(2002) 06 CAL CK 0001

Calcutta High Court

Case No: C.O. No. 178 of 2000

BCL Financial Services Ltd.		APPELLANT
	Vs	
Sri Pashupati Nath Prasad and Others		RESPONDENT

Date of Decision: June 20, 2002

Acts Referred:

- Arbitration Act, 1940 - Section 17
- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 3, Order 9 Rule 13

Citation: (2002) 3 CALLT 352 : (2002) 3 CHN 265

Hon'ble Judges: Malay Kumar Basu, J

Bench: Single Bench

Advocate: Malay Ghosh, Pratik Banerjee, Paritosh Sinha, Sakya Sen, M. Bhattacharyya and Amitava Mitra, for the Appellant; Jiban Ratan Chatterjee and Abhijit Sarkar, for the Respondent

Final Decision: Allowed

Judgement

M.K. Basu, J.

This Revisional Application is directed against the order dated 4th January, 2000 passed by the learned Chief Judge, City Civil Court, Calcutta in T.S. No. 1756/94 allowing an application filed by the defendant of that suit for setting aside the compromise-decree on the ground of fraud after rejecting an application filed by the plaintiff (present petitioner) for taking evidence as to whether the alleged fraud had been committed. The said Title Suit was filed by the plaintiff, BCL Financial Services Ltd. the present revisional applicant u/s 17 of the Arbitration Act, 1940 for passing a judgment and decree upon an award of the Arbitrator. The defendant who is O.P. No. 1 of the present revisional application, Sri Pashupati Nath Prasad, had notice and knowledge of the said award of the Arbitrator but he did not file any petition for setting aside the same. After the said application u/s 17 of the Arbitration Act, 1940 was filed before the City Civil Court on June 14, 1994, a notice

was directed to be served on the defendants of the suit including the defendant No. 1 (the present O.P. No. 1) by the Court''s order dated 15th July, 1994. By its order dated 4th January, 1995 the next date was fixed on 20th May, 1995 for service return of the notice sent to the defendant No. 1 by registered post. But before that date came and the service-return of the said notice could be recorded by the Court, the defendant No. 1 having received the notice contacted the plaintiff-petitioner out of Court along with the defendant No. 3 and for the purpose of avoiding complication proposed a mutual settlement with the petitioner, so that the award could be modified. Thereafter, the parties arrived at an amicable settlement and on the basis thereof a petition of compromise was prepared incorporating therein the terms of the settlement. Thereafter a joint petition was made by the parties before the Court for passing a decree in terms of that compromise and the defendant No. 1 not only signed the terms of the settlement but also affirmed an affidavit in support of that joint petition. Thereafter, another petition was filed before the Court for an order for putting up that petition with the records of the concerned suit and for passing necessary orders on the said petition, since it was being filed well ahead of the date fixed. The learned Chief Judge, City Civil Court, Calcutta allowed that petition and when the records of the case were placed before him heard the learned advocates, perused the records and found the compromise to be legal, valid and sufficient and then ordered the suit to be decreed on compromise by its order No. 4 dated 8th February, 1995. The defendant No. 1 accepted the said compromise-decree under the terms of which he was to pay a sum of Rs. 3,73,250/- in thirty-five (35) equal monthly installments commencing from January 15, 1995, each monthly installment amounting to Rs. 10,750/-. But the defendant No. 1 again defaulted in making payment of the said installments so that as per terms of the compromise the plaintiff-petitioner obtained possession of the concerned vehicle on 8th October, 1995 with the help of the local police. Thereafter, the defendant No. 1 filed an application under Order 9 Rule 13 Code of Civil Procedure, 1908 before the City Civil Court for setting aside that decree on the ground that it was an ex-parte decree passed to his ignorance and he also filed another petition under Order 23 Rule 3, Code of Civil Procedure, 1908 praying for setting aside the compromise-decree on the allegation that it had been procured by exercising fraud. The learned Chief Judge, City Civil Court after hearing that petition under Order 23 Rule 3 Code of Civil Procedure, 1908 dismissed it summarily. There against the defendant No. 1 preferred a revisional application before this High Court and a single Bench of this Court (S. Banerjee, J.) by his order dated March 12, 1998 set aside that order of dismissal and directed the Court below to dispose of the application under Order 23 Rule 3 expeditiously in accordance with law within four months from the date of communication of the order. This order of the Hon''ble High Court was filed before the Court below on 12th May, 1998 (vide order No. 21 of that date), but no copy of the petition whereby the order was communicated to the Court below and a date was fixed by the Court below for its hearing was served on this petitioner and so, on the date fixed for hearing of this petition this petitioner could not appear and the

