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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 19th November, 2020
Date of decision: 17th December, 2020

+ EX.F.A. 9/2020 & CM APPLs. 21460-63/2020

VATEENA BEGUM

..... Appellant

Through: Md. Azam Ansari, Advocate along
with Appellant in person (M-
9990066404).

versus

SHAMIM ZAFAR & ANR.

..... Respondents

Through: Mr. S.P. Jha, Advocate for R-1 (M-
9811009625).

Mr. S.S. Haider, Advocate for R-2
(M-9268355366).

CORAM:

JUSTICE PRATHIBA M. SINGH
JUDGMENT

Prathiba M. Singh, J.

1. This judgment has been pronounced through video conferencing.
2. The present appeal challenges the impugned order dated 13th August, 2020, by which the Executing Court has rejected the objections filed by the Appellant under Order XXI Rule 97 and 101 CPC. The case of the Appellant is that she had purchased the property bearing no. S-18/18, Jogabai Extension, Near Mumtaz Masjid, Jamia Nagar, Okhla, New Delhi-110025 (*hereinafter, "suit property"*) on 21st June, 2012, by way of General Power of Attorney, Agreement to Sell and Purchase, Affidavit, Will, Possession letter and Receipt of Money for a consideration of Rs. 9,00,000/-. The said documents were executed by Mr. Dilawar Hussain Malik on 2nd

July, 2012.

3. On the other hand, the case of the Respondents/Decree holders is that they had purchased the property from Mr. Dilawar Hussain Malik and his wife Ms. Nazma Malik vide documents dated 2nd July 2012. They had executed an Agreement to Sell and Receipt. The agreed consideration was Rs. 6,00,000/- for the said property, out of which Rs. 3,00,000/- was paid to the seller. The Respondents filed a suit for specific performance and the Defendants i.e., Mrs. and Mr. Malik, remained *ex-parte*. They did not file any pleadings and an *ex-parte* decree for specific performance was passed on 11th November, 2013 by the Trial Court, in favour of the Respondents. The remaining amount of consideration of Rs. 3,00,000/- was deposited with the trial court at the time of drawing up of the decree.

4. When the decree holders sought execution of the decree, the Appellant filed objections, which were rejected. The reasoning of the Executing Court for rejecting these objections was that all the documents relied upon by the Appellant are unregistered, and owing to the judgment of the Supreme Court in ***Suraj Lamps and Industries v. State of Haryana* [183 (2011) DLT 1 (SC)]**, no title can be conferred upon the Appellant, based on unregistered documents. Further, the Court held that no trial would be required as even if these documents are taken on file as evidence, by virtue of them being unregistered documents, they would not be valid and would confer no title. Accordingly the court held that no trial would be required and the objections were dismissed.

Submissions

5. When the matter was heard at the preliminary stage, an apprehension had been expressed by the Id. counsel for the Respondents/Decree holders,

that the documents of the Appellant are forged. As per the RTI records, the stamp paper on the basis of which the Appellant claimed to have purchased were sold only on 10th July, 2012 and 27th August, 2012. Thus, the counsel for the Respondents submitted that the date of the documents being 21st June, 2012, in fact shows that the documents relied upon are forged and completely illegal. In view thereof, the matter was taken up in physical Court and the original documents were summoned. Both the parties have filed their original documents on record and both are retained with the court in a sealed cover.

Appellant's Submissions:

6. Mr. Ansari, Id. counsel for the Appellant submits that as per Order XXI Rule 97, read with Rule 101 and 103 of the CPC, objections have to be tried like a suit and hence a trial is essentially required. He submits that the prayers of the Appellant in their objections to the execution are in the nature of declaration of right and title in the suit property, and the same requires to be adjudicated upon after proper cross examination. He further submits that the Court has to determine as to who holds the better title between the Appellant and the Respondents.

