

\$~SB-1 (Single Bench)

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

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Date of decision: 11.10.2021

+ **RSA No.8/2021**

KAMLESH JHA

..... Appellant

Through : Mr. Kamlesh Kumar Mishra, Adv.
Mr. Alok Tripathi, Adv. [Engaged earlier
on behalf of the appellant]

versus

PRAVEEN KUMAR GUPTA

..... Respondent

Through : Mr. Avdhesh Kumar Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL):-

[Physical Court Hearing]

1. The aforesaid appeal was disposed of, *via* order dated 25.01.2021.

1.1 To be noted, on that date i.e., 25.01.2021, besides disposing of the appeal, based on the application moved by the appellant i.e., CM No.2595/2021, time was granted to him to pay the deficit court fee, as well. For this purpose, two weeks were granted. Importantly, the appeal has been listed thereafter only, for compliance.

1.2. It is relevant to note, at that juncture, i.e., when the appeal was disposed of, Mr. Alok Tripathi, Advocate, was representing the appellant.

2. On that date i.e., 25.01.2021, after some arguments, Mr. Tripathi, releasing that the appeal will be dismissed, sought disposal of the appeal by seeking extension of time for vacating the suit property. Counsel for the respondent i.e., Mr Avdhesh Kumar Singh agreed for grant of extension of time, provided other part of the impugned judgement and decree, concerning *mesne* profits, was not disturbed. These aspects are recorded in the order dated 25.01.2021. For the sake of convenience, the relevant part of the said order is

extracted hereafter:

“CM Nos.2592-94/2021

1. Allowed, subject to just exceptions.

CM No.2595/2021

2. Via this application, the appellant seeks extension of time to deposit the deficit court fees.

3. Mr. Alok Tripathi, who appears for the applicant/appellant, says that the deficit court fees will be deposited within two weeks from today.

4. The statement of Mr. Tripathi is taken on record.

5. The application is disposed of in terms of the statement made by Mr. Tripathi.

RSA No.8/2021 & CM No.2591/2021

6. After some arguments, Mr. Tripathi says that he does not wish to press the instant appeal any further provided that some time is granted for vacating the suit property. For the said purpose, Mr. Tripathi seeks time till 30.06.2021.

7. Mr. Avdhesh Kumar Singh, who appears for the respondent, says that he has filed a caveat on behalf of the respondent. The caveat is not found on record.

8. Notwithstanding that, Mr. Singh says that while the respondent would have no objection to the extension of time, being granted to the appellant, for vacating the suit property till 30.06.2021, the appellant should pay the arrears of mesne profit/damages @ 8,000/- per month, commencing from 04.05.2011, till the date of handing over of the possession of the suit property.

8.1 In other words, Mr. Singh says that if the appellant were to hand over the possession of the suit property on 30.06.2021, mesne profit/damages, at the rate ordered by the Trial Court, which was confirmed by the First Appellate Court, should be paid for the aforementioned period.

8.2 Mr. Tripathi says that he is agreeable to the aforesaid offer.

9. Accordingly, the impugned judgement dated 22.09.2020, passed by the Additional District Judge – 03, South East, Saket Courts, New Delhi is varied to the extent that the appellant will have time to hand over the possession of the suit property up until 30.06.2021

9.1 However, the directions contained in the judgement dated 01.05.2019, passed by Civil Judge-01 Saket Court, New Delhi, as confirmed by the First Appellate Court, vide judgement dated 22.09.2020, qua the payment of mesne profit/damages, shall stand confirmed.

9.2 The appellant will file an affidavit to the effect that he will hand over the suit property to the respondent on or before 30.06.2021. The said affidavit will be filed within two weeks from today.

9.3 It is made clear that in case the said affidavit is not filed, the instant appeal shall stand dismissed and the respondent will be free to prosecute the execution petition.

