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

Date of Decision: 16.12.2022

+ **CS(OS) 765/2022**

NARENDER KUMAR

..... Plaintiff

Through: Mr.Rajeev Saxena, Mr.Siddhant Luthra, Mr.Lalit Choudhary, Advs. along with plaintiff in person.

versus

PRAKASH & ORS.

..... Defendants

Through: None.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

I.A. 20653/2022

1. This is an application seeking exemption from service of advance notice of the suit to the defendants.
2. As in my opinion, the suit itself is liable to be dismissed as being not maintainable, the application is disposed of as infructuous.

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3. This suit has been filed by the plaintiff praying for the following reliefs:

“(a) Grant a decree of declaration thereby declaring the judgment and decree dated 30.09.2013 in C.S. (Os) No.2492 Of 2008 Titled As "Shri Prakash & Ors. Vs.

Signature Not Verified

Digitally Signed By:RENUKA

NEGI

Signing Date:21.12.2022

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Shri Dharam Pal & Ors" passed by this Hon'ble Court as null, void and non-est;
(b) *Declare the Sale Deed dated 10.05.2007 as valid, legally and lawfully executed and binding upon the parties."*

4. The plaintiff has filed the present suit alleging therein that he along with the defendant no.14 had purchased agricultural land total measuring 5 Bighas and 8 Biswas out of Khasra No.605, Khatouni Khata No.108, situated in Village Sabhapur, Shahdara, Delhi- 110094, by way of a Registered Sale Deed dated 10.05.2007, for a total sale consideration of Rs.26,00,000/- (Rupees Twenty Six Lakh only) from the defendant nos.11 to 13. It is asserted that the plaintiff is in actual, peaceful, physical possession of the said agricultural land.

5. It has further been asserted by the plaintiff that the defendant nos.1 to 10 are the descendents of one Late Shri Niyadar, son of Late Shri Chandan, having agricultural land falling in Khasra No.609, Village Sabhapur, Shahdara, Delhi, whereas the defendant nos.11 to 13 are the sons of one Late Shri Niyadar, son of Late Shri Antram, who had agricultural land falling in Khasra No. 605, Village Sabhapur, Shahdara, Delhi. Late Shri Niyadar, son of Late Shri Chandan, and Late Shri Niyadar, son of Late Shri Antram, are not in any way related to each other by way of blood and/or relationship.

6. It is asserted that the forefathers of the defendant nos.11 to 13 were declared *Bhumidar* in respect of the agricultural land forming part of Khasra No.605 mentioned hereinabove, while the forefathers of defendant nos.1 to 10 were declared *Bhumidar* in respect of only Khasra No.609 mentioned hereinabove.

7. It is further asserted in the plaint that upon the death of Shri Niyadar, son of Late Shri Antram, the share of Shri Niyadar in the agricultural land bearing Khasra No.605 was duly mutated in the name of the defendant nos.11 to 13 by way of an order dated 30.11.2006. The same was challenged by the Predecessor-in-interest of the defendant nos.1 to 10 by filing an appeal under Section 64 of the Delhi Land Revenue Act, 1954, claiming themselves to be the *Bhumidar* in respect of the land forming part of the Khasra No.605 and challenging the title of the defendant nos.11 to 13 to the said land.

8. It is asserted that the defendant nos.11 to 13 sold the plot of land to the plaintiff and the defendant no.14 by way of a registered sale deed dated 10.05.2007.

9. The plaintiff asserts that the predecessor-in-interest of the defendant nos.1 to 10 filed a Civil Suit, being CS(OS) No.2492/2008, titled ***Shri Prakash & Ors. v. Shri Dharam Pal & Ors.*** (hereinafter referred to as the “said suit”), before this Court, seeking *inter alia* declaration, permanent injunction and cancellation of the sale deed dated 10.05.2007 executed by the defendant nos.11 to 13 in favour of the plaintiff and the defendant no.14. It is asserted that the said suit, however, was filed by the predecessor-in-interest of the defendant nos.1 to 10 without seeking the declaration of their title. The said suit was filed on the basis of a single entry of *Khasra /Girdawari* of possession for the years 1982-83. The plaintiff asserts that the said suit was absolutely false and frivolous and contained concocted averments patently contrary to the facts.

