

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.143/2009

AMIT SINGH

.....Appellant through  
Mr. Sanjay Jain, Sr. Adv.  
with Ms. Deepali, Ms. Laliya  
Mukherjee and  
Ms. Prabhsahay Kaur, Advs.

versus

INDU SINGH & ORS.

.....Respondent through  
Mr. T.K. Ganju, Sr. Adv. with  
Mr. A.K. Thakur, Mr. R.K.  
Mishra and Mr. Rajiv Arora,  
Advs. for Respondent No.1  
Mr. Y.P. Narula, Sr. Adv.  
with Mr. Aniruddha  
Choudhary, Adv. for  
Respondent No.2  
Ms. Geeta Luthra, Sr. Adv.  
with Mr. Parinay D. Shah,  
Adv. for Respondent No.3

% Date of Hearing : November 18, 2009

Date of Decision : November 30, 2009

CORAM:

\* HON'BLE MR. JUSTICE VIKRAMAJIT SEN

HON'BLE MR. JUSTICE SUNIL GAUR

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| 1. Whether reporters of local papers may be<br>allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not?                                   | Yes |
| 3. Whether the Judgment should be reported<br>in the Digest?                | Yes |

VIKRAMAJIT SEN, J.

1. This Appeal assails the Order of the learned Single Judge dated 26.3.2009 whereby the Consent Decree dated 7.7.2008 has been modified pursuant to one of the parties preferring an

application under Section 151 of the Code of Civil Procedure, 1908 ('CPC' for short).

2. The Suit prays for the partition of immovable property bearing No.6/1, Roop Nagar, Delhi owned by Late Smt. Vidyawati who was the mother of Plaintiff No.1 and Defendants 1 and 2. Late Smt. Vidyawati was married to Late Shri Haridwari Lal and from this wedlock four children were born, namely, three daughters - Plaintiff No.1 and Defendants 1 and 2 and the legal representatives of Plaintiff No.2. The youngest daughter, namely, Late Ms. Usha Chaudhary did not marry and passed away in 2007. Her share, therefore, devolved as per law. Since her parents had pre-deceased her, her rights devolved upon her Class-II heirs. It has been alleged by Defendant No.2, namely, Ms. Prem Chaudhary who had separated from her husband and who thereafter resided with her parents in the subject immovable property that she had been gifted the immovable property by her mother, Late Smt. Vidyawati. However, Ms. Prem Chaudhary has given-up her claims flowing from the alleged Gift Deed in favour of her sister, Plaintiff No.1 and the Estate of her late brother, represented by his daughter, Plaintiff No.2.

3. Plaintiff No.1 is married to Shri Baldev Singh and from this union two sons were born – Sarvashri Ajay Singh and Amit Singh. It has not been controverted that Shri Amit Singh, the Appellant before us, had been brought-up from infancy by his maternal grandparents [Nana-Nani], viz. Late Shri Haridwari Lal and Late Smt. Vidyawati, and because of this had resided in the said immovable property all his life. Originally, neither Shri Ajay Singh nor Shri Amit Singh had been impleaded in the Suit.

4. The Partition Suit was filed on 8.8.2005. An Application under Order XXIII Rule 3 dated 29.4.2008 was allowed by which it was agreed that the immovable property, that is, 6/1, Roop Nagar, Delhi would be divided in equal shares between Plaintiff No.1 and Defendant No.1 and their niece Plaintiff No.2. We shall ignore all other properties, movable or immovable, which were the subject-matter of the compromise and shall concentrate our attention on immovable property. The said compromise Application was supported by an affidavit of Shri Amit Singh who had by then been impleaded; as well as an affidavit of his wife, Smt. Jyotika Jogi. It appears to us that this was done because Plaintiff 1 had agreed that her share in the immovable property “shall be given to her son, Amit Singh as per her wish and who will be impleaded as a party to the present suit, before the preliminary decree is passed as per the

compromise between the parties.... It is agreed between the parties that Plaintiff No.1 and her son Mr. Amit Singh and his family who is claiming possession through Plaintiff No.1 would vacate the portion of the property in their occupation as soon as the buyer of the property is finalized by the parties. The Defendant No.1 shall also vacate the premises under her occupation on or before the sale of the property is finalized”.

