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

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**RESERVED ON: 27.04.2016
PRONOUNCED ON: 18.05.2016**

+ **EFA (OS) 41/2011, C.M.Nos.19745/2011, 2335, 7501, 7502, 20611,
20612 & 20628/2012**

FORMOSA PLASTICS CORPORATION USA Appellant
versus
ASHOK CHAUHAN & ORS. Respondents

**EFA (OS) 42/2011, C.M.Nos.19747/2011, 2336, 7503, 7504, 20616,
20617, 20629/2012 & 13202/2016**

FORMOSA PLASTICS CORPORATION USA Appellant
versus
ASHOK CHAUHAN & ORS. Respondents

Present: Mr. Arvind K. Nigam, Sr. Advocate with Ms. Diya Kapur and Ms. Manjira Das Gupta, Advocates for appellants in both matters.

Mr. Krishnan Venugopal, Sr. Advocate with Mr. Tanmay Mehta, Mr. A.P. Singh, Mr. Rajan Chawla and Mr. Gautam Chauhan, Advocates for respondents in both matters.

**CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA**

S.RAVINDRA BHAT, J.

1. This judgment will dispose of two appeals; the first impugns an order dated 31.03.2011 (EFA 42/2011); the second (EFA 41/2011) impugns two orders - dated 02.08.2011 and 20.09.2011. The first order dismissed an execution petition (EP 38/1998); the other two orders rejected the application for recall of that order, under Section 151, and the review of the order rejecting the recall application.

2. The facts briefly are that the appellant (hereafter “Formosa Plastics”) is a foreign decree holder; it sought execution of a decree of the Chancery Division of the UK High Court, dated 24.10.1997, under Section 44A of the Code of Civil Procedure (CPC). The proceeding was registered as EP 38/1998. The execution proceedings were pending for a considerable period of time; the respondent/judgment debtor had filed applications, contending that the proceeding was not maintainable; he sought its rejection. Since some of those applications (EA 525/1999 and EA 569/1999) were pending, the Court permitted withdrawal of another similar application (EA 538/2010), on 08.10.2010. While so, the matter was heard partly on 15.11.2010 by Justice V.K. Shali. It was adjourned to 16th December, 2010. On that date, the judge was on leave; consequently the proceedings were adjourned to 31.03.2011. On the later date, the execution proceedings were listed before Justice J. R. Midha. Though the arguments in the matter were heard partly by Justice Shali, the matter was listed before Midha, J. There was no appearance on behalf of Formosa Plastics; the learned judge therefore, dismissed the execution petition.

3. Formosa Plastics filed an application for recall of the order dismissing the execution proceedings, for non-appearance. The application and other connected applications were posted before yet another learned judge, i.e A.K. Pathak, J. On 02.08.2011, the said learned judge dismissed the application for recall of the order, dismissing the execution petition, holding that it was time barred beyond the thirty day prescribed time limit, under Order XXI Rule 105, Civil Procedure Code (“CPC”) and therefore barred in law. Formosa Plastic’s application for review was also dismissed by order dated 20.09.2011.

4. At the outset, counsel for the respondents had objected to the maintainability of the present appeal on two counts; that the order refusing to recall the order rejecting the execution for non-appearance and an order refusing

to review such order are not appealable. It was contended on behalf of the respondents that such orders are not of the kind that are based on any determination of fact-appreciation; consequently they do not fall within the description of “appealable” orders. Counsel relied upon the judgment of the Supreme Court in *Shah Babulal Khimji vs Jayaben D. Kania & Anr*¹. It is secondly urged that this Court should not condone the delay in the filing of the present appeals especially with respect to the order dated 31.03.2011. Besides, it is urged that the filing of the appeal itself is suspect because the case set up by Formosa Plastics is that one Mark Palay was in correspondence with its local counsel. Mark Palay’s authorization was never shown to the Court much less established. In the circumstances, whether he could have permitted the filing of an application for recall of the order of dismissal in default and whether the present appeal itself could have been filed is questionable.

