

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 276 OF 2016
WITH
CIVIL APPLICATION NO. 564 OF 2016
IN
APPEAL FROM ORDER NO. 276 OF 2016

Smt. Kalpana Kapurchand Barlota (Jain) .. Appellant

vs.

Smt. Bharati Jinendrakumar
Diwakar & Anr.

.. Respondents

Mr. Bhavin Gada I/b. Mr. I. S. Yadav for Appellant.

Mr. Shirish Joshi with Ms Bhakti Jugal and Mr. Swapan
Samdani i/b. for Respondents.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 06 April 2017

Date of Pronouncing the Judgment : 18 April 2017

JUDGMENT :-

1] Heard Mr. Gada for the appellant and Mr. Joshi for the respondents.

2] With the consent and at the request of learned counsel for the parties, the appeal is taken up for final disposal.

3] The appellant, who is original defendant in suit no. 721 of 1996 challenges the order dated 12 December 2015, by which, learned trial Judge has taken on record the consent terms signed by the parties and disposed of the suit in accordance thereof.

4] Mr. Gada, learned counsel for the appellant, has made the following submissions in support of this Appeal :

(A) The impugned order is in breach of Order XXIII Rule 3 of the CPC, in as much as there was no material on record to record satisfaction that the suit has been adjusted wholly or in part. He submits that the dispute between the parties also includes certain shop no. 2, which however, finds no reference in the consent terms, on basis of which the impugned order has been made;

(B) The consent terms on basis of which the impugned order has been made were signed by the parties on 13 November 2009. On this date, the *status quo* order issued by this Court in writ petition no. 7716 of 2003 was very much in operation. The very signing and execution of the consent terms by the appellant, was in breach of such *status quo* order. The consent terms in such a situation, could not have been regarded '*lawful*'. The term of '*lawful*' as it appears in Order XXIII Rule 3 of the CPC is required to be widely construed. Any agreement or compromise, which is in defiance of a *status quo* order made by this Court, could never have been regarded as a lawful agreement or compromise. In as much as, this aspect has not been appreciated by the learned trial Judge, the impugned order taking on record such consent terms disposing of the suit on the basis

thereof is clearly illegal and warrants interference. In this regard, reliance was placed upon the decision of the **Anand Mahadeo Godbole vs. Achut Ganesh Godbole & Ors.**¹, **Jethalal C. Thakkar vs. Lalbhai Hirall Shah**² and **Arjan Singh vs. Punit Ahluwalia & Ors.**³ ;

(C) The consent terms referred to and concerned a third party i.e. Mr. Diwakar Dwivedi. Such consent terms could not have been taken on record without impleading the said Dwivedi. It was submitted that in the consent terms, which affected the rights of third parties can never be accepted and the decree made on the basis thereof. Reliance was placed upon the decision of Calcutta High Court in the case of **Dooly Chand Srimaly vs. Mohanlal Srimali & Anr.**⁴ and the Bombay High Court in **Re: Kelly and Henderson P. Ltd. L. Jai Kulbir Singh & Anr. vs. Kelly and Henderson Pvt. Ltd.**⁵

(D) The evidence on record bears out that disputes have broken out between Dwivedi, who was supposed to be the assignee of the respondent - plaintiff and the respondent. There is some material on record which suggests that even the cheques issued have since been dishonoured. In these circumstances, it is submitted that

1 AIR 1981 Bom. 357

2 LXXXVI The Bombay Law Reporter 10

3 (2008) 8 SCC 348

4 AIR 1924 Cal. 722

5 [1980]50 Company Cases 646 (Bom)

the consent terms should not have been taken on record and acted upon. In any case, it is submitted that consequent decree will be either inexecutable or in any case, will not adjust or settle either wholly or part the disputes between the parties. He submitted that there is yet another suit instituted by the appellant seeking for certain declarations and cancellation in respect of the original agreement, which is the genesis for the present suit, which has since been disposed of by the impugned order. All this, according to the learned counsel, is sufficient to conclude that there is no genuine settlement, adjustment or compromise between the parties.

