Gopi Krishna Vs Ram Prakash Agarwal and Others

Court: Allahabad High Court

Date of Decision: Oct. 20, 2011

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 9 Rule 13, Order 9 Rule 9, 11, 115, 151
Constitution of India, 1950 â€" Article 226, 227
Contract Act, 1872 â€" Section 17
Hindu Succession Act, 1956 â€" Section 14
Land Acquisition Act, 1894 â€" Section 17, 18, 30, 30(b), 4

Citation: (2011) 9 ADJ 751 : (2012) 115 RD 316

Hon'ble Judges: Rajiv Sharma, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Hon"ble Rajiv Sharma, J.
Heard Sri B.K. Saxena, Learned Counsel for the Petitioner, Mohd. Arif Khan, Senior Advocate, assisted by

Sri Manish Kumar, Learned Counsel for the claimants/opposite parties and Standing Counsel.

2. At the out-set, it is relevant to point out that on 12.12.2005 when this case was listed, none was present on behalf of the Petitioner to press the

writ petition. At that stage, a preliminary objection was raised by the Respondent"s counsel that writ petition is not maintainable on account of

availability of alternative remedy and his objections were also recorded in the order. Accordingly, the writ petition was dismissed. Later on,

Petitioner moved an application and shown sufficient cause for his absence in the affidavit but on 12.1.2009, when this application came up for

orders, again the Petitioner"s counsel was not present and as such the application for recall was also rejected for want of prosecution. Again Civil

Misc. Application No. 72899 of 2009 was presented for recall of aforesaid both the orders and it was indicated therein that when the application

for restoration was listed on 12.1.2009, inadvertently, it escaped attention of the Counsel for the Petitioner. As the sufficient cause has been shown

in the affidavits, the order dated 12.12.2005 shall be treated to have been recalled. Further, the Counsel for the parties consented that the case

may be decided finally. Needless to mention here that on numerous occasions, the Apex Court had reminded that the cases should be decided on

merits rather than on technicalities. It is in this background that the case was heard finally.

3. Through the instant writ petition under Article 226 of the Constitution of India, the Petitioner has assailed the judgment and order dated

20.2.2002 passed by the Nagar Mahapalika Tribunal, Lucknow/Additional District Judge, Lucknow [hereinafter referred to as "Tribunal"] in

Miscellaneous Case No. 1-C of 2001, rejecting the application of the Petitioner, purporting to be under Order IX Rule 13 read with Section 151

of the CPC and further the judgment and order dated 22.5.2000 passed by the Nagar Mahapalika Tribunal, Lucknow, allowing partly Misc. Case

No. 66 of 1999 preferred by the claimants/opposite parties, contained in Annexure Nos. 8 and 3 respectively, to this writ petition.

4. Brief facts, giving rise to the instant writ petition, are that that the property, bearing Nos. 264/1 to 53, measuring 27 Bigha, 2 Biswa, 2 Biswansi

and 19 Kachwansi to the extent of half share, situated in village Suppa Rao, Pargana Tehsil and District Lucknow, was owned by one Sri Radhey

Shyam (deceased). Shri Shyam Sunder Das was the son of Sri Radhey Shyam and Smt Janki Bibi was the widow of Shri Shyam Sunder Das,

who died during the lifetime of his father Radhey Shyam. Petitioner-Gopi Krishna was the adopted son of Shyam Sunder Das and Smt. Janki Bibi.

5. Shri Radhey Shyam made an oral Will and a family settlement was also arrived, whereby Smt. Janki Bibi acquired life time interest in the estate

including the property in question and Petitioner-Gopi Kishan became vested remainder.

6. Smt. Janki Bibi disputed the right of the Petitioner-Gopi Krishna. Petitioner filed a regular suit, bearing No. 45 of 1956, before the Civil Judge,

Mohan Lal Ganj, Lucknow, who, vide judgment and decree dated 23.4.1958, recorded findings that Gopi Krishna was adopted son of Shri

Shyam Sundar Das and Smt. Janki Bibi. Smt. Janki Bibi had only life estate interest (limited right) in the properties, which included the property

situated at Suppa Rao. The family settlement/arrangement as well as the oral Will was also upheld and Gopi Krishna was found to possess the right

as vested remainder, which could accrue to him upon the death of Smt. Janki Bibi.

7. The land measuring 27-6-4-10 situated in village Suppa Rao was acquired by the State Government for Uttar Pradesh Avas Evam Vikas

Parishad [hereinafter referred to as ''Parishad''] for the development of the Talkatora Road Scheme, Lucknow, vide notification u/s 4 of the Land

Acquisition Act [hereinafter referred to as the "Act"] dated 20.10.1962. Ultimately, notice u/s 17 of the Act was published on 30.04.1971. The

possession of the land was taken from the owner on 30.12.1971 by the Special Land Acquisition Officer and was handed over to the Parishad.

8. Petitioner-Gopi Krishna approached the Tribunal under Sections 18/30 Land Acquisition Act by filing Misc. Case No. 269 of 1983, claiming

compensation in respect of the properties acquired by the State of U.P. on the ground that he possessed legal right as a vested remainder under

the judgment and decree dated 23.4.1958. In the aforesaid case, Smt. Janki Bibi was a party and after her death Madhuri Saran and his legal heirs

were also brought on record pursuant to the Will of Janki Bibi as a legatee.

