

(2008) 05 DEL CK 0155

In the Delhi High Court

Case No : CS (OS) No. : 1112 of 1993 and CS (OS) No. : 1109 of 1993

Mrs. Jagdish Manohar Singh

APPELLANT

Vs

M/s. South Delhi Builders P. Ltd.

RESPONDENT

Date of Decision : 23-05-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, Order 32 Rule 1

Citation : (2008) 9 ILR Delhi 89 Supp

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Kajal Sharma, for the Appellant; Rajeeve Mehra with Mr. Yogesh Malhotra, Advocate for defendant No. 1 and Ms. Malvika Rajkotia, Advocate for defendants No. 2 and 3, for the Respondent

Judgement

Mr. Justice S. Ravindra Bhat

IA 2226-27/2004 (u/S.151 CPC)

1. In these applications, defendants No. 2 and 3-applicants, under provisions of Order 23 CPC, seek the setting aside of an order dated 2.12.2002. This Court had, by that order, recorded the statement of the plaintiff and the defendant No. 1, which is in the following terms:

S-5

2.12.2002

Present: Mr. Peeyoosh Kalra with Ms. Ginny Jetley & Ms. T.C. Samdup for the plaintiff.

Plaintiff in person.

Mr. Yogesh Malhotra for the defendants.

Mr. Kamal Kaul, the director of the defendant no. 1 in person.

S. No. 1109/1993

Parties have been heard towards compromise in the open court, in the present suit as well as in the connected suit, i.e. suit no. 1112/93.

Parties want to make a statement. Let it be recorded.

At this stage, statements of the parties are recorded. In view of the statement made by the parties, matter be placed before the Hon''ble Court for recording a compromise/withdrawal of the suit for 16-12-2002.

2.12.2002

(N.P. KAUSHIK)

mp Joint Registrar

A further statement was made on 3.2.2003, and on that date the suit was disposed of in terms of the settlement recorded through the statements. The applicants allege that though being material parties, likely to be vitally affected by the compromise, since they were owners of the suit property, they were kept in the dark and had never consented to the compromise. It is contended on their behalf that the settlement in question was unsupported by an application or even an affidavit deposed to by them. The representative of defendant No. 1 who made a statement was not authorized to do so; he did not possess any power of attorney on their behalf.

2. Ms. Malvika Rajkotia, learned counsel for defendants No. 2 and 3 relied upon the text of Order 23 Rule 3 CPC and submitted that the only manner of recording a lawful compromise which can be enforced through the judicial process is outlined in the said provisions. Non-compliance with the same, as far as defendants No. 2 and 3 are concerned, rendered the settlement inoperative and enforceable. She, therefore, submitted that the order dated 2.12.2002 and 3.2.2003 should be recalled. Learned counsel relied upon the judgment of the Supreme Court reported as Ajad Singh @ Ajad Vs. Chatra and Others, and the Division Bench ruling of this Court in Kamla Devi Vs. Prabhat Chand,

3. Ms. Kajal Sharma, learned counsel for the plaintiff opposed the application and relied upon the averments in the counter affidavit. It was firstly contended that the applications are not maintainable as the defendants No. 2 and 3 have no real interest in the property. It was submitted that the said defendants-applicants and the defendant No. 1 (who admittedly made a statement to the Court that led to the disposal of the suits), had made statements. This implies tacit authorization by the applicants to the defendant No. 1. Learned counsel also relied upon the text of collaboration agreement dated 22.9.1988 entered inter se between the defendants and submitted that in those terms, defendant No. 1 had full authority to enter into transactions and sell the properties after building upon the same. In these circumstances, the said defendant No. 1 also had the consequential authority to make a statement in Court with regard to the proprietary interests in

respect of the servant quarters, parking space and cubicle space which are the disputed spaces in the suit property. Learned counsel sought to rely upon the report of the Local Commissioner and contended that the applicants-defendants, never had possession of the servant quarters or even the other spaces and that the defendant No. 1 had voluntarily handed over possession to them pursuant to the settlement, recorded through the statements, in Court.

