

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

Decided on: 20.07.2016

+ **RFA (OS) 18/2016, CAV.177-178/2016, C.M. APPL.7383-7385/2016**

VIDUR IMPEX AND TRADERS PVT. LTD. AND ORS.

..... Appellants

Through: Sh. Dinesh Agnani, Sr. Advocate with
Sh. Javed Ahmed, Advocate.

versus

POONAM KHANNA AND ORS. Respondents

Through: Sh. Sanjeev Anand with Sh. Yakesh
Anand and Ms. Sonam Anand,
Advocates, for Respondent No.1.
Sh. Jayant Bhushan, Sr. Advocate
with Sh. M.S. Vinayak and Ms. Geeta
Mohanty, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. At the outset, counsel for the parties were disclosed that a member of this Bench (S. Ravindra Bhat, J) had dealt with an earlier proceeding, i.e OS 435/1993 during an interlocutory stage. Counsel for both parties stated they had no reservations in the matter. The appeal was heard finally.

2. The judgment and decree in CS(OS) 3364/2015 dated 24.11.2015 has been impugned in this first appeal by the plaintiff. The plaintiff had argued that the decree, drawn pursuant to a compromise application presented under Order XXIII Rule 3, Code of Civil Procedure, 1908 (CPC), to embody terms of a settlement of the parties in a pending suit, i.e CS (OS) 425/1993 was void as it was the result of a fraud on the court. The learned single judge rejected the plaint in the suit. The plaintiff appellants have therefore, approached this court, aggrieved by the impugned order, that has resulted in a decree.

3. Briefly stated, facts of the case, as emerging from the plaint and the documents annexed therewith, are that Late Shri Pradeep Kumar Khanna (husband of respondent/first defendant and respondent/second and third defendant's father entered into an Agreement to Sell dated 13 September, 1988 with fourth defendant, ("Tosh", hereafter) in respect of property bearing no. 21, Aurangzeb Road, New Delhi ("suit property"). The sale deed, however, was not executed, which led to Tosh filing a suit against Late Shri Pradeep Kumar Khanna (CS (OS)425/1993). During the pendency of that suit Shri Pradeep Kumar Khanna died and the first three defendants were brought on record as his heirs. In CS (OS) 425/1996 by order dated 18 February, 1993, defendants were restrained from transferring, alienating, parting with possession or creating third party interest in the suit property. This injunction order was subsequently confirmed. After passing of the injunction order, it appears that Shri Pradeep Kumar Khanna entered into an Agreement to Sell with the plaintiffs herein, on 19th February, 1997. Thereafter, Shri Pradeep Kumar Khanna executed six sale deeds in favour of the plaintiffs all dated 29 May, 1997. However, prior to the execution of the sale deed plaintiff's entered into an Agreement to Sell with Bhagwati Developers, the fifth defendant, in respect of the suit property. During the pendency of CS (OS)425/1993, the present plaintiffs filed an application under Order 1 Rule 10 CPC for their impleadment on the ground that they had purchased the suit property from Late Shri Pradeep Kumar. The applications, however, were dismissed by a learned Single Judge of this Court vide order dated 26 May 2008. The plaintiffs unavailingly impugned that order before the Division Bench; they approached the Supreme Court by filing appeals which were dismissed vide Judgment *Bhagwati Developers Private Limited vs. Tosh Apartments Private limited & Others* (2012) 8 SCC 384 where, in paras 42 to 44, the court stated as follows:

"42. In the light of the above, we shall now consider whether the learned Single Judge and the Division Bench of the High Court committed an error by dismissing the appellants' application for impleadment as parties to Suit No.425/1993. At the cost of repetition, we consider it necessary to mention that respondent 1 had filed suit for specific performance of agreement dated 13.9.1988 executed by respondent No.2. The appellants and Bhagwati Developers are total strangers to that agreement. They came into the picture only when respondent 2 entered into a clandestine

transaction with the appellants for sale of the suit property and executed the agreements for sale, which were followed by registered sale deeds and the appellants executed agreement for sale in favour of Bhagwati Developers. These transactions were in clear violation of the order of injunction passed by the Delhi High Court which had restrained respondent No.2 from alienating the suit property or creating third party interest. To put it differently, the agreements for sale and the sale deeds executed by respondent 2 in favour of the appellants did not have any legal sanctity. The status of the agreement for sale executed by the appellants in favour of Bhagwati Developers was no different. These transactions did not confer any right upon the appellants or Bhagwati Developers. Therefore, their presence is not at all necessary for adjudication of the question whether respondent Nos. 1 and 2 had entered into a binding agreement and whether respondent No.1 is entitled to a decree of specific performance of the said agreement. That apart, after executing the agreement for sale dated 18.3.1997 in favour of Bhagwati Developers, the appellants cannot claim to have any subsisting legal or commercial interest in the suit property and they cannot take benefit of the order passed by the Calcutta High Court for appointment of an arbitrator which was followed by an order for appointment of receiver because the parties to the proceedings instituted before that Court deliberately suppressed the facts relating to Suit No.425/1993 pending before the Delhi High Court and the orders of injunction passed in that suit.