9. In the meantime, Madhuri Saran, predecessor in interest of the opposite parties, feeling aggrieved by the Award made by the Special Land

Acquisition Officer in respect of the property in question at village Suppa Rao, applied u/s 18 of the Land Acquisition Act, which was registered as

Miscellaneous Case No. 66 of 1999, before the Tribunal, praying for enhancement and payment of compensation in respect of the property i.e.

half share in Khasra Plot No. 264/1 to 53, area-27 bigha, 2 biswa, 2 biswansi and 19 Kachwansi. During the pendency of the aforesaid

proceedings, Madhuri Saran died and as such, in his place, his legal heirs were substituted. In the aforesaid case, Petitioner-Gopi Krishna was not

a party. The Tribunal, vide judgment and order dated 22.5.2000, provided that the opposite parties are entitled to receive compensation (including

enhancement) relating to the aforesaid property.

10. Pursuant to the judgment and Order dated 22.5.2000, opposite parties Nos. 1 to 4 approached the Special Land Acquisition Officer, ADM,

Land Acquisition, Parishad and took out a sum of Rs. 12,00,000/- [Rupees twelve lacs]. When the Petitioner came to the know about the ex-

parte order dated 22.5.2000, he enquired from the Special Land Acquisition Officer. Immediately thereafter, Petitioner moved an application

under Order IX Rule 13 read with Section 151 of the CPC for setting-aside the judgment and decree/Award dated 22.5.2000. The Tribunal, vide

order dated 20.2.2002, rejected the application. Feeling aggrieved, the Petitioner has preferred the instant writ petition inter alia on the grounds

that the Tribunal erred in not considering the relevant materials placed on record as well as the law placed before him where from it was

conclusively established that the opposite parties and their predecessor in interest, Sri Madhuri Saran practiced fraud upon the Tribunal and the

Petitioner by suppressing the relevant material facts relating to the legal rights of the Petitioner to receive the compensation in the limited estate of

Smt. Janki Bibi through whom the opposite parties claimed the alleged rights to receive compensation in respect of the property in question.

11. Sri Mohd. Arif Khan, Senior Advocate, appearing on behalf of the opposite party No. 3 and Sri Manish Kumar, Learned Counsel for the

opposite party No. 1 have raised a preliminary objection that the writ petition is not maintainable against the judgment and order dated 20.2.2002,

rejecting the application under Order IX Rule 13 of the CPC insofar as the Petitioner has statutory alternative remedy by preferring an Appeal u/s

54 of the Land Acquisition Act. They submit that since the writ petition has already been dismissed vide judgment and order dated 12.12.2005 on

the ground that the Petitioner has got an alternative remedy of Appeal under the Land Acquisition Act and the said order has not yet been recalled,

as the applications made by the Petitioner-Gopi Krishna (C.M. Application No. 78254 of 2008) after a lapse of more than three years was

dismissed vide order dated 12.1.2009. Moreover, the application for recall of the said order was also dismissed vide order dated 15.3.2010 and

as such, after the death of sole Petitioner-Gopi Krishna, the present application (C.M. Application No. 72888 of 2010) for recall of the order

dated 15.2.2010 filed on 18.2.2010 is not maintainable. Thus, the applications for recall made by the heirs of Gopi Krishna (deceased) are not

maintainable and are liable to be dismissed.

12. As regard the merits of the case, it has been argued on behalf of private Respondents that the application under Order IX Rule 13 of the CPC

was moved after a long expiry of limitation period. Petitioner has alleged that he was in possession over the land in question but the fact is that the

possession over the land in question was taken in the proceedings under the Land Acquisition Act on 31.12.1977. They submit that by virtue of

Section 53 of the Land Acquisition Act, the CPC apply to proceedings under Land Acquisition Act to the extent, same are not inconsistent with

the provisions of Land Acquisition Act. Meaning thereby, if remedy is provided in Land Acquisition Act, CPC will not apply. In support of his

submission, reliance has been placed upon the judgment of the Apex Court in the case of State of Uttar Pradesh Vs. Brahm Datt Sharma and

Another, wherein in para-10 of the writ petition, it was held that when the proceedings stands terminated by final disposal of the writ petition, it is

not open to the Court to reopen the proceedings by means of the miscellaneous applications as there would be confusion and chaos and finality of

proceedings/orders would cease to have any meaning.

13. Elaborating further, it has been contended that if an application made under Order IX Rule 13 is rejected, it gives right to a party to prefer

appeal under the provision of the CPC as well as Revision u/s 115 of the Code of Code of Civil Procedure. Thus, no writ petition lies, if statutory

and alternate remedy is available.

14. Elaborating his submission, Learned Counsel for the opposite parties submits that Petitioner was not an interested person and further no right

and title over land during life time of alleged adoptive mother, who was held to be a life estate holder in Civil Suit relied on by Gopi Krishna and

was held in another, as such, entitled to compensation to the exclusion of Gopi Krishna who was party to it. He submits that having ceased to

remain as an interested party after accepting Rs. 9000/- from Ikram Ahmad as compensation for the land in question, he was also not an aggrieved

person. Thus, this Court cannot entertain a writ petition in which disputed questions are as in the instant petition number of disputed questions of

facts arise and without its determination a non-right holder cannot seek remedy under Article 226 of the Constitution.

