

(2016) 11 DEL CK 0035

DELHI HIGH COURT

Case No: CS(OS) No. 2656 of 2008 and IA No. 8760 of 2016 (for stay)

Icon Build Con. Pvt.
Ltd.

APPELLANT

Vs

Aggarwal Developers
Pvt. Ltd.

RESPONDENT

Date of Decision: Nov. 7, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 37 Rule 4, Order 7 Rule 4

Citation: (2017) 171 AIC 608 : (2016) 234 DLT 642

Hon'ble Judges: Mr. Rajiv Sahai Endlaw, J.

Bench: Single Bench

Advocate: Mr. Sanjay Manchanda, Advocate, for the Defendant; Mr. Gopal Jain, Senior Advocate with Mr. Ankit Jain, Advocate, for the Plaintiff

Final Decision: Dismissed

Judgement

IA No.8761/2016 (of the defendant under Order 37, Rule 4 CPC).

Mr. Rajiv Sahai Endlaw, J. - The defendant, by this application seeks setting aside of a money decree passed in this summary suit.

2. The counsel for the defendant/applicant and the senior counsel for the plaintiff/non-applicant have been heard.

3. The plaintiff instituted this suit under Order 37 of the Code of Civil Procedure, 1908 (CPC) for recovery of Rs. 4,05,67,347/- with interest inter alia pleading that (i) the plaintiff had entered into agreements with others for purchase of some land in Tehsil Najafgarh, New Delhi and in pursuance to the said agreements had paid a sum of Rs. 1,92,92,500/- out of the total sale consideration of approximately Rs. 3.6 crores to the sellers: (ii) the plaintiff, vide Agreement dated 24th February, 2007 with the defendant, agreed to assign

its right under the said Agreements to Sell in favour of the defendant and the defendant in pursuance to the said Agreement dated 24th February, 2007 handed over cheques for a total sum of Rs. 3,60,59,864/- in favour of the plaintiff to the plaintiff; and, (iii) the said cheques were dishonoured on presentment.

Accordingly, the suit for amount of the cheques together with interest at 15% per annum thereon up to the date of institution of the suit, on the basis of the contract dated 24th February, 2007 with the defendant and the dishonoured cheques was filed.

4. The defendant applied for leave to defend inter alia contending that since the cheques were in pursuance to an agreement of assignment of rights to purchase land and which land had not been assigned in favour of the defendant, the said cheques were without consideration.

5. Vide order dated 20th April, 2012 conditional leave to defend, subject to the defendant depositing 50% of the principal amount in this court, was granted.

6. The defendant preferred FAO(OS) No.278/2012 against the order aforesaid and of which, vide order dated 6th July, 2012 of the Division Bench, notice was issued but in the meanwhile the defendant was directed to deposit 25% of the principal amount instead of 50% as directed by this Bench.

7. The defendant filed CM No.13358/2012 in FAO(OS) No.278/2012 supra for modification of the order dated 6th July, 2012 but which application was dismissed on 6th August, 2012.

8. The defendant preferred SLP(C) No.27916-27917/2012 against the orders dated 6th July, 2012 and 6th August, 2012 aforesaid of the Division Bench but which SLP was dismissed in limine on 21st September, 2012.

9. When FAO(OS) No.278/2012 came up before the Division Bench on 24th September, 2012, in view of dismissal of the SLP, the appeal was disposed of with a direction that in case the defendant deposits 25% of the principal amount within a period of one month from that day, the order dated 20th April, 2012 of this Bench would stand varied to that extent and failing which consequences of not depositing the amount would follow.

10. The defendant did not deposit 25% of the principal amount and vide order dated 30th January, 2013 this Bench decreed the suit for recovery of Rs. 4,05,67,347/- along with pendente lite and future interest at 18% per annum.

11. The defendant preferred RFA(OS) No.79/2013 against the decree aforesaid but which appeal was dismissed vide judgment dated 3rd September, 2013.

12. The plaintiff, as stated in the plaint itself, on the basis of the same cheques had also initiated proceedings under Section 138 read with Section 141 of the Negotiable

Instruments Act, 1881 against the defendant and its directors and which proceedings were put to trial and vide judgment dated 18th February, 2013 therein, the defendant and its directors were acquitted inter alia holding that the cheques forming basis of the proceedings were without consideration.