said application under Order 23 Rule 3 Code of Civil Procedure, 1908 of the defendant No. 1 was allowed ex-parte by order No. 26 dated 23rd June, 1998. The defendant No. 1-applicant examined his witness but due to the absence of this petitioner he was not cross-examined and an ex-parte order was passed by the Court on that application under Order 23 Rule 3 Code of Civil Procedure, 1908. Later, this petitioner having come to know of such an ex-parte order applied u/s 114 read with Section 151 of the Code for recalling the said order dated June 23, 1998 and that petition was allowed by the Court by its order dated 26th August, 1998 and as a result, the said application under Order 23 Rule 3 Code of Civil Procedure, 1908 was revived and was to be heard. In this way the application could not be heard within the period fixed by the Hon''ble High Court, that is, four months from the date of communication of the order and because of pre-occupation of the trial Court with various matters more than a year elapsed without the matter being heard. Ultimately the matter was fixed on 7th September, 1999 for hearing. In that date the defendant No. 1 failed to appear personally and a prayer for adjournment was filed on his behalf to enable him to adduce evidence, but that application was rejected by the Court and thereafter by the next order of the same date the Court in view of absence of the defendant No. 1 rejected the petition under Order 23 Rule 3 Code of Civil Procedure, 1908 (vide order No. 45 and 46 dated 7th September, 1999). The defendant No. 1 preferred a revisional application against the order before the High Court and a single Bench of this Court (B. Bhattacharyya, J.) set aside the said order dated 7.7.1999 directing the Court below to give one more chance to the said defendant No. 1-OP to adduce his evidence and if he does not appear or adduce any evidence, then the Court could proceed in accordance with law. The trial Court was further directed to dispose of the petition under Order 23 Rule 3 in question within the 1st week of January 2000 positively. Ultimately, on 4th January, 2000 the matter was taken up for hearing by the trial Court, namely, the learned Chief Judge, City Civil Court and on that date the plaintiff (the present petitioner) made a prayer before that Court for deciding the matter after taking evidence from the parties on the ground that without such evidence it was difficult for the Court to ascertain whether the compromise-decree had been fraudulently obtained as alleged. But the learned Court without paying any heed to that reasoning of this petitioner rejected that prayer and passed the impugned order allowing the application under Order 23 Rule 3 Code of Civil Procedure, 1908 filed by the defendant No. 1 OP. after arriving at a finding that the compromise-decree had been obtained by the plaintiff-petitioner by exercising fraud without giving an opportunity to the parties to adduce their respective evidence in the matter.

2. Being aggrieved by that order the plaintiff-petitioner has preferred the present revisional application challenging the said order as erroneous and unjustified and liable to be set aside.

3. It has been contended by the petitioner that the observation of the Court below to the effect that no evidence was required in this case to prove the allegation of

fraud because fraud was ex-facie evident from the records is totally unfounded and unacceptable. According to the petitioner, further the findings of the Court below are strange that since the parties resided in different states, it would take a long time to take their evidence and since there was no direction given by the Hon''ble High Court to take any such evidence from the parties and in view of the fact that the Hon''ble High Court had directed the trial Court to dispose of the matter within the 1st week of January, 2000, the learned Judge did not consider it proper to allow the parties to adduce their evidence on the alleged story of fraud because thereby the date of hearing would be shifted beyond the date prescribed by the Hon''ble High Court for disposal of the matter.

4. The O.P. No. 1 Pashupati Nath Prasad, has contested this revisional application by filing an affidavit-in-opposition wherein he has denied the material allegations levelled in the petition. His contention is that when he went to take delivery of the vehicle in question from the petitioner, the latter took a number of signatures from him on blank, printed papers on the false pretext that those papers would be required in filing an application of withdrawal of the case which was pending before the Court having been filed by the plaintiff against him due to his failure to pay the money in time. According to the O.P. No. 1 the petitioner has utilised those signed blank papers in preparing the false and fraudulent compromise petition which was never to his knowledge.