15. Sri Arif Khan has further argued that Gopi Krishna claims himself to be adopted son of Janki Bibi but the fact remains that for adoption the

consent of husband under Hindu Law as it stood then, therefore, is necessary but in the instant case, no valid consent of husband was there nor the

husband had authorised the wife to adopt any one after his death. Moreover, she had already executed a registered Will in favour of Maduri

Saran. He submits that while widow is alive, revisionisit is not entitled to any share in the compensation received by her on acquisition of property

in which she had limited estate.

16. Learned Counsel for the opposite parties has also cotended that the judgment dated 23.4.1958, which was relied upon by the Petitioner, was

decided by applying principles of estopple. So far as the admission is concerned and also the interpretation of Section 14 of the Hindu Succession

Act, both are questions of law and said finding could not operate as res judicata inasmuch as they are contrary to the settled principles of law

about the interpretation of Section 14 of the Hindu Succession Act. However, the said controversy is not relevant for the purposes of deciding the

present writ petition. So far as the findings recorded as Issue No. 1 in the said judgment based on the pleadings made in para-2 of the plaint is that

there was a custom in the family of the parties that a widow could adopt a son even in the absence of any authority of her husband and in

pursuance to this custom, Smt. Janki Bibi (Senior) adopted a son. It was held that the custom set up by the Plaintiff, namely, Gopi Krishna is not

proved, hence the issue was decided in negative. While deciding Issue No. 10, it was further held that Gopi Krishna cannot succeed as legatee of

Late Radhey Shyam. On Issue No. 11, it was held that on the allegations of the plaint, it is clear that the Plaintiff (Gopi Krishna) admits that the

Defendants, Smt. Janki Bibi (junior) has a limited interest of the properties in suit for her lifetime. Having limited interest there cannot be any doubt

that it is the Defendant herself who is entitled to receive bonds because the Plaintiff, as along as Defendant is alive, cannot be allowed to be entitled

to receive those bonds.

17. It has been urged that after acquisition of the property, the rights of Gopi Krishna if any in the property were converted into money and Smt.

Janki Bibi could very well make a Will in favour of Madhuri Saran Agarwal. Thus, Gopi Krishna (deceased) could not stake any claim on the basis

of the judgment dated 23.4.1958 in respect to the compensation awarded. He had also not filed any claim u/s 18 before the Special Land

Acquisition Officer.

18. It has also been stated by the Learned Counsel for the opposite parties that findings recorded by this Court in Civil Revision No. 91 of 1988,

decided on 3.1.1990, was challenged before the Apex Court by means of Civil Appeal No. 3871 of 1990, which was disposed of with an

observation that the observation made in the impugned judgment dated 3.1.1990 shall not be treated to have finally adjudicated upon any of the

disputed points. However, the judgment passed in civil revision No. 11 of 2009, decided on 4.3.2009, was challenged through Special Appeal to

Civil Appeal No. 11212 of 2009, which was dismissed vide judgment dated 12.5.2009, with an observation that all questions are left open and

the Court may ultimately decide the matter.

19. Refuting the aforesaid submission of Learned Counsel for the opposite parties, Sri B.K. Saxena, Learned Counsel for the Petitioner submits

that no appeal lies against the impugned order u/s 54 of the Land Acquisition Act. He submits that at the time of admission of the writ petition, the

Counsel for the opposite parties Sri H.S. Sahai, Advocate, who was appearing in the case initially, was heard on preliminary objections on

maintainability as well. However, the writ petition was admitted and interim order was passed directing the opposite parties Nos. 1 to 4 to ensure

that the payment which they have received from the Special Land Acquisition Officer, in pursuance to the award passed by the Court, shall remain

intact and till further order of this Court, the Special land Acquisition Officer, U.P. Awas Evam Vikas Parishad shall not make payment. He

submits that opposite parties have practiced fraud upon the Tribunal as well as the Land Acquisition Officer below and usurped the compensation

in respect of the acquired land, for which the opposite parties were not legally entitled to receive, nor they were the persons competent to alienate

the said land. The opposite parties were not the persons interested, as provided u/s 30(b) of the Land Acquisition Act, especially when the

opposite parties did not possess any interest in respect of the land, which was acquired and the compensation became payable in respect thereof.

He submits that in case of fraud, especially when it was practiced upon the Court below, the proceedings before the Tribunal below, at the behest

of the opposite parties or Madhuri Saran were nullity in the eyes of law. Thus, the writ petition is maintainable on this ground alone. In support of

his submission, he relied upon the judgment of the Apex Court rendered in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath

(dead) by L.Rs. and others, Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd., Budhia Swain and Others Vs. Gopinath Deb and Others,

United India Insurance Company Ltd. v. Sanjay Singh and Ors. AIR 2000 SC 1165]

20. Elaborating his submission, Sri Saxena submits that the Tribunal below rejected the application of the Petitioner moved under Order IX Rule

13 read with Section 151 of the CPC on the ground that it was not maintainable and also by sitting over the judgment passed in Regular Suit No.