13. I may at this stage notice that the aforesaid order of acquittal of the defendant and its directors is of a date before dismissal on 3rd September, 2013 of RFA(OS) No.79/2013 aforesaid preferred by the defendant. However in the judgment dated 3rd September, 2013 there is no mention of the said order of acquittal.

14. The plaintiff preferred criminal leave to appeal which was dismissed by a Single Judge of this Court vide 23rd April, 2014 running into as many as 14 pages, also opining that on the date when the cheques in question were issued, it was not possible for the plaintiff to convey to the defendant a valid transferable right in the land and that even on the date of three agreements for purchase entered into by the plaintiff with others, the plaintiff's right to the land were inchoate and contingent upon both the parties to the said three agreements performing their respective obligations.

15. The defendant preferred SLP(C) No.36155/2013 against the judgment dated 3rd September, 2013 aforesaid of the Division Bench and the plaintiff preferred SLP Criminal No.8336-8341/2014 against the order dated 23rd April, 2014 of dismissal of criminal leave to appeal preferred by the plaintiff.

16. Vide order dated 11th March, 2016, the Supreme Court "dismissed" SLP (C) No.36155/2013 and in view of dismissal thereof, "disposed of" SLP Criminal No.8336-8341/2014 preferred by the plaintiff.

17. The defendant has filed this application pleading that since with respect to the same cheques it has been held that the same were without consideration, the decree against the defendant be set aside under Order 37, Rule 4 of the CPC.

18. This application came up earlier on 21st October, 2016 when though I prima facie observed that Order 37, Rule 4 does not apply to such a contingency but in view of the evident unjustness of the outcome flowing from the civil and the criminal proceedings, an opportunity was given to the counsels to address further arguments today.

19. Today, the senior counsel for the plaintiff/non-applicant has raised a preliminary objection to the maintainability of the application. It is contended that the decree of this court which is sought to be set aside having been appealed against in RFA(OS) No.79/2013 and the SLP there against having been dismissed by the Supreme Court, the decree of this court has merged in the decree of the Division Bench and hence this Bench cannot entertain this application.

20. The senior counsel for the plaintiff/non-applicant has relied upon **Kunhayammed v. State of Kerala (2000) 6 SCC 359** and **Chandi Prasad v. Jagdish Prasad (2004) 8**

SCC 724 on the principle of merger of the decrees.

21. I have enquired from the senior counsel for the plaintiff/non-applicant that since the SLP against the judgment of the Division Bench dismissing the RFA(OS) No.79/2013 has been dismissed in limine, whether the Division Bench would have jurisdiction to entertain an application under Order 37, Rule 4 CPC or the application if at all would lie before the Supreme Court only.

22. The senior counsel for the plaintiff/non-applicant has fairly stated that in view of the dismissal in limine of the SLP preferred against the judgment dated 3rd September, 2013 in RFA(OS) No.79/2013 of the Division Bench, in law the application though not maintainable before this Bench, would lie before the Division Bench.

23. The senior counsel for the plaintiff/non-applicant has also handed over in the court copy of the SLP (C) No.36155/2013 preferred by the defendant to demonstrate that the defendant therein also had taken the same grounds as taken in this application to urge that the decree was liable to be set aside but states that the SLP was still dismissed. Attention is also invited to para 4 of the application under consideration where the defendant has pleaded that the Supreme Court in SLP (C) No.36155/2013 vide order dated 9th December, 2013 "taking into consideration the fact that the defendant stands acquitted in the criminal proceedings filed under Section 138 Negotiable Instruments Act, allowed the defendant to deposit the interim amount as required to defend the present suit" and to para 9 of the application where the defendant has pleaded that on 11th March, 2016 SLP preferred by the defendant as well as SLP preferred by the plaintiff were taken up together for hearing and on the basis thereof contends that the Supreme Court was seized of the inconsistent outcome in the two proceedings and in spite thereof "dismissed" the SLP preferred by the defendant and "disposed of" the SLP preferred by the plaintiff.

24. The counsel for the defendant draws attention to the order dated 2nd May, 2014 in SLP(C) No.36155/2013 whereby the order dated 9th December, 2013 was recalled. However I am unable to understand the consequence thereof to the present controversy inasmuch as ultimately the SLP (C) No.36155/2013 was dismissed.

