

Shamlal Batra and Another

Vs

Bhagwandas Narandas Patel

Civil Appeal No. 2309 of 1972

(K. K. Mathew, A. K. Mukherjea JJ)

28.11.1972

JUDGMENT

MUKHERJEA, J. -

1. This appeal by Special Leave is from a judgment and order passed by a Single Judge of the Bombay High Court on June 22, 1972. The appeal arises under rather peculiar circumstances which may be briefly set out as hereunder.

2. In January, 1961, there was an agreement between the respondent and his landlords in regard to the purchase of a flat and two shops being, main shop No. 35-A and a small shop No. 35. Various disputes arose out of this agreement with the details of which we are not concerned. On March 9, 1964, the landlords filed a suit in the Bombay High Court in which the landlords asked, as an alternative relief, for the ejection of the respondent from the flat and the main shop No. 35-A. The suit was numbered O.O.C.J. Suit No. 100 of 1964. The appellants who were in possession of the main shop No. 35-A were made party defendants. On October 17, 1964, the respondent filed a counter-suit against the landlords for specific performance of the agreement to purchase the small shop No. 35 and, in the alternative, for damages of Rs. 34,000/-. This suit was filed in the Bombay City Civil Court, being suit No. 6519 of 1964. In this suit also the appellants were made party defendants. This suit, however, was on the application of the present respondent, transferred from the City Civil Court to the High Court and was heard along with the suit No. 100 of 1964. On transfer the Bombay City Civil Court suit was renumbered as O.O.C.J. Suit No. 61 of 1968. When these suits came for hearing before a learned Judge of the Bombay High Court, the counsel appearing on behalf of the parties settled the disputes between the parties. On July 5, 1971, we are told, certain consent terms in the hand-writing of the respondent's counsel which were signed also by the counsel for the landlords, the appellants and the respondent were handed over in court to the learned single Judge hearing the suits. The learned Judge thereupon passed an order on the basis of these terms. The order was minuted in the following form :

"By consent, decree in terms signed and handed in. One-half of the institution fee to be refunded."

3. On the same day, some time later, another document containing the consent terms in a type-written form but bearing no signature on behalf of any of the parties was handed into the associate of the learned trial Judge. The appellants say that either they nor their attorney nor their counsel were present at this time. It appears that this type-written document varies from the hand-written document that had been handed over to the learned Judge earlier in the day. One essential difference, we are told, was as to the date of an agreement which clearly appears in the type-written

document as May 21, 1967. The appellants claim that in the hand-written document the date of agreement has been given as May 21, 1961 and that the entire course of transactions between the parties as well as all pleadings in the two suits will show clearly that neither party ever claimed that there was an agreement on May 21, 1967.

4. On September 16, 1971, the respondent's attorneys wrote to the appellants' attorneys demanding that possession of the small shop No. 35 should be handed over to the respondent and that a copy of the agreement of May 21, 1967, should be given to them. In reply the appellants' attorneys told the respondent's attorneys that there was in fact no agreement, dated May 21, 1967, but there was an agreement of May 21, 1961 and further that in the consent terms there was no question of handing over possession of the small shop No. 35 to the respondent. On September 20, 1971, the respondent's attorneys sent their draft of the consent decree to the appellants' attorneys for approval. On October 15, 1971, the respondent took out Chamber Summons in execution of the consent decree for appointment of a Court Receiver and for possession of the small shop No. 35. This application was taken out on the basis of the consent terms as appearing on the type-written document. The respondent obtained an ex parte order from the learned Judge hearing the Chamber Summons. The appellants in their affidavit in answer to the Chamber Summons denied that there was any agreement of May 21, 1967 or that the respondent was entitled to possession of the small shop No. 35. After hearing both the parties the learned Judge hearing the Chamber Summons vacated the ex parte appointment of Court Receiver. He, however, asked the appellants to deposit in court Rs. 30,000/- which the respondent had paid to the appellants on account of the purchase price of the small shop No. 35 under the consent terms. The Chamber Summons was adjourned to court for taking evidence. Pursuant to this order the appellants deposited Rs. 30,000/- in the court and the respondent withdrew that sum.

