

(2012) 02 DEL CK 0518

In the Delhi High Court

Case No : CS (OS) 2503 of 1998 and I.As 8422/99, 1409 of 2000, 1438 of 2000, and CCP (O) 38 of 1999 and Test. Cas. 52 of 1998, IAs 2601/06, 15743/10 and 1440/11

Shiel Mehta

APPELLANT

Vs

Ashok Mehta
 Ashok Mehta Vs State and Another

RESPONDENT

Date of Decision : 02-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, Order 39 Rule 1, Order 39 Rule 2

Citation : (2012) 02 DEL CK 0518

Hon'ble Judges : G.S. Sistani, J

Bench : Single Bench

Advocate : Rajive Sawhney, with Mr. Rakesh Sawhney, in CS OS 2503/1998 and I.As 8422/99, 1409/2000, 1438/2000 and CCP O 38/1999 and Mr. Jayant Bhushan, with Mr. Buddy A. Rangnathan and Mr. Gautam Talukdar, in Test. Cas. 52/1998, IAs 2601/06, 15743/10 and 1440/11, for the Appellant; Jayant Bhushan with Mr. Buddy A. Rangnathan and Mr. Gautam Talukdar, in CS (OS) 2503/1998 and I.As 8422/99, 1409/2000, 1438/2000 and CCP (O) 38/1999 and Mr. Rajive Sawhney with Mr. Rakesh Sawhney, Advocate for the Respondent No. 2 in Test. Cas. 52/1998, IAs 2601/06, 15743/10 and 1440/11, for the Respondent

Judgement

G.S. Sistani, J.

I.A. No. 16927/2011 in CS (OS) 2503/1998 & I.A. Nos. 17740/2011 & 18070/2011 in Test Case No. 52/1998

1. I.A. No. 16927/2011 has been filed by the plaintiff in suit No. 2503/1998 and I.A. No. 17440/2011 and I.A. No. 18070/2011 have been filed by the petitioner in probate case No. 52/1998. Parties are real brothers. Suit for partition and rendition of accounts has been filed by Sh.Shiel Mehta and the probate petition has been filed by Sh.Ashok Mehta. For the sake of convenience Sh.Shiel Mehta shall be referred to as the plaintiff and Sh.Ashok Mehta shall be referred to as the defendant while dealing with all the three applications as one application has been filed by Sh.Shiel Mehta in the suit and two applications have been filed by

Sh.Ashok Mehta in the probate petition, wherein he is the petitioner. Plaintiff and defendant are the legal heirs of late Sh.Ram Lal Mehta, who died on 27.10.1998. On 17.11.1998 while issuing summons in the suit for partition and notice in the application for interim stay, parties were directed to maintain status as of that day with regard to possession of the property as B-60, Pashchimi Marg, Vasant Vihar, New Delhi (hereinafter referred to as the property). Subsequently defendant moved an application I.A. No. 10783/1998 under Order 26 Rule 9 CPC for appointment of a Local Commissioner, in which following order was passed on 1.12.1998:

"IA. No. 10783/98 (under O.26 R.9 and O. 39 R.1 & 2) IN Suit No. 2503/1998

In this application, it is prayed that a local commissioner be appointed to elucidate the status of possession of property no. B-60, Paschimi Marg, Vasant Vihar, New Delhi. By the order of this court dated 17.11.98, this court had directed the parties to maintain status quo as of with regard to possession of the said property.

In this view of the matter, I deem it appropriate to appoint Shri Vijay Zaveri, 101, Lawyers Chambers, Delhi High Court, New Delhi. He would visit property no. B-60, Paschimi Marg, Vasant Vihar, New Delhi today itself and submit a report as to who is in possession of which portion of the property. The local commissioner shall be paid Rs. 5000/- by the plaintiff.

The I.A. stands disposed of."

2. By the present application, I.A. 16927/2011, plaintiff seeks modification of the order dated 17.11.1998 as according to the plaintiff the defendant is taking advantage of the report of the Local Commissioner according to which the plaintiff was stated to be in possession of only one room on the first floor.

3. Plaintiff prays that the interim order be modified and plaintiff be permitted to reside on the ground floor bedroom with toilet and use of drawing, dining, kitchen and other common areas to which the defendant has denied him access.

