



C.R.P. (NPD) No.2361 of 2021

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

|                                       |                                         |
|---------------------------------------|-----------------------------------------|
| Date of Reserving Order<br>29.10.2021 | Date of Pronouncing Order<br>29.11.2021 |
|---------------------------------------|-----------------------------------------|

CORAM:

**THE HONOURABLE Mr. JUSTICE G.CHANDRASEKHARAN**

C.R.P.(NPD)No.2361 of 2021

and

CMP.No.17902 of 2021

P.D.Sivaji

...Petitioner

Versus

P.D.Balaji

...Respondent

**PRAYER:** Civil Revision Petition filed under Section 115 of Civil Procedure Code, to allow the Civil Revision Petition and set aside the fair and decreetal order dated 09.09.2021 passed in E.P.No.779 of 2018 in O.S.No.5253 of 2010 on the file of the IX Assistant Judge, City Civil Court, Chennai.

For Petitioner : Mr.A.Palaniappan

For Respondent : Mr.AR.L.Sunderesan  
Senior Advocate  
for Mr.N.Sivaprakash



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## **ORDER**

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This Civil Revision Petition is filed challenging the order dated 09.09.2021 passed in Execution Petition No.779 of 2018 in O.S.No.5253 of 2010 on the file of IX Assistant Judge, City Civil Court, Chennai.

2. The learned counsel for the petitioner submitted that the respondent filed a suit in O.S.No.5253 of 2010 for the relief of

a) mandatory injunction directing the defendant to vacate and hand over vacant possession of the entire first floor at the old door No.1/31, then door No.50, and present door No.127/2, Perumal Mudali Street, Royapettah, Chennai-14.

b) permanent injunction in respect of this property against the defendant from interfering with his possession and enjoyment.

c) permanent injunction against the defendant from interfering with respondent's rights to reach the aforesaid property through ground floor portion at the old door No.1/31, then door No.50, and present door No.127/1, Perumal Mudali Street, Royapettah, Chennai. and for other reliefs.



3. Petitioner contested this suit. The Trial Court partly decreed the suit granting permanent injunction restraining the petitioner/defendant from interfering respondent's right to reach first floor in door No.127/2 through ground floor portion in door No.127/1. With regard to the other reliefs, the suit was dismissed.

4. Respondent filed appeal in A.S.No.49 of 2013. The learned Appellate Judge reversed the judgment of learned Trial Judge with regard to the dismissal of other reliefs and allowed the appeal. Petitioner filed Second Appeal in S.A.No.218 of 2015 and that was also dismissed. Respondent filed E.P.No.779 of 2018 under Order XXI Rule 35 of Civil Procedure Code for delivery of the property. The suit was filed for mandatory injunction and permanent injunction. Execution petition ought to have been filed for the reliefs provided under Order XXI Rule 32 Civil Procedure Code. The suit was not filed for the relief of recovery of possession. But the respondent filed the execution petition under Order XXI Rule 35 Civil Procedure Code for delivery of immovable property. Since, the decree is not for delivery of immovable property, execution petition cannot be filed under Order XXI Rule 35 Civil Procedure Code. Under Order XXI Rule 32 Civil Procedure Code respondent can only ask for the detention of the petitioner in Civil Prison or for attachment



of his property or by both. When there is no decree for delivery of the property, filing of execution petition under Order XXI Rule 35 cannot be entertained and the execution petition is liable to be dismissed. In support of his submissions, he relied on the judgment reported in **AIR 1972 Delhi 142 (Sarup Singh Vs. Daryodhan Singh)** for the proposition that in execution of a decree in a suit for mandatory injunction, warrants for possession cannot be issued. The relevant portion reads as follows:

*"It is not open to a party to claim the use of the machinery of the execution department of the Court to seek any further or other relief for fulfillment of his object which is not permitted by law. We, therefore, hold that a decree for injunction granted in this case is to be executed by the Court below in the manner provided by sub-rules (1) and (3) of Rule of 32 of Order XXI of the Code and not by issue of a warrant for delivery of possession in accordance with Rule 35 and the impugned order of the execution Court below is without jurisdiction".*

