

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

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

+ **EX.F.A. 9/2016**

VIJAY PATEL **..... Appellant**

Through: Mr.L.K. Singh, Advocate

Versus

JUGAL KISHORE **..... Respondent**

Through: Ms. Gita Dhingra, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Execution First Appeal impugns the order dated 20th November, 2015 in Execution Petition No.41/2012 filed by the appellant seeking execution of the compromise decree dated 4th August, 2009 in Suit No.533/2008.

2. The appeal came up first before this Court on 4th March, 2016, when notice thereof was ordered to be issued. Since then, adjournments were given from time to time. The counsel for the respondent has been appearing. Vide order dated 7th February, 2018, after hearing counsels for some time, the respondent was permitted to file documents along with the Sanctioned Plan and permission to repair the building, from the MCD with advance copy to the counsel for the appellant. The respondent has since filed the Sanctioned Plan from MCD along with letter dated 14th October, 2016 of the North Delhi Municipal Corporation granting permission to carry out the repairs and renovation.

3. The counsel for the appellant and the counsel for the respondent have been heard.
4. The counsel for the appellant has argued:
 - (i) that there were three suits *inter se* the parties, all relating to property No.3195, Ward No.XVI, Gali No.31, Beadon Pura, Karol Bagh, New Delhi and of which, suit No.15/2003 aforesaid was one;
 - (ii) that an umbrella settlement was arrived at between the parties in all the suits and which settlement in the form of an application under Order XXIII Rule 3 of the CPC was filed in Suit No.15/2003 of the Court of Civil Judge, North, Delhi and statements of the parties were recorded and a compromise decree in terms of the application under Order XXIII Rule 3 of the CPC passed;
 - (iii) that under the said compromise decree, the respondent was to reconstruct the property and to hand over vacant peaceful physical possession of one shop on the ground floor of the said reconstructed property, as identified in the site plan of the proposed construction filed along with the application under Order XXIII Rule 3 of the CPC.
 - (iv) that the respondent carried out the said reconstruction and handed over the shop agreed to be handed over to the appellant and executed a registered sale deed dated 13th April, 2010 with respect to the said shop in favour of the appellant;

- (v) that however the MCD/North Delhi Municipal Corporation, on 15th July, 2011, passed an order of demolition of the property on the ground of construction thereon being unauthorized and on 21st April, 2012, an order of sealing of the property on the ground of misuse of the ground floor and in pursuance thereto, sealed the property on 12th May, 2012 and implemented the demolition order on 28th July, 2012;
 - (vi) since the appellant had been deprived of the shop, to which he was entitled to under the compromise decree, he applied for execution of the compromise decree aforesaid.
5. The Executing Court, vide the impugned order, has dismissed the execution so sought by the appellant, reasoning:
- (i) that in terms of the compromise decree, the respondent had constructed the shop and executed the sale deed thereof in favour of the appellant;
 - (ii) the said construction has been demolished by the MCD on account of the fact that the commercial activity cannot be carried out where the property is situated;
 - (iii) therefore whatever was stipulated in the compromise decree has been fulfilled by the respondent and the respondent has complied with the decree in letter and spirit;
 - (iv) though the appellant had received the amount of Rs.5 Lakhs from the respondent at the time of execution of the compromise

application, by way of security and was required to return the said amount to the respondent, but there was nothing to show that the appellant had returned the said amount;

- (v) for the grievance now of the appellant against the respondent, the appellant may initiate appropriate proceedings against the respondent; and
- (vi) so far as the decree is concerned, the terms and conditions thereof already stand complied with.

6. I have also enquired from the counsel for the appellant, whether the disputes which may arise from time to time between the parties to the decree, even if not pertaining to execution of the decree, are to be adjudicated in execution and not by way of separate proceedings appropriate for adjudication of those disputes.

7. The counsel for the appellant states that the appellant, under the compromise, gave up other rights claimed in the property in lieu of getting the shop aforesaid but now the appellant has been deprived of the said shop also, though at one point of time was put in possession thereof and conveyed the title with respect thereto. It is argued, that the said shop was to be for keeps with the appellant and since the appellant, after purported compliance of decree, has been deprived of his entitlement under the decree for reasons attributable to the respondent, the appellant is entitled to seek enforcement in execution and no separate proceeding is required.

8. I am unable to agree.

9. A perusal of the compromise as contained in the application under Order XXIII Rule 3 of the CPC and in terms whereof the compromise decree was passed, shows:

- (i) the respondent to have agreed to put the appellant into possession of built up space as per particulars and measurements described therein and to execute a sale deed in favour of the appellant thereof;
- (ii) the respondents to have, as security, paid an amount of Rs.5 Lakhs to the appellant, to be refunded by the appellant to the respondent on being put in vacant possession of the shop and execution of sale deed with respect thereto;
- (iii) the appellant to have in turn agreed to vacate the portion of the property in his possession, to enable the respondent to reconstruct the property;
- (iv) the respondent to have agreed to allow the appellant use of another shop during the time of such reconstruction, to enable the appellant to continue his business therein till the time the possession of the shop in the suit property was handed over by the respondent to the appellant;
- (v) the appellant to have accepted the title of the respondent to the remaining property;
- (vi) both parties to have agreed not to claim any right, title or interest in the portion of the other;

(vii) the parties to have agreed to sign documents of cancellation of other documents at the time of execution of the sale deed of the shop aforesaid by the respondent in favour of the appellant.

