

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

% **Date of decision: 19th July, 2018.**

+ **EX.F.A. 1/2015, CM No.3282/2015 (for stay) & CM No.2394/2016**
(u/S 151 CPC)

SHUDHIR PANWAR AND ANR **..... Appellants**

Through: Mr. Vinod K. Singh, Adv.

Versus

VINOD KUMAR & ANR **..... Respondents**

Through: Mr. Vijay Singh and Mr. Deepak
Bhanwala, Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Execution First Appeal impugns the judgment/order (having force of decree) [dated 28th January, 2015 in Execution No.54/2013 of the Court of Additional District Judge-1, North East District] allowing the objections under Order XXI Rule 26 read with Rules 97 to 100 of the Code of Civil Procedure, 1908 (CPC) preferred by the respondent no.2 Shushma Chopra to the execution sought by the two appellants of the judgment and decree [dated 4th June, 2013 in CS No.75/2013 of the Court of Additional District Judge (North East)-01] of recovery of possession of ground floor of property no.C-2/127, Yamuna Vihar, Delhi, in favour of the appellants and against the respondent no.1; since in execution, the appellants were put in possession of the said property, vide the impugned order, the appellants have also been directed to revert back the possession to the respondent no.2/objector.

2. The appeal came up first before this Court on 24th February, 2015 when, while issuing notice thereof, stay of operation of the impugned order was granted. The said interim order has continued till date.

3. The respondent no.1/defendant/judgment debtor could not be served and was ordered to be served by publication and has been so served. The counsel for the respondent no.2 appears. Though the record of the Suit Court and the Executing Court has not been requisitioned inspite of numerous listings of the appeal but the parties have filed copies of relevant record and now, after counsels have been heard, need to adjourn on the said account is not felt.

4. The counsel for the appellants and the counsel for the respondent no.2/objector have been heard.

5. The appellants instituted the suit, from order in execution of decree wherein this appeal arises, for recovery of possession of the aforesaid property claiming to have purchased the same vide Sale Deed registered on 1st April, 2013 from the respondent no.1/defendant/judgment debtor and of which possession had not been delivered by the respondent no.1/defendant/judgment debtor to the appellants/plaintiffs. A claim for *mesne* profits was also made.

6. The respondent no.1/defendant/judgment debtor appeared in the suit on 14th May, 2013 and admitted that he had sold the property to the appellants/plaintiffs and gave a statement on oath that he would hand over possession of the property to the appellants/plaintiffs on 25th April, 2013. The suit was adjourned to 27th May, 2013. On 27th May, 2013, the respondent no.1/defendant/judgment debtor again appeared, this time along

with the counsel and sought one more weeks' time to vacate the property. The suit was accordingly adjourned to 4th June, 2013. On 4th June, 2013, the respondent no.1/defendant/judgment debtor did not appear and the Advocate who had appeared for him on the earlier date stated that he had no instructions from the respondent no.1/defendant/judgment debtor. In this scenario, the appellants/plaintiffs sought decree for possession on admissions and the Suit Court, on 4th June, 2013, recording that the appellants/plaintiffs had produced the original registered Sale Deed which showed purchase of the property for consideration of Rs.19,80,000/- and that the respondent no.1/defendant/judgment debtor also, on 4th May, 2013 had made statement on oath stating that he will handover possession of the property to the appellants/plaintiffs, passed a decree on admissions, of recovery of possession, in favour of the appellants/plaintiffs and against the respondent no.1/defendant/judgment debtor. The suit qua the claim for *mesne* profits was listed for further proceedings. The counsel for the appellants/plaintiffs, on enquiry states that the claim for *mesne* profits was subsequently withdrawn.

