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

Reserved on : 8th February, 2018
Date of decision : 23rd May, 2018

\+ **RFA 224/2017 & CM No.41433/2017**

ROHIT RAJPAL & ANR. ..... Appellants

Through: Mr. Rajan Mukherjee and Mr. S. Bhowmick, Advocates (M-9811883782).

versus

ANKITA SURI & ORS ..... Respondents

Through: Mr. Rajeev Kumar, Advocate for R-1 & 2 (M-9868592272).

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

<u>Prathiba M. Singh, J.</u>

1. Sh. Rohit Rajpal and Sh. Rahul Rajpal (`*Plaintiffs'*) filed a suit against their brother Sh. Rajesh Rajpal in respect of property bearing no. 36C, Malviya Nagar, New Delhi- 110017 (*hereinafter, `suit property'*). Smt. Ankita Suri and Smt. Kritika Suri are cousins who were impleaded as Defendants No.1 and 2.

2. The suit property was in the joint ownership of the 3 brothers – Plaintiffs No.1 and 2, and Defendant No.3. Originally, this property was measuring 343 sq. yd, however, by devolution amongst several members of the larger family, 100 sq. yds of the suit property which was numbered as 36C, being part of a plot 36AB, Malviya Nagar, fell into the share of the three brothers. They entered into a collaboration agreement which is not the

subject matter of this case. However, under the said collaboration agreement, the First Floor and Second Floor of 36C, was given by the builder to the Plaintiffs. They were in joint possession of the entire First and Second Floor.

3. Due to financial distress, a loan of Rs.27 lakhs was taken from Defendants No.1 and 2, who were related to the three brothers. It is the case of the Plaintiffs, that they had mortgaged the property, i.e., the First Floor and the Second Floor. However, instead of a mortgage deed, a sale deed was executed dated 24th August, 2011. The same was registered with the Sub-Registrar's office. Thereafter, however, a lease deed was executed on 24th May, 2013 between Sh. Rajesh Rajpal and Smt. Ankita Suri. The said lease deed is a registered lease deed.

4. Sale deed dated 24th August, 2011 and lease deed dated 24th May, 2013 are relevant for the decision in the present appeal.

<u>Lease deed dated 24th May, 2013 and the proceedings there under:</u>

5. The three brothers, after the execution of the sale deed dated 24th August, 2011, continued to live in the property and did not hand over possession, as the Plaintiffs were to pay monthly instalments of Rs. 50, 000/- to Defendants 1 & 2. However, the two brothers Sh. Rohit Rajpal and Sh. Rahul Rajpal, stated that the dealings with the Defendants were being handled by Sh. Rajesh Rajpal to whom they would pay Rs. 35,500/- per month, as their share of the monthly amount of Rs.50,000/-, for further payment to Defendants No.1 and 2.

6. It is their case that they were not aware of the lease deed dated 24th May, 2013 entered into between Sh. Rajesh Rajpal and Smt. Ankita Suri. The registered lease deed dated 24th May, 2013, between Sh. Rajesh Rajpal

and Smt. Ankita Suri was terminated due to non-payment of rent. A suit for possession was filed by Smt. Ankita Suri and Smt. Kritika Suri against Sh. Rajesh Rajpal, along with a complaint under Section 138 of the Negotiable Instrument Act.

7. In the said suit for possession, the main defence was that the property was in fact not taken on rent, but the amount of Rs. 27 lakhs was in fact a loan and the sale deed was only a security document. On 24th April, 2014, a judgment and decree were passed against Sh. Rajesh Rajpal, who admitted the ownership of Smt. Ankita Suri and Smt. Kritika Suri. He gave an undertaking that he would vacate the suit property coupled with the undertaking that the rent would be paid on time. A fresh lease deed was executed between Sh. Rajesh Rajpal and Smt. Ankita Suri and Smt. Kritika Suri. Sh. Rajesh Rajpal again defaulted which resulted in the filing of an execution petition before the Trial Court. In the said execution petition, objections were filed by Sh. Rohit Rajpal and Sh. Rahul Rajpal that they were completely ignorant of the consent decree dated 24th April, 2014. They further took the plea that the sale deed was in fact a mortgage deed. These objections were dismissed, and the order of dismissal was treated as a decree in terms of Order XXI Rule 103 read with Section 47 of the CPC. A review preferred against the order of execution was dismissed.

