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IN THE HIGH COURT OF DELHI AT NEW DELHI
RFA 321 OF 2005

Date of Decision: 14th February, 2011

K.P. SOLVEX LTD. ...Appellant
Through: Mr. Alok Mahajan and Ms. Anjani,
Mahajan, Advocates.

Versus

HYDERABAD INDUSTRIES LTD. & ORS. ...Respondents
Through: Mr. A.S. Chadha and Ms. Harpreet
Kaur, Advocates for R-1.

CORAM:

* **HON'BLE MR. JUSTICE P.K.BHASIN**

1. Whether Reporters of local papers may be allowed to see the judgment?(No)
2. To be referred to the Reporter or not?(No)
3. Whether the judgment should be reported in the digest?(No)

JUDGMENT

P.K.BHASIN, J

This is an appeal against the judgment and decree dated 15.3.2005 passed by the learned Additional District Judge whereby the suit no. (hereinafter to be referred as the 'subsequent suit') filed by the appellant-plaintiff(hereinafter to be referred to as 'the plaintiff') for setting aside of an *ex parte* decree dated 13th October,1993 passed by this Court against it in suit no.89 of 1987(hereinafter to be referred as 'the former suit') filed by the respondent no.1 herein(hereinafter to be referred to as 'the plaintiff of the former suit') for recovery of Rs. 3,75,000/- with interest against the plaintiff and respondents no. 2 and 3 herein, who were impleaded in the

former suit as defendants no. 1 and 2 respectively and in the subsequent suit as defendants no. 2 and 3.

2. The facts, as per the case of the the plaintiff, which led to the filing of the suit out of which the present appeal arose, may briefly be stated before proceeding further. The plaintiff of the former suit, which was earlier known as Hyderabad Asbestos Cement Products Limited and was into the business of making asbestos cement sheets, had appointed M/s Gupta Tractors & Traders(defendant no.3 in the subsequent suit),a proprietorship concern of defendant no. 2 in the subsequent suit, Ashok Kumar Gupta, as its agent/stockist at Jhansi for sale of asbestos cement sheets made by it. (Reference to these two defendants shall hereinafter be collectively made as 'the stockist'). The plaintiff had placed an order on the stockist on 25th April, 1984 for supply of asbestos cement sheets manufactured and sold by the plaintiff of the former suit. As desired by the stockist the plaintiff had made an advance payment of Rs.30,000 to the stockist by way of a bank draft favouring the plaintiff of the former suit and thereafter the stockist placed the order on the plaintiff of the former suit which in turn had supplied the material to the plaintiff. The plaintiff made the payment of that material to the stockist as per the instructions of the plaintiff of the former suit.

3. As per the further case of the plaintiff, the plaintiff of the former suit filed the former suit against the plaintiff and the stockist in the High Court of Delhi for recovery of Rs. 3,75,000/- together with *pendente lite*

and future interest thereon @ 21.5% p.a. alleging that no payment was made to it by the stockist against the supply of asbestos sheets made to the plaintiff M/s K.P. Solvex Ltd. and that though the plaintiff was claiming that it had made the payment to the stockist but the stockist had not acknowledged having received the payment from the plaintiff and since the material had been supplied to the plaintiff it was also liable, jointly and severally, with the stockist to make the payment of the price of the material. It was also claimed by the plaintiff of the former suit that there was a running account of the stockist being maintained by it and during the course of business dealings between the two some cheques issued by the stockist had been dishonoured and the suit amount included the amount of those cheques also besides the amount due from the stockist on account of the particular supply of the material to the plaintiff here. The plaintiff herein had put in appearance in the former suit and had filed its written statement claiming that it had already made the payment to the stockist. After fining the written statement its counsel in that suit disappeared from that case and since the stockist was already not contesting that case the High Court passed a decree on 13th October, 1993 for a sum of Rs.3,75,000/- with interest thereon @ 21.5 % p.a. against the stockist as well as the plaintiff herein holding them liable for the payment of the decretal amount jointly as well as severally.

