

(2013) 10 DEL CK 0212

Delhi High Court

Case No: Regular First Appeal 270 of 2013

Shri Naeemuddin

APPELLANT

Vs

Ms. Babita Rani

RESPONDENT

Date of Decision: Oct. 23, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 21

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: S.D. Ansari, for the Appellant; Sanjiv Bahl, Eklavya Bahl and Mr. Vikrant Arora, for the Respondent

Final Decision: Dismissed

Judgement

Rajiv Sahai Endlaw, J.

CM No. 15020/2013 (of appellant for restoration of the appeal dismissed in default on 10th September, 2013)

1. The counsel for the respondent has fairly stated that subject to the counsel for the appellant arguing the appeal today itself, he has no objection to the appeal being restored to its original position. The counsel for the appellant is agreeable.

2. Accordingly, for the reasons stated, the application is allowed and the appeal is restored to its original position.

3. The application is disposed of.

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4. The appeal impugns the judgment and decree (dated 18th April, 2013 of the Additional District Judge (ADJ)-14, Central District, Delhi in CS No. 178/2009 filed by the respondent/plaintiff) of recovery of possession of portion of property No. D-29, Majnu Ka Tilla, Delhi and for recovery of mesne profits @ Rs. 4,000/- per month with

interest @ 10% per annum with effect from 25th March, 2009 onwards, from the appellant.

5. The appeal was on 12th July, 2013 admitted for hearing and the Trial Court record requisitioned and upon the appellant/defendant expressing inability to deposit in this Court mesne profits decreed, stay of execution only of the decree insofar as for recovery of possession was granted.

6. The respondent/plaintiff had instituted the suit, from which this appeal arises, pleading:

(i) that she is the absolute owner in possession of the property;

(ii) that the respondent/plaintiff was earlier residing in the same property and the appellant/defendant was a neighbour;

(iii) that the respondent/plaintiff in or about the year 2008 shifted to another property and the husband of the respondent/plaintiff requested the appellant/defendant to look after the property;

(iv) that the appellant/defendant threatened that he will forge title documents of the property and of which a police complaint was lodged on 21st March, 2009;

(v) that the appellant/defendant on 25th March, 2009 trespassed into the property and a police complaint thereof was also lodged;

(vi) that the appellant/defendant filed a suit for permanent injunction against the respondent/plaintiff alleging that he was given possession of the property to secure repayment of Rs. 3 lakhs lent by him to the respondent/plaintiff and seeking to restrain the respondent/plaintiff from forcibly dispossessing him from the said property;

(vii) that no loan had been given by the appellant/defendant to the respondent/plaintiff;

(viii) that the electricity connection to the suit property had also been disconnected long back and the appellant/defendant was drawing electricity therein from his house in the neighbourhood;

(ix) that accordingly, the claim for recovery of possession and for mesne profits/damages for use and occupation @ Rs. 6,000/- per month was made.

7. The appellant/defendant contested the suit, by filing a written statement, on the grounds:

(a) that he was in lawful possession of the entire second floor and one room on the first floor of the property;

(b) that in the year 2006, the respondent/plaintiff and her husband were in need of money and had requested the appellant/defendant to lend them an amount of Rs. 3

lakhs;

(c) that the appellant/defendant agreed to the same, subject to their furnishing some security;

(d) that the respondent/plaintiff and her husband took such loan of Rs. 3 lakhs from the appellant/defendant and handed over physical possession of the aforesaid portion of the property to the appellant/defendant;

(e) that it was settled and agreed that the respondent/plaintiff will get back the physical possession of the property when they re-pay the loan and till then the possession of the property will remain with the appellant/defendant as security;

(f) that the appellant/defendant was thus entitled to retain possession till the loan advanced by him was repaid;

(g) denying the other contents of the plaint.

