

**(2009) 08 DEL CK 0443**

**Delhi High Court**

**Case No:** FAO (OS) 314 of 2009 and CM 10309 of 2009

Gopal Krishna Kapoor and  
Others

APPELLANT

Vs

R.S. Chhabra and Others

RESPONDENT

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**Date of Decision:** Aug. 20, 2009

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 3, Order 23 Rule 3A, Order 39 Rule 1, Order 39 Rule 2, 151

**Citation:** (2010) 7 RCR(Civil) 1427

**Hon'ble Judges:** Vikramajit Sen, J; V.K. Jain, J

**Bench:** Division Bench

**Advocate:** Sonia Raina, Proxy Counse, for the Appellant; Sanjeev Sachdeva, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

V.K. Jain, J.

This is an Appeal against the Order passed by the learned Single Judge on 9.4.2009 in CS(OS) No. 691/2007, whereby he dismissed the application filed by the plaintiffs/Appellants under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, seeking injunction against execution of the decree passed in CS(OS) No. 353/2006, in favour of respondent No. 1 and against them. The brief facts giving rise to this Appeal are as under:

2. The Appellant along with one Ms. Sanjogta Kapoor (since deceased), who is the mother of Respondents No. 3 to 6, jointly owned property No. 14-C, Bazar Marg, Old Rajinder Nagar, Delhi. They entered into a Memorandum of Understanding with Shri Rajesh Kumar, respondent No. 2, whereby they agreed to sell the aforesaid property to him, for a total consideration of Rs. 5.2 crores. They also received earnest money amounting to Rs. 1 crore, in three instalments. On 20.4.2005, Shri Rajesh Kumar

entered into a Memorandum of Understanding with Shri R.S. Chhabra, Respondent No. 1, agreeing to sell, transfer, convey and assign the aforesaid property to Shri R.S. Chhabra for a consideration of Rs. 5.2 crores, on the terms and conditions as contained in the Memorandum of Understanding dated 20.4.2005 executed between the Appellants, and late Smt. Sanjogta Kapoor on the one hand and Respondent No. 2, Shri Rajesh Kumar, on the other hand. A sum of Rs. 80 lakhs was paid by Respondent No. 1, Shri R.S. Chhabra to Respondent No. 2, Shri Rajesh Kumar.

3. Since the property in question was a leasehold property, the Appellants and deceased Smt. Sanjogta Kapoor applied for its conversion into freehold property in November, 2005. When the matter relating to conversion of the suit property from leasehold to free hold was being processed in the office of L&D.O., respondent No. 1 made a complaint to L&D.O. in an effort to stop the conversion. He also filed a Civil Suit being CS(OS) No. 353/2006 on 24.2.2006 against the appellants and late Smt. Sanjogta Kapoor as well as against Respondent No. 2, Shri Rajesh Kumar, seeking specific performance of the contract, being assignee of respondent No. 2, Shri Rajesh Kumar under the Memorandum of Understanding dated 20.4.2005. The Appellants and Smt. Sanjogta Kapoor entered appearance in that Civil Suit without filing a Written Statement and compromised the matter with Respondent No. 1, Shri R.S. Chhabra. A joint application under Order XXIII Rule 3 of CPC was filed by the Appellants, Smt. Sanjogta Kapoor and Respondent No. 1 which was followed by a decree in terms of the compromise on 20.3.2006. Under the Compromise decree, it was agreed that the Appellants and late Smt. Sanjogta Kapoor would execute a sale deed of the suit property in favour of Respondent No. 1 Shri R.S. Chhabra and also hand over possession of the same to him on payment of balance consideration of Rs. 4,17,00,000/- to the vendors. The Appellants/plaintiffs thereafter filed Civil Suit bearing No. 691 /2007 seeking a declaration to the fact that the compromise Agreement dated 17.3.2006 in CS(OS) No. 353/2006 was void and for setting aside the decree dated 20.3.2006. They claimed that Shri R.S. Chhabra and Shri Rajesh Kumar were in connivance and in collusion with each other so as to deprive them from full enjoyment of the property. It was alleged in the Plaint that in CS(OS) No. 353/2006, filed by him, Respondent No. 1 Shri R.S. Chhabra had concealed that the alleged assignment of M.O.U. dated 28.2.2002 in his favour had in fact not taken place. It was further alleged that Defendant No. 1, Shri R.S. Chhabra, in fact did not have financial capacity to pay the sale consideration. Respondent No. 2, Shri Rajesh Kumar, on the receipt of said summons in Civil Suit No. 353/2006 filed an application for setting aside the compromise decree dated 20.3.2006. His application was disposed of vide order dated 5.2.2008 holding that since he was also a party in CS(OS) No. 691/2007, the application did not survive for any order.

