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*IN THE HIGH COURT OF DELHI AT NEW DELHI

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EFA(OS) No.1/2014

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Reserved on : 12th August, 2015

Date of decision : 31st August, 2015

P K WADHWA

..... Appellant

Through: Mr. Raman Kapur, Sr. Adv.
with Mr. Manish Kumar and
Mr. Amit Kumar, Advs.

versus

S C MEHTA & ORS

..... Respondents

Through: Mr. N. Prabhakar, Adv. for
Respondent no. 1
Mr. Chetan Sharma, Sr.
Adv. with Mr. B.S. Maan,
Mr. Vishal Maan,
Mr. Aditya Singh and Mr.
Satyawan Rathi, Adv. for
respondent no.2.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE I.S.MEHTA

GITA MITTAL, J.

1. The instant appeal assails the orders dated 6th November, 2012, 11th January, 2013 and 29th November, 2013 in Execution Petition No.81/2001 pending on the original side of this court.
2. It is submitted on behalf of all parties that the relevant

record, necessary for adjudicating on this appeal stands filed in the appeal paper book. Consequently with their consent we have heard learned Senior Counsels and counsel at length on the appeal itself.

3. A compromise between the parties to the Suit No.720/1996 (filed by the respondent no.1 against the appellant) resulted in the decree dated 12th December, 2000.

4. The respondent no.1 filed an execution petition seeking execution of this decree against the appellant by way of Execution Petition No.81/2001. On the plea of respondent no.1 that property No.A-190, Second Floor, Inderpuri, New Delhi was owned by the appellant, the learned Single Judge passed an order dated 11th December, 2011 directing warrants of attachment to issue in respect thereof. This resulted in one Shri Dileep Bhatia – the respondent no.2 herein, filing objections on 12th January, 2002 by way of E.A.No.172/2002 under Order XXI Rule 58 of the CPC claiming that the property had been purchased by him vide a registered sale deed dated 7th September, 1995.

5. On the 7th of January 2003, while considering the arguments

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on E.A.No.172/2002, the learned Single Judge noted the ownership claim of the respondent no.2; the registered sale deed dated 7th September, 1995 in his favour and the lease deeds executed in favour of the appellant.

6. The order dated 7th January, 2003 also notes the submissions of the respondent no.1/decree holder to the effect that similar objections by way of Objection Petition No.28/2000 on similar grounds stood dismissed by the court vide order dated 18th January, 2002; that the respondent no.2/objector had no right, title or interest in the property; that the appellant/judgment debtor had purchased the said property investing a substantial amount therein but since he was short of funds, he had approached the objector for financial assistance on the basis of the deed of understanding dated 5th October, 1995 under which the sale deed was executed in favour of the respondent no.2. The respondent no.1 urged that thus the property was actually purchased by the appellant/judgment debtor for a sum of Rs.10,00,000/-, out of which Rs.6,00,000/- had been paid by him to the seller while the balance was arranged through the said financial arrangement with the respondent no.2.

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7. The respondent no.1/decree holder had further placed on record that as per the memorandum of understanding dated 5th October, 1995, the appellant/judgment debtor was to occupy the property as lessee till the sum of Rs.4,00,000/- (financed by the objector) was returned to him and that the respondent no.2/objector was a mere financier and not a true owner of the property. It was therefore, the specific case of the respondent no.1/decree holder that the appellant/judgment debtor had substantial interest in the property and that the sale deed in favour of the objector was sham and bogus.

8. Inasmuch as the memorandum of understanding was disputed by the respondent no.1/decree holder, the executing court noted that *"disputes of facts as well as the law have been raised which cannot be adjudicated upon unless the parties are given opportunity to lead evidence in respect of their pleas"*. It was therefore, ordered that issues ought to be framed on the objection petition filed by the objector and thereafter the question of attachability of the property would be decided.