5. The facts of the case of the defendant No. 1-OP as made out in his application under Order 23 Rule 3 Code of Civil Procedure, 1908 was that he being desirous of purchasing a Tata Truck for the purpose of plying it commercially approached the M/s. BCL Financial Services Ltd. (present petitioner) for necessary finance to purchase such a vehicle. Finance was provided by this company to him, as a condition precedent to the grant of such finance they obtained his signatures on a number of blank documents and blank papers which were to be converted subsequently into a hire purchase agreement. It was agreed that a sum of Rs. 4,61,000/- including all interests payable thereon was to be paid by the O.P.-plaintiff-petitioner in thirty-five (35) installments. The O.P. initially paid a sum of Rs. 1,51,000/ - and subsequently from time to time paid a total sum of Rs. 5,08,000/-. After making such a payment he went to the financier-company in July 1994 and requested it to execute a registered Deed of ownership in his favour. At that the financier company asked him to pay a further sum of Rs. 1,00,000 (One lakh) on account of interest for delayed payment. In this way he was compelled to pay an additional sum of Rs. 87,400/-. Thereafter he again requested the company to execute and register an appropriate Deed of ownership in his favour as per the terms of the agreement, but the company pleaded is inability to do that until withdrawal of the Court case which had already been filed by them against him and which was pending and they asked him to sign some blank papers on the plea that those papers would be utilised for preparing the application for withdrawal of the said Court case. The O.P. in good faith relying on the words of the petitioner put his

signature on some blank papers. Thereafter, on 8th October, 1995 some men of the financier petitioner appeared at the place of the O.P. and seized the vehicle in question which was then in his possession and deposited the same with the local police at Chickpani Police Station under Bihar. He then filed an application before the High Court at Patna against the petitioner and the petitioner appeared in that Court in connection with that case when they disclosed that a case was pending in the City Civil Court, in connection with this matter and then being advised by his counsel the O.P. withdrew that case from the Patna High Court and after causing some enquiries in the City Civil Court, Calcutta came to know that the financier-petitioner after having initiated a legal proceeding there got the same disposed of on compromise unilaterally to his ignorance by using and utilising the said blank, signed papers and by converting them into compromise-petition and also by engaging an advocate of his group by delivering a false and forged vokalatnama and thereafter managed to obtain a compromise decree by exercising fraud upon the Court. He was never served with any summons or notice of any such case filed by the financier-petitioner against him. Hence he filed this application under Order 23 Rule 3 Code of Civil Procedure, 1908 for setting aside the false and fraudulent decree of compromise dated 8.2.1995 of the City Civil Court passed in T.S. No. 1756/1994 which cannot be binding upon him.

6. This application under Order 23 Rule 3 Code of Civil Procedure, 1908 was contested by the financier company-plaintiff-petitioner by filing a written objection. All the material allegations levelled in the said application were denied by them. It was alleged that since some disputes and differences arose between the parties, in terms of the arbitration agreement executed between them those were referred to Arbitration and the learned Arbitrator on September 3, 1993 made and published his award to the knowledge of the O.P. Thereafter, the company-decree-holder instituted the said Title Suit (T.S. No. 1756/94) before the Court of Chief Judge, City Civil Court for obtaining judgment and decree in terms of the award. During pendency of that Title Suit the petitioner approached the plaintiff-company for setting the disputes mutually and amicably and pursuant to such an approach made by the O.P. the terms of settlement were entered into between them on February 7, 1995 and on the basis thereof a joint application was filed before the Court praying for disposal of the Title Suit in terms of the compromise. The joint petition was duly signed by the O.P. and also affirmed by him. The learned Judge, City Civil Court by his judgment and order dated February 8, 1995 found these terms of settlement as legal, valid and sufficient and he also found that the compromise petition had been signed by the parties to the suit and by their advocates on record and accordingly he allowed the joint petition and decreed the suit on compromise in terms of that compromise-petition.

7. The learned Chief Judge, City Civil Court in his impugned order dated 4.1.2000 has come to the finding that fraud as alleged in the instant case is apparent on the face of the record. The cause of his coming to such a finding is as follows. "The plaintiff

filed the suit for passing a judgment and decree on the basis of the award published on 3rd September, 1993 and also for issuance of notice u/s 14(2) of the Act and instead of that made prayer of putting up the record before any order was passed regarding service of notice and thereafter filed a compromise petition and in this way the suit was managed to be compromised. If really there was any settlement between the parties and if really compromise was affected of such settlement then there was no earthly reason for the petitioner to get an order on a day when the suit was not fixed for any hearing or order and before the service of notice u/s 14(2) of the Act which the plaintiff prayed for in the suit itself." Thus what prompted him to accept the allegation of fraud is the mere fact that the compromise-petition was put up on a date which was not a fixed one and which was far ahead of the date fixed for the purpose of service return of the summons that had been already issued by post. According to the learned Judge, such haste with which the compromise-petition, alleged to be a joint one, had been filed without waiting for the fixed date to come and without enabling the Court to ascertain the receipt of notice by the defendant No. 1 was enough for him to take it for granted that the compromise petition was filed by the plaintiff-petitioner alone without the knowledge of the defendant with a view to obtaining a compromise-decree fraudulently to his (plaintiffs) favour. The second reason that led the Court to come to this conclusion is the probability that the vehicle in question being in possession of the defendant No. 1 (applicant before him) who was plying it commercially as a hirer, there could not be any reason at all for him to rush to the Court with the plaintiff with which a compromise-petition even before he got a notice of the suit u/s 14(2) of the Arbitration Act. Besides these two circumstances or probabilities, there is nothing within the four corners of the said judgment which can be said to have formed the basis of the reasoning of the learned trial Judge in support of the finding arrived at by him that the compromise decree was the product of fraudulent design of the plaintiff-company.

