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

+ RFA 355/2011

AMAR NATH

..... Appellant

Through : Mr. J.M. Bari with
Ms. Meenakshi Bari, Advocates
with appellant in person.

versus

JEE RAM & ORS

..... Respondents

Through : None.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

ORDER

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23.09.2016

CM No.34856/2016 (by the appellant u/Sec.151 CPC)

1. The present application has been filed by the appellant praying *inter alia* for recalling the order dated 22.4.2014, by which the appeal was disposed of.

2. On 22.4.2014, three applications filed by the appellant, one for restoration of the appeal that came to be dismissed in default on 21.11.2013, the second for condonation of delay and the third for stay, were listed. On the said date, counsel for the respondents had stated that the applications had been rendered infructuous in view of a settlement arrived at between the parties before the Executing Court in Ex. Petition No.13/2014. He had

handed over a certified copy of the order dated 21.3.2014, passed in the execution proceedings, wherein it was recorded that the appellant (Judgment Debtor in the executing proceedings) had brought part payment of Rs.60,000/- towards the decretal amount that was duly received by the respondent (Decree Holder). It was further recorded that the parties had arrived at an amicable settlement, whereunder the appellant had agreed to vacate the suit premises on or before 1.10.2014 and pay the balance decretal amount of Rs.1.70 lacs to the respondent before the said date, in terms of the settlement of the parties recorded before the Executing Court. In view of the joint statement made by the counsels for the parties that a settlement had been arrived at between them in the Execution Petition, CMs No.932-34/2014 were disposed of.

3. After passage of one and a half years from the date of passing of the said order, the present application has been filed by the appellant stating *inter alia* that there is no lawful agreement/compromise between the parties within the meaning of Order XXIII Rule 3 CPC and therefore, despite an undertaking given by the appellant before the Executing Court and an amicable settlement between the parties, the appellant has a right to maintain the present appeal and the pending applications.

4. It has been enquired from learned counsel for the appellant as to how would the present application filed under Section 151 CPC be maintainable, for seeking recall of the order dated 22.4.2014, when the appellant's counsel had clearly stated on the said date that the parties had arrived at a settlement before the Executing Court.

5. Learned counsel for the appellant relies on the judgment of the Supreme Court in the case of Sri Budhia Swain & Ors vs. Gopinath Deb & Ors., reported as (1999) 4 SCC 396, to contend that the court has inherent powers to recall its orders and the present case is a fit case where such inherent powers ought to be exercised.

6. The point that arises for consideration in the present case is not whether the court has the inherent power to recall its orders, but whether the present case is a fit case where such inherent power ought to be exercised.

7. No doubt, the Supreme Court has observed in Sri Budia Swain's case (Supra), that the inherent power to recall its own orders vests in Tribunals and Courts, but the circumstances in which such powers ought to be exercised have been circumscribed in the following words:-

*“6. What is a power to recall? Inherent power to recall its own order vesting in tribunals or courts was noticed in **Indian Bank Vs. M/s Satyam Fibres India Pvt. Ltd. 1996 (5) SCC 550**. Vide para 23, this Court has held that the courts have inherent power to recall and set aside an order*

(i) obtained by fraud practised upon the Court,

(ii) when the Court is misled by a party. or

*(iii) when the Court itself commits a mistake which prejudices a party. In **A.R. Antulay v. R.S. Nayak & Anr. AIR 1988 SC 1531** (vide para 130), this Court has noticed motions to set aside judgments being permitted where*

(i) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all and was shown as served or in ignorance of the fact that a necessary party had died and the estate was not represented,

(ii) a judgment was obtained by fraud,

(iii) a party has had no notice and a decree was made against him and such party approaches the Court for setting aside the decision *ex debito justitiae* on proof of the fact that there was no service.

