

**Konark Care Vs. Triveni Infrastructure Development Company Ltd**

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**SooperKanoon Citation :** [sooperkanoon.com/983254](http://sooperkanoon.com/983254)

**Court :** Delhi

**Decided On :** Aug-08-2013

**Judge :** S.Ravindra Bhat

**Appellant :** Konark Care

**Respondent :** Triveni Infrastructure Development Company Ltd

**Advocate for Def. :** Mr. Rakesh Tikku, Mr. Akhil Gupta, Shri. Ramesh Popli. Mr

**Advocate for Pet/Ap. :** Mr. Akhil Sibbal

**Judgement :**

\$~ \* IN THE HIGH COURT OF DELHI AT NEW DELHI % + RESERVED ON:

31. 07.2013 PRONOUNCED ON:

08. 08.2013 CM APPL.7430/2010 (for restoration) in FAO(OS) 520/2009 .....  
Appellant KONARK CARE Through: Mr. Akhil Sibbal, Advocate. versus TRIVENI  
INFRASTRUCTURE DEVELOPMENT COMPANY LTD ..... Respondent Through:  
Mr. Rakesh Tikku, Sr. Advocate with Mr. Akhil Gupta, Advocates for Shri Ramesh  
Popli. Mr . Ashish Makhija, Advocate for Official Liquidator. CORAM: HON'BLE  
MR. JUSTICE S. RAVINDRA BHAT HON'BLE MR. JUSTICE NAJMI WAZIRI MR.  
JUSTICE S.RAVINDRA BHAT CM APPL.7430/2010 (for restoration) 1. This  
application seeks recall of the order dated 13.04.2010 made by the Court  
disposing off the appeal. The application is by one Shri Sandeep Arora, a partner

in the appellant firm Konark Care. CM-7430/2010 in FAO (OS) 520/2009 Pag

2. The brief facts are that the appellant had apparently entered into a contract with the respondent sometime in March 2006 for land development/consultancy in which it (the appellant) had a right to receive 13% of the next sale value of the property of the respondent in the event of sale. The respondent had on 5.10.2006 contracted to purchase the property for Rs. 117 crores. Subsequently, on 24.01.2007, the appellant alludes to two further agreements in which its entitlement to receive 13% of the realised sale value was maintained. It is stated that disputes arose between the appellant and the respondent which led to the filing of an application under Section 9 of the Arbitration and Conciliation Act which was eventually dismissed on 26.05.2009. Subsequently, another application under Section 9 of the said Act was preferred; this application OMP 377/2009 was dismissed by learned Single Judge on 24.09.2009. That order was impugned in the present appeal FAO (OS) 520/2009.

3. On 04.11.2009, while entertaining the appeal, this Court restrained the respondent from disposing off or alienating the property in question, i.e., No.7, Plot no.4, Block-160, Sikandra Road, New Delhi, measuring 2.7 acres. The respondent appears to have carried the matter in appeal by special leave to the Supreme Court, i.e., SLP No.3065-3066/2010. On 08.02.2010, the Supreme Court allowed the said petition to the extent that the interim order of 4.11.2009 was vacated. This event was brought to the notice of the Court and the matter was listed on various occasions.

4. On 13.04.2010, the Court recorded as follows: - FAO (OS) 520/2009 and CM Nos.2898/2010,4901/2010 and 6471/2010 Parties have settled their disputes on the terms and conditions as CM-7430/2010 in FAO (OS) 520/2009 Page 2 contained in CM No. 6471/2010. The Application has been signed by the parties and their respective counsel and has been supported by affidavits of Sh. Ramesh Kumar Popli, Partner of the Appellant and Sh. Sumit Mittal, Authorized Signatory of the Respondent Company. We have perused the contents of the application, which is Ex.C and find that the compromise terms are lawful. The parties shall remain bound by the Agreement. As prayed, Appeal is disposed of as withdrawn.

Interim orders are recalled. The shares, which have been pledged by the Respondent and are in the custody of the Registrar General of the Court, be returned to the Respondent forthwith. Pending Applications are also disposed of. As is evident, the Court allowed the application CM 6471/2010 which had alleged that a mutually agreeable settlement had been arrived at by the parties. The present application CM 7430/2010 was filed on 20.04.2010 on behalf of the appellant; it was sworn to by Mr. Sandeep Arora. The essential averments on which the present application for recall of the previous order of withdrawal of the appeal (dated 13.04.2010) is premised upon are as follows:

2. That all the pleading and Vakalatnama filed before this Honble Court in respect of the appellant partnership firm is signed jointly by Mr. Ramesh Popli and Mr. Sandeep Arora, who are two of the partners of the appellant firm.