5. Counsel for the appellant made his submissions on the maintainability and the merits of both appeals. It is firstly submitted that the Supreme Court in *Shah Babu Lal Khimji (supra)* itself envisions circumstances whereby seemingly innocuous orders can result in prejudice or be termed as those leading to momentous consequences to an aggrieved litigant. Pointed reference was made to certain passages in *Shah Babu Lal Khimji (supra)* in support of the submission, especially paragraphs 106, 111, 112, 113, 114, 115 & 119. Learned counsel also relied upon the Full Bench ruling of this Court in *Jaswinder Singh v. Mrigendra Pritam Vikram Singh Steiner*² and urged that under Section 10 (1) of the Delhi High Court Act, this Court possesses jurisdiction to entertain appeals against orders which are not appealable under Section 104 read with 43 of CPC provided such orders fulfill the test, i.e., one which decides the matter of moment or vital fact or valuable rights of parties and which work serious injustice to the parties

¹AIR 1981 SC 1786

² 196 (2013) DLT 1 (FB).

concerned. It was next argued that the learned Single Judge fell into error in holding - in the orders dated 2.8.2011 and 20.9.2011 - that the application for restoration was not maintainable. It was submitted that the reference to Order-XXI, Rule 106, in the circumstances of the case was not appropriate. Mr. Arvind Nigam, learned senior counsel argued that the reliance placed upon the judgment of the Supreme Court in *Damodaran Pillai v. South Indian Bank Ltd.*³ was inappropriate. In this regard, reliance was placed upon the judgment of the Division Bench in *Deutsche Ranco GmbH v. Mohan Murti*⁴. It is urged that the Division Bench in *Deutsche Ranco* made a pointed distinction between the listing of an Execution Petition for final hearing and the listing of execution *proceedings*. Unless entire Execution Petition itself was listed for final hearing and rejected without a decision on merits, i.e., for non-prosecution, Order-XXI, Rule 105 would not apply. Learned counsel relied upon the Madhya Pradesh High Court's ruling in *Khoob Chand Jain & Anr. v. Kashi Prasad & Ors*⁵. It is urged that when the Court dismisses the Execution Petition on a date when it is not fixed for hearing, but for certain ancillary proceedings such as consideration of other applications, Order XXI Rule 106 would not be attracted.

6. Mr. Nigam further submitted that there is no dispute about the fact that when the Execution Petition was dismissed, i.e., on 31.03.2011, it was not set down for final hearing and that the respondents were making their submissions on its maintainability. Furthermore - and more importantly - as on that date, the issue of maintainability was heard in part on the previous date, i.e., 15.11.2010 by Justice V.K. Shali who adjourned the matter for further hearing on 16.12.2010. On the said date of hearing, the learned Judge was absent and consequently the matter was adjourned to 31.03.2011. Unfortunately, there was no appearance on

³ 2005 (7) SCC 300

⁴ 176 2011 DLT 280

⁵ AIR 1986 MP 66

16.12.2010 on behalf of the Formosa Plastics; the date noted on its behalf by its counsel was wrong. It is in these circumstances, that there was no appearance before the Court on 31.03.2011. But more fundamentally, submitted the counsel, the single Judge could not have dismissed the Execution Petition, as he was not the one who had heard the matter in part. It was pointed out in this context that the roster of sitting of Judges effective from 30.03.2011 clearly excluded “*part heard matters*” from the list of cases assigned to the respective Judges. This was apparent from the note attached to the roster effective from 30.03.2011. Consequently, even though Midha, J could hear other execution proceedings and applications, he did not have any jurisdiction over E.P. No.38/1994. Learned counsel relied upon the decision of the Supreme Court in *State of Rajasthan v. Prakash Chand & Ors*⁶. Learned counsel relied upon the following observations of the Supreme Court in *Prakash Chand (supra)*:

“Therefore, from a review of the statutory provisions and the cases on the subject as rightly decided by various High Courts, to which reference has been made by us, it follows that no judge or a Bench of judges can assume jurisdiction in a case pending in the High Court unless the case is allotted to him or them by the Chief Justice. Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the Court. No departure from it can be permitted. If every judge of a High Court starts picking and choosing cases for disposal by him, the discipline in the High Court would be the casualty and the administration of Justice would suffer. No legal system can permit machinery of the court to collapse.

