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

Judgment Reserved on: September 21, 2015

%   *Judgment Delivered on: October 05, 2015*

\+   **RFA (OS) 112/2014**

BHAI SARABJIT SINGH @
DR SABI SABHARWAL ..... Appellant

Represented by: Mr.Sanjay Poddar, Sr.Advocate instructed by Mr.Manish Kumar, Mr.Amit Kumar, Mr.Piyush Kaushik and Mr.Mohit Arora, Advocates.

versus

SMT.INDU SABHARWAL & ORS. ..... Respondents

Represented by: Mr.Arun Mohan, Sr.Advocate instructed by Mr.Jasmeet Singh and Ms.Astha Sharma, Advocates for Respondent No.1.
Mr.Arvind Nigam, Sr.Advocate instructed by Mr.Sanjeev Mahajan, Advocate for Respondent Nos.2 and 3.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Following settlement agreement was arrived at between the parties in FAO (OS) No.83/2007 when two suits, that is, suit for partition being CS (OS) Nos.1698/2007, suit for injunction CS (OS) No.684/2008 and Testamentary Case No.2/2008 were pending adjudication inter se the parties:

*"**SETTLEMENT AGREEMENT***

This SETTLEMENT AGREEMENT is entered into on 06.08.2010 BETWEEN Mrs. Indu Sabharwal W/o Late Bhai Tirlochan Singh R/o 9, Amrita Shergil Marg, New Delhi-110003, Ms. Nisha Singh D/o Late Bhai Tirlochan Singh R/o B-97, Neeti Bagh, Second Floor (Front Portion), New Delhi-110049 and Ms. Tara Sabharwal D/o Late Bhai Tirlochan Singh R/o A-17, Neeti Bagh, New Delhi-110049 AND Dr.Sabi Sabharwal S/o Late Bhai Tirlochan Singh, R/o 9, Amrita Shergil Marg, New Delhi- 110003.

WHEREAS

1. Disputes and differences had arisen between the Parties hereto and a FAO(OS) No.83/2007 was filed before the Hon'ble High Court of Delhi.

2. The matter was referred to the Delhi High Court Mediation and Conciliation Centre vide an order dated 05.08.2010 passed by a Division Bench comprising of Hon'ble Mr. Justice Badar Durrez Ahmed and Hon'ble Mr.Justice V. K.Jain.

3. Ms. Sadhana Ramachandran, Advocate was appointed mediator by the Hon'ble Court and the parties agreed that she would act as Mediator for the parties in the matter of Mediation and Conciliation proceedings.

4. A meeting was held on 06.08.2010 with all the parties without their counsel and parties have, with the assistance of the Mediation/Conciliator, voluntarily arrived at an amicable solution resolving the abovementioned disputes and differences.

5. Parties hereto also confirm and declare that they have respected and adhered to the spirit of mediation while arriving at the Settlement Agreement.

6. The following settlement has been arrived at between the parties hereto:-

a) It is agreed between the parties that with regard to all the disputes and differences arising in the present case, they will, in principle, divide all the movable, company and immovable properties as heirs of Bhai Trilochan Singh in the following manner:-

i) Share of Dr. Sabi Sabharwal shall be 40% of the total movable company and immovable assets.

ii) Share of Mrs. Indu Sabharwal shall be 20% of the total movable company and immovable assets.

iii) Share of Ms. Nisha Singh shall be 20% of the total movable, company and immovable assets.

iv) Share of Ms. Tara Sabharwal shall be 20% of the total movable, company and immovable assets.

