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

+ **CS(OS) 254/2003**

PRIME TIME INDIA LTD.

..... Plaintiff

Through: Mr. Anil Airi, Sr. Advocate with
Mr. Ravi Krishan Chandna, Ms. Bindiya Airi,
Ms. Sadhna Sarma and Mr. Ishan Madan, Advs.

Versus

ASHOK KAPOOR AND ORS.

..... Defendants

Through: Mr. Nitin Dayal, Adv for D-1.
Ms. Mohini Narain, Ms. Jayati Parasher, Mr. Rajat
Guva and Mr. Rajan Narain, Advs for D-4A-4D
and 5.
Mr. Anupam Srivastav with Mr. Shikhar Sareen,
Advs for D-6.
Mr. B. Krishan, Adv. for D-7.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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13.07.2016

**IA.No.2533/2006 (of the defendants No. 1,5 and 7 for restoration of
IA.No.7845/2004 u/O 7 R-11 of CPC dismissed as withdrawn on 21st
November, 2005).**

1. The counsel for the defendant No.1 Mr. Ashok Kapoor is unable to explain where is the application being IA.No.7845/2004 or the reference thereto in the order dated 21st November, 2005.
2. None appears for the defendant No.5 Mrs. Ambica Vij.

3. The counsel for the defendant No.7 Mr. Som Nath Vij states that he has nothing to say on this application.

4. The defendants who have filed the application being not ready to pursue the application, the same cannot be kept pending.

5. Dismissed for non-prosecution.

IA.No.2794/2006 (of the defendants No. 4 and 6 for revival of IA.No.1923/2005 dismissed as withdrawn on 21st November, 2005)

6. The counsel for the defendant No.6 Mrs. Anjali Sarin states that he is not pressing this application.

7. The counsel for the defendant No.4 Mrs. Alaka Kapoor and her children are also clueless about this application.

8. Dismissed.

IA.No.9401/2014 in CS(OS) No.254/2003 (of the defendant No.4A Smt. Alaka Kapoor for repudiation of compromise agreement in IA.No.1515/2005)

9. The counsel for the defendant No.4A/applicant Mrs. Alaka Kapoor has been heard.

10. This suit was filed for specific performance of an agreement by the defendant No.1 Mr. Ashok Kapoor in favour of the plaintiff for sale of his 1/3rd undivided share in property No.32, Golf Links, New Delhi.

11. However on 25th February, 2005, during the pendency of the suit, IA.No.1515/2005 (u/O 23 Rule 3 of the CPC) was filed by the plaintiff and the defendants No. 1 Mr. Ashok Kapoor, 5 Mrs. Ambica Vij and 7 Mr. Som Nath Vij whereunder the plaintiff, in view of the stand of the defendant No.1 that his share in the property was 28% and not 1/3rd, on the same terms and conditions as contained in the original agreement, agreed to purchase 28% instead of 1/3rd share of the defendant No.1.

12. The defendant No.4A/applicant Smt. Alaka Kapoor vide this application seeks repudiation of the said compromise between the plaintiff and the defendants No. 1, 5 and 7, claiming it to be fraudulent.

13. The counsel for the defendant No.4A/applicant on enquiry states that the defendant No.4A/applicant admits the share of the defendant No.1 in the property to be 28%, as has been agreed to be sold under the compromise.

14. On the grievance of the defendant No.4A/applicant Mrs. Alaka Kapoor with respect to the compromise being enquired, the counsel states that the defendant No.1 under by the compromise, besides selling his 28% share is also purporting to transfer possession of the entire property in which the defendant No.4A/applicant and her children (defendants no.4B – 4D), being the heirs of deceased defendant No.4, Mr. Ashwani Kapoor have a

28% share. It is further stated that the plaintiff has already illegally taken possession of the entire property other than the first floor which is *custodia legis*.

15. Needless to state, the counsel for the plaintiff controverts the aforesaid stand of the defendant No.4A/applicant.

16. As far as the aforesaid grievance of the defendant No.4A/applicant is concerned, the same in my view cannot be a ground for challenging the compromise. All that can be observed at this stage is that the compromise between the plaintiff and the defendants No. 1, 5 and 7 will not affect the rights of the defendant No.4A/applicant and if the compromise decree is sought to be executed, it will be open to the defendant No.4A/applicant to at that stage agitate such claims as are made in this application.