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59. *From the preceding discussion the following broad CONCLUSIONS merge. This, of course, is not to be treated as a summary of our judgment and the conclusion should be read with the text of the judgment:*

⁶1998 (1) SCC 1

(1) That the administrative control of the High Court vests in the Chief Justice alone. On the judicial side, however, he is only the first amongst the equals.

(2) That the Chief Justice is the master of the roster. He alone has the prerogative to constitute benches of the court and allocated cases to the benches so constituted.

(3) That the puisne Judges can only do that work as is allotted to them by the Chief Justice or under his directions.

(4) That till any determination made by the Chief Justice lasts, no Judge who is to sit singly can sit in a Division Bench and no Division Bench can be split up by the Judges constituting the bench can be split up by the Judges constituting the bench themselves and one or both the Judges constituting such bench sit singly and take up any other kind of judicial business not otherwise assigned to them by or under the directions of the Chief Justice.

(5) That the Chief Justice can take cognizance of an application laid before him under Rule 55 (supra) and refer a case to the larger bench for its disposal and he can exercise this jurisdiction even in relation to a part-heard case.

(6) That the puisne Judges cannot "pick and choose" any case pending in the High Court and assign the same to himself or themselves for disposal without appropriate orders of the Chief Justice....."

7. It was lastly urged that the Single Judge acted in error in refusing to recall the order, given that the respondents never brought to the notice of Midha, J., that the matter was part heard by V.K. Shali, J. and that consequently he (Midha, J.) in terms of the roster conditions did not have the jurisdiction to dismiss the matter. In overlooking this and giving a liberal and wide interpretation to Order XXI Rule 106 rather than a narrow interpretation as is necessary in view of the Division Bench ruling in *Deutche Ranco*, the Single Judge erred in law.

8. Mr. Krishnan Venugopal, learned senior counsel appearing for the respondents urged that the order dismissing the execution proceedings and

refusing to recall that order were justified. He relied upon the previous proceedings in the case especially the orders of the Single Judge in execution and contended that neither the restoration application nor the subsequent application for review urged the question of lack of jurisdiction. It was argued that the submission with respect to lack of jurisdiction on the part of the Single Judge in dealing with the matter that was part heard by another Judge is without merit. Learned counsel argued that the issue or controversy of jurisdiction arises in three circumstances, i.e., territorial or local jurisdiction; pecuniary jurisdiction; and subject matter jurisdiction. It is urged that if objection pertains to territorial or pecuniary jurisdiction, it has to be urged at the earliest possible opportunity and in its absence no such objection can be urged at a later stage. Learned counsel relied upon the decision reported as *Harshad Chiman Lal Modi vs Dlf Universal & Anr.*⁷. He also relied upon “*The Law Lexicon*” by P. Ramanatha Aiyar, which describes jurisdiction of the subject matter in the following terms: -

“Jurisdiction of the subject-matter. ‘ Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceeding in question belongs.

If a Court has jurisdiction of the persons to the action and the cause is the kind of a cause triable in such Court, it has jurisdiction of the subject of the action, and has the power to render any rightful judgment therein.

Jurisdiction of the subject-matter always comes from the law, and it cannot be waived, nor conferred by the consent of the parties or their counsel.”

9. Furthermore reliance was placed upon the judgment of the Supreme Court in *Hira Lal v. Kali Nath*⁸, to urge that the order made by a Court which does not possess territorial jurisdiction over the matter, is merely irregular and cannot be challenged in later proceedings.

