

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Pronounced on: 11.11.2010

+ **CS(OS) No. 455/2008**

SH. SYED AFI MOAZZAM

..... Plaintiff

- versus -

SMT. NAFEES FATMA & ORS.

..... Defendants

Advocates who appeared in this case:

For the Plaintiff : Mr Nasis Aziz, Adv.

For the Defendant : Mr S.H. Nizami, Adv. for D-1 to 4

: Mr Satish Kumar Verma, Adv. for D-5

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

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

V.K. JAIN, J (Oral)

1. This is a suit for declaration, partition, rendition of accounts, mandatory injunction and permanent injunction. Defendant No.1 Smt. Nafees Fatma Hashmi is the mother of the plaintiff No.1 and defendants 2 to 5. Plaintiff No.2 is the wife of plaintiff No.1. Vide order dated 15th January, 2010, this Court noted that parties were closely related and purposed to explore the possibility of a settlement. They

were directed to appear before Delhi High Court Mediation and Conciliation Centre on 22nd January, 2010. When the matter was taken up on 07th April, 2010, the Court was informed by the learned counsel for the parties that an oral settlement had been arrived between the parties and some time was required to produce the same in the written. The parties were again directed to appear before the Mediation Centre on 15th April, 2010.

2. On 17th May, 2010, a settlement agreement was recorded before Delhi High Court Mediation and Conciliation Centre which is Ex.P-2. All the parties to the suit were also the parties to the settlement agreement dated 17th May, 2010. The settlement agreement was signed by all of them in the presence of Mediators and their counsels Mr. Nasis Aziz was representing the plaintiff, whereas Mr. S.Hilal Nizami was appearing for the defendants. The settlement agreement was also signed by both the counsels.

3. Under the terms of agreement dated 17th May, 2010, the parties agreed as under:-

“(b) That it is decided that all the parties will jointly apply to the concerned banks for release of funds lying in all such bank accounts as held by Late Zahir Anjum Hashmi as on

the date of his demise and all such funds lying in these bank accounts shall be distributed amongst the parties as per their sharing ratios.

(c) That it has also been agreed that the First party relinquishes his claim on the business of Late Zahir Anjum Hashmi carried on under the name S P Powder Coating as well as the Maruti Car No. DL 2C AA 2047.

(d) That it has been unanimously agreed that property No. J-60 A would henceforth belong exclusively and would remain under the use and possession of the party of the one part to the exclusion of all other parties/legal heirs. It is also made clear that Smt. Iffat wife of the First party shall not lay any claim against the party of the second part.

(e) That the property No. J-12, Abul Fazal Encalve, Jamia Nagar, New Delhi-110025, has already been disposed of.

(f) That it has also been unanimously agreed that the property No. T-9C, Ghafoor Nagar, Jamia Nagar, New Delhi-110025 shall be in the ownership of all the other legal heirs to the exclusion of the party of first part and the defendant No.5 i.e. Shri Razi Tariq Hashmi and will be distributed/shared or dealt with in any other manner by the remaining party of the second part.

(g) That after the execution of this compromise deed, Plaintiff/the party of the first part and the Defendant No.5 i.e. Shri Razi Tariq Hashmi will not have any claim, title or interest left in properties No.J -12 A and T-9C; on the other hand the party of second part shall have no claim title or interest left in property No.J-60A.

(h) That in lieu of the above settlement, the defendant No.5 i.e. Shri Razi Tariz Hashmi shall be paid a sum of Rs 35,00,000/- (Rupees thirty five lakhs only) in full and final settlement in respect of all the claims/properties mentioned hereinabove by defendant No.4 i.e. Shri Shariq hashmi, on behalf of himself and the Defendant Nos. 1 to 3 (i.e. his mother and two sisters). Shri Shariq Hashmi undertakes to pay the said total amount of Rs 35,00,000/- (Rupees thirty five lakhs only) by way of five post dated cheques of Rs. 7,00,000/- (Rupees seven lakhs only) each on 25th May, 2010 before this Hon'ble Court. The said five post dated cheques may be presented by the defendant No.5 i.e. Shri Razi Tariq Hashmi on the following dates:-

- i) 17.10.2010
- ii) 17.11.2010
- iii) 17.12.2010

iv) 17.01.2011

v) 17.02.2011

(i) That the party of second part has filed a suit for possession with regard to property No. J-60A which is pending in the Tis Hazari Court. In view of compromise arrived at between the parties, the party of second part, more specifically Shri Shariq Hashmi on behalf of the party of second part undertakes to withdraw the suit forthwith and will not prosecute the said matter any further.

