

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

**SUBJECT : CODE OF CIVIL PROCEDURE**

Reserved on : 08.04.2009

Date of decision : 27.04.2009

FAO (OS) No.200/2006

M/S KOHLI HOUSING AND DEVELOPMENT PVT. LTD AND ORS.

...APPELLANTS

Through: Mr.Shailen Bhatia,  
Mr.Rohit Aggarwal,  
Ms.Vandana Nathan &  
Ms.Ekta Nayar Saini, Advocates.

Versus

M/S CONVENIENCE ENTERPRISES PVT. LTD ...RESPONDENT

Through: Mr.A.S.Chandhiok  
Mr.Aman Lekhi, Sr.Advs.  
with  
Mr.Nitin Sharma,  
Mr.Mayank Chawla &  
Mr.Gagan Chhabra, Advocates.

FAO (OS) Nos.201-203/2006

M/S KOHLI HOUSING AND DEVELOPMENT PVT. LTD AND ORS.

...APPELLANTS

Through: Mr.Shailen Bhatia,  
Mr. Rohit Aggarwal,  
Ms.Vandana Nathan &  
Ms.Ekta Nayar Saini, Advocates.

Versus

M/S CONVENIENCE ENTERPRISES PVT. LTD      ...RESPONDENT

Through:      Mr. A.S.Chandhiok  
Mr.Aman Lekhi, Sr.Advs.  
with  
Mr.Nitin Sharma,  
Mr.Mayank Chawla &  
Mr.Gagan Chhabra, Advocates.

FAO (OS) No.207-209/2006

M/S KOHLI HOUSING AND DEVELOPMENT PVT. LTD AND ORS.

...APPELLANTS

Through:      Mr.Shailen Bhatia,  
Mr. Rohit Aggarwal,  
Ms.Vandana Nathan &  
Ms.Ekta Nayar Saini, Advocates.

Versus

M/S CONVENIENCE ENTERPRISES PVT. LTD      ...RESPONDENT

Through:      Mr. A.S.Chandhiok  
Mr.Aman Lekhi, Sr.Advs.  
with  
Mr.Nitin Sharma,  
Mr.Mayank Chawla &  
Mr.Gagan Chhabra, Advocates.

FAO (OS) No.219/2006

M/S CONVENIENCE ENTERPRISES PVT. LTD      ...APPELLANT

Through:      Mr. A.S.Chandhiok  
Mr.Aman Lekhi, Sr.Advs.  
with  
Mr.Nitin Sharma,  
Mr.Mayank Chawla &  
Mr.Gagan Chhabra, Advocates.

Versus

M/S KOHLI HOUSING AND DEVELOPMENT PVT. LTD AND ORS.  
...RESPONDENTS

Through: Mr.Shailen Bhatia,  
Mr. Rohit Aggarwal,  
Ms.Vandana Nathan &  
Ms.Ekta Nayar Saini, Advocates.

FAO (OS) No.240/2006

M/S CONVENIENCE ENTERPRISES PVT. LTD ...APPELLANT

Through: Mr. A.S.Chandhiok  
Mr.Aman Lekhi, Sr.Advs.  
with  
Mr.Nitin Sharma,  
Mr.Mayank Chawla &  
Mr.Gagan Chhabra, Advocates.

Versus

M/S KOHLI HOUSING AND DEVELOPMENT PVT. LTD AND ORS.  
...RESPONDENTS

Through: Mr.Shailen Bhatia,  
Mr. Rohit Aggarwal,  
Ms.Vandana Nathan &  
Ms.Ekta Nayar Saini, Advocates.

FAO (OS) No.226/2006

M/S CONVENIENCE ENTERPRISES PVT. LTD ...APPELLANT

Through: Mr. A.S.Chandhiok  
Mr.Aman Lekhi, Sr.Advs.

with  
Mr.Nitin Sharma,  
Mr.Mayank Chawla &  
Mr.Gagan Chhabra, Advocates.

Versus

M/S KOHLI HOUSING AND DEVELOPMENT PVT. LTD AND ORS.  
...RESPONDENTS

Through: Mr.Shailen Bhatia,  
Mr. Rohit Aggarwal,  
Ms.Vandana Nathan &  
Ms.Ekta Nayar Saini, Advocates.

CORAM:  
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL  
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

SANJAY KISHAN KAUL, J.

1. In this judgment, M/s.Kohli Housing & Development Pvt. Ltd and Ors have been referred to as the appellants while M/s Convenience Enterprises Pvt. Ltd has been referred to as the respondent.

2. The respondent filed three separate suits being CS(OS) Nos.9-11/06 against the appellants alleging that in the year 2005 monies were paid by them towards sale consideration in respect of three plots in Malibu Towne, Gurgaon, Haryana to the appellants who were seeking to back out of the transaction. On the other hand, the case of the appellants is that the time period for making the balance payment had expired and the earnest money stood forfeited.