8. On 2nd December, 2016, the subject suit for rectification of the sale deed came to be filed. Parallelly, the order of dismissal of the objections to the execution petition came to be challenged before a Ld. Single Judge of this court. In CM 874/2017, decided on 18th August, 2017, this court passed the following order:

"CM(M) No.874/2017 and CM No.29175/2017 (for stay).

3. This petition under Article 227 of the Constitution of India impugns the order (dated 7th April, 2017 in EX/2634/2016 of the Court of Additional District Judge-03 (South), Saket Courts, New Delhi) of dismissal of objections under Section 47 of the Code of Civil Procedure, 1908 (CPC) filed by the two petitioners, in execution filed by the respondents no.1&2 / decree holders of a decree for ejectment against the respondent no.3 / judgment debtor.

4. It has been enquired from the counsel for the petitioners as to how a petition under Article 227 of the Constitution of India would be maintainable and whether not the order is appealable.

5. The counsel for the petitioners first states that the order is not appealable under Order XLIII of the CPC.

6. However attention of the counsel for the petitioners is drawn to Order XXI Rule 103 of the CPC which provides for such an order to have the same force as if it were a decree.

7. The counsel for the petitioners then states that the objections filed by the petitioners were not under Order XXI Rule 98 or under Rule 100 of the CPC but was under Section XLVII of CPC.

8. Merely because the petitioners chose to give a wrong nomenclature, would not change the substantive provisions of law.

9. The decree in favour of the respondents no.1&2 and against the respondent no.3 is of ejectment of the respondent no.3 from immovable property after determination of tenancy at a rent in excess of Rs.3,500/- per month. The petitioners' claim right to the property as owners of the property along with the respondent no.3 (the two petitioners and the respondent no.3 are brothers) and state that the

Sale Deed executed by the petitioners and the respondent no.3 of the property was in fact a mortgage and thus the said Sale Deed and the Lease Deed by the respondents no.1&2 in favour of the respondent no.3 are sham documents.

10. The aforesaid pleas amount to questions within the meaning of Rule 101 of Order XXI of the CPC and dismissal of the same would have the force of a decree under Rule 103 of Order XXI of the CPC.

11. The counsel for the petitioners has next contended that the petitioners are not seeking stay of dispossession inasmuch as possession has already been recovered and are only wanting to intervene in the execution and only want their claims to the property to be adjudicated in the execution.

12. The same fortifies what has been observed hereinabove.

13. This petition is misconceived and is dismissed with liberty to the petitioners to avail of appropriate remedy in law."

9. Even an execution first appeal was dismissed on 1st November, 2017 in the following terms:

> *"1. After arguments, learned counsel for the appellants, after taking instructions on pass over, states that the appeal be disposed of as not pressed.*
>
> *2. Ordered accordingly."*

10. Thus, insofar as the registered sale deed and the proceedings emanating thereunder were concerned, all the orders attained finality, and the decree dated 24th April, 2014 was to be executed.

<u>Suit For Rectification of Sale Deed</u>

11. The present suit for rectification came to be filed on the basic premise

that Sh. Rohit Rajpal and Sh. Rahul Rajpal were completely unaware of the lease deed dated 24th May, 2013 and the compromise decree dated 24th April, 2014. It was their submission that their brother had hidden the entire set of facts from them, as they fully trusted them in the matter and they were continuously paying their share of the monthly payments towards the mortgage. It was their further submissions that the sale deed was not an actual sale deed but a mortgage deed. In this suit, the Plaintiffs- Sh. Rohit and Rahul Rajpal prayed for the following reliefs:

> *"It is therefore, most respectfully prayed that this Hon'ble Court may be kindly be pleased to:*
> *a) Pass a decree of rectification of the Sale Deed dated 24.08.2011 which was registered as document No. 13806, in Book No. 1, Volume No. 11433 on pages 26 to 36 on 30.08.2011 in the office of the Sub-Registrar V, New Delhi, to be read as a Mortgage Deed and that the said sale deed dated 24.08.2011 be read and referred to for all purposes as a Mortgage Deed and not a Sale Deed;*
> *b) Award the costs of the suit in favour of the plaintiffs and against the defendants; AND*
> *c) Pass any other and further orders and reliefs to be granted in favour of the plaintiffs and against the defendants as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

12. In this suit they also impleaded Smt. Ankita Suri and Smt. Kritika Suri as Defendants No.1 and 2, and Sh. Rajesh Rajpal as Defendant No.3. An application under VII Rule11 read with Section11 of the CPC came to be filed. The grounds taken therein are: -

i) That the suit is barred by limitation;

ii) That the pleas taken in the suit are barred Under Sections 91 and 92 of the Evidence Act.

iii) That the suit is not maintainable under Section 26 of the Specific Relief Act.

13. The Trial Court vide the impugned judgment/order held vide order dated 9th January, 2017 that the suit is barred by limitation as well as Sections 91 and 92 of the Indian Evidence Act, and Section 58(c) of Transfer of Property Act. The findings of the Trial Court are:

- That there is no condition of mortgage in the sale deed dated 24th August, 2011.
- That the proceedings pursuant to the suit for possession filed by Smt. Ankita Suri and Smt. Kritika Suri have culminated in a compromise decree.
- That the execution of the said decree is underway.
- That the Plaintiffs were all along aware of the lease deed and the proceedings arising therefrom.
- That the suit is barred by limitation.

On these grounds the suit was rejected.

14. Before this Court, the submission of the Plaintiffs is that they have been completely defrauded of their property by the Defendants. It was alleged by them that their brother Sh. Rajesh Rajpal had colluded with Defendants No.1 and 2 and had not informed them about the lease deed entered into and the proceedings in respect thereof. They claimed that they had came to know of the said proceedings for the first time when the execution was being undertaken by the executing court, which is when they filed the objections to the same. It is contended by them that they have an independent right to seek cancellation of the sale deed/rectification as the

value of the property was much more than Rs.27 lakhs i.e. it was at least double the amount i.e. Rs.54 lakhs and that they could not have sold the property for half its value. Moreover, it was claimed by them that the property was of sentimental value to them, as it was part of the ancestral property which had devolved upon them. Thus, in their submission, the suit could not have been rejected in a summary manner and ought to have been sent to trial.

15. On the other hand, Ld. Counsel for the Defendants 1 & 2 submits that the sale deed was in fact drafted by Sh. Rohit Rajpal. He is admittedly a person who drafts documents. The Plaintiffs having filed objections to the execution petition, a review thereafter, and a further challenge before this court, the decree passed in their favour has attained finality. In their submission, all the three brothers had signed the sale deed. The summons in the suit was served upon both Sh. Rohit Rajpal and Sh. Rahul Rajpal, and they had complete knowledge of the said suit proceedings. After having knowledge of the same, they ought not to be permitted to argue that the said proceedings happened behind their back. The entire story has been cooked up by the Plaintiffs only in order to deprive the Defendants 1 & 2 of their legitimate right to the suit property. It is further, argued that both Sh. Rohit Rajpal and Sh. Rahul Rajpal having filed objections to the execution on the very same grounds on which the present suit is barred by *res judicata*.

16. Salient terms of the sale deed are:

(i) It has been signed by all three brothers;

(ii) The complete devolution of title in the suit property is mentioned in the recitals;

(iii) That the three brothers clearly sold, conveyed, transferred and assigned to Smt. Ankita Suri and Smt. Kritika Suri, the entire First Floor and Second Floor of the suit property for a total sale consideration of Rs.27 lakhs;

(iv) That the entire amount of Rs.27 lakhs was paid by means of six cheques of Rs. 4,50,000/- each as detailed in the agreement;

(v) The sale deed has a clause which read as under: -

"In full and final settlement the receipt of which the VENDORS admit and acknowledge hereby and nothing is left due to be paid by the VENDEES to the VENDORS against "The Said Portion of the said Property".
2. That the actual , physical, peaceful and vacant possession of the said portion of the said property have been handed over to the VENDEES by the VENDORS at the time of execution of this Sale Deed, who has assumed its legal and physical possession at the spot."