10. The captioned appeal is disposed of in the aforementioned terms.

11. Consequently, the pending application i.e. CM No.2591/2021 shall stand closed.

12. List the matter for compliance before this Court on 16.02.2021.”

2.1. As would be evident from the extract of the order dated 25.01.2021, the appellant was granted leeway, concerning handing over physical possession of the suit property to the respondent till 30.06.2021, provided he filed an affidavit, within two weeks from the date of the said order. Consequently, the interlocutory application for stay i.e., CM No.2591/2021 was closed. The appeal was, thereafter, posted on 16.02.2021, albeit, for compliance.

2.2. On 16.02.2021, it was pointed out to the court by Mr. Tripathi that, the appellant had not complied with the directions issued on 25.01.2021 i.e., neither had he filed an affidavit [as referred to hereinabove] nor had he paid the deficit court fee, as directed.

2.3. Significantly, on 16.02.2021, Mr. Tripathi submitted before the court that, the submissions made by him on 25.01.2021 to accord further time to the appellant to vacate the suit property and agreeing to the payment of arrears of mesne profits/damages @ Rs.8,000/- per month, as ordered by the trial court and confirmed by the First Appellate Court, were based on the instructions of the appellant. Having regard to the same, Mr. Tripathi was directed to file an affidavit, in that behalf, within five days from the date of the said order.

2.4. Unfortunately, on the next date of hearing i.e., 23.02.2021, Mr. Tripathi did not join the proceedings nor was the affidavit filed by him, as directed vide order dated 16.02.2021, available on record of this Court. Instead, on the said

date, another set of lawyers i.e., Mr. Bibhuti Bhushan Mishra and Ms. Shivalika, joined the proceedings on behalf of the appellant.

2.5. Given this position, court notice was issued to Mr. Tripathi. The matter was, then, directed to be listed before the court, on 12.03.2021. The note generated by the Registry on 09.03.2021 disclosed that, Mr. Tripathi had filed his affidavit on 16.02.2021, although, as adverted to hereinabove, it was not available on the case file on that date.

2.6. Subsequently, because of the change in roster, the concerned roster judge listed the matter before me, *via* order dated 19.03.2021. Consequently, the matter came up before me on 09.04.2021, when at the request of Mr. Kamlesh Kumar Mishra, who appears on behalf of the appellant, the matter was listed on 11.05.2021.

2.7. Interestingly, on 11.05.2021, Mr. Mishra was not present, although, Mr. Tripathi was present on account of court notice, being issued to him. Given this position, the proceedings were deferred, making it clear that, if the appellant or his counsel does not join the proceedings on the next date, appropriate orders would be passed.

2.8. Thereafter, the matter came up before me on 02.06.2021, when Mr. Mishra was present. The matter was deferred to 04.06.2021 to enable Mr. Mishra to revert with instructions. On 04.06.2021, the matter could not be heard, due to paucity of time. The matter was, then, directed to be listed on 12.08.2021.

2.9. On 12.08.2021, an adjournment slip was moved on behalf of Mr. Mishra. However, it was noted by me that, up until then, the *vakalatnama* of Mr. Mishra had not been placed on record. Mr. Mishra was directed to take steps, in that behalf. It is in this context that, the matter was directed to be listed on 07.10.2021.

3. It appears that, due to an inadvertent mistake on the part of the Registry, the matter was not listed on 07.10.2021, and that is how the matter has come up

today, before me, i.e., 11.10.2021.

3.1. I queried Mr. Mishra as to, whether deficit court fee had been paid. Mr. Mishra, candidly, admits that, the deficit court fee had not been paid. However, Mr. Mishra says that he has filed with the Registry—an application for recall of the order dated 25.01.2021, along with his *vakalatnama*; even though, the application is not placed before me, not today, at least.

3.2. It is pertinent to note that, the appellant has waited for nearly 9 months to file an application for recall of the order dated 25.01.2021, clearly with a view to stall the execution proceedings.

4. Given the history of the case and the fact that, the affidavit dated 16.02.2021 has been filed by Mr. Tripathi, it is clear that Mr. Tripathi acted in the best interest of the appellant on 25.01.2021, and sought time to vacate the suit property, realising that the appeal would be dismissed by the Court.