7. In *Corpus Juris Secundum* (Vol. XIX) under the Chapter "Judgment- Opening and Vacating" (paras.265 to 284 at pp. 487-510) the law on the subject has been stated. The grounds on which the courts may open or vacate their judgments are generally matters which render the judgment void or which are specified in statutes authorising such actions. Invalidity of the judgment of such nature as to render it void is a valid ground for vacating it at least if the invalidity is apparent on the face of the record. Fraud or collusion in obtaining a judgment is a sufficient ground for opening or vacating it. A judgment secured in violation of an agreement not to enter judgment may be vacated on that ground. However, in general, a judgment will not be opened or vacated on grounds which could have been pleaded in the original action. A motion to vacate will not be entered when the proper remedy is by some other proceedings, such as by appeal. **The right to vacation of a judgment may be lost by waiver or estoppel. Where a party injured acquiesces in the rendition of the judgment or submits to it, waiver or estoppel results.**

8. **In our opinion a tribunal or a court may recall an order earlier made by it if**

(i) **the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent,**

(ii) **there exists fraud or collusion in obtaining the judgment,**

(iii) **there has been a mistake of the court prejudicing a party or**

(iv) **a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented.**

The power to recall a judgment will not be exercised when the ground for re-opening the proceedings or vacating the judgment was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence.

9. *A distinction has to be drawn between lack of jurisdiction and a mere error in exercise of jurisdiction. The former strikes at the very root of the exercise and want of jurisdiction may vitiate the proceedings rendering them and the orders passed therein a nullity. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the proceedings and the order passed thereon unless set aside in the manner known to law by laying a challenge subject to the law of limitation.”*
(emphasis added)

8. In the present case, none of the conditions for recall of the order dated 22.4.2014 as mentioned by the Supreme Court, exist. Here is a case where the appellant (Judgment Debtor) had appeared before the Executing Court through counsel and stated that parties had arrived at an amicable settlement. A perusal of the order dated 21.3.2014 passed by learned Addl. District Judge, Tis Hazari Courts, in Execution Petition No. 13/2014, reveals that the Court had facilitated the parties to settle their dispute and the statement of the appellant herein (Judgment Debtor) as also of the respondent herein (Decree Holder) were separately recorded to the effect that the parties had arrived at an amicable settlement whereunder the appellant had agreed to vacate the suit property on or before 01.10.2014. Further, the appellant had

paid a sum of Rs.60,000/- to the respondent and had undertaken to pay the balance sum of Rs.1,70,000/- on or before 01.10.2014 and in case of default, pay interest @18% p.a. on the reducing balance, till final payment. It was also stated by the appellant that he had made the statement of his own free will, without any pressure or compulsion from any corner. Similarly, the statements of the respondents (Decree Holder) and their counsel were recorded wherein receipt of Rs.60,000/- from the appellant was confirmed and a request was made to the Execution Court to dispose of the Execution Petition in view of the aforesaid statements, with liberty to file a fresh petition, in case of default.

9. Pertinently, the appellant is the son of the respondents and was allowed to live in the first floor of the suit premises. On his failure to vacate the same, the respondents had instituted a suit for possession, permanent injunction, recovery of damages and *mesne profits* against him in the year 2007. Vide judgment dated 22.3.2011, the said suit was decreed in favour of the respondents. Aggrieved by the said decision, the appellant had filed an appeal in this court. As the appellant had stopped appearing in the said appeal after 14.5.2013, the same was dismissed in default on 21.11.2013. In January, 2014, applications for restoration, condonation of delay etc. were filed by the appellant, but on 22.4.2014, in view of the amicable settlement arrived at between the parties in Execution Petition No.13/2014, the said applications were disposed of.

10. After conveniently continuing to occupy the suit premises for a period of two years on the strength of the settlement arrived at with the

respondents, the appellant has the temerity to file the present application for seeking recall of the order dated 22.4.2014. In view of the fact that none of the conditions enumerated in the case of Sri Budhia Swain (supra) for recall/setting aside an order apply to the facts of the case in hand and further, considering the fact that the appellant was permitted to occupy the suit premises only on account of the settlement brokered between the parties in the execution proceedings, he is estopped from seeking recall of the order dated 22.4.2014.

11. The application is accordingly dismissed as being devoid of merits.

SEPTEMBER 23, 2016

sk/ap/mk

HIMA KOHLI, J