(vi) The sale deed states at the signature page that it is drafted by Sh. Rohit Rajpal;

(vii) The execution of the sale deed is not disputed and neither are the signatures.

(viii) The Sale deed is a registered document with the Sub-Registrar-V.

(ix) The registration took place on 30th August, 2011.

(x) The witnesses to the document were Sh. Gaurv Rajpal and Sh. Billal Hassan.

17. Though the possession was handed over vide the sale deed to the buyers, namely, Smt. Kritika Suri and Smt. Ankita Suri, the three brothers remained in possession of the suit property. This fact is well within the

knowledge of the three brothers and there can be no escape for either of the brothers from this fact. If there was no subsequent lease deed entered into dated 24th May, 2013, they could not have remained all along in possession. In the Written Statement, the Defendants 1 & 2 have clearly stated that after purchasing the property in question, Sh. Rajesh Rajpal entered into the lease deed with them in order to continue to remain in possession by paying a lease amount of Rs. 60,000/- per month. During the course of submissions, it is admitted by them that they did not make the monthly payments.

18. In the lease deed dated 24th May, 2013, the ownership of Smt. Ankita Suri and Smt. Kritika Suri is admitted. The entire First Floor and Second Floor has been given on rent to Sh. Rajesh Rajpal. However, Sh. Rohit Rajpal and Sh. Rahul Rajpal continued to live in the premises. This clearly points to the fact that the lease deed was well within the knowledge of Sh. Rohit Rajpal and Sh. Rahul Rajpal. This is the only way in which all the three brothers could have continued to remain in the possession of the suit property after selling the property to Defendants No.1 and 2. Moreover, in the plaint, nowhere do the Plaintiffs make an averment as to how much money was repaid out of Rs. 27 lakhs. This fact is conspicuous by its absence in the plaint.

19. The entire story which has been woven by the three brothers appears to be a complete ruse to exit from the sale transaction after having received the entire consideration.

20. The terms and conditions of the sale deed are clear and categorical, that the rights in the entire two floors of the property were sold for Rs.27 lakhs which was duly received. The fact that the market price of this property is much higher, does not in any way permit Sh. Rohit Rajpal and

Sh. Rahul Rajpal to resile from the sale transaction. The entire submission that this was only a loan arrangement/mortgage, and not a sale, is a clear afterthought.

21. In the suit for possession filed by the Defendants 1 & 2 against Sh. Rajesh Rajpal, the Plaintiffs- Sh. Rohit Rajpal and Sh. Rahul Rajpal were made parties. Summons issued on 12th November, 2013, in the said suit were served upon them but they chose not to appear. It was only when the decree was passed and was thereafter sought to be executed that Sh. Rohit Rajpal and Sh. Rahul Rajpal filed objections. A perusal of the compromise deed dated 23rd April, 2014 shows that there was more than Rs.6,60,000/- which was due as on the date of compromise which was outstanding. The same was to be repaid in instalments. A fresh lease deed was also to be executed dated 2nd May, 2014. The matter had also been referred to mediation in the Karkardooma Mediation Centre. Cheques were issued for the entire amount of Rs.6,60,000/-. In the second lease deed of 2nd May, 2014, the amount of Rs. 50,000/- was agreed as being rent for the period of 18 months from 23rd April, 2014 to 22nd October, 2015; for a further period of six months, Rs. 60,000/- per month was also be paid i.e. for the period between 23rd October, 2015 and 22nd April, 2016. In case of default of more than two months, possession was to be handed over. Admittedly, all the three brothers were in possession and they continued to live together in these premises.

