

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

% *Judgment Reserved on: 25.03.2011*
Judgment Delivered on: 29.03.2011

+ **RSA No. 223/2006**

Dr. Fazal -Ul- Haq**Appellant**

Through: Mr. Ramesh Kumar & Ms. Anjali Chopra,
Advocates.

Versus

Sh. Abdul Haq & Ors.**Respondent**

Through: Mr. S.K. Duggal, Advocate.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1 This appeal has impugned the judgment and decree dated 02.05.2006 which had endorsed the findings of the trial Judge dated 28.07.2005 whereby the suit filed by the plaintiff Fazal Ul Haq seeking possession, damages and mesne profits qua the suit premises comprising of two rooms, one kitchen and one toilet on the ground floor of 1368, Chatta Rajan, Farash Khana, Delhi had been dismissed.

2 This is an unfortunate dispute between the two brothers. The plaintiff and defendant No. 1 are sons of deceased Nasiruddin. Nasiruddin during his lifetime had been allotted premises No. 1368, Chatta Rajan, Farash Khana, Delhi on a tenancy basis. He had bequeathed the said tenancy rights in favour of his 5 sons. The

plaintiff was possessing two rooms, one kitchen and one toilet on the ground floor (suit premises) in terms of an agreement dated 03.02.1989 Ex. PW-3/3; defendant No. 1 was permitted to occupy the suit premises. As per the plaintiff in terms of Ex. PW-3/3 this was only a limited right. Plaintiff revoked this license vide notice dated 23.07.1992 and sought possession of the suit property which was not heeded to. Suit was accordingly filed.

3 The defence of the defendant was that in terms of Ex. PW-3/3 dated 03.02.1989, the plaintiff had given possession of the suit property to defendant No. 1. On 06.02.1989, Ex.PW-3/D2 was executed between the parties of which para 3 is relevant; in terms of this document, the plaintiff had given up all his rights in the suit property. Plaintiff was not entitled to any relief.

4 Trial Judge had framed six issues. Issue No. 4 is relevant for the controversy in dispute. It reads as under:-

"3. Whether the plaintiff's suit is barred in view of compromise recorded and file in the court of Sh. S.C.Mittal, ADJ, Delhi as well as in the court earlier presided over this Court."

5 Oral and documentary evidence was adduced which included three witnesses on behalf of the plaintiff and two witnesses on behalf of the defendant. Trial Judge had examined Ex. PW-3/3 as also Ex. PW-3/D2. Both were admitted documents. Both the said documents had been executed between the parties i.e. the plaintiff and defendant No. 1. Ex. PW-3/3 was executed prior in time. It is dated 03.02.1989. Ex. PW-3/D2 was executed three days later i.e. on 06.02.1989. Vehement contention of the learned counsel for the appellant before this Court is that both the said documents were executed simultaneously i.e. on the same day. Attention has been

drawn to the cross-examination of DW-1 wherein he has admitted that the two documents had been executed simultaneously; two separate compromise deeds were filed in two litigations pending between the parties i.e. Ex. PW-3/3 and Ex. PW-3/D2. In his cross-examination, DW-1 has admitted that the terms and conditions between him and the plaintiff relating to suit premises were mentioned only in Ex. PW-3/3; the said terms were not altered or modified; there was no consideration in delivering possession of the suit property in favour of the defendant. Vehement contention of the learned counsel for the appellant is that Ex. PW-3/D2 related only to the business agreement between the parties i.e. where the parties had agreed to dissolve their business interests; it in no manner had modified the terms and conditions of the agreement Ex. PW-3/3. In his cross-examination PW-3 had admitted the execution of the agreement. Plaintiff had not produced this document. The defendant in his written statement had specifically averred that in terms of this compromise deed (Ex. PW-3/D2), the plaintiff had given up all his claims in the suit premises. In these circumstances, in view of this defence set up by the defendant, it was incumbent upon the plaintiff to have adduced evidence to the contrary; it had not done so.

