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

+ RSA 123/2012

Date of decision: July 27, 2012

SHAMA BAJAJ Appellant
Through Mr Rajender Sharma, Adv.

versus

RAKESH KUMAR GAUR & ORS Respondent
Through Nemo.

CORAM:
HON'BLE MS. JUSTICE VEENA BIRBAL

Veena Birbal, J. (Oral)

1. By way of this Regular Second Appeal under section 100 CPC challenge has been to the judgment dated 26.5.2012 by which learned Addl. District Judge-01, (North-East), Karkardooma Courts has upheld the judgment dated 8.4.2011 by which the learned Civil Judge has allowed the application filed by objectors i.e., respondents 4 and 5 herein under Order 21 Rule 99 CPC and has set aside the judgment and decree dated 25.1.2008 and

directed the decree holder i.e., appellant herein to hand over the vacant possession of the suit property to the objectors i.e., respondent nos. 4 and 5.

2. Factual background of the case is as under:-

On 5.9.2006, the appellant herein i.e., plaintiff before the the Ld.trial court had filed a suit praying for decree for permanent injunction against the defendants i.e., Shri Rakesh Kumar Gaur and Shri Kamal Jaiswal, respondents 1 and 2 in the present appeal. In the said suit, she had averred that respondents 1 and 2/defendants were in the business of construction of flats. Respondent no.1/defendant no.1 had entered into agreement dated 12.2.2005 with the appellant wherein he represented her that he was the absolute owner of property bearing no,G-67, measuring 160 sq. yds with the rights of its construction from ground floor upto last storey in Khasra No.1076/5/2, Dilshad Garden Extension (now known as Dilshad Colony) Shahdara, Delhi-95. At that time, property was under construction. Appellant/plaintiff had alleged that by the said agreement, respondent no.1 had agreed to sell two flats, one MIG and one LIG on the ground floor with the area of both flats measuring 160 sq. yds with fixtures and fitting in the aforesaid property to her. Total sale consideration agreed was Rs.21,25,000/- . As per her, she had paid Rs.3,00,000/- to respondent

no.1/defendant no.1 as part sale consideration and a receipt was executed in the name of M/s Abhi Promoters and builders of which respondent no.1 was the sole proprietor. It was averred that she had paid in all Rs.8 lakhs to respondent no.1. Some of the receipts were issued by respondent no.1/defendant no.1 and some were issued by respondent no.2/defendant no.2. After completion of construction, appellant had approached them with balance sale consideration but respondent no.1 refused to give possession of flats to her. Thereupon, appellant had filed the aforesaid suit praying for decree for permanent injunction to restrain the respondents 1 and 2/defendants from creating third party interest in the suit premises. After service of summons on respondents 1 and 2/defendants, they had appeared in court on 10.10.2006 and informed the court that a settlement was entered into between the parties on 9.10.2006 and accordingly an application along with settlement was filed in the court. Thereafter, the suit was decreed in terms of settlement Ex.C-1. There was a settlement to the effect that Sh.Kamal Jaiswal i.e., respondent no.2/defendant no.2 would pay Rs.4,45,000/- to Smt.Shama Bajaj and would become the owner of the MIG flat. In case Sh.Kamal Jaiswal failed to make payment, then Smt.Shama Bajaj would pay Rs.13,00,000/- to Sh.Kamal Jaiswal who

would then execute a sale deed in respect of the said property in favour of Smt.Shama Bajaj. Appellant had averred that respondent no.2 failed to make payment to her and accordingly she had filed execution petition bearing no.1072/2006 for execution of compromise decree dated 10.10.2006 against respondents 1 and 2/defendants. Respondent no.2/J.D.2 had filed objections which were dismissed vide order dated 24.4.2007. Against the said order, respondent no.2/J.D.2 had filed MCA No.9/2007 which was dismissed in default on 22.2.2010. Thereafter, on 14th December, 2007, the executing court directed issuance of warrants for attachment against the respondents 1 and 2/J.Ds in respect of MIG flat bearing no.G-67, Dilshad Colony, Delhi. As the premises were found locked, the Executing Court vide order dated 11.1.2008 issued warrants for possession of the said property with permission to break open the locks and thereafter possession was delivered to the appellant. The Executing Court vide order dated 25.1.2008 appointed the Naib Nazir of the court for executing sale deed in respect of the said property in favour of appellant/D.H.

3. On 1st February, 2008 and 15.2.2008, respondents 4 and 5 herein i.e., objectors moved applications under Order 1 Rule 10 CPC and Order 21 Rule 99 CPC respectively before the Executing Court praying that they were the

owners of the suit property and had purchased the suit property by registered sale deed and they be put back in possession of the same.

