

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

% *Judgment reserved on : 11.01.2012*
Judgment delivered on: 13.01.2012

+ **CM (M) No.29/2012 & CM Nos.426-27/2012**

M/S PUSHPA BUILDER LTD Petitioner
Through Mr. Ravi Gupta, Sr. Advocate
with Mr. Ashish Aggarwal and
Ms. Basli Kala, Adv.

versus

DR.VIKRAM HINGORANI & ORS Respondents
Through Mr. Aman Hingorani, Adv.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1. Order impugned is the order dated 23.09.2011 vide which the two applications filed by defendants Nos. 4, 5 & 6 under the proviso to Order 23 Rule 3 of the Code of Civil Procedure (hereinafter referred to as the 'Code') as also a third application filed by defendant Nos. 4 & 5 under Section 151 of the Code had been dismissed.

2. Record shows that the present suit is a suit for delivery of legacy/shares in immovable property with the consequential

reliefs of partition, perpetual and mandatory injunction as also for rendition of accounts. There were 6 plaintiffs and 5 defendants; subsequently defendant No. 6 i.e. ING Vysya Bank was also added as a party. Averments in the plaint disclose that plaintiffs No. 1 to 6 and defendant No. 1 were the successors in interest of the original owners i.e. Mr. Hardasmal Banasing Hingorani and Mrs. Sati Tahilramani; vide a decree dated 25.11.1975 passed in suit No. 640-A/1974, both the aforementioned persons were recognized as 50% co-owners in the suit property. The suit property is a bungalow situated at 13, Patel Road, West Patel Nagar, Delhi. On 20.09.1998 a collaboration agreement, in terms of which defendant Nos. 4 & 5 (hereinafter referred to as the collaborators) had to construct flats/units on the suit land and thereafter were to receive 50% of the sale proceeds, this collaboration agreement had been entered into by the predecessor of defendant No. 2 i.e. Sati Thilramani with the collaborators; contention in the plaint is that in terms of this collaboration agreement the collaborators were not to get any title in this property; at best they were entitled to 50% of the sale proceeds of the flats/units which were to be constructed within a period of 20 months from the date of the sanctioned plan and these sale proceeds were to be shared equally by Sati Thilramani and the collaborators. Admittedly, the

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construction of the property was not completed within the stipulated period. Further contention being that the collaborators had in contravention of the terms of the collaboration agreement inducted defendant No. 6 as a licensee in the suit land and have illegally parted with possession of the property to defendant No. 6; as noted supra relief of partition and delivery of possession of property as also rendition of accounts had been sought against defendants No. 1 to 5; defendant No. 6 was added subsequently i.e. after filing of the original plaint.

3. During the course of the suit proceedings on 18.03.2008, a compromise was entered into between the six plaintiffs and defendants No. 1 to 3; pursuant to this compromise, a final decree of partition was passed on 24.04.2008 wherein the rights and shares in the suit land of the plaintiffs and defendants No. 1 to 3 were determined. A preliminary decree has been passed for rendition of accounts as well. Record further shows that on this date i.e. on 24.04.2008, defendants No. 4 to 6 were also represented by the counsel.

4. The impugned order has been assailed by defendants No. 4 to 6. Learned counsel for the petitioners/defendants No. 4 to 6 has submitted that on 24.04.2008, they had reserved their right to file their objections to the aforementioned compromise pursuant to which

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the present application under Order 23 Rule 3-A of the Code as also the application under Section 151 of the Code had been filed; this is disputed by learned counsel for the non-applicant who states that the submission noted in the last few lines of the order dated 24.04.2008 only related to the right of the petitioners to file objections/reply to the pending application under Order XXXIX Rule 10 of the Code. This submission of the respondent is substantiated as record shows that there were three applications which were pending on 24.04.2008 i.e. one application under Order XXXIX Rules 1 & 2 of the Code and two applications under Order XXXIX Rule 10 of the Code of which reply had been filed by defendants No. 4 to 6 only on two applications and they were yet to file reply/objection to the third application under Order XXXIX Rule 10 of the Code and the order dated 24.04.2008 had recorded their right to file their reply only to this application under Order XXXIX Rule 10 of the Code and not on any other count.