6 Both the two fact finding courts had correctly returned a finding against the plaintiff holding that the plaintiff has no right title left in the suit premises to claim back its possession. These are two concurrent findings of fact. The trial Judge had held as follows:-

" Issue no. 4:

"Whether the plaintiff is entitled to possession as claimed for? OPP"

The plaintiff was required to prove this issue. He alleges to be in possession of the premises as depicted in sit plan Ex. PW 3/1 since beginning as a co-tenant alongwith other defendants. The defendant no. 1 Sh. Abdul Haq has submitted that plaintiff was never in possession of any portion on the ground floor prior to death of their father Sh. Nasirudding and that he was occupying the portion on the first floor of the premises in dispute. It was submitted that the plaintiff was made to move away from the said portion on the first floor by their late father consequent to which he shifted to Gaziabad and remained there for a considerable time even after the death of their father. It was alleged that the defendant no. 1 had shown mercy and had brought him back to the relevant portion of premises in dispute due to state of terror at Gaziabad. It is also in pleadings that the plaintiff after acquiring separate residence i.e. house no. 1299, Farash Khana, Delhi had shifted therein even before recording of compromise ex. PW 3/3 and ex PW 3/D2. The possession was handed over at the time of aforesaid compromise which were made simultaneously and are substitute to each other. It is again in pleadings and testimony of PW 1 that the plaintiff's intention have now become malafide and has perpetuated the rise of present dispute. It was submitted that a mere glance on ex. PW 3/3 and PW 3/Defendant No. 2 shall clarify that the plaintiff was left with no further rights in the premises in dispute. On the contrary plaintiff argues that the execution proceedings qua recovery of sum of ₹ 1,15,000/- are reliable only to the dues of defendants payable to the plaintiff and are not in any manner connected with any sort of consideration and receipt under compromise in view of handing over possession of the premises in dispute. He submits that both compromises are separate from each other.

The testimonies of the witnesses in consonance with above are available on record. The fact as to whether plaintiff resided at Gaziabad or was in possession of the premises in dispute at the time of death of his father is not very much relevant for adjudication of the main controversy. It has to be seen as to whether the plaintiff who was admittedly in possession of the premises in dispute prior to recording of compromise had left the said premises for providing temporary accommodation to the deft. no. 1 as licensee till the time he constructed his house at Okhla or whether plaintiff vacated the premises upon consideration received in the compromise.

The answer to the above is to be found very clearly in various clauses of compromise deed/agreement and the other relevant documents on record. To begin with ex. PW3/D1 which is the written statement filed by the defendant/plaintiff herein in the court of Sh. P.K. Malhotra, then Sub Judge, Delhi reveals vide para 4 of preliminary objections that the plaintiff had applied for residential premises in lieu of premises in dispute and was allotted separate residential accommodation. He had also surrendered his tenancy rights qua tenanted premises to the rightful owner/landlord/DDA. It reveals that plaintiff

had legally vacated the premises in dispute.

When the aforesaid pleading is placed under comparative scrutiny with compromise deed ex. PW 3/D2 and the compromise agreement ex. PW 3/3, which stands proved as admitted, it would further reveal that contradiction galore and there is no consonance in construction of terms thereof with the averments made in suit plaint.

It is not disputed on record that both sets of compromise were filed in respective courts at same time. Clause 1 of compromise deed dated 06.02.89 ex. PW 3/D2 states in the middle as hereunder:-

"He (plaintiff) has settled all his accounts and received all his dues and now nothing remains due against the said firm M/s May fair Industrial Corporation as also against the second party (defendant no. 1) as he has settled all his accounts with the said firm nothing whatsoever remain due not only against the said firm M/s Mayfair Industrial Corporation or personally against Sh. Abdul Haq as well and the decree passed by the Ld. Additional District Judge in suit no. 804/87 of the court of Sh. J.D. Kapoor, thus stands fully satisfied....."

Para 3 of the aforesaid deed further sets out that

"Party of the first part (plaintiff) has also no rights, titles or claims upon any of estate of his deceased father Sh. Nasiruddin as also upon the estate of his late mother Smt. Khatoon Begum....He has settled all his accounts and received money in cash against his share in the estate of his deceased parents late Sh. Nasiruddin and Smt. Khatoon Begum and the party of the first part thus not left with any rights, claims or interest upon their estate, nor his legal heirs shall lay any claim upon the estate of late Sh. Nasiruddin and Smt. Khatoon Begum"

The aforesaid construction invariably leads to the conclusion that the settlement was not only aimed to settle the consideration forming part of the decree against the said firm but also towards extinguishment of all claims etc. on the estate of parents of the plaintiff.

Adverting to ex. PW 3/3 dated 3.2.89 its clear that the second party/defendant no. 1 had requested first party (the plaintiff) for handing over possession of premises in dispute to him for his residential purpose as required. It further shows that the second party/D1 was given a personal right of residence only in the premises in dispute. I may set out the relevant clause so far as applicable in the facts of this case. Same is clause 2 which reads "that the second party personally is allowed for his residence purpose in the said portion of the house till as desired by him. This license of residing is allowed only to the second party, and the second party shall have no right to transfer, possession or part with the said premises to anybody else."