7. The appellants/plaintiffs, in or about the month of August, 2013, applied for execution of the decree for recovery of possession in their favour and warrants for recovery of possession issued were returned with the report that the respondent no.1/defendant/judgment debtor and his wife had interfered in execution of warrants of possession. Warrants of possession were thereafter ordered to be issued afresh, to be executed with Police aid. In pursuance thereto, in execution of the said decree, possession of the property was delivered to the appellants/plaintiffs/decreed holders on 4th September, 2013. The report of the Bailiff of that date was, that though the respondent

no.1/defendant/judgment debtor was not found but his wife Shushma Chopra i.e. the respondent No.2/objector was present and possession was got recovered from her.

8. Thereafter the respondent no.2/objector Shushma Chopra, being the wife of the respondent no.1/defendant/judgment debtor Vinod Kumar, filed objections aforesaid.

9. It was the plea of the respondent no.2/objector, (i) that she was the 'real' owner of the property and the decree obtained by the appellants/plaintiffs/degree holders against the respondent no.1/defendant/judgment debtor was in connivance with the respondent no.1/defendant/judgment debtor; (ii) that the respondent no.2/objector was having disputes with her husband respondent no.1/defendant/judgment debtor and the two had been living separately; (iii) that it was the respondent no.2/objector who had purchased the ground and first floors of the property on 13th October, 1997, from the monies lent by the mother of the respondent no.2/objector; however, the property was purchased by the respondent no.2/objector jointly with her husband respondent no.1/defendant/judgment debtor; (iv) that the respondent no.1/defendant/judgment debtor, vide Release Deed dated 10th September, 2004, had released his share in the property, making the respondent no.2/objector the sole owner of the property; (v) that the respondent no.2/objector severed her relationship with the respondent no.1/defendant/judgment debtor by giving a notice in the newspaper of 11th August, 2011; (vi) the respondent no.2/objector was not aware of the suit in which the judgment and decree was passed and became aware thereof for the first time on 4th September, 2013, when she was

dispossessed; and, (vii) that the respondent no.1/defendant/judgment debtor was not the owner of the property on the date on which the Sale Deed in favour of the appellants/plaintiffs was registered and the respondent no.1/defendant/judgment debtor had left the property in question in the year 2006.

10. Needless to state, the objections aforesaid of the respondent no.2/objector were contested by the appellants/plaintiffs/decree holders.

11. The Executing Court, vide order dated 20th September, 2013, framed the following issues in the objections aforesaid of the respondent no.2/objector:-

- “1. Whether the objector is the owner of the suit property and the judgment debtor Vinod Kumar did not have any right to sell the same to the decree holder? (OPO)*
- 2. Whether the objector is entitled to be put back into possession of the suit property? (OPO)*
- 3. Whether the objector is entitled to any compensation on having been dispossessed from the suit property and having to approach the court for redress? If so, the extent of compensation and the person who is liable to bear the same? (OPO)”*

and thereafter on 25th October, 2013, the following additional issue was framed:-

- “4. Whether in the absence of intimation of execution of the release deed dated 10.09.2004 to the DDA and whether in absence of execution of fresh conveyance deed solely in favour of the objector*

Sushma Chopra, she can be said to have become exclusive owner of the suit property? (OPDH) ”

12. The respondent no.2/objector examined only herself. The appellants/plaintiffs/decreed holders examined in all four witnesses.

13. The Executing Court has allowed the objections, reasoning (i) that a Conveyance Deed of freehold rights in the land underneath the property was executed on 13th October, 1997 in the joint name of the respondent no.1/defendant/judgment debtor and the respondent no.2/objector; (ii) that the witness from the DDA examined by the appellants/plaintiffs/decreed holders had proved that no intimation of execution of the Release Deed dated 10th September, 2004, whereby the respondent no.1/defendant/judgment debtor released his share in the property in favour of the respondent no.2/objector, was given to the DDA as there was no requirement therefor in view of the leasehold rights in the land underneath the property having been already converted into freehold; (iii) that there was thus no need for the respondent no.1/defendant/judgment debtor and the respondent no.2/objector to give any intimation to the DDA of the Release Deed dated 10th September, 2004 and there was no need for the respondent no.2/objector to obtain a fresh Conveyance Deed from the DDA only in the name of the respondent no.2/objector; (iv) Issue no.4 aforesaid was accordingly decided against the appellants/plaintiffs/decreed holders and in favour of the respondent no.2/objector; (v) that since the Conveyance Deed of freehold rights did not specify the share of the respondent no.1/defendant/judgment debtor and the respondent no.2/objector, both were owners of the entire property in equal undivided share; (vi) that even if the registered Release Deed executed by

