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

Reserved on: 04.03.2014
Pronounced on: 31.03.2014

\+ **FAO (OS) 15/2013, C.M. APPL.367/2013, 731/2013 & 11066/2013**

MRS. VIBHA MEHTA .....Appellant

Through: Sh. Jayant Bhushan, Sr. Advocate with Ms. Aankhi Ghosh, Advocate.

Versus

M/S. HOTEL MARINA & ORS. .....Respondents

Through: Sh. J.S. Kochar, Advocate, for Resp. No.2.
Sh. Sandeep Sethi, Sr. Advocate with Sh. R.K. Choudhary and Sh. Akshay Sharma, Advocates, for Resp. No.8.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT

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1. This is an appeal against an order of a learned Single Judge dismissing an application of the appellant ("the plaintiff") seeking the setting aside of a compromise decree.

2. The plaintiff had sued the first respondent, M/s Hotel Marina ("*Marina*"), a partnership firm of which she and respondents 2-9 (the other defendants) were members. The suit claimed the dissolution of the firm, a decree of rendition of accounts, and a direction to assess and realize the value of all common assets in order to pay the amount due to the plaintiff. The plaint alleged that Marina was managed by the eighth respondent, the plaintiff's father in law, and another partner, and that she had executed a power of attorney in favour of eighth respondent. Due to apprehensions regarding its misuse and the manner in which the firm was being managed, the plaintiff revoked the power of attorney on 5th February, 2001, and filed the suit for dissolution. By an order dated 14-12-2005, the learned Single Judge restrained the defendants, presently respondents 2-9, from creating any third party interest in the assets and business of the partnership. The suit valued the amount payable to the plaintiff at ₹2 crores.

3. During the course of proceedings, the defendants offered a sum of ₹2 crores for amicable settlement of the suit. This was rejected by the plaintiff, as recorded in the order dated 27th February, 2006. Later, however, a common application under Order XXIII, Rule 3, Code of Civil Procedure ("*CPC*") for a compromise was filed by the parties on 3rd March, 2006. The compromise recorded as follows:

> "*1. The parties have amicably, by their free will and consent compromised the present suit on the following terms*

(i) The Defendant No. 8 shall pay to the Plaintiff a sum of Rs. 200,00,000/(Rupees Two Crores only) on or before 30 March 2006.

(ii) The said payment shall be in full and final settlement and adjustment of any and all right, title and interest of the Plaintiff in the Defendant No. 1 Firm and the assets, properties, belongings, tenancy and business and affairs of the said Firm including plaintiff's 8% share in the said Firm.

(iii) Upon the said payment,

(a) The Plaintiff shall cease to have any share in the Defendant No. 1 Firm and shall also have no claim or demand upon the said Firm.

(b) The plaintiff shall have retired from the Defendant No. 1 firm with effect from 1st April 2006 or earlier when payment is made.

(c) The plaintiff shall have no subsisting dispute or difference with any of the defendant firms and all its partners all disputes and differences shall be deemed to be fully and finally, unconditionally and absolutely satisfied.

(d) The share of the plaintiff shall stand transferred to the Defendant No. 8 automatically and without requirement of doing of any act or omission or commission on the part of any of the parties thereto. The defendant No. 8 shall be the sole and absolute owner of the 8% share held by the plaintiff in the Defendant No. 1 firm until now.

(e) The rights of the plaintiff in tenancy of the Defendant No.1 firm in respect of Hotel Marina at premises No.G-9, Connaught Place, New Delhi shall stand surrendered to the surviving partners of the Defendant No.1 firm and the plaintiff shall have no subsisting right or interest in the tenancy. It shall be open for the surviving partners of the Defendant No.1 firm to apply to the landlord for deletion of the plaintiff as a co-tenant in respect of the said premises.

(f) In the event, the landlord for the said premises does not consent to the said deletion, the plaintiff shall

authorized and keep authorized Defendant No.8 or his nominee to act for the plaintiff, in her name and on her behalf on all matters concerning the said tenancy. The said authorization shall be irrevocable and shall be and shall be executed 'as per the draft enclosed herewith and marked as Annexure-1. The plaintiff undertakes not to revoke the said authorization at any time and for any reason.

(g) The plaintiff undertakes to this Hon'ble Court that from time to time she shall at the request of Defendant No.8 sign and execute any and all documents, papers and deeds required to give effect to the terms of this Agreement including the Dissolution Deed.

(h) That the other defendants other than defendant No.8 are having no objection to the purchase of defendant No.8 above purchasing the share of plaintiff.

(2) The parties stated the Agreement arrived at between them as aforesaid, is lawful and fully and finally settles the subject matter of the present suit and in any manner relating to the Defendant No.1 firm. With the abovesaid settlement, nothing with respect to the Defendant No.1 firm remains to be adjudicated.

(3) The parties hereto undertake to abide by the terms as set out in para 1 herein above."

4. The learned Single Judge noted that the application was signed by the concerned parties (i.e. all partners of the firm) and also supported by their affidavits. Accordingly, the application was allowed, and the Single Judge recorded that:

"*The Plaintiff and Defendant No. 8 are present in Court and confirm that they have settled their dispute … In view of the settlement between the parties, the application is allowed.*

The parties will be bound by the settlement recorded in the application."

5. After the passing of this consent decree, the eighth Defendant filed two applications. The first, IA No. 4079/2006, sought directions to the plaintiff to execute the documents required by the compromise, and the second, IA No. 5215/2006, sought permission to deposit a draft for ₹2 crore in the Court, given the plaintiff's refusal to accept the amount. During the hearing on these two applications, counsel for the plaintiff argued that the compromise between the parties no longer stood on the grounds that, first, the payment of ₹2 crore had not been made on or before 30th March, 2006 as mandated by the compromise, and further, because the settlement between the parties was only with regard to the disputes raised in the plaint concerning the plaintiff's 8% share in the firm, rather than several other amounts which were due from the firm to the plaintiff. These arguments were rejected by the learned Single Judge by an order dated 2nd June 2006, holding that the intention of the parties was to settle the matter in all respects, and thus, no *inter se* liability survived the compromise. This order permitted the amount of ₹2 crores to be deposited in the Court, which may be withdrawn by the plaintiff on execution of the necessary documents.