9. The respondent no.2 (objector) sought review of the order

dated 7th January, 2003 by way of Review Petition No.99/2003 contending that Section 4 of the Benami Transactions (Prohibition) Act, 1988 bars the claim of ownership of the appellant. Reference was also made to the order of the trial court in a suit between the appellant and respondent no.1 and findings on the deed of understanding. The respondent no.1 prayed for release of the property from attachment.

This review was considered by the executing court on the 12th of November 2003 when it was opposed on behalf of the respondent no.1/decree holder who was present.

10. The Executing Court noted the submission on behalf of the respondent no.1 that the plea of the decree holder was not that the property was being held Benami but that the sale deed, which stood created in favour of respondent no.2, was with the view to provide security for the loan advanced by the objector to the judgment debtor and that it was a sham and bogus document. The Executing Court also rightly noted that Section 92 of the Evidence Act excludes oral evidence contrary to the terms of a written contract but it does not preclude a party from establishing that a written

contract is not a genuine document but only a device to cloak the real transaction. The Executing Court thereafter concluded that the right to seek a declaration that a document was fictitious, sham or bogus and not intended to be acted upon could not be taken away by Section 4 of the Benami Transaction Act unless the conditions therein were not fulfilled. It was observed that the decree holder did not fall in the category of persons covered under the prohibition of Section 4. In support of these conclusions, reliance was placed on a Division Bench decision reported at *AIR 1991 Orissa 131, Gopal Bariha v. Satyanarayan Das and Others*, which enabled a third party to get such a declaration. In this background, the court was of the view that no good grounds for the review of the order dated 7th January, 2003 were made out. As a result the review petition was dismissed.

11. We find that thereafter on the 19th February, 2004, the court framed the following issue :

“Whether the objector is the owner of property No.A-190, Inder Puri, New Delhi, and as such the said property is not liable to be attached? OP – Objector”

A Local Commissioner was appointed for recording

evidence in the objection petition. The court directed that the “*examination-in-chief of the witnesses of the parties will be taken on affidavits*”. The parties were directed to appear before the Local Commissioner on the 10th of March 2004.

12. The proceedings before the Local Commissioner have been placed before us. These show that the judgment debtor was represented and has participated in these proceedings.

13. The proceedings recorded by the Local Commissioner on 16th May, 2006 reflect the plea of the plaintiff – decree holder/respondent no.1 Shri S.C. Mehta that “*he wants to cross-examine the judgment debtor Mr. P.K. Wadhwa first then to lead his evidence*”. On this, the Local Commissioner recorded that “... *As per order dated 19th February, 2004, I direct both the parties i.e. plaintiff (decree holder) and defendant (judgment debtor) to file evidence by way of affidavit ...*”.

14. We find that as a dispute was being raised with regard to the priority of leading evidence thereafter several orders have been noted by the Local Commissioner at the instance of the respondent no.1/decree holder who wanted to get a clarification from the court

on the aspect that he would lead evidence after he had cross-examined the judgment debtor. The matter was adjourned on this issue from 10th October, 2006 till September, 2008. On the 15th of September 2008, the Local Commissioner even directed notice to be issued to the judgment debtor.

15. The rival claims raised on the execution and validity of the memorandum of understanding dated 5th October, 1995 stand pressed in the execution. On the 16th of October 2008, when Shri S.C. Mehta, Advocate, the decree holder was being cross-examined, he had stated as follows :

“Ans : - This question again arises between the judgment debtor and objector. My evidence is based on the execution of MOU dt 5.10.1995 between the judgment debtor and objector. The signatures of judgment debtor appeared at Page 11 of MOU dt 5.10.1995 i.e. Exh DH1, signature of judgment debtor are at Page 11 as Mark ‘A’ and at page 13 as Mark ‘B’. The signatures of the objector appears at Page 11 as Mark ‘C’ and at page 13 as Mark ‘D’.”

