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

+ CM(M) 1154/2016 and CM No. 42336/2016

VIRENDER KUMAR ..... Petitioner  
Through Ms.Sangeeta Jain, Advocate.

versus

PROMILA SAMUAL & ORS ..... Respondents  
Through Mr.Siddharth Yadav and Ms.Ishita  
Yadav, Advocates.

**CORAM:**  
**HON'BLE MR. JUSTICE JAYANT NATH**

**ORDER**  
**08.03.2017**

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1. By the present petition filed under Article 227 of the Constitution of India, the petitioner seeks to impugn the order dated 05.09.2016 by which an application filed by the decree holder/petitioner for framing of an issue was dismissed.
2. The petitioner/decreed holder had filed a suit seeking the relief of declaration, possession and permanent injunction regarding the suit property. The suit was decreed on 09.11.2010.
3. The case of the respondent is that the suit is a collusive suit and a fraud upon the court. Based on that, they had filed objections to the decree. The said objections were dismissed on 02.03.2012. Against the said order, an appeal was filed which was also dismissed. Finally the matter came to this court in CM (M) 196/2014. This court noted the catena of judgments of the Supreme Court and held that where there is a fraud, the petitioner who claims the fraud can file an appropriate application before the court which

passed the decree for recall of the judgment decreeing the suit. Based on the said judgments, the respondent has filed the present application under Order 9 Rule 13 CPC read with Order 22 Rule 10 and Section 151 CPC read with Section 44 of the Indian Evidence Act.

4. On 11.08.2015, the trial court framed the following issue:-

“1. Whether the judgment/decreed dated 09.11.2010 has been obtained by playing fraud upon the Court? OP-Applicant”

5. Thereafter, the petitioner has filed the present application under Order 14 Rule 5 CPC seeking that the original issue framed by trial Court on 11.08.2015 be struck off and a new issue be framed which reads as follows:-

“Whether the present application filed by the applicants under Order 9 Rule 13 read with Order 22 Rule 10 & Section 151 CPC r/w Section 44 of the Evidence Act is not maintainable in law as well as the facts of the case and deserve dismissal in limine.”

6. By the impugned order the trial court has dismissed the said application of the petitioner holding that this argument of the petitioner about locus standi of the respondent to file the present application in the present proceedings has been dealt with by the court in its order dated 11.08.2015 and hence, there is no infirmity in the said order and the same argument cannot be heard again. The application was dismissed.

7. I have heard learned counsel for the parties.

8. Learned counsel for the petitioner stresses that the contention of the respondent about the alleged fraud on the court has to be agitated by them in a separate proceedings, namely, may be by filing of a separate suit. She submits that in a disposed off suit, the present application cannot be filed as the decree has attained finality.

9. Learned counsel for the respondent relies upon the order of this court dated 05.09.2014 passed in CM(M) 196/2014 to contend that the present application would lie.

10. We may look at the order of this court dated 05.09.2014 in CM(M) 196/2014. This court had noted as follows:-

“2. During the course of hearing, the judgments of the Supreme Court in the cases of Dhurandhar Parsad Singh vs. Jai Prakash University and Ors. (2001) 6 SCC 534 and Budhia Swain and Ors. vs. Gopinath Deb and Ors. (1999) 4 SCC 396 were read.

3. The ratio of the aforesaid judgments is that a person who is affected by fraud etc., and which the petitioners claim to be, then such person can file an application before the court which passed the decree for recall of the judgment decreeing the suit. The application for recall can be filed including under Order 9 Rule 13 CPC read with Order 22 Rule 10 CPC read with Section 151 CPC and Section 44 of the Evidence Act etc.

4. Without in any manner expressing any opinion on merits with respect to the merits of the cases of either of the parties, in accordance with the liberty which is sought for by the petitioners to file an application for recall of the judgment dated 09.11.2010, the present petition is disposed of as not pressed and liberty is granted to the petitioners to file appropriate independent proceedings or for recall of the judgment dated 09.11.2010.”

11. A perusal of the above order would show that this court had granted liberty to the respondent to file appropriate independent proceedings or for recall of the judgment dated 09.11.2010. It is manifest that the option has been left with the respondent to pursue either one of the two proceedings. However, whatever proceedings he may chose to pursue, he has to also satisfy the court that “he is a person effected by fraud.” If he fits into this

category then he has the option of pursuing the remedies stated by this court in its order dated 05.09.2014. The issue already framed on 11.08.2015 does not cover this dispute.

12. Further the petitioner also challenges the locus standi of the respondents to file this petition in the disposed off proceedings.

13. In my opinion, in view of the above and in the interest of justice, an additional issue be framed. Accordingly, issue No.2 would read as follows:-

“Whether the applicants are entitled to file the present application under Order 9 Rule 13 r/w 22 Rule 10 and Section 151 CPC read with Section 44 of the Evidence Act (OP-Non-applicant/plaintiff)

14. Both the issues shall be decided after completion of evidence.

15. In view of the above, the present petition and all pending applications stand disposed of.

**JAYANT NATH, J**

**MARCH 08, 2017/rb**