

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

% **Date of decision: 31st August, 2018**

+ **EX.F.A. 36/2018**

GAUTAM MODI

..... Appellant

Through: Mr. Rahul Sagar Sahay and Mr.
Siddharth Bangar, Advs.

Versus

PRAVIN CHANDRA MODI

(DECEASED) THR LRS

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No. 35491/2018 (for exemption)

1. Allowed, subject to just exceptions.
2. The application stands disposed of.

EX.F.A. 36/2018 & CM No. 35490/2018 (for stay)

3. This Execution First Appeal impugns the order [dated 9th August, 2018 in Execution No. 41/2016 (New Number 54326/2016) of the Court of Senior Civil Judge-North] of dismissal of the objections filed by the appellant / defendant / judgment-debtor to the execution sought by the deceased respondent / plaintiff / decree-holder of judgment and decree [dated 12th February, 2015 in RCA No. 6/2014 of the Court of Additional District Judge-04, North-West] allowing the appeal of the deceased respondent / plaintiff / decree-holder and passing a decree in favour of the deceased respondent / plaintiff / decree holder and against the appellant / defendant / judgment debtor, of i) permanent injunction restraining the appellant / defendant / judgment debtor from entering, living in or otherwise using LIG

Flat No.A-I/202 B, Lawrence Road, Delhi; and, ii) permanent injunction restraining the appellant / defendant / judgment debtor from causing any disturbance to residence of deceased respondent / plaintiff / decree-holder in the said flat and / or dispossessing the deceased respondent / plaintiff / decree-holder from the said flat.

4. The appellant/judgment debtor had raised several pleas in his objections.

5. One of the pleas in the objections was that the Court in which execution had been sought did not have jurisdiction to execute the decree as the decree was passed in appeal preferred by the deceased respondent / plaintiff / decree-holder against the judgment and decree of the Suit Court of dismissal of the suit. The said plea has been negated by the Executing Court by drawing the attention of the counsel for the appellant/judgment debtor to Section 37(a) of the Code of Civil Procedure, 1908 (CPC).

6. Another plea in the objections of the appellant/judgment debtor was, that a finding of title had been rendered in the decree in a suit for injunction and the Appellate Court thus did not have jurisdiction to pass the decree. The Executing Court has negated the said plea by reasoning that the judgement and decree of which execution was sought had attained finality and it was not open to the appellant/judgment debtor to raise the said plea in execution.

7. The third plea in the objections of the appellant/judgment debtor was, that the deceased respondent / plaintiff / decree-holder had obtained the decree on the basis of false and fabricated documents. Again, the Executing

Court has rightly held that the said plea was also beyond the domain of the Executing Court.

8. The fourth plea in the objections of the appellant/judgment debtor was, that the wife and daughter of the deceased decree holder were necessary and proper party to the execution proceedings. The said plea has been negated, by reasoning that as per the registered Gift Deed executed by the deceased respondent/plaintiff/ decree holder, the persons who had been substituted in place of deceased respondent / plaintiff / decree-holder in the execution proceedings only were the beneficiaries of the property under the Gift Deed. It was further ordered that the said plea also was not open in execution proceedings.

9. The last plea of the appellant/defendant/judgment debtor in his objections was, that the appellant/judgment debtor, on demise of the deceased respondent/ plaintiff/ decree holder had become a co-sharer in the property. Again, it was reasoned by the executing court that the deceased respondent/plaintiff/decreed-holder, in his life time, having executed the Gift Deed with respect to the property, there was no possibility of the appellant/defendant/ judgment debtor inheriting the property as an heir of the deceased respondent/ plaintiff/ decree holder.

10. Considering the nature of the objections aforesaid, I have enquired from the counsel for the appellant/judgment debtor as to how this appeal lies. The settled principle of law is that without statutory provision for appeal, no appeal lies. The appellant/ defendant/ judgment debtor has in the title of the appeal claimed the same to have been filed under Order XLIII Rule 1 read with Section 105 of the CPC.

11. However, the counsel for the appellant/ defendant/ judgment debtor states that he also was in a quandary in this respect but could not find any definite answer. It is further stated that the Registry of this Court also had raised the objection *qua* maintainability of this appeal and the counsel for appellant/ defendant/ judgment debtor had requested to have the appeal listed subject to the said objection and undertaken to satisfy this Court as to maintainability.