5. A Decree dated 7.7.2008 was passed in which all the terms of the compromise was incorporated, including the salient features already mentioned above. In the application under Order I Rule 10 of the CPC by which Shri Amit Singh (Appellant) was impleaded in the Partition Suit it has been pleaded that “Shri Amit Singh is the son of Plaintiff No.1. Shri Amit Singh is living in the annexe portion of the property no.6/1, Roop Nagar, Delhi-110 007. That the suit property has to be held and to effectuate the said sale, vacant possession has to be given to the purchaser. Hence, Shri Amit Singh son of Plaintiff No.1 may be impleaded as a party so that the matter is settled once and for all and statement of Shri Amit Singh to abide by the terms of the family arrangement and to vacate the suit premises at the time of sale of the said property. In order to effectively carry out the terms of the family arrangement, it is necessary that Shri Amit

Singh be impleaded as a necessary and proper party to the present suit as Defendant No.7.”

6. In terms of the Order dated 7.7.2008 the learned Single Judge had, *inter alia*, ordered that a Decree-Sheet be drawn-up. Plaintiff No.1 was, at that time, represented by Mr. Y.P. Narula, Senior Advocate with Mr.Aniruddha Choudhary. IA No.13509/2008 came to be filed on 6.11.2008 through a different Advocate, Shri C.K. Rai, Advocate. The Application, *inter alia*, states that the property belonged to Late Shri Haridwari Lal; that the parties to the suit intended that the property be shared equally between his three surviving legal heirs. The Application contains, *inter alia*, the following pleadings:-

5. That the Plaintiff No.1 is a housewife and is not well educated and/or acquainted with the Court procedures and therefore, had trusted her son Mr. Amit Singh and his wife Ms. Jyotika Jogi to look after her interest in the proceedings in the said suit. In fact the Plaintiff No.1 had also executed a Special Power of Attorney in favour of her daughter-in-law Ms. Jyotika Jogi for prosecuting the said civil suit. Plaintiff No.1 may also have executed any other attorney or document in favour of her daughter-in-law Ms. Jyotika Jogi. All of which have been revoked by the Plaintiff No.1 by executing a revocation deed. It was, therefore, under the influence and the advice of her other son, Mr. Amit Singh and daughter-

in-law Ms. Jyotika Jogi, that the Plaintiff No.1 signed the joint Application for compromise being IA No.5208 of 2008 under a bonafide belief that the said Application for compromise will adequately protect her interest. Plaintiff No.1 did not understand the implication of Para 10 and 11 of the said Application wherein it is stated that she wants to give her entire interest and share in the said property to her son Mr. Amit Singh. Plaintiff No.1 has had no intention at any point of time of excluding her other son Mr. Ajay Singh from the ownership and/or his legitimate rights. It is only after her other son Mr. Ajay Singh came to India during October 2008 and pointed out to her that she has signed a joint Application being IA No.5208 under which her share in the suit property sought to be given to Mr. Amit Singh only. It is at that point of time the Plaintiff No.1 realised the mistake as the said Application was got prepared and finalized by her other son Mr. Amit Singh and his wife Ms. Jyotika Jogi, who were exercising undue pressure and forced on her to sign the Application so that disputes are resolved.

6. That the Plaintiff No.1 further states that the said property at No.6/1, Roop Nagar, Delhi-110 007 is in any event an ancestral property in which both her sons have equal share and she neither had any intention nor could have legally or otherwise excluded her son Mr. Ajay Singh from his right in the suit property.

7. That after the said joint Application was filed in this court, on or about 29.4.2008, and order dated 7.7.2008 was passed by this Hon'ble Court on the basis of the said joint Application whereby this Hon'ble Court

passed a decree in the terms of the said compromise recorded in the joint Application. By the said preliminary decree it was also recorded that the suit property at No.6/1 Roop Nagar, Delhi 110007 is not capable of being partitioned and therefore parties will take steps to have the said property sold within a period of six months from the date of decree. The said property has not been sold as yet and no sale could take place without the consent, knowledge and signature of Plaintiff No.1.