4.1. The affidavit filed by Mr. Tripathi, *inter alia*, reveals the following:

- (i) The appellant had duly executed the *vakalatnama* in favour of Mr. Tripathi.
- (ii) He had discussed the matter with the appellant, prior to the case being listed before this Court, and indicated to him that the appeal may not meet with success.
- (iii) After the appeal was disposed of on 25.01.2021, Mr. Tripathi had conveyed the result of the appeal to the appellant, through his daughter and his relative i.e., one Mr. Satish Kumar.
- (iv) Mr. Tripathi had also conveyed to the appellant's daughter and his relative, the directions contained in the order dated 25.01.2021, concerning the payment of deficit court fee and the requirement to file an affidavit of compliance, to enable him to remain in the occupation of the suit property, till 30.06.2021.
- (v) The appellant, after the order dated 25.01.2021 was passed, did not visit the office of Mr. Tripathi to enable him to file the undertaking in the form

of an affidavit, as directed by the Court. This impelled Mr. Tripathi to issue a letter dated 05.02.2021, to the appellant. Despite the said communication being issued, the appellant did not visit the office of Mr. Tripathi and take further steps in the matter.

(vi) On 16.02.2021, the appellant's wife [not the appellant for some strange reason] joined the court proceedings and made an allegation that, Mr. Tripathi had no instructions to make any statement(s) or submission(s) on behalf of the appellant, before this Court.

5. Having regard to the aforesaid position, in my view, nothing further needs to be done, insofar as this court is concerned.

5.1. In view of the fact that, the appellant has neither filed an affidavit of compliance nor paid the deficit court fee, the respondent hereon is left free to execute the judgment and decree dated 01.05.2019, passed by the Learned Civil Judge dated 01.05.2019, which has merged in the judgment dated 22.09.2020, passed by the Learned Additional District Judge. Consequently, the appeal shall stand dismissed, with liberty to the respondent to execute the impugned judgement and decree, in terms of paragraph 9.3 of the order 25.01.2021

5.2. It is unfortunate that, the appellant, having secured time from the court for vacation of the suit property, has taken, what can only be construed as a desperate step of acting against his own advocate i.e., Mr. Alok Tripathi.

5.3. All these months, as noticed above, the appellant failed to pay the court fee, although, an order was passed, to that effect, as far back as on 25.01.2021.

5.4. Therefore, the appellant does not deserve any leeway.

6. Before I conclude, it is important to emphasise that an advocate is an authorised agent of his client. His/her actions in the ordinary course would bind the litigant. Submissions made by an advocate in the course of hearing, in the best interest of his/her client cannot be brushed aside lightly, as such a practice, if accepted, would stymie the functioning of the courts.

6.1. It needs to be noticed that, Mr. Tripathi, via his *vakalatnama*, was given

express authority “**to withdraw or compromise**” the case. Furthermore, the appellant had also agreed “**to ratify and confirm all acts done**” by Mr. Tripathi, as if they were the appellant’s “**own acts**”, and to not hold Mr. Tripathi responsible for the result of the case.

6.2. These provisions in the *vakalatnama* have to be given weight, as otherwise it would expose the advocate to danger of being sued for professional negligence.

6.3. In this behalf, the observations of Ramaswami, J. in the case of *Govindammal v. Marimuthu Maistry & Ors.* AIR 1957 Mad 7, being apposite, are extracted hereafter:

“5. An examination of these authorities and extracts from standard publications on professional conduct, leads us to the following deductions: The decisions appear to be fairly clear that even in cases where there is no express authorization to enter into a compromise, under the inherent authority impliedly given to the Vakil he has power to enter into the compromise on behalf of his client. But in the present state of the clientele world and the position in which the Bar now finds itself and in the face of divided judicial authority and absence of statutory backing prudence dictates that unless express power is given in the vakalat itself to enter into compromise, in accordance with the general practice obtaining a special vakalat should be filed or the specific consent of the party to enter into the compromise should be obtained. If an endorsement is made on the plaint etc., it would be better to get the signature or the thumb impression of the party affixed thereto, making it evident that the party is aware of what is being done by the Vakil on his or her behalf.”