4. Defendant No.5 was to be paid Rs 35,00,000/- by way of five post-dated cheques of Rs 7,00,000/- each. The first cheque was encashable on 17.10.2010, the second on 17.11.2010, the third on 17.12.2010, the fourth on 17.01.2011 and the fifth on 17.02.2011. This amount was to be paid to him in full and final settlement of all the claims/properties and the payment was to be made by defendant No.4 for himself and for defendants 1 to 3. The defendants were to withdraw the civil suit which they had filed for possession with regard to Property No.J-60 A Abul Fazal Encalve, Jamia Nagar, New Delhi. When this matter was taken by the Court on 25th May, 2010, defendant No.5 was not present though his counsel was present. The

matter was adjourned to 02nd June, 2010. On that day, it was pointed out by the plaintiffs that the defendants are required to hand over the documents of title related to property No. J-60 A Abul Fazal Enclave, Jamia Nagar, New Delhi to the plaintiffs. When the matter was taken up on 02nd June, 2010, the learned counsel for the defendants Mr.S.H. Nizami informed the Court that the defendants were searching for the documents, mentioned in para 11 of the settlement and sought some more time for this purpose. The matter was adjourned to 28th July, 2010. On 28th July, 2010 also, defendant No.5 was not present in the Court though defendant No.4 was present alongwith Mr S.S. Nizami Adv. On that date, it was stated that the original documents had been placed on the file of another case filed by the defendants against the plaintiff. The learned counsel for the defendants sought one week's time to produce the documents in the Court. The matter was adjourned to 17th August, 2010. On 17th August, 2010, no one was present for the parties and the matter was adjourned to 26th August, 2010. On 26th August, 2010, the matter was adjourned to 08th September, 2010 on the request of the learned counsel for the plaintiff. Defendant Nos.4 and 5 were present in

person on that date. On 08th September, 2010, defendant No.5 was not present in the Court. On that date, the plaintiff informed the Court that they had filed an application under Order 1 Rule 10 of CPC. The matter was adjourned to 23rd September, 2010. On 23rd September, 2010, defendant No.5 was not present and the application under Order 1 Rule 10 of CPC for impleading the wife of the then sole plaintiff as plaintiff No.2 was allowed by the Court since no objection was raised by the defendants to her impleadment as a co-plaintiff. The matter was directed to be listed before the Joint Registrar at 11 AM on 28th September, 2010 and before this Court at 2.15 PM on the same date. On 28th September, 2010, the Joint Registrar recorded the statements of the plaintiffs, defendant No.4 and Mr Shafi Ullah, Advocate, who appeared for defendant No.5. The statement of defendant No.4 was recorded for himself as well as for defendants 1 to 3, who executed a Special Power of Attorney in his favour. All the five cheques bearing No.786126 to 786130 for Rs 7,00,000/- each all drawn on Delhi State Cooperative Bank Limited, Trikona Park, Main Road, Okhla, New Delhi were accepted by Mr Shafi Ullah, who appeared for defendant No.5 and he

undertook to file the original acknowledgement of the cheques from defendant No.5 in favour of defendant No.1 to 4 within two weeks. When the matter was taken up by the Court at 2.15 PM on that date, the Court was of the view that it would be necessary to record the statement of defendant No.5. The cheques that had been handed over to his counsel were returned back to defendant No.4, who was present in the Court and he was directed to bring the cheques on next day. When the matter came up before the Court on 07th October, 2010, defendant No.5 was not present, despite earlier direction of the Court to remain present in the Court. Cost of Rs 10,000/- was imposed upon him and it was directed that in case he fails to put in appearance, the matter would be disposed of in terms of the settlement arrived at between the parties. Defendant No.4 was directed to remain present alongwith the cheques. The matter was adjourned to 29th October, 2010.

5. When the matter was taken up on 29th October, 2010, statement of defendant No.5, who was present in the Court, was recorded by the Court. He admitted that the agreement Ex.P-2 was signed by him before Delhi High Court Mediation & Conciliation Centre in the presence of his

counsel S.Hilal Nizami. He also admitted that his counsel had also signed the settlement agreement 'X-1' in his presence. He admitted that he had executed a vakalatnama in favour of S.Hilal Nizami, which is available on the Court file. He claimed to be a post-graduate with knowledge of reading and writing English. He also stated that he had read the settlement agreement Ex.P-2 and understood it before he signed it. He, however, claimed that when he signed the agreement on 17th May, 2010, he was in need of money and that is why he was agreed to accept the cheques mentioned in para 13(h) of the agreement Ex.P-2. He also admitted that he had engaged Mr Shafi Ullah as his Advocate on 07th September, 2010 and that he had appeared in the Court on 08th September, 2010. According to him, the post-dated cheques, mentioned in the settlement agreement, were not handed over to him on 08th September, 2010 and the matter was adjourned to 23rd September, 2010. He admitted that he had appeared before the Joint Registrar on 23rd September, 2010. He also admitted that he had not appeared before the Court at any time after 08th September, 2010.

