

# SUPREME COURT OF INDIA

Narinder Kumar Malik

Vs.

Surinder Kumar Malik

(S.B.Sinha and Deepak Verma JJ.)

04.08.2009

## JUDGEMENT

**Deepak Verma, J.**

1. Leave granted.

2. Parties to the litigation are real brothers having spent their childhood with cheer and joy in the courtyard, are here, now fighting tooth and nail for theirf respective shares in a piece of plot admeasuring 3149.75 sq. yds. allotted to the partnership firm, viz., M/s. Narinder Kumar Malik & Surinder Kumar Malik at D-2, Udyog Nagar, Rohtak Road, New Delhi.

3. Even though the partnership business could never commence but the plot in question continued to be owned by both of them as partners of the firm to the extent of 50% each. On account of differences having arisen between the parties, the present appellant-Narinder Kumar Malik was constrained to file a suit bearing No. 779 of 1997 before the High Court of Delhi, later transferred to the Court of Additional District Judge, Tis Hazari, Delhi and was numbered as 289 of 2004, claiming 1/2 share in the aforesaid piece of land allotted to the partnership firm.

4. The respondent filed a written statement and took an objection that the property was owned by a partnership firm and thus the suit for partition was not maintainable and rather a suit for dissolution of partnership firm ought to have been filed.

5. During the pendency of the proceedings of the suit, the defendant (respondent herein) filed an application under O.VII R. 11 of the Code of Civil Procedure (for short, `CPC') for dismissing the suit on the ground that it did not disclose any cause of action as the property ws owned by a partnership firm, whereas the appellant herein filed an application under O.XII R 6, CPC praying therein that on account of admission having been made by the respondent, judgment and decree on the said admission be passed.

6. Both the applications came to be considered by the learned trial Judge on 04th November 2004. By the said order, the application filed by the respondent under O.VII R. 11, CPC came to be dismissed. However, the application filed by the appellant herein under O.XII R.6

CPC came to be allowed and a preliminary decree of partition was passed in the following terms:-

"12. In view of my above discussion, the application of the defendant under order 7 rule 11 CPC is hereby dismissed and application under order 12 rule 6 CPC is hereby allowed. A preliminary decree of partition is passed with the direction to the parties to decide the means of partitioning the plot in question and in case they failed to partition the plot by themselves, a Local Commissioner may be appointed by the court for suggesting the means.

13. The case is now adjourned for 8.12.2004 for further proceedings."

7. Feeling aggrieved and dissatisfied with the said order respondent herein, viz., Surinder Kumar Mail was constrained to file appeal in the High Court of Delhi at New Delhi registered as R.F.A. No. 649 of 2004 reiterating the grounds taken in the written statement and in the application filed by him under O.VII Rule 11 of CPC.

8. It appears, during the pendency of the said appeal in the High Court, good sense prevailed upon the two brothers and they arrived at a settlement and pursuant thereto "Memorandum of Understanding" (hereinafter referred to as `MOU') came to be executed between themselves on 09th February 2005 at Delhi.

9. It is pertinent to mention here that this MOU was arrived at also on account of the strong belief of the Division Bench of the High Court that the parties being real brothers should settle the matter among themselves through mediation. Accordingly, on 17th December 2004 an order was passed, with the consent of the parties, that both the brothers would appear before Mr. M.L. Mehta, Addl. District Judge, Delhi who was requested to be a mediator. On 17th March 2005 it was noted by the High Court that parties have entered into a settlement as MOU was already entered into between the parties on 09th February 2005. However, despite settling the matter outside the Court on their own terms and conditions, it appears that the dispute between them did not come to an end.

10. Some of the relevant and salient terms and conditions of the MOU are reproduced hereinbelow:

"(i) that Party No.1 has agreed to sell his share i.e. 50% area of the said Industrial plot to party No.2 at the settled and agreed consideration of Rupees three crores fifty lacs only and party No.2 has agreed to purchase the said share at the said consideration.

(ii) that the second party has paid a sum of Rs. 10,00,000.00 (Rupees ten lacs) in cash and Rs. 15,00,000.00 vide Payee's A/c Cheque No. 131112 dated 05.02.2005 drawn on UCO Bank, Punjabi Bagh in favour of the first party as a token money and in first party has accepted the same.

