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

+ CM(M) 1857/2023 & CM APPL. 58719-20/2023

NIDHI JAIN

..... Petitioner

Through: Petitioner in person

versus

RANI JAIN & ORS.

..... Respondent

Through: None

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Reserved on: 10th November, 2023

Date of Decision: 23rd November, 2023

CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J:

1. This Petition filed under Article 227 of the Constitution of India impugns the order dated 14.10.2023 passed by ADJ-05, South West District, Dwarka Courts, New Delhi ('Trial Court') in CS No. 673/2019, titled as **Rani Jain v. Rishabh Jain & Anr.**, whereby the Trial Court dismissed an application filed under Section 151 of the Code of Civil Procedure, 1908 ('CPC') by the defendant no.3 i.e., the Petitioner herein seeking dismissal of the partition suit on the ground of concealment by the plaintiff i.e., Respondent No.1.

1.1. The Petitioner herein is the defendant no.3. The Respondent No.1 is the plaintiff. Respondent Nos.2 and 3 are defendant nos.1 and 2 respectively before the Trial Court.

1.2. The plaintiff i.e., Respondent No.1 has filed a partition suit on



09.08.2019 seeking partition of the property bearing no. 237, Atulya Apartments, Sector 18-B, Dwarka, New Delhi ('suit property').

1.3. The Petitioner herein filed an application under Section 151 CPC on 08.09.2020 seeking dismissal of the partition suit on the ground of concealment by the plaintiff of the orders passed by the MM ('Mahila Court'), Dwarka Courts ('DV Court'), in CC No. 45524/2016 ('DV Proceedings') initiated by the Petitioner herein. Thereafter, the Petitioner filed another application under Section 151 CPC dated 06.10.2022 seeking disposal of the earlier application filed on 08.09.2020.

1.4. The Trial Court vide order dated 14.10.2023 after allowing the application for early hearing, dismissed the Section 151 CPC application dated 08.09.2020 seeking dismissal of the partition suit.

2. The Petitioner herein i.e., defendant no.3 who appears in person states that the Trial Court in the impugned order has referred to the order dated 18.03.2013 passed by DV Court restraining the Respondents from not dispossessing the defendant no.3 from the suit property without due process of law.

2.1 She states that the Trial Court failed to appreciate that the defendant no.3 was relying upon the orders dated 17.12.2016, 28.02.2017 and 27.07.2017 whereby DV Court had restrained the Respondents herein i.e., plaintiff and defendant nos. 1 and 2 from (i) dispossessing the Petitioner from the suit property; and (ii) also restrained them from visiting the suit property.

2.2 She states that the said orders of the D.V. Court restraining the Respondents from visiting the suit property, though interim in nature are in subsistence.

2.3 She states that the consequence of these restraint orders is that



Respondent No.1 i.e., the plaintiff is not in actual or constructive possession of the suit property. She states that since the plaintiff is not in actual or constructive possession of the suit property, the suit for partition is not maintainable, as no separate relief for recovery of possession has been sought for in this partition suit.

2.4 She states that a plaintiff is not entitled to maintain the suit for partition unless he/she has actual or constructive possession of the suit property. In this regard, she placed reliance on the decisions pronounced by Patna High Court in *Mukha Singh & Ors. v. Ramchariter Singh & Ors.*, 1955 SCC OnLine Pat 74, Mysore High Court in *M.L. Sreenivasa Rao v. Harinath Upadaya & Ors.*, 1971 SCC OnLine Kar 20, Calcutta High Court in *Babu Lokenath Singh v. Babu Dhawakeshwar*, AIR 1915 Cal 357, Kerala High Court in *Ummer v. Sainuddin & Ors.*, 1959 KLJ 65 and Delhi High Court in *Harphool Singh v. Daropati & Ors*, 2011 SCC OnLine Del 957 (*Reversed in Daropti v. Harphool Singh*, (2013) 10 SCC622).

2.5 She states that the suit has been instituted on 09.08.2019 without disclosing the proceedings initiated by defendant no.3 under the Domestic Violence Act, 2005, the orders passed therein and in view of this suppression, the plaint ought to have been dismissed.

