SUPREME COURT OF INDIA

Hansa Industries Pvt. Ltd. and others

Vs.

Kidarsons Industries Pvt. Ltd.

C.A.No.1682 of 1999

(B.P. Singh and Altamas Kabir JJ.)

13.10.2006

JUDGMENT

B.P. SINGH, J.

This appeal by Special Leave is directed against the judgment and order of the High Court of Delhi at New Delhi dated March 25, 1998 in F.A.O (O.S.) No.39 of 1993, whereby the Division Bench of the High Court dismissed the appeal preferred by the appellants herein against the order of the learned Single Judge dismissing their objections to the report of the Chartered Accountants who had valued the share of Respondent No.1 Company, and directing the implementation of the settlement arrived at between the parties on 9th June, 1988. This Court while granting special leave by its Order dated March 19, 1999 restricted the appeal to two issues only as recorded in the order of this Court dated August 10, 1998, namely issues relating:-

"(a) The portion of the Golf Links property which was in the possession of N.N. Nanda.

(b) Modification of the Division Bench order so that it is stated that the company shall challenge the imposition of capital gains tax, if any provided funds for that purpose are furnished by the appellants".

To appreciate the background in which the two aforesaid issues arise, it is necessary to refer to the factual background of the case. The relevant facts are really not in dispute. The Respondent No.1 Company, namely Kidarsons Industries Pvt. Ltd. is a Private Limited Company closely held by the Nanda family. Except for a few shares held by their relatives and friends the entire shareholding of the Company is that of the members of the Nanda family. Appellant No.2 before us is Shri Narendra Nath Nanda. His three brothers namely, Mohinder Nath, Varinder Nath and Rajinder Nath were the respondents in the High Court alongwith their mother, who is no more.

The main source of income of Respondent No.1 Company was the commission earned from the agency business of M/s. Thyssen Sthal Union of Germany (hereinafter referred to as 'Thyssen'). Disputes arose between the brothers, and it appears that appellant No.2 succeeded in getting the agency exclusively in his name. M/s. Thyssen served a notice on Respondent No.1 Company terminating their agency w.e.f. June 30, 1988 and thereafter the agency was given to appellant No.1,

namely Hansa Industries Private Limited, a company controlled by appellant No.2.

After the termination of the agency of Respondent No.1 Company, the appellants herein filed a petition for winding up of Respondent No.1 Company alleging that the agency having been terminated, the main source of income of the Company had vanished and, therefore, it was just and equitable to wind up the Company. On the other hand, the Respondents filed a suit for declaration and for injunction restraining the appellants from carrying on the agency business by holding themselves out as the agent of M/s. Thyssen.

During the pendency of the proceedings the parties arrived at a compromise whereby appellant No.2 Narendra Nath Nanda and his group agreed to transfer their equity shares in Kidarsons Industries (P) Ltd. Respondent No.1 Company, constituting 30.14% of the share capital of Respondent No.1 Company, in favour of the respondents. The price of the shares was to be paid in specie by transferring to the appellants 30.14% of the assets of the Company. The agency of Thyssen was to be retained by Narendra Nath Nanda, appellant No.2 and his group. The relevant terms of the settlement are the following:-

"2. That the price of the aforesaid 5654 (later corrected as 5564) equity shares of Kidarsons Industries (P) Ltd., will be paid to Shri Narendra Nath Nanda, and/or his nominees in specie by Company by transferring to him 30.14% of the assets of the Company. Marginal amount not exceeding 5 lakhs may be paid by the company to Shri Narendra Nath Nanda and/or his nominees as the case may be, in cash if found necessary. Similarly Shri Narendra Nath Nanda may make similar compensatory equilisation payment to the company. Parties by consent can, however, agree to a larger amount.

6. That Shri P.N Khanna, Retired Judge is at present acting as a Mediator. He will act as a Commissioner, to separate 30.14% of the assets of the company to be given to Shri Narendra Nath Nanda Group as set out hereinbefore.

10. Assets of the company will be valued as on 01.07.1988.

14. Shri Narendra Nath Nanda will continue to occupy the portion of the property of the company in which he is at present residing as deemed owner/owner, and the value of such portion will be taken into account for evaluating the assets of the company. The value of such part of the property as is occupied by Shri Narendra Nath Nanda will be adjusted in the value of his share.

16. That for the purpose of valuation of share of Shri Narendra Nath Nanda Group, the property No.K-72, Udyog Nagar, Rohtak Road, Delhi will be treated as the property of the company.

