IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 776 OF 2017

Mrs. Jyotsna Metha & Others ... Petitioners

Versus

M/s Anand Bose Construction
Pvt. Ltd. & Others ... Respondents

***

Shri Devang Metha, Petitioner No. 2 in person.

Shri Nitin Sardessai, Senior Advocate with Shri Gaurang Panandikar, Advocate for the Respondent No. 1.

Shri J. Dias, Advocate for the Respondent Nos. 2 and 3.

CORAM : C.V. BHADANG, J.

Reserved on : 23rd APRIL 2018

Pronounced on : 27th APRIL 2018

ORDER:

The challenge in this petition, under Article 227 of the Constitution of India, is to the order dated 01.03.2017, passed by the learned Senior Civil Judge at Vasco-da-Gama. By the said order, the learned Senior Civil Judge has dismissed Civil Miscellaneous Application No. 09/2016/A in Regular Civil Suit No. 38/2013/A, filed by the petitioners.

2. The brief facts necessary for the disposal of the petition may be stated thus:

That the petitioner no. 1, Mrs. Jyotsna Metha and her husband Pramodchandra Metha (since deceased) (vendors, for short), had entered into an agreement to sale their land being Plot No. 1, admeasuring 1,473 square metres (more specifically described in the plaint), in favour of the respondent no. 1, M/s Anand Bose Construction Private Limited, who are the Developers and Builders (developer, for short).

Under the said agreement, the developer was to develop the property by construction of various units. The consideration was to be partly monetary and partly in kind by giving built up area of 1,667.38 square metres on the various floors of the proposed building. The total units to be given to vendors were 47 units and car parking spaces. It is stated that out of 47 units, 5 units were reserved for accommodation of the tenants.

Clause 10 of the agreement required the vendors to execute the Power of Attorney in favour of the developer for restricted purpose. The Power of Attorney was accordingly executed in favour of Anand Chandra Bose, the Managing Director of the respondent no. 1, on 11.01.2010. The said Power of Attorney was in respect of the units other than, which were to be given to the vendors.

3. Pramod Metha passed away on 07.09.2010, leaving behind the petitioners as well as the respondent no. 2, Parag Metha and his wife, Charuta Metha, as the only legal representatives.

4. The vendors filed Regular Civil Suit No. 38/2013/A, purportedly, under Section 74 of Contract Act, seeking compensation for the alleged breach of the contract by the developer. The vendors relied upon clause 7 of the agreement where under, on failure on the part of the developer to hand over the possession of the premises, in accordance with clause 5, the developer was liable to pay to the vendors a compensation of Rs.2,000/- per month, per unit, from the date of the default, till the possession of the premises is handed over.

That during the pendency of the suit, the respondent nos. 2 and 3 were impleaded, as defendant nos. 2 and 3.

5. It appears that during pendency of the suit, the parties reached an amicable settlement and eventually, consent terms were filed in the civil suit. In the said terms, the respondent no. 1 was to pay an amount of Rs.13,22,309/- to the petitioner no. 1 and an amount of Rs.6,61,153/- to the petitioner no. 2, by way of compensation.

6. Clauses 4 to 7, which are relevant, for the purpose read as under:

> *"4. The defendant no. 1/ builder/ developer shall execute one or more deed of exchange of the units allotted to the plaintiffs as per the family settlement between the plaintiff and the defendant no. 2 and 3. The defendant nos. 2 and 3 shall join such deed of exchange as consenting party.*
>
> *5. The cost of executing exchange deeds like stamp duty, registration fee and advocates fee shall be borne by the plaintiffs to the extent of the units allotted to them.*
>
> *6. The defendant no. 1/ builder/ developer shall hand over the possession of the units allotted to the plaintiffs within 7 days complete in all respect with occupancy certificate and completion certificate from the concerned authorities.*
>
> *7. Upon the defendant no. 1 paying the agreed compensation as above and handing over of the possession of the units allotted to the plaintiffs and the execution of one ore more deeds of exchanges of the said units as per the requirement of the plaintiffs, the plaintiffs shall give a power of attorney in favour of defendant no. 2 i.e. Parag Metha as per the requirements of the defendant no. 1 at the cost of defendant no. 1 on the same day of signing of deed of exchange."*

7. The suit came to be decreed on the basis of the consent terms on 30.09.2014.

8. The respondent no. 1, filed Execution Application No. 32/2014/D, for execution of the consent decree. The respondent no.1 sought the following reliefs in the execution application.

