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

+ RFA(OS) 8/2018

RAVI CHANDER SEITH

..... Appellant

Through: Mr.Pankaj Kumar, Advocate with
Mr.Prabhat Kumar, Advocate

versus

RAJESH CHANDER SEITH

..... Respondent

Through: Mr.Brajesh Kumar Srivastava,
Advocate with Mr.Deo Prakash
Sharma, Mr.Umesh Gupta, Advocates

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

% **27.08.2018**

CM No. 5001/2018 [for condonation of delay of 388 days in filing the RFA (OS)]

This is an application filed by the appellant-plaintiff seeking condonation of delay of 388 days in filing the appeal.

It is averred that the delay is primarily because, there is a challenge to the orders dated September 26, 2016 and November 24, 2017 and that the certified copies of order dated November 24, 2017 was applied for on

December 12, 2017 and was received on January 6, 2018. It is averred, that moreover, the appellant-plaintiff is suffering from the Cancer and was hospitalized.

Keeping in view the reasons stated in the application, the delay in filing the appeal is condoned.

Application stands disposed of.

RFA(OS) 8/2018

1. The challenge in the appeal is to two orders i.e. dated November 24, 2017 and September 26, 2016 in CS (OS) 403/2016. Vide the second order dated September 26, 2016, the learned Single Judge of this Court, in a suit filed by the appellant herein for partition, has, by recording the prayer made by the appellant (plaintiff in the suit), who was present in the Court in a wheel chair, decreed the suit. Even though, some other directions were also given, with which, this Court is not concerned in the present proceedings.

2. On November 7, 2016, an application was filed by the appellant-plaintiff under Order XXIII Rule 3 read with Section 151 of the Code of Civil Procedure to set aside the order and decree dated September 26, 2016. It was the case of the appellant-plaintiff that the decree was passed by the learned Single Judge as a result of fraud practised by the counsel, having no

power to enter into such compromise. It was averred that no such instructions were given to the counsel and the counsel had never asked for the consent of the plaintiff, effecting the partition by selling it. It was also averred in the application that the decree would lead to great hardship to the appellant-plaintiff as the decree and order talks about giving right to refusal to either parties. It was stated that the plaintiff is not in a position to give right to refusal to the other party as he was critically ill and wants to die in his own property as he has emotional attachment to the said place and moreover, he is not in a position to purchase the other 50% share in the property as he is cash strapped, having spent large sums on medical treatment, being suffering from Cancer. The said application being IA No. 13913/2016 was decided by the learned Single Judge on November 24, 2017. The learned Single Judge in para 4 (in IA No. 13913/2016) has concluded as under:

“4. I have heard learned counsel for the parties. The summons in the suit were issued on 12.08.2016 returnable on 26.09.2016. On 26.09.2016 when the matter had come up, a preliminary objection was raised by the defendant to the effect that the present suit was not maintainable and the same was not filed on instructions from the plaintiff as he was medically unfit and was not in a condition to express either orally or in writing. The Court has also recorded that “the plaintiff, who is present in Court in a wheel chair, along with his authorised representative, prays for a partition of the suit property”. The

order dated 26.09.2016 was passed in the presence of the plaintiff and his other close family members. It may also be noted that the matter was passed over once to enable the parties to discuss the matter with their families and their counsels. Thus, the grounds raised in the application are misplaced and misleading. The order dated 26.09.2016 was passed in the presence of the counsels for the parties and thus, in my view, no grounds are made out to entertain this application. I may also note that a practice to accuse counsel and shift the blame on them is fast gaining pace, which is highly unfortunate”.

3. It is the submission of the learned counsel for the appellant that when, on the basis of a compromise entered into between the parties, the suit is disposed of, it necessarily has to be in written and signed by the parties. He stated, after Order XXIII Rule 3 read with Section 151 CPC was amended in the year 1976, when the words “written and signed” were introduced, it left no scope of ambiguity, that a compromise cannot be recorded virtually without it being written and signed by the parties. He stated that the Court had overlooked the fact that neither the compromise was in writing nor it was signed by the parties. In fact, the counsel for the appellant-plaintiff in his email dated November 5, 2016, has stated that the wording in the order is not according to what the counsel and the appellant-plaintiff had submitted. He in fact, had stated that the appellant-plaintiff at the relevant point of time moved out of the Court. He would rely upon the judgments of the Supreme Court in the case of ***Gurpreet Singh Vs. Chatur Bhuj Goel (1988) 1 SCC***

270 and Commissioner of Income Tax, Madhya Pradesh and Bhopal Vs. Smt. Sodra Devi, AIR 1957 SC 832 in support of his contention that the suit can be compromised only when the same is in writing and signed by the parties.