10. The learned counsel for the plaintiff pleads that without claiming their own title to the land, the said suit was not maintainable under Sections 31 and 34 of the Specific Relief Act, 1963. The plaintiff further asserts as under:

“42. That, no doubt, that the Plaintiff and the Defendant No. 14 been arrayed as the Defendants in the said civil suit, had been served with the notice thereof, however, on account of serious communication gap between the Plaintiff and the said Defendant No. 14, besides the ignorance of the procedure followed in the court of law, and ultimately, they were proceeded ex-parte.

43. That there is no gainsaying the fact that once the parties are served with the notice issued by the Hon'ble Court, then they are bound to join the proceedings and diligently pursue their interests defending their rights and interests during the proceedings besides also assisting the court for the resolution of the dispute pending before the Hon'ble Court with honestly and in all fairness. Even, in case the Hon'ble Court has proceeded the other party ex-parte, the contesting party is not absolved from discharging its onerous responsibility. However, in the present case, unfortunately, while the Plaintiff herein – being defendants had been proceeded ex-parte, the Defendants herein being the plaintiffs in the said suit have neither discharged their solemn obligation of pleading fairly nor have they disclosed the true and correct facts before the Hon'ble Court, for the reasons whereof the then Hon'ble Bench proceeded to pass the impugned judgment and the decree, which is absolutely contrary to the facts and more particularly against the documents filed and relied upon by the parties thereto.”

11. The plaintiff further claims that this Court, in passing of the impugned judgment and decree dated 30.09.2013, erred by relying upon the baseless, frivolous and concocted claims and submissions of the plaintiff in the said suit by placing reliance on the solitary entry of the years 1982-83 in *Khasra /Girdawari*.

12. It is asserted that this Court erred in relying upon the evidence led by the plaintiffs in the said suit, in passing the impugned decree and order. The plaintiff makes various assertions on why the impugned decree is incorrect on merits.

13. The plaintiff, however, admits in the Plaint that the defendant no.14 filed an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC') in the said suit, which was dismissed by this Court vide an order dated 21.03.2016. No appeal was filed by the defendant no.14 against the order dated 21.03.2016, nor any challenge against the impugned judgment and decree dated 30.09.2013 was made by the plaintiff and/or the defendant no. 2 by way of an appeal under Section 96 of the CPC.

14. I have considered the contents of the plaint and the submissions made by the learned counsel for the plaintiff.

15. It is the own case of the plaintiff that in the said suit, the plaintiff was impleaded as the defendant no.4. Though the plaintiff filed his written statement in the said suit, he thereafter chose not to appear in the suit. Accordingly, the plaintiff was proceeded *ex parte* by an order dated 02.06.2011 of the Court.

16. The *ex parte* decree, which is in challenge in the present suit, was thereafter passed in favour of the defendant nos.1 to 10 herein on

30.09.2013. The defendant no.14, who along with the plaintiff claimed to have purchased the subject land from the defendant nos.11 to 13, filed an application under Order IX Rule 13 of the CPC, seeking setting aside the *ex parte* decree dated 30.09.2013. The said application was dismissed by the Court vide its order dated 21.03.2016. The proceedings rested with such dismissal.

17. The plaintiff, inspite of the knowledge of the ex-parte decree, neither filed an application under Order IX Rule 13 of the CPC nor filed an appeal under Section 96 of the CPC. The decree, therefore, attained finality as against the plaintiff.

18. The plaintiff has now filed the present suit challenging the said decree *inter alia* claiming therein that the decree has been wrongly passed in favour of the defendant nos.1 to 10 as the defendant nos.1 to 10 had failed to show a better title to that of the plaintiff in the said suit. It is further claimed that the Court in the earlier suit had erred and had proceeded with the material irregularity in decreeing the suit without framing of issues. The learned counsel for the plaintiff further submits that the Court also erred in not appreciating that the defendant nos.1 to 10, who were the plaintiffs in the earlier suit, had failed to discharge the onus of proof placed on them.

19. I am not impressed with the above submissions.

20. In ***Bhivchandra Shankar More v. Balu Gangaram More***, (2019) 6 SCC 387, the Supreme Court held as under:

“10. A conjoint reading of Order IX Rule 13 CPC and Section 96(2) CPC indicates that the defendant who suffered an ex-parte decree has two remedies:- (i) either to file an application under Order IX Rule 13 CPC to set aside the

ex-parte decree to satisfy the court that summons were not duly served or those served, he was prevented by “sufficient cause” from appearing in the court when the suit was called for hearing; (ii) to file a regular appeal from the original decree to the first appellate court and challenge the ex-parte decree on merits.”