45 of 1956 by the Court of Civil Judge, Mohanlalganj, Lucknow, on 23.4.1958 as a Court of Appeal ignoring the said judgment which not only

operate as res-judicata between the parties and the persons claiming through them, but also, the said judgment was held as binding on the parties

by the Division Bench of this Court in First Appeal No. 24 of 1963 Smt. Janki Bibi v. Smt. Bibi Devi] decided on 20.8.1979. He submits that in

First Appeal No. 64 of 1965 and in R.C.A. No. 20 of 1978 Ikram Ahmed v. Smt. Janki Bibi], the Court had already declared that Janki Bibi was

having Life Interest and Gopi Krishna was her validly adopted son. Furthermore, in writ petition No. 3006 (MS) of 2001, this Court held that the

Petitioner''s application under Order IX Rule 13 of the CPC was maintainable as consented and expressed by the party''s counsel. It was further

held in the writ petition that once the allegations of fraud have been made, the proper course would be to allow the Tribunal to look into the matter

and take a decision. But the Tribunal, contrary to the above, failed to look into the facts relating to fraud, pleaded and established by the Petitioner

and held that the application is not maintainable.

21. Insofar as the averments made in para-60 of the counter affidavit filed on behalf of the opposite parties Nos. 1 to 4 to the effect that the

Petitioner-Gopi Krishna accepted Rs. 9000/- from Mohd. Ikram Ahmed and Petitioner had relinquished his right of compensation with respect to

the subject matter of the land in question in favour of Ikram Ahmad, Sri Saxena submits that by the judgment and order dated 14.3.1974 passed in

R.C.A. No. 209 of 1968 Ikram Ahmed v. Janki Bibi (Junior) and Gopi Krishna], the Additional District Judge, Lucknow held that Smt. Janki Bibi

[(Junior) from whom the opposite parties claim rights on the basis of her alleged Will] accepted a sum of Rs. 9000.00 so as to discharge mortgage

debts on the basis of Mortgage Deed dated 20.1.1902 executed by the then, Janki Bibi (Senior). It was also held that Janki Bibi (Junior) had Life

Estate as already decided in Regular Suit No. 45 of 1956, which decree operates as res judicata against all parties including Ikram Ahmad.

Moreover, till date i.e. even after 36 years, none on behalf of Ikram Ahmed ever came forward to claim compensation amount.

22. Sri Saxena also argued that Petitioner is a person interested in respect of the subject matter in question and as such, the application at his

instance under Order IX Rule 13 read with Section 151 of the CPC for setting aside the ex-parte judgment in which he was not impleaded as a

party, was legally maintainable but the Tribunal has committed manifest errors of law in failing to consider and hold the same. In support of his

submission, he relied upon the judgments of the Apex Court rendered in the cases of Surajdeo Vs. Board of Revenue, U.P., Allahabad and

Others, Kewal Ram Vs. Smt. Ram Lubhai and Others, and this Court judgment in the case of Tara Shanker v. Madan Mohan Pathak and Ors.

1993 (2) ARC 156].

23. Sri Saxena further argued that principle of res-judicata, u/s 11 of the CPC are applicable insofar as findings recorded in judgment and decree

dated 23.4.1958 passed in Regular Suit No. 25 of 1956 had attained finality. He submits that even if a wrong decision is being passed by a Court

having jurisdiction, the said decision is binding between the parties till it is set-aside. In support of his submission, he relied upon the judgment of

the Apex Court rendered in the case of State of West Bengal v. Hemant Kumar Bhattacharjee and Ors. AIR 1966 SCC 1061].

24. Elaborating his submission, Sri Saxena submits that Janki Bibi''s interest is Life Estate in the acquired property and Petitioner-Gopi Krishna as

Vested Remainder. Thus, Janki Bibi did not possess right to execute a Will or transfer the property. He submits that where the widow is entitled to

life estate in accordance with law, then, upon her death, the person cannot claim title to the properties on the basis of Will executed by the widow

in her favour. In support of his submission, he relied upon the judgment of the Apex Court in the case of Mst. Karmi Vs. Amru and Others, and

Vasantiben Prahladji Nayak and Others Vs. Somnath Muljibhai Nayak and Others,

25. I have heard Learned Counsel for the parties and perused the records.

26. As lengthy arguments were advanced by the Learned Counsel for the Petitioner regarding maintainability of the writ petition against the

impugned order, this Court feels to first examine the aforesaid preliminary question.

27. From the perusal of record, it is evident that the instant writ petition was admitted on 13.3.2002. This crucial necessary fact was not brought to

the notice of the Court by the Respondent''s Counsel when the order dated 12.12.2005 was passed. Had, the Counsel brought it to the notice of

the court, there would have been no occasion for the court to pass such an order. It is a normal practice of the High Court that when the affidavits

are exchanged and the writ petitions are pending for final hearing since long, the question of maintainability of the writ petitions on account of

availability of the alternative remedy, should not be allowed to be raised. Furthermore, it is a settled law that question of maintainability of the writ

petition is to be raised at the first instance and once the writ petition is admitted, the question of maintainability of the petition goes and it cannot be

raised later on.

28. Apart from the fact that the writ petition after admission may not be thrown out, more so when it was admitted for hearing, there is also one

aspect of the matter which empowers to this Court to entertain this petition and decide the issue on merit.

29. Under Article 227 of the Constitution of India, this Court has been conferred power of superintendence over all Courts and tribunals

throughout the territories in relation to which it exercises jurisdiction. This Court may call for returns from such Courts or may make and issue

general rules and prescribe forms for regulating the practice and proceedings of such courts or issue to appropriate guidelines. Now, it is settled

that the power of ''superintendence'' conferred upon the High Court by Article 227 of the Constitution of India is not confined to administrative

superintendence only, but includes the power of judicial revision also, even where no appeal or revision lies to the High Court under the ordinary

law. [vide Waryam Singh and Another Vs. Amarnath and Another, D.N. Banerji Vs. P.R. Mukherjee and Others, Achutananda Baidya Vs.

