

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(OS) 1906/2008**

Decided on 01.05.2015

IN THE MATTER OF:

BISHNU DAS

..... Plaintiff

Through: None

versus

BISHWATOSH DAS AND ORS

..... Defendants

Through: Mr. Vijay K. Sehgal, Advocate for D-1

CORAM

HON'BLE MS.JUSTICE HIMA KOHLI

HIMA KOHLI, J. (Oral)

I.A. 9101/2015 (exemption)

Allowed, subject to all just exceptions.

I.A. 9099/2015 (by D-1 u/O IX R 13 CPC) and I.A. 9100/2015 (by D-1 u/S 151 CPC for stay)

1. I.A. 9099/2015 has been filed by the defendant No.1 under Order IX Rule 13 read with Section 151 CPC praying *inter alia* for setting aside the judgment and decree dated 05.04.2010 and I.A. 9100/2015 has been filed by the defendant No.1 under Section 151 CPC for stay.

2. Before advertng to the submissions made by the counsel for the

applicant/defendant No.1, it is relevant to refer to the sequence of events that have unfolded in the present case.

3. The plaintiff had instituted the present suit against his siblings praying *inter alia* for partitioning an immovable property bearing No.H-2/27A situated at village Palam known as Mahavir Enclave, Bengali Colony, New Delhi, measuring 102 sq. yards, owned by the mother of the parties, apart from the relief of possession, rendition of account etc. Summons were issued in the suit on 12.09.2008, returnable on 03.12.2008. In the interregnum, on 22.09.2008, at the request of the counsel for the plaintiff, a Local Commissioner was appointed to visit the suit premises and inventorize the stocks lying in the shop and on the ground floor, basement and the second floor of the suit premises and submit a report.

4. As per the court records, the applicant/defendant No.1 was served with the summons in the suit on 21.11.2008. However, he did not enter appearance and nor did he file the written statement. After the pleadings were completed in respect of the remaining defendants, issues were framed in the suit on 03.07.2009, whereafter the matter was directed to be placed before the Joint Registrar for recording the evidence. The evidence was concluded on 18.12.2009 and the suit was placed before the Court for further proceedings.

5. On 05.04.2010, after examining the evidence led by the parties, the Court had arrived at a conclusion that in terms of the Memorandum of Family Settlement dated 21.07.2007 (Ex.P-8/D-2) (hereinafter referred to as 'the MOU'), all the parties had agreed that the suit property would be sold in the open market and the sale consideration would be distributed equally amongst them. It was further recorded that the parties had agreed in the said MOU that the plaintiff, defendants No.1, 2 and 4 had released and relinquished their rights in the suit premises in favour of the defendant No.3, who would sell the same to a prospective buyer and distribute the sale proceeds equally amongst all the parties. Lastly, it was agreed that the occupants of the suit premises would vacate the same within three months or within one month from the date of the notice of vacation.

6. After recording the terms and conditions of the settlement arrived at between the parties to the present suit, as per the MOU, it was noted in the order dated 05.04.2010 that ordinarily, a preliminary decree is passed in the first instance, but in view of the stipulations contained in the MOU, a final decree was being passed and the decree sheet was directed to be drawn up. With this order, curtains were drawn on the suit proceedings.

7. Now, after the passage of five years, the applicant / defendant

No.1 has approached the Court for setting aside the judgment and decree dated 05.04.2010.

