

**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

Present:-

The Hon'ble Justice Subhasis Dasgupta.

CO. No. 1293 of 2022

Taxation Services Syndicate Pvt. Ltd. & Ors.

Vs.

Laxmi Housing Udyog Pvt. Ltd.

With

C.O. No. 1294 of 2022

Sharad Subramanyan & Ors.

Vs.

Laxmi Housing Udyog Pvt. Ltd.

For the Petitioners : Mr. Shubhobrata Dutta, Adv.
Mr. Sourojit Dasgupta, Adv.
Mr. Souradeep Banerjee, Adv.
Mr. Amit Agarwalla, Adv.
Mr. Aniruddha Agarwalla, Adv.
Mr. B.N. Joshi, Adv.

For the Opposite Party : Mr. Aniruddha Chatterjee, Adv.
Mr. Niloy Sengupta, Adv.
Mr. Kushal Chatterjee, Adv.
Mrs. Sayanti Nandy, Adv.
Mr. Iftekhar Munshi, Adv.
Mr. Sujit Banerjee, Adv.

Heard On : 23.06.2022, 16.06.2022.

Judgment : 01.07.2022.

Subhasis Dasgupta, J:-

Hearing was given on the prayer of learned advocates of both the parties upon consideration of a common law point being involved in these two revisional applications referred above.

C.O. No. 1293 of 2022 is relatable to T.S. No. 56 of 2019 of learned Civil Judge (Senior Division), 2nd Court at Alipore, while C.O. No. 1294 of 2022 pertains to T.S. No. 11620 of 2014 of learned Civil Judge (Senior Division), 2nd Court at Alipore, granting eviction decree in both the suits.

The judgment in both the suits granting eviction decree was delivered on 29th September, 2020. In the meantime, petitioners of both the two revisional applications preferred two separate appeals before this Court being F.A.T. No. 331 of 2020 with F.A.T. No. 332 of 2020, against the decree being granted in two suits mentioned hereinabove.

In the pending appeals no stay, however, could be obtained as regards operation of decree impugned in such appeals. Such stay was, however, refused by Division Bench of this Court on 20th January, 2021.

Petitioner in both the two cases filed then two separate applications under Section 151 of Code of Civil Procedure on 6th February, 2021, containing principal prayers, which are enumerated hereinbelow:

- “ a) The ex-parte decree dated 29th September 2020 passed in Title Suit No. 56 of 2019 (Laxmi Housing Udyog Pvt. Ltd. – vs- Taxation Services Syndicate Private Limited & Ors.) be recalled and/or set aside;*
- b) Incorrect recording in Order dated 13.03.2020 be deleted.*
- c) Pending disposal of the application, the decree dated 29th September 2020 be stayed;”*

By the order impugned, the court below rejected the prayers of petitioners/defendants, made under Section 151 C.P.C., observing therein that after delivering judgment and decree in contested form, the court below had become *functus officio* without further authority to set aside its own judgment, for the reasons being set out in petition under Section 151 C.P.C.

Bearing in mind the pendency of appeal, preferred against the judgment and decree, granted by the Trial Court, the court below thus declined to recall its own order under the behest of an order under Order 9 Rule 13 or under Section 151 C.P.C. so as to extend the proposed reliefs, made in petition under Section 151 C.P.C.

Upon referring such facts mentioned hereinabove, Mr. Shubhobrata Dutta, learned advocate appearing for the petitioners/defendants submitted that judgment and decree had been passed by the Trial Court during the pandemic, when the learned senior advocate representing petitioners/defendants in the court below could not be able to participate in the hearing process of argument, even in the absence of adequate

facilities to take part in the argument virtually after availing of video conferencing facility, and as such eviction decree granted against the petitioners could not be treated to be contested decree, and rather it should be treated as *ex parte* one, which could be very well recalled and/or set aside upon resorting to an application under Section 151 C.P.C., irrespective of pendency of the appeal and stay order being refused by the appellate body.

Adverting to the averments contained in petition under Section 151 C.P.C., learned advocate strenuously argued that since an opportunity to take part in the hearing of argument could not be extended to learned advocate representing defendants in the court below, because of surge of COVID-19, and the consequent resolutions being adopted by the concerned Bar Association, the decree of eviction could not be treated to be lawful decree, obtained after a contesting hearing of eviction suit, initiated against the petitioners/defendants.

Reliance was placed by Mr. Dutta on a decision reported in **(2011) 11 SCC 275** delivered in the case of ***K.K.Velusamy Vs. N. Palanisamy*** to establish that when there was no provision in the Code governing the matter relatable to the circumstances prevailed at the time of granting eviction decree against petitioner/defendant by the Trial Court, and when *bona fides* of the petitioner could not be doubted, and further when such exercise of power by the court below under Section 151 C.P.C. was to meet

the ends of justice and to prevent abuse of process of court, the court below could recall the order very well upon resorting to Section 151 C.P.C.

