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Smt. Surinder Kaur and ors. Vs. S. Rajdev Singh and ors.

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Court : Delhi

Decided On : Jul-30-2008

Reported in : 152(2008)DLT704; 2008(105)DRJ324

Judge : Rajiv Sahai Endlaw, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 81; Code of Civil Procedure (CPC) - Sections 89, 151 and 152 - Order 23, Rule 3

Appeal No. : IA. No. 6029/2008 in CS(OS) 1806/1999

Appellant : Smt. Surinder Kaur and ors.

Respondent : S. Rajdev Singh and ors.

Advocate for Def. : P.S. Khandelwal, Adv. for Defendant No. 1 and ; Ravinder Sethi, Sr. Adv., ;

Advocate for Pet/Ap. : Arun Khosla, Adv. for Plaintiff No. 1 and; Riju Raj Jamwal, Adv. for Plaintiff Nos. 2 and

Disposition : Application dismissed

Judgement :

Rajiv Sahai Endlaw, J.

1. The plaintiff Nos 1 and 2 have filed this application under Order 23 Rule 3 CPC. The application is not signed by other parties, rather opposed by them. This order shall decide whether the suit can be decreed as sought by plaintiff Nos 1 and 2.

2. The plaintiffs have instituted the present suit for restraining the defendants from dispossessing the plaintiffs from estate bearing Municipal No. 124, Janpath, New Delhi and the building comprising of Hotel Imperial constructed thereon and for permanent injunction restraining the defendants from dealing with the said property and for declaration and other reliefs relating to running of hotel Imperial, New Delhi. The suit has been contested vigorously by the defendants. On 18th July, 2007, while hearing arguments on various pending applications, this Court gave the parties a chance of mediation and directed that counsel for both the parties shall hold a meeting and explore the possibility of mediation. Thereafter, the proceedings were adjourned from time to time on statement that conciliation attempts were being made. Thereafter, the matter was ordered to be taken in Chamber. On 17th November, 2007 the following order was passed:

Parties present in person in my Chamber.

The parties are litigating in this Suit. The efforts are being made for compromise and resolving all disputes between parties. Parties were counseled for considerable time today in the Chamber Meeting. Parties have ultimately agreed to sort out all their disputes. It is basically agreed that the defendants, who are managing the hotel presently, shall pay a sum of Rs 15 crore to Smt Gobinder Kaur and Rs 15 crore to Inderdev Singh for Smt Surender Kaur, legal heir of Late Smt Gyan Kaur and Rs 30 crore to Smt Surender Kaur, legal heir of Late Smt Gyan Kaur and Rs 30 crore to Sh Surender Singh Sibia on behalf of himself and on behalf of his two children.

After payment of this amount, as agreed between the parties, all claims of recipients in respect of the property in the hotel shares account shall stand settled and the recipients of the amount shall lay no further claim on the hotel business or the hotel property. No further accounting shall be got done and this will be considered as a final figure of the settlement. The details of the agreement shall be prepared by the parties in consultation with each other, which also shall give

modalities of payment of this amount.

The amount will be payable within a period of two years from today in a equal quarterly installments. The details of the agreement shall be prepared by the parties in consultation with each other, their Chartered Accountants and Advocates. No interest shall be payable for a period of 2 years. However, if the payment is delayed beyond a period of two years, the interest will be payable on the unpaid amount for the delayed period @ 10% per annum. The parties shall file draft agreement in the Court within a period of two weeks from today.

List this matter now on 27th November, 2007

However, on the next date i.e., 27th November, 2007, the following order was passed:

Present: Mr Riju Raj Jamwal, Advocate for plaintiffs No. 2 and 3.

CS (OS) No. 1806/1999

At request, list this matter for arguments on 14th December, 2007.

