

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 11th October, 2018

+ EX.F.A. 2/2018

HAJI ABDUL MATEEN

(DECEASED) THROUGH LRS.

....Appellant

Through: Mr. Anand Yadav, Mr. Anita Tomar,
Mr. Shoaib Haider, Ms. Kulsum
Haider, Mr. Navjot Kumar, Advs.

Versus

RATTAN SINGH

..... Respondent

Through: Mr. Debasis Mishra, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

**CM No.32249/2018 (for restoration of the appeal dismissed in default
on 11th July, 2018)**

1. This order is in continuation of the earlier order dated 10th August, 2018.
2. Though there is no sufficient cause for restoration of the appeal dismissed in default on 11th July, 2018 but still, in the interest of justice, subject to the appellant paying costs of Rs.25,000/- to the respondent, the appeal is restored to its original position.
3. Costs have been paid by the counsel for the appellant/plaintiff to the respondent/defendant in person.
4. The application is allowed and disposed of.

EX.F.A. 2/2018

5. The counsel for the appellant has been heard and the records perused.
6. This Execution First Appeal under Order XXI Rule 103 of the Code of

Civil Procedure, 1908 (CPC) impugns the order [dated 22nd September, 2017 in Execution No.23745/2016 of the Court of Additional District Judge-14, Central] of dismissal of objections filed by the appellant / objector to the execution sought by the respondent / decree holder.

7. The respondent/plaintiff/decreed holder instituted a suit for specific performance of an Agreement dated 25th April, 1988 of sale of 100 sq. yds. of Khasra No.1 and TC 90, Khata No.193, Khewat No.27 situated at Village Ghonda, Chohan Bangar, Delhi having a total area of 200 sq. yds., against (i) Shyam Sunder Sharma; (ii) Om Prakash Sharma; and, (iii) Mahabir Sharma. Only defendant no.1/judgment debtor Shyam Sunder Sharma contested the suit by filing a written statement. The counsel for the appellant / objector clarifies that the defendants no.2&3 Om Prakash Sharma and Mahabir Sharma had nothing to do with the property subject matter of the Agreement to Sell and no relief was claimed against them and they were merely proper parties.

8. The said suit, being Suit No.167/2008 instituted on 16th October, 1998, was allowed vide judgment and decree dated 22nd February, 2010 of the Court of the Additional District Judge, Delhi and the defendant no.1/judgment debtor Shyam Sunder Sharma aforesaid was directed to execute the Sale Deed in favour of the respondent/plaintiff/decreed holder, upon the respondent/plaintiff/decreed holder paying/depositing the balance sale consideration.

9. The counsel for the appellant/objector on enquiry states that the defendant no.1/judgment debtor Shyam Sunder Sharma preferred First Appeal to this Court against the aforesaid judgment and decree and which appeal was dismissed in default.

10. The respondent/plaintiff/decreed holder applied for execution of the decree aforesaid and in pursuance whereof a Sale Deed in favour of the respondent/plaintiff/decreed holder was executed under the authority of the Executing Court and the respondent/plaintiff/decreed holder delivered vacant peaceful physical possession of the property through process of the Court on 6th January, 2011.

11. The appellant, on 18th January, 2011 filed objections in the execution filed by the respondent/plaintiff/decreed holder, pleading (i) that the appellant/objector is the legal owner of the property, having purchased the same from its previous owner Sarfaraj vide General Power of Attorney (GPA), Agreement to Sell, Receipt etc. all dated 24th November, 2004; (ii) that the appellant/objector, on such purchase, paid the entire agreed sale consideration of Rs.6,50,000/- and was also delivered vacant peaceful physical possession of the property by said Sarfaraj; (iii) that the said Sarfaraj had purchased the said property from the defendant no.1/judgment debtor Shyam Sunder Sharma vide various documents such as registered GPA, Agreement to Sell, Receipt, Affidavits, registered Special Power of Attorney, registered Will etc. all dated 29th July, 1998; (iv) that the appellant/objector, since purchase on 24th November, 2004, was in possession of the property and had been forcibly dispossessed therefrom in execution sought by the respondent/plaintiff/decreed holder of the judgment and decree dated 22nd February, 2010 aforesaid; (v) that the appellant/objector was not aware of the suit, in execution of decree wherein he was dispossessed or of pendency of the execution proceedings and was caught unaware; (vi) that the respondent/plaintiff/decreed holder obtained the decree, in execution of which the appellant/objector was dispossessed, in