6. The Single Judge's order was challenged by the plaintiff in FAO(OS) No. 492/2006, whereby a Division Bench of this Court, by an order dated 3rd January, 2012, set aside the order of the learned Single Judge. However, this order was actually again in favour of Defendant No. 8, as the Court set aside the learned Single Judge's order on the ground that the applications were not maintainable, and

any further proceeding was to be necessarily maintainable before the execution court. Crucially, at this stage of the matter as well, the Court recorded that

> "*10……[n]o doubt, the appellant has not taken any steps for setting aside of the decree in question either by filing an appeal against the said decree or otherwise.*"

7. The plaintiff filed CM No. 8161/2012 before the Division Bench even after the matter was disposed off, claiming that the challenge in the appeal was also to the decree of 3rd March, 2006. The Division Bench rejected this argument, and held that no appeal from the decree had been filed, but rather, only the interim order of the learned Single Judge was challenged. The Division Bench further noted that the correct remedy, in any case, to challenge the decree would be to approach the Court which passed the decree, as an appeal is barred under Section 96(3), CPC.

8. This led to the filing of IA No. 11371/2012 by the plaintiff before the learned Single Judge seeking recall and setting aside of the order dated 3rd March, 2006. This application was dismissed, and is presently the subject-matter of this appeal. This application (IA No. 11371/2012) presents the following case for the recall of the compromise decree:

> "*III. On 3.3.2006, the plaintiff and defendant no.8 entered into a Settlement Agreement drafted by defendant no.8 on his own outside the Court premises, wherein it was agreed by both the parties that the plaintiff will retire from the partnership firm on 1.4.2006 and that the defendants would pay a sum of Rs.2.0 crores to the*

plaintiff on or before 30.3.2006 and it was understood that the said amount was payable for settlement of 8% share of the plaintiff in the partnership firm only and the same would not include any settlement on the capital accounts. The said settlement was recorded by the learned Single Judge vide order dated 3rd March, 2006 and the same was decreed vide the said order in terms of settlement recorded in joint application preferred by the parties under Order XXIII Rule 3 of the CPC.

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V. It is germane to mention herein that on 3.3.2006, the plaintiff was forced to settle the matter for Rs.2 crores on the basis of current accounts and balance sheet dated 31.12.2005. It is pertinent to mention that five days earlier to the settlement i.e. on 27.02.2005 the plaintiff clearly refused to settle the matter for a sum of Rs.2 crore, while the parties were in the Court premises and even submitted before the Hon'ble Court that her share is of much higher value than what was sought to be portrayed.

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VIII. However, in actual the prayer in Civil Suit bearing CS(OS) No.1703/2005 is restricted to dissolution of a partnership. It is relevant to submit here that in case of dissolution of partnership firm, the cumulative profit is arrived at and the same is treated as personal property of a partner and can in no way be regarded as right, title and share in the partnership firm. Henceforth, it is amply clear that the plaintiff only asked for her 8% share in the firm. It is pertinent to mention herein that in paragraph 10 of the proposed draft Retirement deed proposed to be executed by the defendant with respect to the payment of tax on profits upto 31st March, 2006. The relevant clause is reproduced herein below for ready reference:

"10. The second party hereto shall pay and discharge all tax liabilitiesincluding the penalties if any, on the 8% share of First Party in the partnership firm and the profits thereof upto 31st March, 2006 pertaining to partnership firm M/s Hotel Marina only."

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XII … However, despite sincere efforts and despite being a partner of defendant no.1, the plaintiff was not provided with the accounts of the partnership firm and was bluntly declined. The plaintiff made every effort to procure the capital accounts and balance sheets from Income Tax Department also. Left with no other option, plaintiff filed an application under RTI Act on 16.12.2008 before the Deputy Commissioner of Income Tax (Public Information Officer), Circle 31(1) Income Tax Department New Delhi requesting for a detailed copy of the Capital Accounts and Current Accounts pertaining to the plaintiff for the period of 1.4.2005 to 31.3.2006 of the partnership firm namely M/s Hotel Marina. The plaintiff received the information as sought and the same was filed before the Division Bench of this Hon'ble Court in FAO(OS) No.492 of 2006 vide CM No.6600/2009……

XIII … the plaintiff after perusing the said accounts discovered that the balance amount in her current account as on 31.3.2006 was Rs.1,69,44,438.15 (Rupees One crore sixty nine lakhs forty four thousand four hundred thirty eight and fifteen paise only). At the time of entering into the settlement, the plaintiff was shown some hand written balance sheets and details of current account by defendant no.8 as per which the plaintiff's balance of current account as on 31.12.2005 was recorded as Rs.59,57,744.14 and the said documents were filed even when retirement was agreed upon as 1st April, 2006 before the Hon'ble Court.

...The plaintiff was never informed, neither was there any indication by defendant no.8 that so much more money was to be credited to the plaintiff's accounts by 31.3.2006 or that the plaintiff's share was much more than what was portrayed at the time of settlement. By suppressing the said fact not only have the defendants defrauded the plaintiff but also this Hon'ble Court and in this manner the whole settlement stands vitiated and cannot be enforced upon and the same is liable to be set aside for this ground alone. It is respectfully submitted that the deed of settlement between the parties which the plaintiff was coerced to sign was on 3.3.2006 and the date of retirement which both the parties agreed was mentioned as 1.4.2006."