(E) The consent terms work out serious injustice to the appellant/ defendant. The appellant/ defendant has received only an amount of Rs.12 Lakhs in pursuance of the consent terms, whereas, the price of the suit flat, which is now required to be made over to the respondents or to the respondents assignees, is substantially high. He submits that it is the duty of the Court to ensure that the consent terms do not work out grave injustice to any one party and if that do work out injustice, then, not to accept such consent terms and dispose of the suit on basis thereof. It is submitted that the Court not only has inherent power to go into the

issue as to whether the consent terms are just and equitable or not but further, there is a duty enjoined upon the court to go into this aspect, before, such consent terms are taken on record and acted upon.

5] Mr. Joshi, the learned Counsel for the respondent - original plaintiff in the suit, submits that the present appeal is a clear abuse of the judicial process. He submits that the appellant, on the basis of consent terms dated 13/11/2009, has not only received and retained an amount of Rs.12 Lakhs, but further, has continued in occupation of the suit premises for the last 8 years, despite having consented to convey and part possession of the same to the respondents. He submits that the appellant signed the consent terms quite willingly and there is not even any allegation of coercion, undue influence, fraud, mistake or misrepresentation. Upon realisation that there was a status-quo order in operation, the consent terms were not even presented to the Court. It is only the status-quo order was vacated on 21/03/2011 that a motion was taken up to take on record the consent terms some time in April, 2012. At the stage when the consent terms tendered and ultimately accepted, there was no status-quo order in operation, which disabled any of the parties from requesting the learned Trial Judge to act on basis of such consent terms. Mr. Joshi further points out that the dispute in suit no.721/1996 has no nexus

whatsoever with the dispute in respect of shop no.2. He points out that Dwivedi is not bound to do anything under the consent terms and, therefore, there was no question of his impleadment. He points out that due to the conduct of the appellant, it is the respondent, who suffered and is suffering injustice. For all these reasons, he submits that this petition may be dismissed with exemplary costs.

6] The rival contentions now fall for determination.

7] The dispute between the parties concerns suit flat no. 2, Ground Floor, Plot No.311, Sher-E-Punjab, Shobhana Cooperative Housing Society, Mahakali Caves Road, Andheri (West), Mumbai-400 093(suit premises). The respondents - plaintiffs have alleged that the suit premises were divided in two parts by temporary wooden partition. One part was in occupation of the licensee of the appellant i.e. Kamladevi Jain and the other part was in occupation of the respondent. In the plaint it is alleged that the appellant trespassed into the portion of the suit premises occupied by the respondents by illegally breaking the locks of the door. On this basis, the respondents instituted suit no. 721 of 1996 seeking restoration of possession and other consequential reliefs.

8] There was a parallel dispute between the appellant and

Smt. Kamladevi Jain in respect of the half portion of the suit premises. This resulted in institution of writ petition no. 7716 of 2003 by Kamladevi's son Shri Prakash Jain. On 1 March 2004, this Court ordered '*status quo*' in respect of the portion of the suit premises, which formed the subject matter of the said writ petition. On or about 30 October 2009, settlement was recorded between the appellant and Prem Prakash Jain, in terms of which , the appellant undertook to pay an amount of Rs.1,30,000/- to said Mr. Jain. An amount of Rs.1 lakh was actually paid to Mr. Jain and the balance was to be paid upon Mr. Jain withdrawing the writ petition. There was some delay in payment of the balance amount and consequently withdrawal of the writ petition no. 7716 of 2003.

9] In the meanwhile, on 13 November 2009 i.e. after a period of hardly 13 days from the date the appellant settled the dispute with Mr. Jain, the appellant and the respondent signed minutes of consent, on basis of which, they proposed that Suit No. 721 of 1996 could be disposed of. Such consent terms, have been signed by not only the appellant and the respondents but also their respective Advocates. It is pertinent to note that it is not even the case of the appellant that such consent terms were signed by the appellant unwillingly or without understanding their scope and import. There is not even any allegation that said consent terms were signed by the appellant whilst reeling

under any misrepresentation, undue influence, coercion , mistake or any such matter.

