

CR No.3157 of 2018(O&M)
Date of Decision: 18.08.2018

Versus

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Mr. Karthik K.R., Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. Petitioners have preferred this revision petition against the order dated 07.03.2018 passed by Civil Judge (Junior Division), Gurugram, whereby application filed by the petitioners under Order 23 Rule 3 read with Section 151 CPC was dismissed.

[2]. In the application under Order 23 Rule 3 read with Section 151 CPC, petitioners sought to challenge the order dated 24.09.2010 passed by Additional Civil Judge (Senior Division), Gurgaon, compromise deed dated 24.09.2010 and decree dated 08.02.2013 passed by the trial Court.

[3]. Plaintiff/respondent filed a civil suit for permanent injunction for restraining the defendants/petitioners from alienating the suit property which was subject matter of agreement to sell dated 20.11.2009 between the parties.

[4]. During pendency of the suit, a compromise was effected between the parties on 24.09.2010. In the said compromise, plaintiff Arun Sharma was referred to as first party, whereas defendants namely Rishi Raj Chauhan and Smt. Chander Bala was referred to as second party. The background in which the compromise was entered between the parties was that the defendants are owners in possession of House No.1094-A, Sector 17, Gurgaon on the basis of sale deed dated 03.11.2004. Agreements to sell dated 20.11.2009 and 07.12.2009 were executed between the plaintiff and the defendants, whereby defendants agreed to sell their house to the plaintiff for a consideration of Rs.90,00,000/-. The house was lying mortgaged with LIC Housing Finance Ltd. Defendants could not pay the outstanding dues towards loan and the interest of the said financial institution and thus could not obtain 'No Due Certificate' from the financial institution. Defendants could not obtain the transfer permission in respect of house from Haryana Urban Development Authority (HUDA) in favour of the plaintiff. Thereafter, parties went to approach the financial

institution with a request that the plaintiff is ready to furnish an undertaking that he will pay the loan amount at the time of execution and registration of the sale deed in his favour and the financial institution may take an affidavit from the plaintiff and issue letter to HUDA to that effect without prejudice to its rights qua the aforesaid house. The financial institution ultimately refused to accept the request of the parties. Plaintiff deposited an amount of Rs.45,00,000/- in the registry of the trial Court.

[5]. Plaintiff filed a suit for permanent injunction. A suit for specific performance was also filed which was got adjourned *sine die*. In the suit for permanent injunction, a compromise was effected between the parties on the following terms and conditions:-

“1. That out of the balance outstanding sale consideration of Rs.45,00,000/-, the First Party will pay off the entire outstanding dues of the aforesaid financial institution on the unambiguous understanding and assurance of the Second Party that simultaneous to the payment of the dues by the First Party, the Second Party will obtain the 'No Dues Certificate' from the said institution and will apply for Transfer Permission from H.U.D.A in favour of the First Party on the very same day.

2. That the Second Party will obtain Transfer Permission from HUDA within one week from the date

of submission of application and will hand over the same to the First Party immediately thereafter.

3. That thereafter, the First Party will get executed and registered the sale deed in respect of the aforesaid house from the Second Party in his favour and or in favour of his nominee.

4. That if the amount payable to the said institution is less than Rs.45,00,000/- then, after paying the dues of the said institution, the First Party will pay the remaining balance sale consideration to the Second Party; and if the said outstanding amount is more than Rs.45,00,000/- then the First Party will have the right to pay off the entire amount and recover the excess amount paid from the Second Party.

5. That if for any reason whatsoever, the Second Party fails to fulfill their obligations as contemplated in this compromise after the First Party has made payment of dues of the aforesaid financial institution, then the First Party shall have the right to get this compromise enforced through the process of law without prejudice to their right to resort to any other legal remedy as may be available to the First Party under the civil and criminal law, at the entire cost and consequences of the Second Party.”

