
(2007) 11 DEL CK 0190

In the Delhi High Court

Case No : IA No"s. 1868 and 1869 of 2007 in CS (OS) No. 2885 of 1989

Shri Gopal Mohan Vadhera

APPELLANT

Vs

Shri Jagdish Rai Vadhera and Others

RESPONDENT

Date of Decision : 28-11-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, Order 23 Rule 3A, Order 43 Rule 1, Order 43 Rule 1A, 151
Contract Act, 1872 — Section 17

Citation : (2008) 100 DRJ 371 : (2007) 11 ILR Delhi 85

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : Prabhjit Jauhar and Anupama Kaul, in is Nos. 1868 and 1869/2007 in CS OS No. 2885/1989 and Anupam Srivastava and Sanchit Ahluwalia, in is Nos. 1866 and 1867/2007 in CSOS 449/200, for the Appellant; Vijay Tandon, for Defendant Nos. 1 and 3 and Anupam Srivastava and Sanchit Ahluwalia for Defendant No. 2 in is Nos. 1868 and 1869/2007 in CS (OS) No. 2885/1989 and Vijay Tandon, for Defendant Nos. 1-2 and Prabhjit Jauhar and Anupama Kaul for Defendant Nos. 3-5 in is Nos. 1866 and 1867/2007 in CS(OS) 449/2001, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—This order shall dispose of four applications. is No. 1868/2007 (for stay) and is No. 1869/2007 (for setting aside the compromise decree dated 25.08.2006) have been filed in CS (OS) 2885/1989 on behalf of the defendant No. 2 (Suharsh Mohan Vadhera) [hereinafter referred to as "S.M. Vadhera"]. The said Mr. S.M. Vadhera is also the plaintiff in CS(OS) 449/2001. In that suit also, similar applications being is 1866/2007 (for stay) and is No. 1867/2007 (for setting aside the compromise decree) have been filed. The compromise decree was passed in both the suits.

2. The learned Counsel appearing on behalf of Mr. S.M. Vadhera, the applicant in these applications stated that a fraud was committed upon him by the other

parties inasmuch as the terms of settlement indicated that the plaintiff in CS(OS) 2885/1989 would hand over vacant and peaceful possession of the property in favor of the said Mr. S.M. Vadhera, whereas the said plaintiffs and other defendants were always aware that vacant possession of the ground floor of the property bearing No. 5A/6, Ansari Road, Darya Ganj, New Delhi (hereinafter referred to as "the Darya Ganj Property") could not be obtained inasmuch as it was occupied by a tenant. Consequently, as stated in para 12 of is No. 1869/2007, it is alleged that the other parties made a promise without any intention of performing it and this constituted fraud. It is, Therefore, alleged that the consent of the applicant (Mr. S.M. Vadhera) to the agreement / compromise, which culminated in the decree of 25.08.2006, was obtained by fraud and is, Therefore, voidable at the option of the applicant (S.M. Vadhera), which option he wants to exercise.

3. The learned Counsel for the applicant submitted that Order 23 Rule 3 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the CPC") requires that a compromise of a suit is to be based on a lawful agreement. He then referred to the proviso to the said Rule 3 which stipulates 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. Referring to the Explanation appended to the said Rule 3, the learned Counsel submitted that an agreement or compromise which is void or voidable under the Indian Contract Act, 1872 shall not be deemed to be lawful within the meaning of this rule. He, Therefore, submitted that an agreement or compromise which could be regarded as void or voidable under the Indian Contract Act, 1872 would not be a lawful agreement and a compromise based on such an agreement which was not lawful could be challenged.

