

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Commercial Division

Present:

The Hon'ble Justice Shekhar B. Saraf

IA No. GA 3 of 2019
(Old G.A. No. 917 of 2019)

in

C.S. No. 125 of 2014
Emars Mining and Construction Pvt. Ltd.
Versus
Manjunath Hebbar

For the Applicant/Defendant : Mr. Swatarup Banerjee, Adv.,

For the Respondent/Plaintiff : Ms. Manju Bhuteria, Adv.,
Mr. S. Mukherjee, Adv.,
Mr. M. Mukherjee, Adv.,
Ms. P. Sharma, Adv.

Heard on : September 16, 2020, October 9, 2020, November 18, 2020,
December 2, 2020 and December 16, 2020.

Judgment on : 13.01.2021

Shekhar B. Saraf, J.:

1. The applicant (the defendant in C.S. No. 125 of 2014) had filed this application bearing G.A. No. 917 of 2019, principally praying for the recall and/or setting aside of the *ex-parte* decree dated March 13, 2019 rendered by this Court. The applicant/defendant has filed this application seeking

such recall and/or setting aside of such *ex-parte* decree under O. IX, R. 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as CPC).

2. While the respondent (the plaintiff in C.S. No. 125 of 2014) had made claims that they had made a series of advance payments to the tune of Rs. 15,66,50,000/- on various dates through RTGS and electronic fund transfers in terms of the agreement signed between the applicant/defendant and the respondent/plaintiff, the applicant/defendant had only supplied commensurate goods to the respondent/plaintiff valued at Rs. 5,84,10,000/-thereby leaving a balance amount payable to the respondent/plaintiff assessed at Rs. 8,82,40,000/-.
3. Accordingly, the respondent/plaintiff had instituted C.S. No. 125 of 2014 against the applicant/defendant praying for the grant of a decree to the tune of Rs. 12,00,06,400/-; this decretal amount was evaluated based on the principal outstanding amount payable to the respondent/plaintiff along with interest claimed @ 18% per annum calculated from January 2012 to December 2013.
4. Based on the perusal of the documents on record, the examination of a sole witness on behalf of the respondent/plaintiff and the fact that while the applicant/defendant had entered appearance but had chosen to not file any written statement, I had treated the afore-stated suit as an undefended suit and granted an *ex-parte* decree dated March 13, 2019,

directing the applicant/defendant to ensure the payment of the decretal amount as stated above, in favour of the respondent/plaintiff.

5. Mr. Swatarup Banerjee, appearing on behalf of the applicant/defendant had averred that the respondent's/plaintiff's contention that an advance payment to the tune of Rs. 15,66,50,000/- on various dates through RTGS and electronic fund transfers was utterly misconceived and in page 14 of such application, conspicuously drew my attention to the fact that a sum of Rs. 3,00,00,000/- (Rupees Three Crores) dated December 10, 2010 by RTGS drawn through the State Bank of India bearing remarks "SBINH10344318588" was never transferred into the account of the applicant/defendant. I have also perused the bank statement, appended as 'Annexure-D' to the application by the applicant/defendant which reflects such an averment. Accordingly, the applicant/defendant contended that such a brazen act of misleading the court by the respondent/plaintiff in securing an *ex-parte* decree against the applicant/defendant, amounted to fraud and abuse of the process of this Court.

6. Based on this revelation, I had directed respondent/plaintiff to justify the purported payment of Rs. 3,00,00,000/- dated December 10, 2010 by RTGS drawn through the State Bank of India bearing remarks "SBINH10344318588", to the applicant/defendant by filing relevant documents as proof of such transaction by an order dated September 16, 2020.

7. Mrs. Manju Bhuteria, learned counsel appearing on behalf of the respondent/plaintiff, had chosen to rely on the purchase order (appended to this application under consideration) bearing no. PO/SE/02 dated December 10, 2010, wherein the recital “Terms of payment” records a distinct payment to the tune of Rs. Three Crores made to the applicant/defendant. The relevant recital is reproduced hereinbelow:

Terms of payment

Payment would be released as below:

100% against Proforma Invoice to be paid to M/S Menezes/Shyam Enterprises as mutually agreed.

