

(2004) 03 DEL CK 0056
In the Delhi High Court
Case No : FAO 247 of 2003

Rajinder Singh and Narender Singh

APPELLANT

Vs

Smt. Pushpa Devi Bhagat (deceased) through Smt. Sadhna
Rai and Others

RESPONDENT

Date of Decision : 03-03-2004

Acts Referred:

Citation : AIR 2004 Delhi 228 : (2004) 110 DLT 350 : (2004) 73 DRJ 475 :
(2005) 2 RCR(Civil) 117 : (2005) 1 RCR(Rent) 475

Hon'ble Judges : Madan B. Lokur, J

Bench : Single Bench

Advocate : Sanjay Jain, Sunil Aggarwal and J. Devassy, for the Appellant; A.S.
Chandhiok Geetika Panwar and Sandeep, for the Respondent

Judgement

Madan B. Lokur, J.—The facts of the case, as they appear from the appeal paper book, clearly point to various afflictions in our justice delivery system. Firstly, chronic delays - a simple suit for recovery of possession of immovable property was instituted in 1989 and it is still pending. Secondly, unnecessary adjournments - not a single witness turned up for the Respondents between December, 1998 and April, 2001 despite a dozen opportunities. Finally, frivolous and unsubstantiated allegations - this time against a respectable lawyer for the Respondents. Expressing his pain and anguish in a written response dated 7th December, 2001 submitted to the Trial Court, the lawyer requests the Court:

""... to pass appropriate orders in the matter as it would be in the interest of justice to prevent the abuse of process of law and the court so that the litigant does not take the court or the counsel for a ride and does not get the liberty to make any statement, be it a white lie or be it at the costs of reputation of counsel, just to make a gain for himself/ herself.""

2. The Appellants filed a suit in April, 1989 (later numbered as Suit No.52/93) for recovery of possession of the front half portion of property bearing No. C-25, Friends Colony, New Delhi. According to the Appellants, the suit property was in

the tenancy of the Respondents and their tenancy was determined by a notice to quit dated 9th February, 1989 effective on the expiry of the tenancy month on 31st March, 1989.

3. The suit was contested by the Respondents who raised various defenses, including that the tenancy was not validly terminated and also claiming protection of the provisions of the Delhi Rent Control Act, 1958.

4. Some time in 1993, issues were framed in the suit and in 1996 additional issues were framed on the basis of amended pleadings. The oral evidence of the Appellants concluded in September, 1998 and thereafter proceedings were adjourned from time to time for recording the oral evidence of the Respondents, which was not readily forthcoming.

5. Ultimately, it appears that discussions were held between the parties to amicably resolve their disputes, and so the order sheet for 20th January, 2001 records as follows:

""Pr. Cl. for Parties.

At joint request put up on 8.2.2001 for compromise.""

6. The order sheet of 23rd May, 2001 is important and this records as under:

""Pr: Sh. B. Khan, cl. for pltf. with pelts.

Sh. Dinesh Garg, Adv. for all the delfts. In both cases.

It is stated that the matter has been compromised between the parties. The delfts. undertakes to vacate the suit premises by 22.1.02 and will keep on paying the rent/damages of the suit premises @ Rs.4800/- w.e.f. 1.5.2001, till the time of vacation of the suit premises.

Statement of Sh. Dinesh Garg, Adv. for the delfts

W.O.

I have instructions on behalf of the delfts to make the present statement that the delfts undertake to vacate the suit premises by 22.1.2002 and will keep on paying the rent/damages @ Rs.4800/- w.e.f. 1.5.2001, till the vacation of the suit premise

The rent up to 30.4.2001 already stands paid.

sd/- sd/-

R.O.A.C. C.J.

Statement of Sh. B. Khan, cl. for both the pelts.

W.O

I have instructions on behalf of pelts to make the present statement that in view

of the statement made by the cl. for the defendant on behalf of the delfts, the suit may kindly be disposed off accordingly. I accept the terms of the st. of cl. for delfts.

The pelts are also present today in the court and will counter-sign this statement.

sd/- sd/-

R.O.A.C. C.J.

7. On the same day, the learned Civil Judge passed the following order:

""ORDER

In view of the st. made by the cl. for parties in the presence of both the pelts. The suit stands disposed off as settled. Parties to be bound by their statements made today.

File be consigned to R/R. Decree sheet in terms of said comp. be prepared.

Sd/-

(Savita Rao)

C.J. Delhi

23/5/01

8. Thereafter, there was some minor problem about the vakalatnama given by Defendants No. 3 and 4 not being on record. This problem was sorted out on 18th July, 2001 and orders were passed for modifying the decree dated 23rd May, 2001 and preparing a fresh decree.