collusion with the defendant no.1/judgment debtor Shyam Sunder Sharma because, while defendant no.1/judgment debtor Shyam Sunder Sharma was contesting the suit, it was the appellant/objector who was in possession of the property w.e.f. 24th November, 2004; (vii) that the collusion is also evident from the fact that the defendant no.1/judgment debtor Shyam Sunder Sharma did not appear in execution proceedings; (viii) that the decree, without impleading the appellant/objector, is bad in law; and, (ix) that the appellant/objector is the owner of the property and could not have been dispossessed therefrom.

12. Needless to state, the respondent/plaintiff/deGREE holder opposed the objections aforesaid by filing a reply and the Executing Court, on 19th November, 2014 framed the following issues:-

- “1. Whether the objector Shri Abdul Matin was the owner/title holder of the property in question to convey the title to his LRs, to affect the decree in question? OP Objector.*
- 2. What is the effect, on the execution of the decree, in case the objector succeeds in proving issue No.1? OP Parties.”*

and relegated the appellant/objector and the respondent/plaintiff/deGREE holder to evidence on the objections.

13. The Executing Court, vide impugned order dated 22nd September, 2017 having force of decree, has dismissed the objections preferred by the appellant/objector to the execution, reasoning (i) that the appellant/objector had placed on record documents Ex. OW1/1 to Ex. OW1/5 to prove title to the subject property; (ii) Ex. OW1/2 is an unregistered GPA in favour of the appellant/objector; (iii) that Ex.OW1/1 and Ex.OW1/3 to OW1/5 are also unregistered documents; (iv) such unregistered documents could not create

right, title or interest in favour of the appellant/objector in immovable property; (v) there was no force in the contention of the counsel for the appellant/objector, that while the respondent/plaintiff/decree-holder only had receipts for payment of advance sale consideration executed by the defendant no.1/judgment debtor Shyam Sunder Sharma in his favour, the appellant/objector had valid transfer documents of the subject in his favour and was a *bona fide* purchaser in possession of the property, because the appellant/objector had not and could not have “purchased the property” in 2004, on the basis of unregistered documents; on the contrary, the Agreement to Sell by the defendant no.1/judgment debtor Shyam Sunder Sharma in favour of the respondent/plaintiff/decree holder and of which specific performance had been directed and decreed was evident from documents dated 25th April, 1998 and 18th May, 1998 executed by the defendant no.1/judgment debtor Shyam Sunder Sharma in favour of the respondent/plaintiff/decree holder; moreover in execution of the decree, a registered Sale Deed had been executed in favour of the respondent/plaintiff/decree holder; (vi) that the appellant/objector had failed to prove a valid title in his favour; (vii) that the appellant/objector had also admitted his predecessor having filed an application under Order I Rule 10 of the Code of Civil Procedure, 1908 (CPC) in the appeal preferred by the defendant no.1/judgment debtor Shyam Sunder Sharma against the decree dated 22nd February, 2010; and, (viii) that the objections of the appellant/objector thus had no merits.

14. The counsel for the appellant/objector has at the outset sought to argue that the decree in favour of the respondent/plaintiff/decree holder and against the defendant no.1/judgment debtor Shyam Sunder Sharma, in execution of

which the appellant/objector has been dispossessed from the property, is bad in law.

