

**HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO
AND
HONOURABLE SRI JUSTICE K. LAKSHMAN**

I.A.No.4 of 2019

in/and

CCCA.No.366 of 2019

J U D G M E N T:(Per Sri Justice M.S.Ramachandra Rao)

1. This appeal is preferred against the compromise decree dt.15.11.2018 in OS.No.404 of 2012 passed by the XXVI Additional Chief Judge, City Civil Court at Hyderabad.

2. The appellant is a third party to the said suit.

The prayer in O.S.No.404 of 2012

3. The said suit was filed by the 1st respondent against the 2nd respondent for specific performance of agreement of sale dt.14.07.2011 allegedly executed by the 2nd respondent in favour of the 1st respondent.

The property which is subject matter of the suit

4. The subject matter of the said agreement was house property bearing municipal No.10-3-282/2/A/12, Plot No.6 admeasuring 332 sq.yards situated at Humayun nagar, Hyderabad (hereinafter referred to as ‘the subject property’).

The plea of the plaintiff/1st respondent in the appeal

5. It is the contention of the 1st respondent that the 2nd respondent is the owner of the subject property; that she offered to sell the said property to him for Rs.40 lakhs; that Rs.10 lakhs was paid by him to the 2nd respondent on the date of execution of the said agreement of sale; that the balance consideration of Rs.30 lakhs was agreed to be paid by him to the 2nd

respondent within ten months from the date of execution of the agreement of sale; that on 01.04.2012 and thereafter, the 1st respondent approached the 2nd respondent with balance of sale consideration showing his readiness and willingness to pay it and to get possession of the subject property on execution of the sale deed; but the 2nd respondent was evading to receive it and execute the sale deed.

6. He claimed that certain documents i.e, as original municipal mutation order dt.19.04.2011, original order of change of consumer name dt.23.03.2011 and original acknowledgment CPDCAP vide complaint dt.16.03.2011 and original municipal tax receipt No.32 were given by her to him.

7. He stated that he issued legal notice to the 2nd respondent on 16.04.2012 to receive the balance sale consideration, but there was no response from the 2nd respondent and so he filed the suit on 07.06.2012.

The written statement of defendant/ 2nd respondent in the appeal

8. The 2nd respondent filed written statement in the suit denying that she offered to sell the suit schedule property to the 1st respondent for Rs.40 lakhs and also denying execution of agreement of sale dt.14.07.2011 in his favour. She alleged that the agreement of sale is a forged and fabricated document and that the 1st respondent created the document by forging her signatures on it. She reserved her right to initiate action against the 1st respondent for cheating and forgery offences.

9. She claimed that the 1st respondent is a complete stranger to her and there was no occasion for her to handover any documents to the 1st respondent.

11. She contended that her sister had filed OS.No.238 of 2011 before the IX Junior Civil Judge, City Civil Court, Hyderabad against her and she engaged Mr.M.A.Qavi Abbasi, Advocate, to defend her in the said suit and certain documents, such as original municipal mutation order dt.19.04.2011, original order of change of consumer name dt.23.03.2011 and original acknowledgment CPDCAP vide complaint dt.16.03.2011 and original municipal tax receipt No.32 were given by defendant/2nd respondent to the said advocate, but the said advocate colluded with the 1st respondent and gave the 1st respondent the said documents. She contended that there was no privity of contract between herself and the 1st respondent. Other allegations made in the plaint were also denied.

12. Six years later, an application under Order XXIII was filed on 15.11.2018 , i.e. IA.No.1406 of 2018 by both parties, which states as under:

- "1. That due to intervention of the elders and well wishers the Parties herein have settled the dispute.*
- 2. That the Respondent/Defendant have agreed to execute and Register the Sale Deed in favour of the petitioner/Plaintiff on or before 30th November, 2018.*
- 3. That the Respondent/Defendant have received the balance sale consideration amount of Rs.30,00,000/- (Rupees Thirty Lakhs only).*
- 4. xx
xxxxxxxxxx.*
- 5. That the Respondent/Defendant undertakes to execute and register the Sale Deed ion favour of the petitioner/Plaintiff within 15 days from this day.*
- 6. That in case if the Respondent/Defendant fails to execute and register the sale deed, the petitioner/plaintiff shall have at liberty*

to approach this Honourable Court and get the sale deed registered through this Honourable Court.