In the light of the aforesaid clause it has been vehemently set out by Ld. Counsel for the plaintiff that the license created by virtue of this compromise agreement could not have been terminated by legal notice ex. PW 3/6 for the reason that the license was created for residential purpose of the defendant no. 1 in the said portion of the house "till as desired by him." It was argued that the license could not have been therefore, terminated in the manner alleged.

In the scenario of construction of various clauses of the compromise

deed, it was incumbent upon the plaintiff to have proved that either the terms of the deed were later varied or that the defendant no. 1 was having accommodation at Okhala as alleged and he was put into the possession of the premises in dispute irrespective of ex PW3/D2 upon license for period during which the defendant acquired the alternate accommodation or completed construction of the house at Okhala. The perusal of entire testimonies of PW's does not show even a single line to the effect that defendant no. 1 was having any accommodation at Okhala. He did not take pains to call any record to show that the defendant no. 1 and Sh. Siraj-ul-Haq were owners of three plot in Ikhala despite saying so in his cross-examination dated 3.10.97. He did not produce his patient who told to him that the said plot was allotted to Sirajul Haq at Okhla. Further, the plaintiff had not even seen any construction being carried out on the alleged plot. He admitted that the aforesaid fact was not mentioned in any of the compromise deed. He also could not produce Sh. Om Prakash as his witness to show that he had shifted to his house after handing over temporary possession to the defendant no. 1. Thus, the terms of the compromise cannot be permitted to be substituted by this oral evidence which has not been set out as provided u/s 91 and 92 of the Indian Evidence Act, 1872.

Besides the aforesaid I have observed that para 5 of ex. PW 3/3 makes a provision which is dramatically opposite to the averments set out in the plaint and to an extent given credence to the defence as set out in WS. In para 5, it was agreed that the plaintiff exclusively shall be entitled to the alternative allotment of plot (or residential flat given in lieu of the said property (suit property)). It was also set out that the plaintiff shall be entitled to the privilege, compensation and interests whatsoever of the above mentioned property.

The need for making this provision in ex. PW 3/3 would not have arose if premises in dispute were given to the defendant no. 1 till the time he raised construction at his plot at Okhla. Rather, it appears that need had arisen as compromise qua sum of Rs. 1,15,000/- vide ex. PW 3/D2 was made also towards parting with possession by plaintiff of the plot in dispute. The use of phrase "as desired by him" suggests that the license intended to operate to the pleasure of deft. no. 1. Thus, if he did not desire to hand over the possession of the premises to the plaintiff in his life time then the license, personal to defendant no. 1 could only expire on the occasion of demise of the defendant no. 1 and not prior to that. It is another matter that the provision with respect to residence only and only of defendant no. 1 himself was made and ostensibly the family of defendant no. 2 was not allowed such residence. However, they are not parties before me nor any prayer against them has been made in suit.

The impact and purport of the aforesaid discussion is, as I said, is writ large. The admitted license could not have been terminated upon the will of the plaintiff particularly when he has failed to show that the terms of the compromise deed were varied subsequently. It has not been even pleaded. I hold that the aforesaid discussion disentitles the plaintiff to claim possession. The issue alongwith issues no. 2 and 3 thus stand answered."

7 This finding was endorsed by the impugned judgment; it held as follows:-

“ The two agreements as placed and proved on record Ex. PW 3/3 and Ex. PW 3/D2 have been relied upon by the parties and not in dispute. It is also not disputed that both the agreements are of the same date i.e. 6.2.89 as were effected between the parties in two separate cases. As such, the agreement Ex. PW 3/D2 is equally binding on the parties including on the appellant/plaintiff of which relevant terms read as under:-

“ that the party of the first part has also no rights, titles or claims upon any other estate of his deceased father Shri Nasiruddin as also upon the estate of his late mother Smt. Khatoon Begum, which shall vest exclusively in their other heirs namely party of the second part. He has settled all his accounts and received money in cash against his share in the estate of his deceased parents late Shri Nashiruddin and late Smt. Khatoon Begum and the party of the first part has thus not left with any rights, claims or interests upon their estate, nor his legal heirs shall lay any claim upon the estate of late Sh. Nashiruddin and Smt. Khatoon Begum.”

