

(2012) 02 DEL CK 0423

In the Delhi High Court

Case No : Regular First Appeal (OS) No. 31 of 2003

Madan Lal Kapoor

APPELLANT

Vs

Subhash Lal Kapoor and Others

RESPONDENT

Date of Decision : 22-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 4
Contract Act, 1872 — Section 15

Citation : (2012) 02 DEL CK 0423

Hon'ble Judges : Pratibha Rani, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Y.P. Naruala, instructed by Mr. Parag Chawla and Mr. Anirudh Choudhary, with Mr. Mohit Kapoor in person, for the Appellant; Harish Malhotra instructed by Mr. Rajender Aggarwal, Advocate for R-1, Mr. Ashish Bhagat, Abdhesh Choudhary, Ms. Manisha Suri, Advocates for R-2 and Mr. Rajender Mathur, with Ms. Geetanjali, Advocate for R-3 and 4, for the Respondent

Final Decision : Dismissed

Judgement

Pratibha Rani, J.—The appellant Madan Lal Kapoor and the respondents Subhash Lal Kapoor, Jawahar Lal Kapoor, Mohan Lal Kapoor and Satish Lal Kapoor are real brothers. They are litigating with respect to property No. R-565, New Rajinder Nagar, New Delhi (hereinafter referred to as the "suit property"), which was purchased in the name of Madan Lal Kapoor and Subhash Lal Kapoor from Mr. N.N. Sethi vide two separate sale deeds dated 21.11.1977 recording each brother having undivided half share in the property. While plaintiff was a bank employee, the other four brothers were carrying on business, as partners, in the name "M/s. Nawab Packers".

2. After purchasing the suit property, Madan Lal Kapoor and Subhash Lal Kapoor demolished the existing structure and agreed to share the cost of re-construction in equal proportion. It was agreed that the initial cost of construction was to be financed Subhas Lal Kapoor and latter construction cost was to be financed by the appellant. After obtaining a sanction from the MCD in July, 1978, re-

construction commenced with the funds provided by defendant No. 1. The funds were ostensibly exhausted and the building was incomplete. To find a way out, on August 09, 1979 the five brothers executed an agreement Ex. D1/1 recording therein that except for contributing Rs. 50,000/- and that too by obtaining a loan from Laxmi Commercial Bank, Madan Lal Kapoor had contributed no more in the acquisition and reconstruction of the property. It was further recorded that the new building, consisting of a basement, ground floor, mezzanine floor, first floor and the barsati floor was under re-erection and towards re-construction a sum of Rs. 2,70,000/- had been spent through the finances made available by the other four brothers. It was recorded further that Madan Lal Kapoor had expressed his inability to invest any further amount in the property and that with the intervention of relatives and friends, the parties had agreed that henceforth Madan Lal Kapoor shall have 35% share in the property and the other four brothers would jointly own the remaining 65%. The construction would be completed from the funds to be made available by Nawab Packers and that initially the basement shall be occupied by Nawab Packers and that 200 sq. ft. space on the mezzanine floor shall be taken on rent by Nawab Packers and similar area could be taken on rent in the mezzanine floor by Madan Lal Kapoor. That the ground floor and the remaining mezzanine floor would be let out and the rent would be shared : 35% by Madan Lal Kapoor and 65% by the other brothers. It was agreed that the two flats on the first floor would be occupied, one each by Madan Lal Kapoor and the other four brothers (jointly) and that they would be free to let out the respective flat to a tenant. The barsati and the terrace was agreed to be occupied exclusively by Madan Lal Kapoor. Manner in which rent would be appropriated after adjusting the investment made by Nawab Packers at an agreed rate was settled.