Prafullya Kumar Gayen and others, Achutananda Baidya v. Prafullya Kumar Gayen and Others].

30. The power conferred under Article 227 of the Constitution cast a duty on the High Court to keep the inferior Courts and tribunals ''within the

bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner.'' [vide D.N. Banerji (supra].

31. Where there is grave dereliction of duty and flagrant abuse of fundamental principles of law or justice and where grave injustice would be

done, then, in such a situation, this Court must interfere in pursuance to the power conferred under Article 226/227 of the Constitution of India.

32. In the present case, it has been argued that decree has been obtained by commission of fraud, hence grave injustice shall be caused in case this

Court declined to interfere with the controversy in question.

33. From the material on record, it is established beyond doubt that Smt. Janki Bibi was the widow of Shyam Sunder, the only son of Radhey

Shyam. Smt. Janki Bibi whose husband had died during the life time of Radhey Shyam could not claim any title to his properties. The nearest heir

to Radhey Shyam was Mohanlal, who was in the line of Bandhus. Radhey Shyam had, therefore, made an oral Will which provided that Smt. Janki

Bibi was to remain in possession and enjoyment of all the properties of Radhey Shyam during her life time. It is also not disputed that Smt. Janki

Bibi was empowered to adopt a son with the consent of Mohan Lal and it was further provided under the Will that in case a son was so adopted

by Smt. Janki Bibi, the adopted son would be the owner of the properties of Radhey Shyam. The deed of adoption was executed not only by Smt.

Janki Bibi but also by Mohan Lal, who was the natural father of Gopi Krishna. At this juncture it would be useful to mention that the issue of

adoption of Gopi Krishna was the subject matter, in the Suit No. 45 of 1956; Sri Gopi Krishan v. Smt. Janki Bibi passed by the Civil Judge,

Mohanlalganj and a clear finding has been recorded, which reads as under:

In view of the observations above, I come to the conclusion that the oral and documentary evidence produced by the Plaintiff is of very convincing

nature and clearly goes to show that the Plaintiff was infact adopted by the Defendant on 16th April, 1936 after due ceremonies.

34. Counsel for the Respondents have not been able to establish that the decision rendered in the aforesaid regular suit has been reversed in any

subsequent proceedings. Therefore, the assertion of the Petitioner that the aforesaid decision is still intact, and attained finality has much force,

cannot be ignored or brushed aside.

35. It is also important to mention that question of substitution also arose in Civil Revision No. 91 of 1988; Laxmi Narain and Ors. v. State of U.P.

and Ors. which was preferred against the order dated 21.5.1988 passed by the Presiding Officer, Nagar Mahapalika Tribunal, Lucknow in Misc.

Case No. 249 of 1983. In the said case, revisionists have claimed substitution on the ground that they in law represent the estate of Smt. Janki

Bibi. This Court while dismissing the said Revision vide judgment and order dated January 3,1990 observed as under:

The revisionists have claimed substitution on the ground that they in law represent the state of Smt. Janki Bibi. It is not their case that they are

intermeddlers and are, therefore, entitled to be substituted as legal representative. As discussed above, the learned Presiding Officer of the

Mahapalika Tribunal was justified in coming to the conclusion that in the circumstances of the case Gopi Krishna is entitled to represent the estate

held by Smt. Janki Bibi and in directing Gopi Krishana on the basis of his consent, Madhuri Saran as well to be subsititued as her legal

representative.

36. So far as the application filed under Order IX Rule 13 of the CPC is concerned, the application may be maintainable when a decree is passed

ex parte against the Defendant. A decree can be said to have been passed ex parte only if the Defendant does not appear when the suit is called

on for hearing.

37. A plain reading of Order IX Rule 9 of CPC reveals that when a suit is wholly or partly dismissed under Rule 8, the Plaintiff shall be precluded

from bringing a fresh suit in respect of same cause of action. But he may apply for an order to set the dismissal aside and in case he satisfies the

Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside

the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with suit.

Order IX Rule 13 is reproduced as under:

In any case in which a decree is passedex parte against a Defendant, he mayapply to the Court by which the decreewas passed for an order to set

it aside;and if he satisfies the Court that thesummons was not duly served, or that he was prevented by any sufficient cause from appearing when

the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into

Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such Defendant only it may be set aside as against all or

any of the other Defendants also:

[Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of

summons, if it is satisfied that the Defendant had notice of the date of hearing and had sufficient time to appear and answer the Plaintiff s claim.]

[Explanation.-Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any

ground other than the ground that the Appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte

decree.]

38. From plain reading of Order IX Rule 13 is obvious that an application shall be maintainable for setting-aside the decree or restoration of the

case only in case the suit is decreed ex parte against the Defendant and in case person is not arrayed as Defendant in a suit, any application on his

behalf seems to be not maintainable [vide Mohammad Nasem Vs. Third Additional District Judge and Others, Abed Ali Vs. Prafulla Kumar Sen,

Union of India and Others Vs. Manager, M/s. Jain and Associates, B. Janakiramaiah Chetty Vs. A.K. Parthasarthi and Others,

39. However, during the pendency of the suit before the trial Court, it was open for the trial Court to add the applicant as party suo moto on the

application moved by the party concerned. Wherever there is mis-description of the party, the trial Court has a right to permit the Plaintiff to

amend the suit or add a person as party suo moto. [vide Kurapati Venkata Mallayya and Another Vs. Thondepu Ramaswami and Co. and

Another, Bishandayal and Sons v. State of U.P. and Ors., (2001) 1 SCC 555]

40. However, in the present case, applicant is not remediless at the face of record, where appears to commission of fraud and decree has been

obtained to a property without impleading the Petitioner as Defendant whose right has been settled up to Hon''ble Apex Court. Dispute is with

regards to the commission of fraud.