It has been held in this case that "where a party is content to seek a decree for injunction to vacate rather than delivery of possession in a suit, he has to face its logical consequences and he can have the decree executed only in the manner provided by Order XXI Rule 32 Civil Procedure Code and the issue of warrant for delivery of possession in execution of a decree for injunction is not justified



either by Order XXI Rule 35 Civil Procedure Code or Clause (e) of Section 51 of Civil Procedure Code, as it is impossible to convert a suit and a decree for injunction into a suit and a decree for recovery of possession and afford a different relief in the execution."

5. In response, the learned counsel for the respondent, submitted that the issues now raised by the learned counsel for the petitioner were raised before the Trial Court and the Appellate Courts. The Appellate Court negatived the plea and passed a decree for mandatory injunction directing the petitioner to hand over the possession of the suit property to the respondent. In the Second Appeal a substantial question of law was also framed, as to whether the suit for mandatory injunction without seeking recovery of possession is maintainable. That substantial question of law was found against the petitioner and the Second Appeal was dismissed. Petitioner has also filed E.A.No.2985 of 2018 under Section 47 of Civil Procedure Code challenging executability of the decree. That petition was also dismissed on 11.12.2020. When the Court ordered delivery, this petition was filed raising a new ground. The suit was filed in the year 2010. At every stage of the proceedings, petitioner is resorting to delaying tactics. This is yet another attempt to challenge the decree on the ground that respondent cannot seek for delivery of the possession. The learned



IX Assistant Judge, City Civil Court, Chennai has rightly rejected the contention

of the petitioner and ordered delivery. In the case before hand, first Appellate Court specifically granted the decree directing the petitioner to hand over possession of the suit property to the respondent. Thus, the judgment relied by the learned counsel for the petitioner is not applicable to the facts and circumstances of this case. Therefore, the learned counsel for the respondent prayed for confirming the order of the learned IX Assistant Judge, City Civil Court, Chennai and for dismissal of this Civil Revision Petition.

6. Considered the rival submissions and perused the records.

7. Admittedly, the respondent filed the suit for mandatory injunction and seeking direction to the petitioner to vacate and hand over the possession of the A schedule property and for permanent injunction, in respect of A Schedule property and B schedule property. The suit was not not filed for the recovery of possession. The suit was dismissed by the Trial Court insofar as the prayer for mandatory injunction in respect of A schedule property. In appeal, the judgment of the Trial Court was reversed and the learned Appellate Judge directed the petitioner to vacate the A schedule property and hand over vacant possession of A schedule property to the respondent.



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8. As rightly pointed out by the learned counsel for the respondent in Second Appeal filed by the petitioner a specific substantial question of law was framed as to "whether the suit as prayed for mandatory injunction without seeking for recovery of possession is maintainable", along with other two substantial questions of law. While answering, this Court found that,

*"7. there is no dispute on facts. Both the parties admitted the settlement deeds. Therefore, first floor goes to the respondent/plaintiff absolutely and so is the case of the ground floor in favour of the appeallant/defendant. The appellant/defendant was given permissive possession by the grandmother is also not in dispute. Therefore, the question as to whether the appellant is in partial possession or complete possession of the first floor is totally irrelevant. Admittedly, the first floor belongs to the respondent/plaintiff. The issuance of legal notice Ex. A6 is not in dispute. When once the statement of the appellant is very clear, being a permissive occupant, there is absolutely no legal right in his favour. In the legal notice, the respondent/plaintiff has stated in clear terms about the earlier request made and the refusal to vacate the first floor.*

*8. In such view of the matter, this Court is of the view that there is absolutely no material to reverse the judgment and*



*decree of the Lower Appellate Court as there is no substantial question of law involved, warranting interference. Accordingly, the second appeal is dismissed."*

9. Thus, it is seen from the judgment in S.A.No.218 of 2015 that the Second Appeal was dismissed as no substantial question of law involved warranting interference of judgment of First Appellate Court. It appears that no SLP was filed against the judgment in Second Appeal and it has become final. Now the only question before this Court is that whether the respondent can file execution petition for delivery of property under Order XXI Rule 35 Civil Procedure Code. Submission of the learned counsel for the petitioner is that respondent can file execution petition only under Order XXI Rule 32 Civil Procedure Code for detaining the petitioner in Civil Prison or for attachment of his property or both. The respondent cannot seek for delivery of property.