3. The parties with the assistance of counsel arrived at a Memorandum of Settlement ('MOS' for short) to compromise all the three suits and executed the same on 23.01.2006. The said MOS records in para 4 that an out of court settlement had been arrived at between the parties in pursuance whereto the appellants had paid to the respondent both cash and pay orders/bank drafts. It may be noticed that while the original earnest money paid was less, almost double that amount was agreed to be paid as under:

Plot No.

By Draft

Draft No. and Date

Drawn On

By Cash  
Total  
15 Pine Drive  
6,82,000/-  
990255  
21.1.2006  
Citibank N.A., Jeevan Bharati, Connaught Circus,  
New Delhi  
18,000/-  
7,00,000/-  
18 Pine Drive  
6,82,000/-  
990256  
21.1.2006  
Citibank N.A., Jeevan Bharati, Connaught Circus,  
New Delhi  
18,000/-  
7,00,000/-  
10 Club Road  
8,82,000/-  
990257  
21.1.2006  
Citibank N.A., Jeevan Bharati, Connaught Circus,  
New Delhi  
18,000/-  
9,00,000/-

4. Since it is this agreement which forms the substratum of the present dispute, it is necessary to reproduce the relevant clauses of the same, which are as under:

“5. The First Party and Dr.R.K.Anand confirm that they have received the aforesaid amounts as indicated in para 4 above and inconsideration of the aforesaid payments all rights, title and interest of the First Party and Dr.R.K.Anand in the abovementioned plots, pursuant to all the aforesaid Agreements dated 08.04.2005, 25.04.2005 and 12.05.2005 executed between the parties stand fully satisfied and extinguished and the First Party and Dr.R.K.Anand are left with no other or further claims, rights, title or interest in the said plots. In consideration of the said payments the First Party and Dr.R.K.Anand have also agreed to unconditionally withdraw CS(OS) Nos. 9/2006, 10/2006 and 11/2006, pending before this Hon’ble High Court. Similarly, the Second Party, Third Party and Fourth Party also have no grievances and/or claim of any nature, whatsoever, against the First Party and Dr. R.K.Anand.

6. The parties further agree that with the execution of this Memorandum of Settlement all the parties have been released and/or relieved of their respective obligations under the said Agreements and all the said Agreements stand revoked, cancelled and terminated absolutely and forever.

7. The First Party and Dr.R.K.Anand in consideration of the aforesaid payment specified in para 4 above also hereby agrees and undertakes not to file any other legal proceedings in any other Court/Forum in respect of the said plots against the Second and Third Party or Fourth Party or any other person and confirm that they have not entered into any transaction in respect of Plot No.15, Pine Drive and Plot No.18, Pine Drive, Malibu Town, Gurgaon with any other party or created any other party rights in respect thereof. However, in respect of Plot No.10, Club Road, Malibu Town, Gurgaon, an agreement on 4th day of May, 2005 was entered into by the First Party with one Mr.Kanwar Ajay Mahipal, S/o Sh.N.S.Mahipal, R/o 74, Hemkunt Colony, G.K.-I, New Delhi – 110048, which agreement stood terminated/cancelled and is legally not binding and enforceable according to the First Party.

8. That this Memorandum of Settlement has been executed in full and final settlement of all claims of all parties including Dr. R.K.Anand and no party hereto has any claim of any nature whatsoever left against each other. All the parties to this Memorandum of Settlement hereby agree and undertake that they have no cause of action for filing any legal proceedings of any nature, whatsoever, against each other in relation to the aforesaid plots and the aforesaid agreements. The parties to this Memorandum of Settlement further declare that except the above three civil suits, no other civil and/or criminal proceedings have been either filed or are pending by or against each other.

9. The First Party and Dr.R.K.Anand have returned the three original Agreements to Sell dated 08.04.2005, 25.04.2005 and 12.05.2005 to the Second Party the receipt of which the Second party hereby confirms and acknowledges.

10. Simultaneously with the execution of this Memorandum of Settlement the First Party and Dr.R.K.Anand have also authorized and empowered Dr.R.K.Anand and/or Mrs. Nalini Sarin, wife of Mr. Varun Sarin, jointly and/or severally to take all steps necessary to withdraw CS(OS) Nos. 9/2006,10/2006 and 11/2006 filed by the First Party and Dr.R.K.Anand in the Hon'ble High Court of Delhi.

11. The parties further agree that both the parties shall move a joint application for withdrawal in terms of this Memorandum of Settlement in CS(OS) Nos.9/2006, 10/2006 and 11/2006 before the Delhi High Court. This Memorandum of Settlement has been signed and executed by the Parties hereto in five parts, one each to be annexed with the joint application to be filed in each of the aforesaid three suits and one copy each will be retained by the First Party and one copy collectively by the Second, Third and Fourth Party.”

(emphasis supplied)

5. A joint application was also prepared by the parties under Order 23 Rule 3 r/w Section 151 of the Code of Civil Procedure, 1908 ('the said Code' for short). A copy of the MOS dated 23.01.2006 was annexed as Annexure 'A' to the application. It was averred in the application that with the execution of MOS, the claims of the parties did not survive and the suits be dismissed in view of the MOS. The application was signed on 24.01.2006.

