

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

% **Date of decision: 17th September, 2018.**

+ **EX.F.A. 19/2018**

SATISH CHAND

..... Appellant

Through: Mr. Ankit Jain with Mr. Sarvesh Rai
and Mr. Siddhant Nath, Advs.

Versus

RAJ KUMAR

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Notice issued to the respondent remains unserved with the endorsement 'left the premises'.
2. The counsel for the appellant states that the appellant is not aware of any other address of the respondent.
3. Considering the facts of the present appeal, the same is believable.
4. This Execution First Appeal impugns the order [dated 15th February, 2018 in Ex. Civil No.1267/2017 of the Court of the Additional District Judge-04 (South-West)] of dismissal of application for execution filed by the appellant.
5. The appeal came up first before this Court on 18th May, 2018 when notice thereof was ordered to be issued. The respondent as aforesaid, remains unserved.
6. The counsel for the appellant has been heard and the copies of the relevant Trial Court record annexed to the memorandum of appeal perused.

7. The appellant instituted the suit, from application for execution of decree wherein this Execution First Appeal arises, *inter alia* for recovery of possession of property No.1677-C, Todar Mal Colony, Prem Nagar, Najafgarh, Delhi – 110 043, pleading (i) that the appellant/plaintiff was a tenant under one Raghunath Singh in the aforesaid property at a monthly rent of Rs.1,700/-; (ii) the appellant/plaintiff was carrying on his business from the said premises; (iii) the respondent/defendant was a tenant under the same Raghunath Singh in another shop in the same property; and, (iv) that the respondent/defendant forcibly took possession of the shop of the appellant/plaintiff also. Accordingly, the suit for recovery of possession under Section 6 of the Specific Relief Act, 1963 was filed.

8. The respondent/defendant contested the aforesaid suit.

9. However the Suit Court, vide judgment dated 19th November, 2016 allowed the suit of the appellant/plaintiff and passed a decree in favour of the appellant/plaintiff and against the said Raghunath Singh of recovery of possession of shop in the tenancy of the appellant/plaintiff.

10. The counsel for the appellant/plaintiff, on enquiry states that no appeal was preferred against the aforesaid judgment.

11. The appellant/plaintiff applied for execution of the decree aforesaid and the respondent/defendant filed objections to such execution pleading that he had as far back as in the year 2016 handed over possession of the shop, for recovery of possession whereof decree was passed, to Raghunath Singh. Vide the impugned order dated 15th February, 2018, the objections of respondent/defendant have been allowed and the execution application of appellant/plaintiff has been dismissed.

12. The Executing Court has held, that once the respondent/defendant/judgment debtor had handed over possession to Raghunath Singh, the remedy if any of the appellant/plaintiff was against the said Raghunath Singh and not under the decree against the respondent/defendant.

13. The counsel for the appellant/plaintiff also admits that the respondent/defendant left the premises in the year 2016 and on enquiry states that Raghunath Singh is now in possession of the property.

14. It is in the aforesaid scenario that it has been observed hereinabove that the statement of the counsel for the appellant/plaintiff that the appellant/plaintiff is not aware of any other address of the respondent/defendant, is believable. The respondent/defendant admittedly is now left with no concern with the premises with respect to which decree was passed and would not be interested in defending the same.

15. Having found it mentioned in the judgment in the suit, that Raghunath Singh aforesaid had also filed proceedings for ejectment of the appellant/plaintiff from the premises, for recovery of possession of which the appellant had sued the respondent/defendant, the fate of the said proceedings has been enquired.

16. The counsel for the appellant/plaintiff states that Raghunath Singh had filed the said proceedings claiming the rent of the premises let out to the appellant/plaintiff to be Rs.13,500/- per month, when according to the appellant/plaintiff the rent was Rs.1,700/- per month. It is further stated that the said suit filed by Raghunath Singh has been dismissed vide judgment dated 6th January, 2017 in CS No.16731/2016 (Old No.329/2014) of the

Court of the Additional District Judge-04 (South-West)] and no notice of appeal if any preferred thereagainst has been received as yet.

17. The position which thus emerges is, (i) that the appellant/plaintiff himself, admittedly was/is a tenant in the shop under Raghunath Singh; (ii) a decree for recovery of possession of the said shop was passed in favour of the appellant/plaintiff and against the respondent/defendant; and, (iii) notwithstanding the said decree having attained finality, the application for execution of the said decree has been dismissed owing to the stand of the respondent/defendant that he had in January, 2016 i.e. prior to the date of the decree dated 19th November, 2016, delivered possession of the shop to the landlord Raghunath Singh. The question which arises is, whether on a defendant/judgment debtor so parting with possession of the property, for recovery of possession whereof from him a suit is pending, the suit or the decree ultimately passed therein can be defeated.

18. I have however, at the outset enquired from the counsel for the appellant/plaintiff, how this Execution First Appeal is maintainable.