15. I have however enquired from the counsel for the appellant/objector, as to how, in law it is open to the appellant/objector to challenge a decree in favour of the respondent/plaintiff/decreed holder and against the defendant no.1/judgment debtor Shyam Sunder Sharma.

16. The counsel for the appellant/objector states that if the decree is a nullity, the same could not have been executed.

17. Attention of the counsel for the appellant/objector has been drawn to Order XXI Rule 35 of the CPC providing the mode of execution of a decree for immovable property and which provides for removing from the property “any person bound by decree and who refuses to vacate the property”. It has been enquired from the counsel for the appellant/objector, whether not the scope of the appellant as objector in execution is confined to showing that the appellant/objector is not bound by the decree and it is not open to the appellant as objector in execution to challenge the decree on merits. Attention of the counsel for the appellant/objector has also been invited to *Balvant N. Viswamitra Vs. Yadav Sadashiv Mule* (2004) 8 SCC 706; *Rafique Bibi Vs. Sayed Waliuddin* (2004) 1 SCC 287; and *Vijay Patel Vs. Jugal Kishore* 2018 SCC OnLine Del 10279 laying down as to on what grounds a decree can be held to be a nullity in execution thereof and which does not permit the decree to be challenged on grounds, as are sought to be urged, of the documents dated 25th April, 1998 and 18th May, 1998 supra not evidencing an Agreement of Sale of immovable property.

18. The counsel for the appellant/objector has then urged, that Order XXI Rule 102 of the CPC makes the provisions of Order XXI Rule 98 and 100

invoking which objections were filed not applicable only to transferee *pendente lite* and the appellant/objector is not a transferee *pendente lite*. On asking, whether not the appellant/objector claims to have purchased the property on 24th November, 2004, which was during the pendency of the suit in execution of decree wherein the appellant/objector has been dispossessed and which was instituted on 16th October, 1998, the counsel for the appellant/objector states that the vendor of the appellant/objector namely Sarfaraj purchased the property on 29th July, 1998 i.e. prior to the institution of the suit on 16th October, 1998.

19. However there is no Sale Deed from the defendant no.1/judgment debtor Shyam Sunder Sharma in favour of Sarfaraj and all that is argued to have been executed by the defendant no.1/judgment debtor Shyam Sunder Sharma in favour of Sarfaraj, is also a registered GPA and Special Power of Attorney along with unregistered Agreement to Sell etc. Supreme Court in ***Suraj Lamp & Industries P. Ltd. Vs. State of Haryana*** (2009) 7 SCC 363 and (2012) 1 SCC 656 has held that the said documents do not amount to documents of transfer of title to the property. It thus cannot be said that any title in the property stood conveyed/transferred, within the meaning of Section 54 of the Transfer of Property Act, 1882, from the defendant no.1/judgment debtor Shyam Sunder Sharma in favour of the said Sarfaraj also, prior to the institution of the suit.

20. The counsel for the appellant/objector has next contended that Sarfaraj was a necessary party to the suit.

21. However it is not Sarfaraj who is before this Court but it is the appellant/objector, documents in whose favour were admittedly executed during the pendency of the suit, by Sarfaraj acting as attorney of defendant

no.1/judgment debtor Shyam Sunder Sharma, in favour of appellant/objector.

22. The counsel for the respondent/plaintiff/decree-holder at this stage interrupts to state that Sarfaraj had filed an application under Order I Rule 10 of the CPC “when the matter was before this Court but which was dismissed on 14th August, 2002”. The counsel for the respondent/plaintiff/decree holder is however unable to point out the page of the paper book containing the said order.

