

A M/S. CHITRALEKHA BUILDERS & ANR.
THROUGH ANIL G. SHAH POWER OF ATTORNEY &
HUSBAND OF THE PARTNER

v.

B G.I.C. EMPLOYEES SONAL VIHAR CO-OP. HOUSING
SOCIETY LTD. & ANR.

(Civil Appeal No. 946 of 2016)

MARCH 01, 2021

[INDU MALHOTRA AND AJAY RASTOGI, JJ.]

- C *Code of Civil Procedure, 1908 – s.96 – Right of appeal – Appeal against judgment of High Court dismissing appeal filed by appellants against Consent Order dated 16.02.2005 in Suit No. 1335/1988 to which appellant was not signatory – Appellants were not a party to the proceedings at the stage when the consent order*
- D *came to be passed on 16.02.2005, or the subsequent consent order dated 03.10.2005 in Suit No. 1335 / 1988 – High Court in the impugned judgment, recorded a finding that since Appellants were not a party to the proceedings, and the Order dated 16.02.2005 was passed on the terms agreeable to the parties to the proceedings,*
- E *it shall not be binding upon the Appellants, and their rights could be examined independently in the substantive suit No. 3162 / 2005 filed at their instance (which is pending adjudication before High Court) – Propriety – Held: Proper – Since the Appellants were not a party to the Consent Terms as evident from the record, when the Orders came to be passed on 16.02.2005 followed with 03.10.2005,*
- F *it may not bind the Appellants – Its legal effect is open to be examined in the substantive suit filed at their instance independently on its own merits in accordance with law – Party – Consent decree.*

Disposing of the appeal, the Court

- G **HELD:1. Suit No. 1335/1988 was disposed of by the Court on the consent terms arrived between the parties to the proceedings vide Order dated 16.02.2005 followed by Order dated 03.10.2005. In the given circumstances, the Appellants who were later impleaded, have a right of appeal under Section 96 of the**

CPC. However, since the Appellants were not a party to the Consent Orders, it was not open for the Court to examine the legal effect of the Consent Orders dated 16.02.2005 and 03.10.2005 to which the Appellants were not a party. Once the substantive suit has been filed at their instance questioning the Consent Orders dated 16.02.2005 followed by 03.10.2005, the same is indeed open to be examined independently on its own merits in the pending proceedings initiated at their instance. [Para 19][135-D-G]

2. So far as the rights of the Appellants are concerned, the same have been duly protected by the High Court in the impugned judgment. The observations/findings which were recorded by the High Court in the impugned judgment, in no manner, prejudiced the rights of the Appellants, and the pending Suit No. 3162/2005 filed by the Appellant may be examined by the Court independently on its own merits in accordance with law without being influenced by the observations made by the High Court in the impugned judgment. [Para 20][135-G-H; 136-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 946 of 2016.

From the Judgment and Order dated 22.07.2014 of the High Court of Bombay in Appeal No. 558 of 2007 in Suit No. 1335 of 1988.

Nikhil Nayyar, Sr. Adv. (A.C.)

Jay Savla, Sr. Adv., Ms. Prerna Mehta, O. P. Bhadani, Advs. for the Respondents.

Anil G. Shah, Appellant-in-person

The Judgment of the Court was delivered by

INDU MALHOTRA, J.

1. The present Civil Appeal has been filed assailing the Judgment and Order dated 22.07.2014 passed by the Bombay High Court in Appeal No. 558 / 2007 dismissed the appeal filed by the appellants against the Consent Order dated 16.02.2005 in Suit No. 1335 / 1988 to which the appellants are not the signatory to the proceedings

2. The *lis* pertains to land admeasuring 5082 square yards bearing Survey No. 218, CTS No. 727 situated in Village Mulund, Greater

- A Bombay. The background facts of this litigation are briefly stated as follows :
- (i) An Agreement to Sell dated 28.04.1980 was executed between Defendant Nos. 1 to 52-Vaity family and the Plaintiff-M/s. Chitralekha Builders (then comprising of one Kusum Gorule and Tukaram Baliram Nalwade), whereby the Vaity family undertook to execute a Deed of Conveyance in favour of Chitralekha Builders, or its nominees, on receipt of Rs.35,00,000 towards the balance consideration.
- B
- C (ii) On 09.05.1980, M/s. Chitralekha Builders entered into an Agreement with a Society *viz.* G.I.C. SonalVihar Co-operative Housing Society Ltd.-Respondent No.1 herein, whereby it was agreed that Chitralekha Builders would develop the suit property, and the constructed area would be given to the Society after development.
- D (iii) On 01.07.1980, the Partnership between Kusum Gorule and Tukaram Baliram Nalawade stood dissolved *vide* a Dissolution Deed.

