
(2012) 07 DEL CK 0374

In the Delhi High Court

Case No : EFA (OS) No. 38 of 2009

Shri M.R. Malhotra (Since Deceased) Thr. Lrs. and Others

APPELLANT

Vs

Competent Builders Pvt. Ltd.

RESPONDENT

Date of Decision : 25-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 23, Order 23 Rule 3, 151

Contract Act, 1872 — Section 51, 55

Succession Act, 1925 — Section 214, 214(1)(b), 214(b)

Citation : (2012) 192 DLT 295

Hon'ble Judges : Pradeep Nandrajog, J; Manmohan Singh, J

Bench : Division Bench

Advocate : Sanjay Poddar, instructed by Mr. Mohinder Madan, Mr. Shyam Dev and Mr. S.S. Handa, s-LR1bi to iv, for the Appellant; Anil Sapra instructed by Ms. Sapna Sinha and Ms. Payal Juneja, for the Respondent

Final Decision : Disposed Off

Judgement

Manmohan Singh, J.—The present execution first appeal assails the order dated 28th July, 2009 passed in Execution Petition No. 95/2003 whereby the learned Single Judge dismissed the execution petition. The facts of the case leading to filing of the present appeal in execution petition are that the appellants filed the suit bearing CS(OS) No. 938/1990 before this Court, praying for permanent and mandatory injunction against the respondent and seeking to recover the possession of the land on the basis of an agreement to sell dated 25th November, 1980 which had been executed by the appellants with the respondent and a sum of Rs. 11 lac had been received from the respondent towards part consideration of the said agreement. The total consideration had been agreed at Rs. 34.50 lac. The balance amount of the agreed sale consideration was required to be paid by the respondent to the appellants at the time of execution of the sale deed, i.e. appellants were seeking avoidance of the agreement.

2. On 8th March, 1991 a compromise arrived at between the parties in the said

suit, in the form of application under Order XXIII, Rule 3 of the Code of Civil Procedure, 1908 which had been signed by both the parties and their respective counsel. The said application came up before the Court on 21st March, 1991. The learned Single Judge after recording the statements of the parties had decreed the suit in terms of the compromise and by allowing the said application.

3. It is necessary for us to refer the terms and conditions mentioned in the compromise application which read as under:-

2. That the parties have agreed to settle the present dispute. The plaintiff shall return the sum of Rs. 11,00,000/- to the defendant and simultaneously the defendant shall deliver back possession of 6,525 sq. yds. of land to the plaintiffs. The defendant shall also not have any interest in the remaining 2,175 sq. yds. of land which is with the tenant as aforesaid running CHANDRALOK cinema.

3. That the parties have agreed that the aforesaid transaction shall be completed within one week from today. None of the parties shall thereupon have claim against each other in regard to the aforesaid agreement to sell dated 25-11-1980 and the agreement shall be treated as a DEAD LETTER.

4. In view of the above said terms mentioned in the application, the suit of the appellants was disposed of vide order dated 21st March, 1991. The application was exhibited as Ex.C1 and it was specifically recorded that the parties would be bound by the terms of the agreement and Ex.C1 would form part of the decree.

5. The respondent wrote a registered letter dated 30th October, 2001 to one of the appellants in reply to letter dated 15th October, 2001, namely, Sh. Suresh Kumar Malhotra informing him that since his father Sh. M.K.Malhotra had expired, as such it was necessary that before possession of land in question was handed over to the legal heirs, a Succession Certificate was required to be obtained from the competent Court of law. No response to the said letter was given by the appellants.

6. The appellants thereafter in February, 2003 filed the execution petition bearing Ex.P.No.95/2003 seeking relief from the Court to dispossess the judgment-debtor/respondent from the property in question and to put the decree-holders/appellants in possession of the property to satisfy the decree.

7. It was mentioned in para-3 of the execution petition that the appellants would pay the sum of Rs. 11 lac to the respondent as and when the respondent would deliver the possession of the land in question as earlier the appellants had been demanding the possession of the property from the respondent who failed to do so and had been withholding the same for the last about 12 years.