8. No replication is found to have been filed by the respondent/plaintiff.

9. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 31st August, 2009:

1) Whether the possession of the suit property was handed over to the defendant in consideration of the payment of the loan amount of Rs. 3 lakhs towards valuable security extended by the defendant to the plaintiff and her husband? OPD

2) Whether the defendant is unauthorised occupant of the suit property? OPP

3) To what amount the plaintiff is entitled as mesne profit from the defendant? OPP

4) Relief.

10. The respondent/plaintiff examined herself only as a witness in support of her case. The appellant/defendant besides examining himself examined two other witnesses.

11. The learned ADJ, in the impugned judgment, has held/found/observed:

(i) that though the counsel for the appellant/defendant had contended that the respondent/plaintiff in her cross-examination having admitted the value of the suit property to be more than Rs. 25 lakhs, the Court of the ADJ has no pecuniary jurisdiction to try the suit but ignoring that the respondent/plaintiff had admitted such value of the entire property, while the subject suit was concerned only with second floor and one room on the first floor thereof and that the suit was filed much prior to the date when the said admission was made;

(ii) that the ownership of the respondent/plaintiff was not disputed;

(iii) that the extent of the property in possession of the appellant/defendant was not disputed;

- (iv) that there was no documentary evidence to prove advancement of loan of Rs. 3 lakhs by the appellant/defendant to the respondent/plaintiff;
- (v) that though the appellant/defendant had tried to depose that he had arranged the amount from different persons but the same was not worthy of belief;
- (vi) that DW-2 & DW-3 claimed to be close friends of the appellant/defendant and had deposed in his support but were never asked to arrange the funds;
- (vii) that the persons from whom the appellant/defendant had claimed to arrange the funds were not produced;
- (viii) that the amount were not shown in the income tax return;
- (ix) that no bank account of the appellant/defendant from which part of the loan amount was stated to have been arranged had been produced;
- (x) that the appellant/defendant had admitted that his annual income is Rs. 1 lakh and no such person will give an amount of Rs. 3 lakhs i.e. his three years earning to somebody at mere asking without execution of any document;
- (xi) that the inconsistencies between the pleading and statement of the respondent/plaintiff of the date when the appellant/defendant had trespassed into the property was not material, the respondent/plaintiff having moved the Court within limitation;
- (xii) that the plea of the appellant/defendant of loan was thus discarded and the respondent/plaintiff was held entitled to possession;
- (xiii) that though no evidence had been led as to the market value or the prevalent letting value of the premises but suggestion was given by the respondent/plaintiff to the appellant/defendant in cross-examination that the property may fetch Rs. 6,000/- as rent;
- (xiv) that even if no evidence as to rate of mesne profits came on record, the Court could determine the same on its own, keeping in view the extent of possession and locality;
- (xv) that thus, mesne profits of Rs. 4,000/- per month were awarded to the respondent/plaintiff with interest @ 10% per annum from 25th March, 2009 till delivery of possession;

12. The counsel for the appellant/defendant has argued:

(A) that the respondent/plaintiff had set up the case of the appellant/defendant having forcibly trespassed into the property on 25th March, 2009; for forcible trespass, there should have been some goods of the respondent/plaintiff in the property which should have been removed by the appellant/defendant; however there is no such plea or evidence;

(B) that the respondent/plaintiff in the plaint itself had admitted that there was no electricity/water supply to the property; the same is also indicative of the respondent/plaintiff being not in possession on 25th March, 2009;

(C) that the respondent/plaintiff had admitted in cross-examination that the value of the property was Rs. 25 lakhs and on the basis of the said admission, the Court of the ADJ, maximum pecuniary jurisdiction whereof is Rs. 20 lakhs only, had no jurisdiction to entertain the suit; however the learned ADJ has wrongly interpreted the said admission as an admission of the value of the entire property of which the suit property is a part instead of returning the plaint on the basis of the said evidence;

(D) that the respondent/plaintiff had not proved her ownership/title to the property and could not have been granted a decree for possession;

