

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

+ **RFA No. 727/2002**

% **24th November, 2011**

SH. RADHEY MOHAN KAPUR Appellant
Through : Mr. R.S. Kela, Advocate.

versus

SARITA PAHUJA & ORS. Respondents
Through : None.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 20.7.2002. By the impugned judgment the suit of the appellant/plaintiff wherein cancellation of the sale deed dated 3.6.1988 executed on behalf of the appellant (by the attorneys of the appellant/defendant Nos. 2 and 3) in favour of defendant No. 1 was prayed to and in the alternative a decree was prayed for recovery of ₹2,00,000/- which was the balance consideration payable by defendant No.1 under the Agreement to Sell dated 2.6.1987 and pursuant to which the sale deed dated 3.6.1988 was executed, was dismissed.

2. The case of the appellant/plaintiff before the Trial Court was that he had become the owner of the suit property bearing No.40, Arakasha Road, Ram Nagar, Delhi by virtue of a Will dated 30.12.1981 executed by his mother-Smt. Jai Rani Kapoor, and who was the owner of the property. The appellant/plaintiff had entered into an Agreement to sell dated 2.6.1987 for selling the suit property with defendant No.1/respondent No.1 for a total consideration of ₹4,00,000/-, out of which the appellant/plaintiff received a sum of ₹2,00,000/-. It was further the case of the appellant/plaintiff that defendant No.1 had got a power of attorney dated 1.7.1987 executed in favour of defendant Nos. 2 and 3/respondent Nos. 2 and 3 with respect to the subject Agreement to Sell and the suit property. The appellant/plaintiff further pleaded that defendant No. 1/respondent No.1 committed breach of contract by not obtaining the necessary Income Tax clearance certificate and clearance from the Controller of Estate Duty and therefore the sale deed could not be executed. It was also pleaded that defendant No.1 entered into a collusive compromise in Suit No.376/1988 with defendant Nos. 4 and 5, in a suit filed by defendant No.4 claiming rights in the suit property on account of an entitlement to ₹1,00,000/- each of the defendant Nos. 4 and 5 by virtue of the very Will dated 30.12.1981 relied upon by appellant/plaintiff. It was the case of the appellant/plaintiff that, though he was a party to the suit No. 376/1988, after he left the Court on the date of hearing being 8.8.1988, there was a collusive compromise between Smt. Sheela Khanna (defendant No. 4 in this suit and who was the plaintiff in that suit) and defendant No. 1 in the present suit. The plaintiff stated that he remained under a belief that the suit was infact withdrawn, whereas the same was infact compromised, and whereby defendant No.4 in the present suit namely Smt. Sheela Khanna

agreed to receive a sum of ₹1,00,000/- in terms of the Will dated 30.12.1981 of Smt. Jai Rani Kapoor bequeathing the suit property to the appellant/plaintiff with the pre-condition of making payment of ₹1,00,000/- each to defendant Nos.4 and 5 in the present suit namely Smt.Sheela Khanna and Sh. Om Parkash Khanna, respectively. Smt. Sheela Khanna was the daughter of Smt. Jai Rani Kapoor and the sister of the appellant/plaintiff. Sh. Om Parkash Khanna was the brother of the deceased Smt. Jai Rani Kapoor.

3. The respondents/defendants contested the suit. One written statement was filed by defendant Nos. 1 and 2 and other written statements were filed by defendant Nos. 4 and 5. As per the respective stands, the basic defence was that the appellant/plaintiff was claiming under a Will dated 30.12.1981 of Sh. Jai Rani Kapoor bequeathing the suit property to him, however, as per that Will itself, before the appellant/plaintiff was to become the owner of the property, the appellant/plaintiff had to pay a sum of ₹1,00,000/- each to Smt. Sheela Khanna and Sh. Om Parkash Khanna. It was the case of the defendants that in terms of the compromise arrived at between Smt. Sheela Khanna and the defendant Nos. 1 and 2 in this Suit No. 376/1988, filed in the Court of Sh. H.S. Sharma, Civil Judge, Delhi, Smt. Sheela Khanna was paid a sum of ₹1,00,000/-. It was also claimed that an amount of ₹1,00,000/- was paid to Sh. Om Parkash Khanna, the brother of Smt. Jai Rani Kapoor, the defendant No.5 in the present suit by relying upon relevant portions of the Will dated 30.12.1981 which read as under:-

