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

Date of Decision: August 26, 2016

+ **EX.F.A. 17/2016**

SHAM BHATIA Appellant
Through: Mr. Aly Mirza, Mr. Madan Lal and
Mr. Kulish Tanwar, Advocates

versus

RAJU ALIAS RAJU MASIH Respondent
Through: Mr. Deepak Kumar, Advocate

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

% **JUDGMENT**
(ORAL)

Appellant is the legal heir of decree-holder, who had died after obtaining the decree against respondent, who happens to be the real son of the original decree holder. The decree of possession passed at the instance of the father i.e. the decree-holder against his real son i.e. the respondent attained finality and thereafter, appellant who also happens to be another son of the decree-holder, had filed an execution petition while relying upon a registered Will of 19th May, 2011. The executing court in the impugned order of 8th June, 2016 has held that the validity of any Will is not required to be gone into in the execution proceedings. It is noted in the impugned order that the possession of the suit property was taken by

the appellant on 17th March, 2016 in execution of warrants whereas application under Order 21 Rule 26 of CPC was filed by the respondent-herein on 15th March, 2016. The mistake of the court pointed out by executing court in the impugned order is that when application under Order 21 Rule 26 CPC was pending, then there was no occasion for issuance of warrants of possession.

At the hearing, learned counsel for appellant submitted that the executing court has erred in holding that during the pendency of the application under Order 21 Rule 26 of CPC, the decree stood executed. Attention of this Court is drawn to the executing court's order of 15th December, 2016 to show that before the next date i.e. 18th March, 2016, there is a noting of 17th March, 2016 by the concerned *Naazir* that the decree stood executed.

Attention of this Court is also drawn to the bailiff's report of 8th March, 2016 to show that the decree infact stood executed on 8th March, 2016 itself and the possession of suit property was given to appellant. It is pointed out that respondent's application under Order 21 Rule 26 of CPC was not maintainable on 15th March, 2016 as the decree stood executed on 8th March, 2016. To submit so, it is pointed out that Order 21 Rule 26 of CPC provides for stay of the execution and once execution has already taken place, the stay application was not maintainable and executing court has gravely erred in allowing the respondent's application under Order 21 Rule 26 of CPC and has directed appellant to restore the possession of the suit premises to the respondent.

Learned counsel for the respondent pointed out that the application under Order 21 Rule 26 of CPC was filed with the aid of Section 151 of

CPC and a prayer in that application was made to restore the property attached. It is submitted that the impugned order suffers from no infirmity and this appeal deserves to be dismissed.

Upon hearing and on perusal of impugned order and the material on record, I find that the decree stood executed on 8th March, 2016 and so, respondent's application under Order 21 Rule 26 of CPC filed on 15th March, 2016 was not maintainable and the executing court has gravely erred in allowing the application. In view thereof, the impugned order is set aside with liberty to respondent to assail the Will set up by appellant and to seek restoration of the decreetal property in question.

Needless to say, in case respondent succeeds in getting the appellant's Will set aside, then legal heirs of the deceased decree-holder or the respondent, if he sets up a Will, would be entitled to have possession of the suit property, as the case may be.

This appeal is accordingly disposed of.

(SUNIL GAUR)
JUDGE

AUGUST 26, 2016

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