7. *That in case if the Respondent/Defendant fails to deliver the possession on or before 30/11/2018, the petitioner/plaintiff shall have the liberty to obtain the possession through the Court of law.*
8. *That the parties shall have bear their own costs."*

The compromise decree dt.15.11.2018 passed by the Court below

13. On the basis of the said application, the impugned judgment and decree dt.15.11.2018 was passed by the Court below as follows:

"Plaintiff called present. Defendant called present. Compromise petition filed under Order 23 CPC filed, terms of compromise recorded by the Court and both parties agreed for the terms, hence suit is decreed in terms of compromise petition filed today."

E.P.No.493 of 2019

14. Pursuant to the said decree, EP.No.493 of 2019 was filed by the 1st respondent against the 2nd respondent before the Court below.

15. On 23-8-2019, a regd. sale deed Doc.No.5673 of 2019 was executed in favor of the 1st respondent by the Court below.

The warrant issued to the Bailiff by the Court

16. On 25.10.2019 in EA.No.65 of 2019 in EP.No.493 of 2019 the Court below directed the Bailiff of the said Court that the 2nd respondent is in occupation of the subject property, and the Bailiff should put the 1st respondent in possession of the same and remove any person bound by the decree, who may refuse to vacate the property. He was also directed to break open locks, if necessary, at the time of execution of the warrant.

The eviction of appellant on 3.12.2019 by the Bailiff

17. The Bailiff went to the premises on 03.12.2019 along with the 1st respondent and the police of PS Humayun Nagar.

18. In his report dt.03.12.2019 he stated that the 2nd respondent/J.Dr. was not present but a representative of the J.Dr. by name Mohd.Salman was present and he claimed to be the brother of the present owner of the property; that he then showed the Court warrant and explained its contents; some portions of the property were found locked; some J.Dr.s agreed to vacate and received their saloon shops' articles and vacated; but Mohd.Salman refused to receive his articles from (A) Babu Shifa clinic and (B) storage godown articles located in the subject property; that the Bailiff then made an inventory of the articles in those two portions; there were two other shutters found under locks, which were broken open and he entered into them along with the 1st respondent, panchas and police; he did not find any articles in them; and after removing all the articles, he handed over possession to the 1st respondent in the presence of panchas and the police. He also stated that the articles removed from the Babu Shifa clinic and Storage godown were kept at the same premises under lock and seal of the Court. Panchanama with similar contents was also prepared and filed in the Court. The 1st respondent filed memo that he has received possession of the suit schedule property.

19. The EP was then closed on 03.12.2019.

The instant appeal filed by the appellant/third party

20. The appellant herein filed the instant appeal on 06.12.2019.

The leave application I.A.No.1 of 2019

21. He also filed IA.No.1 of 2019 seeking leave to file the appeal against the Judgment and Decree dt.15.11.2018 passed by the Court below in OS.No.404 of 2012.

22. It is the plea of the appellant that he is the owner of the subject property and that a registered sale deed Doc.No.530 of 2017 was executed in his favour on 31.01.2017 by the 2nd respondent through her agreement of sale-cum-GPA holder, one Dilawar Hussain.

23. He alleged that the 2nd respondent had executed a registered agreement of sale-cum-GPA with possession in favour of Dilawar Hussain on 07.09.2016 vide Doc. No.5257 of 2016 conveying the suit schedule property to him; and the GPA Holder had executed on 31.01.2017, another registered sale deed Doc. No.530 of 2017 in his favour, and also inducted him into possession of the subject property after receiving Rs.83,38,000/- as sale consideration.