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XV. Therefore, the defendants had complete knowledge of the fact that they had to close the accounts by 31st March every year and till that time the share of the plaintiff would be substantially higher than Rs.59,57,744.14/- lakhs. It is also submitted the balance sheet of 2005-2006 clearly reflects that the advance tax amounting to Rs.1,87,80,800/- had been paid by defendant no.1, which was never paid in advance for the last 6 financial years. This shows that the defendants were very well aware that how much profit had been earned by the partnership firm and how much more sums would be allocated to each of the partners capital accounts.

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XVI. It is submitted that under Section 9 of the Indian Partnership Act, the plaintiff and defendants nos. 2 to 9 were in a fiduciary relationship and this fact was only known to the defendants that the value of the capital account of the plaintiff was much higher. The defendants were under a duty to disclose the said fact to the plaintiff. That the non-disclosure of the said crucial fact clearly

amounts to fraud under section 17 of the Contract Act which fraud has been played by defendant no.8 not only upon the plaintiff but also upon this Hon'ble Court and any consensus arrived at perpetuating fraud is liable to be set aside being void.

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XX. … Further, it is submitted that it was never the intention of the plaintiff to settle the capital accounts. That the plaintiff only wanted to settle the 8% share in the partnership firm. The plaintiff never knew what should be the value of 8% share in the partnership firm … The plaintiff did not understand what should be the meaning of the "Full and Final Settlement" and signed the settlement on 3.3.2006 under the impression that it was a settlement of only her 8% share of partnership firm. It was duty of the defendants to let know the plaintiff what was the value of 8% share in the partnership firm and to inform the plaintiff that more money would be credited to her current account by 31.3.2006. The deed of settlement thus entered into by the parties is not covered under Order 23 Rule 3 which is applicable only to such contracts which are not void and voidable under Indian Contract Act. The present settlement having been entered into on the basis of fraud, is thus beyond the purview of Order 23 Rule 3 and in the facts of the case it is unconscionable. XXI. It is submitted that defendants were under duty to disclose the free and fair details of the accounts and the true value of share in the capital account i.e. 8% of the plaintiff which come to the knowledge of the plaintiff on 19.12.2008. By not disclosing the vital information and by not submitting the true status of accounts to the plaintiff the defendants have committed fraud thus making the settlement void and unenforceable."

9. In essence, the plaintiff attacked the compromise agreements on two grounds: first, that the defendants did not disclose free and fair

details of the accounts, i.e. the true value of shares in the capital account of the plaintiff's 8% share in the partnership. This allegedly amounted to fraud, and thus, negated the compromise; and secondly, that in any case, the intention of the plaintiff was to settle only her 8% share in the partnership and not the capital accounts, in respect of which the plaintiff's rights remain intact.

10. The application was dismissed by the learned Single Judge, holding that (a) no case of fraud was set up by the plaintiff before the Division Bench, (b) there was a complete disclosure of the accounts as on the date of settlement, (c) the plaintiff, in terms of the compromise, agreed to a full and final settlement and was thus barred from raising any claims, (d) there was no coercion to accept the settlement offer, and the plaintiff could have rejected the same, to have left the suit to proceed to trial, or indeed, settle at a later point in time, (e) there was no link between the settlement and the share of the plaintiff in the profits of the partnership, as the former was an independent and complete package. Thus, no obligation was cast upon Defendant No. 8 to disclose to the plaintiff the profits which the partnership firm had earned till 03.03.2006, (f) the principle of law contained in Section 88 of the Indian Trusts Act, 1882 was not applicable in this case.

11. Impugning this judgment, and supporting the stand taken in IA No. 11371/2012, the learned senior counsel, Mr. Jayant Bhushan, argued that the plaintiff was the victim of misrepresentation by the defendants, as the value of her share in the partnership firm was underplayed during the course of the settlement. It is argued that in order to present a negative image of the business of the partnership,

the eighth Respondent handed over the written accounts of the partnership business as on 21-12-2005, in compliance of earlier verbal directions of the Court. Given this rendition of the accounts provided to the plaintiff, she was wrongfully induced into signing the compromise application. It is argued that the fact that the plaintiff had earlier – as recorded by the 27-02-2006 – rejected a similar proposal for settling the dispute by accepting ₹2 crore, but later accepted indicated that it was the state of the accounts present to her by the eighth that was crucial. It is further argued that when the plaintiff signed the application, the retirement was effective from 01-04-2006, but subsequently, after handing over the application to the counsel for eighth Respondent, the words "*when payment is made*" were inserted surreptitiously. This, learned counsel argues, is important because the current account, i.e. the 8% share of the appellant in Marina went up significantly in the time immediately following the date of the settlement before the learned Single Judge.

12. It was urged that in terms of the settlement application, prior to this insertion, she was entitled to these increased profits as they accrued before her retirement. In this context, it is further argued that during the pendency of the appeal before the Division Bench, in the earlier round of litigation, the plaintiff filed an application under the Right to Information Act, 2005, on 16-12-2008, with the Deputy Commissioner of Income Tax, requesting a detailed copy of the capital and current accounts pertaining to the period 1st April, 2005 to 31st March, 2006. Learned counsel submits that this information led to the discovery of the fraud in this case, which is also the reason why

the plea was not taken in earlier proceedings. It is argued that the image of the partnership's business, and specifically, the plaintiff's share, was significantly higher than what was portrayed by the eighth respondent. It was submitted that the balance amount in the plaintiff's current account as on 31st March, 2006 was ₹1,69,44,438,15, i.e. almost ₹1 crore more than the amount indicated by the eighth Defendant. Furthermore, learned counsel urged that the balance sheet for the year 2005-06 showed that the partnership firm had deposited advance tax amounting to ₹1,87,80,800, on 13-09-2005, 15-12-2005 and 04-03-2006, at levels that had never been paid in advance for the last 6 financial years. Thus, learned counsel urged that the managing partners, especially the eighth Defendant, were aware that additional profits would accrue, and the non-disclosure of this fact violated the fiduciary duty that operated between the partners.

