

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

Reserved on: 5th August, 2011

% Date of decision: 19th September, 2011

+ **FAO(OS) 502/2009**

LT. COL S.D. SURIEAppellant

Through: Mr. Ashok Sethi, Advocate.

-versus-

PARAMOUNT ENTERPRISES AND ORS.Respondents

Through: Mr. B. Mohan and Mr. Shant
Kumar Jain, Advocates.

**HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL**

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. The present Appeal assails the order dated 8th September, 2009 passed by the learned Single Judge. By the impugned order, the learned Single Judge disposed of an interim

application captioned as I.A. No.3697/2009 in CS (OS) 788/1993.

2. This interim application was filed by the Defendants No.1 to 8/Respondents herein (hereafter referred to as Defendants 1 to 8) under Section 151 of the Code of Civil Procedure (CPC), 1908 for the purpose of recalling the order dated 8th April, 2008 passed by this Court.

3. Brief facts leading upto the filing of the present Appeal are as follows:-

- (a) The Appellant filed a Suit for Declaration claiming that the alienation and sale certificate of property No.6, Amrita Shergil Marg, New Delhi (suit property), as void, illegal and ineffective qua 1/3rd share of the Appellant as the same does not belong to the Respondents.
- (b) The Appellant claims the suit property to be built by his father and subsequently rented out to one Sh. B.M. Patel.
- (c) The Appellant's father died in the year 1972 and pursuant thereto the Appellant and his two brothers

initiated a Suit for Eviction against the tenant, the aforesaid B.M. Patel.

- (d) The father of the Appellant left behind a Will which was duly probated by this Court's order dated 29th February, 1980. The effect of granting of probate was entitling the Appellant to be the owner of 1/3rd share in the suit property. However, the Probate Court while granting probate directed the auction of the suit property through a Court Auctioneer so as to enable the division of property according to Will. The Appellant asserted in the suit that the Probate Court lacked jurisdiction to pass such an order and that too by relying upon facts which were wholly misrepresented and fabricated.
- (e) In that situation, the Appellant filed an interim application captioned as I.A. No.516/1994 under Order VI Rule 17 CPC praying for permission of the Court to allow amendment of the Appellant so as to incorporate the alternate relief of partition.
- (f) I.A. No.516/1994 came to be allowed by the Court vide order dated 26th May, 2006. The said order

dated 26th May, 2006 required the Appellant to file the Amended Plaintiff within two weeks of passing of the said order and thereafter the Defendant Nos.1 to 8 were directed to file their Written Statement to the amended plaintiff within four weeks. The matter was thereafter adjourned from time to time.

(g) In the meanwhile, the Court directed impleadment of Defendant No.9 vide order dated 19th January, 2007 and consequently permitted the Appellant to file Amended Memo of Parties as well as Amended Plaintiff within one week. The said order dated 19th January, 2007 also directed the Defendant Nos.1 to 8 to file their Written Statement within eight weeks thereafter.

(h) On 2nd February, 2007 the Court corrected a typographical error in the order dated 19th January, 2007 and summons were issued to Defendant No.9.

(i) The matter came to be listed before the Joint Registrar on the 30th April, 2007 wherein it was noted that the Amended Written Statement (i.e. Written Statement to the Amended Plaintiff) on behalf

of Defendant Nos.1 to 8 was not on record and, therefore, if the Defendants required to file the same, leave had to be sought from the Court on account of delay in filing the Amended Written Statement.

- (j) On the 14th May, 2007, counsel for the Defendant Nos.1 to 8 submitted that the Amended Written Statement could not be filed for want of instructions from the clients. Thereafter, the matter was adjourned on several occasions.
- (k) However, when the matter came to be considered on the 8th April, 2008, the learned Single Judge observed that Defendant Nos.1 to 8 were in possession of a copy of the amended plaint since 8th February, 2007 and yet no Amended Written Statement had been filed on their behalf. On the same date, the learned Single Judge after due consideration of the purported reasons supplied by the Defendants for non-filing of Amended Written Statement, closed the right of the defendants to file the Amended Written Statement.