.....

- a. Pass an order thereby recalling and/or modifying the order dated 7.7.2008 passed in IA No.5208 of 2008 to the extent as described in para 10 and 11 of the said IA No.5208 of 2008 which is also described in the said Order dt. 7.7.2008, by which the right of the Plaintiff No.1 and her other son Mr. Ajay Singh is sought and/or purported to be excluded and the said order be modified to the extent that the right of Plaintiff No.1 in the suit property bearing No.6/1 Roop Nagar, Delhi 110007 shall belong to Plaintiff No.1 and her two sons Mr. Amit Singh and Mr. Ajay Singh in equal proportion i.e. all three would have one ninth share in the suit property.

7. It is trite to say that orders and decrees passed on the invitation of the parties and by their consent are not amenable to be appealed against. Very recently in FAO(OS) No.**314/2009** titled **Gopal Krishan Kapoor -vs- R.S. Chabra** decided on

20.8.2009 the Division Bench of this Court, of which one of us (Vikramajit Sen, J.) was a member, after considering opinion of the Apex Court, has observed thus:-

13. In *Pushpa Devi Bhagat -vs- Rajinder Singh*, JT 2006(6) SC 235 the Hon'ble Supreme Court held that no independent suit can be filed for setting aside compromise decree on the ground that the compromise was not lawful in view of the bar contained in Order XXIII of Code of Civil Procedure and the only remedy available to a party to a consent decree to avoid such consent decree is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. It was further held that in that event the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not.

14. On the other hand, in the case of *Dadu Dayal Mahasabha -vs- Sukhdev Arya*, (1990) 1 SCC 189, the Hon'ble Supreme Court held that if a party makes an application before the court for setting aside the decree on the ground that he did not give his consent, the Court has the power and duty to investigate the matter and to set aside the decree if it is satisfied that the consent as a fact was lacking and the court was induced to pass the decree on a fraudulent representation made to it that the party had actually consented to it. The Hon'ble Supreme Court further held that if the case of the party challenging the decree is that he was in fact a party to the compromise petition filed in the case but his consent has been



procured by fraud, the Court cannot investigate the matter in the exercise of its inherent power and the only remedy to the party is to institute a suit.

8. Equally, there can be no gainsaying that modification to the decree is possible under Section 152 of the CPC and that too only for correction of clerical or arithmetical mistakes in judgments, decrees, orders or errors arising therein from any accidental slip or omission, either *suo moto* or by an application of the parties. The Application which has been allowed by the impugned Order invokes Section 151 of the CPC praying for “recalling and/or modifying the Order dated 7.7.2008”.

9. Suffice it is to advert to the observations of the Division Bench in the Order dated 25.11.2009 in FAO(OS) No.**139/2009** titled **Aggarwal Packers & Logistics Pvt. Ltd. -vs- DRS Logistics Pvt. Ltd.**. This, in turn, relied upon the Division Bench decision in Late *Bawa Harbans Singh -vs- Lt. Governor*, 132(2006) DLT 533.

10. On a reading of Section 152 of the CPC, it is manifestly clear that amendments or modifications can be carried out only if the intention is to correct clerical or arithmetical mistakes or errors arising from any accidental slip or omission. Section 152 does not contemplate a complete substitution of a decree, judgment or final order. If this interpretation of Section 152 is accepted, it will underscore the well-entrenched principle of law

that the inherent powers preserved in Section 151 cannot be employed to overcome any other provision. In other words, the inherent powers of the Court do not annihilate any other provision in the Code. It does not give a *carte blanche* to the Court to pass any kind of order even if that order runs against the grain of a particular Section, Order or Rule of the Code itself.

