

(2004) 11 DEL CK 0006

In the Delhi High Court

Case No : IA No. 5899 of 2004 in CS (OS) No. 1570 of 1999

Virendra Bhatnagar Sansthan and Another

APPELLANT

Vs

Aar Ess and Co. and Another

RESPONDENT

Date of Decision : 29-11-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 7 Rule 14

Citation : (2005) 116 DLT 211 : (2005) 79 DRJ 205

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : Parag P. Tripathi and Pramod Gupta, for the Appellant; J.P. Gupta and Riky Gupta, for the Respondent

Final Decision : Allowed

Judgement

Mukul Mudgal, J.—This application on behalf of the plaintiffs u/s 151 of the Code of Civil Procedure, 1908 seeks the recalling of the Order dated 1st September, 2000 and revival of the present suit.

2. For ready reference, the Order dated 1st September, 2000 reads as follows:-

""01.09.2000.

Present: Mr. Ravinder Sethi, Sr. Advocate with Mr. Pramod Gupta for the plaintiff.

Mr. J.P. Gupta for the defendants.

Suit No. 1570/99

Counsel for the plaintiff craves leave of this court to withdraw the suit on the strength of the affidavit Annexure `A" and the receipts and possession letter, dated 7.12.1999 (Page Nos.36 to 41) of the documents file. The counsel for the defendant does not deny the signature on the receipts and the possession letter.

Leave granted. The suit is dismissed as withdrawn.""

This order was passed on an application under Order XXIII Rule 1 CPC filed by the plaintiff.

3. The plaintiff has filed the present suit seeking a recovery of Rs. 81 lakhs against the defendants on account of the deficiencies committed by them as civil contractors in the work done at Virender Gram, Gurgaon. The claim raised in the plaint arises on account of the construction of the school building being constructed by the defendant No. 1 Company and defendant No. 2 its proprietor. It was averred that due to a settlement between the parties and in order to buy peace the plaintiff had agreed to pay Rs. 25 lacs to the defendant. After receipt without protest of the sum of Rs. 25 lacs in full and final settlement of its claim on 1.9.2000 the defendants resiled from such settlement and filed his own civil suit No. 147/2003 based on the same transactions as was the subject matter of CS(OS) No. 1570/99 filed by the plaintiff. Since the defendant after the receipt of the sum of Rs. 25 lacs as full and final settlement of his claims has attempted to back out of the settlement, this application was filed for revival of suit No. 1570/99. The order of 1st September, 2000 clearly refers to receipts and possession letter dated 7th December, 1999 and recorded the statement of the defendant's counsel who did not deny the signature on the receipt and possession letter dated 7th December, 1999.

4. The application under Order 23 Rule 1 filed by the plaintiff clearly stated that the parties have settled their disputes and in paragraph 3 of the affidavit dated 7th December, 1999 annexed to the application dated 9th December, 1999, filed under Order VII Rule 14 CPC, it was averred as follows:-

""3. That M/S Aar Ess and Company with the mutual concurrence of Virendra Bhatnagar Sansthan has now decided to part ways and terminate the contract mid-way. All the outstanding dues, as on date, have been satisfactorily settled and there are no more claims pending on each other.""

5. It is not in dispute that the total amount paid to the defendant as recorded in the Order dated 1st September, 2000 was a total sum of Rs. 25 lacs. Mr. Gupta, who appears on behalf of the defendant has strenuously objected to this application for revival of the present suit by contending that the Order dated 1st September, 2000 while recording the non-denial of the signature of the receipts and the possession letter given by the defendant, nevertheless did not take into account the averments made by the defendant in reply to the application under Order 23 Rule 1 wherein coercion was alleged in respect of the execution of the said documents. He, Therefore, says that the plaintiff took its own chance in withdrawing this suit and cannot now be heard in an application to revive the said suit on the present averments made in the present application for revival. He submits that merely because the signatures were not denied on the receipts and possession letter by the defendants as recorded in the order dated 1st September, 2000, it did not amount to waiver of the averments made by him in reply to the application for withdrawal of the suit which inter alia pleaded coercion. In my view it was for the defendant to have pressed the pleas raised in

his reply and plead the coercion in the Order dated 1st September, 2000. By admitting the signature on the receipt and the possession letter and by not raising the other pleas raised in the reply, the defendant is deemed to have abandoned/waived the other pleas which were sought to be raised in reply to the application particularly when the suit was sought to be withdrawn based on the signatures of the defendant No. 2 on the concerned documents. It is not understood at what stage the defendant could have raised such pleas when the suit itself stood withdrawn.