23. The counsel for the appellant/objector has drawn attention to page 546 of the paper book, being a copy of IA No.1619/1999 filed by the defendant no.1/judgment debtor Shyam Sunder Sharma in the suit, then pending before this court as Suit No.2262/1998, for impleadment of Sarfaraj in the suit and to page 379 of the paper book, being order dated 14th August, 2002 on IA No.1619/1999 in Suit No.2262/1998 dismissing the said application recording the submission of the counsel for the respondent/plaintiff/decree holder that the submissions in the application were contrary to the pleadings in the ‘other Suit’ and on account of default of appearance by the counsel for the defendant no.1/judgment debtor Shyam Sunder Sharma. On enquiry, neither the counsel for the appellant/objector nor the counsel for the respondent/plaintiff/decree holder are aware of the nature of the ‘other Suit’ but the counsel for the appellant/objector states that it was a suit filed by the defendant no.1/judgment debtor Shyam Sunder Sharma for cancellation of the documents dated 25th April, 1998 and 18th May, 1998 aforesaid.

24. I may notice, that the defendant no.1/judgment debtor Shyam Sunder Sharma, in IA No.1619/1999 aforesaid, pleaded having sold the property to Sarfaraj on 29th July, 1998 and having delivered possession of the property to Sarfaraj and having not been left with any right in the property. The

respondent/plaintiff/decreed holder, in his reply to the said application at page 552 of the paper book pleaded that the defendant no.1/judgment debtor Shyam Sunder Sharma, in the plaint dated 5th August, 1998 in Suit No.1641/1998 had pleaded that he, on that date, was in possession of the property and which possession could be verified by issuance of commission and sought to injunct the respondent/plaintiff/decreed holder from taking of possession of the property.

25. The counsel for the appellant/objector then refers to Section 19 of the Specific Relief Act, 1963 to contend that Sarfaraj and/or the appellant/objector were necessary parties to the suit and the decree for specific performance passed in favour of respondent/plaintiff/decreed holder is nullity for this reason alone.

26. Section 19(b) of the Specific Relief Act *inter alia* provides that specific performance of a contract “may” be enforced against either party thereto as well as against any other person claiming under him by a title arising subsequent to the contract, except a transferee for value who had paid his money in good faith and without notice of the original contract. The same does not require that the title arising subsequent to the contract, of which specific performance is sought, should be during the pendency of the suit for specific performance. Thus, Section 19(b) permits specific performance, also against a person to whom the title in the property has passed from the defendant in the suit, on a date subsequent to the contract of which specific performance is claimed, even if it be prior to the date of the institution of the suit.

27. In the present case, no title has passed from the defendant no.1/judgment debtor Shyam Sunder Sharma in favour of Sarfaraj also,

though Sarfaraj has not asserted his rights in the Court. It was only Sarfaraj who could have asserted so and there is nothing before the Court, on the basis whereof it can be said that Sarfaraj was not in the know of the transaction of the defendant no.1/judgment debtor Shyam Sunder Sharma with the respondent/plaintiff/decreed holder or that he acted in good faith. Else, the acquisition of rights claimed by the appellant/objector is admittedly during the pendency of the suit for specific performance in execution of decree wherein the appellant / objector has been dispossessed. The appellant/objector has not filed the objections as attorney of the defendant no.1/judgment debtor Shyam Sunder Sharma but filed the objections in his own right, claiming himself to be the owner of the property and which the appellant/objector is not. I have in ***Sushil Kumar Bagga Vs. Dewan Chander Batra*** (2014) 207 DLT 346 (SLP(c) No. 10178/2014 preferred whereagainst was dismissed vide order dated 8th May, 2014 and Review Petition (c) No. 1303/2014 preferred against the aforesaid order was also dismissed on 22nd July, 2014), referring to ***Sujata Sanzgiry Vs. Ankush R Naik*** AIR 2005 Bom 404 (SLP (c) No. 24958/2005 preferred whereagainst was dismissed on 13th December, 2005) observed that title arising subsequently referred to in Section 19(b) of Specific Relief Act can be only by way of registered document and not by way of Agreement to Sell.

28. Though the documents claimed to have been executed by Sarfaraj in favour of the appellant/objector are not before this Court but the counsel for the appellant/objector has handed over the same under cover of Index dated 3rd October, 2018 and states that though they were filed in the Registry of this Court but were returned with objections. The said documents are now taken on record.

