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A.No.4596 of 2022 in C.S.No.132 of 2010

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Reserved on : 23.02.2023

Pronounced on : 03.03.2023

N.SESHASAYEE.J.,

1.1 This application is taken out by the sixth defendant in C.S.No.132 of 2010 under Order VII Rule 11 CPC, seeking rejection of the plaint. The facts leading to this case may be briefly stated :

- A certain piece of immovable property belonged to M/s.Hymavathi Constructions. It was an unregistered partnership firm. On 01.02.1996, it entered into a sale agreement with Mukanchand Bothra, the first defendant in the suit (today on his demise, his heirs have replaced him).
- To enforce the said agreement, the first defendant had laid C.S.No.205 of 1999 against M/s.Hymavathi Constructions, and had obtained an *exparte* decree on 02.09.2002.
- Few years later, the plaintiff (M/s.Hymavathi Constructions) took out an application to set aside the *exparte* decree along with an



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application in A.No.5021 of 2007 for condoning the delay of 1,765 days in filing the earlier mentioned application. On 26.02.2008, this application in A.No.5021 of 2007 was dismissed. Aggrieved by the same, they preferred an intra court appeal in O.S.A.No.441 of 2008, and that too came to be dismissed on 29.04.2009.

1.2 Subsequently, the plaintiff herein had laid the present suit, *inter alia* for declaring that the *exparte* decree for specific performance obtained by the first defendant herein (the plaintiff in C.S.No.205/1999) is null and void on the ground that (a) the first defendant herein as plaintiff in C.S.No.205/1999 had played fraud on Court; and (b) the Court had no territorial jurisdiction.

1.3 Two additional facts may also be now stated to complete the narration :

- Prior to the institution of C.S.No.205/1999, Mukandchand Bothra had instituted O.S.No.1160/1997 for bare injunction seeking to restrain the plaintiff from alienating the property. It was decreed.
- Notwithstanding the decree in O.S.No.1160/1997 prohibiting the plaintiff from alienating the property, and also the *exparte* decree



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granting specific performance in C.S.No.205/1999, the plaintiff (Hymavathi Constructions) through his Power of Attorney sold the property to a certain Kulwant Singh on 14.11.2003.

- Kulwant Singh had filed a suit both against M/s Hymavathi Constructions and the first defendant herein in C.S.No.456 of 2007, almost on identical grounds on which the present suit is laid. In addition, Kulwant Singh alleges that both the plaintiff and the first defendant in the present suit have colluded to defeat his right.

3. This is the setting in which the 6th defendant, a legal heir of the decree holder in C.S.No.205/1999, has filed the present application for rejection of plaint, on three grounds:

- (a) that the procedural option available to the plaintiff for challenging the *ex parte* decree in C.S.No.205/1999 is to invoke Order IX Rule 13 CPC or in the alternate to prefer a regular first appeal under Section 96 CPC; that the plaintiff had attempted to have the *ex parte* decree passed in C.S.No.205/1999 set aside, but had lost it right at the



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threshold stage, when his application in O.A.No.5021/2007 to condone the delay for filing it was dismissed. The next best option open to him was to file a regular first appeal under Section 96, but that was not done.

(b) While C.S.No.205/1999 was laid against the partnership firm, the present suit was laid by an individual partner of the firm.

(c) Even according to this defendant, the plaintiff herein became aware of the exparte decree in C.S.No.205/1999 on 09.06.2007, but he laid the present suit well beyond the three years time as provided under Article 59 of the Limitation Act.

4.1 The respondents/plaintiffs in their objection have essentially contended that the cause of action for the present suit is founded on an allegation of fraud played on the Court by the first defendant as plaintiff in C.S.No.205/1999, which led this Court to pass an exparte decree.

4.2 Appearing in person and opening his argument Mr.Gagan Bothra, the sixth defendant/applicant submitted:



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- The remedy open to a party aggrieved by a decree is either to file a regular first appeal, and in case of an ex parte decree, his options are either to file an application under Order IX Rule 13 CPC to have the decree set aside, or to prefer a regular first appeal under Se.96 CPC. And there is no right in him to file an independent suit for setting aside the ex parte decree passed in the earlier suit. Reliance was placed on the ratio of the Hon'ble Supreme Court in ***Bhanu Kumar Jain v. Archana Kumar & another*** [(2005) 1 SCC 787] and the judgement of the High Court of Andhra Pradesh in ***Nannuri Sathi Reddy v. Nannuri Narsi Reddy & Others*** [S.A.No.833 of 2004].
- Indeed the plaintiff in his affidavit filed in support of A.No.5021/2007 in C.S.No.205 of 1999, which he had laid for condonation of delay, had alleged that he came to know of ex parte decree passed in C.S.No.205/1999 only on 09.06.2007, but the learned Single Judge of this Court had found that the summons indeed was duly served on him on 26.04.2001. Besides, this Court in its order dated 26.02.2008 in A.No.5021/2007 had also recorded that ignoring the decree for injunction prohibiting alienation in O.S.No.1160/1997, and also the



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decree passed in C.S.No.205/1999, the property had been sold to Kulwant Singh by the defendant in C.S.No.205/1999.

- As stated earlier, while the plaintiff claims that he had obtained knowledge about the exparte decree on 09.06.2007, he laid the present suit only on 08.02.2010, well beyond three years time stipulated for the purpose.

