A.No.3861 of 2019
in C.S.No.163 of 2010

Reserved on : 25.10.2021
Pronounced on : 03.01.2022

N.SESHASAYEE, J.,

The present application is filed by the defendants 1,2,7 and 11 to recall a consent decree passed by this Court.

2. 1 The background may be briefly stated:

- A certain block of property in relation to which the suit was laid originally was stated to have been held benami by a certain Sudharshanam. When Sudharshanam started acting independently asserting his right over the property, defendants 1, 2 & 3 (of whom, defendants 1 and 2 are two of the four applicants herein) had laid a suit in O.S.No.244 of 2005 before the Principal Sub Court, Chenglepet for declaration of their title over the property and also for recovery of possession. This suit was later transferred to this Court in Transfer C.S.No.247 of 2012. The defendants 1 to 7 have constituted the 8th defendant as their Power of Attorney. Now, the 8th defendant was stated to have entered into a sale agreement with the 9th defendant. On the strength of the said agreement, the ninth defendant had instituted C.S.No.573 of 2006 for specific performance against defendants 1 to 8 herein (which includes the applicants) and had obtained a consent decree, with the 8th defendant as power of attorney of other defendants lending consent to it. This led to a compromise decree being passed on 24.01.2007. Consequent to this on 29-03-2007, a sale deed came to be executed in favour of the 9th defendant.

- Be that as it may, the aforesaid Sudharshanam, the alleged benamidar of the property had sold the property to a certain Sinna Alagappan Chettiyar. The plaintiff in the present suit/1st respondent herein (M/s.Pioneer Software Park Pvt. Ltd.,) had purchased the property from the aforesaid Sinna Alagappan Chettiyar. This suit was laid after the aforesaid sale in favour of the 9th defendant pursuant to the decree passed in C.S.573 of 2006.

- This has given raise to two litigations. Both Pioneer Software Park Pvt. Ltd., the plaintiff in the suit and defendants 1 to 7 in the suit have filed separate suits respectively in C.S.No.163 of 2010 and C.S.No.971 of 2007 for a declaration that the consent decree passed in C.S.No.573 of 2006 is null and void.

- The plaintiff in this suit (C.S.163 of 2010) contended that it had purchased the said property from the 10th defendant even in 2004, and that the decree passed in C.S.No.573 of 2006 is a collusive and a fraudulent decree, aimed to defeat the rights of the plaintiff over the property in question and that neither the plaintiff nor the 10th defendant (from whom the plaintiff had purchased the property) were parties to C.S.No.573 of 2006.

2.2 While things stood thus, there was an understanding to resolve various litigations. The terms were arrived and they were reduced to writing into a MoU dated 20-02-2015. There were four signatories to the MoU, and they are: the plaintiff in C.S.163 of 2010, Defendants 8 and 9 thereto, and a certain M/s.Appasamy Real Estates Ltd. The last mentioned party was not a party to the suit. Neither of the applicants/defendants 1,2,7 and 11 were signatories to the MoU.

However, the MoU itself recites that the 8th defendant was the Power of Attorney of these applicants.

2.3. The MoU *inter alia* provided for payment of Rs.3.50 crores by the 9th defendant (who is the First Party in the MoU), receiving which the 9th defendant was to resolve all disputes over the property which is necessary for perfecting the title of the plaintiff. Contextually, clause 11(f) and 12 are relevant. They read as below:

> ***Clause 11(f)***: *A sum of Rs.3,50,00,000/- (Rupees Three Crores and Fifty Lakhs only) at that time of resolving disputes related to N.Prabhuraj and related parties and their acceptance of the title etc., of the Party of the Third Part.*
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> ***Clause 12*** *:The Party of the First Part undertakes to resolve litigations, claims, matters detrimental to the interest of the party of the Third Part as above relating to the schedule property. The Party of the Third Part undertakes to withdraw W.P.No.23331 of 2012 filed before High Court of Madras by bringing to the notice of the court the Memorandum of Compromise entered into C.S.No.573 of 2006.*

3. The MoU subsequently resulted in this Court passing a set of three consent decrees based on three different joint compromise memos, the

details whereof are as below:

Date	Parties
10.03.2015	D8 & D9
08.12.2016	D1, D2, D7 & D11
20.08.2019	D3 & D5

Of them, the consent decree dated 08-12-2016 pertain to these applicants, by which they withdrew C.S.247 of 2012, allowed their C.S.971 of 2007 to be dismissed as become infructuous, which paved way for the Court to decree the present suit, upholding the title of the plaintiff without a contest.

4. The present allegation that these applicants level in this application is that the plaintiff herein (the Third party to the MoU) had not paid them the amount due to them under it, that they had played fraud on the applicants and require this court to recall the consent decree passed by this Court. The strategy here is that, if the consent decree is recalled, it would automatically revive at least two suits, which would enable these applicants to sustain their title to the property besides reviving their contest to the present suit.

