

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

% Reserved on: 7th May, 2015
Decided on: 29th May, 2015

+ **CM(M) 221/2015**

INDER KUMAR GUPTA Petitioner
Through: Mr. Shiv Charan Garg, Mr. Imran
Khan and Ms. Nandini Aggarwal,
Advocates.
versus

SUMER CHAND GUPTA Respondent
Through: Mr. Aniruddha Konar, Advocate.

+ **CM(M) 780/2014**

INDER KUMAR GUPTA Petitioner
Through: Mr. Shiv Charan Garg, Mr. Imran
Khan and Ms. Nandini Aggarwal,
Advocates.
versus

SUMER CHAND GUPTA Respondent
Through: Mr. Aniruddha Konar, Advocate.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. The Petitioner Inder Kumar Gupta filed a suit for possession, permanent and mandatory injunction and for recovery of damages against his brother Sumer Chand Gupta being Suit No.72/06/96 before the learned Civil Judge which was decided in favour of the Petitioner/Plaintiff on 12th March, 2008. By the judgment and decree it was held that the Petitioner/Plaintiff was entitled to possession of the suit property, that is, 7609/2, Prem Nagar, Delhi-110007 and the Respondent/Defendant being an illegal occupant of

the suit property, he was liable to pay damages for the period from 8th June, 1996 to 7th July, 1997 and till the vacant possession is handed over @ Rs.1,000/- per month. It was further clarified that by way of judgment, no declaration with regard to the ownership of the suit property was passed in favour of the Petitioner/Plaintiff. A decree of permanent injunction was also passed in favour of the Plaintiff and against the defendant restraining the Defendant from creating any third party interest or parting with possession.

2. First appeal filed by Sumer Chand Gupta against the judgment and decree dated 12th March, 2008 was dismissed on 6th October, 2008 having been filed beyond the period of limitation. Sumer Chand Gupta filed RSA No.7/2010 before this Court which was dismissed on 6th May, 2010 observing that no interference was warranted in the appellate order. Since the appeal by Sumer Chand Gupta was filed belatedly on 23rd July, 2008, Inder Kumar took over the possession of the suit premises from the Respondent in the execution petition.

3. On 26th July, 2010 Sumer Chand Gupta filed objections under Order XXI Rule 58 CPC read with Section 47 CPC in Execution Petition No.159/2008 filed by Inder Kumar which was pending for the recovery of the damages. Two pleas were taken in the Objection Petition, that is, in the judgment and decree Inder Kumar was directed to deposit the court fee and he having failed to comply with the said order, he was not entitled to execution and secondly that since the suit for partition between the parties was already pending, till the decision of the said suit the decree holder cannot recover the damages from the judgment debtor and thus the remaining portion of the decree, that is, qua damages was liable to be stayed till the decision in the suit for partition.

4. As regards the first objection of the court fee, vide order dated 29th July, 2010 the learned Trial Court held that the suit was decreed on 12th March, 2008 and on 15th July, 2008 the Plaintiff/the Decree Holder paid a sum of Rs. 1,400/- as Court fee with regard to the future damages. Thus the objection of Sumer Chand on this count was dismissed. The objection petition which was still pending on the second count was dismissed vide order dated 29th July, 2010 by the learned Civil Judge. Against the order dated 29th July, 2010 dismissing the objections Sumer Chand filed an appeal before the learned Additional District Judge which was allowed vide the order dated 28th April, 2011 and the review application filed by Inder Kumar was dismissed vide order dated 2nd April, 2014. The orders dated 28th April, 2011 and 2nd April, 2014 are impugned in the present petitions.

5. Before advertng to the contentions of the parties, one more fact which is relevant to be noted in the proceedings *inter se* the parties, who are siblings, is that a probate petition was filed by Inder Kumar being Probate Case No.138/2007 seeking grant of probate of Will dated 25th January, 1973 executed by the mother late Kasturi Devi whereby she bequeathed all her movable and immovable properties on Inder Kumar. Vide the judgment dated 7th August, 2008 the said probate petition was dismissed as no copy of the Will was filed along with the petition rather a photocopy was filed as the Petitioner was not in the possession of the original Will which according to him had been filed in the office of Municipal Corporation of Delhi while applying for mutation. The probate petition was dismissed as not maintainable and it was also noted that since on the basis of the Will, No Objection Certificates, affidavits and surrender documents executed by all the other legal heirs, the property was already being administered by Inder

Kumar, grant of letter of administration was superfluous as the suit property stood transferred in the name of Inder Kumar.