6. The date fixed before the Court was 25.01.2006, but no proceedings were held on that date on account of the Presiding Officer not taking court. The pay orders/bank drafts which were prepared and handed over to the respondent were in the name of 'M/s. Convenience Enterprises Limited'. It is the case of the appellants that they realized that while the name of the respondent was M/s. Convenience Enterprises Private Limited, the word 'Private' was missing from the pay orders/bank drafts. Thus, even prior to the date fixed of 25.01.2006, the appellants got prepared fresh pay orders/bank drafts on 24.01.2006 and even filed an application on 28.01.2006 seeking directions that the respondents be directed to accept the fresh pay orders and return the original ones.

7. The respondent, however, took the stand before the Court that they had presented the pay orders/bank drafts which could not be credited to their account on account of the fact that the word 'Private' was missing. In fact, the pay orders/bank drafts were even re-presented to Citi Bank N.A., which had issued the pay orders/bank drafts, to facilitate the encashment, but even there the same problem arose. The respondent thus pleaded that the consideration had failed and the settlement was over. In fact, the respondent backed out of the settlement on account of the pay orders/bank drafts not being honoured on account of name of the respondent not having the word 'Private' in the pay orders/bank drafts. This was succeeded by the respondent filing an application that the settlement could not be accepted as it was obtained under fraud, coercion and undue influence.

8. The aforesaid applications were decided by the impugned order dated 10.03.2006 by the learned Single Judge of this Court. The learned Single Judge concluded that the respondent had been unable to establish a case of undue influence, coercion or fraud. However, simultaneously, the learned Single Judge has come to the conclusion that though the parties had freely entered into the MOS, the erroneous description of the respondent in the pay orders/bank drafts and the consequent inability of the respondent to encash them is of crucial importance. The consideration as per the MOS had not passed on to the respondent even though it had done whatever was required of him including handing over all the original documents to the appellants at the time of the settlement. The learned Single Judge concluded that there was time and occasion for the appellants to make the payments but they had let it slip by and the respondent had not condoned the lapse and thus the respondent could not be compelled to accept the settlement. The result was that the suits were liable to be proceeded with as the MOS was held to be voidable. The learned Single Judge in the end observed that he was satisfied that there has been a failure of consideration and, therefore, the agreement between the parties is voidable. Both the parties were aggrieved by the said order and have filed separate appeals. The appellants are aggrieved by the non acceptance of the pay orders/bank drafts by the respondent as per the MOS while the respondent has filed the appeals on account of the finding that there was no fraud, coercion or undue influence.

9. The findings of the learned Single Judge that the MOS was entered into freely could not really be assailed. The allegation of fraud, coercion and undue influence was made by the respondent for the first time only in a lawyer's notice dated 27.01.2006. Prior to that, the cash amount had been accepted as also the pay orders/bank drafts. The pay

orders/bank drafts were presented for payment and re-presented for payment. Compromise application had also been signed. Other than the bald allegation of fraud, coercion and undue influence, nothing has been substantiated. The respondent had made corrections in the MOS including incorporating of facts known only to the respondent like the further transaction between the respondent in respect of one of the plots with a third party. The electronic correspondence between the parties also showed the free application of mind by both the sides before signing the MOS. This also appears to be the reason that the respondent has made no effort to even canvass the said proposition. It is trite to say that an allegation of fraud must be clear, definite and specific and general allegations unaccompanied by particulars are insufficient to amount to an averment of which judicial notice can be taken. We draw strength from the observations made by the Supreme Court in *A.C.Ananthswamy v. Boraiah*; (2004) 8 SCC 588 where in para 5, it was observed as under:

“To prove fraud, it must be proved that representation made was false to the knowledge of the party making such representation or that the party could have no reasonable belief that it was true. The level of proof required in such cases is extremely higher. An ambiguous statement cannot per se make the representor guilty of fraud. To prove a case of fraud, it must be proved that the representation made was false to the knowledge of the party making such representation. (See *Pollock & Mulla: Indian Contract and Specific Relief Acts* (2001), 12th Edn., p.489)”

There is, thus, no infirmity with the finding of the learned Single Judge on this account.

10. The real bone of contention between the parties arose as a consequence of pay orders/bank drafts not being honoured by the bank on account of the word ‘Private’ missing from them. A question thus arises whether there was a failure of consideration making the MOS voidable at the option of the respondent as concluded by the learned Single Judge or whether the agreement continued to be binding between the parties in view of the facts and circumstances of the case.

