

\$~A-1 (2019)

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

Date of Decision: 3rd December, 2021

+ **EX.F.A. 14/2019 & CM APPL. 16054/2019**

SANJAY KUMAR Appellant

Through: None.

versus

RAJESH KUMAR Respondent

Through: Mr. Ravi Bassi, Advocate.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done in physical Court. Hybrid mode is permitted in cases where permission is being sought from the Court.
2. The present Execution First Appeal has been filed seeking the following reliefs:

“a. pass an order for handing over of the possession of the suit property to the appellant which has been taken away from the appellant wrongly thereby setting aside the impugned orders dated 08.02.2019 and 22.3.2019;

b. pass an order giving direction to the concerned executing Court not to execute the above said impugned decree dated 28.10.2016 which is nullity and alternatively/consequentially the impugned decree dated 28.10.2016 may kindly be set aside;

c. pas any other appropriate order/direction which this Hon'ble Court may deem fit in the facts and circumstances of the case.”

3. The appeal arises out of the judgment and decree dated 28th October, 2016 passed by the ld. ADJ-05 (West), Tis Hazari Courts, in **CS No.**

12382/16 titled ***Rajesh Kumar v. Shri Sanjay Kumar***, which was sought to be executed in ***Execution Petition No. 659/2017***, before the Court of the Id. ADJ-03, West District, Tis Hazari Courts, Delhi.

4. None appears for the Appellant. There has been no appearance since the last three days i.e., 24th November 2020, 29th January 2021 and 5th October 2021. Accordingly, this Court is proceeding to pass orders on the basis of the material on record.

5. A perusal of the present appeal shows that in effect what the Appellant is intending to do is to challenge the original judgment and decree which was upheld by this Court vide a judgment dated 1st June, 2018 in ***RFA 249/2017*** titled ***Sanjay Kumar v. Rajesh Kumar***. Paragraph 6 of the grounds that have been urged in the present appeal reads as under:

“6. That earlier the Appellant preferred appeal before the Hon'ble High Court of Delhi from the above said impugned decree and Judgment but the same was dismissed by the order dated 01.06.2018 as the Hon'ble Court could not notice that the suit property is a licensee property which was allotted to one stranger and never got mutated in favour of any of the parents of the parties and the same (suit property) is still under the ownership of DUSIB being the licensee property.”

6. Further, the reliefs sought in this appeal, extracted above, also clearly suggest the present appeal is merely an attempt to overturn the original decree that was upheld by this Court. Specifically prayer (b) of the reliefs sought in the present appeal seeks that the decree dated 28th August, 2018 ought not to be executed, and hence the orders dated 8th February, 2019 and 22nd March, 2019 also ought to be set aside.

7. The original judgment/decreed dated 28th October, 2016 was upheld by this Court vide judgment dated 1st June 2018 in **RFA 249/2017**, in the following terms:

“13. A perusal of the documents and the evidence on record clearly shows that the mutual agreement entered into by the mother along with the three sons is fully admitted by both the Plaintiff and the Defendant. In fact, the said mutual agreement has been admitted by the Defendant in the earlier suit which was filed by him seeking permanent injunction. In the said suit, the Defendant not only admits the mutual agreement dated 21st October, 2009 but also admits all the three separate portions as has been extracted in paragraph 2 above, have fallen into the share of all the three brothers. In the said suit, the case set up by the Defendant was that the property was leased out to him on a monthly rent. In the said suit, the Plaintiff herein took the plea that the rent of Rs.1,000/- was incorrect and that the suit property Y-317 was capable of fetching rent of Rs.5,000/- to Rs.10,000/- per month. In the said suit, the Plaintiff herein gave the following statement:

“I am defendant in the present matter. I have already filed a suit for possession, permanent injunction and mesne profits against the plaintiff which is pending adjudication before the court of Shri Bhupesh Kumar, Ld. ADJ and fixed for 02.06.2010. Hence I will not dispossess the plaintiff without due process of law from the suit property.”