4. In CS(OS) No. 691/2007, Respondent No. 2/Defendant No. 2 Shri Rajesh Kumar also filed I.A. No. 17543/2007 seeking stay of operation of the judgment and decree dated 20.3.2006 passed in CS(OS) No. 353/2006. He also sought injunction against

creation of any third party interest in the suit property.

5. The suit was contested by Defendant No. 1 as well as Defendant No. 2. Defendant No. 2, Shri Rajesh Kumar took the stand that the plaintiffs/Appellants were in collusion with Defendant No. 1, Shri R.S. Chhabra. He also filed a counter claim seeking a declaration that the decree dated 20.3.2006 passed in CS(OS) 353/2006 was inoperative and unenforceable. He also sought a decree for specific performance of Agreement to Sell (M.O.U. dated 28.2.2005) in his favour. Alternatively, he sought damages to the tune of Rs. 3.5 crores along with interest.

6. Since the learned Single Judge dismissed the applications filed by the plaintiffs/Appellants as well as the application filed by Defendant No. 2, separate Appeals were preferred by them. The Appeal filed by Defendant No. 2, Shri Rajesh Kumar was dismissed by this Court vide Order dated 27.4.2009.

7. The only argument alleged before us was that though the M.O.U. dated 28.2.2005 had not actually been assigned to Defendant No. 1, he made a false allegation in CS(OS) No. 691/2007 that the M.O.U. had been assigned to him by Defendant No. 2 and this action of Defendant No. 1 amounted to a fraud being played upon the plaintiffs and late Smt. Sanjogta Kapoor as well as upon the Court.

8. This is not the case of the plaintiffs/Appellants that they had not seen the Memorandum of Understanding dated 20.4.2005 executed between Defendants No. 1 and 2. A bare perusal of the Plaint in CS(OS) No. 353/2006 filed by Respondent No. 1 - Shri R.S. Chhabra would show that the Memorandum of Understanding dated 20.4.2005 was filed in original, along with the Plaint. This document has been shown at Serial No. 8 in the List of Documents dated 24.2.2006 filed with the Plaint. The compromise application was signed not only by the Appellants but also by their counsel Ms. Megha Khatri. Vakalatnama dated 9.3.2006 in favour of Ms. Megha Khatri was also filed in the Court.

9. A perusal of Writ Petition filed by the plaintiffs/Appellants against Union of India and Others would show that in paragraph 12 of the Petition, they specifically averred as under:

The Respondent No. 2, without any intimation to the Petitioners & Respondent No. 4, proceeded to enter into a Memorandum of Understanding with the Respondent No. 3 on 20.4.2005. Under the said MOU (hereafter referred to as the second MOU), THE Respondent No. 2 transferred his rights under the original MOU to the Respondent No. 3. A copy of the said second MOU is annexed hereto and marked as Annexure P-2.

In paragraphs 18 and 19, they inter alia averred as under:

18. That to the utter stock of the Petitioner & Respondent No. 4, the Respondent No. 2 proceeded to file a suit on or about 24.2.2006 against the Petitioner & Respondent No. 4 before this Hon.ble Court. The suit was numbered as CS(OS) 353 of 2006.

19. Therefore, after consultation with their legal counsel, they agreed to the suggestion of the counsel of Respondent No. 3 to move a settlement application.