24. He contended that ever since the purchase of property, he was in peaceful possession and enjoyment of the same, that he constructed mulgies and gave them on rent to Babu Shifa Clinic and Mens and Ladies Saloon, and also to a Storage godown in the subject property. He claimed that he had applied for electricity meters and was also granted electricity connection and was also paying property tax.

25. He claimed that he had also applied for mutation to the GHMC and when no action was taken on his application for mutation, he had filed WP.No.5462 of 2019 in this Court and obtained a direction for consideration of his application for mutation on 22.04.2019.

26. He stated that one Mohammad Ali Islami filed OS.No.1101 of 2017 before the II Additional Chief Judge, City Civil Court, Hyderabad for declaration of his title and perpetual injunction impleading the appellant as well as the 2nd respondent as parties; that the plaintiff had filed IA.No.1923 of 2017 under Order XXXIX Rule 1 and 2 CPC and sought ad-interim injunction and obtained an *ex-parte* order on 29.12.2017; that the appellant filed CMA.No.26 of 2018 before this Court to suspend the same; and on 5.1.2018, this Court in CMA MP. NO.2 of 2018 in CMA NO.26 of 2018 suspended the same and directed maintenance of status quo. He stated that on 03.12.2019 the Bailiff of the Court highhandedly sealed the property with the valuables of the appellant and his tenants. It is stated that only then, the appellant came to know about the judgment and decree in OS.No.404 of 2012.

27. He alleged that the said decree is a fraudulent one; that fraudulently showing resistance, police protection orders were obtained by the 1st respondent; and since appellant's rights over the property are substantially affected, the appellant should be granted leave to file the appeal.

28. On 06.12.2019, leave was granted to the appellant in IA.No.1 of 2019.

The suspension application IA No.2 of 2019

29. IA.No.2 of 2019 was filed by appellant seeking suspension of the judgment and decree dt.15.11.2018 in OS.No.404 of 2012 and interim suspension was also granted on a *prima facie* finding that the said compromise decree is a collusive decree and crucial facts were suppressed by the respondents before the Court below.

IA 3 of 2019 filed by appellant to restore possession

30. I.A.No.3 of 2019 is filed by the appellant to restore/restitute possession of the subject property to him pending appeal. Notice was ordered on 06.12.2019 in the said application.

The implead application by Dilawar Hussain IA No. 4 of 2019

31. I.A.No.4 of 2019 is filed by Dilawar Hussain to get impleaded in this appeal. In the said application, he contended that the 2nd respondent had executed a registered agreement of sale-cum-GPA with possession in his favour on 07.09.2016 vide Document No.5257 of 2016, that he was also put in possession, that he was empowered to sell the property to third parties; and on 31.01.2017, he executed registered sale deed Doc.No.530 of 2017 in favour of the appellant and also delivered vacant possession to him. He stated that appellant was in possession and had even made constructions of mulgies and gave the same on rent to various persons. He thus supported the appellant and contended that impugned judgment and decree are collusive and fraudulent and he must also be impleaded in the appeal.

32. Having regard to the stand taken by the proposed party, we are satisfied that he is a necessary party to the appeal. Accordingly, I.A.No.4 of 2019 is allowed and Dilawar Hussain is impleaded as 3rd respondent in this appeal.

The consideration of the Appeal

33. Heard Sri K.S.Murthy, counsel for the appellant, Sri T.Sanjay Rao, counsel for 1st respondent and Sri M.Rama Rao, counsel for 2nd respondent.

34. We have already extracted the pleadings of the 1st respondent/plaintiff and the 2nd respondent/defendant in OS.No.404 of 2012.

35. There is no dispute that the 2nd respondent/defendant was the owner of the subject property as on the date of filing of the suit OS.No.404 of 2012.