25. The counsel for the defendant/applicant has referred to **Pasupuleti Venkateswarlu v. The Motor & General Traders (1975) 1 SCC 770** but which is not found to be of any relevance on the said aspect. He has not cited any judgment to show that notwithstanding the decree of this court having merged with the judgment of the Division Bench, the application under Order 37, Rule 4, if maintainable, would lie before this Bench.

26. In Kunhayammed supra it was held that the logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time; when a decree or order passed by inferior court was subjected to a remedy available under the law before a superior forum, then, though

the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy; once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court which is the final, binding and operative decree or order wherein merges the decree or order passed by the court below. In Chandi Prasad supra it was held that when a judgment is pronounced by a High Court in exercise of its appellate power upon entertaining the appeal and a full hearing in presence of both parties, the same would replace the judgment of the lower court and only the judgment of the High Court would be treated as final; the doctrine of merger was held to be based on the principles of propriety in the hierarchy of justice delivery system and the said doctrine does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority.

27. Order 37, Rule 4 enables the Court to, under special circumstances, set aside the decree. I agree with the contention of the senior counsel for the plaintiff/non-applicant that the power to set aside decree can be exercised only by the Court whose decree governs the subject matter at a given point of time and in accordance with the principles aforesaid there can be only one decree governing the parties at a given point of time and since the decree though originally passed by this Bench was appealed against and the Division Bench in exercise of its appellate power entertained the appeal and after a full hearing in the presence both the parties has dismissed the appeal, the decree in existence today or on the day when this application under Order 37, Rule 4 was filed would be the decree of the Division Bench and it would be the Division Bench only which would be empowered to entertain the application under Order 37, Rule 4 of the CPC, if at all maintainable.

28. Merit is thus found in the preliminary contention/objection of the plaintiff/non-applicant as to the maintainability of the application under Order 37, Rule 4 of the CPC and the application is liable to be rejected on this ground alone.

29. I may however add my reasons for expressing doubts in the order dated 21st October, 2016 as to the very applicability of Order 37, Rule 4 CPC to the present factual situation and for observing herein above that the application under Order 37, Rule 4 of the CPC, if maintainable, would lie before the Division Bench.

30. Order 37, Rule 4 is as under:-

"4. Power to set aside decree - After decree the court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit".

31. Order 37, Rule 4, as per its language, postulates a decree under Order 37 having been passed either (i) without the defendant against whom decree has been passed appearing and applying for leave to defend or; (ii) the defendant though having appeared

and applied for leave to defend, the application for leave to defend having not been considered and in such a situation empowers the Court to "under special circumstances, set aside the decree".

32. Rule 4 Order 37 in my view does not provide for a situation where leave to defend has been filed and considered and declined.

33. This is evident from the language thereof requiring the Court to, "after decree" "under special circumstances, set aside the decree" and to thereafter proceed to "give leave to the defendant to appear to the summons and to defend the suit". The only inference from the language used in Rule 4 Order 37 is that the power thereunder is to be exercised only where the defendant has had no opportunity to show to the Court that he is entitled to leave to defend.

34. The language of Rule 4 Order 37 cannot in my view be interpreted as empowering the Court to, after it has on an earlier occasion considered the application of the defendant for leave to defend and held the defendant not entitled to leave to defend, in a second round change its view and grant leave to defend. Rule 4 Order 37 in my view, is akin to Order 9, Rule 13 of the CPC and which is not applicable to Order 37. Rule 4 can thus be invoked only when the defendant has missed the chance to have his claim for leave to defend considered by this Court and has no application where the decree is as a consequence of not finding the defendant entitled to leave to defend.

35. Not only does the language of Rule 4 Order 37 does not permit such an interpretation but such an interpretation would also be contrary to the principle of finality of judgments and orders of the Courts and which in **Rupa Ashok Hurra v. Ashok Hurra (2002) 4 SCC 388** reiterated in **Indian Council for Enviro-Legal Action v. Union of India (2011) 8 SCC 161** has been held to be for public good, in the interest of the State and sacrosanct even if observance thereof entails hardship on individual litigants as the mischief arising from that source is small in comparison with the great mischief which would necessarily result from doubt being thrown upon finality of decisions. I have also had occasion to deal with the said aspect in *Yaro Khan v. Union of India*, *Government of NCT of Delhi v. Sant Gurbaksh Singh*, **Ram Chander Aggarwal v. UOI 187 (2012) DLT 370 (DB)** and **Sh. Ashok Kumar v. Smt. Surjit Kaur AIR 2014 Delhi 1**. If the said principle of finality is breached, it would erode the faith in the judicial system. After all dispensation of justice, though a divine function, has to be by human beings and no two human beings can think alike even though governed by judicial principles. If it were to be held that after an application for leave to defend has been dismissed by one Judge and the suit decreed, a successor Judge can re-hear the matter of grant of leave to defend and if finds special circumstances, change the decision from that of refusal of leave to defend to grant of leave to defend and consequently set aside the decree, the consequences thereof would be grave for the judicial system.