Immovable Properties

b) It is agreed between the parties that the immovable properties comprising the subject matter of the dispute between the parties herein and the settlement are as follows:-

i) 5/18th share of 9, Amrita Shergill Marg, New Delhi-110003,

ii) 71, Jor Bagh, New Delhi-110003, ad measuring 564 sq yds.

iii) B-II/7, Mohan Co-operative Industrial Estate, New Delhi, ad measuring 803.33 sq yds (proprietorship concern namely Universal Rubber).

iv) 610, Bhandari House, Nehru Place, New Delhi, ad measuring 713 sq ft.

v) Agricultural Land at Budhewal (Ludhiana) ad measuring 23 kanals & 11 marlas ad measuring 13,900 sq. yds. vi) 50% share in land owned by Bhai Construction Machinery ad measuring 24 kanals & 5 marlas =17,500 sq. yds.

vii) 50 % share in the land at Budhewal ad measuring 14 kanals and 35 marlas = 19,763 sq.yds in the name of Bhai Engineering Corporation.

viii) 1/16 A, Asaf Ali Road Flat, First Floor, ad measuring total covered area of 314.6 sq.metres.

c) It is agreed between the parties that after valuation, the share of the parties to this Settlement Agreement in 9, Amrita Shergill Marg, New Delhi, referred to above shall be mutually interpreted to result in the physical possession being undivided with one party and cash value distributed to the remaining parties in accordance with their respective shares.

Company Properties

d) It is agreed between the parties that the company assets comprising immovable and movable properties which form the subject matter of the dispute between the parties herein and the settlement are as follows:-

i) Bhai Tirlochan Singh (hereinafter referred to as BTS) individual share of 546 and BTS HUF share of 623 in Bhai Sunder Dass Sardar Singh Pvt. Ltd. Company including the building comprising Hotel President, 4/23, Asaf Ali Road, Delhi and deposits held in FAO (OS) No. 83/2007 with the Registrar General of the Hon'ble Delhi High Court.

ii) BTS individual 1700 shares and 816 BTS HUF shares held in Bhai Sunder Dass & Sons Pvt. Ltd.

iii) 50% business and partnership interest in Bhai Engineering Corporation including plant machinery and stock and 10,500 sq yds land at B-53, Focal Point, Phase-V, Ludhiana.

iv) Movable assets of Bhai Tower Crane proprietorship including stock thereof.

e) The ROC Annual Returns of the two companies as on 31.03.2006 are annexed herewith as ANNEXURE-A and ANNEXURE-B respectively.

Movable Properties

f) It is agreed between the parties that the cash and liquid assets comprising movable properties which form the subject matter of the dispute between the parties herein and the settlement are as follows:-

i) Deposit paid by Tirlochan Singh for Second Floor at A-11, Pamposh Enclave, New Delhi, to be returned by the builder namely Casa Techno.

ii) Deposit paid by BTS in his name for one plot at Saraswati Kunj Co-operative Society, Gurgaon.

iii) Any other movable assets comprising shares, bank accounts, RBI bonds, rental deposits deposited with Registrar General, Delhi High Court, including items annexed herewith as ANNEXURE-C.

g) It is agreed between the parties that an independent valuation be made of the immovable and company properties referred to in paras (b) and (c) above preferably *within a period of two months from the date of signing of this Settlemnet Agreement and all the parties to this settlement will abide by the valuation of the said independent valuer.*

h) It is agreed between the parties that they will abide by the valuation in this regard by an independent valuer appointed by this Hon'ble Court with regard to the above mentioned properties.

i) It is agreed between the parties that with reference to any future litigation with third parties regarding the immovable and movable assets referred to in the present Settlement Agreement, all parties to this Agreement shall do all acts necessary to protect each other from third parties interests.

j) It is agreed between the parties that in the event of any of the parties to this agreement acquiring shares in movable and/ or immovable properties in future by any court's order/ judgment/ directions/ family settlement, that party shall duly relinquish the said share to the respective party to this Agreement in the spirit of this Agreement.

k) It is agreed between the parties that they will not file any litigation against each other with regard to any movable or immovable properties with respect to the disputes in the present case. It is agreed between the parties that in the event of a third party litigation filed against any of the parties to this Settlement Agreement, all parties to this Settlement Agreement shall support each other.

l) It is agreed between the parties that Mrs.Indu Sabharwal, Ms.Nisha Singh and Ms. Tara Sabharwal including their legal heirs shall support Dr.Sabi Sabharwal in his litigation pertaining to FAO (OS) No. 87/2007. The said support shall include filing of affidavits in support of Dr.Sabi Sabharwal.

m) It is further agreed between the parties that Mrs.Indu Sabharwal, Ms.Nisha Singh and Ms.Tara Sabharwal including their legal heirs shall support Dr. Sabi Sabharwal in his litigation pertaining to Letters of Administration or probate of Smt. Somawanti's Will of 1981. The said support shall include filing of affidavits in support of Dr.Sabi Sabharwal. In the event of there being no probate of the said Will then Mrs.Indu Sabharwal, Ms.Nisha Singh and Ms. Tara Sabharwal shall relinquish their rights coming from Smt. Somawanti's estate in favour of Dr. Sabi Sabharwal.