10] Although, the consent terms were signed by the parties and their Advocates on 13 November 2009, the same were not immediately presented to the court for issuance of the consent decree on the basis of the same. There is merit in the submission of Mr. Joshi, learned counsel for the respondent that this was not done precisely because the *status quo* order issued by this Court on 1 March 2004 in writ petition no. 7716 of 2003 instituted by the Jains against the appellant, was still in operation. From the material on record, it is clear that the consent terms were signed and executed on 13 November 2009, since, hardly 13 days earlier i.e. on 30 October 2009, the appellant, had virtually settled the dispute with Mr. Jain and all that remained to be done was payment of balance settlement amount of Rs.30,000/- by the appellant and the withdrawal of writ petition no. 7716 of 2003 by Mr. Jain. Ultimately, writ petition no. 7716 of 2003 was disposed of by this court on 21 March 2011. The *status quo* order made on 1 March 2004 was specifically vacated by the said order.

11] Upon vacation of the *status quo* order, the respondent - plaintiff, in April 2012, took out a notice of motion, enclosing along with the consent terms dated 13 November 2009 and

applied for the issue of consent decree on the basis of the same. In the meanwhile on account of changes in pecuniary jurisdiction, the matter was transferred to the City Civil Court, Mumbai. Initially, the appellant, in the replies filed to the notice of motion did not raise any of the objections, which are now raised in the present appeal. However, in installments, such objections were raised. Considerable time was spent in leading evidence, mostly upon irrelevant matters. The City Civil Court by order dated 27 October 2014 however dismissed the respondents notice of motion. Against such dismissal, the respondents filed writ petition no. 502 of 2015, which was converted into civil revision application no. 583 of 2015. By order dated 16 October 2015, the order made by the City Civil Court was set aside and the matter was remanded to the City Civil Court for fresh disposal of the notice of motion having regard to the provisions of Order XXIII Rule 3 of CPC. The City Civil Court, upon consideration of the matter afresh, has made the impugned order dated 12 December 2015, taking on record the consent terms and issuing a consent decree in terms thereof.

12] Now we are only concerned with the suit premises i.e. flat no.2. The suit and the appeal have no nexus with the disputes, if any, concerning shop no.2. Therefore, there is no merit in the first contention of Mr. Gada that the disputes between the

parties, have not been adjusted wholly and, therefore, the consent terms ought not to have been taken on record. Incidentally, Order XXIII, Rule 3 of C.P.C. contemplates adjustment in a suit either wholly or in part as well.

13] From the material on record, it does appear that the dispute in W.P.No.7716/2003 between Jains and the appellant was almost settled on 30/10/2009. The terms of settlement required the appellant to pay to Jain, a sum of Rs.1,30,000/-, pursuant to which, Jain had undertaken to withdraw the Writ Petition, which would naturally lead to dissolution of the status-quo order dated 01/03/2004. The appellant did pay a sum of Rs.1,00,000/- to Jain. It appears that there was some delay in payment of the balance amount of Rs.30,000/-, as a result of which, the W.P.No.7716/2003 was disposed of only on 21/03/2011. The order specifically records that the status-quo order dated 01/03/2004, stands vacated.

14] The consent terms between the appellant and respondent were signed and executed on 13/11/2009, obviously, in anticipation that W.P.No.7716/2003 would be soon withdrawn the status-quo order dated 01/03/2004, soon dissolve. However, upon realisation that the status-quo order is in operation, the parties refrained from presenting the consent terms to the learned Trial Judge for passing of the consent

decree on the basis thereof. It is only after the status-quo order was dissolved on 21/03/2011, that the notice of motion was taken up some time in April, 2012, to take the consent terms on record and make a consent decree on basis thereof. In these circumstances, there is really no merit in the second contention of Mr. Gada that the consent terms were "unlawful", since the same were in defiance of the status-quo order.