3. Thereafter, an application being IA. No. 14432/2007 was filed by the defendant No. 2 under Sections 151 and 152 of the CPC for amendment of the order dated 17th November, 2007 and for necessary directions. It was, inter alia, stated in the said application that the defendant No. 2 was willing to go ahead with the settlement only to buy peace and was ready to make the payment only if there was no tax liability on the defendant No. 2 or on the partnership firm M/s Akoi Saab; it was further stated in the application that the chartered accountants and tax advisor of the defendant No. 2 had advised that the consequence of making the payment as recorded in the order dated 17th November, 2007 would be far reaching and unaffordable. The defendant No. 2, therefore, sought direction that the plaintiffs and the defendant No. 4 should indemnify the defendant No. 2 against any tax liability. This application was dismissed on 25th March, 2008 on the submission of the counsel for the defendant that the settlement arrived at on 17th November, 2007 was tentative and since no final settlement could be arrived at and no application for compromise was filed, this application be dismissed as

withdrawn.

4. On the contrary, the counsel for the plaintiffs on 25th March, 2008 submitted that the suit should be decreed in terms of compromise in terms of proviso to Order 23 Rule 3 CPC. The court, on this submission of the counsel for the plaintiffs, recorded that the parties were, pursuant to the order dated 17th November, 2007, to file an application under Order 23 Rule 3 CPC setting out the modalities of payment in terms of understanding arrived at between the parties and since no application under Order 23 Rule 3 CPC had been made by the parties, it may not be possible for the court to pass a decree. The counsel for the plaintiffs, thereafter, sought time to make submissions and file appropriate application under Order 23 Rule 3 CPC for disposal of the suit in terms of compromise vis--vis defendant Nos 2 and 3. Thereafter, the instant application came to be filed.

5. Extensive arguments have been addressed on the application. The counsel for the plaintiffs has urged that the settlement recorded by the court in the order dated 17th November, 2007 even without signatures of the parties is compromise within the meaning of Order 23 Rule 3 CPC; that the order dated 17th November, 2007 is self-contained and nothing else remained to be settled or agreed between the parties; that the plaintiffs and the defendant No. 4 to whom the money is to be paid in terms of the order are both agreeable to the same; that the defendant No. 2 himself had moved IA. No. 14432/2007 admitting the compromise contained in the order dated 17th November, 2007 but illegally seeking certain modifications thereto and which application was also dismissed as withdrawn; that none had challenged the order dated 17th November, 2007 and if, inspite of the same, the decree under Order 23 Rule 3 CPC in terms thereof is not passed, the same would offend the sanctity and lower the majesty of the court. The counsel further urged that the order dated 17th November, 2007 contained admissions of the defendant No. 2 to the entitlements of the plaintiffs and the defendant No. 4 of the amounts mentioned therein and the plaintiffs were entitled to a decree for recovery of the said amounts in terms of the order dated 17th November, 2007, even on admissions, if not under Order 23 Rule 3 CPC. Reliance has been placed on *Silver Screen Enterprises v. Devki Nandan Nagpal* : AIR 1970 SC669 ; *State of*

Maharashtra v. Ramdas Shrinivas Nayak and Anr. : 1982 CriLJ1581 ; Jineshwardas (Dead) Through L.Rs. and Ors. v. Smt. Jagrani and Anr. JT 2003 (Supp.2) SC 158; Pushpa Devi Bhagat (D) Through LR. Smt Sadhna Rai v. Rajinder Singh and Ors. : AIR 2006 SC2628 .

6. Per contra, the senior counsel for the defendant No. 2 has contended that the application moved by the plaintiffs is under Order 23 Rule 3 CPC and not seeking judgment/decreed on admissions; that the disputes and controversies subject matter of the suit were not sorted out on 17th November, 2007 but were only agreed to be sorted out and the said order was part of an ongoing process in an attempt to conciliation; that the details of the agreement were to be worked out and further consultations were to take place and the chartered accounts and advocates of the parties were to be involved; that the order also mentions that only the draft agreement and not the final agreement was to be filed before the court and which was to be subject matter of further discussions; that the dismissal of IA. No. 14432/2007 was of no avail; that the evidence of the parties was underway and no admissions of fact had been made and monies were tentatively agreed to be paid only to get rid of the litigation and not in admission of any liability. Reliance has been placed on Gurpreet Singh v. Chatur Bhuj Goel : [1988]2SCR401 ; Kamla Devi v. Prabhat Chand : AIR1997 Delhi317 ; A.V.M.(RETD) K.G. Mohan Chandra v. Arun Mohan Chandra and Ors. 2007 (145) DLT 428; Som Dev and Ors. v. Rati Ram and Anr. : AIR 2006 SC3297 ; K. Venkatachala Bhat and Anr. v. Krishna Nayak (D) by LRs and Ors. : (2005)4SCC117 ; Rickmers Verwaltung GmbH v. Indian Oil Corporation Ltd AIR (1999) SCC 504; S.P. Minocha v. Lila Ram : AIR2002 Delhi223 .