19. The counsel for the appellant/plaintiff has drawn attention to Rule 103 of Order XXI of the Code of Civil Procedure, 1908 (CPC) and which in turn refers to adjudication under Rules 98 or 100 of Order XXI of the CPC. Rules 98 and 100 in turn refer to Rule 101 and which in turn refers to Rules 97 or 99.

20. On a composite reading of the said Rules, it transpires that findings in execution qua possession constitute a decree and are appealable as such. The appeal is thus found to be maintainable.

21. In my mind there is no doubt as to the position of law. Raghunath Singh, even if landlord of the appellant/plaintiff, could not have recovered possession of the premises let out to the appellant/plaintiff, save in accordance with law. Raghunath Singh on the contrary, has recovered possession of the said premises from the appellant/plaintiff, by taking possession thereof from the respondent/defendant who himself has been found in the judgment and decree in the suit, to have without the consent of the appellant/plaintiff and otherwise than in due course of law, dispossessed the appellant/plaintiff, from the said premises and who has been ordered and/or directed to deliver possession of the said premises to the appellant/plaintiff. If law were to be permitted to allow so, no claim for recovery of possession will ever attain finality or even if allowed by Court, fructify, with the dispossessors, without due process of law, from immovable property or persons in unauthorised occupation of immovable property, after fully contesting the proceedings filed against them for recovery of possession of such property and losing the said proceedings or when on the verge of losing the same, transferring possession to another and the lawful owner/occupier being required to institute fresh proceedings against such transferee.

22. The counsel for the appellant/plaintiff rightly draws attention to Section 52 of the Transfer of Property Act, 1882 which *inter alia* provides that during the pendency of a suit, the property cannot be transferred or otherwise dealt with, so as to affect the right of any of the parties thereto under any decree or order which may be made therein, except under the authority of the Court. The admitted act of the

respondent/defendant/judgment debtor, of handing over possession of the shop to Raghunath Singh, during the pendency of the suit filed by the appellant/plaintiff, amounted to otherwise dealing with the property and Raghunath Singh shall remain bound by the decree and the appellant/plaintiff, in execution, will remain entitled to recover possession from Raghunath Singh and/or whosoever else may be in possession of the property unless they establish any independent right.

23. I may add, that it is for this reason only that Order XXI Rule 35 of the CPC, while providing mode of execution of a decree for immovable property, in sub-rule (1) thereof provides that where a decree is for delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, by removing “any person bound by the decree who refuses to vacate the property”. The said Rule does not say ‘...by removing the defendant/judgment debtor from the property’. The decree is thus entitled to be executed, not only against the defendant/judgment debtor but against any person who may be found in possession of the property. This becomes further clear from Rule 102 of Order XXI which provides that nothing in Rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for possession of immovable property by a person to whom judgment debtor has transferred the property after the institution of the suit in which decree was passed or to the dispossession of any such person.

24. Though the law is absolutely clear and no precedent is required but since the Additional District Judge, notwithstanding the same has dismissed the execution, it is also deemed appropriate to refer to *Silverline Forum*

Pvt. Ltd. Vs. Rajiv Trust (1998) 3 SCC 723 holding that if the resistance to the execution is made by transferee *pendente lite* of the judgment debtor, the scope of adjudication under Rule 101 of Order XXI of the CPC would be shrunk to the limited question whether he is such transferee and on a finding in the affirmative regarding that point, the Execution Court has to hold that he has no right to resist in view of the clear language contained in Rule 102; it was further held that exclusion of such a transferee from raising further objection is based on the salutary principle adumbrated in Section 52 of the Transfer of Property Act. In ***Usha Sinha Vs. Dina Ram*** (2008) 7 SCC 144 it was further held that a transferee from a judgment debtor is presumed to be aware of the proceedings before a Court of law and that Rule 102 of Order XXI of the CPC takes into account the ground reality and refuses to extend a helping hand to purchasers of property in respect of which litigation is pending. It was reasoned that if unfair, inequitable or undeserved protection is afforded to a transferee *pendente lite*, a decree holder will never be able to realize the fruits of his decree and every time the decree holder seeks a direction from a Court to execute the decree, the judgment debtor or his transferee will transfer the property and the new transferee will offer resistance or cause obstruction; to avoid such a situation, Rule 102 of Order XXI of the CPC has been enacted.

25. Resultantly, the appeal is allowed and the impugned order is set aside and the execution application restored to the same position as immediately before the impugned order.

26. The Executing Court is however directed to, instead of issuing notice to the respondent/judgment debtor of the execution, issue notice thereof to

Raghunath Singh, who according to the appellant also is in possession of the shop, so that the independent claim if any of Raghunath Singh to the decretal property can be known.

27. The appeal is disposed of.

28. A copy of the impugned order and this judgment be forwarded to the Committee of Inspecting Judges of the learned Additional District Judge.

SEPTEMBER 17, 2018
'pp/bs'

RAJIV SAHAI ENDLAW, J.