the respondent no.1/defendant/judgment debtor in favour of the respondent no.2/objector on 10th September, 2004 were to be ignored, it was not understandable as to on what basis the respondent no.1/defendant/judgment debtor presumed himself to be the exclusive owner of the ground floor of the property, to be able to execute the Sale Deed thereof in favour of the appellants/plaintiffs/decreed holders on 1st April, 2013; (vii) the respondent no.1/defendant/judgment debtor, without partition between himself and the respondent no.2/objector, could not have sold the ground floor to the appellants/plaintiffs/decreed holders; (viii) the co-ownership rights of the respondent no.1/defendant/judgment debtor were also extinguished, on the respondent no.1/defendant/judgment debtor, on 10th September, 2004 executing and registering the Release Deed in favour of the respondent no.2/objector and on which execution, the respondent no.1/defendant/judgment debtor lost all ownership rights and interest in the property; (xi) that the appellants/plaintiffs/decreed holders, even if unaware of the Release Deed, had got executed the Sale Deed in their favour only from the respondent no.1/defendant/judgment debtor, without ascertaining as to how the respondent no.1/defendant/judgment debtor was competent to alone sell the same to the appellants/plaintiffs/decreed holders; (xii) the Sale Deed executed by the respondent no.1/defendant/judgment debtor in favour of the appellants/plaintiffs/decreed holders was thus not legal and valid and not binding on the respondent no.2/objector; (xiii) that the appellants/plaintiffs/decreed holders could not be treated as *bona fide* purchasers because they had not checked the record of the Sub Registrar to find out whether any type of document was executed qua the property after the execution of Conveyance Deed of freehold rights in the land underneath

the property in the joint names of the respondent no.1/defendant/judgment debtor and the respondent no.2/objector; (xiv) thus the appellants/plaintiffs/decreed holders did not get any rights in the property under the Sale Deed in their favour; (xv) that the appellants/plaintiffs/decreed holders relied upon the photocopy of one General Power of Attorney (GPA) dated 19th May, 1998 allegedly executed by the respondent no.2/objector in favour of the respondent no.1/defendant/judgment debtor; (xvi) however the original of the said GPA had not been produced and the same could not be read in evidence, especially when no notice under Order XII Rule 6 of the CPC was given either to the respondent no.1/defendant/judgment debtor or to the respondent no.2/objector to produce the same; (xvii) the respondent no.2/objector, in her statement had disputed the correctness of her signatures on the GPA; (xviii) the appellants/plaintiffs/decreed holders had perhaps opted to purchase the property from the respondent no.1/defendant/judgment debtor alone, on the basis of the said GPA; (xix) however the appellants/plaintiffs/decreed holders had failed to verify the correctness of the GPA, by contacting the respondent no.2/objector qua its authenticity; (xx) that the GPA was also not proved to be registered and thereunder, the respondent no.1/defendant/judgment debtor had no authority to sell the property to the appellants/plaintiffs/decreed holders; (xxi) the version of the appellants/plaintiffs/decreed holders, that negotiations for sale/purchase took place in the presence of the respondent no.2/objector could not be believed as the appellants/plaintiffs/decreed holders, on coming to know that the property was in the joint name of the respondent no.1/defendant/judgment debtor and the respondent no.2/objector, were required to ask the respondent no.2/objector to at least sign the Sale Deed executed by the respondent