21. Therefore, a decree cannot ordinarily be challenged by way of an independent suit; the remedy of the plaintiff, if any, was to either seek its setting aside under Order IX Rule 13 of the CPC and / or file an appeal challenging the same.

22. In ***Saroja v. Chinnusamy (dead) by LRs and Another***, (2007) 8 SCC 329, the Supreme Court has held that an *ex parte* decree is as good and effective as a decree passed after contest on a person against whom such an *ex parte* decree has been passed, unless such a party can satisfy the Court that the *ex parte* decree has been obtained by fraud. I may quote from the judgment as under:

“13. It is well settled that an ex parte decree is binding as a decree passed after contest on the person against whom such an ex parte decree has been passed. It is equally well settled that an ex parte decree would be so treated unless the party challenging the ex parte decree satisfies the Court that such an ex parte decree has been obtained by fraud. Such being the position, we are unable to hold that Condition (iv) was not satisfied and accordingly it cannot be held that the principle of res judicata would not apply in the present case.

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15. In this connection, reference can be made to a decision of Madras High Court in

the case of Arukkani Ammal v. Guruswamy, (1987) 100 Lw 707, which was also relied on by the first appellate court. The Madras High Court in that decision observed as follows:-

"It is also difficult to appreciate the view taken by the District Munsif that ex parte decree cannot be considered to be 'full decree on merits'. A decree which is passed ex parte is as good and effective as a decree passed after contest. Before the ex parte decree is passed, the court has to hold that the averments in the plaint and the claim in the suit have been proved. It is, therefore, difficult to endorse the observation made by the Principal District Munsif that such a decree cannot be considered to be a decree passed on merits. It is undoubtedly a decree which is passed without contest; but it is only after the merits of the claim of the plaintiff have been proved to the satisfaction of the trial court, that an occasion to pass an ex parte decree can arise." (emphasis supplied).

16. *We are in full agreement with this view of the Madras High Court holding that a decree which is passed ex parte is as good and effective as a decree passed after contest. A similar view has also been expressed by a Division Bench of the Allahabad High Court in the case of Bramhanand Rai v. Dy. Director of Consolidation, Ghazipur [AIR 1987 All 100]. However, the learned counsel for the appellant relying on a decision of the Madras High Court, namely, A.S. Mani v. Udipi Hari Niwas [1996 (1) Madras Law Journal 171] invited us to hold that the principle of res judicata would not apply as the former suit was decided ex parte. This decision, in our view, is distinguishable on facts. In that decision, the observation that the ex parte decree shall not operate as res judicata was made on the basis that the earlier petition which was filed for*

eviction against the tenants was dismissed only on technical grounds, and after keeping this fact in mind only, the Madras High Court held that the ex parte decree would not operate as res judicata inasmuch as the petition was not heard and finally decided as contemplated in Section 11 of the CPC. Therefore, in our view, since condition (iv), as noted hereinbefore, was satisfied, we hold that the principles of res judicata would be applicable in the present case as held by the first appellate court and also affirmed by the High Court.”

23. In **A.C. Ananthaswamy & Others v. Boraiah (dead) by LRs** (2004) 8 SCC 588, the Supreme Court held that an ambiguous statement of fraud is not enough to set aside a decree.

24. In the present plaint, plaintiff contends that the defendants obtained the impugned decree dated 30.09.2013 by way of fraud in the following paragraphs of the plaint:

“48. That passing the impugned judgment and the decree the Hon'ble Court had gravely erred by relying upon the otherwise baseless, frivolous and concocted claims and submissions of the defendants- plaintiff therein as gospel truth, ignoring the legal and lawful title and possession of the plaintiffs - defendants therein in respect of the suit property and the duly executed and registered Sale Deed and for that matter, the Defendants No. 1 to 10 have obtained the said decree by playing fraud against the court.

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59. That, however, now, as aforesaid a bare perusal of the impugned orders read in conjunction with the facts of the case, the statutory mandate of the Delhi Land Reforms Act, as amended up-to-date and more

importantly the documents now available with the Plaintiff, it is apparent that the impugned judgement and decree, lacks judicious disposition and is thus liable to be set aside and declared as null and void having been obtained by fraud.