3. Appellant claimed that he was forced to enter into the agreement Ex. D1/1 and further claims that his brothers did not complete the construction and left with no other alternative, was once again compelled to execute another agreement Ex. D1W1/1 on 30.09.1981 wherein he once again agreed to be the owner of 35% share in the property with remainder 65% belonging to his brothers. He was compelled to agreed to the fact that his brothers had invested Rs. 4,10,000/- in excess of their 65% share towards construction and that the said amount was financed by Nawab Packers. Since the building was still incomplete, he was forced to agree that his brothers would invest further sums as required, to complete the building and upon completion thereof the basement, ground and mezzanine floor would be let out and rent appropriated : 35% to him and the remainder 65% to his brothers. He was further forced to agree that his share of the rent would be subject to a charge being his 35% share in the construction cost incurred by his four brothers which shall be received by them with interest @ 16% per annum. He was further forced to agree that he would occupy 35% of the first floor and the barsati floor and the remaining 65% would be occupied by his four brothers and that each group would be entitled to let out the same and appropriate the rent. He was further forced to agree to share the

common areas.

4. As per the appellant, since the building was not fully reconstructed, he terminated the agreement Ex. D1W1/1 and refuted the claims of his brothers as per their notice dated April 30, 1982 and demanded his 50% share in the property. As per the appellant a loan in sum of Rs. 6 lacs was obtained from the New Bank of India, which was disbursed in a manner that he received Rs. 2,08,588.50p and the remaining by his brothers. He claims to have paid, out of this sum, Rs. 1,60,000/- towards the cost of construction.

5. In the suit filed by the appellant, he claimed rendition of accounts pertaining to the cost of construction and sought a decree for partition. He sought 50% share in the property.

6. The respondents i.e. the four brothers pleaded that the agreements Ex. D-1/1 and Ex. D1W1/1 were voluntarily executed by the appellant and highlighted his having no funds to construct a building on the plot which was purchased by the appellant and respondent No. 1 as 50% co-owners thereof. They highlighted that in lieu of the four brothers initially spending money from their pocket to construct a building, the appellant parted with 15% interest in the land. They highlighted that all these years the agreement Ex. D1W1/1 was implemented by the parties evidenced by the fact that appellant took 35% rent paid by New Bank of India and the respondents took the remaining 65%. They highlighted that even the loan in sum of Rs. 6 lakhs taken from New Bank of India was apportioned in the ratio 35 : 65. They pleaded that it were they who were entitled to receive money from the appellant, for which they alleged having spent more money than their 65% share and also highlighted that the appellant was occupying an excess area on the first floor. A counter claim was raised.

7. Needless to state that the counter claim was disputed by the appellant.

8. On the pleadings of the parties following issues were settled :-

(i) Whether the plaintiff and defendant No. 1 are the only owners of the property R-565, New Rajinder Nagar, New Delhi having equal shares? OPP

(ii) Whether the defendants No. 2 to 4 are entitled to raise the plea of benami with regard to the ownership of the property in question? If so, to what effect? OPD

(iii) Whether the defendants No. 2 to 4 have any right, title or interest in the property R-565, New Rajinder Nagar, New Delhi? OPD

(iv) If issues No. 2 and 3 are decided in favour of defendants No. 2 to 4, whether the suit property was orally partitioned by the parties to the suit in the ratio of 35% for the plaintiff and 65% for the defendants jointly, as stated in the preliminary objection No. 1? OPD.

(v) If issues No. 4 is decided in favour of the defendants, whether the said partition has been acted upon by the parties and they are consequently stopped

from challenging the same? OPD

(vi) What was the amount paid by the plaintiff to the defendants in excess of Rs. 1,60,000/- for completing the construction? OPP

(vii) Whether defendants No. 1 to 4 had incurred any expenses on construction of the building on R-565, New Rajinder Nagar, New Delhi? If so, how much and its effect? OPD

(viii) Whether the agreement dated 30.09.1981 is a building contract? If so, what is its effect? (This issue will also include the question of its admissibility in evidence)? OPP

(ix) Is the plaintiff entitled to rendition of accounts from the defendants? If so, for what period? OPP

(x) If defendants are found entitled to any payment whether they are entitled to receive? If so and at what rate and for what period? OPD.

(xi) Is the plaintiff in occupation of area in excess of his share at present? If so, to what extent and to what effect? OPD

(xii) Relief.

