

(2006) 08 DEL CK 0223

In the Delhi High Court

Case No : CM (M) No's. 1476 and 1491 of 2004

Mohd Kamil (Since Deceased) and Now represented by Smt.
Rukshana Praveen and Others

APPELLANT

Vs

Chootey Lal

RESPONDENT

Date of Decision : 08-08-2006

Acts Referred:

Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 116
Transfer of Property Act, 1882 — Section 108

Citation : (2006) 08 DEL CK 0223

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Satya Prakash Gupta, for the Appellant; Ramesh Saraf and H.L. Raina, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—Admit.

2. At the request of the learned Counsel for the parties, the petitions are taken up for final disposal.

3. The two petitions arise from the grievance of the petitioner in respect of the common order passed in two execution proceedings by the learned Civil Judge on 20.7.2004

4. The petitioner had filed two suits for recovery of possession, arrears of rent and mesne profits in respect of plot Nos. 1 and 2, forming part of Khasra No. 38/5/1, Khureji Khas, Patparganj Main Road, Shahdara, Delhi. In the two suits, the plots 1 and 2 have been described as ad measuring 400 and 500 sq. yards respectively. The description of the plots as given in para 1 of the complaints for plots 1 and 2 respectively are as under:

Plot No. 1

North: Plot of Gaon Sabha

South: Plot forming part of Khasra No. 38/5/1 of Ahmed Chaudhary, etc.

East: Road

West: Plot of Shri Ram Chander, etc.

Plot No. 2

North: Plot of Gaon Sabha

South: Plot forming part of Khasra No. 38/5/1 of Ahmed Chaudhary, etc.

East: Road

West: Plot of Shri Ram Chander, etc.

5. The two suits were decreed and the first appeal as well as the second appeal filed by the respondent were dismissed. The matter, thus, came for execution of the decree. At that stage, the respondent filed objections, which were also dismissed. The problem has arisen at the stage of the execution of the warrants of possession in respect of the suit property.

6. A perusal of the impugned order shows that an architect was directed to go to site to identify the plots to carry out measurements. At site the architect did not find any discrepancy insofar as the boundaries of the plots are concerned but the two plots were found to be measuring 430.8 sq. yards and 596.9 sq. yards instead of the original areas as mentioned in the plaint. The Trial Court was of the considered view that since the areas were different, the decree cannot be executed and that the decree holder should have been more careful in describing the area of the plots. Since the discrepancy was also not minor the Trial Court held that the decree was not capable of execution.

7. Learned Counsel for the petitioner seeks to contend that though the areas of the plots are different there is no doubt about the identity of the property in view of the fact that boundaries of the plots were described in the plaint. Learned Counsel submits that it is not a case where the respondent is claiming any title in the property or that some other person has come up with title claim to the property. Respondent was a tenant under the petitioner and has been held liable for eviction from the suit property.

8. Learned Counsel for the respondent on the other hand submitted by reference to the written statement filed that a specific objection was taken about the identity of the property. Since the plots are of larger areas, it is contended that the decree cannot be executed in respect of the part of the property in view of the judgment of the Apex Court in Jagdish Dutt and Anr. v. Dharam Pal and Ors. 1999 4 AD (SC) 36. Learned Counsel has also contended that the impugned order of the Executing Court is based on the fractural matrix and it is not jurisdiction of this Court to act as a court of appeal and thus this is not a fit case for exercise of jurisdiction under Article 227 of the Constitution of India.

9. On consideration of the rival submissions advanced by learned Counsel for the parties, I consider it appropriate to first clarify that there can hardly be any doubt about the proposition that this Court does not act as a court of first appeal. It is trite to say that it is only in the eventuality that this Court coming to the conclusion that there is a patent error in the impugned order or there is failure to exercise jurisdiction or erroneous exercise of jurisdiction would this Court interfere with the order of the Trial Court.