10. As already stated, the learned counsel for the petitioner heavily relied on the judgment referred above. Reading of judgment reported in ***AIR 1972 Delhi 142 (Sarup Singh Vs. Daryodhan Singh)*** shows that suit was filed by the plaintiff for mandatory injunction directing the defendant to quit and vacate the workshop in dispute. Plaintiff was the landlord of the suit property and



defendant was a licensee to run a workshop. The suit was decreed before the Trial Court. First Appeal filed by the defendant was dismissed and Second Appeal was also dismissed by the Court. When the plaintiff filed execution petition for possession, Court ordered delivery and issued delivery warrant. Challenging the said order, Revision Petition was filed. While disposing the revision petition, it was held that when the decree is not for delivery of possession nor the decree-holder adjudged is entitled to receive the possession, provisions of order XXI Rule 35 Civil Procedure Code are not attracted. The decree holder can only invoke Order XXI Rule 32 Civil Procedure Code for detaining the judgment-debtor in Civil Prison or attaching and selling his property or both. It was observed that where a party is content to seek decree for injunction to vacate rather than delivery of possession in a suit properly framed for the purpose, he has to face its logical consequences and he can have the decree executed only in accordance with provisions of law governing execution of decree for injunction and he cannot employ the argument of frustration of his object existing behind his suit to obtain a relief from the Court, which was not envisaged by the suit and not granted by the Court.

11. True it is that in the judgment it is categorically held that in a suit for injunction, decree holder has to seek remedy only in terms of Order XXI Rule



32 Civil Procedure Code and cannot invoke the provisions under Order XXI

Rule 35 Civil Procedure Code. In that case, the decree for mandatory injunction was only to quit and vacate the workshop. It appears that no prayer for handing over possession was asked. However, in the case before hand though the suit was filed for mandatory injunction, prayer was specific that respondent prayed for granting mandatory injunction directing the petitioner to vacate and hand over possession of the 'A' schedule property. Prayer for possession was specifically raised in the plaint. That prayer was favourably considered by the Appellate Court. Substantial question of law framed in the Second Appeal as to whether the suit filed for mandatory injunction without the prayer for recovery of possession is maintainable was also decided against the petitioner. Thus, in the case before hand, effective decree for possession was granted in favour of respondent. When the Second Appeal was dismissed and when there is no SLP filed against the Second Appeal, we cannot go into the merits of granting a decree for handing over vacant possession in a suit for mandatory injunction.

12. That apart, in a case reported in *AIR 2004 P&H 270 (Gurucharan Singh and Anr. Vs. Gurudwara Shri Singh Sabha)*, judgement of Delhi High Court in *AIR 1972 Delhi 142 (Sarup Singh Vs. Daryodhan Singh)* came to be discussed. Quoting Law Commission's report and need to have wider view than



a narrow view on the amendment brought in under Order XXI Rule 32 Sub-Rule 5 by Act 22 of 2002 with an insertion of explanation to Order XXI Rule 32 Sub-Rule 5 CPC., it was observed that view taken in ***AIR 1972 Delhi 142 (Sarup Singh Vs. Daryodhan Singh)*** is narrow view driving the party to further litigation and it would not advance the cause of justice.

