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

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Date of decision: 15.09.2016

+ CM(M) 524/2014

COL. A.S.BUTALIA & ORS Petitioner
Through Mr.Mohit Gupta, Adv.

versus

M/S SUPERIOR FILMS PVT. LTD. Respondent
Through Mr.H.S.Chandihoke and Mr.Anant
Garg, Adv.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. By the present petition the petitioner seeks to impugn the order dated 4.2.2014 by which an application for review filed by the petitioner/decreed holder for review of order dated 1.12.2012 framing issues was allowed and the order was recalled and the Execution Petition filed by the petitioner was dismissed.

2. The basic facts which led to passing of the impugned order are that the petitioner filed a suit for recovery of possession, damages/mesne profits etc. against the respondent. As per the plaint the petitioners are joint owners of Flat No.403, Satyam Cinema Building, Patel Nagar, New Delhi measuring 830 sq.ft. The said property is stated to have been leased to the respondent w.e.f. 1.2.2003.

3. Subsequently, the matter was compromised. An application was filed by the parties under Order 23 Rule 3 CPC which permitted the respondent to retain possession of the said premises Flat No.403, 4th Floor, Satyam Cinema Building, Patel Nagar, New Delhi upto 3rd October, 2010. The application was allowed and compromise decree was passed after recording of statement of the parties on 29.10.2009.

4. Subsequently, in Court on 11.02.2011 in the Execution Petition the keys of the property were handed over to the petitioner. The petitioner now filed the present Execution pointing out that instead of handing over the suit premises measuring 830 sq.ft. the respondent has handed over an area of only 695 sq.ft. and has illegally merged 135 sq.ft. in their own adjoining Flat No.402 in the same building. Based on this averment the trial court on 1.12.2012 after considering the averments and documents held that the matter cannot be decided without leading evidence and framed the issues as follows:-

“1. Whether the suit property measured 830 sq.ft.as actual covered/carpet area at the time of creation of lease between the parties on 21.01.2003? OPDH

2 Whether an area equivalent to 135 sq.ft. of the suit property has been merged by the JD with adjoining flat no.402 in the same building? OPDH

3.Relief ?”

5. The petitioner thereafter filed the present application for recalling/modifying the order dated 1.12.2012 stating that framing of issues is not warranted and that the court cannot go behind the decree and has to execute the same as it is. The application prayed for recall of order dated 1.12.2012 and execution of the decree. The trial court by the impugned

order held that no evidence is required to decide the Execution Petition particularly when no evidence was led by the parties in the main suit. Leading of evidence would be beyond the scope of the main suit and would result in enhancing the controversy between the parties and hence the trial court set aside the order dated 1.12.2012 framing the issues.

6. On the issue of execution of the decree, the trial court noted that the parties have exhibited the application Ex.C-1 whereby the respondent undertook to hand over vacant and peaceful possession of Flat No.403 to the plaintiff on or before 31.10.2010. None of the parties mentioned the area of the Flat in the compromise application or in their affidavits or in their statements recorded before the court. The compromise decree was passed in terms of the application and the statement of the parties where no area of flat is mentioned. Hence, it held that the decree has been passed without mentioning the area of the Flat in question and the plea of the petitioner that he has to be given possession of 830 sq.ft. cannot be granted by way of an Execution Petition. The trial court accordingly dismissed the execution.

7. Learned counsel for the petitioner has vehemently argued that the respondents are the builders of the property in question. Reliance is placed on the allotment letter dated 7.8.1980 in favour of the petitioners issued by the respondent when the Flat was bought which states that the covered area of the flat is 828.01- sq.ft. It is stressed that the property was leased to the same builder/respondent who demolished the boundary wall and merged the flat of the petitioner with their own flat being flat No.402. Now, it is urged that the respondent has mischievously usurped 135 sq.ft. and have amalgamated it with their own flat. Reliance is also placed on an order passed by the executing court on 14.9.2012 where a direction was passed

that the respondent shall produce the sanctioned building plan inasmuch as the same would be available with the respondent being the builder. It was urged that the respondent has deliberately not complied with the said order to suppress actual facts.