8. Objections to the execution petition were filed by the respondent under Order XXI, Rule 23 read with Section 151 CPC wherein it was stated by the respondent that as per the compromise decree passed on 21st March, 1991, it was obligatory on the part of the appellants to first pay within one week the amount of Rs. 11 lac to the respondent and the possession was required to be delivered

simultaneously by the respondent. The period of one week stated in the application was to be started from the date of recording of the compromise, i.e. 21st March, 1991 which was ended on 28th March, 1991. Thus, time was the essence of the agreement as the decree was passed in terms thereof. Since appellants were not ready and willing to pay the said amount of Rs. 11 lac to the respondent within the time granted by the Court, nor were they ready to take back simultaneous possession of the land thereof. Now, they are not entitled to enforce the decree.

9. The second objection raised by the respondent was that the execution petition was not maintainable in view of the provisions of Section 214 of the Indian Succession Act, as the appellants/decreed-holders No. 1 to 4, 7 and 8 who were the plaintiffs in the main suit have since died. The execution was filed by the appellants being the alleged legal heirs of those deceased plaintiffs without obtaining succession certificate. The respondent also alleged that the appellants are not the true legal heirs of the deceased decreed-holders.

10. The third objection raised by the respondent was that the alleged power of attorney was executed jointly in the name of Sh. Suresh Malhotra and Sh. Sanjeev Malhotra and no power has been given independently or either of them to act exclusively under the powers granted.

11. The learned Single Judge has upheld objections No. 1 and 2 and has thus dismissed the execution petition.

12. Mr. Sanjay Poddar learned Senior counsel for the appellants has made his submissions which can be outlined in following manner:

a) Firstly, learned counsel argued that the learned Single Judge erred in the coming to the finding by placing the reliance on the judgments of Pioneer Engineering Co. Vs. D.H. Machine Tools, and Somani Marketing Pvt. Ltd. and Another Vs. Subhash C. Raswant, Raswant of Division Bench of this court that the executing court cannot extend the time period for the performance of the obligation in the compromise agreement where clear time period is mentioned. It is argued that rather Somani Marketing (Supra) itself records by placing the reliance of Supreme Court judgment in the case of Smt. Periyakkal and Others Vs. Smt. Dakshyani, that the time can be extended but in a rare case to avoid manifest injustice. Learned counsel thus argued that the present case is a case where injustice would be caused if the performance of the obligation is not insisted by the court. This is due to the reason that neither the respondent had paid the residual sum in agreement to sell nor performed the obligations as per the decree. Thus, the same would cause injustice to the appellants that even after filing of the suit and getting the decree with consent, nothing has ensued in favour of the appellants.

b) Learned counsel argued that the time was not the essence of the agreement or the compromise agreement, it is argued that the compromise agreement has to be read and understood in order to find out the intention of the parties as it

existed on the date of the agreement, if there is such intention emerging at the time of the contract that the time was intended to be essence, only then the same has to be respected and not in all other cases. If the parties never understood the time as an essence of the contract and continue to operate under the said agreement even after the expiry of time, then, it cannot be said that the time is intended to be the essence of the contract in such an agreement. Learned counsel relied upon the judgment of apex court in the case of Amteshwar Anand Vs. Virender Mohan Singh and Others, where the Supreme Court approved the said proposition by observing thus:

It is thus argued that the said observations squarely governs the case of the appellants as in response to the letter issued by the appellants in the year 2001, the respondents vide letter dated 30th October 2001 insisted for the succession certificate before any action in the matter is taken. By reading the said reply, it was argued that the respondent never replied to the said demands of the appellant to give back the land by stating that the time is essence of the contract. Rather, the respondent insisted for succession certificate for further action which means that even the respondent never understood as per the agreement, the time is the essence of the contract. Therefore, the passage of time and non performance of the obligations by the parties under the compromise agreement as per the time contained in the agreement which is 7 days cannot be said to make the decree inexecutable.

c) Learned counsel for the appellants further argued that the objection as to production of the succession certificate as a bar to the execution of the decree is not maintainable as the said Section 214 of the Indian Succession Act is only applicable to the debts and not in other cases.

d) Learned counsel for the appellant argued on the aspect of the solemn principle governing the executing court which is that the court cannot go behind the decree and proceed to nullify or invalidate or modify the same. If the time was never intended to be essence of the contract, the court by relying upon the extension principle cannot rewrite the compromise agreement by saying that the expiry of the time would operate to the detriment of the appellants.

By making all the afore noted submissions, learned counsel for the appellants submitted that as no objection raised by the respondent is tenable, the execution is liable to be allowed in favour of the appellants.