- (l) Defendants Nos.1 to 8 were informed of the order dated 8th April, 2008 by their counsel through letter dated 22nd April, 2008.
- (m) On the 13th March, 2009 the Defendants filed I.A. No.3697/2009 under Section 151 of CPC for recalling the order dated 8th April, 2008. The disposal of I.A. No.3697/2009 by the learned Single Judge vide Order dated 8th September, 2009 is the order impugned before us.
- (n) The contentions raised by the Defendant No.1 to 8 in the said I.A. primarily rested upon the facts that there had been a delay of eight months on behalf of the Appellant in filing the amended plaint. Defendant No.1 to 8 also sought to explain the reasons for delay in non-filing of the Amended Written Statement within the requisite time frame as prescribed by this Court. The Defendant No.1 to 8 contended that due to the pendency of the suit for a long time and subsequent changes in the management of the Defendants as well as the change in the counsel appearing, the delay occurred

in filing of the Amended Written Statement. The Appellant objected to the application on the ground that it was hopelessly time barred and the order dated 8th April, 2008 was a well reasoned order and hence requires no interference. The Appellant also challenged the maintainability of the application under Section 151 of the CPC thereby invoking inherent powers of the Court in assailing an order striking of the defence, which is an appealable order under Order XLIII CPC.

4. Counsel appearing on behalf of the Appellant relied on the following case law:-

- (i) ***Shah Babulal Khimji -vs- Jayaben D. Kania & Anr., AIR 1981 SC 1786.***
- (ii) ***Swadeshi Polytax Ltd. -vs- V.K. Goel & Ors., AIR 1987 DELHI 260.***
- (iii) ***State of U.P. -vs- Roshan Singh, AIR 2008 SC 1190.***

5. On the other hand, Defendants 1 to 8 relied on the following decisions:-

- (i) ***AIR 1977 SC 1348, M/s. Jaipur Mineral Development Syndicate -vs- C.I.T.***
- (ii) ***38 (1989) DLT 129, Arvind Construction Co. & Ors. -vs- UOI & Ors.***
- (iii) ***R.D. Extrusions -vs- Haryana State Electricity Board, (2005) 12 SCC 346.***

- (iv) ***Rupa Ashok Hurra -vs- Ashok Hurra & Anr., 2002 (3) SCALE 406.***
- (v) ***1993 Supp. (4) SCC 596, M. Shankaraiah & Anr. -vs- State of Karnataka & Ors.***

6. Before proceeding further it would be relevant to extract the order dated 8th April, 2008 which was recalled by the impugned order. The said order reads as follows:-

“Vide order dated 26th May, 2006, the application filed by the plaintiff seeking amendment of the plaint was allowed, subject to costs of Rs.2000/-. However, written statement to the amended plaint has not been filed by the defendants till date.

Vide order dated 19th January, 2007, defendants No.1 to 8 were directed to file their written statement to the amended plaint within eight weeks. Vide order dated 14th May, 2007, it was recorded on behalf of the defendants No.1 to 8 that the written statement to the amended plaint could not be filed for want of instructions from his client. Counsel for the defendants No.1 to 8 was directed to place on record the notice issued by him to the Defendants No.1 to 8. The said notice has not been placed on the record till date.

There is no justification for granting further time to the defendants No.1 to 8 to file their written statement to the amended plaint. Accordingly the right of the defendants No.1 to 8 to file written statement to the amended plaint is closed.”

7. It is also relevant to observe that the learned Single Judge after considering the decisions in ***Shah Babulal Khimji (supra)*** and ***Swadeshi Polytax Ltd. (supra)***, cited on behalf of the Appellant, came to the conclusion “*that the order dated*

8th April, 2008 is an appealable order but the Defendants No.1 to 8 have failed to challenge the same.” However, after considering the decisions in **Roshan Singh’s (supra)**, a case cited on behalf of the Appellant, the learned Single Judge in the impugned order held that *“this Court is of the view that each case under the present situation shall be judged upon its own peculiar circumstances. By not allowing the present application it would affect the rights of the Defendants directly, insofar as if they are not permitted to file the amended written statement, their interests will be severely affected. Also this Court has power to allow such an application by virtue of its inherent powers under Section 151 of the CPC.”*

8. In view of the above, the learned Single Judge allowed the application and permitted the Defendants No.1 to 8 to file the Amended Written Statement. The issue that arises before us is whether the inherent jurisdiction of the Court under Section 151 of the CPC can be exercised when a party has a remedy by way of an Appeal and has neglected to avail himself of the same.

9. In order to determine this issue it is necessary *inter alia* to refer to the decisions relied upon by the respective parties in this behalf.

