

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ EFA (OS) No. 15/2008 & CM No. 5726/2008

% Date of decision : 15.04.2009

MOHD. AMIN APPELLANT
Through : Ms. Nandita Rao &
Mr. Rahul Kumar,
Advocates.

- V E R S U S -

MOHD. IQBAL RESPONDENT
Through : Mr. K.K. Bhuchar &
Mr. Anshuman Sood,
Advocates.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | No |
| 3. | Whether the judgment should be
reported in the Digest? | No |

SANJAY KISHAN KAUL, J. (ORAL)

1. Admit.
2. At request of learned counsel for the parties, the
appeal is taken up for final disposal at this stage.
3. The present appeal raises a question of law as to
whether a compromise filed in suit proceedings could

be enforced through execution proceedings even though the suit was dismissed as withdrawn at the specific request of the parties.

4. The appellant in the year 1989 filed a suit for permanent injunction against the respondent to restrain him from interfering in any manner with the appellant's right of peaceful enjoyment and possession or encroaching or entering upon or carrying out any construction activity on the property bearing Municipal No. 268, Jamia Nagar, Okhla, New Delhi. The parties thereafter entered into an Agreement on 25.02.1991. The said Agreement is based on factual matrix stating that the appellant is the exclusive owner and in possession of the land comprising of 8430 sq. mtrs. including residence, servant quarters and out-house constructed on the same and that out of the said area, 6000 sq. mtrs. was to be developed as a Multi-storeyed Group Housing Complex. In respect to the said development, an Agreement had been entered into with M/s. Unitech Ltd. The respondent was alleged to be in illegal and unauthorized possession of piece of land measuring 435 sq. yds. since the year 1974 which land fell in the land to be utilized for the project and in respect of which the suit had been filed by the appellant. It is noticed in the compromise that the learned Single Judge by an Order dated 27.11.1989

restrained the respondent from constructing on the piece of land during the pendency of the suit and the settlement was being entered into to avoid any future litigation.

5. In terms of the aforesaid settlement, the respondent handed over possession of the land measuring 435 sq. yds. along with construction thereon to the appellant (clause 8 of the Agreement). Some of the other important clauses insofar as the present dispute is concerned are as under :-

“10. That without prejudice to the aforesaid, it is hereby specifically agreed by and between the parties that if for any reasons, the aforesaid Multi-storeyed Group Housing Project is abandoned the area of the plot measuring 435 sq. yds. shall be reverted to the Second Party and this Agreement shall become null and void and the Second Party shall be free to use the said land according to its desire.

11. That First Party and Second Party both hereby agree to withdraw the aforesaid suit No. 331 of 1989 titled as Mohd. Amin Vs. Mohd. Iqbal pending in the court of Delhi, New Delhi simultaneously with the signing of this Agreement.

... ..

19. That all disputes, differences relating to the technical aspects and arising out of and in connection with this Agreement or interpretation of the provisions of the Agreement, shall be referred to the Project Architect, as Sole Arbitrator, whose decision shall be final and binding on the parties hereto. The provisions of Indian Arbitration Act, 1940 or any statutory modification thereto shall be

applicable to such arbitration. The venue shall be at Delhi.”

6. The parties having entered into the aforesaid settlement moved an application under Order XXIII Rule 3 of the Code of Civil Procedure, 1908 (for short, ‘CPC’) annexing a copy of the compromise Agreement as Annexure – A and praying to the Court to record the compromise between the parties and dispose of the suit in terms thereof.

7. On 25.02.1991, the statements of the parties were recorded and thereafter the Order was passed by the learned Single Judge. The operative portion of the Order is as under :-

“Both the parties have undertaken that they will be bound by the terms of the compromise, as recorded in Ex. P – 2.

Under these circumstances, plaintiff has sought permission of this Court to withdraw the suit. Permission granted. Suit is dismissed as withdrawn. I direct that parties shall be bound by the terms of compromise Ex. P – 2.”

8. It appears that the project had not taken off. The respondent claimed that the project stood abandoned while according to the appellant, the developer was taking necessary steps for development. The respondent filed an execution petition, which was disposed of by the learned Single Judge of this Court in terms of the Order dated 12.03.2004 recording that in view of the suit being dismissed as withdrawn, there

was no decree in favour of any of the parties and that no question of entertaining execution petition on behalf of the decree holder would arise on the basis of clause 10 of the Agreement, which was a new contract between the parties. The respondent was left to seek his other remedies on the basis of clause 10 of the Agreement in accordance with law. The respondent aggrieved by the said Order preferred an appeal, i.e., EFA (OS) No. 13/2004, which was disposed of in terms of an Order dated 18.11.2005 of the Division Bench. The Division Bench took note of the fact that while permitting withdrawal of the suit, it was directed that the parties would be bound by the terms of the compromise and, thus, the observations of the Executing Court that clause 10 of the Agreement was a new Agreement between the parties does not appear to be correct. The Order dated 12.03.2004 was set aside and the matter remanded back to the Executing Court to decide afresh in the light of the observations made in the appeal.