4. Mr. Sawhney submits that till recently plaintiff was ordinarily residing at Australia. The plaintiff's wife is 70 years old and unfortunately not in good health. She has had two cancer related surgeries in 2004 and had gone through intensive doses of chemotherapy which have taken in huge toll on her health. She is extremely weak and is unable to stand and walk steadily, is on a wheel chair and requires round the clock care and support. It is further contended that she is unable to climb stairs and therefore the room on the first floor is extremely inconvenient and the plaintiff and his wife cannot stay on the first floor of the property. On account of difficulties faced by the plaintiff and his wife in assessing prompt and timely medical attention and hospital support in Australia, for which huge costs were involved, the plaintiff himself having aged and being of frail health has decided to move back to India to their home at Vasant Vihar, Delhi. The plaintiff along with his wife arrived at New Delhi on 18.10.2011 and

checked into a hotel in Gurgaon to give themselves time to arrange for their needs to live a comfortable life in their home in Vasant Vihar, Delhi. The defendants were informed about their arrival on 19.10.2011.

5. The grievance of the plaintiff is that on 19.10.2011 the defendant and his wife put up obstructions and objections when they visited the suit property and they objected to the plaintiff and his wife occupying the bedroom on the ground floor which the defendant had converted into a sitting room, during the plaintiff's absence. The defendant refused to open the room and insisted that the plaintiff can only occupy the bed room on the first floor. It is contended that the defendant showed disregard to the fact that the plaintiff's wife is on the wheel chair and cannot climb stairs. The defendants having shown no understanding or sympathy, forced the plaintiff to move back to the hotel.

6. In these circumstances it has been prayed that the defendants, their agents and employees be restrained from interfering with and obstructing the peaceful use and enjoyment of the house by the plaintiff and his family members. It is also prayed that the defendants also be restrained from obstructing the use of the bed room with attached bath room on the ground floor along with the use of two servant quarters on the first floor and the garage block.

7. Mr. Rajeev Sawhney, learned senior counsel for the plaintiff submits that in fact the plaintiff is in joint possession of the suit property. Counsel for the plaintiff further submits that even as per the understanding of the defendant the plaintiff was residing in the suit property which is evident upon reading of para 2 of the probate petition, which would show that the defendant (petitioner in the probate) had stated that the residence of the plaintiff herein is B-60 Paschimi Marg, Vasant Vihar, New Delhi. It is contended that surely one room would not amount to residence. It is next submitted that the defendant cannot derive any benefit from the report of the Local Commissioner, as the entire proceedings were stage managed, no notice was issued to the plaintiff by the Local Commissioner nor an advance copy of the application was supplied. It is also submitted that admittedly during the relevant period soon before the death of the father both the plaintiff and the defendant were not residing in India and the defendant had taken over the keys from the father and thus both the parties were deemed to be in joint possession of the entire house. It is further submitted that at the time when the Local commissioner visited the suit property the room on the ground floor was lying vacant, which has now been converted into a sitting room and the servant quarters were lying locked.

8. Counsel for the plaintiff submits that the local commissioner was appointed without any prior notice to the plaintiff and in the report the local commissioner confirms that the plaintiff and the defendants are in joint possession and enjoyment of the house. Learned senior counsel for the plaintiff next submits that although keys to some rooms including the living room were with the defendant, which cannot mean that the plaintiff was not in joint possession of the house. It is contended that at the time of inspection of the local commissioner

the defendant locked some rooms and stage managed the statements made to the local commissioner. Counsel further submits that pursuant to the execution of the commission the defendant did not seek any order and now the defendant has sought to create false record with respect to the status of the parties in the house by manipulation, with a view to defeat the plaintiff's right with respect to the house and to defeat the status quo order.

