

(2006) 01 DEL CK 0009

In the Delhi High Court

Case No : I.A. No's. 9942 of 2003 and 1181 and 1644 of 2005 in CS (OS) 736 of 2002 and I.A. No. 4283 of 2004 in C.C.P. No. 90 of 2004

Smt. Jugan Mehta

APPELLANT

Vs

Shri Sham Sunder Gulati and Others

RESPONDENT

Date of Decision : 17-01-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 2A, Order 39 Rule 3, Order 39 Rule 4
Delhi High Court (Original Side) Rules, 1967 — Rule 3
Partition Act, 1893 — Section 4
Transfer of Property Act, 1882 — Section 44

Citation : (2006) 01 DEL CK 0009

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : S.P. Kalra and Sanjay Kalra, for the Appellant; Vinay Bhasin and Anil Kher Advocate for Defendant No. 7 and Sanjeev Sindwani, for Defendant Nos. 1 to 6, for the Respondent

Judgement

Anil Kumar, J.—This order will dispose of applicant/defendant no.7's application under order 39 Rule 4 read with section 151 of CPC for vacation of order dated 16th February, 2005 passed in IA. No. 1181 of 2005 u/s 151 of CPC for early hearing of I.A no.4283 of 2004 in C.C.P No. 90 of 2004 which is an application of the plaintiff's u/s 151 of CPC filed in C.C.P no.90 of 2004 to seal the property. This order will also dispose of the interim application of the plaintiff being I.A no. 4283 of 2004 filed in C.C.P no.90 of 2004 The C.C.P no.90 of 2004 has already been dismissed by order dated 27th September, 2004 Another application of the plaintiff under Order 39 Rules 1 and 2 being I.A No. 9942/2003 seeking interim mandatory injunction against the defendants is also disposed of by this order.

2. Brief facts to appreciate the controversies are that the plaintiff filed this suit for partition and rendition of account. She contended in her suit that her father late Shri Mangal Sain Gulati was the owner of property bearing No. 31, Bungalow

Road, Kamla Nagar Delhi, who died on 5th November, 1982 intestate leaving plaintiff, her two brothers and two sisters who inherited suit property to the extent of 1/5th share each. One of the brothers of the plaintiff also died on 30th March, 1992. She contended that she was in possession of a portion of the suit property, however, on account of illness of her husband in 1999 she remained under constant mental, physical and financial stress and ceased to visit the suit property. The defendants controlled the main entrance from the front and entrance from rear of the property which was in possession of the plaintiff. The defendants taking advantage of the circumstances threatened to dispossess the plaintiff and to dispose of the entire suit property including the portion which was in occupation of the plaintiff by executing false documents in favor of defendant no.7, Smt. Neelam Sablok.

3. Defendant nos. 1 to 6 contested the allegations of the plaintiff and contended that the father of the plaintiff had executed a registered will dated 16th April, 1981 devising property in favor of defendant no.1 and late Shri Prakash Chand Gulati. Plaintiff knew about the will and she had herself sworn two affidavits dated 18th August, 1988 and 25th August, 1988 for mutation and construction over the property. One of the affidavits was in respect of the suit property and the other was in respect of another property owned by the father of the plaintiff. After the death of the father of the plaintiff on 5th November 1982 plaintiff never claimed any right title or interest in the suit property as she was aware of the will executed by the father of the plaintiff and in the circumstances the suit of the plaintiff is barred by time. The property had been mutated in the name of the beneficiaries under the will and a portion of the property was sold by sale deed dated 16th June, 1997. These defendants, brother and sisters and the children of deceased brother of the plaintiff further contended that ultimately the entire property has been sold by the registered sale deed dated 11th October, 2000 to defendant no.7. It was contended that the plaint is liable to be rejected as the plaintiff is not in possession of any portion of the property and the suit is bad for non joinder of parties and the defendant no.7 is in possession of entire property except the portion which was sold to three other persons earlier. The inheritance of any share in the property by the plaintiff was denied.

4. The defendant no.7 in a separate written statement repudiated the claim of the plaintiff and contended that she is a bona fide purchaser of the property for valuable consideration of Rs.40 lakhs and that she is in physical possession of suit property after the sale deed dated 11th October, 2000 was executed in her favor by the owners. She denied the maintainability of the suit and contended that the plaintiff never stayed in the suit property after 1974. The sellers have also attorned the defendant no.7 as owner and landlord in respect of tenants who are occupying the basement and the shops on the ground floor and the defendant no.7 is collecting the rent from the tenants and the property has been mutated in her name.

5. Defendant no.7 after getting the property mutated in her name, got the plan

sanctioned and started construction about six months ago and she had already constructed basement and Ground Floor. In the midst of the construction the plaintiff has got the ex-parte restrain order against her which is causing immense loss to the her. The whole labor which was engaged is lying idle and causing huge loss to the applicant/defendant no.7.

6. The defendant no.7 contended that the plaintiff has misled the Court as the earlier ex-parte order dated 2nd April,2002 and modified order dated 25th August,2003 were not brought to the notice of the Court. By the said orders the defendants were directed to maintain the status quo and after hearing the parties, the Court had directed that in case the defendant no.7 wants to transfer the title or possession of the property further, she would seek prior permission from the Court.

7. Thereafter, the plaintiff filed a contempt petition being CCP No. 90 of 2004 wherein relief that further construction be not carried out by the defendant no.7 was claimed, however, the application of the plaintiff was dismissed by order dated 27th September,2004 and the defendant no.7 was not restrained from carrying out demolition and/or construction of the property.