7. Reliance is placed by Id. counsel for the Appellant on ***Vikas Wadhwa v. Pradeep Kumar & Ors. [256 (2019) DLT 787]***, upheld by the Hon'ble Supreme Court [vide order dated 03/07/2019 in ***SLP (C) Diary No. 19663/2019***], ***Rajeev Dutta and ors. v. Punjab Waqf Board [(2003) AIHC 3144]***, ***Noorduddin v. Dr. K.L. Anand [(1995) 1 SCC 242]***, ***Shreenath & Anr. v. Rajesh & Ors. [AIR 1998 SC 1827]***, ***Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal & Anr. [(1997) 3 SCC 694]***, ***Har Vilas v. Mahendra Nath & Ors. [(2011) 15 SCC 377]*** and ***Maya Devi v. Lalta***

prasad [AIR 2014 SC 1356].

8. In effect, Mr. Ansari, Id. counsel for the Appellant, submits that even if the case of the Respondents that the documents of the Appellant are forged, is to be considered, the same would require time and an opportunity for the Appellant to cross examine the Respondents, especially as to the validity of the documents on the basis of which the decree itself has been passed.

9. Id. counsel further submits that by virtue of the documents of the Respondents i.e. “*An agreement to Sell – Advance receipt*”, having been executed subsequent to that of the Appellant, the rejection of the objections in a preliminary manner, without trial, is not tenable. The Appellant’s documents are of 21st June 2012 and the Respondents’ Agreement to Sell was of 2nd July 2012 i.e. in the next month.

10. Mr. Ansari, Id. counsel for the Appellant, refers to his written submissions and submits that various legal issues arise in this matter. Both parties have entered into agreements with the two co-owners of the property, who are both no longer alive. The entire chain of documents in favour of the Appellant cannot be of less validity compared to the Respondents’ documents of July 2012. He submits that by virtue of both parties being in the same position, issues ought to have been framed and objections be heard after conducting a trial, as to who holds a better right, title and interest in the suit property.

11. Mr. Ansari further submits that though the *Suraj Lamps (supra)* judgment has been considered by the Trial Court as defeating the Appellant’s rights, the same judgment would then be applicable in the case of the Respondents as well. He relies upon two judgments, namely, *Vikas*

Wadhwa (supra) and ***Maya Devi (supra)*** in support of his case.

12. He further submits that as soon as the Appellant came to know that warrants of possession were issued, they entered appearance on 29th May, 2018, and informed the Court that they are in possession of the property and have documents in their favour, as recorded in the order dated 29th May, 2018. He thus submits that the objections of the Appellant could not have been dismissed in a summary manner by the Executing Court.

13. Mr. Ansari, Id. counsel for the Appellant, finally submits that the sale consideration, which was paid by the Appellant in June 2012, is Rs.9 lakhs and two of the witnesses, namely, Mohd. Aslam and Mr. Irfan Khan are still alive and that he would be able to establish the said payment, if given an opportunity before the Executing Court.

Respondents' Submissions

14. Mr. Jha, Id. counsel for the Respondents, on the other hand, submits that the Appellant is not entitled to the benefit of Section 53A of Transfer of Property Act as under Section 17 of the Registration Act, unless the agreement to sell or power of attorney is registered, the benefit under section 53A, of part performance, cannot be given.

15. He submits that the judgment in ***Vikas Wadhwa (Supra)***, relates to documents which were executed in 2001 and not post the judgment in ***Suraj Lamps (supra)*** and thus, the same would not benefit the Appellant in any manner. He further submits that since the Appellant has also purchased the property from the same original owner, the provisions of Order XXI Rule 97 would not apply.

16. Id. Counsel further submits that in both the judgments relied by the

Appellant i.e. *Vikas Wadhwa (Supra)* as well as *Maya Devi (Supra)*, the documents were executed prior to the rendering of the *Suraj Lamps (supra)* decision. *Suraj Lamps (supra)* is not to be held applicable in a retrospective manner, however, in the present case, the Appellant's documents are of 2012, subsequent to the decision in *Suraj Lamps (supra)*.

17. Insofar as the Respondents/Decree holders' own documents are concerned, Mr. Jha, submits that the July 2012 document was an Agreement to Sell. On the basis of this Agreement to Sell, a suit for specific performance was filed by the Respondents against the Original Owners Dilawar Malik and Nazma Malik. The decree of specific performance was passed and thereafter the Respondent deposited the money in the Court. The registered sale deed to give effect of that decree has therefore now been executed. He submits that the Executing Court cannot go beyond the registered sale deed in favour of the Respondents.

