My Palace Mutually Aided Co Operative ... vs B. Mahesh on 23 August, 2022

Author: N. V. Ramana

Bench: Hima Kohli, Krishna Murari, N. V. Ramana

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5784 OF 2022
(@ S.L.P (CIVIL) NO. 7015/2022)

MY PALACE MUTUALLY AIDED CO-OPERATIVE SOCIETY …APPELLANT(S)

VERSUS

B. MAHESH & ORS. …RESPONDENT(S)

JUDGMENT

N. V. Ramana, CJI

1. Leave granted.

2. The present Civil Appeal has been filed by the appellant against impugned final judgment and order dated 21.09.2021, passed by the High Court of Telangana in Interlocutory Application No. 5/2020 in Application No. 837/2013 in CS No. 7/1958.

3. The brief facts of this case necessary for the disposal of the appeal are as follows: the present dispute relates to Sy. No. 57 (Old Sy. 17:18:34 IST Reason:

> No. 274) in Shamsguda Village, Ranga Reddy District, Telangana forming part of S. No. 252 of the list of Mukthas in the preliminary decree dated 06.04.1959 by the erstwhile High Court of Andhra Pradesh in CS No. 7/1958.

4. The underlying original suit was filed in 1953 before the City Civil Court, Hyderabad by one Smt. Sultana Jahan Begum, the daughter of Nawab Moinuddowla Bahadur. The plaintiff was seeking partition of properties of the Nawab known as 'Asman Jahi Paigah'. This suit was ultimately transferred to the file of the High Court numbered as C.S. No. 7/1958. The suit along with certain applications were disposed of by a preliminary-cum-final decree dated 06.04.1959 passed by the learned Judge of the High Court of Andhra Pradesh. The judgment recorded that the plaintiff withdraws the suit against defendant Nos. 27 to 49. It also recorded that a compromise was affected amongst some of the defendants. The litigation relating to this original suit subsequently enters a complicated phase, wherein several different parallel proceedings take place. Suffice to state, that even after 60 years, the issues in the same are not settled.

5. It is the say of the present appellant that they acquired the property in Sy. No. 57 of Shamsguda Village under an Assignment Deed dated 16.09.2000 executed by the earlier predecessor-in-interest under the preliminary decree. The predecessors-in-interest had also executed a Conveyance Deed dated 03.08.2003 in favour of the appellant, conveying the schedule property with specific boundaries. As the earlier Assignment Deed dated 16.09.2000 and Conveyance Deed dated 03.08.2003 were unregistered documents, the predecessors-in-interest also executed a registered document in favour of the appellant, namely a 'Deed of Declaration/ Confirmation' dated 12.08.2011.

6. On the above basis, an application (No. 837/2013) was filed in C.S. No. 7/1958 by the appellant herein along with a party (not before us) for passing a final decree in their favour in respect of property measuring Acs 92.56 cts. and Acs. 27.00 gts land in Sy. No. 57 of Shamsguda Village, Balanagar Mandal, Ranga Reddy District. A further prayer was made for a direction to deliver the physical possession of the said properties.

7. The learned Single Judge of the High Court of Andhra Pradesh allowed the said Application in part vide final decree dated 19.09.2013 as sought by the appellant, and granted a declaration that they are the absolute owners of Acs. 92.56 cts in Sy. No. 57 of Shamsguda Village.

8. The State of Andhra Pradesh challenged the said order in OSA SR No. 3744 of 2014. After formation of the State of Telangana on the bifurcation of the composite State of Andhra Pradesh, the State of Telangana filed IA No. 2 of 2016 seeking condonation of delay of 182 days in filing the Appeal. Responding to the said IA, the appellant stated that the delay in filing of the Appeal is much longer, amounting to 729 days. Thereafter, I.A. No. 2 of 2017 was filed by the State of Telangana to condone a delay of 913 days in filing the Appeal.

9. By order dated 22.12.2020, the Division bench of the High Court of Telangana dismissed the two applications for condonation of delay in filing the appeal, being I.A. No. 2 of 2016 and I.A. No. 2 of 2017. As a consequence of the same, the State of Telangana's appeal, OSA SR No. 3744 of 2014 was dismissed.

10. In these circumstances, after lapse of nearly 7 years since the final decree was granted in favor of the appellant herein, the respondents herein filed 6 IAs (in Application 837/2013 in CS No. 7/1958)

before the High Court of Telangana in 2020. The details of the applications are as follows:

I.A No. Prayer 1/2020 To grant leave to the respondents to file implead petition in the above□ mentioned application.