“i) That a sum of Rs.1,00,000/- (One Lac) shall be paid by my aforesaid son Shri Radhey Mohan to Smt. Sheela Khanna out of the estate left by me or in lieu

thereof one flat of ground floor of the aforesaid house in the tenancy of Mr. Mehra will be given to her.

ii) That my brother Mr. Om Parkash Khanna who has been a helping hand throughout whom I wish to reimburse in one way or other in order to sow my regards towards him. Besides it he helped my favourably to the extent of ₹1,00,000/- therefore I wish him to give him ₹1,00,000/- out of my estate left by me after my demise or in lieu thereof one flat of first floor of the afroesiad house shall be given to him after my demise which is in the tenancy of Mr. P.N. Agarwal.

iii) That in case the amount of ₹1,00,000/- as mentioned above are not being paid out of my estate after my death the aforesaid persons Smt. Sheela Khanna my daughter and Shri Om Parkash Khanna my brother will be the exclusive owner and the landlord of the aforesaid flat as mentioned above, and they will be fully entitled to recover the rent or to alienate the aforesaid flats in any wise or manner they like.”

It was, therefore, stated by the defendants that after paying an amount of ₹1,00,000/- each to Smt. Sheela Khanna and Sh. Om Parkash Khanna a sale deed was executed of the suit property in favour of defendant No. 1 through appellant/plaintiff’s attorney/defendant No.2, defendant No.2 having been appointed as an attorney by the appellant/plaintiff vide General Power of Attorney dated 1.7.1987.

4. The relevant portions of the trial Court judgment are the portions which deal with the Will in question of Smt. Jai Rani Kapoor, which was the subject matter of issue No. 2, and issue No.11 which dealt with the validity of the compromise deed dated 8.8.1988 in the suit being 376/1988 decreed

as compromised by the Court of Sh. H.S. Sharma, Civil Judge, Delhi. The relevant portions of the impugned judgment giving the necessary findings read as under:-

“ISSUE No. 2:

Who is entitled to inherit the property in view of the will defendant 30.12.81 executed by Smt. Jai Rani Kapoor defendant 30.12.81? OPP

The onus to prove this issue is upon the plaintiff. The Will Ex.PW1/X2 is not in dispute. All the parties relies upon the same. As per Will Ex. PW1/X2 the suit property was bequeathed in favour of the plaintiff subject to the following conditions.

i) That a sum of Rs.1,00,000/- (One Lac) shall be paid by my aforesaid son Shri Radhey Mohan to Smt. Sheela Khanna out of the estate left by me or in lieu thereof one flat of ground floor of the aforesaid house in the tenancy of Mr. Mehra will be given to her.

ii) That my brother Mr. Om Parkash Khanna who has been a helping hand throughout whom I wish to reimburse in one way or other in order to sow my regards towards him. Besides it he helped me favourably to the extent of ₹1,00,000/- therefore I wish him to give him ₹1,00,000/- out of my estate left by me after my demise or in lieu thereof one flat of first floor of the aforesaid house shall be given to him after my demise which is in the tenancy of Mr. P.N. Agarwal.

iii) That in case the amount of ₹1,00,000/- as mentioned above are not being paid out of my estate after my death the aforesaid persons Smt. Sheela Khanna my daughter and Shri Om Parkash Khanna my brother will be the exclusive owner and the landlord of the aforesaid flat as mentioned above, and they will be fully entitled to

recover the rent or to alienate the aforesaid flats in any wise or manner they like.

In view of the conditions of the will the plaintiff could inherit the suit property in his absolute right subject to conditions he would have made the payment of Rs.1 lac to defendants no. 4 and 5 failing which defendants no. 4 and 5 were entitled to have one flat each on the ground floor and 1st floor respectively. This issue is accordingly answered.”