8. Counsel for the applicant / defendant No.1 contends that the present suit was collusively instituted by the plaintiff and the defendants No.2 to 4 against the defendant No.1 and they have broken the good faith and trust that the defendant No.1 had reposed in his siblings. He refers to a suit for permanent injunction instituted by defendant no. 1 against the plaintiff and the defendants No.2 to 4 herein in the trial court, registered as Suit No.262/2008 and states the defendants in the said suit had made a statement that they would not dispossess the plaintiff (defendant No.1 herein) without following the due process of law. Learned counsel argues that the siblings of the defendant No.1 had failed to put him to notice at the time of instituting the present suit for partition in September, 2008 and though the defendant No.1 was served with the summons in the suit on 21.11.2008, he chose to stay away from the suit proceedings only on the assurance given by his siblings that they would take care of his interests. However, it is not disputed that when the Local Commissioner was appointed vide order dated 22.09.2008 and he had gone to visit the suit premises, for executing the commission, defendant No. 1 was very much present at the spot and he had

participated in the said proceedings. Yet again, learned counsel reiterates that defendant No.1 had elected not to participate in the suit proceedings only on the assurance given by his siblings.

9. After some prodding, the underlying reason for filing the present application after a period of five years is revealed. It transpires that the plaintiff has filed an execution petition in this Court, registered as EX.P. 123/2014, praying *inter alia* for execution of the judgment and decree dated 05.04.2010, and vide order dated 28.10.2014, directions were issued to the defendant No.1 (J.D. No. 1 therein) to hand over the possession of the suit premises to the Judgment Debtor No.3, to enable her to implement and execute the decree. It has also been clarified in the said order that in case the defendant No.1 declines to vacate the suit premises and he fails to hand over the vacant peaceful possession thereof to the Judgment Debtor No.3, then the Decree Holder would be entitled to seek police assistance for getting the suit premises vacated after breaking open the locks, if necessary. Learned counsel concedes that till date, the defendant No.1 has not taken any steps to challenge the judgment dated 05.04.2010, by filing an appeal and nor has he filed any objections in the execution petition. Instead, he has proceeded to file the present application in a decided case.

10. The only explanation sought to be offered by the counsel for the

defendant No.1 for resisting the decree passed in terms of the Memorandum of Family Settlement dated 21.07.2007, is the blind faith that he had purportedly placed in his siblings and his claim that he has been made a scapegoat by them.

11. The Court has heard the submissions made by the counsel for the defendant No.1 and examined the explanation offered for filing present the application. Given the background of the case, it is quite evident that the present application is nothing but a circuitous route adopted by the defendant No.1 to somehow stall the order dated 28.10.2014 passed in EX.P.123/2014. It is apparent from the sequence of events noted above that the defendant No.1 was served with the summons in the suit as long back as on 21.11.2008, but he had failed to enter appearance or file the written statement. Instead, he decided to remain a fence sitter and has been watching the proceedings in the suit from a safe distance. Another opportunity to participate in the suit had come his way when the Local Commissioner had visited the suit premises on 28.09.2008. As per the Local Commissioner's report, the defendant No.1 was present at the spot and was apprised of the pendency of the suit. In fact, it was in his presence that the commission was executed. Even thereafter, the defendant No.1 had elected not to participate in the suit proceedings.

Eventually, the evidence was concluded in the suit and as all the remaining parties had unanimously relied upon the Memorandum of Family Settlement dated 21.07.2007, the judgment and decree dated 05.04.2010 was passed in line with the stipulations contained in the said document.

12. The execution of the said MOU has not been denied by the defendant No.1, who is a signatory to the said document, along with his other siblings. Despite the same, he has filed the present application for setting aside the judgment and decree passed on the basis of the very same MOU. The judgment and decree is nothing but the Court's imprimatur to the manner in which the family members had unanimously agreed to dispose of the suit premises and share the sale proceeds amongst them, on the terms embodied in the said MOU.

13. At this stage, it is considered appropriate to refer to a stream of judicial pronouncements that highlight the sanctity of family arrangements and the reason why the Courts should abjure from interfering with them.

14. In the case of Kale and Ors. vs. Deputy Director of Consolidation

and Ors. reported at **(1976) 3 SCC 119**, the Supreme Court had laid much emphasis on the value of family arrangement entered into between the parties with a view to resolve their disputes once and for all and stated as below:-

"9. By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made. In this connection, Kerr in his valuable treatise "Kerr on Fraud" at p. 364 makes the following pertinent observations regarding the nature of the family arrangement which may be extracted thus:

The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to that their rights actually are, or of the points on which their rights actually depend.