⁷(2005) 7 SCC 791

⁸AIR 1962 SC 199

10. It was submitted that Formosa Plastic's conduct also bars it from the relief it claims. Learned counsel submitted that the execution proceedings were pending for more than ten years and that the persistent default in its prosecution eventually led the Single Judge to vacate the subsisting interim order on 14.12.2009. Thereafter, the order sheets show that at the request of the decree holder, proceedings were adjourned repeatedly - on 24.2.2010, 31.8.2010 and 8.10.2010. It was submitted that even though on 13.9.2010 E.A. Nos.525/199 and 569/1999 were directed to be paginated, the order sheets of later dates did not show them. However, there cannot be any dispute that those applications along with the main proceedings were heard - particularly because the applications had urged the issue of maintainability of execution proceedings.

11. It was urged that Formosa Plastic's default in appearance was part of its larger conduct in showing indifference in the prosecution of the execution petition. Urging that the dismissal of the execution petition was justified and that no exception could be taken merely because one or the other Single Judge had rejected it, counsel submitted that Justice Midha acted within jurisdiction and could not be said to have lacked inherent jurisdiction to make the order of 31.03.2011.

12. It was also urged in addition that the delay in filing of the application for recall (E.A. No.439/2011) was not only unjustified but based on false averments. It is submitted in this regard that this Court had directed examination of e-mail communications allegedly between Formosa Plastic and its counsel in the context of its attempts to blame its counsel. Learned counsel urged that unless the truth of those allegations is verified, this Court should not rule on the merits of setting aside of the order, dated 31.03.2011. In other words it was urged that this Court should first decide the justification or truth urged by Formosa Plastic to see whether it had established the grounds of condoning the delay in the first instance and then rule upon maintainability.

Analysis and conclusions

13. Rules 105 and 106 of Order XXI, CPC read as follows:

“105. Hearing of application-

(1) The court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the court may make an Order that the application be dismissed.

(3) Where the applicant appears and the opposite party to whom the notice has been issued by the court does not appear, the court may hear the application ex parte and pass such Order as it thinks fit.

106. Setting aside orders passed ex parte, etc.-

(1) The applicant, against whom an Order is made under sub-rule (2) of rule 105 or the opposite party against whom an Order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of rule 23, may apply to the court to set aside the order, and if he satisfies the court that there was sufficient cause for his non-appearance when the application was called on for hearing, the court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.

(2) No Order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party.

(3) An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex parte order, the notice was not duly served, within thirty days from the date when the applicant had knowledge of the order.”

14. The Court first proposes to deal with the question of maintainability of the appeal. In *Shah Babulal Khimji* the Supreme Court considered whether orders, that were not appealable under Order 43 CPC could be yet appealed against and the parameters for deciding maintainability of such appeals. The Supreme Court

considered various nuances of orders made in the course of a civil trial- in Charter or Presidency High Courts, as well as non-Charter High Courts, wherever the Letters Patent or such instruments permitted an appeal. The court was also conscious of the distinction between various High Courts, some of which exercised original civil jurisdiction and others, which did not. It then held that the nomenclature of an order as “appealable” or “interlocutory” was inconclusive; what mattered was if it had a direct and immediate consequence on the litigant and determined, in one way or the other, some issue. Even refusal to grant relief, in the sense of refusing to exercise discretion, might result in serious prejudice, in which event appellate intervention would be necessary. The Supreme Court proceeded to explain what are important orders that have serious consequences and can be appealable:

“Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of order 43 Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by o. 43 R.1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. For instance, where the Trial Judge in a suit under order 37 of the Code of Civil Procedure refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff's case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the Letters Patent so as to be appealable to a larger Bench. Take the converse case in a similar suit where the trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature

and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an Order passed by the Trial Judge would not amount to a judgment within the meaning of cl. 15 of the Letters Patent but will be purely an interlocutory order.