36. According to the appellant, a registered agreement of sale-cum-GPA with possession was executed by the 2nd respondent in favour of Dilawar Hussain (3rd respondent herein) on 07.09.2016 (registered Doc. No.5257 of 2016). Copy of this document filed by the appellant indicates that she offered to sell the subject property to him and also delivered possession of the property to him. She received Rs.83,38,000/- from him and authorized him as her GPA to sell the same. The counsel for the 2nd respondent did not dispute this fact.

37. Thereafter, Dilawar Hussain, as agreement of sale-cum-GPA holder, executed registered sale deed dt.31.01.2017(Doc. No.530/2017) in favour of the appellant conveying the suit schedule property to him after receiving Rs.83,38,000/- from the appellant and also delivered possession to him.

38. In the light of the above transactions as on the date of the decree, the 2nd respondent had no title and she was also not in possession of the subject property.

39. Having filed a written statement in OS.No.404 of 2012 that she never executed any agreement of sale on 14.07.2011 in favour of the 1st respondent, that he in fact forged her signature and created the said agreement of sale, and that he was a complete stranger to her, it is shocking that the 2nd respondent signed the compromise memo on 15.11.2018 meekly stating that she will execute a registered sale deed in favour of the 2nd respondent on 30.11.2018 and she had received balance sale consideration of Rs.30 lakhs. She has never informed the Court below about execution of

registered agreement of sale-cum-GPA with possession dt.07.09.2016 being Doc. No.5257/2016 in favour of Dilawar Hussain. The counsel for the 2nd respondent had no explanation to offer for this conduct of the 2nd respondent.

40. She also did not inform the Court that she was not in possession of the suit schedule property. Cleverly in clause 7 of the compromise memo she agreed that if she did not deliver possession on or before 30.11.2018, the 1st respondent/D.Hr. would have the liberty to obtain possession through Court of law.

41. The Encumbrance certificate dt.4.12.2019 filed by the appellant along with the appeal clearly shows the regd. sale deed Doc.No. 530 of 2017 in favor of the appellant by Dilawar Hussain on 31.1.2017. The electricity bills filed by the appellant show that Dilawar Hussain was having an electricity connection provided by the power utility at the subject property. These were not disputed by counsel for the respondents. So Dilawar Hussain and later the appellant were in actual physical possession of the subject property.

42. But it appears that a wrong plea was taken in the E.P by the 1st respondent that the 2nd respondent was in actual physical possession of the subject property and in it's order dt.25.10.2019 in EA.No.65 of 2019 in EP.No.493 of 2019, the Court below also recorded as if the 2nd respondent was in actual physical occupation of the subject property. However, as per Bailiff report dt.03.12.2019, the 2nd respondent was not present in the subject property. Thus the Court below was also not informed that property was in possession of appellant.

43. In our opinion, it was incumbent on the part of the respondents 1 and 2 to implead the appellant as well as the 3rd respondent as parties to the suit in

view of the registered agreement sale cum GPA dt.7.9.2016 (Doc.no. 5257 of 2016) executed by the 2nd respondent in favour of the 3rd respondent and registered sale deed dt.31.1.2017 (Doc.No.530 of 2017) by the 3rd respondent in favour of the appellant, since there has been creation of right, title and interest in favour of the appellant and the 3rd respondent, much before the compromise of the suit between the respondents 1 and 2 on 15.11.2018.

44. In our opinion, the respondent no.2 suppressed the fact that she executed a registered agreement sale cum GPA dt.7.9.2016 (Doc.no. 5257 of 2016) in favour of the 3rd respondent after receiving consideration, and she colluded with the 1st respondent and got the decree passed in favour of the 1st respondent behind the back of the appellant and the 3rd respondent by playing fraud on them and also the Court.