8. Against the dismissal of her contempt petition seeking demolition and/or construction, the plaintiff contended that she has filed an appeal no. 249 of 2004 which is pending with the division Bench. In the contempt petition the plaintiff had also filed an interim application being I.A no. 4283 of 2004 The plaintiff contended that the interim application passed in the contempt petition which was dismissed by order dated 27th September, 2004, is, however, pending adjudication.

9. plaintiff thereafter, filed an application for early hearing of I.A 4283 of 2004 alleged to be pending in Contempt petition though the contempt petition had been dismissed, being I.A No. 1181/2005 in his suit for partition and rendition of account for an early hearing and seeking restrain from carrying on any kind of construction till the disposal of application being I.A No. 4283 of 2004 In the said application being 1181 of 2004 an order dated 16th February,2005 was passed restraining the defendants from carrying out any kind of construction at the suit property.

10. The defendant no.7 is seeking vacation and modification of this order dated 16th February,2005 by the application under Order 39 Rule 4 of the CPC contending that the balance of convenience is in favor of defendant no.7 and that the plaintiff had never been in possession of any portion of the property at any point after 1974.

11. The plaintiff has opposed the application of the defendant no.7 on the ground that the sale deed dated 11th October,2000 is bogus, sham and void and has been manipulated by committing forgery and fabrication by defendant no.1 to 7 and in total defiance of order dated 2nd April,2002 and 25th August,2003 the entire property has been demolished and now the defendant no.7 wants to

convert it into a commercial complex in violation of Municipal bye laws. The structure which was demolished was worth more than Rs.1.5 crores. Due to illegal acts the plaintiff has suffered monetary loss and dispossession from the portion under her occupation and possession of the suit property. The plaintiff has also prayed for disposal of his interim application being I.A no. 4283 of 2004 in the contempt petition though the contempt petition has been dismissed. The plaintiff has also sought mandatory injunction against the defendants by I.A 9942 of 2004 seeking direction to the defendant no.7 to undo her possession and re-convey the title of the property for a value of Rs.80,00,000 price at which the defendant no.7 is claimed to have purchased the property. The plaintiff denied construction of ground floor on the property and contended that only some pillars and columns have been erected in violation of the Court's order dated 2nd April,2002 and 25th August,2003. plaintiff contended that the balance of convenience is in her favor and she would suffer irreparable loss and injury if the defendant no.7 is allowed to construct any thing on the property. Relying on Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass, and AIR 1993 SC 776 Dalpat Kumar and Anr. v. Prehlad Singh and Anr. it was contended that it is settled law that the subject matter i.e suit property has to be preserved.

12. I have heard the learned counsels for the parties at length and have perused the pleadings and applications and replies. What emerges is that the plaintiff filed suit for partition and rendition of account along with an application for interim injunction being is no. 3171 of 2002 on which the Court passed an interim ex-parte order dated 2.4.2002. Relevant interim order is extracted as under:

The plaintiff has prayed for grant of ex-party ad interim injunction restraining the defendants from transferring/selling or parting with the possession of property no. 6909/31 Bunglow Road, Kamla Nagar, Delhi and from dispossessing the plaintiff from the portion thereof as mentioned in the application etc. In case the status quo as of today is disturbed it will create insurmountable difficulties in the way of the execution of the decree if it is passed in this suit. I accordingly direct the parties to maintain the status quo in respect of the title and possession of the premises as of today and the parties are restrained from any alienating, selling, transferring or creating third-party interest in the property no. 6909/31, Bunglow Road, Kamla Nagar, Delhi till the next date. The provision of order 39 Rule 3 CPC be complied with.

13. The interim order dated 2.4.2002 on an application of the plaintiff being I.A 3171/2002 was modified by order dated 25th August, 2003 on an application of the defendant no.7 under order 39 Rule 4 of the CPC being I.A no. 4447/02 holding that whether the plaintiff is in possession of the any portion of the property or not can be decided only after evidence. The transfer of property in favor of defendant no.7 will not be affected by the interim order but any further transfer or alienation of the title or parting with possession will not be permissible. The relevant order dated 25th August, 2003 is extracted as under

for reference:

the question whether the plaintiff is in possession of any portion of the property or not if, Therefore, can be decided only after evidence. The affidavit which had been relied upon on behalf of the defendant had been strongly disputed on behalf of the plaintiff and it is alleged that they are forged and fabricated documents.

It is the case of the defendant that the property has been transferred in 2000 to defendant no.7, who is in possession of the premises. The ex-parte ad interim injunction order which was granted on 2nd April, 2004 simply required the parties to maintain status quo qua the possession and the title and restrained the defendants from further alienation or transfer or creating of third-party interest in the property. If the defendant no.7 claimed the transfer of the property by virtue of sale deed executed by defendant no.1 and his brother Prakash Chand Gulati, it would not be affected by that order. But any further transfer, alienation of the title or parting with possession of the property will not be permissible. Copy of the registered sale deed has been placed on record. Except the plaintiff, all other heirs of Late Mangal Sain Gulati who have been arrayed as defendant nos. 1 to 6 have no objection to the will and the sale of the property.

In the totality of facts and circumstances of the case, I find that the prima facie case is made out in favor of grant of interlocutory injunction order in terms of the order which was passed on 2nd April, 2002 with slight modifications that in case defendant no.7 wants to transfer the title or possession of the property further, as claimed by her, she would seek prior permission from the Court."

14. After the order dated 25th August,2003, defendant no.7 demolished the property and started re-construction. The plaintiff, Therefore filed a Civil Contempt Petition no.90 of 2004 under Order 39 Rule 2A read with Section 151 of CPC seeking action against the defendant no.7 for disobedience of order dated 25th August, 2003 on account of demolition and re-construction of the property. In the contempt petition the plaintiff also sought restoration of the property to its original condition and to put to stop further demolition or construction of the property. The said Contempt petition was dismissed by order dated 27th September, 2004 holding that by demolition and construction of the property, no disobedience of order 25th August,2003 was made out.