8. Learned counsel appearing for the respondent has opposed the present petition. It is stated that while the allotment of the flat in favour of the petitioner took place in 1980 the present property has been leased to the respondent in 2003 i.e. after nearly 23 years. What has happened in the interregnum is not known to the respondents. It is pointed out that no site plan was filed by the petitioners alongwith their plaint nor was any dimensions mentioned in the plaint. It is also pointed out that issues had been framed by the court on 1.12.2012 in the execution petition but it was the petitioners who themselves do not want to lead evidence on the issues and sought to wriggle out. It is urged that the executing Court cannot go behind the decree and in the present decree there is no description or dimensions of the property. Reliance is placed on judgments of the Supreme Court in ***Ramesh vs. Harbans Nagpal and Others, (2015) 8 SCC 716;*** ***Rajasthan Financial Corporation vs. Man Industrial Corporation Ltd., (2003) 7 SCC 522;*** and judgment of the Andhra Pradesh High Court in ***Pothuri Thulasidas vs. Potru Nageswara Rao, AIR 2005 AP 171*** to support the contention that the court cannot go behind a decree.

9. I may first look at the relevant terms and conditions of the joint application filed by the parties under Order 23 Rule 3 CPC. The relevant paragraphs read as follows:-

“a. The defendant and its employees, agents and sister concerns shall be entitled to retain the possession of the suit

premises i.e. flat bearing No.403, 4th floor, Satyam Cinema Building, Patel Nagar, New Delhi till midnight of 31st October 2010.

b....

c...

d. On or before 31st October 2010, the defendant undertakes to this court to hand over vacant and peaceful possession to the plaintiffs in the original condition and it is agreed that the plaintiff No.1 shall be entitled to receive possession on behalf of other plaintiffs.”

10. The statement of the Authorised Representative of the respondent was recorded on 29.10.2009 as follows:-

“Application under Order 23 Rule 3 CPC has been drafted by our counsels which bears my signature at point X-1 on application Ex.C-1. Application is supported by my affidavit which also bears my signatures and is Ex.C-3. I had voluntarily compromised with the plaintiff on behalf of the defendant in accordance with the terms and conditions mentioned in application Ex.C-1 and our statements. I will abide by the terms and conditions of the compromise application Ex.C-1 and my statement. I undertake on behalf of the defendant that we will hand over the peaceful and vacant possession of the suit premises to the plaintiff in the proper condition except the ordinary wear and tear on or before 31.10.10 and will pay the rent @Rs.25,000/- per month w.e.f. 1st Nov, 2009 till the date of vacation of the premises. My undertaking may be accepted and suit may kindly be disposed off by way of compromise decree.”

11. The trial court passed a decree as mentioned in the application Ex.C-1 coupled with the statement of the parties. It is clear from a perusal of the decree, the application and statement of parties that there is no description of the property and its area. Going a step further even in the plaint though the

area of the suit property is mentioned it is neither mentioned whether it is super area or carpet area. No site plan is annexed, no dimensions are mentioned.

12. In the light of the above facts, the contention of the petitioners that as per the decree they ought to be given possession of an area of 830 sq.ft is misplaced. No such conclusion follows from a reading of the decree or the background papers. In view of this finding what is the next step i.e. should the executing court go into this issue or should it be left open to the petitioner to take steps as per law.

13. The stand of the respondent is that any attempt to adjudicate upon the area of the flat as claimed by the petitioner would tantamount to going behind the decree. Reliance was placed by the learned counsel for the respondent on the judgment of Supreme Court in the case of **Ramesh vs. Harbans Nagpal & Ors. (supra)**. The facts of the said case were that the plaintiff had prayed for a decree of mandatory injunction that the chhajja occupied by the defendants forcibly and illegally be handed over to the plaintiff. The plaint did not give details or dimensions of Chhajja nor did it refer to any plan so that details or dimensions could be gathered. In the light of the above, the Supreme Court in para 9 held as follows:-