13. Per contra, Mr. Anil Sapra, learned Senior counsel has made his submissions which are enumerated as under:

a) Mr. Sapra argued that in the present case the compromise agreement contained the reciprocal promises which are to be performed simultaneously within the period of 7 days. It has been argued that for more than 10 years nothing has been done by the appellants towards the fulfillment of the terms of the compromise. Therefore, the time was intended to be of essence in the said agreement which is reflected by the use of the term "simultaneously" in clause 2

of the terms of settlement and also by the use of the wordings "shall be completed within one week from today" in clause 3 of the terms of the settlement. The said aspect makes the consent decree having not been performed and thus becomes inexecutable.

Mr. Sapra supported the finding of the learned single judge in this regard by stating that there is no infirmity in the order of the learned single judge when he finds that the decree is inexecutable.

b) Mr. Sapra, learned Senior counsel for the respondent raised another objection by contending that there is a clear bar for the appellants as the heirs of Sh. M.R. Malhotra to file execution and this court to proceed with the execution in view of Section 214 of the Indian Succession Act, 1925. Mr. Sapra relied upon the judgment of learned single judge of Karnataka High Court in the case of AIR 1986 Kar 204 K.T. Thumme Gowda v. Thimme Gowda & Another to contend that the legal representative cannot execute the decree unless he obtains the succession certificate in view of clear applicability of Section 214 (1) (b) of Succession Act, 1925.

c) Mr. Sapra, learned Senior counsel for the respondent argued that the executing court cannot enlarge the time period fixed under the compromise for performing the obligation. Learned senior counsel in order to support the contention relied upon the judgments passed in Pioneer Engineering (supra) and Somani Marketing (supra). Mr. Sapra also read the impugned order in this respect and has urged that the said observations are correct and should not be interfered by this court.

By making the aforementioned submissions, Mr. Sapra submitted that this court should dismiss the execution petition.

14. We have gone through the order passed by the learned Single Judge and also the records of the present proceedings. We have also carefully considered the submissions advanced by the learned counsel for the parties at the bar.

15. Firstly, we shall deal with the objection raised by the learned counsel for the respondent that the present execution petition is not maintainable in view of the inability of the appellants or petitioners to bring the succession certificate in view of the applicability of the Section 214(b) of the Succession Act, 1925. The said section reads as under:

214. (b) Proceed, upon an application of a person claiming to be so entitled to execute against such a debtor a decree or order for the payment of his debt, Except on the production, by the person so claiming, of- (i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or (ii) a certificate granted u/s 31 or Section 32 of the Administrator General's Act, 1913 (III of 1913) and having the debt mentioned therein, or

(iii) a succession certificate granted under Part X and having the debt specified

therein, or

(iv) a certificate granted under the Succession Certificate Act, 1889, (VII of 1889) or

(v) a certificate granted under Bombay Regulation No. VIII of 1827, and if granted after the first day of May, 1889, having the debt specified therein. (2) The word "debt" in sub-section (1) includes any debt except rent, revenue or profits payable in respect of a land used for agricultural purposes.

16. On the mere reading of the aforementioned provision, it is clear that Section 214 (b) provides for the cases where the courts are executing the decrees involving a debt. The said aspect is also clear from reading of sub section (2) of the Section 214 which defines debt in the form of inclusive definition. The said section would therefore, not operate as bar to any execution proceeding and its ambit is confined to only cases where there is an execution seeking to recover a debt.

17. This is also clear when Madras High Court explains the underlying purpose of the section in the case of (1956) 2 MAD.L.J. 114 Venkatalakshmi v. The Central Bank where the Madras High Court held that: "The object of taking out a succession certificate u/s 214 of the Indian Succession Act is to give security to the debtors paying the debts due to the deceased and thus facilitate the collection of debts on succession. The purpose of the Act is not to enable litigant parties to have an opportunity of litigating contested questions of title to property. When a Bank is satisfied that the applicant is entitled to collect the debts it should not prescribe onerous conditions which are in no way necessary for its safety.

18. In the case of Khader Bee and Others Vs. Mohammad Vazir and Others, the learned Single Judge of Andhra Pradesh High Court was concerned with the question whether Succession Certificate as contemplated u/s 214 of the Indian Succession Act, 1925 is required for the purpose of executing a decree obtained in the suit for partition of immovable properties. The court answered the question in negative by observing thus:

The question raised in this revision petition has been considered by this Court in T. Rama Seshagiri Rao and Another Vs. N. Kamalakumari, . This Court while interpreting Section 214 of the Indian Succession Act has held as under:

Where execution petition was filed by the legal representative of the deceased decree holder for execution of the decree for maintenance with charge the legal representative would not be required to obtain a Succession Certificate before executing the decree for maintenance and for execution of a decree for costs.