17. The application is dismissed with the aforesaid clarifications.

IA.No.14679/2014 in CS(OS) No.254/2003 (of the defendant No.4A-4D u/O 7 Rule 11 of the CPC)

18. The position with respect to this application is the same.

19. The fact that the plaintiff and the defendants No. 1, 5 and 7 may have illegally dispossessed the defendant No.4A-4D cannot come in the way of

the plaintiff seeking specific performance of the agreement to sell. It cannot be a ground of rejection of plaint particularly after a compromise has been arrived at between the plaintiff and the defendant No.1, for specific performance of agreement with whom the suit was filed.

20. The application is dismissed, again with clarification that it will be open to the defendant No.4A-4D/applicants, to take appropriate remedies with respect to their share in the property.

IA.No.18494/2014(of the defendant no.1 u/S 45 of the Indian Evidence Act,1872 for bringing on record the original documents for examination of the documents by CFSL)

21. The counsel for the defendant No.1/applicant Mr. Ashok Kapoor has been heard.

22. It is *inter alia* the case of the defendant No.1/applicant Mr. Ashok Kapoor in this application that the plaintiff has forged the signatures of the defendant No.1 on certain letters dated 20th August, 2002, 14th December, 2002 and 15th December, 2002 copies whereof have been filed by the plaintiff before this Court. The defendant No.1/applicant Mr. Ashok Kapoor thus seeks production of the original letters and examination thereof by CFSL.

23. I have enquired from the counsel for the defendant No.1/applicant Mr. Ashok Kapoor whether the aforesaid letters are of the date prior to the compromise arrived at between the plaintiff No.1 on the one hand and the defendants No.1,5 and 7 on the other hand.

24. The counsel for the defendant No.1/applicant states that the letters are of earlier dates. He however states that he is disputing the settlement arrived at also and thus this application is relevant.

25. The challenge by the defendant No.1/applicant Mr. Ashok Kapoor to the settlement / compromise contained in IA No.1515/2005 would be considered under IA No.1515/2005.

26. Suffice it is to state that no right with respect to the said letters was reserved in IA No.1515/2005.

27. This application is disposed of with clarification that if the compromise is not accepted and the suit is to proceed, the prayer of the defendant No.1/applicant in this application can be considered.

IA.No.18541/2014(of the defendant No.1 Mr. Ashok Kapoor u/O 6 R-7 CPC) in CS(OS)254/2003

28. This application seeks to amend the written statement to challenge the compromise arrived at in IA.No.1515/2005.

IA.No.18542/2014(of the defendant No.5 Mrs. Ambica Vij u/O 6 R-17 CPC)

29. The counsel for the defendant No.4A-4D who now states that she is also the counsel of the defendant No.5 / applicant Mrs. Ambica Vij on inquiry states that the share of defendant No.5 Mrs. Ambica Vij in the property is 22% and the defendant No.5 Ambica Vij also admits that the share of the defendant No.1 in the property to be 28%.

30. By this application defendant no.5 / applicant Mrs. Ambica Vij is seeking to amend the written statement, again to challenge the compromise arrived at in IA.No.1515/2005.

31. This application shall also be considered hereunder while considering the compromise and/or the order to be made in IA.No.1515/2005.

IA.No.67/2015(of the defendant No.1 u/O 39 Rule 1-A CPC)

32. Defendant No.1 Mr. Ashok Kapoor by this application seeks a direction to the plaintiff to submit the original title documents of property No.32, Golf Links, New Delhi and to restrain the plaintiff from creating a third party right during the pendency of the suit.