[6]. On the basis of aforesaid compromise, both the parties appeared through their counsel before the trial Court and joint statement was made before the Court in the context of

compromise. Additional Civil Judge (Senior Division), Gurgaon passed the order dated 24.09.2010 to the following effect:-

*“Present: Mr. Anil Kumar Yadav, Adv. for the plaintiff.
Mr. Pradeep Yadav, Adv. for the defendants.*

File taken up today as an application on behalf of the defendants has been moved in this regard. Joint statement of the parties with respect to the fact of compromise of matter in dispute has been recorded. Compromise Ex.C1 has also been placed on the file on behalf of the parties. Thereafter, the plaintiff has requested that the present suit be decreed. In view of the statement so got recorded by the plaintiff, the present suit is accordingly disposed off being compromised. Compromise Ex.C1 has been made part of the file. File after due compliance be consigned to be record room.

(Narinder Kaur),
Addl. Civil Judge (Sr. Divn.)
Gurgaon: 24.09.2010.”

[7]. At the time of disposal of the suit on the basis of compromise, formal decree was not drawn. Thereafter, an application under Section 33 read with Sections 151,152, 153 CPC was moved by the decree holder for preparation of the compromise decree. The said application was allowed vide order dated 08.02.2013 and a consequent decree dated 08.02.2013 was drawn.

[8]. In the execution of the decree, defendant No.1 filed objections on 30.11.2013. *Inter alia* on the scope of execution of a decree passed in a suit for permanent injunction involving claim of specific performance, issue of Court fee was also highlighted. The execution of a decree passed in a suit for permanent injunction can only be executed in terms of Order 21 Rule 32 CPC. Defendant No.1 also alleged fraud at the instance of the plaintiff to the effect that a prudent person would not like to sell property worth crores of rupees for a throw away price of Rs.90,00,000/-. Defendant No.1 alleged that in order to grab the property of defendant No.1, the plaintiff got issued a notice from the income tax authority and under the threat perception, he hatched a conspiracy of occupying the house by fraudulent means. He further alleged that agreements to sell dated 20.11.2009, 07.12.2009 and supplementary agreement to sell dated 15.02.2010 were executed just to exploit the situation and friendly relations between the parties. Defendant No.1 further alleged that the plaintiff and defendant No.1 used to advance money orally in cash or cheque to each other, but the cheques issued to defendant No.1 by way of advance for the alleged purchase of house was in fact not credited in the account of defendant No.1. The amount of cheque of Rs.25,00,000/- was remained under custody and control of the plaintiff w.e.f. 07.12.2009 till 03.02.2010 when the same was deposited in the

account of defendant No.1 on 03.02.2010. Plaintiff himself had withdrawn the amount of Rs.25,00,000/- from the account of defendant No.1 on the same very day by two cheques in the sum of Rs.3,00,000/- and Rs.22,00,000/- respectively.

[9]. Defendant No.2 also filed objections against the execution on 28.01.2014. The objections filed by defendant No.2 were also in the same pith and substance in terms of fraud and inexecutability of the decree passed in a suit for permanent injunction.

[10]. The objections filed by defendants were contested by the plaintiff.

[11]. Executing Court vide order dated 09.07.2014 dismissed the objections. The said order was assailed by the defendants/petitioners in CR No.4703 of 2014. High Court considered the objections of the petitioners/judgment debtors and it was held that even if, the suit was for seeking a decree of permanent injunction, but in the compromise, if the liberty is given to the plaintiff to get the agreement to sell enforced by way of execution of sale deed against defendants/judgment debtors, the same is permissible keeping in view the provisions of Rule 3 Order 23 CPC. The Co-ordinate Bench after relying upon the ratio laid down in **Suraj Mal Vs. Shiv Lal and another, 2004(1) RCR (Civil) 410 (P&H), Vasudev Dhanjibhai**

Modi Vs. Rajabhai Abdul Rehman and others, 1970 AIR (SC)

1475 and other precedents held that even if, property not originally included in the plaint is made subject matter of the compromise between the parties, then the validity of decree passed on such compromise cannot be questioned in execution proceedings of such compromise, nor maintainability of such execution petition can be questioned. Executing Court is to execute the decree between the parties as it stands and is not supposed to go into the question as to which relief is sought by the plaintiff in the suit. Such decree is binding between the parties to the compromise. It was also held that plea of fraud is not available to the judgment debtor in execution of the decree. The Court also held that merely because during pendency of the suit for permanent injunction, another suit for specific performance had been filed and in the meanwhile, parties had settled the matter by way of compromise and liberty in terms of settlement was given to the decree holder, the same is permissible. The objections of the judgment debtors/petitioners were dismissed by the High Court vide order dated 18.02.2015.