4. Referring to Rule 3A of Order 23 CPC, the learned Counsel submitted that no suit could be filed to set aside a decree on the ground that the compromise on which the decree is based is not lawful. He then referred to Section 96(3) CPC to indicate that no appeal could be filed in respect of a decree passed by the court with the consent of the parties. He referred to these provisions to indicate that neither a suit could be filed nor an appeal in respect of the compromise decree dated 25.08.2006 and the only remedy that the applicant (Mr. S.M. Vadhera) had was to file an application before this Court invoking the proviso to Rule 3 of Order 23 CPC. The learned Counsel then referred to the decision of the Supreme Court in the case of Banwari Lal Vs. Smt. Chando Devi (through L.R.) and another, . In paragraph 7 of the said decision, the Supreme Court observed as under:

7. By adding the proviso along with an Explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the Court which had recorded the compromise in question. That Court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The Explanation made it clear

that an agreement or a compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of the said Rule. Having introduced the proviso along with the Explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3A in respect of institution of a separate suit for setting aside a decree on basis of a compromise saying:

3A. Bar to suit - No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

The Supreme Court also held in paragraph 13 as under:

When the amending Act introduced a proviso along with an Explanation to Rule 3 of Order 23 saying that where it is alleged by one party and denied by other that an adjustment or satisfaction has been arrived at, "the Court shall decide the question", the Court before which a petition of compromise is filed and which has recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on basis of any lawful agreement. To make the enquiry in respect of validity of the agreement or the compromise more comprehensive, the Explanation to the proviso says that an agreement or compromise "which is void or voidable under the Indian Contract Act..." shall not be deemed to be lawful within the meaning of the said Rule. In view of the proviso read with the Explanation, a Court which had entertained the petition of Compromise has to examine whether the compromise was void or voidable under the Indian Contract Act. Even Rule 1(m) of Order 43 has been deleted under which an appeal was maintainable against an order recording a compromise. As such a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23, or an appeal u/s 96(1) of the Code, in which he can now question the validity of the compromise in view of Rule 1A of Order 43 of the Code.

5. The learned Counsel for the applicant then referred to the decision of the Supreme Court in the case of Pushpa Devi Bhagat (D) th. LR. Smt. Sadhna Rai Vs. Rajinder Singh and Others, wherein the Supreme Court observed as under:

12. 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 3A.

(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. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21.8.2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27.8.2001), filed an appeal and chose not to pursue the application filed before the court, which passed the consent decree. Such an appeal by second defendant was not maintainable, having regard to the express bar contained in Section 96(3) of the Code.

6. On the strength of the aforesaid decisions, the learned Counsel for the applicant submitted that the only remedy available to a party seeking to challenge the compromise decree on the ground of fraud was by way of moving the present applications under the proviso to Rule 3 of Order 23 CPC. He then submitted that in view of the provisions of Clause 3 of Section 17 of the Indian Contract Act, 1872, the compromise was vitiated by fraud. Clause (3) of Section 17 defines fraud, inter alia, to include an act where a promise is made without an intention of performing it. In this background, it was contended that the other parties to the compromise were well-aware that the godown in the ground floor of the Darya Ganj Property was tenanted and one Mrs. Shashi Shroff was a tenant therein and the tenancy was covered under the Delhi Rent Control Act, 1958. He submitted that while the other parties were aware that vacant possession of the said godown in the ground floor of the Darya Ganj Property could not be given to the applicant (Mr. S.M. Vadhera), they went ahead and agreed to give possession of the said premises knowing very well that they could not do so because evicting the tenant who was protected under the Delhi Rent Control Act would take many years. It was contended that this fact of the premises being under the occupation of a tenant at the time the compromise was entered into was not known to the applicant (Mr. S.M. Vadhera). Consequently, it was contended that the other parties made a promise without any intention of performing the same and this constituted fraud which vitiated the entire compromise. The said decree was, Therefore, according to the learned Counsel for the applicant, liable to be set aside on this score.

