

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

+ **CM (M) 288-296/2006 & CM A. No.1921/2006 (u/S 151 CPC for stay)**

% **Date of decision:8<sup>th</sup> January, 2010**

**CHANDER KANTA & ORS.** ....Petitioners

Through: Mr. Kuldeep Kumar, Advocate

**Versus**

**M/S ANJUM ISHNA ASHARIYA REGD.** ... Respondent

Through: Mr. J.P. Sengh, Sr. Advocate with Ms. Gurkamal, Advocate.

**CORAM :-**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

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|----|---|----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not?                                | No |
| 3. | Whether the judgment should be reported in the Digest?                | No |

**RAJIV SAHAI ENDLAW, J.**

1. This petition under Article 227 of the Constitution of India has been preferred by the legal representatives of one Shri Shanti Swaroop. The said Shri Shanti Swaroop had filed a suit for possession of certain lands at Panchkuian Road, New Delhi against the respondent herein. The respondent herein was contesting the said suit. An application dated 24<sup>th</sup> January, 1992 was filed by the parties in the said suit. It was *inter alia* stated therein that the plaintiff Shri Shanti Swaroop was unconditionally withdrawing the suit and giving up his claim in the suit; that the parties be left to bear their own costs; that neither party thereafter shall have any claim of any sort whatsoever against each other; that the compromise was in full & final settlement of all disputes between the parties against each other; that the heirs and legal representatives of Shri Shanti Swaroop will

have no claim whatsoever over the respondent and the property in dispute. The prayer made in the application was for dismissal of the suit as withdrawn leaving the parties to bear their own costs. The said application besides being signed by the said Shri Shanti Swaroop and on behalf of the respondent and their respective advocates was also signed by Shri Subhash Chand one of the petitioners herein who has been pursuing these proceedings on behalf of the other heirs of Shri Shanti Swaroop also. The said Shri Subhash Chand endorsed on the application that he being the son of Shri Shanti Swaroop approved of the compromise and will have no claim against the respondent.

2. The court of Civil Judge before whom the suit was pending recorded the statement of Shri Shanti Swaroop on oath. Shri Shanti Swaroop in the said statement also stated that he had understood the contents of the compromise application and wants to withdraw the suit. The Civil Judge vide order dated 24<sup>th</sup> January 1992, on the basis of the statement and the application, allowed the suit to be withdrawn and accordingly dismissed the suit.

3. It is informed that Shri Shanti Swaroop died on 19<sup>th</sup> July, 1992. On 19<sup>th</sup> October, 1992 Shri Subhash Chand being the son of Shri Shanti Swaroop filed an application under Order 9 Rule 9 of the CPC for restoration of the suit. It was *inter alia* stated that therein that Shri Shanti Swaroop had entered into the compromise with the respondent for withdrawal of the suit and his claims therein, in consideration of the respondent having agreed to pay a sum of Rs.75,000/- to Shri Shanti Swaroop and of which Rs.25,000/- was paid and the balance Rs.50,000/- remained to be paid; that Shri Shanti Swaroop had agreed to withdraw the suit on the premise that the balance sum of Rs.50,000/- will also be paid by the respondent to him; however the respondent failed to pay the said sum of Rs.50,000/- and which fact was brought by Shri Shanti Swaroop to the notice of the High Court of Delhi in RFA No.793/1988 between the parties and owing whereto the compromise to be recorded in the RFA also was not recorded. It was thus pleaded that the suit be restored to the original number and be tried on merits. It was further pleaded that Shri Shanti Swaroop prior to his death had not been feeling well and had also been hospitalized and thus could not move the application himself but the said

Shri Subhash Chand being the legal heir of Shri Shanti Swaroop was entitled to apply. Subsequently, an application for condonation of delay in applying for restoration was also filed.

4. The respondent contested the application. The Civil Judge dismissed the application *inter alia* on the ground that the prayer in the compromise application was for unconditional withdrawal of the suit; that Shri Subhash Chand who had filed the application under Order 9 Rule 9 was himself a signatory to the application; that the compromise application did not record/provide that any monies were to be paid by the respondent to Shri Shanti Swaroop; that the court also after recording satisfaction of the compromise had dismissed the suit as withdrawn; that in the circumstances, the application under Order 9 Rule 9 was not maintainable; that Shri Shanti Swaroop had himself not filed any application and no right to sue survived to Shri Subhash Chand or the other heirs; that the order in RFA No.793/1988 refusing compromise was confined to that matter only and had no relevance to the suit which had been unconditionally withdrawn and the compromise application of withdrawal wherein did not mention the RFA. It appears that Shri Subhash Chand also raised a plea before the Civil Judge for the application to be put to evidence. The Civil Judge held that no issue requiring evidence was raised in the application and dismissed the application.

