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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: 17.12.2021

Judgment Delivered on: 16.03.2022

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RSA 110/2013**SANT KIRPAL SINGH**

..... Appellant

Through: Ms. Hemlata Rawat and Mr.
Aayushmaan Vatsyayana, Advs.

versus

SOBHA SINGH AND SONS PVT. LTD. RespondentThrough: Mr. P. S. Bindra, Sr. Adv. with Mr.
Anand Singh, Mr. Bhuvneshwar Tyagi
and Ms. Monica Phartyal, Advs.**CORAM:****HON'BLE MR. JUSTICE NAJMI WAZIRI****NAJMI WAZIRI, J**

1. The present proceedings arise out of a decree passed in a suit preferred by the respondents seeking mandatory and perpetual injunction against the defendants i.e. the present appellant, directing the defendant, his servants, relatives, employees and agents to remove sign boards, A/C sheets, fencing and other temporary unauthorized structures put up by him in Sujan Singh Park, New Delhi, as well as restraining them from entering and/or stepping into any part of Sujan Singh Park, New Delhi.
2. The first appeal against the said order was dismissed. Hence this second appeal.



Facts

3. The appellant claims to be the mahant/owner and beneficiary of land admeasuring 165 ft. x 111 ft. in Sujan Singh Park, New Delhi, on the basis of a *Daan Patra* dated 20.11.1974 executed by Sir Sobha Singh in his favour. He also claims to be in possession of the said land. It is respondent's (plaintiff) case that they are the owner of the Dera Gurudwara, which is a part of the Sujan Singh Park; that the appellant (defendant) was illegally occupying one room (Kothri) measuring 10 ft. x 10 ft., at the back of Gurudwara as per the Plan (annexed at volume 1, pdf pg. 205, volume 2, pdf pg. 157). The appellant/defendant has contested the suit contending that he was in the lawful possession for the past 14 years. Another suit was filed by the respondent, which too was decreed and the kacha room constructed by the defendant was directed to be demolished. Thereafter, a third suit was filed by the respondent (suit no. 112/2003) seeking permanent and mandatory injunction, as under:-

"I) a decree for mandatory injunction ordering the defendant, his relatives, servants, employees and agents to withdraw completely from Sujan Singh Park, New Delhi;
(II) a decree for mandatory injunction directing the defendant, his servants, relatives, employees and agents to remove sign boards, A/C sheets, fencing and other temporary unauthorised structures put up by him in Sujan Singh Park, New Delhi,
III) a decree for perpetual injunction restraining the defendant, his servants, employees and agents from entering and /or stepping into any part of Sujan Singh Park, New Delhi".

4. The plaint had *inter alia* averred as under:-

"12. That as a result of dismissal of Suit No.1415/2000-93 (Old number 374 of 95, 434/94 and 694/93) bottom has been completely knocked out of the false claim of the plaintiff on the basis of the



alleged Deed of Daan and a judicial finding has been given by Shri Narinder Kumar, Civil Judge, Delhi that the defendant is an encroacher. After 15.7.2002, the defendant has not even the slightest right, title or interest in the said piece of land measuring 165' x 111' or any other part of Sujan Singh Park. As a result the defendant is bound and liable to withdraw completely from the said Sujan Singh Park, along with his wife and children. He is also bound to remove the sign boards, A/C sheets, fencing, and other temporary unauthorised structures put up by him”.

5. On 23.04.2011, the learned Trial Court decreed the suit in favour of the respondent and held as under:

“... 16. RELIEF:

In view of my findings given on issues No. 1, 2 and 3, plaintiff is entitled to partial relief and the suit is decreed and a decree for mandatory injunction is passed in favour of the plaintiff and against the defendant and defendant, his agents, employees are directed to withdraw from portion measuring 165 x 111 feet in Sujan Singh Park which the defendant has claimed to be the owner on the basis of daan deed in his suit No.649/93. Defendant is further directed to remove his signboard, fencing, any other temporary structure put on the piece of land measuring 165 x 111 feet in Sujan Singh Park. Defendant is also perpetually restrained from entering and stepping into this area of 165 x 111 feet in Sujan Singh Park. No order as to costs. Decree sheet be prepared accordingly. File be consigned to Record Room.”

6. Aggrieved by the aforesaid order, the appellant filed an appeal before the learned Additional District Judge bearing RCA No. 02/2012. The same was dismissed on 23.02.2013. The respondent filed the present Regular Second Appeal before this court impugning the said order dated 23.02.2013. It was disposed-off on 21.02.2014, with the direction that appellant will not be evicted from the suit premises till 29.02.2019, upon him furnishing an undertaking. The appellant filed Special Leave Petition (C) No. 8745/2014



impugning the said order of this court. The impugned order was set aside on 07.01.2015, and the case was remanded back to this court, to be decided on merits.

7. Substantial questions of law, for adjudication in this appeal were framed as:

- i. Whether the suit of the respondent is barred under Order II Rule 2 CPC as the respondent had earlier, through a suit, sought eviction of the appellant from the suit property.
- ii. Whether a decree of eviction could be passed in a suit for mandatory injunction.
- iii. Whether the suit of the respondent is barred by the law of limitation.
- iv. Whether the document, Ex.P1, can at all be treated as a "Will" and would it be admissible in evidence for the purposes of claiming possession in the suit property by the appellant.

Issue 1: Whether the suit of the respondent is barred under Order II Rule 2 CPC as the respondent had earlier, through a suit, sought eviction of the appellant from the suit property.

8. It is the appellant's case that the present decree could not have been passed since the relief now sought and decreed could well have been sought in the first suit of 1982 in which the appellant had clearly stated in his Written Submissions that he was in possession of 10 ft.x10 ft. room as well as a courtyard. Instead in the 1990 they only sought demolition of the kacha room on the roof of the verandah. In Written Submissions in the suit no. 28/2003, the appellant had averred *inter alia* as under:-



“... 4. That the suit is barred by section 11 C.P.C. The Plaintiff filed suits after suits in different courts against the Defendant pertaining to the suit property. The Plaintiff could have filed the suit for removal of possession of the Defendant earlier which it omitted to file. It will be deemed that such a suit was filed but the Plaintiff lost it. This salutary provision of law is the sheet-anchor of the defence of the Defendant...”.

9. The appellant contends that the plaint should have been amended to comprehensively include all reliefs, which could have been sought against the defendant, including the relief of injunction and possession as of that date, under Order II Rule 2, C.P.C. The said provision of law reads as under:

*“2. Suit to include the whole claim. –
(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
(2) Relinquishment of part of claim.-Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.
(3) Omission to sue for one of several reliefs.-A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”*

10. The learned counsel for the appellant submits that when a relief could have been sought but was not sought by a party, it constitutes waiver of the relief and the party waving grant of such relief is estopped from seeking it in a subsequent suit or proceeding. In support of this proposition, he relies upon the following judgments:-

i) *M/s Virgo Industries (Eng.) P. Ltd. v. M/s Venturetech Solutions P.*



Ltd. (2012) 7 SCR 933, which held:

“14 . The averments made by the Plaintiff in C.S. Nos. 831 and 833 of 2005, particularly the pleadings extracted above, leave no room for doubt that on the dates when C.S. Nos. 831 and 833 of 2005 were instituted, namely, 28.8.2005 and 9.9.2005, the Plaintiff itself had claimed that facts and events have occurred which entitled it to contend that the Defendant had no intention to honour the agreements dated 27.7.2005. In the aforesaid situation it was open for the Plaintiff to incorporate the relief of specific performance along with the relief of permanent injunction that formed the subject matter of above two suits. The foundation for the relief of permanent injunction claimed in the two suits furnished a complete cause of action to the Plaintiff in C.S. Nos. 831 and 833 to also sue for the relief of specific performance. Yet, the said relief was omitted and no leave in this regard was obtained or granted by the Court.

