

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

+ EX.F.A. 18/2014

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Reserved on: 14th May, 2015
Decided on: 29th May, 2015

BINA DEVI

..... Appellant

Through

**Mr. Manoj V. George, Ms. Shilpa M.
George, Mr. Akarsh Kamra, Advts.**

versus

SURAT NIRMAL DASS

..... Respondent

Through

**Mr. Amit Sibal, Sr. Adv. with Mr.
Subhiksh Vasudev, Mr. Vinay P.
Tripathi, Advts.**

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Suit No. 200/1999 was filed by Manshya Ram Nirmal Dass against his brother Surat Nirmal Dass seeking possession and recovery of damages in respect of flat No.A-13/32-A, Kalkaji Extension, New Delhi (in short the suit flat). Manshya Ram claimed in the suit that the flat was allotted to him under MIG category in the draw of lots held on 20th March, 1984 by the DDA. The total cost of the flat was paid by Manshya Ram in four installments. When the possession of flat was taken, parents of Manshya Ram were residing with Surat Nirmal Dass his younger brother at a rented accommodation in East of Kailash. The parents of Manshya Ram expressed their desire to live in the suit flat and since at that time Manshya Ram did not have the urgent need of the suit flat his parents and Surat shifted to the suit

flat. As against the rent it was agreed that Surat would deposit the monthly installments of the suit flat with the DDA. However, Surat did not deposit the installments and Manshya Ram had to deposit the same. The parents of Manshya Ram and Surat expired in the year 1993 and thereafter Surat was residing in the suit flat. Since Surat was not depositing the installments with the DDA, Manshya Ram asked him to hand-over the vacant peaceful possession of the suit flat for which a notice dated 18th April, 1994 was also served. Since Surat had no right, title or interest in the suit flat and had a plot measuring 200 sq.yds. bearing No.E-145 Masjid Moth, Greater Kailash II he was asked to shift to his own house and vacate the premises of Manshya Ram.

2. During the pendency of the civil suit Manshya Ram and Surat entered into a settlement and an application under Order 23 Rule 3 read with Section 151 CPC was filed. In the application it was stated that parties have settled their disputes by mutual compromise and they want that the suit may be decided and a decree be passed in the terms of the said compromise. The terms of compromise between the parties were:

“(a) That the defendant undertakes and shall deliver the vacant and peaceful possession of flat No.A-13/32-A, Kalkaji Extension New Delhi to the plaintiff on or before three years from the date of decree passed by the Court on the basis of the compromise, as completion of construction in plot No.E-145 Masjid Moth owned by defendant likely to take three years.

(b) That the defendant shall also pay to the plaintiff a sum of ₹50,000/- (Rupee Fifty thousand only) at the time delivery of possession of the flat to the plaintiff. This amount shall be paid by the defendant over and above the amount of ₹42,402/- which was deposited by him on behalf of plaintiff in DDA office.

- (c) That the defendant shall not part with the possession of flat in favour of anybody else and shall deliver its possession to the plaintiff as per this compromise.
- (d) That till the date of delivery of possession of flat to the plaintiff electricity and water charges shall be paid by the defendant directly to the local body.
- (e) The plaintiff give up his claim for damages over and above the amount which has been agreed to between the parties as mentioned above.
- (f) That both the parties shall bear their own costs.”

3. In the application it was further stated that the compromise was arrived between the parties of their own free will and without any coercion and thus a prayer for the suit to be decreed in terms of the compromise was made by both the parties. Statements of both Manshya Ram and Surat were recorded who endorsed the terms of compromise mentioned in the application, proved their signatures and that the compromise was executed without any force. Vide order dated 4th March, 1999 the suit was disposed of as under:

“Present counsel for the parties with parties in person.

Statement of Shri Manshya Ram Nirmal Dass and that of Shri Surat Nirmal Dass recorded.

In view of the statement and in terms of compromise application Ex.C-1 suit of the plaintiff is disposed off.

Suit file be consigned to record room.”

4. Manshya Ram died on 21st October, 2008. All the legal heirs of Manshya Ram executed a relinquishment deed in favour of his wife Smt. Bina Devi on 10th July, 2009 where after the execution petition was filed.

