

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

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Reserved on: 9th July, 2021

Pronounced on: 27th July, 2021

+ CM (M) 304/2021, CM APPL.13683/2021 (by the petitioner u/S 151 CPC for stay)

MOHD. AZIM

..... Petitioner

Through: Mr. Syed Hasan Isfahani,
Advocate

versus

DDA & ANOTHER

.... Respondent

Through: Ms. Mrinalini Sen, Standing
Counsel with Mr. Tanmay Yadav,
Advocates for R-1.
Mr. Wajeeh Shafiq, Standing
Counsel with Ms. Ramsha Shan,
Advocates for R-2.

CORAM:

HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

[VIA VIDEO CONFERENCING]

CM (M) 304/2021, CM APPL.13683/2021 (by the petitioner u/S 151 CPC for stay)

1. This petition has been filed by the plaintiff before the learned Trial Court under Article 227 of the Constitution of India praying that the impugned order & judgment of the Additional District Judge/Appellate Court dated 30th January, 2021 be set aside and as a consequence thereof, allow the application under Order XXXIX Rule 1 & 2 CPC filed by the

CM (M) 304/2021

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petitioner/plaintiff and grant temporary injunction against the respondent No.1/Delhi Development Authority ('DDA') restraining it from demolishing the premises in question till the suit was decided.

2. The facts as are relevant for the disposal of the present petition are that the petitioner/plaintiff had filed a suit against the respondent No.1/DDA and respondent No.2/Delhi Waqf Board ('DWB') for a decree of permanent injunction against respondent No.1/DDA from illegally dispossessing the petitioner/plaintiff from the suit property which he described as T-35/10, Ward No.8, Pankhe Wali Masjid, Khasra No. 1151/3 (Min.), Mehrauli, New Delhi.

3. The case setup by the petitioner/plaintiff was that the suit property was a Muslim religious place constituting a Masjid and an old Qabristan on a part of Khasra No.1151/3 Min. (Old Khasra No.1665) which was included as a Waqf property in the notification dated 18th October, 1998. The petitioner/plaintiff claimed that the suit property had been with the forefathers of the petitioner/plaintiff since long. Moreover, in the year 2010, a survey carried out by the Zonal Officer, South Delhi of the respondent No.2/DWB, recorded the fact that the petitioner/plaintiff was residing in a portion of the suit property alongwith his family. The petitioner/plaintiff had even submitted an application to the respondent No.2/DWB to be recognized as its tenant.

4. As noticed, alongwith this plaint, an application under Order XXXIX Rule 1 & 2 CPC was also filed which the learned Trial Court dismissed vide orders dated 11th September, 2019 (Annexure P-8). Against this order, an appeal was filed and the learned Additional District

Judge, South District Saket, dismissed the said appeal vide the impugned order dated 30th January, 2021.

5. Mr. Syed Hasan Isfahani, learned counsel for the petitioner/plaintiff submitted that the learned Trial Court and the learned Appellate Court had denied interim protection on the ground that the suit property on demarcation was not found to be located in Khasra No.1151/3 (Min.), but rather in Khasra No. 216. However, the respondent No.1/DDA had claimed that the suit property fell in Khasra No.217 and that was acquired land and, therefore, they had a right to remove the encroachments, but the demarcation report completely falsified their stand. Learned counsel further submitted that once it was clear that the suit property did not fall in Khasra No.217 which was acquired land, respondent No.1/DDA could not interfere with the rights of the petitioner/plaintiff in another Khasra number whether it be 216 or 1151/3 (Min.). Since the petitioner/plaintiff had been in possession of the suit property for a very long period, from the time of his forefathers, the petitioner/plaintiff was entitled to a protection of his possession till the suit was decided.

