

**ESA No.64 of 2017 (O&M) AND
CR No.6097 of 2015 (O&M)**

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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Date of decision : 13.02.2019

1.

ESA No.64 of 2017

Avtar Singh

... Appellant

Versus

Dalwinder Singh and others

... Respondents

2.

CR No.6097 of 2015 (O&M)

Avtar Singh

... Petitioner

Versus

Dalwinder Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Sunil Chadha, Senior Advocate with
Mr. Chetan Bansal, Advocate
for the appellant in ESA-64-2017 and
for the petitioner in CR-6097-2015.

Mr. Naveen Sharma, Advocate
for respondent Nos.1 and 2 in CR-6097-2015.

Mr. Malkiat Singh, Advocate
for respondent Nos.1 and 2 ESA-64-2017.

Mr. Harish Goyal, Advocate
for respondent No.4.

AMIT RAWAL, J.

This order of mine shall dispose of one **Execution Second
Appeal No.64 of 2017** titled as **"Avtar Singh V/s Dalwinder Singh and**

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others", preferred against the orders dated 28.08.2015 and 21.09.2015, whereby the objection (Annexure A-1) against the judgment and decree dated 29.08.2013, has been dismissed and other **Civil Revision No.6097 of 2015** titled as **"Avtar Singh V/s Dalwinder Singh and others"** preferred against the impugned order dated 28.08.2015, whereby warrant of possession has been issued.

The appeal is accompanied by an application seeking condonation of delay of 697 days by averring that against the aforementioned order, the petitioner filed the Civil Revision No.6097 of 2015 by realizing that the aforementioned orders were appealable in view of the provisions of Order 43 Rule 1 of the Code of Civil Procedure and in this process, delay occurred. Even the attention of this Court was also drawn to the order dated 20.11.2017, while issuing notice in the application for condonation of delay, the appeal was ordered to be heard with CR No.6097 of 2015.

It was stated that respondent Nos.1 and 2-plaintiffs instituted the suit on 02.01.2008 against respondent Nos.3 to 5 i.e. defendants, seeking possession by way of specific performance of agreement to sell dated 04.01.2006, by laying challenge to the sale deed dated 04.04.2006 executed by respondent No.3 in favour of respondent No.5 through her attorney i.e. respondent No.2. In the aforementioned suit, the trial Court, on 22.09.2007 passed the status quo order, but on the statement made by respondent Nos.1 & 2 i.e. plaintiffs, in the suit, did not press the application for stay.

Vide sale deed dated 11.03.2011, respondent No.5 without

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disclosing the fact of pendency of the suit, sold the suit property in favour of the appellant and his brother Inderjit Singh/respondent No.6, through registered sale deed dated 11.03.2011 for a sale consideration of ₹25 Lacs. Respondent No.5, in the aforesaid suit, was proceeded ex parte, whereas respondent No.3-vendor denied the execution of the agreement to sell in favour of the plaintiffs, but the suit vide judgment and decree dated 29.08.2013, was ultimately decreed.

The plaintiffs/respondent Nos.1 and 2, instituted the execution application. When the notice was served, the appellant, under the *bona fide* legal advice, was suggested to file the civil suit on 03.04.2015, claiming declaration of absolute owner in possession, on the basis of registered sale deed dated 11.03.2011, by laying challenge to the aforementioned judgment and decree. However, on 02.05.2015, preferred an objection in the execution application purported under Order 21 Rule 58 of CPC (Annexure A1). The trial Court dismissed the objection without framing the issue and the appeal laid before the lower Appellate Court was also dismissed being not maintainable.

Mr. Sunil Chadha, learned Senior Counsel assisted by Mr. Chetan Bansal, learned counsel appearing on behalf of the petitioner in CR No.6097 of 2015 and for the appellant in ESA No.64 of 2017, submitted that the appellant was third party and the objection as per the provisions of Order 21 Rule 98 of CPC was to be adjudicated as a suit being in possession. He was not party in the suit and therefore, the trial Court was required to frame the issues.

