

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

+ **Ex. F.A. No.5/2011**

% **15th September, 2014**

SH.RAJESH BHASHIN & ANR. Appellants
Through: Mr. A.K. Rout, Advocate.

VERSUS

SH.JAGDISH SHARMA & ANR. Respondents
Through: Mr. Nazimuddin, Advocate for
respondent No.2.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This execution first appeal is filed by the petitioners/objectors impugning the order dated 19.11.2010 of the executing court by which the executing court has dismissed the petitioner's objection petition against the execution of the judgment and decree dated 19.2.2009. The judgment and decree dated 19.2.2009 is a money decree for Rs.3.75 lacs alongwith cost of suit in favour of the respondent no.1/decreed holder and against the respondent no.2 and her husband Sh. Ali Ahmed.

2. Since there is an interim order passed by this Court on 13.1.2012, and which encapsulates the issues in the present appeal, the said order dated 13.1.2012 is reproduced as below:-

“Learned counsel for the appellants argues the following main points:

1. The appellants / objectors purchased rights in the property by means of a registered power of attorney dated 21.9.2006. It is argued that the power of attorney creates right by virtue of Section 202 of the Contract Act, 1872 and therefore the power of attorney was irrevocable. It is argued that the power of attorney dated 21.9.2006 is prior to grant of loan to the decree holder by the judgment debtor which as per the impugned judgment and decree was granted on 27.10.2006. It is therefore argued that the appellants already had rights in the property by virtue of an earlier document dated 21.9.2006 and the loan was granted subsequently on 27.10.2006.

2. It is also argued that actually there is no mortgage of the property because the impugned judgment and decree does not refer to any mortgage documents. It is also argued that even assuming property was mortgaged, as per Order 34 Rule 14 CPC a mortgaged property cannot be sold in execution of a simple money decree, and the judgment and decree sought to be executed on 19.2.2009 is only a simple money decree and not a mortgage decree under Order 34 CPC.

Till further orders unless varied by the Court, there shall be stay of execution of the judgment and decree dated 19.2.2009.

Notice be issued to the respondents on filing of process fee both in the ordinary method as well as by Registered Post AD, returnable on 23rd March, 2012.

Dasti.”

3. A reading of the aforesaid order shows that the petitioners/objectors claim right in the suit property bearing no.A-659, J.J. Colony, Raghubir Nagar, Delhi measuring 25 sq yds pursuant to a registered

power of attorney dated 21.9.2006. The power of attorney was executed and registered on the same date i.e 21.9.2006 and was executed in favour of the petitioner no.2 by the husband of the respondent no.2 Sh. Ali Ahmed. The power of attorney was executed for a consideration, which was duly paid. By virtue of a power of attorney, rights were created in favour of the petitioner no.2/Smt. Rita Bhasin by the husband of the respondent no.2 namely Sh. Ali Ahmed in the suit property A-659. The judgment and decree dated 19.2.2009, as also the interim order of this Court dated 13.1.2012, shows that decree is only a money decree. The agreement (unregistered) by which the loan was granted by the respondent no.1 to the respondent no.2 and her husband Sh. Ali Ahmed was secured by mortgage of the suit property is dated 3.1.2007. As per this agreement dated 3.1.2007, the property bearing no.A-659, J.J. Colony, Raghubir Nagar, Delhi was in effect mortgaged/given as security for repayment of the loan amount with interest. Since the agreement creates rights in an immovable property it cannot be looked into as it is unregistered. This agreement, assuming it created an interest of a mortgage in favour of the respondent no.1, is dated 3.1.2007, but the registered general power of attorney in favour of the respondent no.2 is of an earlier point of time being dated 21.9.2006. Also, the judgment and

decree in this case was passed on 19.2.2009 (wrongly recorded as being dated 27.10.2006 in the order dated 13.1.2012 because actually the date of 27.10.2006 is the date of granting of loan by the respondent no.1/decree holder to the respondent no.2 and her husband Sh. Ali Ahmed) ie later than the registered general power of attorney dated 21.9.2006.

4. As per Section 48 of the Transfer of Property Act, 1882 when rights in an immovable property are created at different points of time, the earlier right prevails over the subsequent rights. In the present case, rights in the immovable property bearing no.A-659, J.J. Colony, Raghubir Nagar, Delhi were created in favour of the petitioner no.2 by the registered general power of attorney dated 21.9.2006 and which is prior not only to the grant of loan on 27.10.2006 but is also prior to the agreement dated 3.1.2007 by which mortgage rights were created in favour of the respondent no.1/decree holder. The registered power of attorney given for consideration creates rights in an immovable property and such general power of attorney becomes irrevocable by virtue of Section 202 of the Contract Act, 1872. I have held accordingly in the judgment in the case of ***Sh.Ramesh Chand Vs. Suresh Chand & Anr.*** in RFA No.358/2000 decided on 9.4.2012 wherein I have relied upon the relevant observations of the Supreme Court in the case

of *Suraj Lamps & Industries Pvt. Ltd. Vs. State of Haryana and Anr. (183) 2011 DLT 1 (SC)*. Accordingly, since the rights in the property bearing no.A-659, J.J. Colony, Raghubir Nagar, Delhi were created in favour of the petitioner no.2 prior to the loan being granted by the respondent no.1 to the respondent no.2 and her husband, and also prior to agreement being executed in favour of the respondent no.1 with respect to the suit property on 21.9.2006, petitioners have an independent right, title and interest in the suit property and which cannot be defeated by the subsequent loan and mortgage documentation dated 27.10.2006 and agreement dated 3.1.2007. Therefore, the money decree dated 19.2.2009 cannot be executed against the petitioners qua the property bearing no.A-659, J.J. Colony, Raghubir Nagar, Delhi.

5. There is another reason why the money decree dated 19.2.2009 cannot be executed in favour of the respondent no.1/deGREE holder inasmuch as Order XXXIV Rule 14(1) of Code of Civil Procedure, 1908 (CPC) specifically provides that a money decree cannot be executed against a mortgaged property and if mortgaged property has to be brought in sale in execution of the decree, then, a decree has to be taken specifically against the mortgaged property under Order XXXIV CPC. In the present case, the judgment and decree dated 19.2.2009 is only a simple money decree and not

a mortgage decree under Order XXXIV CPC, and therefore, this is another reason why the property bearing no.A-659, J.J. Colony, Raghubir Nagar, Delhi (and which is a mortgaged property in favour of the respondent no.1/decreed holder) cannot be put to execution and sale of the money decree dated 19.2.2009.

6. In view of the above, this execution first appeal is allowed. Impugned order of the executing court dated 19.11.2010 is set aside. It is held that the objectors have a right, title and interest in the suit property and that the respondent no.1/decreed holder cannot execute the money decree dated 19.2.2009 against the petitioners with respect to the property bearing no.A-659, J.J. Colony, Raghubir Nagar, Delhi . Parties are left to bear their own costs.

VALMIKI J. MEHTA, J

SEPTEMBER 15, 2014

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