*15. Furthermore, according to the Plaintiff, which fact is also stated in the complaints filed in C.S. Nos. 831 and 833, on the date when the aforesaid two suits were filed the relief of specific performance was premature inasmuch as the time for execution of the sale documents by the Defendant in terms of the agreements dated 27.7.2005 had not elapsed. According to the Plaintiff, it is only after the expiry of the aforesaid period of time and upon failure of the Defendant to execute the sale deeds despite the legal notice dated 24.2.2006 that the cause of action to claim the relief of specific performance had accrued. The above stand of the Plaintiff found favour with the High Court. We disagree. A suit claiming a relief to which the Plaintiff may become entitled at a subsequent point of time, though may be termed as premature, yet, can not per se be dismissed to be presented on a future date. There is no universal rule to the above effect inasmuch as "the question of a suit being premature does not go to the root of the jurisdiction of the Court" as held by this Court in *Vithalbhai (P) Ltd. v. Union Bank of India* MANU/SC/0195/2005 : 2005 (4) SCC 315. In the aforesaid case this Court has taken the view that whether a premature suit is required to be entertained or not is a question of discretion and unless "there is a mandatory bar created by a statute which disables the Plaintiff from filing the*



suit on or before a particular date or the occurrence of a particular event", the Court must weigh and balance the several competing factors that are required to be considered including the question as to whether any useful purpose would be served by dismissing the suit as premature as the same would entitle the Plaintiff to file a fresh suit on a subsequent date. We may usefully add in this connection that there is no provision in the Specific Relief Act, 1963 requiring a Plaintiff claiming the relief of specific performance to wait for expiry of the due date for performance of the agreement in a situation where the Defendant may have made his intentions clear by his overt acts.

16. The learned Single Judge of the High Court had considered, and very rightly, to be bound to follow an earlier Division Bench order in the case of R. Vimalchand and M. Ratanchand v. Ramalingam, T. Srinivasalu & T. Venkatesaperuma I(supra) holding that the provisions of Order II Rule 2 of the Code of Civil Procedure would be applicable only when the first suit is disposed of. As in the present case the second set of suits were filed during the pendency of the earlier suits, it was held, on the ratio of the aforesaid decision of the Division Bench of the High Court, that the provisions of Order II, Rule 2(3) will not be attracted. Judicial discipline required the learned Single Judge of the High Court to come to the aforesaid conclusion. However, we are unable to agree with the same in view of the object behind the enactment of the provisions of Order II Rule 2 of the Code of Civil Procedure as already discussed by us, namely, that Order II Rule 2 of the Code of Civil Procedure seeks to avoid multiplicity of litigations on same cause of action. If that is the true object of the law, on which we do not entertain any doubt, the same would not stand fully subserved by holding that the provisions of Order II Rule 2 of the Code of Civil Procedure will apply only if the first suit is disposed of and not in a situation where the second suit has been filed during the pendency of the first suit. Rather, Order II, Rule 2 of the Code of Civil Procedure will apply to both the aforesaid situations. Though direct judicial pronouncements on the issue are somewhat scarce, we find that a similar view had been taken in a decision of the High Court at Allahabad in Murti v. Bhola Ram (1894) ILR 16 All 165 8 : AIR 1954 Bom 125 and



by the Bombay High Court in Krishnaji v. Raghunath MANU/MH/0032/1954 : AIR 1954 BOM 125”.

ii) *State Bank of India v. Gracure Pharmaceuticals Ltd.* (2014) 3 SCC 595, which held:-

“15. When we go through the above quoted paragraph it is clear that the facts on the basis of which subsequent suit was filed, existed on the date on which the earlier suit was filed. The earlier suit was filed on 15.03.2003 and subsequent suit was filed on 21.05.2003. No fresh cause of action arose in between the first suit and the second suit. The closure of account, as already indicated, was intimated on 20.03.2002 due to the alleged fault of the Respondent in not regularizing their accounts i.e. after non-receipt of payment of LC, the account became irregular. When the first suit for recovery of dues was filed i.e. on 15.03.2001 for alleged relief, damages sought for in the subsequent suit could have also been sought for. Order 2 Rule 2 provides that every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the same cause of action. Respondent is not entitled to split the cause of action into parts by filing separate suits. We find, as such, that Respondent had omitted certain reliefs which were available to it at the time of filing of the first suit and after having relinquished the same, it cannot file a separate suit in view of the provisions of Sub-rule 2 of Order 2 Rule 2, Code of Civil Procedure. The object of Order 2 Rule 2 is to avoid multiplicity of proceedings and not to vex the parties over and again in a litigative process. The object enunciated in Order 2 Rule 2, Code of Civil Procedure is laudable and it has a larger public purpose to achieve by not burdening the court with repeated suits”.

11. The learned Senior Counsel for the respondent (plaintiff) refuting the aforesaid contentions says that no cause of action arose apropos the courtyard because the appellant (defendant) was never in possession of the courtyard and this aspect has been averred in paras 7 and 8 of the plaint.



Furthermore, the plea of Order II Rule 2 C.P.C. had not been taken in the suit, therefore, no issue regarding the courtyard was framed. Referring to the written arguments, he submits as under:

- (i) There is no question of suit being barred under Order II Rule 2 CPC. In fact the Appellant did not file a copy of the plaint in earlier suit filed by Respondent, qua which the Appellant that the suit in question is barred by Order II Rule 2 CPC. Even no plea regarding the suit being barred under Order II Rule 2 CPC was taken in written statement by the Appellant before learned trial court.
- (ii) Without prejudice to the aforesaid, it is stated that the Respondent filed copy of the plaint under list of documents dated 26.2.2016. A perusal of the same would show that earlier suit was concerned with unauthorized occupation of the Appellant herein in one room (Kothri) measuring 10 x 10 feet situated at the back side of Gurdwara in building known as Sujan Singh Park.
- (iii) The aforesaid suit was decreed when the Defendant made a claim over land admeasuring 165 X 113 sq. Ft. in Sujan Singh Park, New Delhi on the basis of forged and fabricated Deed of Daan and on the basis of said suit he kept on putting up sign board, making illegal construction, raising pillars, laying roof in the said premises. Finally, the said suit was dismissed by the Civil Judge on 15.7.2002 holding, that assuming the Deed of Daan to be gift deed, it was not registered as such, is of no consequence. Appeal filed against the said judgment was dismissed by Senior Civil Judge on 14.5.2003. RSA [Regular Second Appeal] against the aforesaid



judgment was dismissed by this Hon'ble Court on 6.8.2003. The SLP filed before Hon'ble Supreme Court against the said order has also been dismissed on 9.2.2004. Application seeking review of the order passed in SLP also been dismissed on 31.3.2004.

- (iv) After the suit of Appellant for injunction filed on the basis of Deed of Daan was dismissed, the Appellant filed the present appeal which is based on completely different cause of action. Present suit is based on encroachment / illegal construction done by the Appellant after filing the said suit for injunction and decree of earlier suit filed by Respondent herein. Since cause of action is completely different in both the aforesaid two suits, there is no question of applicability of Order II Rule 2 CPC.

12. What emanates from the above is that the circumstances did not exist to seek any relief more than what had been sought by the plaintiff in the suit. The plaintiff has sought only such reliefs which were warranted in the facts as it then existed and the suit was decreed after trial. For the respondent to say that under Order II Rule 2 C.P.C., all encompassing reliefs should have been sought, may well be an academic exercise, if the fact circumstances did not warrant any more relief than what was sought in the suit. That being the position, the suit was not barred under the provisions of Order II Rule 2 C.P.C.

Issue 2: Whether a decree of eviction could be passed in a suit for mandatory injunction.

13. The appellant contends that in the absence of a specific relief of possession being sought, the suit for injunction cannot be extended to



possession of land in question, i.e., 165ft. x 111ft., which otherwise is in the possession of the appellant.