43. We are in complete agreement with the Delhi High Court that the application for impleadment filed by the appellants was highly belated. Although, the appellants have pleaded that at the time of execution of the agreements for sale by respondent No.2 in their favour in February 1997, they did not know about the suit filed by respondent No.1, it is difficult, if not impossible, to accept their statement because the smallness of time gap between the agreements for sale and the sale deeds executed by respondent No.2 in favour of the appellants and the execution of agreement for sale by the appellants in favour of Bhagwati Developers would make any person of ordinary prudence to believe that respondent No.2, the appellants and Bhagwati Developers had entered into these transactions with the sole object of frustrating the agreement for sale dated 13.9.1988 executed in favour of respondent 1 and the suit pending before the Delhi High Court. In any case, the appellants will be deemed to have become aware of the same on receipt of summons in Suit No. 161/1999 filed by respondent 2 for annulment of the agreements for sale and the sale deeds in which respondent 2 had clearly made a mention of Suit No.425/1993 filed by respondent No.1 for specific performance of the agreement for sale dated 13.12.1988 and injunction or at least when the learned Single Judge of the Delhi High Court entertained T.No.625/2001 filed by respondent No.1 and restrained respondent 2 and 4 from

transferring possession of the suit property to the appellants. However, in the application for impleadment filed by them, the appellants did not offer any tangible explanation as to why the application for impleadment was filed only on 4.2.2008 i.e. after 7 years of the passing of injunction order dated 22.1.2001 and, in our considered view, this constituted a valid ground for declining their prayer for impleadment as parties to Suit No.425/1993.

43. The ratio of the judgment in Kasturi v. Iyyamperumal (supra), on which heavy reliance has been placed by the learned senior counsel for the appellants, does not help his clients. In the present case, the agreements for sale and the sale deeds were executed by respondent No.2 in favour of the appellants in a clandestine manner and in violation of the injunction granted by the High Court. Therefore, it cannot be said that any valid title or interest has been acquired by the appellants in the suit property and the ratio of the judgment in Surjit Singh v Harbans Singh (supra) would squarely apply to the appellants' case because they are claiming right on the basis of transactions made in defiance of the restraint order passed by the High Court. The suppression of material facts by Bhagwati Developers and the appellants from the Calcutta High Court, which was persuaded to pass orders in their favour, takes the appellants out of the category of bona fide purchaser. Therefore, their presence is neither required to decide the controversy involved in the suit filed by respondent No.1 nor required to pass an effective decree.

44. The next question which merits consideration is whether the Delhi High Court was justified in appointing the receiver and directing him to take possession of the property. Though, learned senior counsel appearing for Bhagwati Developers has sought to invoke the doctrine of comity of jurisdictions of the Courts for continuance of the receiver appointed by the Calcutta High Court, we do not find any merit in his submission. It is not in dispute that respondent No.1 had filed the suit for specific performance on 1.2.1993 and the learned Single Judge of the Delhi High Court passed the order of injunction on 18.2.1993. The arbitral award for specific performance of the agreement for sale of the same property entered into between the appellants and Bhagawati Developers was obtained on 7.1.1999. The execution proceedings were instituted in the Calcutta High Court in 2000 and the order for appointment of receiver was passed on 12.8.2000. It is thus clear that when Bhagwati Developers approached the Calcutta High Court, the Delhi High Court was already seized with the suit involving the subject matter of the award. The contention of the appellants and Bhagawati Developers that they were unaware of the proceedings before the Delhi High Court cannot be accepted because in Suit No.161/1999 filed by respondent No.2 for declaring that the agreements for sale and the sale deeds relied upon by the appellants were

