

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.592/2009 & CM No.17112/2009

Structural Waterproofing
Co. Pvt. Ltd.

.....Appellant through
Mr. Sushant Kumar and
Ms. Shikha Singh, Advs.

versus

Continental Foundation Joint
Venture & Co.

.....Respondent through
None

% Date of Hearing: February 15, 2010

Date of Decision: February 26, 2010

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE MANMOHAN SINGH

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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? | Yes |
| 3. Whether the Judgment should be reported in the Digest? | Yes |

VIKRAMAJIT SEN, J.

1. The present Appeal assails the Orders of the learned Single Judge dated 9.11.2009 and 13.11.2009. Vide orders dated 9.11.2009, the learned Single Judge had allowed the withdrawal of the Suit by the Plaintiff. The very next day, the erstwhile Plaintiff had filed an application for withdrawal of the compromise, which was numbered as IA No.14656/2009. On 13.11.2009, the learned Single Judge had obligated the Appellant/Plaintiff to comply with the Orders of the learned

Single Judge dated 9.11.2009 as a pre condition for affording further hearing on the application for restoration of Suit numbered as IA No.14656/2009.

2. The factual matrix that obtains from the records is that the disputes had arisen between the two brothers, namely, Shri Amit Gupta and Shri Sumit Gupta. Shri Sumit Gupta is the owner of Structural Waterproofing Co. Pvt. Ltd. (hereinafter referred to as 'SWC') and Shri Amit Gupta is the owner of CICO Technologies Limited (hereinafter referred to as 'CICO'). The Memorandum of Family Settlement mentions as many as seven cases filed by CICO, of which the present case was attached with another filed by CICO. Five other cases were filed by SWC against CICO. SWC had filed a Suit for Recovery under Order XXXVII against the contesting Respondent, namely, Continental Foundation Joint Venture (hereinafter referred to as 'CFJV'). In those proceedings, CFJV was directed to deposit a sum of Rupees Ten Lakh as a condition for grant for Leave to Defend. SWC availed of the permission to withdraw the sum of Rupees Ten Lakh on furnishing a Bank Guarantee. To complete the scenario, it should be mentioned that the defence taken by CFJV was that the dues claimed by SWC in the disposed of Suit No.1948/2002 had been paid by CFJV to CICO at a time when

the disputes between the two brothers had already surfaced and culminated into litigation.

3. It was in this background that the Court was apprised of the efforts for amicable settlement of the matter by the parties on 16.3.2009. On 25.9.2009, learned counsel for the Plaintiff informed the Court that the matter had been settled and sought time for moving an appropriate application. An application under Order XXIII Rules 1 and 3 of the Code of Civil Procedure, 1908 (for short 'CPC), numbered as IA No.14364/2009, was moved on 9.11.2009 for withdrawal of the said suit in the light of a Family Compromise entered into by the Plaintiff. It will be relevant to emphasize that the decision to withdraw the cases took several months and was not a hurried or impetus one. The learned Single Judge on this 9.11.2009 allowed the withdrawal of the Suit filed by the Plaintiff/Appellant and also directed the Plaintiff to return the amount of Rupees Ten lakhs which had been deposited by the Defendants and withdrawn by the Plaintiff on furnishing a Bank Guarantee vide Order dated 1.11.2004 of the learned Registrar-General.

4. The grounds for restoration set out before the learned Single Judge in the said application were that the withdrawal of suit by the Appellant/Plaintiff under Order XXIII Rule 3 of the CPC was contrary to law because the compromise of Plaintiff

was with one CICO, which is a party outside the suit and not with Defendants No. 1 and 3. The terms of this Settlement are set out in the Memorandum of Settlement dated 7.9.2009.

5. Soon thereafter, on 10.11.2009 itself, another application for restoration was moved by the Plaintiff, which was listed before the same learned Single Judge on 13.11.2009 who was pleased to direct the Plaintiff to comply with the Order passed on previous date, as a requirement for having his rights adjudicated upon.

6. The Appellant before us seeks setting aside of these Orders of the learned Single Judge passed on 9.11.2009 and 13.11.2009 on the grounds that the Plaintiff had filed the withdrawal application in haste and by inadvertence, and that the compromise, which was slated to be the basis of the withdrawal, was, in fact, between the Appellant/Plaintiff and a party outside the proceedings, namely, CICO and hence “application for withdrawal was against the principles of law laid down under Order XXIII Rule 3 CPC”.

7. We may, at the very outset, recall that the Application for Withdrawal was a composite one, that is, under Order XXIII Rules 1 and 3 of the CPC and not just under Order XXIII Rule 3 of the CPC.

8. The said provision allows the Plaintiff to withdraw or abandon his suit or part of claim as against all or any of the Defendants at any stage after the institution of suit. The said provision reads as under:-

Rule 1. Withdrawal of suit or abandonment of part of claim.—(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An Application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other, person.