5. Be that as it may, the application under Order 23 Rule 3-A of the Code was filed on 21.08.2008 i.e. after a lapse of almost about four months.

6. The averments contained in the said application are largely to the effect that the compromise between the plaintiffs and defendants No. 1 to 3 is collusive and against the interest of

defendants No. 4 to 6 who have been prejudiced as their rights in terms of the collaboration agreement dated 20.09.1998 gives a right to the collaborators/defendants No. 4 & 5 to take possession of the property, to demolish it and without any interference by the first party (defendant No. 2) to make a construction on the basement, ground, mezzanine, first and second floors as per the building bye laws and on completion of this building, the sale proceeds shall be shared between the two parties.

7. A scrutiny of this agreement shows that the only right given to defendants No. 4 & 5 was to take possession of property for the purpose of construction and after completion of construction to share 50% of the sale proceeds along with defendant No. 2. This agreement clearly shows that defendants No. 4 & 5 were only acting as an agent of defendant No. 2 and their agency having been terminated by defendant No. 2 by a legal notice dated 17.10.1992 as also by a subsequent public notice dated 24.03.1994, it is clear that right of the agent to remain in the suit premises and thereafter to handover the possession of the same to defendant No. 6 when admittedly this was in contravention of a status quo order which had been passed in suit No. 740/1994 dated 06.04.1994 was negatived. Relevant would it be to state at this stage that this suit i.e. Suit No. 740/1994 had been filed by
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defendants No. 4 & 5 challenging the termination of their contract against defendant No. 2 in which this status quo order dated 06.04.1994 had been passed; this suit had thereafter been dismissed in default on 24.09.1998.

8. The Apex Court in AIR 1990 SC 673 Southern Roadways Ltd. Vs. S.M. Krishnan while dealing with the concept of an agent's possession in the suit land had noted herein as under:-
"The respondents possession of the suit premises was on behalf of the company and not on his own right. It is, therefore, unnecessary for the company to file a suit for recovery of possession. The agent has no right to remain in possession of the suit premises after termination of his agency." In 43 (1991) DLT 719 Master Builder Vs. U.S.A., a Division Bench of this Court had noted that where a contract agreement of the builder has been terminated, the said builder/contractor could not be allowed to remain in possession of the property and could not hold on to the property; a wrongful termination of his contract would be challenged by an independent claim i.e. an action for damages or breach of contract which in the instant case had been done by defendants No. 4 & 5 who had filed the suit No. 740/1994 against predecessor of defendant No. 2 which had thereafter been dismissed in default.

9. Learned counsel for the respondent submits that the application under Order 23 Rule 3-A of the Code was not maintainable and in fact he had raised this objection before the trial Court as well. Attention has been drawn to the statutory provision as contained in the proviso to Order 23 Rule 3 of the Code which clearly speaks of a party to the compromise alone who can challenge the said compromise and the decree. In National Small Industries Corporation Ltd. Vs. Industrial Textile Products (P) Ltd. 2001 (60) DRJ 144 a Bench of this court had noted that where a compromise is either refused or allowed under the proviso of Order 23 of the Code it is an appealable under Order XLIII Rule 1-A of the Code. The statutory mandate of proviso of the Order 23 Rule 3 of the Code as also in view of the pronouncement of this Court reported as H.C. Shastri Vs. Dolphin Canpack P Ltd. 67 (1997) DLT 652 where a Bench of this court has noted that a person who is not a party to the compromise cannot seek a setting aside of the said compromise under the proviso of Order 23 Rule 3 of the Code; only remedy would be by way of an appeal.