XXX XXX XXX

A suit to recover money due on a simple mortgage by sale of the mortgaged property is a suit for recovery of debt, but it is a suit to enforce a charge on

immovable property and no succession certificate need be obtained by the heirs of the mortgagee to recover the money, therefore, an application for execution of a mortgage decree for realisation of the amounts by sale of the mortgaged property is not an application to obtain an order for payment of debt.

4. In another case in *S. Rajayalakshmi v. Smt. S. Sitamahalakshmi*, this Court considered the applicability of Section 214 of the Act. This Court held that the Succession Certificate is necessary, if a debt is sought to be recovered, for the purpose of other items of the decree, Succession Certificate is not necessary. In the present case, execution proceedings have been filed in pursuance of the decree obtained in the suit for partition of immovable properties. Hence, succession certificate is not required as contemplated u/s 214; since it is not a debt within the meaning of subsection (2) of Section 214 of the Indian Succession Act.

(Emphasis Supplied)

19. In view of the aforementioned findings of the several courts in India and upon clear reading of Section 214 of Succession Act, 1925, we find no force in the argument of the learned Senior counsel for the respondent that the Succession Certificate is a condition precedent for the executing court to proceed in the present matter. In the present matter, the appellants have to pay the sum towards the possession of the property from respondent. The appellants are not seeking to recover the debts and thus the provision clearly has no applicability. Accordingly, the judgment passed in *K.T. Thumme Gowda v. Thimme Gowda* (supra) would have no applicability to the facts of the present case. The objection of the respondent is thus rejected without any merit.

20. We shall now proceed to discuss the matter on merits. We think that in order to understand the meet of the case, we should state some facts as a backdrop to the present execution proceedings so that it can be realized that in what context the appellants and respondents are litigating.

21. The plaintiffs/ appellants and the respondent had entered into an agreement to sell dated 25th November, 1980 for the land measuring 6525 sq. yards situated at Tuglukabad. The sale consideration of the said agreement was Rs. 34 lac which was to be paid in installments. The respondents had paid Rs. 11 lac as initial sum after entering the agreement and took the possession of the land. Thereafter, on 12th October, 1987, the notice was served upon the respondent whereby it was stated that the money paid by the respondent shall be forfeited and the respondent should restore the possession to the plaintiffs. The plaintiffs again through counsel sent the notice on 1st July 1989 calling upon the respondent to restore the possession. Thereafter, the plaintiffs filed the suit before this court bearing CS(OS) No. 238/1990 wherein notices were issued and eventually the said suit was decreed on 21st March 1991 whereby the plaintiff was directed to return Rs. 11 lac to the respondent and respondent was directed to deliver back the possession of 6525 Sq. Yards of land to the plaintiff.

22. Thereafter, the said decree was sought to be executed and giving rise to this appeal. This backdrop became necessary so as to make it clear that in the suit, appellants were seeking restoration of possession on the basis of non compliance of obligation under the agreement to sell entered into earlier in the year 1980 by the respondent, which has not culminated into the complete sale till date. The said property is remained in possession of the respondent as the appellants had not paid back the said sum of Rs. 11 lac which was paid to them at the time of the contract.

23. The said facts as a backdrop also became necessary to mention due to the reason that impugned order passed by the learned Single Judge nowhere records the said facts and straightaway proceeds on the basis that there is a compromise decree presented to the court for execution where there is a timeline prescribed and the same cannot be extended by the court. According to us, the facts antecedent to the filing of the execution are crucial and will enable the court to understand the seriousness involved in the case.

24. Now, we proceed to discuss the legal aspect as to whether the time is essence of the compromise agreement in the present case and if so, whether the decree becomes inexecutable on that count.

25. It is trite law that the compromise decree is an imprimatur of the court on what has been agreed by the parties in the agreement. The court has to thus see decree as an agreement entered into by the parties and has to find out the intention of the parties from the agreement or otherwise.

26. No doubt, it is true that the compromise agreement provided that the petitioner would pay Rs. 11 lac and simultaneously the respondent shall hand over the possession of the land. The said transaction was also agreed to be completed within a week.

27. Upon reading of the terms of the agreement, it is apparent that what has been said to be completed with in one week is the "transaction" and there was no unilateral obligation of payment of Rs. 11 lac on the plaintiffs only but, the said transaction was intended to be completed with in a week.