9. On 21st August, 2001 an application was moved by Pushpa Devi Bhagat (Defendant No.2) to the effect that her lawyer was not authorized to enter into any compromise or settlement and that, in any case, an unwritten compromise was not valid in law. It was prayed that the decree dated 18th July, 2001 be set aside and the suit be proceeded with. Notice in the application was issued, inter alia, to the lawyer for the Respondents who filed his response dated 7th December, 2001 (referred to above).

10. In the meanwhile, on 27th August, 2001 Pushpa Devi Bhagat filed RCA No. 14/2001 praying that the decree dated 18th July, 2001 be set aside and the matter be remanded to the Trial Court for a decision in accordance with law.

11. During the pendency of the appeal, Pushpa Devi Bhagat expired and her daughter Sadhna Rai was brought on record as her legal representative.

12. By the impugned order dated 21st December, 2002, the appeal of Sadhna Rai was accepted, the decree dated 18th July, 2001 was set aside and the learned Civil Judge was directed to proceed with the trial of the case in accordance with law.

13. In this appeal, the contest is between the Appellants (original plaintiffs) and Sadhna Rai (Respondent No.1). The other Respondents have no interest in the proceedings and in fact learned counsel for the Appellants stated that it was not necessary to even serve them for disposal of this appeal.

14. Learned counsel for the contesting parties were heard on 12th and 20th February, 2004 when judgment was reserved.

15. The controversy in this case centres around the interpretation of Rule 3 of Order XXIII of the CPC (for short the CPC) as amended in 1976. The provision reads as follows:-

""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.""

16. The relevant portion of the Statement of Objects and Reasons for the 1976 amendment states that:

""It is provided that an agreement or compromise under Rule 3 should be in writing and signed by the parties. This is with a view to avoiding the setting up of oral agreements or compromises to delay the progress of the suit.""

17. The provisions of Order XXIII, Rule 3 of the CPC came up for consideration in Gurpreet Singh Vs. Chatur Bhuj Goel, . In that case, the Respondent had filed a suit for specific performance of a contract, and in the alternative for damages. The suit was decreed by the District Judge and by a learned Single Judge of the Punjab and Haryana High Court. During the pendency of a second appeal, the parties entered into a compromise and on 28th January, 1987 the Division Bench recorded the statements of the Appellant's father Col. Sukhdev Singh, his counsel and the Respondent and adjourned the matter to 17th March, 1987. As per the statement of the counsel for the Appellant

"".....Gurpreet Singh in his personal capacity or through his father Colonel

Sukhdev Singh shall pay Rs. 2,25,000/- to the respondent on March 17, 1987 by a bank draft payable at Chandigarh....."

18. However, before 17th March, 1987, the Respondent backed out of the compromise and moved an application in the Court on 9th February, 1987 clearly indicating that he had resiled.

19. When the matter was taken up by the High Court on 17th March, 1987, the Division Bench directed that the appeal be heard and decided on merits since the Respondent was not prepared to abide by the proposed compromise.

20. In appeal before the Supreme Court the contention of the Appellant was that Order XXIII, Rule 3 of the Code is in two parts, the word "or" making the two conditions mentioned therein disjunctive. It was urged that the words "in writing and signed by the parties" relate to the first part and not the second. This contention was not rejected by the Supreme Court but was found to be of no avail because, according to the Supreme Court, the case fell within the first part of Order XXIII, Rule 3 of the CPC

. 21. With regard to the interpretation of the first part of Rule 3, the contention before the Supreme Court was that it refers to "an adjustment or settlement of the claim in suit by a lawful agreement or compromise outside the court, meaning thereby that where the parties make a statement before the court that the dispute between them has been settled on certain terms and the statements so made form part of the proceedings of the court, there is no legal requirement to have an agreement in writing embodying the terms of the compromise"

22. The Supreme Court declined to differentiate between a settlement or a compromise arrived at outside Court or during the hearing of a suit or appeal. The law was laid down by the Supreme Court in paragraph 10 of the Report in the following words:-

"Under Rule 3 as it now stands, when a claim in suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a complete agreement between them. To constitute adjustment, the agreement or compromise must itself be capable of being embodied in a decree. When the parties enter into a compromise during the hearing of a suit or appeal, there is no reason why the requirement that the compromise should be reduced in writing in the form of an instrument signed by the parties should be dispensed with. The court must therefore insist upon the parties to reduce the terms into writing."