33. The need for considering this application will also arise if IA.No.1515/2005 is dismissed and suit is to proceed.

IA.No.1515/2005(of the plaintiff and defendant No.1 Mr. Ashok Kapoor, Defendant No.5 Smt.Ambica Vij(wrongly mentioned in the title of the application as defendant No.3) and defendant No.7 Mr. Som Nath Vij)

34. The plaintiff had instituted the present suit, as aforesaid, for the relief of specific performance of the agreement to sell dated 2nd July, 2002 between the plaintiff and the defendant No.1 Mr. Ashok Kapoor whereunder the defendant No.1 Mr. Ashok Kapoor is claimed to have agreed to sell his 1/3rd undivided share in property No. 32, Golf Links, New Delhi to the plaintiff. Besides the said relief, the relief of restraining the defendant No.2 M/s Industrial Oxygen Co. Ltd. from handing over the possession of the first floor of the property to the defendant No.1 Mr. Ashok Kapoor and the relief of declaration that the arbitration award dated 28th October, 2002 and the judgment/decreed dated 13th December, 2002 in CS(OS) No.2187/1993 whereby the share of the defendant No.1 Mr. Ashok Kapoor in the property was reduced to 28% instead of 1/3rd, was also claimed.

35. The senior counsel for the plaintiff informs that the defendant No.2 M/s Industrial Oxygen Co. Ltd. was a tenant on the first floor of the property and has since vacated the premises and the keys of the portion of the first floor in the tenancy of the defendant No.2 M/s Industrial Oxygen Co. Ltd. are laying deposited in this Court and the said portion of the property is

custodia legis. It is also stated that the plaintiff on 13th December, 2012 has given up the relief of permanent injunction and declaration.

36. By this application-

- (i) defendant No.1 confirmed that he had received the entire sale consideration in terms of agreement to sell dated 2nd July, 2002 of Rs.1.25 crores from the plaintiff;
- (ii) it was agreed that the share of the defendant No.1 in the property as mentioned in the agreement to sell dated 2nd July, 2002 be read as 28% instead of 1/3rd and the sale consideration received be treated in lieu of the said 28% share in the property;
- (iii) the defendants No. 1 Mr. Ashok Kapoor, 5 Mrs. Ambica Vij and 7 Mr. Som Nath Vij withdrew all the allegations and objections in their written statement/s;
- (iv) the defendant No.5 Mrs. Ambica Vij agreed to settle all her disputes with the plaintiff with respect to her 22% share in the property and to file a compromise in connected suit CS(OS) No.554/2004;

- (v) the defendants No.1,5 and 7 gave their no objection to hand over physical possession of part of the first floor in *custodia legis* to the plaintiff;
- (vi) the defendants No.1, 5 and 7 agreed to execute documents for transfer of 28% share of the defendant No.1 Mr. Ashok Kapoor and 22% share of the defendant No.5 Mrs. Ambica Vij (which had also been agreed to be sold by the defendant No.5 to the plaintiff and for specific performance of which connected CS(OS) No.254/2003 is pending);
- (vii) the defendants No.1, 5 and 7 agreed not to create any impediment to the transfer of title of the property in favour of the plaintiff;
- (viii) the defendant No.7 Mr. Som Nath Vij confirmed that power of attorney executed by defendant No.1 Mr. Ashok Kapoor in his favour was subsisting;
- (ix) the plaintiff and defendant No.1, 5 and 7 sought recording of the said compromise.

37. The aforesaid application is signed on behalf of the plaintiff and by defendant No.7 Mr. Som Nath Vij as attorney of defendant No.1 Mr. Ashok

Kapoor and by one Mr. K.C. Vij as attorney of the defendant No.5 Mrs. Ambica Vij and is supported by the affidavits of the said persons.

38. On enquiry it is informed that Mr. K.C. Vij who has signed as attorney of the defendant No.5 Mrs. Ambica Vij is the father in law and power of attorney holder of the defendant No.5 Mrs. Ambica Vij.

39. On further enquiry it is informed that defendant No.7 Mr. Som Nath Vij is not related to the defendant No.1 Mr. Ashok Kapoor or to the aforesaid Mr.K.C. Vij but was the arbitrator who had rendered the arbitral award dated 28th October, 2002 supra.

40. The counsel for the defendants No. 4(A) to (D) Mrs. Alaka Kapoor and her children and 5 Mrs. Ambica Vij and the counsel for the defendant No.1 Mr. Ashok Kapoor on enquiry state that Mr. Som Nath Vij is a person of their community and was as such known to the said defendants.