10. Reliance by learned counsel for the petitioner on the judgment of a Bench of this Court reported as AIR 1980 Delhi 99

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support his submission that such an application would be maintainable is misplaced. This was a case for dissolution of partnership and accounts wherein a compromise had been entered into between the plaintiff and defendants No. 1 & 2; contention of defendant No. 3 all along was that he is also a partner; his right was yet to be adjudicated and the compromise effected between the plaintiff and defendants No. 1 & 2 ousting defendant No. 3 was unlawful and illegal in terms of Section 23 of the Indian Contract Act; court had noted that the object of the agreement was to deprive defendant No. 3 of his right in the immoveable property and this compromise was thus hit by Section 23 of the Indian Contract Act. Facts of the said case are distinct and decipherable. In the instant case, the compromise decree dated 24.04.2008 passed between the plaintiffs and defendants No. 1 to 3 has adjudicated their rights and shares in the suit property; admittedly in terms of collaboration agreement dated 20.09.1988, defendants No. 4 & 5/petitioners did not have any right, title or interest in the property; in terms of said collaboration agreement, they at best had to get 50% of the sale proceeds and that too only after the sale of the suit property. It is also relevant to state that on the date when the compromise decree was passed, presence of counsel for the said respondents

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has been noted and it was in their effective presence that the said compromise decree was recorded; it is also a matter of record that the application under Order 23 Rule 3 of the Code had been filed on 18.03.2008 pursuant to which a final decree dated 24.04.2008 had been passed on this application. In these circumstances, the ratio of this judgment does not come to the aid of the present petitioners; the submission of the learned counsel for the respondent that the application was not maintainable under Order 23 Rule 3 of the Code is thus an objection which carries weight. It is only on the allegation by one party which is denied by the other party that the question has to be decided as to whether the compromise arrived at under Order 23 Rule 3 of the Code on the adjustment and satisfaction has been arrived at or not which has then to be answered; a person who is not a party to this compromise is not covered by this provision.

11. The present petitioner being only an agent of the predecessor in interest of defendant No. 2 (Sati Thilramani) and being aggrieved by that fact that defendant No. 2 has not honoured the collaboration agreement (on the basis of which their claim is based), had in fact challenged the termination of this contract in suit No.740/1994 which had subsequently been dismissed in default on 24.09.2009 and admittedly no steps had

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been taken by the petitioner thereafter to get that suit revived. The claim of the petitioner in terms of the collaboration agreement was only to share 50% of the sale proceeds of the suit land after its sale; admittedly the construction of the suit land is yet to be completed; the question of sale did not arise; rightly or wrongly this collaboration agreement had been terminated by Sati Tahilramani against which the suit filed by the petitioner had been dismissed. In this factual scenarios, the petitioner was well within his right to file an appeal against this compromise decree dated 24.04.2008 under Order XLIII Rule 1-A of the Code but he has not done so; application filed under Order XXIII Rule 3 of the Code after a lapse of four months would also be hit by latches.

12. In AIR 1993 SC 1139 Banwari Lal Vs. Smt. Chando Devi (through L.R.) the Apex Court has enunciated that the remedy available for such a person is a remedy under Order XLIII Rule 1-A of the Code and the bar of Section 93 (3) would also not come in the way. Not only such an application in the present form was not maintainable but even on its merits there is no case made out in favour of the petitioner to have the compromise decree dated 24.04.2008 set aside. This compromise decree was a sharing of rights in the suit property between the co-owners; the present petitioners on the basis of their collaboration agreement have no

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such rights. Nothing precluded some of the parties to the suit i.e. the plaintiffs and defendants No. 1 to 3 to enter into a compromise; the law permits it. The judgment reported as 1970 (3) SCC 124 *Bai Chanchal & Others Vs. Syed Jalaluddin and others* enunciates this position.

13. Impugned judgment in no manner suffers from any infirmity.
14. Petition is without any merit. Dismissed.

INDERMEET KAUR, J

JANUARY 13, 2012
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