The object of the arrangement is to protect the family from long drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain and uphold the unity and homogeneity of the family which ultimately results in the unification of the society and, therefore, of the entire country, is

the prime need of the hour. **A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is undoubtedly a milestone in the administering of social justice.** That is why the term "family" has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successions so that future disputes are sealed for ever and the family instead of fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. **The Courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the Courts find that the family arrangement suffers from a legal lacuna or a formal defect the Rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits.** The law in England on this point is almost the same. In Halsbury's Laws of England, Vol. 17, Third Edition, at pp. 215-216, the following apt observations regarding the essentials of the family settlement and the principles governing the existence of the same are made:

A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving-its honour.

The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied.

Family arrangements are governed by principles which are not applicable to dealings between strangers. The Court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements.

10. In other words to put the binding effect and the essentials of a family settlement in a concretized form, the matter may be reduced into the form of the following propositions:

- (1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;
- (2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;
- (3) The family arrangement may be even oral in which case no registration is necessary;
- (4) It is well-settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the Court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.”

15. The aforesaid principles have been reiterated in a series of decisions starting in the early 20th century when the Privy Council had underlined the importance of family arrangements in the case of Khunni Lal vs. Gobind Krishna reported at **(1911) 38 Ind App 87** and Mt. Hiran Bibi vs. Mt. Sohan Bibi reported at **AIR 1914 PC 44**. In the mid 1950's in the case of Sahu Madho Das vs. Mukand Ram reported at **AIR 1955 SC 481**, the Supreme Court had amplified the doctrine of validity of the family arrangement in the following words:

“It is well settled that compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from the one in

whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary. But, in our opinion, the principle can be carried further and so strongly do the Courts lean in favour of family arrangements that bring about harmony in a family and do justice to its various members and avoid in anticipation, future disputes which might ruin them all, and we have no hesitation in taking the next step (fraud apart) and upholding an arrangement under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their member (provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to their shares as gifts pure and, simple from him or her, or as a conveyance for consideration when consideration is present."

16. In Ram Charan Das vs. Girjanandini Devi reported at **(1965) 3 SCR 841**, the object of family settlement was highlighted in the following words:

"Courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes regarding property amongst members of a family. The word 'family' in the content is not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute.... The consideration for such a settlement, if one may put it that way, is the expectation that such a settlement will result in establishing or ensuring amity and goodwill amongst persons bearing relationship with one another. That consideration having been passed by each of the disputants the settlement consisting of recognition of the right asserted by each other cannot be permitted to be impeached thereafter."

17. In Tek Bahadur Bhujil vs. Debi Singh Bhujil reported at **AIR 1966 SC 292**, the Supreme Court had dwelled into the effect of an oral family arrangement and the requirement of registering the same if it was reduced into writing and held that a document, which was only a memorandum of what had been agreed upon by the parties, did not require any registration. In the case of Maturi Pullaiah vs. Maturi Narasimham reported at **AIR 1966 SC 1836**, it was observed that even if there was any conflict of legal claims between the parties but the settlement was a *bonafide* one, the same could be sustained by the Court. It was also held that even the disputes that were based upon ignorance of the parties as to their rights, once resolved through a family arrangement, ought to be sustained by the Court, the underlying object being that the settlement was arrived at to maintain family peace and bring harmony amongst the family members. An expansive interpretation of the word 'family' beyond such members of the family, who have a right of succession or claim a share, was endorsed by the Supreme Court in the case of Krishna Biharilal vs. Gulabchand reported at **AIR 1971 SC 1041**. On the same lines was an earlier decision in the case of Ram Charan Das (supra), wherein it was held that if the dispute, which is settled through a family arrangement, is between near relations, then settlement of such a

dispute can be considered as a family arrangement.