12. The counsel for the appellant draws attention to Section 96 of the CPC. However, on being asked whether not Section 96 provides for appeals only against decrees passed by the Court exercising original jurisdiction, the counsel states that as per definition of decree, the same includes an order which has a ring of finality. Attention of the counsel for the appellant is drawn to Section 2(2) of the CPC which provides for only such orders in the suit and not orders in Execution.

13. I have in ***Sumeet Saluja Vs. A.K. Hab Europe BV*** 2018 SCC OnLine Del 10072 dealt with the aspect of maintainability of appeals from orders in Execution and have held:

“19. This Execution First Appeal, even otherwise is not maintainable. All orders made in the course of the execution or adjudicating objections under Section 47 of the CPC have not been conferred the status of a decree, for an appeal to lie thereagainst. The definition of a decree under Section 2(2) of the CPC does not include an order on objections aforesaid preferred by the appellant. Though Section 2(2) of the CPC, as it stood prior to the amendment of CPC of the year, 1976, included in the definition of decree, the determination of any question within Section 47 of the CPC but vide amendment of the CPC of the year 1976,

determination of any question within Section 47 is no longer a decree. Else, Order XXI, only in Rules 46H, 58 and 103 makes the orders thereunder appealable. Under Rule 46H, orders under Rules 46B, 46C or 46E i.e. against a garnishee or third persons, have been made appealable. Under Rule 58, invoking which this appeal has been preferred, adjudication of claims to, or objections to attachment of property on the ground that such property is not liable to such attachment has been conferred the same status as a decree. Under Rule 103, an adjudication under Rules 98 and 100 adjudicating possession of immovable property have been conferred the status of a decree. The objections raised by the appellant / judgment-debtor, against dismissal of which this appeal has been preferred, do not fall in any of the said categories. A right to appeal is otherwise not a natural right and has to be specifically conferred. No right of appeal has been conferred against an order of dismissal of objections as aforesaid and invocation of the appellate remedy thereagainst thus is even otherwise misconceived.”

Reference in this regard may also be made to *Arjun Thapan Vs. Anita Thapan* 2018 SCC OnLine Del 10105, *North Delhi Power Ltd. Vs. Mahindra Cold Storage* 2018 SCC OnLine Del 9945 and *Vijay Patel Vs. Jugal Kishore* 2018 SCC OnLine Del 10279.

14. The counsel for the appellant / defendant / judgment debtor next relies upon Section 47 of the CPC. However, the same also does not provide for any appeal and has already been dealt with in the judgments aforesaid.

15. No other argument as to the maintainability of the appeal has been urged.

16. The counsel for the appellant/ defendant/ judgment debtor has thus failed to satisfy this Court as to the maintainability of the appeal.

17. However, even if the impugned order was to have stature of a decree and be appealable, the appeal to this Court is still misconceived. The impugned order is of the court of the Senior Civil Judge and the appeal, even if were to be allowed, would lie to the District Judge and not to this Court.

18. The counsel for the appellant / defendant / judgment-debtor, during the hearing, has referred to *M. Desikachariar Vs. Ramachandra Reddiar* AIR 1951 Mad 56, *S.P. Chengalvaraya Naidu Vs. Jagannath* AIR 1994 SC 853 and *Kishan Lal Barwa Vs. Sharda Sharan* MANU/UP/0163/2015, all on the aspect of fraud in obtaining a decree.

19. Though once this appeal itself is found to be not maintainable, citing of the aforesaid judgments on the merits of the appeal is irrelevant but for the sake of clarity it is deemed appropriate to notice the facts as emerging from the file, though the counsel for the appellant / defendant / judgment-debtor has not argued the same.