3. Suit No. 1335 / 1988

- E 3.1. On the failure of the Vaity family to handover possession of the suit property, and execute the Sale Deed as per the Agreement dated 28.04.1980, Respondent No. 1-Society and Respondent No.2-Kusum Gorule filed **Suit No. 1335 / 1988** before the Bombay High Court against the Vaity family seeking specific performance of the said agreement.
- F 3.2. During the pendency of the suit, M/s. Chitralekha Builders was re-constituted, and a Partnership Deed dated 08.04.1989 was executed between Respondent No.2-Kusum Gorule, Appellant No.2-Nina Anil Shah and two other partners *viz.* S.J.Pakhare and S.N.Gadekar. Pursuant to the Partnership Deed, the Appellant No. 2 was made a partner of M/s. Chitralekha Builders to the extent of 50%.
- G
- H 3.3. Subsequently, a Supplementary Deed dated 26.01.1996 was executed between Respondent No.2-Kusum Gorule, Appellant No.2-Nina Anil Shah and the two other partners, whereby S.J.Pakhare relinquished his entire share in the partnership in favour of Appellant No.2; and S.N.Gadekar relinquished his share equally between Appellant No.2 and Respondent No.2.

3.4. The Bombay High Court appointed a Court Receiver of the property by Order dated 31.08.1991 passed in Notice of Motion No. 1311 / 1988 filed in Suit No. 1335 / 1988. It was noted that Respondent No.2 had taken possession of the suit property, and constructed a boundary wall around the property. A

3.5. The Appellants filed Chamber Summons No. 1334 / 2004 for impleadment as co-plaintiffs in Suit No. 1335 / 1988. The Respondents filed Chamber Summons to transpose themselves as Defendants. B

The Chamber Summons filed by the parties were disposed of by a common order dated 26.10.2004 passed by the learned single judge of the High Court. The Chamber Summons filed by the appellants for impleadment as co-plaintiffs was dismissed as not maintainable, since a party could not force himself to be a co-plaintiff in the Suit. R.1-Society was transposed as Defendant No. 54. C

3.6. The Appellants filed Appeal No. 598 / 2005 against the Order dated 26.10.2004 rejecting their Chamber Summons for impleadment before the division bench of the High Court. D

3.7. First consent decree dated 16.02.2005

During the pendency of the aforesaid Appeal, the Respondent No. 2 entered into a compromise with the Vaity family on 16.02.2005, and drew up Consent terms, whereby the Vaity family agreed to execute the Conveyance Deed in favour of Respondent No.2 / nominees on receipt of the balance consideration of Rs.35 Lacs. The agreement dated 28.04.1980 between the Vaity family and M/s. Chitalekha Builders stood cancelled. It is relevant to note at this stage that the appellants had not been impleaded as parties to the suit. E F

Pursuant to the consent terms arrived between R.2-Kusum Gorule and the Vaity family, the learned Single Judge passed a Consent Decree dated 16.02.2005, whereby Suit No. 1335 / 1988 was partly decreed as per the Consent Terms (**First Consent Decree**). It was however observed that the Suit would continue with respect to Defendant No.54-Society, which was now re-transposed as the Plaintiff. G

3.8. On 26.07.2005, the Respondent No. 2-Kusum Gorule sold the suit property to M/s. Oswal Enterprises / Builders, who were subsequently impleaded as Defendant No. 57 in Suit No. 1335 / 1988. H

- A 3.9. The appellants filed Chamber Summons No. 961 / 2005 in Appeal No. 598 / 2005 seeking amendment to the original Chamber Summons No. 1334/2004, praying that the appellants be impleaded as Defendants instead of co-plaintiffs. A division bench of the High Court by Order dated 19.08.2005 allowed the Appeal alongwith the Chamber Summons No. 961 / 2005, and directed that the appellants be added as Defendants in the Suit. It was held that the appellants were necessary parties to effectuate the final adjudication of disputes.