15. Though the contempt petition was dismissed, the plaintiff is contending that an interim application being I.A No. 4283 of 2004 seeking sealing of the property till the final disposal of the suit which was filed in the contempt petition is still pending.

16. Against the dismissal of the contempt petition of the plaintiff, an appeal has been filed by the plaintiff being FAO(OS) No. 249/2004 which is also pending disposal. During pendency of these, an application being I.A No. 1181/2005 was filed by the plaintiff in his suit for partition and rendition of account for an early hearing of application I.A No. 4283 of 2004 filed in the contempt petition, CCP

No. 90 of 2004, seeking restrain against the defendant no.7 from carrying on any kind of construction in the property till the disposal of application being I.A No. 4283 of 2004 and for its early hearing. In the said application I.A No. 1181 of 2004 an ex-parte order dated 16th February, 2005 was passed restraining the defendants from carrying out any kind of construction in the suit property on the ground that despite pendency of partition suit and restrain order to the said effect, the defendants have demolished the suit property and are now raising construction thereon. The defendant no.7 is seeking vacation of this order dated 16th February, 2005 by an application under Order 39 Rule 4 of the CPC being I.A No. 1644 of 2005.

17. The learned Senior Counsel for the plaintiff Mr. Kalra has argued in great detail about the entire merits of the case. He even contended that since the written statement was not filed within time prescribed under the Code of Civil Procedure, Therefore, there is no written statement of defendant no.7 on record in law and pleas raised by defendant no.7 can not be considered though the written statement was filed by the defendant no.7 and the issues were framed and the parties are already leading evidence.

18. I have considered this plea of the plaintiff which in my opinion, is not sustainable. The written statement was filed by the defendant no.7 on 4th October, 2002. Thereafter, plaintiff filed replication to the written statement of defendant no.7 without raising any such objection. Issues were framed on the basis of pleadings of the parties and thereafter the parties are leading evidence. The plea of the plaintiff that as the written statement was not filed within the period contemplated under Order VIII Rule 1 of the Code of Civil Procedure, it can not be considered, is not justifiable. Under Delhi High Court Original Side Rules, Chapter VI Rule 3, the period of ninety days as contemplated under Order VIII Rule 1 of the Code of Civil Procedure, is not provided.

19. The Apex Court has held in Smt. Rani Kusum v. Smt. Kanchan Devi and Ors., AIR 2005 SCW 3985 that amendment in Order 8 Rule 1 of CPC does not completely takes away power of Court to extend the time for filing the written statement beyond time specified in Order 8 Rule 1 of CPC. In Delhi Development Authority v. K.R. Builders P. Ltd, 2005 iv AD Delhi 509, a division Bench had held that the suit on the original side of the High Court would be governed by the original side rules and not by the amended provisions of Order VIII Rule 1 of CPC and once provisions of O VIII Rule 1 are excluded the question of reading these in harmony with the provision of Rule 3 of Chapter VI of the Original Side Rules does not arise.

20. The written statement has already been filed and even the replication was filed by the plaintiff without any objection that the written be not considered as it was not filed within time as contemplated under the provision of Code of Civil Procedure. At the time framing of issues this objection was not taken and the issues were framed considering the pleas and contentions of the defendant no.7 also. The parties are leading evidence on the basis of issues framed considering

the pleas and contentions of the defendant no.7 also. In these circumstances, it can not be held that the written statement filed by the defendants is not to be considered as the written statement was not filed within the time contemplated under Order VIII Rule 1 of the Code of Civil Procedure. If the delay in filing the written statement was considerable coupled with deliberate attempt on the part of the defendant to delay the suit, then a different inference could be drawn. But in the facts and circumstances of the present case and keeping in view entirety of facts, it will not be in the interest of justice not to consider the pleas raised by the defendants in their written statements at this juncture when the parties are leading evidence on the ground that the written statement was not filed within ninety days. On written statement not filed within ninety days, the Court could pass a decree. However, the Court has proceeded with the trial in order to meet the ends of justice. If that be so the pleas raised by the defendant no.7 can not be rejected now on the ground that the written statement was not filed within the time contemplated under Order 8 Rule 1 of the CPC for the reasons stated hereinbefore. Consequently pleas raised in the written statement are not to be ignored and require consideration.

21. The learned Counsel for the plaintiff has argued in great detail about validity of the will of Late Mr. Mangal Sain Gulati on the grounds that there was an attempt to finish the will in one page; no margins in the will were left; Doctor who has attested the will is son of one of the daughter; age mentioned in the will is 72 years whereas the age of the executant was mentioned as 75 years; Pawan Anand is not the daughter of Late Shri Mangal Sain Gulati, however, she has been included deliberately; Husband of Pawan is the brother of the Defendant no.2, Smt. Chanchal Gulati widow of late Shri Prakash Chand Gulati; Smt. Chanchal Kumari's sister is married to defendant no.1 Shri Sham Sunder Gulati; there are a number of documents to show that the Pawan Anand is a daughter of Shri Channan Mal and not Shri Mangal Sain Gulati; difference in the signatures of Mangal Sain Gulati on the will and other documents of partnership. Similarly the affidavits given by the plaintiff regarding the validity of the will have been challenged on the ground that different age of plaintiff is given in the affidavits and even the addresses are different.