41. Though the proviso to Order XXIII Rule 3 of CPC requires that where it is alleged by one party and denied by the other that an adjustment or settlement has been arrived at, the Court shall decide the question and no adjournment shall be granted for the purpose of deciding the question unless the Court for reasons to be recorded thinks fit to grant adjournment but this

application for recording compromise arrived at between plaintiff on one hand and defendants No.1,5 &7 on the other hand has remained pending for the last nearly eleven years.

42. The counsel for the defendant No.1 Mr. Ashok Kapoor has objected to the compromise being recorded and the suit being disposed of in terms thereof on the grounds:-

- i. That defendant No.7 Mr. Som Nath Vij who has signed the said application as the attorney of the defendant No.1 Mr. Ashok Kapoor had no authority to do so.
- ii. That though the defendant No.7 Mr. Som Nath Vij as arbitrator had rendered the arbitration award but even under the award he had no such authority.
- iii. That as per the said award, the property was agreed to be sold and 10% of the sale proceeds after meeting all the outgoings were agreed to be given to a charitable trust and the balance sale proceeds were agreed to be shared by the parties with the share of the defendant No.1 being 28% therein – thus the 28% share

of the defendant No.1 is not out of 100% but out of 100% minus 10%.

43. I have enquired from the counsel for the defendant No.1 Ashok Kapoor whether the agreement to sell dated 2nd July, 2002 seeking specific performance of which the suit was filed was signed by the defendant No.1 himself or by defendant No.7 Mr. Som Nath Vij on his behalf.

44. The counsel for the defendant No.1 Mr. Ashok Kapoor states that the agreement to sell was signed by the defendant No.1 himself but under duress.

45. On further enquiry as to what was the duress, it is informed that another family member Mr. Ajay Kapoor who was in possession of a part of the property though not having any share therein purported to be agree to sell his share to the plaintiff and had handed over possession of the portion of the property in his occupation to the plaintiff and which had resulted in the plaintiff having presence in the property causing disturbance to the defendant No.1 Mr. Ashok Kapoor and his family residing in the property and which harassment constituted duress under which the defendant No.1 Mr. Ashok Kapoor signed the agreement to sell dated 2nd July, 2002 in favour of the plaintiff with respect to his share in the property.

46. On further enquiry it is informed by the defendant No.1 Mr. Ashok Kapoor personally present in Court that he is now 53 years old and presently has his own PR Services Company but was in the year 2002 employed with 'Integral P.R.' as a Director.

47. The defendant No.1 Mr. Ashok Kapoor present in Court on enquiry, whether he had received any part of the agreed sale consideration of Rs.1.25 crores reflected in the agreement to sell dated 2nd July, 2002 at the time of signing thereof, states that out of agreed sale consideration of Rs.1.25 crores he had received Rs.1.10 crores before signing of the agreement to sell. He however states that the balance Rs.15 lakhs has never been received by him.

48. The senior counsel for the plaintiff states that the defendant No.1 Mr. Ashok Kapoor has filed an affidavit in this Court confirming receipt of the entire sale consideration of Rs.1.25 crores.

49. The counsel for the defendant No.1 Mr. Ashok Kapoor though does not dispute the affidavit but states that the same was signed under misguidance from the defendant No.7 Mr. Som Nath Vij.

50. On further inquiry whether defendant No.7 Mr. Som Nath Vij had acted as the attorney of the defendant No.1 Mr. Ashok Kapoor prior to

signing this application i.e. IA No.1515/2005 on behalf of defendant No.1 Mr. Ashok Kapoor, it is stated that the written statement of the defendant No.1 Mr. Ashok Kapoor in the suit was also signed by the defendant No.7 Mr. Som Nath Vij as an attorney of the defendant No.1 Mr. Ashok Kapoor.

51. On enquiry whether any FIR has been lodged against the defendant No.7 Mr. Som Nath Vij, it is stated that in December, 2015 a complaint to the police has been filed against defendant No.7 and a complaint has been filed with the Bar Council against Mr. Baldev Krishan who was engaged by defendant No.7 and who appeared on behalf of the defendant No.1 Mr. Ashok Kapoor.

52. Mr. Baldev Krishan, Advocate present in Court states that Mr. Som Nath Vij was the general attorney of the defendant No.1 Mr. Ashok Kapoor as per General Power Attorney dated 10th December, 2002.