It was thus submitted by Mr. Dutta that power under Section 151 C.P.C. could be exercised well to deal with any particular procedural aspect, which was not provided expressly or impliedly in C.P.C., to prevent abuse of process of court.

Reliance was also placed by Mr. Dutta on a decision reported in **(2016) SCC OnLine Cal 2288** delivered in the case of **Prabha Agarwal Vs. Aditi Oil Mill** to submit that the eviction decree granted, being construed to be *ex parte* one, for whatever reasons, petitioners had a statutory right to apply for recalling of decree within the statutory period of limitation from the date of decree, or even beyond the prescribed period of 30 days in aid of an application under Section 5 of Limitation Act, irrespective of the fact that the decree had been drawn up, completed and filed within the period in accordance with the law.

Thus, according to Mr. Dutta, the court below would not become *functus officio*, and would not lose jurisdiction to grant proposed recalling of order, even after the order had been drawn up, completed and filed as per law.

Reliance was further placed by petitioners on an unreported decision rendered in **C.O. No. 1952 of 2010** by Co-ordinate Bench of this Court to establish that availability of an alternative remedy by way of an appeal, would not be a bar in setting aside an *ex parte* order under

Section 151 C.P.C. upon consideration of the reasons, for non-appearance of learned senior advocate for the petitioners in the Trial Court, particularly when explanation had been offered stating the circumstances preventing him from taking part in the hearing process of argument on the date of the Trial Court.

Mr. Aniruddha Chatterjee, learned advocate appearing for the opposite party disputed with the submissions, canvassed by Mr. Dutta, contending that such decisions would have no relevance to the issue, under reference. According to Mr. Chatterjee, the present revisional application would not be maintainable, for the impugned order of rejection under Section 151 C.P.C. being fundamentally against the proposed prayer for recalling and/or setting aside the *ex parte* decree, dated 29th September, 2020, granted by the Trial Court. It was thus sought to be established by Mr. Chatterjee that against the order of rejection of proposed prayers, as referred hereinabove, an appeal under Order 43 Rule 1 (d) would ordinarily allow.

Mr. Chatterjee further contended that when appeals had already been preferred by petitioners impugning the judgment and decree, granted against them in F.A.T. No. 331 of 2020 with F.A.T. No. 332 of 2020, wherein the Division Bench was not inclined to grant any unconditional stay of operation of the decree impugned, the proposed reliefs, sought to be availed upon resorting Section 151 C.P.C., could not be extended to petitioners.

Supporting the order of the court below, Mr. Chatterjee replied that when an eviction decree was granted giving a contested judgment by Trial Court, the nature of the decree could not be described to be *ex parte* decree, as proposed by the petitioners, particularly when appeal had already been preferred, and that too during the pendency of such appeal before Division Bench of this Court.

Incidentally, Mr. Chatterjee submitted that when several opportunities had been extended to petitioners requiring their participation in the hearing process of argument, which would be evident from the impugned order, the judgment and decree of Trial Court could not be allowed to be re-opened by Trial Court itself, simply to stall the pending execution case, taking resort to Section 151 C.P.C.

As regards the alleged nature of decree, which was contended by Mr. Dutta to be *ex parte* one, Mr. Chatterjee argued that to determine the nature of an application, the court should not be guided by its label or mentioning of a particular Section of a statute at the cause-title of such application, but should find out what it contains.

Reliance was placed by Mr. Chatterjee on such issue, on a decision reported in **(2007) SCC OnLine Cal 664** delivered in the case of **Maruti Real Estate Pvt. Ltd. & Anr. Vs. Life Insurance Corporation of India & Ors.**, to establish that nomenclature under which the petition is filed is not quite relevant and does not debar the Court to exercise its jurisdiction,

which otherwise it possesses, unless there is a special procedure prescribed, which procedure is mandatory.

Thus, according to Mr. Chatterjee, mentioning of a Section to the proposed relief would not be fatal. The averment that contained in petition together with reliefs proposed would indicate objective purpose of the petition. The prayer proposed being conspicuous, relatable to setting aside or recalling of an order granting eviction decree, according to Mr. Chatterjee, could not be allowed to be re-opened taking resort to Section 151 C.P.C.

Having considered the submissions of both sides, it appears that a contested judgment granting eviction decree by Trial Court on 29th September, 2020 was sought to be re-opened upon filing a petition under Section 151 C.P.C. with a prayer for recalling and/or setting aside such eviction decree, after describing the same to have been granted *ex parte*, for the learned advocate representing petitioners not having participated in the hearing process of argument, scheduled by the Trial Court, for the circumstances the then prevailed, because of surge of COVID-19.

The court below while declining to allow the prayer under Section 151 C.P.C., was not oblivious of the pendency of the appeals preferred against the decree granted by the Trial Court.