8. It is agreed between the parties that by signing this Agreement, all pending litigations between the parties shall stand withdrawn and settled. It is further agreed between the parties that with regard to all/ any criminal actions filed by the parties against each other, they shall proceed with withdrawal of their respective complaints and submit before the Hon'ble Delhi High Court or any other Court the manner and time frame in which action for the quashing of the same shall be taken by them.

9. It is agreed between the parties that the partition suit being CS(OS) No. 1698/2007 shall be withdrawn by all the parties to this Settlement Agreement at the time of passing of the final order by this Hon'ble Court.

10. It is agreed between the parties that they shall make every effort to harmonize their relationship and do no act that would cause any physical, mental or emotional harm or stress to each other. The parties undertake to implement this term of the Settlement Agreement with immediate effect.

11. By signing this Agreement the parties hereto state that they have no further claims or demands against each other and all the disputes and differences in this regard have been amicably settled by the Parties hereto through the process *of Conciliation/Mediation.*

12. That the parties undertake before the Hon'ble Court to abide by the terms and conditions set out in the agreement and not to dispute the same hereinafter in future."

2. After the settlement Bhai Sarabjit Singh, the appellant herein filed a suit being CS (OS) No.753/2014 against the three respondents/defendants, that is, Indu Sabharwal, the step mother, Ms.Nisha Singh and Ms.Tara Sabharwal, the two sisters seeking declaration of the settlement agreement dated August 06, 2010 entered into between the parties which culminated into the decree dated November 08, 2013 in CS (OS) No.1698/2007 as null and void on account of fraud and misrepresentation being played upon the plaintiff by the defendants. In the suit Bhai Sarabjit Singh claimed that he and defendant Nos.2 and 3, that is, Ms.Nisha Singh and Ms.Tara Sabharwal are the children of Sardar Tirlochan Singh and Mrs.Manjit H.Singh and defendant No.1 Smt.Indu Sabharwal the second wife of Bhai Tirlochan Singh. In the plaint Bhai Sarabjit Singh pleaded the facts relating to previous litigations inter se the parties and the settlement agreement. It was further pleaded that immediately after the settlement agreement Indu Sabharwal changed and without waiting for the valuation started breaching the settlement by not providing support to the plaintiff in the probate case of his grandmother being Testamentary Case No.108/2008 as agreed and did not permit the plaintiff to withdraw his share of money or quick valuation of property No.9, Amrita Shergill Marg, New Delhi, started pressing for a decree in terms of the settlement agreement without withdrawing the suit and illegally withdrew, misappropriated huge sums of money as were lying

in the form of investments, bonds, shares, debentures, mutual funds etc. It was pleaded that it was never the spirit of the settlement agreement to get a decree which would result in heavy taxation on the plaintiff due to the high value of the suit properties. It was pleaded that after the settlement agreement dated August 06, 2010 defendant No.1 filed I.A.No.14651/2013 in CS (OS) No.1698/2007 for sale of all the assets of Bhai Tirlochan Singh which was in negation of the settlement agreement. It was pleaded that the defendant No.1 by deliberate acts of fraud and misrepresentation got the plaintiff to sign the settlement agreement by concealing and suppressing material facts that the defendant No.1 had already withdrawn the entire money from the estate of Bhai Tirlochan Singh and if the plaintiff knew about it, he would have never agreed to settlement and thus the settlement agreement was entered into by playing fraud upon the plaintiff and the plaintiff has a right to get the same declared as null and void. Though no summon was issued in the suit and no caveats were filed however, counsels for defendants appeared before the Court and contended that the suit was not maintainable.

