(2018) 01 DEL CK 0307

In the Delhi High Court

Case No : Execution First Appeals(Original Side) No. 7 Of 2017, Civil Miscellaneous No. 26669, 26672 Of 2017

Renu Bala APPELLANT

Vs

Vijay Kumar & Ors RESPONDENT

Date of Decision : 11-01-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 44A, 60, 151, Order 21 Rule 11(2), Order 21 Rule 13, Order 21 Rule 58, Order 21 Rule 59

Citation : (2018) 01 DEL CK 0307

Hon'ble Judges : Sanjiv Khanna, J;Chander Shekhar, J

Bench : Division Bench

Advocate : Shobhana Takiar, Arun Bhardwaj, Rishi Manchanda, Arun Kumar, Divya Singh

Final Decision : Allowed

Judgement

Sanjiv Khanna, J

1. This common order would dispose of intra-court appeal preferred by Renu Bala (hereinafter referred to as "DH"), appellant in EFA(O) No.7/2017 and the cross-objection, CM No.26669/2017, filed by Rajesh Kumar and Sachin Kumar (incorrectly spelt as Sachine Kumar in the memo of parties) (hereinafter referred to as "Objectors").

2. The DH has filed Ex.P. No. 126/2012 against Vijay Kumar (referred to as "JD"), her former husband, inter alia, praying that the JD be directed to pay ?76,000, with interest, as per decree passed by the District Judge Ellery, sitting at Wolverhampton County Court, England & Wales. Another prayer is for attachment of the property mentioned in Schedule-I, namely, House No.A-884, Shastri Nagar, Delhi-110 052, India (hereinafter referred to as "India property").

3. The aforestated Ex.P. invokes Section 44A, read with Order XXI Rule 11(2) of the Code of Civil Procedure, 1908 ("CPC" for short).

4. An application, EA(OS) No.294/2012 under Order XXI Rule 13 read with Section 151 of the CPC was filed for attachment of the India property by the DH and granted vide order dated 7.3.2013.

5. The mother of the JD, namely Krishna Rani, had thereupon filed objections under Order XXI Rule 58 of the CPC along with an application under Order XXI Rule 59, claiming that she was the lawful owner of the India property having acquired the same by virtue of the registered Gift Deed dated 4.8.2009, executed by her son Vijay Kumar, the JD. Copy of the said Gift Deed was enclosed.

6. Krishna Rani expired on 10.7.2014 and thereupon, two EAs filed by her were dismissed as infructuous vide order dated 10.2.2015. Leave was granted to her legal representatives ("LRs") to file fresh objection.

7. Pursuant to the aforesaid liberty, the Objectors had filed EA No.625/2015 under Order XXI Rule 58 read with Section 151 CPC and EA No.351/2015 under Order XXI Rule 59 CPC for stay of order of attachment and consequential action. They relied upon the registered Gift Deed dated 4.8.2009 executed by the JD in favour of their mother, Late Krishna Rani and a Will executed by her bequeathing the India property to the Objectors. It was stated that the objectors were residing in the India property with their family members, consisting of their wife, children and their father (father, it is accepted, expired during pendency of the litigation).

8. The impugned order dated 29.8.2016 decides the aforestated EAs, i.e., EA No.294/2012 filed by the DH for attachment of the India property, EA No.625/2015 and EA No.351/2015 filed by the Objectors for vacation of the attachment, and with reference to the execution proceedings, holds:-

"33. Even if such a relief was sought in the present execution petition, the same cannot be granted without the parties being allowed to lead evidence on the validity of the Gift Deed. Thus, the trial in the present case is needed. The attachment order passed on 7th March, 2013 in E.A. No.294/2012 is recalled. Consequently, the order for selling the property by way of auction also becomes infructuous. However, considering the circumstances in the matter, the objectors are restrained from disposing of the said property directly or indirectly till the final disposal of the execution petition after trial."

Thus, the attachment order passed on 7.3.2013 in EA No.294/2012 has been recalled. Accordingly, the order directing the sale of the India property by way of auction would become infructuous. Thirdly, it holds that the relief sought by the DH cannot be granted, without parties being allowed to lead evidence on the validity of the Gift Deed. Lastly, the Objectors have been restrained from disposing of the India property, directly or indirectly, till the final disposal of the Ex.P. after trial.