3.10. Appeal against the first consent decree

- Upon being impleaded as Defendants in Suit No. 1335 /1988, the
- C appellants filed Appeal No. 558 / 2007 to challenge the consent decree dated 16.02.2005. The High Court by the impugned order dated 22.07.2014 dismissed the Appeal, and held that the appellants were not parties to the Consent Terms dated 16.02.2005, and would not be bound by the same. The rights of the appellants were not affected by the Consent terms, and therefore, the order dated 16.02.2005 did not warrant interference.

The present Civil Appeal has been filed to challenge the Order dated 22.07.2014.

3.11. Second Consent decree dated 03.10.2005

- E On 03.10.2005, the Respondent Nos. 1 and 2 entered into a compromise with Oswal Enterprises, wherein it was agreed that Respondent No. 1 would transfer the suit property to Oswal Enterprises on receipt of Rs.50 Lacs, and would make no claim on the suit property. The learned single judge took the draft amendment on record, and impleaded Oswal Builders as Defendant No. 57. The Suit No. 1335 / 1998 was decreed as per the Consent Terms (***Second Consent Decree***). On an objection being raised by the appellants, the High Court granted 4 weeks to initiate appropriate proceedings to challenge the Consent decree, and directed the Court Receiver not to handover possession of the suit property for 4 weeks. The Suit was accordingly disposed of.

G 4. Suit No. 3162 / 2005

Pursuant to the Order dated 03.10.2005, the Appellant No.2 filed **Suit No. 3162 / 2005** before the Bombay High Court for a declaration that the 1st and 2nd Consent decrees dated 16.02.2005 and 03.10.2005, were illegal and void.

H

M/s. Chitralekha Builders was impleaded as Defendant No.1, A
Kusum Gorule was impleaded as Defendant No.2, and M/s. Oswal
Enterprises was impleaded as Defendant No.3.

It was prayed that :

- “(a) this Hon’ble Court be pleased to declare that the partnership firm M/s Chitralekha Builders stands dissolved on 15.07.2004 or from such other date as this Hon’ble Court may deem fit and proper; B
- (b) this Hon’ble Court be pleased to order for dissolution and winding up of affairs of the partnership firm M/s Chitralekha Builders under the order and directions of this Hon’ble Court. C
- (c) this Hon’ble Court be pleased to order for taking accounts of the partnership firm M/s Chitralekha Builders from the date of dissolution or from such other date as this Hon’ble Court may deem fit and proper and the shares of the plaintiff and the defendant no. 2 be ascertained and ordered to be paid over. D
- (d) for the purposes aforesaid, necessary directions be given and orders be passed;
- (e) this Hon’ble Court be pleased to declare that consent decree dated 16.02.2005 passed in suit No. 1335 of 1998 is bad in law, illegal and void and not binding upon the suit property; E
- (f) this Hon’ble Court be pleased to further declare that the consent decree dated 03.10.2005 passed in suit no. 1335 of 1998 is bad in law, illegal and void and not binding upon the suit property; F
- (g) this Hon’ble Court be pleased to declare that the purported conveyance dated 25.07.2005 executed in favour of the defendant no. 3 of the suit property is bad in law, void, inoperative and not enforceable against the suit property. G
- (h) this Hon’ble Court be pleased to pass the decree revoking and cancelling the purported conveyance dated 26.07.2005 executed in favour of the defendant no. 3 in respect of the suit property.

