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

Date of Decision: September 28, 2016

+ **EX.S.A. 2/2016 & C.M. 7504/2016**

RAJ PAL & ANR.

.....Appellants

Through: Mr. Harish Malhotra, Senior
Advocate with Mr. Vishal Gera,
Advocate

Versus

DEEPAK MAKWANA

..... Respondent

Through: Mr. Anil Misra, Advocate

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT

(ORAL)

Appellant-Judgment Debtor's objections under Order 21 Rule 58 r/w Section 47 of CPC have been dismissed by Executing Court and the dismissal of the objections has been upheld by Appellate Court vide impugned order of 25th January, 2016.

Learned senior counsel for Appellants-*Judgment Debtors* submits that the dispute is regarding shop No.33, Teliwara, Shahdara, Delhi and as per appellants' site plan, the area of the said shop is 5'X4" and appellants are ready to surrender the said shop to the Respondent-Decree Holder. It is pointed out by learned senior counsel for appellants that a prayer was made to the Executing Court to put the parties to evidence on

appellants' objections regarding identification of Shop No.33 and that during suit proceedings no site plan was filed and Executing Court has simply proceeded on the basis of Shop number and has relied upon the Rent Agreement of 2nd December, 1987 to conclude that the area of Shop No. 33 is 22.7 Sq. Yards. It is submitted by learned senior counsel for appellant that reliance upon Rent Agreement of 2nd December, 1987 is erroneous, as the said Rent Agreement was de-exhibited on the objection of respondent-decree holder.

It is urged that the First Appellate Court in the impugned order has erroneously held that a document filed by a party, though un-exhibited/ de-exhibited can be relied upon for collateral purposes. To hold so, reliance has been placed by the First Appellate Court on a decision of this Court in *Mangal Singh Vs. Tek Ram* AIR 1973 Delhi 267. It is pointed out by learned Senior Counsel for appellants that in *Mangal Singh (supra)*, it was an un-exhibited document whereas de-exhibited document cannot be relied upon. Reliance is also placed by learned senior counsel for appellants upon a decision of this Court in RSA No. 130/2007, titled as *Sarla Devi Vs. Budhan*, rendered on 28th April, 2011 to point out that upon de-exhibition of a document, it no longer remains on record. Thus, it is submitted on behalf of appellants that the impugned order as well as order of the Executing Court deserves to be set aside and an opportunity ought to be granted to appellants to lead evidence to show that the area of Shop No.33 is 5'X4".

On the contrary, learned counsel for Respondent-*Decree Holder* supports the impugned order and submits that premises Municipal No.33 comprises of two rooms, one shop and one shed, whose dimensions are

given in the Municipal Certificate Report, which is on the record of the First Appellate Court. It is pointed out that an objection has been taken by appellants that there is a passage between Shop No. 32 & 33, which leads to property No.28 but this objection has been taken for the first time and is without any basis because there is no passage reaching property No. 28 via Shops No. 32 & 33. Thus, it is submitted that Respondent-*Decree Holder* is entitled to possession of premises No. 33, in which the shop in question is located.

Upon hearing and on perusal of impugned order, Executing Court's order and the material on record, I find that impugned order notes that the Rent Agreement is a de-exhibited document but relies upon *Mangal Singh (supra)*, which pertains to an un-exhibited document. This Court in a later decision in *Sarla Devi (supra)*, has reiterated that a de-exhibited document clearly means that the said document does not exist on the record of the case. Both the courts below have erred in relying upon a de-exhibited document to dismiss appellants' objection. Copy of the Municipal Certified Plan of the property No.29 & 33 placed on record in the suit proceedings could not have been relied upon as its perusal shows that it relates to composite numbers 29 to 33 and so, the dimension of different shops and rooms, as given in this Municipal Plan, does not clearly indicate to which municipal number the room or the shop relates to.

In such a situation, there is no option except to let the parties lead evidence on the objections so filed by the appellants. In the aforesaid view of the matter, impugned order as well as order of the Executing Court is hereby set aside and appellants' objections are restored for being

tried after affording an opportunity to parties to lead evidence on these objections. Parties through their counsel shall appear before the Executing Court on 19th October, 2016. Considering that these objections relate to a decree of 7th February, 2003, the Executing Court shall make all the endeavours to take the evidence on these objections within a period of six months from the date fixed for evidence on the objections.

With aforesaid directions, this appeal and application are disposed of. Trial court record be remitted back forthwith.

SEPTEMBER 28, 2016

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**(SUNIL GAUR)
JUDGE**