4. On the objections filed, the Executing Court framed the following issues:-

1. Whether the objector is entitled to be put back in possession of the flat in question?
2. Whether the objector is the lawful owner of the flat in question.
3. Relief.

5. To prove their case, the respondents 4 and 5/objectors had led their evidence. Respondent no.4 had examined himself as OW1. He had produced Shri P.R.Narshima Prasad, Senior Manager, Syndicate Bank as OW2, Shri Vijay Kumar Rawat, official from Sub Registrar IV as OW3 and Shri Saji Chacko, a neighbour as OW4.

6. The objector/respondent no.4 by way of affidavit Ex OW1 deposed on the lines of the objections filed by him. He was cross-examined by appellant but his testimony was not shaken. He denied the suggestion that Rakesh Kumar Gaur i.e., respondent no.1/defendant no.1 was the owner of the property. Shri P.R.Narshima Prasad, Senior Manager, Syndicate Bank OW2 had brought the original sale deed in respect of the flat in question and

exhibited the same as OW1/6. He had deposed that the flat in question was mortgaged with the bank for a housing loan of Rs.18 lacs availed by respondents 4 and 5. Shri Vijay Kumar Rawat, OW3, an official from Sub Registrar-IV Nand Nagri brought the summoned record and had proved the sale deed of the flat in question as Ex.OW1/8. Sh. Saji Chacko OW4 a neighbor had deposed that respondents 4 and 5/objectors were the owners of the suit property who had purchased the same vide sale deed dated 23.7.2007.

7. Thereafter, the matter was listed for the evidence of the appellant. The appellant was given number of opportunities but she did not lead her evidence. Appellant had filed her evidence by way of affidavit but she did not make herself available for cross-examination, as such her evidence was closed on 26.11.2010. Thereafter, vide order dated 8th April, 2011, the applications of the objectors/respondents 4 and 5 was allowed by the executing court.

8. Aggrieved with the said order, the appellant had filed RCA No.76/2011. The said appeal was also dismissed vide judgment dated 26.5.2012. Aggrieved with the same, present second appeal is filed.

9. Learned counsel for the appellant has contended that respondents 4

and 5 are not the owners of the suit property. It is contended that respondents 1 and 2/J.Ds are the owners of property and on the basis compromise, decree Ex.C-1, the sale deed of suit property ought to have been executed in his favour.

To decide the issue whether respondents 4 and 5/objectors are the lawful owner of the suit property, the executing court has recorded the evidence of objectors/respondents 4 and 5. After examining four witnesses the details of which have been mentioned above, appellant/DH was given number of opportunities to prove her stand, whereas she did not lead any evidence to show that respondents 1 and 2/J.Ds with whom she had entered into agreement to sell with respect of the suit flat had any title to the said flat. She even did not make herself available for cross-examination. It is not her case also when she had entered into agreement to sell with respondent no.1/defendant no.1, she had seen the title documents in favour of respondents 1 and 2/J.Ds.

10. The findings of the learned Senior Civil Judge as to whether respondents 4 and 5 are the lawful owners of the suit property are as under:-

“The onus of proving this issue was on the objectors. The objectors have claimed that they had purchased the suit property for valuable consideration from its previous owner

and they were put in possession of the suit property by the previous owner. In order to prove this issue, objectors have placed on record the certified copies of the sale deeds and other title documents which show that objectors have purchased the suit flat for valuable consideration. Objectors have examined OW-1 Mohd.Ali who has testified the facts stated in the application and has proved on record the complete chain of title documents in favour of objectors as Ex.OW-1/1 to OW-1/6. In his affidavit OW-1 has categorically deposed that when they purchased the flat from Mrs.Rema J., she was in possession of the flat and she handed over the same on 23.2.2007. he also testified that at the time of sale deed, they had taken over the possession of the suit flat and since it was in semi-finished stage without water and electricity so the flat was kept under lock and key with some furniture inside it. Objectors also examined OW-3 Vijay Kumar Rawat who proved the registration of the sale deed Ex.OW-1/6 in favour of the objectors and OW-4 who corroborated the fact that the possession of the flat was handed over to the objectors. OW-2 proved on record that objectors had availed housing loan from Syndicate Bank for making the payment of the sale consideration.

13. Compared to this, Decree Holder neither placed any title deeds on record to show that the Judgment Debtors with whom she had entered into agreement to sell with respect to the suit flat had a valid title to the property in their favour nor she has examined any witness in support of her case. The Decree holder even failed to enter the witness box to depose regarding the facts stated by her in the suit or in reply to the application of the objectors. Non appearance of the Decree Holder in the witness box raised any adverse inference that she had no documentary evidence available with her to prove that Judgment Debtors were having a valid title to the property in dispute.”