22. These pleas of the plaintiff were considered by the Court while disposing off application of the plaintiff under Order 39 rules 1 and 2 and application of the defendant no.7 under Order 39 Rule 4 of the CPC by order dated 25th August, 2003 holding that whether the plaintiff is in possession of the any portion of the property or not can be decided only after evidence and the transfer of property in favor of defendant no.7 will not be effected by the interim order but any further transfer or alienation of the title or parting with possession will not be permissible without prior permission of the Court. An appeal was also filed against the said order dated 25th August, 2003 being FAO(OS) no.366 of 2003.

23. The plaintiff also filed a contempt petition against the defendants for demolition and re-construction of the property after interim order dated 25th

August, 2003 was passed. The grievance of the plaintiff regarding demolition of the property and construction by the defendants being contrary to interim order dated 25th August, 2003 has been declined by dismissing his application for the contempt of Court. An appeal is filed by the plaintiff against dismissal of his contempt petition by order dated 27th September, 2004, which is pending adjudication. The plaintiff had also filed an interim application in the contempt petition for sealing of the property in the contempt petition which is, somehow, pending despite dismissal of the contempt petition. The plaintiff filed another application being I.A No. 1181 of 2005 for early hearing of interim application in contempt petition and for restraining defendants from carrying out any further construction. On the interim application for early hearing, by order dated 16.2.2005 the defendants have been restrained from carrying any further construction. The relief claimed by the plaintiff in contempt petition, interim application in contempt petition I.A no. 4283/04 and I.A no.1181/05 for yet another interim order and for early hearing of I.A 4283/04 in juxtaposition are as under:

C.C.P 90 OF 2004

- i.) admit the present petition;
- ii.) summon the respondents nos. 1 to 4 and be dealt with in accordance with law for the aforesaid disobedience breach by way of attachment of their respective properties;
- iii.) respondents be made to pay full compensatory cost to the petitioner so that the suit property and could be restored to its original shape;
- iv.) put the respondents to deposit a some of Rs.2.00 crores in this Hon''ble Court as to reconstruction of the suit premises to its original shape;
- v.) detail the respondents in the civil prison to its maximum limits as contemplated in the provisions of order 39 rule 2A;
- vi.) put full stop to further demolition or construction;
- vii.) award cost of the present petition in favor of the petitioner and against the respondents/contemnors;
- viii.) pass such other or further orders as this Hon''ble Court deems fit and proper in the facts and circumstances of the case in favor of the petitioner and against the respondents. In

I.A No. 4283 of 2004

It is, Therefore, most respectfully prayed that in the interest of justice and equity this Hon''ble Court may kindly be pleased to:-

- i) seal the suit property bearing No. 6909/31, Bunglow Road, Kamla Nagar, Delhi till the final disposal of the Suit.

ii) pass such other or further Orders as this Hon"ble Court deems fit and proper in the facts and circumstances of the case in favor of the plaintiff and against the Defendants.

I.A.No.1181 of 2005

It is , Therefore, prayed that the Hon"ble Court may kindly be pleased to:

i.) fix an early date for hearing and disposal of I.A No. 4283/04

ii.) restrained defendants from carrying on any kind of construction at the suit premises no.31 Bungalow Road, Kamla Nagar, Delhi till the disposal of this application and I.A no. 4283/04

iii.) Pass any further and other orders in favor of the plaintiff.

24. For vacation of ex-parte interim order dated 16th February, 2005 the defendant no.7 has filed an application under Order 39 Rule 4 being I.A No. 1644/2005. The defendant no.7 contended that the plaintiff is not entitled for interim order dated 16th February, 2005 especially in view of dismissal of contempt petition filed by the plaintiff in which the plaintiff had also specifically sought relief against the defendant no.7 that she should not carry any further construction in the property in dispute.

25. This raises two questions. Whether an application for interim relief in a Contempt petition will ensure even after dismissal of the contempt petition in which also a similar relief was sought. And whether the order dated 25th August, 2003 disposing off the interim injunction application of the plaintiff and holding that transfer of property in favor of defendant no. 7 will not be affected by the interim order and thereafter dismissal of contempt petition against demolition and reconstruction of the property on the ground that construction was not in violation of interim order, can the interim order be modified or reviewed by another interim application seeking early disposal of interim application in the contempt proceedings seeking sealing of property after dismissal of contempt petition.

26. The application u/s 151 of CPC filed along with the contempt petition, being is No. 4283 of 2004 has sought sealing of property in dispute on account of demolition and reconstruction by defendant no.7. This is an interim application in the contempt petition which was dismissed by order dated 27th September, 2004 While dismissing the contempt petition of the plaintiff it was held that no contempt of the order dated 25th August, 2003 was made out on account of demolition of the structure and starting reconstruction on the property by defendant number 7. The specific order against the defendant no.7 from carrying out any further construction was not granted.

27. The pleas of the plaintiff that will of her father is not genuine on the grounds that there was an attempt to finish the will in one page; no margins in the will were left; Doctor who has attested the will is son of one of the daughter; age

mentioned in the will is 72 years whereas the age of the executant was mentioned as 75 years in other documents; Pawan Anand is not the daughter of Late Shri Mangal Sain Gulati, however, she has been included deliberately; Husband of Pawan is the brother of the Defendant no.2, Smt. Chanchal Gulati widow of late Shri Prakash Chand Gulati; Smt. Chanchal Kumari's sister is married to defendant no.1 Shri Sham Sunder Gulati; there are a number of documents to show that the Pawan Anand is a daughter of Shri Channan Mal and not Shri Mangal Sain Gulati; difference in the signatures of Mangal Sain Gulati on the will and other documents of partnership and various discrepancies in the affidavits given on behalf of the plaintiff were considered by the Court and order dated 25th August, 2003 was passed on prima facie view holding that if the defendant no.7 claimed transfer of the property by virtue of sale deed executed by defendant no.1 and his brother Prakash Chand Gulati, it would not be affected by the that order.