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66. *That the Hon'ble Court gravely erred in failing to appreciate that there is no concept of Automatic Bhumidar under the DLR Act or that of hostile possession, muchless, when the legal and lawful recorded owners in possession of the land in question have executed a duly registered Sale Deed in respect of the said land in respect of which the vendors thereto - Defendants No. 11 to 13 continues to remain the recorded owner in possession even till date and the Plaintiff is in continuous physical possession of the land in question, which the Defendants 1 to 10 are now threatening to take over forcibly in the garb of the impugned judgment and decree which apparently been obtained by fraud.*

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74. *That the facts and circumstances as truthfully disclosed hereinabove sufficiently proves that the decree has been passed by the Ld. Single Bench based on non-disclosure of relevant and material documents with a view to obtain an undue advantage before the Hon'ble Court which apparently tantamount to a fraud, and for that matter the judgment and decree obtained by fraud is to be treated as a nullity "S.P. Chengalvaraya Naidu (dead) by LRs Vs. Jaganath (dead) by LRs and Ors." (1994) 1 SCC(1)"*

25. The above pleadings cannot satisfy the test laid down by the Supreme Court for challenging a decree by way of a separate suit. Order VI Rule 4 of the CPC requires the plaint, which alleges fraud, to give particulars (with dates and items if necessary) in support of an

allegation of fraud; mere use of the word '*fraud*' in the pleadings does not meet the requirement.

26. In ***Memon Aba Isa Haji Adhreman Dharar v. Memon Mamad Hai Suleman Chamadia and Another***, 1954 SCC OnLine Guj 5, it was held as under: -

“8. As both the respondents are proved to have been served with the summons the decree cannot be set aside on the ground that the appellant intentionally put forward a false claim in the suit and obtained the decree by perjured or false evidence. See — Kadirvelu v. Kuppuswami”, AIR 1919 Mad 1044 (FB) (B), and ‘Nalini Kanta v. Hari Nikari’, AIR 1925 Cal 663 (C), which was followed in — ‘Baikuntha v. Prahlad’, AIR 1926 Cal 426 (D). See also — ‘Janki Kuar v. Lachmi Narain’, AIR 1915 All 400 (E).

9. The following passage from the judgment of James L.J., in — ‘Flower v. Lloyd’, (1879) 10 Ch D 327 (F), which has been quoted by Sadasiva Aiyar, J. in AIR 1919 Mad 1044 (B), in his order of reference to the Full Bench may be reproduced here with advantage:

“Assuming all the alleged falsehood and fraud to have been substantiated is such a suit as the present sustainable? That question would require very great consideration indeed, before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants sub-juris and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories or a misleading

production of documents or of a machine, or of a process had been given?

There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiff's had sustained on this appeal the judgment in their favour the present defendants, in their turn might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury and so the parties might go on alternately ad infinitum. There is no distinction in principle between the old common law action and the old Chancery suit and the Court ought to pause long before it establishes a precedent which would or might make, in numberless cases, judgments, supposed to be final only the commencement of a new series of actions? Perjuries, falsehoods, frauds, when detected must be punished and punished severely, but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods and frauds."

10. *The above principles apply to a decree in which the summons was duly served on the defendant and he had opportunity to defend the suit but allowed the decree to be passed by default of appearance.*

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13. *The jurisdiction of the Court to set aside a decree on the ground of fraud is well-established but as stated by Jenkins C.J. in — 'Nanda Kumar v. Ram Jiban', AIR 1914 Cal 232 (G), it has to be exercised with care and reserve. He quotes with approval the following observations of Sir John Rolt L.J. in — 'Patch v. Ward', (1867) 3 Ch App 203 (H):*

“The fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance.”

14. Devadoss J., stated the rule in the following, terms in — ‘Subhanna v. Bayamma’, AIR 1925 Mad 640 (I):

“The fraud must be extrinsic to the proceedings before the Judge. It must be in the conduct of the suit by keeping the plaintiff out of Court, by practising a fraud on him or by not serving a notice upon him or by false declaration, inducing the Court to believe that notice has been served, and proceed with the suit ex parte, or by some other act by which the defendant is prevented from placing his case before the Court.”

