
(1972) 06 CAL CK 0001
In the Calcutta High Court
Case No : Suit No. 440 of 1967

Sm. Subarnarani Mullick and Another APPELLANT
Vs
Bejoy Kumar Daw and Others RESPONDENT

Date of Decision : 09-06-1972

Acts Referred:

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

Citation : AIR 1973 Cal 8

Hon'ble Judges : Hazra, J

Bench : Single Bench

Advocate : P.K. Mallick, for the Appellant; H.M. Dhar, for the Respondent

Judgement

Hazra, J.—This is an application for an order that the terms of settlement being annexure "B" to the petition be filed and a decree may be passed in accordance with the terms of settlement. This application has been made under Order 23, Rule 3 of the CPC by defendant No. 1 Bejoy Kumar Daw, under the following circumstances.

This partition and administration suit was instituted on February 7, 1961. During the pendency of the suit all parties agreed to settle the suit and on August 14, 1971 a settlement was arrived at between the plaintiffs on the one hand and the defendants on the other. Under this agreement defendants Nos. 1 and 2 were declared as the sole and absolute owners of premises No. 11, Beniapara Lane, Calcutta-35 in equal shares and that the plaintiffs have no right, title and interest thereto. This agreement is admitted by all parties to this suit.

2. The petitioner's case is that after this agreement, on August 16, 1971 the defendants Nos. 1 & 2 came to terms with regard to the partition between them of the said premises No. 11, Beniapara Lane, Calcutta-35 and they attended the office of Messrs. S.C. Roy Chowdhury & Co., Solicitors at No. 10, Old Post Office Street to record the said amicable settlement with regard to the partition of premises No. 11, Beniapara Lane, Calcutta-35 which was to be allotted to each of

them under the settlement as aforesaid. On the same day, the terms as already agreed to by and between them were reduced into writing and typed in duplicate and one copy of the same was given to the defendant No. 2. Thereafter, on August 18, 1971, the defendant Nos. 1 and 2 attended the office of M/s. S.C. Roy Chowdhury & Co., and with some modification as to the original terms was agreed upon by which the defendant No. 2. Tulsi Charan Daw was given a right to occupy the room in the second floor for 7 years, where he is now staying in the portion allotted to defendant No. 1, Bejoy Kumar Daw. The said agreement with the said modification was thereupon signed by the defendant No. 1 Bejoy Kumar Daw and defendant No. 2 Ram Tulsi Daw and the said modifications were also initialled by both of them. A plan showing the demarcation in terms of the agreement was also signed by the defendants Nos. 1 and 2 on August 18, 1971.

3. The Solicitors for the defendant No. 1 informed M/s. R.L. Dutta & Co. the Solicitors for the plaintiff that the defendants Nos. 1 and 2 also agreed among themselves to partition the premises No. 11, Beniapara Lane as aforesaid and handed over a copy of the terms of settlement to be incorporated in the main terms of settlement. On August 25, 1971 M/s. R.L. Dutta & Co., Solicitors for the plaintiff forwarded a copy of the terms of settlement to M/s. Fox & Mondal the Solicitors for the defendant No. 1 and M/s. S.C. Roychowdhury & Co. the Solicitors for the petitioner.

4. On August 25, 1971, M/s. Fox & Mondal, the Solicitors for the defendant No. 2 addressed a letter to the Solicitors for the plaintiff stating that their client was persuaded and induced to sign a writing purporting to be his consent to the mode of partition of premises No. 11, Beniapara Lane, Calcutta-35. It is stated In this letter that the Solicitor had no knowledge of the proposed writing and defendant No. 2 states that he signed the same without realising the effects thereon and it should be treated as cancelled. This letter was received by M/s. S.C. Roychowdhury & Co., on August 26, 1971. The reply was given to this letter to M/s. Fox & Mondal. the Solicitors for the defendant No. 2. It was stated in this letter that the defendants No. 1 and 2 agreed among themselves to amicable partition of the dwelling house at No. 11, Beniapara Lane. Calcutta. Both of them came to the office of M/s. S.C. Roychowdhury & Co., and caused the terms of partition to be recorded in writing in duplicate. Both of them signed the terms in duplicate. They also signed the plan, showing the division and the common passage. It was stated that the said agreement was a lawful agreement and binding on the parties and cannot be treated as cancelled,

5. On November 22, 1971, this application for recording the terms of settlement in this suit was made. Only the defendant No. 2, Ram Tulsi Daw is opposing this application.