On 9th April, 2014 vide the impugned order the execution petition being EX.No.74/13 was dismissed on the objections of Surat for the following reasons:

“(i) the said order dated 04.03.1999 is neither a decree nor an executable order in terms of Section 2(3) CPC;

(ii) Rule 1 of Order XXIII CPC talks about withdrawal of suit or abandonment of part of claims and Rule 3 of Order XXIII CPC talks about compromise of suit. In case of withdrawal of suit or adjustment of suit under Rule 1 of Order XXIII CPC, no decree is framed. Whereas in case of compromise of suit, considering the agreement/ compromise/ satisfaction of suit, there could be a consent decree or the agreement between the parties may constitute part of such decree.

Whereas the order dated 04.03.1999 does not carry any element to be construed or infer that this is a compromise of suit or there was a consent decree requested by the parties;

(iii) by order dated 04.03.1999 (in suit No.200/1995), the operating part reads as “in view of their statements and in terms of compromise application Ex.C-1, the suit of the plaintiff is disposed off. Suit file be consigned to Record Room”. In Mohammad Amin Vs. Mohammad Iqbal 158 (2009) DLT 531 and also in Sanjay Goel Vs. Lions Club International & Anr. CM(M) 784/2012 & CM No. 11734/2012, 11733/2012 and Cav.693/2012, DOD 09.08.2012, a similar question was arisen, whether withdrawal of suit on statement of parties amounts to decree. It was held that simplicitor withdrawal of suit is not a decree, as parties have formed an opinion to withdraw the suit, without request to Court to draw a decree;

(iv) it is apparent from introductory part, paragraph 1, above of this order, there were formal issues framed and the Court had not given any finding on any of the issue because of joint application of the parties, consequently, neither there was any admission of any aspect by either of the parties nor any finding on any of the issue and;

(v) in view of the conclusions drawn (i) to (iv), above, it also stands reaffirmed that the order dated 04.03.1999 is also not an executable order. Thus, the other questions, like execution petition is barred by law need not to be looked into, as the said order is not a decree.”

5. Learned counsel for Bina Devi challenging the impugned order contends that a joint application was filed by both Manshya Ram and Surat under Order XXIII Rule 3 CPC wherein the Court was obliged to pass a decree and even if the word ‘decree’ has not been used the import of the order disposing of the suit was that of a decree. The error, if any, was committed in the proceeding of the Court for which the petitioner could not be penalized. There is no delay in filing the execution petition as the same was filed within 12 years from the date when Surat had to vacate the premises and he did not do so. It is stated that an act of Court cannot prejudice a litigant. Further it was a joint application filed by both the parties praying for passing a decree and was not an application under Order 23 Rule 1 CPC wherein the suit was withdrawn by Manshya Ram or he abandoned his claim. Reliance is placed on Shri Abdul Saliq Khan Vs. Shri Nahid Khan & Ors. 179 (2011) DLT 347 and United Phosphorous Ltd. Vs. A.K. Kanoria AIR 2003 Bom 97.

6. Learned counsel for Surat on the other hand contends that in the application under Order XXIII Rule 3 CPC filed, during the course of hearing parties added further words in paragraphs 3(a) i.e. “*as completion of construction on plot No.E-145, Masjid Moth owned by defendant is likely to take three years*”. Relying on this addition learned counsel for the respondent contends that time was not the essence of the agreement and on

completion of the house of Surat at E-145, Masjid Moth, Greater Kailash II, Opposite Savitri Cinema he was to vacate the same. It is in this view of the matter no execution petition was filed by Manshya Ram in his life time and only after his death his legal heirs filed the execution petition. Even the appellant knew that a litigation with regard to plot No.E-145, Masjid Moth, Greater Kailash II owned by Surat is pending and thus no construction could be carried out. Hence, Surat cannot be evicted till the conclusion of construction on the plot at E-145, Masjid Moth, Greater Kailash. In the light of this addition in the terms of compromise the Court did not pass a decree and since no decree was passed no execution petition was maintainable. Order XX Rules 6, 6A and 7 CPC states about the contents of the decree which are missing in the present case. In the absence of a decree, a judgment of the Court simplicitor was not executable. Till date the appellant has not approached the Trial Court for passing of a decree. The two limbs of Order XXIII Rule 3 CPC are not satisfied in the facts of the present case and thus the case falls under Order XXIII Rule 1 CPC. Since no decree was passed, the remedy available with the petitioner was specific performance of the contract and not execution and hence there is no infirmity in the impugned order and the present petition be dismissed.