H

- A (i) Pending the hearing and final disposal of the suit court receiver, High Court, Bombay or any other any fit and proper person be appointed as the receiver in respect of the suit property more particularly described in Schedule annexed to the plaint and marked Exhibit-B with all powers under Order 40 of the Code of Civil Procedure, 1908;
- B (j) pending the hearing and final disposables of the suit the defendants no. 2 and 3, their agents, servants and/or any person acting or claiming through them be restrained by an interim order and injunction of this Hon'ble Court from dealing with, disposing of or creating any third party interest or carrying out development works of any nature whatsoever in the suit property more particularly described in the Scheduled annexed to the plaint and marked Exhibit-B.
- C (k) ad-interim reliefs in terms of prayers (i) and (j) above be granted;
- D (l) Cost of the suit be awarded to the plaintiff;
- (m) Such other and further reliefs as the nature and circumstances of the case may require be granted."
- E During the course of hearing, we were informed that the Suit No.3162/2005 is pending at the stage of recording of evidence.

5. Arbitration proceedings

- F 5.1. The *inter se* disputes between Appellant No.2-Nina Anil Shah and Respondent No.2-Kusum Gorule led to the invocation of arbitration proceedings. The Bombay Court by Order dated 22.07.2005 appointed Justice A.C. Agarwal, retired Chief Justice of the Madras High Court as the sole arbitrator.
- G 5.2. The sole arbitrator passed an Award on 01.08.2006 holding that the partnership firm-Chitralekha Builders was dissolved on 15.07.2004. The suit property was not an asset of the partnership firm. The Appellant No. 2 was directed to pay Rs.62,18,324 i.e. 50% of the expenses of the partnership firm with interest @ 12 % p.a.
- H 5.3. The appellants filed Objections to set aside the award u/s. 34, which were dismissed by Order dated 03.10.2006.

The appellants filed Appeal No. 813 / 2006 u/S. 37 of the 1996 Act, wherein by Order dated 21.07.2014, the division bench of the High Court remanded the application u/S. 34 for fresh consideration. A

5.4. A single judge of the High Court by Order dated 05.06.2017 partly allowed the application u/S. 34, and set aside the claim for expenses of the partnership firm. B

5.5. The appellant No. 2 filed Appeal No. 266-268 / 2017 under Section 37 of the 1996 Act before the High Court, which is currently pending consideration before the division bench.

6. Proceedings before the Supreme Court C

The challenge in the present Civil Appeal is limited to the Order dated 22.07.2014 passed by a division bench of the High Court dismissing the appeal being Appeal No. 558 / 2017 filed by the appellants to challenge the 1st Consent Decree dated 16.02.2005.

6.1. This Court by Order dated 19.11.2014 issued Notice only for exploring the possibility of a settlement between the appellants and Respondent No.2-Kusum Gorule (originally Respondent No.55). D

6.2. The appellants filed I.A. No. 9 / 2016 to delete the original Respondent Nos. 2 to 54 (members of the Vaity family) from the array of parties. Mr.Anil G. Shah-the husband and Power of Attorney holder of Appellant No.2-Nina Anil Shah appeared before the Chamber Judge of this Court, when I.A. No. 9 / 2016 filed by the said Appellant was allowed *vide* Order dated **28.11.2016** at the risk of the Appellants. E

6.3. On 27.03.2018, the appellants filed I.A. No. 48308 / 2018 to implead Oswal Enterprises as a party to the present proceedings. F

6.4. This Court by Order dated 12.12.2019 appointed Mr. Nikhil Nayyar, learned Senior Counsel as *Amicus Curiae* to assist the Court on behalf of the Appellant.

6.5. On 17.03.2020, the appellants filed I.A. No. 73241 / 2020 to re-implement Respondent Nos. 2 to 54 i.e. members of the Vaity family [who had been deleted *vide* Order dated 28.11.2016] as parties to the present Civil Appeal. G

7. We have heard the learned *Amicus Curiae*, Mr. Nikhil Nayyar, Senior Advocate, Mr. Jay Savla, Senior Advocate on behalf of the H

A Respondents, and Mr. Anil G. Shah in-person, as the Power of Attorney holder of Appellant No.2.

8. We will first deal with the 2 pending I.As.

(i) I.A. No. 48308 / 2018 was filed to implead Oswal Builders as a party respondent to the present Civil Appeal. We find that the said I.A. deserves to be dismissed, since Oswal Builders has already been impleaded as Defendant No.3 in the substantive Suit No. 3162/ 2005 filed by the Appellant before the Bombay High Court.