no.1/defendant/judgment debtor, as a witness; (xxii) no Agreement to Sell also was got executed from the respondent no.2/objector; (xxiii) the respondent no.2/objector had also not been impleaded as a party to the suit decree wherein was in execution; (xxiv) no notice was got issued by the appellants/plaintiffs/decreed holders to the respondent no.2/objector before filing the suit; (xxv) the appellants/plaintiffs/decreed holders had thus failed to prove that they were *bona fide* purchasers; (xxvi) even if it were to be believed that the respondent no.2/objector had no source of income for purchase of the property, the same still did not make the respondent no.1/defendant/judgment debtor the owner of the property; (xxvii) the Executing Court, in execution, was only required to see who was the actual owner of the property and whether the appellants/plaintiffs/decreed holders had acquired any rights in the property and once the respondent no.2/objector was found to be the owner of the property, the appellants/plaintiffs/decreed holders, under the Sale Deed executed by the respondent no.1/defendant/judgment debtor, had not acquired any rights in the property; (xxviii) accordingly, issue no.1 was decided in favour of the respondent no.2/objector and against the appellants/plaintiffs/decreed holders; (xxix) qua issue no.3, the respondent no.2/objector was relegated to a separate suit for recovery of damages/*mesne* profits; however costs of Rs.10,000/- were awarded to the respondent no.2/objector against the appellants/plaintiffs/decreed holders; and, (xxx) since the respondent no.2/objector had been dispossessed from her property in execution of the decree against the respondent no.1/defendant/judgment debtor, she was liable to be put back into possession.

14. I have enquired of the whereabouts of the respondent no.1/defendant/judgment debtor.

15. The counsel for the appellants/plaintiffs/decreed holders states that the respondent no.1/defendant/judgment debtor though had appeared in the suit as aforesaid but thereafter stopped appearing and the appellants/plaintiffs/decreed holders are not aware of his whereabouts.

16. I have further enquired from the counsel for the appellants/plaintiffs/decreed holders, whether not after coming to know of the objections of the respondent no.2/objector, the appellants/plaintiffs/decreed holders were required to file a First Information Report (FIR) of the offences if any committed by the respondent no.1/defendant/judgment debtor.

17. The counsel for the appellants/plaintiffs/decreed holders states that complaint was lodged with the Police; however the Police refused to lodge an FIR and a criminal complaint under Section 156(3) of the Code of Criminal Procedure, 1973 (Cr.PC) has been filed before the Magistrate and which is pending and in which evidence of the appellants/plaintiffs/decreed holders is being recorded.

18. The counsel for the respondent no.2/objector states that the complaint under Section 156(3) has been dismissed but a private complaint filed by the appellants/plaintiffs/decreed holders against the respondent no.1/defendant/judgment debtor is pending consideration.

19. On the same enquiry being made from the counsel for the respondent no.2/objector, he states that the relationship of the respondent no.2/objector with the respondent no.1/defendant/judgment debtor, since marriage in the year 1968, had been strained and the respondent no.1/defendant/judgment

debtor was not residing with the respondent no.2/objector and the respondent no.2/objector is unaware of his whereabouts.

20. On enquiry, whether any FIR has been lodged of the offences which the respondent no.1/defendant/judgment debtor is claimed to have committed qua the property of the respondent no.2/objector or any other action taken, the reply is in the negative and it is merely stated that the respondent no.2/objector is a lone widow and is living hand to mouth.

21. Now at the time of dictation however it is stated that complaint has been made to the Police and on which no action was taken.

22. It has next been enquired from the counsel for the respondent no.2/objector, whether the respondent no.2/objector has filed any complaint of the respondent no.1/defendant/judgment debtor having gone missing or taken any steps for having him declared dead for having gone missing for over seven years.

23. The counsel for the respondent no.2/objector states that the respondent no.2/objector filed a petition for dissolution of her marriage with the respondent no.1/defendant/judgment debtor, though on 23rd January, 2015 i.e. after the respondent no.2/objector had been dispossessed from the property and during the pendency of the objections. Attention is invited to the copy of the Divorce Petition filed along with the reply to this appeal and to order sheet in the said divorce proceedings.