41. A Division Bench of this Court in writ petition No. 1377 (SB) of 2005 Manjula Pant v. Bhatkhande Music Institute and others], decided on

22.4.2009, had considered various ingredients of fraud. Relevant portion of Manjula Pant (supra) is reproduced as under:

91. Now coming to the effect of fraud, committed in passing the Board''s resolution dated 18.5.2005. In Black''s Law Dictionary, ''fraud'' has

been defined as under:

fraud. n. 1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is

usu. a tort, but in some cases (esp. when the conduct is willful)it may be a crime.

2. A misrepresentation made recklessly without belief in its truth to induce another person to act. 3. A tort arising from a knowing

misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment. 4.

Unconscionable dealing; esp., in contract law, the unconscientious use of the power arising out of the parties'' relative positions and resulting in an

unconscionable bargain.

92. In Webster''s Third New International Dictionary, the fraud in equity has been defined as an act or omission to act or concealment by which

one person obtains an advantage against conscience over and other or which equity or public policy forbids as being prejudicial to another.

93. In Concise Oxford Dictionary, ''fraud'' has been defined as a criminal deception, use of false representation to gain unjust advantage, dishonest

trick.

94. According to Halsbury''s Laws of England, a representation is deemed to have been false and therefore, a misrepresentation, if it was at the

material date false in substance and in fact.

95. Section 17 of the Contract Act defines fraud as an act committed by a party to a contract with intention to deceive another.

96. Thus from dictionary meaning and otherwise also, fraud arises out of deliberate active role of representator about a fact which he knows to be

untrue, yet he succeeds in misleading the presente by making him believe it to be true. The representation to become fraudulent must be of fact with

knowledge that it was fraud.

97. In Panjak Bhargava and another Vs. Mohinder Nath and another, Hon''ble Supreme Court observed that fraud in relation to statute must be a

colourable transaction to evade the provision of a statute.

99. According to Craies on Statute Law, 7th Edition, page 79, ""If a statute has been passed for some particular purpose, a Court of Law will not

countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond

its scope.

100. Virtually, the Vice Chancellor has committed fraud on the institute and acted deceitfully while convening the meeting of the Board of

Management on 18.5.2005.

101. Hon''ble supreme Court in a case reported in Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers, while considering the concempt of fraud on

statute observed that it relates to abuse of power or mala fide exercise of power. Their Lordships have proceeded to observe as under:

20.....It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power

may exercised for extraneous or irrelevant considerations. The colour of fraud in public law or administrative law, as it is developing, is assuming

different shades. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and

procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. That is

misrepresentation must be in relation to the conditions provided in a section on existence or non-existence of which power can be exercised.

102. In R.K. Dalmia Vs. Delhi Administration, Hon''ble Supreme Court held that if the intention with which a false document is made is to conceal

a fraudulent or dishonest act which had been previously committed, that intention could not be other than an intention to commit fraud.

103. In Ram Chandra Singh Vs. Savitri Devi and Others, Hon''ble Supreme Court while referring the earlier judgment observed that the fraudulent

act should be viewed by Courts seriously. Relevant portion from Ram Chandra Singh''s case is reproduced as under:

21. In Bigelow on Fraudulent Conveyances, at p. 1, it is stated:""If on the facts the average man would have intended wrong, that is enough.

It was further opined:

This conception of fraud (and since it is not the writer"s, he may speak of it without diffidence), steadily kept in view, will render the administration

of the law less difficult, or rather will make its administration more effective. Further, not to enlarge upon the last matter, it will do away with much

of the prevalent confusion in regard to "moral" fraud, a confusion which, in addition to other things, often causes lawyers to take refuge behind such

convenient and indeed useful but often obscure language as "fraud upon the law". What is fraud upon the law ? Fraud can be committed only

against a being capable of rights, and " fraud upon the law" darkens counsel. What is really aimed at in most cases by this obscure contrast

between moral fraud and fraud upon the law, is a contrast between fraud in the individual"s intention to commit the wrong and fraud as seen in the

obvious tendency of the act in question.

22. Recently this Court by an order dated 3.9.2003 in Ram Preeti Yadav v. U.P. Board of High School & Intermediate Education held: SCC

pp.316-317, paras 13-15

13. Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to

the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud. (See Derry v. Peek).

14. In Lazarus Estates Ltd. v. Beasley the Court of Appeal stated the law thus: (All ER p. 345 C-D) "I cannot accede to this argument for a

moment. No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a

minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is

distinctly pleaded and proved; but once it is proved it vitiates judgmens, contracts and all transactions whatsoever;

15. In S.P. Chengalvaraya Naidu v. Jagannath this Court stated that fraud avoids all judicial acts, ecclesiastical or temporal."" ""23. An act of fraud

on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render

the transaction void ab initio. Fraud and deception are synonymous."" ""26. In Shrisht Dhawan v. Shaw Bros. it has been held that: (SCC p. 553,

para 20) ""20. Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of

human conduct.