2.6 She states that the defendant no.3 disputes that the plaintiff along with defendant no.1 and defendant no.2 is a co-owner of the suit property. In this regard, she states that it is a matter of record that the suit property has been mortgaged with LIC Housing Finance and an Equated Monthly Instalment ('EMI') of Rs. 36,000/- per month is payable to the Mortgager. She states that as per the record of the D.V. Act proceedings and more specifically the order dated 13.05.2019 therein, it is evident that it is defendant no. 2 alone who is



paying the entire instalment of Rs. 36,000/- to the mortgager.

2.7 She states that, however, as is evident from the order dated 22.08.2016 a sum of Rs. 12,000/- has been deducted by DV Court from the disposable income of defendant no.2, towards his share of EMI towards the subject property. She states, it is her contention that this amount of Rs. 12,000/- which is deducted from the disposable income of defendant no.2 would amount as her (i.e., defendant no. 3's) contribution towards repayment of loan.

2.8 She states that she apprehends that since the Trial court has listed the matter for adjudication of the application filed by the plaintiff under Order XII Rule 6 CPC, the said application will be decided by the Trial Court relying upon the findings returned in the impugned order.

3. This Court has considered the submissions of the Petitioner and perused the record.

4. The defendant no.3 (i.e., Petitioner herein) filed an application under Section 151 CPC seeking dismissal of the suit on the ground that the plaintiff is not in possession of the suit property. To prove the said submission reliance has been placed upon the interim order dated 17.12.2016 passed by the DV Court restraining the plaintiff, defendant nos. 1 and 2 from visiting the suit property.

4.1 Defendant No.3 has also relied upon the order dated 24.12.2014 passed by the DV Court restraining the plaintiff, defendant nos. 1 and 2 from creating any third-party interest in the suit property.

4.2 It was, further, stated in this application that the plaintiff and defendant nos. 1 and 2 have been proceeded ex-parte by the DV Court on 27.08.2019.

4.3 It was, therefore, defendant no. 3's contention in the application that the suit is not maintainable in view of the restraint orders passed by the D.V.



Court on 24.12.2014 and 17.12.2016.

5. The Trial Court by its impugned order dated 14.10.2023 has dismissed this application filed under Section 151 CPC and the operative portion of the order reads as under:

“6. Perusal of record clearly reveals that, present 'suit for partition' filed by the plaintiff against her two sons and daughter in law i.e. defendant No.3 on the ground that plaintiff, defendant No. 1 and defendant No. 2 jointly purchased the suit property vide registered sale deed dated 13.11.2009 on bank loan. Record also reveals that, summons of the present suit duly served on the defendants and defendant No.3 also filed detailed written statement thereby mentioning about the pending litigation Under DV Act.

7. Record also reveals that, objections under present application is similar to the objections made under previous application which was dismissed as withdrawn without seeking any liberty. No reason has been given by defendant No. 3 why she withdrawn earlier application and filed present one.

8. This court does not find any merit in the submissions made by the defendant No. 3 with respect to possession of suit property qua plaintiff and other defendants for two reasons. Firstly, in her written statement, no pleading has been made by defendant No. 3 as to how plaintiff or other defendants are dispossessed from the suit property. Secondly, no explanation is given by defendant No. 3 that how she came into the possession of suit property i.e. admittedly owned by plaintiff and other defendants. Moreover, in entire written statement, defendant No. 3 made averment with respect to pending disputes between the parties due to marital relationship and given description/dispute related to third properties i.e. Kamla Nagar, Noida etc. which is not subject matter of present dispute. In any case, Ld/MM/Mahila court restrained the respondents to said proceedings (i.e. plaintiff and other defendants) from dispossessing the defendant No. 3 without due course of law.

9. It is well settled law that, proceedings under DV Act and Civil Proceedings under 'suit for partition' are independent to each other and the same has to be decided as per the respective provisions of law. In fact, all orders relied upon by the defendant No. 3 in her application are interim in nature and pertains to the year 2014 and 2016.”

(Emphasis supplied)

6. This Court has perused the plaint and the written statement filed by



defendant no.3.

6.1 Defendant no.3 has admitted in the written statement that the suit property has been purchased by plaintiff, defendant nos. 1 and 2 by a registered sale deed dated 13.11.2009 duly registered in the Office of Sub-Registrar, Janakpuri, New Delhi. The sale deed states that marriage of defendant nos. 2 and 3 was solemnised subsequently on 16.02.2012.