Similarly, suppose the Trial Judge passes an Order setting aside an ex parte decree against the defendant, which is not appealable under any of the clauses of O. 43 R.1 though an order rejecting an application to set aside the decree passed ex parte falls within O. 43 R.1 cl. (d) and is appealable, the serious question that arises is whether or not the order first mentioned is a judgment within the meaning of Letters Patent. The fact, however, remains that the order setting aside the ex-parte decree puts the defendant to a great advantage and works serious injustice to the plaintiff because as a consequence of the order, the plaintiff has now to contest the suit and is deprived of the fruits of the decree passed in his favour. In these circumstances, therefore, the order passed by the Trial Judge setting aside the ex parte decree vitally affects the valuable rights of the plaintiff and hence amounts to an interlocutory judgment and is therefore, appealable to a larger Bench.

In the course of the trial, the Trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing an adjournment, an order refusing to summon an additional witness or documents, an order refusing to condone delay in filing documents, after the first date of hearing an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final judgment passed by the Trial Judge.

Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters

of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the Trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate court in appeal against the final judgment.

We might give another instance of an interlocutory order which amounts to an exercise of discretion and which may yet amount to a judgment within the meaning of the Letters Patent. Suppose the Trial Judge allows the plaintiff to amend his plaint or include a cause of action or a relief as a result of which a vested right of limitation accrued to the defendant is taken away and rendered nugatory. It is manifest that in such cases, although the order passed by the trial Judge is purely discretionary and interlocutory it causes gross injustice to the defendant who is deprived of a valuable right of defence to the suit. Such an order, therefore, though interlocutory in nature contains the attributes and characteristics of finality and must be treated as a judgment within the meaning of the Letters Patent. This is what was held by this Court in Shanti Kumar's case (supra), as discussed above.

Let us take another instance of a similar order which may not amount to a judgment. Suppose the Trial Judge allows the plaintiff to amend the plaint by adding a particular relief or taking an additional ground which may be inconsistent with the pleas taken by him but is not barred by limitation and does not work serious injustice to the defendant who would have ample opportunity to disprove the amended plea taken by plaintiff at the trial. In such cases, the order of the Trial Judge would only be a simple interlocutory order without containing any quality of finality and would therefore not be a judgment within the meaning of cl. 15 of the Letters Patent. The various instances given by us would constitute sufficient guidelines to determine whether or not an order passed by the Trial Judge is a judgment within the meaning of the Letters Patent. We must however hasten to add that instances given by us are illustrative and not exhaustive. We have already referred to the various tests laid down by the Calcutta, Rangoon and Madras High Courts. So far as the Rangoon High Court is concerned we have already pointed out that the strict test that an order passed by the Trial Judge would be a judgment only if it amounts to a

decree under the Code of Civil Procedure, is legally erroneous and opposed to the very tenor and spirit of the language of the Letters Patent. We, therefore, do not approve of the test laid down by the Rangoon High Court and that decision therefore has to be confined only to the facts of that particular case because that being a case of transfer, it is manifest that no question of any finality was involved in the order of transfer. We would like to adopt and approve of generally the tests laid down by Sir White, C.J. in Tuljaram Row's case (supra) (which seems to have been followed by most of the High Courts) minus the broader and the wider attributes adumbrated by Sir White, C.J. Or more explicitly by Krishnaswamy Ayyar, J. as has been referred to above.

Apart from the tests laid down by Sir White, C.J., the following considerations must prevail with the court:

(1) That the Trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the Trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice one party or the other cannot be treated as a judgment otherwise the appellate court (Division Bench) will be flooded with appeals from all kinds of orders passed by the Trial Judge. The courts must give sufficient allowance to the Trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is ex facie legally erroneous or causes grave and substantial injustice.

(2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.

(3) The tests laid down by Sir White, C.J. as also by Sir Couch, C.J. as modified by later decisions of the Calcutta High Court itself which have been dealt with by us elaborately should be borne in mind. Thus, these are some of the principles which might guide a

Division Bench in deciding whether an order passed by the Trial Judge amounts to a judgment within the meaning of the Letters Patent.”