13. It is pertinent here to refer certain portions of the judgment reported in ***AIR 2004 P&H 270 (cited supra)*** for better understanding:-

*13. Referring to the judgment of the Full Bench of Delhi High Court in Samp Singh's case (supra), the Law Commission has observed as under:-*

*"8.1.10. In a Delhi case ([Sarup Singh v. Dieylim Singh](#), A.I.R. 1972 Del. 142 (F.B.) the comparison was between Order 21, Rule 32 and Order 21 Rule 35. The injunction issued against the licensee was to vacate the premises occupied by him as licensee. It was held that steps to evict the licensee would mean, practically, dispossession of the licensee (judgment-debtor). This was not permissible under Order 21 Rule 32.*

*8.1.11. The Delhi case was really one in which the decree against the licensee was to quit and vacate the premises. The decree in question was sought to be enforced under Order 21 Rule 32(5). The Court held that truly Rule*



*32(5) cannot in the very nature of things come to the aid of a decree holder to obtain possession. But the rulings of the other High Courts (mentioned above) do reveal a conflict of decision."*

*14. After noticing the aforementioned judgment of various High Courts including the Full Bench judgment of Delhi High Court in Sarup Singh's case, the Law Commission made recommendations, which led to the insertion of explanation 5. The recommendations of the Law Commission read as under:-*

*8.1.12. Recommendation.- Clarification is obviously needed on the point at issue. It is suggested that as a matter of legislative amendment, it is preferable to incorporate the wider view (though the majority of the High Courts have taken a contrary view) and to provide that the words "act required to be done" cover prohibitory (as well as mandatory) injunctions. This would also be in conformity with Section 3(2), [General Clauses Act, 1897](#) which provides that in all [Central Acts](#), the words "act" includes illegal omissions. Besides this, on the merits there is also justification why a decree-holder should be driven to a separate suit for getting relief in the nature of enforcement of a decree which he must have obtained after considerable expenditure of time, labour and money."*



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15. *It is in view of the aforementioned historical perspective that the order dated 23.2.2004 passed by the Civil Judge has to be examined. 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*



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*method to direct hand over of possession. Tweedledes is Tweedledum. It can mean nothing else except the handing over of possession and, therefore, the wider view as suggested by the Law Commission has to be followed because it serves the ends of justice. The decree cannot be defeated by raising technical objections. It is well settled that technicalities of law should be construed to advance justice and not to defeat justice. With utmost defence to the Id. judges, I am of the view that the ratio of the judgment of the Full Bench of Delhi High Court in Sarup Singh's case (supra) stands considerably watered down by Explanation added to Sub-rule 5 of Rule 32 of Order 21. The wider view preferred by Allahabad High Court in Harihar Pandey's case (supra) has rightly held that the decree holder cannot be compelled to file another suit for it would multiply litigation which course public policy would discourage. Courts cannot be party to the illegal designs of a Judgment debtor who wishes to carry on with his illegal possession. The ground realities propagated by Realist School of Thoughts led by Jurist like Karl Llewellyn must dawn on the parties to litigation and substantial justice must be done.”*

This Court is also in a respectful agreement with the view expressed in ***AIR 2004 P&H 270 (Gurucharan Singh and Anr. Vs. Gurudwara Shri Singh Sabha)*** case. The respondent filed a suit in 2010. There is no second opinion that he is entitled for A schedule property. Petitioner is his brother, even after



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completion of 11 years, respondent is not able to take possession of his property. Petition filed under Section 47 of Civil Procedure Code was dismissed, and there is no further proceedings against that. As already held there is a specific decree granted in favour of the respondent directing the petitioner to vacate A schedule property and hand over vacant possession of A schedule property to the respondent. Therefore, this Court is of the considered view that the judgment relied on by the learned counsel for the petitioner is not applicable to the facts and circumstances of this case. The learned IX Assistant Judge, City Civil Court, Chennai has rightly ordered delivery and there is no reason to interfere with the delivery order passed in E.P.No.779 of 2018 in O.S.No.5253 of 2010 and the order is confirmed.

14. Resultantly, this Civil Revision Petition is dismissed. No Costs. Consequently, connected miscellaneous petition is closed.

**29.11.2021**

*jai/mra*

Index: Yes  
Speaking Order / Non-Speaking Order

To

The IX Assistant Judge,  
City Civil Court,



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**G.CHANDRASEKHARAN, J.,**

*jai*

order in  
**C.R.P.(NPD)No.2361 of 2021**

Dated: 29.11.2021