28. The said terms in the agreement nowhere provided the consequences for non completion of the said transaction in the event the same is not completed within a stipulated time frame. Thus, it is not easy to assume on a priori basis that by mere specification of time in the agreement, the parties agreed and intended to have time as an essence to the contract.

29. It is noteworthy to mention that the compromise agreement is binding on both the parties. The said obligations of the payment of money as well as the simultaneous handing over of the possession of the land by the respondents were reciprocal promises in the agreement.

30. One cannot brush aside this important fact in view of Section 51 of the Indian Contract Act, 1872 if promises which reciprocals each one has always the

option to perform his part of the contract but one party cannot insist on the other performing his promise without himself performing what he has agreed to do under the contract.

31. Therefore, when the learned counsel for the respondent complains that there is lack of the endeavors for more than 10 years by the appellants to pay the money within a stipulated time and take back the possession, the same equally holds good for the respondent as well.

32. Admittedly, the plaintiff namely Sh. M.R. Malhotra had died. There is no document on record to suggest as whether the plaintiff contacted the respondent and insisted for the performance of the terms of the compromise agreement or not. We are also not sure whether such insistence was carried out by plaintiff orally with the respondent or not. As per record, there is a complete silence for the period of 10 years.

33. Likewise, there is no document on the record where under the respondent has written anything to the appellants/plaintiffs in relation to insist the performance of the obligations within time showing under the agreement pursuant to passing of the decree and showing its willingness to comply with the decree. There is also no document on record suggesting that the respondent has written to the plaintiff that the compromise agreement or decree has become unworkable or repudiated as the performances between the parties were not implemented timely as envisaged under the agreement. This position of no exchange of communication between the parties relating to compliance of the performance remained intact upto 2001.

34. In the year 2001, the appellant by way of letter dated 15th October, 2001 called upon the respondent to comply with the terms of the decree.

35. In response thereto, the respondent replied vide letter dated October 30, 2001 as under:

In view of the compromise recorded by Hon"ble Delhi High Court under Order 23 Rule 3 of the Code of Civil Procedure, you have vide your letter dated 15.10.2001, desired to handover the possession of the land measuring 6525 sq. yds. in Khasra No. 2, Village Tughlakabad, Delhi.

Shri M.K. Malhotra, your respected father (plaintiff) has expired as such it is necessary that before possession

of land in question is handed over to the legal heirs a Succession Certificate is must to be obtained from the Competent Court of Law.

Please do the needful before any action in the matter is taken.

36. Therefore, the subsequent conduct of the parties after the passing of the decree reveal that the parties never understood the agreement in the sense that the time should be essence of the contract. The parties under the agreement never called upon each other to comply with the obligations under the terms of

agreement timely. On the contrary, in the year 2001, when the appellants sought the return of the possession of land, the respondent replied that the succession certificate must be obtained before any further action is taken in the matter. The respondent never denied the existence of the agreement and nor the respondent repudiated or avoided the agreement on the count that the promise of payment of sum was not complied by the petitioner timely and thus the appellant could not have insisted for return of possession. The respondent rather only asked the appellant to furnish the Succession Certificate by stating that it is necessary that before possession of land in question is handed over to legal heirs.

37. All the events subsequent to passing of the decree especially in the year 2001 are indicative of the intention of the parties, which was not to treat the time as essence of the contract or agreement. It is altogether different matter that the time was mentioned in the agreement to comply the obligation under the agreement. The communication exchanged between the parties in the year 2001 reflects that till the year 2001, the intention of the parties was to comply with the agreement and not to repudiate the agreement on the ground of time as essence. What follows from the same is that the parties never understood the compromise agreement or decree as time bound till 2001, which is prior to appellant's approaching this court in the year 2003.

38. It is well settled law that whether time is intended to be an essence of the contract can be discerned by examining the intent of the parties at the time of entering the agreement, contents of the agreement and events subsequent thereto the agreement. The subsequent conduct of the parties is relevant to infer the intent of the parties as to whether the parties intended to treat the time as an essence or not. Sometimes, in the contract or the agreement where initially time was not of much importance can become essence of the agreement later on the basis of the subsequent conduct of the parties. Similar are the cases wherein the time is stipulated under the agreement, but the later conduct of the parties may reveal that the time was never understood to be the essence of the agreement. Thus, subsequent conduct plays a significant role in evaluating as to whether the time was treated to be an essence of the contract.