13. It was argued that the fraud played upon the plaintiff in this case must be seen in the context of the fiduciary duty between partners of a firm, especially the managing partner and others, as regards the proper disclosure of accounts. For this, learned counsel relies on the decision of the Supreme Court in *PCK Muthia Chettiar and Ors.* v. *VES Shanmugham Chettiar (dead) and Anr.*, AIR 1969 SC 552, for the proposition that a compromise may be revisited by the Court if defendant violates his or her "*fiduciary obligation to disclose the true state of affairs*", as in that case one of the members of a partnership did not disclose additional income earned to the other. As regards the concept of a fraud, learned counsel relies on the decisions in *Ganpat Ranglal Mahajan* v. *Mangilal Hiralal and Anr.*, AIR 1962 MP 144,

concerning the sale of property with defective title, *John Minas Apcar* v. *Louis Caird Malchus*, AIR 1939 Cal 473, concerning the sale of property between relatives by actively misrepresenting its commercial value, and *Niaz Ahmad Khan and Anr*. v. *Parsottam Chandra and Anr.*, AIR 1931 All 154, relating to a fraudulently obtained mortgage. The impact of these decisions on the present case will be discussed later in the judgment.

14. In support of the plaintiff's stand, learned counsel further argues that the import of Section 9 of the Partnership Act, 1932, mandates that the partners must be just and faithful to each other, render true accounts and full information of all things affecting the firm. In this case, despite the knowledge that additional money would accrue to the firm, and thus, to the plaintiff's 8% share, the eighth Defendant did not disclose this fact. It is argued that this act of passive misrepresentation, when a fiduciary duty to disclose operated, amounts to fraud and vitiated the compromise. It is argued that the reliance of the learned Single Judge on Sections 17 and 19 of the Indian Contract Act, 1872 ("*Contract Act*") was incorrect, as the primary violation of Section 9 of the Partnership Act is standalone, and "*recourse to external collateral aids in the form of exceptions to Section 19 and 17 …are not be to be readily infused …*" The finding that the plaintiff did not exercise due diligence in determining the correct accounts by herself, a factor admitted by the plaintiff to be relevant under the Contract Act, should not affect the Court's judgment, argued learned counsel.

15. In any case, it is argued that the plaintiff exercised due diligence by the filing the RTI application, and on realizing the true value of the firm, set up the plea of fraud at the first available instance. Finally, learned counsel argues that the approach of the learned Single Judge combines the plaintiff's 8% share with her capital account, by holding that the settlement applies to both. Rather, the intention of the plaintiff was at all times to settle her 8% share, and any capital amount due to her from the firm would naturally remain due.

16. On the other hand, learned senior counsel for eighth defendant, Mr. Sandeep Sethi, supports the findings in the impugned judgment. It is urged that the two parties, as partners of the firm, *inter se*, settled all pending disputes between the plaintiff and the firm, and all amounts due between them, by the compromise application. In such a case, it is urged that the Court should be extremely cautious in reopening the settlement, short of a clear case of fraud. Learned counsel argues that the plea of fraud in this case was only set up at a belated stage, several years after recording the compromise. In the interim, as also during the making of the compromise, no protest was expressed by the plaintiff. Further, learned counsel argues that the facts of this case do not support a finding of fraud. Whilst there is an obligation of good faith between partners, under the Partnership Act, that obligation has been met in this case, The accounts presented to the plaintiff by eighth defendant were correct as on the date, and no false statement or misrepresentation has been alleged. Submitting that the plea regarding existence of an obligation to disclose future profits, i.e. after the date of the settlement, does not arise. The plaintiff, it is argued, was fully

aware of the financial implications of the settlement signed by both parties, and the mere perceived inadequacy of this compromise cannot be a reason to reinvestigate. Further, learned counsel argues that the settlement in this case was a complete package, or a full and final settlement, that was not based on the balance sheet or the plaintiff's share in the profits, and thus, even if there was an obligation, it remains unrelated to the terms of the compromise. Rather, it is argued that these facts were *not* the basis on which the compromise was recorded, and thus, any misrepresentation as to them cannot, as a matter of fact, affect the compromise.

17. In support of his submissions, learned counsel relies on the decision in *Chennuru Gavararaju Chetty* v. *Chennuru Silaramurty Chetty and Ors.*, [1959] Supp 1 SCR 73, concerning the sharing of benefits accruing towards one partner by all after the termination of the firm, *Y. Venkanna Chowdry (died) and Anr.* v. *G. Lakshmidevamma and Ors.*, AIR 1994 Mad 140, concerning the duty of the managing partner to maintain and disclose accounts properly, *Sher Khan* v. *Akhtar Din*, AIR 1937 Lah 598, and *Mithoolal Nayak* v. *Life Insurance Corporation of India*, [1962] Supp 2 SCR 571, concerning circumstances in which suppression of material facts and silence as to facts, respectively, can amount to fraud, and *Sri Kishan Lal* v. *Musammat Kashmiro and Ors.*, 20 CWN 957, concerning the nature of the duty to disclose facts in instances of trust and confidence between the parties to the transaction. The decision in *Henry M'Kellar v Wallace* (1851) Moo.IA 372 was relied on to say that when the circumstances reveal that a partner retiring from the firm, agrees to

take a fixed amount, without enquiring or basing the amount on any calculation, proportion of profit or value of assets, the question of undervaluation being the basis of re-opening of a valid compromise would not arise.