14. In an earlier suit, a structure of 10ft. x 10ft. was decreed in favour of the respondent/plaintiff. In the present case, an injunction was sought against the appellant with respect to the land abutting the 10ft. x 10ft. structure. The appellant says that it is a matter of record that the aforesaid land was not in possession of the plaintiff/respondent. The decree dated 23.04.2011, clearly records *inter-alia* as under:

“...

9. I have considered the rival submissions of both the counsels. In the Judgment relied upon by the counsel for the plaintiff, a suit for mandatory injunction against a licensee seeking directions to him to vacate the property was held maintainable under the circumstances of that case. Hon'ble Supreme Court was of the opinion that if the licensor acts quickly, a suit for mandatory injunction is maintainable against a licensee for recovery of the possession of the property. In the present case, admittedly, the defendant up to 15.07.02 was contesting his suit claiming title in the piece of land measuring 165 X 111 feet on the basis of a deed of daan. The cause of action, therefore, as far as this piece of land is concerned, will certainly accrue in favour of the plaintiff on 15.07.02. The present suit was filed on 20.02.03 and therefore, plaintiff acted promptly for taking back the possession of this particular piece of land and therefore, suit for mandatory injunction is not barred by limitation for this land. As far as mandatory injunction to the effect that defendant alongwith his family members should be asked to remove themselves completely from Sujan Singh Park is concerned, I am of the considered opinion that the suit is barred by limitation as well as being vague. The cause of action in respect of unauthorized occupation of the defendant in Sujan Singh Park except of the piece of land measuring 165 x 111 feet was available to the plaintiff and maintainable against the defendant irrespective of the pendency of the suit of the defendant bearing No.649/93 which was



dismissed on 15.07.02. There was no legal bar restraining the plaintiff from seeking this remedy of mandatory injunction or possession against the defendant for any other portion of Sujan Singh Park. The present suit seems to be a piece of astute drafting. The plaint is completely silent in respect of the date from which and the portion in which the plaintiff is in possession of any other area of Sujan Singh Park. As a matter of fact, up to para 12, there is only brief history of other litigation between the parties and from para 13, the cause of action accrued in favour of the plaintiff. If the entire is read as a whole, in para 12, plaintiff has talked about the fact that the plaintiff does not have any right, title or interest in the piece of land measuring 165 x 111 feet and has cleverly added the words 'any other part of Sujan Singh Park'. The plaint is silent or has cleverly concealed not only the date, but also any other part which is in possession or is occupied by the defendant and under the garb of this area measuring 165 X 111 feet, in the present suit, plaintiff has tried to take a blanket order against the defendant to ask not only him, but his other relatives or employees to vacate Sujan Singh Park. On the vague and unspecific plea, a blanket order cannot be granted in favour of the plaintiff and against the defendant. At most the plaintiff can ask is to vacate or remove the defendant from this plot of 165 X 111 feet. As a matter of fact, even the affidavit of PW-1 is cleverly drafted. In his affidavit, plaintiff exhibits-the site plan as Ex. P-5 and shows that Gurudwara therein shown red in the site plan and the size of Gurudwara has cleverly been concealed and there seems to be a wilful and intentional deliberate attempt on the part of the plaintiff even to conceal the specific area of 165 x 111 feet from which they want an order in their favour directing the defendant to remove himself from the property. Otherwise also, this relief has been sought not only against the defendant, but against his family members, his relatives, his employees and his agents. The word 'relative' further is very vague term as there cannot be an end to the relations and can an unspecified relative of the defendant be thrown out of Sujan Singh Park? The answer is no. The court cannot give a blanket order in favour of the plaintiff that all the relatives whether specified or unspecified of the defendant should withdraw completely from Sujan Singh



Park.

...”

(Emphasis supplied)

15. Relying upon the judgement of *Anathula Sudhakar vs. P. Buchi Reddy (Dead) by Lrs. And Others*, (2008) 4 SCC 594, the learned counsel for the appellant submits that a decree of eviction cannot be passed in an injunction suit. The said judgment has held *inter-alia* as under:

“13. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

13.1) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

13.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction”.

16. In terms of the above, the appellant submits that the suit ought to have been amended to comprehensively include all the relief sought, i.e. injunction, possession and other reliefs as may have been sought, for which



requisite court fee ought to have been paid. Also, not paying the requisite court fee will render the suit not maintainable.

17. It is argued that for a property located in one of the most prime lands in India i.e. Sujan Singh Park, court fees of merely Rs.40 was filed for injunction, whereas for possession, the prevailing value of the land in the year 2002 ought to have been considered and a much higher court fee would have been payable. In so far as the said valuation was not done and corresponding court fee was not filed, the said suit ought to have been rejected.

18. Relying upon *Anathula Sudhakar (Supra)*, she submits that a decree of injunction cannot be extended to be a warrant of possession, as the former is under Order XXI Rule 32, C.P.C. and the possession is under Order XXI Rule 35, C.P.C. The rules read as under:

“Order XXI Rule 32:

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 wilfully failed to obey it, the decree may be enforced in the case of a 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 been passed is 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 for [six months] if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the 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.

Order XXI Rule 35:

35. Decree for immovable property. –

(1) 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, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the



country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.”

19. She submits that the decree of injunction has to be treated in a specific way while a warrant of possession has to be treated specifically in terms of Rule 35. In support of this contention, she relies upon the dicta of this court in *Sarup Singh Vs. Daryodhan Singh* AIR 1972 Delhi 142. The said judgment has held *inter alia* as under:

“...6. Sub-rule (5) of Rule 32, under which the decree-holder seeks relief, authorises the Court to 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. The statutory illustration illustrates the scope of the rule by instance that where person of little substance erects a building which renders a family mansion uninhabitable and the judgment-debtor, in spite of his detention in prison and attachment of property, declines to obey the decree the Court may remove the building which the decree has directed to do and may recover the cost from the judgment-debtor in execution proceedings. This shows that the act which is authorised by sub-rule (5) to be done consists of something which may be done so far as practicable by the decree-holder himself at the expense of the judgment-debtor to quit and vacate the premises cannot, constitute an act which may, without the will and volition of the judgment-debtor, be done by the decree-holder. Obviously, the decree-holder cannot vacate the premises in place of judgment-debtor and deliver its possession to himself and recover its costs. Reference may also be made to the distinction in the language of sub-rule (3) of Rule 35 and of sub-rule (5) of Rule 32; while in the former the possession is to be delivered through its officers, in the latter the act is to be done by the decree-holder or by (and not through) another person. Consequently, obedience of the injunction to vacate cannot be done by any officer or other person appointed by the Court as well.

7. As such, the conclusion is inevitable that sub-rule (5) of Rule



32 can, in the nature of things, not come to the aid of the decree-holder to obtain dispossession of the judgment-debtor and it would be impossible to convert a suit and a decree for injunction into a suit and decree for recovery of possession and afford consequential relief in the execution department.

8. The next question for consideration is whether as urged by the respondent a warrant for possession can specifically be issued under Rule 35 in aid of obtaining compliance with the decree for mandatory injunction. The opening words of Rule 35 and (are?) "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 * * * * * by removing any person bound by the decree who refuses to vacate the property." Subrule (3) of Rule 35 further makes provision for removing or breaching open any lock, bolt or door and performing other acts necessary for putting the decree-holder in possession. The decree passed in this case is plainly not for delivery of possession, nor has the decree-holder been adjudged as entitled to receive the possession and as such the provision of Rule 35 of Order Xxi are not attracted. The form of the decree for possession as well as the form of warrant of possession respectively prescribed in Form 23 of Appendix D and Form 11 of Appendix E unmistakably show that the decree must direct the defendant to put the plaintiff in possession of the property and then the warrant which is issued to the bailiff of the Court. Commands him to put the plaintiff in possession of the property in dispute by removing the defendant judgment-debtor who may refuse to vacate the same.