6.2 It is also an admitted fact that the suit property is mortgaged with LIC Housing Finance and an EMI of Rs. 36,000/- is being paid to the mortgager.

6.3 The effect, if any, of defendant no.2 paying the entire amount of Rs. 36,000/- per month to the mortgager on the admitted title of the plaintiff would be considered by the Trial Court while deciding the application under Order XII Rule 6 CPC or at trial.

6.4 Further, even if it is assumed that the entire amount towards EMI of Rs. 36,000/- is being paid by defendant no.2, this fact alone would not be a ground for dismissing the suit for partition at the threshold; since, admittedly the plaintiff is the recorded title holder.

7. With respect to the contention of the defendant no.3 that she is residing alone in the suit property and there are orders of the DV Court dated 17.12.2016, 28.02.2017 and 27.07.2017 restraining plaintiff, defendant nos.1 and 2 from visiting the suit property; and as per defendant no.3 the same evidences that the plaintiff is not in possession of the suit property, can also not be a ground for dismissing the partition suit at the threshold.

7.1 It would also be relevant to note that the contents of the order dated 06.02.2016 passed by the DV Court, which records the statement of the defendant no.3 that she is willing and has no objection if the plaintiff, defendant nos. 1 and 2 reside with her in the suit property. The said admission



of the defendant no.3 was recorded by the DV Court while disposing off an application filed by the plaintiff, defendant nos. 1 and 2 for vacating the suit property and to shift in an alternative accommodation. The relevant portion of the order dated 06.02.2016 reads as under:

“Moreover, court is not able to contemplate a situation to evict the complainant from the matrimonial house so as to put back all the respondents into the house as the same can never be the intention of the legislature while drafting the present legislation, and that too in a case where complainant has always expressed her willingness before the court and always stated that she does not have any objection if the respondents reside with her in the shared household.”

(Emphasis supplied)

7.2 The DV Court relied upon the said submission of defendant no.3 as it was a consideration which weighed with the said Court while dismissing the application filed by the plaintiff. The aforesaid statement made by the defendant no.3 evidences that she admits to the plaintiff and defendant no. 2's right to possession in the suit property and has not disputed the same.

7.3 The defendant no.3 has, however, relied upon the subsequent ad-interim order dated 17.12.2016 passed by the DV Court restraining the plaintiff, defendant nos. 1 and 2 from visiting the suit property; and the fact that the said interim order has been continued by the said Court on 28.02.2017 and thereafter. This Court has, therefore, examined the said orders dated 17.12.2016 and 28.02.2017, which read as under:

Order dated 17.12.2016

***“Nidhi Jain vs. Ankit Jain
CC No. 45524/16
PS Dwarka North***

17.12.2016



File received by way of transfer vide order of Hon'ble High Court no. 21/DHC/Gaz/G-7/V.I.E 2(a) 2016 dated 30.11.2016. It be checked and registered.

Present: Both Parents of complainant with counsel Ms. Kirtika. Ms. Akshita, Proxy counsel for respondent no. 1 with respondent no. 1 in person.

An application has been moved on behalf of complainant for appointment of local commissioner for Inspection of joint locker of parties maintained at Standard Chartered Bank. Copy supplied to counsel for respondents who seeks some time to file reply to the said application.

Matter is fixed for CE. However, complainant is not present today. Ld. Counsel for complainant submits that respondent no. 3 Mrs. Rani Jain and sister-in-law of complainant, namely, Ms. Rashi Jain had threatened the complainant at the matrimonial house of complainant on 14.12.2016. The allegations are denied by the respondent. Complainant is at liberty to file affidavit and evidence in support of allegations of the complainant. Complainant is also at liberty to obtain CCTV footage of society in which she is currently residing for 14.12.2016.

Copy of this order be given dasti to complainant for facilitating the obtaining of CCTV footage of the date and place of incident.

Till the next date of hearing respondent restrained from visiting the residential premises of the complainant.

List for CE as well as for filing of reply to the above mentioned application for inspection of joint locker of the parties by the respondents if any on 28.02.2017.

At request, a copy of this order be also given dasti to the ld. counsel for the respondents.

***(Jasjeet Kaur)
MM/(Mahila Court)-04
Dwarka Courts/
17.12.2016***

Order dated 28.02.2017

***CC no.
NIDHI JAIN VS. ANKIT JAIN
PS Dwarka North***

28.02.2017

File received upon transfer vide order no. 2853-2867/Case Transfer/JUDI./DWK/2017 dated 04.02.2017 by Hon'ble District & Sessions Judge, South West. It be checked and registered.