28. Can this order dated 25th August, 2003 be reviewed and modified by another interim application? Similarly can the order of dismissal of contempt petition dated 27th September, 2004 be further varied by a pending interim application?

29. The interim application was filed by the plaintiff u/s 151 of CPC in the petition for taking action for contempt of court. Since the petition for contempt of court on account of demolition of property and reconstruction was dismissed and the relief sought against any further construction was not granted, the interim application will also not ensure after dismissal of the contempt petition. If demolition and reconstruction of the property is not contrary to the interim order passed by this Court, a fortiori the defendant no. 7 will also be not liable for sealing of her property on account of demolition and construction of property nor by said application the interim order dated 25th August, 2003 passed on the application under order 39 rules 1 and 2 in the suit, can be varied or modified. For these reasons I am of the opinion that the plaintiff is not entitled for any relief sought in the said interim application IA.No.4283 of 2004 in the contempt petition and it is, Therefore, dismissed.

30. If the plaintiff is not entitled for any relief in the is 4283 of 2004, interim application in the contempt petition which has been dismissed, whether the plaintiff is entitled for any relief in another interim application being I.A No. 1181 of 2005 filed for early hearing of said interim application in the Contempt petition and whether the ex-parte interim order dated 16th February, 2005 passed in I.A N.1181/2005 is liable to be confirmed, modified or varied restraining the defendants from raising further construction or any other type of construction in the property.

31. In the suit for partition and injunction, her application under Order 39 Rules 1 and 2 was disposed of by order dated 25th August, 2003 declining the other relief sought by her except that in case defendant no.7 wants to transfer the title or possession of the property further, as claimed by her, she would seek prior permission from the Court. The plaintiff has filed yet another application under

Order 39 Rule 1 and 2 read with section 151 of CPC being I.A No. 9942 of 2004 seeking mandatory injunction to direct the defendant no.7 to undo her possession of property and re-convey the property to plaintiff for a consideration of Rs.80,00,000. In juxtaposition the reliefs claimed by the plaintiff in this application and in the suit are as under:

CS(OS) 736 of 2002

(i). for partition of the aforesaid immovable property bearing No. 31, Bungalow Road, Kamla Nagar, Delhi, left by Shri Mangal Sain Gulati and his wife Shrimati Vidya Vati by separating the plaintiff's share by metes and bounds; and

(ii). for rendition of accounts Along with the benefits and profits arising out of the aforesaid M/s Mangal Sain and Bros. And M/s Sunder Fruit Co. directing defendant Nos. 1 to 4 to render the accounts since death of Shri Mangal Sain Gulati and Smt. Vidya Wati Gulati; and

(iii.) for partition of the aforesaid movable properties left by Shri Mangal Sain Gulati and Shrimati Vidya Vati Gulati; and

(iv.) for rendition of accounts directing the defendants to render accounts of the aforesaid movable properties and other profits, rent etc. accrued due and collected by them since respective deaths of plaintiff's father and mother.

(v.) for recovery of the amount of rent accruing on immovable property No. 31, Bungalow Road, Kamla Nagar, Delhi found due to the plaintiff along with interest thereon after rendition of accounts by the defendant No. 1 to 4 of the entire estate left by Shri Mangal Sain Gulati and Smt. Vidya Vati Gulati; be passed in favor of the plaintiff and against the defendants.

(vi.) Interest on the amounts so decreed in favor of the plaintiff and against the defendants at the rate of 24% p.a. from the date of the suit till payment of the amount, be also awarded to the plaintiff and against the defendant.

(vii.) Costs of the suit and such other and further relief deemed fit and proper in the circumstances of the case, may also be awarded to the plaintiff in the interest of justice.

I.A No. 9942/2003

(a) Pass forthwith a Mandatory Injunction (as held in Supra 1990, SC867 in favor of the plaintiff and against the defendant No. 7 by directing her to undo her possession, (as claimed by her) in property No. 31, Bungalow Road, Kamla Nagar, Delhi, and allow such possession be kept by the plaintiff;

(b). By directing the defendant no.7 to re-convey the title qua property No. 31 Bungalow Road, Kamla Nagar, Delhi in favor of plaintiff for a value of Rs. 80,00,000/-, price at which she claims to have purchased the property

(c) Pass such further orders as this Hon"ble Court in circumstances deem fit and proper in favor of the plaintiff and against the defendant in the interest of justice

and equity.

32. The learned counsel for the defendants contended that the scope of the suit can not be enlarged by interim applications and the relief of injunction which has not been sought in the suit can not be granted by an interim application. It was also contended by the Learned Senior Counsel for the defendant Shri Vinay Bhasin Advocate that plaintiff has not claimed cancellation of the sale deed executed in favor of the defendant no.7. Without cancellation of sale deed the plaintiff is not entitled to recover possession of the entire property from the defendant no.7 nor can seek any relief that the defendant no.7 should not carry on construction in the property.

33. The defendants have relied on (1998) 8 SCC 274, Mahabir Prasad Jain v. Ganga Singh; 1991 Raj LR 19, Jathedar Rachpal Singh Vs. Kirpalchand and Others, , Sree Jain Swetambar Terapanthi Vid.(S) Vs. Phundan Singh and Others, ,Sree Jain Swetabhar Treapanthi v. Phundan Singh and Ors.G.A no. 2702 of 2000 in C.S No. 252 of 2000 decided on 11.12.2002, Smt. Chandana Bose Vs. Saturday Club Limited and Others, . and Civil Revision Petition no. 3938 of 2001 decided on 31.01.2002, A. Kumar Vs. P. Muthupandi and A. Perachi to contend that the plaintiff is not entitled for those interim relief which have not been sought by the plaintiff in the suit by applications for interim mandatory and prohibitory injunctions.