16. We also find that apart from the prolonged cross-examination of the decree holder by the objector/respondent no.2, he was also cross-examined at the instance of the appellant on the 4th of May 2009, when he had, inter alia, deposed as follows :

“It is correct that judgment debtor Mr. P.K. Wadhwa is owner of Property being No.A-1/190, IInd Floor, Inderpuri, New Delhi since 1994. It is correct that Mr. Wadhwa is residing at the suit property of A-1/190, 2nd Floor, Inderpuri, New Delhi.”

(Emphasis by us)

17. On the 20th of August 2010, the appellant was granted three weeks time to file his examination-in-chief on affidavits. Further time was granted on the 21st of September 2010 and 18th of October 2010 on the ground of sickness of the counsel for the appellant. Counsel for the appellant had also stated that he had to cross-examine the respondent no.2/objector.

18. We find that it was only on the 30th of May 2011, that an objection was taken by the respondent no.2 that the appellant/judgment debtor could not examine himself in the matter and that in order to resolve this controversy, the matter be sent back to court. The matter was listed before the court. In the hearing held on 6th November, 2012, E.A.No.172/2002 i.e. the objections which had been filed by the respondent no.2 were taken up for directions. We find that the executing court has noted that by the order dated 9th February, 2004, the *“parties were afforded opportunity of leading evidence”*. However, persuaded by the

submissions on behalf of the respondent no.2 that the judgment debtor no.1 had jumped into fray after evidence had been concluded before the Local Commissioner and only at that stage insisted that his deposition be recorded, the learned Single Judge declined permission to the appellant/judgment debtor to depose in the objections. The learned Single Judge noted that the onus to prove the issue was placed on the objector.

19. The appellant herein filed E.A.No.129/2015 seeking review of this order dated 6th November, 2012 accompanied by E.A.No.130/2013 under Section 5 of the Limitation Act seeking condonation of delay in filing the review petition. The application for condonation of delay was considered by the court and stands allowed. So far as the application for review was concerned, the learned counsel for the applicant had pointed out that the submission that the appellant had jumped into the fray after the evidence was concluded was erroneous. However, the learned Single Judge was of the view that there was no mistake or error which was apparent on the face of the record and that no new or important matter of evidence which after exercise of due diligence

was not within the knowledge or could not be produced by the appellant at the time of passing the order dated 6th November, 2012 was available. It was held that consequently the review jurisdiction under Rule 1 of Order 47 of the CPC could not be exercised. It was observed that if the appellant/judgment debtor has a grievance against the order dated 6th November, 2012, "*then his remedy lies elsewhere*". The learned Single Judge also did not deal with the submission of the appellant that the order dated 11th January, 2013 was contrary to the earlier orders dated 18th January, 2002, 7th January, 2003 and 12th January, 2003 which had attained finality between the parties, reiterating that it was open for him to assail the order of 11th January, 2003 in accordance with law and that the exercise of review jurisdiction would tantamount to permitting the appellant to re-argue his application which was legally impermissible. For this reason, the learned Single Judge rejected the prayer to review the order dated 6th November, 2012 and 11th January, 2013.

20. It is also essential to note an application being E.A.No.854/2012 which was filed by the respondent no.2/objector

seeking clarification of the order of attachment dated 11th of December 2001 contending that its suit for possession before the Civil Judge, Delhi stood decreed by a judgment dated 18th March, 2003 in respect of the second floor of the premises bearing No.A-190, Second Floor, Inderpuri, New Delhi and that this decree had attained finality up to the Supreme Court of India. The respondent no.2 had made a grievance that the appellant/judgment debtor had taken advantage of the order of attachment dated 11th December, 2001 and retained possession of this premises and resisted Execution Petition No.161/2006 which had been filed by the respondent no.2 which was consequently disposed of by the trial court by its order dated 13th September, 2012. The respondent no.2 sought permission to pursue the execution petition filed by it for execution of the judgment dated 18th March, 2003.