9. Vide impugned judgment, the learned Single Judge has held the agreement Ex. D1W-1/1 to be admissible in evidence holding the same to be a family settlement thus not requiring mandatory registration and additionally that the same was a building contract. We highlight that the issue of admissibility came up with respect to the plea urged that the effect of the agreement was to convey appellant's 15% interest in the property which was immovable property and hence required registration. The learned Single Judge held that it was not a case where the respondents had pleaded the appellant to be a benamidar. The learned Single Judge held that the appellant having acted upon Ex. D1W1/1 and having received benefit thereunder could not challenge the same. The learned Single Judge found on the evidence that the respondents had spent more on construction and thus decreed the counter claim in sum of Rs. 3,60,000/-.

10. We need not decide the issue pertaining to the counter claim being decreed inasmuch as during arguments Sh. Harish Malhotra, Senior Advocate who appeared for respondent No. 1, Mr. Ashish Bhagat, Advocate who appeared for respondent No. 2 and Mr. Rajinder Mathur, Advocate who appeared for respondents No. 3 and 4 stated that if this Court were to uphold the agreement Ex. D1W1/1, their clients would not press the counter claim.

11. Since we are upholding the agreement Ex. D1W1/1, for the reasons hereinafter noted, we need not note and deal with the arguments pertaining to the counter claim.

12. It was urged by learned counsel for the appellant that the agreement Ex. D1/1 and the agreement D1W1/1 were both inadmissible in evidence for want of

registration. Counsel urged that the appellant was coerced to sign the agreement inasmuch as he had no funds to construct. Counsel urged that meaningfully read, the respondents were treating the appellant to be a benamidar to the extent of 15% share in the property.

13. Now, coercion is defined u/s 15 of the Indian Contract Act as under :-

Coercion is the committing or threatening to commit any act forbidden by the Indian Penal Code (XLV of 1860) or the unlawful detaining, or threatening to detain any property, to the prejudice of any person wherever, with the intention of causing any person to enter into an agreement.

14. Except for pleading coercion pertaining to the agreement Ex. D1/1 and the agreement Ex. D1W1/1, we find no pleadings as to what were the acts committed by the brothers which constitute coercion. Crying from the rooftop that the appellant was coerced, would be useless in law. It is settled legal position that in order to prove an agreement is tainted by coercion or force, the onus to prove the same lies on the party who pleads the same. It is a plain and basic rule of pleadings that in order to make out a case of fraud or coercion, there must be : (a) an express allegation of coercion or fraud; and (b) all the material facts in support of such allegations must be laid out in full and with a high degree of precision. In other words, if coercion or fraud is alleged, it must be set out with full particulars. In the decision reported as Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath, , in paras 27 and 28, it was held as under :-

27. We turn next to the questions of undue influence and coercion. Now it is to be observed that these have not been separately pleaded. It is true they may overlap in part in some cases but they are separate and separable categories in law and must be separately pleaded.

28. It is also to be observed that no property particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court out to take notice however strong the language in which they are couched may be, and the same applied to undue influence and coercion. See Order 6 Rule 4 of the Civil Procedure Code.

15. From the pleadings of the appellant it is clear that he did not have the funds to construct a building on the plot jointly purchased by him and respondent No. 1. The brothers sat together and four brothers agreed to provide the funds, of course to be returned by the appellant vis-?-vis his share, but upon the condition that he would enjoy ownership and possession of 35% constructed area i.e. 15% less than the 50% share to which he would be entitled to, but upon the condition that he would spend 50% on the construction cost. We see no coercion. It is not

the case of the appellant that he signed a bargain which was unconscionable. It is not his case that he should be relieved from an unjust bargain. His action is not one in equity.

16. Having received the benefit under the agreement and having consistently received only 35% rent paid by New Bank of India, the appellant cannot approbate and reprobate. The Doctrine of approbate and reprobate is a species of estoppel, where a party to a contract who allows to appropriate benefit out of it would be estopped from repudiating the other part, as held in the decision reported as 1964 AC 993 *Kok Hoong v. Leong Cheong Kweng Mines Ltd.*: "a litigant may be shown to have acted positively in the face of the Court, making an election and procuring from it an order affecting others apart from himself, in such circumstances the Court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned." Same is the ethos when the maxim "qui approbate non reprobate", meaning one who approbates cannot reprobate, was applied by the Supreme Court in the decisions reported as *New Bihar Biri Leaves Co. and Others Vs. State of Bihar and Others*, and *Union of India (UOI) and Others Vs. Krishan Lal Arneja and Others*, .