6. Ms. Mrinalini Sen, learned Standing Counsel for respondent No.1/DDA, on the other hand, submitted that even if it was considered that the suit property fell in Khasra No.216, Ladha Sarai, New Delhi and not in Khasra No.217, the petitioner/plaintiff still could not claim a right in the said land since the land bearing Khasra No.216 ad-measuring 27 bighas 8 biswas of land in village Ladha Sarai had been transferred to the respondent No.1/DDA by the Ministry of Rehabilitation vide Book Transfer dated 31st December, 1968. It may be mentioned here that on

directions of this Court, an affidavit has been filed by the Deputy Director/LM/South, an officer of the respondent No.1/DDA to this effect, also enclosing as Annexure-1, the list of Evacuee Properties taken over from the Ministry of Rehabilitation on 31st December, 1968. Learned counsel for respondent No.1/DDA has pointed out to the entry No.17 on page No.2 of the said list (pg. no. 141 of the electronic file) recording this transfer of 27 bighas 8 biswas of land in Khasra No. 216 to it. Hence, the learned counsel contended that the location of the suit property in Khasra No.216 was inconsequential to the petitioner/plaintiff as he had to stand on his own and establish a legal right to the suit property, which he had failed to do. On both these grounds, the learned counsel prayed that the petition be dismissed.

7. Mr. Wajeeh Shafiqe, learned Standing Counsel for the respondent No.2/DWB submitted that respondent No.1/DDA could not stake any claim to the suit property inasmuch as the property was a duly notified Wakf property and it was declared as such vide gazette notification dated 19th January, 1989 (filed as Annexure P-1, pdf page No.47 to 49). While describing the petitioner/plaintiff as an unauthorized occupant of the suit property, the learned counsel for respondent No.2/ DWB submitted that respondent No.1/DDA could not seek to demolish the premises or assert any rights in the suit property. It was submitted that since respondent No.1/DDA insisted on asserting such rights, it would be appropriate that an injunction to restrain respondent No.1/DDA from doing so, be issued by this Court.

8. In the exercise of the jurisdiction vested in this Court under Article 227 of the Constitution of India, the Court is not to reappraise facts. The

scope is limited to an inquiry as to the existence of some perversity or grave error in the impugned order that would call for rectification. As observed by the Supreme Court in *India Pipe Fitting Co. v. Fakruddin M.A. Baker*, (1977) 4 SCC 587

“5. The limitation of the High Court while exercising power under Article 227 of the Constitution is well-settled. Power under Article 227 is one of judicial superintendence and cannot be exercised to upset conclusions of facts however erroneous those may be. It is well-settled and perhaps too late in the day to refer to the decision of the Constitution Bench of this Court in Waryam Singh v. Amarnath [AIR 1954 SC 215 : 1954 SCR 565 : 1954 SCJ 290] where the principles have been clearly laid down as follows:

“This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in Dalmia Jain Airways Ltd. v. Sukumar Mukherjee [AIR 1951 Cal 193] to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.”

The same view was reiterated by another Constitution Bench of this Court in Nagendra Nath Bora v. Commissioner of Hills Division and Appeals, Assam [AIR 1958 SC 398 : 1958 SCR 1240 : 1958 SCJ 798] . Even recently in Bathutmal Raichand Oswal v. Laxmibai R. Tarta [(1975) 1 SCC 858] dealing with a litigation between a landlord and tenant under Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, this Court relying on its earlier decisions observed as follows:

“If an error of fact, even though apparent on the face of the record, cannot be corrected by means of a writ of certiorari it should follow a fortiori that it is not subject to correction by the High Court in the exercise of its jurisdiction under Article 227. The power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a superior court can

do in exercise of its statutory power as a court of appeal. The High Court cannot in guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal when the Legislature has not conferred a right of appeal and made the decision of the subordinate court or tribunal final on facts.”

9. Before the learned Trial Court, the specific relief of permanent injunction had been sought by the petitioner/plaintiff only against the defendant No.1, respondent No.1/DDA to restrain them from illegally dispossessing the petitioner/plaintiff from the suit property. This plaint was filed in October, 2012, and almost 9 years later, the suit is still at the stage of disposal of an interim application. Be that as it may, a perusal of the orders passed by the learned Trial Court explains the reason why there was so much delay. Even before the learned Trial Court, respondent No.1/DDA had relied on a demarcation report but the learned Trial Court did not accept the same, observing that Khasra No.1151/3 and Khasra No.217 were written by hand and not digitally as was done in the rest of the plan. Accordingly, the learned Trial Court found it appropriate vide its order dated 19th August, 2014, to direct that a fresh demarcation be carried out by the concerned SDM in respect of Khasra No.1151/3, Khasra No.217, as also the location of the suit property i.e., house of the petitioner/plaintiff, as described by him i.e., T-35/10, Ward No.8, Pankhe Wali Masjid, Mehrauli. This demarcation report was submitted to the court, after which, the application under Order XXXIX Rules 1 & 2 CPC, was taken up for disposal.