6. The relevant portion of the affidavit-in-opposition of Ram Tulsi Daw affirmed on January 17, 1972 is paragraph 4. This is a long paragraph but the substance of it is that the defendant No. 2 admitted that he signed the agreement and the partition plan but stated that he signed the writing at the instance of Mr. Roy

Chowdhury. He said that at the repeated persuasion, insistence and shouting of his brother and his son, he was induced to sign the same. Thus he admitted that he signed the agreement and the plan but his case was that he was persuaded and induced to sign the same. To put it differently, his case is that he did sign the agreement and the plan but this was done either by undue influence or by coercion.

7. Under these facts and circumstances, the question is whether I shall record the terms of settlement under the provision of Order 23. Rule 3 of the Code.

8. Mr. P. K. Mallick, appearing for the petitioner placed before me the decision of this Court by D. N. Sinha, J. (as he then was) reported in Harbans Singh Chauhan Vs. Bawa Singh Chauhan and Others, and submitted that the agreement in this case is a lawful agreement and the word "lawful" cannot be construed as wide enough to include an enquiry as to whether the agreement was voidable or not. Fraud, undue influence or coercion makes a contract voidable and apt void. Here the agreement was challenged on the ground of undue influence or coercion. But in an application under Order 23, Rule 3, the Court cannot consider the contract as not a lawful agreement or compromise, because one party seeks to avoid it on the ground of fraud, undue influence or coercion.

9. In the case before Sinha, J. (as he then was) the plaintiff opposed the application on the ground that although he had executed the terms, he was compelled to subscribe the signature thereto by exercise of undue influence, threat and pressure of criminal prosecution. It was argued on behalf of the plaintiff before Sinha, J. that plaintiff had no other alternative but to sign the terms, regard being had to the fact that the criminal action was going on against the plaintiff and there was heavy amount of bail. Sinha, J. followed the principles laid down in ILR 50 All 748 = (AIR 1928 All 494) also AIR 1940 Bom 60 and held that under the provisions of Rule 3. Order 23 of the Code, the Court must order a compromise to be recorded where it is proved to the satisfaction that a suit had been adjusted wholly or in part by any "lawful agreement or compromise". Fraud, undue influence or coercion makes a contract voidable and not void. Sinha, J. accepted the view of Kania, J. (as he then was) in the case reported in The Western Electric Company, Limited Vs. Kailas Chand, where it was held that under Order 23. Rule 3 of the Code, the Court has to be satisfied on two points; firstly, that there was an agreement between the parties; and secondly, that it was lawful. The word "lawful" cannot be construed as wide enough to include an enquiry whether an agreement is voidable or not.

10. Mr. H. M. Dhar, appearing for the defendant No. 2 Ram Tulsi Daw, submitted that I shall not apply the principles laid down in Harbans Singh Chauhan Vs. Bawa Singh Chauhan and Others, , because in that case, the agreement was not only signed but the same was acted upon; as the criminal proceedings were withdrawn in terms of the settlement by the plaintiff. Therefore, according to Mr. Dhar the facts of the case before Sinha, J. were different from the facts of the

instant case. Mr. Dhar. thereafter, referred to me several decisions and submitted that I shall not record the terms of settlement.

11. The first case referred to me by Mr. Dhar is Mst. Shujarat and Another Vs. Mohammad Raza, . In this case the defendant applied to Court that the disputes in the suit have been adjusted between the parties by a compromise reached between them and produced in Court in writing. The plaintiff disowned this document and urged that the signature had been taken on a blank sheet of paper which later happened to be dishonestly utilised by the opposite party to forge the aforesaid document. There was thus a specific and definite denial by the plaintiff that he ever entered into any agreement and that the document which purported to be executed by him was ever executed by him in fact. Therefore, the question before the Court was whether the document set up by the defendant and denied by the plaintiff was in fact arrived at between them. It was held in this case that the Court must find whenever there is a dispute between the parties whether the agreement has really been arrived at or not. Without this finding it would be impossible for the Court to record a compromise and to pass a decree in accordance therewith. The whole purpose of Rule 3 will be lost if the Court is deprived of the power to decide whether the agreement pleaded by a party had been reached or not. If the Court is deprived of that power it would enable any dishonest litigant to get away from a compromise reached by him freely and lawfully merely by pleading that it had not done so. That can never be the intention of the legislature.

12. I do not think that this case helps Mr. Dhar's client. Because in the facts of the instant case, before me the defendant did not say that he did not enter into agreement at all; but he admitted that he entered into agreement and signed the terms and also the plan. All that the defendant states is that he was induced to do so by undue influence or by coercion.