4. On the other hand, learned counsel for the respondent has supported the impugned orders passed by the learned Single Judge. He states that the present appeal is nothing but an abuse of process of law and it was only an attempt to resile out of the decree. He states, the very fact that the appeal has been filed with the delay of 388 days, shows the seriousness of the appellant-plaintiff to pursue the remedy against the impugned orders. He would rely upon the judgments of the Supreme Court in the cases of *Jineshwardas (D) by LRs and Others Vs. Jagrani (Smt.) and Another (2003) 11 SCC 372*, *Bakshi Dev Raj (2) and Another Vs. Sudheer Kumar (2011) 8 SCC 679* and this Court in *Pankhuri Investments & Securities Limited & Ors. Vs. S.E.Investments 2018 (168) DRJ 525 (DB.)*

5. Having heard the learned counsel for the parties, in the first impugned order dated September 26, 2016, the learned Single Judge, has in clear terms (in para 3, though un-numbered) noted as under:-

“The plaintiff, who is present in Court in a wheel chair, along with his authorized representative, prays for a partition of the

suit property”.

6. From the above, it is clear that the appellant-plaintiff was present in the Court in a wheel chair along with his representative and has prayed for partition of the suit property. In the second impugned order dated November 24, 2017, the relevant part of which, has already been reproduced above, it is clear, the learned Single Judge has narrated the sequence of events that have taken place. It is important to note that the matter was passed over to enable the parties to discuss the matter with their families and with their counsels. It is in the second round, the order dated September 26, 2016 was passed. It also records that the other close family members of the appellant-plaintiff were also present. So, it is a case, where the appellant-plaintiff being present, has in unequivocal terms, made a statement that the partition be effected of the suit property.

7. Insofar as the judgments relied upon by the learned counsel for the appellant-plaintiff are concerned, in the case of ***Gurpreet Singh (supra)***, the Supreme Court in paras 9, 10 and 12 has held as under:

“9. According to the grammatical construction, the word 'or' makes the two conditions disjunctive. At first blush, the argument of the learned counsel appears to be plausible but that is of no avail. In our opinion, the present case clearly falls within the first part and not the second. We find no justification to confine the applicability of the first part of order XXIII, r. 3 of the Code to a compromise effected out of Court. Under the rule prior to the

amendment, the agreement com promising the suit could be written or oral and necessarily the Court had to enquire whether or not such compromise had been effected. It was open to the Court to decide the matter by taking evidence in the usual way or upon affidavits. The whole object of the amendment by adding the words 'in writing and signed by the parties' is to prevent false and frivolous pleas that a suit had been adjusted wholly or in part by any lawful agreement or compromise, with a view to protract or delay the proceedings in the suit.

10. Under Rule 3 as it now stands, when a claim in suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them. To constitute an adjustment, the agreement or compromise must itself be capable of being embodied in a decree. When the parties enter into a compromise during the hearing of a suit or appeal, there is no reason why the requirement that the compromise should be reduced in writing in the form of an instrument signed by the parties should be dispensed with. The Court must therefore insist upon the parties to reduce the terms into writing.

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12. In any event, the present case clearly does not come within the ambit of the second part of order XXIII, r. 3 [of the Code](#). Under the terms of the proposed compromise, the appellant was required to pay Rs.2,25,000 by a bank draft on March 17, 1987, but the fact remains that the respondent before the due date resiled from the proposed compromise saying that it was detrimental to his interest. That being so, the appellant could only fall back on the first part. But in the absence of an agreement in writing, the learned Judges had no other alternative but to direct that the appeal be listed for hearing on merits”.

8. Similarly, the reliance placed by the appellant-plaintiff in

Commissioner of Income Tax, Madhya Pradesh and Bhopal (supra), to contend that unless there is any such ambiguity, it would not be open to the Court to depart from the normal rule of construction which is that the intention of the Legislature should be primarily gathered from the words which are used.