29. A perusal of the Agreement to Sell executed by Sarfaraj in favour of the appellant/objector shows that the same was executed by Sarfaraj as owner of the property and not in assignment of the Agreement to Sell executed by the defendant no.1/judgment debtor Shyam Sunder Sharma in favour of Sarfaraj. Similarly, the Power of Attorney is not for consideration and thereunder Sarfaraj, acting as attorney of the defendant no.1/judgment debtor Shyam Sunder Sharma, appointed the appellant/objector as attorney to do the acts, deeds and things mentioned thereon. However, the appellant/objector thereunder is at best the attorney of the defendant no.1/judgment debtor Shyam Sunder Sharma and when the defendant no.1/judgment debtor Shyam Sunder Sharma could not have raised the objections as have been raised, the appellant/objector as his attorney cannot be permitted to do so.

30. The counsel for the appellant/objector relies on *Vimala Ammal Vs C Suseela* AIR 1991 Mad 209, holding that a subsequent purchaser is a necessary party and a decree without impleading him cannot be executed by a prior purchaser. However, a reading of the facts of the case shows that in that case there was a sale deed in favour of the subsequent purchaser and which is not so in the present case. The presence of the subsequent purchaser is necessary because, as far back as in *Lala Durga Prasad Vs. Lala Deep Chand* AIR 1954 SC 75 , Supreme Court dealing with the diverse views of the High Courts then prevalent, held that while allowing specific performance there is no need to annul or cancel the document by which the defendant seller has transferred title to the subsequent purchaser and the proper form of decree to be passed in such a situation is to direct the subsequent purchaser to join the defendant seller in conveying title to the

plaintiff in specific performance of the agreement to sell. However, here, as aforesaid, no title has passed from the defendant no.1/judgement debtor Shyam Sunder Sharma to Sarfaraj or to the appellant/objector and the presence of Sarfaraj and/or the appellant/objector was/is not necessary for conveying title to the property in favour of the respondent/plaintiff/decreed holder in specific performance of the Agreement to Sell by defendant no. 1/judgement debtor Shyam Sunder Sharma in favour of respondent/plaintiff/decreed holder.

31. I am therefore unable to see any merit in this appeal or any error in the reasoning given by the Executing Court for dismissal of the objections of the appellant to execution.

32. The counsel for the appellant/objector was interrupting during the dictation and was asked to wait. He now argues, (i) that the plea of nullity of a decree can be taken at any time; reliance in this regard is placed on ***Ram Sworup Singh Vs. Mahabir Mahton*** AIR 1960 Patna 235; (ii) that there was no averment in the plaint in the suit for specific performance, which was decreed, that the respondent/plaintiff/decreed holder was always ready and willing to perform his part of the Agreement; in the absence of the same, the decree for specific performance could not have been passed; reliance in this regard is placed on ***Prem Raj Vs. D.L.F. Housing & Construction Pvt. Ltd.*** 1968) 3 SCR 346 and ***Abdul Khader Rowther Vs. P.K. Sara Bai*** AIR 1990 SC 682; (iii) that ***Suraj Lamp & Industries P. Ltd.*** supra is only prospective; (iv) that on execution of the Agreement to Sell, rights under Section 53A of the Transfer of Property Act accrued; (v) that the documents by Sarfaraj in favour of the appellant/objector were executed as per practice; and, (vi) that only Sarfaraj could have shown that he was a *bona fide* purchaser for value

and which could not have been shown in any other proceeding unless he was impleaded as a party to the suit.

33. No merit this found in any of the said contentions.

34. I have already hereinabove, referring to **Balvant N Viswamitra, Yadav Sadashiv Mule** and **Rafique Bibi** supra held as to what constitutes a plea of nullity available in execution of a decree. The pleas taken by the counsel for the appellant/ objector of, the decree for specific performance having been passed in the absence of a plea in the plaint of the respondent/plaintiff/decreed holder being always ready and willing to perform his part of agreement of which specific performance was claimed, does not constitute such a plea of nullity of a decree available to defeat execution of the decree.