39. In the decision of *P. D'Souza Vs. Shondriilo Naidu*, the Supreme Court discussed the similar proposition wherein the time as an essence of the contract was waived by the party by way of the subsequent conduct. The Supreme Court observed thus:

The contention raised on behalf of the appellant to the effect that the plaintiff had failed to show her readiness and willingness to perform her part of contract by 5.12.1978 i.e. Time stipulated for performance of contract is rejected inasmuch as the defendant himself had revived the contract at a later stage. He, as would appear from the findings recorded by the High Court, even sought for extension of time for registering the sale deed till 31.12.1981. It is, therefore, too late in the day for the defendant now to contend that it was obligatory on the part of the plaintiff to show readiness and willingness as far back as 5.12.1978.

Time, having regard to the fact situation obtaining herein, cannot, thus, be said to be of the essence of the contract. In any event, the defendant consciously waived his right. He, therefore, now cannot turn around and contend that the time was of the essence of the contract and the plaintiff was not ready and willing to perform her part of contract in December 1978.

40. In the case of Tandra Venkata Subrahmanayam Vs. Vegesana Viswanadharaju and Another, the court has held that the mere stipulation of the time is not sufficient and the court has to see the real intent of the parties. The court observed thus:

The mere fact that the notice gave a certain time to perform the contract would not necessarily lead to the conclusion that the time prescribed was the essence of the contract. In all such cases, the Court has to look to the pith and substance of the notice and not at the letter of the notice and decide as to whether time was or was not essential to the subsistence of the contract. The real intention of the party who gives notice must be clear from the notice itself..... According to Section 55 of the Contract Act, it is no doubt true that in case the first defendant makes time the essence of contract and if the contract is not performed by the other side, the contract becomes voidable. It must however be remembered that the only right which the first defendant gets in such a case is to avoid the contract. The contract does not automatically get determined. He has to further expressly or in unambiguous words determine the contract under S.64 of the Contract Act. It is not in dispute that subsequent to Exhibit A-5, the first defendant did not issue any notice cancelling the contract. His previous as well as subsequent conduct brings out prominently the fact that he had never any intention to make time the essence of contract. The irresistible conclusion therefore is that Exhibit A-5 neither makes time the essence of contract nor does it conditionally or otherwise put an end to the contract. The assertion that he will sell the property to others need not necessarily in all cases mean that he wanted to put an end to the contract & quot; Learned counsel submitted, therefore, if the plaintiff wanted possession, he ought to have issued notice. He should have been willing to part with the advance that he had derived from the agreement, viz., a receipt of Rs. 4000/-. He cannot take the benefit under the agreement and also take possession from the appellants who are in legal possession.

(Emphasis Supplied)

41. From the reading of the aforementioned observations of the Supreme Court and other courts, it is seen that the subsequent conduct of the parties may bring out the intent of the parties which may show whether the time was actually intended to be of essence or not which depends on case to case basis.

42. This question has been examined by the Supreme Court in the cases relating to compromise decree containing obligation to pay the sum within a stipulated time frame where the Supreme Court applied the same principle that for time to be essence of the contract, the parties should have understood said contract in

such spirit.

43. The Supreme Court in the case of Amteshwar Anand Vs. Virender Mohan Singh and Others, observed thus:

Clause (d) contains apparent contradictions but the overall intention was to record a relinquishment of rights in the properties which were the subject matter of the two pending suits by KK and Guneeta in favour of VMS in exchange for VMS giving up his rights in the Bhopal properties and assuming all liabilities in respect of the suit properties and making payment in future of the sum of Rs. 50 lakhs.

Following the same procedure adopted in connection with the first agreement, an application was made by AA and VMS being I.A. No. 4252 of 1993 in Suit No. 1495 of 1989 under Order XXIII Rule 3 of the Code asking the Court to accept the compromise arrived at between the applicants. The application was disposed of on 27th May 1993 by directing the agreement " be taken on record

An agreed order was passed by the High Court of Delhi on 8th November, 1995 under which KK and Guneeta were directed to execute a General Power of Attorney in favour of VMS within 2 weeks and deposit the same in Court when VMS would make payment of the balance amount as claimed by them. Pursuant to the order, VMS brought bank drafts for the balance amount but KK and Guneeta refused to accept the same.