19. This agreement will be filed in the Suit No.1310 of 1988 and C.P. No.28 of 1988, and appropriate orders will be passed in the suit".

Justice P.N. Khanna acting as the Commissioner allotted the Golf Links property to the group of appellant No.2 even though he found that appellant No.2 and his group were entitled to get assets worth Rs.1.10 crores whereas the value of the property was Rs.1.82 crores. However, since further disputes arose between the parties the matter came up before the Court and it was agreed by the parties that the valuation of the shares of Respondent No.1 Company namely, Kidarsons Industries Private Ltd. and the immovable properties owned by the Company shall be done, and for this

purpose the Court by its order of August 30, 1990 appointed M/s. V. Shankar Aiyer and Company as the Chartered Accountants for valuing the assets of the Respondent No.1 Company. They were required to work out the value of each share after valuing the assets as well as the liabilities of the Company. The Court passed an order to this effect on September 4, 1990.

The Chartered Accountants gave their report and worked out the net assets of Respondent No.1 Company at Rs.1,68,95,570/-. On that basis the value of each share was worked out as Rs.916/-. From this the valuers deducted 20% on account of provision restricting transfer of the shares of Respondent No.1 Company. By this process, the value of each share was worked out to be Rs.733/-.

Appellant No.2 filed his objections to the report of the Chartered Accountants which was dismissed by a learned Judge of the High Court by his Judgment and order dated February 5, 1993. Objections were raised such as those relating to valuation of goodwill, valuation of tenancy rights, valuation of Udyog Nagar plot, deduction from the value of the assets, provision for capital gains tax liability which may be payable on the hypothetical transfer of property, the deductions made from the value of the shares on account of restriction on transfer of the shares, and the question of allotment of a portion of the Golf Links property in favour of appellant No.2 Shri Narendra Nath Nanda in terms of Clause 14 of the settlement between the parties. In the instant appeal, we are only concerned with two issues namely, whether the portion of Golf Links property which at the time of settlement was occupied by Shri Narendra Nath Nanda be not allotted to him, and secondly, whether appropriate directions be given so that the appellants be made liable for payment of capital gains tax, if any, levied in future which levy shall be challenged by Respondent No.1 Company, provided the funds are made available to it by the appellants for the purpose.

At the threshold we may observe that the exercise undertaken by the High Court was with a view to give effect to the terms of settlement reached between the parties. It is trite that the terms of settlement reached between the parties shall ordinarily not be modified except with the consent of the parties. In the instant case, it has not been argued by anyone that the terms of settlement with which we are concerned are either illegal as being opposed to any statute or that it is hit by impossibility of performance and, therefore cannot be performed or that the settlement was not reached bona fide. Learned counsel appearing on behalf of the appellants submitted that Clause 14 of the settlement in clear terms provided that appellant No.2 was to continue to occupy the portion of the Golf Links property of the Company in which he was residing as deemed owner/owner, and that the value of such portion shall be taken into account for evaluating the assets of the Company. The value of such part of the property as was occupied by Shri Narendra Nath Nanda was to be adjusted in the value of his share. He submitted that the parties clearly agreed that Shri Narendra Nath Nanda, appellant No.2 will be allotted the portion of Golf Links property occupied by him on the date of settlement and that the value of the portion occupied by him shall be adjusted against the value of his share. It was submitted before us that in case anything more has to be paid that will be paid by Shri Narendra Nath Nanda, but the Respondents cannot insist on the ground of their convenience that the entire Golf Links property be allotted to them. The High Court in its impugned judgment has observed that having regard to the acrimony between the parties it was practically impossible for them to live in the same house. The strained relationship between the parties was evident from the fact that there had been instances of violence, and matters reached such a stage that reports were made to the police. The High Court also observed that being leasehold property, sub-division of the property was not permitted. It further observed that under the settlement, the appellants were entitled to 30.14% of the assets of the Company and only a sum not exceeding 5 lakhs could have been paid by the Company in cash, if the same was found necessary, and vice-

versa. Having regard to these circumstances the learned Judges held that the interpretation placed on Clause 14 by the learned Single Judge was correct and the said property could not in any manner be given to Shri Narendra Nath Nanda.