45. In **S.P. Chengalvaraya Naidu v. Jagannath**¹, the Supreme Court declared that a litigant who comes to the Court must come with clean hands and suppression of documents relevant to the litigation by the parties amounts to playing fraud on the Court. Such judgments obtained by playing fraud on the Court have to be treated as a nullity and can be challenged in any Court even in collateral proceedings. The Court held:

“ 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 non est in the eyes of law. Such a judgment/decre — 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.....

¹ (1994) 1 SCC 1

The principle of “finality of litigation” cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who’s case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

6. 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 (Ex. B-15) 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 is tantamount 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 Ex. 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.”

(emphasis supplied)

46. In A.V. Papayya Sastry v. Govt. of A.P.² , the Supreme Court reiterated the said principle in the following terms:

*“ 23. In the leading case of **Lazarus Estates Ltd. v. Beasley**³, Lord Denning observed: (All ER p. 345 C)*

² (2007) 4 SCC 221

³ 1956(1) All ER 341

“No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud.”

24. In *Duchess of Kingstone*, Smith’s Leading Cases, 13th Edn., p. 644, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be *res judicata* and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was “mistaken”, it might be shown that it was “misled”. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.

25. It has been said: fraud and justice never dwell together (*fraus et jus nunquam cohabitant*); or fraud and deceit ought to benefit none (*fraus et dolus nemini patrocinari debent*).

26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of “finality of litigation” cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants.”

47. It is settled law that a decree which has been obtained by suppression of facts or collusively will not be executable against those who were not parties to the suit. (**V.J.Thomas Vs. Pathrose Abraham and others**⁴).

48. In *Ram Chandra Singh v. Savitri Devi*⁵, it was held that if an application is filed by a third party challenging the preliminary decree in a partition suit on the ground that such decree was obtained by practicing fraud, such application is maintainable and the Court, in exercise of its inherent power, can grant relief. The Supreme Court held that commission of fraud on Court is to be viewed seriously and *a collusion or conspiracy with a view to deprive the rights of others in relation to a property would*

⁴ (2008) 5 SCC 84

⁵ (2003) 8 SCC 319

render the transaction void *ab initio*. It quoted its earlier decisions in **Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education**⁶ and in **S.P. Chengalvaraya Naidu** (1 supra) to hold that *no Court can allow a person to keep an advantage he has obtained by fraud and fraud unravels everything*. It reiterated that the principle of “finality of litigation” cannot be pressed to the extent of such an absurdity that it becomes an engine a fraud in the hands of dishonest litigants and that one who comes to Court, must come with clean hands. It also stated that a person, whose case is based on falsehood has no right to approach the Court and he can be summarily thrown out at any stage of the litigation.

49. In Lachhman Dass v. Jagat Ram⁷, the Supreme Court declared:

“17. The manner in which the purported consent decree was entered into by and between Defendant 9 on the one hand and Defendants 1 and 2 is telltale. Defendants 1 and 2 having transferred their right and interest, could not have conveyed any right in the property of Defendant 9. No such right existed in them.

18. In the consent decree no finding was arrived at as to on what basis the right of defendant-Respondent 9 was considered to be a superior right of pre-emption. Defendant 9 out of the total consideration amount of Rs 30,000, deposited only 1/5th thereof i.e. Rs 6000 in the court. Respondents 1 and 2 neither said to have claimed the said amount nor the rest of the amount of Rs 24,000 could have been paid in their favour by Defendant 9.

*19. If Defendants 1 and 2 only could not have accepted the said amount as a valid consideration of passing of a decree of pre-emption in favour of Respondent 9; the purported consent decree, in our opinion, was void ab initio. Moreover, in the aforementioned facts and circumstances of this case, the appellant was a necessary party therein. No decree, therefore, could have been passed in his absence. The parties to the said suit and, in particular, defendant-Respondents 1 and 2, therefore, by suppression of material facts committed a **fraud on the court** in obtaining the said decree. It may be true that collusion between Respondent 9 and Defendants 1 and 2 was required to be specifically pleaded, but in this case **collusion between***

⁶ (2003) 8 SCC 311

⁷ (2007) 10 SCC 448

them is apparent on the face of the record. The circumstances obtaining in the case lead to only one conclusion that the parties were in collusion with each other for the purpose of obtaining the said decree.”(emphasis supplied)

50. These decisions, would clearly apply to the instant case rendering the judgment and decree of the Court below as a nullity and *non est* in law.