11. Learned counsel for the appellants emphasized that the learned Single Judge had lost sight of the fact that part of the consideration was already paid and accepted by the respondent in cash. The respondent had accepted the pay orders/bank drafts after verifying the same. Thus, the respondent was satisfied with the receipt of the cash and pay orders/bank drafts and the full consideration in that manner had passed. This was also so recorded in the MOS dated 23.01.2006. Learned counsel invited the attention of this Court to para 6 of the MOS where it was clearly stated that the parties had agreed that with the execution of MOS all the parties had been released and/or relieved of their respective obligations under the said agreement and all the agreements stood revoked/cancelled and terminated absolutely and forever. It was thus contended that the respondent never objected that its name was not correctly reflected in the pay orders/bank drafts. The factum of presentation of the pay orders/bank drafts by the respondent itself showed that the respondent thought that the pay orders/bank drafts would be honoured and the absence of the word ‘Private’ would not make any difference as there were no two separate legal entities – one being a public company and one being a private

company. In the alternative it was submitted that at best it could be treated as a case of mis-description of the name of the respondent by a bona fide mistake and the appellants being conscious of the possibility of a problem had got a second set of pay orders/bank drafts prepared with the word 'Private' included in them on 24.01.2006 itself i.e. the very next day and before the first date fixed in the Court. The account of the appellants, in fact, had been debited twice by getting two separate sets of pay orders/bank drafts and continued to be so debited since both the sets of pay orders/bank drafts are lying in the Court.

12. Learned counsel for the appellants also sought to challenge the findings of the learned Single Judge about the time being the essence of the contract since the matter related to immoveable properties and the cancellation of agreement in respect thereof. It was, thus, contended that it was not open to the respondent to wriggle out of the compromise arrived at or oppose the joint application filed by the parties. In support of its contention, learned counsel referred to the judgment of the Apex Court in Swarnam Ramachandran (Smt.) and Anr. v. Aravacode Chakungal Jayapalan; (2004) 8 SCC 689 and of the learned Single Judge in Kuldip Gandotra v. Shailendra Nath Endlay & Anr.; AIR 2007 Delhi 1.

13. Learned counsel for the appellants in order to support the plea that the respondent cannot wriggle out of the compromise application filed under Order 23 Rule 3 of the said Code relied upon judgments in Parmod Kumar Rastogi v. Gian Chand Jain; 1996 AIHC 3756 and Mathulla Verghese and Anr.v.Mrs.Vijaya and Ors; 2001 AIHC 966. However, these judgments are really in respect of the mode and manner of a compromise application being filed, which is not really germane to the present issue. Learned counsel also referred to the judgment in XS Financial Services Ltd. and Anr. v. N.Devendran and Ors; AIR 2003 Madras 369 where the Division Bench had observed that once a memorandum of compromise is signed and produced before the Court, the Court shall presume that the memorandum of compromise has been entered into with full understanding of its terms. It may once again be observed that there is really no dispute about the compromise being arrived at in the present case.

14. A reference was also made to the judgment in Amteshwar Anand v. Virender Mohan Singh & Ors; (2006) 1 SCC 148 where a compromise decree was sought to be subsequently re-opened on account of the alleged non-payment. It was held that mere non-payment was certainly not supportive of ground for setting aside the decree on the basis of allegation of fraud but that the applicants could execute a decree for money due under the compromise decree.

15. Learned counsel for the appellants next sought to refer to provisions of Section 93 of the Negotiable Instruments Act, 1893 ('the said Act' for short) to contend that there was no notice issued by the respondent of dishonor and the appellants had taken immediate steps to rectify the consequences of the mistake. The relevant provisions are as under: "92. Dishonors by non-payment.- A promissory note, bill of exchange or cheque is said to be dishonored by non-payment when the maker of the note, acceptor of the bill or

drawee of the cheque makes default in payment upon being duly required to pay the same.

93. By and to whom notice should be given.-

When a promissory note, bill of exchange or cheque is dishonored by non-payment, the holder thereof, or some party thereto who remains liable thereon, must give notice that the instrument has been so dishonored to all other parties whom the holder seeks to make severally liable thereon, and to some one of several parties whom he seeks to make jointly liable thereon.

Nothing in this section renders it necessary to give notice to the maker of the dishonored promissory note, or acceptor of the dishonored bill of exchange or cheque.

16. Learned counsel also relied upon the judgment in *Raghunath Rithkaran v. The Imperial Bank of India Ltd*; 1925 Volume XXVII 1229. In the facts of the case, the bank had presented four hundis for payment to the plaintiffs. Hundis were all alike in outward appearance and written out in the same hand and bearing the same nishani. Three of the hundis were drawn against the plaintiffs while the fourth one was not drawn against the plaintiff, but against a different person altogether. The bank failed to bring the mistake with reference to one of the hundis to the notice of the plaintiffs when they accepted the hundis. The plaintiffs paid off the amount of the four hundis in couple of hours in entire ignorance of the fact that one of the hundis was not drawn on them at all. The mistake committed was not even noticed when the plaintiffs entered the hundis in their Nondh book.

17. A difference of opinion between the two judges gave rise to a reference. One of the judges was of the opinion that the plaintiffs were not entitled to recover both on account of negligence in not examining the terms of the hundis when they accepted them and of their delay in not calling upon the bank as soon as the mistake came to their notice afterwards. The second opinion was that the bank was also equally guilty of negligence in not noticing the drawee's name and in making a wrong presentment and the bank failed to prove that they were prejudiced by reason of delay on plaintiffs part.