6. Owing to the contradictions noted above, this Court examined the defendant No. 2, Shri Sushil Kumar Rout under Order X CPC and his statement reads as follows:-

""Statement of Shri Sushil Kumar Rout, Son of Mr. K.C. Rout, Age : 48, Address: 135, Laxman Vihar, Gurgaon (Haryana) (on oath)

I received Rs. 25 lacs from the defendant. Out of Rs. 25 lacs, sum of Rs. 20 lacs was paid to me in cash and Rs. 5 lacs was paid to me by DD. The said sum of Rs. 25 lacs was paid to me after obtaining my signature on the blank papers by the defendant. The said payment of Rs. 25 lacs was made on 7th December, 1999 at 1.00 AM at night. I was threatened by 8 to 10 people.

I did not sign any affidavit or any document in support of the application dated 9th December, 1999 under Order VII Rule 14 CPC. (Thereafter upon being shown the documents to Shri Sushil Kumar, he admitted that he had signed the affidavit and other documents in support of the application under Order VII Rule 14 CPC).

Q. Have you informed your lawyer about the coercion committed by the defendant since the matter came up before the Court on 17th December, 1999; 2nd February, 2000 and 9th February, 2000?

Ans. I have informed my lawyer, Shri J.P. Gupta about the coercion.

Q. How many blank papers/stamp paper you have signed?

Ans. I have signed about 10 to 15 blank papers. I have not signed any stamp paper. (However, later on the witness says that he had in fact signed one stamp paper).""

The statement made by defendant under Order X CPC and indeed the demeanor of the defendant No. 2 during his examination did not inspire any confidence about the veracity of the witness who appears to be prevaricating. Particularly illuminating is the answer given to the question of the Court as to whether the defendants informed their lawyer about the coercion exercised against them on 7th December, 1999 since the matter came after the execution of the receipt before the Court on 17th December, 1999, 2nd February, 2000 and 9th February, 2000 and the only answer given by the defendant No. 2 is that he has informed his lawyer about the coercion. Defendant No. 2 claims to have signed about 10 to 15 blank papers. He has also been ambivalent about the signing of a stamp

paper after first making the statement that he has not signed any stamp paper but later on agreed that he had in fact signed one stamp paper.

7. Prima facie the plea of coercion even if believed cannot have any relevance when it was not pressed when the order of 1st September, 2000 was passed and consequently such a plea of coercion is deemed to be abandoned. The examination of the defendant No. 2 on 30th July, 2005 also clearly shows that the defendant does not appear to be a witness who inspires confidence as revealed his demeanor in the Court. Accordingly the effect of Order dated 1st September, 2000 is that the plaintiff was persuaded to withdraw the suit on the basis of the representation of the defendant No. 2 who had admitted to having signed the receipts and the defendant No. 2 has admitted in his examination under Order X CPC that he had received a sum of Rs. 25 lacs on 7th December, 1999. Accordingly there is merit in this application for revival of the suit. Significantly after the suit was withdrawn the defendant itself filed a suit for recovery in the year 2003 by filing a Suit No. 147 of 2003 entitled ""S.K. Raut Vs V.B. Sanasthan" in respect of the same transaction. It is also curious as to why up to date the defendant who is the plaintiff in Suit No. 147 of 2003 had waited for almost three years for dues which according to him upon measurements in 1998 had become due in 1999. Obviously this was done subsequent to the withdrawal of the suit of the plaintiff herein.

8. Accordingly the application is allowed. The suit is revived and stands restored at its original number.

IA.No. 5898/04(by plaintiffs)

1. This application on behalf of the plaintiffs u/s 151 CPC seeks directions to the defendants to deposit the sum of Rs. 25 lacs which is the amount paid to the defendant by the plaintiff under the settlement dated 7th December, 1999.

2. It is the plaintiffs' case as detailed in the accompanying order passed today in IA.No. 5899/04 that the plaintiff was persuaded to pay a sum of Rs. 25 lacs to buy peace and upon the withdrawal of the present suit, the defendant had backed out of the said settlement and caused untold harassment to the plaintiffs/applicants by filing Suit No. 147/2003.

3. Considering the facts and circumstances as recounted in the accompanying Order in I.A. No. 5899/2004 passed today, I am satisfied that since the defendant admits to having received the sum of Rs. 25 lacs on 7th December, 1999 and which was by way of a settlement dated 7th December, 1999 and has subsequently resiled from the said settlement and in fact filed a suit No. 147 of 2003, the prayer made in this application deserves to be granted and the application is allowed. It is directed that the sum of Rs. 5 lacs be deposited in the registry of this Court by the defendants on or before 31st of December, 2004

4. The application stands allowed and disposed of accordingly.

CS(OS) No. 1570/1999

List the matter on 17th March, 2005 for directions.