> *"1. To direct the JD 1 & 2 to pay the cost of exchange deeds like stamp duty, registration fees & Advocate fees as per clause 5 of the consent decree.*
>
> *2. To direct the JD No. 1 & 2 to execute Power of Attorney in favour of Mr. Parag Metha as per the requirement of the defendant no. 1 at the cost of defendant no. 1 as per clause 7 of the consent decree.*
>
> *3. By attachment and sale of the properties belonging to Judgment Debtors 1 & 2."*

9. The petitioners/judgment debtors filed a reply objecting to the grant of the first prayer. The petitioners did not raise any objection, insofar as the second prayer is concerned, i.e. to execute the Power of Attorney in favour of Parag Metha, as per the requirement of the respondent no. 1 in terms of the consent decree. Insofar as prayer to grant cost of the exchange deed is concerned, it was contended that clause 4 of the consent terms was included by way of misconception of fact as the land belongs to the petitioners/judgment debtors and the respondent no. 1 was only permitted to erect a building on the said land.

10. The petitioners also filed an application under Section 47 of CPC, for rejection of execution case, the consent decree being null and void and inexecutable. In short, it was contended that the respondent no. 1 had no title or ownership on the land and as such, there was no question of respondent no. 1 executing an exchange deed, which is a "fallacy" according to the petitioners.

11. The Executing Court by an order dated 05.12.2015, dismissed the application *inter alia* on the ground that no appeal lies against the consent decree and the argument based on "fallacy" cannot be decided in an execution application.

12. Feeling aggrieved, the petitioners challenged the same before the learned District Judge, in Miscellaneous Civil Application No. 05/2016. The learned District Judge, by an order dated 21.06.2016, allowed the appeal, directing the Executing Court to conduct an inquiry in terms of Section 47 of CPC, in respect of the contentions raised in the application dated 17.03.2015 at Exhibit-10. The said application is pending before the Executing Court.

13. In the meantime, the petitioners filed a separate application being Civil Miscellaneous Application No. 9/2016 in Regular Civil Suit No. 38/2013, purportedly, under proviso to Order XXIII, Rule 3 of CPC. Similar contentions have been raised in the said application. It was contended that “heart of the consent terms” is the exchange of titles as envisaged in clause 7. It was contended that the judgment debtor along with the respondent nos. 2 and 3 were/are the title holders of the land and therefore, the respondent no. 1 had nothing to exchange. The petitioners prayed that the consent decree dated 30.09.2014 be declared as null and void and as such, is inexecutable. The said application was filed on 21.04.2016. The learned Senior Civil Judge at Vasco-da-Gama has dismissed the application by an order dated 01.03.2017, which is subject matter of challenge in this petition.

14. I have heard the petitioner no. 2, who appears in person. He also happens to be the Power of Attorney holder of the petitioner no. 1. I have also heard Shri Sardessai, the learned Senior Counsel for the respondent no. 1. The petitioners have also filed written submissions, along with list of reliance.

15. The petitioner no. 2 made the following submissions:

That the impugned order is cryptic and unreasoned. The learned Trial Court has failed to set out the facts and the points for determination and the order also lacks material reasons for rejecting the application. This according to the petitioner no. 2 is not permissible.

That, clause no. 4, requiring the respondent no. 1 to execute the exchange deed in respect of the units reserved for the purpose of the vendors was introduced by way of mistake/misconception of fact. It is submitted that the petitioners were/are the owners of the land, where the respondent no. 1 was permitted to effect the development, as such, there was no question of the respondent no. 1 executing the exchange deed in favour of the petitioners/ vendors.

It is submitted that thus, the consent decree is void and can be so declared under the proviso to Order 23, Rule 3 of CPC. It is submitted that Order 23, Rule 3-A of CPC specifically bars a suit to set aside a decree on the ground that the compromise on which the decree is based was not lawful. Thus, the only remedy is to file an application before the same Court, which passed the decree. It is thus submitted that the application is filed in the same suit in which, the decree was passed.