On 27th May 1996, AA filed an application for setting aside the second agreement and the decree dated 25th August 1993 on the ground that the agreement between AA and VMS was conditional upon VMS making payment of Rs. 15 lakhs to AA on or before 30th June 1994, that VMS had failed to pay the amount of Rs. 15 lakhs within that date or thereafter and had thereby committed a fundamental breach of the compromise and that the agreement stood repudiated. It was also alleged that the land over which AA was to have a lien by way of security for payment of Rs. 15 lakhs had also been mortgaged to Punjab National Bank which was the subject matter of a suit. This fact had been fraudulently suppressed by VMS. Furthermore, it was claimed that the 44 acres of land at Raisen referred to in Clause (e) was not the subject matter of the two suits nor was AA's son who owned the land, party to the suits; that VMS had acquired no lawful right to any of the properties of AA and that AA had not received any benefit in terms of the settlement or the compromise decree, which decree had come to the knowledge of AA recently.

On these facts, it was the contention before the Supreme Court that the time was of the essence of the contract as the said compromise agreement contained the obligation to pay within a stipulated time. The Supreme court negated the contention by looking into the subsequent conducts where the parties never understood the contract in that manner by observing thus:

The final submission of the appellants was that time for payments under the

agreements was of the essence. But the appellants themselves had never understood the agreements in that manner. They had asked for payment much after the dates had expired. As far as KK and Guneeta were concerned, in their application made in 1995 what they had asked for was for payments due in 1993.

(Emphasis supplied)

44. Applying the said principle to the present case, it can be seen that when the petitioner wrote to the respondent in the year 2001 calling upon the compliance of the terms of the decree, the respondent merely stated that for handing over the possession to the heirs, the succession certificate is necessarily to be produced. The respondent never stated that the agreement has ended or repudiated. Thus, the parties in the present case never understood the time as an essence of the contract. The respondent by not repudiating the agreement in the year 2001 and rather insisting the Succession Certificate for handing over the possession implicitly waived the right to urge that the time is an essence of the contract.

45. Now, we proceed to examine the order of the learned Single Judge which deals with the aspect of extension of time prescribed under the terms of the settlement.

46. The learned Single Judge by placing reliance on the judgment of this court on Pioneer Engineering Co v. D.H. Machine Tools (supra) passed by another Single Judge of this court proceeded to hold that where the time was fixed under terms of the compromise decree, the court has no jurisdiction to extend the said time. The learned Single Judge records this finding in para 10 of his judgment.

47. The learned Single Judge further in para 11 stated that the ratio of Pioneer Engineering (supra) was upheld by the Division Bench of this Court in AIR 2001 Del 152 Somani Marketing Pvt Ltd v. Subhash C. Raswant and consequently observed that the decree holder cannot seek court's indulgence and have the performance time extended.

48. We have examined the position in law of the said judgments passed by this court. Firstly, Pioneer Engineer (supra) indeed no doubt has held that this court cannot extend time where the time is prescribed for the performance of obligations under the compromise decree. However, the said judgment was rendered in the context of cases where the application was made to extend the said time period before the Judge pursuant to the passing of the decree and not in the cases of execution. The said judgment nowhere addresses the aspect in the context of the executing court granting such extension by looking into the agreement and future events in the matter. Furthermore, thereafter there is a Supreme Court judgment in the case of Smt. Periyakkal (supra) directly dealing with the aspect of executing court having powers to overlook the time period in order to avoid injustice. The said judgment was passed on 18th November, 1992. The learned Single Judge did not rely upon the said judgment and also did not address the question in the light of the judgment passed by the apex court.

49. It is also noteworthy that the learned Single Judge records that Somani Marketing (supra) affirms the decision of the Pioneer's case (supra). We have gone through the judgment and we find that Somani Marketing (supra) does not affirm the judgment of Pioneer (supra) and rather noticed the judgment of the Supreme Court in the case of Smt. Periyakkal (supra) and proceeded to observe that leaving the question open as to whether the court would have jurisdiction to extend time or not and the Division Bench in the case of Somani (supra) did not feel that it was a rare case where manifest injustice would be caused as in the case of Supreme Court in Periyakkal (supra). In the words of Learned Division Bench in Somani's case (supra), it was observed thus:

10. In this case without going into the question as to the applicability of the decision in Smt. Periyakkal and Others Vs. Smt. Dakshyani, that whether the Court will or will not have jurisdiction to entertain an application and pass orders thereon for extension of time and assuming that such power do exist in Court, we are of the view that this case would not fall within the criteria of rare case as laid down in Smt. Periyakkal and Others Vs. Smt. Dakshyani, It is not a rare case where manifest injustice would be caused to the appellants.