Analysis & Findings

18. The relevant provisions of the Partnership Act, 1932 are as follows:

> *"**Section 9 General Duties Of Partners**- Partners are bound to carry on the business of the firm to greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner, his heir or legal representative.*
>
> ***Section 17 Rights and Duties of Partners** -After a change in the firm subject to contract between the partners, -*
>
> *(a) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be;*
>
> *(b) AFTER THE EXPIRY OF THE TERM OF THE FIRM. where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, and so far as they may be consistent with the incidents of partnership-at-will; and*
>
> *(c) WHERE ADDITIONAL UNDERTAKINGS ARE CARRIED OUT where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings…"*

19. The relevant provisions of the Contract Act in this regard are also extracted below:

> ***14.*** *"**Free consent" defined -***
> *Consent is said to be free when it is not caused by -*
> *(1) coercion, as defined in section 15, or*
> *(2) undue influence, as defined in section 16, or*
> *(3) fraud, as defined in section 17, or*
> *(4) misrepresentation, as defined in section 18, or*
> *(5) mistake, subject to the provisions of section 20,21, and 22.*

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake.

> ***15. "Coercion" defined***
> *"Coercion" is the committing, or threating to commit, any act forbidden by the Indian*
> *Penal Code (45 of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.*

> ***16. "Undue influence" defined***
> *(1) A contract is said to be induced by "under influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.*
> *(2) In particular and without prejudice to the generally of the foregoing principle, a person is deemed to be in a position to dominate the will of another -*
> *(a) where he hold a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or*

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.
Nothing in the sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872)

17. "fraud defined
"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agents, with intent to deceive another party thereto his agent, or to induce him to enter into the contract;
(1) the suggestion as a fact, of that which is not true, by one who does not believe it to be true;
(2) the active concealment of a fact by one having knowledge or belief of the fact;
(3) a promise made without any intention of performing it;
(4) any other act fitted to deceive;
(5) any such act or omission as the law specially declares to be fraudulent.

18. "Misrepresentation" defined
"Misrepresentation" means and includes -
(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or anyone claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is subject of the agreement.

19. Voidability of agreements without free consent

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to contract, whose consent was caused by fraud or mispresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put on the position in which he would have been if the representations made had been true.

Exception : If such consent was caused by misrepreentation or by silence, fraudulent within the meaning of section 17, the contract, neverthless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation : A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable."

20. The documents handed over to the plaintiff, before the compromise was entered into and agreed upon, included a "*Details of Amount Payable to Mrs. Vibha Mehta as on 31/12/2005*", which reads as follows:

"Hotel Marina

1. . FIXED CAPITAL ACCOUNT	Rs. 80,000/00
2. BALANCE Of CURRENT ACCOUNT	Rs.59,57,744/14
3. 8% SHARE FROM RESERVE & SURPLUS A/c of Rs. 1,12,46,592/-	Rs. 8,99,727/36

TOTAL PAYABLE Rs 69,37 17,1/50"

The plaintiff had, in the application, ultimately disposed off by the impugned order, urged several grounds. These included the submission that the compromise did not contemplate her claim in the capital account. This plea was given up by her on 9th September, 2012 in the course of proceedings before the Single Judge, when she was present with her counsel. This aspect was recorded by the Single Judge, in the impugned order at paragraph 10 in the following terms:

> *"the plaintiff/applicant was asked on September 19, 2012 as to what were the ground on which she was pressing IA No. 11371/2012. The learned counsel for the plaintiff, on instructions from the plaintiff, who was present on that date, stated that the IA was being pressed only on the ground that the decree had been obtained by playing a fraud on the applicant/plaintiff by not disclosing to her the amount which had accumulated in her capital account in the partnership firm Hotel Marina on the date IA No. 6376/2006 for recording compromise was filed. The learned counsel for the plaintiff, however, did not sign that statement, presumably because the plaintiff wanted to make some changes in the statement. Thereupon, statement of the plaintiff/applicant was recorded in the presence of her counsel on 24.09.2012. In that statement, she stated that she was pressing for setting aside the decree dated 03.03.2006 on the ground that the decree had been obtained by playing a fraud on her by not disclosing (i) the amount which would have accumulated in her capital account in the partnership firm Hotel Marina, on the date the application being IA No. 6376/2006 for recording of compromise was filed in the Court; (ii) the amount which would have accumulated in her capital account in the aforesaid firm till 31.03.2006. In view of the statement*

given by the plaintiff on 24.09.2012, the only question which needs to be examined is as to whether any fraud was played upon the plaintiff by defendant No. 8 and was that fraud which led to her entering into a settlement."

21. The Court has considered the submissions of the parties. The two questions that arise are (a) whether the entire settlement is vitiated under any provision of the Contract Act, in terms of the explanation to Order XXIII, Rule 3, CPC; and (b) whether the settlement, if valid, relates only to the plaintiff's 8% share in the partnership firm, or to all dues between them, including the capital account.

22. On the first issue, the plaintiff has set up a case under Sections 15, 17 and 18 of the Contract Act, of coercion, fraud and misrepresentation. The facts, as they appear from the record, are crucial to this issue. The plaintiff does not deny that she signed the compromise application dated 3rd March, 2006. Neither is it disputed that the terms of the application presented to the Court on that date were the same as extracted in the order of this Court on that date. The Court enquired from the parties if they had consented freely to the agreement, to which a positive response was forthcoming. The argument that the contents of the application were changed to include the term that the plaintiff would resign on 1st April, 2006 "*or earlier when payment was made*" does not hold water as the application, with that phrase, was the one submitted to the Court, which both parties, in Court, agreed to have read and signed. This assurance was given to the learned Single Judge while recording the compromise. That compromise must, therefore, be operative in these proceedings, and

the Court must give meaning to it. The terms of the compromise are also broad and categorical: In return for a payment of ₹2 crore, which the parties contested to be "*in full and final settlement*" no claim of the plaintiff would survive. The plaintiff today presents two reasons to undercut this agreement: first, that the settlement was based on the accounts shown to the plaintiff, which undervalued the profits to be earned till 31st March, 2006, when the agreement itself was signed on 3rd March of that year; and secondly, that the eighth defendant was under an obligation to disclose these facts under a fiduciary duty between partners. That defendant denied and resists every ground, and in addition, argued that in any case, the accounts were not the basis of the agreement, but rather, based on an independent, complete and final package of all claims; therefore, any failure to disclose the accounts cannot vitiate the settlement.