Admittedly, the Division Bench of this Court was not inclined to grant any unconditional stay of operation of decree, meant to stall the execution proceedings, if any undertaken. It is after the rejection of stay

order by Division Bench of this Court, petitioners filed a separate petition under Section 151 C.P.C. on 6th February, 2021, containing prayers mentioned hereinabove.

It would be quite pre-mature one to return a decision, as regards the nature of the decree, whether it is contested, or it is *ex parte* granted by the Trial Court, during the pendency of the appeals before the Division Bench. The appellate body would certainly determine the issue, raised by the petitioners as to whether it was *ex parte* decree or contested one.

There cannot be any controversy with regard to the settled proposition of law that when there is no provision in the court governing the matter, and when the *bona fides* of a case made out by the parties is not doubted, and when such exercise of power available under Section 151 C.P.C. is to meet the ends of justice and to prevent abuse of process of court; the court may in appropriate case make use of provision available under Section 151 C.P.C. primarily to meet the ends of justice and to prevent abuse of process of court.

In the judgment rendered by the Apex Court in ***K.K. Velusamy (Supra)***, the scope of Section 151 C.P.C. was summarised upon consideration of several decisions, rendered by the Apex Court. But the inherent power of the court, being complimentary to the power specifically conferred, a court is free to exercise them for the purposes mentioned under Section 151 C.P.C. of the Code, when the matter is not covered by any specific provision of the Code, and the exercise of those powers would

not in any way in conflict with, what has been expressly provided in Code, or be against the intention of the legislature.

The prime thrust of these two revisional applications, as elaborated by Mr. Dutta, is against the surge of COVID-19, preventing the learned senior advocate representing petitioners/defendants in the court below from taking part in the hearing process on scheduled date, and lack of inadequate infrastructure in the court below to ensure hearing process to be concluded after availing of video conference facilities by learned senior advocate from his residence, and as such the decree of eviction cannot be construed to be *ex parte*, though described to be contested one.

As regards the non-availability of video conference facility in the court below, it would be profitable here to refer a communication of court below, made by e-mail, dated 19th June, 2020, addressed to one Kaushik Chatterjee, which may be reproduced hereinbelow:

“It is inform you that argument of both the suits is to be heard on 24.06.2020 at 12.30 PM, plaintiff is at liberty to argue either by VIDEO CONFERENCING or to file the written arguments in PDF form by email in this email i.d. and also to serve a copy of the same to the defendants. In case written arguments are filed the defendants will be at liberty to submit the written reply if any only on law points.

Links will be sent to the parties.

You are requested to take necessary steps.”

The text of such e-mail communication, as reproduced hereinabove, made from the court below would negate the contention raised by the

petitioners as regards non-availability of video conferencing facility in the court below on the schedule date of hearing of argument.

As the ratio of the decision rendered in the case of ***Prabha Agarwal (Supra)*** being relatable to an *ex parte* decree granted against the defendants, such decision factually would differ from the present facts and circumstances, presented in this case.

As regards the availability of an alternative remedy, irrespective of pendency of appeal, to set aside *ex parte* order under Section 151 C.P.C., and the ratio of the decision emerged in an unreported decision being ***C.O. No. 1952 of 2010 (Supra)***, it appears that the same would not be relevant in present facts and circumstances of this case, because in the case referred, for setting aside the order of dismissal for default, the reasons for non-appearance remaining unexplained by the petitioner before the appeal court, were permitted to be placed by defaulting party upon filing an application under Section 151 C.P.C. before the learned Trial Judge. More so, the pendency of the appeal in the referred case is relatable to Order 21 Rule 90 C.P.C., which is of course distinguishable from present facts and circumstances.

The court expresses its same view, as said by Mr. Chatterjee that nomenclature under which the petition is filed, is not always decisive, in other words, mentioning of wrong section or non-mentioning section is not fatal for the proposed reliefs. The proposed reliefs and objective purpose of

any application may be deciphered upon viewing the averments contained in the petition.

Significant fact is that appeals have been preferred impugning the judgment and decree allowing eviction against the petitioners, wherein prayer for stay has been refused, as regards the operation of the decree. Though ordinarily an appeal would lie under Order 43 Rule 1 (d) C.P.C. against the rejection of a prayer under Order 9 Rule 13 C.P.C., but when the nature of the decree being disputed one, which appears to be subject of the decision of appeal, together with other points raised in appeal, whatever may be the nature of the decree granted by the Trial Court, should not be permitted to be re-opened taking resort to Section 151 C.P.C., pending decision of the appeal, otherwise there may be conflicting decisions to come up.

The impugned order does not call for any interference.

The two revisional applications, accordingly, stand dismissed for the discussions made hereinabove.

The prayer for stay of operation of instant order, as proposed by learned advocate for the petitioners appearing today, is considered and refused.

Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of all formalities, on priority basis.

(Subhasis Dasgupta, J.)