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ISSUE No.11

What is the effect of compromise recorded in suit no. 376/88? OPP

21. The onus to prove this issue is upon the plaintiff. The plaintiff has averred that the defendant no.1 in collusion and conspiracy with Smt. Sheela Khanna, the defendant no. 4 got filed a suit no. 376 of 1988 on 6.6.88 against the plaintiff and herself i.e. defendant no.1 for permanent injunction and got obtained the exparte stay order restraining the plaintiff from selling or disposing off the said property. In the said suit the said defendant no. 4 falsely set up a will allegedly dated 17.10.84 alleging to have been executed by Smt. Jai Rani Kapoor. The plaintiff was served with the notice of the said suit for 8.8.88. The plaintiff put in his appearance through his advocate Shri R.S. Kela, before the court of Sh. H.S. Sharma who on filing the vakalatnama sought time to file the written statement to the said plaint and the case was adjourned to 12.8.88 for the filing of the written statement and reply to the injunction application and meanwhile it was ordered that the injunction order shall continue. It is further stated that the defendant no.1 was served in the said suit for 6.7.88 and filed her vakalatnama through counsel and sought time to file

written statement for which the case was adjourned to 8.8.88 for the service upon the plaintiff and filing of the reply by the defendant no.1. The defendant no.1 at no point of time set up any Sale Deed with respect to the property in question before the said court on the said 2 dates. The defendant no. 1 however, after the said suit had been adjourned by the court on 8.8.88 and the counsel for the plaintiff had left the court, in collusion and conspiracy with the defendants no. 2 to again appear before the said court and got the false compromise recorded on the same date 8.8.88 behind the back of the plaintiff and without even informing the plaintiff. These facts came to the knowledge of the plaintiff only 12.8.88 when the counsel for the plaintiff went to attend the said court but did not find the case in the cause list and on enquiry from the court informed that the suit had already been withdrawn on 8.8.88. The plaintiff believed that the suit has unconditionally been withdrawn by the said defendant no. 4. Hence, did not make any further enquiry for the circumstances of the withdrawal of the suit but the said collusion and conspiracy of the said defendant has now been revealed to the plaintiff after the plaintiff obtained copy of the order sheet when the defendant no.1 started setting up false claim of title to the property in question. The plaintiff apprehending mischief from defendants no. 2 and 3 also served upon the said notice dated 17.8.88 notifying to the said defendants with copy endorsed to the defendant no.1 and copies to all the tenants of the property since the interest of the plaintiff, the plaintiff notified them that the Power of Attorney dated 1.7.87 executed by the plaintiff had been cancelled.

22. The plaintiff has almost reiterated the same facts in his examination in chief regarding this issue and proved copy of the injunction suit as Ex.P1 application for interim injunction is Ex.P2 and statement of the parties in the said suit is Ex.P3 and Ex.P6. Ex.P4 and P5 are the orders of the said Court. Ld. counsel for the plaintiff submits that the defendants no. 4 and 5 collusively filed

the suit against the plaintiff and also without any authority of the plaintiff got the settlement recorded in the court on 8.8.88 vide compromise application Ex.P2. It is pertinent to mention here that the plaintiff after the coming to know of this settlement in the court never challenged the same either before the same court or in any other manner before any other court of law except sending a notice to the defendants no. 2 and 3. It is a fact on the record that the defendant no. 3 who executed the sale deed and whose statement was recorded by the court of Civil Judge on 8.8.88 was lawful attorney of the plaintiff on that date and was having the authority of the plaintiff to enter into the compromise with the plaintiff. Even apart from the above facts the plaintiff had all the opportunities to move an appropriate application before the Id. Civil Judge for the setting aside of the compromise or to initiate appropriate proceedings against the defendants no. 1 and 3 but it is a fact that except a notice he never initiated any proceedings for the setting aside of the compromise recorded before the Sub Judge, Delhi in suit no. 376/88. It is a well settled proposition of law that unless and until the compromise recorded by the court is set aside the same shall remain binding upon the parties. Hence, the compromise in suit no. 376/88 is binding upon the plaintiff as well as defendants no. 1,3 and 4. Issue is decided accordingly.”