3. The Partnership Firm in the majority of times was represented before this Honble Court through Praveen Agrawal, Advocate, who is moving the present application for the recall of the order dated 13 th April, 2010 before this Honble Court. Copy of order dated 13.04/2010 is annexed herein as Annexure-A.

4. That nonetheless, Mr. Vikash Deep, Advocate has also signed the Vakalatnama along with the present Counsel who is moving the CM-7430/2010 in FAO (OS) 520/2009 Page 3 said application.

5. That on 13th April, 2010 Mr. Ramesh Popli without consultation with the other partners of the firm, along with Mr. Vikash Deep, Advocate appeared before this Honble Court and withdrawn the present appeal by giving a statement before this Honble Court as the dispute has been settled.

6. That since Mr. Ramesh Popli is acting against the interest of the appellant firm, and has acted without the consent and even intimation to the present counsel in moving the withdrawal of the present appeal. It seems that Mr. Ramesh Popli does not wish to continue with the present counsel and therefore the present counsel also seeks discharge from representing Mr. Ramesh Popli before this Honble Court.

7. That as a matter on abundant caution, the copy of the present application is also being sent to Mr. Ramesh Popli and his counsel Mr. Vikas Deep, Advocate.

5. This Court had issued notice upon the application to the respondent; the applicant Shri Sandeep Arora was represented. Counsel on behalf of the other partner Shri Ramesh Kumar Popli was also notified. During the course of hearing, it was submitted that the winding up of the respondents company had been ordered. In these circumstances, this Court on 02.05.2013 issued notices to the Official Liquidator. On the next date of hearing, i.e., 29.05.2013, counsel for the Official Liquidator as well as the senior counsel appearing on behalf of Shri Ramesh Kumar Popli had entered appearance. It was in these circumstances that the application was heard. It is argued by Mr. Akhil Sibbal, learned counsel for the applicant that the affidavit in support of the appeal FAO (OS) 520/2010 itself was filed by Mr. Sandeep Arora as a partner. At that stage Shri Ramesh Kumar Popli too had CM-7430/2010 in FAO (OS) 520/2009 Page 4 filed an affidavit in support. The application seeking disposal of the appeal, however, was signed only by Shri Ramesh Kumar Popli and the affidavit was sworn only by him. It was also urged that without the consent of the applicant Shri Sandeep Arora, the appeal could not have been compromised to be withdrawn. Learned counsel relied upon Section 19 (2) of the Partnership Act to say that a partner had no implied authority to compromise any suit or legal proceedings filed on behalf of the firm. Learned counsel relied upon the registration certificate issued by the Registrar of Firms to say that though the appellant is a registered firm, the provisions of Section 19 (2) nevertheless mandate that no partner could withdraw legal proceedings without an expressed consent or concurrence. Learned counsel also relied upon the judgment of the Madras High Court reported as Chainraj Ramchand v. V.S. Narayanaswamy and Ors., AIR 198.Mad 326. It was submitted that the subsequent winding up of the respondent company would have no bearing upon power and jurisdiction of this Court to deal with and dispose of the application for recall of the order. In this regard, learned counsel relied upon the expression pending under Section 446(1) of the Companies Act and further relied upon Section 446 (4). He further relied upon the judgment reported as S.V. Kandeekar v. V.N. Deshpande and Anr., (1972) 1 SCC 438.especially the observation of the Supreme Court to the following effect: Looking at the legislative history and the

scheme of the Indian Companies Act, particularly the language of Section 446, read as a whole, it appears to us that the expression other legal proceeding in sub-section (1) and the expression legal proceeding in subsection (2) convey the same sense and the proceedings in both the sub-sections must be such as can appropriately be dealt with by the winding up court. CM-7430/2010 in FAO (OS) 520/2009 Page 5 Learned counsel submitted that object of Section 446 was to ensure that potential liabilities arising out of proceedings in Courts of first instance were not allowed to proceed without leave of the Company Court and that the Company Court could exercise its discretion in trying such cases. It was submitted that an appeal and all proceedings connected with the appeal such as an application for recall of a disposed off appeal stood outside the purview of Section 446 (1) as Company Court could not decide whether the original order disposing off the appeal by a Court was for good and valid reasons.

6. Learned counsel urged that the order dated 13.04.2010 requires to be recalled since it was the result of a fraud played upon the court by one of the partners of the appellant firm in apparent collusion with the respondent. Counsel stressed that this Court, in view of the facts and circumstances and the express prohibition under Section 19 (2), would pass an order to secure the ends of justice. It was contended that if such orders withdrawing or compromising pending proceedings in respect of a firm without consent of all partners are allowed to stand, they would make a mockery of the rights of such partners whose entitlements would be seriously prejudiced.