104. In Lilly Kutty Vs. Scrutiny Committee, S.C. and S.T. and Others, while reiterating the observations made in the case of Ram Chandra Singh

(supra), Hon"ble Supreme Court observed as under:

26. Yet recently in Bhaurao Dagdu Paralkar v. State of Maharashtra a Division Bench of this Court inter alia following Ram Chandra Singh and

other decisions observed: (SCC p. 614, para 15)

15[17]. "Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a

response to the conduct of the former either by words or letter.

27. In Lazarus Estates Limited v. Beasley the Court of Appeal stated the law thus: (All ER p. 345 C), I cannot accede to this argument for a

moment. No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a

minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is

distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever.

105. In Bhaurao Dagdu Paralkar Vs. State of Maharashtra and Others, Hon"ble Supreme Court observed that fraud means an intention to

deceive; whether it is from any expectation of advantage to the party himself or from ill will towards the other is immaterial.

106. In Prem Singh and Others Vs. Birbal and Others, Hon"ble Supreme Court held that fraudulent misrepresentation as regards character of a

document is void.

42. The provisions contained u/s 151 of the CPC is not a limited power. u/s 151 of Code of Civil Procedure, under the inherent power, the Court

may make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Obviously, applicants are

necessary party and their rights have been settled up to Hon"ble Apex Court. It was incumbent upon the Plaintiff to implead them as a party. By

not doing so, the action appears to be deliberate in order to get the ex parte decree against the Petitioner. In such a situation, applicants were

entitled to move either first appeal u/s 96 of CPC or would have moved an application u/s 151 of the CPC to set-aside the judgment and decree

obtained by commission of fraud.

43. An application u/s 151 of CPC can be moved to set-aside an order obtained by fraud practised upon the Court or where the Court is mislead

by a party or the Court itself commits a mistake which prejudices a party, who, is not to blame or when a pleader, not engaged by the Defendant,

consents to a decree, on behalf of the Defendant. [vide Benoy Krishna Mukerjee Vs. Mohanlal Goenka and Others, Saiyed Muhammad v. Ram

Saroop: AIR 1929 Oudh 385 (FB)].

44. In the case of Dadu Dayal Mahasabha Vs. Sukhdev Arya and Another, the Hon''ble Apex Court has held that where a party applies for

setting aside a consent decree, the Court has inherent jurisdiction to do so, on the ground of lack of consent. Relevant portion of Dadu Dayal

Mahasabha (supra) is reproduced as under:

6. The main question which requires consideration, however, is whether the trial court has jurisdiction to cancel the order permitting the withdrawal

of the suit under its inherent power, if it is ultimately satisfied that Hari Narain Swami was not the Secretary of the Appellant Society and was,

therefore, not entitled to withdraw the suit. The position is well established that a court has inherent power to correct its own proceedings when it is

satisfied that in passing a particular order it was misled by one of the parties. The principle was correctly discussed in the judgment in Sadho Saran

Rai and Others Vs. Anant Rai and Others, pointing out the distinction in cases between fraud practised upon the court and fraud practised upon a

party.

7.....The principle has been followed in this country for more than a century. In Vilakathala Raman v. Vayalil Pachu, 27 MLJR 172, the trial

court had vacated its previous order regarding satisfaction of decree on the ground that the same was obtained by the judgment debtor''s fraud on

the court. The High Court, while confirming the order, said that in the exercise of inherent power u/s 151 of the CPC a court can vacate an order

obtained by fraud on it. Reliance had been placed on an old decision of Bombay High Court of 1882 and a Madras decision of 1880. In

Basangowda Hanmantgowda Patil and Ors. v. Churchigirigowda Yogangowda and Another, ILR 34 Bom 408, the Defendant applied to the court

to set aside a compromise decree on the ground that he had not engaged the lawyer claiming to be representing him and had not authorised him to

compromise the suit. The court accepted his plea and ruled that it is the inherent power of every court to correct its own pro-ceedings when it has

been misled. Similar was the view of the Calcutta High Court in several decisions mentioned in Sadho Saran''s case (supra). The ratio has been

later fol-lowed in a string of decisions of several High Courts.

45. In the Laxicon, Sri P. Ramanatha Aiyer, 2nd Edn. (reprint), 2001, the words ?abuse of process of Court? defines as follows:

Abuse of process of Court, is the malicious and improper use of some regular legal proceedings to obtain an unfair advantage over an opponent.

Nothing short of obvious fraud on the part of a debtor would render him liable to have his petition for insolvency dismissed on the ground of

''abuse of process of Court'', Tin Va v. Subya 6 LBR 146 (FB). The term is generally used in connection with action for using some process of the

Court maliciously to the injury of another person, Per Abdur Rahim J. in Thathunaik v. Condu Reddi 5 Mad LT 248 . Abuse of process of Court

generally applies to proceeding wanting in bona fides and is frivolous, vexatious or oppressive. Making use of the process of court as a devise to

help the jurisdiction of a civil court is an abuse of the process of the court, R. Narapa Reddy Vs. Jagarlamudi Chandramouli and Others, Contempt

of Courts Act, 1952.