(iii) that as agreed the second party shall make the balance payment of Rs. 3.25 crores within a maximum period of 150 days the date of execution of this, MOU i.e. upto or before 9th day of July, 2005. However, this period of 150 days is extendable by another 10 to 20 days, if need be, with the consent of both the parties but not more.

(iv) that on receiving the full consideration of Rupees three crores, fifty lacs the first party shall execute the necessary documents like GPA, Release Deed, Sale Deed etc., as advised in favour of the second party or his nominee and hand over the physical, peaceful and vacant possession of his share to the second party or his nominee as the case may be.

(v) that the First Party i.e. Shri Narinder Kumar Malik is presently out of India, but his counsel/advocate Shri J.R. Bajaj along with Shri Rohit Malik son of the first party and Shri Ashok Kumar Marwaha, Advocate, have been authorized to sign this MOU for and on his behalf.

(vi) that both the parties shall be jointly responsible for payment of ground rent/lease money and all other statutory taxes etc., in respect of the Industrial Plot upto the date of execution of this MOU, but thereafter only party No.2 and/or his nominee shall be liable to pay the same.

(vii) that all the expenses like stamp duty, registration charges etc., for the registration of necessary documents shall be borne by party No.2 or his nominee in whose favour the documents of ownership are to be executed.”

11. On 12th May 2005 despite having arrived at a settlement, High Court directed them to approach the learned mediator for resolving their points of differences, if any, but, instead of resolving the same, their difference continued to rise.

12. A registered notice dated 22nd June 2005 was not sent to the appellant by respondent's advocate Mr. Harish Malhotra mentioning therein that his client, viz., the respondent herein is ready with the balance payment as mentioned in the said MOU and despite approaching the appellant, he has not been honouring the same. Appellant replied to the said notice through his advocate Shri Anuj Sehgal on 30th June 2005 denying the averments made in the notice and calling upon the respondent to pay the balance sum of Rs. 3.25 crores to him on 07th July 2005 at 10.00 a.m. at 885, East Park Road, Karol Bagh, New Delhi. On payment of the aforesaid amount, it was categorically mentioned by the appellant that necessary transfer documents for transfer of his share of the property in the name of the respondent or his nominee would be executed.

13. It was further mentioned in the said reply to the notice that in case there is any default committed by the respondent to pay the balance amount on the said date or latest by 09th July 2005 as contemplated in the MOU then in that eventuality MOU would stand cancelled and the appellant would no longer be bound by the said MOU dated 09th July 2005.

14. It appears from the record that despite giving a fixed time to the respondent for compliance of the terms and conditions of the MOU, respondent did not honour the commitment and instead continued to send notices through his advocate, which were replied to by the appellant.

15. During all this period, the appeal filed by the respondent in the High Court remained pending and it came up for hearing before the Division Bench on 19th July 2005. On the said date, learned counsel appearing for the parties informed that negotiations have failed as both of them were making allegations against each other. On the said date, it was further informed that respondent is still ready and willing to pay the balance sum of Rs. 3.25 crores in terms of the MOU, but, counsel for the appellant said that since no payment was received by the last date, i.e. 09th July 2005 as mentioned in the MOU, the time cannot be extended. In the said order, it was further directed that the amount of Rs.25 lac, which was received by the appellant during the pendency of the appeal, be returned to the respondent within a week.

16. In spite of the aforesaid order, the respondent filed an application being C.M. No.12796 of 2005 before the High Court seeking a direction to the appellant to execute necessary transfer documents in terms of the MOU.

17. On 04th April 2006, a statement was made by the parties that no settlement is possible between them and the appeal was directed to be listed for hearing on 14th July 2006.

18. However, on 11th October 2006, yet another statement was made by the learned counsel appearing for the parties that they are making another attempt to find an amicable solution and thus prayed for time.

Consequently, appeal kept on being adjourned from time to time. But it came up for hearing again on 18th July 2007. On the said date, the Division Bench passed an order, the relevant portion whereof is reproduced hereinbelow:

".....

While counsel for the appellant claims that the appellant was ready and willing to implement the settlement and had raised the funds therefore, counsel for the respondent disputes the same. Counsel for both the parties are conscious of the fact that as a result of passage of time, there have been change in the values of the assets etc. Both of them, however, are desirous of making yet another attempt of an amicable settlement, since appellant and the respondent happen to be the brothers. In these circumstances, we consider it appropriate to refer the matter to Delhi High Court Mediation & Conciliation Center for mediation.