8. It has been argued by Mr. Ghosh that here on the part of the Court suspicion has taken the place of proof. According to him, finding that particular compromise-decree which had been passed by the same Court after recording its satisfaction that it had been filed by both the parties and its terms were legal, valid and sufficient, has been obtained fraudulently after exercising fraud upon the Court is fraught with serious consequences. Mr. Ghosh contends that it is curious that the learned trial Judge has arrived at such a finding without caring to take evidence on the basis of a circumstances which do not lead to such a conclusion unerringly or conclusively. He points out that the judgment and order passed by the learned Predecessor-in-office of the learned trial Judge (who passed the impugned order) after verifying that all the parties had signed the joint compromise-petition and they were being represented before that Court by their empowered advocates whose signatures had been also put thereon and such compromise-petition had been accompanied by affidavits filed by the concerned parties was so easily thrown aside

by the learned trial Judge and in arriving at his finding he did not care to examine the said advocates whose signatures had been put on the said compromise-petition of the said affidavits sworn by the parties in support of such a petition. According to Mr. Ghosh had the learned Judge held an enquiry, then he could ascertain that O.P., Pashupati Nath Prasad, had participated in the preparation of the said compromise-petition the terms of which were in his knowledge. It is the further submission of Mr. Ghosh that the constituted attorney of the petitioner-company named Pranjit Majumdar who sworned an affidavit in support of the compromise-petition was identified by the learned advocate, Mr. D. Roy and in order to properly adjudicate upon the allegations that the said compromise-petition was fraudulently obtained, the Court ought to have examined these signatories to arrive at the truth. Mr. Ghosh also draws my attention to the annexure ''D'', that is, the receipts which were granted by the petitioner-company in favour of the O.P. after receiving the money due from him in installments wherefrom it would be seen that the contents of the said Receipts tally with the terms of settlement as entered into the impugned compromise-petition. The further contention of Mr. Ghosh is that the allegations levelled by the O.P. against the petitioner that he has practised fraud in preparing and filing the said compromise petition cannot be tenable under the law since they are devoid of the necessary particulars constituting such alleged fraud. Secondly, according to him, even if such particulars of the alleged fraud are furnished, it remains a duty of the trial Court to adjudicate upon such allegations on the basis of clear and cogent evidence.

9. In support of his contentions Mr. Ghosh refers to a number of reported decisions of the apex Court. Thus he refers to 28 CWN 327 Chatterjee v. Kumar Satish Kanta and Ors.) wherein the Privy Council held that charges of fraud and conclusion must be proved by those who make them--proved by established facts or inferences legitimately drawn from those facts taken together as a whole and suspicions and surmises and conjectures are not permissible substitutes for those facts or those inferences and if these were not so, many a clever and dexterous knave would escape. Mr. Ghosh next cites Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath, wherein a Five-Judge-Bench of the Apex Court held that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid and there can be no departure from them in evidence. The third ruling relied on by Mr. Ghosh is reported in Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd., wherein a Division Bench of the Apex Court has held that in a case where fraud has been alleged to have been committed by a party upon the Court, the Court is obliged to decide the question regarding such fraud by recording evidence since forgery and fraud are essentially matters of evidence which can be proved as a fact by direct evidence or by inferences drawn from proved facts. In these judgments Their Lordships relied upon the principle that has been enunciated in the above-mentioned Privy Council decision of the Apex Court in (S.C. Chatterjee v. Kumar S.K. Roy).