18. On a query from the Court, Mr. Jha submits that the entire sale consideration as per the Agreement to Sell was Rs.6 lakhs out of which Rs.3 lakhs was paid prior to the filing of the suit for specific performance. The remaining Rs.3 lakhs is lying deposited in the Trial Court, pursuant to which, the sale deed was executed in favour of the Respondents.

19. Ld. Counsel also submits that the documents of the Appellant are fabricated, which in his submission is evident from the interpolation of the number of the property in all the documents. It is further submitted that in the letter for possession, there is no signature of the person who had handed over the possession. Further, in his submission the Aadhar Card on record is of 2018 and the decree was passed in 2013. He finally submits that the receipt filed on record by the Appellant in fact does not have any witness

whatsoever, and no affidavits of witnesses can be entertained when the documents itself do not have any witness.

Analysis and findings:

20. The admitted facts in this case are as under:

(i) The original owner, in respect of the agreements of both the parties before this court, is Mr. Dilawar Hussain Malik. The Appellant has allegedly entered into the following documents in respect of the property with the original owner:

(a) a General Power of Attorney ('GPA') by the owner in favour of the Appellant dated 21st June, 2012.

(b) an Agreement to sell and purchase dated 21st June, 2012.

(c) an Affidavit of the owner dated 21st June, 2012.

(d) a Will dated 21st June, 2012, purportedly executed by the owner.

(e) an unsigned Possession Letter which is witnessed by two witnesses and the Petitioner. However, there is no signature of the owner in this document

(f) a Receipt for a sum of Rs.9,00,000/- executed by the owner.

(ii) None of the Appellant's documents are registered.

(iii) The sale consideration fixed is Rs. 9,00,000/-.

(iv) The entire amount is purportedly received only in cash.

(v) On the other hand, the Respondents/ Decree Holders filed a suit for specific performance on the strength of an Advance Receipt-cum-Agreement to Sell and Purchase, dated 21st July, 2012, with the same original owner.

(vi) The consideration recorded in this agreement is Rs.6,00,000/-.

Advance payment of Rs.1,00,000/- is stated to have been made out of which Rs.45,000/- is a cheque payment.

(vii) There is also a receipt executed by one Mr. Mohd. Javed, who is stated to have received Rs. 2,00,000/- i.e. a part of the remaining sale consideration.

21. The suit for specific performance and permanent injunction was filed by the Respondents/ Decree Holders in September, 2012. A perusal of the trial court record reveals that in the suit, repeated summons were issued to the Defendant/ Original Owner of the property (*hereinafter, "Defendant"*). Finally, the Defendant was served by publication on 21st January, 2013, in *The Statesman*. The order sheets of the suit file also show that since the inception of the suit for specific performance, no one had appeared for the Defendants. The address of the suit property and the Defendant's residence are in the same area of Jamia Nagar.

22. In the suit, issues were framed on 21st January, 2013. Only *ex parte* evidence was led, and the suit was decreed by the Trial Court on 11th November, 2013. At the time of filing of the suit, Rs. 3,00,000/- was paid by the Plaintiff to the owner. After the decree was passed, at the time of execution, the remaining Rs. 3,00,000/- was deposited by the Decree Holders in the trial court. Out of the initial payment of Rs.3,00,000/- only a payment of Rs.60,000/- was made by cheque and all the remaining payments were admitted to have been made by cash. The Respondents/ Decree Holders have also produced the original documents i.e. Agreement to sell and the Receipt.

23. Thereafter, the decree of specific performance, which was passed by

the trial court, was sought to be executed by the Respondents/ Decree Holders.

24. The Executing Court, on 9th March, 2017, directed the Court Commissioner to execute the sale deed in favour of the Respondents/ Decree Holders. Warrants of possession were first issued on 4th April, 2018. The same were returned unexecuted, according to the order dated 29th May, 2018, passed by the Executing Court. The report of the bailiff was recorded in the said order as under:

“Warrants of possession are returned un-executed. The bailiff reports that when the warrants of possession was sought to be executed on 04.05.2018 in the presence of the DH and as per the demarcation and identification of the property by the DH one person by the name of Irshad, his wife and son and daughter were found in occupation of the premises and orally stated that the property belongs to them and that they shall not vacate the property at any cost and that the execution of the warrant of possession were resisted by the aforesaid persons and that there is a likelihood of breach of peace in the execution of the warrants of possession and therefore police aid may be provided for in the execution of the warrants of possession.