9. Having noted the judgments relied upon by the learned counsel for the appellant-plaintiff, it is necessary to note the judgments as relied upon by the learned counsel for the respondent. In *Jineshwardas (D) by LRs and Others (supra)*, the Supreme Court was considering a case wherein, Jineshwardas, whose legal heirs are the appellants before the Supreme Court filed a Civil Suit No. 102-A of 1980 before the IVth Civil Judge, Class I, Jabalpur, seeking a decree for specific performance and recovery of the possession of the suit land or in the alternative, damages at market value as may be proved for non-performance of the contract and for recovery of Rs. 2500 paid by the plaintiff as deposit. The defendants therein disputed the suit claim by attributing fraud and undue influence as vitiating the agreement, stating that it was opposed to public policy as well and really constituted no agreement of sale of immovable property. After trial and on consideration of the materials on record, the suit filed was dismissed. The

matter was pursued on appeal before the VIth Additional District Judge, Jabalpur. After elaborate consideration of the evidence on record, the Appellate Court affirmed the findings of the learned Trial Judge by holding that the suit agreement cannot be considered as an agreement for sale of the land. The Appellate Court also noticed the specific fact that the father of the plaintiff was a practising advocate and it is in respect of certain amount spent for the litigation only, the agreement came to be executed and that it was merely an agreement to repay and not to convey the property itself. Aggrieved by the order, the matter was pursued before the High Court by means of second appeal. The second appeal was admitted on the following two question of law:-

“(1) Whether the courts below were in error in holding that the agreement dated 23.04.1963 (Ext.P-2) was not a genuine agreement to sell the property in suit and the same is not enforceable?”

(2) Whether the court below was right in non-suiting the plaintiff also on the ground of limitation?”

10. The second appeal came up for hearing before the Single Judge of the High Court when an order was passed noting the agreement of the counsel to settle the matter. The learned counsel for the respondents stated that the respondents would pay an amount of Rs. 25,000/- to the appellant within a

period of one month, otherwise, it will carry an interest @ 12% per annum from the date of the order i.e. September 26, 2003. In terms of this agreement, the appeal was decided and the judgment and decree passed below, was modified to the following extent:

“1. The respondents will pay Rs. 25,000/- to the appellants within a period of one month.

2. If this amount is not deposited in the court on or before 10-6-2002, the above amount will carry interest @ 12% per annum till its realization.

3. Cost of the litigation will be borne by both the parties”.

11. It appears that the appellants filed an application for review contending that the order dated May 9, 2002 disposing of the appeal is nothing but a compromise decree and since the compromise could, if at all, have been entered into only under Order 23 Rule 3 CPC, and the one in this case, has not been so entered into in writing and signed by the parties, the same was not to be made the basis for disposal of the appeal and submissions, if any, made by the counsel appearing for the appellants in the High Court were without any instructions of the appellants. The learned Judge, by an order dated July 15, 2002, rejected the review application observing that the aforesaid settlement was arrived at between the parties in the Court at the time of hearing and if the applicants are aggrieved, they may

take appropriate action under law but no case for review had been made out.

The Supreme Court in the appeal, while considering its judgments in the case of *Byram Pestonji Gariwala Vs. Union Bank of India* (1992) 1 SCC

31 and *Gurpreet Singh case* (*supra*), has, in paras 7 and 8 held as under:-

*“7. We have carefully considered the submissions of the learned counsel appearing on either side. Though in Gurpreet Singh case this Court explained the object and purport of **Rule 3 of Order 23 CPC**, by laying emphasis on the words “in writing and signed by parties”, to be necessitated in order to prevent false and frivolous pleas that a suit had been adjusted wholly or in part by any lawful agreement or compromise with a view to protract or delay the proceedings in the suit itself, it was also observed therein that as per **Rule 3 of Order 23 CPC**, when a claim in the suit has been adjusted wholly or in part by any lawful agreement or compromise, such compromise must be in writing and signed by the parties and there must be a complete agreement between them and that to constitute an adjustment, the agreement or compromise must itself be capable of being embodied in a decree. The fact that the parties entered into a compromise during the hearing of the suit or appeal was considered not to be sufficient to do away with the requirement of the said rule and that courts were expected to insist upon the parties to reduce the terms to writing. In Byram Pestonji Gariwala v. Union Bank of India 1992 1 SCC 31 this Court while adverting to the very amendment in 1976 to **Rule 3 of Order 23 CPC**, noticed also the effect necessarily to be given to **Rule 1 of Order 3 CPC**, as well and on an extensive review of the case-law on the subject of the right of the counsel engaged to act on behalf of the client observed as follows: (SCC pp. 47-48, paras 37-40)*

“37. We may, however, hasten to add that it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances demanding immediate adjustment of suit by agreement or

compromise and the signature of the party cannot be obtained without undue delay. In these days of easier and quicker communication, such contingency may seldom arise. A wise and careful counsel will no doubt arm himself in advance with the necessary authority expressed in writing to meet all such contingencies in order that neither his authority nor integrity is ever doubted. This essential precaution will safeguard the personal reputation of counsel as well as uphold the prestige and dignity of the legal profession.

