

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

% **Date of decision: 7th May, 2019**

+ **EX.P. 42/2019, EA No.219/2019 (u/O XX R-6A CPC) & EA No.220/2019 (u/O XXXIX R-1&2 CPC)**

JAI DEV & ANR.

..... Decree Holders

Through: Mr. Abhishek Aggarwal, Adv.

Versus

JAI BALA MITTAL & ORS.

..... Judgement Debtors

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

EA No.221/2019 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

EX.P. 42/2019

3. Execution is sought of a decree in terms of order dated 14th September, 2018 in Test Case No.66/2016.
4. Ordinarily, in a Test Case, either an order of dismissal of the case or of allowing the case and granting letters of administration / probate can be made. However, as per the dicta of the Division Bench of this Court in *B.S. Oberoi Vs. P.S. Oberoi* 2013 SCC OnLine Del 616, and the dicta of Co-ordinate Benches of this Court in *Harinder Singh Kochar Vs. State* (2010) 173 DLT 365 and *Ambica Mengi Vs. State* MANU/DE/4557/2015, upon the parties to a Test Case being family members and agreeing on partition *inter se* of the property of the deceased, a Test Case is permitted to be converted into a suit for

partition and pursuant to such conversion, a decree of partition is permitted to be passed.

5. Though not clear from the documents placed on record but as per the order dated 14th September, 2018, the subject Test Case was filed for grant of probate of the document dated 10th December, 2006 claimed to be the Will of Late Sh. Raja Ram Singh.

6. The counsel for the decree-holders states that the decree-holder no.1 Jai Dev was the petitioner in the Test Case and the decree-holder no.2 Harsh Dev Gupta and the respondents no.1 and 2 namely Jai Bala Mittal and Sushila Gupta were the respondents in the Test Case and the Test Case was being contested.

7. The parties to the Test Case, along with the respondent no.3 Tamir Ahmed filed IA No.12458/2018 therein stating that the parties had settled the matter amicably and annexed to the application a Memorandum of Understanding (MOU) dated 8th September, 2018 signed by the parties. As per the said MOU, the decree-holders and the respondents no.1 and 2 agreed to sell the property of the deceased Raja Ram Singh and subject matter of the document claimed to be the Will, to the respondent no.3.

8. This Court vide order dated 14th September, 2018, without converting the Test Case into a suit of any nature, and merely recording that the MOU was taken on record, passed a decree in terms of paras no.1 to 17 of the MOU. The said order is as under:

“IA No.12458/2018

The petitioner has filed the petition under Section 276 of the Indian Succession Act for grant of probate of Late Sh.Rajan

Ram Singh dated 10.12.2006. During the course of the proceedings the parties have settled the matter amicably and have moved the above application. Along with the application they have also annexed Memorandum of Understanding ('MOU') dated 8th September, 2018 and submit that the parties shall be bound by the terms of MOU, more specifically, paras 1 to 17. Since they have agreed to dispose of this property to one Mr.Tamir Ahmad in terms of MOU. Mr.Tamir Ahmad has also filed an affidavit in support of such MOU. Since the agreement is lawful and without any coercion and the parties are agreeing voluntarily without any undue influence the MOU is taken on record. The suit of the plaintiff is decreed in terms of para 1 to 17 of the MOU. Decree sheet be prepared. The MOU shall form part of the decree.

*The petition stands disposed of along with pending applications.
The date before the Joint Registrar stands cancelled.*

9. This execution has been filed claiming that the respondent no.3 purchaser has not paid the balance sale consideration which he had agreed to pay, and seeking recovery thereof from respondent no.3 including by attachment of his properties.

10. There is no decree of specific performance in favour of the decree-holders and respondents no.1 and 2 and against the respondent no.3 which can be executed by this Court. All that happened vide order dated 14th September, 2018 was that this Court put its imprimatur on the agreement arrived at by the decree-holders and the

respondents no.1 and 2 on the one hand and respondent no.3 on the other hand, of sale of the property subject matter of the document claimed to be the Will of the deceased. The decree is akin to that of partition, of sale of the property and of distribution of sale proceeds between the decree holders and respondents no. 1 and 2 in the ratio agreed in the MOU. Merely because the respondent no.3 agreed to purchase the property and become party to the MOU, though not a party to the Test Case, would not entitle the decree holders to seek execution against the respondent no.3. At best, the decree holders, in execution, can compel sale of property. The MOU itself does not show any intention of the parties to obtain a decree for specific performance, in favour of the decree holders and respondents no. 1 and 2 and against the respondent no.3. Para 15 of the MOU in this context is as under:

“15. That it has been agreed between the parties that the parties will move an appropriate application before the Hon’ble High Court of Delhi in test case no. 66 of 2016 placing record the present MOU and seeking indulgence of the Court in passing a decree in the matter on the basis of the present settlement.”