24. The order sheet of the divorce proceedings shows the respondent no.1/defendant/judgment debtor to have not appeared therein and the counsel for the respondent no.2/objector has handed over in the Court a copy of the *ex parte* judgment dated 13th January, 2016 in HMA No.69/2015 of the

Court of Principal Judge, Family Court, Vishwas Nagar, Delhi, dissolving the marriage of the respondents by a decree of divorce under Section 13(1) (ia) and (ib) of the Hindu Marriage Act, 1955.

25. A perusal of the petition filed for divorce shows the respondent no.2/objector to have pleaded therein, (i) that she was married to the respondent no.1/defendant/judgment debtor on 8th February, 1968 and there were two daughters from the said wedding, both of whom are married and living at Kanpur, Uttar Pradesh in their matrimonial homes; (ii) that the respondent no.1/defendant/judgment debtor was having illicit relations with various women and was also residing at Kanpur; (iii) that the respondent no.1/defendant/judgment debtor had always inflicted cruelty on the respondent no.2/objector and demanded dowry throughout his married life; (iv) that incidents of cruelty were pleaded from 13th January, 1969 itself; (v) that the respondent no.2/objector had made the respondent no.1/defendant/judgment debtor live separately since the year 2006; (vi) the respondent no.2/objector had also got published in the newspapers of 11th August, 2011, a notice disowning the respondent no.1/defendant/judgment debtor and informing all that the respondent no.1/defendant/judgment debtor had no right to any of the properties of the respondent no.2/objector; and, (vii) the respondent no.1/defendant/judgment debtor however visited the house of the respondent no.2/objector on 24th March, 2013 and threatened the respondent no.2/objector of selling her house aforesaid.

26. A perusal of the Conveyance Deed of freehold rights in the land underneath the property executed by DDA in favour of the respondents shows the leasehold rights in land were not granted in favour of the

respondents but were granted in favour of one Shushil Kanta Patni wife of Tarsem Lal, who had vide Power of Attorney executed on 25th July, 1986 constituted the respondents as her attorney with respect to the property and on the basis of which Power of Attorney, Conveyance Deed of freehold rights in land underneath the property was being executed in favour of the respondents jointly. Therefrom it appears, that the property was purchased jointly by the respondents on 25th July, 1986, though on Power of Attorney basis, and ultimately title in the land underneath the same obtained by having Conveyance Deed of freehold rights in land executed from DDA on 13th October, 1997. Needless to state that for obtaining freehold rights also, consideration was paid to DDA, besides the consideration which must have been paid to Shushil Kanta Patni aforesaid.

27. The factum of joint purchase of the property on 25th July, 1986 is totally inconsistent with the facts pleaded in the divorce case and on the basis whereof *ex parte* judgment of dissolution of marriage has been obtained. The same raises a suspicion, that if relationship between the respondents was so strained w.e.f. 13th January, 1969 itself, where was the need to file the petition for dissolution of marriage on 23rd January, 2015 i.e. after the respondent no.2/objector had been dispossessed from the property. The only recent act of cruelty pleaded was, of the threat made by respondent No.1/defendant/judgment debtor, on 24th March, 2013 of sale of property; else it was the case of the respondent no.2/objector in the divorce case, that she had separated from the respondent no.1/defendant/judgment debtor in the year 2006. It is quite obvious that the divorce case was only for the purpose of bolstering objections which had been preferred.

28. The Executing Court is found to have dealt with the objections in a clinical manner, going only by the factum of ownership of the property i.e. whether of respondent no.1/defendant/judgment debtor or of the respondent no.2/objector. The relationship between the two, of husband and wife, has been lost sight of.