23. As regards the second part of Rule 3, the Supreme Court recognised that for the satisfaction of the claim of the plaintiff, wholly or in part, there need not be an agreement in writing signed by the parties. It was said in paragraph 11 of the Report:

"The word "satisfies" denotes satisfaction of the claim of the plaintiff wholly or in part, and for this there need not be an agreement in writing signed by the

parties. It is open to the defendant to prove such satisfaction by the production of a receipt or payment through bank or otherwise. The satisfaction of the claim could also be established by tendering of evidence. It is for the court to decide the question upon taking evidence or by affidavits as to whether there has in fact been such satisfaction of the claim and pass a decree in accordance with Order XXIII, Rule 3 of the Code.'"

24. In the view of the Supreme Court, the case did not fall within the ambit of the second part of Rule 3. As per the proposed compromise, the Appellant was required to pay Rs.2,25,000/- to the Respondent on 17th March, 1987 but before that date, the Respondent resiled. The claim of the Respondent was clearly not satisfied. Since the case did not fall in the second part of Rule 3 of Order XXIII of the Code, the Appellant had no option but to fall back on the first part of Rule 3. But, since there was no agreement in writing between the parties, even the first part of Rule 3 was not available to the Appellant and, Therefore, the order passed by the High Court for hearing the appeal on merits was unexceptionable.

25. The importance of Gurpreet Singh lies in the fact that the Supreme Court accepted that Rule 3 of Order XXIII of the Code is in two parts.

As regards the first part, the agreement or compromise between the parties has to be in writing and signed by the parties. It is of no consequence if the agreement or compromise is entered into out of Court or during the hearing of a suit or appeal - it must be reduced to writing and signed by the parties.

As regards the second part of Rule 3, the Supreme Court held that satisfaction of the claim of the plaintiff, wholly or in part, need not be by an agreement in writing signed by the parties. The Defendant is entitled to otherwise prove the satisfaction of the claim of the plaintiff and it is for the Court to decide whether the claim has been satisfied or not..

26. Byram Pestonji Gariwala Vs. Union Bank of India and others, had a completely different factual matrix. In that case a compromise was entered into in writing and signed by counsel representing the parties, but not signed by the parties themselves. The question that arose before the Bombay High Court and in the Supreme Court was whether the consequent decree was valid and in accordance with the provisions of Order XXIII Rule 3 of the CPC. Both the Courts answered the question in the affirmative.

27. In the Supreme Court, the contention urged by the Appellant was that the words ""in writing and signed by the parties"" means only parties and none else and to read ""counsel"" is to presume that Parliament failed to say what it intended to say and was an attempt to supply an omission by correcting the deficiency. It was submitted that a decree based on a compromise not signed by the parties in person is a nullity and is incapable of execution. .

28. The Supreme Court examined a large number of cases, both English and Indian. The Supreme Court rejected the contention and held in paragraph 39 of

the Report:

""To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorised representative. If a power-of-attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorisation by vakalatnama, act on behalf of his client. Not to recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in court. If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated.""

29. It was further held that the words ""in writing and signed by the parties"" must necessarily mean what Order III, Rule 1 of the CPC says, that is:

""any appearance, application or act in or to any court, required or authorized by law to be made or done by a party in such court, may except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by his recognized agent, or by a pleader, appearing, applying or acting as the case may be, on his behalf: ""

30. The importance of this case lies in the fact that the Supreme Court accepted the position that counsel for the parties could enter into a written compromise on their behalf. There was, Therefore, a forward march from the law laid down in Gurpreet Singh.

31. Finally in Jineshwardas (D) through L.Rs. and Others Vs. Smt. Jagrani and Another, , the Supreme Court took a further progressive step in the march of the law. In that case, when a second appeal filed by the plaintiff came up for hearing before the Madhya Pradesh High Court, the following order was passed on 9th May, 2000 on a consensus by both the learned counsel:

""Both the counsel are in agreement to settle the matter. The learned counsel for the respondents submits that respondents will pay an amount of Rs.25,000/- to the appellant within a period of one month, otherwise it will carry interest at the rate of 12% per annum from the date of today. On this agreed submission, this appeal is decided and judgment and decree passed by the Court below is modified to this extent.

1. The respondents will pay Rs.25,000/- (Rupees twenty five thousand) to the appellants within a period of one month.

2. If this amount is not deposited in the Court on or before 10th June, 2002, the above amount will carry interest @ 12% per annum till its realisation.

3. Cost of the litigation will be borne by both the parties.

The appeal is disposed of in view of the above said agreed submissions.""