3. The learned Single Judge vide the impugned judgment held that the suit was not maintainable in view of the bar under Order XXIII Rule 3 and 3A CPC. The learned Single Judge noted Section 17 of the Indian Contract Act, 1872 and explanation thereto which provides that mere silence as to the fact likely to affect the willingness of a person to enter into a contract is not fraud, unless it is the duty of the person keeping silence to speak or unless silence is in itself equivalent to speech. The learned Single Judge noted that there was no averment in the plaint that the Defendant No.1 represented or suggested to the plaintiff that the movable assets of Bhai Tirlochan Singh

were not as described in Annexure-C to the settlement agreement or that she had not withdrawn or encashed the same or that the defendant No.1, had the duty to speak so that her silence in this respect was equivalent to speech. The plaintiff nowhere pleaded that the defendant No.1 represented to the plaintiff that the said investments were existing in the old form rather what the plaintiff pleaded was "*he bona fide believed so in his mind at the time of signing the settlement agreement*". Thus such a belief without any representation from defendant No.1 could be a mistake of fact but does not amount to fraud. The learned Single Judge also noted that a compromise forming the basis of a decree can only be questioned before the same Court that recorded the compromise and a fresh suit for setting aside the compromise decree was expressly barred by Rule 3A of Order XXIII CPC. It was held that the expression "not lawful" used under Rule 3A covers a decree based at a fraudulent compromise.

4. The case of the plaintiff/appellant before this Court is that since in CS (OS) No.1698/2007 a status quo order dated September 14, 2007 was in operation in respect of all the movable assets pertaining to the estate of late Bhai Tirlochan Singh, which was either in his individual name or in the joint name of late Bhai Tirlochan Singh and defendant No.1 or any other third party where late Bhai Tirlochan Singh had a share were lying deposited in the respective accounts and these remained untouched by the parties. This fact is reflected from Clause 6 (c) of the settlement agreement which clearly indicates that upon valuation of the movable property at 9, Amrita Shergill Marg, New Delhi in which late Bhai Tirlochan Singh had shares and admittedly the plaintiff had also independent shares the plaintiff was to retain his father's shares in 9, Amrita Shergill Marg, upon valuation of the

said property. The idea being that the movable assets in the form of deposits, investments, bonds, shares etc.of late Bhai Tirlochan Singh which had fallen in the respective share of the parties could have been released in lieu of their shares in the property at 9, Amrita Shergill Marg so that the settlement agreement could be implemented. The plaintiff pleads that he felt confident that with the incentive of getting cash defendant No.1 would leave her share in 9, Amrita Shergill Marg, New Delhi. It is further stated that the parties were ad-idem on the issue that no formal decree should be passed as it included taxation and overall valuation of the shares and deposits of duty, stamp, in respect of the share to be transferred to a particular person and the settlement agreement was designed in a manner that the family property being 9, Amrita Shergill Marg, New Delhi and 71, Jor Bagh, New Delhi are retained and divided amongst all so that everybody will get a place for living and some movable assets. It was pleaded that it was never the intent of the settlement agreement to get a decree which results in heavy taxation due to high value of properties, that is, 9, Amrita Shergill Margh, New Delhi and 71, Jor Bagh, New Delhi.

5. In view of the pleadings as noted above it is evident that neither there is any concealment nor misrepresentation by defendant No.1. If the plaintiff forms a belief without clarifying the same with the defendants, the defendants cannot be faulted for the same. To declare a contract null and void due to fraud the plaintiff must plead the ingredients of fraud as defined under Section 17 of the Indian Contract Act, 1872 which provides as under:

> *"17. "Fraud' defined.- 'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agents, with intent to deceive another party thereto or his agent, or to induce him to enter*

into the contract:-

(1) the suggestion as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech."

6. From the pleadings as noted above there is no representation or misrepresentation to the plaintiff pleaded. What the plaintiff believes is his own belief and as noted in the explanation to Section 17 of the Indian Contract Act, 1872 mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud unless it is the duty of a person keeping silence to speak, or unless his silence is in itself equivalent to speech.

