

\$~A-2.

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

+ **Date of Decision: 12.01.2021**

% **EFA(OS) 21/2019**

JUJHAR SINGH Appellant

Through: Mr. Manish Vashisht, Advocate.

versus

M/S HOTZ INDUSTRIES LTD Respondent

Through: Mr. Ravi Gupta, Senior Advocate
with Mr. Ankur Mahindro, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J. (ORAL)

1. The present appeal is directed against the order dated 06.08.2019 passed by the learned Single Judge, whereby, inter alia, the Execution Petition No.46/2018 preferred by the plaintiff/ appellant to execute the order passed on an application under Order XXXIX Rules 1 & 2 CPC (being I.A. No.3865/2018) was rejected on the ground that the execution petition was not maintainable, and was misconceived.

2. The order dated 20.03.2018 passed by the learned Single Judge may be reproduced. The same recites the background facts of the case:

“I.A.No. 3866/2018 (Exemption)

Exemption allowed subject to just exceptions.

I.A stands disposed of.

CS(OS) 114/2018 & I.A.No.3865/2018(U/o 39 Rules 1 and 2 CPC)

1. *This is a suit for possession, mandatory and permanent injunction with respect to a portion of the property comprised in the main property bearing no. G-6, Maharani Bagh, New Delhi which is situated on a plot of land of 800 sq. yds. The disputed portion is shown in red colour in the site plan and is in possession of the defendant no.1 through its guards and servants as stated in para 23 of the plaint.*

2. *Learned counsel for the plaintiffs argues that the suit house was a jointly owned house of originally the plaintiffs with the defendant no.2 and late Smt. Madhuri Kuldeep Singh who is the daughter of Smt. Raj Mohan Singh and the sister of the predecessor-in-interest of the plaintiffs and the defendant no.2. As on date the undivided share of late Smt. Madhuri Kuldeep Singh is claimed by the defendant no.1 herein.*

3. *It is argued that the admitted position is that the suit property by devolution came to be co-owned by the legal heirs of the deceased mother Smt. Raj Mohan Singh, and this suit property was a residential house which was never partitioned between the family members being the legal heirs of Smt. Raj Mohan Singh. It is argued that in a joint family house Section 44 of the Transfer of Property Act, 1882 gives the protection that no stranger can enter into the property. It is argued that in terms of the agreement to sell entered into between Smt. Madhuri Kuldeep Singh and the defendant no.1 at best the defendant no.1 could have purchased the undivided 1/6th share of late Smt. Madhuri Kuldeep Singh but no possession of the joint family residential house could have been legally given by Smt. Madhuri Kuldeep Singh to the defendant no.1 under the compromise dated 9.2.2005 recorded in Suit no. 1261/1995*

filed by defendant no.1 herein for specific performance of an agreement to sell the suit property. It is argued that the Suit no. 1261/1995 filed by the present defendant no.1 as plaintiff for specific performance with respect to the entire property G-6, Maharani Bagh, New Delhi stands dismissed, and therefore at best the defendant no.1 would have only 1/6th undivided right in the suit property which fell to the share of late Smt. Madhuri Kuldip Singh. Reliance by the plaintiffs is placed upon a judgment of the Supreme Court in the case of Dorab Cawasji Warden vs. Coomi Sorab Warden and others (1990)2SCC 117 that courts can grant status quo ante when by fraud Section 44 of the Transfer of Property Act is violated. It is argued that the present is a fit case for grant of interim injunction because none of the Directors or family members of the Directors or shareholders of the defendant no.1 are living in the suit property but the physical possession of the disputed portion shown in red colour in the site plan is sought to be maintained by the defendant no.1 through its servants and guards. It is argued that disentitlement to legal and physical possession of the defendant no.1 should be legally recognized by preventing the defendant no.1 from in any manner entering upon or using the portion marked in red colour in the site plan filed with the plaint.

4. In view of the arguments urged on behalf of the plaintiffs, and the fact that the suit property is a joint family property which devolved on the legal heirs of Smt. Raj Mohan Singh and no partition has ever been pleaded by late Smt. Madhuri Kuldip Singh and not so even by the defendant no.1 as per the pleadings in the earlier suit no. 1261/1995, and the Supreme Court in the judgment in the case of Dorab Cawasji Warden (supra) has held that illegal possession can be corrected even by status quo ante and directing injunction against the defendants not to enter into possession of an undivided joint family residential house by exercising powers under Order 39 Rules 1 and 2 CPC, therefore, till further orders unless varied by the Court, defendant no.1 is restrained from in any manner entering upon or using the portion shown in red colour in the site plan attached to the suit and which forms part of property

no. G-6, Maharani Bagh, New Delhi. Copy of the site plan will be attached to the notice issued to defendant no.1.

5. Summons in the suit and notice in the I.A be issued to the defendants on filing of process fee, both in the ordinary method as well as by registered AD post, returnable on 19th April, 2018.

6. Plaintiff will comply with the provision of Order 39 Rule 3 CPC within 3 days.

Dasti.”