50. Therefore, the learned Single Judge's finding that the decision of Pioneer Engineer (supra) has been upheld in the Somani (supra) is not correct position in law as the judgment leaves the question open and proceeds to observe that the case in hand does not fall fit in the observations of the Supreme Court in Periyakkal (supra). Therefore, the finding of the learned Single Judge is not correct.

51. In a way Division Bench in law followed the Supreme Court in Periyakkal (supra) but on facts found that the case in hand did not warrant grant of extension of the time as no injustice would be caused to the appellant. The said case of Somani (supra) was the case involving the time period fixed for the appellant tenant in the compromise decree which as per the Division Bench was proper and nothing prevented the tenants to find out alternative accommodation and vacate the premises.

52. The Supreme Court however, in the case of Periyakkal (supra) has observed that the time fixed in the agreement or compromise decree is no different from the time allowed by the court once the parties invited the compromise decree where the court is also the party. Thus, the court can extend the time to avoid injustice. The Hon'ble Apex Court observed thus:

The parties, however, entered into a compromise and invited the court to make an order in terms of the compromise, which the court did. The time for deposit stipulated by the parties became the time allowed by the court and this gave the court the jurisdiction to extend time in appropriate cases. Of course, time would not be extended ordinarily, nor for the mere asking. It would be granted in rare cases to prevent manifest injustice. True the court would not rewrite a contract between the parties but the court would relieve against a forfeiture clause; And,

where the contract of the parties has merged in the order of the court, the court's freedom to act to further the ends of justice would surely not stand curtailed. Nothing said in Hukamchand's case militates against this view. We are, therefore, of the view that the High Court was in error in; thinking that they had no power to extend time.

(Emphasis Supplied)

53. Once we find the preceding paragraphs of this judgment that time was not understood to be the essence of the contract by parties especially noticing the subsequent conduct of the parties till the year 2001 and also read alongside the observations of the Supreme Court in Periyakkal's case (supra) where the Court's power to extend the time is not curtailed to prevent manifest injustice, we think that the facts of the present case are such, where grave injustice would be caused to the appellants if they are not allowed to take back the possession of the property solely on the count of payment of money by the respondent which was also the part payment in the agreement to sell entered way back in the year 1980.

54. We have noticed that the respondent was for all the time in the possession of the property and did not even fulfil the obligations under the agreement to sell earlier which compelled the appellant's father/plaintiff to approach this court, thereafter, the respondent agreed as per the compromise decree to vacate the premises but for some reason both the plaintiff and defendant could not perform the obligations and eventually in the year 2001 started conversing about the same, wherein again the respondent insisted for Succession Certificate for handing over the possession and never denied the existence of the valid decree. The respondent till date is in possession of the property and on the other hand, the appellants are deprived of their property for all this time only on the count non payment of the money. The respondent also did not repudiate the decree by treating the time as an essence. Till the time prior to approaching the court in the year 2001, the respondent only insisted for Succession Certificate and never wrote to the appellants or the plaintiff that his part of obligation had ended as the time was the essence. In these circumstances, we find that there would be a manifest injustice to the appellant if the compromise decree as it stands and understood by the parties is not allowed to be executed by the court.

55. There is no serious impediment in allowing the decree to be executed and avoiding the time period fixed under the agreement in view of our finding that the subsequent conduct of the parties reveal otherwise and the time was not understood to be essence of the contract. Therefore, the *ex debito justitiae*, we feel that the present case is fit and rarest one where the court feel that the decree should be allowed to be executed.

56. It is further trite that the act of the court should prejudice none. The latin maxim *actus curiae neminem grabavit* is equally apposite to the present case which is judicially recognized by the Supreme Court and this court time and

again. (kindly see the judgment passed in A.R. Antulay Vs. R.S. Nayak and Another, a Bench of Seven Judges of the Supreme Court held that the principle of *actus curiae neminem gravabit* is founded upon justice and good sense and affords a safe and certain guide for the administration of law). Therefore, the passage of time during the pendency of the present proceedings can also not be allowed to operate to the detriment of the appellants. In any case, the respondent had enjoyed the possession of the property in the meantime. Therefore, we also do not deem fit to grant any such interest on the said amount. Accordingly, the order passed by the learned Single Judge is set aside. The execution petition filed by the appellants is revived. The same will be listed before the roster bench on 22nd August, 2012 for direction to proceed further in accordance with law.