29. The counsel for the respondent no.2/objector has argued, (i) that the appellants/plaintiffs/decreed holders are in collusion with the respondent no.1/defendant/judgment debtor; (ii) that the appellants/plaintiffs/decreed holders did not make respondent no.2/objector a party to the suit, though knew that the respondent no.1/defendant/judgment debtor and the respondent no.2/objector were joint owners of the property and though had purchased the property from both of them, with the respondent no.1/defendant/judgment debtor acting as the attorney of the respondent no.2/objector; (iii) that the respondent no.2/objector, even if so believed to have given a Power of Attorney to the respondent no.1/defendant/judgment debtor, ought to have been made a witness to the Sale Deed; and, (vi) that the respondent no.2/objector is disputing the Power of Attorney.

30. A perusal of the Sale Deed executed by the respondent no.1/defendant/judgment debtor in favour of the appellants/plaintiffs/decreed holders shows the respondent no.1/defendant/judgment debtor to have therein acted as the attorney of the respondent no.2/objector. The Registrar of Documents, under Section 34 of the Registration Act, 1908, before registering any document, is required to satisfy himself as to the identity of the executants and as to the authority of the executants to execute the document being sought to be executed. The counsel for

appellants/plaintiffs/deed holders also states that a copy of Power of Attorney, on the basis of which the respondent no.1/defendant/judgment debtor executed Sale Deed on behalf of the respondent no.2/objector, is also annexed to the copy of the Sale Deed in the Office of the Registrar of Documents which was called during the evidence. The counsel for the respondent no.2/objector though does not dispute, states that it was not part of the suit record. On specific enquiry, it is admitted that the copy of the Power of Attorney was on the record of the Registrar which had come during recording of evidence.

31. What emerges is,

- (i) that the two respondents were married on 8th February, 1968;
- (ii) that a daughter was born to the respondents on 13th January, 1969;
- (iii) that according to the petition for divorce aforesaid filed by the respondent No.2/objector, the respondent No.1/defendant/judgment debtor inflicted acts of cruelty on the respondent No.2/objector with effect from 13th January, 1969 only;
- (iv) that another daughter was born to the respondents on 11th July, 1973;
- (v) however, the acts of the respondent No.1/defendant/judgment debtor of cruelty to the respondent No.2/objector, as per averments in petition for divorce, continued and such acts, as per the respondent No.2/objector, were grave in nature viz. of the respondent No.1/defendant/judgment debtor living with other women and of calling his own daughters 'prostitutes';

(vi) however the respondent no.2/objector, notwithstanding the aforesaid cruelties inflicted on her by the respondent No.1/defendant/judgment debtor, continued to live with the respondent No.1/defendant/judgment debtor;

(vii) that not only so, the subject property was acquired by the respondents in their joint names on 25th July, 1986 and Agreement to Sell, Power of Attorney etc. executed by the earlier owner of the property in the names of the respondents jointly; according to the respondent No.2/objector, the consideration for purchase of the said property had flown not from the respondent No.1/defendant/judgment debtor but from the respondent No.2/objector; it is inexplicable that if the respondent No.1/defendant/judgment debtor was inflicting grave acts of cruelty on the respondent No.2/objector, why would the respondent No.2/objector, while purchasing the properties with her own monies, have the name of the respondent No.1/defendant/judgment debtor as the first name in the documents got executed for purchase of the said property; similarly, even if it were to be believed that the property was purchased by the respondent No.1/defendant/judgment debtor with his own monies, it is inexplicable, as to why the respondent No.1/defendant/judgment debtor would add the name of the respondent No.2/objector along with his name, in the documents of purchase of the property, when as per the averments made by the respondent No.2/objector in the Divorce Petition, it appears that the respondent No.1/defendant/judgment debtor did not care about the respondent No.2/objector or his daughters; the only inference is that the pleas of respondent

No.2/objector cannot be believed without investigation on all these aspects;

(viii) that as per the pleas of the respondent No.2/objector in the Divorce Petition, the acts of cruelty on the part of the respondent No.1/defendant/judgment debtor continued thereafter also;