18. On reference, the third Judge opined that the plaintiffs accepted the position as drawees of the hundis on account of mutual relationship with the bank which cast on them a duty to inform the bank within a reasonable time that they had accepted that position under a mistake of fact. It was observed that in case of negotiable instruments, mistakes of this kind should be noticed within a reasonable period of time which they failed to do.

19. The aforesaid judgment has been relied upon by the learned counsel for the appellants to support the plea that it is, in fact, the appellants who took remedial steps to correct the mistake without any loss to the respondent while the respondent had not even notified them of the mistake of accepting the pay orders/bank drafts drawn in the manner as was so done.

20. A reference has also been made to the commentary of Tannan's on Banking Law and Practice in India, 20th Edition, 2001 where on pages 317-318. it has been observed as under:

“Apparent mistakes do not vitiate the validity of Cheques – The validity of cheques is not vitiated by mistakes which can be easily discovered and which are apparent. An instrument is not rendered invalid by an apparent mistake, e.g., an omission in the written words, as long as the intention is quite clear – see Halsbury's Laws of England, 2nd Edition, Vol.II, p.713. Thus, a bill where the word “pound” is used instead of “pounds” does not thereby become invalid.”

21. Learned counsel also referred to the Halsbury's Laws of India; Volume 4:

“{30.030} Payee maybe mentioned by name or description

Where the payee is named incorrectly, or where his name is misspelt, the instrument is not invalidated, the payee being permitted indorse the instrument as he was described, adding at his option his proper signature.

It is sufficient that the payee should be indicated without being actually named if the indication is reasonably precise.

Where there are two persons of the same name who are possible payees, the presumption will be that the one indorsing the instrument was the person intended.

An instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees.

An instrument may also be made payable to the holder of an office for the time being.”

22. It would be useful also to refer to the judgment of the Supreme Court in *K.Venkata Seshiah v. Kanduru Ramasubramma (dead) by LRs*; (1991) 3 SCC 338 which dealt with an application under Order 23 Rule 3 of the said Code. It was held that once a compromise was found to be genuine and lawful, the same has to be acted upon. In the facts of the case, there was a compromise between the father and his two sons which stipulated payment of Rs.1 lakh by father to each of his sons in view of relinquishment of their interest in the property. The sale pendente lite of a part of the land by one of the sons to a third party was held to be invalid as he had no interest in the property to part with in view of the stipulation in the compromise.

23. In *K.Venkata Seshiah v.Kanduru Ramasubramma (dead) by LRs's case (supra)*, a reference has been made to a judgment in *Bhaja Govinda Maikap v. Janaki Dei*; AIR 1980 Ori 108 and the principle set out in that judgment has been approved. We thus reproduce the observations made in para 3 of *Bhaja Govinda Maikap v. Janaki Dei's case (supra)* as under:

“The underlined words have been inserted by amendment in 1976. If a party to a suit alleges that a suit has been adjusted by a lawful agreement and applies to the court to record an agreement and to pass a decree in accordance therewith but the other party to the suit denies the agreement or wishes to resile from it, the question arises whether the court has power in the one case to decide if the agreement was effected and to pass a decree accordingly; and in the other case to pass a decree in spite of the other party's reluctance. The Bombay, Madras and Calcutta High Courts had taken the view that the court had jurisdiction to do so, (See Goculdas Bulabdas Mfg. Co. Ltd. v. James Scott, (1892) ILR 16 Bom 202; Appasami Nayakan v. Varadachari, (1896) ILR 19 Mad 419; Brojodurlabh Sinha v. Ramanath Ghose, (1897) ILR 24 Cal 908 (FB) while the Allahabad High Court had taken the view that unless parties to the compromise appeared before the court and accepted the terms, at the moment of moving the court, the Court had no jurisdiction to record the compromise (See Bandhu Bhagat v. Shah Muhammad Taqiu, (1892) ILR 14 All 350. These were decisions rendered prior to the Code of 1908. Rule 3 of Order 23 of the Code of 1908 accepted the view of the Presidency High Courts.

The words "where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part" clearly show that the court has power under this rule, where an agreement or compromise is denied, to decide whether as a fact the alleged agreement of compromise was made and if it is satisfied that it was made, to record it. (see *Jai Govind Singh v. Bagal Lal Singh*, AIR 1950 Pat 445). The observations of the Privy Council in the case of *Sourendra Nath Mitra v. Tarubala Dasi*, AIR 1930 PC 158, also lend support to this view. If there had been a lawful compromise, the objections raised by the plaintiffs in their petition of 28th Feb. 1979, did not authorise the court to refuse to record the compromise. 'Besides, the compromise was also not disputed by the third defendant who had received Rs. 1,000/- in lieu of any claim to a share in the property. The learned Trial Judge obviously missed the point and exercised jurisdiction vested in him contrary to law.’”