7. Heard learned counsel for the parties. The issue involved in the present appeal is whether an executable decree has been passed by the learned Trial Court while disposing of the suit vide order dated 4th March, 1999. Order XXIII Rule 3 CPC reads as under:

“3. Compromise of suit.- Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in

respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit: -

Provided that where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation : An agreement or compromise which is void or avoidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.”

8. Thus the twin requirement of Order XXIII Rule 3 CPC is that it is proved to the satisfaction of the Court that a suit has been adjusted in whole or part by any lawful agreement or compromise in writing and signed by the parties or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit. In the present case the first requirement of the satisfaction of the Court regarding adjustment of the suit wholly or in part by a lawful agreement or compromise in writing and signed by the parties has been duly fulfilled. The only issue is that the learned Trial Court while disposing of the suit and passing the judgment did not direct a decree to be prepared. This was entirely in the domain of the act of the Court and it is well-settled that an act of a Court cannot prejudice a party.
9. Section 2(2) CPC defines “decree” as a formal expression of an adjudication of the rights of the parties conclusively determined by the

Court. This formal expression of adjudication of the rights of parties conclusively has happened in the present case. Passing of a decree pursuant to a judgment is a ministerial act which a Court is bound to perform. This Court in Abdul Saliq Khan (supra) in a similar situation held that where the Court had inadvertently not drawn up a formal decree as per the mandate upon the Court to have drawn up the decree in terms of compromise recorded by the Court this was an error which could be corrected and such a power was available under Section 152 of the CPC. It was held that Section 152 of the CPC was founded on the maxim “*actus curiae neminem gravabit*” i.e. an act of Court shall prejudice no man. Where the decree does not correctly express what was really decided and initiated by the Court, the Court has inherent power to amend the decree so as to carry out its own meaning.

10. The second contention of learned counsel for the respondent that the time was not the essence of the compromise between the parties and since house of Surat at E-145 Masjid Moth, Greater Kailash II has not been constructed as yet, he would have the right to continue in the flat is misconceived. While incorporating Clause (a) in Para 3 of the compromise application under Order XXIII Rule 3 CPC Surat undertook to deliver vacant and peaceful possession of the premises on or before three years from the date of decree being passed by the Court on the basis of compromise “*as completion of construction on plot No. E-145, Masjid Moth owned by defendant was likely to take three years*”. This time cannot be extended indefinitely on the basis that litigation of Surat with DDA was continuing before this Court. In any case more than sufficient time was granted first by Manshya Ram and then his legal heirs as the eviction petition was instituted

only on 2nd January, 2012 before the expiry of 12 years period when Surat was to vacate the flat.

11. Vide the impugned order the learned Executing Court wrongly relied upon the decisions of this Court in Mohammad Amin Vs. Mohammad Iqbal 158 (2009) DLT 531 and Sanjay Goel Vs. Lions Club International & Anr. CM(M) 784/2012 DOD 09.08.2012. In the present case the application was filed under Order XXIII Rule 3 CPC and not under Order XXIII Rule 1 CPC. There was no withdrawal of the suit, rather on the consent and terms of compromise entered into between the parties, a decree was prayed. Though a judgment was passed in terms of the compromise, however inadvertently the Court did not draw a decree for which act the petitioners cannot be faulted.

12. Consequently, the impugned order is set aside. The petitioner would be at liberty to file an application under Section 152 CPC before the Court for passing of a formal decree whereupon the execution petition of the petitioner will be considered by the learned Trial Court. Appeal is disposed of accordingly.

(MUKTA GUPTA)
JUDGE

MAY 29, 2015
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