22. In the appeal, during oral arguments, it was claimed that Sh. Rajesh Rajpal was living in the First Floor of the property and Sh. Rahul Rajpal and Sh. Rohit Rajpal were living in the Second Floor. Since, Sh. Rajesh Rajpal was the person who signed the lease deed, only his portion i.e. First Floor ought to be handed over to the Defendants. This submission is clearly

without any basis inasmuch as having taken the amount of Rs.27 lakhs as sale consideration, the Plaintiffs, brothers, Sh. Rohit Rajpal and Sh. Rahul Rajpal did not have any justification to continue to remain in the premises. If Rs.27 lakhs was a loan, there ought to have been given a detailed statement as to how much was to be repaid, which has not been done.

23. The version of the Plaintiffs that it was a loan transaction and that the proceedings before the Trial Court and the Executing Court, where the decree for possession was passed was done behind their back, is wholly unacceptable and improbable. The Plaintiffs had complete knowledge of the said proceedings. They have availed of remedy of filing objections to execution petition, which have also been decided.

24. The order of review dated 8th April, 2016 in the application under Section 47, made before the Trial Court seeking review of compromise decree, dated 24th April, 2014, shows that the Trial Court dealt with these very arguments in the said review pet. The Trail Court's observation is relevant and is quoted below:

> *"11. As per the contents of the present application, the objectors and the judgment debtor were joint owner of the suit property and they have jointly executed registered sale deed in favour of the decree holder in respect of the suit property. The contention of the objectors is that sale deed was executed in favour of the decree holder as they had taken loan from the decree holder and it was agreed that after repayment of loan the property would again be transferred to the objector and judgment debtor seems to be quite implausible, unreasonable and afterthought. If the sale deed was executed by the objectors for the purpose of securing repayment of loan taken by them from the decree holder then they*

> *should have executed mortgage deed instead of sale deed. Once, sale deed in respect of the suit property has been executed by the objectors and judgment debtor in favour of the decree holder, the ownership of the suit property is transferred to the decree holder and the objectors have remained with no right, title or interest in the suit property. When the objectors have no right, title or interest in respect of the suit property, they have also no right to make this application for seeking dismissal of the execution petition."*

25. Thereafter, Sh. Rohit Rajpal and Sh. Rahul Rajpal sought a review order dated 8th April, 2016 which was again dismissed on 18th November, 2016, with the following observations:

> *18. Admittedly, the applicants/objectors herein alongwith the judgment debtor Rajesh Rajpal have executed a sale deed in favour of the decree holders. They have also admitted that a formal lease deed was also executed between the plaintiff and the defendant. Though they have contended that the sale deed was executed merely as a security to secure the loan amount of Rs.27 Lacs taken by them from the plaintiff/decree holder but they have failed to prove their contentions. In view of the judgment held in Ittyachan's case (supra), mere possession by the claimants would not be sufficient but they have to show a right to possession independent of the judgment debtor. The objectors/applicants have failed to show that they have a right to possession independent of the judgment debtor, more particularly in the light of sale deed executed by them in favour of the decree holders.*
>
> *19 .Further, the applicants have also failed to satisfy why sale deed and not mortgage deed was executed by them in favour of the decree holders*

> *while as per their contention, the sale deed was executed for the purposes of securing repayment of loan taken by them from the decree holder moreso, when the applicants themselves are deed writers and fully aware of the legal consequences of executing sale deed. Under Section 58(c) of Transfer of Property Act, 1882, there are provisions of mortgage by conditional sale which could have been executed between the parties but the objectors executed sale deed in favour of the decree holders and not mortgage by conditional sale.*
>
> *20. In the wake of execution of sale deed by the objectors in favour of the decree holders, I am of the clear opinion that the objectors have left with no right, title or interest in respect of the suit property which required to be adjudicated upon by this court."*

Appeal against all these orders have also been dismissed.