Mr. A.S. Chandhiok, Sr. Advocate is appointed as the mediator along with Ms. Swati Singh as the co-mediator. Both the parties will deposit Rs.2500/- each with Delhi High Court Mediation & Conciliation Center and shall appear before it on 23.7.2007 at 4.30 P.M. List this matter before the court on 21.8.2007"

19. The aforesaid order would show that parties were once again given an opportunity to iron out the differences between them. But despite the best efforts made by the learned Judges of the High Court, the Mediator and the senior advocate appointed in this behalf they were not able to convince the parties that it is a fit case where an amicable settlement must be arrived at. Thus, on 24th January 2008 a statement was made that mediation talks have failed. The matter, then came up for hearing again before another Division Bench of the High Court on 24th July 2008, but learned counsel appearing for the parties thought that there is still light at the end of the tunnel and prayed for two weeks' time for arriving at a lasting settlement between the parties. Since nothing worked on that, the matter was, finally taken up by the High Court on 08th September 2008 and appeal of the respondent was allowed in terms of the directions contained in para 39 of the impugned judgment which are reproduced hereinbelow:

"We thus dispose of the application and along therewith the appeal by passing the following directions :- (A) The appellant shall deposit Rs. 3.5 crores with the learned Trial Judge within a period of 2 weeks from today. (The appellant is being directed to deposit Rs. 3.5 crores because the appellant has received back Rs.25 lacs pursuant to interim orders passed in the appeal).

(B) Along with the deposit, the appellant shall file a draft of the document which the appellant desires to be executed by the respondent to convey respondent's 50% share in the subject property.

(C) The learned Trial Judge would thereupon finalize the document to be executed and the respondent would thereafter execute the document drawn up and on execution of the same would be entitled to received Rs. 3.5 crores from the learned Trial Judge."

20. Appellant, feeling aggrieved and dissatisfied with the aforesaid direction contained herein, has preferred this appeal.

21. Ms. Indu Malhotra, learned senior counsel appearing on behalf of the appellant contended that in the MOU a specific date was fixed for payment of balance consideration by or before 09th July 2005 and respondent having failed to honour his commitment by the said date and time being the essence of the contract, MOU could not have been directed to be implemented by the High Court.

22. It was also contended that it being a contingent contract dependent on execution of the terms and conditions mentioned in the M.O.U. and respondent having failed to honour his own commitment, the same cannot be given effect to.

23. Mr. Raju Ramchandran learned senior counsel appearing for the respondent contended that at all material times, the respondent had been ready and willing to perform his part of the contract but for some reason or the order and also keeping in mind that the price of the

disputed plot has substantially shot up, the appellant is making excuses not to comply with the direction as contained in the said order.

24. It was also contended by him that the appellant would be required to pay unearned increase of the plot to the Delhi Development Authority and, therefore, he has taken somersault from complying with the directions.

25. In the light of the aforesaid contentions, we have heard learned counsel for the parties and perused the record.

26. It is pertinent to mention here that the amount was deposited by the respondent only on 04th October 2008 whereas in the impugned order passed by the High Court two weeks' times was granted to him to deposit the sum of Rs.3.5 crores. From the aforesaid date it would be clear that the amount, as directed to be deposited by the impugned order, was not deposited by the respondent within the stipulated time. Instead, the same was done much after the last/stipulate date.

27. To ascertain if the time was the essence of the contract, we have to go through Condition No. (iii) of the MOU which categorically mentions that the second party, viz., the respondent herein shall make the payment of the balance amount of Rs. 3.25 crores within a maximum period of 150 days from the date of execution of the MOU, i.e., upto or before 09th July 2005.

“However, this period of 150 days was extendable by another 10 to 20 days, if need be with the consent of both the parties but not more.”

28. High Court certainly fell into error in construing the said provision in right perspective and erred in coming to the conclusion that since time was extendable, the time could not have been made the essence of the contract.

29. A bare perusal of the aforesaid provision makes it clear that ultimately the time was fixed only upto 09th July 2005. However, with an intention to give further leverage to the respondent herein, the time was made extendable by 10 to 20 days and not more and that too only with the consent of the parties. Even if it is said that 09th July 2005 could not have been the last date, at least after 20 days the said last date expired.