We may observe that before us counsel appearing on behalf of Shri Narendra Nath Nanda gave up his claim of allotment of the entire Golf Links property to him and submitted that he will be satisfied if the portion in his occupation on the date of settlement is allotted to him. He has very strongly asserted that when a settlement had been reached which is sought to be given effect, the Court cannot re-write the settlement. There is no ambiguity in Clause 14 of the settlement, and there is nothing to indicate that it is unworkable, however inconvenient it may be to the respondent. Certainly, it was not incapable of being implemented and the architects may have a solution for their problem. It is submitted that if, however, the Court comes to the conclusion that Clause 14 cannot be given effect, it being one of the important conditions of the settlement, the whole agreement becomes un-enforceable with its concomitant consequences. It is, therefore, submitted that in terms of Clause 14 of the settlement the portion of the Golf Links property which was in occupation of Shri Narendra Nath Nanda ought to be demarcated and allotted to him and the value thereof be adjusted against his share. It is submitted that in the ultimate analysis the parties will themselves have to find a solution to their problems, if any, and learn to live peacefully in the premises. On the other hand, counsel for the respondent submitted that this was really a case of family settlement and the learned Judges have taken the broadest view of the matter with a view to give effect to the settlement reached between the parties. It is submitted that the over- all intention was to give respondent No.1 Company to the contesting respondents and by compensating the appellants who are entitled to their 30.14% share in specie and the agency business of Thyssen. If the dominating intention of the parties has been effected minor issues like the one raised by the appellants should not defeat the settlement reached between the parties. It is submitted that a little ironing out of creases in family settlements must be permitted. It is therefore, submitted that the finding of the High Court on this aspect of the matter required no interference. Learned counsel for the respondents has brought to our notice a decision of the this Court in Kale and others vs. Deputy Director of Consolidation and others : (1976) 3 SCC 119 laying down the approach of the Court in giving effect to a bona fide family arrangement entered into between the parties with a view to resolving disputes once for all. This Court held that the family arrangements are governed by special equity peculiar to themselves and would be enforced if honestly made. Reference was made with approval to a passage appearing in Kerr on Fraud wherein the following pertinent observations appear:- "The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend."

Reference was also made to the observations regarding the essentials of the family settlement and the principles governing the existence of the same in Halsbury's Laws of England, Volume 17, Third Edition at pp. 215-216 which are as follows :-

" A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied.

Family arrangements are governed by principles which are not applicable to dealings between strangers. The Court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements."

This Court held that courts have leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits. The principles were concretized and succinctly reduced to the following propositions :-

"(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence; (3) The family arrangement may be even oral in which case no registration is necessary;

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the Court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immoveable properties and therefore does not fall within the mischief of Section 17(2) (sic) (Section 17(1)(b)?) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld, and the Courts will find no difficulty in giving assent to the same; (6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement."

The aforesaid judgment of this Court refers to many other decisions to which we need not advert in this case but some of those decisions do take the view that a compromise or family arrangement is

based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary.

We have made the above observations only because it has some relevance to the second issue which arises for our consideration in this appeal.

It is true that the High Court has taken note of the practicalities of the situation and has proceeded on the basis that the appellants and the respondents cannot peacefully live in the same premises. The High Court has, therefore, not favoured allotment of a portion of the house in favour of appellant No.2 and has approved the allotment of the house to the respondents who owned the majority shares in the respondent No.1 Company. This was done with a view to ensure that the parties live separately but in peace and harmony. We cannot find fault with the concern shown by the High Court, but the problem which arises in the instant case is that the High Court was not considering a matter in which it could have exercised its discretion to make allotment one way or the other as in a case of family partition. The decree of the Court is based upon a settlement reached between the parties. Even at the time when the settlement was reached the parties were well aware of the strained relationship which existed and the unfortunate events that occurred between the branch of appellant No.2 and the remaining members of the family. Despite this, it was agreed by all of them that the portion in occupation of appellant No.2 shall be allotted to him and the value thereof adjusted against his share. The respondents cannot now be heard to say that it would be inconvenient for them to reside with appellant No.2 and his family members in the same house, though in separate portions. The question as to how the parties will manage their affairs is a matter with which they only are primarily concerned and the Court cannot advise them in the matter. It may be that the architects may provide a solution for their problems, or it may be that in view of the circumstances one party may agree to sell its share or buy the share of the other party with a view to purchase peace, if that becomes necessary. These are matters in which the Court may have nothing to say.