5. The petitioners preferred an appeal which was dismissed vide order dated 25<sup>th</sup> July, 2005 of the Addl. District Judge. The Addl. District Judge held that the manner in which the suit was disposed of did not attract the provisions of Rule 8 or Rule 9 of Order 9; that the withdrawal of the suit had become final and the suit could not be restored.

6. The petitioners thereafter approached this court. This court while issuing notice of the petition, vide *ex parte* order on the application being CM No.1921/2006 of the petitioners directed status quo to be maintained in respect of the property. The said order continues to be in force.

7. This court after hearing the counsel for the parties on 2<sup>nd</sup> December, 2009 dismissed the petition with reasons to follow and which are recorded herein below.

8. The contention of the counsel for the petitioners is that at the contemporaneous time four legal proceedings were pending between the parties. Besides the suit from which this petition arises and RFA No.793/1988, there were two other suits filed by Shri Shanti Swaroop against the respondent and pending in the court of Civil Judge, Delhi. It is contended that an overall settlement was arrived at, whereunder the respondent was to pay Rs.75,000/- to Shri Shanti Swaroop who was to withdraw all the four legal proceedings aforesaid. It is contended that a fraud has been played on Shri Shanti Swaroop in making him unconditionally withdraw the suit from which this petition arises, without paying the entire sum of Rs.75,000/-. The counsel for the petitioners urges that plea of fraud having been raised, the trial court ought to have investigated the matter, framed issues and put the parties to trial. Reliance is placed on

(i) ***United India Insurance Co. Ltd. Vs. Rajendra Singh*** AIR 2000 SC 1165 laying down that the High Court has plenary power to investigate fraud;

(ii) ***Ram Chandra Singh Vs. Savitri Devi*** (2003) 8 SCC 319 in which case a preliminary decree for partition was challenged on the ground of fraud and the application was held maintainable. It was further held that review petition filed by an affected third party against consent order is maintainable;

(iii) ***Kandapazha Nadar Vs. Chitraganiammal*** 2007 (5) SCALE 707 laying down that when the court allows a suit to be withdrawn without liberty to file a fresh suit, without any adjudication, such order allowing withdrawal cannot constitute a decree;

(iv) ***N. Khosla Vs. Rajlakshmi*** AIR 2006 SC 1249 which is regarding mutation obtained fraudulently;

(v) ***J.L. Barua Vs. Sanjay Das Gupta*** 110 (2004) DLT 629 which was a case of dismissal in default and application for restoration thereof;

(vi) ***Jet Ply Wood Pvt. Ltd. Vs. Madhukar Nowlakha*** AIR 2006 SC 1260 holding that there being no specific provision in CPC providing for application for recall of order permitting withdrawal of suit, such application can be filed under Section 151 of the CPC.

9. The mainstay of the contention of the counsel for the petitioners is the refusal of this court in RFA 793/1988 to record the compromise. It is urged that Shri Shanti

Swaroop within three days of withdrawal of the suit from which this petition arises had informed the High Court in RFA that the balance amount had not paid to him and owing to which plea the compromise was not recorded in the RFA. The case of the petitioners is that the proceedings in the RFA showed that the sum of Rs.75,000/- was payable to Shri Shanti Swaroop and the whole of which amount had not been paid and thus the application for recalling the order of withdrawal ought to have been entertained. It is further pointed out that the respondent herein had preferred an SLP to the Supreme Court against the order in RFA No.793/1988 refusing recording of compromise and the said SLP was also dismissed.