34. According to learned counsels for the defendants, the plaintiff is seeking an interim relief of restrain against further construction by an interim application in another interim application in contempt petition which sought sealing of property only in the contempt petition. If the plaintiff is not entitled for sealing of property in the contempt petition, whether the plaintiff will be entitled for confirmation of interim order dated 16th February,2005 in the interim application filed for early hearing of interim application in the contempt petition?

35. The learned senior counsel for the plaintiff, Mr. Kalra, has contended that the defendant no.7 is a stranger and she has not been conferred any right of exclusive possession. The plaintiff is entitled for her share in the property and in the circumstances, the property could not be allowed to be demolished and reconstruction can not be permitted. He relied on Section 44 of the Transfer of Property Act, 1982 to contend that the defendant no.7 can not be allowed to change the nature of property as it will deprive the plaintiff of her right to buy of the share purchased by the stranger. Reliance was placed by the plaintiff on Ghantesher Ghosh Vs. Madan Mohan Ghosh and Others, and Dorab Cawasji Warden Vs. Coomi Sorab Warden and others, .

36. The object of section 44 of Transfer of Property Act, 1882 is to keep of strangers who may purchase the undivided share of a co-sharer of an immovable property, so far as dwelling houses are concerned to make it possible for a co-sharer who has not sold his share to buy off from the stranger purchaser. The section also assures the transferee the right to joint possession or the common

enjoyment of the property but does not confer on him any right to exclusive possession without enforcing partition. On a plain reading of the section it is clear that there are certain conditions for its application, such as?

- (1) the dwelling house must belong to an undivided family;
- (2) the transfer must be made to a stranger;
- (3) the transferee has filed the suit for partition; and
- (4) the shareholder claims and undertakes to buy the share of the stranger.

The condition for application of this statutory provision is that a dwelling house belonging to an undivided family must have been transferred to a person who is not a member of such family and such transferee sues for partition. If this precondition is satisfied then if any member of the family being a shareholder undertakes to buy the share of such transferee the court is to make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder. The Apex Court considered the scope and object of section 4 and 44 of Partition Act in Ghantesher Ghosh Vs. Madan Mohan Ghosh and Others, . It was held:

Section 4 of the Partition Act read with Section 44 of the T.P. Act represents a well-knit legislative scheme for insulating the domestic peace of members of undivided family occupying a common dwelling house from the encroachment of a stranger transferee of the share of one undivided co-owner as the remaining co-owners are presumed to follow similar traditions and mode of life and to be accustomed to identical likes and dislikes and identical family traditions. This legislative scheme seeks to protect them from the onslaught on their peaceful joint family life by stranger-outsider to the family who may obviously be having different outlook and mode of life including food habits and other social and religious customs. Entry of such outsider in the joint family dwelling house is likely to create unnecessary disturbances not germane to the peace and tranquility not only of the occupants of the dwelling house but also of neighbors residing in the locality and in the near vicinity. With a view to seeing that such homogeneous life of co-owners belonging to the same joint family and residing in the joint family dwelling house is not adversely affected by the entry of a stranger to the family, this statutory right of pre-emption is made available to the co-owners who undertake to buy out such undivided share of the stranger co-owner.

The condition for applicability of section 4 of the Partition Act in Ghantesher Ghosh (supra) was approved by the Apex Court in Babulal Vs. Habibnoor Khan (Dead) by LR's. and Others, . It was held by the Court:

9. Therefore, one of the basic conditions for applicability of Section 4 as laid down by the aforesaid decision and also as expressly mentioned in the section is that the stranger-transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned. It is, of

course, true that in the said decision it was observed that even though the stranger-transferee of such undivided interest moves an execution application for separating his share by metes and bounds it would be treated to be an application for suing for partition and it is not necessary that a separate suit should be filed by such stranger-transferee. All the same, however, before Section 4 of the Act can be pressed into service by any of the other co-owners of the dwelling house, it has to be shown that the occasion had arisen for him to move u/s 4 of the Act because of the stranger- transferee himself moving for partition and separate possession of the share of the other co-owner which he would have purchased. This condition is totally lacking in the present case. To recapitulate, Respondent 1 decree-holder himself, after getting the final decree, had moved an application u/s 4 of the Act. The appellant, who was a stranger-purchaser, had not filed any application for separating his share from the dwelling house, either at the stage of preliminary decree or final decree or even thereafter in execution proceedings.

10. Only on this short ground, Therefore, the application u/s 4 of the Partition Act has to be treated as not maintainable as held by the trial court. The decision of the Orissa High Court in *Alekha Mantri case*¹ relied upon by the learned Single Judge also cannot be of any avail in view of the settled legal position discernible from the aforesaid decision of this Court in the case of *Ghantesher Ghosh*².

37. In the matter of *Dorab Cawasji Warden Vs. Coomi Sorab Warden and others*, relied on by the plaintiff, a suit was filed on the ground that the suit property is a dwelling house belonging to an undivided family, that there had not been any division of the said property at any time, that the plaintiff and his deceased brother Sohrab during his lifetime were for convenience occupying different portions, the plaintiff occupying the first floor while the deceased Sohrab was occupying the ground floor. After the death of Sohrab respondents 1 to 3 continue to be in occupation of that portion which was in the occupation of Sohrab. In the circumstances it was held that the defendant 4 who was a stranger to the family had no right to have joint possession or common enjoyment of the property along with the plaintiff on the basis of the purchase of the undivided share. On this ground the appellant- plaintiff claimed that he is entitled to perpetual injunction as prayed for in the suit. He further claimed that pending the suit he is entitled to ad interim relief as prayed for and that if the said relief is not granted irreparable loss and great prejudice will be caused to him which cannot be compensated in terms of money, and that the equity and balance of convenience is in his favor and no prejudice or loss would be caused to the respondents and in those circumstances the Court by an interim order had directed the stranger to restore the possession of the dwelling house to the co-owners.