(E) Attention is invited to the cross-examination of the respondent/plaintiff to show that the respondent/plaintiff therein had deposed of the appellant/defendant having trespassed into the property in August, 2008, while the case in the plaint was of appellant/defendant having trespassed into the property on 25.03.2009; for this reason only, her case ought to have been disbelieved;

(F) the respondent/plaintiff in cross-examination had admitted to taking loan from other persons and from this admission, the plea of the appellant/defendant also having lent money to the respondent/plaintiff ought to have been believed;

(G) that the respondent/plaintiff has not proved the appellant/defendant being in an unauthorized occupation of the premises;

(H) that irrespective of the defence of the appellant/defendant, the respondent/plaintiff was required to prove her own case; and,

(I) that there is a distinction between burden of proof and onus of proof.

13. Per contra, the counsel for the respondent/plaintiff has argued that the onus was on the appellant/defendant to prove that his possession was authorized, as pleaded by him.

14. The counsel for the appellant/defendant in rejoinder has contended that there is no evidence of the rate of mesne profits and in the absence thereof the learned ADJ erred in decreeing mesne profits at the rate of Rs. 4,000/- per month.

15. The counsel for the respondent/plaintiff in sur-rejoinder has contended that though the respondent/plaintiff did not give any instances of letting in the vicinity but in her affidavit by way of examination-in-chief deposed of the prevalent letting value of the property being Rs. 6,000/- per month and there is no cross-examination whatsoever by the appellant/defendant on the said aspect.

16. I have considered the rival contentions.

17. No merit is found in the contention of the appellant/defendant that for dispossession/trespass, the presence of goods and belongings of the respondent/plaintiff or the supply of electricity and water to the premises was essential. It was the case of the respondent/plaintiff that earlier she was in occupation of the property and had shifted therefrom; this part of the case of the respondent/plaintiff was not disputed; in this view of the matter, there was no occasion for the goods/belongings of the respondent/plaintiff to be lying in the property or of the existence of electricity and water supply to the property and absence of the said pleas do not come in the way of the case set up by the respondent/plaintiff of the appellant/defendant having forcibly trespassed into the property.

18. There is also no merit in the contention of the Court of the learned ADJ having no jurisdiction to entertain the suit from which this appeal arises. No objection as to the jurisdiction of the learned ADJ is found to have been taken in the written statement filed by the appellant/defendant. In fact the appellant/defendant in the written statement to the corresponding para in the plaint as to the valuation of the suit, did not controvert the said valuation. Axiomatically, no issue also was framed and the parties were not put to trial on the said aspect. In cross-examination, the counsel for the appellant/defendant enquired the value of the property in question from the respondent/plaintiff and to which the respondent/plaintiff replied as "between Rs. 15 lakhs to Rs. 25 lakhs". A further suggestion was given that the value of the property in question was more than Rs. 25 lakhs and which was agreed to by the respondent/plaintiff. I am unable to hold from the said questions/suggestions in the cross-examination which were beyond the scope of pleadings and issues and which ought not to have been allowed, that the learned ADJ did not have the jurisdiction to entertain the suit.

19. The argument even if urged before the learned ADJ in this regard was also beyond the pleadings and issues. A perusal of the memorandum of appeal also does not show any such ground being urged by the appellant/defendant. Section 21 of the CPC bars an objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction from being entertained by an Appellate Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where Issues are settled at or before such settlement and unless there has been a consequent failure justice. In the present case no such objection was taken in the Court of the first instance at the earliest possible opportunity i.e. in the written statement and no issue was sought on the competence of the Court with reference to the pecuniary limits of its jurisdiction and the argument raised is misconceived. The contention of the counsel for the appellant that he was under the impression that such an Issue had been framed is palpably false inasmuch as without him taking a plea in this regard, he could not have been under any such impression. The further contention that the matter should be considered because evidence was led is also misconceived, as save for the

suggestions in the cross-examination no evidence even was led on the said aspect. The appellant/defendant in his affidavit by way of examination-in-chief is also not found to have deposed that the market value of the property was Rs. 25 lakhs. No witness examined by the appellant/defendant also has deposed so.