15. The test thus indicated was “*orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned*”. One of the very telling illustrations given by the Supreme Court was where an *ex-parte* decree is set aside, which seriously prejudices the plaintiff and consequently, is appealable: “*therefore, the order passed by the Trial Judge setting aside the ex parte decree vitally affects the valuable rights of the plaintiff and hence amounts to an interlocutory judgment and is therefore, appealable to a larger Bench*”. The converse, i.e., order refusing to set aside such order or decree is a vital one and one of “moment”.

16. The Full Bench of this court, in *Jaswinder Singh* held that the tests indicated in *Khimji* would apply equally to appeals. The letter patents jurisdiction (Clause 15) applicable to this Court. In the present case, the order refusing to set aside the order dismissing the execution petition is certainly one of moment; moreover the interpretation placed on provisions of the CPC, i.e. Order 21 Rules 105 and 106 would be rendered final; in the event of error in the exercise of discretion refusing to entertain any application, or an error in the course of allowing such application, would result in serious prejudice act and finally the orders dated 31.03.2011, 03.08.2011 and 20.09.2011 are therefore appealable.

17. On the second question is to whether the interpretation of provisions of Order 21, Rules 105 and 106 are correct and whether the single judge was justified in rejecting the application for recall of the order dismissing the execution proceeding. *Damodaran Pillai* is undoubtedly an authority for the proposition that where an execution application is set down for hearing and the applicant does not appear, the court is empowered to dismiss it and that if the application is not

preferred within the time prescribed, it is barred. The court also clarified that unlike in other cases, where recourse to Section 5 of the Limitation Act is available, any delay in filing the application cannot be condoned, because the CPC fixes the period for the purpose. The Division Bench in *Deutsche Ranco GmbH* considered this decision and held that:

“What is extremely pithy, so far as the factual matrix before us is concerned, is the specific recording that the “execution petition had been set down for hearing” on the date on which it came to be dismissed. In this conspectus, we are of the view that the Single Benches referred to above, have correctly analysed the law on the subject. Accordingly, since the Execution Petition had not been “set down for hearing” on 7.8.2007, it should not have been dismissed in default. The proper course would have been to list the Petition, or for that matter any of the pending applications, for consideration and disposal on a future date. If only an application had been fixed for disposal on the future date, only that application could have been dismissed in default if the applicant remained unrepresented. Of course, in the event of the listing of all the pending applications as well as Execution an omnibus order dismissing all of them would also have been legally possible if there was none to press them.

7. Where no provision of law can be located for alleviating a grievance, resort to Section 151 of the CPC is the available recourse with the Civil Courts. The learned Single Judge has poignantly mentioned that the caption of an application, or to say it differently, the provisions of law which have been invoked in an application should not deter the Court from applying the correct legal provision. This amply finds enunciation in Ram Sunder -vs- Union of India, (2007) 13 SCC 255, J. Kumaradasan Nair -vs- Iric Sohan, (2009) 12 SCC 175 and Vijaya Bank -vs- Shyamal Kumar Lodh, (2010) 7 SCC 635. Having said so, the Court ought not to have felt inhibited or circumscribed in any manner in applying the correct law. In the present case, the learned Single Judge has, in our opinion, incorrectly applied Rule 106 of Order XXI of the CPC whereas he ought to have proceeded under Section 151 of the CPC.”

18. In the present case, the record in the proceedings (Ex. 38/1998) reveals that on 08.10.2010, the respondents sought time to address arguments on the execution. This was in the context of an application, EA (Execution Application

No. 565/2010, which had urged that the execution proceedings were not maintainable). The Court allowed withdrawal of that application, because apparently two other - older applications were pending. The Court's order of 08.10.2010 reads as follows:

“Learned counsel for defendant 4 seeks permission to withdraw the application and prays for some time to address arguments on the question of execution of the decree.”

