Kapoor next contends that this petition has abated. It is argued that respondent no.3(e) Jai Pal Nanda died on 12th November, 2015 and though an application has been filed by the petitioners for substitution of his legal heirs, but belatedly and the same is still pending and has not been allowed and no application has been filed for setting aside of the abatement.*

14. *This petition arises from a proceeding in execution of a decree.*

15. *The counsel for Rajni Kapoor, on enquiry, agrees that in execution proceedings and in appeals arising therefrom, the rule of abatement on death does not lie. He however contends that the said Rule will apply to a petition under Article 227 of the Constitution of India arising from execution proceedings.*

16. The said argument belies logic. If to execution proceedings and to appeals arising from execution proceedings, the rule of abatement does not apply, it is incomprehensible as to why, where no remedy of appeal is provided, leaving the jurisdiction under Article 227 to be invoked, would the rule of abatement apply.

17. I have again asked the counsel for Rajni Kapoor as to under what authority Rajni Kapoor settled with the judgment-debtor, particularly when on the application of the husband of Rajni Kapoor and represented by the same advocate, the Probate Court had appointed an Administrator to do what Rajni Kapoor herself did. On enquiry, it is informed that Rajni Kapoor is also a party to the Probate Case.

18. The counsel for Rajni Kapoor states that Rajni Kapoor derived the authority from the order of the Supreme Court and from the order in the Probate Case. It is contended that before the Supreme Court, only Rajni Kapoor was pursuing the proceedings. However, on enquiry, it is stated that the petitioners as well as the respondents no.3(a) to (g) also were substituted in place of deceased Rameshwar Pal Nanda in the proceedings before the Supreme Court and it is not as if the Supreme Court altered the decree from to that in favour of the estate of Rameshwar Pal Nanda to that in favour of Rajni Kapoor or accepted the undertaking of Excel Industries Ltd. to deliver possession to Rajni Kapoor or authorised Excel Industries Ltd. to settle with Rajni Kapoor. Similarly, it is vaguely suggested that in the Probate Case, the petitioners and the respondents no.3(a) to (g) were restrained from dealing with the estate of Rameshwar Pal Nanda. However, it is clarified that so was Rajni Kapoor restrained.

19. At this stage, the counsel for Rajni Kapoor states that he has no objection upon balance decretal amount being recovered from Excel Industries Ltd.

20. I have enquired as to who is in possession of the flat.

21. At first, it was stated by the counsel for Rajni Kapoor that Rajni Kapoor is in possession of the flat. However subsequently, it is stated that the flat is in possession of a *tenant. On enquiry, it is stated that it is not known who is the tenant and at what rent and to whom the tenant is paying the rent. It is stated that neither Rajni Kapoor nor her husband Sant Kumar Kapoor are present in Court.*

22. Difficulty is expressed as regards appearance of Rajni Kapoor in this Court.

23. In this view of the matter, Sant Kumar Kapoor to appear before this Court tomorrow i.e. 10th November, 2017, to also explain as to why he should not be proceeded against for acting in contravention of the order in the Probate Case and to also explain on behalf of Rajni Kapoor as to why Rajni Kapoor, in addition to the judgment-debtor Excel Industries Ltd. be not made liable for restoring the prejudice which has been caused to the estate of Rameshwar Pal Nanda.

24. I have then enquired from the counsel for Excel Industries Ltd. as to under which law and authority Excel Industries Ltd. can be said to be discharged of its liability under the decree.

25. In my view, a liability under the decree cannot be said to be discharged on the judgment-debtor settling with a person who is not authorized to represent the estate.

26. The counsel for Excel Industries Ltd. states that since the execution petition was filed only by Rajni Kapoor, therefore Excel Industries Ltd. was entitled to settle with Rajni Kapoor.

27. Order XXI of the CPC provides for the manner in which a decree is discharged and if the judgment-debtor seeks to discharge the decree in any other manner, the same cannot wipe out the liability under the decree.

28. However, instead of wasting any further time today, it is deemed appropriate to allow the counsel for Excel Industries Ltd. to also come with a positive reply tomorrow which is supported by law and not in the air.

29. I am, at this stage, refraining from asking the counsel who obtained contradictory orders in the two proceedings to also explain.

30. The counsel for Rajni Kapoor then contends that though at one point of time Rajni Kapoor was also injuncted from dealing with the estate but on an application being made to the effect that she was required to pursue the proceedings before the High Court and the Supreme Court, she was allowed to deal with the property.

31. I have enquired from the counsel for Rajni Kapoor whether the aforesaid was prior to the appointment of the Administrator or subsequently.

32. The answer is, prior to the appointment of the Administrator.

33. Once that is so, the Probate Court having vested the authority to execute the decree in favour of the Administrator, Rajni Kapoor was barred from executing the decree.