Out of the total order value **the following payments are already made:**

1) Cost of materials	=Rs. 3,00,00,000.00
2) Advance towards handling charges to M/S Menezes Enterprises	=Rs. 55,30,000.00
3) Customs Duty	= Rs. 28,31,202.00

Total	=Rs. 3,83,61,202.00
Balance PO Value	=Rs. 1,20,38,798.00

Emphasis supplied.

8. Since Mr. Banerjee has prayed for the setting aside of the *ex-parte* decree under O.IX, R.13 read with Section 151 of the CPC, it is prudent that the relevant provisions are reproduced. O.IX, R. 13 provides as follows:

13. Setting aside decree ex parte against defendants.— In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon

such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further than no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation.—Where there has been an appeal against a decree passed *ex parte* under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that *ex parte* decree.

9. On the other hand, Section 151 of the CPC saves the inherent powers of the Court which provides as follows:

151. Saving of inherent powers of Court.- Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

10. As is evident from a bare reading of the two provisions of law extracted above, the grounds of *fraud* and/or *abuse of the process of the Court* are not conditions which would merit the Court's interference specifically, under O. IX, R. 13. Rather, O. IX, R. 13 *stricto sensu* envisages two particular conditions, either of which if fulfilled, warrants an interference by the Court to set aside an *ex parte* decree; these conditions are:

- a) *Either the defendant satisfies the Court that the summons were not duly served upon him, **or***

b) *The defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing.*

11. The applicant/defendant has not pressed either of these conditions before this Court. The predominant plea has been that of fraud and/or abuse of the process of the Court. Therefore, the natural progression would be to examine if the grounds of fraud and/or abuse of the process of the Court are not covered under O. IX, R.13, would it be statutorily permissible for the Court to rely on Section 151 and invoke its inherent powers to provide relief to the applicant/defendant and set aside an *ex parte* decree that may have been so obtained by either resorting to fraud and/or abuse of the process of this Court?

12. The Supreme Court in ***Ram Prakash Agarwal –v- Gopi Krishnan (Dead through LRS.)***, reported in (2013) 11 SCC 296 had held:

“15. In exceptional circumstances, the Court may exercise its inherent powers, apart from Order 9 CPC to set aside an *ex parte* decree. *An ex-parte decree passed due to the non-appearance of the counsel of a party, owing to the fact that the party was not at fault, can be set aside in an appeal preferred against it.* So is the case, where the absence of a defendant is caused on account of a mistake of the court. ***An application under Section 151 CPC will be maintainable, in the event that an ex parte order has been obtained by fraud upon the court or by collusion. The provisions of Order 9 CPC may not be attracted, and in such a case the court may either restore the case, or set aside the ex parte order in the exercise of its inherent powers.***

There may be an order of dismissal of a suit for default of appearance of the plaintiff, who was in fact dead at the time that the order was passed. Thus, where a court employs a procedure to do something that it never intended to do, and there is miscarriage of justice, or ***an abuse of the process of Court, the injustice so***

done must be remedied, in accordance with the principle of actus curia neminem gravabit - an act of the court shall prejudice no person.

16.**

17.**

18.**

19. **In view of the above, the law on this issue stands crystallised to the effect that the inherent powers enshrined under Section 151 CPC can be exercised only where no remedy has been provided for in any other provision of the CPC. In the event that a party has obtained a decree or order by playing a fraud upon the court, or where an order has been passed by a mistake of the court, the court may be justified in rectifying such mistake, either by recalling the said order, or by passing any other appropriate order.**

However, inherent powers cannot be used in conflict of any other existing provision, or in case a remedy has been provided for by any other provision of the CPC. Moreover, in the event that a fraud has been played upon a party, the same may not be a case where inherent powers can be exercised.”