51. It is contended by Sri T.Sanjay Rao, counsel for 1st respondent that there was a sale deed executed by the 2nd respondent in favour of one Mohd. Gulam Afroz vide document No.2074/2014 dt.15.05.2014 and so the appellant could not have any title in regard to the subject property since the appellant's sale deed is dt.31.01.2017. He relied on an encumbrance certificate issued on 18.12.2019 by the Sub-Registrar, Golkonda. He contended that the appellant is not in possession and did not construct mulgies. He also contended that the sale deed executed in favour of the appellant is hit by the doctrine of *lis pendens*. According to him, the appellant suppressed the sale deed dt.15.05.2014 and so his (appellant's) sale deed is nominal and sham and was not supported by consideration.

52. Firstly, if there was already a sale on 15.05.2014 in favour of Mohd.Gulam Afroz, that too pending the suit, the 1st respondent ought to explain why he did not implead Mohd. Gulam Afroz as a party to his suit OS.No.404 of 2012, and why in the compromise petition he did not mention about the said fact and obtained the compromise decree behind the back of Mohd.Gulam Afroz.

53. The fact that the said individual Mohd.Gulam Afroz made no attempt to oppose the execution of the decree in OS.No.404 of 2012 or challenge the said decree like the appellant, indicates that the alleged sale in favor of Mohd.Gulam Afroz is a nominal and sham document and the said individual

was not affected by the decree in O.S.No.404 of 2012 or its execution. Had the sale in favour of Mohd.Gulam Afroz been genuine, the said individual would not have allowed the 1st respondent to obtain a sale deed behind his back and take possession of the property.

54. When the 2nd respondent had denied the very execution of the agreement of sale dt.14.07.2011 in favour of the 2nd respondent, and had alleged that he was a total stranger to her and he had forged her signature and created the said agreement of sale, what prompted her to suddenly, 8 years after filing of the suit, to enter into the compromise with the 1st respondent has not been explained by the 2nd respondent. In these circumstances, fraud and collusion are obvious and where a decree or suit is collusive, the doctrine of *lis pendens* would not apply.

55. Section 52 of the Transfer of Property Act, 1882 states:

“Section 52 Transfer of property pending suit relating thereto:-

During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the Court and on such terms as it may impose.”

56. As can be seen from the above provision of law, the doctrine of *lis pendens* does not apply to a suit or proceeding which is collusive. Since in the instant case, the decree is obviously collusive, the said doctrine has no application.

57. Though Bailiff stated that one Mohd. Salmaan was in the subject property and described him as “J.Dr. person”, there is no basis to believe that Mohd.Salman had anything to do with the 2nd respondent/J.Dr.

58. The order dt.25.10.2019 passed by the Court below authorized the Bailiff to remove any person bound by the decree and who had refused to vacate the same. In our view, it cannot be said that the appellant or Mohd. Salmaan are bound by the decree of the Court below since they are not parties to the suit and the decree is obtained by playing fraud on the Court and is a collusive decree.

59. It is also contended by the counsel for the 1st respondent that the decree passed cannot be challenged and that an appeal is barred under Section 96(3) of CPC.

60. We reject this contention, since in our view the decree has been obtained by playing fraud on the Court and is a collusive decree. Such a decree can be challenged under Order XLIII Rule 1A(2) CPC, which states:

“In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded.”