“9. We have gone through the record and considered the rival submissions. In our view, no dimensions were given in the plaint nor did the plaint refer to any sketch. The judgment and decree also did not refer to any dimensions of the chhajja in question nor did it incorporate or refer to any sketch from which dimensions could be gathered. In the premises the view taken by the trial court was absolutely correct, in that any exercise would amount to going behind the decree. The application preferred Under Section 151 Code of Civil Procedure was also vague and

lacking in any particulars. The High Court was, therefore, not justified in passing the instant directions. We, therefore, allow the appeal and set aside both the orders under appeal. It is open to Respondent No. 1-Plaintiff to take such steps as are open to him in law. We may also observe that the application for setting aside the ex parte decree preferred by the Appellant shall be considered on its own merits.”

14. In *Rajasthan Financial Corporation vs. Man Industrial Corporation Ltd. (supra)* the Supreme Court in para 18 held as follows:-

“18. We have considered the rival submissions. There can be no dispute to the proposition that the executing Court cannot go beyond the decree. There can be no dispute that the executing Court must take the decree according to its tenor. Also as has been set out in the *Greater Cochin Development Authority's case* (supra) when a decree is in terms of an award/document then the terms of that document have to be looked at....”

15. The legal position is quite clear. The executing court cannot go behind the decree.

16. However, the petitioners here have failed to urge about the applicability of Section 47CPC to this case. Section 47 reads as follows:-

“47. Questions to be determined by the Court executing decree.- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) [omitted by Act 104 of 1976. effective from 1-2-1977]

(3) Where a question arises as to whether any person is or is not

the representative of a party, such question shall, for the purposes of this section, be determined by the court.”

17. In the above context, reference may be had to the judgment of the Supreme Court in the case of ***Pratibha Singh & Ors. vs. Shanti Devi Prasad & Anr.***, ***AIR 2003 SC 643*** in which the Supreme Court held as follows:-

“17. When the suit as to immovable property has been decreed and the property is not definitely identified, the defect in the court record caused by overlooking of provisions contained in Order 7 Rule 3 and Order 20 Rule 3 of the CPC is capable of being cured. After all a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to Section 152 or Section 47 of the CPC depending on the facts and circumstances of each case -- which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected under Section 152 of the CPC by the Court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained by the Executing Court as a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47 CPC. A decree of a competent Court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission. In the facts and circumstances of the present case we think it would be more appropriate to invoke Section 47 of the CPC.”

18. The above judgment was cited with approval by the Supreme Court in the case of ***Niyamat Ali Molla vs. Sonargon Housing Co-operative Society Ltd. & Ors.***, ***AIR 2008 SC 225***.

19. Let us come to the facts of the present case. As noted above, the plaint describes the property as being flat No. 403, Satyam Cinema Building, Patel Nagar, New Delhi measuring 830 sq. ft. The application for compromise, the statements of the parties do not stipulate the area of the flat and a decree is

passed based on mere address of the flat in question. The petitioners have a decree in their favour for possession of the flat and cannot be denied the fruits of the decree on a mistake in correctly identifying the dimensions of the flat in the compromise application and the consequent decree. On the face of it, it appears to be a bona fide mistake committed by both the sides in giving an exact description of the dimensions of the flat. Perhaps both did not envisage that a situation like this would arise.

20. In the course of arguments it was put to the learned counsel for the parties that the most appropriate method of resolving this issue was to remand the matter back to the trial court to adjudicate on the issues as framed by the executing court on 01.12.2012. Learned counsel appearing for the respondent had stated that they have no objection to this course. This was however stoutly opposed by the learned counsel for the petitioners.

21. In my opinion, the appropriate course is that the matter be remanded back to the trial court for adjudication of the issues as framed on 01.12.2012. This would be as per Section 47 CPC and would be in the interest of the parties. Accordingly, the impugned order dated 04.02.2014 is quashed as it suffers from material irregularity. The matter is remanded back to the executing court to adjudicate upon the issues as framed on 01.12.2012 after the parties have led their evidence.

22. The petition stands disposed of.

JAYANT NATH, J

SEPTEMBER 15, 2016

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