They further illustrate that Rule 35 is wholly inapplicable for the purpose of executing a decree for injunction which is directed against the person of the judgment-debtor and appeals to his will and volition. The counsel for the respondent has submitted that although the decree in this case is not for delivery of possession to the decree holder, part of the powers conferred under Rule 35 to dispossess the judgment debtor may be exercised by the Court and then after removal of the judgment-debtor, the property may be left unattended, leaving it to the decree-holder to get into its occupation if he can. The submission is far-fetched and no provision of the Code of Civil Procedure justifies such a step.



Ordinarily the Court has no jurisdiction to dispossess a person and leave the property in the vacuum and it exercises powers of enforcing dispossession only to put some other person whom the Court so adjudges to be entitled to be in possession and not otherwise.

...

10. Applying the dictum of the Supreme Court, it follows that a decree for injunction must be executed in the manner provided by Rule 32 and the issue of a warrant for delivery of possession in execution of a decree for injunction is not justified either by Rule 35 of Order Xxi of clause (e) of Section 51.

...

12. As observed by the High Court of Calcutta in Hem Chandra Naskar and Anr. Vs. Narendra Nath Bose and Others, AIR 1934 Cal 402 and by the High Court of Allahabad in Nawab Singh Vs. Mithu Lal and Others, AIR 1935 All 480, a decree for mandatory injunction as well as for preventive injunction are to be executed in accordance with Rule 32 of Order Xxi of the Code. We are not impressed by the vehement submission of the counsel for the respondent that the decree which had been obtained by him in this case has become useless or inexecutable. In fact, where a party is content to seek a decree for injunction rather than for delivery of possession in a suit property (properly?) framed for the purpose, he has to face its logical consequences and he can have the decree executed only in accordance with the provisions of law governing execution, of decrees 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.

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 it to be executed by the Court below in the manner provided by sub-ruled (1) and (3) of Rule 32 of O.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. ...”



20. The learned counsel for the appellant submits that the question of law, as raised hereinabove, ought to have been considered and adjudicated upon in the impugned judgment and decree dated 23.02.2013, and not doing so, would not be in compliance of Order XLI Rule 31 C.P.C. She relies upon the dicta of Supreme Court in *S. Kesari Hanuman Gaud v. Anjum Jehan and others*' reported in 2013 Law Suits (SC) 313, wherein it was, *inter alia*, held as under:

"...7 The High Court while deciding the first appeal filed under section 96 CPC, did not consider all the issues as is required under Order XLI Rule 31 CPC. On the other hand, it dealt with only one issue elaborately, without making any reference to the pleadings taken by the parties..".

21. Refuting the aforesaid contention, the learned Senior Advocate of the respondent submits that this issue is no more *res integra* as it has been conclusively and clearly decided in the RCA No.50/2002 (preferred against the dismissal of the appellant's suit). It was held, therein, *inter alia*, as under:-

"...19. The plaintiff has further claimed that he was put in possession of the land measuring 165' x 111' on the same day on which the Deed of Daan Ex. P1 was executed i.e. on 20.11.74. The plaintiff, however, has not placed a single document on record to show that he is in possession of the property since 20.11.1974. It is admitted by him in his cross-examination that he has never paid house tax of the land in dispute and has further admitted that the ground rent and house tax of the entire land of Sujan Singh Park is being paid by Sir Shobha Singh, even after his death, though he denied the suggestion that the taxes were being paid by Sir Shobha Singh & Sons (P) Ltd. The plaintiff in his cross-examination has also admitted that the possession of Gurudwara and the land around it is with Guru Singh Sabha,



Sujan Singh Park, though he claimed that the latter had engaged goondas for keeping the land in Sujan Singh Park and a complaint is also pending in Patiala House Courts. The defendants had set up a specific case that plaintiff was never in possession of any part of the suit property, but was given one small kothri for the purpose of residence behind the Gurudwara in the year 1980 when he was appointed as a Granthi though he was removed from the said post after four months when he embezzled the accounts of Gurudwara and filed a suit for eviction from the said room which was decreed and the possession of the room has also been taken by the defendants. These averments of the defendants are clearly supported by the admission of the plaintiff that he is not in possession of the suit land. The plaintiff has not been able to prove by way of document or any other cogent evidence that he has been in possession of any part of the suit land by virtue of the document dated 20.11.74 which is Ex.P-1.

20. The plaintiff has claimed that by virtue of Deed of Daan Ex.P-1 he was given a plot of land measuring 165 ft.x111 ft. situated in Sujan Singh Park, New Delhi for dera purposes. It has not been challenged by the plaintiff that the land in Sujan Singh Park was a plot of land measuring 7.5 acres. The plaintiff has not filed any site plan to show which portion out of the entire plot of land was given to him by virtue of Dan Patra. Even in the document Ex.P-1, there is no description of the plot measuring 165 ft.x111ft. by virtue of which the property could be identified. The onus was on the plaintiff to have proved that he was having a right/title in respect of a specific piece of land measuring 115 ft. x 111 ft. and should have clearly denied the boundaries of the said plot of land, but has failed to do so. The plaintiff has not been able to establish the identity of the plot in respect of which he is claiming his right/title and possession. Furthermore, it is stated in the Deed of Daan Ex.P-1 (wrongly mentioned as D-1) that the said plot of land was given for dera purpose and the plaintiff could raise construction over the said plot. The plaintiff, however, has admitted in his cross-examination that he never got any plan sanctioned for construction of dera in Sujan Singh Park. He has further deposed that in the Dera, three houses were constructed



by Shobha Singh and he cannot tell the cost of construction of dera. He has further deposed that he was present at the time the dera was being constructed and he had filed the present suit at that time and that prior to that there did not exist any dera. These admissions of the plaintiff in his cross-examination itself demolish the case of the plaintiff that he ever came in possession of any part of land of Sujan Singh Park for the purpose of Dera. In fact, there is a clear admission by him that there existed no dera prior to the filing of the suit in the year 1993. Furthermore, the plaintiff has vaguely claimed in his plaint that he is in possession of Dera Gurudwara land etc to it. The plaintiff in his plaint has also not defined the suit property nor has he established the identity of the property in respect of which the relief has been claimed by the plaintiff. The ld. Trial court in its impugned order has, thus, rightly held that the plaintiff has not given complete description of the property in respect of which relief has been claimed and no site plan has also been placed on record for the purpose...”

22. The learned Senior Advocate for the respondent submits that the aforesaid finding is a clear adjudication that the suit property was never in possession of the appellant, therefore, there was no occasion to file a suit or seek possession of a property which was already with the respondent. He submits that redundant reliefs are not warranted in law. Therefore, since there was no requirement of relief of possession, then in that eventuality there was no need for amendment of the plaint or for payment of court fees, as has been contended by the appellant. He further submits that an appeal against the aforequoted order was dismissed by this court on 06.08.2003 in RSA No.134/2003 and the appellant's SLP (Civil) No.20876/2003 against the said order was dismissed on 09.02.2004, even the Review Petition No.674/2004, filed against the dismissal of the said SLP was dismissed on 31.03.2004.

23. The respondent's Suit No.112/2003, which led to the impugned order



dated 23.02.2013, was filed on 20.02.2003, by which time, the appellant's suit being Suit No.649/1993, seeking the aforementioned perpetual and mandatory injunction, based on the Daan Patra (Gift Deed) had already been dismissed on 15.07.2002 and by the time the appellant had filed his written statement, his RCA No. 50/2002 was dismissed on 14.05.2003, therefore, it was not necessary for the plaintiff (respondent herein) to amend Suit No. 112/2003.