5. On May 2 and 4, 1972, there were meetings in the Prothonotary's office for settling the draft of the consent decree of July 5, 1971. On June 12, 1972, the respondent's attorneys wrote a precis to the Prothonotary for placing the matter before the learned single Judge for speaking to the minutes and for deciding as to whether the date of agreement should be May 21, 1961 or May 21, 1967. The matter was accordingly placed by the Prothonotary before the learned single Judge who on June 22, 1972, passed the following order :

"Prothonotary and Senior Master to proceed to draw up the decree as per typed consent terms after a week from today. Matter is wrongly placed on Board for speaking to the minutes of order, dated July 5, 1971.

Defendants Nos. 4 and 5 are at liberty to take any proceedings in the meantime if they are so advised."

6. On June 28, 1972, the appellants filed an appeal against this order of June 22, 1972. When the appeal came up for hearing on June 29, 1972, the Division Bench hearing the appeal asked for a clarification by the learned single Judge who gave the clarification on June 30, 1972, in the following manner :

"This matter has been placed before me for directions on a precis written by the plaintiff's Attorneys stating that the Appeal Bench desired a certain clarification of the order made by me on June 22, 1972.

The order made by me is quite clear and conveys my intention that the decree should

be drawn up in accordance with the typed consent terms since they were intended to replace the hand-written consent terms and really speaking the hand-written consent terms should not have remained on the record.

The mere fact that the typed consent terms were through oversight not signed, to my mind make no difference for it is open to the parties to ask the court to pass an order in terms which they have written out though the same may not have been signed. However, before I made that order, by way of extra caution I did read the hand-written terms also since the same were on record."

7. Thereafter on July 3, 1972, the Division Bench dismissed the appeal as not maintainable. The Division Bench of Bombay High Court also dismissed the petition for special leave to appeal from their order, dated July 3, 1972. The appellants then came to this Court for special leave to appeal from the order, dated June 22, 1972 and were granted special leave.

8. The main controversy between the parties centred round the question whether the order, dated June 22, 1972, of the learned single Judge can be sustained.

9. Mr. Shroff appearing for the respondent has made our task very simple by conceding with commendable fairness that the order, dated June 22, 1972, cannot be sustained. The order that was passed by the learned Judge on July 5, 1971, appears to have clearly mentioned that the decree was passed in accordance with certain consent terms which had been signed and handed in. Unless, therefore, the learned Judge came to a finding that his order had not been correctly minuted it is difficult to see how a decree could be drawn up in accordance with the terms which appear in the type-written document, for that document admittedly does not bear the signature of any party and was not certainly the document that was handed over in the court by all the parties. It is possible that the learned Judge was under the impression that the type-written document contains the same terms as the document written in hand. On that basis alone, the learned Judge could have directed that the hand-written document should be replaced by the typed document. Since, however, the contents of the two documents are admittedly different the learned Judge could not, without correcting the minute of July 5, 1971, direct the Prothonotary and the Senior Master to draw up the decree "as per typed consent terms". That is, however, what the learned Judge has done. In his clarification, dated June 30, 1972, the learned Judge says that his order makes it quite clear and conveys the intention that the decree should be drawn up in accordance with the type-written consent terms. The learned Judge further observes that it was his intention to replace the hand-written consent terms. But the learned Judge does not say that the minute, dated July 5, 1971, was wrong and did not correctly represent the decree that he had passed. It is not understood how by a direction passed on June 22, 1972, the learned Judge could ask a decree to be drawn up in the terms which are clearly different from the actual terms of the decree that had originally been passed. In these circumstances we have no doubt at all that Mr. Shroff is very right in his concession that the order of the learned Judge, dated June 22, 1972, cannot be sustained. In this view of the matter, we allow the appeal and set aside the order, dated June 22, 1972, passed by the learned single Judge. The parties will pay and bear their respective costs.

10. Mr. Desai urged us to give certain directions regarding the manner in which this matter should be proceeded with in the Bombay High Court. To this we cannot agree. So far as the order of direction passed by the learned Judge is concerned, it was clearly not sustainable. Even so, after having set aside that order we see neither any justification nor any occasion for giving further directions regarding the manner in which this matter will be dealt with in the Bombay High Court.

The dispute as to what exactly is the content of the written terms of consent or what exactly is the date of the agreement appearing on that written document are matters which must be decided by the Bombay High Court. It is for the parties to take such appropriate proceedings as they may be advised in that behalf to have these disputes settled by the Bombay High Court. We see no warrant for any interference by this Court in those matters.

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