20. The deceased respondent / plaintiff / decree-holder was the father of the appellant / defendant / judgment-debtor and was residing in the same flat. It was the plea of the deceased respondent / plaintiff / decree-holder in the plaint in the suit, that he was the owner / resident of the subject flat and had also allowed the appellant / defendant / judgment-debtor use thereof as a son but the appellant / defendant / judgment-debtor was causing nuisance to the residence of the deceased respondent / plaintiff / decree-holder and other family members in the said flat. On the contrary, it was the plea of the appellant / defendant / judgment-debtor in his written statement (a) that it was the mother of the appellant/defendant/judgment-debtor who had purchased the said flat; that the Agreement to Purchase the said flat was in the name of the

mother of the appellant / defendant / judgment-debtor; (b) that the mother of the appellant / defendant / judgment-debtor had instituted proceedings under the Protection of Women from Domestic Violence Act, 2005 against the deceased respondent / plaintiff / decree-holder and in which proceedings, the possession of the mother of the appellant / defendant / judgment-debtor with respect to one room in the flat had been protected; (c) that the appellant / defendant / judgment-debtor had been allowed by his mother to reside in the flat; and, (d) that the deceased respondent / plaintiff / decree-holder, taking advantage of the power of attorney obtained from the allottee / owner of the said flat in the name of the deceased / respondent / plaintiff / decree-holder, had fraudulently got the sale deed with respect to flat executed in his own name.

21. The suit of the respondent / plaintiff / decree-holder as aforesaid was dismissed by the Suit Court but on appeal by the respondent / plaintiff / decree-holder, was allowed by the First Appellate Court and which judgment has attained finality. It was reasoned by the First Appellate Court that though it was the plea of the appellant / defendant / judgment-debtor that the agreement to purchase the subject flat was in favour of his mother but the appellant / defendant / judgment-debtor, at the same time had also admitted execution of a Conveyance Deed with respect to the flat in the name of deceased respondent / plaintiff / decree-holder and the appellant / defendant / judgment-debtor had thereby admitted the title and ownership of the respondent / plaintiff / decree-holder and the respondent / plaintiff / decree-holder as owner of the flat was entitled to the reliefs sought in the suit against the appellant / defendant / judgment-debtor who had not disclosed any right to the flat.

22. The deceased respondent / plaintiff / decree-holder applied for execution of the decree in his favour. During the pendency of the said execution, the respondent / plaintiff / decree-holder died. The three brothers of the appellant / defendant / judgment-debtor sought substitution in place of deceased respondent / plaintiff / decree-holder on the basis of a registered Gift Deed with respect to the subject flat executed by the deceased respondent / plaintiff / decree-holder in their favour. The stand of the appellant / defendant / judgment-debtor was that since the deceased respondent / plaintiff / decree-holder himself had no right to the flat and had got the Conveyance Deed with respect to the flat executed in his favour fraudulently, he could not have executed the Gift Deed.

23. I may at this stage highlight that though under Rule 103 of Order XXI of the CPC, an order under Rules 98 and 100 adjudicating possession of immovable property has been conferred the status of a decree but the objection aforesaid of the appellant / defendant / judgment-debtor did not fall under Rules 98 and 100 also.

24. It has however also emerged from the record that the appellant / defendant / judgment-debtor, after the demise of the deceased respondent / plaintiff / decree-holder, has filed a suit which was pending in the Court of another Civil Judge, asserting his rights in the flat aforesaid. However, there is no interim order in that suit with respect to the subject execution or against dispossession pursuant to the decree for injunction, from the subject flat.

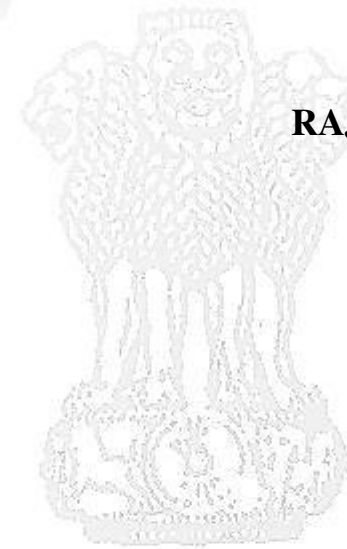
25. It is clarified that the aforesaid factual aspects have been mentioned only for the purpose of clarity and be not deemed as any observation on the merits of the challenge to the order of dismissal of objections as the counsel

for the appellant / defendant / judgment-debtor states that the appellant / defendant / judgment-debtor will be taking appropriate remedies available in law thereagainst.

26. The appeal is thus dismissed as not maintainable. Needless to state, that if the appellant has any other remedy in law available against the order dated 9th August, 2018, he shall be entitled to invoke the same.

AUGUST 31, 2018
'SR/gsr'..

RAJIV SAHAI ENDLAW, J.



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