32. Thereafter, the Appellants therein (LRs of the plaintiff) filed a review application contending that the order is a compromise decree which did not meet the requirements of Order XXIII, Rule 3 of the CPC inasmuch as it was not in writing and was not signed by the parties. It was also alleged that the counsel for the Appellants made his submissions, if any, without any instructions from the Appellants. The review application was dismissed by the High Court.

33. While dismissing the appeal, the Supreme Court referred to Gurpreet Singh and Byram Pestonji Gariwala. It was said in paragraph 8 of the Report:

""We are in respectful agreement with the above statement of law. Consequently it is not permissible for the appellant, to contend to the contrary. That apart we are also of the view that a judgment or decree passed as result of consensus arrived at before Court, cannot always be said to be one passed on compromise or settlement and adjustment. It may, at times, be also a judgment on admission, as in this case.""

34. In other words, the Supreme Court reiterated the position in law that a counsel could compromise a dispute on behalf of his client. The decree that followed could be the result of a consensus arrived at before Court and that consensus may not necessarily be a compromise or settlement and adjustment. It could, in a given case, be a judgment on admission. Such a consensus would not fall within the first part of Rule 3 of Order XXIII of the CPC, but would fall within the second part thereof. That is to say that the claim of a plaintiff could be satisfied by a defendant on the basis of instructions given to a counsel and that that satisfaction need not be through an instrument, such as a compromise agreement. The law with regard to ""satisfaction"" of a claim, as laid down in Gurpreet Singh (paragraph 11 of the Report) was reaffirmed by the Supreme Court.

35. The Supreme Court observed that the Respondent therein alone was saddled with liabilities and there were no allegations of impropriety against the counsel appearing for the parties. It follows, Therefore, that the Supreme Court decided that on facts the claim of the Appellants therein was satisfied. .

36. Applying the law laid down by the Supreme Court, if the Appellants are to succeed in this appeal, it will be necessary for them to bring their case within the second part of Rule 3 since the first part is quite clearly not applicable. Assuming the Appellants are able to bring their case within the second part of Rule 3, it will also have to be established that learned counsel for the contesting Respondent had the authority to make the statement, which he did, before the learned Civil Judge.

37. At this stage, it is worth mentioning that there is one significant feature that differentiates the present case from Gurpreet Singh and Jineshwardas. In the two cases decided by the Supreme Court, the plaintiff had resoled from the compromise or the consensus. In Gurpreet Singh, the defendant was unable to convince the Court that the claim of the plaintiff had been satisfied, while in

Jineshwardas, the defendant was able to convince the Court that the claim of the plaintiff was satisfied. If I may rephrase Justice Holmes in *United States vs. Johnson*, 221 US 488 at 496: The meaning of the second part of Rule 3 is to be felt rather than to be proved. In the present case, the plaintiffs (Appellants before me) are themselves saying that their claim has been satisfied. Is it possible for the Respondents to canvass that the claim of the Appellants has not been satisfied? The answer to this question must obviously be in the negative.

38. I am of the view that the first appellate Court erred in limiting its consideration to the first part of Rule 3 of Order XXIII of the Code. After having concluded (and rightly so) that the case of the Appellants does not fall within the scope and ambit of the first part of Rule 3, the learned Judge should have dealt with the contention of the Appellants that their case fell within the second part of Rule 3. This exercise was not undertaken by the learned Judge. Even the Supreme Court undertook such an exercise in *Gurpreet Singh and Jineshwardas*. There was, Therefore, no reason why the first appellate Court could not. Had the exercise been undertaken by the learned Judge, on the submission of learned counsel for the Appellants, the answer would have been obvious - that the case of the Appellants was within the scope and ambit of the second part of Rule 3; that for this reason, no agreement in writing by the parties was necessary; that the plaintiffs (Appellants herein) were satisfied that their claim was met and the defendants (Respondents herein) could not repudiate the consensus by attempting to challenge their satisfaction.

39. Under the circumstances, I have no doubt that the consensus between the parties in this case does not fall within the first part of Rule 3 of Order XXIII of the Code but within the second part.

40. The next issue is whether learned counsel for the Respondents had the authority to make the statement that he did and to enter into an understanding with the Appellants. I think this must be answered in the affirmative.

41. Justice Krishna Iyer in *Jamilabai Abdul Kadar Vs. Shankarlal Gulabchand and Others*, said (on page 619 of the Report):

""Those who know how courts and counsel function will need no education on the jurisprudence of lawyer's position and powers.""