10. The counsel for the appellant, on enquiry, states that in terms of the compromise, the appellant has refunded Rs.5 Lakhs received as security and also admits that the respondent, during the period of reconstruction of the property, had allowed the appellant use of another shop and the appellant, upon being delivered the possession of the agreed reconstructed shop, has vacated that shop of the respondent.

11. The aforesaid shows that the compromise decree, to the extent compromise was arrived at between the parties, has exhausted itself and upon the same happening, nothing remained for execution of the compromise decree.

12. What has happened thereafter at the instance of the North Delhi Municipal Corporation was not germane to the dispute subject matter of suit or in issue in the suits in which the compromise was arrived at and the compromise decree passed.

13. The dispute now between the parties is, whether the appellant is to blame or the respondent is to blame for the action taken by the North Delhi Municipal Corporation after the compromise decree as aforesaid had worked itself out. The resolution of the said dispute will have several facets. On enquiry, it is stated that the sanction of the reconstruction plans had not been obtained at the time of entering into compromise. The counsel for the appellant states that the sanction

was obtained, so far as the ground floor is concerned, for a residential building. I have asked the counsel for the appellant whether in the locality, where the property is situated, it was possible to obtain sanction of the entire building for commercial purposes. The counsel for the appellant has chosen not to reply. However, judicial notice can be taken of the fact that the sanction for construction is not granted, for use contrary to the Master Plan and the Zonal Development Plan. It can thus safely be assumed that the compromise between the parties, in which the parties agreed to the respondent putting the appellant into possession of a shop on the ground floor and to convey title to the appellant of the said shop, was contrary to law, i.e. the Master Plan and the Zonal Development Plan. Similarly, without the plans for construction being sanctioned, the appellant and the respondent, on their own, could not have by way of compromise, drawn up a site plan and agreed to the respondent giving possession of a particular portion to the appellant, without even knowing whether construction of the said portion would be sanctioned or not and whether the same would be in accordance with law or not. Construction and delivery of possession of shop in accordance with such site plan, if not in accordance with prevalent building bye-laws and not sanctioned by Municipality, would also remain unauthorized and liable to be demolished by the Municipality. The question arises, whether the compromise is contrary to law and void under Section 23 of the Indian Contract Act, 1872. Supreme Court in **Rafique Bibi (dead) by LRs vs. Sayed Waliuddin** (2004) 1 SCC 287 and **Balvant N. Viswamitra vs. Yadav Sadashiv Mule** (2004) 8 SCC 706 held that the distinction

between a decree which is void and a decree which is wrong/incorrect/irregular or not in accordance with law cannot be overlooked or ignored; where a court lacks inherent jurisdiction in passing a decree, the decree would be without jurisdiction, *non est* and void ab initio and validity of such a decree can be challenged even in execution; however, a decree which is erroneous or illegal is not void and cannot be objected to in execution. The High Court of Calcutta also in ***Shivani Properties Pvt. Ltd. vs. United Bank of India*** 2013 SCC OnLine Cal 9022 held that the scope of an Executing Court under Section 47 of the CPC is very narrow; the Executing Court cannot adjudicate upon the legality or correctness of the decree unless the decree is a nullity; if the decree is challenged as contrary to law, such objection cannot be entertained by the Executing Court.

14. The Executing Court can execute only in terms of judgment and decree and not go beyond that. Here, upon the respondent putting the appellant in possession of the shop and conveying title thereof in favour of the appellant and the appellant, in acknowledgement thereof, having refunded the security of Rs.5 Lakhs to the respondent (as claimed by the appellant), the decree stood satisfied and nothing remained for execution. The disputes which have subsequently arisen between the parties with respect to what was conveyed and delivered in compliance / implementation of the decree cannot be resolved in execution.

15. A perusal of the objections filed by the respondent to the execution sought by the appellant discloses the case of the respondent to be:

- (i) that the action with respect to the property was taken by the North Delhi Municipal Corporation (NrDMC) owing to orders in W.P.(C) No.2759/2011 of this Court filed by one Deepak Grover complaining of inaction of the municipal authorities qua illegalities in construction and use of the property aforesaid;
- (ii) that the respondent had done all that was required to do under the compromise decree;
- (iii) that the appellant was using the shop aforesaid for commercial purposes which is not permissible under the Master Plan of Delhi and had also made various additions and alterations in the said shop including by erection of a mezzanine floor;
- (iv) that the respondent had no control over the action by NrDMC;
- (v) that the basic structure of the shop, to which the appellant was entitled to under the decree, still exists and it is always open to the appellant to use the same for the purposes permitted; and,
- (vi) that the respondent is not responsible for the happenings after the respondent had complied with the decree.