*Present: Complainant in person with counsel Sh. J.D. Sharma.
Respondent is absent.
Ms. Akshita, proxy counsel for the respondent.*

Submission heard.

At request of the complainant, her applications filed before this court on 19.12.2016 for giving directions to Bharti Airtel and Idea Cellular for providing mobile locations and call details for 14.12.2016 stand withdrawn. Signature of the complainant are obtained on the margin of this order sheet in this regard.

Complainant has also filed an affidavit regarding the incident dated 14.12.2016 along with a CDs containing the CCTV footage for the incident dated 14.12.16. Ld. Counsel for the respondent has also filed reply to the application u/s 25 (2) for modification of interim maintenance order dated 22.08.2016 filed on behalf of the complainant. Same be taken on record. Copy supplied.

List for filing of reply to the aforesaid as well as reply to the application for inspection of joint locker in pursuance to order dated 17.12.2016 for 12.04.2017.

Till the next date of hearing respondents are restrained from visiting the premises.

**(Archana Beniwal)
MM, (Mahila Court) -03
Dwarka Courts, 28.02.2017"**

7.4 Wherein a perusal of the said orders would show that these are ad-interim orders passed by the Trial Court without any adjudication on the merits of the contention of the parties and is in a nature of a protection order.

7.5 This Court is of the opinion that the said orders dated 17.12.2016 and 28.02.2017 cannot be construed as ousting the plaintiff and defendant nos. 1 and 2 from the possession of the suit property. The same is not the intent of the said orders of the DV Court, which are only in the nature of interim relief to protect the defendant no. 3.

8. This Court, is therefore, unable to accept the contention of the defendant no.3 especially viewed in the background of the statement made by defendant no.3 before the same DV Court on 06.02.2016.



9. This Court, therefore, finds no infirmity in the impugned order dismissing the application filed by the defendant no.3 under Section 151 CPC, dated 08.09.2020.

10. The determination of the application under Order XII Rule 6 CPC by the Trial Court would be on its own merits, in accordance with law and issue of the operation of the interim orders passed by the D.V. Court would be duly considered by the Trial Court keeping in view the authoritative pronouncement of the Supreme Court in *Satish Chander Ahuja v. Sneha Ahuja*, (2021) 1 SCC 414. It is imperative to refer the judgment of the Supreme Court in *Satish Chander Ahuja v. Sneha Ahuja* (supra), wherein the Supreme Court authoritatively held that proceedings under the DV Act cannot act as an embargo in a civil proceedings. The operative part of the said judgment reads as under:

“157. From the above discussions, we arrive at following conclusions:-

(i) **The pendency of proceedings under Act, 2005 or any order interim or final passed under D.V. Act under Section 19 regarding right of residence is not an embargo for initiating or continuing any civil proceedings, which relate to the subject matter of order interim or final passed in proceedings under D.V. Act, 2005.**

(ii) *The judgment or order of criminal court granting an interim or final relief under Section 19 of D.V. Act, 2005 are relevant within the meaning of Section 43 of the Evidence Act and can be referred to and looked into by the civil court.*

(iii) **A civil court is to determine the issues in civil proceedings on the basis of evidence, which has been led by the parties before the civil court.**

(iv) *In the facts of the present case, suit filed in civil court for mandatory and permanent injunction was fully maintainable and the issues raised by the appellant as well as by the defendant claiming a right under Section 19 were to be addressed and decided on the basis of evidence, which is led by the parties in the suit.”*

(Emphasis supplied)

11. In the opinion of this Court, the orders dated 18.03.2013, 24.02.2014



and 17.12.2016 passed by the DV Court would not bar the maintainability of the suit for partition.

12. The petition filed by defendant no.3 before the DV Court has not been placed on record and therefore, this Court has not had the benefit of perusing the averments made by defendant no.3 therein with respect to the title of the plaintiff, defendant nos. 1 and 2 to the suit property and the averments with respect to the possession of the said property.

13. Accordingly, the present petition is dismissed. Pending applications are disposed of.

MANMEET PRITAM SINGH ARORA, J

NOVEMBER 23, 2023/msh/sk