The case was accordingly adjourned to 26th October, 2010, whereupon, it was further adjourned to 15th November, 2010. On that day, the matter was heard in part. It is not in dispute that the withdrawal of EA 538/2010 was because two application urging the same contentions, i.e. that the appellant could not maintain the execution proceeding were pending (EA 525/1999 and EA 569/1999). The relief claimed in the applications which essentially urged that the execution proceedings were not maintainable, were heard on 15.11.2010. On 16th December, 2010, the learned judge did not sit, as he was on leave. The next date of hearing was 31-03-2011; on that date, Midha, J dismissed the entire execution for non-prosecution. A plain reading of the said order would show that the learned judge did not take into consideration the fact that the matter was part-heard by Justice Shali.

19. The above facts, in the opinion of the court, support Formosa Plastic's submission that the execution was not set down for hearing - rather what was heard in part was the question of maintainability. Now, it could be said that the issue of maintainability itself would be conclusive of the merits, because if the single judge were to hold that the execution was not maintainable, the matter would have ended. However, the Court cannot be oblivious of the fact that if the decision were otherwise, only a preliminary issue would have been decided and there would have been no decision on the merits. As a result, it is held that the

execution petition itself was not part heard, nor set down for hearing; rather, it was only on the *issue of maintainability* that the matter was set down for hearing; this is also supported by the fact that EA 525/1999 and EA 569/1999 were allowed to be on the record, whereas a later application (EA 538/2010) was dismissed as withdrawn on 08.10.2010. Resultantly, this court holds that the order of 31.03.2011 could not have been treated as one for dismissal of the execution proceeding; it was the kind of order, which the Division Bench had in mind in *Deutsche Ranco GmbH* and not - as held by the single judge- covered by *Damodaran Pillai*.

20. The decision of the above question itself would be determinative of the issue of maintainability. However, since counsel had also urged the issue of jurisdiction of the learned single judge who dismissed the execution (Midha, J), it would be necessary to return findings on that aspect. There is no dispute that the power of settling the roster of hearing of cases and their categorization for the purpose, is exclusively that of the Chief Justice. Rule 5 of the Delhi High Court notification dated 12.12.1966, in the exercise of power conferred under Section 7 of the Delhi High Court Act, 1966, empowers the Chief Justice to settle the roster: “...*The List shall be published in accordance with the roster settled by the Hon’ble Chief Justice.*” This norm obliges every judge of this court to exercise her (or his) jurisdiction strictly in accordance with the roster allocation; *Prakash Chand* underlined this in the following terms:

“it follows that no judge or a Bench of judges can assume jurisdiction in a case pending in the High Court unless the case is allotted to him or them by the Chief Justice. Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the Court. No departure from it can be permitted.”

Article 225 of the Constitution of India provides that:

“Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution”

21. The Note appended to the roster drawn in which Justice Midha was assigned cases, including execution matters, clearly stated that “Part-heard” matters were *not assigned*. They remained with the judge who had heard them- in this case, Justice Shali. What appears to have happened is that the Office or Registry of this court listed the Part heard applications with EP 38/1998 before Justice Midha. This was inadvertent. It is equally evident that the said judge did not notice the previous order sheets, especially the order of 15.11.2010 which clearly reflected that the case was heard partly by Justice Shali. On the assumption that the case was part of his board (i.e. the list and class of matters which he could hear though it clearly was not, in view of the Note to the roster) Justice Midha dismissed the execution petition itself.

22. The observations in *Prakash Chand*, in this court’s opinion are clear that every judge cannot exercise jurisdiction over all matters. Though all judges of the High Court have equal powers, they work to a plan. The role assigned to the Chief Justice is unique - she prepares the roster and assigns the judge or judges concerned. The Chief Justice also has exclusive power to form Benches and indicate who would man them. A combined and logical reading of Rule 5 of the Notification of 1966, read with Section 7 of the Delhi High Court Act and Article 225 leave no room for doubt that when certain cases are excluded from the category or class of cases assigned to a particular judge, she or he cannot deviate from the roster and decide or deal with such excluded matters. The

respondent/judgment debtor had argued that such a situation does not result in the invalidity of the order itself. Counsel had urged in this regard, that the order would be merely irregular and that the appellant's omission to urge it initially precludes it from doing so now.