7. Referring to the terms and conditions of the settlement which were arrived at

in the course of mediation, the learned Counsel for the applicant drew my attention to Condition No. 1 which reads as under:

1. Property No. 5A/6, Ansari Road, Darya Ganj is the only HUF property, which HUF stand dissolved today. Defendant No. 2 in suit No. 2885/1989 and plaintiff in suit No. 449/2001 (Suharsh Mohan Vadhera) shall be entitled to portion Marks A, B, C, D on the first floor and the portion Mark E, F, G, H, I, J, K and L on the first floor and the portion Mark M, N, O, P, Q, R, S, T, U V, W on the second floor and the portion mark X, Y, Z, Z1, Z2, Z3, Z4, Z5 and Z6 on the third floor.

He also referred to the following portion of the settlement:

This settlement has been arrived at between the parties voluntarily in presence of their respective counsels without any pressure, coercion and there shall not remain any dispute with regard to any property / share of the property between the parties. All the parties shall deliver vacant and peaceful possession of the respective portions and Mr. Suharsh Vadhera will shift to their own portion by 31.8.2006. The parties have agreed to maintain peace and harmony in future and there shall not be any litigation from Jagdish Rai Vadhera against Suharsh Mohan Vadhera, his wife Smt. Kiran Vadhera and their son Master Manik Vadhera.

A reference was also made to the map which was attached with the said settlement. According to the learned Counsel for the applicant, it was the understanding of the parties that vacant possession of the entire property as mentioned in Condition No. 1, referred to above, would be handed over and no exception was carved out in respect of the godown which was allegedly under the tenancy of Mrs. Shashi Shroff. He also referred to the notices dated 25.08.2006, 01.09.2006 and 12.09.2006 issued by the counsel for Shri Jagdish Rai Vadhera and others. These notices were issued to the applicant with regard to the working of the compromise decree. The learned Counsel drew my attention to paragraph 3 of the first letter wherein it was indicated that the other parties were willing to hand over vacant and peaceful possession of the portion which had fallen to the share of Mr. S.M. Vadhera in the Darya Ganj Property and Mr. S.M. Vadhera was called upon to cooperate and take possession in terms of the compromise. These letters were written because, according to the other parties, Mr. S.M. Vadhera was not abiding by the compromise decree and was not handing over possession of the property which he was supposed to hand over to the other parties. The third letter of 12.09.2006, according to the learned Counsel for the applicant, for the first time, mentioned that the ground floor portion of the property fell under the tenancy of Mrs. Shashi Shroff and that the said tenant had been informed that Mr. S.M. Vadhera had become her landlord and that the symbolic possession of the portion had been handed over to Mr. S.M. Vadhera after erecting walls, etc. According to the learned Counsel for the applicant, this letter for the first time introduced the concept of symbolic possession, when, according to the compromise, vacant possession was to be handed over by the other parties to Mr. S.M. Vadhera. It was, Therefore, submitted that this is clear evidence of the fact that the parties had made a

promise without any intention of performing the same. This, in turn, amounted to fraud and consequently the decree was liable to be set aside on this ground.

8. The learned Counsel appearing for the other parties to the compromise submitted that all the parties are abiding by the terms of the compromise which was recorded by this Court and the decree which was passed in terms thereof on 25.08.2006 except Mr. S.M. Vadhera. They submitted that it was all along known to Mr. S.M. Vadhera that the godown in the ground floor of the Darya Ganj Property was in the tenancy of Mrs. Shashi Shroff. Even the map which accompanied the settlement and which has been signed by all the parties, including Mr. S.M. Vadhera, indicates that the godown in the ground floor of the Darya Ganj Property was under the tenancy of Mrs. Shashi Shroff. It was further pointed out by the learned Counsel appearing for the other parties that Condition No. 1 of the terms of settlement only speaks of the entitlement to the portions of the property at Darya Ganj. It does not speak of possession. Condition No. 11 of the terms of settlement talks of transfer of possession in respect of portions of the Darya Ganj Property. The said condition reads as under:

11. Vacant possession of the garrage on the ground floor and Mezzanine between ground floor and first floor which have come in the share of Mr. Suharsh Mohan Vadhera and its vacant and peaceful possession shall be delivered by Shri Gajender Mohan Vadhera by 31.8.2006.