5. Per contra, Mr.Arun Anbumani, the learned counsel for the respondent/plaintiff submitted that while as a general principle any party who had suffered a decree does not have a right to file an independent suit challenging the decree so passed, still, it is subject to an exception in that where a decree was obtained by playing fraud on the Court, an independent suit for the purpose is maintainable. Reliance was placed on the authorities of the Hon'ble Supreme Court in *Indian Bank v. Satyam Fibres (India) Pvt. Ltd.*, [(1996) 5 SCC 550] and *Ram Chandra Singh v. Savitri Devi and others* [(2003) 8 SCC 319].

6.1 The learned counsel for the plaintiff then proceeded to highlight two



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aspects of fraud alleged to have been played by the first defendant in obtaining a decree in C.S.No.205/1999. They are :

- (a) The copy of the sale agreement dated 01.02.1996 was produced by the first defendant herein as plaintiff in O.S.No.1160/1997, and the same came to be marked as Ext.B1 in C.S.No.205/1999. In the same suit, the plaintiff (1st defendant herein) had filed a certified copy of the said agreement. However, in the sale agreement which the first defendant herein had later filed in his suit for specific performance in C.S.No.205/1999, there are atleast three critical and material corrections seen made. In other words, the agreement relied on by the first defendant herein to obtain a decree for specific performance is an agreement with corrections or inter lineations, are not there in the agreement which the plaintiff had produced in O.S.No.1160/1997.
- (b) The sale consideration agreed to be paid by the defendant in C.S.No.205/1999 under the sale agreement dated 01.02.1996 was Rs.15.0 lakhs, out of which he had paid Rs.4,85,000/- under the agreement. The balance required to be paid by him was Rs.10,15,000/-. Now in the order passed in A.No.5021/2020, the



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learned Single Judge of this Court had mentioned that the suit summons in C.S.No.205/1999 was served on the defendant (plaintiff herein) on 26.04.2001. In between these two dates, the defendant herein claims to have paid a sum of Rs.9,60,000/- to the plaintiff and had obtained a dateless, handwritten receipt, on a stamp paper which appears is have been purchased on 14.12.2000. This receipt obviously is obtained after the suit, and this was introduced in evidence only on the date on which the plaintiff introduced it in evidence, and was marked as Ext.P13, on the very date on which the exparte judgment was delivered. This receipt defies logic because if only the first defendant herein could pay the sum of Rs.9,60,000/- between 04.12.2000 and 26.04.2001 (the dates on which suit summons in C.S.No.205/1999 was either attempted to be served or actually served, as the case may be), then there is hardly any need for the first defendant herein to prosecute the suit in C.S.No.205/1999, since he could have easily gone for obtaining the sale deed from a willing vendor. This document indeed is a fabrication, but this Court was made to rely on this document in C.S.No.205/1999 to grant a



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decree for specific performance. And, in the process the Court was hoodwinked and abused.

6.2. Turning to the other aspect that the defendant in C.S.No.205/1999 was M/s.Hymavathy Constructions, whereas in the present suit, the individual partner thereof is the plaintiff is concerned, the counsel for the plaintiff submitted that the business of M/s.Hymavathy Constructions has come to an end and it is now sustained only by the plaintiff herein for a very limited purpose.

7.1 The point here is whether the suit discloses a cause of action which the civil Court can take cognizance of within the meaning of Order VII Rule 11 CPC. Here the submissions made by the applicant is not without merit. Challenging the *exparte* decree, the defendant in that suit/the plaintiff herein did attempt to have it set aside, but his efforts reached nowhere near the stage where he could be heard on the cause for his non-participation under Order IX Rule 13 CPC. He could not even cross the first stage of having the delay intervened in filing the application under Order IX Rule 13 CPC condoned. And legally there is



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considerable merit in what this Court may record as an impressive performance by a party in person with no formal education in law, that the option that would be available to the present plaintiff was to go for a regular appeal under Section 96 CPC.

7.2 However, where the plaintiff herein has managed to bring in a difference to his case in seeking an exception to the general rule is that, he rests the cause of action for the suit on a certain allegation of fraud played by the first defendant on the Court in obtaining an *ex parte* decree in C.S.No.205/1999. Indeed, he was able to make a *prima facie* impression in the Court when he explained the two aspects of fraud. This aspect requires to be probed as the Court is under an obligation to examine if it was duped into doing something which it would not have, but for the fraud alleged to have been played on its process.

7.3 While considering an application for rejection of plaint under Order VII Rule 11(a) CPC., the Court is only required to read the plaint and on the supposition of the truth of the allegations made therein. If the submission of the counsel for the plaintiff herein is tested on the touchstone of this principle,



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it becomes instantly evident that he has established a triable case. Now, whether the plaintiff herein can upset the *exparte* decree obtained in C.S.No.205/1999 depends on his ability to establish the alleged acts of fraud said to have been committed by the first defendant on the Court in obtaining the *exparte* decree therein and it cannot be pre-judged at this stage.

8. While this Court is in agreement with the principles declared in the authorities which the applicant has produced, given the fact that the plaintiff has found the cause of action for the suit on fraud with appropriate pleadings, this Court does not consider it appropriate to reject the plaint at this stage. Hence, this application is dismissed. No costs.

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Pre-delivery order in
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