11. Further respondent no.4/objector in his evidence as OW 1 has proved

on record Sale deeds of all the previous owners in respect of the suit property and proved on record complete chain of documents in this regard as to how he became the owner of this property whereas appellant had not led any evidence.

12. It has also been observed in the order of the learned Executing Court that respondents 4 and 5/objectors have also proved by way of evidence that they were in possession of the suit property prior to execution of warrants of attachment issued by the predecessor of that court and accordingly has allowed the objections of respondents 4 and 5/objectors and issued directions for handing over the vacant and physical possession of the suit flat to them.

13. The aforesaid order was challenged by way of RCA No.76/2011 before the learned ADJ wherein the findings of the learned Executing Court to the effect that respondents 4 and 5 are the lawful owners of the flat in question have been upheld.

14. The relevant findings in first appeal are as under:-

“37. Title to immovable property can be conveyed only by a registered conveyance deed within the meaning of Section 54 of the Transfer of the Property Act, 1882. In the present case, the decree holders received possession of the property in question on 17.10.2008 prior to execution of any sale deed in

their favour. The Ld.Executing Court had appointed its Naib Nazir to execute the sale deed in favour of the decree holders under the provisions of Order 21 Rule 34 CPC. Before the same could be executed objections were filed. Hence the date on which the decree holders received possession of the premises in question, there was no registered sale deed in their favour. No title of the property in question was transferred in their favour on that date. Even the decree dated 10.10.2006 on the basis of settlement agreement dated 09.10.2006 Ex.C-1 also does not operate as transfer of title in favour of the decree holders since the same was only an agreement to enter into a further agreement. It was agreed between the plaintiff and the defendant that either the defendant would pay Rs.4,45,000/- to the plaintiff and purchase the property from her or in default thereof, the plaintiff would pay Rs.13,00,000/- to the defendant after which the defendant would execute sale deed of the property in favour of the decree holders. Till date there is no registered sale deed in favour of the decree holders in respect of the flat in question either executed by the judgment debtor or executed through the process of the Ld.Executing Court under Order 21 Rule 34 CPC.

38. The other question which arises is whether the judgment debtors had any title to the suit property which they could convey of the plaintiff/decreed holders. The objectors in the present case have produced and proved the entire series of registered documents on the basis of which title was transferred by the original owners of the plot to the builders who thereafter sold the flat in question and last buyer thereof were the objectors. Issue was framed by the Ld.Executing Court regarding the question whether the objectors were the owners of the property in question. Objectors have led evidence and proved on record the entire chain of registered documents as Ex.OW1/1 to Ex.OW1/6 by which title of the property was transferred to the objectors. On the other hand despite grant of several opportunities, the decree holder has not led any evidence. It is also worthwhile to note before the Ld.Executing Court the defendant/judgment debtor no.2 had

filed objections in which judgment debtor had stated that the property was never owned by judgment debtor no.2 but the same was owned by Sh.U.K.Jaiswal who had sold the same in the year 2006. Of course, objections of JD No.2 were dismissed by the Ld.Executing Court on 24.04.2007. However, the fact remains that as on the date of gaining possession of the premises in question through execution, no transfer of title of the property took place in favour of the decree holders. Further decree holders has not led any evidence to prove that the defendants or the judgment debtors had any title to the suit property. It may also be noted that warrants for possession were issued by the Ld.Executing Court prior to execution of the sale deed through the process of the Court under Order 21 Rule 34 CPC. In the opinion of this court, possession could not have been delivered without the decree holders first depositing Rs.13,00,000/- which was to be paid by them under the settlement agreement dated 09.10.2006 to the judgment debtors and execution of the sale deed by the judgment debtors or in their absence by an officer of the Executing Court in favour of the decree holders.

39. The Ld.Executing Court has held and rightly so that the objectors were owners of the property in question. Findings on this issue are in order and do not call for any inference.”

15. Both the courts below have given concurrent findings of facts based on evidence on record that respondents 4 and 5/objectors are the owner of suit property. The direction of putting back the possession of the suit property in favour of respondents 4 and 5 also has been passed on the basis of evidence on record. Even during arguments, a specific question was put to the learned counsel for the appellant as to whether the appellant was

having any documents to substantiate that respondents 1 and 2 were at any point of time the owner of suit property. The counsel replied in negative.

A second appeal under Section 100 CPC can only be entertained only if there arises a substantial question of law. Mere appreciation of evidence, finding of facts and conclusions of a judgment based on the finding of facts do not fall in the realm of a substantial question of law. The courts below have rightly held that respondents 4 and 5 are the owners of the property in question and directed to hand over the vacant and physical possession of the suit property to them.

Appeal stands dismissed.

VEENA BIRBAL, J

JULY 27, 2012

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