10. If the matter is scrutinised in the aforesaid perspective it will be seen that insofar as the boundaries of the property are concerned, the same were described in plaint and there is no dispute about the same. Yet it is not in dispute that the area described in the plaint was comparatively less for both the plots as compared to what has been found at the site. The nature of the suits filed are for recovery of possession, arrears of rent and mesne profits/damages. These are not title suits. It is not a case where somebody else has come up and set up a claim to the suit land in question on the ground that the petitioner is claiming a larger area than what the petitioner is entitled to.

11. A perusal of the written statement filed by the respondent shows that the plea of the respondent in para 7 of the preliminary objections are as under:

7. That the suit of the plaintiffs is also not maintainable as no copy of alleged site plan has been supplied to the defendants as well as the site plan filed with their suit is also totally false and is not correct according to the site, hence the suit of the plaintiffs is liable to be dismissed with heavy costs.

12. The respondent had also stated in para 1 of the reply on merits that the area was not bounded as stated by the petitioner.

13. A perusal of para 7 of the preliminary objections shows that the objection relates to non-supply of the site plan. There is just a bald denial of the site plan and thereafter it is said that the property boundaries are not correctly described. However, the fact remains that the respondent failed in its defense before three Courts and even the objections were dismissed. At the stage of handing over possession of the suit properties no discrepancy has been found in respect of the boundaries of the property. The difference is only in respect of the area.

14. Learned Counsel for the petitioner has rightly drawn the attention of this Court to Section 108 of the Transfer of Property Act 1882, which deals with the rights and liabilities of the Lesser and the lessee. It is an obligation in terms of Clause (q) of the rights and liabilities of the lessee that on determination of the lease the lessee is bound to put the Lesser into possession of the property. It is also not open to a tenant to challenge the title of the landlord in view of the provisions of Section 116 of the Evidence Act, 1872.

15. Learned Counsel for the petitioner has also referred to a number of judgments on the issue as to what ought to be the approach of the court in case there is a difference in the area as compared to the description of the boundary.

16. In *Zeenut Ali and Ors. v. Ram Doyal Poddar* (1872) 18 Sut WR 25 it has been held that where a plaintiff has obtained a decree for possession of land and describes the land as having a particular area and lying within certain boundaries the boundaries must prevail even if land exceeds area stated in the plaint.

17. The Supreme Court in *Ravinder Kaur v. Ashok Kumar and Anr.* AIR 2004 SC 904 had considered the matter where such objections were being raised. The Supreme Court noticed that the defense was not that the possession is of some other property in regard to which there is no eviction order but the landlord is trying to take possession in the execution proceedings. The Supreme Court deprecated the practice of giving a long rope in execution proceedings in respect of claims of identity of property where the object is only to defeat the decree despite various forums having found in favor of the landlord.

18. In *Chitturi Perraju and Another Vs. Yednapudi Venkamma and Others*, , the Division Bench held that where the description of the property is by boundaries given with precision, such boundaries must prevail even if there is some discrepancy about the actual extent of the land. To the same effect, observations have been made by the learned single Judge of the Calcutta High Court in *Roy and Co. and Another Vs. Sm. Nani Bala Dey and Others*, .

19. The learned Single Judge of this Court in *Krishan Lal Dutta Vs. Behari Lal Chhabra*, had observed that what was important was as to what plot had been the subject matter of the suit filed by the plaintiff seeking possession and that whether the plot was completely identifiable by the map as well as by the boundaries given therein.

20. In my considered view, the Executing Court committed a patent error and failed to exercise jurisdiction vested in it by law. The Trial Court appears to have proceeded on the sole aspect of the discrepancy in the area of the plot failing to notice that there is no discrepancy insofar as the description of the boundaries is concerned. It is further not to be lost sight of and is again emphasised that the present case is one where the tenant is in possession under the landlord and the matter is one of returning back the tenanted property to the landlord on a decree of possession being passed in favor of the landlord.

21. I am thus of the considered view that the impugned order cannot be sustained and is hereby set aside. The Executing Court is directed to issue warrants of possession in respect of the two plots as per the description of the property and the boundaries given in the plaint over which there is no dispute.

22. The petitions are allowed leaving the parties to bear their own costs.

23. The parties to appear before the Trial Court on 29.8.2006.

24. duty to learned Counsel for the parties.