10. Per contra, the senior counsel for the respondent has urged that the present proceedings are malafide and do not justify the invocation of jurisdiction of this court under Article 227 of the Constitution of India. It is contended that Shri Shanti Swaroop was in unauthorized occupation of the property of the respondent known as Imamia Hall at Panchkuian Road, New Delhi; that he was earlier having a khokha for selling paan and cigarettes on municipal pavement outside the said property; on being threatened by municipal authorities, he shifted his khokha inside the compound of Imamia Hall. The respondent as far back as in 1970 instituted a suit for recovery of possession of the portion of compound under the khokha from Shri Shanti Swaroop. The said suit was decreed and the first and second appeal preferred by Shri Shanti Swaroop dismissed. Shri Shanti Swaroop preferred an SLP to the Supreme Court which was also declined. However, on compassionate grounds Shri Shanti Swaroop was given time to vacate the said premises. It is further informed that Shri Shanti Swaroop however did not vacate the premises and the Supreme Court ultimately appointed the SDM to takeover possession of the property and which was ultimately under orders of the Supreme Court delivered to the respondent.

11. It is further informed that the suit from which this petition arises was a corollary to the main litigation aforesaid and which was instituted by Shri Shanti Swaroop just to confuse the issue and to perpetuate his illegal possession. It is informed that it was the averment of Shri Shanti Swaroop in the said suit that besides the portion under the

khokha (subject matter of the suit filed by the respondent) he was the owner by way of adverse possession of some surrounding area of the compound also and possession whereof was sought from the respondent. It is further the contention of the senior counsel for the respondent that it was never the case of Shri Shanti Swaroop in the suit for possession filed by the respondent which Shri Shanti Swaroop lost till the Supreme Court that he was the owner of or in possession of any surrounding area also. The senior counsel contends that Shri Shanti Swaroop who had been litigating with the respondent for over 20 years prior to 24<sup>th</sup> January, 1992 was not a naive person and was fully aware of the legal process/procedure and it could not be expected of such a person that he would sign and file the application for withdrawal if any monies were due to him. It is also urged that Shri Subhash Chand son of Shri Shanti Swaroop falsely pleaded in the application that he was not aware of the withdrawal of the suit when he was himself a signatory to the application. Reliance is placed on ***Rajesh Gupta Vs. Naman Fincap Limited*** 98 (2002) DLT 726 laying down that once the parties have settled the matter and made statement to the court and which compromise is accepted by the court, the same forms a valid basis for rendering the judgment.

12. The counsel for the petitioners in rejoinder has contended that the stand of the respondent in RFA was of Rs.75,000/- having been agreed to be paid to Shri Shanti Swaroop and in fact having been paid. It is contended that that being the stand, the case for investigation whether the sum of Rs.75,000/- was paid or not is made out and if it is found that the entire sum of Rs.75,000/- was not paid, the petitioners would be entitled to recall of the order of withdrawal of the suit. Reliance is placed on the SLP preferred by respondent against order refusing to record compromise in the RFA and wherein the respondent pleaded that it had agreed to pay Rs.75,000/- to Shri Shanti Swaroop in consideration of withdrawal of all the four proceedings then pending.

13. What struck me as peculiar in this case, though not dealt with by any of the courts below, is, that the case of the petitioners being of the suit having been withdrawn on the assurance of payment of Rs.75,000/- and of which Rs.50,000/- remained to be not paid, they could at best maintain a claim for payment of balance of Rs.50,000/-. It defies logic

as to how the petitioners who as per their own case, having agreed to withdraw the claim for consideration, could apply for recall of the order of withdrawal. The petitioners on their own plea could at best have maintained the claim for recovery of balance consideration. In view of the compromise, according to the petitioners also, their claim against the respondent remained for Rs.7,5000/- only, of which they admit receipt of Rs.25,000/-. There is no basis for their claim, to be entitled to continue the suit or to wriggle out of the compromises; they could at best have enforced what according to them were the terms of compromise. The application for restoration of the suit is found to be misconceived for this reason alone. Though it was so put to the counsel for the petitioners during the hearing but no satisfactory reply was forthcoming. Similarly, there was no response to the query as to why the consideration of Rs.75,000/- if intended to be a consideration for withdrawal of the suit was not mentioned in the application.

