

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

% *Judgment Reserved on : February 20, 2017*
Judgment Delivered on : February 22, 2017

+ **EFA(OS) 19/2016**

ASHOK K CHAUHAN & ORS Appellants
Represented by: Mr.A.S.Chandhiok, Sr.Advocate
instructed by Dr.R.M.Sharma,
Mr.Tanmaya Mehta, Mr.Rajan
Chawla, Mr.A.P.Singh,
Mr.S.B.Singh, Mr.Gautam
Chauhan and Mr.Shyam Singh,
Advocates

versus

FORMOSA PLASTICS
CORPORATION, USA Respondent
Represented by: Mr.Arvind K.Nigam, Sr.Advocate
instructed by Ms.Shyel Trehan,
Ms.Manjira Dasgupta and
Mr.Mikhil Sharda, Advocates

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE YOGESH KHANNA

PRADEEP NANDRAJOG, J.

1. The respondent : Formosa Plastics Corporation, filed EP No.38/1998 for execution of a decree of the Chancery Division of the U.K. High Court. The decree was against appellant No.1, who filed interim applications praying a summary rejection of the execution petition on the ground that the same was not maintainable. These applications were being heard by Mr.Justice V.K.Shali because of the then Roster notified by the Chief Justice of this Court. The applications were part-heard on November 15, 2010. The next date was December 16,

2010. The learned Judge was on leave. The Court Master adjourned the matter to March 31, 2011. A day prior, the Roster was changed, but with a specific direction by the Chief Justice that part-heard matters would continue to be listed before the previous Bench before which the matter was part-heard. Overlooking said direction, the Registry listed the matter before Mr.Justice J.R.Midha on March 31, 2011 who dismissed the execution petition noting no representation from the side of the respondent. This led the respondent to file two applications, one seeking restoration of the execution petition and the other seeking delay to be condoned in filing the former application. Listed before Mr.Justice A.K.Pathak, the learned Single Judge held that in view of Order 21 Rule 106 of the Code of Civil Procedure the delay in seeking restoration could not be condoned. The result was EA No.438/2011 and EA No.439/2011 being dismissed on August 02, 2011. Review of said order sought vide RA No.506/2011 was declined vide order dated September 20, 2011.

2. Formosa Plastics Corporation filed two execution appeals, registered as EFA(OS) No.41/2011 and EFA(OS) No.42/2011. The latter impugning the order dated March 31, 2011 and the former impugning the orders dated August 02, 2011 and September 20, 2011.

3. The two first appeals were disposed of vide order dated May 18, 2011. The terminal paragraph of which decision reads as under:-

“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 No.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 extend.”

4. After noting the factual backdrop, the Division Bench first proceeded to decide the maintainability of the appeals. After noting various judgments cited as also the arguments advanced, the Division Bench held that the appeals were maintainable.

5. The Division Bench then proceeded to focus on the second question : Whether the learned Single Judge was justified in rejecting the application seeking re-call of the order dismissing the execution petition. The Division Bench noted that Mr.Justice V.K.Shali had heard arguments in part on the applications filed by the appellant No.1 seeking summary rejection of the execution petition on the ground that it was not maintainable and that in spite of the applications being part-heard the matter was listed before Mr.Justice J.R.Midha who dismissed the execution petition for non-appearance and hence non-prosecution on March 31, 2011. The Division Bench held that on March 31, 2011 only the applications filed by the appellants were posted for hearing and thus the order dated March 31, 2011 could not have been treated as one of dismissal of the execution petition. As per the Division Bench, the order was of the kind which a Division Bench of this Court had dealt with in the decision reported as (176) 2011 DLT 280 Duetshe Raneo GmbH vs. Mohan Murthi, wherein a distinction between listing of an execution petition and listing of interim applications was highlighted. The Division Bench noted the note appended to the Roster notified as per which Mr.Justice J.R.Midha was assigned cases on the Original Side including execution matters, but part-heard matters not being assigned and therefore the execution petition and the pending applications being required to be listed before Mr.Justice V.K.Shali before which it was a part heard matter. The Division Bench noted that the Registry inadvertently listed the matter before Mr.Justice J.R.Midha. The Division Bench thereafter

noted the decision of the Supreme Court reported as 1998 (1) SCC 1 State of Rajasthan vs. Prakash Chand & Ors., and concluded, in paras 22 and 23 of the decision as under:-

“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 in 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 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 caption 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 (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."

6. The Division Bench therefore held that the order dated March 31, 2011 passed by Mr.Justice J.R.Midha could not be treated as conclusive and of the kind contemplated by Order 21 Rule 106.