7. The counsel for defendant No. 3 has also opposed the application and has argued that besides this suit, other legal proceedings were also pending inter se parties; that there could be no settlement/compromise in this suit only, without composite settlement vis--vis all legal proceedings; that the defendants had never admitted any liability to the plaintiffs; that the issues relating to tax burden were discussed on 17th November, 2007 also and that is why the order of that date records of consultation with the chartered accountants; that there is no unequivocal admission of facts or liability; that the plaintiff No. 3 was not even

present on 17th November, 2007 and the application even is not signed by all the plaintiffs. Reliance was placed on para 14 of Pushpa Devi Bhagat (supra). It was further argued that even in M/s Silver Screen Enterprises (supra) there was an agreement in writing and in any case the said judgment is of prior to the amendment to Order 23 Rule 3 CPC.

8. Order 23 Rule 3 CPC has two limbs. The court is empowered to decree the suit when satisfied either (i) that the suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties or (ii) where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit. The Apex Court in Gurpreet Singh (supra) has held that when the parties enter into a compromise during the hearing, there is no reason why the requirement that the compromise should be reduced in writing in the form of an instrument signed by the parties should be dispensed with and has further held that the court must insist upon the parties to reduce the terms into writing. It is exactly this which the order dated 17th November, 2007 has done. The order provides for the parties filing draft agreement in the court. However, no such draft agreement came to be filed. In Gurpreet Singh it is further laid down that for the second limb of Order 23 Rule 3 there need not be an agreement in writing signed by the parties and it is open to the defendant to prove such satisfaction by production of a receipt or payment through bank or otherwise; the satisfaction of the claim could also be established by tendering of evidence. Thus, the limb of Order 23 Rule 3 which does not require any written argument has to be of a settlement or adjustment already effected. The said limb has no application in 'to do' compromise. In Gurpreet Singh case also the facts were that the one party was required to pay monies by a bank draft on a stipulated date but before the stipulated date resiled from the proposed compromise saying that it was detrimental to his interest. The Apex Court held that the same did not fall in the second limb of Order 23 Rule 3 and the compromise of such nature could only be under the first limb of Rule 3 and which had to be in writing. The Apex Court further held that without such agreement in writing being filed, the court had no option but to hear the suit on merits.

9. A.V.M.(RETD) K.G. Mohan Chandra is a case decided by the same Hon'ble Judge who had in the present case also passed the order dated 17th November, 2007 (supra) and the facts thereof are close to that of the present case. In that case also during the hearing before the court, the parties had agreed to enter into a compromise on the terms recorded in the order of the court and, in fact, the court had also observed that the parties shall abide by the terms of the settlement as recorded in the order. However, the court was informed that the parties shall make a Written compromise application on the basis of agreed terms. However, no compromise application came to be filed. Prayer was made to the court to decree the suit on the terms recorded earlier by the court. However, this Court held that even where the parties in the court agreed to certain terms but later on refused to file an application under Order 23 Rule 3 CPC as required under the law, the court cannot pass a decree under Order 23 Rule 3 CPC and cannot dispose of the suit.

10. The present case is not of the second limb of Order 23 Rule 3 CPC which can be without writing, in as much as the settlement recorded on 17.11.2007 was of 'To do' category and not of adjustment already affected. The counsel for plaintiffs has urged that the Apex Court in Jineshwar Das and Pushpa Devi Bhagat (supra) has expanded what was laid down in Gurpreet Singh. In both Jineshwar Das and Pushpa Devi the proceeding was disposed of as compromised and which was sought to be reopened/set aside. It is this crucial element which distinguishes the present case, making the said two dicta inapplicable here.