23. The first basic issue is whether the eighth defendant, in showing the accounts that led to the 3rd March, 2006, agreement committed a fraud by being passive, and remaining silent as to certain facts, i.e. the profits that would accrue by 31st March, 2006, the end of the financial year. The answer, in the opinion is that the said defendant was under no such obligation, and his alleged silence did not commit fraud or misrepresentation. Fraud, through silent, or the omission to speak out a fact, arises only when there is an obligation to do so. In this case, the accounts presented to the plaintiff were *true* as on that date. This fact is not disputed. Rather, the argument is that *subsequent* profits that appear in the balance sheet at the end of the financial year, 31st March, must also have been disclosed. However, the law does not locate an

obligation to predict future income, no matter how certain the predictions, between partners. A managing partner, or one maintaining the accounts, must under Section 9 of the Partnership Act, which codifies a general principle of private law, disclose true accounts and be faithful in her dealings with other partners in matters of the firm. Indeed, these accounts must not hide details of transactions or profits already accrued or liabilities existing. In other words, a true account of all assets and liability must be presented fully as on the date. In this case, this was clearly and undisputedly done. There is no dispute that the accounts (allegedly on the basis of which the agreement was entered into) as on the date of the settlement were the ones available.

24. The plaintiff stated (as extracted in the earlier portion of this judgment) in the application, that "*after perusing the said accounts"* which she sourced later, she discovered that the balance amount in her current account as on 31.3.2006 was ₹1,69,44,438.15. She also claims that at the time of entering into the settlement, she was shown some hand written balance sheets and details of current account by the eighth defendant in terms of which her balance of current account *as on 31.12.2005* was recorded as ₹59,57,744.14 and that document was filed when retirement was agreed upon as 1st April, 2006 before the Court. She alleged about her "*never*" being informed and nor there being any *"indication by defendant no.8 that so much more money was to be credited to the plaintiff's accounts by 31.3.2006 or that the plaintiff's share was much more than what was portrayed at the time of settlement. By suppressing the said fact not only have the defendants defrauded the plaintiff but also this Hon'ble Court and in*

this manner the whole settlement stands vitiated and cannot be enforced upon and the same is liable to be set aside for this ground alone." In support, the various tax deduction at source amounts are relied upon to say that the eighth defendant was in the know that the sum due in her capital account would have in all likelihood swelled to over ₹1.69 crores, as the profits and income of the firm for that year were considerably higher.

25. The plaintiff's entire argument is built around the eighth defendant's foreknowledge about the strong likelihood of her share yielding more than ₹59 lakhs odd that she was shown to be allocable to her, in the capital account, as on 31-12-2005. This is clear from the following plea in the application disposed of by the learned Single Judge:

> *"…the Defendants had knowledge of the fact that more money will be attributable to the Plaintiff by 31.03.2006 in the capital accounts and under clause 8 of the partnership agreement the Defendants were obliged to close the accounts before 31st March. That is the reason why the Defendants agreed to settle the matter in 2 crores and fraudulently asked the deed of settlement to be signed before 30.03.2006 without informing the Plaintiff that her share is much greater and there is more money which will be attributable to the Plaintiff by 31.03.2006. Business is a going concern and the Defendants knew how much would be the balance in the accounts by 01.04.2006 and Defendants fraudulently concealed this fact from the Plaintiff."*

26. The eighth defendant's stand was that the plaintiff settled the dispute of her own accord; it is also argued that the sum of ₹2 crore

was even mentioned in the 27th February, 2006 order, which the plaintiff did not accept at that time, but accepted later. The defendant relies heavily on the statement recorded on 03rd March, 2006, embodying the compromise and denies any fiduciary or other duty. The plea on this aspect is to be found in the following extract from the said defendant's reply to the plaintiff's application:

> *"19. As regards profits earned between 03.03.2006 to 31.03.2006, as noted earlier, there was no agreement between the parties that the plaintiff was entitled to a share in the profits that were to be earned by the partnership firm till 31.03.2006 or till the date she retired from the firm. As noted earlier, the plaintiff would have retired from the firm at any time on or after 03.03.2006 in case the agreed amount of Rs 2 crore was paid to her. The accounts till 31.03.2006 could have been prepared only after the close of the financial year. Therefore, there was no question of the profits of the firm for the whole of the Financial Year 2005-06 being disclosed to the plaintiff on or before 03.03.2006. Even if it is presumed that defendant No. 8 had, in his contemplation, the profit which the firm could be earning between 03.03.2006 to 31.03.2006, that would make no difference to the merits of the case since there was no agreement between the parties that the plaintiff was necessarily entitled to a share in the profits earned by firm during the whole of the Financial Year 2005-06. Defendant No. 8 had agreed to pay a lump sum amount of Rs 2 crore to the plaintiff. Had there been losses in the firm between 03.03.2006 to 31.03.2006, he would still be liable to pay that much amount to the plaintiff for the simple reason that the amount which he had agreed to pay to the plaintiff was not made dependent upon the profits to be earned by the firm during the Financial Year 2005-06. If the losses of the firm could not have been effected the amount payable to the plaintiff in her settlement with defendant No. 4, it can hardly*

be accepted that profits earned by the firm between 03.03.2006 to 31.03.2006 would affect the amount payable to her under the settlement. Once, the plaintiff had agreed to accept a lump sum amount of Rs 2 crore from defendant No. 8, the profits or losses of the firm became insignificant and she was entitled to nothing more or less than that particular amount, irrespective of the profits earned by the firm and her share in the profits of the firm."