20. I agree with the reasoning given by the learned ADJ of the inconsistency in the pleadings and evidence of the respondent/plaintiff as to the date on which the appellant/defendant had trespassed into the property being inconsequential inasmuch as there was no plea of the claim for possession being barred by time. Moreover, in the light of the defence also, the same was of no effect.

21. As far as the argument of the counsel for the appellant/defendant of the respondent/plaintiff having not proved her ownership/title of the property is concerned, it has to be noticed that the defence of the appellant/defendant was that he had as security for the loan given to the respondent/plaintiff taken the possession of the property as security for repayment of the loan. The question of the appellant/defendant taking the said security from the respondent/plaintiff would arise only if the respondent/plaintiff was the owner of the property. It was also not the plea of the appellant/defendant that the respondent/plaintiff was not entitled to the relief claimed of possession for the reason of having no title to the property. Consequently, no issue to the said effect was framed. In the light of the admission of the appellant/defendant of the ownership of the respondent/plaintiff, the argument now that the respondent/plaintiff has not proved ownership and that the respondent/plaintiff is required to prove his/her own case irrespective of the defence of the appellant/defendant is misconceived. A plaintiff is not required to prove what is admitted by the defendant.

22. Similarly the argument that the respondent/plaintiff has not proved unauthorized occupation is misconceived. The appellant/defendant defended the claim for possession by pleading to be in authorized possession under the respondent/plaintiff. Once the appellant/defendant is unsuccessful in proving that he was put into possession by the respondent/plaintiff and is entitled to, in terms of his occupation, continue in possession, his possession has but to be held to be unauthorized.

23. The argument of the difference between burden of proof and onus of proof has been made vaguely without enunciating the same and needs no discussion.

24. It may be highlighted that the appellant/defendant has not even attempted to justify before this Court the defence taken of having advanced loan to the respondent/plaintiff and having been put into possession of the property by way of security for repayment of the said loan.

25. I have during the hearing also enquired from the counsel for the appellant/defendant whether the defence of the appellant/defendant amounted to that of being a usufructuary mortgagee of the property and whether a usufructuary

mortgage could be created without a registered document. No answer has been forthcoming.

26. That leaves the aspect of mesne profits. The counsel for the respondent/plaintiff is correct in contending that though there is no evidence of prevalent rent in the locality but the evidence of the respondent/plaintiff in this regard has gone uncontroverted. It is the settled principle of law that whatever part of the deposition is not controverted in the cross-examination is deemed to have been admitted. Reference in this regard can be made to [Laxmibai \(Dead\) thr. L.Rs. and Another Vs. Bhagwantbuva \(Dead\) thr. L.Rs. and Others, , Rajinder Pershad \(dead\) by L.rs. Vs. Smt. Darshana Devi](#), and judgment dated 19th September, 2013 in RFA No. 411/2000 titled Chanchal Dhingra Vs. Raj Gopal Mehra. Though the respondent/plaintiff had deposed the letting value of the property to be Rs. 6,000/- per month but the learned ADJ has limited the decree for mesne profits at the rate of Rs. 4,000/- per month only. In the light of the suggestion given by the Advocate for the appellant/defendant to the respondent/plaintiff in cross-examination, of the value of the property of which possession was sought being in excess of Rs. 25 lakhs and in the light of the argument today urged by the counsel for the appellant/defendant of the market value of the property being Rs. 25 lakhs, I am not inclined to interfere with the decree for mesne profits at the rate of Rs. 4,000/- per month i.e. at an annual value of Rs. 48,000/- which a mere 1.92% of the market value of Rs. 25 lakhs contended by the respondent/plaintiff. No merit is thus found in the appeal which is dismissed with costs.

Decree sheet be prepared.