53. A perusal of power of attorney dated 10th December, 2002 shows the same to be a registered one and empowered defendant No.7 Som Nath Vij to do all acts on behalf of the defendant No.1 with respect to the property.

54. The counsel for the defendant No.1 Mr. Ashok Kapoor does not controvert execution of the power of attorney but states that the same was only in the context of the recitals thereof.

55. However on enquiry as to, if that was so, why did the defendant No.1 after receipt of summons of the suit allow the defendant No.7 to sign the written statement in this suit as his attorney, the counsel for the defendant No.1 states that the fraud has come to light only now.

56. The said explanation does not answer the query.

57. The senior counsel for the plaintiff also states that the defendant No.1 Mr. Ashok Kapoor had earlier filed IA.No.818/2006 for setting aside of the compromise contained in this application (IA No.1515/2005) on the same grounds as are being urged herein and which application was dismissed on 13th December, 2012.

58. A perusal of the order dated 13th December, 2012 *inter alia* shows that upon the defendant No.1 Mr. Ashok Kapoor challenging the compromise, this Court vide order dated 16th March, 2007 directed the defendant No.1 Mr. Ashok Kapoor to deposit the sum of Rs.1.25 crores received by him in this Court as a pre-requisite to the consideration of the challenge and the

application was dismissed owing to the defendant No.1 Mr. Ashok Kapoor having failed to deposit the said amount of Rs.1.25 crores.

59. The senior counsel for the plaintiff rightly points out that the denial of the defendant No.1 Mr. Ashok Kapoor today of having received the entire sum of Rs.1.25 crores is also falsified from the direction to him to deposit Rs.1.25 crores in this Court.

60. The counsel for the defendant No.1 Mr. Ashok Kapoor on enquiry whether the defendant No.1 at that time said before the Court that he had received only Rs.1.10 crores and not the balance Rs.15 lakhs, states that defendant No.7 Mr. Som Nath Vij attorney was conducting the suit at that time and thus it remained to be so stated.

61. The senior counsel for the plaintiff also points out that it is recorded in para 10 of the order dated 13th December, 2012 that the defendant No.1 was personally present on that day.

62. There is no justification why the defendant No.1 Mr. Ashok Kapoor on that date did not take the stand of having received only Rs.1.10 crores and not Rs.1.25 crores.

63. It is the contention of the counsel for the defendant No.1 Mr. Ashok Kapoor that the said order dated 13th December, 2012 does not come in the way of the defendant No.1 today challenging the compromise contained in IA.No.1515/2005 because the said order is of dismissal of IA.No.818/2006 challenging the compromise on the ground of the defendant No.1 having failed to deposit the sum of Rs.1.25 crores in this Court and does not decide the challenge to the compromise on merits. He argues that he is thus entitled to challenge the compromise on merits today.

64. The aforesaid contention is noted to be rejected. The defendant No.1 Mr. Ashok Kapoor after having allowed the order of dismissal of IA.No.818/2006 challenging the compromise to have attained finality cannot be permitted to again challenge the same and thereby nullifying the order dated 13th December, 2012.

65. The principle of *res judicata* and constructive *res judicata*, which are applicable also to successive stages of the same proceeding, would squarely apply.

66. I have, speaking for the Division Bench of this Court in ***Rohit Shekhar Vs. Narayan Dutt Tiwari*** AIR 2012 Del. 151 [SLP(C) No.17622/2012 preferred whereagainst was disposed of vide order dated 24th