Thus, the suit was then withdrawn by Sh. Sanjay Kumar.

14. It is clear that the Defendant has admitted to the entire case of the Plaintiff in the pleadings and evidence as enumerated below:

- i) Complaint in suit no.57/2010 paragraph 2 to 5;*
- ii) Written statement in the present suit in paragraph 5 wherein mutual agreement is admitted;*
- iii) Cross-examination in paragraph 9 & 11 as extracted above.*

15. Thus, the Defendant having admitted the terms of the mutual agreement cannot be allowed to resile from the same on the plea that his parents were not the owners of the suit property. Clearly, from the deposition of the officials from DUSIB, sale and transfer of property was taking place in the colony. The family of the parties has been living in this premises since 1973. This being the position, the plea of the Defendant that his parents were not the owners cannot be accepted. Moreover, the mother of the parties duly entered into the mutual agreement with all three brothers which is itself an admitted document. The electricity and telephone bills, property tax documents placed on record show that the family has been residing in this property. The Defendant himself having filed a suit claiming rights in the suit property is bound by the admission in the said suit. Thus, under Order XII Rule 6, the present suit is liable to be decreed in view of the admissions in the earlier suit filed by the Defendant. Be that as it may, the Defendant having obtained advantage on the basis of a particular plea cannot resile from the same.

16. The Trial Court is right in observing that the Defendant has taken mutually destructive pleas. The fact that the parties have been staying in Y-316 and Y-317 is not in dispute. There is no evidence to show or to establish the plea that the mutual agreement was entered into under pressure. The evidence of the official from DUSIB does not by itself mean that the parents of the parties did not have rights in the suit property. It is an admitted position that no one else has claimed any rights to the property. From the records produced by the official of DUSIB, it is clear that Y-

316 was allotted in the name of Sh. Ganga Prasad i.e. the husband of Smt. Laxmi Devi. They were the parents of the parties. The documents relating to property tax show that even qua Y-317 either of the brothers has been paying property tax and they are running their shops as well. It cannot be therefore held that the property belongs to a third party.

17. The documents on record are sufficient to hold that the Plaintiff has acquired rights under the mutual agreement. The Mutual agreement is in the form of a family settlement. The plea of the Ld. Counsel for the Defendant is that the mutual agreement is not a registered document and hence does not confer any rights. He submits that the title has to be proved beyond any doubt and if there is a cloud on the title, decree of possession cannot be granted. He relies on the following judgments:

Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria AIR 2012 SC 1727

Anathula Sudhakar v. P. Buchi Reddy AIR 2008 SC 2033.”

8. In an indirect manner, by way of the present Execution First Appeal, the said original judgment/decreed cannot be challenged. The judgment and decree dated 8th October, 2016 which has already been dealt with and upheld by this Court in ***RFA 249/2017***, is liable to be executed by the Executing Court. The objections of the Defendant/Judgment Debtor has also been dismissed vide order dated 19th July 2018 passed by the Executing Court, and the possession was directed to be handed over. The possession has also been handed over by the Appellant, as is evident from the relief (a) claimed in the appeal wherein the Appellant prays that possession which has already been taken over by the Respondent be given back to the Appellant. It is the settled legal position that the executing court cannot go behind the decree. A

perusal of the various grounds alleged in the appeal are primarily related to the legality and validity of the original judgement/decreed. The Appeal seeks to urge grounds which have already been rejected in the Appeal challenging the original judgement/decreed. The only allegation in the execution is that the decree is not executable, but there are no valid or tenable reasons for the same.

9. Accordingly, there are no grounds for interference against the orders passed by the Executing Court. The present appeal is dismissed. All pending applications are disposed of. The interim order granted on 5th April 2019 also stands vacated.

DECEMBER 3, 2021

dj/Ak

**PRATHIBA M. SINGH
JUDGE**