“Admittedly, the respondent has not honoured his commitment, within the extendable period given to him, even though he had no right to claim the benefit as of right for the extendable period.”

30. The respondent sent the photocopies of three pay orders two of which were for a sum of Rs.1 crore each and the third one for a sum of Rs.1.25 crore. It was neither here nor there as the originals were never tendered to the appellant and only photocopies were sent to make a semblance that respondent has been ready and willing to perform his part of the contract.

“When MOU had already been arrived at between the parties then mere show of readiness and willingness would not discharge the obligation resting on one of the parties unless it is shown to be real and genuine.”

31. From the conduct, behaviour and attitude of the respondent it is clearly made out that he had not been ready and willing to perform his part of the contract as mentioned in the MOU.

32. Ms. Indu Malhotra, learned senior counsel for the appellant has placed reliance on a judgment of this Court in the case of *Star Construction and Transport Co. & Ors. vs. India Cements Ltd.*<sup>1</sup> and laid emphasis on paragraph 7 thereof which reads thus:

"7. In this case, application are filed under Order 23 Rule 3 CPC. This Rule is a provision for making a decree on any lawful agreement or compromise between the parties during the pendency of the suit by which claim is satisfied or adjusted. The agreement, compromise or satisfaction may relate to the whole of the suit or part of the suit or it may also include matters beyond the subject-matter of the suit. But Rule 3 clearly envisages a decree being passed in respect of part of subject-matter on a compromise. Whether in fact there has been compromise or adjustment of the suit claim or any part thereof is itself put in dispute in this case. Unless it is clearly established that such accord or compromise has been entered into between the parties, the powers under order 23 Rule 3 CPC could not be exercised. The respondent's case is that the claim made in the suit were never before the arbitrators in any form and even the figures mentioned in the reconciliation statement also do not pertain to the suit claim and the scope of reference to the arbitrators does not enable them to make an award on that aspect of the matter. Those objections have to be dealt with appropriately on full trial. That is the course now adopted by the Division Bench of the High Court."

33. She has further placed reliance on yet another judgment of this Court in the case of *United Bank of India vs. Ramdas Mahadeo Prashad & Ors.*<sup>2</sup> particularly paragraphs 7 and 9 thereof which are reproduced herein below:

"7. Undisputedly, the respondents did not withdraw the suit filed by them against United Bank of India, which is the condition precedent stipulated in clause (1) of the MOU. The respondents also did not pay the guarantee liability of Rs.2.33 lakhs. No compromise petition was filed before an appropriate court. Therefore, by no stretch of imagination can it be said that the terms and conditions stipulated in the MOU had been complied with and acted upon by the parties. Apart from what has been said, subsequent to the MOU there was also a lot of correspondence between the parties by exchanging letters giving offers and counter-offers, as would be revealed in the letters dated 16.6.1994, 23.12.1994, 12.6.1995, 15.6.1995 and 19.6.1995. All these correspondences would go to show that the parties failed to arrive at a consensus even on what were the terms of the MOU.

Thus, it is clear that there was no concluded contract nor was there any novation.

9. Mr. Ranjit Kumar, learned Senior Advocate contended that in view of the MOU signed by the parties the original contract stood substituted by the MOU and it is a fit case where Section 62 of the Indian Contract Act can be invoked. We have already said that there was no concluded settlement or novation. Even otherwise, there has been non-compliance with the terms and conditions of the MOU by the respondents and a party in breach can hardly seek to enforce a contract. Therefore, the MOU does not amount to novation of contract as envisaged under Section 62 of the Indian Contract Act. The contention of Mr. Ranjit Kumar is, therefore, legally untenable."

34. However, even without referring to the aforesaid judgments, from the facts as have been mentioned hereinabove, it is as clear as day light that respondent has committed default of the terms and conditions of the MOU and had neither been ready and willing nor has been so throughout the relevant period. Thus, MOU entered into between the parties cannot be given effect to. We accordingly hold so.

35. Thus, judgment and decree passed by the impugned order are hereby set aside and quashed, but, with no order as to costs.

36. The appeals are allowed accordingly.

<sup>1</sup>(2001) 3 SCC 351

<sup>2</sup>(2004) 1 SCC 252