false and fabricated, a specific reference was made to the suit filed by respondent No.1. That apart, in its order dated 15.2.2001 passed in the application filed by respondent No.4 in EC No.10/2000, the learned Single Judge of the Calcutta High Court categorically observed that the said Court had not been apprised of the facts relating to the suit pending before the Delhi High Court and the injunction orders passed therein including order dated 8.2.2001 restraining the receiver of the Calcutta High Court from taking possession of the property and that if these facts had been disclosed, the Court would have been slow in passing the order that it had passed earlier and hence the order passed by it, if it is in conflict with the order passed by the Delhi High Court, would be subject to that order and Bhagwati Developers who is a party to the proceedings before the Delhi High Court can approach the said Court for obtaining appropriate orders. This shows that on being apprised of the correct facts, the learned Single Judge of the Calcutta High Court had shown due respect to the orders passed by the Delhi High Court and directed that the same should operate till they are modified or vacated at the instance of the appellants or Bhagwati Developers. The course of action adopted by the Calcutta High Court was in consonance with the notion of judicial propriety. Therefore, Bhagwati Developers cannot invoke the doctrine of comity of jurisdictions of the Courts for seeking continuance of the receiver appointed by the Calcutta High Court.

45. The learned Single Judge and the Division Bench of the Delhi High Court have assigned detailed and cogent reasons for appointing a receiver to take care of the suit property. The clandestine nature of the transactions entered into between respondent No.2 and the appellants on the one hand and the appellants and Bhagwati Developers on the other would give rise to strong presumption that if a receiver is not appointed, further attempts would be made to alienate the property in similar fashion. Therefore, we do not find any valid ground much less justification to interfere with the impugned order or the one passed by the learned Single Judge of the Delhi High Court.

46. In view of the above conclusions, we do not consider it necessary to advert to the documents filed by respondent No.1 before this Court for the first time and the additional affidavit filed by Smt. Bhanwari Devi Lodha on behalf of Bhagwati Developers.”

4. After the above judgment, a Settlement was arrived at between the Tosh on the one hand and the first three defendants on the other in CS (OS) 425/1993 and on an application filed under Order 23 Rule 3 CPC impugned decree was passed. The plaintiff alleged that decree was obtained by the defendant nos.1 to 4 by perpetuating fraud on the Court. It was alleged that it was neither impleaded in the said application nor any notice

was issued to them prior to passing of the decree. The facts regarding sale of suit property by Late Shri. Pradeep Kumar Khanna by registered sale deeds all dated 20May, 1997, was not disclosed. His heirs, defendant nos. 1 to 3 did not disclose that they were divested of all their rights in the suit property, in view of the sale deeds. Defendants did not disclose in the compromise application that plaintiffs had filed CS (OS)3195/2012 praying therein that they be declared owners of the suit property in view of the sale deeds, despite the fact that they were party to the said suit. It is further contended that plaint in CS (OS) 3195/2012 was rejected under Order 7 Rule 11 CPC by the learned Single Judge but in the appeal the said order was set aside, with the consent of the parties.

5. In this case, the single judge observed as follows, while rejecting the plaint:

“6. In nutshell, case of the plaintiffs is that decree was obtained by perpetuating fraud. Defendants have appeared through senior counsel/counsel and have contended that plaint does not disclose any cause of action. Grounds, on which, it is alleged that decree was obtained by perpetuating fraud, does not disclose any cause of action.

7. As regards, plea of plaintiffs, as taken in the plaint, that they were not made a party to the compromise application nor were issued any notice before passing the decree, in my view, does not disclose any cause of action. In CS (OS) 425/1993 plaintiffs had sought impleadment on the ground that they were owner pursuant to the six sale deeds, but their impleadment was found not necessary. Supreme Court categorically observed that sale deeds were entered in a clandestine manner. It has been further held that the transaction being in violation of injunction order had no legal sanctity. Agreement was entered into by the appellant with Bhagwati Developers to frustrate the agreement to sell dated 13th September, 1988 (specific performance of what was sought in suit no. 425/1993). Suppression of material facts in Calcutta High Court takes the plaintiffs herein out of the category of bonafide purchaser. Accordingly, in my view, once the impleadment of plaintiffs in CS (OS) 425/1993 was declined, there was no requirement of impleadment of plaintiffs at the time of recording the compromise nor any notice was required to be issued to them. As regards plea of non-disclosure of sale deeds is concerned, same has no force. It is on the basis of these sale deeds, application for impleadment was made and this fact was already on record of CS (OS) 425/1993 at the time of passing the compromise decree. Disclosure of other suits was also not necessary as same are independent of CS(OS) 425/1993, which was in respect of prior agreement to sell between the defendant no. 4 and Late Shri Pradeep Kumar Khanna.”