5. Counter has been filed by the plaintiff/First respondent. It also filed an additional affidavit.

6.Arguing for the applicants, Mr.V.Raghavachari, learned counsel submitted: The applicants had agreed for a consent decree in this case only based on the MoU dated 20.02.2015, and that the MoU itself finds a reference in the Memo of Compromise on the foundation of which the consent decree in the suit came to be passed. In terms of clause 11 (f) of the MoU, applicants were paid only a sum of Rs.87.0 lakhs and the balance was not paid. When the plaintiff/1st respondent has not performed its obligation under the MoU, more particularly the entirety of clause 11(f) thereof, the foundation for lending consent for passing a decree stands shakened. And today, with the respondents refusing to perform their obligations in terms of Clause 11(f) of the MoU, the applicants remain stranded. On the one hand they have withdrawn their own suit in O.S. 247 of 2012, and on the other hand they have allowed the plaintiff to obtain a decree, with no advantge for the applicants in the bargain. This amounts to a fraud on Court and judicial process and hence the decree passed must be recalled. Reliance was placed on the ratio in

Compack Enterprises India (P) Ltd., Vs Beat Singh [2021(3) SCC 702 : (2021) 2 SCC (Civ) 325], ***Byram Restonji Gariwala Vs Union Bank of India*** [(1992) 1 SCC 31], ***S. Hadit Singh Obra Vs Daljit Singh*** [AIR 1975 Delhi 144], ***Pushpa Devi Bhagat Vs Rajinder Singh & Others*** [2006 (5) SCC 566]. If the decree as per the consent decree dated 08-12-2016 is withdrawn, it would enable the applicants to test their claim of title under the law and before the judicial system.

7. Contending that the applicants are blackmailers with no title in themselves to challenge the title of the plaintiff/1st respondent, Mr.P.S.Raman, learned Senior Counsel argued:

(a) The applicants are not parties to the MoU, and hence there is no privity of contract between them and the plaintiff, and hence they do not have any *locus standi* to prefer this application on a point which the parties to the MoU alone have right to challenge, if at all it could be. As per the MoU there is an obligation inter alia to pay Rs.3.50 crores only to the 9th defendant/7th respondent, and if at all any, the applicants have to work out their remedy only against the 9th defendant/7th respondent, or their own power of attorney, the 8th defendant/6th respondent.

(b) The terms of MoU cannot be telescoped into the compromise memo. A mere reference to the MoU in the compromise memo does not *ipso facto* enables reading the MoU as part of the compromise memo, and hence applicants cannot pivot their cause for action on the alleged breach of terms of the MoU.

(c) Assuming that the applicants have a *locus standi* to seek enforcement of the terms of MoU, it can be done only by an independent proceedings. This possibility now stands foreclosed since limitation has intervened to snap the cause of action when it expired on the expiry of three years from 20-02 2015, the date of MoU. Hence, the applicants have taken recourse to an ingenious method of coming out with this application to circumvene limitation.

(d) The MoU dated 20.02.2015 has stipulated six months time frame for its performance, this time has lapsed.

(e)There is no case for the applicants herein that any of the applicants were made to lend their consent to the decree passed on any of the grounds that might vitiate the contract. At any rate, there was no fraud.

(f)The ground on the basis of which the applicants seek recall of the decree is alien to the scope of the decree, and that cannot be made a subject matter to upset the decree.

Reliance was placed on the ratio in ***Shanti Budhiya Vesta Patel & Others Vs Nirmala Jayaprakash Tiwari & others*** [(2010)5 SCC 104], ***Shankar Sitaram Sontakke & Another Vs Balkrishna Sitaram Sontakke & Others*** [AIR 1954 SC 352], ***XS Financial Services Ltd., & Another Vs N.Devendran & Others*** [AIR 2003 Madras 369 : 2003-2-L.W.208], ***P.T.Thomas Vs. Thomas Job*** [(2005) 6 SCC 478], ***Rama Narang Vs Ramesh Narang & Another*** [(2006)11 SCC 114] and ***Shiv Dayal Kapoor & Others Vs Union of India & Another*** [AIR 1963 P & H 538].

8. In response, the counsel for the applicants would submit that the rule of privity of contract that the counsel for the 1st respondent now contends viz-a-viz the MoU dated 20.02.2015 stands breached even by the very respondent, when it had made direct payments to some of those

whose interest the defendants 8 and 9 represent in the MoU. Secondly, acting on the MoU, it was not the defendants 8 and 9 who had withdrawn the suit, but these applicants. Thirdly, and admittedly, the 1st respondent is still due to pay a sum of Rs.87.50 lakhs to defendants 8 and 9 in terms of the MoU. Now having admitted that there is a liability to pay this amount, is the respondent justified in refusing to pay to the applicants?

9. In the course of the arguments, the plaintiff/first respondent has filed an affidavit dated 02-09-2021, the reference to which would be made in the course of this order.

Discussion & Decision:

10. The rival submissions are closely examined. Before, considering the legal aspects and their applications, the facts need to be analysed to arrive at a greater clarity.