16. I have wondered whether the aforesaid disputes, as raised in the objections of the respondent, can be subject matter of adjudication in execution proceedings. Section 47 of the CPC is as under:

“47. Questions to be determined by the Court executing decree.— (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

*(2)**

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

2[Explanation I.— For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.— (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]

**Omitted by Act 104 of 1976, S. 20 (w.e.f. 1-2-1977).”*

17. In my opinion, the questions as arising from the objections of the respondent and as culled out hereinabove do not relate to execution, discharge or satisfaction of the compromise decree within the meaning of Section 47(1) for determination thereof to be by the Executing Court and not by a separate suit. The questions relating to

execution can only be confined to compliance by the parties of the terms of the decree. The appellant, in the present case, admitted compliance by the respondent of the decree by claiming to have refunded the security amount of Rs.5 Lakhs which he was to refund only on such compliance. Similarly, the questions relating to discharge or satisfaction of the decree can also be relating to compliance/implementation of the decree as per its terms and in acknowledgement of which compliance the appellant claims to have refunded the security. The questions which arise between the parties, subsequent to acknowledgement of compliance / implementation or satisfaction of the decree, cannot in my view be questions relating to execution, discharge or satisfaction of the decree within the meaning of Section 47(1) supra.

18. I was in *Novartis A.G. vs. Wander (P) Ltd.* (2009) 161 DLT 598 (Del) concerned with execution of a compromise decree wherein the defendant had agreed not to use the trademark subject matter of the suit and to enter into a distributorship agreement with the plaintiff; it was also a term of the compromise that the defendant, on breach of any of its obligations under the compromise, will pay damages in the sum of Rs.5 Crores to the plaintiff. It was held that the rights and liabilities of parties flowing from the distributorship agreement were to be adjudicated in a separate proceeding, not in execution of the compromise decree as the said disputes were not relating to execution, discharge or satisfaction of the decree and were beyond the scope of Section 47 of the CPC. Execution First Appeal being Ex.F.A.(OS)

No.37/2009 preferred thereagainst was dismissed as barred by time on 9th August, 2010.

19. The High Court of Allahabad in ***Ganga Ram vs. Second Additional District Judge, Muzaffarnagar*** 1998 SCC OnLine All 1296 also held that a holder of a decree for specific performance of an agreement of sale, if before has accepted the conveyance, discovers a material defect in title of the seller, may claim damages or rescind the agreement; however, if he discovers defect in title after he accepts the conveyance in execution of the decree, his remedy is in damages of covenant of title.

20. Else, the legal position is clear. The Executing Court can neither travel beyond the decree nor sit in appeal over the same or pass any order jeopardizing rights of the parties thereunder, as recently reiterated in ***Brakewel Automotive Components (India) Pvt. Ltd. vs. P.R. Selvam Alagappan*** (2017) 5 SCC 371.

21. A perusal of the sale deed executed by respondent in favour of appellant also shows the same to record in clause 1 of the habendum thereof that it was being executed in terms of the compromise decree and the respondent to have meted out other assurances to the appellant as is the norm in a sale deed. On execution of the sale deed, the rights of the parties are determined by the terms thereof and if any dispute arises between the parties relating to the said terms, claims with respect thereto cannot be made in execution.

22. Though prior to the amendment of the year 1976, all questions arising between the parties to the decree were permitted to be decided in execution, after the said amendment only the question relating to execution, discharge or satisfaction of the decree can be determined thereunder. The disputes which the appellant claims to have now arisen, do not relate to execution, discharge or satisfaction of a decree which stands superseded by the sale deed and the rights of the parties now are strictly in terms of the sale deed.

23. The counsel for the appellant at this stage states that he be granted permission to revive the suit.

24. Whether the appellant is entitled to so revive the suit or not, is not in the domain of this appeal and as and when the appellant makes any such application, I am sure the same would be dealt with in accordance with law.

25. No error can thus be found in the impugned order, to the extent dismissing the execution application filed by the appellant.

26. Before parting, I may also record that this appeal has been preferred invoking Order XXI Rule 98 and Rule 103 read with Section 104 of the CPC. However, orders which have been made appealable thereunder are only orders determining the questions of resistance or obstruction to possession of immovable property and which is not the case here. Though prior to the amendment of the CPC of the year 1976, adjudication of all questions in Section 47 was conferred the status of a decree, but after the 1976 amendment, only orders made

under Rules 46H, 58 and 103 have been made appealable and no other orders in execution. The order impugned in this appeal does not fall in any of the said categories. However, since the notice of the appeal was issued and the same has been pending for the last two years, without going into the said aspect, it was not deemed appropriate to reject the appeal on the said ground alone.

27. The appeal is dismissed.

28. This order shall however not come in the way of the appellant, if entitled to, initiating any other proceedings.

No costs.

JULY 19, 2018
Pk.

RAJIV SAHAI ENDLAW, J