14. Though the argument of the counsel for the petitioners on the basis of Shri Shanti Swaroop having within three days of withdrawal of the suit taken a stand in the High Court that Rs.75,000/- agreed to be paid to him had not been paid to him looks attractive but on deeper thought is not found to be meritorious. In the application for withdrawal of the suit by way of compromise, filed in the present suit, there is no reference whatsoever to any of the other legal proceedings pending between the parties. The withdrawal of the suit in question was not made dependent upon the compromise if any in the other proceedings. The withdrawal of the suit was complete on application being presented to the court, statement of Shri Shanti Swaroop being recorded and suit being dismissed as withdrawn. Such withdrawal was not dependent or contingent upon anything whatsoever. Thus merely because before the RFA No.793/1988 could be withdrawn, the sum of Rs.75,000/- was mentioned does not entitle the petitioners to apply for revocation of the withdrawal of the suit also. Shri Shanti Swaroop, while appearing in the suit and making the statement did not make any mention of Rs.75,000/- and did not make the withdrawal subject to balance of Rs.50,000/- being paid to him. Upon his making the statement and the court accepting the same, the withdrawal of the suit became concluded and that too with the consent of the defendant/respondent. It was further a term of such withdrawal that the parties were not left with any claims against each other. Shri Shanti Swaroop

was/is bound by such term and such consent could not be altered. The subsequent pleading of respondent/defendant in the SLP against order of refusal to record compromise in RFA 793/1988 that Rs.75,000/- was consideration also for withdrawal of the suit cannot be relied upon by the petitioners for revoking the withdrawal of the suit because respondent/defendant further pleaded in the SLP that the entire said sum of Rs.75,000/- had been paid. The only remedy of the petitioner was to claim the balance Rs.50,000/-. Such balance payment if any could not be a ground for revocation of withdrawal.

15. It is significant that not only is there no mention in the compromise application filed in the suit in question of the sum of Rs.75,000/- or of settlement in any other proceedings but the parties expressly recorded that they were left with no claims against each other. Thus, as far as the suit in question was concerned, the compromise was complete and final and not dependent on any other contingencies and the Civil Judge rightly held that no issue requiring evidence was made out. The court, merely because averments of fraud are made would not automatically direct the same to be investigated. There has to be a basis for the plea of fraud. In the present case, there is none.

16. In *Jet Ply Wood Pvt. Ltd.* (Supra) where the Supreme Court held that an application under Section 151 of the CPC could be made for recall of the order of withdrawal of the suit, the statement withdrawing the suit itself recorded that the suit was being withdrawn owing to the settlement talks having commenced between the parties; the application for revoking the withdrawal was filed stating that since the talks did not culminate in the settlement, the suit should be permitted to be continued. Thus in that case there was basis in the statement of withdrawal itself for the said order to be recalled.

17. It is also pertinent that Shri Shanti Swaroop could have simply withdrawn the suit in the present case also. However, the parties did not deem that to be the appropriate course. The suit was withdrawn recording that the parties were left with no claims against each other. Shri Shanti Swaroop withdrew the suit only on taking a statement from the respondent also of the respondent having no claims against Shri Shanti Swaroop. Thus,

the consideration emerging from the compromise application was a mutual settlement of the parties giving up claims against each other and which consideration has not failed.

18. Shri Shanti Swaroop who had been litigating with the respondent for years, before all courts, is deemed to be fully aware of the consequences of his action. This is also borne out from his stand three days later in RFA No.793/1988. Just like he objected to be RFA being disposed of as compromised for the reason of Rs.75,000/- having not been paid to him, similarly he could have objected to the withdrawal of the suit in question also. However, he did not do so. It is in the circumstances to be presumed that as far as Shri Shanti Swaroop was concerned, Rs.75,000/- was not the consideration for withdrawal of the suit. He did not object to the withdrawal of the suit and in spite of having raised the objection in the RFA, he still did not in his lifetime make any application in the suit. All these factors lead me to hold that the plea taken by the petitioners is by way of an afterthought. If such pleas in spite of written compromise are permitted to be taken and put to trial, there will be no sanctity of compromise before the court. The litigants, banking on such compromise not only give up their rights but also pay consideration, often not visible to the court, in the hope that they will be saved the agony of lengthy, costly litigation. The courts cannot allow such faith to be belied specially when there is absolutely nothing to show that there was any consideration as alleged for the withdrawal of the suit.

19. The petition fails and is dismissed. Interim order is vacated. The petitioners to also pay costs of Rs.25,000/- of these proceedings to the respondent.

**RAJIV SAHAI ENDLAW  
(JUDGE)**

**8<sup>th</sup> January, 2010  
PP**