Mr. Chadha, on instructions from his client, submitted that the

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suit filed much before the filing of the objections, which was on wrong and incorrect advice shall be withdrawn. The appellant is not a transferee *pendente lite* in view of the provisions of Rule 102 of Order 21 of CPC and therefore, can possibly be said to be resisting the possession in execution of the decree, particularly when respondent No.3, subsequent vendee, drew title from original vendor, who sold the property, in dispute, to the appellant. It was also submitted that delay may be condoned as the reasons mentioned in the application are *bona fide* as delay is neither willful or intentional.

Per contra, Mr. Malkiat Singh, Mr. Naveen Sharma and Mr. Harish Goyal, learned counsels appearing on behalf of the respondents submitted that it is a collusive action of the defendants. They are transferee *pendente lite* and the objection as per the provisions of Rule 102 of Order 21 of CPC, would not be maintainable nor be permitted to obstruct the possession alleged to have been taken in pursuance to the sale deed. The sale deed was hit by doctrine akin to *lis pendens*. In such circumstances, both the Courts below did not err in rejecting the objection as framing of issues would have been a farcical exercise, thus, urges this Court for dismissal of the revision petition as well as execution second appeal.

I have heard learned counsel for the parties, appraised the paper book and of the view that it is a settled law that where third party objection are filed obtaining the decree and decision thereon, has a trapping of a decree, thus, appealable. The lower Appellate Court, vide impugned order, dismissed the appeal without any merit except on maintainability. For the sake of brevity, the relevant portion of the order reads as under:-

"Arguments heard on maintainability of the appeal. This Civil Appeal is directed against order dated 28.08.2014 of the Executing Court, whereby third party objections filed by the appellants/objectors have been dismissed. Execution application was filed by the respondent/decree holder for execution of decree dated 29.08.2013 for specific performance of agreement to sell dated 4.01.2006 executed by the Judgment Debtor in favour of the respondent/Decree Holder. According to the learned counsel for the appellant, their objections were under Order 21 Rule 34 of CPC.

However, Order 21 Rule 34 of CPC provides as under:-

"34. Decree for execution of document, or endorsement of negotiable instrument.—(1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered."

However, perusal of the grounds of appeal, impugned and copy of objections filed by the appellants/objectors before the Executing Court show that the same are not under Order 21 Rule 34 of CPC, which provides for filing of objections by the Judgment Debtor against draft sale deed prepared by the Decree Holder. In the present case, the appellants/objectors are not the Judgment Debtors. Rather, they filed third party objections, being subsequent purchaser of the suit property vide sale deed dated 11.03.2011 executed in their favour by the Judgment Debtor during the pendency of the suit, wherein decree dated 29.08.2013 was passed.

As per provisions Order 43 Rule 1 of CPC, an appeal shall lie from the orders under Rule 34, 72, 92, 105(1) and 106(1) of Order 21 of CPC only. Therefore, this appeal is not maintainable as per provisions of Order 43 of the CPC and hence the same is dismissed as such. File be consigned to the Record Room."

In my view, the aforesaid adjudication is wholly incorrect as it conclusively determines the right of the party. The lower Appellate Court ought to have decided the appeal on merits. The manner and mode, as adopted by the lower Appellate Court, is not sustainable in the eyes of law being fallacious and perverse.

Resultantly, the impugned orders, are hereby set aside and the matter is remitted to the lower Appellate Court to decide the appeal afresh on merit within a period of two months from the date of receipt of certified copy of this order. It is a matter of record that the appeal did not mention any provisions, as noticed by the lower Appellate Court.

The parties or through their counsel are directed to appear before the lower Appellate Court on 19.03.2019.

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Resultantly, the application seeking condonation of delay as well as the execution second appeal stand disposed of.

As regards the revision petition, since Mr. Chadha, during the course of hearing, on instructions from his client, undertakes to withdraw the suit bearing No.89 of 03.04.2015 pending in the Court of Civil Judge (Junior Division) Kharar, with liberty to raise all points, which are required to be determined by the Executing Court, before the Appellate Authority.

In view of above, the revision petition is ordered to be dismissed as withdrawn with the liberty aforesaid.

I cannot remain oblivious of the fact that there is an interim order dated 24.09.2015 passed in CR No.6097 of 2015, accordingly, till the decision of the appeal, the same shall remain in force.

13.02.2019
Yogesh Sharma

**(AMIT RAWAL)
JUDGE**

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Whether speaking/reasoned **Yes/ No**

✓

Whether Reportable **Yes/ No**