4. On coming to know about the *ex parte* decree having been passed against it in the former suit the plaintiff filed an application under Order

IX Rule 13 read with Section 151 C.P.C. for setting aside the *ex parte* judgment and decree . In that application the plaintiff had claimed that its counsel had kept it in dark about the progress of the suit and had stopped appearing in the proceedings and, therefore the *ex parte* decree should be re-called. It was also claimed by the plaintiff herein that the plaintiff of that suit had obtained the decree by suppressing the fact that its stockist had been paid the full price of the material by it on the specific instructions of the plaintiff of that suit and, therefore, the plaintiff of that suit had obtained the decree by fraud. That application was, however, rejected on 23rd September,1996 by the learned Single Judge on the ground that the applicant(plaintiff herein) had failed to show that it was prevented by any sufficient cause from appearing in the suit proceedings. Regarding the facts pleaded in the application touching the merits of the claim of the plaintiff of that case, the learned Single Judge had observed as under:-

“Therefore, in view of the above legal position, the applicant cannot challenge the judgment and decree on merits under Order 9 Rule 13 CPC. For that the applicant ought to have taken recourse to the remedies which may be available to it under law.”

5. The dismissal of that application under Order IX Rule 13 CPC was not challenged in appeal and instead in view of the above-quoted observation of the learned Single Judge the plaintiff filed a separate suit for declaration that the decree in the former suit had been obtained by the plaintiff of that suit by fraud and so was a nullity. That suit, in which the stockist firm and its proprietor were also impleaded, was also filed in the

Delhi High Court but subsequently the same was transferred to the District Courts because of the increase in pecuniary jurisdiction of District Courts.

6. The plaintiff's main plea in the subsequent suit was that the allegations made against it in the former suit were false to the knowledge of the plaintiff of that suit inasmuch as it had made the full payment towards the material to the stockist and that position was not only known to the plaintiff of the former suit but was specifically admitted also by it in its notice of demand dated 16th May, 1986, Ex.PW-2/12, in which only sales tax was claimed from the plaintiff and though a reference was made in the plaint about that demand notice in the former suit but that notice had been suppressed from the Court by the plaintiff of that suit and that concealment of vital document amounted to fraud upon the Court. Another ground taken in the plaint was that even though the plaintiff's counsel had disappeared from the case after filing the written statement the Court was still required to consider the written statement filed by the plaintiff in the former suit as also the documents filed by the plaintiff in that suit some of which were letters exchanged between the plaintiff and the plaintiff of the former suit wherein the plaintiff had claimed that it had made the payment of the material in question to the stockist and the plaintiff of the former suit had not refuted in any of its letters that fact and further that a bare reading of the plaint in the former suit would show that that case was based on the outstanding dues from the stockist as reflected in its running account which was being maintained by the plaintiff of the

former suit and not for the price of the material purchased by the plaintiff here. That aspect had not been taken note of by the learned Single Judge who had decreed that suit. It was also pleaded in the plaint in the subsequent suit by the plaintiff that it was under no obligation to pay the price of the material to the plaintiff of the former suit and so it could not be made liable for the payment of price of the material under a joint and several decree in the former suit. Another ground of challenge taken was that, in fact, the plaintiff of the former suit had fraudulently invoked the territorial jurisdiction of the Delhi High Court when, in fact, no cause of action whatsoever had arisen within the jurisdiction of this Court and for that reason also the ex-parte decree in the former suit was liable to be set aside having been passed by a Court having no jurisdiction. It was also pleaded that for more than two years after the transaction in question the plaintiff of the former suit had not demanded the price of the material from the plaintiff and it had been claiming only the supply of 'C Form' under the Sales Tax Rules and even in the final demand notice dated 16th May, 1986 only sales tax forms were demanded from the plaintiff. In paras no. 28(XII & XIII)) of the plaint it had also been pleaded that:

“XII. THAT Hon’ble Mr. Justice M. Shamim, who passed the ex-parte decree, did not take cognizance of the facts submitted in the written statement filed in suit no. 89 of 1987, on behalf of defendant no. 3(the defendant herein), and the documents produced on record by the defendant no. 3 in the said suit..... The learned Judge misdirected himself in passing a joint and several decree in the sum of Rs. 3,75,000/- against the plaintiff herein, when the allegations pleaded in the plaint were only for non-supply of CST Form-C or for differential of CST amounting to Rs. 14,867/-. When the written statement and the relevant documents were placed on record by and on behalf of the plaintiff herein, it was the duty of the Court to look into these

documents before passing an ex-parte decree and the learned Judge, therefore, misdirected himself in passing an ex-parte joint and several decree in the sum of Rs. 3,75,000/- when the only claim pleaded in the plaint against the Plaintiff herein was for non-supply of CST Form C.