(3) Where the Court is satisfied,—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to

institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

9. It is sought to be contended before us by the Appellant that the Appellant had several different cases pending before this Court in which CICO was a party. And that since the Appellant and CICO wished to settle their disputes, the Memorandum of Settlement dated 7.9.2009 was executed and the said Settlement, as well as the withdrawal of application, was moved before the learned Single Judge in a haste.

10. We have perused the records and the Memorandum of Settlement arrived at dated 7.9.2009 and do not find merit in the argument presented by the learned counsel for the Appellant. It is palpable from the pleadings that the present dispute is intricately connected with a family dispute between

two brothers. The Suit filed under the provisions of Order XXXVII of the CPC for recovery of money materially suppresses this fact. The Plaintiff has averred in his Plaint that certain supplies were made to the Defendants and the Defendants had failed to make the payment for the same and thus a claim of Rupees 33,01,689.03/- was raised. Defendants, on the other hand, have taken a defence that the outstanding payments were made on 13.2.2002 to CICO which was allegedly a part of the Plaintiff and that no further outstandings in respect of the bills filed by the Plaintiff remained. Defendants also raised the plea of material suppression by the Plaintiff inasmuch they omitted to disclose a formal settlement whereby the business of the Plaintiff family was divided. This Memorandum of Understanding (MoU) dated 1.2.2000 is between Mr. Sumit Gupta and Mr. Amit Gupta, sons of Late Shri Santosh Ranjan Gupta. As per this MoU, the assets of the business were divided amongst the brothers wherein Mr. Sumit Gupta got control of the Plaintiff Company, that is, SWC and the other brother, Mr. Amit Gupta floated CICO to consolidate and assimilate his assets.

11. It was the Defendants' contention throughout that they had made all outstanding payments to this newly constituted group of CICO who had apparently given an Indemnity Bond

against the payments as well. CICO, vide its application No.4577/2003 under Order I Rule 10 of the CPC, had sought impleadment in this Suit as well as to support the contention of the Respondents/Defendants, although, vide Order dated 14.10.2003, the same was dismissed by the learned Single Judge. This dismissal has been affirmed by the Division Bench of this Court vide Order dated 17.12.2003 on the ground that CICO was not a necessary party to the Suit.

12. Pursuant to this, CICO filed a Suit against SWC, numbered as CS(OS) No.1144/2005, seeking claims against the same transactions on which the subject matter suit was pending against the Plaintiff and the defendants herein and the two suits were clubbed together.

13. As regards the present Suit, Clause (g) of the Family Settlement dated 7.9.2009 reads as under:-

(g) Whereas SWC has filed a suit no.1948 of 2002 in High Court of Delhi against CFJV. In the said suit, CFJV have deposited a sum of Rs.10 lakhs in pursuance to the orders of the court. The said amount of Rs.10 lakhs has been withdrawn on furnishing the Bank Guarantee by SWC. On withdrawal of the suit it is agreed that the Bank Guarantee shall unconditionally stand discharged/withdrawn without any financial liability on SWC. However, in case CTL has to recover any amounts from CFJV they will be at liberty to take any action against CFJV without causing any financial

liability on The Structural Waterproofing Company Pvt. Ltd. the SECOND PARTY.

14. Thus, it is manifest that the Suit, which is the subject-matter of the present Appeal, was under contemplation of the Plaintiff while drawing-up and signing the said Family Settlement and the withdrawal was in light of the same as against the argument of haste which is proposed before us. Thus, the plea of inadvertence or mistake on the part of the Appellant is a moonshine defence taken against a conscious withdrawal of the Suit.

15. The argument that the learned Single Judge erred in allowing the Suit to be withdrawn by the Plaintiff in the absence of an agreement with the Defendants is also misconceived. As we have already noted above, the application of withdrawal was one under Order XXIII Rule 1 and 3 and not merely under Rule 3. Rule 1 expressly allows the Plaintiff to withdraw his entire Suit or any part thereof against any or all of the Defendants arrayed by him. The said provision neither postulates any compromise with the Defendants nor require that the withdrawal should have the concurrence of the Defendants. This is because a subsequent suit on the same cause of action would be barred if the consent of the Court had not been obtained at the time of the withdrawal. Leave granted under Order I

insulates the Defendants from further litigation. Rule 3, inasmuch as it grants Leave to the Plaintiff to file fresh case on the same cause of action, mandates that the Defendants should consent to the withdrawal.

16. We find no merit in the present Appeal and the same is dismissed with costs of Rupees 10,000/-. Pending application also stands dismissed.

17. Trial Court record be sent back.

(VIKRAMAJIT SEN)
JUDGE

February 26, 2010

(MANMOHAN SINGH)
JUDGE