May, 2012 without disturbing the reasoning in the judgment of the Division Bench of this Court] held (i) that a plea which ought to have been taken at an earlier stage, if not taken then, was barred by the principles of constructive *res judicata*; (ii) relying on ***Satyadhyan Ghosal Vs. Deorajin Debi*** AIR 1960 SC 941 and ***Arjun Singh Vs. Mohindra Kumar*** AIR 1964 SC 993 that the principle of *res judicata* also applies between the two stages in the same litigation to the extent that the Court having at an earlier stage decided the matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage; (iii) relying on ***Y.B. Patil Vs. Y.L. Patil*** (1976) 4 SCC 66 that once an order made in course of a proceeding becomes final, it would be binding at subsequent stage of that proceeding; (iv) relying on ***Bhanu Kumar Jain Vs. Archana Kumar*** (2005) 1 SCC 787 that the principles of constructive *res judicata* also apply with full force at subsequent stage of the same proceedings; (v) relying on ***Ajay Mohan Vs. H.N. Rai*** (2008) 2 SCC 507 that a mere amendment of the plaint does not entitle the plaintiff to injunction under Order XXXIX, Rules 1 & 2 of the CPC which had been denied on an earlier occasion; (vi) that if such practices were to be permitted, it will have dangerous consequences; (vii) that if entire suit is not decided by the same Judge and if it were to be permissible for each successive Judge

presiding over a Court to take a different view, it will not only lead to the litigants and the counsels urging the same issues repeatedly each time on change of Roster but also be contrary to Rule of Law; (viii) relying on ***Swaran Singh Vs. Surinder Kumar*** 179 (2011) DLT 136 that even if the principles of *res judicata* were to be not attracted, the principle of issue estoppel precludes the Court from entertaining a second application (in that case under Order VII, Rule 11 of the CPC) based on the same factual matrix and no order negating and nullifying the previous order can be made on change of Roster; (ix) relying on ***Gajraj Vs. Sudha*** (1999) 3 SCC 109 that repeated applications for the same relief are not maintainable; (x) relying on ***Shimnit Utsch India Pvt. Ltd. Vs. West Bengal Transport Infrastructure Development Corporation Ltd.*** (2010) 6 SCC 303 that binding effect of an order passed by a Court of law is well settled; if an order has been passed by a Court which has jurisdiction to pass it, then the error or mistake in the order can be got corrected from a higher Court and not by ignoring the order or disobeying it expressly or impliedly; (xi) relying on Halsbury's Laws of England that the fact that an order ought not to have been made is not sufficient excuse for disobeying it and disobedience to it constitutes a contempt; (xii) that such action of a litigant is contumacious.

67. The counsel for the defendant No.1 Mr. Ashok Kapoor of course persists in contending that the fraud of the attorney was detected only in December, 2014.

68. The fact that the defendant No.1 Mr. Ashok Kapoor was present before this Court on 13th December, 2012 estops the defendant No.1 from taking any such plea.

69. I am even otherwise of the opinion that the grounds urged by the defendant No.1 Mr. Ashok Kapoor do not entitle him to renege from the compromise.

70. There is thus no merit in the challenge by the defendant No.1 Mr. Ashok Kapoor to the said application.

71. The counsel for the defendant No.5 Mrs. Ambica Vij states that her challenge to the compromise contained in IA.No.1515/2005 is to the extent that the same records the confirmation of the defendant No.5 also with respect to her agreement to sell which is the subject matter of other connected Suit No.554/2004 and on the ground that the application records delivery of possession and possession of the entire property could not have been given.

72. Though the application on behalf of the defendant no.5 Mrs. Ambica Vij is signed by her father in law whose authorization is not challenged but it is clarified that anything observed herein will not come in the way of this Court, viz-a-viz defendant No.5, considering the matter in connected CS(OS) No.554/2004 and shall not influence the consideration of the other suit on its own merits.

73. As far as the objection of the defendant No.4 Mrs. Alaka Kapoor is concerned, as aforesaid, nothing contained herein will affect the rights of the defendant No.4 which can be adjudicated in appropriate proceedings.

74. With the aforesaid, IA.No.1515/2005 is allowed.

75. The suit, insofar as for specific performance of the agreement to sell against the defendant No.1 Mr. Ashok Kapoor is decreed in terms of the compromise contained in this application which shall form part of the decree sheet.

76. Though the conduct of the defendant No.1 is found to be highly vexatious and dilatory and in fact it *prima facie* also appears that the defendant No.1 has been taking inconsistent stand from time to time and has abused the judicial process but I am refraining from initiating any

proceedings in this regarding against the defendant No.1 Mr. Ashok Kapoor or from imposing costs on the defendant No.1, in the hope that he will at least now see the light of the day.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J.

JULY 13, 2016

M/bs..