XIII. THAT without prejudice to the aforesaid, it is submitted that even on the Pleadings in the Plaint, the extent to which Defendant No. 3(the Plaintiff herein) could be held liable in a joint and several decree would be for the non-supply of CST Forms C, and in failure thereof to payment differential in sales tax between 4% and 10%, which comes to Rs. 14,867/-. The joint and several ex-parte decree in the sum of Rs. 3,75,000/- passed against the Defendants in the suit ought to have been apportioned against the Defendants in the ratio of Rs. 3,60,133/- against the Defendants 1 & 2 and Rs. 14,867/- against Defendant No. 3. Any liability under the decree beyond Rs. 14,867/- against the Defendant No. 3 is manifestly against law.”

7. The plaintiff of the former suit only contested the subsequent suit on the grounds that after the dismissal of plaintiff's application under Order IX Rule 13 read with Section 151 C.P.C. for setting aside of the *ex parte* decree that decree had become final since no appeal was filed challenging the order dismissing that application or even against the judgment and decree and so the present suit was barred by the principle of *res judicata* since the plea of payment which the plaintiff had raised in the subsequent suit was raised by it in the former suit also. Similarly the plea of fraud was also raised in the application under Order IX Rule 13 CPC and the order of rejection of that application also created a bar for the same plea being entertained in the subsequent suit. On merits, the plaintiff of the former suit admitted that the plaintiff had placed an order upon the stockist for purchase of asbestos cement sheets but it was claimed that price of that material was to be paid by the plaintiff directly to the plaintiff of the former suit and in any event payment was not made to it either by the stockist or by the plaintiff here even if it had been made to

the stockist and so it(plaintiff of the former suit) was justified in filing a suit for recovery of its dues against its stockist as well as the present plaintiff as an unpaid seller of goods and the trial Court had rightly decreed the former suit against all the defendants in that suit holding them liable jointly as well as severally for the payment of the decretal amount. It was also pleaded that no fraud was played upon the Court by the plaintiff of the former suit and all the material facts had been pleaded in the plaint including the fact that the plaintiff was claiming that it had made the payment to the stockist but the stockist had not acknowledged the receipt of any money from the plaintiff and so the plaintiff of the former suit was justified in claiming the price of the material sold from the stockist as well as from the plaintiff.

8. The following issues arising out of the aforesaid pleadings of the contesting parties came to be framed by the learned trial Court:-

- 1. Whether the suit has been properly instituted and signed by a duly authorized person?*
- 2. Whether the present suit is barred by time? If so, its effect.*
- 3. Whether the judgment and the decree dated 13.10.1993 passed in Suit No. 89 of 1987 has become final and if the principle of res judicata would be attracted?*
- 4. Whether the impugned judgment and decree dated 13.10.1993 is liable to be set aside on the grounds mentioned in the plaint?*
- 5. Relief.*

9. After examining the evidence adduced by the contesting parties and hearing the counsels from both the sides the trial Court decided issues no. 1 & 2 in favour of the plaintiff while issues no. 3 & 4 were decided against it and consequently the suit came to be dismissed. Feeling aggrieved, the plaintiff filed the present appeal.

10. Mr. Alok Mahajan, learned counsel for the plaintiff had contended that since the *ex parte* decree in the former suit qua the plaintiff had been obtained by the plaintiff of the former suit by playing fraud upon the Court the same was a nullity. Elaborating this ground of challenge, Mr. Mahajan had contended that a perusal of the plaint of the former suit, Ex.PW-2/13, would show that the former suit was based upon the balance amount due to the plaintiff of that suit from its stockist in the running account which the plaintiff of that suit was maintaining in the ordinary course of business and the plaintiff here had been impleaded only because it had to pay sales tax on the value of the material purchased by it since requisite Sales Tax Forms C' had not been furnished by it. The stockist was having regular business dealings with the plaintiff of the former suit and the transaction of sale of the material to the plaintiff here was one of the many transactions which the stockist had done for the plaintiff of the former suit. My attention was drawn to para no. 11 of the plaint in the former suit wherein the plaintiff of that suit had categorically pleaded that it was filing the suit for the recovery of its dues outstanding in the running account of the stockist. The plaintiff had placed the order upon the stockist who in turn