24. The learned Senior Advocate for the respondent submits that the facts of the present case are different from *Anathula Sudhakar (supra)*. In the latter, plaintiff's sale deed was contested i.e. the right title and interest of the plaintiff was yet to be adjudicated, whereas in the present case, the hereditary title and interest of the plaintiff-Sir Sobha Singh and Sons Pvt. Ltd. had already been established. The present appellant (defendant) had sought to make out a case that he was the beneficiary of the said land, on the basis of a *Daan Patra* dated 20.11.1974 (gift deed). The said *Daan Patra* was never established, therefore, no relief or rights could flow to the appellant on the basis of the said documents or by law of adverse possession but neither of this was proven. Therefore, the respondent contends that the issues that were elaborately discussed in *Anathula Sudhakar (supra)* would not have a bearing upon this case. Even otherwise, all issues, as were required to be adjudicated, have been considered and duly adjudicated in the respondent's suit.

25. The learned Senior Advocate for the respondent relies upon the dicta of the Supreme Court in *Sant Lal Jain vs. Avtar Singh*, 1985 2 SCC 332, in which it was held *inter alia* as under:

“ ...



7. *In the present case it has not been shown to us that the appellant had come to the court with the suit for mandatory injunction after any considerable delay which will disentitle him to the discretionary relief. Even if there was some delay, we think that in a case of this kind attempt should be made to avoid multiplicity of suits and the licensor should not be driven to file another round of suit with all the attendant delay, trouble and expense. The suit is in effect one for possession though couched in the form of a suit for mandatory injunction as what would be given to the plaintiff in case he succeeds is possession of the property to which he may be found to be entitled. Therefore, we are of the opinion that the appellant should not be denied relief merely because he had couched the plaint in the the form of a suit for mandatory injunction.*
...”

(emphasis supplied)

26. The respondent contends that for a moment assuming that the plaint for a relief of possession was guised as a suit for mandatory injunction, even that would be allowed because of the pre-existing adjudication holding that the appellant had no right title or interest in the suit property. The aforecited quotation of *Santlal Jain (supra)* was with respect to a licensor who had some rights, in the suit property, whereas in the present case, the appellant has not been able to establish, at any stage, despite 15 adjudications, that he has any right title or interest in the said property.

27. As regards the applicability of order XXI Rule 32, the learned Senior Advocate for the respondent submits that this is an issue of executability of a decree and the arguments are premature; that this argument could well be taken up at the appropriate stage. He says that Order XXI Rule 32(5), Code of Civil Procedure, 1908 lays down a specific provision for the manner in which a decree of mandatory injunction is to be executed. It reads as under:



“ ...

Order XXI: Execution of Decrees and Orders

...

32. Decree for specific performance for restitution of conjugal rights, or for an injunction.

...

(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.”

28. In the amended suit no.612/96, the plaint as amended, had averred *inter alia* as under:

“ ...

4. That the Plaintiff company has several times called upon the defendant to handover the vacant possession of the quarter but all in vain. A notice dated 12.1.1982 was also served upon the defendant to handover the possession of the said room (kothari) to the plaintiff company but the defendant failed to comply with the notice.

... ”

29. Therefore, the relief sought was *inter alia*, as under:

“ ...

9. That the plaintiff company prays that:

That a decree for possession of room (Kothri) situated in Sujan Singh Park New Delhi as per plan annexed be passed in favour of the plaintiff against the defendant.

... ”

30. At that time, there was no cause of action for the respondent



(plaintiff) apropos the appellant (defendant) extending himself or encroaching upon the abutting land admeasuring 165x111 sq. ft., which is the suit property in the present case. In the suit for mandatory and perpetual injunctions i.e. suit no.112/03, the reliefs sought were as under:

“....

16. It is, therefore, prayed that this Hon'ble Court be pleased to pass in favour of the plaintiff against the defendant :-

(I) a decree for mandatory injunction ordering the defendant, his relatives, servants, employees and agents to withdraw completely from Sujan Singh Park, New Delhi;

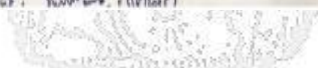
(II) a decree for mandatory injunction directing the defendant, his servants, relatives, employees and agents to remove sign boards, A/C sheets, fencing and other temporary unauthorised structures put up by him in Sujan Singh Park, New Delhi,

(III) a decree for perpetual injunction restraining the defendant, his servants, employees and agents from entering and /or stepping into any part of Sujan Singh Park, New Delhi.

Costs and any other relief this Hon'ble Court deems fit and proper may also be awarded to the plaintiff.”

31. In other words, the respondent/plaintiff had all along regarded the appellant/defendant as a trespasser in the plaint who had no right title or interest, therefore, he was sought to be enjoined from coming into the property and otherwise be removed therefrom. The cause of action in the two suits being different, the reliefs were sought accordingly.

32. The learned Senior Advocate for the respondent further submits that the suit property is not a part of the Gurudwara but land forming part of Sujan Singh Park, in the vicinity of the Gurudwara, which too is located in the said Park. He refers to a map (at pdf page 205 of volume 1). The same is reproduced hereunder:



34. What emanates from the preceding discussion is that the respondent (plaintiff) was able to prove that it was the owner of the suit land-the open area/courtyard outside the *Kothri* near the Gurudwara; the said open area/courtyard was claimed to be a part of Sujjan Singh Park; the appellant



(defendant) was unable to establish any rights in the open area; not even on the basis of the *Daan Patra* propounded by him. Therefore, the grant of the injunction and of corollary relief of possession as held in *Santlal Jain (supra)* cannot be faulted. The relief of possession would be inherent in the injunction as otherwise, it would lead to multiplicity of suits and “the attendant delay, trouble and expense”. In the circumstances, this issue is answered in the affirmative.

Issue 3: *Whether the suit of the respondent is barred by the law of limitation.*

35. Apropos the third question of law, the learned counsel for the appellant refers to an order dated 25.10.2010 passed in the suit by the learned Trial Court, which recorded as under:-

“Written arguments filed by the plaintiff. Copy supplied. Learned Counsel for the defendant during the course of arguments has also argued that present suit is barred by limitation. Record Shows that issue in this regard has not been framed and since the same is a legal issue. It can be raised at any stage. In facts and circumstances, that this issue has been raised for the first time at the stage of final arguments. I am of the opinion that opportunity should be given to the plaintiff to make submissions on this issue also. In facts, put up for further arguments on the issues already framed as well as on the aspect of this suit being barred by limitation”.

36. The learned counsel for the appellant argues that this court has framed the issue of limitation because the same was never examined by the learned Trial Court. She submits that according to the plaintiff the appellant was in an unauthorized possession of the suit property comprising 10 x 10 feet and the courtyard; if that was the case then the respondent ought to have sought a



relief for eviction of the appellant from the entire area within a period of limitation starting from 1981; instead, a suit was filed in 2003 seeking removal of the appellant, as an encroacher from the said land 22 years later. She submits that the suit for injunction was filed perhaps because in a suit for possession, the respondent would have had to file court fees as per the market value of the suit property.

37. The learned Senior counsel for the respondents submits that the limitation would not apply in the present case because there was a continuous wrong by the defendants/appellants inasmuch as it continued to illegally occupy and/or encroach upon the premises of the Gurudwara owned by Sir Sobha Singh. Furthermore, the appellant's earlier suit bearing No.374/95 in which he had sought permanent injunction restraining Sir Sobha Singh and other from interfering had been rejected on 15.07.2002. The rights of the parties got crystallized, therefore, that was the appropriate moment to file the present suit. This aspect has been dealt with in the judgment of the learned Trial Court dated 23.04.2011 in Suit No. 112/03 as under:-

"8. ISSUES NO.2 AND 3:

Both the issues are interlinked and they are decided together. The onus of proving these issues was on the plaintiff who has claimed that defendant is an unauthorized occupant of the suit property and should be directed to remove himself, all his relatives, agents, employees etc. from entire Sujan Singh Park. Ld. Counsel for the defendant has strongly argued that the relief is barred by limitation since admittedly, defendant is in possession of the property since 1974 and the suit filed in 2003 and is hopelessly barred by limitation whereas counsel for the plaintiff has claimed that since the suit of the defendant claiming his title in the piece of land measuring 165 x 111 feet on the basis of a deed of daan was dismissed by the court on 15.07.02, the cause of action



accrued in favour of the plaintiff only on that date since an earlier suit of the plaintiff would have been stayed u/s X CPC as the matter was already subjudice in another suit. In this regard, Ld. Counsel for the plaintiff has placed reliance upon the Judgment titled as "Sant Lal Jain Vs. Avtar Singh" reported in AIR 1955 SC 857. Ld. Counsel for the defendant has placed reliance upon the Judgment titled as "Faqir Chand Vs. Lila Ram" reported in AIR 1994 Delhi 161. In this Judgment, in a suit for mandatory injunction seeking demolition of unauthorized construction, Hon'ble Delhi High Court has taken a view that the limitation is three years under Article 113 of the Limitation Act and shall apply in a suit of mandatory injunction.