7. The learned Single Judge also rightly held that Rule 3A to Order XXIII CPC bars a fresh suit to set aside a decree on the ground that the compromise on which the decree is based was unlawful. The Supreme Court in the decision reported in *2012 (5) SCC 525 Horil vs. Keshav & Anr.*

carving out the distinction between decrees passed by Civil Courts and those passed by Courts, tribunals or authorities of limited jurisdiction held that a fresh suit from seeking to set aside the decree based on compromise passed by courts, tribunals or authorities of limited jurisdiction were maintainable. The present is not a case of decree based on compromise passed by a court of limited jurisdiction, hence a fresh suit for declaring the decree as null and void was not maintainable.

8. In the decision reported as 1993 (1) SCC 581 Banwari Lal vs.Chando Devi (Smt.) (through LRs) & Anr.it was held:

> *"13. When the amending Act introduced a proviso along with an explanation to Rule 3 of Order 23 saying that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, "the Court shall decide the question", the Court before which a petition of compromise is filed and which has recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on basis of any lawful agreement. To make the enquiry in respect of validity of the agreement or the compromise more comprehensive, the explanation to the proviso says that an agreement or compromise "which is void or voidable under the Indian Contract Act ..." shall not be deemed to be lawful within the meaning of the said Rule. In view of the proviso read with the explanation, a Court which had entertained the petition of compromise has to examine whether the compromise was void or voidable under the Indian Contract Act. Even Rule 1(m) of Order 43 has been deleted under which an appeal was maintainable against an order recording a compromise. As such a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23, or an appeal under Section 96(1) of the Code, in which he can now question the validity of the compromise in view of Rule 1-A of Order 43 of the Code.*

14. The application for exercise of power under proviso to Rule 3 of Order 23 can be labelled under Section 151 of the Code but when by the amending Act specifically such power has been vested in the Court before which the petition of compromise had been filed, the power in appropriate cases has to be exercised under the said proviso to Rule 3. It has been held by different High Courts that even after a compromise has been recorded, the court concerned can entertain an application under Section 151 of the Code, questioning the legality or validity of the compromise. Reference in this connection may be made to the cases Tara Bai (Smt) v. V.S. Krishnaswamy Rao [AIR 1985 Kant 270 : ILR 1985 Kant 2930] ; S.G. Thimmappa v. T. Anantha [AIR 1986 Kant 1 : ILR 1985 Kant 1933] ; Bindeshwari Pd. Chaudhary v. Debendra Pd. Singh [AIR 1958 Pat 618 : 1958 BLJR 651] ;Mangal Mahton v. Behari Mahton [AIR 1964 Pat 483 : 1964 BLJR 727] and Sri Sri Iswar Gopal Jew v. Bhagwandas Shaw [AIR 1982 Cal 12] where it has been held that application under Section 151 of the Code is maintainable. The court before which it is alleged by one of the parties to the alleged compromise that no such compromise had been entered between the parties that court has to decide whether the agreement or compromise in question was lawful and not void or voidable under the Indian Contract Act. If the agreement or the compromise itself is fraudulent then it shall be deemed to be void within the meaning of the explanation to the proviso to Rule 3 and as such not lawful. The learned Subordinate Judge was perfectly justified in entertaining the application filed on behalf of the appellant and considering the question as to whether there had been a lawful agreement or compromise on the basis of which the court could have recorded such agreement or compromise on February 27, 1991. Having come to the conclusion on the material produced that the compromise was not lawful within the meaning of Rule 3, there was no option left except to recall that order."

9. This brings us to the second limb of the argument of the learned

counsel for the appellant/plaintiff who states that after the settlement agreement, the behaviour of defendant No.1 changed and she did not co-operate in Testamentary Case No.108/2008 and did not permit the plaintiff to withdraw his share of money in terms of settlement agreement etc. These issues relate to the execution of the decree and cannot be pressed in a fresh suit.

10. Concurring with the view expressed by the learned Single Judge we dismiss the appeal.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

OCTOBER 05, 2015
'vn'