

CASE NO.:
Appeal (civil) 729 of 2004

PETITIONER:
Ravi Constructions Co.

RESPONDENT:
Somvanshi Arya Kshatriya Samaj & Ors.

DATE OF JUDGMENT: 13/09/2006

BENCH:
ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

Appellant calls in question legality of the judgment rendered by a learned Single Judge of the Bombay High Court in Second Appeal filed by the respondents.

Background facts, as projected by appellant in a nutshell are as follows:

An agreement was entered into between Viraj Construction-respondent No.9 in this appeal and respondent No.1 Somavanshi Arya Kshatriya Samaj (hereinafter referred to as the 'Trust') on 7.7.1985 on for construction of a multi-purpose Community hall free of charges. Trust agreed simultaneously to surrender certain portions of the Trust land to respondent No.9 for development. On 3.7.1987, an agreement was entered into between appellant and respondent No.9 in respect of the right to develop the plot of the trust in terms of the agreement dated 7.7.1985. It was agreed that the appellant will be the sub developers of the plot and would construct the community hall. A sum of Rs.3,00,000/- was payable as consideration to respondent No.9. On 26.4.1988 the respondent No.1-trust filed a civil suit (Civil Suit No.190 of 1988) for declaration and injunction in the Court of Civil Judge, junior division, Kalyan praying inter-alia for the following reliefs:

- A. Declaration that the defendants cannot commit breach of the agreement dated 7th July, 1985;
- B. Permanent injunction restraining the defendants from carrying out any construction on the suit land in breach of the agreement.

The said suit was filed by respondent No.2, Nilkanth Mahadeo Kamble as the chief trustee of the trust.

On 10.6.1988 the aforesaid Civil Suit was compromised between the parties and a compromise pursis was filed by them along with the map which highlighted the compromise agreed between the parties. A sum of Rs.1,10,000/- was also paid to the trust as consideration for the compromise which was accepted by the trust. It is to be noted here that by a

resolution of respondent No.1, chief trustee i.e respondent No. 2 was authorized to compromise the suit in any one of the three alternatives indicated. All the other trustees were signatories to the resolution. According to appellant, one of the alternatives was adopted. On 26.2.1990 another Civil Suit (Civil Suit No.101 of 1990) was filed by the respondent No.1-Trust for setting aside the consent decree passed on 10.6.1988. The primary stand was that the earlier suit could not have been filed by the chief trustee-respondent No.2 on behalf of the Trust (Respondent No.1) without joining the other trustees as plaintiffs. It was further stated that respondent No.2 had no authority to compromise the suit. On 5.4.1990 appellant and respondent No.9 filed written statement taking the stand inter-alia that respondent No.2-the Chief Trustee was authorized by the other trustees by a resolution to compromise the Civil Suit No.190 of 1988. In fact the resolution authorized respondent No.2 to enter into the compromise and the same was produced in Court before the final order was passed and reference was made to the resolution in the order regarding compromise. The suit was not really filed by respondent No.2 in his personal capacity, but as the chief trustee representing the trust. On 11.1.1991, the Civil Suit was dismissed by judgment and order of learned Civil Judge, Junior Division, Kalyan. It was held that the respondents had not proved that respondent No.2 was not authorized to enter into the compromise which culminated into a consent decree. Further it was held that it could not be shown by the respondents 1 to 8 that respondent No.2 was not authorized to file a suit on behalf of the Trust. Reference was made to Order XXIII Rule 3A of the Code of Civil Procedure, 1908 (in short the 'CPC') to hold that the challenge to the consent decree was barred. Appeal filed by respondent Nos.1 to 8 (Appeal No. 59 of 1991) was dismissed by order dated 11.12.1992 passed by Additional District Judge, Thane. It was held that the respondents had filed a copy of the resolution authorizing respondent No.2 to compromise the suit. Compromise was entered into between the appellant and respondent No.2 representing the Trust and respondent No.9 in conformity with the resolution and with full knowledge and consent of the other trustees. Therefore, the Civil Suit was not maintainable. Second Appeal No.289 of 1994 in terms of Section 100 CPC was filed before the Bombay High Court by respondents Nos.1 to 8. By the impugned judgment the Second Appeal was allowed even without framing a substantial question of law. The High Court held that the earlier suit was not maintainable in law in the absence of all the trustees being made parties. Therefore, Order XXIII Rule 3A of the CPC has application and the suit was maintainable. Conclusions recorded by the courts below were set aside.

In support of the appeal learned counsel for the appellant submitted that the High Court lost sight of the fact that the earlier suit was compromised by the chief trustee in terms of the resolution to which all the trustees were signatories. Filing of the earlier suit was within knowledge of all the trustees. They had in fact authorized the chief trustee to enter into a compromise in any of the three alternative modes indicated. The factual finding recorded that the earlier suit was filed with their knowledge and consent and was compromised was not challenged before the High Court and in any event the High Court has not recorded finding on that factual aspect. Therefore, the High Court was not justified in allowing the second appeal. In any event the second appeal could not have been dealt with without framing a substantial question of law.

In response, learned counsel for the respondents 1 to 8 submitted that the High Court's judgment is in order. The earlier suit was non-est in the eye of law. Therefore, any compromise recorded therein had no legal effect.

At the outset it is to be indicated that the second appeal was allowed without framing a question of law which is clearly contrary to the mandate of Section 100. This position has been highlighted in several decisions. (See Gian Dass v. Panchayat, Village Sunner Kalan & Ors. (JT 2006 (7) SC 102), Joseph Severane and Ors. v. Benny Mathew and Ors. (JT 2005 (8) SC 509), Sasikumar and Ors. v Kunnath Chellappan Nair and Ors. (JT 2005 (9) SC 171), Chadat Singh v. Bahadur Ram and Ors. (JT 2004 (6) SC 296), Kanhaiyalal v. Anupkumar (JT 2002 (10) SC 98), Roop Singh v. Ram Singh (JT 2000 (3) SC 474) and Ishwar Dass Jain v. Sohan Lal (JT 1999 (9) SC 613).

Further both the trial court and the first appellate court categorically observed that the resolution adopted by all the trustees including the chief trustee and the advocate for the trust who was himself a trustee clearly established that the earlier suit was filed with the knowledge and consent of all the trustees and on behalf of all the trustees. Significantly the trust deed was not produced. It could have shown, as rightly contended by learned counsel for the appellant, that the trust could be sued or can sue in the name of chief trustee. In any event the categorical factual finding recorded that the suit was filed with the knowledge and consent of all the trustees has not been disturbed and in fact no reference has been made in the impugned judgment to this aspect. If the trustees had no knowledge of the suit they could not have adopted a resolution for compromise in a particular mode indicating three alternatives. They specifically authorized the chief trustee and the advocate who was also a trustee to enter into a compromise. In that view of the matter the High Court was not justified in holding that the suit was maintainable.

Looked at from any angle the High Court's judgment is indefensible and is set aside. Learned counsel for the appellant during course of hearing had stated that as a matter of genuine gesture, the appellant shall pay to the respondent no.1-trust a sum of Rs.3,00,000/-. Notwithstanding the fact that the appeal has been allowed, let the statement made by learned counsel for the appellant be translated into reality and the amount be paid within three months.

Appeal is allowed. No orders as to costs.