23. This Court is of the opinion that given the nature of the declaration of law in *Prakash Chand* (supra), the deviation from the roster was a serious matter, which the learned judge should have considered, in the application for recall of the order (dated 31.03.2011). Rosters are prepared for the smooth and efficient functioning of the High Court; each judge exercises the jurisdiction and powers vested in the court, in regard to the specific matters allocated to her or him. Once this discipline is breached, the orderly functioning of the institution would be broken resulting in unwholesome consequences. The contravention of the roster condition is both a matter of breach of jurisdiction as well as a serious breach of propriety. The Court no doubt comprises of judges who exercise equal powers; at the same time it is a collegial institution, wherein the orders of each judge or Bench are deemed to be that of the entire court. The centrality of the Chief Justice's role here assumes significance: though possessing equal powers and jurisdiction as other colleagues, she has an added responsibility, as captain of the team to demarcate the tasks that each judge is to carry out. While no one can require a Judge of any High Court to decide causes that are in her or his domain and no order dictating the "how" and "when" can be given to her (or him). What cases are assigned to her/him is the domain of the Chief Justice. A Judge cannot determine what kinds of cases he or she would hear and decide. In individual cases, there may be compelling reasons to recuse. But as to what class or category are to be assigned in roster is the exclusive task of the Chief Justice. Having regard to these factors, the argument about lack of jurisdiction is without merit. At the same time, the question that would still remain unaddressed is whether the

appellant filed its application under Section 151 CPC (which is the appropriate application, nomenclature apart) after showing sufficient cause for the delay occasioned in the filing.

24. The respondent judgment debtor had argued that the present appeal is delayed and that the filing thereof is suspect. This court notices at the outset that the delay in the filing of the appeals - against the first two orders dated 31.03.2011 and 03.08.2011 is explained by the fact that a review petition was filed; it was rejected on 20.09.2011. As to whether the application for condoning the delay in the filing of the “recall of order” application (i.e. EA 439/2011) sufficient cause is shown, this court notes that the issue is contentious. Formosa Plastics relied on the e-mail exchange between its counsel to say that it was not kept informed and that it became aware of the dismissal of the execution petition much later; the respondent questioned these averments. Copies of e-mail correspondence and their electronic authentication were called for; there are three expert reports. This court is of opinion that going into and dealing with these primary facts at the appellate stage, is inappropriate, as it would result in depriving the aggrieved party the right to appeal. Therefore the question of whether there was sufficient cause in filing the application 438/2011 (under Section 151 CPC for recall of order) as explained in the application under Section 5 of the Limitation Act (E.A. No.439/2011) could be gone into by the learned single judge. While doing so, the single judge should consider the report of the experts, which was filed before this court and connected documents. The rights and contentions of the parties, on this aspect, are kept open.

25. In view of the above discussion, it is held that the order dated 31.03.2011 dismissing the execution cannot be treated as conclusive and of the kind contemplated in Order 21 Rule 106 (3). The application for recall of order under Section 151 was, therefore maintainable. The learned single judge shall now

decide whether the appellant had disclosed sufficient cause for the delay in filing I.A.438/2011 (under Section 151 CPC) - seeking the setting aside of the order dated 31.03.2011. All rights and contentions of the parties on this aspect are expressly reserved and kept open.

26. EFA 41/2011 has to succeed. EFA 42/2011 is to succeed to the extent indicated in the preceding paragraph and for decision as to whether sufficient cause was shown by the appellant to explain the delay in the filing of EA 438/2011, the said application and the application for condoning the delay shall be listed before Midha, J, on 25.05.2016 since he made the order dated 31.03.2011. The single judge is requested to hear and dispose of the matter expeditiously. EFA 41/2011 is allowed; EFA 42/2011 is allowed to the above extent.

**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

MAY 18, 2016