7. At the remanded stage, since the Division Bench had directed the matter to be placed before Mr.Justice J.R.Midha, the Registry placed the matter before the Bench presided over by Mr.Justice J.R.Midha who recorded a prima-facie view on May 27, 2016 that the order dated March 31, 2011 warrants a suo-motu correction in exercise of the inherent powers of the Court. Giving an opportunity to the appellants to respond to the prima-facie view taken by the Court, the matter was adjourned. Arguments were heard on June 01, 2016. Impugned order dated July 13, 2016 was passed holding that in view of the law declared by the Supreme Court in Prakash Chand's case (supra), the matter could not be heard by him because of the Roster notified by the Hon'ble Chief Justice. The

result was order dated March 31, 2011 being recalled suo-motu and as a result EA No.438/2011 and EA 439/2011 having been rendered infructuous.

8. The appellants are aggrieved by the order dated July 13, 2016.

9. Sh.Amarjeet Singh Chandhiok, learned Senior Counsel for the appellant urged that as per the order dated May 18, 2016 passed by the Division Bench the order dated March 31, 2011 passed by the learned Single Judge was not set aside and the same was subject only to a decision in EA No.438-39/2011 i.e. was subject to it remaining or being recalled depending upon the fate of the two interim applications. Learned Senior Counsel urged that the mandate of para 24 and 25 of the order passed by the Division Bench clearly mandated the learned Single Judge to decide the two applications keeping in view the directions issued in the two paragraphs which read as under:-

“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 No.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 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 call 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.*

10. Sh.Arvind Nigam, learned Senior Counsel for the respondent urged that the appeal filed by the appellants was not maintainable inasmuch as against the impugned order passed by the learned Single Judge SLP(C) No. 19855/2016 was filed by the appellants which was withdrawn before the Supreme Court on July 29, 2016 without obtaining any leave to file the instant appeal. On merits, learned Senior Counsel urged that nothing prevented the learned Single Judge from exercising suo-motu power to correct a patent wrong resulting from the order dated March 31, 2011 being passed.

11. On the issue of the maintainability of the appeal, we hold the same to be maintainable because an appeal lies against the impugned order and the remedy availed by the appellants upon legal advise to directly approach the Supreme Court was not the correct remedy. It hardly matters under the circumstances whether the leave from the Supreme Court was

not obtained to file the instant appeal. The right of appeal is a statutory right and can be availed of by an aggrieved party.

12. On merits, we see no infirmity in the view taken by the learned Single Judge because indeed, as per the Roster notified, the matter being part-heard before Mr.Justice V.K.Shali, the learned Single Judge : Mr.Justice J.R.Midha, could not be assigned the matter and the Registry wrongly listed the same in his Court. It was the duty of the appellant's counsel to have pointed out this to the learned Single Judge. Further, as of said date, interim applications filed by the appellants were being heard and the execution petition was not being listed for hearing. The ratio of law declared by the Supreme Court in Prakash Chand's case (supra) was clearly applicable. The pithy observations of the Division Bench in its order dated May 18, 2016, in paragraph 23 thereof clearly bring home the point that a manifest jurisdictional error i.e. of assuming jurisdiction took place on March 31, 2011. In the judgments reported as AIR 1953 SC 23 Keshardeo Chamria vs. Radha Kissen Chamria & Ors., AIR 1977 Del 7 Devi Dayal Textile Co. & Anr. vs. Nand Lal, (1990) 1 SCC 189 Dadu Dayal Mahasabha vs. Sukhdev Arya & Anr., (1999) 4 SCC 396 Budhia Swain & Ors. vs. Gopinath Deb. & Ors., and (2013) 11 SCC 296 Ram Prakash Agarwal & Anr. vs. Gopi Krishan & Ors. it has been held that if a Court passes an order which is patently without jurisdiction, it becomes the duty of the Court to recall the same. A mistake can be suo-motu corrected by a Court. In Keshardeo Chamria's case (supra), the Supreme Court observed that in this correctional process, where the error is apparent, it may not be necessary for the Court to investigate into the correctness of various allegations and counter allegations made by the parties. Thus, the learned Single Judge could have exercised his inherent power to correct a jurisdictional error and thus it was not necessary to

decide the other issues which were directed to be decided by the Division Bench. The matter could be looked at differently. If the Court, due to Roster allocation notified did not have the jurisdiction to take up the matter, but erroneously took up the matter and passed an order adverse to a party on account of the party defaulting in appearing, it was open to the Court to not even look at the cause shown by the parties for not appearing and additionally to not consider other grounds urged, ones the Court was convinced of lack of its jurisdiction in passing the order dated March 31, 2011.

13. Concurring with the view taken by the learned Single Judge we dismiss the appeal but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(YOGESH KHANNA)
JUDGE

FEBRUARY 22, 2017
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