38. The cases relied on by the plaintiff are apparently distinguishable. The defendant no.7 is not in possession of a portion of the house but the entire house which has been sold to her. It is not the case of the plaintiff that the property

which has been sold to the defendant no.7 is a dwelling house. Rather it has been pleaded that a part of the house was sold to some other persons by a sale deed dated 16th June, 1997. This is not the case of the plaintiff that the entry of defendant no.7 in the joint family dwelling house is likely to create unnecessary disturbances nor germane to the peace and tranquility and will disturb the domestic peace of members of undivided family occupying a common dwelling house. The property in dispute is not the dwelling house in the facts and circumstances. The plaintiff has not claimed cancellation of the sale deed executed in her favor pursuant to which she is in possession and has carried out demolition and re-construction.

39. Regarding the plea of defendant no.7 that the relief of cancellation of sale deed in favor of the defendant no.7 has not been claimed by the plaintiff, it was asserted by the plaintiff that in a suit for partition, plaintiff is not liable to seek cancellation of sale deed and recovery of possession and has relied on *Syed Rasool and Others Vs. Mohammad Moulana*, and *Sanjay Kaushish Vs. D.C. Kaushish and others*, .

40. The case of *Syed Rasool (supra)* was a redemption suit where mortgagor alleged that the sale deed executed by him in favor of Mortgagee was invalid and in those circumstances it was held that the suit was maintainable without prayer for cancellation of the sale deed. The sale deed was executed by the Mortgagor who filed a suit for redemption and not by some one else. The proposition laid down in the said case is not applicable to the present case in respect of a sale deed of a bona fides purchaser not executed by the plaintiff but the beneficiaries of will of Late Mangal Sain Gulati. Similarly the ratio of the case *Sanjay Kaushish Vs. D.C. Kaushish and others*, laying down that in a suit for partition and, a declaration avoiding an earlier decree was not necessary. In *Sanjay Kaushish (supra)* the partition of the properties was sought and an declaration regarding an earlier partition decree was not claimed because while passing a new partition decree, either the earlier decree could be given effect to or could be modified on account of new partition decree passed by the Court. These cases are clearly distinguishable with the facts of case of the plaintiff. In the case of plaintiff, the sale deed has been executed and by merely claiming partition of the property with the beneficiaries of the will of Shri Mangal Sain Gulati who have sold the entire property to the defendant no.7, she will not be entitled for cancellation of sale deed. Even if she succeeds and is able to challenge the will of her deceased father successfully, she may be entitled for value of her share, in case sale deed in favor of defendant no.7 is not cancelled.

41. A Division Bench of this Court in *Jathedar Rajpal Singh (Supra)* has held that it was not permissible to pass an order on an application of the plaintiff for sealing the property where the relief sought was only that the defendant should not transfer, alienate or part with the possession thereof. A Single Judge of this Court in *Prakash Kaur (Supra)* had held that if in a suit there is no prayer for permanent injunction, plaintiff cannot be allowed to ask for interim injunction.

Similarly, in Smt.Chandra Bose (Supra) it was held that no order can be passed on any interlocutory application which is not in aid of final relief in suit. No relief can be granted at interlocutory stage which is beyond the scope of the suit and such prayers made at interlocutory stage which are beyond the scope of the suit cannot be entertained.

42. A Single Judge of the Madras High Court in A.Kumar (Supra) had held that when relief in main suit is one, different relief cannot be sought for an interim application. In this case the relief sought against the defendant was that he and his men be restrained from locating the liquor shop in a particular place and by an interim order the relief sought was against the defendant from selling the liquor which was not the prayer in the suit and was declined.

43. By an interim mandatory injunction, the plaintiff is seeking re-conveyance of the property for a consideration of Rs.80,00,000 and recovery of possession from the defendant no.7. The relief regarding possession of the plaintiff was denied by order dated 25th August,2003 while disposing of the interim injunction of the plaintiff. The relief of interlocutory mandatory injunctions are granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. The guidelines generally evolved for grant of mandatory interim injunctions are:

(1) The plaintiff has a strong case. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favor of the one seeking such relief.

44. Granting of mandatory injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm. It has been held by the Courts that the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion.

45. Perusal of the prayers made in the plaint it is apparent that no relief has been sought against defendant No. 7 for cancellation of the sale deed executed in her favor in respect of the property nor any relief is sought for re-conveying the property by defendant No. 7 in favor of plaintiff for a consideration of Rs.80

lakhs alleged to have been paid by defendant No. 7 for execution of sale deed in her favor. If that be so the plaintiff is not entitled to claim by an interim order that the defendant No. 7 be directed to re-convey the property for a consideration of Rs.80 lakhs in favor of plaintiff nor is entitled to claim possession of the property.