She. Abid Ibrahim, Advocate appears and submits that Smt. Watina is the bonafide purchaser of the sit property and that she came to know about the decree and the warrant of possession last evening and that she shall be taking the appropriate steps in accordance with law.

XXXX”

25. When warrants of possession were issued by the Executing Court, the Appellant was found residing at the suit property. It is on the occasion of this warrant being executed that the Appellant is stated to have acquired

knowledge of the decree, and has thereafter moved these objections to the execution under Order XXI Rule 97 and 101 of the CPC. The crux of the Appellant's case is that the documents were executed in her favour, one month prior to that in favour of the Respondents/Decree Holders. Admittedly, the Appellant is in physical possession of the property. The objections were dismissed by the impugned judgment of the Executing Court, on the ground that none of the documents of the Appellant are registered, and hence the same would not confer any legal title to the property, in the Appellant's favour, in view of the judgment of the Supreme Court in *Suraj Lamps (supra)*.

26. The submissions made by the parties have already been recorded above. The questions raised in the present appeal are:

- (a) Whether it was compulsory for the Executing Court to frame issues and adjudicate the objections after trial?
- (b) Whether there exists any validity or sanctity in law to the documents which have been put forward by the Appellant, and if so to what effect?

27. Insofar as the first question is concerned, the Executing Court while adjudicating objections, filed under Order XXI Rule 97 to 106 of the CPC, has the discretion to frame issues and to conduct a trial in the matter. However, it is not in every case that the objections would have to be adjudicated after a trial. The discretion given to the executing court is very wide. The Executing Court may decide against holding a trial, if according to the court, the facts do not require the same. Every question raised by the Objector need not be decided by the Executing Court, after trial. It would have to consider as to whether the issues raised, even arise in the matter. It is

not necessary to call for evidence in every case wherein objections have been raised in an execution proceeding. The discretion purely vests with the Executing Court. The Executing Court has the option to either frame issues while deciding, record evidence while adjudicating upon the objections, or to merely consider whether such a course of action is even required or not.

28. In *Silverline Forum Pvt. Ltd. v. Rajiv Trust and Ors. (1988) 3 SCC 723*, the Hon'ble Supreme Court has held:

“xxx

10. It is true that Rule 99 of Order 21 is not available to any person until he is dispossessed of immovable property by the decree-holder. Rule 101 stipulates that all questions "arising between the parties to a proceeding on an application under rule 97 or rule 99" shall be determined by the executing court, if such questions are "relevant to the adjudication of the application".....

11. When a decree-holder complains of resistance to the execution of a decree it is incumbent on the execution court to adjudicate upon it. But while making adjudication, the court is obliged to determine only such question as may be arising between the parties to a proceeding on such complaint and that such questions must be relevant to the adjudication of the complaint.

12 . The words "all questions arising between the parties to a proceeding on an application under Rule 97" would envelop only such questions as would legally arise for determination between those parties. In other words, the court is not obliged to determine a question merely because the resistor raised it. The questions which executing court is obliged to determine under rule 101, must possess two adjuncts. First is that such questions should have legally arisen

between the parties, and the second is, such questions must be relevant for consideration and determination between the parties, e.g. if the obstructer admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. Hence, it is necessary that the questions raised by the resistor or the obstructer must legally arise between him and the decree-holder. In the adjudication process envisaged in order 21 Rule 97(2) of the Code, execution court can decide whether the question raised by a resistor or obstructer legally arises between the parties. An answer to the said question also would be the result of the adjudication contemplated in the sub-section.

.....

14. The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or even on the averments made by the resistor. Of course, the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary. xxx"

29. It is the settled legal position as held by various High Courts and the Supreme Court that the Executing Court merely needs to appreciate the documents filed on the record, apply its mind to the same, and decide the objections. It is only if complex facts are put up, or on a perusal of the documents relied upon, evidence is required, that issues need to be framed and evidence may be called for.