10. In support of their contention that Section 151 of the CPC could be invoked to recall the order dated 8th April, 2008, the Defendants No.1 to 8 first relied on the decision in ***M/s. Jaipur Mineral Development Syndicate (supra)***. In that matter the High Court had declined to answer the reference for non-appearance on behalf of the Petitioner. The Supreme Court held that there was nothing in any of the provisions of the Income Tax Act which either expressly or by necessary implication stood in the way of the High Court from passing an order for disposal of the reference on merits and that since the reference was dismissed on account of non-appearance of a party, the exercise of Section 151 CPC to recall the order by the High Court was permissible. This judgment does not come to the aid of the Defendants since it does not deal with the issue before us.

11. Next the Defendants 1 to 8 relied upon the decision of a Single Judge of this Court in ***Arvind Construction Co. & Ors. (supra)***. However, in this matter the issue before the Court was that in respect of Section 35 B of the CPC, no specific provision has been made thereby permitting the defaulting party to move an application. Therefore, it was held that

Section 151 of the CPC would be attracted and if the Court is satisfied that there was sufficient cause for the defaulting party for not paying the costs on the date fixed, the Court under its inherent jurisdiction could recall the order, and under Section 148 of the CPC, enlarge the time for making the payment. This decision also does not assist the case of the Defendants 1 to 8, insofar as, in this case there was no provision available for the party to seek a recourse for redressal and, therefore, the inherent powers under Section 151 of CPC were held to be exercisable.

12. The next is decision of the Supreme Court in ***R.D. Extrusions (supra)***. With utmost respect, we note that the order does not lay down any law with regard to the issue at hand and the Supreme Court merely issued directions to provide relief to a party aggrieved by recall in the facts of that case.

13. The Defendants 1 to 8 next relied on ***Rupa Ashok Hurra (supra)***. This decision of the Supreme Court was passed on a Curative Petition and upheld the powers of the Hon'ble Supreme Court to review its own judgment in extraordinary

circumstances in order to prevent abuse of its process and to cure gross miscarriage of justice.

14. On behalf of the Appellant reliance was placed on the decision in ***Roshan Singh's (supra)*** case where the Supreme Court in Paragraph 7 of the report observed as follows:-

“7. The principles which regulate the exercise of inherent powers by a court have been highlighted in many cases. In matters with which the CPC does not deal with, the Court will exercise its inherent power to do justice between the parties which is warranted under the circumstances and which the necessities of the case require. If there are specific provisions of the CPC dealing with the particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter, the inherent powers of the Court cannot be invoked in order to cut across the powers conferred by the CPC. The inherent powers of the Court are not to be used for the benefit of a litigant who has remedy under the CPC. Similar is the position vis-à-vis other statutes. The object of Section 151, CPC is to supplement and not to replace the remedies provided for in the CPC. Section 151, CPC will not be available when there is alternative remedy and same is accepted to be a well-settled ratio of law. The operative field of power being thus restricted, the same cannot be risen to inherent power. The inherent powers of the Court are in addition to the powers specifically conferred to it. If there are express provisions covering a particular topic, such power cannot be exercised in that regard. The section confers on the Court power of making such orders as may be necessary for the ends of justice of the Court. Section 151 CPC cannot be invoked when there is express provision even under which the

relief can be claimed by the aggrieved party. The power can only be invoked to supplement the provisions of the Code and not to override or evade other express provisions. The position is not different so far as the other statutes are concerned. Undisputedly, an aggrieved person is not remediless under the Act. “

15. We need not dilate on the decisions in *Shah Babulal Khimji (supra)* and *Swadeshi Polytax Ltd. (supra)*, cited on behalf of the Appellants, since the learned Single Judge in the impugned order had come to a conclusion that, the Appellants before the learned Single Judge had correctly contended that the order dated 8th April, 2008 was an appealable order.

16. Also in *K.K. Velusamy -vs- N. Palanisamy, 2011 (4) SCALE 61* the Hon'ble Supreme Court after considering the scope of Section 151 CPC as explained by the Supreme Court in several decisions summarized the said powers thus:-

“(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is 'right' and undo what is 'wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, Section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any

particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is co-extensive with the need to exercise such power on the facts and circumstances.

(c) A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or necessary implication exhaust the scope of the power of the court or the jurisdiction that may exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and the facts and circumstances of the case. The absence of an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a *carte blanche* to grant any relief.

(f) The power under Section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the *bona fides* of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.