B (ii) I.A. No. 73241 / 2020 has been filed by the appellants to re-implement Respondent Nos. 2 to 54, who were deleted *vide* Order dated 28.11.2016 at the risk of the appellants. We are of the view that the said I.A. cannot be allowed at this stage. The said I.A. is accordingly dismissed.

C 9. Mr. Nikhil Nayyar, learned senior counsel appearing as *Amicus Curiae*, Mr. Anil G. Shah in-person, as the Power of Attorney Holder of appellant no. 2, and also learned counsel for the respondents have extensively made their submissions on merits. What transpires from the record is that both the consent decrees dated 16.02.2005 and 03.10.2005 have been challenged at the behest of the appellants in the substantive Suit No. 3162/2005 filed at their instance, which is pending adjudication before the Bombay High Court.

D 10. The submission of the learned counsel for the appellants is that the appellants are not a signatory to the consent orders dated 16.02.2005 and 03.10.2005 passed in Suit No. 1335/1988 which are detrimental to the interest of the appellants, and have been challenged by them in an Appeal invoking Section 96 of the Code of Civil Procedure, 1908. The High Court failed to examine the dispute raised by the appellants on merits, and the filing of a substantive suit by them cannot be a ground to reject their Appeal, particularly since there is a patent error committed while passing of the consent decree dated 16.02.2005 behind the back of the Appellants.

E F G H 11. It was further submitted that even though the Appellants were impleaded in Suit No. 1335/1998 at a later stage, it shouldin no manner deprive their right to assail the Order dated 16.02.2005, which was passed behind their back, andis a nullity in the eyes of law. In the given

circumstances, the order dated 16.02.2005 ought to have been recalled A for the very reason that it was passed in their absence, to their detriment.

12. It was further submitted that pursuant to the compromise decree B on consent terms dated 16.02.2005, a conveyance deed dated 22.07.2005 was executed alienating the suit property in favour of a third party i.e. Oswal Enterprises, in disregard to the rights of the Appellants, and possession of the suit property was parted with without affording an opportunity of hearing to the Appellants. Consequently, their rights have been seriously jeopardized.

13. The Appellant appeared in person, and placed reliance on C certain judgments of this Court regarding the scope of the appeal preferred under Section 96 of the Code.

14. On the other hand, learned counsel for the Respondents, while D supporting the judgment impugned passed by the High Court submitted that the rights of the Appellants have been protected by the High Court under the impugned judgment, and what is being prayed for by the appellants in the instant appeal is the subject matter of challenge in Suit No. 3162/2005 filed at their instance. It was open for the Appellants to pursue their remedy in the substantive Suit. In the given circumstances, no error has been committed by the High Court in the impugned judgment which calls for interference by this Court.

15. The substantive Suit No.1335/1988 was originally filed at the E instance of Kusum Gorule(i.e. Geetanjali G. Sohani)[original plaintiff no. 2 in Suit No. 1335/1988] and the Vaityfamily and the decree on the consent terms was passed *vide* Order dated 16.02.2005, and the subsequent consent order dated03.10.2005, came to be passed between the parties, *viz.* GIC Employees' SonalVihar Co-operative Housing Society (original plaintiff no. 1 in Suit No. 1355/1988) and Oswal Enterprises (Defendant No. 57 in Suit No. 1355/1988). Undisputedly, F Suit No. 1335/1988 had not been examined by the Court on merits, since the parties to the proceedings entered into a compromise, and a consent order came to be passed by the Court *vide* Order dated 16.02.2005 followed with Order dated 03.10.2005. Consequently, the suit was disposed of on the consent terms arrived between the parties.