6. Vide the impugned orders dated 28th April, 2011 and 2nd April, 2014 the learned Additional District Judge in the appeal and the review application allowed the objections of Sumer Chand and held that since the Probate Case No.138 of 2007 filed by the Decree Holder on 15th September, 1997 seeking grant of probate of Will dated 25th January, 1973 was dismissed on 7th August, 2008 the decree became non-executable.

7. Vide order dated 28th April, 2011 the Court noted that the Court of the learned Additional District Judge in Probate Case No. 138 of 2007 held that Sumer Chand was entitled to 1/8th share of the house which he could obtain by filing a suit for partition. By subsequent events, that is, subsequent judgment dated 7th August, 2008 in the probate petition which is a judgment in rem and on filing a suit for partition the decree dated 12th March, 2008 passed on the basis of mutation of the property granted by the MCD on the Will, it became unexecutable at least for recovery of the damages particularly after the decree holder was successful in obtaining possession of the property pursuant to decree dated 12th March, 2008 on 23rd September, 2008 without notice to the judgment debtor and by concealing the factum of judgment dated 27th August, 2008 passed in the probate case.

8. A perusal of the judgment in Probate Case No.138 of 2007 would reveal that the Court did not return the finding that Sumer Chand was entitled to 1/8th share in the property. It noted the contention of Sumer Chand and held that if the Respondent, that is, Sumer Chand has any grievance he could file a suit for partition and get his 1/8th share in the property. Inder Singh was not named as executor in the Will, thus no

probate can be granted. Under the circumstances Letters of Administration is issued in favour of Inder Singh for the purpose of administering the property of the deceased. In this case record shows that the “Will” stands acted upon and the property stands transferred in the name of Inder Singh in the records of MCD. All the requisite documents including no objections and affidavits were furnished by all legal heirs including Sumer Chand and on the basis of these documents mutation was recorded in favour of Inder Singh. So the “Will” stood executed. There is nothing left in the case to be decided by the Court or to grant Letter of Administration. However, on the basis of evidence it was held that the execution of the “Will” was not proved and issuance of letter of administration had become superfluous.

9. Further in view of Order XXI Rule 22 CPC if an execution petition is filed within two years of the judgment and the decree being passed then the execution thereof can be directed even without notice. Learned Additional District Judge vide the impugned orders failed to notice that in RSA No.7/2010 the issue of genuineness of Will was raised however, this Court reiterated the finding of the learned Trial Court vide the decree, the title of the suit property had not been decided and Sumer Chand was held to be a licensee of Inder Kumar in the suit property and thus liable to vacate the same. The learned Additional District Judge while passing the impugned orders failed to notice the settled legal position that an executing court cannot go behind the decree and in the absence of successful challenge to the decree no objection can be raised in execution. (See ONGC Ltd. vs. Modern Construction and Company, 2014 (1) SCC 648; Bhawarlal Bhandari vs. Universal Heavy Mechanical Lifting Enterprises, 1999 (1) SCC 558; Dhurandhar Prasad Singh vs. Jai Prakash University, 2001 (6) SCC 534;

Rajasthan Financial Corporation vs. Man Industrial Corporation Ltd., 2003 (7) SCC 522; Balvant N. Viswamitra vs. Yadav Sadashiv Mule, 2004 (8) SCC 706 and Kanwar Singh Saini vs. High Court of Delhi, 2012 (4) SCC 307).

10. Consequently, the impugned orders are set aside. The objections filed by Sumer Chand Gupta are dismissed.

11. It is clarified that in none of the proceedings the title of the property has been decided.

12. Petitions are disposed of.

(MUKTA GUPTA)
JUDGE

MAY 29, 2015

‘vn’