9. I have considered the rival submissions of both the counsels. In the Judgment relied upon by the counsel for the plaintiff, a suit for mandatory injunction against a licensee seeking directions to him to vacate the property was held maintainable under the circumstances of that case. Hon'ble Supreme Court was of the opinion that if the licensor acts quickly, a suit for mandatory injunction is maintainable against a licensee for recovery of the possession of the property. In the present case, admittedly, the defendant up to 15.07.02 was contesting his suit claiming title in the piece of land measuring 165 X 111 feet on the basis of a deed of daan. The cause of action, therefore, as far as this piece of land is concerned, will certainly accrue in favour of the plaintiff on 15.07.02. The present suit was filed on 20.02.03 and therefore, plaintiff acted promptly for taking back the possession of this particular piece of land and therefore, suit for mandatory injunction is not barred by limitation for this land. As far as mandatory injunction to the effect that defendant alongwith his family members should be asked to remove themselves completely from Sujan Singh Park is concerned, I am of the considered opinion that the suit is barred by limitation as well as being vague. The cause of action in respect of unauthorized occupation of the defendant in Sujan Singh Park except of the piece of land measuring 165 x 111 feet was available to the plaintiff and maintainable against the defendant irrespective of the pendency of the suit of the defendant bearing No.649/93 which was dismissed on 15.07.02. There was no legal bar restraining the



plaintiff from seeking this remedy of mandatory injunction or possession against the defendant for any other portion of Sujan Singh Park. The present suit seems to be a piece of astute drafting. The plaint is completely silent in respect of the date from which and the portion in which the plaintiff is in possession of any other area of Sujan Singh Park. As a matter of fact, up to para 12, there is only brief history of other litigation between the parties and from para 13, the cause of action accrued in favour of the plaintiff. If the entire is read as a whole, in para 12, plaintiff has talked about the fact that the plaintiff does not have any right, title or interest in the piece of land measuring 165 x 111 feet and has cleverly added the words 'any other part of Sujan Singh Park'. The plaint is silent or has cleverly concealed not only the date, but also any other part which is in possession or is occupied by the defendant and under the garb of this area measuring 165 X 111 feet, in the present suit, plaintiff has tried to take a blanket order against the defendant to ask not only him, but his other relatives or employees to vacate Sujan Singh Park. On the vague and unspecific plea, a blanket order cannot be granted in favour of the plaintiff and against the defendant. At most the plaintiff can ask is to vacate or remove the defendant from this plot of 165 X 111 feet. As a matter of fact, even the affidavit of PW-1 is cleverly drafted. In his affidavit, plaintiff exhibits the site plan as Ex. P-5 and shows that Gurudwara therein shown red in the site plan and the size of Gurudwara has cleverly been concealed and there seems to be a willful and intentional deliberate attempt on the part of the plaintiff even to conceal the specific area of 165 x 111 feet from which they want an order in their favour directing the defendant to remove himself from the property. Otherwise also, this relief has been sought not only against the defendant, but against his family members, his relatives, his employees and his agents. The word 'relative' further is very vague term as there cannot be an end to the relations and can an unspecified relative of the defendant be thrown out of Sujan Singh Park? The answer is no. The court cannot give a blanket order in favour of the plaintiff that all the relatives whether specified or unspecified of the defendant should withdraw completely from Sujan Singh Park.



10. As far as the right of the plaintiff to ask removal of defendant from this portion of 165 x 111 feet is concerned, plaintiff admittedly has proven that they are the owners of the property and defendant under guise of a deed of daan has unauthorizedly occupied the area of 165 X 111 feet and his claim to this property has been dismissed up to Hon'ble Supreme Court including subsequent probate petition which was dismissed by Hon'ble Delhi High Court on 12.01.10 in C.M. (Main) No.265/09 titled as "Khuswant Singh & Anr. Vs. Kirpal Singh". Therefore, plaintiff has been able to establish that they have right in this piece of land measuring 165 x 111 feet whereas the defendant has none and therefore, plaintiff is entitled to an order of mandatory injunction against the defendant only for this portion of plot. Issue No.1, therefore, is decided accordingly.

11. As far as the relief of perpetual injunction is concerned, it has been asked by the plaintiff that defendant should be stopped from entering or stepping in any part of Sujan Singh Park in future. Admittedly, Sujan Singh Park in total is an area of almost 15 Acres consisting of Ambassador Hotel, residential flats, garages, servant quarters etc. Though plaintiff has asked for a blanket order directing I the defendant to remove completely from Sujan Singh Park, but as already discussed and stated as above, this court cannot grant this blanket relief since not only their claim in respect of any other portion except of 165 x 111 feet is barred by limitation, their pleadings in respect of the other portion is vague and astute drafting and once I have held that the plaintiff cannot be given this blanket relief of mandatory injunction, the question of giving the plaintiff a blanket perpetual injunction in respect of any other area of Sujan Singh Park does not arise. For instance, Ambassador Hotel being situated in Sujan Singh Park is a public place and every person has a right to visit there and the perpetual injunction as asked for will mean that not only the defendant, but every other member of his family, his servants, his employees, etc. shall be restrained from entering Sujan Singh Park for all times to come which relief cannot be granted to the plaintiff. Defendant can be restrained only from forcibly and unlawfully re-entry in this area of 165 x 111 feet. Issue No.2 is also accordingly decided."



38. In view of the above, it is apparent that the suit for mandatory injunction was not barred by limitation. The continuing wrong of trespass was enjoined as the Appellant was unable to show any right, title or interest in the land. This claim on the basis of *Daan Patra* had been rejected. The guise deed of *Daan* had been called out and the Appellant had been considered as an unauthorised occupant of the land.

Issue 4: Whether the document, Ex.P1, can at all be treated as a "Will" and would it be admissible in evidence for the purposes of claiming possession in the suit property by the appellant.

39. Apropos this issue, the learned counsel for the appellant refers to a Deed of Daan dated 20.11.1974, she states that the same is proven by leading evidence of the witness, i.e., Swami Ved and Ujagar Singh, she also refers to the cross-examination of the appellant on 27.02.1996 in which he has deposed in favour of the said document.

40. The learned counsel contends that Deed of Daan has been annexed by the plaintiff themselves in the suit. Furthermore, the defendant would have a right to rely upon the documents which were filed.

41. The deposition of the appellant has been referred to in the 1982 suit in para no. 7 of the judgment in Suit No. 143/82.

42. The appellant claims to have absolute ownership of the suit premises in terms of the aforesaid Deed of Daan since 1974 and that he has been in possession of the suit property. Therefore, he submits that the said Deed is complete in all aspects.

43. The learned counsel for the respondent refutes the aforesaid contentions, he submits that the said arguments as being without substance



because the parties have had over nine litigations between them and in each of them the case has been held against the appellant.