9. The appellant preferred a Special Leave Petition against this Order, but the same was dismissed vide Order dated 10.04.2006.
10. Learned Single Judge thereafter again proceeded to decide the execution petition filed by the appellant. Learned Single Judge took note of the plea of the

appellant that no time-limit had been fixed by virtue of the Agreement dated 25.02.1991 within which the judgment debtor along with the builder had to carry out the construction. Thus, clause 10 of the Agreement, as pleaded by the Agreement, would come into operation only when the developer abandoned the project. This had not happened. Learned Single Judge, however, concluded that in view of the Order of the Division Bench dated 18.11.2005 regarding clause 10 of the Agreement not bringing into force a new Agreement, the Agreement formed a part of the decree and would be subject matter of execution. It was further noticed that where no time was fixed, reasonable time would have to be assumed and, in the present case, sixteen years had gone by since the execution of the Agreement. The warrants of possession were consequently directed to be issued.

11. The appellant aggrieved by the aforesaid Order filed the present appeal in which notice was issued and learned counsel for the respondent made a statement on 28.05.2008 that he will not take any further action in pursuance to the impugned order. The appeal has thereafter been heard now.
12. The substratum of the case of learned counsel for the appellant is that in view of the suit having been dismissed as withdrawn, there was no decree passed,

which was capable of execution and the remedy of the respondent, if any, lay elsewhere. On the other hand, learned counsel for the respondent submits that part of the Order, which records the factum of the compromise, is executable.

13. Learned counsel for the respondent has relied upon a judgment of the Division Bench of this Court in Hardit Singh Obra v. Daljit Singh, ILR (1974) II Delhi 571. In the facts of the said case, an application under Order XXIII Rule 3 of the CPC was filed. It was observed that if the compromise is legal, there is no discretion in the Court to add or vary the terms and the Court must pass a decree in accordance with the compromise. The decree holder in such a situation has the right to execute the executable part of the decree. The Court having added the words that the suit was dismissed was held to imply that the original relief in the plaint stood rejected to avoid contradiction.
14. We find that the basis of the compromise application is the Agreement dated 25.02.1991. The compromise, thus, envisages in clause 11 that the Agreement between the parties that the suit would be withdrawn. Thus, the parties were conscious of the fact that having entered into the compromise, no decree was to be prayed before the Court, but the suit was to be withdrawn. The application filed by the parties, though

under Order XXIII Rule 3 of the CPC, prayed for recording of the compromise between the parties and disposal of the suit. The object of the parties was clear that they wanted to place on record the compromise arrived at between the parties, but did not seek to obtain a decree in terms of the compromise, which would be executable. It is in these circumstances that the suit has been dismissed as withdrawn, though the parties were to be bound by the terms of the compromise.

15. The case of the respondent is predicated on the plea that the project stood abandoned while the stand of the appellant is that the execution of the project is still on the card. If any rights arise for enforcement by the respondent, in our considered view, the same cannot be through the process of execution as the suit itself was dismissed as withdrawn. This was not a mistake as in the case of Hardit Singh Obra's case (supra). The Order was consciously passed on the basis of the understanding between the parties as contained in the Agreement dated 25.02.1991 that the suit should be dismissed as withdrawn. We may also notice that the Division Bench while passing the earlier Order dated 18.11.2005 had only remanded the matter to be re-examined by the Executing Court in view of the observations that clause 10 of the Agreement was not

a new Agreement between the parties. There was no final finding in respect of the various controversies raised in the appeal. An order for a decree or order to be executable must contain finality as to the nature of directions, which are capable of execution. A dismissed suit can hardly give rise to an execution of a decree. There is no separable part of the decree, which is capable of execution in the present case. No doubt, the Agreement between the parties is binding in view of the statements recorded of the parties and the Order passed, but that only gives an imprimatur of the Court on the Agreement. The validity of the Agreement is not disputed, but the enforcement of the Agreement is in question as also the mode and manner of the same.

16. We are, thus, of the considered view that the respondent could not have sought execution of the decree in a suit, which was dismissed as withdrawn on the prayer of the parties and it is for the respondent to take recourse to appropriate legal remedies in accordance with law for enforcement of the rights under the Agreement dated 25.02.1991, if so advised.
17. The appeal is accordingly allowed, the impugned Order dated 30.11.2007 is set aside and the execution petition filed by the respondent is dismissed with liberty to the respondent to take out appropriate legal

proceedings for enforcement of the Agreement dated
25.02.1991 in accordance with law, if so advised.

18. The parties are left to bear their own costs.

SANJAY KISHAN KAUL, J.

April 15, 2009
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SUDERSHAN KUMAR MISRA, J.