It only speaks of vacant possession of the garage on the ground floor and the mezzanine between the ground floor and the first floor. There is no mention of handing over of vacant possession of the godown. Thus, because it was well-known to all the parties that the godown was under the tenancy of Mrs. Shashi Shroff who was a tenant protected under the Delhi Rent Control Act and her eviction would take some time, even the last portion of the settlement which has been referred to by the learned Counsel for the applicant bears reference to delivery of vacant and peaceful possession of their respective portions. This has obvious reference to the specific conditions, including Condition No. 11 referred to above. Furthermore, in the reply to is No. 1869/2007 filed on behalf of the plaintiffs in CS(OS) 2885/1989, it is clearly stated in paragraph 8 that the applicant (Mr. S.M. Vadhera) as well as the other parties were well-aware of the fact that the godown in the ground floor of the Darya Ganj Property was under the tenancy of one Mrs. Shashi Shroff who had been using the said premises for the last 35-40 years. In the rejoinder filed on behalf of the applicant (Mr. S.M. Vadhera), this fact has not been specifically denied.

9. The learned Counsel appearing for the other parties also referred to a decision of the Supreme Court in the case of Hansa Industries Pvt. Ltd. and Others Vs. Kidarsons Industries Pvt. Ltd., wherein the Supreme Court observed that courts have always leaned in favor of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. A reference was also made to the decision of the Supreme Court in the case of Dadu Dayal Mahasabha Vs. Sukhdev Arya and Another, wherein the Supreme Court had observed as under:

6. The main question which requires consideration however, is whether the trial court has jurisdiction to cancel the order permitting the withdrawal of the suit under its inherent power, if it is ultimately satisfied that Hari Narain Swami was not the Secretary of the appellant Society and was, Therefore, not entitled to withdraw the suit. The position is well established that a court has inherent power to correct its own proceedings when it is satisfied that in passing a particular order it was misled by one of the parties. The principle was correctly discussed in the judgment in *Sadho Saran Rai and Ors. v. Anant Rai and Ors.* AIR 1923 Pat 483, pointing out the distinction in cases between fraud practiced upon the court and fraud practiced upon a party.

7. Let us consider the cases in which consent decrees are challenged. If a party makes an application before the Court for setting aside the decree on the ground that he did not give his consent, the court has the power and duty to investigate the matter and to set aside the decree if it is satisfied that the consent as "a fact was lacking and the court was induced to pass the decree on a fraudulent representation made to it that the party had actually consented to it. However, if the case of the party challenging the decree is that he was in fact a party to the compromise petition filed in the case but his consent has been procured by fraud, the court cannot investigate the matter in the exercise of its inherent power, and the only remedy to the party is to institute a suit. It was succinctly summed up in the aforementioned case that the factum of the consent can be investigated in summary proceedings, but the reality of the consent cannot be so investigated.

10. This decision was cited for the purpose of stating that since the applicant had raised the issue of "reality of consent", then that could not be gone into in summary proceedings and the only remedy available to the party was to institute a suit. A decision of a learned single Judge of this Court in the case of *Shri Tarachand Jain Vs. Smt. Saroj Gupta*, was also referred to. The said decision placed reliance on *Dadu Dayal Mahasabha (supra)*. The learned single Judge observed as under:

8. Coming to the question of fact that he was misled into entering into the agreement with Geeta Devi and Sarla Devi, I find that enquiry in this regard cannot be gone into in an application u/s 151 CPC. It is pertinent to mention here that although the applicant says that he was misled into entering into this assignment deed, he does not give the details as to how Geeta Devi and Sarla Devi misled the applicant or committed any fraud on him. He does not deny that the agreement was executed by him but says that this was without his consent. The enquiry required for trying the claim of the applicant cannot be done within the scope of Section 151 CPC. The same can be subject-matter of an independent suit as is held by the Supreme Court in the case of *Dadu Dayal Mahasabha Vs. Sukhdev Arya and Another*, . Referring to an old judgment of *Sadho Saran Rai and Ors. v. Anant Rai and Ors.* AIR 1923 Pat. 483 Supreme Court laid down the following law in respect of efficacy of Section 151 CPC in dealing with the situations as the one at hand.