On this application, the learned Single Judge on 11th January, 2013 directed that the respondent no.2/objector would be entitled to proceed further in the execution proceedings unhindered by the order of attachment dated 11th December, 2001 subject to the condition that the respondent no.1 shall file an affidavit within two

weeks “*undertaking inter alia that if it receives possession of the subject premises in the aforesaid execution petition in accordance with law, it shall not create any charge/lien on the said premises and retain possession thereof till the disposal of the objection filed by it, vide E.A.No.172/2002*”.

21. The appellant has filed the present composite appeal assailing the orders dated 6th November, 2012, 29th November, 2013 and 11th January, 2013.

22. Mr. Raman Kapoor, learned Senior Counsel for the appellant has drawn our attention to an order dated 26th September, 2005 passed in E.A.No.279/2004 filed by the respondent no.2/objector seeking recasting/modification of the issues framed on 19th February, 2004 contending that the objector was relying only on the registered sale deed dated 7th September, 1995 and that he had filed a certified copy thereof on record. It was submitted by the respondent no.2/objector that the decree holder had assailed the sale deed placing reliance on an alleged memorandum of understanding dated 15th October, 1995 which he was required to prove. The court had disposed of this application observing that

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the decree holder could lead evidence to prove that the sale deed was a sham document and that the property under attachment actually belongs to the judgment debtor.

23. We have heard learned Senior Counsels for the appellant and the respondent no.1 as well as learned counsel for respondent no.2.

P We have been carefully taken through the copy of the record filed along with the appeal. The record reflects that on the 19th of February 2004 when the issues were framed, on the objections of the respondent no.2, the court had directed that the examination-in-chief of the "*parties*" would be taken on affidavit.

24. It is essential to note that the decree holder has sought attachment of the property No.A-190, Second Floor, Inderpuri, New Delhi on the plea that the same was owned by the appellant/judgment debtor no.1. As the respondent no.2/objector was claiming ownership, the issue was framed by the court as to whether the objector was the owner of the property. The issue on title of the property rests on basically rival claims with regard thereto between the appellant/judgment debtor on the one hand and the respondent no.2 on the other.

25. We had put a query to Mr. Chetan Sharma, learned Senior Counsel for respondent no.2 as to what would be the stand of respondent no.2 if the decree holder were to examine the judgment debtor as a witness. We were informed that the objector could possibly have no objection.

26. Undoubtedly, so far as the decree holder is concerned, the best evidence to prove the ownership of property is the judgment debtor.

27. The proceedings before the Local Commissioner would show that the judgment debtor has cross-examined the decree holder and has participated in the proceedings throughout. We have extracted the same heretofore.

28. In fact the matter was being adjourned before the Local Commissioner for recording of the evidence of the appellant/judgment debtor. No objection was raised by any of the parties when time was granted to the appellant on 18th October, 2010 to file the examination-in-chief of the judgment debtor or when the same was extended thereafter.

29. The record of the Local Commissioner also establishes that

the contention of the respondents that the appellant jumped into the fray after proceedings before the Local Commissioner is completely misconceived and is contrary to the record. This observation therefore, is certainly an error which is apparent on the face of the record.

30. It cannot be contended that so far as the property is concerned, the rights of the judgment debtor are not affected. Even the decree holder is asserting a claim for attachment of this property in execution of a decree premised on a plea that the property is owned by the judgment debtor. It is the case of the appellant as well that the sale deed relied upon by the respondent no.2 was of no consequence and effect, inasmuch as the memorandum of understanding dated 5th October, 1995 was to govern the rights of the parties qua the said property. Even the initial order dated 19th February, 2004 records that the examination-in-chief of the witnesses of the "*parties*" would be filed on affidavit. This order did not preclude the judgment debtor from these proceedings. The judgment debtor therefore, has an entitlement to lead evidence and the right to do so stands

recognized by the fact that he has participated in the proceedings before the Local Commissioner without any objection.

31. The reading of the orders dated 6th November, 2012 and 29th November, 2013 would show that the learned Single Judge has been largely persuaded by the erroneous impression that the judgment debtor has come into the picture after the evidence of the other parties stood concluded. The record of the case is to the contrary.