42. Nevertheless, it may be worthwhile to cite a few precedents that may further illumine the jurisprudential aspects.

43. Halsbury's Laws of England (4th edition), Volume 3 paragraph 1181 clearly states:

""The client's consent is not needed for a matter which is within the ordinary authority of counsel: thus if, in court, in the absence of the client, a compromise or settlement is entered into by counsel whose authority has not been expressly limited, the client is bound.""

44. Lord Atkin in AIR 1930 158 (Privy Council) said (on page 161 of the Report):

""Two observations may be added. First, the implied authority of counsel is not an appendage of office, a dignity added by the Courts to the status of barrister or advocate at law. It is implied in the interests of the client, to give the fullest beneficial effect to his employment of the advocate. Secondly, the implied authority can always be countermanded by the express directions of the client. No advocate has actual authority to settle a case against the express instructions of his client. If he considers such express instructions contrary to the interests of his client, his remedy is to return his brief.""

45. In (1935) AWR 980 (Privy Council) , it was said by Lord Atkin on page 121 of the Report:

""In their Lordships" experience both in this country and in India it constantly happens, indeed it may be said that it more often happens, that counsel do not take upon themselves to compromise a case without receiving express authority from their client for the particular terms; and that this position in each particular case is mutually known between the parties.

In such cases the parties are relying not on implied but on an express authority given ad hoc by the client.""

46. Over the years, the jurisprudential basis of the authority of counsel has not changed in law and the factual position also remains the same. Under the circumstances, I have no reason to doubt that learned counsel for the Respondents acted on behalf of his clients, on instructions (whether implied or express) and in their best interests. The authority of learned counsel was not shown to have been countermanded by the Respondents.

47. There is another way of looking at the problem. Pushpa Devi Bhagat moved an application on 21st August, 2001 before the learned Civil Judge to have the decree set aside. The allegation made in the application was that her advocate had acted without instructions and authority. The application was supported by her affidavit. Less than a week later, she filed an appeal against the decree dated 18th July, 2001 before the learned District Judge. The appeal memo contained the same allegations but was not supported by an affidavit of Pushpa Devi Bhagat. The application was not pursued by her but the appeal was. I take it, Therefore, that the allegations made on affidavit by Pushpa Devi Bhagat against her learned counsel were not pressed. It must follow from this that the allegation that her counsel had acted without instructions or without authority was given up or at least not followed up. Indeed, even before me, learned counsel for the Respondents did not seek to impeach the integrity of his counterpart before the learned Civil Judge. Consequently, any allegation made by the Respondents to impeach the integrity of learned counsel stood withdrawn, if not by necessary implication then by default.

48. On these facts, I think the only reasonable inference that can be drawn is

that the learned counsel appearing before the learned Civil Judge did so on the authority given to him by the Respondents and he made the statement that he did on the instructions of and on the authority given to him by the Respondents.

49. For these reasons, the appeal must succeed.

50. There is a minor procedural point that requires to be addressed. The Registry of this Court raised an objection about the maintainability of what is described as a First Appeal.

51. The impugned order passed by the learned Additional District Judge is an order remanding the case to the learned Civil Judge for a decision on merits in accordance with law. An appeal from this order falls within the category of an appeal from an order as described in Order XLIII Rule 1(u) of the CPC. There was no dispute that had the learned Additional District Judge confirmed the decree, a second appeal could have been filed to this Court. Since the decree passed by the learned Civil Judge was not confirmed but was in fact set aside and the matter remanded for a decision in accordance with law, it would squarely be covered by the aforesaid provision of Order XLIII of the CPC. Reference in this context may also be made to Section 104(1)(i) of the CPC whereby an appeal is provided from any order made under the rules from which an appeal is expressly allowed. There is, Therefore, no difficulty in holding that the appeal filed by the Appellants is maintainable. Whether the Registry chooses to call it a first appeal or a second appeal or give it some other nomenclature is not the concern of the Appellants. For convenience, the Registry has described the appeal as a first appeal. As long as it is maintainable in this Court, its description is of consequence.

52. For the aforesaid reasons, I am of the view that the order dated 21st December, 2002 passed by the learned Additional District Judge in RCA No.14/2001 is liable to be set aside. It is ordered accordingly. It is held that the case of the Appellants is covered by the second part of Rule 3 of Order XXIII of the CPC. It is also held that learned counsel for the Respondents was duly instructed and authorized to enter into a consensus with the Appellants, which he lawfully did. The decree passed by the learned Civil Judge on 18th July, 2001 is upheld.

53. The Appellants will be entitled to costs which are quantified at Rs. 11,000/-.