9. Mr. Sawhney, during argument has laid considerable stress on the medical condition of the wife of the plaintiff in support of his submission that the plaintiff and his wife cannot be expected to stay in one room on the first floor of the property especially when the wife of the plaintiff cannot walk and she is confined on the wheel chair. Counsel has drawn the attention of the Court to various documents in support of his plea that the wife of the plaintiff is unable to climb stairs, a letter addressed to the wife of the plaintiff from the occupational therapist advising her various steps to be taken for climbing stairs and precautions for visiting the bath room. As per letter of 17.08.2011 the risk factors on account of her medication condition have been detailed including "impaired balance " and use of hip protectors to reduce the risk of injury. Attention of this court has also been drawn to a certificate to show that the wife of the plaintiff would require wheel-chair access during flight from Canberra to India, because of her health condition as she is unable to climb stairs, her medical summary has also been referred to by counsel for the plaintiff extensively.

10. Mr. Sawhney next submits that the immediate family of the plaintiff is also being put to gross hardship by the defendant, as the children of the plaintiff cannot visit the old ailing parents on account of paucity of space, the unsympathetic attitude of the defendant and obstructions being caused by them. It is, thus, prayed that the interim order be modified and the plaintiff and her family be allowed to occupy the bed room on the ground floor along with toilet and common use of all other facilities including kitchen, dining room/drawing room, etc.

11. Mr. Jayant Bhushan, counsel for the defendant has vehemently opposed this application for modification and submitted that the defendant and his family are in settled possession of the entire house except one room and toilet on the first floor of the property. This fact was duly confirmed by the Local Commissioner. No objection to the report of the local commissioner was filed, and thus, the finding of the Local Commissioner stands confirmed and admitted. Counsel also submits that plaintiff cannot be permitted to seek possession of the area which was never occupied by him by means of an application. It is further contended that grant of the prayer made by the plaintiff in the application, would tantamount to putting the plaintiff in possession of a part of the suit property, which was never in his occupation and would amount to an interim partition and a decree of partition of the suit itself. It is further contended that the status quo order passed on 17.11.1998 was reiterated in four other orders and the status quo was to be

maintained with regard to possession as it was.

12. Mr. Bhushan next submits that reading of the order dated 01.12.1998 would show that the purpose of appointing the Local Commissioner was to ascertain as to who was in actual possession of which portion of the property. Relying on the report of the Local Commissioner Mr. Jayant Bhushan, learned senior counsel for the defendant submits that it has been categorically stated in para 3(f) of the report of the Local Commissioner that plaintiff was in use and occupation of only room and bath room on the first floor of Vasant Vihar property. Further relying on the report of the Local Commissioner, Mr. Bhushan, submits that it has been recorded that the plaintiff (admitted that he had access to the room, but did not have keys to the entrance of the room). It is thus submitted that the status quo as on the date of the order was crystal clear that the plaintiff was in use and occupation of only one room and one bath room on the first floor of the property. The site notes of the local commissioner have also been signed by the plaintiff and his wife and also by the defendant and his wife, which would also confirm that the rough inspection report prepared at the spot was correct. Counsel for the defendant submits that the report of the Local Commissioner was never challenged by the plaintiff in past 13 years and the same cannot be questioned at this stage. It is submitted that the plaintiff and his wife has been residing in Australia for the past 30 years and after the execution of the commission by the Local Commissioner, the plaintiff and his wife left for Australia.

13. Mr. Jayant Bhushan also submits that the plaintiff has lived in Australia for more than 40 years whereas the defendant was posted abroad for only about 3 years. It is submitted that the only purpose of filing the present application is to harass the defendant whose wife is also a cancer patient.

14. Mr. Bhushan further submitted that the application filed by the plaintiff is without any merit and is liable to be dismissed while the applications filed by the defendant in the probate petition be allowed. Mr. Bhushan has drawn the attention of the Court to the prayers made in the application filed by the defendant (petitioner in probate petition), being I.A. No. 17440/2011 under Order 39 Rules 1 & 2, which reads as under:

"a) Restrain the respondent no. 2 and his wife, son, daughter-in-law, son-in-law and /or any other person claiming through or under him and/or his servants or agents from entering in, occupying or using any part of the Vasant Vihar property during the pendency of the present case;

b) Direct by interim mandatory injunction the Respondent No. 2 and his wife, son, daughter-in-law, son-in-law and/or any other person claiming through or under him and/or his servant or agent to immediately remove all of their possessions which have been brought in by them into the Vasant Vihar property on or after 20/21.10.2011.

c) Restrain by an interim injunction the Respondent No. 2 and his wife, son, daughter-in-law, son-in-law and/or any other person claiming through or under

him and/or his servant or agent from in any way interfere with the peaceful use and occupation of the Vasant Vihar property by the Petitioner and his family; and

d) Pass an interim and ad-interim ex-parte order in terms of above three prayers and confirm the same after notice to the respondent No. 2."