11. At the outset it has to be stated that the court faces a complex situation, which is largely the making of the parties, more particularly the applicants themselves. To start with they along with their other co-

sharers had laid two suits (C.S.247 of 2012 & C.S.971 of 2007) and were contesting the present suit (C.S.163 of 2010). Their aim was to establish or secure their title to the property in question. Then they decided to resolve the dispute with the other parties to the litigation. This is absolutely a brilliant idea, and indeed an appreciable idea too. But there it stops. As indicated in the opening sentence of this paragraph the mode they have adopted to convert their intent to compromise into reality has driven to the present situation, and it is their making. This can be explained:

- Clause 11(f) of the MoU indicates that the applicants along with their other co-sharers (all of whom were arrayed as defendants 1 to 7 and 11) were to satisfy themselves with a certain money value in lieu of their claim over the property. This is perfectly legal. But who they nominated for the purpose? Their power of attorney, the 8th defendant/6th respondent and the 9th defendant/7th respondent. What they have failed to borne in mind was that this 9th defendant had obtained an exparte decree in C.S.573/2006, thanks to the consent given by their power of attorney, which in turn had led to institute C.S.971 of 2007, to which the very 8th and 9th defendants in this suit were the defendants. They opted to trust their opponents when they had the best opportunity to trust themselves and participate in the MoU. This appears to have set in motion the later developments.

- Clause 11(f) merely says that the plaintiff/1st respondent had to pay Rs.3.50 crores to the 9th defendant, but there is no term regarding the share of the applicants in the said sum. Secondly, this term does not even refer to any back to back agreement between the 9th defendant and the applicants and their co-defendants. Thirdly, Clause 9 of the MoU read with Clause 11(f) thereof only indicates that the amount which the plaintiff had agreed to pay the 9th defendant was intended to enable the latter to resolve the dispute viz-a-viz the applicants and their co-defendants, which going by the expression used appears to be more of a hope to resolve the dispute than a promise to resolve. This becomes apparent from the fact that the 9th defendant could not rope in some of the co-defendants of the applicants, to which specific reference will be made later.

- If according to these applicants they were not paid the entire money which the 9th defendant had promised to pay, then these applicants at least should have desisted from lending the consent vide their memo of compromise. But they chose to file a compromise memo.

- Now, with no clarity about the money actually payable to these applicants, and with they having lent their consent vide the memo of compromise, what is that amount, the non-payment of which had provided them the cause of action for filing this application, even if the maintainability of this petition or the tenability of the relief sought are kept as constants?

12. Here the statement of the plaintiff in the affidavit dated 02-09-2021 is critical. In this affidavit, it is averred, that (a)while the dispute concerning these applicants were settled, dispute regarding defendants 3 to 6/respondents 2 to 5 were not settled; (b) Since the 9th defendant did not bring around the defendants 3 to 5 to comply with that which the

MoU contemplated, the plaintiff had to directly negotiate with at least two of these defendants. Accordingly, on 20-08-2019, the plaintiff had paid Rs.1.25 crores to the 5th defendant/4th respondent, paid Rs.25.0 lakhs to 3rd defendant/2nd respondent. In addition, the affidavit avers that on 05-01-2017, it has paid the 9th defendant a sum of Rs. 87.50 lakhs to the 9th defendant/7th respondent. In could be seen from the copy of the receipt of the 9th defendant made available by the plaintiff/1st respondent it is stated that this sum of Rs.87.50 lakhs was received as part of the amount receivable in terms of Clause 11(f). The plaintiff has further averred in the affidavit that it has to pay only Rs.87.50 lakhs and no more.

13. As indicated earlier, if the maintainability of the application and the sustainability of the prayer sought are kept aside for a while, and assuming the applicants are entitled to claim, still it cannot be ignored that in terms of the MoU all amounts are to be routed to these applicants and their co-defendants only through the 9th defendant. And the 9th defendant is found to have received Rs.2.37.50 crores. How it is distributed by the 9th defendant to the other defendants, other than

defendants 3 to 5? There is no knowing. As already indicated what is the amount these applicants had to be paid? There is no knowing. Is there is a balance, and if so what is it? There is no knowing. Only a statement from the 9th defendant may resolve it, if at all it can be resolved, but the relief in the application is not directed against him. Given the scenario, how can it reflected on the consent decree or the plaintiff? Without a need for going into the various decisions cited at the bar specifically, as a broad statement, unless a fraud on the court or the judicial process is demonstrated, no decree can be recalled. In a setting such the one explained above, how to hold that the plaintiff had defrauded these applicants, more when there is no privity of contract between the plaintiff and the applicants? Except certain emotional statements made, there is no material on record that could enable this Court to conclusively hold that the plaintiff/-respondent had either defrauded these applicants, or the judicial process. Secondly, when substantial part of the MoU is performed, it will be nigh difficult an option for the Court to recall a decree merely because certain amounts payable were not paid. The consent decree passed on 08.12.2016 in C.S.No.163 of 2010 therefore, cannot be recalled.

14. In conclusion, this Court does not find merit in the application and dismisses it. No costs.

03.01.2022

Tsg/ds

N.SESHASAYEE.J.,

tsg/ds

Pre-delivery order in
A.No.3861 of 2019 in C.S.No.163 of 2010

03.01.2022