61. The Supreme Court has held that an appeal can be maintained against a consent decree invoking the above provision in **Banwari Lal v. Chando Devi**⁸. The Supreme Court declared:

“9. Section 96(3) of the Code says that no appeal shall lie from a decree passed by the Court with the consent of the parties. Rule 1-A(2) has been introduced saying that against a decree passed in a suit after recording a compromise, it shall be open to the appellant

⁸ (1993) 1 SCC 581

to contest the decree on the ground that the compromise should not have been recorded. When Section 96(3) bars an appeal against decree passed with the consent of parties, it implies that such decree is valid and binding on the parties unless set aside by the procedure prescribed or available to the parties. One such remedy available was by filing the appeal under Order 43, Rule 1(m). If the order recording the compromise was set aside, there was no necessity or occasion to file an appeal against the decree. Similarly a suit used to be filed for setting aside such decree on the ground that the decree is based on an invalid and illegal compromise not binding on the plaintiff of the second suit. But after the amendments which have been introduced, neither an appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3-A of Order 23. As such a right has been given under Rule 1-A(2) of Order 43 to a party, who challenges the recording of the compromise, to question the validity thereof while preferring an appeal against the decree. Section 96(3) of the Code shall not be a bar to such an appeal because Section 96(3) is applicable to cases where the factum of compromise or agreement is not in dispute."(emphasis supplied)

62. In view of the above decision, we also hold that it was not necessary for the appellant to invoke Order XXI Rule 101 CPC and that the remedy of appeal invoked by the appellant is appropriate.

63. It is next contended by the counsel for 1st respondent that even if the decree is set aside, High Court cannot grant restitution of possession of the property and that the appellant should take appropriate steps before the trial Court only.

64. No doubt Sec.144 CPC states that an application for restitution is to be filed in the Court which passed the decree i.e the Court of first instance and when such decree is set aside/varied/reversed in an appeal.

65. But the Supreme Court has held in **Kavita Trehan v. Balsara Hygiene Products Ltd.**⁹, that the said provision is not exhaustive. It declared:

“21. Section 144 CPC incorporates only a part of the general law of restitution. It is not exhaustive.

22. The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144.”

66. The supreme Court had stated the following about persons who abuse the process of Court and the urgent need to give the wronged party restitution in **Padmawati v. Harijan Sewak Sangh**¹⁰ :

“17. The faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make the wrongdoer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the courts to see that such wrongdoers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years’ long litigation. Despite the settled legal positions, the obvious wrongdoers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the courts.’

67. When fraud is played on the Court below and also the appellant to obtain a decree and the decree also happens to be collusive, as in the instant case, it cannot be contended that this Court is helpless to grant restitution of possession of the subject property to the appellant, who has been dispossessed by the 1st respondent, in exercise of its inherent powers under Sec.151 CPC. The 1st respondent cannot be allowed to enjoy the fruits of the

⁹ (1994) 5 SCC 380

¹⁰ (2012) 6 SCC 460

decree obtained by him by playing fraud on the Court and on the appellant by colluding with the 2nd respondent and cannot be allowed to squat on the subject property even for an instant.

68. We therefore allow the Appeal with punitive costs of Rs.50,000/- and set aside the judgment and decree dt.15.11.2018 in OS.No.404 of 2012 passed by the XXVI Additional Chief Judge, City Civil Court at Hyderabad; the regd. sale deed Doc.No.5673 of 2019 dt.23.8.2019 executed by the Court below in favor of the 1st respondent on behalf of the 2nd respondent is also set aside and is declared to be null and void; and 1st respondent is directed to forthwith restore possession of the subject property to the appellant.

69. I.A.No. 4 / 2019 is also allowed as above.

70. Liberty is also granted to the appellant to seek damages from the respondents 1 and 2 for fraudulently dispossessing the appellant by a separate proceeding or in an application under Sec.144 CPC, if he is so advised.

71. Consequently, miscellaneous petitions pending if any shall stand closed.

M.S.RAMACHANDRA RAO, J

K.LAKSHMAN, J

Date: -01-2020
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