15. The defendant (petitioner in probate petition) also filed, another application, being I.A. No. 18070/2011, with the following prayer:

"A) Pass an interim mandatory injunction directing Ajay Mehta, his wife Kavita, Shiel Mehta and any other person claiming through or under him to vacate and leave B-60 Paschimi Marg, Vasant Vihar, New Delhi;

in the alternative

Pre-pone the Petitioner 's I.A. No. 17440 of 2011 in Test Case No. 52 of 1998 and pass appropriate Orders thereon: AND

B) Pass an interim injunction restraining Ajay Mehta, his wife Kavita, Shiel Mehta and any other person claiming through or under him from approaching within 100 meters of B-60 Paschimi Marg, Vasant Vihar, New Delhi; AND

C) Pass an interim injunction restraining Ajay Mehta, his wife Kavita, Shiel Mehta and any other person claiming through or under from approaching within 100 meters of the Petitioner, his wife Meenakshi Mehta or any other member of the Petitioner's family; AND

D) Direct that the Petitioner and his family be given sufficient and adequate police protection to ensure safety of their lives and property as also to ensure compliance with the Orders of this Hon'ble Court, if necessary, at whatever cost the Delhi Police is pleased to charge from the Petitioner."

16. Elaborating his arguments further Mr. Bhushan submits that the application filed by the plaintiff is neither honest nor bona fide as after the plaintiff has come to India he and his family has made life of the defendant and his family miserable. It is submitted that in gross misuse of the status quo order, plaintiff his wife, his son Ajay Mehta, his daughter in-law and a 5th person, Ian Penman, who is purported to be the son-in law of the plaintiff arrived at the suit property on 19.10.2011. The 5th person aggressively and threateningly began to order Ashok Mehta/defendant and his wife to open up all the rooms on the ground floor so that they could select one which could be used by Sh. Shiel Mehta 's wife It is alleged that these five persons used un-parliamentary language and they have been forcing the defendant to sell the suit property. Mr. Bhushan, also submits that the said five persons are terrorizing and traumatizing the defendant and his wife throughout the day. Also the plaintiff stands on the main staircase till late at night in an attitude of aggressive surveillance. He stands watching defendant and his wife at meal times and taunts them while sitting on the opposite side. It is alleged that on 7th November, Mr. Ajay Mehta (plaintiff'sson) physically struggled with Mr. Ashok Mehta 's wife. It is also alleged that Mr. Ajay Mehta is a

large strong man with a police record of harassment in Australia where he is a citizen. Mr. Ajay Mehta was put to a two years good behavior bond by the Australian court for harassing a senior constable as well as innocent citizen. It is pointed out that Mr. Ajay Mehta is a former policeman in Australia, who is at present alleged to be in property business after he left the police force. Copies of the print outs of news items dated 10.02.2005 have been place on record in support of the plea that Mr. Ajay Mehta was abusing his former contacts to harass and intimidate another senior member of the force. It is thus contended that Mr. Ajay Mehta has a criminal bent of mind and his presence and behavior has a terrorizing effect on the defendant. It is next submitted that on 08.11.2011 Sh. Ajay Mehta, forcibly brought in some unknown and unauthorized person late in the evening who claimed himself to be a taxi driver. Again on 09.11.2011, Mr. Ajay Mehta tried to bring in another unauthorized stranger, claiming to be his friend. Being fearful of their lives and safety, defendant was constrained to report the matter to the local Police, a copy of the complaint has been filed along with the application. It is alleged that on 12.11.2011 Mr. Ajay Mehta became extremely aggressive and blocked the defendant at the top of the staircase in the house. Obscene and indecent language was used not only against defendant, but also against his daughter who had come from Mumbai for few days to take care of her parents. For this incident also a police complaint was lodged. It is also alleged that Mr. Ajay Mehta and his wife also tried to physically harm the defendant's daughter and indecent language was used for which another police compliant was lodged.