46. By an order dated 25.8.2003 this Court has already passed an interim order of injunction after considering the pleas and contentions of the parties, only restraining the defendant No. 7 to further transfer the rights in the property without the prior permission of the Court. It was held that the question of possession shall be determined on the basis of the evidence of the parties. Subsequently the plaintiff filed the application seeking contempt against the defendant no.7 for demolition and re-construction of the property, impliedly admitting that the possession of the property is with defendant no.7 which has already been dismissed. By the interim mandatory injunction the plaintiff is seeking defendant no.7 to undo her possession in property No. 31, Bungalow Road, Kamla Nagar, Delhi, and allow such possession to be kept by the plaintiff. For grant of interim mandatory injunction the case should be of higher standard than a prima facie case that is normally required for a prohibitory injunction. The plaintiff was declined relief regarding her alleged possession for prohibitory injunction. If that is so, then considering the facts and circumstances and subsequent applications filed by the plaintiff, it is apparent and inevitable to infer that the plaintiff does not have such a strong case to entitle her for grant of a mandatory interim injunction.

47. If the plaintiff succeeds and is able to challenge the will of her deceased father successfully, she may be entitled for value of her share, as the plaintiff has not sought cancellation of sale deed in favor of the defendant no.7. The property is not a dwelling house and the suit for partition of share of her property has not been filed by the defendant no.7, transferee who has been sold the entire property. In the facts and circumstances of this case, Therefore, it can not be inferred that the plaintiff shall suffer irreparable or serious injury in case the plaintiff is not granted interim mandatory injunction. The defendant no.7 has paid the entire sale consideration and has also demolished the old structure and started new construction and has incurred considerable expenditure. The application of the plaintiff for contempt of Court on account of demolition and for carrying out construction was dismissed.

48. The plaintiff has also placed reliance on Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass, to contend that the plaintiff is entitled for mandatory and prohibitory interim injunction as prayed by her. In this case the lower appellate court had considered the question of prima facie case but the appellate Court did not consider the prima facie case and allowed the relief holding that alienation made, if any, will be subject to the law of lis pendens and constructions, if any, put by the respondent will have to be removed at his own risk and cost in the event of the suit being decreed. The Apex Court held that in

the facts and circumstances of this case, the lower appellate court and the High Court were not justified in permitting the respondent to change the nature of the property by putting up construction as also by permitting the alienation of the property. The relevant observation of the Apex Court is as under:

9. While it is true that the lower appellate court did go into the question of prima facie case and held that the appellant had not made out any such case, the High Court did not go into that question at all. 10. Be that as it may, Mr Sachar is right in contending that unless and until a case of irreparable loss or damage is made out by a party to the suit, the court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings. In the instant case no such case of irreparable loss is made out except contending that the legal proceedings are likely to take a long time, Therefore, the respondent should be permitted to put the scheduled property to better use. We do not think in the facts and circumstances of this case, the lower appellate court and the High Court were justified in permitting the respondent to change the nature of the property by putting up construction as also by permitting the alienation of the property, whatever may be the conditions on which the same is done. In the event of the appellant's claim being found baseless ultimately, it is always open to the respondent to claim damages or, in an appropriate case, the court may itself award damages for the loss suffered, if any, in this regard. Since the facts of this case do not make out any extraordinary ground for permitting the respondent to put up construction and alienate the same, we think both the courts below, namely, the lower appellate court and the High Court erred in making the impugned orders. The said orders are set aside and the order of the trial court is restored.

49. The plaintiff's application for interim injunction was disposed of by an order dated 25th August, 2003 declining all other relief except that the defendant no.7 shall not transfer the rights in the property further without prior permission of the Court. In contradistinction to restrain the defendant no.7 to transfer the rights in the property completely, the defendant no.7 was directed to seek the prior permission only. The application for committing contempt of Court on account of demolition and construction was also dismissed. The defendant no.7 has a sale deed for the entire property. In case the plaintiff succeeds whether the defendant no.7 shall be liable to restore 1/6th share of the property or only liable to pay the value of share of the plaintiff, has to be determined. Apparently, the case relied on by the plaintiff is distinguishable and on the ratio of said decision, plaintiff is not entitled for any relief of mandatory injunction in the facts and circumstances and for other reasons stated herein before. The application of the plaintiff being I.A 9942/2003 for mandatory interim injunction is Therefore, dismissed.

50. The plaintiff had categorically prayed in the contempt petition that the

further construction in the property be stayed, however, the contempt petition was dismissed by order dated 27th September, 2004. The interim injunction order dated 25th August, 2003 is also not liable to be reviewed or varied by another interim application. No order is to be passed on any interlocutory application which is not in aid of final relief in the suit. No relief should also be granted at interlocutory stage which is beyond the scope of the suit in the present facts and circumstances of the case. The interim application seeking sealing of property being I.A 4283 of 2004 in the contempt petition has been dismissed. Therefore interim application being I.A no.1181 of 2005 in the interim application in the contempt petition seeking restrain against further construction is also liable to be dismissed. Consequently the order dated 16th February, 2005 restraining the defendant no.7 from carrying out any further construction is vacated and the application of the defendant no.7 being I.A no.1644 of 2005 under Order 39 Rule 4 of the CPC is allowed.

51. Thus the interim application of the plaintiff being I.A 4283 of 2004 for sealing of the property is dismissed which was filed in the contempt petition no.90 of 2004 which contempt petition was dismissed by order dated 27th September, 2004. Another interim application being I.A No. 1183 of 2005 for early hearing of I.A no.4283 of 2004 and for restraining the defendant no.7 from carrying out any further construction in the property is also dismissed and ex-parte interim order dated 16th February, 2005 restraining the defendant no.7 from carrying out further construction in the property is vacated and consequently the application of the defendant no.7 being I.A no.1644 of 2005 under Order 39 rule 4 of the CPC for vacation of ex-parte interim order dated 16th February, 2005 is allowed. The application of the plaintiff being I.A No. 9942 of 2003 for mandatory interim injunction directing the plaintiff to undo her possession and re-convey the property to the plaintiff for consideration is also dismissed. In the facts and circumstances of the case, the parties are also left to bear their own costs.