16. On behalf of the petitioners, reliance is placed on the decision of the Supreme Court in the case of **Banwari Lal Vs. Chando Devi (through LRs) & Another, (1993) 1 SCC 581**; **Pushpa Devi Bhagat (through LRs) Vs. Rajinder Singh & Others, (2006) 5 SCC 566** and **R. Rajanna Vs. S.R. Venkataswamy & Others, (2014) 15 SCC 471**. Reliance is also placed on the decisions of the various High Courts in the case of **Ram Chandra Misra & Others Vs. Ganesh Chandra Gang Padhya & Others, AIR 1917 Cal 786**, **M/s Kuldip Oil Industries Ltd. Vs. Ch. Pratap Singh, AIR 1959 All 505**, **Ram Lal Vs. Mustafabad Oil and Cotton Ginning Factory & Others, AIR 1968 P&H 399** and **Transport Corporation of India Ltd. Vs. Haryana State Industrial Development Corporation Ltd., AIR 1991 P&H 225**.

17. On the contrary, it is submitted by Shri Sardessai, the learned Senior Counsel for the respondent no. 1 that the proviso to Order 23, Rule 3 of CPC, is not attracted in this case, in as much as, the consent terms were recorded before the Court. It is submitted that the proviso to Order 23, Rule 3 of CPC, would apply to a case where the parties have reached a settlement out of the Court.

18. On behalf of the respondent no. 1, reliance is placed on the decision of the Supreme Court in the case of **Mahalaxmi Cooperative Housing Society Limited and Others Vs. Ashabhai Atmaram Patel (dead) thorough LRs and Others, (2013) 4 SCC 404** and in particular, para 40 thereof. He therefore submits that the application filed before the learned Senior Civil Judge is misconceived and is not maintainable in law. Shri Sardessai, the learned Counsel has pointed out that the petitioners have received the compensation as agreed in the consent terms and have also paid the service tax and have also complied with clause 3 of the consent terms and thus now, it would not be open to the petitioners to claim that the clause 4 of the consent terms, was introduced on account of mistake/ misconception of fact. It is submitted that although, the land is belonging to the petitioners, the building is constructed thereon by the respondent no. 1 and the consideration was to be partly paid in cash and partly in terms of exchange of 47 units and some parking spaces. It is submitted that the petitioners are trying to wriggle out of the consent term, which requires the petitioners to bear the expenses of exchange deed/s. It is submitted that the judgments cited on behalf of the petitioners are distinguishable.

19. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out.

20. There cannot be any manner of dispute with the proposition that a consent decree can be challenged by approaching the Court (which passed the decree), under the proviso to Order XXIII, Rule 3 of CPC. The Hon'ble Supreme Court in the case of **Pushpa Devi Bhagat** (supra) has summed up the position that emerges under the amended provisions of Order XXIII of CPC in para 17 as under:

> *"(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC.*
>
> *(ii) No appeal is maintainable against the order of the Court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) Rule 1 Order 43.*
>
> *(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3-A.*
>
> *(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the Court which passed the consent decree, by an order on an application under the proviso to Rule 3 Order 23.*

<u>Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise</u>. In that event, the Court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree, is nothing but contract between parties superimposed with the seal of approval of the Court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21.08.2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27.8.2001), filed an appeal and chose not to pursue the application filed before the Court which passed the consent decree. Such an appeal by second defendant was not maintainable, having regard to the express bar contained in section 96 (3) of the Code."

(Emphasis supplied)

21. A similar view has been reiterated in a subsequent decision in the case of **R. Rajanna** (supra). The Hon'ble Supreme Court has also brought out the distinction between the two parts of Order XXIII, Rule 3 of CPC and it has been held that the first part, requires the compromise to be in writing and to be signed by the parties. The same view has been expressed in the case of **Mahalaxmi Cooperative Housing Society Limited** (supra), relied upon by the learned Senior Counsel for the respondent no. 1. Thus, the principles in this regard are well settled. The question whether the consent decree needs to be set aside as been illegal, void and inexecutable, would however depend upon facts and circumstances of each case.

22. Coming to the present case, the contention raised on behalf of the petitioners, is that the land being owned by the petitioners, there was no question of any deed of exchange being executed by the parties. This is the solitary contention, on the basis of which, the petitioners approached the Court under the proviso to Order XXIII, Rule 3 of CPC. In my considered view, the said contention, cannot be accepted.

23. A perusal of agreement dated 11.01.2010, would show that the vendors had not contributed anything towards the

construction to be undertaken on the land. Thus, it can clearly be envisaged that while the land was owned by the petitioners, the superstructure was constructed by the respondent no. 1, out of his own funds. The consideration for the land was paid partly in cash and partly by handing over certain units. For this reason, it cannot be accepted that, because the land was belonging to the petitioners, there was no question of execution of an exchange deed in respect of certain tenaments/units, as has been agreed in the consent terms.