24. Learned senior counsel for the respondent on the other hand sought to support the impugned judgment and while doing so highlighted the fact that though the application as drawn was under Order 23 Rule 3 of the said Code, the prayer made was really one under Order 23 Rule 1 of the said Code as it was for withdrawal of the suit. Learned counsel submitted that the nature and necessity of the MOS is to be construed as making time the essence of the contract and the non-payment resulted in the same being voidable at the option of the respondent. Since the respondent was not willing to proceed with the settlement, it could not be compelled to do so.

25. Learned counsel further submitted that the pay orders/bank drafts were drawn not in the name of the respondent but a different entity altogether and thus the MOS itself was without consideration which was not known to either of the parties until the presentation and dishonour of pay orders/bank drafts and thus making the MOS void and the subsequent payment could not revive it. Learned counsel drew our attention to Section 54 of the Indian Contract Act, 1872 (‘the Contract Act’ for short) to contend that there was an element of reciprocal promise and the violation of consideration amounted to the reciprocal promise not being performed. Learned counsel also drew our attention to provisions of Section 20 of the Contract Act to contend that where the agreement is under

a mistake as to matter of fact essential to the agreement, the agreement is void. Section 20 of the Contract Act reads as under:

“20. Agreement void where both parties are under mistake as to matter of fact – Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation – An erroneous opinion as to the value of the thing which forms the subject of the agreement, is not to be deemed as mistake as to a matter of fact.”

26. Learned counsel referred to the judgment of the Patna High Court in Jagarnath Keyal and Ors v. Nagar Mull and Anr.; AIR 1962 Patna 426 where an application was filed under Order 23 Rule 1 and 3 of the said Code. The application was held to be merely one for withdrawal of suit under Order 23 Rule 1 of the said Code and not for recording compromise and such an application could be withdrawn.

27. A reference was also made to National Insurance Co.Ltd. v. Seema Malhotra and Ors; (2001) 3 SCC 151 where a premium of insurance was unpaid because the cheque of insured was dishonored. It was held that the contract of insurance was void and therefore if the insurer had disbursed the amount to the insured before dishonouring of the cheque, he was entitled to reimbursement. Learned senior counsel for the respondent drew our attention to the commentary of Pollock and Mulla on Indian Contract and Specific Relief Acts 13th Edition Volume I where while dealing with the question of time being the essence of the contract, it was observed as under:

“Intention of the Parties

The question, whether time is of the essence of the contract, does not depend upon express stipulation to that effect made by the parties, but it depends upon the intention of the parties. Notwithstanding that a specific date is mentioned, one has not to look at the letter but at the substance of the contract. Whether time is of essence is a question of fact, and the real test is the parties’ intention. It depends on the facts and circumstances of each case. An intention to make time of the essence of the contract must be expressed in unmistakable language, indicating that the parties wanted to make their rights dependent upon observation of time limits.

The intention of the parties can be ascertained from:

- i) The express words used in the contract;
- ii) The nature of the property which forms the subject matter of the contract;
- iii) The nature of the contract itself; and
- iv) The surrounding circumstances.

The question of intention of parties is a question of fact, or may be a mixed question of law and fact.”

28. Learned counsel submitted that it was not within the powers of the Court without the consent of the parties to grant extension of time for performance and relied upon the observations made in Novartis AG v. Wander Pvt. Ltd; 114 (2004) DLT 625 for the said proposition.

29. A Division Bench of this Court in Iqbal Krishan v. Maharaj Krishan; 68 (1997) DLT 318 had observed that on an application under Order 23 Rule 3 of the said Code,

adjustments must be by any lawful agreement or compromise and be in presenti. It must thus precede the date on which the Court is called upon to exercise its jurisdiction under Order 23 Rule 3 of the said Code as the use of the phrase “has been adjusted” clearly suggests. In *Chin Gwan and Co. v. Adamjee Hajee Dawood and Co.*; AIR 1933 Rangoon 79, it was held that Section 20 of the contract applies only when there is a mutual mistake of fact which goes to the root of the contract.

30. Lastly, learned counsel invited attention of the Court to the aspect of failure of consideration and submitted that under Section 25 of the Contract Act, an agreement without consideration is void unless it is made on account of natural love and affection or is a compromise to compensate for something done.

31. On hearing learned counsel for the parties, we find that both the learned counsel for the parties have traversed paths which are not really germane to the controversy in question. The controversy is within a limited scope. The MOS was undisputedly signed by both the parties. The terms of settlement, if closely looked into, clearly provide that on the execution of the settlement itself, the parties are relieved of the obligations under the original agreements (para 6 of the MOS as notice above).

32. The respondent confirmed the receipt of the amounts as set out in para 4 of the MOS and extracted aforesaid herein whereby Rs.18,000/- each was received in cash in respect of three properties apart from the pay orders/bank drafts. The rights, title and interests of the respondent stood extinguished pursuant to the cash received as also the pay orders/bank drafts. (para 5 of the MOS as notice above). The parties were left with no claim whatsoever against each other. The parties agreed to move a joint application for withdrawal in terms of the settlement.