(ix) that notwithstanding the aforesaid, the respondents, in or about October, 1997 jointly applied for conversion of leasehold rights in land underneath the property into freehold in their own names and paid charges/consideration therefor and obtained the Conveyance Deed of freehold rights in land in their joint names on 13th October, 1997; though it was open to the respondents at that stage to have the Conveyance Deed of freehold rights executed in the name of either of them but inspite of estranged relation of the respondents, the respondents opted to act jointly and obtained Conveyance Deed of freehold rights in their joint names; it is the case of the respondent No.2/objector in the Divorce Petition that the mother of the respondent No.2/objector had purchased the property in the joint names of the respondents in the hope that the same would make better the conduct of the respondent No.1/defendant/judgment debtor towards the respondent No.2/objector; it is not the case of the respondent No.2/objector in the Divorce Petition that the conduct of the respondent No.1/defendant/judgment debtor became any better; it is inexplicable that notwithstanding the same, why would the respondents act in concert, after eleven years of initial purchase also;

(x) that according to the appellants/plaintiffs/decreed holders, on 19th May, 1998, the respondent No.2/objector executed a Power of

Attorney with respect to her 50% share in the property in favour of the respondent No.1/defendant/judgment debtor; unfortunately, no specific issue came to be framed on the said aspect and which has led to appropriate evidence which could have been led on the proof of the said Power of Attorney, being not led, though the impugned judgment reasons that the said Power of Attorney has not been proved; else, from the conduct of the respondents of joint purchase on 25th July, 1986 and joint conversion of leasehold rights in the property into freehold on 13th October, 1997, the act of the respondent No.2/objector, as the wife of the respondent No.1/defendant/judgment debtor executing Power of Attorney with respect to her 50% share in the property in favour of the respondent No.1/defendant/judgment debtor does not strike as odd or out of the ordinary;

(xi) that a deed of release of 50% undivided share in the property held by the respondent No.1/defendant/judgment debtor in favour of the respondent No.2/objector was executed on 10th September, 2004; the said Release Deed would not terminate the Power of Attorney dated 19th May, 1998, if executed by the respondent No.2/objector in favour of the respondent No.1/defendant/judgment debtor and the respondent No.1/defendant/judgment debtor, under the said Power of Attorney, depending upon the terms thereof, would become entitled to act as the Attorney of the respondent No.2/objector with respect to not only her 50% share in the property but also with respect to 50% share of the respondent No.1/defendant/judgment debtor released in favour of the respondent No.2/objector;

(xii) that it is the case of the respondent No.2/objector that the respondent No.1/defendant/judgment debtor stopped residing with her in the property with effect from the year 2006 only; notwithstanding the same, no cancellation of the Power of Attorney, if any is claimed to have been affected;

(xiii) that on the contrary, the respondent No.2/objector claims to have issued a public notice after considerable time i.e. only on 11th August, 2011 disowning the respondent No.1/defendant/judgment debtor;

(xiv) that the respondent No.1/defendant/judgment debtor, on 1st April, 2013, acting for himself holding 50% undivided share in the property and acting as the Attorney of the respondent No.2/objector with respect to her 50% share in the property, sold the ground floor of the property to the appellants/plaintiffs/decreed holders, though could not put the appellants/plaintiffs/decreed holders into possession thereof;

(xv) that the appellants/plaintiffs/decreed holders soon thereafter instituted the suit aforesaid and in which again the respondent No.1/defendant/judgment debtor appeared on 14th May, 2013 and 27th May, 2013 and promised to deliver possession;

(xvi) that thereafter, on failure of the respondent No.1/defendant/judgment debtor to appear, a decree was passed in favour of the appellants/plaintiffs/decreed holders and against the respondent No.1/defendant/judgment debtor on 4th June, 2013;

(xvii) that the respondent No.2/objector was dispossessed from the ground floor of the property on 4th September, 2013 in execution of the decree aforesaid;