46. In the case reported in AIR 2004 Kar 280: MV Rajashekhar v. Smt. M.V. Rajamma (deceased by L. Rs.) and Ors. the Hon''ble Apex Court

has held that where proceedings are fraud, vexatious or want of bona fide, malicious and improper, then, it comes within the meaning of abuse of

the process of the Court.

47. Now it is settled law that judgment and order obtained by commission of fraud is nullity in law as per Manjula Pant (supra). Accordingly, the

Courts have ample power to correct its error and prevent abuse of process of Court by entertaining an application u/s 151 CPC and set-aside the

order passed on account of commission of fraud committed by a party. Plaintiff has not disclosed to the trial Court that the right and title of the

applicant have been settled up to Apex Court. Order with regard to the property in question, were appears to be obtained by deliberate

concealment of fact and commission of fraud on the part of the Plaintiff, hence an application could have been moved u/s 151 CPC for recall of the

judgment and de novo trial.

48. The Hon''ble Apex Court in the case reported in Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, held that the provisions of the

CPC are not exhaustive, hence, the Courts to secure ends of justice may pass appropriate orders by exercising inherent power conferred u/s 151

of the Code of Civil Procedure

49. The above principle has been reiterated in another case reported in Rameswar Sarkar Vs. State of West Bengal and Others,

50. In a recent case reported in Jet Ply Wood Private Ltd. and Another Vs. Madhukar Nowlakha and Others, Hon''ble Apex Court has held that

when the CPC is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act ex debito justitiae for doing real

and substantial justice between the parties. Relevant portion of Jet Ply Wood Pvt. Ltd. (Supra) is reproduced as under:

18. Mr. Singhvi urged that the owners of the property had resorted to subterfuge to wriggle out of the agreement and had misled the Respondent

No. 1 into withdrawing the suit and it is on account of such misrepresentation that the Respondent No. 1 was entitled in law to have his suit

restored.

19. Mr. Singhvi submitted that it would not be correct to contend that the Learned Trial Judge did not have the jurisdiction to withdraw the order

passed by him permitting the Respondent No. 1 to withdraw his suit. What was relevant was whether in the circumstances such a power should

have been exercised or not. Since the learned Trial Judge had chosen not to exercise such power, the High Court stepped in, in exercise of its

powers under Article 227 of the Constitution to restore the suit filed by the Respondent No. 1.

.....

.....

22. Mr. Soli J. Sorabjee, learned senior counsel for the Respondent No. 1 in the second set of appeals while adopting Mr. Singhvi"s submission,

added that since the Learned Single Judge of the Calcutta High Court had acted within his jurisdiction to do justice between the parties, the same

did not warrant any interference by this Court. Mr. Sorabjee submitted that this was not a case of the Court having acted without jurisdiction but

having acted in the exercise of its inherent powers to do justice between the parties.

25. The aforesaid position was reiterated by the learned Single Judge of the High Court in his order dated 4th February, 2005, though the language

used by him is not entirely convincing. However, the position was clarified by the learned Judge in his subsequent order dated 14th March, 2005,

in which reference has been made to a bench decision of the Calcutta High Court in the case of Rameswar Sarkar (supra) which, in our view,

correctly explains the law with regard to the inherent powers of the Court to do justice between the parties. There is no doubt in our minds that in

the absence of a specific provision in the CPC providing for the filing of an application for recalling of an order permitting withdrawal of a suit, the

provisions of Section 151 of the CPC can be resorted to in the interest of justice. The principle is well established that when the CPC is silent

regarding a procedural aspect, the inherent power of the court can come to its aid to act ex debito justitiae for doing real and substantial justice

between the parties. This Court had occasion to observe in the case of Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, as follows:

It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the

possible circumstances which may arise in future litigation and consequently for providing the procedure for them.

26. Based on the aforesaid principle, the Division Bench of the Calcutta High Court, in almost identical circumstances in Rameswar Sarkar"s case,

allowed the application for withdrawal of the suit in exercise of inherent powers u/s 151 of the Code of Civil Procedure, upon holding that when

through mistake the Plaintiff had withdrawn the suit, the Court would not be powerless to set aside the order permitting withdrawal of the suit.

51. In the instant case the Petitioner has moved an application under Order IX Rule 13 read with Section 151 of the CPC but the court while

rejecting the application has not considered the very vital fact that it would result in grave miscarriage of justice and ought to have invoked the

provisions of Section 151 of the Code to do complete justice between the parties. To do complete justice between the parties, the courts are

required to examine the entire facts as a whole and not just the prayer clause. Such a technical approach if adopted by the courts would lead to

grave miscarriage of justice. It is pertinent to add that the application was moved by the Petitioner not only under Order IX Rule 13 of the Code

but it was also u/s 151 of the Code. That being so, the court below ought to have looked into the application with this angle and would also have

taken into consideration the provisions of Order 1 Rule 10(2) of the Code. Court should have exercised power conferred by Section 151 of CPC

to record a finding with regards to commission of fraud on merit. Thus, the Court below has been failed to exercise jurisdiction vested in it u/s 151

of Code of Code of Civil Procedure

52. In view of the aforesaid discussions, the writ petition is allowed. The impugned orders are hereby set-aside. The matter is remitted to the Court

below for deciding the same afresh, after considering the observations, made hereinabove, independently without having influence by the finding

with regards to disputed question of fact.

53. Let the application be decided, expeditiously, say, within three months from the date of service of a certified copy of this order.