*38. Considering the traditionally recognized role of counsel in the common law system, and the evil sought to be remedied by Parliament by the **CPC (Amendment) Act, 1976**, namely, attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties, and allowing the compromise decree to comprehend even matters falling outside the subject-matter of the suit, but relating to the parties, the legislature cannot, in the absence of express words to such effect, be presumed to have disallowed the parties to enter into a compromise by counsel in their cause or by their duly authorized agents. Any such presumption would be inconsistent with the legislative object of attaining quick reduction of arrears in court by elimination of uncertainties and enlargement of the scope of compromise.*

39. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorized representative. If a power-of-attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorization by vakalatnama, act on behalf of his client. Not to recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in court. If the

legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated.

*40. Accordingly, we are of the view that the words ‘in writing and signed by the parties’, inserted by the **CPC (Amendment) Act, 1976**, must necessarily mean, to borrow the language of **Order 3 Rule 1 CPC**:*

‘any appearance, application or act in or to any court, required or authorized by law to be made or done by a party in such court, may except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader, appearing, applying or acting as the case may be, on his behalf:

Provided that any such appearance shall, if the court so directs, be made by the party in person.’ ”

(emphasis in original)

8. We are in respectful agreement with the above statement of law. Consequently, it is not permissible for the appellant to contend to the contrary. That apart, we are also of the view that a judgment or decree passed as a result of consensus arrived at before court, cannot always be said to be one passed on compromise or settlement and adjustment. It may, at times, be also a judgment on admission, as in this case”.

12. As regards the case of **Bakshi Dev Raj (2) and Another (supra)**, the facts were, Sh. Harbans Lal, father of appellant No. 1, purchased the land in dispute measuring 40 kanals 4 marlas bearing Khasra No. 65 in Village Chak Gainda, Tehsil Kathua from one Gurdas by way of a registered sale deed dated March 18, 1959. The said land fell in Khasra No. 109/65 and the same was recorded in the name of the father of the appellant No. 1 and after his father’s death, the name of the appellant No. 1 was recorded from Kharif

1987. The plot of Sudheer Kumar, the respondent therein, was on the southern side of the land of the appellants. On April 29, 1991, the respondent therein filed a Civil Suit being No. 17/Civil/1991 in the Court of the Sub-Judge, Kathua seeking a declaratory decree to the effect that he is the owner and in possession of the suit land measuring and bounded by East Kathua Kalibari Road 90', West Police Line measuring 96', North Land of Bakshi Dev Raj (appellant No. 1) and South, Lane 460' situated at Ward No. 1, Village Chak Gainda, Tehsil Kathua and further sought decree for permanent injunction restraining the appellants therein in the suit land. On April 6, 1993, the appellants before the Supreme Court filed a joint written statement in the above civil suit. The Trial Court, vide judgment dated April 25, 2003, dismissed the suit filed by the respondent therein. Aggrieved by the said judgment, the respondent filed Civil First Appeal No. 6 in the Court of the District and Sessions Judge, Kathua. The first Appellate Court, vide judgment and decree dated June 9, 2005, set aside the judgment and order dated April 25, 2003, passed by the Trial Court and allowed the appeal in favour of the respondent. Challenging the same, the appellants filed Second Appeal No. 19 of 2005 before the High Court of Jammu and Kashmir. Vide judgment dated March 18, 2008, the second appeal was disposed of by the

High Court by modifying the decree with the consent of both the parties. Against the said order, a special leave petition bearing SLP(C) 10939 of 2008 was filed by the appellants before the Supreme Court and the same was dismissed as withdrawn. On May 21, 2008, the appellants filed a review petition before the High Court for review of the order dated March 18, 2008 passed in the second appeal. The learned Single Judge of the High Court dismissed the review petition by order dated September 08, 2008. Aggrieved by the final orders dated March 18, 2008 passed in the second appeal, and the order dated September 08, 2008 in the review petition, the appellants approached the Supreme Court the questions which came up for consideration were as under:

“i) Whether Review Petition (C) No. D-5/2008 filed before the High Court against the judgment in Second Appeal No. 19 of 2005 is maintainable in view of dismissal of SLP (C) No. 10939 of 2008 dated 14.05.2008 by this Court filed against the said Second Appeal?

ii) Whether the statement of the counsel conveying that the parties have settled and modified the decree without a written document or consent from the appellants is acceptable? and

iii) Whether dismissal of SLP as withdrawn without leave of the Court to challenge the impugned order therein before an appropriate court/forum is a bar for availing such remedy?”