(xviii) that as per the Divorce Petition filed by the respondent No.2/objector, the respondent No.2/objector, on 24th March, 2013 threatened the respondent No.2/objector with dispossession; the respondent No.2/objector however still did not take any action and did not file any proceedings against the respondent No.1/defendant/judgment debtor;

(xix) that though according to the respondent No.2/objector, the respondent No.1/defendant/judgment debtor has not been seen after 24th March, 2013 but the Divorce Petition was filed on 23rd January, 2015; it is inexplicable that if the respondent No.1/defendant/judgment debtor was missing since 24th March, 2013, where was the need for filing a Divorce Petition on 23rd January, 2015.

32. It is for all the aforesaid reasons that I have hereinabove observed that the Executing Court has dealt with the objections in a clinical manner and without considering the possibility of the respondents acting in concert and collusion with each other and using documents *inter se* to, after receiving sale consideration from the appellants/plaintiffs/deed holders with respect to the ground floor of the property, not delivering possession thereof to the appellants/plaintiffs/deed holders. For the reasons aforesaid, doubts in this regard arise and which have unfortunately not been put to trial. If it were to be found that the respondents are indeed acting in concert and collusion, then, in my opinion, the respondents cannot use their *inter se* documents to deprive the appellants/plaintiffs/deed holders of the benefit of the Sale Deed and the decree.

33. Though the conduct of the appellants/plaintiffs/deed holders of not impleading the respondent No.2/objector as a defendant to the suit, of decree

wherein execution was sought, inspite of the respondent No.1/defendant/judgment debtor having executed the Sale Deed not only for himself but also on behalf of the respondent No.2/objector, also is out of the ordinary, suggesting that the respondent No.1/defendant/judgment debtor was indeed acting contrary to the interest of the respondent No.2/objector, because ordinarily no one would part with sale consideration, but one frequently comes across such lapses/lacunae in drafting of plaints and the possibility of the non-impleadment of the respondent No.2/objector as defendant in the suit for the said reason also, cannot be ruled out.

34. It is thus deemed appropriate to set aside the impugned judgment and decree and it is also deemed appropriate to, in exercise of powers of remand under Order XLI Rule 23A of the CPC, remand the objections preferred by the respondent No.2/objector to the execution sought by the appellants/plaintiffs/decreed holders for fresh decision, besides on the issues, on which decision has already been rendered, also on the following issues:

(I) Whether the respondent No.2/objector executed a Power of Attorney dated 19th May, 1998 in favour of the respondent No.1/defendant/judgment debtor and the respondent No.1/defendant/judgment debtor executed the Sale Deed in favour of the appellants/plaintiffs/decreed holders on the basis of the said Power of Attorney and if so, to what effect? OPDH

(II) Whether the respondent No.1/defendant/judgment debtor and the respondent No.2/objector are in collusion with each other and if so, to what effect? OPDH

35. It is ordered accordingly. Till decision as aforesaid, the appellants/plaintiffs/decreed holders to continue in possession of the ground floor of the property delivered to them in execution of the decree. However, the appellants/plaintiffs/decreed holders are restrained from alienating, encumbering or parting with possession of the said ground floor till the decision aforesaid.

36. The Executing Court is requested to decide the matter, as aforesaid, as expeditiously as possible.

37. In the event of the decision aforesaid being in favour of the respondent No.2/objector, the respondent No.1/defendant/judgment debtor shall be liable to pay *mesne* profits for the period of occupation with respect thereto and the parties may lead evidence on the said aspect also during trial ordered as aforesaid, including by the Executing Court framing an issue with respect thereto.

38. The parties are left to bear their own costs.

39. Decree sheet be drawn up.

40. The parties to appear before the Executing Court i.e. Court of Additional District Judge-1, North East District, Karkardooma Courts, Delhi, on 13th September, 2018.

RAJIV SAHAI ENDLAW, J.

JULY 19, 2018
'pp/bs'