6. The main contentions of the Appellants, in favour of setting aside the aforementioned order, are that there was a suppression of material facts before the Single Judge by the Respondents when the compromise was recorded, and the earlier suit was. They have suggested that the Respondents failed to appraise the Single Judge of the fact that the said property is the subject matter of another suit (3195/2012) and thereby impacted due to *lis pendens*. That the Ld. Single Judge relied on an erroneous premise in rendering his order. This erroneous premise, according to the Appellants, is that - they are not entitled to be impleaded at the time of reaching a compromise agreement. As *per* the Appellants, the premise should be that - fraud was committed on the Court. It is urged that the order could not have been rendered since the compromise agreement is unlawful due to collusion between Respondents 1 - 3 and Respondent 4; That they did not inform the Ld. Single Judge of the clandestine agreements dated February 16, 2015 and August 31, 2015. In doing so, the Ld. Single Judge overlooked Sections 10 and 23, Indian Contract Act, 1872, and Order XXIII, Rule 3, Code of Civil Procedure.

7. The Single Judge in CS(OS) 3364/2015 did, in fact, engage with the first two aforementioned contentions. The Appellants had contended that fraud was committed on the Court, and that there was a pending suit (3195/2012). The extracts of the impugned judgment clearly show that this issue was discussed.

8. The third and final contention raised by the Appellants is that there were collusive and clandestine agreements between the Respondents for a sum of 50 crores, which was overlooked by the Single Judge in CS(OS) 3364/2015. They have argued that the Respondents did not inform the Ld. Single Judge of the clandestine agreements dated February 16, 2015 and August 31, 2015. Therefore, the Ld. Single Judge overlooked Sections 10 and 23, Indian Contract Act, 1872, and Order XXIII, Rule 3, Code of Civil Procedure. It is urged by the appellants in their suit that:

“Q. Because Ld. Single Judge failed to consider that under Order 23 Rule 3 CPC, a lawful agreement or compromise is a mandatory prerequisite for passing a decree on the basis of such agreement or compromise. In the present case, the agreement dated 31.08.2015 and 16.02.2013 are void, unlawful and against the public policy also, hence, the decree based upon on those compromise is a nullity and liable to be set aside. In the instant

case, fraud is proved on the part of the Respondents on account of, first, entering into an unlawful agreement by the Respondents for an unlawful object with the intention of defeating the legitimate rights of the Appellant companies and, secondly, the clandestine transaction concluded between the Respondents is in violation of the injunction order. Thus, Respondents played fraud upon the Hon'ble Court.”

9. Their argument here is that since these two agreements were apparently void and that they are in violation of the injunction order, fraud was played upon the Court. In ignoring the said fraud, runs the argument, the Single Judge has overlooked Sections 10 and 23, Indian Contract Act, 1872, and Order XXIII, Rule 3, Code of Civil Procedure. The *rationale* for this grievance is as follows (again a part of their pleading in the suit):

“S. Because the Respondent no.4 entered into a fresh agreement dated 31.08.2015 in collusion and connivance with the Respondent no.1 to 3 and filed an application under order 23 Rule 3. It is pertinent to mention here that the Respondent No.4 virtually abandoned his claim for specific performance on the basis of agreement dated 13.09.1988 and entered into another fresh agreement, with the intention of defeating the lawful rights of the Appellant. Hence, in these circumstances, rights of the Appellant will not be subservient to the rights of Respondent No.4 flowing from agreements dated 16.02.2013 and 31.08.2015; rather the rights of the Respondents shall be subservient to the outcome of the Suit No. 3195/2012 and this factor of grave significance and import was callously disregarded by the Ld. Single Judge, while passing the impugned Judgment.”

11. After considering the documents, pleadings and the suit records, this court is of opinion that there is no infirmity in the impugned judgment. The earlier orders of this court and the judgment of the Supreme Court and decisively ruled on two issues: one that the present appellant/plaintiff had sought to belatedly enforce its rights, by filing an application in a pending suit. It had not approached the court in time, to seek relief, within the time stipulated in law. The second, and more important – as well as damaging finding regarding the appellant, was its conduct. It had colluded with another party, i.e Bhagwati Developers in approaching the Calcutta High Court; it had also clandestinely entered into the agreement which it now relies upon, to put in the words of the Supreme Court were with a view to frustrate the rights of the parties in the pending suit, and defeat the interim orders made therein. As a result the plaintiffs, who had no right to enforce in the first

place, in respect of the suit property, cannot complain that the compromise decree is the result of a fraud.

12. For the foregoing reasons, the appeal has to fail; it is dismissed.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

JULY 20, 2016