33. The present case is not one where a cheque issued bounced. A pay order/bank draft/banker's cheque is issued after debiting a party's account. It is almost as good as cash. A reference in this regard can also be made to a decision of the Kerala High Court in *Varghese v. Annamma*; ILR (1971) Ker 494 where a question arose as to whether a tender of money under an agreement was not proper as it was made not by cash but by demand draft. It was observed under:

“9. According to me, an offer of payment may be made in any form in which, in the common course of events, the payment represents and produces cash and would be treated as such by persons placed in the position of the parties to the transaction. In business circles, payment by cheque or demand draft, by a party situate at one place to a party at another is a normal mode. It may be that the parties may not be willing to take a cheque. That depends upon the extent of faith in the party issuing the cheque and the commitment the party receiving the cheque has to make before cashing the cheque. But normally there would be no objection in receiving a demand draft in lieu of payment in cash. Such mode of payment has come to stay. If in the normal course of events parties have come to view an offer of payment by demand draft as a valid form of offer, I see no reason why I should take the view that unless there is an offer of cash there is no offer of payment.....”

10. In view of what I have stated above, I hold the view that a tender by way of demand draft is a valid tender of money.”

Of course, it has to be drawn in favour of the party with whom the settlement was arrived at. The negotiable instrument was so drawn but the word “Private” was omitted. This fact was not pointed out by the respondent at any stage and they accepted the negotiable instrument as drawn in full and final satisfaction of the claim. If there was a mistake in drawing the same, it ought to have been pointed out by the respondent at the stage of execution of the MOS. It is obvious that the respondent also did not find any irregularity in the pay orders/bank drafts as not only did they accept the same, but even presented them to their banker. The problem came to light when there was some objection and the credit was not forthcoming to the account of the respondent who thereafter sought to represent the same, which also met the same fate.

34. It is not the case of the respondent that they ever informed the appellants about this problem or gave a notice in terms of Section 93 of the said Act. On the other hand, it is the appellants who sought to remedy the position apprehending a problem and not wanting the respondent to suffer any adverse consequences. Thus fresh pay orders/bank drafts were prepared by the appellants on the very next date i.e. 24.01.2006.

35. The respondent appears to have had a second thought and sought to back out the compromise ostensibly on the ground that the pay orders/bank drafts/banker’s cheques were not encashed even though the fresh pay orders/bank drafts/banker’s cheques were available.

36. The appellants even took the precaution of filing an application immediately seeking directions for the new pay orders/bank drafts to replace the earlier pay orders/bank drafts on 28.01.2006 i.e. within three days of the date fixed before the Court when no proceedings were held. The intent of the respondent to somehow back out of the settlement is apparent from the fact that belatedly they sought to raise the issue of fraud, coercion and undue influence, which has been rightly rejected. If all these facts are read in conjunction, it is apparent that fresh pay orders/bank drafts in the right name were available rectifying the mistake which mistake had never been pointed out by the respondent.

37. We are unable to accept the conclusion of the learned Single Judge that there has been failure of consideration. The settlement arrived at itself shows that part consideration in cash had already been received. Thus, part consideration had already passed and only the balance consideration was received by pay orders/bank drafts in which the respondent found no fault. We also fail to appreciate as to how the learned Single Judge has come to the conclusion that the erroneous description of the respondent and the consequent failure to encash them resulted in the relevant time and occasion slipping by. It is not really a case of condonation of lapse or the MOS being voidable at the option of the respondent much less being void. No principle of law can be considered de hors the facts of a case. The initial document submitted was not a cheque but a pay order/bank draft which is as good as cash. Even the name of the respondent

was shown correctly, but the word “Private” was missing. The consequence was that it would appear to be in the name of a public limited company, but not a different company. Undisputedly, there cannot be a private and a public limited company by the same name. The mistake, if any, was capable of being rectified. The conduct of the respondent itself showed that they did not even perceive it as a mistake. It is not an agreement without consideration as under Section 25 of the Contract Act.

38. Learned senior counsel for the respondent sought to lay great emphasis on Section 20 of the Contract Act. The provision envisages an agreement under a mistake as to matter of fact essential to the agreement, the agreement is void. We find no such mistake. If the sum of Rs.18,000/- was received by the respondent, the respondent knew it was to the credit of the said respondent-entity, a private limited company. Thus, part consideration had passed. The respondent also did not think there would be any difficulty in encashing the pay orders/bank drafts and that is why raised no objections at the relevant stage.

39. Be that as it may, the pay orders/bank drafts were ready the very next day and the information to the appellants could have resulted in the same being handed to the respondent and being presented for encashment. There would have been practically no delay since the case was listed before the Court after that date. The fact that the respondent did not bring any such mistake to the notice of the appellants in a sense makes the situation similar to the one which arose in *Raghunath Rithkaran v. The Imperial Bank of India Ltd's case* (supra). In those facts also, one of the hundis was against a third person. In the present case, of course, the name is correct though the word “Private” is missing.