9. The DH is aggrieved by the first three directions, whereas the Objectors are

aggrieved by the last direction with regard to restraint of disposal of the property, till the final decision of the Ex.P., after trial.

10. In order to decide the present appeal, some facts are required to be noticed -

(a) The DH and the JD had admittedly got married on 10.10.1995 in the United Kingdom. They have a daughter born on 27.5.2005.

(b) During the pendency of the marriage, the India property was purchased on 28.4.2003 vide registered sale deed in the name of JD.

(c) Serious disputes and differences arose between the DH and the JD and they started residing separately with effect from 16.5.2009.

(d) On 25.1.2010 the DH initiated proceedings for separation and dissolution of marriage in Wolverhampton County Court, England & Wales.

(e) During the course of the said proceedings, the question arose was whether the India property was a matrimonial asset. JD thereupon accepted and admitted that the India property was a matrimonial asset. Order dated 7.6.2011 records statement of the JD that the India property would be treated by the Court at final hearing as a matrimonial asset, notwithstanding JD's deposition to his mother in August, 2009. The order also records that the Court would proceed with final hearing on the basis of the value of this property, as set out in the valuation report submitted by the independent valuer dated 17.12.2010, unless the parties complied and agreed with a single joint valuation to be done by a nominated independent valuer, to be available by 19.07.2011.

11. Order dated 10.10.2011 refers to property No. A-884, Shastri Nagar, Delhi-110 052 as India property and holds and records:

"The Property in India

AND UPON the Husband agreeing that the property in India, being a Matrimonial asset, is held beneficially between the Husband and the Wife in 50/50 shares.

(the wifes share not to exceed ?76000 plus interest at the prevailing High Court Rate in England and Wales and upon payment of the said lump sum the Wife shall transfer her beneficial interest in the Property to the Husband.

AND UPON the Husband agreeing that he transferred the Legal Estate in the Property in India to his Mother, Krishna Rani, in order to defeat the Wifes claim for financial relief.

Secured Borrowing

AND UPON the Wife undertaking to the Court and agreeing to use her best endeavours to procure the release of the Husband on or before the transfer provided for below from the mortgage numbered; 05900120988 secured upon the Former Matrimonial Home in favour of Nationwide and in any event to indemnity the Husband against all such liability.

AND UPON Husband undertaking to the Court and agreeing to use his best endeavours to procure the release of the Wife on or before the transfer provided for below from the mortgage numbered: 60090720020 secured upon the Former Matrimonial Home in favour of the Nationwide and in any event to indemnity the Wife against all such liability and to pay all installments due in respect of this mortgage as and when they fall due."

12. Thus, the JD had agreed that the DH and the JD both had 50% share in the India property. Further, the JD had accepted, without reservation, that he had transferred the legal estate in the India property to his mother, Late Krishna Rani, in order to defeat the wife"s claim (DH"s claim) for financial relief. Only on payment of ?76000 plus interest in lump sum, the DH was to transfer beneficial interest in the (India) property to the JD. The said admissions and agreement are significant and important.

13. Thereafter, the Wolverhampton County Court, England & Wales vide order date 10.11.2011 had directed as under:

"1.That Husband shall transfer all his legal and beneficial estate in the Former Matrimonial Home to the Wife subject to the Mortgage secured thereon in favour of Nationwide and subject to the interveners beneficial interest in the same by 4pm on 10th November 2011.

2. The Husband shall pay or cause to be paid to the Wife a lump sum of £76000 on or before 4pm on the 10th December 2011.

3. The Husbands claims for financial provision, pension sharing and property adjustment Orders do stand dismissed and the Husband shall not be entitled to make any further application in relation to the marriage under the Matrimonial Causes Act 1973 s 23(1) (a) or (b) and the Husband shall not be entitled on the Death of the Wife to apply for provision out of her estate.

4. Upon the transfer of property provided for in clause 1 above and the payment of the lump sum provided in clause 2, the Wifes claims for financial provision, pension sharing and property adjustment Orders do stand dismissed and the Wife shall not be entitled to make any further application in relation to the marriage under the Matrimonial Causes Act 1973 s 23(1) (a) or (b) and from this time the Wife shall not be entitled on the Death of the Husband to apply for provision out of his estate.