had placed the order upon the plaintiff of the former suit and the plaintiff had made the payment also of the price of the material to the stockist and in that regard the plaintiff of the former suit had while making the delivery of the material to the plaintiff instructed the plaintiff to make the payments to its stockist only. Learned counsel, referring to the averments in the plaint of the former suit, submitted that it appeared that the stockist while placing the order of the plaintiff upon the plaintiff of the former suit had given some cheques also to the plaintiff of the former suit but those cheques had got dishonoured and the plaintiff of the former suit had after informing its stockist only about the bouncing of those cheques debited the amount of those cheques to the running account of the stockist and since in the past also the stockist's cheques had been bouncing the plaintiff of the former suit this time it was decided to close the dealings with the stockist and to file a recovery suit for the amount due from the stockist. Before filing that suit the plaintiff was also served with a demand notice dated 16-05-86 sent on behalf of the plaintiff of the former suit and in that notice the plaintiff had acknowledged that the plaintiff had made the payment of the material purchased by it to the stockist but since it had not furnished 'C' Forms the plaintiff was called upon to furnish the 'C' Forms only else it shall have to pay sales tax @ 6%. Mr. Mahajan further submitted that earlier to that also for about two years the plaintiff was never called upon by the plaintiff to make the payment of the price of the material which showed that the plaintiff of the former suit had accepted

the position that money was to be paid to it by its stockist only and it had also accepted that plaintiff had made the payment to the stockist and that is why only the stockist was being called upon to clear the outstanding amount in its running account with the plaintiff of the former suit. Mr. Mahajan submitted that the entire tenor of the plaint would also show that the entire case was against the stockist and only in para no.13 a line had been added that since the plaintiff here had received the material it was also liable for the price of the goods jointly as well as severally with the stockist. However, in the former suit the plaintiff of that suit did not place on record the demand notice dated 16.5.86 which contained the admission of the plaintiff of the former suit that the plaintiff here already made the payment to its stockist on its instructions. That concealment of the vital document, according to Mr. Mahajan, amounted to fraud upon the Court and so the decree passed in the former suit could be set aside in a separate suit by invoking the provisions of Section 44 of the Evidence Act.

11. It was also contended by Mr. Mahajan that the fact that the plaintiff had not challenged that decree or the order of rejection of the application under Order IX Rule 13 CPC in appeal would not make any difference. To support his submission about the concealment of this vital document from the Court by the plaintiff of the former suit Mr. Mahajan drew my special attention to para no.15 and sub- paras no. VII & VIII of para no.28 of the plaint in the subsequent suit and also to the reply of the plaintiff of the

former suit in the corresponding paras of its written statement in the present suit. Those paras are re-produced below:-

“15. THAT on 16.5.1986, a legal notice was received by the plaintiff, on behalf of Defendant no.1 Company from Shri Shivraj Bahadur Nagar, Advocate, calling upon the Plaintiff to send CST Form C for the supplies made to the Plaintiff by the Defendant No. 1. Receipt of the payments by the Plaintiff to Defendant No. 3 was duly acknowledged in the said notice. A copy of the said notice is hereto annexed and marked as ANNEXURE P -11. No other demand except for furnishing of CST Form C was made, even, in this legal notice.

28(VII). THAT in para 19 of the plaint, the legal notice dated 16.5.1985(sic 1986) is pleaded as cause of action against Defendant No. 3. This legal notice does not raise any demand against Defendant No. 3 for any amount other than the non-supply of CST Forms C, or for the differential in sales tax and, therefore, the ex-parte joint and several decree against Defendant No. 3 was manifestly unwarranted, and without jurisdiction.

28(VIII). THAT it was to the specific knowledge of the Plaintiff in Suit No. 89 of 1987 that Defendant No. 3 had made the entire payment for the goods supplied to them as indented by their stockist. The Plaintiff had itself confirmed this fact, not only in its letter, but also in the legal notice issued on Defendant No.3. This factum had been deliberately and dishonestly suppressed by the Plaintiff. The Plaintiff suppressed the legal notice dated 16.5.1985(sic 1986) issued on Defendant No. 3 which was pleaded as a substantive cause of action against Defendant No. 3, and which did not make any demand on Defendant No. 3, except for non-supply of CST Form C, or differential in C.S.T. The ex-parte decree was manifestly procured by the Plaintiff (Defendant No. 1 herein) in fraud of the Court, and in fraud of Defendant No. 3 (the Plaintiff herein), and is a nullity in law, and cannot be enforced against the Plaintiff herein.”