Let us consider the cases in which consent decrees are challenged. If a party makes an application before the court for setting aside the decree on the ground that he did not give his consent, the court has the power and duty to investigate the matter and to set aside the decree if it is satisfied that the consent as a fact was lacking and the court was induced to pass the decree on a fraudulent representation made to it that the party had actually consented to it. However, if the case of the party challenging the decree is that he was in fact a party to the compromise petition filed in the case but his consent has been procured by fraud, the court cannot investigate the matter in the exercise of its inherent power, and the only remedy to the party is to institute a suit. It was succinctly summed up in the aforementioned case that the factum of the consent can be investigated in summary proceedings, but the reality of the consent cannot be so investigated.

11. It is apparent that the Supreme Court in *Pushpa Devi Bhagat* (supra) has clearly held that the only remedy for challenging a compromise decree was to file an application under the proviso to Rule 3 of Order 23 of CPC, whereas in *Dadu Dayal Mahasabha* (supra), the Supreme Court drew a distinction between a fraud practiced upon the court and fraud practiced upon a party. The Supreme Court observed that if it was a fraud practiced upon the court, then the court had the power to investigate the matter in exercise of its inherent powers and to set aside the decree if it was satisfied that the consent as a fact was lacking and that the court was induced to pass a decree on a fraudulent representation made to it that the party had actually consented to it. On the other hand, where the case of the party challenging the decree was that he was, in fact, a party to the compromise petition, but that his consent had been procured by fraud, the court could not investigate the matter in exercise of its inherent powers and the only remedy with the party was to institute a suit. There appears to be an apparent conflict between the two decisions of the Supreme Court on this aspect of the matter. In *Pushpa Devi Bhagat* (supra), the Supreme Court states that the only remedy was by way of filing an application under the proviso to Order 23, whereas in *Dadu Dayal Mahasabha* (supra), the Supreme Court observed that in a case where the party alleges that his consent was procured by fraud, the only remedy available to such party was to institute a suit.

12. However, without resorting to try and resolve this controversy, I find that the applicant has not been able to lay any foundation for setting aside the decree. From the narration of facts and circumstances, it is apparent that the applicant (Mr. S.M. Vadhera) was well-aware that there was a tenant in the godown in the ground floor of the Darya Ganj Property. This fact has also not been denied specifically in the rejoinder filed on his behalf. The map which formed part of the settlement clearly displayed the godown to be in the tenancy of Mrs. Shashi Shroff. The said map was signed by all the parties, including Mr. S.M. Vadhera. Condition No. 1 of the terms of settlement referred to various portions of the property and did not refer to the question of possession. Condition No. 11 of the terms of settlement specifically referred to transfer of possession with regard to the garage and the mezzanine, but did not refer to the godown at all. Therefore,

it cannot be said that the consent of Mr. S.M. Vadhera was obtained fraudulently. He consented to the terms of settlement with open eyes and with the full knowledge that the godown was tenanted. He cannot now be permitted to resile from the same.

13. Returning to the question of whether these applications are maintainable or not in view of the apparent conflict in the decisions of the Supreme Court referred to above, there are only two possible outcomes. One, that the applications are not maintainable and the applicant would have to file an independent suit. Two, the applications are maintainable. In view of the conclusion arrived at by me on merits, it does not at all matter if the applications were maintainable and, if the applications were not maintainable, then they would, in any event, be dismissed. Consequently, resolution of the apparent conflict between the Supreme Court decisions in Pushpa Devi Bhagat (supra) and Dadu Dayal Mahasabha (supra) would not be necessary for the purposes of this case.

14. The applications have no merit. They are dismissed.