10. If the plaintiffs/Appellants were aware of the contents of the Memorandum of Understanding dated 20.4.2005 as is evident from the fact that the original document was annexed to the plaint in CS(OS) No. 353/2006 and a copy of the same was filed by them as AnnexureP-2 to the Writ Petition, it cannot be said that a material fact was withheld from them or a fraud was played upon them. Whether the Memorandum of Understanding dated 20.4.2005 executed between Defendant No. 1 and Defendant No. 2 amounted to assignment of the M.O.U. dated 20.4.2005 in favour of Defendant No. 1 or it only gave a right to Defendant No. 1 to get it assigned in his favour at a later date is a matter of interpretation of document. If the plaintiffs/Appellants after considering the Memorandum of Understanding dated 20.4.2005 and consulting their Advocate agreed with the contention of Defendant No. 5 that by virtue of Memorandum of Understanding dated 20.4.2005, the earlier M.O.U. dated 28.2.2005 stood assigned in his favour. It cannot be said that a fraud was played upon them by Defendant No. 1. There can be a genuine difference of opinion on the legal interpretation of a document. But since long as the document itself was made available to them, it cannot be said that there was a fraud upon the plaintiffs/Appellants merely because Defendant No. 1 interpreted it to mean as assignment of the first M.O.U. in his favour and the plaintiffs/Appellants agreed with him and that too after consulting their Advocate. In such circumstances, neither there was any concealment nor any fraud.

11. As noted by us, while dismissing the appeal filed by respondent No. 2, Rajesh Kumar, Clause 7 of the Memorandum of Understanding dated 28th February, 2005 executed between him, on the one hand, and the appellant and late Smt. Sanjogta Kapoor, on the other hand, shows that Respondent No. 2 Shri Rajesh Kumar was specifically granted right to nominate and assign Memorandum of Understanding in favour of any nominee(s) and assignee(s). As further noted by us, since Shri Rajesh Kumar had divested all his rights in favour of Shri R.S. Chhabra (Respondent No. 1, herein). The Memorandum of Understanding dated 20th April, 2005 specifically stipulated that he (Respondent No. 1, Shri R.S. Chhabra) shall be entitled to get the sale deed executed in his favour, balance payment was to be made directly to the sellers and the possession was also to be handed over by them to Shri R.S. Chhabra. After execution of the second Memorandum of Understanding, Respondent No. 2 Shri Rajesh Kumar was not entitled, either in law or in equity, to get the suit property sold to him under the Memorandum of Understanding dated 28th February, 2005. Therefore the appellants having compromised with respondent No. 1, after examining the terms and conditions of Memorandum of Understanding dated 20th April, 2005 and after consulting their advocate, it cannot be said that a fraud was played upon them by respondent No. 1 by claiming that the Memorandum of Understanding dated 28th February, 2005 had been assigned in his favour. Respondent No. 1 may have bonafidely interpreted the Memorandum of

Understanding dated 20th April, 2005 to mean that the earlier Memorandum of Understanding dated 28th February, 2005 stood assigned in his favour. But that by itself would not constitute a fraud upon the appellants, particularly, when the Memorandum of Understanding was very much in the knowledge of the appellants. In fact, we failed to appreciate what difference it would have made to the appellants had the Memorandum of Understanding dated 20th August, 2005, actually assigned the previous Memorandum of Understanding dated 28.2.05 to Respondent No. 1, instead of only giving him a right to get the previous Memorandum of Understanding assigned in his favour at a later date. For them what was material was that they had entered into a Memorandum of Understanding with respondent No. 2 Rajesh Kumar on 28th February, 2005 and under that documents they had given special right to him to assign his rights under the Memorandum of Understanding in favour of any nominee or assignee and Respondent No. 2, Shri Rajesh Kumar, by signing the Memorandum of Understanding dated 20.4.05 with respondent No. 1, has already divested him of all his rights under the MOU dated 28.2.2005. For them what is material is that they are getting agreed consideration from respondent No. 1 and are not committing any breach of the terms and conditions contained in the Memorandum of Understanding executed on 28th February, 2005 between them and Respondent No. 2, Rajesh Kumar. They have nothing to lose by executing the sale deed in favour of Respondent No. 1. It is more so when not only the application filed by Shri Rajesh Kumar for grant of interim injunction against execution of the compromise decree dated 28th March, 2006 passed in CS (OS) No. 353 of 2006 has been dismissed, the appeal filed by him has also been dismissed by this Court.

12. The learned Counsel for the appellant has referred to S.G. Thimmappa v. T. Anantha and Ors. AIR 1986 Kar 1, where a learned Single Judge of Karnataka High Court inter alia held as under:

The above statement makes it clear that the party who challenges the compromise on the basis of fraud, undue influence or coercion, has two remedies open to him firstly by filing a suit, secondly, making an application u/s 151 C.P.C. The fact that the Courts can exercise their inherent powers u/s 151 does not mean that there is a bar for filing a suit which remedy is available to the party.