15. It is evident from these authorities and the decisions cited therein that the alleged fraud must lie in a deliberate attempt on the part of the plaintiff in the first suit to prevent the defendant of that suit from having notice of the suit and inducing the Court by false declarations or by other conduct to believe that notice has been properly served and to proceed ex parte under that belief. It is the plaintiff's mental approach to the suit which is material and mere proof of non-service of summons and/or falsity of the claim by themselves are not sufficient to sustain an action unless they are shown to have been intended for the purpose of effecting a general design to commit fraud.

16. But there is abundant authority for holding that where non-service is proved and it is not clear whether it was accidental or intended to prevent the defendant from appearing or contesting the suit, the merits of the plaintiff's claim in the first suit may be

looked into with a view to finding out whether the failure to serve the summons was with the object of practising fraud on the Court and thereby obtaining a decree without giving the other side a fair opportunity of being heard. 'Ram Chandra v. Firm Parbhu Lal Ram Ratan', AIR 1927 Pat 183 (J); — 'Janki Kuer v. Thakur Rai', AIR 1924 Pat 241 (K); — 'Kunjabehari v. Krishnadhane', AIR 1940 Cal 489 (L). The scope and the nature of that inquiry have defined limits which have been stated as under by Kulwant Sahay, J. in 'AIR 1927 Pat 183 (J)', as under (p. 135):

"The plaintiffs have in the first place to show that there was no service of summons or notice of the appeal or of the application for review of judgment. They have then to show that the non-service of the summons or the notices was due to a fraud practised by the plaintiff in the previous suit with the object of keeping the defendant in that suit in ignorance of the suit and of preventing him from placing his case before the Court. A decree passed by a competent Court cannot be set aside by a suit simply on the ground that the decree passed was based on a false claim, nor can a decree be set aside simply on the ground that there was no service of summons or notices. But, once it is established that there was no service of summons or notices, it is, in my opinion, open to the plaintiff in the subsequent suit to show that the claim in the previous suit was a false claim and the Court can go into the question with the object of determining as to whether there was a willful and fraudulent suppression of the notices and summons in order to obtain a decree based on a false claim by preventing

the defendant from placing his case before the Court. In other words after non-service of the summons is proved it is open to the Court to go into the question as regards the merits of the previous suit with the object of finding as to whether there was any motive for the fraud and as to whether fraud was actually perpetrated, and as to whether, if opportunity had been given to the defendant he could have produced evidence which might have led the Court to come to a different decision.”

17. *The object of the inquiry into the merits of the first suit is, therefore, not to ascertain whether the decree in the first suit was incorrect and should not have been passed. Such an inquiry is exclusively within the ambit of an appellate Court or a Court of review. In a suit for setting aside the decree on the ground of fraud it is only permissible to go into merits of the first suit with a view to ascertaining whether there was a motive for the plaintiff to suppress service of summons and fraud was actually perpetrated thereby and whether the defendant in the first suit was wilfully prevented by the plaintiff from appearing and defending the suit.*

18. *Where, however, non-service is proved and the plaintiff's claim is shown to be false, the falsity of the claim will at once raise an inference that the non-service was intentional. This rule was enunciated in some of the decisions cited above. But the falsity of the claim raises merely a presumption against the plaintiff in the first suit and if the circumstances of the case show that the plaintiff's claim was 'bona fide' and his conduct before and during the suit negatives any inference of fraud or an attempt to commit fraud, the decree cannot be set aside even if non-service of summons is proved and it is shown that if the defendant had defended the*

suit the decree against him might not possibly have been passed.”

27. In the present suit, however, but for the vague assertions in the plaint reproduced herein above, it is not the case of the plaintiff that the decree has been obtained by playing fraud upon the Court or upon the plaintiff. Admittedly, the plaintiff was duly impleaded as a defendant in the said suit, and after filing of his written statement, chose not to appear in the same. The plaintiff, therefore, cannot even plead ignorance of the said suit. The plaintiff cannot be permitted to challenge the decree passed in the said suit on the grounds that on merits such decree could not or should not have been passed; this would and could only fall in the domain of the appellate court against the decree passed in the said suit, and not within the domain of this Court, which exercises concurrent jurisdiction.

28. In view of the above and in terms of Order VII Rule 11 (d) of the CPC, the present suit is clearly barred by law.

29. Accordingly, the plaint is rejected.

30. The suit and the pending applications are dismissed.

NAVIN CHAWLA, J

DECEMBER 16, 2022/ RN

Date of Release of Order: 21.12.2022