32. In view of the above, the observation of the learned executing court in the order dated 29th November, 2013 that the review sought by the appellant of the order dated 6th November, 2012 was not the appropriate remedy was erroneous inasmuch as the said order dated 6th November, 2012 suffered from an error apparent on the face of the record.

33. For all these reasons, the appellant cannot be prevented from participating in the proceedings and has to be given an opportunity to establish his case.

34. Before us, Mr. Chetan Sharma, learned senior counsel for the respondent no.2/objector has contended that in view of the

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adjudication in the litigation arising out of suit for possession filed by respondent no.2 against the appellant, nothing further requires to be done and the issue of ownership has attained finality. The decree holder/respondent no.1 was not a party to such litigation and therefore, adjudication on this issue would not bind him. In any case, this submission was not accepted by the executing court seized of Execution Petition No.81/2001. An issue stands framed and the objector has accepted the finding that the issue requires evidence. The impact of the judgments in the litigation between the appellant and the objector would require to be seen when the same are placed before the executing court for consideration after the evidence.

35. We now examine the challenge to the order dated 11th January, 2013 passed on EA No.854/2012 filed by the objector for clarification of the order dated 11th December, 2001 directing attachment of the aforesaid property. The objector contended that the judgment and decree dated 18th March, 2003 for possession of these premises in its favour passed by the learned Single Judge had attained finality. However, the execution proceedings initiated by

the objector by way of Execution Petition No. 161/2006 stood disposed of because of the order of attachment dated 11th December, 2001. On this application, by the order dated 11th January, 2013, the learned Single Judge had directed that the objector would be entitled to proceed further in the execution proceedings, unhindered by the order dated 11th December, 2001, subject to its filing an undertaking on affidavit within two weeks to the effect that if it receives possession of the said premises in its execution petition in accordance with law, it shall not create any charge/lien on the said premises and also retain possession thereof till disposal of the objections filed by it vide EA No.172/2002.

36. So far as the order passed on 11th January, 2013 modifying the order of attachment dated 11th December, 2001 is concerned, the appellant has to abide by the outcome of the adjudication. The learned Single Judge has carefully protected the property even in respect of the litigation with the respondent no.2, in case the property comes into the hands of the respondent no.2 in lawful execution proceedings. In case, the appellant is aggrieved by orders passed in those proceedings, he has available remedies in

accordance with law. The order dated 11th January, 2013 cannot be assailed on any legal grounds.

37. Needless to say that the proceedings in the execution case filed by the respondent no.2 are without prejudice to all the rights and contentions of the respondent no.1 in the present case.

38. It is not clear to us as to whether a final order has been passed with regard to the attachment by the learned Single Judge. The appellant has independent remedies qua the attachment as well.

39. We make it clear that we have expressed no opinion on the merits of the claims made by the parties qua the ownership of the property in question.

40. As a result, the orders dated 6th November, 2012 and 29th November, 2013 are hereby set aside and quashed. It is directed that the appellant would be entitled to an opportunity to lead evidence on the issue framed by the court in the order dated 19th February, 2004.

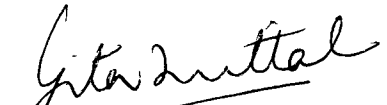
41. For this purpose, the parties shall appear before the Local Commissioner on 14th September, 2015 at 11:00 am for fixing a

date for recording of the evidence of the appellant. The appellant shall file his examination-in-chief on affidavit within the period of six weeks from today.

42. In case any witness is required to be summoned, the Local Commissioner shall pass appropriate directions in respect thereof on the request of the appellant.

43. So far as the challenge to the order dated 11th January, 2013 is concerned, we find no merit in this appeal and the same is rejected.

This appeal is disposed of in the above terms.


GITA MITTAL, J


I.S. MEHTA, J

AUGUST 31st, 2015
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