44. He submits that the sole basis of the appellant's claim to the occupation of the premises of the Gurudwara is a *Daan Patra*, i.e., a Gift Deed, allegedly executed by Sir Sobha Singh. However, an identical relief sought on the basis of the said *Daan Patra* stands rejected in an earlier proceeding preferred by the appellant in Suit No.649/1993 titled as '*Sant Kirpal Singh vs. Sir Sobha Singh & Sons (P) Ltd.*', wherein the appellant had sought the following relief:-

"....defendants be restrained by a decree for perpetual injunction not to dig the land within the precincts of Gurudwara Dera, Sujan Singh Park, New Delhi for the purposes of erecting cement concrete pillars and for raising a roof in place of the existing tin-shed and from further restraining them from raising any other additions, alterations in the Gurudwara precincts. A decree for mandatory injunction be also passed for demolition of any cement pillars or any additions or alterations made in the said Gurudwara precincts by defendants...."

45. The judgment dated 15.07.2002 passed in the aforesaid suit records that the plaintiff's claim was based on the contention that he is a Mahant/owner of Dera Gurudwara Sujan Singh Park; that under a *Daan Patra* dated 20.11.1974 executed by Sir Sobha Singh in his favour, he was in possession of the Dera Gurudwara land, etc. appurtenant to it. However, the learned Trial Court reasoned that the *Daan Patra*, i.e., a Gift Deed, effectively being a transfer of rights, of the erstwhile owner of the immovable property to another person, would be required to be registered under section 123 of the Transfer of Property Act, 1882; that unless it was duly registered under sections 47 and 49 of the Indian Registration Act,



1908, judicial cognizance of the same could not be taken and no reliance can be placed on it. Furthermore, the learned Trial Court has held, *inter alia*, that:-

“ A perusal of Ex.P1 would reveal that this document was never got registered under Indian Registration Act. Therefore, as rightly argued by learned counsel for defendants No.1 and 4 no reliance can be placed on Ex.P1 and this unregistered document does not affect any immovable property comprised therein. It is pertinent to mention that while appearing as PW1, plaintiff termed this document as a will. According to DW1- Sh. Himmat Singh, Sir Sobha Singh executed will dt. 22.2.1953. Thereafter, he never executed any will. Certified copy of Probate granted by Hon'ble High Court of Delhi in the year 1979 is Ex.D1. It is not case of the plaintiff that at any time he filed any objections during pendency of probate proceedings so as to put forth Dan Patra dt.20.11.74. This belies the version of the plaintiff about execution of any will by Sir Sobha Singh in his favour. In view of the above discussion, plaintiff is not entitled to the relief of injunctions as prayed for in the plaint. Both these issues No.1 and 7 are therefore decided against the plaintiff and in favour of the defendants.”

46. An appeal against the aforesaid order was dismissed on 14.05.2003. In his Regular Second Appeal (No.134/2003) against both the dismissals, the appellant's argument was that the document concerned was not a *Daan Patra* or a Gift Deed, but a Will. However, this court dismissed the RSA on 06.08.2003 with the following observations:-

“RSA 134/2003 and CM 395/2003 :

This appeal is directed against the judgment and order dated 14th May, 2003, of the Additional District Judge in RCA No.50/2002, which arose from a judgment and decree dated 15th July, 2002, of the Civil Judge, Delhi. The Appellate court vide its judgment concurred with the findings of the Trial Court and dismissed the appeal.



Learned counsel for the applicant submits that the document in question which has been held to be a gift deed is, in fact, a will and that this Court in regular second appeal must re-appreciate the document and then come to a conclusion whether the same is will or a gift deed.

I have heard learned counsel for the applicant and have also gone through the judgment under challenge. I find that the courts below have scrutinised the document and concurrently held that the same is a gift deed and not a will. I am of the opinion that it is not open to this Court to re-appreciate this finding in the regular second appeal under section 100 CPC. In this view of the matter, RSA 134/2003 is dismissed. CM395/2003 also stands disposed of.”

47. The order in RSA No.134/2003 was upheld by the Supreme Court and has attained finality. The appellant has again relied upon the same *Daan Patra* and refers to evidence apropos it, which is untenable. This is the fourth round of litigation regarding the *Daan Patra*.

48. A suit bearing no.490/01/90 was filed by the respondents for demolition of one temporary / Kachcha room, admeasuring 8 feet x 8 feet on the terrace of the aforesaid Gurudwara. The present appellant (defendant) had contended that he was the owner of the property by virtue of a Will dated 20.11.1974. However, the said contention was rejected by the learned Trial Court and the suit was decreed. The decree was upheld by this Court in RSA No.61/2007 by judgment dated 01.08.2008. Thereafter, the appellant filed a Probate Petition before the learned District Court seeking probate of the Will dated 20.11.1974, in which the respondent's application under Order VII rule 11 C.P.C. was dismissed by order dated 31.01.2009. The said order was challenged by the respondents in this court by CM(M) No.265/2009 and this court dismissed the appellant's probate petition on



12.01.2010, holding *inter alia* as under:-

“16. Seen in the aforesaid light, I am satisfied that the present case falls in the category of the petition for probate being not only an abuse of the process of the court but also of there being no chance of the respondent deriving any benefit even by succeeding in proving the document.

17. Taking up of the second aspect first, it is abundantly clear from the judgments of the various courts in the first round of litigation that it stands established that the property subject matter of the document titled Deed of Daan belonged, even in the lifetime of deceased Sir Sobha Singh, as well as now to Sir Sobha Singh & Sons Ltd. and which apparently was subsequently known as Sir Sobha Singh & Sons Pvt. Ltd. The judgment of the first appellate court in the first round of litigation as noticed above expressly records that the respondent herein had not disputed the said fact. The said finding of the first appellate court has not been disturbed in the order in second appeal or by the Supreme Court and is now conclusive and binding on the respondent. Once it is established and binding on the respondent that the property is of Sir Sobha Singh & Sons Ltd., even if the respondent succeeds in establishing that the document is a Will and not an invalid gift and/or in proving the same, the respondent still cannot derive any benefit therefrom for the reason of Sir Sobha Singh who has purported to transfer /bequeath the property there under himself having no right with respect thereto.

18. In this regard it is also significant that the respondent also, in the first round of litigation chose to litigate with Sir Sobha Singh & Sons Pvt. Ltd. and not with the natural heirs of Sir Sobha Singh. If Sir Sobha Singh was the owner of the property, the same upon his demise and in the absence of any Will would have fallen to the share of his natural heirs and the respondent would have in the first round of litigation while seeking to establish his rights with respect thereto would have made the natural heirs of Sir Sobha Singh as parties to the suit. The respondent did not choose to do so and choose to litigate with the limited company. The respondent now cannot be permitted a second round with the natural heirs of Sir Sobha Singh. Thus, I find the petition to be



doomed for the said reason and which ought not to be permitted to drag in the courts at the cost of other deserving cases. The petition seeking probate deserves summary dismissal on this ground alone.

*19. The present case is clearly a case of re-litigation. The contention of the counsel for the respondent that the genuineness and authenticity of a Will is to be established in a probate proceedings only does not find favour with me. It is now settled proposition as held in *Bihari Lal Ramcharan Vs. Karam Chand Sahni* AIR 1968 P&H (at Delhi) 108 (DB) and *Rajan Suri Vs. The State* AIR 2006 Delhi 148 and reiterated in the recent dicta of *Banwari Lal Charitable Trust Vs. Union of India* MANU/DE/2515/2009 that as far as the city of Delhi is concerned, probate is not necessary to claim/assert rights under a Will. Even in the absence of a probate, such rights under a Will can be established in a collateral proceedings in which the Will may be in question. See *Prithipal Singh Sabharwal Vs. Jagjit Singh Sabharwal* MANU/DE/0851/1996.*

20. From a reading of the judgments of the courts in the first round of litigation, it is clear that the validity, authenticity, genuineness of the document was very much in question. The respondent as plaintiff in those proceedings relied upon the said document in assertion of his rights qua proved as a Will. The said finding of the civil court is now res-judicata before the probate court at least against the respondent. The respondent having not impleaded the natural heirs of the deceased Sir Sobha Singh as parties to the civil suit, the finding if had been returned in the first round of litigation of the Will having been proved would not have been binding upon the said legal heirs of the deceased but is nevertheless binding upon the respondent.