6. It is quite clear from the above discussion that the parties to the suit, including defendant No.5 had willingly and consciously entered into an agreement before Delhi High Court Mediation and Conciliation Centre on 17th May, 2010, in the presence of their respective counsels. Defendant No.5, who now, wants to back out of the settlement, is not an illiterate person. He is a post-graduate and admittedly, he had read and understood the settlement agreement before it was signed by him. Admittedly, the agreement was also signed by his counsel S.Hilal Nizami. The grievance of defendant No.5, who is present in the Court and is now represented by S.K. Verma, Advocate, is that since the cheques were not handed over to him in time he could not meet his requirement of funds and, therefore, now he does not want to honour the agreement which was executed before Delhi High Court Mediation and Conciliation Centre on 17th May, 2010. As noticed earlier, the five cheques which were to be given to defendant No.5 under the settlement agreement were all post dated cheques, the first cheque being dated 17th October, 2010. The cheques were tendered to his advocate, Mr Shafi Ullah on 28th September, 2010. He himself did not appear before

the Court on 23rd September, 2010 though the date of 23rd September, 2010 was fixed in his presence on 08th September, 2010. The statement of his counsel Mr Shafi Ullah was recorded by the Joint Registrar on 28th September, 2010 and the cheques were also accepted by him. The cheques were returned back to defendant No.4 only because defendant No.5 was not present and the Court felt that his statement was required to be recorded before handing over the cheques to him or to his counsel. Had defendant No.5 appeared in the Court on 23rd September, 2010 and/or 28th September, 2010, the cheques would have been handed over to him and he could very well have utilized the whole money, including the amount of the first cheque which could not have been encashed before 17th October, 2010. It would be pertinent to note again that the defendant No.5 did not appear before the Court on 07th October, 2010, despite a specific direction having been given for his personal appearance. Therefore, there was absolutely no justification for his not remaining present in the Court on 07th October, 2010. The Court had also to take recourse to burden him with costs, on account of his remaining absent, despite direction of the Court. Had he appeared in

the Court on 07th October, 2010, the cheques would have been given to him and he would have been able to encash even the first cheque on 17th October, 2010. Therefore, there is no merit in the contention of defendant No.5 that he was deprived of the use of the money on account of delay in delivery of the cheques to him. Defendant No.5 cannot be allowed to take advantage of his own act by his remaining absent from the Court, despite direction of the Court. It is not open to him to remain absent from the Court and then say that the cheques were not given to him before 17th October, 2010. No useful purpose in any case would have been served by giving the cheques to him before prior to 17th October, 2010 when the first cheque could not have been encashed before that date. Therefore, I have no doubt that the reason given by defendant No.5 backing out of the settlement agreement is nothing but an afterthought and a lame excuse.

7. Order 23 Rule 3 of CPC, to the extent it is relevant, provides that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, the Court shall order such agreement or

compromise to be recorded and shall pass a decree in accordance therewith, so far as it relates to the parties to the suit, irrespective of whether the subject matter of the agreement or compromise is the same as the subject matter of the suit or not. It further provides that where it is alleged by one party and denied by the other party that an adjustment or satisfaction has been arrived at, the Court shall decide the question. In the case before this Court, there is no dispute that the parties had actually entered into a settlement. It is not permissible for defendant No.5 to back out of the settlement arrived at between the parties and recorded in writing before Delhi High Court Mediation and Conciliation Centre. Hence, defendant No.4 is directed to hand over the five post-dated cheques, mentioned in the settlement agreement Ex.P-2 to defendant No.5, who is present in the Court, in full and final settlement of all the claims/properties, mentioned in the settlement agreement. All the five cheques have been handed over to defendant No. 5 in the Court. I am informed that the civil suit, mentioned in para 13(i) of the settlement agreement has already been withdrawn. All the parties to the settlement will apply to the concerned banks, in terms of Clause 13(b) of the

settlement, for release of funds lying in all such accounts as on the date of the demise were held by late Zahir Anjum Hashmi and all such funds lying in these bank accounts shall be distributed amongst the parties as per their sharing ratios. If defendant No.5 does not join in applying to the concerned banks for release of funds, the bank will act in this regard on the application of all other parties, on the strength of the order being passed by this Court.

8. The suit is decreed in terms of the settlement agreement Ex.P-2, subject to payment of additional Court fee, if any, required to be paid in the light of the settlement agreement. Decree sheet be prepared accordingly. The settlement agreement Ex.P-2 shall form part of the decree. There shall be no order as to costs. Defendant No.5 need not to deposit costs of Rs 10,000/ which were imposed on him vide order dated 07th October, 2010. It has been agreed between the parties that defendant No.4 will initiate the application to the banks for release of funds in terms of para 13(b) of the settlement agreement and defendant No.5 will also sign that application as and when requested by other parties to the suit. The Registry will examine the matter to ascertain whether any additional Court fee is

required to be paid for preparing Decree Sheet in terms of the settlement agreement Ex. P-2. If any additional Court fee is required, the Registry shall communicate the same to the parties to the suit within two weeks and the additional Court fee shall be filed in the Court within one week, thereafter. It is made clear that the Decree Sheet will be prepared only if additional Court fee, if any, demanded by the Registry is filed.

(V.K. JAIN)
JUDGE

NOVEMBER 11, 2010

bg/Ag