The corresponding paras of the written statement are also re-produced below:-

“15. In reply to para no.15, it is not disputed that on behalf of the defendant no.1 company, Shri.S.B.Nagar, Advocate, had addressed a letter dated 16.5.1986 but it is submitted that in that letter, only CST Form was demanded. However, the factum of the plaintiff's paying the amount to the defendant No. 3 was wrongly stated in the said letter on the assumption that the plaintiff had made the payment to the defendant No. 3 but in fact the plaintiff had not paid the said amount to the defendant No. 3 nor the defendant No. 3 had received the same on behalf of answering defendant. Furthermore, the answering defendant later on realized that the amount in question was not paid by either the plaintiff or the defendants No. 2 and 3 to the answering defendant.

28(vii). Sub Paragraph (vii) of para 28 of the plaint is wrong and misconceived. The plaintiff is wrongly construing the contents of the said notice. In fact, at that time the answering defendant was not fully aware of the correct factual position.

28(viii). Sub Paragraph (viii) of para 28 of the plaint is wrong and denied. It is wrong to say that any fact was deliberately withheld or there was a suppression of facts in the earlier filed suit by the answering defendant. It is totally wrong to say that the suit was procured by playing fraud and, therefore, the judgment and decree are a nullity in the eyes of law. All the allegations made in the para under reply are wrong and misconceived.”

12. Mr. Mahajan also drew my attention to the following para of the demand notice dated 16.5.86:-

“5. The payment against the above supply has been made by you to the stockist M/s. New Gupta Tractor & Traders as confirmed by you vide your letter No. 2/84/74 Dt. 27.7.84. (Please refer your letter Dt. 8-9-84 and my Client’s reply to this letter vide his letter No. CC:SH:1203-DP dated 9-10-84.”

and referring to the aforesaid pleadings and the contents of the demand notice, learned counsel for the appellant-plaintiff had contended that the plaintiff of the former suit had admitted categorically that in its demand notice dated 16.5.86, Ex.PW-2/12, it had admitted that the plaintiff had made the payment of the material to the stockist and had also not denied the assertion of the plaintiff that the said demand notice had not been placed on record by it in the former suit. It was also contended that the plea now being raised in the subsequent suit that payment of money to the stockist was wrongly admitted in the demand notice dated 16.5.86 was clearly an after-thought and in fact that plea showed that the non-production that demand notice in the former suit by the plaintiff of the former suit was deliberate taking advantage of the fact that the counsel for the plaintiff had stopped appearing in that suit. Mr. Mahajan submitted

that the demand notice was such a vital document that if it had been filed in the former suit no decree would have been passed against the plaintiff in the former suit. That vital document was kept away from the Court intentionally by the plaintiff of the former suit because it knew that the plaintiff here had already made the payment to its stockist on its instructions and it was only an attempt being made to get a joint and several decree against its stockist as well as the plaintiff here for the price of goods and in that attempt it had succeeded also because of the gross negligence of the plaintiff's counsel in not prosecuting the case on behalf of the plaintiff who had in complete disregard to the professional ethics and duty which he owed to his client had stopped appearing in the matter after filing the written statement and did not even inform the plaintiff anything about the fate of proceedings in the former suit and consequently the plaintiff in that suit had succeeded in getting a joint and several decree against all the three defendants impleaded in that suit and in that manner the plaintiff had been deceived by its advocate as well as by the plaintiff of the former suit. Learned counsel submitted that even though the plaintiff's counsel had stopped appearing in the former suit after filing the written statement the plaintiff of the former suit was still under an obligation towards the Court to bring on record all vital documents and particularly its legal demand notice dated 16th May, 1986. In support of the submission that concealment of a vital fact or document from the Court by any party to a suit amounts to playing fraud on Court Mr. Mahajan placed strong

reliance upon a judgment of the Supreme Court in “*S.P Chengalvaraya Naidu(dead) by L.Rs vs Jagannadh(dead) by LRs and others*”, AIR 1994

SC 853 with particular reference to the following paras:-

“1. "Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and honest in the eyes of law. Such a judgment/decree - by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.

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8. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Exhibit B-1S) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial tantamounts to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Exhibit B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.”