21. Probate can be sought only of a Will. If it is disputed before the probate court where the document of which probate is sought is a Will or not, the probate court would adjudicate on the same. As aforesaid, in the city of Delhi the said jurisdiction also extends to the civil courts in which the Will may be established. The civil courts in the first round of litigation have categorically held the document not to be a Will. It is so expressly set out in the order in



second appeal to this court. The respondent cannot now be permitted a second round before the probate court by contending the document to be a Will. Once the finding of the civil court of the document not being a Will is held to be binding on the respondent, the respondent is not entitled to a second round in the probate court to contend the document to be a Will. Thus, on both these counts the petition for probate is found to suffer from the malady of re-litigation.

22. *The probate court was thus in error in holding that all the aforesaid aspects which are borne out from the judgments, have to be shut out and the probate petition to be put to trial. The probate petition was liable for summary dismissal not only under Order 7 Rule 11 of the CPC but as held in the judgment cited above also in the exercise of inherent powers of the court to weed out such frivolous litigation. The Supreme Court in Sardar Estates Vs. Atma Ram Properties Pvt. Ltd. (2009) 6 SCC 609 has held that starting a second round of litigation on frivolous grounds is a flagrant abuse of the process of the court and CM (M)265/2009 Page 12 of 12 this process has become widespread and which the court cannot approve of, otherwise no judgment would ever attain finality.*

23. *As far as the contention of the counsel for the respondent of this Court in exercise of jurisdiction under Article 227 of the Constitution of India being not entitled to interfere with the orders of the trial court, the present is in fact found to be a classic case where such powers ought to be exercised by this Court. The respondent is clearly made out to be abusing the process of the court and indulging in re-litigation. I may mention that not only the first round of litigation mentioned herein above but similar issues were also for adjudication in the suit filed against the respondent by Sir Sobha Singh & Sons Pvt. Ltd. for possession of room/ Kothari and which were decreed. The defence of the respondent to the said suit was of the ownership on the basis of the document aforesaid. It was held that the respondent has failed to prove the aforesaid document.*

24. *This petition succeeds and the petition for probate of the alleged Will dated 17th April, 1954 of Sir Sobha Singh is*



rejected/dismissed summarily. The respondent in the circumstances is also burdened with costs of Rs.25,000/- payable to the petitioners”.

49. The appellant’s SLP No. 10887/2010 against this court’s aforesaid order dated 12.01.2010 was dismissed by the Supreme Court on 19.04.2010.

50. In RSA 134/2003, this court affirmed on 06.08.2003 that the decree dated 15.07.2002 and the subsequent order in RCA No.50/2002 dated 14.05.2003; that the document is a gift deed and not a Will. Furthermore, while dismissing the appellant’s Probate Petition which propounded the same *Daan Patra* as a Will, this court has held that reiteration of the said document as a Will by the Appellant was a case of re-litigation, in the face of the validity, authenticity and genuineness of the document being “very much in question”. The Probate Petition was dismissed summarily with costs of Rs.25,000/- against the Appellant. In view of the above, the answer to Issue No.4 is in the negative.

51. The appellant next submits that even if the said document is to be dismissed, the eviction of the appellant from the premises of the Gurudwara would have to be done by the due process of law; that the issue as to whether the document dated 20.11.1974 was ever a *Daanpatra* (Gift Deed) or a Will was never raised and prayed, in any other case, as an issue and adjudicated upon. The learned Senior Advocate for the respondent submits that this issue has already been adjudicated upon by way of rejection of the appellant’s Probate Petition, which held that the said document was not a Will.

52. The learned counsel for the appellant further submits that in none of the suits, provisions of the Indian Succession Act were discussed.

53. The learned counsel for the respondent submits that the reliance by the



appellant on the so-called Will no more applicable to him because the issue has been examined in detail by this court in its judgment dated 12.01.2010 in CM(M) 265/2009, as noted hereinabove; that the respondent's suit for eviction from the quarters occupied by him for his residence was decreed on 20.02.1998; that while process of his eviction was underway, he encroached upon other areas of the land adjoining the Gurudwara on the basis of the so-called *Daan Patra*. In the circumstances, a suit for mandatory injunction was filed which too was decreed on 15.07.2002.

54. The Court would note that the appellants' motions seeking right, title and interest in the said property was only on the basis of the Dan Patra and/or the Gift Deed, which was rejected being an inadmissible document in law. The said order was upheld by the Supreme Court. The second motion to have the said document treated as a 'Will' too was rejected by this Court as well as by the Supreme Court. The respondents have succeeded by a court order in demolishing the illegal construction raised by the appellant in the premises of the Gurudwara. They also have in their favour a permanent injunction against the appellant with respect to his ingress into Sujan Singh Park and/or the Gurudwara. Now, for the appellant to seek probate of a Will, in effect seeks to over-reach the decision of this court dated 06.08.2003, which has held that the said document cannot be treated as a Will. That order having been upheld by the Supreme Court. The appellant would have no locus to file and/or pursue this appeal. The issue being *res judicata* cannot be entertained by this court.

55. Insofar as this Court has held in RSA No.134/2003 that the said document was rightly held to be a Gift Deed and not a Will and the said judgment has become final in view of the appellant's SLP against the said



order being dismissed, the issue has attained finality and that document cannot be treated as a Will, therefore, a probate petition apropos the same would not lie.

56. The respondent has prepared a chart to show the 16 rounds of litigation involving the appellant and the result in them have been against him.

S. No.	Suit No.	Title	Reliefs	Date of Decision
1	612/96	Sir Sobha Singh & Sons Pvt. Ltd. Vs Kirpal Singh	For possession of room Kothri (Quarter) 10'x10' at back of Gurudwara	Suit decreed on 20.02.98 (P. 297) RCA 4/98- Dismissed on 31.10.98 (P. 312) RSA 103/98- Dismissed on 26.07.99 (P. 320)
2	490/01/90	Sir Sobha Singh & Sons Pvt. Ltd. Vs Kirpal Singh	For mandatory injunction to remove kacha room 8'x8' on roof of Gurudwara Singh Sabha	Suit decreed on 29.11.04 (P. 234) RCA 60/06 dismissed on 24.11.06 (P. 251) RSA 61/07 dismissed on 01.08.08 (P. 258)
3	649/93	Kirpal S. Vs Sir Sobha S. &	For perpetual and mandatory injunction	Suit dismissed on 15.07.02 (P. 200)



		Sons Pvt. Ltd.	based on Dan Patra on 20.11.74	RCA 50/02 dismissed on 14.05.03 (P. 212) RSA 134/03 dismissed on 06.08.03 (P. 229) SLP(C) 20876/03 dismissed on 09.02.04 (P. 232) Review P. 674/04 dismissed on 31.03.04 (P. 253)
4	Probate Petition	Kirpal Singh Vs State & Ors.	Seeking probate of alleged Will dated 20.11.97 of Sir Sobha Singh	Probate petition dismissed by this Hon'ble Court in CM(M) 265/09 on 12.01.10 (P. 261) SLP(C) 10887/10 dismissed on 19.04.10 (P. 273)
5	112/03 Filed on 20 th Feb. 2003	Present suit titled as Sir Sobha Singh & Sons Pvt. Ltd. Vs Kirpal Singh	Suit for mandatory and permanent injunction	Suit No. 112/03 decreed on 23.04.11 (P. 46) RCA No. 02/12 dismissed on 23.02.2013 (P. 30)

57. The appellant's contention that the issue of possession was never framed nor was it adjudicated upon is rejected as untenable in the context of



the aforesaid facts, the judgments cited as well as the fact that the RSA, SLP and Review Petition, preferred by the appellant, settles the said issue.

58. The appeal is without merit and is accordingly dismissed.

NAJMI WAZIRI, J

MARCH 16th 2022
SS/rd/AB