17. The said five persons have been freely roaming through the dining room, kitchen and foyer, disturbing the peace of the defendant and his wife and openly taunting and harassing the defendant throughout the day. Mr. Bhushan has also relied upon various other instances detailed in the application of harassment being melted out to the defendants, with respect to the history of aggressiveness and intimidating behavior of Mr. Ajay Mehta. It is further contended that Mr. Ajay Mehta son of the plaintiff has been suggesting that the suit property be sold. It is contended that the plaintiff has been violating the status quo order and they have been using the dining room, kitchen and foyer under the disguise of being in occupation of the one bedroom on the first floor, and have been threatening to bring in heavy furniture in the house and thus abusing the intent and spirit behind the status quo order. Counsel also submits that in case the plaintiff and his family members are permitted to reside in any portion of the house including first floor room which was in their possession, it would only lead to further harassment to the defendant and his wife, who is suffering from cancer.

18. Mr. Bhushan submits that even otherwise the application filed by the plaintiff is liable to be dismissed as it is not filed with bona fide intention. Mr. Bhushan further submits that it is not expected that the plaintiff will be able to reside in one room after migrating from Australia with his entire luggage. It is further contended that in case the health of the wife of the plaintiff was as bad as it is being made out to be, the plaintiff would have made proper arrangement for her

stay before reaching Delhi, although, it is denied that the medical condition of the wife is such that she cannot climb stairs or is unable to walk.

It is contended that the wife of the defendant is also a cancer patient and she has been recently operated upon at Tata Memorial Hospital, Bombay and is still under treatment and medication. Recently she had lost her mother and she is still in grief and is being subjected to traumatic harassment from the plaintiff and his family members.

19. Further in support of his argument that the application of the plaintiff is not bona fide, Mr. Bhushan, counsel for the defendant submits that in the year 2005 both the plaintiff and the defendant had filed applications before this court inter alia seeking modification of the original status quo order, to permit the parties to evict the existing tenants occupying W-9, Greater Kailash -I, comprising of two floors, both of which were given on rent by late Sh. R.L. Mehta. Vide order dated 28.10.2005 this court permitted the plaintiff to initiate proceedings to evict the tenants who were residing at the ground floor. Likewise, defendant was permitted to negotiate/initiate proceedings in respect of the tenant who was occupying the first floor. The defendant terminated the tenancy of the tenant and filed a suit for possession against the tenant of the first floor and possession has been handed over, however, the suit is still pending qua arrears of rent/ mesne profit. The plaintiff on the other hand has till date neglected to initiate any proceedings against the tenant of the ground floor and to the knowledge of the defendant, the said tenant is still occupying the ground floor since the year 1998 as the plaintiff has willfully avoided to take any action qua the tenant, despite the order passed by this court. The plaintiff was reminded on three different occasions by the defendant i.e. on 26.03.2009, 20.08.2009 and 09.10.2010, however, the plaintiff has failed to take any steps in the matter, which would show that the plaintiff is not interested to make his stay and his wife 's stay comfortable. It is submitted that in case the plaintiff was serious to shift from Australia to India for the reasons relied upon by him, he would have evicted the tenant and occupied the full ground floor available to him rather than decide to shift in one room, which is in his possession on the first floor. Counsel also disputes that two bed rooms are available on the ground floor as alleged. It is submitted that there is one drawing room, part of which is being used as a family room, a dining room, kitchen and the defendant's office (where he receives his clients) with one store room. There is one bath room on the ground floor, which is used by the visitors, and also contains a washing machine. Thus it is not possible to accommodate plaintiff on the ground floor. It is submitted that permitting the plaintiff and his family members to occupy any portion of the ground floor would in fact uproot the defendant, who has been in settled possession for more than a decade.

20. I have heard the arguments addressed in detail by Mr. Rajive Sawhney, learned senior counsel for the plaintiff/applicant in I.A. No. 16927/2011, and Mr. Jayant Bhushan, Senior Advocate for the defendant and applicant in I.A. No. 17740/2011 & 18070/2011, which applications have been filed in the probate

petition. All the applications are being disposed of by a common order.

21. The main thrust of arguments of Mr. Rajiv Sawhney is that the order of status quo dated 17.11.1998 is to be construed harmoniously and in the light of the fact that plaintiff was in a joint possession of the suit property along with his brother.