My special attention was drawn to the underlined portion.

13. On the other hand, Mr. A.S.Chadha, learned counsel for the plaintiff of the former suit had submitted that he was not disputing the legal proposition that if any decree is obtained by a party to a suit by playing fraud upon the Court then that decree can be got set aside by the

unsuccessful party by filing a separate suit by invoking Section 44 of the Evidence Act. However, he submitted that in the present case Section 44 of the Evidence Act was not attracted since the plaintiff of the former suit had not practised any fraud upon the Court for securing money decree against the plaintiff and the stockist in the former suit and that non-production of the legal demand notice dated 16.5.86 in the former suit by the plaintiff of the former suit did not amount to playing fraud upon the Court justifying setting aside of the *ex parte* decree passed in that suit. Learned counsel argued that at the highest non-production of the said demand notice in the former suit by the plaintiff of that suit would show that the decree had been obtained in that suit by not bringing on record all the true facts or upon perjured evidence but that was not a sufficient ground to set aside that decree in a separate suit. In support of the argument that to constitute a fraud within the ambit of Section 44 of the Evidence Act it is required to show that the fraud played was extrinsic or collateral to everything that has been adjudicated upon in the suit and it is not sufficient to show only that the decree was obtained by perjured evidence and particularly after the unsuccessful party had failed to get the decree set aside on the ground of fraud by having resort to Order IX Rule 13 CPC Mr. Chadha cited some judicial pronouncements of some High Courts, including one of this Court which are reported as AIR 1978 Madras 223, AIR 1969 Madras 462, AIR 1963 Kerala 26, AIR 1942 Patna 357 and 1979 (I) RLR 446 Delhi. Learned counsel also contended that

even if the plaintiff had made payments to the stockist that would not absolve it of the liability towards the goods purchased from the plaintiff of the former suit since the stockist was not the agent of the plaintiff of the former suit. In support of this submission also Mr. Chadha cited two judgments of the Supreme Court reported as (1995) 6 SCC 566 and AIR 1967 Supreme Court 181. In the end, Mr. Chadha had submitted that since all the pleas which were now being put forth in the subsequent suit by the plaintiff had been taken in the former suit also the subsequent suit was barred by *res judicata* as the learned Single Judge who had decided the former suit would be deemed to have taken into consideration the plaint as well as the written statement before passing the impugned decree this Bench now cannot sit in appeal over that decision even if it were to be accepted that decree against the plaintiff here was as a result of wrong appreciation of facts pleaded and the evidence adduced and even if that was an *ex parte* decree the same was binding on the parties to that suit. In this regard also Mr. Chadha cited some judgments which are reported as AIR 1977 Supreme Court 1680, AIR 1977 Supreme Court 808 and AIR 1973 Supreme Court 1406. However, Mr. Chadha very fairly had also contended that the bar under the principle of *res judicata* would not come in the way of this Court in setting aside the *ex parte* decree in the former suit if this Court would come to the conclusion that the plaintiff of the former suit had actually played some kind of fraud upon the Court for

securing the decree against the plaintiff here. Though it was reiterated that no fraud had been played upon the Court.

14. Before proceeding further it may be stated here that during the course of the hearing of this appeal it became a matter of anxiety to find out as to why the impugned ex parte decree in the former suit had remained unexecuted even against the stockist and so the counsel for the appellant was asked whether he could tell any reason for that. His answer was that the stockist firm had wound up its establishment in Jhansi long time back and so the decree holder could not have executed the decree against the stockist and since the plaintiff was a going concern the decree holder could easily execute the decree against it but that could not be done because of the stay against execution granted in the present appeal by this Court vide order dated 6-5-05.

15. The learned trial Judge after noticing the various judicial pronouncements cited on behalf of the parties relating to cases of fraud covered under Section 44 of the Evidence Act had rejected the plea of fraud raised by the plaintiff. The relevant paras from the impugned judgment showing the discussion and the conclusions of the trial Judge are being re-produced below:-

“The basic question in the present case is whether the earlier judgment Ex.PW-2/16 is obtained by the present defendant no. 1 (plaintiff in the earlier suit) by practicing fraud. There is no allegation of collusion in the present suit. The Apex Court in S.P. Chengalvaraya Naidu’s case (supra) has explained that a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another’s loss. It is a cheating intended to get an advantage.