17. We would also highlight that while terminating the agreement Ex. D1W1/1 when he sent the telegram Ex. D-2 on May 14, 1982, the appellant never claimed that he was coerced into signing the agreement. He repudiated the same alleging breach thereof.

18. Since the appellant has been held not entitled, being estopped, from reprobating qua the agreement, it is obvious that he cannot project the substantive law pertaining to registration thereof and effect of non-registration to non-suit the respondents. Estoppel applies as a part of the Law of Evidence and would not conflict with a substantive law which operates in its own field.

19. We shall be failing not to note that when a dispute arose between the brothers and when the respondents sought the dispute to be referred to arbitration, since the agreement contained an Arbitration clause, a learned Single Judge of this Court held against the respondents on the strength of the reasoning that the agreement not being registered and having effect of extinguishing a right in immovable property, was inadmissible in evidence. But in appeal, leaving the issue open, the Division Bench opined that the nature of dispute was better left to be adjudicated at a proper civil trial. In para 15 of its decision, the Division Bench opined as under :-

... We think we must leave it open to the court if it tries the suit to re-determine this question, because the terms of the agreement are complex, of wide amplitude and cover much more than an agreement regarding transfer of the property i.e. the agreement is not confined to the giving up of a share in the property by Shri Madal Lal Kapoor but covers other matters also. It may be that the court may on a different reasoning hold that the document is inadmissible in evidence. We would like to leave this matter open because eventually the court

will have to determine as to what are the rights of the parties from the facts and circumstances of the case. Having made this observation it now remains to be seen whether the arbitration should be ordered in this case.

As already observed above this matter is one which requires the application of a number of legal principles to the question of what are the rights flowing from the various documents. One of the points involved must include the interpretation of the document dated 30.09.1981. This document may be held to be inadmissible because registration is compulsory. It may be held that it is partly referable on certain questions or it may be of some value in interpreting the series of transactions between the parties and the resulting rights in the property. These various facets are such that the matter cannot be referred to Arbitrator and especially not to a lay Arbitrator.

We explore during the hearing the possibility that the matter may be referred to some agreed Arbitrator like a retired Judge or some other lawyers. But having examined the question we feel that the rights of the parties are not at all easy to determine in the present case in view of what has happened during the course of construction of this building. We would, therefore, prefer that the matter is left to the court and we would decline to accept the appeal, affirm the order but for slightly different reasons.

20. We agree with the view taken by the learned Single Judge that Ex. D1W1/1 is a family settlement and is admissible in evidence in view of the law declared by the Supreme Court in the decision reported as Kale and Others Vs. Deputy Director of Consolidation and Others, The observations of the Supreme Court that where Courts find a legal lacuna or a formal defect in a family arrangement, if it is shown that parties had consistently acted thereunder, the Rule of Estoppel should be pressed into service and he who has enjoyed some material benefit under the family settlement, should be deprived even the opportunity to plead to the contrary when it comes to the other party receiving the benefit under the agreement.

21. We would highlight that the agreement Ex. D1W1/1 records that the respondents had spent Rs. 4,10,000/- over and above their 65% share towards the cost of construction. It cannot be lost sight of that when the respondents poured in their funds and constructed a building, the appellant received benefit of receiving 35% rent from the New Bank of India pertaining to the portions let out by the brothers to the bank and thus he cannot now turn around to repudiate the same.

22. We take on record the statement made by learned counsel for respondents not to press the counter claim. We set aside the impugned judgment insofar Counter Claim No. 1031/1987 has been allowed and we dismiss the same.

23. Since the agreement Ex. D1W1/1 has been upheld by us, we uphold the impugned decree in so far it has dismissed the suit filed by the appellant. Keeping in view the relationship between the parties we refrain from imposing

any costs.