[12]. Thereafter, an application under Order 23 Rule 3 read with Section 151 CPC came to be filed on behalf of the defendant/petitioner No.1. The instance of fraud with reference to the cheque amount of Rs.25,00,000/- was highlighted to the

effect that after credit of the cheque amount of Rs.25,00,000/- in the account of defendant No.1 on 03.02.2010, the amount was again debited to the credit of the plaintiff on the same day in the ratio of Rs.22,00,000/- and Rs.3,00,000/-. The said plea was sought to be explained by the plaintiff on the ground that on account of business transactions between the parties, the amount was debited from the account of defendant No.1 towards consultancy of the plaintiff. Both the parties were having cordial relations and often used to advance amount in cash or cheque to each other. Plaintiff and defendant No.1 were involved in real estate marketing and consultancy. Similar objections were raised by the defendants in the execution when the same were dismissed by the Executing Court vide order dated 09.07.2014, against which CR No.4703 of 2014 was filed and the same was also dismissed by the High Court on 18.02.2015.

[13]. Trial Court while taking cognizance of the application under Order 23 Rule 3 CPC referred to the conduct of the defendants in order to reject the contentions. Firstly, the same objections were taken on earlier occasion which ultimately stood culminated in dismissal by the Executing Court on 09.07.2014 and by the High Court on 18.02.2015 in CR No.4703 of 2014. Secondly, the allegations of the defendant/petitioner No.1 were

that an amount of Rs.25,00,000/- which was deposited vide cheque No.614959 dated 07.12.2009 was never received by defendant No.1 and was misused by the plaintiff, but the same was never complained by defendant No.1 before the police and any other authority. The amount of Rs.25,00,000/-was withdrawn from the account of defendant No.1 on 03.02.2010 by using blank cheque of defendant No.1 in possession of the plaintiff. Despite the aforesaid allegations, no complaint was filed by defendant No.1 even after passing of six years for the reasons best known to him. The filing of complaint after the aforesaid delay has its own background to cover the lacuna in the context of alleged cheating. The alleged cheating was never reported for about six years despite the knowledge of the fact with defendant No.1. This very objection was never pleaded before the Executing Court and was never argued before the High Court.

[14]. The document Ex.RW1/Q was written by defendant No.1 himself to the plaintiff. The aforesaid letter dated 17.12.2011 was in the context of apprising the plaintiff that the defendants did not want to adhere to the terms and conditions of the agreement to sell dated 07.12.2009 and the defendants offered to refund the amount of Rs.45,00,000/- towards earnest money. Even they issued cheques No.012021 and 012022

dated 28.09.2011 in discharge of their liabilities. The aforesaid conduct also demonstrated acknowledgement of the fact of the defendants that they had received part payment of Rs.45,00,000/- from the plaintiff. Even in the aforesaid communication, the factum of alleged fraud in the context of Rs.25,00,000/- viz-a-viz the credit and debit in the account of defendant No.1 on 03.02.2010 was not pleaded.

[15]. Taking into entirety of facts and circumstances of the case, I am of the view that the objections/grounds for being part of application under Order 23 Rule 3 read with Section 151 CPC have already been taken by the defendants before the Executing Court in the form of objections which were dismissed on 09.07.2014. Civil Revision i.e. CR No.4703 of 2014 against the said order was also dismissed by the High Court vide order dated 18.02.2015. In the objections filed before the Executing Court, these very objections were specifically taken. If the objections were not adverted to by the Court in the order, the same would not give any right to the defendants/petitioners to reagitate the same in the form of application under Order 23 Rule 3 read with Section 151 CPC. The plea raised by learned counsel for the petitioners on the basis of lease deed dated 08.11.2011 has no relevance in the present context.

[16]. In view of above, impugned order dated 07.03.2018

passed by Civil Judge (Junior Division), Gurugram is not found to be suffered with any error of jurisdiction, nor the same is found to be perverse on account of any misreading of facts on record. This revision petition is found to be totally devoid of merits and the same is accordingly dismissed.

August 18, 2018
Prince

(RAJ MOHAN SINGH)
JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No