5. There be liberty to apply as to the timing and implementation of this Order.

6. The Husband shall pay a contribution of £1500 towards the Wifes costs; such costs not to be enforced without Leave of the Court. For the avoidance of doubt any other costs orders made earlier in these proceedings shall stand. There shall be a detailed assessment of the Respondents public funded certificate."

14. The DH professes that she and her father had paid the entire consideration for purchase of the India property and has relied on certain documents. She

claims that the DH was then undergoing medical treatment in England and, therefore, the India property was registered in the name of the JD. Be that as it may, we are not required to go into and examine this aspect, as the order dated 10.10.2011 passed by the Wolverhampton County Court, England & Wales specifically records clear and categoric admission of the JD that the India property is a matrimonial asset and belongs both to the DH and the JD, each having 50% share in the said property. Para 4 of the said order specifically states that transfer of legal estate of the India property was to defeat the claim of the DH for financial relief. The final order or direction holds and directs that the JD would pay to the DH in lump sum £76000 on or before 4:00 pm on 10.12.2011. On payment of the lump sum of £76000 by the JD to the DH, that the DH"s claim for financial provision, pension sharing and property adjustment shall stand dismissed. In other words, till the payment of £76000 is made, the DH"s share in the said asset, including the India property owned equally by the DH and the JD would continue and would be legal and enforceable.

15. We have referred to the appointment of an independent valuer by the Wolverhampton County Court, England & Wales. The independent valuer had visited India and inspected the India property. Valuation Report submitted by him is on record and bears the signature of Late Krishna Rani, who was present at the time of inspection.

16. In the aforesaid factual background, we fail to understand how the Objectors, or for that matter, Late Krishna Rani, could have objected to attachment of the property or its sale, once it is accepted that payment of ?76000 plus interest has not been made. They are clearly taking and putting up a contra case, which negates and is antithesis of the order dated 10.10.2011 and admissions made by the JD before the Wolverhampton County Court, England & Wales. Surprisingly, the JD had filed an affidavit with the Ex.P. 126/2012, stating that the India property was purchased on 28.4.2003 from his hard earned money and, on 4.8.2009, out of natural love and affection, he had transferred the property in favour of his mother, Late Krishna Rani. The first statement obviously is incorrect, as JD had made a contrary admission and statement that the India property is matrimonial asset. As far as the Gift Deed is concerned, the said aspect was clearly noted and known to the Wolverhampton County Court, England & Wales. JD had agreed and consented to the India property being included in the list of matrimonial assets for division. In fact, the JD was candid in admitting and affirming that the transfer to his mother was in order to defeat the wife"s claim, i.e., the DH"s claim, to financial relief. We do not, in these circumstances, find that any of the defences raised by the Objectors, relying upon Section 60 of the CPC, les situs or the assertion that the DH should first seek declaration for cancellation of the gift deed, have any substance. The contentions are devoid of merit and substance, for the India property is a matrimonial asset owned by the DH and JD. Both have a 50% share. DH wants to sell her share and enforce and execute her decree against the JD's share.

17. Late Krishna Rani and the Objectors were certainly aware of the proceedings in the Wolverhampton County Court, England & Wales. The independent valuer had visited the India property in Late Smt. Krishna Rani's presence and had valued the same. It is obvious that JD would have informed present Objectors and Late Krishna Rani about the divorce/separation proceedings and the orders passed, including the order relating to the India property.

18. In view of the aforesaid discussion, we allow the present appeal preferred by the DH, i.e., Renu Bala and dismiss the cross-objections preferred by the Objectors, i.e., Rajesh Kumar and Sachin Kumar. First three findings and directions given in the impugned order dated 29.08.2016 are set aside. The order of attachment would get revived. The Execution Court need not examine the question of validity of the gift deed, for the property is as a matrimonial asset of the DH and owned by her and the JD, each having a 50% share. The direction with regard to framing of issues, trial etc. is also set aside. The execution proceedings will continue in accordance with law. All the pending applications are also disposed of. No costs.