34. The counsel for Rajni Kapoor next contends that three Administrators appointed successively did not act.

35. That also, in my view, will not entitle either Rajni Kapoor or the advocate who was the advocate in the Probate Case to take the law into their own hands.

36. The next contention is that applications were filed by Excel Industries Ltd. as well as by the petitioners in the Probate Case to the effect that Rajni Kapoor did not have any authority to pursue the Execution Petition and which were dismissed. On enquiry, it is stated that the said orders were after the appointment of the Administrator.

37. The counsel for Rajni Kapoor is searching his papers in this regard.

38. List tomorrow i.e. 10th November, 2017 at 1500 hours."

2. The matter could not be taken up on 10th November, 2017 and was adjourned to today. Mr. Sant Kumar Kapoor is present in person. The counsels have been further heard.

3. The counsel for the petitioners has drawn attention to the order dated

21st January, 2011 in the Execution Petition filed by Rajni Kapoor dismissing the objection of Excel Industries Ltd. that Rajni Kapoor was not entitled to execute the decree because in Test. Cas. No.4/2000 Shri A.K. Sangar, former Registrar, Delhi High Court was appointed as the Administrator to execute the decree and to take steps for execution of warrants of possession and Rajni Kapoor directed to assist the Administrator in taking over possession.

4. The counsel for the petitioners has also handed over in the Court a copy of the order dated 31st January, 2011 in SLP(C) No.1432/2011 preferred by Excel Industries Ltd., issuing notice of the said petition and contends that it is evident from the said order that the counsel who is appearing for Rajni Kapoor and her husband Sant Kumar Kapoor accepted notice on behalf of all the respondents to the SLP i.e. the petitioners and the respondents no.3(a) to (g)/their predecessors as well. Copy of the order dated 4th November, 2011 in the aforesaid SLP dismissing the SLP granting six months' time to Excel Industries Ltd. to vacate the property is also handed over. It is the contention of the counsel for the petitioners that the counsel for Rajni Kapoor and her husband Sant Kumar Kapoor misrepresented himself to be acting on behalf of the petitioners and the respondents no.3(a) to (g) as well and had he not accepted notice on behalf of the petitioners and respondents no.3(a) to (g), the petitioners and respondent no.3(a) to (g)/their predecessors, on receipt of notice from the Supreme Court, would have been in the know of the happenings.

5. The counsel for the petitioners has next drawn attention to the application dated 30th April, 2012 of Rajni Kapoor duly accompanied by affidavit of Rajni Kapoor and moved through the same Advocate who was

appearing for her husband Sant Kumar Kapoor also, withdrawing the execution by settling with Excel Industries Ltd. as aforesaid. It is argued that Rajni Kapoor and her husband Sant Kumar Kapoor were working in tandem. Attention is also invited to para 4 of the said application whereby Rajni Kapoor has agreed to not press the contempt proceedings filed in this Court against Excel Industries Ltd. and its Directors; it is informed that the said contempt proceedings were filed by Sant Kumar Kapoor. The counsel for the petitioners has next invited attention to the reply, filed by Rajni Kapoor before the Executing Court, to the application of the petitioners under Section 144 of the CPC stating that Rajni Kapoor was the only contesting respondent in the SLP preferred to the Supreme Court by Excel Industries Ltd. It is argued that the said averment is also false inasmuch as the Advocate for Rajni Kapoor as aforesaid accepted notice on behalf of the petitioners and respondents no.3(a) to (g)/their predecessor as well. Attention is also invited to the stand of Rajni Kapoor in para 15 of the said reply where Rajni Kapoor admitted that notice of execution preferred by her and in which Rajni Kapoor settled with Excel Industries Ltd., was not issued to the petitioners and respondents no.3(a) to (g). It is thus the contention of the counsel for the petitioners that it is a clear case of the Administrator Sant Kumar Kapoor having mal-administered to the benefit of himself and his wife Rajni Kapoor.

6. The counsel for Rajni Kapoor has in Court handed over list of dates and copies of:-

(i) the order dated 20th May, 2004 of dismissal of CRP No.313/1999 titled ***Rajender Pal Nanda Vs. Rajni Kapoor*** and on a reading whereof it appears that the petitioners therein were seeking stay of execution and it was the contention of the counsel for the Rajni Kapoor that the petitioners therein were colluding with the tenant and substance was found wherein; the Revision Petition was dismissed observing that "all questions pertaining to the rights in respect of removal of property are now the subject matter of a Probate case No.5/2000 pending in this Court .... would now have to be adjudicated by the probate Court";

(ii) Order dated 17th January, 2000 in Probate Case No.4/2000 directing *status quo* to be maintained in respect of flat aforesaid;

(iii) Order dated 7th March, 2000 in Probate Case No.4/2000 modifying the earlier order dated 17th January, 2000 by directing *status quo* to be maintained by the respondents no.2 to 9 therein only;