27. The learned Single Judge dealt with this aspect in the following manner:

"15. Since there was no linkage between the amount of Rs 2 crore which defendant No. 8 agreed to pay to the plaintiff and the share of the plaintiff in the profits of the partnership firm as on 3.3.2006 or 31.3.2006, no obligation was cast on defendant No. 8 to disclose to the plaintiff the profits which the partnership firm had earned till 03.03.2006.

16. The compromise application was signed by the plaintiff and her statement was recorded in the Court on 03.03.2006. Nothing prevented the plaintiff from insisting upon rendition of accounts till 03.03.2006, before she entering into a binding settlement with defendant No. 8. If the understanding of the plaintiff was that she was to get her profits earned by the firm till 03.03.2006, nothing prevented her from insisting upon such profit being worked out before her entering into a settlement with defendant No. 8. This is not the case of the plaintiff that she had asked defendant No. 8 to render Profit & Loss account of the partnership firm as on 03.03.2006 and he had given false accounts to her. Her case is that defendant No. 8 was under an obligation to disclose the profit which had accrued to her share till 03.03.2006. It is true that under Section 9 of Indian Partnership Act, the partners are bound to be just and faithful to each other, and to render true accounts and

full information of all things affecting the firm to any partner or his legal representative…"

After noticing the relevant provisions of law, the Single Judge further held:

"19. As regards profits earned between 03.03.2006 to 31.03.2006, as noted earlier, there was no agreement between the parties that the plaintiff was entitled to a share in the profits that were to be earned by the partnership firm till 31.03.2006 or till the date she retired from the firm. As noted earlier, the plaintiff would have retired from the firm at any time on or after 03.03.2006 in case the agreed amount of Rs 2 crore was paid to her. The accounts till 31.03.2006 could have been prepared only after the close of the financial year. Therefore, there was no question of the profits of the firm for the whole of the Financial Year 2005-06 being disclosed to the plaintiff on or before 03.03.2006. Even if it is presumed that defendant No. 8 had, in his contemplation, the profit which the firm could be earning between 03.03.2006 to 31.03.2006, that would make no difference to the merits of the case since there was no agreement between the parties that the plaintiff was necessarily entitled to a share in the profits earned by firm during the whole of the Financial Year 2005-06. Defendant No. 8 had agreed to pay a lump sum amount of Rs 2 crore to the plaintiff. Had there been losses in the firm between 03.03.2006 to 31.03.2006, he would still be liable to pay that much amount to the plaintiff for the simple reason that the amount which he had agreed to pay to the plaintiff was not made dependent upon the profits to be earned by the firm during the Financial Year 2005-06. If the losses of the firm could not have been effected the amount payable to the plaintiff in her settlement with defendant No. 4, it can hardly be accepted that profits earned by the firm between 03.03.2006 to

31.03.2006 would affect the amount payable to her under the settlement. Once, the plaintiff had agreed to accept a lump sum amount of Rs 2 crore from defendant No. 8, the profits or losses of the firm became insignificant and she was entitled to nothing more or less than that particular amount, irrespective of the profits earned by the firm and her share in the profits of the firm."

28. Generally, the duty of a managing partner of a firm would be that a true account of all assets and liability must be presented fully. In the present case, the date when the compromise was arrived at between the parties was that date. This was clearly and undisputedly done. That, however, was not the case in the decision cited by learned counsel for the plaintiff. *Ganpat Ranglal Mahajan* (supra), was a case concerned with the sale of property by transferring, without notice, title that was defective on the date of transfer. In *John Minas Apcar* (supra), the defendant actively misrepresented the commercial value of property to his relative, who operated in his confidence. In *Niaz Ahmad Khan* (supra), the facts involved the sale of property without disclosing a prior mortgage, despite stating that the property was free from all liabilities. This is not the case here, nor are such or similar facts involved in the case set up by the plaintiff. There is no challenge to the fact that the accounts (allegedly on the basis of which the agreement was entered into) correctly attributed the amount due to the plaintiff at the time. There was no question of attributing profits *yet to come*, even if with a high sense of probability. The right to that money remains inchoate till the profits accrue *in fact*. Indeed, it cannot be said that there would not have occurred losses in the interim, between 3rd and 31st March, 2006. The fact that the time period involved is a mere

three weeks does not affect this determination, as the time period does not affect the *legal principle* in operation. This is not to say that the accrual of profits can be deliberately postponed, as that would violate the duty to act in the interest of the firm without achieving any additional personal pecuniary benefit at the expense of other partners. That, however, is not the case here. No such allegation has been made, and is neither apparent from the record. Even otherwise, the Supreme Court has ruled (in a somewhat different context, vis-à-vis tax liability in relation to share of a member of a HUF) in *Commissioner of Income Tax v Ashokbhai Chimanbhai* AIR 1965 SC 1343 that:

> *"If the profit or loss has to be ascertained by a comparison of the assets at two stated points, the most business like way would be to do so at stated intervals of one year and that would be a reasonable period to be adopted for the purpose. In the case of large business concerns the working of the company during a particular month may show profits and the working in another month may show loss. The business during the earlier part of the year may show profit or loss and in the later part of the year may show loss or profit which would go to counter balance the profit or loss as the case may be in the earlier part of the year. It would therefore be reasonable to determine the profit or loss as the case may be at the end of every year' so that on such calculation of net profits the managing agents may be paid their remuneration or commission at the percentage stipulated in the managing agency agreement and the shareholders also be paid dividends out of the net profits of the company…"*

29. The argument that there existed a fiduciary duty between the plaintiff and the eighth defendant is insubstantial, for two reasons.