3. The aforesaid would show that the learned Single Judge took notice of the decision of the Supreme Court in ***Dorab Cawasji Warden vs. Coomi Sorab Warden and Others***, (1990) 2 SCC 117, wherein it had been held that illegal possession can be corrected, even by directing status quo ante, and directing injunction against the defendants not to enter into possession of an undivided joint family residential house by exercising powers under Order XXXIX Rules 1 & 2 CPC.

4. The plaintiff/ appellant preferred the Execution Petition No.46/2018, wherein the plaintiff/ appellant sought execution of the said order in the following manner:

“10. Mode in which the Assistance of the court is required.

i. The Decree Holder/Petitioner most respectfully submits that this Hon'ble Court may kindly issue warrants of possession and the Judgment Debtor/Respondent be directed to vacate the possession and remove the locks on the portion highlighted in red color in the site plan in the suit property by appointing a bailiff. The bailiff be directed to go to the spot and take physical possession of the part of the property bearing No G-6, Maharani Bagh,

New Delhi as shown in red colour in the site plan and deliver the same to the Decree Holder/Petitioner.

- ii. *That the Bailiff be further directed to also remove the belongings of the Judgment Debtor/Respondent lying in the said premises kept locked by the Judgment Debtor/Respondent and to deliver the Decree Holder/Petitioner vacant physical possession of the part of the property bearing No G-6, Maharani Bagh, New Delhi as shown in red colour in the site plan.*
- iii. *It is also prayed that this Hon'ble Court may please be gracious enough to provide the Police aid as the Decree Holder/Petitioner has all the apprehension that the Judgment Debtor/Respondent shall put all kinds of resistance and obstruction in execution of the said order. Therefore, this Hon'ble Court may direct Dy. Commissioner and/or SHO, Maharani Bagh, New Delhi, to assist the bailiff in getting the physical possession of the part of the property bearing No G-6, Maharani Bagh, New Delhi as shown in red colour in the site plan.”*

5. The submission of learned counsel for the appellant is that the learned Single Judge, while passing the impugned order – holding the execution petition to be not maintainable and misconceived, ignored Section 36 of the Code of Civil Procedure which provides that the provisions of the Code relating to the execution of decree (including provisions relating to payment under a decree) shall, so far as they are applicable, be deemed to apply to the execution of orders (including payment an order).

6. Mr. Vashisht has also referred to a decision of a Division Bench of this Court in **Rohit Shekhar Vs. Narayan Dutt Tiwari & Another**, ILR (2012) 5 Delhi 181, in support of his submission that an execution would lie even in respect of an order passed under Order XXXIX Rules 1 & 2 CPC.

7. We find force in this submission of Mr. Vashisht. In our view, the learned Single Judge has acted in ignorance of Section 36 CPC while passing the impugned order, as well as of the aforesaid decision. Interestingly, it is pointed out that the learned Single Judge – who passed the impugned order, was party to the said decision of the Division Bench. It appears that the said decision escaped the attention of the learned Single Judge while passing the impugned order. The impugned order passed by the learned Single Judge in Execution Petition No.46/2018 is, therefore, set aside and we hold that the said Execution Petition was maintainable. The Execution Petition is restored for consideration by the learned Single Judge on its merits.

8. On the aspect of what interim arrangement should operate in the meantime, i.e. till the consideration of the Execution Petition, Mr. Gupta, on instructions from Mr. Ankur Mahindro, who in turn, has taken instructions from the respondent, without prejudice to the rights & contentions of the respondent, states that the respondent is agreeable that the appellant may occupy and use the portion of the property, of which the respondent's vendor purported to deliver exclusive possession to the respondent. The said portion is delineated in red colour in the plan Annexure A-11 at page 182 of the record.

9. Accordingly, the appellant may use and occupy the portion demarcated in Red colour in the plan (Annexure A-11) without prejudice to the rights & contentions of the parties.

10. The respondent is permitted to remove its belongings from the said

portion within one week, so that the portion may be used and occupied by the appellant, as aforesaid.

11. The learned Single Judge will hear and decide all the pending applications and the execution petition, which is restored on the file of the learned Single Judge. Mr. Vashisht states that no adjournment would be sought before the learned Single Judge in the pending applications/ suit.

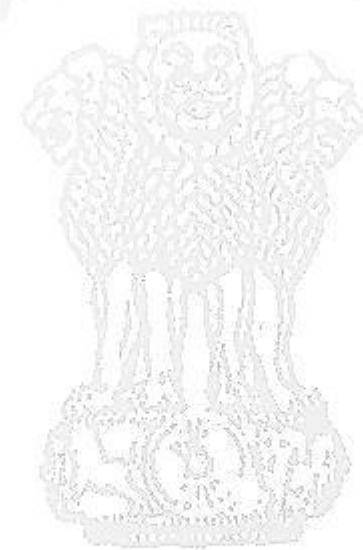
12. The appeal stands disposed of in the aforesaid terms.

JANUARY 12, 2021

B.S. Rohella

VIPIN SANGHI, J

REKHA PALLI, J



न्यायमेव जयते