22. The next submission of Mr. Sawhney is that keeping in view the medical condition of the wife of the plaintiff it cannot be expected that she would reside in one bedroom on the first floor of the suit premises. It has also been contended that even otherwise on humanitarian grounds the plaintiff and his family should be permitted to stay on the ground floor of the suit premises and enjoy other amenities and facilities to enable them to reside peacefully on their return from Australia. Strong reliance has been placed by Mr. Rajive Sawhney on the medical record of the wife of the plaintiff in support of the argument that the wife of the plaintiff is not in a position to climb stairs and she is completely confined to the wheelchair. The detailed submissions made by Mr. Rajive Sawhney have been noticed in the above paras.

23. Per contra, Mr. Jayant Bhushan, Senior Advocate, has placed strong reliance on the report of the Local Commissioner, according to which, at the relevant time the plaintiff was in possession of only one bedroom on the first floor of the suit premises. It is, thus, contended that status quo order dated 17.11.1998 is to be strictly adhered to and the plaintiff and his wife would be entitled to restrict their presence only in one room with attached toilet. It is next contended that although the wife of the plaintiff is suffering from cancer that itself cannot be a ground for the defendant to part with possession of the premises or allow the plaintiff and his family to impinge upon their privacy and disrupt the household of the defendant.

24. Even otherwise on merits, it is submitted that firstly the plaintiff has no case on merits. It is contended that under the registered Will dated 23.09.1987, which is pending probate, the genuineness of the said Will has not been denied by the plaintiff in the pleadings. As per the Will the entire premises B-60, Paschim Marg, Vasant Vihar, New Delhi devolves entirely upon the petitioner. As per the subsequent unregistered Will dated 06.10.1998 (which according to both the parties is invalid), the said premises also devolves upon the petitioner.

25. The prayers made by the defendant in their applications filed in the probate are that the plaintiff should be restrained from entering into the suit premises at all in view of their conduct and the conduct of their son, his wife and another person, who claims himself to be their son-in-law. Numbers of instances have been narrated with regard to harassment meted out to them including assault and reliance has been placed on police reports.

26. It is also contended that the wife of the defendant is also a cancer patient, she is also in grief having lost her mother and in case the plaintiff and his wife are allowed entry into the house, it would only lead to multiplicity of proceedings

and harassment to all the parties.

27. After the status quo order was granted by this Court on 17.11.1998 defendant had filed I.A.10783/1998 under Order XXVI Rule 9 CPC for appointment of Local Commissioner. The Local Commissioner visited the suit premises in the presence of the parties. The operative portion of the report of the Local Commissioner is reproduced below:

(a) The Drawing room key was in possession of Mr. Ashok Mehta. On opening the drawing room, I observed that some old furnisher (sic. Furniture) was lying. On the right side of the drawing room, there is a wooden partition wall leading to the study room with attached bath. The study room also had a separate entrance from the lobby. The key to the separate entrance door of the study room was also with Mr. Ashok Mehta. On asking Mr. Shiel Mehta whether he had the key to the drawing room and as to the study room, the answer was in the negative.

(b) Next, was the bed room on the Ground Floor on the right side which was also locked. Mr. Ashok Mehta had the key to the said room. This bedroom is attached with a store having wooden almirahs and a bath room having separate entrance from the bed room as well as from the lobby. At the relevant time, the bath room was also opened from the lobby. However, Mr. Ashok Mehta informed me that the door opening from the lobby remained locked from inside and as such the bath room could be used form the door opening from the bed room only. On asking the Shiel Mehta, whether he had the key to the bed room, the answer was in the negative.

(c) Next, was the Dining Room on the ground floor attached to the kitchen. The key to the dining room was with Mr. Ashok Mehta. On asking whether both the parties were using the dining room, the answer was in the affirmative. However, Mr. Shiel Mehta volunteered to state that he did not have the key to the dining room. The kitchen had no lock although one can enter the kitchen only after entering the dining room. From the dining room, there was a door which led to the backyard of the house which was in common use of the parties.

With this, the inspection of the Ground Floor was completed and next was the inspection of the First Floor of the premises, the entrance to which was through the stairs starting from the lobby at the Ground Floor.