4. The narrow question which this Court has to consider is whether the statements recorded on 2.12.2002 and 3.2.2003 ultimately leading to disposal of the suit, can be regarded as a valid and binding compromise order, so as to affect any rights of the other defendants, i.e. the present applicants in the property.

5. Undoubtedly, the collaboration agreement - (which has not been denied by the defendants No. 2 and 3) - empowered the defendant No. 1 to build upon the property and sell portions built on it. Nevertheless the plaintiff was constrained to approach this Court by filing two suits in respect of the disputed spaces. The suits were pending for almost a decade. The applicants also do not dispute that they had filed a joint written statement. However, the question is whether in the absence of their involvement, the statement made by defendant No. 1 could bind them or affect their rights.

6. The object of impleading defendants No. 2 and 3 obviously was that the plaintiff regarded them as necessary party; they admittedly were owners of the property. The dispute requiring adjudication was whether the agreement between the defendant No. 1 and the plaintiff comprehended inter alia an obligation by the other defendants to sell or convey the disputed spaces. On this aspect, the plaintiff had to implead defendants No. 2 and 3, who had title to the property. Without them, it was not possible to effectively grant the reliefs, since they would have had to execute the sale deeds, if the suit were to succeed. In these circumstances, in the absence of the defendants No. 2 and 3/ applicants, whose rights were to be vitally effected in this manner, the compromise could not have been arrived at.

7. Order 23 CPC prescribes the mode of withdrawal or adjustment of suits:

ORDER XXIII

WITHDRAWAL AND ADJUSTMENT OF SUITS

1. Withdrawal of suit or abandonment of part of claim.-(1) At any time after, the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be

accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule(1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

2. Limitation law not affected by first suit-In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

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.]

8. The procedure for compromise as may be noticed is outlined in Order 23 Rule 3 CPC and in the opinion of this Court, is not merely a procedure, but also obliges the parties and the Court to follow a particular discipline in regard to the recording of settlement, which would result in a binding decree. The decision of the Supreme Court in *Ajad Singh* (supra) and indeed the earlier decisions are sufficiently clear on this aspect, that, any decree which is opposed to the letter and procedure of Order XXIII R.3 CPC cannot be sustained so far as those who do not participate in it. It is axiomatic that where the law prescribes a mode of doing something, no other procedure or mode of its performance is lawful. Therefore, the Court has to adhere to the parameters of Order 23 in disposing of a suit-either permit its withdrawal (Rule 1) or record a lawful compromise (Rule 3). In the latter event, a decree is also drawn in terms of the compromise. The Supreme Court in *Ram Narang vs. Ramesh Narang*, (2000) 11 SCC 44, held that an order under Order 23 Rule 3 is composed of both a command and a contract, consent of the parties being an essential component of such an order. Such a consent needs to be obtained in the form prescribed in the said rule, failing which it cannot be treated as valid or binding.

9. In this case, the Court recorded disposal of the suit-neither its withdrawal nor recording of compromise. Such order has latent problems about enforceability.

10. In the circumstances of this case, although this Court recorded the statements of some of the parties, which are sought to be enforced against defendants No. 2 and 3 yet no decree was directed to be drawn, therefore, the most appropriate course would be that defendants No. 2 and 3 are declared not bound by such statements. The order dated 2.12.2003 and 3.3.2003 are accordingly modified as far as the said defendants No. 2 and 3 are concerned. CS(OS) 1109/1993 and CS(OS) 1112/1993 are restored to the file of this Court, as against defendants No. 2 and 3.

IAs 2226-27/2004 are allowed in the above terms.

CS(OS) 1109/1993 & CS(OS) 1112/1993

List before the Joint Registrar for further proceedings/cross-examination on 12th August, 2008.