Emphasis supplied

13. Therefore, this Court does possess the power to invoke its inherent powers under Section 151 of the CPC to provide relief to the applicant/defendant in such a case where fraud and/or abuse of the process of the Court may have transpired. However, whether the applicant/defendant has successfully discharged his burden in proving the same by contending that the nature of payments made by the respondent/plaintiff to M/s. Lotus Enterprises, purportedly on behalf of the applicant/defendant, merits a different consideration altogether.

14. On the question of the requirements of proving fraud, the Supreme Court in **A.C. Ananthaswamy -v- Boraiah (Dead) by LRS.**, reported in (2004) 8 SCC 588, had ruled:

“5. We do not find any merit in this appeal. Firstly, in the present case, Patel Chikkahanumaiah had moved an application under Order 9 Rule 13 CPC for setting aside the ex-parte decree on the ground of non service of summons in which fraud was not alleged. As stated above, Patel Chikkahanumaiah had moved R.A. No.54 of 1977 in which there was no such allegation. Secondly, the present suit has been instituted to set aside the ex-parte decree on the ground that the decree was obtained by fraud and misrepresentation. **Fraud is to be pleaded and proved. 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 & Specific Relief Acts (2001) 12th Edition page 489].”

Emphasis supplied.

15. Mr. Banerjee, counsel appearing on behalf of the applicant/defendant has submitted that the Rs. Three Crores in question was never paid to his client but was paid to M/s. Lotus Enterprises. He submits that there is no relationship of his client with M/s. Lotus Enterprises. According to him, this Three Crores payment that has been reflected in the plaint, is a fraud on the Court and is an abuse of the process of Court. The above argument of Mr. Banerjee has been countered by Ms. Bhuteria, appearing on behalf of the respondent/plaintiff. She submits that this amount of Rs. Three Crores was paid to M/s. Lotus Enterprises on instruction of the

applicant/defendant. According to her M/s. Lotus Enterprises is a sister concern of the applicant/defendant. She further relies on bank account details to show that this payment was made and on the purchase orders to show that the same reflect payments made to the defendant. In fact, she relies on purchase order bearing no. PO/SE/02 dated December 10, 2010 to show that subsequent to the payment of Rs. Three Crores, the same was reflected in the purchase order as a payment received by the applicant/defendant. In light of the same, she submits that there is no question of any fraud having been played on the applicant/defendant.

16. Mrs. Bhuteria has conspicuously relied on the purchase order bearing no. PO/SE/02 dated December 10, 2010 which manifestly indicates that an amount to the tune of Rs. Three Crores was indeed transferred into the account of the applicant/defendant's proprietorship or its purported sister entity M/s. Lotus Enterprises, by the respondent/plaintiff. However, Mr. Banerjee strenuously contended that such a payment is disputed since no document had been produced by the respondent/plaintiff to prove that the applicant's/defendant's proprietorship is in any way connected to M/s. Lotus Enterprises. *Apropos* this question of fact, to my mind, it would not be improper to state that had the applicant/defendant been present before the Court to contest the suit, such fact could have been controverted by placing their reliance upon a written statement as well as cogent evidence that could have been led by the applicant/defendant; such a fact accordingly, could have been proved to the contrary. But that ship has sailed.

17. Upon an application of my mind as well as the yardstick laid down in **A.C. Ananthaswamy** (*supra*), this new *factum* as referred to in the immediately preceding paragraph, does not appear to me to be a case of fraud and or/abuse of the process of the Court. The degree of proving fraud is much higher. An ambiguous question of fact, as in this case, cannot be categorized as a case of fraud.

18. Moving forward, as for the options at the disposal of the applicant/defendant to set aside the *ex-parte* decree dated March 13, 2019, the applicant/defendant could have:

- a) Either filed an application under O.IX, R.13 of CPC whereupon if such an application is dismissed, such an order of dismissal would be appealable under O. XLIII, R. 1(d), **or**
- b) Filed an appeal under clause (2) of Section 96 of the CPC.