36. I may clarify that in this respect it matters not whether the leave to defend has been dismissed on merits or has been dismissed as a consequence of non-compliance of condition subject to which it was granted.

37. Thus, in my view, the application under Order 37, Rule 4 of the CPC is not even maintainable.

38. Though my sympathies are with the defendant/applicant, who in spite of it having held by this Court in criminal leave to appeal emanating from proceedings under Sections 138 and 141 of the Negotiable Instruments Act that the cheques, on the basis inter alia whereof the suit has been decreed, are without consideration.

39. The senior counsel for the plaintiff/non-applicant has also drawn attention to **Kishan Singh v. Gurpal Singh (2010) 8 SCC 775** to contend that considering the standard of proof in the civil and the criminal proceedings, there is neither any statutory nor any legal principle that findings recorded in the court either in civil or criminal proceedings shall be binding between the same parties while dealing with the same subject matter.

40. The said judgment is not in relation to Section 138 of the Negotiable Instruments Act. In my opinion adjudication under Section 138 of the Negotiable Instruments Act is akin to adjudicating civil suit. In the proceedings under Section 138 of the Negotiable Instruments Act, on the basis of the same cheques and the same agreement, it has been held that the cheques were without consideration. It is incredulous that in a civil suit a decree for recovery is passed on the basis of the very same cheques and agreement.

41. I will however be failing in my duty if do not mention that a Single Judge of this Court in *Daya Sapra v. Vishnu Dutt Sharma* rejected the plaint in a suit under Order 37 of the CPC as having been filed in abuse of the process of the Court owing to the defendant having been exonerated in the proceedings under Section 138 of the Negotiable Instruments Act and reasoning that the forum and the action, whether civil or criminal, may be different but the substance of both actions is likely to be the same and that if the subsequent civil action raises same questions of law and fact which have been already disposed of and same set of evidence with same probative value is sought to be used, the civil action would be an abuse of the process of the law. However Supreme Court in appeal reported as **Vishnu Dutt Sharma v. Daya Sapra (2009) 13 SCC 729** set aside the judgment of the Single Judge of this Court and restored the suit reasoning that principles of res judicata are not applicable and a judgment of a Criminal Court cannot be binding on a Civil Court.

42. The counsel for the defendant/applicant has also referred to **Jet Ply Wood Private Ltd. v. Madhukar Nowlakha 2006 (3) SCC 699** to contend that this court is entitled to re-call the decree under Section 151 of the CPC.

43. The aforesaid contention is contrary to **Ramkarandas Radhavallabh v. Bhagwandas Dwarkadas AIR 1965 SC 1144** laying down that express provision having

been made for setting aside of a decree under Rule 4 Order 37, there is no scope to resort to Section 151 of the CPC. The judgment cited by the counsel for the defendant/applicant is not with respect to Order 37, Rule 4 of the CPC but in the context of correction of mistakes.

44. The counsel for the defendant/applicant has also handed over copies of (i) **Rajni Kumar v. Suresh Kumar Malhotra (2003) 5 SCC 315**; (ii) **Indian Express Newspapers (Bombay) Ltd. v. Shiv Kapooria AIR 2003 Bom 496**; (iii) **State Bank of Hyderabad v. Rabo Bank (2015) 10 SCC 521**; (iv) **Baldev Krishan v. Satya Narain 2013 (14) SCC 179**; (v) **Sahakari Khand Udyog Manda Ltd. v. Commissioner of Central Excise 2005 (3) SCC 738**; (vi) **State Farm Corporation of India Limited v. Regional Labour Commissioner 134 (2006) DLT 137**; and, (vii) **K.K. Velusamy v. N. Palanisamy 2011 (11) SCC 275** but which are not found to be relevant in the aforesaid context and are either generally on Order 37 or on the principle of unjust enrichment and need to burden this judgment with details thereof is not felt.

45. Dismissed.

46. No costs.