18. Another decision on the same lines was rendered in the case of S. Shanmugam Pillai vs. K. Shanmugam Pillai reported at **(1973) 1 SCR 570**, wherein the entire case law on various dimensions of the family arrangement was examined and the Supreme Court had observed that courts generally lean in favour of a family arrangement and if in the interest of family properties or family peace, the close relations have settled their dispute amicably, then the courts would be reluctant to destroy the same. Summing up their view on the legality, validity and sanctity of the family arrangement, the following general propositions were laid down:-

“(1) A family arrangement can be made orally.

(2) If made orally, there being no document, no question of registration arises.

With reference to the second question:

(3) If though it could have been made orally, it was in fact reduced to the form of a "document", registration (when the value is Rs. 100 and upwards) is necessary.

(4) Whether the terms have been "reduced to the form of a document" is a question of fact in each case to be determined upon a consideration of the nature and phraseology of the writing and the circumstances in which and the purpose with which it was written.

(5) If the terms were not "reduced to the form of a document", registration was not necessary (even though the value is Rs. 100 or upwards); and, while the writing cannot be used as a piece of evidence for what it may be worth, e.g. as corroborative of other evidence or as an admission of the transaction or as showing or explaining conduct.

(6) If the terms were "reduced to the form of a document" and, though the value was Rs. 100 or upwards, it was not registered, the absence of registration makes the document inadmissible in evidence and is fatal to proof of the arrangement embodied in the document."

19. The underlying principle in all the above decisions is that ordinarily, the courts give a lot of weightage to a family arrangement as it is considered an instrument that brings about affinity and compatibility between kith and kin and encourages goodwill and unity in the family and the extended family. A family arrangement also helps in avoiding future dispute between family members and is a step towards anticipating and nipping them in the bud through an amicable resolution and mutual understanding. It is for this reason that the Courts must strive to uphold the family arrangements and bring them to fruition in the higher interest of maintaining family peace, cordiality and harmony amongst family members and strengthening their ties.

20. In the teeth of the aforesaid legal position, the submission made by learned counsel for the defendant No.1 that his client is not bound by the MOU to which defendant No. 1 is a signatory or that he has been made a scapegoat by his siblings is taken note of only to be turned down. It is not disputed by the defendant No.1 that he is a signatory to the Memorandum of Family Settlement, a document

which was given recognition in the judgment and decree dated 5.4.2010. No challenge has been laid by the defendant no. 1 to the said document till date. He is quite obviously in breach of the conditions he had agreed to abide by under the MOU and after bidding his time, for five long years, has decided to jump into fray at the fag end of the litigation by filing the present application and seeking to unsettle, settled disputes between the family members. It is evident that under the garb of this application, the defendant No.1 is trying to stall the execution proceedings, which cannot be countenanced. Having consciously stayed away from the suit proceedings after being duly served with the summons on 21.11.2008, it does not lie in the mouth of the defendant No.1 to try to shift the blame on to the plaintiff and the other defendants, when he was all along in the know of the litigation and well aware of the risk that he was running by staying away. The defendant has failed to offer a plausible reason, leave aside sufficient reason, for the court to intervene.

21. This Court is therefore of the opinion that the present applications have been filed in bad faith and are a deliberate attempt on the part of the defendant No.1 to resist the judgment and decree dated 05.04.2010 and some how drag the execution proceedings filed

by the plaintiff with the sole object of continuing to occupy the suit premises, to the exclusion of all his other siblings.

22. Accordingly, the present applications are dismissed with costs of ₹30,000/- imposed on the defendant No.1, to be paid to his siblings in equal share, within two weeks from today. It is further directed that till the proof of payment of costs is placed on record, the Registry shall not entertain any application filed by the defendant No.1 in any proceeding arising from the present suit.

MAY 01, 2015
rkb / app

(HIMA KOHLI)
JUDGE