13. Next case cited by Mr. Dhar is K. Mahammad Ghouse Sahib Vs. Jamila Bi and Others, Mr. Dhar submitted that the document is inadmissible in evidence as it is not registered. I do not find any substance in the contention of Mr. Dhar on this point. It is not a point taken in the affidavit-in-opposition but raised for the first time now in the course of the argument. This is an application for recording the terms of settlement in a suit. Parties have agreed to settle a suit in a particular manner. What is now being done is to settle the suit in accordance with the terms of settlement. Question of division, and partition of property will follow. This document merely shows the intention of the parties, that the parties agreed to settle the suit in a certain manner and the suit should be settled according to the agreement I do not think, any question of registration of the agreement arises now when the application has been made to record the terms of settlement. In any event, this point cannot be raised in argument as Mr. Dhar's client has not raised it in the affidavit

14. The next case cited by Mr. Dhar is AIR 1952 84 (Nagpur) . In this case it is admitted by all parties to this suit that the 1st plaintiff and the 1st defendant did

in fact sign the compromise. It is also admitted that each was represented by counsel and that counsel also signed is their respective behalf. The compromise was challenged on the ground of undue Influence. The undue influence complained of was not that of a party to the compromise or anybody whom the party to the compromise had authorised to exercise undue influence on his behalf but of somebody who is not a party, namely, defendant No. 3. Whether this In itself would invalidate a plea of undue influence was not considered because the plea was defective for another reason. The reason seems that full particulars and necessary pleading of undue influence were not given. The compromise was also attacked on the ground of fraud. The learned Judge said at page 87, para. 22 "I hold therefore that the lower Court was right in upholding the compromise". I do not understand how this case helps the contention of Mr. Dhar. With regard to another point argued by Mr. Dhar viz., that such agreement requires registration, this case cited by Mr. Dhar is against such contention. At page 87. paragraph 24 of the judgment the Learned Judge said "I hold therefore that the compromise "does not require registration".

15. The next case cited by Mr. Dhar is (1957) 61 Cal WN 67, (Sadasukh Kabra v. Jugal Kishore Singh), This is a judgment by P. N. Mookerjee, J. and Renupada Mukherjee. J. It was held, in this case, that before recording a compromise under Order 23, Rule 3 of the Civil P. C., the Court is in law, bound to examine Its legality or lawful character and in the absence of anything pointing to the contrary, the Court must be presumed to have done its duty and to have recorded the compromise only after being satisfied as to its lawful character particularly when it is reasonably possible to hold in favour of the legality of such compromise. This case goes against the contention of Mr. Dhar.

16. Mr. Dhar also cited Rameshwar Singh v. Hitendra Singh, AIR 1924 PC 202 . Both parties to the suit referred the dispute to the arbitration of a pleader whose verdict was to be taken as final but as appeared from the affidavit of the pleader of one of the parties that he was not of opinion that a final and binding agreement which should commit his client to any sum or no sum had been come to. In this case, their Lordships are equally clearly of opinion that although the impression upon the minds of both counsel was that the settlement had thus been achieved yet on point of feet there was a misapprehension as to the exact ambit of the terms of that agreement. It was held in this case that the parties were not ad idem in connection with this compromise, and that the compromise had thus failed as a settlement of the suit between the parties.

17. I do not think that the decision of the Privy Council is applicable under the facts of this case, because, in the Privy Council decision, the parties had misapprehension as to the exact ambit of the terms of the compromise and, therefore, they were not ad idem at all.

18. The next case cited by Mr. Dhar is Misrilal Jalamchand and Another Vs. Sobhachand Jalamchand and Others, . This is a single Bench judgment of the Bombay High Court and it was held by Shah, J. that the Court has power under

Rule 3, where an agreement or compromise is denied, to decide whether as a fact the alleged agreement or compromise was made, and if it is satisfied that it was made to record it. When the Court is required to satisfy itself as to the existence of an agreement and is further required to satisfy itself that there is a lawful agreement adjusting the suit the Court must on an application to record compromise consider, especially where a plea of undue influence is raised, whether the agreement is motivated on any such ground as illegality, fraud, misrepresentation etc. Therefore, the contention that the trial Judge while recording the compromise should not have recorded any finding on the question whether there was or was not any undue pressure or undue influence as set up by a party in his application is not acceptable. In this case, the learned Judge held that "it is clear that when the Court is required to satisfy itself as to the existence of an agreement and is further required to satisfy that there is a lawful agreement adjusting the suit the Court must on an application to record compromise consider especially where a plea of undue influence is raised, whether the agreement is not vitiated on any ground such as illegality, fraud, misrepresentation etc". It may be argued that this Bombay case helps the contention of Mr. Dhar.