19. The nature and scope of both these remedies need to be reiterated. Dr. D.Y. Chandrachud, J. speaking for a three judges bench of the Supreme Court in **Neerja Realtors Pvt. Ltd. -v- Janglu (Dead) through Legal Representative**, (2018) 2 SCC 649 had enunciated the ‘procedural scope’ of both these remedies, in the following terms:

“17. A defendant against whom an ex parte decree is passed has two options: the first is to file an appeal. The second is to file an application under Order 9 Rule 13. **The defendant can take recourse to both the proceedings simultaneously. The right of appeal is not taken away by filing an application under Order 9 Rule 13. But if the appeal is dismissed as a result of which the exparte decree merges with the order of the**

appellate court, a petition under Order 9 Rule 13 would not be maintainable. When an application under Order 9 Rule 13 is dismissed, the remedy of the defendant is under Order 43 Rule 1. However, once such an appeal is dismissed, the same contention cannot be raised in a first appeal under Section 96. The three Judge bench decision in *Bhanu Kumar Jain* has been followed by another bench of three Judges in *Rabindra Singh v Financial Commissioner, Cooperation, Punjab* and by a two Judge bench in *Mahesh Yadav v Rajeshwar Singh*. In the present case, the original defendant chose a remedy of first appeal under Section 96 and was able to establish before the High Court, adequate grounds for setting aside the judgment and decree.”

Emphasis supplied.

20. However, in a subsequent decision of the Supreme Court in ***Bhivchandra Shankar More –v- Balu Gangaram More*** reported in (2019) 6 SCC 387, while also relying on the dictum of ***Bhanu Kumar Jain***¹ as was done in ***Neerja Realtors*** (*supra*), the Court had ruled on the ‘substantive scope’ of both these remedies as follows:

“11. It is to be pointed out that the scope of Order 9 Rule 13 CPC and Section 96(2) CPC are entirely different. **In an application filed under Order 9 Rule 13 CPC, the Court has to see whether the summons were duly served or not or whether the defendant was prevented by any “sufficient cause” from appearing when the suit was called for hearing.** If the Court is satisfied that the defendant was not duly served or that he was prevented for “sufficient cause”, the court may set aside the *exparte* decree and restore the suit to its original position. In terms of Section 96(2) CPC, the appeal lies from an original decree passed *exparte*. **In the regular appeal filed under Section 96(2) CPC, the appellate court has wide jurisdiction to go into the merits of the decree. The scope of enquiry under two provisions is entirely different.** Merely because the defendant pursued the remedy under Order 9 Rule 13 CPC, it does not prohibit the defendant from filing the appeal if his application under Order 9 Rule 13 CPC is dismissed.

¹*Bhanu Kumar Jain –v- Archana Kumar*, (2005) 1 SCC 787.

12. The right of appeal under Section 96(2) CPC is a statutory right and the defendant cannot be deprived of the statutory right of appeal merely on the ground that the application filed by him under Order 9 Rule 13 CPC has been dismissed..."

Emphasis supplied.

21. The powers of the Court are guided, controlled and circumscribed by the statutory limitations of the CPC. Hence, while the scope of enquiry under O. IX, R. 13 is severely constricted but well-defined nonetheless, it remains quite expansive in its scope under a regular appeal envisaged under clause (2) of Section 96 of the CPC, wherein the appellate court can go into merits of the decree under challenge dated March 13, 2019, which this Court cannot while exercising its powers under O. IX, R. 13.

22. I have previously ruled that Mr. Banerjee had not pressed either of the conditions envisaged under O. IX, R. 13 of the CPC. As far as the other limb of Mr. Banerjee's argument is concerned which had consistently focused on the facet of fraud and/or abuse of the process of the Court, such a limb also fails to pass the test as laid down in **A.C. Ananthaswamy** (*supra*), as discussed in paragraphs 15 to 17.

23. Accordingly, for the reasons discussed above in detail, this application bearing G.A. No. 917 of 2019 seeking the recalling/setting aside of the *ex-parte* order dated March 13, 2019 is hereby dismissed. There shall be no orders as to costs.

24. Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)