4. *It is well settled proposition of law that the parties in a suit can settle the matter in suit by incorporating other related matters between the parties while compromising a particular suit. So is the case in the compromise deed Ex. PW 3/D2 as filed on record of the case file of the trial court along with application Under Section 151 CPC wherein other related disputes were settled by the parties amicably besides the subject matter of the suit.*

5. *From the reading of the Ex. PW 3/D2 as referred to above, it is crystal clear that plaintiff/appellant has surrendered his right with regard to estate of the deceased father in favour of the defendant/respondent which included the tenancy rights over the suit property of which possession was sought by the plaintiff from the defendant.*

6. *The suit for possession was filed by the plaintiff against the defendant on the basis of Ex. PW 3/3 after termination of license treating the agreement Ex. PW 3/3 as license granted by plaintiff in favour of the defendant to be in occupation of the suit property till desired by him after termination of the license vide notice Ex. PW 3/6. In fact, plaintiff was admittedly a tenant in succession of the father of the plaintiff in defendant of the portion of the suit property as were occupied by them in term of convenience during the life time of their father as shown in the red colour in the site plan attached with the plaint of which possession was given to the defendant vide agreement Ex. PW 3/3.*

7. *Both these documents were discussed in detail by the Ld. Civil Judge by coming to the conclusion that;*

“in this scenario of construction of various clauses of the compromise deed, it was incumbent upon the plaintiff to have proved that either the terms of the deed were later varied or that the defendant no. 1 was having accommodation at Okhla as alleged and he was put into the possession of the premises in dispute irrespective of Ex. PW 3/D2 upon license for period during

which the defendant acquired the alternate accommodation or completed construction of the house at Okhla.

The impact and purport of the aforesaid discussion is, as I said, is writ large. The admitted license could not have been terminated upon the will of the plaintiff particularly when he has failed to show that the terms of the compromise deed were varied subsequently. It has not been even pleaded. I hold that the aforesaid discussion disentitles the plaintiff to claim possession. The issue along with issue 2 and 3 thus stand answered”.

8. *After the clause in the agreement Ex. PW 3/D2 as referred to above, the plaintiff/appellant to have any right over the suit property including right of a tenant as well as licensor so as to entitle him to terminate the license of the defendant/respondent by way of notice as vide term of the agreement, he has no right, title or claim upon the estate of the deceased father Shri Nasiruddin from whom in succession he has got right of tenancy in the suit property.*

9. *There was hardly any requirement for discussion of agreement Ex. PW 3/3 on the face of contra agreement between the same parties and of the same date as was filed by them before different courts for compromise of the matter in those suits. Ld. Civil Judge, however, made efforts to discuss the effects of the terms of the compromise Ex. PW 3/3 with reference to construction of the plot at Okhla especially when his emphasis was upon Ex. PW 3/D2 whereby implicitly possession was part with by the plaintiff in favour of the defendant after acceptance of the compromise consideration of ₹ 1,15,000/- vide Ex. PW 3/D2 yet on the face of same day compromise between the parties with regard to the suit property vide Ex. PW 3/D2 in succession of compromise Ex. PW 3/3, I do not see any ground to interfere with the findings of the Ld. Civil Judge which are based on evidence discussed in detail in the impugned judgment while coming to the conclusion that plaintiff is not entitled to any relief. In fact, the terms of the agreement Ex. PW 3/3 can be superseded by the terms of the agreement Ex. PW 3/D2 which is filed simultaneously by the parties in different courts and were effected on the same date i.e. 6.2.89. After the terms of the agreement in Ex. PW 3/D2 which was in supersession of agreement Ex. PW 3/3, the plaintiff/appellant seized to have any right, title or interest in the suit property including right of over possession of the defendant/respondent on the suit property as the plaintiff himself surrender such right in favour of the defendant. It has been so rightly observed by the Ld. Civil Judge that;*

“ the possession was handed over at the time of aforesaid compromise which were made simultaneously and are substitute to each other. It is again in pleadings and testimony of PW1 that the plaintiff’s intention have now become mala fide and has perpetuated the rise of present dispute. It was submitted that a mere glance on Ex. PW 3/3 and Ex. PW 3/D2 shall clarify that the plaintiff was left with no further rights in the premises in dispute.”

10. *In view of the discussion as above and no infirmity in the finding of the Ld. Civil Judge based on evidence which could have been arrived only on the basis of Ex. PW 3/D2 as also referred to above by him, I see no merit in the appeal.”*

8 This is a second appeal. It had been admitted and on 18.09.2009, the following substantial question of law was formulated:-

“Whether the courts below interpreted the terms contained in the agreement dated 03.02.1989 in the right perspective while dismissing the suit of the appellant.”

9 The aforementioned discussion has answered this substantial question of law. Both the two fact finding courts had examined and scrutinized the contents of the two documents Ex. PW-3/3 & Ex. PW-3/D2 to arrive at a conclusion that no right vested in the plaintiff to claim back the possession of the suit premises. This finding calls for no interference. The finding is returned against the appellant and in favour of the respondent. Appeal has no merit. Dismissed.

MARCH 29, 2011

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INDERMEET KAUR, J.