In the present case, the plaintiff of the earlier suit (defendant no.1 in the present suit) has pleaded that the cheques issued by the defendant no. 2 in the earlier suit with regard to the goods supplied by plaintiff of the earlier suit (defendant no.1 herein) to the present plaintiff(defendant no. 3 in the earlier suit) were dishonoured. The plaintiff in para no. 14 of the earlier suit, Ex.PW-2/13, has alleged that the defendant no. 3(plaintiff herein), however claims to have made payments to defendant no.2, who has not acknowledged the said receipt. This plea of the plaintiff (defendant no. 1 herein) in para no. 14 of the plaint rules out any quest of fraud on the part of plaintiff in the earlier suit (defendant no.1 herein). Had the defendant no.1 herein (plaintiff in the earlier suit) wanted to practice fraud or deception such pleadings as made in the para no. 14 of the plaint, Ex.PW-2/13 would not have been there in the earlier plaint. Therefore, it was for the present plaintiff (defendant no.3 in the earlier suit) to contest the suit and bring the evidence before the court that he is discharged from the liability having paid the price of goods supplied to present defendant no.3 (to be paid to plaintiff in that suit) and only defendant no. 1 and 2 in the earlier suit were liable and not defendant no.3 (present plaintiff). Instead of contesting the suit and filing of written statement only, the present plaintiff (defendant no. 3 in the earlier suit) abstained and suffered ex parte decree Ex.PW-2/16,

In the present suit, in para no. 18 the plaintiff has stated that it appointed Sh. D.M.S.D. Bhartiya, Advocate, to prosecute its defence in suit no. 89 of 1987. Sh. Bhartiya entered appearance in the suit on behalf of the defendant no.3 in the suit (the plaintiff herein). As per para no. 19 of the plaintiff, a written statement on behalf of defendant no.3 (plaintiff herein) was filed in the Hon'ble High Court at Delhi in suit no. 89 of 1987. In para no. 20, the plaintiff has alleged that Sh. Bhartiya, who was appointed as Advocate by the plaintiff (defendant no.3 in the said suit) assured the present plaintiff that there was absolutely no case against it, and that he will take care of all the matters and the plaintiff need not worry at all. The present plaintiff fully relied upon the integrity of, and assurances given by its advocate in the matter of prosecuting the defence, for and on its behalf, in the Hon'ble High Court of Delhi in Suit NO. 89 of 1987. In para no. 23 it has been alleged that it appears that Sh. Bhartiya, the Advocate appointed by the plaintiff (defendant no.3 in the said suit) failed and neglected to appear in the suit for defendant no. 3 (the plaintiff herein) was proceeded against exparte on 18.10.1999. The plaintiff submitted that Sh. Bhartiya never informed the plaintiff (the defendant no.3 in earlier suit) about the proceedings in the suit No. 89 of 1987 and the plaintiff, all along, relied upon the assurances given by Sh. Bhartiya.

The above pleadings made in the present plaint show that the grievance of the plaintiff is against his earlier counsel Sh. Bhartiya. The inaction on the part of the counsel cannot be a ground for alleging that the plaintiff (defendant no.1 in the present suit) practiced any fraud particularly when there is no averment in the plaint that the present defendant no.1 and Sh. Bharatiya, the earlier counsel for plaintiff in the earlier suit, colluded against the present plaintiff. The inaction on the part of plaintiff (defendant no. 3) or its counsel in the earlier suit, cannot be ground for setting aside the ex parte judgment/decreed dated 13.10.1993 Ex.PW-2/16.

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Therefore the fact that despite the plaintiff being defendant no.3 in the earlier suit was proceeded with ex parte on 24.09.1987 and thereafter on thirty dates the suit was listed for hearing but none appeared for defendant no.3 (plaintiff herein) clearly shows the inaction and negligence on the part of the plaintiff to defend the earlier suit or to contact his counsel. So, the plaintiff in the present suit cannot take benefit of its own wrong to now come with the plea that the earlier decree was passed by practicing fraud by the plaintiff (defendant no.1 herein) in the earlier suit.

In view of the above, it is not established on record that any fraud was practiced by the plaintiff (defendant No.1 herein) in the earlier suit, rather, it was inaction and negligence on the part of the present plaintiff (defendant no.3 in the earlier suit) in defending the suit and producing evidence before the Court to show that the payments have already been made by it to defendants no. 1 and 2 in earlier suit to discharge from the liability. The matter being now finally settled by ex parte judgment/decreed Ex.PW-2/16 dated 13.10.1993, the same cannot be reopened now.