10. The learned Trial Court declined to grant interim protection and vacated the *status quo* order for the reasons that the petitioner/plaintiff

had not filed on record a single document of ownership or possession of the suit property while claiming to have been in possession thereof since the time of his forefathers; the measurement of the house was not given in either the plaint or the site plan annexed to the plaint; the notification produced by him was not duly certified from the concerned authority; the coloured photographs did not identify the suit property as being in possession of the petitioner/ plaintiff and the demarcation report clearly showed that the suit property did not fall in Khasra No.1151/3, Mehrauli.

11. When taken in appeal, the learned Additional District Judge/Appellate Court found no error in these conclusions. In fact, even before that Court, the very same pleas were taken, which the learned Additional District Judge rejected. It concluded that neither the petitioner/plaintiff disclosed a *prima facie* case, nor any irreparable loss or injury was caused to him, and the balance of convenience was also held not to be in his favour. This was because the petitioner/plaintiff had failed to disclose any right that was capable of being enforced by way of injunction.

12. In ***Wander Ltd. v. Antox India (P) Ltd.***, 1990 Supp SCC 727, the Supreme Court had observed as follows:

“9. Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated

“...is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the ‘balance of convenience’ lies.”

The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted.”

13. Thereafter, the Supreme Court went further to hold that the Appellate Court would not ordinarily interfere with the exercise of such discretion of the court of a first instance to substitute its own discretion in the following words:

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of

discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph [(1960) 3 SCR 713 : AIR 1960 SC 1156] : (SCR 721)

“... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton [1942 AC 130] ‘...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case’.”

14. In the instant case, the suit has been filed by the petitioner/plaintiff, as noticed above, for an injunction only against the respondent No.1/DDA. The respondent No.1/DDA has claimed ownership of the property in question and described the petitioner/plaintiff as an encroacher. The respondent No.2/DWB has described the petitioner/plaintiff as an unauthorized occupant. The petitioner/ plaintiff has claimed to be owner in adverse possession as against the respondent No.2/DWB, while also claiming that since 2010, an application had been filed by him to respondent No.2/DWB to treat him as a tenant. No

declaration has been sought against respondent No.2/DWB. Thus the petitioner/plaintiff, from the side of both the respondents is someone without any right to remain in possession of the suit property. He has not been able to *prima facie* show that he has legally entered into the property and has a right to remain in the said premises. The demarcation report included the determination of the location of the suit premises. Modern methods of TSM has been used to demarcate the land. The claim of the petitioner/plaintiff that the suit premises fall in Khasra No.1151/3 (Min.) has been found incorrect.

15. Furthermore, respondent No.1/DDA has filed the document of the Ministry of Rehabilitation to show that Khasra No.216 was transferred to it way back in the year 1968. The demarcation report has located the suit property as described by the petitioner/plaintiff to be falling in Khasra No.216. This also *prima facie* shows that the case of the petitioner/plaintiff to remain in possession is not made out.

16. As regards the claim of respondent No.2/DWB, the notification relied upon by respondent No.2/DWB is of the year 1989. There is nothing, on the basis of which, it can be said that before such notification, respondent No.1/DDA had been notified or rather respondent No.1/DDA was given an opportunity to show the documents to the respondent No.2/DWB. That being the case, the mere notification issued by respondent No.2/DWB, 30 years after the land had been transferred by the Ministry of Rehabilitation as an Evacuee Property to the DDA, cannot suffice to protect the possession of the petitioner/plaintiff.

17. If respondent No.2/DWB is asserting any rights in respect of the suit property, it is for the respondent No.2/DWB to take appropriate

action, but it cannot piggyback ride on the suit of the petitioner/plaintiff with the limited relief that the petitioner/plaintiff has claimed from the respondent No.1/DDA.

18. The question before the learned Additional District Judge/Appellate Court was whether the learned Trial Court had rightly or wrongly declined the interim protection and had rightly or wrongly vacated the status quo in force vide order dated 19th August, 2014 and the learned Additional District Judge/Appellate Court has rightly concluded that there was in fact no error in the exercise of the discretion by the learned Trial Court. This Court finds no perversity or error in the reasoning contained in the impugned order.

19. The present petition is completely devoid of merits and is accordingly dismissed alongwith the pending application.

20. The judgment be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

JULY 27, 2021
ak/ck

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