(d) On reaching the first floor, there is a bed room with attached bath room on the right side. This bedroom was occupied by Mr. Ashok Mehta. On asking Mr. Shiel Mehta whether he had the key to the said bedroom, the answer was in the negative.

(e) In the centre there is a master bed room with attached with bath room. The bed room is interconnected with a dressing room and a store attached on the right side. On asking Mr. Shiel Mehta whether he had the key to the master bedroom, the answer was in the negative.

(f) Next, was another bed room with attached bath room on the left hand side,

which was in the use and occupation of Mr. Shiel Mehta. On asking Mr. Shiel Mehta, whether he had the key to the said room, Mr. Shiel Mehta admitted that he had access to the room but did not have the key to the entrance to the room. The bed room is further inter-connected by a door with a bed room on the left, the key of which was found on the door itself. This bedroom has a separate entrance from the outside. The room had several cupboards, the keys of which were with Mr. Ashok Mehta. This room had a steel almirah with both the parties having key to the same. Mr. Shiel Mehta stated that he did not have the key to the room but with the key on the door interconnecting the rooms, the door opened with the key bearing No. 88."

28. The report of the Local Commissioner will show that the plaintiff claims himself to be in possession of only one room and one toilet on the first floor of the suit property. Thus, the order of status quo with regard to possession is to be read along with the report of the Local Commissioner. The submission made by counsel for the plaintiff that since the defendant had stated in the probate petition that plaintiff was a resident of the suit property it should be understood that defendant admitted that plaintiff was in joint possession is unacceptable, as that by itself would not lead to the conclusion that the plaintiff is in joint possession of the property.

29. It is also the case of the plaintiff that plaintiff was in occupation of one room on the first floor. What has been prayed is that on account of the ailing health of the wife of the plaintiff, defendant should be directed to vacate one room in their occupation at the ground floor and permit the plaintiff and his wife to stay on the ground floor and use of drawing room, dining room, kitchen and other common areas by them.

30. In my considered view, this prayer of the plaintiff cannot be exceeded to on the ground that as per the order of status quo the plaintiff was in occupation only of one bed room with toilet on the first floor besides the fact that the status quo order was passed as far back as on 17.11.1998; the Local Commissioner visited the suit premises on 01.12.1998; and the Local Commissioner filed his report on 10.12.1998. No objection to the report of the Local Commissioner has been filed by either of the parties and thus the same has attained finality. Admittedly plaintiff has been residing in Australia for the past approximately 40 years.

31. Further as per the application filed by the plaintiff, on account of the medical condition of his wife the plaintiff decided to migrate from Australia to India. It cannot be expected that the plaintiff was unaware of the fact that his brother was residing in the entire suit premises for the past many years except one room on the first floor. The plaintiff having regard to the extremely strained relationship between the parties would certainly have made arrangement for storage of his entire luggage which he would have collected in the past four decades. Even if the plaintiff had possession of one room on the ground floor it would not have been possible for the plaintiff to shift the entire luggage in one room. Thus, to say that defendant has been extremely unsympathetic towards

the plight of the plaintiff or his wife is not acceptable.

32. It has been vehemently disputed by senior counsel for the defendant that the wife of the plaintiff is unable to walk at all but be that as it may in case medical condition of the plaintiff's wife is as described, the plaintiff should have made arrangement for alternate accommodation where he and his wife can live in peace and comfort rather than in an atmosphere of animosity and in one room. Prima facie it appears that plaintiff wanted to take advantage of the ill health of his wife as a ground for modification of the order. It is also not understandable how the plaintiff would reside in one bedroom along with his adult, grown up married family members unless the sole aim and purpose was to create an unpleasant situation in the suit property. I also find force in the submission made by learned senior counsel for the defendant that the present applicant is not honest or bona fide as plaintiff has taken no steps for eviction of the tenant from the property situated at the Greater Kailash and in case plaintiff had plans to migrate back to India he could have evicted the tenant and made arrangements for his stay at Greater Kailash house. There is no explanation rendered by senior counsel for the plaintiff as to why no steps were taken by the plaintiff for eviction of the tenant at the Greater Kailash House.