15] **Godbole** (supra) and **Jethalal** (supra) take the view that expression "not lawful" have a wide connotation and include cases, where the compromise suffers from want of authority or the exceeding of authority. As on the date of presentation of the consent terms before the learned Trial Judge, or on the date when the consent terms acted upon by the learned Trial Judge, there was no status-quo order in operation. This means that there was no illegality of whatsoever nature, which was attached to the consent terms. Therefore, even upon a wide connotation to the expression "not lawful" as it appears in Order XXIII, Rule 3 of C.P.C., it is not possible to accept the second contention of Mr. Gada. **Arjan Singh** (supra) was a case, where the Trial Court had accepted the terms during the subsistence of a restraint order by a Judicial Authority. Since such are not the facts in the present case, the decision in the case of **Arjan Singh** (supra) is clearly distinguishable. Further it is to be noted that acceptance of Mr. Gada's second

contention, would virtually amount to award of a premium to the appellant for what the appellant terms as his own unlawful act. The appellant, in this case, is bent upon indulging into the approbation and reprobation. The appellant has been far from candid to the judicial process. These are only an additional grounds to reject Mr. Gada's second contention in support of this appeal.

16] There is no merit in the third contention raised by Mr. Gada as well. From the perusal of the consent terms, it is clear that the suit flat had to be conveyed by the appellant to either the respondent or the respondent's assignee- Dwivedi. This is not a case where Dwivedi was required to do something under the consent terms. This was also not a case where the rights, if any, of Dwivedi, were proposed to be affected even in the slightest manner. In such a situation, there was no necessity to implead Dwivedi in the suit, before its disposal on basis of the consent terms. In **Dooly Chand** (supra), and in **Re: Kelly and Henderson P. Ltd.** (supra), the consent terms had affected the rights of the third parties and it is in this context that it was held that the consent terms, which affected the right of third parties, could not have been accepted, without impleadment of such third parties.

17] The so called subsequent disputes between Dwivedi and

the respondent, have no nexus with the issue of legality of the consent decree. Such disputes are quite irrelevant to such determination. In any case, the objections raised by Mr. Gada, on behalf of Dwivedi, are really objections, which may arise in the course of actual execution of the decree. Such objections, do not in any manner, affect the legality of the consent decree. Accordingly, there is no merit in the fourth contention of Mr. Gada.

18] This is certainly not a case, where the consent terms and the consent decree in pursuance thereof work out to some serious injustice to the appellant. The appellant, in the year 2009, signed and executed the consent terms quite willingly and in pursuance thereof, even accepted the amount of Rs.12 Lakhs. This is not a case where there is any inequality of bargaining power between the parties to the consent terms. This is purely a commercial transaction, which, both the parties had entered into, with their open eyes. The terms entered into between the parties, are by no means unconscionable. These are routine commercial terms in matters of this nature. As noted earlier, the appellant, even after accepting the amount of Rs.12 Lakhs under the consent terms, has resisted for all these years handing over of possession of the suit premises to the respondent. In such circumstances, the appellant, can hardly complain of any injustice. In fact, the record, to some extent,

bears out that it is the appellant, who has himself, acted unjustly in the matter. Accordingly, there is no merit in the fifth contention of Mr. Gada.

19] For the aforesaid reasons, this appeal is required to be dismissed and the same is hereby dismissed. The appellant, in the year 2009, settled the matter as evidenced by the consent terms. For reasons attributable to the appellant, the consent terms could not be filed on record until 2012. Thereafter, the appellant raised one objection after the other in instalments. The objections have been found to be meritless. On the basis of such objections, however, the appellant not only retained the amount of Rs.12 Lakhs received by her under the consent terms, but further, the appellant continued with the possession of the suit premises as well for all these years. In such a situation, the conduct of the appellant does sound in the arena of abuse of judicial process. This appeal is accordingly, required to be dismissed with exemplary costs, which are determined at Rs.50,000/-.

20] Accordingly, this appeal is dismissed with costs of Rs.50,000/-. The amount of costs to be paid or deposited by the appellant in this Court, within a period of four weeks from today. The interim relief, if any, is hereby vacated.

21] Civil Application No.564/2016 does not survive and is accordingly disposed of.

(M. S. SONAK, J.)

22] At this stage, Mr. Yadav applies for continuation of interim relief, which was in operation until the pronouncement of this judgment and order, for a further period of eight weeks from today. Since the interim relief was already in operation, the same is continued for a period of eight weeks from today. However, the appellant is also directed to maintain status-quo in respect of the suit premises and refrain from creating any third party rights or parting with the possession of the suit premises.

(M. S. SONAK, J.)

Chandka/SMA