30. The short case of the Appellant is that she has various documents in

her favour. The Court has seen the original documents. None of the documents are registered. It is, however, agreed by both counsels for the parties that Mr. Dilawar Hussain Malik and his wife are no longer alive but the date of their death has not been ascertained or produced before the court. The Appellant has a “Will” executed in her favour dated 21st June, 2012 along with the other documents. The same is purportedly signed by the owner Dilawar Hussain Malik, and is witnessed by two witnesses. Though the remaining unregistered documents namely the GPA, Agreement to Sell, Affidavit etc. would not confer any rights, the Will stands on a completely different footing. Unless and until the Will is argued to be forged or fabricated, the Petitioner ought to be given a chance to prove the Will as both the owner Dilawar Hussain Malik and his wife Najma Malik are no longer alive. The Executing Court is right, to the extent that since the Appellant’s documents are unregistered, and they are purportedly executed post the judgment in *Suraj Lamps (supra)*, they may not have any sanctity in law. However the position in respect of the Will would be completely different, as it would raise several complexities with respect to the transfer and registration in favour of the Respondents/ Decree Holders, given that the date of death of the Defendant has not been established before this court. The Appellant has filed affidavits of two persons - namely Mr. Irfan Khan and Mohd. Islam who are stated to be the witnesses in the Will.

31. The lower court record in this case shows that the Respondents/Decree Holders do have a decree for specific performance in their favour. The objections by the Appellant however, do raise an issue as to the right, title and interest of the two parties, with respect to the suit property. The Appellant is in physical possession of the property. It is

extremely surprising that neither at the time of entering into a transaction with the original owners, nor during the pendency of the suit, did the Respondents ascertain as to who was in possession of the property. In both the Agreements to Sell, possession of the property is not handed over. The clauses in the Agreements to Sell, qua possession, read as under:

Agreement dated 21st June 2012 in favour of the Appellant:

“2. That the FIRST PARTY undertake to handover the vacant physical possession of the said Property unto the SECOND PARTY at the spot along with all documents related thereto after receiving full and final sale consideration and registration of GPA/ Will and all other relevant documents in the office of the Sub-Registrar, New Delhi. xxx”

Agreement dated 2nd July 2012 in favour of the Respondent:

“ 4. That FIRST PARTY shall handover the peaceful vacant possession of the said property to the SECOND PARTY or his/her/their nominee(s) along with the photocopy/original documents and papers in respect of the said property at the spot. xxx”

From the above clauses it is clear that both parties allegedly parted with consideration without insisting on physical possession. The possession letter in favour of the Appellant does not bear the signature of the seller. Neither party got the documents of sale registered. How and when the Appellant came into possession, is not clear at this point.

32. As per Order XXI Rule 101 of the CPC, any dispute which arises in respect of the right, title or interest in a property between the parties in proceedings before the Executing Court, i.e. the Decree Holder and the

Objector, the same need not be decided by a separate suit. The legislative mandate is that the objections ought to be adjudicated in the execution petition itself, in order to avoid multiplicity of proceedings and conflicting rulings.

33. It is the settled legal position that the Executing Court cannot go beyond the decree. However the question is whether the Appellant has any right, title or interest in the property in view of the documents and the Will dated 21st June, 2012. Whether the registered sale deed executed by a Court Commissioner in favour of the Respondent is valid or not would also have to be considered, depending upon the date of death of Mr. Malik and his wife i.e. the original owners. It is also the settled legal position that a Will need not be registered in Delhi for being enforced and needs to be only proved in terms of Section 68 of the Indian Evidence Act, 1872.

34. The Appellant's case is also not beyond suspicion in as much as the entire sale consideration of Rs.9 lakhs is purportedly paid in cash and none of the documents are registered. The RTI documents relied upon by the Respondent cannot be straightaway taken as proved. Some evidence will be required on this aspect as well.

35. Thus, a perusal of the original documents placed on record by both sides shows that there are several unanswered questions:

1. When did the demise of Mr. Dilawar Hussain Malik take place?
2. When did the demise of his wife Ms. Nazma Malik take place?
3. Did they have any knowledge of the decree and the sale deed before their demise, given the decree was passed *ex parte*?
4. If Mr. Dilawar Malik and Ms. Nazma had passed away prior to the Decree, would that vest the rights in the property in favour of the

Appellant, given the Will in her favour?