2/2020 To dispense with the filing of a neatly typed copy of material papers in application filed in the abovementioned application 3/2020 To allow impleadment 4/2020 To allow impleadment.

5/2020 To recall the order dated 19.09.2013 passed in the above□mentioned application and to set aside and pass such other order or orders as deemed fit and proper in the circumstances of the case 6/2020 To direct the appellant to not to alienate, not to interfere, not to change peaceful possession, not register any documents in scheduled property in Sy No.57 and any subdivision numbers in Sy No 57 of Shamsguda in the above□mentioned application.

11. A Division Bench of the High Court of Telangana vide order dated 05.01.2021, allowed IA No. 1/2021 preferred by the respondents and granted them leave to file the application recalling the final decree dated 19.09.2013, passed by the learned Single Judge of the High Court in Application No. 837/2013 in C.S No. 7/1958.

12. The aforesaid order was challenged before this Court in an earlier Special Leave Petition, being SLP(C) No. 8025/2021. This Court, by order dated 06.07.2021, dismissed the said petition and gave the parties liberty to raise all objections when the substantial application for recalling the final decree was being heard.

13. After hearing the submissions of the parties, the Division Bench of the High Court in I.A No. 5/2020 in Application No. 837 of 2013 in CS No. 7 of 1958, passed the impugned order dated 21.09.2021, allowing the recall of the final decree dated 19.09.2013.

14. One of the primary objections taken by the appellant herein before the Division Bench of the High Court related to the fact that the senior member of the Bench hearing the recall application was presiding over the Bench which had heard and dismissed the appeal filed by the State of Telangana against the same final decree dated 19.09.2013. On this issue, the Division Bench held that the earlier appeal filed by the State of Telangana had been dismissed as a consequence of the dismissal of the application for condonation of delay in filing the appeal filed by the State. There was no discussion on the merits of the matter, particularly the claim of the appellant. Further, the Division Bench held that as per the roster prepared by the Hon'ble Chief Justice of the High Court of Telangana, all matters arising out of C.S. No. 7 of 1958 were placed before it. As such, the Division Bench held that there were no strong reasons put forth by the appellant for the said member of the Bench to recuse from the hearing of the present matter.

15. The High Court, on merits, held that the appellant had obtained the final decree dated 19.09.2013 by suppressing certain information and by exercising its powers under Section 151, Code of Civil Procedure, 1908 ("CPC"), has recalled its earlier final decree dated 19.09.2013. At the same time, the High Court clarified that recalling of the order would not enure to the benefit of the State

of Telangana, whose appeal had already been dismissed, or the respondents, who would have to establish their right, title and interest in the subject property in appropriate proceedings.

16. Aggrieved by the impugned judgment of the High Court recalling the final decree dated 19.09.2013, the appellant has approached this Court by way of the present Civil Appeal.

17. It is appropriate to mention here that the State of Telangana, despite dismissal of its appeal in 2020, and the specific observations of the High Court in the impugned order, initially filed an impleadment application, being IA No. 98965/2022, in the present Civil Appeal. This Court dismissed the abovementioned application for impleadment vide order dated 22.07.2022.

18. The State of Telangana also filed separate Special Leave Petitions challenging the present impugned order dated 22.12.2020, as well and the earlier order dated 22.12.2020 dismissing their intra court appeal [SLP (C) No. 13453 of 2022 and SLP (C) No. 13454□13456 of 2022]. These Special Leave Petitions were heard on 01.08.2022 by this Court and were dismissed in light of the observations made by the High Court in paragraph 116 of the impugned order. In any case, the claim of the State over the scheduled property is not sufficiently supported by any documentary evidence.

19. Dr. A. M. Singhvi, learned Senior Counsel appearing on behalf of the appellant, submitted as follows:

(i) No recall application could have been filed by the respondents.

Their only remedy was a separate civil suit for declaration of title.

(ii) The preliminary decree in the matter was passed on 06.04.1959 and the final decree in favour of the appellant was passed on 19.09.2013. The appeal preferred by the State of Telangana challenging the final decree was dismissed by the High Court on 22.12.2020. The respondents' application for recall of final decree, in which the impugned order has been passed, was filed before the High Court on 16.12.2020, raising issues of fraud for the first time. The High Court ought to have dismissed the application for recall on the grounds of delay.

(iii) A reading of the impugned order shows that the survey numbers claimed by the respondents are distinct from those claimed by the appellant.

