

(2013) 07 BOM CK 0249

In the Bombay High Court

Case No : Appeal No. 452 of 2012 and Suit No. 631 of 2003

Girja Shankar G. Gupta and Others

APPELLANT

Vs

M/s. Shanil Builders and Others

RESPONDENT

Date of Decision : 24-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, Order 43 Rule 1, Order 43 Rule 1(m), 96(3)

Citation : (2013) 07 BOM CK 0249

Hon'ble Judges : S.C. Gupte, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : A.J. Rizvi, for the Appellant; Mayur Khandeparkar, instructed by Mr. R.D. Suvarna for Respondent Nos. 14 to 37 and Mr. D.K. Patil, Section Officer, for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—The Appeal arises from an order of a learned Single Judge dated 18 June 2012 by which Consent Terms arrived at between the original plaintiffs on the one hand and the Fourth Defendant for himself and on behalf of defendants 5 to 10 were accepted and a decree was passed in terms thereof. A preliminary objection has been raised to the maintainability of the appeal on the ground that a substantive appeal against an order passed in terms of Consent Terms is not maintainable by virtue of the provisions of Section 96(3) read with the proviso to Order 23 Rule 3 of the Code of Civil Procedure, 1908.

2. The Appellants before the court were originally plaintiffs 15, 16, 20 and 23. All the plaintiffs together had joined in seeking specific performance of their agreements with the developer, the original Fourth Defendant. Initially on 10 June 2004, certain consent terms were arrived at in Notice of Motion 634/2003 under which the developer was to carry out the development under certain terms and conditions. The developer failed to do that. On 4 October 2011, the Appellants were transposed as Defendants and have been arraigned as

Defendants 14 to 17. This was necessitated in view of the fact that admittedly, there were certain disputes between the plaintiffs inter se. On 18 June 2012, the learned Single Judge took on record Consent Terms between the plaintiffs and the Fourth Defendant on behalf of himself and Defendants 5 to 10 for whom he acted as a constituted attorney. The learned Single Judge noted that the plaintiffs had signed the Consent Terms and their signatures were identified by the Advocate. Similarly, the Fourth Defendant was present in the court and was recorded as having signed the Consent Terms. The suit was accordingly disposed of by taking the Consent Terms on the record. The Appellants have taken out a Notice of Motion, Notice of Motion 1059/2012, in which they have inter alia sought various reliefs including the removal of the Fourth Defendant as developer and the rejection of the proposed Consent terms. In the meantime, an Appeal has been filed against the order of the learned Single Judge dated 18 June 2012 accepting the Consent Terms.

3. Order 23 Rule 3 of the Code of Civil Procedure, 1908 provides as follows:

Order XXIII -Withdrawal and Adjustment of suits

3. Compromise of suit--Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation.--An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.

4. The first part of Order 23 Rule 3 deals with a situation where it is proved to the satisfaction of the court that the suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties. The subsequent part deals with a situation where the Defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit. The court is empowered in either event to order that such an agreement, compromise and satisfaction be recorded and to pass a decree in accordance therewith. The proviso to Rule 3 was introduced by the Amending Act of 1976. The effect of the proviso is that when it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the court has to decide the

question. Simultaneously, Rule 3A was inserted, consequent upon which a suit is not maintainable for setting aside a decree on the ground that the compromise on which the decree is passed was not lawful. Order 43 Rule 1(m) which had provided for an appeal from an order of the court under Order 23 Rule 3 was amended so as to delete clause (m). Section 96(3) stipulates that no appeal shall lie from a decree passed by the court with the consent of parties.

5. These provisions have been interpreted in a judgment of the Supreme Court Pushpa Devi Bhagat (D) th. LR. Smt. Sadhna Rai Vs. Rajinder Singh and Others, where the position in law has been settled as follows:-

17. The position that emerges from the amended provisions of Order 23, can be summed up thus:

(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC.

(ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of Clause (m) Rule 1 Order 43.

(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3-A.

(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree, is nothing but contract between parties superimposed with the seal of approval of the court.

6. However, it has been urged on behalf of the Appellants that they are not parties to the Consent Terms. That, in our view, would make no difference to the legal position that a substantive appeal would not be available to the Appellants against the consent decree which has been passed by the learned Single Judge on 18 June 2012 in the suit. Though the Appellants were originally part of the group of plaintiffs, they have since been transposed as Defendants. The order of transposition has been accepted by them. The remedy of the Appellants, in the event that they believe that the Consent Terms affect them prejudicially, would be to move the learned Single Judge in terms of the proviso to Rule 3 of Order 23.

7. In the circumstances, we accept the preliminary objection which has been

raised to the maintainability of the Appeal and hold that the Appeal against the impugned order of the learned Single Judge dated 18 June 2012 is not maintainable. The Appeal is accordingly dismissed. In view of the dismissal of the Appeal, the Motion in the appeal does not survive and is disposed of accordingly.