

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

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Ex.F.A.No.14/2013

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13th October, 2014

SH.VIJAY KUMAR JAIN (DECEASED) THR LRS Appellants
Through: Ms.Neha Gupta, Advocate.

VERSUS

M/S JAINSONS JEWAL EXPORTS Respondent
Through:

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 impugns the order of the executing court dated 02.2.2013 which has dismissed the execution petition filed under Order XXI Rule 32 of the Code of Civil Procedure, 1908 (CPC) by the appellants herein, and who are/were the legal heirs of the defendant/counter-claimants.

2. The suit was filed by the respondent herein for recovery of Rs.2 lacs against Sh.Vijay Kumar Jain, and whose legal heirs are the appellants/counter-claimants.

3. In the suit, issues were framed with respect to recovery of money claimed by the respondent/plaintiff and also with respect to entitlement of the counter-claimant Sh.Vijay Kumar Jain and his legal heirs to the title deeds of the property bearing no.22/5, Shakti Nagar, Delhi, and which title deeds were submitted by Sh.Vijay Kumar Jain as security with MMTC on the request of the present respondent/plaintiff.

4. Paras 8, 9 & 10 of the impugned order dated 02.2.2013 show the issues which were framed, how they were disposed of by the judgment in the suit, and the operative para of the judgment and decree dated 31.8.2009, and which paras read as under:-

“ 8 In the suit issues No.2, 5 and 6 were framed to the following effect:

“ii. Whether on return of the said amount along with interest the plaintiff would arrange the return of the title deeds of the property bearing no.22/5, Shakti Nagar, Delhi submitted by late Sh.Vijay Kumar Jain as surety with the MMTC on the request of the plaintiff in the year 1992-1993? (OPP)

v. Whether the plaintiff firm gave Rs.2 Lakhs as security amount to late Sh.Vijay Kumar Jain as has been claimed by the defendant in this case? (OPD)

vi. Whether the counter claim filed by the defendant in this case is liable to be decreed in their favour? OPD”

9. These three issues were taken up and decided together. The court specifically observed in para 22 of the judgment as follows:

“22. From the said evidence both the defendants have categorically admitted that the property was kept as security for the plaintiff with the MMTC by the deceased in the year 1990 or 1991. The defendants failed to assail the NOC proved on the record on behalf of the plaintiff which is Ex.PW2/1 nor the defendants requested for impleading the MMTC as the party to the suit or to establish their counter claim. Moreover, the cheque of the loan amount was received by the deceased on 7.8.1994, much later than the transaction of keeping his property as security with the MMTC. The time gap between the said two transactions goes to establish that the taking of Rs.2 lacs by the deceased in the year 1994 had nothing to do with the keeping of his property as security with the MMTC on behalf of the plaintiff. The defendants have miserably failed to summon the MMTC to prove the documents or nature of transaction of the security given by the deceased to the MMTC so as to claim the said amount of Rs.2 lacs taken by the deceased as security for the transaction carried out by the deceased with the MMTC. The onus to prove the issue no.2 was on the plaintiff whereas onus to prove the issues no.5 and 6 was on the defendants. In fact, it was the onus on the defendants which was to be discharged by them in order to claim the documents back from the plaintiff after release from the MMTC and thereafter to pay the said Rs.2 lacs and I am of the considered opinion that the defendants have completely failed to discharge their onus in this regard. Accordingly, issues no.5 and 6 are decided against the defendants and in favour of the plaintiff and accordingly the counter claim of the defendants is hereby dismissed and subject to the finding on the other issues no.1, 3 and 4, the issue no.2 is decided in favour of the plaintiff and against the defendants and the plaintiff is held liable to return the documents of the property of the deceased to the defendants, kept as security with the MMTC after getting the

same released from the MMTC, after receiving back the said loan amount from the defendants.”

10. The judgment also gives reliefs as follows:

“ RELIEF

20. In view of my finding on issues no.1 and 3 above, the plaintiff is held entitled to a decree of a sum of Rs.2 lacs along with an interest @ 60% p.a w.e.f. 7.8.1994 to 1.7.1997 and @ 9% p.a. w.e.f. 2.7.1997 till realization along with the cost of the suit and in view of my finding on issues no.2, 5 and 6, the defendants are held entitled to receive back the document of the property after release and valid discharge by the MMTC from the plaintiff after the defendants making payment of the said decreed amount to the plaintiff. Let the decree-sheet be prepared accordingly. File be consigned to Record Room.”

5. In spite of the categorical operative para of the judgment dated 31.8.2009, and which directed the return of the title deeds by the respondent/plaintiff deposited with the MMTC, on the appellants paying back the entire decretal amount claimed in the suit, the executing court has dismissed the execution petition by observing that the decree cannot be executed allegedly because the title documents are not in possession of Sh.Lalit Kumar Jain, partner of the respondent/plaintiff, but the same are with MMTC, by making the following observations in para 15 of the impugned judgment dated 2.2.2013:-

“ When Mr.Lalit Kumar Jain is not in possession of the documents of the property which are kept as security with MMTC Mr.Lalit Jain cannot be put in Civil Imprisonment. The documents were deposited in some litigation with MMTC and Mr.Lait Jain cannot be expected to return the documents of the property. The decree to this extent is accordingly held to be un-executable.”

6. In my opinion, the executing court has committed a fundamental error because the operative part of the judgment which has been reproduced above shows that when the suit of the respondent/plaintiff for recovery was decreed, simultaneously a judgment and decree was also passed by the civil court that the appellants herein, and who are the legal heirs of Sh.Vijay Kumar Jain, will be entitled to receive back the title documents of the property on the payment being made to the respondent/plaintiff and as decreed by the same operative para of the judgment dated 31.8.2009. Once the appellants have made the payment of the decreed amount in terms of the operative para of the judgment and decree dated 31.8.2009, the respondent/plaintiff was liable to return back the title deeds.

7. In view of the above, the impugned order dated 02.2.2013 is set aside and the execution proceedings are revived. The executing court will now proceed in accordance with law to execute the operative part of the judgment and decree dated 31.8.2009 in favour of the appellants, whereby on the

appellants having deposited the decretal amount in favour of the respondent/plaintiff, the appellants herein and who are the decree holders in the counter-claim, will be entitled to return of the title deeds of the property 22/5, Shakti Nagar, Delhi and directions will have to be issued by the executing court, including as contained under Order XXI Rule 32 CPC, so that the title deeds of the property no.22/5, Shakti Nagar, Delhi can be received back by the appellants.

8. In view of the above, the appeal is allowed and disposed of in terms of the aforesaid observations, leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J

**OCTOBER 13, 2014
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