(iv) The Senior Judge heading the Division Bench, Justice M.S. Rama Chander Rao who passed the impugned judgment appeared on behalf of one of the parties who were claiming possession in parallel proceedings relating to the subject property, which party had also filed an FIR against the appellant herein.

(v) The respondents alleged fraud on the basis of non□disclosure of certain orders passed against the appellant. The first such order is of 10.06.2003, whereby the High Court set aside recognition of the assignment deed in favor of the appellant. The second order is of 26.08.2013, passed in injunction proceedings preferred by the appellant against the revenue authorities. However, both

these orders were passed at a time when the assignment deed in favour of the appellant was unregistered. At the time when final decree was passed in 2013 the appellant had a registered assignment deed in their favour with respect to the subject property. The earlier orders are therefore not relevant.

(vi) The fact that the subject property had certain proceedings pending against it was recorded in the preliminary decree, and the same was in the notice of the learned Single Judge at the time of passing of the final decree in 2013. No fraud can be alleged on this ground by the respondents.

20. Mr. Dushyant Dave, learned Senior Counsel also appearing on behalf of the appellant, submitted as follows:

> (i) After the final decree was passed on 19.09.2013, the respondents, who are rank outsiders to the proceedings, filed the application for recall only in 2020. The respondents have neither provided an explanation as to the delay, nor have they filed any application for condonation of delay.
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> (ii) The affidavit supporting the application for recall was filed by power of attorney holders. The person who signs the affidavit must have personal knowledge of the facts. Without such personal knowledge, such an affidavit could not have been filed.
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> (iii) The present litigation is nothing but a proxy litigation.

Unrelated third parties are seeking to interfere in the present matter as the value of the subject property is very high.

(iv) The allegations of fraud were never taken before any forum until the impugned recall application before the High Court. Such plea taken by the third party without any supporting documents cannot be raised at a belated stage.

(v) Once the State's appeal against the final decree was dismissed on grounds of delay, the respondents' recall application should have been similarly dismissed.

21. Mr. C. S. Sundaram, learned Senior Counsel appearing on behalf of respondent No. 1, submitted as follows:

> (i) respondent No.1 is claiming through the original pattedar of the property. The recall applications were filed soon after his possession over the property was sought to be disturbed.

Therefore, the question of delay does not arise.

(ii) The preliminary decree indicates that the title to the suit property was conditional. The respondents' claim was upheld in the Atiyat Court, which was not shown before the learned Single

Judge at the time of passing of the final decree on 19.09.2013.

(iii) Respondents had also filed another application seeking leave to file the recall application, which was allowed by the High Court on 05.01.2021. The Special Leave Petition against the same was dismissed by this Court on 06.07.2021 and, as such, the locus of the parties to file recall application cannot be questioned at this stage.

(iv) The Court always has the power to recall its order, if such an order was obtained by playing fraud upon the Court.

(v) Ultimately, the impugned order does not decide the title of the parties. The parties have been relegated to file a civil suit to decide title. The appellant may exercise its right and do the same.

22. Mr. V. Giri, learned Senior Counsel appearing on behalf of the respondents no. 3 to 8, submitted as follows:

> (i) The preliminary decree was a conditional decree as it was subject to pending Revenue Court proceedings.
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> (ii) The respondents are the pattedars of the property who were owners in possession.
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> (iii) The appellant's earlier application seeking delivery of the property on the basis of assignment deed was remanded to the Single Judge and subsequently dismissed for non-prosecution as it was not pressed. They abandoned their original application. Additionally, the civil suit filed by the appellant for injunction in 2007 was also dismissed.
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> (iv) None of these facts and findings against the appellant were disclosed by them in 2013 when the final decree was sought. It is a clear case of fraud on the Court.
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> (v) In any event, no final decree could have been passed on the assignment deed as no order for partition of property was ever passed.
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> (vi) These points moved the learned Division Bench in allowing the recall application filed by the respondents. The impugned order therefore, merits no interference by this Court.

23. Mr. Yatin Oza, learned Senior Counsel appearing on behalf of the respondent no. 4, submitted as follows:

> (i) The conduct of the appellant is clear for all to see. They committed fraud on the Court to have the final decree dated 19.9.2013 passed in their favour by supressing judgement of Nazim Atiyat.

(ii) The fundamental principle of equity is that the parties must come to Court with clean hands. In the present case, this Court should not show any indulgence to the appellant by interfering with the well-reasoned impugned judgment of the High Court under Article 136 of the Constitution.