10. In the instant case, it cannot be denied that these enunciated principles have been utterly violated by the learned Judge who did not have the patience to wait for sufficient materials to come and to properly inquire into such a serious allegation. On the contrary, he appears to have toyed with the same by drawing his conclusion in hot haste on the basis of conjectures and surmises--a course which the Apex Court and the High Court have discarded and prohibited again and again. It is not understood how the learned Judge, with his seniority and experience could over simplify the task and come to the finding that the allegation of fraud had been established simply in view of some mere probabilities that the petition for compromise had been filed far ahead of the date which was fixed for service-return of the notice and that the defendant-O.P., being in possession of the vehicle in dispute was not likely to rush to the Court so hurriedly to oblige the plaintiff by filing such a compromise-petition. He did not care to verify whether the signature of the advocate named Sri C.K. Goon appearing on the impugned compromise petition allegedly representing the O.P. was genuine or not by holding an appropriate inquiry and by examining that alleged advocate, Mr. Goon, or the other deponents who swore the affidavits accompanying the compromise petition in question on behalf of the plaintiff company or the O.P. He did not also care to verify the truth or falsity of the allegation of the O.P. that he had been compelled by the plaintiff-petitioner to put his signatures on certain blank papers or blank printed forms beforehand and subsequently the plaintiff utilised those signed papers in preparing the impugned compromise petition in order to make wrongful gain. The probabilities relied upon by the learned trial Judge cannot be taken as conclusive by themselves. It cannot be said with any degree of certainty that the reverse cannot come true or be probable. Human conduct cannot admit of any rigidly fixed omnibus formula and it may vary from individual to individual depending on the exigencies of the situation arising in case of each. That is why it may sometimes become dangerous to rely on such probabilities alone unaccompanied by evidence.

11. The contention that the learned Judge has allowed suspicion to take the place of proof can hardly be brushed aside. In order to adjudicate upon such a serious allegation properly he ought to have given an opportunity to the parties particularly the defendant-O.P., who brought the charge of fraud, to adduce evidence in discharge of his onus of proof. In the impugned judgment it has been observed by the learnd Judge that the plaintiff company had sought such an opportunity, but not the defendant and since the defendant who filed the petition under Order 23 Rule 3 Code of Civil Procedure, 1908 for setting aside the compromise-decree on the ground that it was obtained by fraud did not seek any such opportunity to lead evidence on this, although it was his onus to prove the charge, there was no point in allowing the plaintiffs petition giving him a chance to adduce evidence. Such a view of the learned Judge was not justified. It was in the interest of proper adjudication that he ought to have suo motu directed the parties to place all the cards before the table to enable him to determine the question and arrive at the truth.

12. It will be interesting to notice another disconcerting feature in the judgment of the Court below. The learned trial Judge considered it inexpedient to take evidence at that stage for the further reason that as per the direction of the High Court he was to dispose of the matter within a specified date, viz., the first week of January, 2000, but granting of such an opportunity to the parties would lead them to consume further time taking the hearing beyond the cut-off date. It seems, the learned Judge was being more concerned with his personal anxiety that he would be failing to comply with the High Court''s order within the specified date and the consequences of such failure than with any urge for doing real justice to the litigant parties. The question is why the learned Judge did not become alert to such a necessity at the right moment just after receiving such direction of the High Court when he could have enough time at his disposal to take such evidence from the parties completely. When he woke up, time had run out, but even then even at that juncture he was not without a remedy and he might very well seek Hon''ble Court''s permission to extend the time for this purpose in the interest of justice and fair play. But the learned Judge preferred to sacrifice them at the altar of some considerations extraneous to such principles.

13. Be that as it may, it goes without saying that in case of this nature, without examining the material witnesses or without scrutinising the vital documents it would be risky on the part of a Court to take a decision over the allegation that the compromise-decree which was apparently jointly filed alleged and which was accept ed by the Court after verifying its contents was fraudulently obtained by the plaintiff after practising fraud on the Court to the ignorance of the defendant. Therefore, the hearing of the petition under Order 23 Rule 3 Code of Civil Procedure, 1908 should be held afresh by the trial Court.

14. In view of the foregoing reasons the revisional applications be allowed, but in the circumstances, without any cost. The impugned order of the Court below be set aside. The case be remanded to the trial Court for fresh hearing and disposal of the petition under Order 23 Rule 3 Code of Civil Procedure, 1908 in accordance with law after giving the parties an opportunity to adduce their evidence. Be it made clear that I have not entered into the merits of the case and the learned Judge while disposing of the matter afresh shall not be influenced by any of my findings above so far as its merits are concerned.

Since the matter has been old, the Court below is directed to dispose of it as expeditiously as possible preferably within a period of four months from the date of communication of this order.

Sent down the LCR to the Court below at once.