19. The next case referred by Mr. Dhar on behalf of the respondent is AIR 1946 Sind 81. (*Sadujiwatlal v. Sm. Chandrani*). In this matter the defendant asks the court to record a compromise and pass a decree. The plaintiff who is defendant's son repudiates the compromise and files his objection. He contends that he was subject to coercion and undue Influence at Lahore on 3rd April, 1945 when certain misrepresentations, were also made to him. He asks that as a result of misrepresentation, coercion or undue influence "he was induced on 3rd April to sign the terms of a compromise which was written out. He asserts that on 7th April, he was given Bhang when he was in a state of intoxication. Ext. 3 was represented to him as a typed document containing the said terms which has been written out and had been signed by him on 3rd April and he was induced to sign the document He asserts that the terms incorporated in Ext. 3 are materially different from the terms of the writing which was signed by him on 3rd April. He repudiates the compromise, which he contends is, therefore, void and he wishes to prove his allegations. In my view, the facts of this case are entirely different from the instant case. Here the parties go to the root of the matter and say that the agreement which was produced before the court is materially different from the terms which were signed between all the parties. Under these circumstances, the learned Judge ordered that the matter should be tried on evidence.

20. Mr. Dhar also cited *Gokulananda Harichandan Vs. Iswar Chhotrai*, . In this case it was held that in order to record a compromise it is necessary for the court before whom the compromise is brought for recording, to be satisfied that the suit has been adjusted wholly or in part in any lawful manner and the onus of establishing that state of mind in the court lies on the person who brings the compromise forward. Where the court is not satisfied from the materials before it that the suit has been really compromised, it should refuse to record it.

21-22. The other case cited by Mr. Dhar is AIR 1930 158 (Privy Council) which is a well-known case (*Sourendra Nath Mitra v. Tarubaia Dassi*), This is really a case as to the authority of an Advocate to compromise, which is implied. The implied authority can of course, be countermanded by express directions of the client.

It was held by the Privy Council at page 162 that "the words of the rule do not in terms appear to confer a discretion on the court, but their Lordships desire to say nothing to prejudice a contention that the courts retain an inherent power not to allow their proceedings to be used to work a substantial injustice such as emerged in the case of *Neale v. Gordon Lennox*, 1902 AC 465". I do not think *Tarubala*'s case helps Mr. Dhar's client.

23. Mr. P. K. Mullick appearing for the petitioner submitted that in "*Mulla on Code of Civil Procedure*" 13th Edn. at pages 1298, 1299 there is a summary of most of the decisions on this point. It is stated by Mulla; "where both parties to a suit apply to the court under this rule to pass a decree in accordance with the compromise arrived at between them, the court has no power to refuse to pass the decree, on the ground that it considers the compromise to be too favourable to one of the parties. The Privy Council have said that the court has a duty not a discretion to record a lawful compromise subject possibly to an inherent power of refusal when substantial injustice would be worked. An agreement may be lawful although it is voidable for fraud or undue influences and the court must pass a decree in accordance with it though the party aggrieved may file a suit to set it aside. This view has found acceptance with the High Courts of Andhra Pradesh, Calcutta, Kerala, Madras, Allahabad, Orissa and Rajasthan. The Bombay High Court has taken a different view in *Misirilal Jalamchand and Another Vs. Sobhachand Jalamchand and Others*, ". I think, this is a correct summary of the cases on the point.

24. Having regard to the aforesaid authorities, although a single Judge of the Bombay High Court in *Karamchand Pessumal Vs. Madhavdas Savaldas and Others*, , might be taking a slightly different view, I think, I should follow the judgment of this Court passed by Sinha, J. in *Harbans Singh Chauhan Vs. Bawa Singh Chauhan and Others*, .

25. This is not a case where the defendant No. 2 denied as to factum of the agreement. It is not the case of the defendant No. 2 that he did not execute the agreement at all. In this agreement the defendant No. 2 agreed to adjust his share in the family dwelling house by dividing the family dwelling house between his elder brother and himself in a certain manner. The question of absolute equality of partition is not incumbent in a family compromise between two brothers. One brother may agree to take more or to take less. It cannot be said that this agreement is unlawful. The defendant No. 2 also admits to have signed the writing and the plan and initialed the alterations made in the agreement. The case made out by the defendant is that he did it on coercion or undue influence of his elder brother,

26. In the premises, I think that In this case the principles laid down by Sinha. J. (as he then was) in Harbans Singh Chauhan Vs. Bawa Singh Chauhan and Others, apply. I have no doubt that when the agreement was entered into on August 18, 1971, the parties fully understood that the family dwelling house was agreed to be divided in the manner in which the agreement was written out and alterations made and the plan was prepared and they signed the agreement with knowledge and consent. After making the agreement the defendant No. 2 took the plea that he was induced to sign by undue influence and coercion. In my view it has been proved to the satisfaction of the court that the suit has been adjusted by lawful agreement.

27. In view of the above matter I am bound to follow the judgment of Sinha, J. reported in Harbans Singh Chauhan Vs. Bawa Singh Chauhan and Others, . In the premises there will be an order in terms of prayer (a) of the petition. The defendant No. 2 must pay the costs of this application to the petitioner and the parties supporting the petitioner in this application.