35. As far as the contention of prospectivity of **Suraj Lamp & Industries P Ltd** supra is concerned, I have, in **Bishan Chand Vs. Ved Prakash** 2018 SCC OnLine Del 11408 giving detailed reasons, rejected such a contention and need to reiterate the said reasons here is not felt. Suffice it is to state that **Suraj Lamp & Industries P Ltd** supra merely clarifies the law as it always stood and did not lay down any new law. It merely overruled the dicta of the Division Bench of this Court in **Asha M Jain Vs. Canara Bank** (2001) 94 DLT 841.

36. As far as the contention of rights under Section 53A of the Transfer of Property Act, 1882 is concerned, the Transfer of Property Act, the Registration, Act, 1908 as well as the Stamp Act, 1899 were amended with effect from 24th September 2001 and with effect wherefrom the plea of Section 53A of Transfer of Property Act is not available unless the agreement to sell, in part performance of which the possession is claimed to have been given, is registered. The Agreement to Sell dated 24th November,

2004 claimed to have been executed by Sarfaraj in favour of appellant/objector is not registered. The plea of Section 53A of the Transfer of Property Act is thus not available to the appellant/objector. Though the Agreement to Sell in favour of Sarfaraj is of prior thereto but Sarfaraj is not before the Court and Section 53A is/was otherwise also not available to Sarfaraj because (a) for a plea of Section 53A of Transfer of Property Act to succeed, it is necessary to plead and prove that the transferee has performed or was willing to perform his part of the contract and which was/is not the position here; (b) on the contrary, the defendant no.1/judgement debtor Shyam Sundar Sharma as aforesaid, in the plaint dated 5th August, 1998 in Suit No. 1641/1998 pleaded that he was in possession of the property as on 5th August, 1998 i.e. after the Agreement to Sell dated 29th July, 1998 in favour of Sarfaraj; (c) Section 53A only bars the transferor i.e. defendant no.1/judgement debtor Shyam Sunder Sharma or any person claiming under him i.e. the respondent/plaintiff/decreed holder from enforcing against the transferee i.e. Sarfaraj and/or any person claiming under him i.e. appellant/objector, any right in respect of the property; however the said provision has to be read harmoniously with the Specific Relief Act; the Agreement to Sell in favour of respondent/plaintiff/decreed holder, specific performance of which has been decreed, is dated 25th April, 1998 and 18th May, 1998 i.e. prior to the Agreement to Sell dated 29th July, 1998 in favour of Sarfaraj; the respondent/plaintiff/decreed holder is thus the prior purchaser to Sarfaraj and enforcement of which right cannot be held to be barred by Section 53A of the Transfer of Property Act.

37. I may, before parting with this judgment, also state that the

appellant/objector has besides the unregistered Agreement to Sell purportedly executed by the defendant no. 1/judgment debtor Shyam Sunder Sharma in favour of Sarfaraj, filed a registered Special Power of Attorney purportedly executed by defendant No.1/judgment debtor Shyam Sunder Sharma in favour of Sarfaraj but which power of attorney only authorises Sarfaraj to take possession on the spot and to take electricity and water connections from the concerned authorities with respect to the subject property. The same nowhere authorised Sarfaraj to sell the property or do any other act with respect to the property. No GPA with respect to the subject property executed by defendant No.1/judgment debtor Shyam Sunder Sharma in favour of Sarfaraj has been produced. The same also belies the claims of defendant No.1/judgment debtor Shyam Sunder Sharma having intended to transfer or sell the property to Sarfaraj. Once, Sarfaraj did not have any such rights, the question of appellant/objector acquiring such rights from Sarfaraj does not arise.

38. Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

OCTOBER 11, 2018

‘bs’/pp..