(iv) Order dated 10th January, 2007 in Test Case No.4/2000 making the interim order dated 7th March, 2000 absolute till the disposal of the case;

(v) Lease Deed dated 26th May, 2009 between the two petitioners Vijay Nanda and Atul Nanda and the respondent no.3d on the one hand and Excel Industries Ltd. on the other hand of the aforesaid flat w.e.f. 1st June, 2009;

(vi) Order dated 23rd April, 2010 of the Additional District Judge (Central), Delhi of dismissal of objections filed by Rajender Pal Nanda; and,

(vii) my order dated 6th February, 2013 in Test. Cas.4/2000 directing the applications under Order XXXIX Rule 2A of the CPC and CCP filed therein to be taken up for consideration at the time of final arguments.

7. The counsel for Excel Industries Ltd. has argued, (i) that none else except Rajni Kapoor came forward to take possession of the flat and hence possession was given to whosoever came forward; (ii) that Rajni Kapoor unilaterally withdrew the Execution Petition and there was no compromise; (iii) that Excel Industries Ltd. was not aware of the orders or proceedings in the Probate Case; and, (iv) that Excel Industries Ltd. will pay balance decretal amount if Sant Kumar Kapoor/Rajni Kapoor fail in Test. Cas. No.4/2000.

8. Having given thought to the matter, I am of the view

(i) that the decree, from execution whereof these proceedings arise, cannot certainly be said to be satisfied; Excel Industries Ltd. also admits that the entire decretal amount has not been paid; it cannot thus escape liability merely because an unauthorised person who had sought execution withdrew the Execution Petition or made a statement in the Executing Court that the entire decree stood satisfied;

(ii) as far as the contention of the counsel for Excel Industries Ltd., that the balance decretal amount will be deposited in the event of Rajni Kapoor/Sant Kumar Kapoor failing in the Test. Cas.4/2000 is concerned, though certainly in the event of Rajni Kapoor/Sant Kumar Kapoor succeeding, the petitioners/respondents no.3(a) to (g) cannot recover the balance decretal amount from Excel Industries Ltd. but certainly the deposit by Excel Industries Ltd. of the balance decretal amount in the Court cannot be ordered to await the outcome of Test. Cas. No.4/2000; in this fast changing corporate world, the companies also change their constitution from time to time, it is thus deemed expedient that Excel Industries Ltd. deposits the balance decretal amount forthwith subject to the same remaining deposited subject to the outcome of Test. Cas.4/2000;

(iii) the conduct of Excel Industries Ltd. cannot be said to be above board. They are found to have taken objection of Rajni Kapoor, who had filed execution, being not authorised to execute the decree, Rajni Kapoor was merely directed to render assistance to the Administrator in having the warrants of possession issued; Excel Industries Ltd. was directed to deliver possession to the Administrator; Excel Industries Ltd. however handed over possession to Rajni Kapoor instead of to the Administrator; it was open to Excel Industries Ltd. to move an application in Test. Cas.4/2000, offering to deliver possession to whomsoever the Court may authorise. Excel Industries Ltd. however, owing to some understanding which they appeared to have arrived at with Rajni Kapoor, delivered possession to Rajni Kapoor and also paid part of the decretal amount to her; and,

(iv) as far as the conduct of Rajni Kapoor/Sant Kumar Kapoor and their Advocate is concerned, it is not deemed appropriate to deal with the matter in this proceeding; it will be open to the petitioners to, in the Test. Cas., seek appropriate relief in this regard.

9. The petition is thus disposed of with a direction to Excel Industries Ltd. to, on or before 31st March, 2018, deposit the balance decretal amount, instead of in the Executing Court, in this Court in which Test. Cas.4/2000 is also pending. The said amount be kept in a maximum interest bearing deposit. In the event of Rajni Kapoor/Sant Kumar Kapoor succeeding in Test. Cas.4/2000, subject to any order in appeal, Excel Industries Ltd. shall be entitled to, after one month of the decision in the said Test. Cas., to refund of the amount deposited along with interest. However if Rajni Kapoor/Sant Kumar Kapoor fail in the Test. Cas., then the petitioners shall be entitled to seek appropriate directions in the Test. Cas. for disbursement of the amount so deposited with interest. As far as the matter of Rajni Kapoor taking possession of the flat and re-letting the same is concerned, the petitioners and respondents no.3(a) to (g) will have liberty to seek necessary directions in the Test. Cas.

10. The Trial Court record requisitioned in this Court be returned forthwith.

RAJIV SAHAI ENDLAW,J

NOVEMBER 20, 2017

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(Corrected and released on 20th February, 2018).

P.S. – After the order was corrected and signed, copy of an application dated 18th December, 2017 filed by Rajni Kapoor seeking to place additional documents on record was received from the Registry.