First, whilst a partner is bound to render accounts of the partnership, in the absence of special circumstances, he or she cannot be regarded as trustee for the other partners or liable to render accounts to them in a fiduciary capacity. (*Prem Ballabh Khulbe* v. *Mathura Datt Bhatt*, AIR 1967 SC 1342, at page 1343) Indeed, a partnership by itself does not create a fiduciary duty, absent circumstances that justify an increased obligation, for example, the death of a partner, familial relation or a power of attorney agreement. The decision of the Supreme Court in *Prem Bhallabh Khuble* (supra) is a case in point. That was a case for dissolution and rendition of accounts. During the course of the suit, it was established that one partner, the defendant, had overdrawn from the partnership account. The lower court granted a decree to recover that amount, on the ground that a fiduciary duty operated regulated the relationship of the parties. The Court reversed the decision, holding that:

> "*7. In the present case, the respondent as the managing partner was liable to render accounts of the partnership assets in his hands. On the taking of the accounts it was found that he overdrew the partnership account and a decree for the sum due was passed against him. No fraud or clandestine dealing is alleged or proved. On these facts it is not possible to say that the decree was for a sum for which he was bound to account in a fiduciary capacity.*"

30. This Court is of the opinion that given the facts of this case, the position that the plaintiff was placed in – a literate and knowledgeable individual with some business sense and crucially, with the legal resources she had with her, the plea that the eighth defendant failed in

his fiduciary duty cannot be accepted. No doubt, the eighth defendant might have been in the know that the income levels for the year were likely to be high; on the other hand, the accounts had not been drawn or settled. They were finalized in September 2006. The entire case of the defendants- which was accepted by the Single Judge was that there was no linkage between the amount of ₹2 crore and the accounts or figures shown to the plaintiff. The amount- in view of the past history of offer of the defendant was by all accounts, a lump sum amount agreed to be paid to the plaintiff, for full and final settlement of the disputes, where the plaintiff's entire claim was settled; her share vested, by transfer to the eighth defendant. In this Court's opinion this case squarely falls within the class of matters where a party settles his disputes by agreeing to accept one lump sum. *M'Kellar* (supra) is an authority for the proposition that there can be no doubt that the Court will hold the parties to a compromise where they had agreed to accept a lump sum in settlement of their differences and would conversely not to hold a party to a settlement which has been obtained under improper circumstances where there is an account taken leading to a compromise, based on it. The Court, in that case held that:

> "*If on the other hand, persons meet and agree, not to ascertain the exact balance, but agree to take a gross sum as to the balance; a sum which one is willing to pay, and the other is content to receive as the result of those accounts; it is obvious, that the production of vouchers is entirely out of the question, and errors in the account also, for the very object of the parties is to avoid the necessity for producing those vouchers…*"

31. As observed earlier, the duty of a partner under Section 9 of the Partnership Act is to make truthful disclose of full information. That the partner could have visualized or foreseen a higher degree of profits, in the ensuing year, that in turn would have been more beneficial to the partner (to whom the disclosure was made) is not part of that duty; more so, because the accounts here were settled in September, i.e. six months later. The law as this Court understand, does not and cannot demand the disclosure of future profits; there is no such an obligation. Given that there is no such duty, there can be no fraud.

32. In terms of Section 17 of the Contract Act, mere silence as to fact likely to affect the willingness of a person to enter into a contract is not fraud unless the circumstances of the case are such that regard being had to them, it is the duty of the person, keeping silent, to speak (see, *Navichandra Jethbhai* v. *Moolchand Saderam Ginodiya*, AIR 1966 Bom 111). Silence is fraud only when there is an obligation to speak up. No such obligation as to convey possible future profits arises, which is the case presently. The same conclusion follows for the plea of passive misrepresentation. Neither has the plaintiff, in terms of Order VI, Rule 4, CPC, furnished any particulars or details to support the plea of coercion taken in the pleadings. The plaintiff voluntarily signed the agreement, with knowledge of the complete contents of the application, and its consequences. For these reasons, the agreement does not fall under the Contract Act, and is valid in terms of Order XXIII, Rule 3, CPC. The findings of the learned Single Judge on this issue thus cannot be faulted. Given that the Court has

concluded that there is no fraud or misrepresentation, the issue of whether the agreement was reached on the basis of the accounts presented, or as an independent package, becomes moot.

33. On the second question that arises in this case, the issue is whether the settlement extended only to the plaintiff's 8% share in the firm (excluding her capital account and other dues from the firm), or to the entire gamut of rights and interests. The answer to this question is made clear by the text of the compromise agreement itself. It records that the payment of ₹2 crore "shall be *in full and final settlement and adjustment of any and all right, title and interest of the Plaintiff*". (emphasis supplied). It further records that this also exhausts the plaintiff's claims to "*the assets, properties belongings, tenancy and business and affairs of the said Firm including plaintiff's 8% share in the said Firm.*" The argument that the compromise extended only to the 8% share is thus clearly specious. The wording is broad, without exceptions or limitations. In fact, the agreement clearly contemplates more than just the 8% share as it only forms a sub-set ("*includes*") of the compromise. The fact that the plaintiff *intended* to settle only the 8% share, whether correct or not, cannot wash away the clear and express terms of the bilateral agreement of the parties. The terms "*any and all*" put to rest any vestigial interest that may remain, reaffirming this in clause 3(a), which categorically records that "*shall also have no claim or demand upon the said Firm*." This flies in the face of the plaintiff's claim. The intention of the parties is important in construing this document, but the 'intention' that the Court must consider is that which emanates from the words used by the parties

bilaterally, rather than the meaning sought to be intended by one. Thus, the compromise in this case includes both the 8% share of the plaintiff and her capital account in the firm, as also any other money due (as a loan or otherwise) from the firm at the time of the settlement. In short, any cause of action between the plaintiff and Defendant No. 8, in their character as partners of the firm, is exhausted.

34. For the above reasons, the Court holds no interference with the decision of the learned Single Judge is merited. The appeal is accordingly dismissed along with pending applications, with parties to bear their own costs.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

MARCH 31, 2014