26. In the present suit, the same issue is sought to be re-agitated again by Sh. Rohit Rajpal and Sh. Rahul Rajpal. The two documents, namely, the sale deed and the lease deed being registered there is a presumption of validity that applies to them as held in the Supreme Court judgement ***Prem Singh and Ors v. Birbal and Ors (2006) 5 SCC 353***

> *"There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus would be a person who leads evidence to rebut the presumption..."*

27. Any evidence to the contrary as to the effect and purport of these two documents is not admissible in law. To contend that the sale deed was in fact a mortgage deed is completely implausible especially when the document speaks for itself. The sale deed records categorically that it was drafted by

Sh. Rohit Rajpal who admitted in court as being a documents draftsman. The stand of the Plaitiffs that it was in fact a mortgage deed is thus liable to be rejected. It has been repeatedly rejected on two occasions by the Trial Court and on two occasions by Ld. Single Judge as part of the execution proceedings. The same is binding on the Plaintiffs and is not liable to be re-agitated.

28. The complete silence in the plaint as to, if the amount of Rs.27 lakhs was taken on loan, how it was repaid and how much was in fact paid back, leaves enormous suspicion in the court's mind as to the credibility of the Plaintiffs. The Plaintiffs, admittedly have enjoyed the amount of Rs.27 lakhs taken on loan. They have also enjoyed the suit property for many years, until this court in the present appeal directed the keys of the suit property to be handed over and deposited in court. It was finally on 3rd July, 2017 that a submission was made that the Plaintiffs have in fact vacated the property and the Registry took the keys on record. Hence, from 2011 to 2017 for almost 6 years, the Plaintiffs not only enjoyed the amount of Rs.27 lakhs given by Defendant, but also enjoyed possession of the suit property. They cannot seek any more benefits.

29. Insofar as limitation is concerned, the order taking on record the compromise deed dated 23rd April, 2014. The suit was filed on 2nd December, 2016. The Plaintiffs claimed knowledge only when the execution of the compromise deed was affected. However, the reliefs sought in the plaint are for rectification of the sale deed. The date of the sale deed is therefore relevant and not the date of the compromise or execution proceedings. So long as the sale deed remained, and the Plaintiffs were enjoying the possession of the suit property, no suit for rectification of the

deed was filed. Only when the Defendants sought to evict the Plaintiffs from the suit property, there was a change of heart as to the nature of the sale deed the rectification was sought. The Plaintiffs have cited authorities to the effect that the question of limitation is a mixed question of fact and law. As to this legal position, there is no quarrel. However, in the present case, the only two documents that need to be seen are the sale deed which is registered and admitted and the plaint which is also admitted. The sale deed is of 24th August, 2011 and the suit is of 2016. There is no development in between, which would extend limitation in this case. If the sale deed was wrongly recorded, rectification ought to have been immediately sought. There is no question of fact left to be decided in this case. Thus the suit is barred by limitation. The sale deed being of 24th August, 2011, the suit for seeking rectification of the same filed in 2016 is barred by time.

30. Section 58(c) of the Transfer of Property Act has no applicability in the present case inasmuch as the said Section only applies qua to mortgage deeds. The sale deed in the present case is not a mortgage deed and hence the said Section has no application. None of the grounds raised by the Plaintiffs are made out. Even in equity, the Plaintiffs have failed to make out a case. Admittedly, they had knowledge of the suit for possession which was filed. They were enjoying possession as a direct benefit of the lease deed which was executed by the third brother, Defendant no.3. In the absence of the lease deed they had no locus to stay in the suit property as they had already handed over possession when the sale deed was executed. In any event they are unauthorized occupants. The pleadings and the documents clearly point to the fact that all the three brothers were in collusion with each other in order to keep the dispute hanging and to continue to deprive the

Defendants of their legitimate rights. Even in equity, they are not entitled to any relief.

31. The Trial Court was right in holding that the suit is not maintainable. The appeal is accordingly dismissed. The keys of the two floors of the property lying with this court shall be handed over by the Registry to the Defendant No.1 and 2 by the Registrar on 30th May 2018.

32. Appeal is dismissed. No order as to costs. All pending applications are disposed of.

PRATHIBA M. SINGH, J.
Judge

MAY 23, 2018/*Rahul*