7. Mr. Rakesh Tikku, learned Senior counsel appearing on behalf of Shri Ramesh Kumar Popli urged that a decision on the present application would really be academic. Counsel argued that as on date, there is no pending arbitration proceedings since the dispute with the respondent had been in effect settled and even the land which was the subject matter of the proceedings sold. Furthermore, the respondent company was in liquidation.

8. Learned Senior counsel submitted that even otherwise the Court should not be oblivious to the facts that the applicant Shri Sandeep Arora CM-7430/2010 in FAO (OS) 520/2009 Page 6 concededly was a partner to the extent of 25% of the

appellant firm. Shri Ramesh Kumar Popli, on the other hand, was partner to the extent of 50% share. The third partner, however, supported neither of the parties, which meant that he had no grievance with the order disposing of the appeal. In these circumstances, the Court should not encourage fruitless litigation by restoring the appeal on the technicalities of violation of Section 19 (2) of the Partnership Act. If at all Shri Sandeep Arora has any grievance, he is free to agitate it either against Shri Ramesh Kumar Popli or against the respondent in other proceedings.

9. Learned counsel for the Official Liquidator submitted that this Court should not proceed with the application CM 7430/2010 without first directing the applicant to seek permission of the Company Court under Section 446 (1). Counsel underlines that the embargo on legal proceedings against companies is not only in respect of those that had to be instituted after the order but also in respect of pending proceedings. Learned counsel relied upon the decision of the Supreme Court reported as *Asgarali Nazarali Singaporewalla v. State of Bombay*, AIR 195.SC 50, where it was held as follows: Pending: - (1) A legal proceeding is pending as soon as commenced and until it is concluded, i.e., so long as the Court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein. Similar are the observations of Jessel, M.R. In *re Clagett's Estate; Fordham v. Clagett*, (1882) 20 Ch.D. 637 at p. 653 (J). What is the meaning of the word pending? In my opinion, it includes every insolvency in which any proceedings can by any possibility be taken. That I think is the meaning of the word pending ..... A cause is said to be pending in a Court of justice when any proceeding can be taken in it. That is the test. CM-7430/2010 in FAO (OS) 520/2009 Page 7 (22) There is no doubt therefore that the case of the appellant was not concluded and was pending before the learned Presidency Magistrate at the date of the commencement of the impugned Act.

10. From the above discussion what is evident that the Court has to address two issues. First as to the maintainability of the application for recall of the order disposing of the appeal. The second would be the merits of the application for recall.

11. The objection as to the maintainability of the application CM 7430/2010 is voiced by the Official Liquidator who relies upon Section 446 of the Companies Act. The same reads as follows:

446. Suits stayed on winding up order. (1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced. or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose. (2) [ The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being, in force, have jurisdiction to entertain, or dispose of(a) any suit or proceeding by or against the company; (b) any claim made by or against the company (including claims by or against any of its branches in India); (c) any application made under section 391 by or in respect of the company; (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company; whether such suit or proceeding has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of CM-7430/2010 in FAO (OS) 520/2009 Page 8 the company, or before or after the commencement of the Companies (Amendment) Act, 1960 .] (65 of 1960 .) (3) Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court. (4) [ Nothing in sub- section (1) or sub- section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.] The reference to pending proceedings and the reliance placed upon Asgarali Nazaralis case (supra), to this Courts mind, is unpersuasive. Whilst the expression pending is broad and compendious, at the same time, the context of its usage is equally important. In the present case, Section 446 (4) gives a clue to parliamentary intent that the embargo placed upon continuation of legal proceedings is lifted to a limited extent in regard to appeals pending before the High Court or Supreme Court. Now, if appeals themselves are proceeding - and there can be no dispute about that - every ancillary proceeding connected with such main proceedings like

an appeal would be a part of it. In other words, every miscellaneous application connected with the appeal itself would be a proceedings connected with the appeal. If parliamentary intent was to separate the appeal from such miscellaneous proceedings, as in the present instance, the language employed would have been more specific having regard to Section 446 (1) itself. Such is not the case. Moreover as held in Supreme Courts judgment in S.V. Kandeakars case (supra), the proceedings which is sought to be statutorily barred in this case should be of such nature as can be dealt and adjudicated upon by the Company Court itself. There can be no dispute that CM-7430/2010 in FAO (OS) 520/2009 Page 9 an application for recall of an order disposing of the appeal by the High Court cannot be dealt with by any Court or Bench other than that which made it - at least not the Company Court. Furthermore, the interpretation placed by this Court on Section 446 in the present instance is supported by a Lahore High Court Full Benchs ruling in Smt. Shakuntala v. Peoples Bank of Northern India Ltd., AIR 194.Lah 392. The Court speaking of Section 446 as it then stood held as follows:

4. It does not include proceedings taken in the course of the suit nor proceedings arising from the suit and continued in a higher Court like an appeal from an interlocutory or final order passed in the suit. The rule of interpretation to be followed in such cases is contained in the maxim *copulatio verbo-rum indicat acceptationem in eodem sensu* (the coupling of words shows that they are to be understood in the same sense). Reference may, in this connection be made to *Hood Barrs. v. Cathcart* (1894) 3 Ch 376 affirmed on appeal by the House of Lords in *Hood Barrs v. Heribt* (1897) A.C. 177 in which a similar provision in the (English) Married Womans Property Act, 56 and 57 vict., c.63, Section 2, was so interpreted.

12. In the light of the above discussion, it is held that the Official Liquidators objection to the maintainability of the present application is groundless; they are accordingly overruled. The application is held to be maintainable.

13. As to the second issue, the facts emerging from the records are: (1) The appeal was supported by the affidavits of both Shri Sandeep Arora and Shri Ramesh Kumar Popli; (2) The application for disposal of the appeal was signed by

and supported by the affidavit of Shri Ramesh Kumar Popli only; (3) Neither the supporting affidavit nor the signature of Shri Sandeep Arora appears upon or in relation to the application for disposal; CM-7430/2010 in FAO (OS) 520/2009 Page 10 (4) The application seeking disposal of the appeal does not refer to any consent by all partners of the appellant firm; there is no supporting document in that regard. (5) The only reference is found in Ramesh Kumar Popli's affidavit; he states that he is a partner of the appellant and was conversant with the facts. Even this affidavit nowhere states that he was authorized by the other partners to either swear the affidavit or move an application asking for withdrawal of the appeal.

14. The above facts are a matter of record and incontrovertible. On the basis of such application, the appeal was disposed of on 13.04.2010. It is not in dispute - as is evident from Annexure P-1 to the appeal - i.e. the copy of the registration certificate that the appellant is a registered partnership firm. Section 19 (2) of the Partnership Act in no uncertain terms mandates that the implied authority of a partner does not extend to withdrawing or compromising legal proceedings. It clearly states that in the absence of any usage or customs or trade to the contrary, the implied authority of a partner does not empower him to compromise or relinquish any claim or portion of the claim by the firm or to withdraw the suit or proceedings filed on behalf of firm. In other words, unless an expressed authority is given to the partner by all other partners, he cannot alone compromise a claim either in part or whole or withdraw the suit, (refer Chainraj Ramchand v. V.S. Narayanaswamy and Ors., supra).

15. In the present case, there was no attempt made on behalf of Shri Ramesh Kumar Popli to contend that he either had expressed authority or that there was any custom or usage in the trade. Certainly no proof to that effect was offered. These are sufficient for the Court to hold that the order CM-7430/2010 in FAO (OS) 520/2009 Page 11 of 13.04.2010 deserves to be recalled in the interests of justice.

16. This Court is unimpressed by the arguments made on behalf of Shri Ramesh Kumar Popli that an order allowing the application for recall would be academic. At the stage of considering the application, in such proceedings, the Court is limited

in its consideration of the merits of the application. In respect of a party's action which has potentially resulted in irreparable prejudice to another party's property rights, it certainly would not lie in the mouth of that party to contend that subsequent events consequent to the wrongful action have completely deprived the wronged person from approaching the Court as regards the property itself and that restoring legal proceedings would be futile. In other words, the culpability of Shri Ramesh Kumar Popli debars him from contending that consequence of his legal action would render the appeal itself infructuous. If Courts were to countenance such pleas, they would be admitting the helplessness in the face of fraud and in a sense relegate parties to illegality and injustice. Clearly such arguments cannot prevail; they are accordingly rejected.

17. In view of the above discussion, this Court is of the opinion that ends of justice require that the appeal should be restored.

18. CM APPL.7430/2010 for restoration of appeal is allowed in the above terms.

19. The appeal is restored to its original position.

20. Having regard to the circumstances, this Court is of the opinion that the matter cannot be closed as such; the Court hereby directs issuance of notice for initiation of criminal contempt to Shri Ramesh Kumar Popli and to Shri Sumit Mittal, the address of both such individuals are to be found in affidavits filed in support of CM 6471/2010. The Registry is directed to CM-7430/2010 in FAO (OS) 520/2009 Page 12 ensure that notices without process fee are issued to the said individuals returnable on 27th August, 2013. S. RAVINDRA BHAT (JUDGE) NAJMI WAZIRI (JUDGE) AUGUST 08 2013 /vks/ CM-7430/2010 in FAO (OS) 520/2009 Page 13

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