(Underlining added)

5. Learned counsel for the appellant, before this Court, argued only one point that no amount was payable to defendant Nos. 4 and 5 to the present suit i.e., Smt. Sheela Khanna and Sh. Om Parkash Khanna, inasmuch as these persons had foregone their rights, and therefore, defendant No. 1 had to pay the balance consideration of ₹2,00,000/- to the appellant/plaintiff and not ₹1,00,000/- each to Smt. Sheela Khanna and Sh. Om Parkash Khanna. It is argued that once the amount was foregone by defendant Nos. 4 and 5 in

the present suit, the Trial Court erred in refusing to cancel the sale deed inasmuch as an amount of ₹2,00,000/- was admittedly not paid to the appellant/plaintiff. It is argued in the alternative that atleast a money decree for ₹2,00,000/- ought to have been passed in favour of the appellant/plaintiff.

6. In my opinion, the argument as raised on behalf of the appellant/plaintiff is totally bereft of any substance whatsoever. Firstly, though, the appellant/plaintiff in the suit challenged the compromise dated 8.8.1988 in suit being 376/1988 filed by Smt. Sheela Khanna however, there is nothing contained in the plaint, by even a whisper, that defendant Nos. 4 and 5 in the present suit namely, Smt. Sheela Khanna and Sh. Om Parkash Khanna in any manner gave up their rights to claim a sum of ₹1,00,000/- each given to them under the Will dated 30.12.1981, Ex.PW1/X2, relied upon by the appellant/plaintiff himself. The relevant portion of the trial Court judgment and the portion of the Will have already been reproduced above. Neither is there any averment in the present suit plaint of defendant Nos. 4 and 5 having foregone their rights to claim ₹1,00,000/- each under the Will dated 30.12.1981 of Smt. Jai Rani Kapoor, even the replication is totally silent on this point. Secondly, the appellant/plaintiff in his affirmative evidence also has made no such statement of the alleged fact that defendant Nos. 4 and 5 gave up their rights to claim ₹1,00,000/-. Thirdly, when I put it to learned counsel for the appellant to show me a ground in the grounds of appeal with respect to this argument which is now raised, learned counsel for the appellant was not able to show me any ground that the amount of ₹1,00,000/- each was not payable to defendant Nos. 4 and 5

because they gave up their rights to receive the said amount, and to which they were entitled to vide Will dated 30.12.1981 of Smt. Jai Rani Khanna.

7. In view of the above, the conclusions that can be arrived at are:-

(i) The appellant/plaintiff claimed ownership of the suit property under a Will dated 30.12.1981 of his mother-Smt. Jai Rani Kapoor, and as per that Will itself, the appellant/plaintiff was to become the owner of the suit property bequeathed to him only subject to a sum of ₹1,00,000/- each being paid to Smt. Sheela Khanna (daughter of Sh. Jai Rani Kapoor and sister of the appellant/plaintiff) and Sh. Om Parkash Khanna (brother of Smt. Jai Rani Kapoor) and who are defendant Nos. 4 and 5 in the present suit.

(ii). Admittedly, no payment of ₹1,00,000/- each was made by the appellant/plaintiff to Smt. Sheela Khanna and Sh. Om Parkash Khanna. The case now being argued of Smt. Sheela Khanna and Sh. Om Parkash Khanna of having given up their rights is an argument totally without any basis.

(iii) There was an Agreement to Sell of the suit property dated 2.6.1987 in favour of defendant No.1 by the appellant/plaintiff, for a total consideration of ₹4,00,000/-, and of which a sum of ₹2,00,000/- was received by the appellant/plaintiff and the balance amount of ₹2,00,000/- was paid by making payments of ₹1,00,000/- each by defendant No. 1/ proposed buyer to defendant No. 4/Smt. Sheela Khanna and defendant No.5/Sh. Om Parkash Khanna.

(iv) At no point of time, the appellant/defendant ever took steps in any manner for seeking to set aside the compromise decree dated 8.8.1988

passed by the Court by Sh. H.S. Sharma, Civil Judge, Delhi in the Suit No. 376/1988.

(v) There cannot be said to be any illegality in defendant No. 1 making payments of ₹1,00,000/- each to defendant Nos. 4 and 5 inasmuch as the Will relied upon by the appellant/plaintiff itself requires the appellant/plaintiff to pay such amounts before becoming owner of the suit property.

8. In view of the above, I do not find any merit in the appeal which is, accordingly, dismissed leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J.

NOVEMBER 24, 2011

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