17. Further, in ***Nainsingh -vs- Koonwarjee, AIR 1970 SC 997*** in para 4 of the report the Supreme Court had held as follows:-

“4. The High Court, in our opinion, erred in holding that the correctness of the remand order was open to review by it. The order in question was made under rule 23, Order 41, Civil Procedure Code. That order was appealable under Order 43 of that Code. As the same was not appealed against, its correctness was no more open to examination in view of Section 105(2) of the Code which lays down that where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom he shall thereafter be precluded from disputing its correctness. The High Court has misconceived the scope of its inherent powers. Under the inherent power of courts recognized by Section 151, CPC, a court has no power to do that which is prohibited by the Code. Inherent jurisdiction of the court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words the court cannot make use of the special provisions of Section 151 of the Code where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same. Further the power under Section 151 of the Code cannot be exercised as an appellate power.”

18. In the present case it is observed that vide order dated 26th May, 2006, the application filed by the Appellant seeking amendment of the plaint was allowed. Further, it is observed that vide order dated 19th January, 2007, the Defendants No.1 to 8 were directed to file their Written Statement to the amended plaint within eight weeks. Vide order dated 14th May, 2007 it was recorded on behalf of the Defendants No.1 to 8 that the Written Statement to the amended plaint could not be filed for want of instructions from the said Defendants. Finally, on 8th April, 2008, the learned Single Judge recorded that there was no justification for giving more time and, therefore, closed the right of the Defendants No.1 to 8 to file a Written Statement to the amended plaint. It is also noticed that the Defendants No.1 to 8 were informed of the order dated 8th April, 2008 by their counsel through letter dated 22nd April, 2008, yet the Defendants No.1 to 8 did not take any action till 18th March, 2009. In the impugned order the learned Single Judge came to the conclusion *“that the order dated 8th April, 2008 is an appealable order but the Defendants No.1 to 8 have failed to challenge the same.”* Instead of filing an Appeal against the

order dated 8th April, 2008, the Defendants No.1 to 8 after almost one year filed I.A. No.3637/2009 seeking “recall” of the order dated 8th April, 2008 under Section 151 of the CPC.

19. In ***Nain Singh (supra)***, the Hon’ble Supreme Court held that when an Appeal is maintainable against an order and the same has not been appealed against, the party aggrieved by such an order is thereafter precluded from disputing its correctness. In the instant case the impugned order held that an Appeal was maintainable against the order dated 8th April, 2008. The Defendants 1 to 8 have not impugned or assailed the said finding by the learned Single Judge, by way of an Appeal. The Hon’ble Supreme Court further held that the Court cannot make use of the special provisions of Section 151 of the CPC, where a party had his remedy provided elsewhere in the Code, and has neglected to avail himself of the same. The Supreme Court, in ***Roshan Singh’s case (supra)***, also observed that the inherent powers of the Court are not to be used for the benefit of the litigant who has the remedy under the CPC, and that the object of Section 151 CPC is to supplement and not to replace the remedies provided for in the CPC. Thus, it has been observed that Section 151 CPC will not be available when there

is a specific alternative remedy, and the same is accepted to be a well settled principle of law. The operative field of power being thus restricted, the same does not entitle the exercise of inherent power.

20. Then a submission was made on behalf of counsel for the Defendants No.1 to 8 that the present Appeal was not maintainable on the ground that it was against an order permitting “recall” under Section 151 of the CPC. There is no force in the said submission on behalf of the Defendants No.1 to 8 for two reasons. **Firstly**, the impugned order was in the nature of a review of the order dated 8th April, 2008. An order granting review is an appealable order under Order XLVII Rule 7 of the CPC, thus the present Appeal is maintainable against the impugned Order. **Secondly**, the order dated 8th April, 2008 sought to negate valuable rights that had accrued and vested in the Appellants, when the Defendants 1 to 8 did not prefer an Appeal against the order dated 8th April, 2008 closing its right to file a Written Statement to the amended plaint. **(Re: AIR 1935 CAL 336 (2) *Saratchandra Sen* -vs- *Mrityunjay Ray Chaudhari*.)**

21. In view of the discussion above and the acceptance by the learned Single Judge of the appealability and finality of the order dated 8th April, 2008, it follows that such an order could not be recalled by resort to Section 151 of the CPC after a period of one year had elapsed, and the said recall under Section 151 of the CPC was unwarranted and impermissible. Resultantly, the Appeal is allowed and the impugned order dated 8th September, 2009 is set aside. No costs.

SIDDHARTH MRIDUL, J.

BADAR DURREZ AHMED, J.

SEPTEMBER 19, 2011

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