11. So far as the present case is concerned, an appeal against the Decree has been provided for since it has originally been passed predicated on the consent of parties. This is evident from a perusal of Section 96(2) of the CPC which declares that no appeal shall lie from a decree passed by the Court with the consent of parties. In the normal course, an application moved before a succeeding Court would, *a fortiori*, be barred. It would be of advantage to recount that Rule 3A of Order 23, introduced into the CPC with effect from 1.2.1977, postulates that no suit shall lie to set aside a decree on the ground that the compromise by which the Decree is passed was not lawful. We can do no better than to extract the passage from *Pushpa Devi Bhagat -vs- Rajinder Singh*, AIR 2006 SC 2628 which reads thus-“The position that emerges from the amended provisions of Order 23, can be summed up thus:

(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC.

(ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of Clause (m) Rule 1 Order 43.

(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3A.

(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree, is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made.

12. In the present case, although the application endeavours to make out that the consent of Plaintiff No.1/Applicant was

obtained by misrepresentation, the impugned Judgment principally proceeds on the platform circumscribing the rights of the Plaintiff/Applicant not permissible. The impugned Order, therefore, calls to be set aside.

13. Even on a consideration of the Application on merits, we are of the view that it is devoid of substance. We have already mentioned that Plaintiff No.1/Applicant was represented by Mr. Y.P. Narula, Senior Advocate and Mr. Aniruddha Choudhary, Advocate who were present before us. Mr. Y.P. Narula has stated that the Compromise Arrangement and the Decree passed consequent thereto was with the consent of all the parties. He has stated that this Arrangement, especially the compact of the Appellant receiving the share of Plaintiff No.1/Applicant, was on her initiative and insistence.

14. Plaintiff No.1/Applicant is an educated lady, worldly wise and in full command of her mental faculties. We have carefully perused the asseverations in the Application under Section 151 of the CPC and find that mischief sufficiently to set aside a compromise decree is absent. It is vaguely contended on behalf of Plaintiff No.1/Applicant that the Appellant has ill-treated her. If this has occurred after the passing of the Decree, it would not provide a ground for setting it aside.

15. On a perusal of the records of the Trial Court the glaring fact is that the Objections of Mr. Ajay Singh, elder son of Respondent No.1, who is said to be residing in USA, to the compromise entered into by his mother has been withdrawn and Ajay Singh by means of an impleadment Application under Order I Rule 10 of the CPC filed on 6.11.2008 prayed for his impleadment in the already compromised suit and also sought for recalling of the compromise Decree as it was alleged that the same was without his knowledge and adversely affected his interests in the said property. On the same day, Plaintiff No.1, his mother also filed the subject application under Section 151 endeavouring to withdraw her consent. Both the Applications were heard together on 6.2.2009 where all the parties except for Plaintiff opposed the impleadment of Mr. Ajay Singh. Thus, it is abundantly clear to us from these facts that the change of heart or subsequent withdrawal of consent was induced by the dissatisfaction of Mr. Ajay Singh by the entire share of his mother in the immovable property going to his brother. It has not been controverted before us that the Appellant's brother, namely, Mr. Ajay Singh has already received substantial share of the properties from his parents, including Plaintiff No.1/Applicant, whereas the Appellant has received none.

16. Having heard the matter in great detail, it appears that there was sufficient reason for Plaintiff No.1 to have agreed that the proceeds of the sale of the immovable property should go to her younger son, the Appellant before us. We are unable to find any misrepresentation on the part of the Appellant, even assuming that the Application under Section 151 of the CPC was worthy of adjudication before the learned Single Judge.