6.4 The judgment in the *Govindammal* case is cited with approval by the Supreme Court in the case of *Jamilabai Abdul Kadar vs. Shankarlal Gulabchand and Ors.*, (1975) 2 SCC 609. This was a case where a challenge was laid to a compromise, which was entered into on behalf of the tenant by his pleader. The Supreme Court, while ruling that the pleader had the same powers as are conferred on an advocate to represent his/her client under the Advocates Act, 1961, also held, after noticing several authorities, that compromise entered into, via the pleader in a given case without the specific consent of the client

would be sustained, subject to two overriding conditions:- first, he/she must act for the benefit of the client otherwise the power fails; and second, it is prudent and proper to consult the client and take his/her consent, if there is time and opportunity.

6.5. The Supreme Court also went on to hold in the abovementioned case that, in event of any instruction to the contrary or withdrawal of authority, the implicit power to compromise vested in the pleader/advocate, will dissolve.

6.6. As indicated above, Mr. Tripathi, to my mind, acted in good faith when the appeal was disposed of i.e., on 25.1.2021. Mr. Tripathi had, as is evident from his affidavit, explained to the appellant the possibility of success in the appeal.

6.7. Furthermore, as noticed hereinabove, this was a case where explicit authority was conferred on Mr. Tripathi, to withdraw or enter into a compromise on behalf of the appellant. The *vakalatnama* of Mr. Tripathi expressly indicates, as noticed above, that any such act would be ratified by the appellant.

6.8. Given the fact that, there was a likelihood of the appeal being rejected, and the looming possibility of the impugned judgment and decree being executed, Mr. Tripathi, at that juncture, acted in the interest of his client and sought extension of time for vacation of the suit property. Likewise, Mr. Avdhesh Kumar Singh, who appears on behalf of the respondent, perhaps acted in the interest of his client i.e., the respondent and agreed to time being granted for vacation, subject to the impugned judgment and decree not being disturbed, as regards the aspect concerning the payment of *mesne profits*.

6.9. Upon statement being made before the Court, as is evident, Mr. Singh gave up right to proceed with the execution of the decree and allowed time to the appellant to vacate the suit premises by 30.06.2021, provided he paid the *mesne profits*.

7. Therefore, to my mind, the circumstances obtaining in the present case

squarely fall within the test encapsulated by courts from time to time, with regard to the power of the advocate to act in the best interest of his client. In this context, a reference may also be made to the judgment of the Supreme Court in *Om Prakash vs. Suresh Kumar* (2020) 13 SCC 188 at page 194¹.

8. The case papers shall stand consigned to record.

RAJIV SHAKDHER, J

OCTOBER 11, 2021/aj

¹ “12. The moot question is : whether the appellant should be bound by the statement made by his counsel before the High Court that the respondent tenant will be re-inducted in equal area in the newly constructed building within one month i.e. on or before 30-11-2017 from the date of completion of the construction work i.e. 31-10-2017. From the tenor of the statement made before the High Court on behalf of the appellant, it is obvious that it is an unequivocal statement made by the counsel engaged by the appellant to espouse his (the appellant's) cause before the High Court. It is not the case of the appellant that he had expressly instructed his counsel not to make such a statement. Further, the statement was in respect of the commitment of the appellant qua the subject-matter of the proceedings in which the counsel was engaged and instructed to appear. Not only that, right from the beginning and even before this Court, an attempt was made by the parties to explore possibility of working out an amicable solution, as is evident from the order dated 9-1-2017 [*Om Prakash v. Suresh Kumar*, 2017 SCC OnLine SC 1955] before the respondent was put to notice of these appeals, and more particularly, dated 14-11-2017 [*Om Prakash v. Suresh Kumar*, 2017 SCC OnLine SC 1957].”