33. The suit filed by plaintiff has been pending since the year 1998. The injunction order was passed on 17.11.1998 and the Local Commissioner was appointed on 1.12.1998. The issues were framed in this matter in the year 2006. The evidence in this matter has still not been concluded. Having regard to the fact that defendant has been in settled possession of the entire suit property for the past so many years since 1995 I deem it extremely unreasonable to disturb the household of the defendant and to allow the plaintiff to reside in one room on the ground floor or to direct the parties to share the kitchen, drawing room, dining room and other common areas. In a short span of time, there have been number of police report, which would show the level of strained relationship between the parties. Any attempt to change the status quo order would only lead to multiplicity of proceedings and further aggravate the situation and neither of the parties would be able to stay peacefully.

34. Another ground which would disentitle the plaintiff for the reliefs prayed for is that this is not a case where this is the only accommodation available to the plaintiff and in case plaintiff was interested in migrating back to India he should have made alternate arrangements before doing so. Any variation in the status quo order will disturb not one but two households.

35. While considering an application under Order XXXIX Rules 1 and 2 CPC, the Court must take into consideration there factors i.e. (i) strong prima facie case; (ii) balance of convenience; and (iii) irreparable loss. It is also to be seen while considering the application for grant of injunction as to whether the case of the plaintiff is frivolous or vexatious. In granting or refusing temporary injunction the Court is to exercise its discretion with reasons and sound judicial principles. Since the power to grant or refuse an injunction would essentially lie in the realm

of discretion of the Court the power has to be exercised with greatest care, caution and circumspection.

36. The plaintiff has failed to make a strong prima facie case, neither balance of convenience is in favour of the plaintiff nor plaintiff has been able to show that in case the order is not modified the plaintiff will suffer irreparable loss. The report of the Local Commissioner clearly shows that the plaintiff was in occupation of only one room on the first floor, the plaintiff has been residing in Australia for almost four decades, at no stage the plaintiff made any attempt either to challenge the report of the Local Commissioner, the plaintiff has not filed any objections or has not taken any steps to assail the order, by which stay was granted. The application filed by plaintiff is not honest or bona fide in view of the fact that it is impossible for a person to shift box, bag and package into one room be it on the ground floor or the first floor. Thus to say that wife of the plaintiff is unable to climb stairs and the defendant be directed to vacate the room of the ground floor cannot be entertained. The fact that this Court had granted liberty to the parties as far as back as in the year 2005 to take steps to vacate the tenant of the property at Greater Kailash and the plaintiff having taken no steps in the matter would show that the plaintiff had no interest in the accommodation but is only interested to make a foothold in the suit property. Presence of the close relations of the plaintiff in the suit property have only led to aggravating the situation, which is evident from allegations and counter allegations from both the sides and police reports. On the other hand having regard to the fact that defendant has been in settled possession of the ground floor of the suit property for the past so many years and whose wife is also suffering from cancer, the defendant cannot be directed to change the setting of the house while the plaintiff has the means and options of an alternate accommodation to shift. The order can also not be modified to allow the strained relations to reach a point, which would lead to multiplicity of proceedings and which is not in the interest of either of the parties. Plaintiff cannot be permitted to disturb the peace and tranquility of a running household of the defendant, which he is occupying uninterruptedly for the past almost 40 years. Accordingly, application, being I.A.16927/2011, filed by plaintiff is dismissed and the application filed by defendants, being I.A. No. 17440/2011 & I.A.18070/2011, are allowed to the extent that the plaintiff, his servants, agents and family members are restrained from causing any interference in the peaceful enjoyment of the premises of the defendant and his family and entry of the plaintiff and his wife is restricted only from the entrance to the room at the first floor and they shall not be entitled to access to any part of the house to avoid any untoward incident between the parties.

37. Accordingly, application, being I.A.16927/2011, filed by plaintiff stands dismissed and applications, being I.A. No. 17440/2011 & I.A.18070/2011, filed by defendant stand disposed of in view of above.

CS (OS) 2503/1998, & I.As 8422/99, 1409/2000, 1438/2000 & CCP (O) 38/1999.

Test. Cas. 52/1998, IAs 2601/06, 15743/10 & 1440/11

List on 20.3.2012 before Joint Registrar for fixing dates of trial.