17. The mischief that has actually occurred is that an undertaking or an assurance has been extracted from the Appellant who was in undisputed possession of the annexe of the immovable property for several years. It is not idle to assume that he may not have agreed to give an undertaking to vacate the property had his mother not simultaneously agreed to give him the proceeds of her 1/3<sup>rd</sup> share. It is contended by Mr. T.K. Ganju, learned Senior Counsel for Plaintiff No.1 that the Appellant does not have any independent right in the property and that whatever right he may have flows solely as her legal heir. What cannot be ignored is the admitted case that the Appellant is in exclusive and undisputed possession of Annexe. He has had no say in legal proceedings apart from furnishing an undertaking in response to his mother agreeing to part with her share in his favour. We feel that he has been drawn into making a commitment on the assurance of Plaintiff

No.1 that her share would be given to him. The impugned Order does not specifically deal with the question of misrepresentation of Plaintiff No.1 at the hands or instigation of the Appellant. Instead, it proceeds on legal principle that the Appellant can claim rights only through Plaintiff No.1 and that she possessed or retained untrammelled rights to deal with her share in the property. The impugned Order proceeds, therefore, on a dialectic which is totally different to that presented in the Application.

18. Before concluding, we may also record the argument of Mr. Ganju that no Reply had been filed by the Appellant to the Plaintiff's application under Section 151 of the CPC. We may only state here that Plaintiff No.1's own sister had filed a Reply contesting the stand taken by the former. The allegations in the Application were essentially one of misrepresentation and fraud, perpetrated by one member of the family against another. In the present case, it is only Plaintiff No.1 who asserts misrepresentation and this has been denied by other parties. We, therefore, are not impressed with the absence of any Reply by the Appellant during the period when the matter was shuttling between two Benches. On the contrary, in our view, the Appellant should have been granted sufficient time to file his Reply before proceeding to hear arguments and pass orders.

19. In any case, non-filing of the Reply by the Appellant to the Application under Section 151 of the CPC of the Respondent would be, in our opinion, inconsequential for the reason that although the plea was taken in the Application under Section 151 CPC that Respondent No. 1/Plaintiff No.1 was misled by the Appellant, but, this plea has not been adjudicated upon by the learned Single Judge in the impugned Order. What has weighed with the learned Single Judge, as stands noted in the impugned Order, is as under:-

*“This Court is of the opinion that children of Plaintiff No.1 get share, if any, only through Plaintiff No.1 being their mother. The children have no independent right either to ask for their impleadment or to ask for a share in the property in which their mother has got a share in partition suit. Even if what is stated in para 10 of the consent decree dated 07.07.2008 is taken on its face value, still I am of the view that Plaintiff No.1 has a right in law to change her mind and decide not to give her entire 1/3<sup>rd</sup> share in the suit property only to one of her son namely Mr. Amit Singh mentioned in para 10 of the consent decree. It is for Plaintiff No.1 to deal with her share the way she likes. Her children cannot dictate the term to her about the manner in which her share is to be apportioned.”*

We are unable to subscribe to the aforesaid view of the learned Single Judge, as we find that Respondent No. 1, after giving her



share in the suit property to the Appellant, cannot turn around to now withdraw her consent because the same has been acted upon by the Appellant, who has given an undertaking to vacate the *annexe portion* of the suit property, so that the entire suit property can be sold and its proceeds can be shared by the respective parties in terms of the Consent Decree.

20. We have already expressed our empathy for Plaintiff No.2, and especially Defendant No.1, who asserts that the immovable property was gifted to her by her mother, Late Smt. Vidyawati and that she had unilaterally agreed to share it equally with her siblings. Apart from this complaint, it appears to us that they have sympathized and supported the Appellant before us. It is indeed regrettable that because of the change of heart and mind of Plaintiff No.1 the Compromise Arrangement whereby the immovable property was to be sold and shared equally between the three siblings of the family has been delayed. That is indeed unfortunate.

21. It is in these circumstances that the Appeal is allowed. The impugned Order is set aside. Respondent No.1, namely, Ms. Indu Singh shall pay costs quantified in the following manner – costs of Rupees 25,000/- each to the Appellant as well as Respondent No.2, Ms. Deepsikha and Respondent No.3, Ms. Prem Chaudhary. We realize that these costs are only a fraction

of what the Appellant and Respondent Nos.2 and 3 have been forced to expend.

22. Trial Court record be sent back to the Record Room.

( VIKRAMAJIT SEN )  
JUDGE

November 30, 2009  
tp

( SUNIL GAUR )  
JUDGE