A contract or agreement may be lawful but it can still be challenged on the ground that it was entered into or achieved by exercising fraud, undue influence or coercion and can be avoided. This aspect of the matter is not covered by the words "not lawful. occurring in Rule 3A of Order 23 C.P.C. Therefore, to hold that the compromise decree cannot be challenged on the ground of fraud, undue influence or coercion under R.3A would not be correct.

He has also referred to the decision of learned Single Judge of this Court in IA No. 1868 and 1869/2007 in CS(OS) No. 2885/1989 wherein the learned Single Judge noted an apparent conflict in the decisions of Hon.ble Supreme Court in the case of

[Pushpa Devi Bhagat \(D\) th. LR. Smt. Sadhna Rai Vs. Rajinder Singh and Others,](#) and its decision in [Dadu Dayal Mahasabha Vs. Sukhdev Arya and Another,](#) .

13. In Pushpa Devi Bhagat.s case, 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 CPC 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 (Supra), 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.

15. The contention of the learned senior counsel for the appellants was that since the consent of the appellants to the compromise deed dated 28.3.2006 was obtained by playing a fraud upon them, on account of a misrepresentation that the Memorandum of Understanding dated 28th February, 2005 had been assigned by Respondent No. 2 Shri Rajesh Kumar in favour of Respondent No. 1 Shri R.S. Chhabra, a suit for setting aside the compromise decree is competent.

16. Even if we proceed on the proposition that a party whose consent to the compromise resulting in passing of compromise decree was obtained by fraud, is entitled to file a suit for setting aside such a compromise decree, we find that in the facts and circumstances of the present case, no fraud actually appears to have been played upon the appellants. Therefore the appellants have failed to make out a prime facie case in favour of setting aside the compromise decree dated 28th March, 2006.

17. Even at the stage of granting ad interim injunction during the pendency of the suit, the court is not expected to accept every allegations made in the plaint to be true, where the documents available on record and the facts and circumstances of the case clearly point to the contrary. In fact, in every application for grant of primary injunction in a pending suit it is necessary for the court to enter, to a limited extent, into the merit of the case, in order to determine whether there exists a

prima facie case or not. It would not be necessary for a party to prove its case to the hilt, at least at this stage, but, it is obligatory for him to make out a fair question for determination during trial. The balance of equity and balance of convenience also does not appear to be in favour of the appellants in this case. They have already received Rs. 1.00 crore from Respondent No. 2 Shri Rajesh Kumar, who has already entered into a subsequent Memorandum of Understanding dated 20th April, 2005 in favour of Respondent No. 1 Shri R.S. Chhabra. Respondent No. 1 Shri R.S. Chhabra claims that he has always been and is still ready and willing to pay the balance sale consideration to the appellants. A compromise, on legal advice, was entered into by the appellants with Respondent No. 1, which resulted in a compromise decree being passed on 28th March, 2006. We see no reason for allowing the appellants to back out of the compromise and thereby deprive Respondent No. 1 from execution of the decree passed in his favour. The appellants stand nothing to lose by executing the sale deed in favour of Respondent No. 1, on payment of balance consideration. As noted earlier, the application of Respondent No. 2, Shri Rajesh Kumar for grant of injunction against execution of decree has already been dismissed and appeal filed by him has also been rejected. The Respondent No. 1 paid Rs. 80.00 lacs to Respondent No. 2 way back in April, 2005 and has got nothing in return, whereas the appellants continue to enjoy the possession of the suit property. The relief of injunction is a equitable relief and the equity certainly is in favour of respondent No. 1 and not in favour of the appellants. In the facts and circumstances of the case, we see little likelihood of the appellants ultimately succeeding on merits. Therefore, we find no reasonable ground for grant of injunction to the appellants. This is more so when the order passed by learned Single Judge is a discretionary relief and it cannot be said that the view taken by him in the matter is not a reasonable or plausible view. This Court would not be justified in interfering with the exercise of discretion by learned Single Judge even if it feels that a view contrary to that taken by the learned Single Judge is equally possible in the facts and circumstances of the case. For the reasons given in the aforesaid paragraphs, we find no merit in the appeal and the same is, hereby, dismissed.