Clause 14 of the settlement being unambiguous, clear and categoric, it must be given effect because one cannot term the said Clause 14 as vitiated by fraud, or illegal being in breach of any statutory provision, or against public policy, or hit by the principle of impossibility of performance. The settlement was made bona fide by the parties to resolve all their disputes and all facts were known to the parties when they reached the settlement. With their eyes open and fully aware of their experiences of the past, they agreed to share the Golf Links property. The relevant clause in the settlement is not vitiated by any consideration which may impel the court not to give effect to that clause in the settlement. The question of practical inconvenience should have concerned the respondents when they entered into the settlement. They cannot at the stage of implementation of the settlement avoid a covenant in the settlement solemnly incorporated with their consent on the pretext of practical inconvenience of living in the same house, albeit in separate portions, in the unfortunate background of bickerings and acrimony. This issue must, therefore, be decided in favour of the appellants. The next question is whether the judgment of the High Court could be suitably modified to provide for challenge by respondent -Company to any order that may be passed in future by the tax authority imposing capital gains tax on the hypothetical transfers made under the

settlement. We find from the judgment of the High Court that the matter was discussed at length and the Court was of the view, prima facie, that the transfers may attract capital gains tax. There was, therefore, justification for deduction of the anticipated capital gains tax liability from the total value of assets.

Before us learned counsel for the respondent did not want to join issue on this question and left it to us to pass an appropriate order. Learned counsel for the appellants argued before us that no capital gains tax is payable in the instant case because the transfers are by virtue of an order of the Court and, therefore, Sections 100 to 104 of the Companies Act are attracted. There is in reality no transfer or sale that may attract capital gains tax, in view of the pre-existing right and title of the parties which gets crystalised under a family arrangement. He further submitted that so far as respondent - Company is concerned it does not get any consideration and, therefore, there is no question of any capital gains tax liability so far as respondent Company is concerned. In any event even if the capital gains tax liability is imposed that will be the liability of the appellants herein, and they will be obliged to discharge that liability in accordance with law. Learned counsel for the appellant made a clear and categoric statement before us that if any liability arises out of the valuation of the assets or capital gains relating to properties covered by the settlement, the appellants shall be liable to discharge that liability. The appellants are willing to execute an undertaking to this effect and to creating a charge on the assets which may fall to their share for discharge of such tax liability, if any, imposed. It was submitted that there was no need to deduct this amount from the value of the assets of the Company and this Court may direct that in case such a liability arises in future and any demand is raised against respondent Company of capital gains tax, the appellants shall be liable to discharge that liability. Respondent No.1 shall be entitled to challenge the tax demand, if any, for which necessary funds will be made available by the appellants. All this has been stated on the assumption that on a future date there is a demand of capital gains tax by the tax authority on the alleged transfers made under the settlement.

We are of the view that since no demand of capital gains tax has been made so far, if any such demand is made in future in respect of the transfer of assets under the settlement for which 20% has been deducted by the Chartered Accountants, the respondent Company shall challenge the demand provided the appellants shall place at its disposal necessary funds for the purpose. In any event the liability under the head "capital gains", if any, shall be that of the appellants who shall furnish an undertaking to this effect accepting their liability, and create a charge over the aforesaid assets to secure payment of capital gains tax, if any, imposed in future. Subject to this being done, there shall be no deduction from the value of the assets of the company of the anticipated liability of capital gains.

We, therefore, allow this appeal to the extent indicated below:-

a) that the judgment and order of the High Court is modified to the extent that appellant No.2, namely Shri Narendra Nath Nanda shall be allotted the portion of the Golf Links house which was in his occupation on the date of settlement, and the value thereof shall be adjusted against his share. If something remains to be paid even after adjustment, the appellants shall pay such amount within a period of two months from the date of the order of the High Court.

b) That no deduction shall be made from the value of the assets of the anticipated capital gains tax liability on the hypothetical sale under the settlement. In case a demand of capital gains tax is made by the tax authority in future against respondent Company, the aforesaid Company shall be entitled

to challenge the imposition of such tax subject to appellant No.2 providing sufficient funds to the respondent Company for this purpose. In any event, the capital gains tax, if found payable, shall be the liability of the appellants to be discharged by them. They shall furnish an undertaking before the High Court accepting such liability, and shall execute a document creating a charge on the assets allocated to them under the settlement to discharge capital gains tax liability, if found payable.

The matter is remitted to the High Court for giving effect to the aforesaid modifications which may involve directing the Chartered Accountants to make a re-calculation on the basis of the directions contained in this judgment, and apportion the assets accordingly.

This appeal is allowed to the extent indicated above. Parties to bear their own costs.

WITH

CIVIL APPEAL NO.1705 OF 1999

Hansa Industries Pvt. Ltd. and others Appellants Versus

Kidarsons Industries Pvt. Ltd. Respondent

J U D G M E N T

B.P. SINGH, J.

In view of the judgment passed by us today in Civil Appeal No. 1682 of 1999 it is not necessary to pass any order in this appeal. The appeal stands disposed of.