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As regards the contention of the learned counsel for the plaintiff that the ex parte judgment passed by the Hon'ble High Court of Delhi at New Delhi was not by proper appreciation of facts, this Court in the present suit cannot sit in appeal against the said judgment. The present plaintiff (defendant no.3 in the earlier suit) should have filed an appeal against the exparte judgment/decreed and it has chosen not to do so. Though the plaintiff (defendant no.3 in the earlier suit) has filed an application under Order IX Rule 13 CPC which was dismissed by the Hon'ble High Court of Delhi at New Delhi, Ex.PW-2/19, but, for the reasons best known to the plaintiff (defendant no.3 in the earlier suit) no appeal was filed against the order of the Hon'ble High Court of Delhi at New Delhi dismissing the application under Order IX Rule 13 CPC. Therefore, the matter cannot be reagitated. The scope of the present suit is to be judged within the limits of S.44 of the Indian Evidence Act of alleged fraud, collusion or jurisdiction of the Court. The plaintiff has not been able to establish the fraud committed by defendant no.1 (plaintiff in the earlier suit).....”

16. I am in general agreement with the afore-said discussion and findings arrived at by learned trial Judge. I am also in full agreement with the submission of the learned counsel for the plaintiff of the former suit that despite the fact that no demand on account of price of the material supplied to the plaintiff had been made by the plaintiff of the former suit at

any stage and only sales tax forms were being claimed as in the former suit a claim was made for passing of a joint and several decree against all the three defendants in that suit and that prayer had been accepted that in the present proceeding this Bench cannot sit in appeal over the judgment of the learned Single Judge of this Court who had passed the ex-parte decree in the former suit. The only remedy available to the plaintiff was to carry the matter further by filing an appeal against the ex-parte judgment and decree.

17. As far as the plaintiff's case that that decree against it had been obtained by plaintiff is concerned, I do not find any merit in that case also. In the former suit it had been pleaded by the plaintiff of that suit that the plaintiff had been claiming that it had made the payment of the price of material to the stockist but despite that it had been prayed in that suit that decree should be passed against it also because it had appropriated the material after having purchased from the plaintiff of the former suit. In the demand notice dated 16th May, 1986 also all that was stated was that the plaintiff had made the payment to the stockist as was being claimed by it(the plaintiff). Now, the question whether despite the plaintiff of the former suit having admitted in the demand notice that the plaintiff had made the payment to the stockist a decree could be passed against the plaintiff or not could be the subject matter of the former suit only and in the present suit it cannot be said that that could or could not have been done. In the documents which had been placed on record in the former

suit by the plaintiff here it had been claimed that payment had been made to the stockist as per the instructions of the plaintiff of that suit. It was rightly submitted by learned counsel for the plaintiff of the former suit that even if the plaintiff had been instructed to make the payment to the stockist and payment had actually been made also to the stockist that could not debar the plaintiff of the former suit in filing a suit against the plaintiff as well as the stockist claiming that it had not received the payment either from the plaintiff or from the stockist and, therefore, both of them were jointly and severally liable to make the payment. It was for the Court to have considered the case of the plaintiff of the former suit from all angles, which it is presumed to have done while passing a decree against all the defendants, and in the present proceedings, it is not permissible for this Court to make a comment as to whether that decree was correctly passed or not. Therefore, I am of the view that because of non-production of the demand notice dated 16th May, 1986 in the former suit by the plaintiff of that suit it cannot be said that the plaintiff of that suit had played any kind of fraud upon Court or even upon the plaintiff here.

18. Even the question of territorial jurisdiction of the Delhi Courts could have been a subject matter of decision in the former suit only which could have been given after considering the evidence if at all it had been adduced by the plaintiff here to show that no part of the cause of action had arisen within the jurisdiction of Delhi Courts. The plaintiff had chosen not to adduce any evidence and now it cannot be permitted to urge in the present

proceedings that Delhi Courts had no territorial jurisdiction to decide the dispute between the parties.

17. For the fore-going reasons, I do not find any merit in this appeal which is consequently dismissed with costs.

P.K. BHASIN,J

February 14, 2011
pg/sh