24. In the case of **Ram Chandra Misra** (supra), the contract was said to be made under a mutual mistake, as to the nature and extent of the vendor's title. In that case, the contract was to grant mining lease by Mogoli Brahmattardar, at a time when Brahmattardars generally were believed to own subsoil rights. As noticed earlier, whether, there is a mistake or misconception as to fact, mutual or others, would solely depend upon facts and circumstances of each case. In my considered view, the case of **Ram Chandra Misra** (supra), turned on its own facts.

25. In the case of **Ram Lal** (supra), a suit was filed for abatement of a continuing nuisance, caused by working of flour

mill, oil expellers, cotton ginning machine, power driven machine etc. The Trial Court found that no case for actionable nuisance was made out. However, on the second issue, the Trial Court found that the erection of the machinery was in contravention with Punjab Agricultural Produce Markets Act. The third issue was not pressed by the defendants and therefore, was decided against them. In view of the finding on the second issue, the suit came to be decreed, granting permanent injunction restraining the defendants from operating the disputed factory or from erecting any other power driven machinery. The first Appellate Court did not refer to the issue as to the existance or to the issue of continuing nuisance. It was in these circumstances found by the High Court that the Courts below did not touch upon the legal principles, which they were required to apply to the established facts of the case. It was found that the Courts did not consider the first issue, much less sift it. The High Court also found that there was sufficient credible material to support the plaintiff's case for actionable nuisance.

It can thus be seen that the case turned on its own facts.

26. In the case of **Transport Corporation of India Limited** (supra), the Haryana State Industrial Development

Corporation Limited (HSIDC) had filed a suit for mandatory injunction against the Transport Corporation of India (TCI) and during pendency of the suit, a compromise was arrived at between the parties and the suit was decreed in terms thereof. In terms of clause no. 2 of the consent terms, TCI was to take over the entire shareholding of HSIDC in Haryana Detergents Limited (HDL) at the face value plus interest, as agreed. Admittedly, TCI had paid a sum of Rs.6 lakhs to HSIDC, which was to be adjusted against the part of the sum payable as indicated in the schedule. Under the said agreement, HSIDC was to transfer 26% shares of HDL, which they were holding in favour of TCI. When HSIDC sought execution of decree against TCI, TCI filed an objection under Section 47, read with Order XXI, Rule 58 of CPC, regarding maintainability of the execution of the decree. The objection was dismissed by the Executing Court, which was subject matter of challenge in a civil revision application before the High Court. The High Court in the aforesaid circumstances found that the issue was linked with the execution, discharge or satisfaction of the decree as provided under Section 47 of CPC and it can be determined only by the Court executing the decree.

In the present case in hand, an application under Section 47 of CPC, filed by the petitioners is pending before the

Executing Court. The challenge in the present petition is to the order passed, rejecting the application, filed under the provisions of Order XXIII, Rule 3 of CPC.

27. In the case of **M/s Kuldip Oil Industries Limited** (supra), the challenge to the judgment and decree was on two counts. Firstly, it was submitted that the judgment did not fulfill the requirements of Order XX, Rule 4(2) of CPC, inasmuch as, it does not contain a concise statement of the case, the points for determination and the reasons for the decision. The second contention was that the order was passed on 02.10.1947, which was a holiday for the Civil Courts in the District of Dehra Dun. Here again, in the facts of that case, it was found that there was no discussion of any oral or documentary evidence, nor the conclusions drawn were supported by any reasoning whatsoever.

28. In the first place, it is necessary to note that what is challenged in this petition is an order and not a judgment on a full fledged trial. The sufficiency and the adequacy of reasons would also be peculiar to facts of each case. It is neither possible nor appropriate to prescribe any particular standard in this regard. It may be that the Trial Court would have done well to elaborate the matter in some greater details. However, the

fact remains that the ultimate order of dismissal of the application cannot be faulted, inasmuch as, the consent terms cannot be said to have been executed on any misconception of fact as claimed. For this reason, no case for interference is made out. The Writ Petition is accordingly dismissed with no order as to costs.

It is made clear that this Court has not expressed any opinion on the issue of executability of the decree, which is raised under Section 47 of CPC, which the Executing Court can independently go into and decide.

C.V. BHADANG, J.

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