16. The present appellants were not a party to the proceedings at the stage when the consent order came to be passed on 16.02.2005, or the subsequent order dated 03.10.2005 in Suit No. 1335/1988. Both the G H

- A consent orders dated 16.02.2005 and 03.10.2005 would consequently not have a binding effect on the present Appellants. The consent orders dated 16.02.2005 and 03.10.2005 challenged in the substantive Suit No. 3162/2005 would require to be examined by the Court independently on its own merits in accordance with law, without being influenced by the observations made in the impugned judgment dated 22.07.2014.
- B 17. The Division Bench of the High Court in the impugned judgment, after taking note of the submissions made, has recorded a finding that since the Appellants were not a party to the proceedings, and the Order dated 16.02.2005 has been passed on the terms agreeable to the parties to the proceedings, it shall not be binding upon the Appellants, and their rights could be examined independently in the substantive suit filed at their instance. The relevant paras of the judgment impugned are as under:-
- C “13. It is an admitted position that the said Mrs. Kusum did not sign the consent terms either on behalf of M/s. Chitralekha Builders, a partnership firm, or as a partner of the said partnership firm. The settlement which is recorded in terms of the decree by way of impugned order is between the parties to the consent terms. The present appellants were admittedly not parties to the consent terms and in fact on the date on which the impugned order was passed, they were not even impleaded as parties to the suit. Therefore, it is obvious that the consent terms dated 16th February, 2005, on the basis of which the impugned order dated 16th February, 2005 was passed, do not bind the appellants.
- D 14. Consequently, the consent decree passed on the basis of the said consent terms dated 16th February, 2005 does not bind the appellants. As stated earlier, under the impugned order, the suit was not disposed of. The suit has been disposed of by a subsequent order, which is not the subject matter of challenge in the present Appeal. Hence, in this Appeal, an order of restoration of the Suit cannot be passed.
- E 15. Thus, the appellants are not affected by the impugned order in any manner. Therefore, it is not necessary to interfere with the impugned order. We, however, make it clear that we have made no adjudication on the rights claimed by the appellants in respect of the property in question as well as the right claimed by the
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respondents as a separate Civil Suit filed by the second appellant A in relation to the same property is pending.”

18. We are also of the considered view that since the Appellants were not a party to the Consent Terms as is evident from the record, when the Orders came to be passed on 16.02.2005 followed with 03.10.2005, it may not bind the Appellants. Its legal effect is open to be examined in the substantive suit filed at their instance independently on its own merits in accordance with law. We do not find any error having been committed by the High Court, which may call for our interference.

19. The submission of the learned *Amicus Curiae* for the Appellants, and of the Appellant-in-person is that apart from the substantive suit having been preferred at their instance, the Consent Decree dated 16.02.2005, followed with 03.10.2005, which have been challenged at their behest under Section 96 of the Code, ought to be examined by the Division Bench of the High Court on merits, and their substantive right of appeal filed under Section 96 of the Code could not have been stultified merely on the premise that a substantive Suit No. 3162/2005 had been preferred at their instance, is pending adjudication. The submission is of no substance since in the first instance, Suit No. 1335/1988 was disposed of by the Court on the consent terms arrived between the parties to the proceedings *vide* Order dated 16.02.2005 followed by Order dated 03.10.2005. In the given circumstances, even though the Appellants who were later impleaded, have a right of appeal under Section 96 of the CPC. However, since the Appellants were not a party to the Consent Orders, it was not open for the Court to examine the legal effect of the Consent Orders dated 16.02.2005 and 03.10.2005 to which the Appellants were not a party. Once the substantive suit has been filed at their instance questioning the Consent Orders dated 16.02.2005 followed by 03.10.2005, the same is indeed open to be examined independently on its own merits in the pending proceedings initiated at their instance.

20. So far as the rights of the Appellants are concerned, the same have been duly protected by the High Court in the impugned judgment dated 22.07.2014. In furtherance thereof, we make it clear that the observations/findings which have been recorded by the High Court in the impugned judgment dated 22.07.2014, in no manner, prejudice the rights of the Appellants, and the pending Suit No. 3162/2005 filed by the Appellant may be examined by the Court independently on its own merits

A in accordance with law without being influenced by the observations made by the High Court in the impugned judgment dated 22.07.2014.

21. Since the suit was instituted in 2005, we consider it appropriate to observe that the High Court may hear and dispose of Suit No. 3162/2005 as expeditiously as possible, preferably within a period of one year.

B 22. The Civil Appeal on the above terms stands disposed of with no order as to costs.

23. Pending application(s), if any, stand disposed of.

24. We appreciate the effort and time spent by Mr. Nikhil Nayyar, learned senior counsel for rendering his able assistance to this Court.

Devika Gujral

Appeal disposed of