If at all any disputes arise out of the said MOU, between the decree holders and respondent no.1 and 2 on the one hand and respondent no.3 on the other hand, the remedy is not by way of execution but of suing the respondent no.3 for the reliefs which the decree-holders may be entitled to. The MOU does not contain any stipulations of consequences of breach of any of the covenants by any of the parties

and which covenants at least had they been incorporated and a decree passed, would have bound the parties.

11. Supreme Court in *Bharat Dynamics Limited Vs. Khody Engineering Limited* (2010) 15 SCC 495 was concerned with a compromise arrived at in a simpliciter suit for injunction restraining the defendant from, without settling the dues of the plaintiff, engaging any other person or agency for completing the balance work under an agreement between the parties which was terminated by the defendant. The parties, in compromise agreed to take joint measurement of the works undertaken and material left, to enable preparation of final bills and settlement in accordance with terms of the agreement. A judgment and decree was passed in the suit in terms of the compromise, disposing of the suit as per terms and conditions of the compromise. The plaintiff sought execution by seeking recovery of the monies claimed by the plaintiff to be due. It was held, (i) a plain reading of the terms of the compromise showed that the compromise did not deal with a situation where, in the process of settlement there was a dispute between the parties and the clear implication was that if such a dispute arose, the same was to be determined either by mutual agreement or by way of independent suit; (ii) it could not be lost sight that the suit was for injunction simpliciter and there was no claim for money in the suit – this also showed that no money decree was being passed; (iii) however post measurement, disputes arose between the parties as to the amount payable; (iv) the compromise did not amount to an executable decree; (v) the compromise only was that the measurements were to be taken in the manner provided and final bills

to be prepared in accordance with the terms and conditions of the contract; (vi) the compromise did not deal with a situation of disputes between the parties as to the final amount due; and, (vii) thus there was no executable money decree and the executing court could not decide disputes not covered by the decree.

12. This Court, in *Atul Chopra Vs. Technotree Corporation* 2012 SCC OnLine Del 3446 was concerned with the execution of a compromise arrived at in a suit for declaration and injunction and in terms of which compromise, a decree was passed. It was held, (i) it is to be at the outset determined whether the compromise, in terms whereof a decree was passed, fully and finally resolved the dispute or the parties had entered into an arrangement entailing future obligations upon the parties; (ii) if the compromise entered into is found to be entailing future obligations upon the parties, then the executing court has to further examine whether the executing court can enforce such agreement by proceeding to insist upon compliance of the said obligations or whether the parties are to be relegated to a separate suit; (iii) if the intention is not to govern such obligations under the decree, the parties must be relegated to a separate suit; and, (iv) only if from a reading of the compromise the intent of the parties is found to be to govern their future obligations within the purview of the decree, does a execution lie.

13. I also entertain doubts that a decree for specific performance, as is sought to be executed directing the purchaser to purchase the property and / or of recovery of balance sale consideration from the

purchaser, can be passed. The only remedy of the decree-holders as sellers, for breach by the respondent no.3 of the agreement of purchase, would be to claim damages if any suffered. Reference in this regard may be made to *Vikas Goyal Vs. Yogesh Agarwal* 2015 SCC OnLine Del 10530 (SLP(C) No. 1694/2014 preferred whereagainst was dismissed vide order dated 20th July, 2015) and *Baldev Steel Vs. The Empire Dyeing and Manufacturing Co. Ltd.* AIR 2001 Del 391.

14. At the end, a word of caution to the litigants. The litigants, while entering into the settlement / compromise, should ensure that the settlement / compromise concludes the disputes and does not lead to further litigation. The law as opined above ought to have been considered by the parties and their counsels at the time of entering into the Settlement Agreement.

15. I may also state that from a reading of the documents placed on record, it transpires that a suit for partition of the property aforesaid was also pending between the decree-holders and the respondents no.1&2. Rather than obtaining a decree in the said suit for partition, the said suit for partition was withdrawn and the compromise as aforesaid recorded in the Test Case.

16. Dismissed.

RAJIV SAHAI ENDLAW, J

MAY 07, 2019

‘gsr’..