40. We find support in our conclusion from the observations made in Tannan's commentary on Banking Law and Practice in India that validity of cheques is not vitiated by mistakes which can be easily discovered and which are apparent. The respondent would certainly know in whose name it wanted the cheque and accepted the cheque in the name of a non private limited company. Such a instrument cannot be rendered invalid as long as the intention is clear. It is thus clear that the respondent acquiescencesd and approbated in handing over the cheques in the name of a public limited company and not a private limited company. In fact, Halsbury's Laws of India goes as far as to say that where a payee's name is incorrect or misspelt, the instrument is not invalid, the payee being permitted to indorse the instrument as he was described.

41. The significance of the receipt of part consideration supported by the commentary of Ansons's on Law of Contract; 27th Edition to the following effect:

“Failure of consideration occurs where one party has not enjoyed the benefit of any part of what it bargained for. It is judged from the payer's point of view and consideration in this context refers to performance by the payee of the contractual promise. This means that any performance of the actual thing promised, as determined by the contract, is fatal to recovery.”

42. The aforesaid observations show that the very premise of failure of consideration has not occurred since undisputedly the respondent has taken Rs.18,000/- per plot in cash under the compromise. The observations in *Amteshwar Anand v. Virender Mohan Singh*

& Ors's case (supra) are relevant to the extent that once a compromise is correctly arrived at and some payment remains outstanding, even if the decree is passed, the remedy was held not to open the compromise, but seek recovery of the balance amount. Appellants herein have, in fact, all along been ready and willing to replace the pay orders/bank drafts and had got prepared such duplicate pay orders/bank drafts in the correct name including the word "Private" the very next day at their own expense and with the consequence of the amount being debited twice over in their account. Such pay orders/bank drafts are still lying in the Court as informed to us by the learned counsel for the parties.

43. We are of the considered view that once a compromise is genuine and lawful, the same must be acted upon as observed in *K.Venkata Seshiah v.Kanduru Ramasubramma* (dead) by LRs's case (supra) which in turn had approved the dictum of *Bhaja Govinda Maikap v. Janaki Dei's case* (supra).

44. The application had been styled as one under Order 23 Rule 3 of the said Code. The prayer no doubt is that the suit of the plaintiff (respondent herein) be dismissed, but it is not a simpliciter prayer as the suit is prayed to be dismissed "in view of the Memorandum of Settlement, Annexure 'A' hereto". Thus, the parties were legally advised and correctly moved the application under Order 23 Rule 3 of the said Code as the parties wanted the compromise to be taken on record and the claim of the respondent to be treated as satisfied on payment of much larger amount (almost double the original amount) than what was paid as earnest money. Thus, instead of enforcing the rights against the plots being the properties in question, the respondent chose to accept almost double the amount of earnest money in full and final satisfaction of the claim, out of which part amount was accepted in cash and appropriated while the remaining amount was received through the disputed pay orders/bank drafts. The MOS arrived at was annexed to the application so that the Court was conscious of the nature of settlement arrived at between the parties. We may also notice that the suits as framed are for permanent injunction and declaration and have not been styled as suits for specific performance. The claim thus stood satisfied on the respondent's unconditional acceptance of the cash amount and the pay orders/bank drafts as they stood drawn at the relevant stage.

45. If we were to accept the plea of the respondent, in our view, it would be a premium on dishonesty permitting a party which has partly appropriated the amount and which had unconditionally accepted the pay orders/bank drafts as drawn, to resile from the settlement. The intention of the parties was clear. In fact, time was not even the essence of the contract nor was it mentioned as such apart from the fact that there has not been any loss of time. It is not a case where some extension of time to perform the obligations under the agreement was sought to be obtained from the Court. The agreement was lawful.

46. We are unable to appreciate the significance of the judgments referred by the learned senior counsel for the respondent in this behalf including *Iqbal Krishan v. Maharaj Krishan's case* (supra) since the lawful agreement making the adjustment was preceding the application under Order 23 Rule 3 of the said Code or in any case regarding the

acceptance of the said application by reason of the appellants even having moved a requisite application in that behalf to replace the earlier pay orders/bank drafts.

47. We are unequivocally of the view that the respondent could not have wriggled out of the compromise and all that was required to be done was to return the earlier pay orders/bank drafts to the appellants and hand over the new ones to the respondent. Both sets of pay orders/bank drafts are lying in the Court. The first set of pay orders/bank drafts is liable to be returned to the appellants so that they can be encashed and credited to their account while the second set of pay orders/bank drafts is also to be returned to the appellants for purposes of re-validation as the time has now passed. Necessary re-validation be done within a maximum period of seven days of the same being handed over by the Registry of this Court to the appellants and same after revalidation be re-filed in the Court to be withdrawn by the respondent.

48. The appeals of the appellants to the aforesaid extent are accordingly allowed. The application made under Order 23 Rule 3 of the said Code as also the applications of the appellants for replacement of the pay orders/bank drafts are also allowed while the applications of the respondent to withdraw from the settlement stand rejected. The appeals of the respondent stand dismissed.

49. The appellants are also held entitled to costs quantified at Rs.33,000/- for all the appellants.

Sd/-  
SANJAY KISHAN KAUL, J.

Sd/-  
SUDERSHAN KUMAR MISRA, J.