13. On the issue No. 2, the Supreme Court, while referring to its judgments in ***Gurpreet Singh (supra)***, ***Byram Pestonji Gariwala (supra)***,

Pushpa Devi Bhagat Vs. Rajinder Singh (2006) 5 SCC 566, Jineshwardas (D) by LRs and Others (supra) and Jagtar Singh Vs. Pargat Singh (1996) 11 SCC 586, has in paras 30 to 32, held as under:

“30. The analysis of the above decisions make it clear that the counsel who was duly authorized by a party to appear by executing Vakalatnama and in terms of Order III Rule 4, empowers the counsel to continue on record until the proceedings in the suit are duly terminated. The counsel, therefore, has power to make a statement on instructions from the party to withdraw the appeal. In such circumstance, the counsel making a statement on instructions either for withdrawal of appeal or for modification of the decree is well within his competence and if really the counsel has not acted in the interest of the party or against the instructions of the party, the necessary remedy is elsewhere.

31. Though learned counsel for the appellant vehemently submitted that the statement of the counsel before the High Court during the course of hearing of Second Appeal No. 19 of 2005 was not based on any instructions, there is no such material to substantiate the same. No doubt, Mr. Garg has placed reliance on the fact that the first appellant was bedridden and hospitalized, hence, he could not send any instruction. According to him, the statement made before the

Court that too giving of certain rights cannot be sustained and beyond the power of the counsel.

*32. It is true that at the relevant time, namely, when the counsel made a statement during the course of hearing of second appeal one of the parties was ill and hospitalized. However, it is not in dispute that his son who was also a party before the High Court was very much available. Even otherwise, it is not in dispute that till filing of the review petition, the appellants did not question the conduct of their counsel in making such statement in the course of hearing of second appeal by writing a letter or by sending notice disputing the stand taken by their counsel. In the absence of such recourse or material in the light of the provisions of the CPC as discussed and interpreted by this Court, it cannot be construed that the counsel is debarred from making any statement on behalf of the parties. No doubt, as pointed out in *Byram Pestonji (supra)*, in order to safeguard the present reputation of the counsel and to uphold the prestige and dignity of legal profession, it is always desirable to get instructions in writing”.*

14. On a reading of the conclusion arrived at by the Supreme Court in ***Bakshi Dev Raj (2) and Another (supra)***, it is clear that the Supreme Court, after analysing all the judgments, has held that a counsel, who was duly authorized by the party to appear by executing the vakalatnama and in terms

of Order 3 Rule 4 CPC, is empowered to continue on record until the proceedings in the suit are duly terminated. It was held that the counsel has the power to make a statement on the instructions from a party to withdraw the appeal. In such a circumstance, the counsel making a statement on instructions, either for withdrawal of appeal or for modification of a decree, is well within his competence. It is also noted from the above that the appellant did not question the conduct of the counsel in making such a statement in the course of hearing of second appeal, by writing a letter or by sending the notice, disputing the stand taken by the counsel. In fact, it is noted by the Supreme Court that the son of one of the parties was present in the Court when the counsel made the statement.

15. In view of the above, the plea of the learned counsel for the appellant that a compromise could be arrived at only if it is in writing and signed by the parties, is a misconceived argument. Further, such an argument of the appellant is untenable as the case of the appellant before the Court below, was that no instructions were given to the counsel and the counsel never asked for the consent of the appellant-plaintiff regarding effecting the partition of the property by selling it. Even otherwise, such a stand, is contrary to what has been recorded by the learned Single Judge, which has

already been noted above. In fact, in reply to the application under Order XXIII Rule 3 CPC filed by the respondent, in para 3, it is averred as under:-

“.....It will be relevant to mention here that aforesaid order was passed by the Hon’ble Court in open Court and dictation was given in open Court in the present of the Appellant/Plaintiff, his son and his wife. Even at the time of dictation no voice was raised by the Appellant/Plaintiff, his son and his wife”.

16. So, it is clear, it was the appellant who had agreed for the compromise. The judgments relied upon by the counsel for the appellant in ***Gurpreet Singh (supra)*** and ***Smt. Sodra Devi (Supra)*** would be of no help to him in the facts of this case. It appears, the attempt of the appellant is to resile out of the order dated September 26, 2016. In view of the aforesaid discussion, we do not see any merit in the appeal. The same is dismissed.

CM No. 5000/2018 (for stay)

In view of the order passed in the appeal, the application is dismissed as infructuous.

CHIEF JUSTICE

V. KAMESWAR RAO, J

AUGUST 27, 2018/akb