5. What is the role of Mr. Mohammad Javed who received payments from the Decree Holder? Was he duly authorized to receive the said payments and if so for whose benefit?

6. At the time when the Sale Deed was executed by the Court Commissioner in favour of the Respondent/ Decree Holders, were either Mr. Malik or Ms. Malik alive and to what effect?

7. Who would be entitled to Rs.3,00,000/- which stands deposited by the Respondents in court?

8. Are the GPA, Agreement to Sell, Affidavit, Receipt and the Will, relied upon by the Appellant genuine, or are they forged and fabricated?

9. What is the role of the two witnesses who have signed the said documents put-forth by the Appellant as witnesses?

10. Why is the possession letter in favour of the Appellant not signed by either Mr. Dilawar Hussain Malik or his Wife?

11. Can the Appellant rely on these documents to protect her possession, if the same are found to be valid?

36. Order XXI Rule 101 CPC has been included in the Code to resolve such issues which come up while adjudicating upon objections raised during execution proceedings. The Executing Court ought to consider these issues before dispossessing the Appellant from the suit premises. Merely on the ground that the documents in favour of the Appellant are unregistered, applying *Suraj Lamps (supra)*, the Appellant cannot be non-suited without a trial, especially when the decree for specific performance was an ex-parte decree.

37. Moreover, it is noticed that in suits seeking specific performance, if the actual status of the *de-facto* possession of the property is ascertained prior to passing of a decree, such complexities would not arise. The Defendant in the suit for specific performance, i.e. the Original Owner, was *ex parte* all along in the suit proceedings. He was only served by means of publication in *The Stateman*, and has never come-forth either in the suit, or in the execution proceedings. It is not even clear as to why the money, with respect to the property was paid to a third party i.e. Mohammed Javed. All these questions could not have simply been brushed aside by holding that the Appellant's documents are not registered in terms of the decision in *Suraj Lamps (Supra)*, and hence even if the same are considered genuine no title would be vested in favour of the Appellant. It needs to be noted is that the Petitioner's documents are stated to have been executed just a few months after the rendering of the *Suraj Lamps (supra)* judgment.

38. The execution of a decree for specific performance does not merely relate to a title of a property, but as in the present case, also involves dispossessing a person who is already in physical possession of the property. At the time when the decree was passed it is not even clear as to who was in possession of the property. Hence, in such a situation, objections would have to be considered in detail by the Executing Court and may require leading of evidence to ascertain factual aspects, with respect to the suit property and the Original Owner.

39. While entertaining suits for specific performance and granting interim relief, and specifically while passing *ex parte* decrees for specific performance, courts ought to make sure that the property is secured during the pendency of the suit and that the decree, which is passed, is not merely a

paper decree. It would be advisable to ascertain as to who is in physical possession of the property, during the proceedings of a specific performance suit, in order to ensure that the complexities, of the kind that have arisen in the present case, do not arise in future.

40. Accordingly, the impugned order is set aside. The Executing Court would frame issues and adjudicate the objections after receiving evidence. Needless to add this Court has not examined the legality or the validity of the documents relied upon by the Appellant and the Respondents, or any other averments on merits.

41. Considering that the decree in the present case was passed way back in 2002, the Executing Court shall decide the objections within a period of six months. The original documents which were handed over during the court hearing be returned to the respective counsel upon proper acknowledgment. The same be produced before the executing court. The Registry of this Court to scan the documents before the same are returned to the Ld. Counsels for the parties.

42. List before the Executing Court on 5th January 2020, for framing of issues and for fixing the schedule for trial.

43. Copy of this judgment to be communicated to the Executing Court in *Ex. No. 9939/2016*, titled *Shamim Zafar and Anr. v. Dilawar Hussain Malik and Anr.*, i.e. ADJ-05, South East District, Saket Courts, New Delhi. Copy of this judgement be also sent to the District & Session Judges for circulation amongst the judicial officers.

PRATHIBA M. SINGH
JUDGE

DECEMBER 17, 2020

dj/Ak