11. Rather a perusal of the order dated 17th November, 2007 shows that only the 'basic agreement' reached between the parties in the chamber is recorded therein. The parties appear to be also aware that all the terms and conditions had not been settled and certain details were yet to be worked out by the parties in consultation with each other. The said details were not only of the modalities of payment, inasmuch as separate reference to details and modalities of payment is made in the order. The order also refers to the consultations which the parties were required to do with their chartered accountants and advocates and which the parties must have informed the court.

12. The question which arises for determination is whether the order dated 17th November, 2007 can be said to contain even a lawful agreement between the parties. For a lawful agreement, the parties have to be ad idem on each and every aspect. The reference in the order to the basic agreement, details to be prepared in consultation with chartered accountants and advocates shows that the parties were till then not ad idem. Though a mere reference to a formal contract will not prevent a binding bargain between the parties, I find that in the present case, the parties did not intend to be bound until a formal application under Order 23 Rule 3 CPC was signed. For this reason also no valid agreement can be said to have come into existence. In fact in the present case making, signing and filing of an application under Order 23 Rule 3 CPC was made a condition of the proposed settlement and if the application is not approved and signed, there is no concluded contract. Lord Cairns said in *Rassier v. Miller* 3 A.C. 1124

If you find not an unqualified acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled, no contract is to arise then you cannot find a concluded contract.

13. The further consultations between the parties and the consultations of the parties with their advocates and chartered accountants contemplated in the order cannot be reduced to an empty exercise and there is nothing to show that nothing was to turn on the said consultations. A reading of the said order, as the counsel for the plaintiffs would want, would reduce several parts of the order otiose and the order cannot be read in that fashion. If due weightage is given to the further consultations, the conclusion is inescapable that the agreement contained in the order was tentative and was only an agreement to agree in future and which is not enforceable in law. Thus I hold that irrespective of the requirement of signing as required by Rule 3 being not satisfied, there is no lawful agreement also between the parties as contained in the order dated 17th November, 2007 inasmuch as the parties were still to work out the modalities and the complete details of the agreement.

14. The next question to be considered is whether the plaintiffs, even though not entitled to a decree under Order 23 Rule 3, are, in the aforesaid facts, entitled to a judgment/decreed on admissions as prayed. At the outset, it would be highly inequitable and unjust to do by way of admissions what cannot be done under Order 23 Rule 3 CPC. Under the CPC as amended in 2002, a duty has been cast upon the court to explore the possibility of settlement and alternate means of adjudication of disputes and controversies between the parties under Section 89 CPC. Several offers and counter offers may be exchanged between the parties during such parleys held by the court. When under the law, what transpires in such parleys is not enforceable, the same cannot also constitute an admission to entitle the parties to apply for judgment on admissions. If the parties are permitted to seek orders/judgments on what is contained in the orders of the court made during the said process of settlement/conciliation, the same will seriously hinder the settlement attempts by the courts. The parties would be loathe to give offers and counter offers lest the same are held against them in the event of the compromise attempts failing. Section 81 of the [Arbitration and Conciliation Act, 1996](#) also prohibits the parties from relying upon or introducing as evidence in arbitral or judicial proceedings views expressed or suggestions made by the other party in respect of possible settlement of the dispute or admission made by the party in the course of conciliation proceedings. The courts ought not to allow such a procedure which would be contrary to the spirit of introduction of Section 89 in the CPC in the year 2002 and which will negate the same.

15. Even otherwise, it is the stand of defendants that they had agreed to make payment, not in admission of any liabilities but to finish the litigation. Thus, there is no admission, lest absolute unequivocal, unambiguous admission.

16. The plaintiffs are, therefore, not entitled to relief claimed in the application. The application is dismissed.

17. I had during the course of hearing inquired from the senior counsel for the defendant No. 2 as to why the parties could not proceed further in terms of the order dated 17th November, 2007 and suggested the difficulties, if any, faced by the defendant No. 2 in making the payments as recorded in the said order, could

be discussed and attempted to be resolved. However, he fairly stated that no purpose would be served in spending further time on the mediation efforts. In the circumstances, since considerable time of the court has been spent in attempting mediation/settlement between the parties and consequently in the disposal of this application, as indicated at the time of hearing, the defendant No. 2 is burdened with costs of Rs 40,000/- payable to Delhi Legal Services Authority.

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