24. We have heard the learned Senior counsel on either side, perused the entire material on record. Though several grounds have been raised, the first ground taken is that the High Court erred in exercising jurisdiction under Section 151 of the CPC, when alternate remedies exist under the CPC. Second ground is that the Senior Judge on the Bench, who appeared for one of the parties, ought not to have heard the matter.

25. In response to the first leg of challenge, i.e., on the procedural aspect, we may note that the recall application was filed under Section 151 of the CPC against the final decree dated 19.09.2013. It is in this context that we must ascertain whether a third party to a final decree can be allowed to file such applications, by invoking the inherent powers of the Court under Section 151 of the CPC.

26. Section 151 of the CPC provides for Civil Courts to invoke their inherent jurisdiction and utilize the same to meet the ends of justice or to prevent abuse of process. Although such a provision is worded broadly, this Court has tempered the provision to limit its ambit to only those circumstances where certain procedural gaps exist, to ensure that substantive justice is not obliterated by hyper technicalities. As far back as in 1961, this Court in Padam Sen v. State of U.P., AIR 1961 SC 218, observed as under:

> "8. ...The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well recognized that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code." (emphasis supplied)

27. In exercising powers under Section 151 of the CPC, it cannot be said that the civil courts can exercise substantive jurisdiction to unsettle already decided issues. A Court having jurisdiction over the relevant subject matter has the power to decide and may come either to a right or a wrong conclusion. Even if a wrong conclusion is arrived at or an incorrect decree is passed by the jurisdictional court, the same is binding on the parties until it is set aside by an appellate court or through other remedies provided in law.

28. Section 151 of the CPC can only be applicable if there is no alternate remedy available in accordance with the existing provisions of law. Such inherent power cannot override statutory prohibitions or create remedies which are not contemplated under the Code. Section 151 cannot be invoked as an alternative to filing fresh suits, appeals, revisions, or reviews. A party cannot find solace in Section 151 to allege and rectify historic wrongs and bypass procedural safeguards inbuilt in the CPC.

29. The respondents in the present case had access to recourse under Section 96 of the CPC, which allows for appeals from an original decree. It must be remembered that the present matter was being heard by the High Court exercising its original jurisdiction. The High Court was in effect conducting a trial, and the final decree passed by the High Court on 19.09.2013 was in effect a decree in an original suit. As such, there existed a right of appeal under Section 96 of the CPC, for the respondents. Though they were not parties to the suit, they could have filed an appeal with the leave of the Court as an affected party. Section 96 of the CPC reads as under:

> 96. Appeal from original decree .—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

[(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed [ten thousand rupees.]

30. Sections 96 to 100 of CPC deals with the procedure for filing appeals from original decrees. A perusal of the above provision makes it clear that the provisions are silent about the category of persons who can prefer an appeal. But it is well settled legal position that a person who is affected by a judgment but is not a party to the suit, can prefer an appeal with the leave of the Court. The sine qua non for filing an appeal by a third party is that he must have been affected by reason of the judgment and decree which is sought to be impugned.

31. In the light of the above, it can be safely concluded any aggrieved party can prefer an appeal with the leave of the Court.

32. The High Court, in the impugned judgment, relied on the judgment of this Court in Indian Bank vs Satyam Fibres (India) Pvt. Ltd., (1996) 5 SCC 550, wherein this Court acknowledges the possibility of maintaining a recall application against a judgement if it is obtained by fraud on the Court. However, it went on to hold that in cases of fraud, the Court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. The Court held as follows:

> “22. The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud...”

33. The subsequent judgment of this Court in Ram Prakash Agarwal v. Gopi Krishan, (2013) 11 SCC 296 further clarifies the law on the use of the power under Section 151 of the CPC by the Court in

cases of fraud and holds as follows:

> "13. Section 151 CPC is not a substantive provision that confers the right to get any relief of any kind. It is a mere procedural provision which enables a party to have the proceedings of a pending suit conducted in a manner that is consistent with justice and equity. The court can do justice between the parties before it. Similarly, inherent powers cannot be used to re□open settled matters. The inherent powers of the Court must, to that extent, be regarded as abrogated by the legislature. A provision barring the exercise of inherent power need not be express, it may even be implied. Inherent power cannot be used to restrain the execution of a decree at the instance of one who was not a party to suit. Such power is absolutely essential for securing the ends of justice, and to overcome the failure of justice. The Court under Section 151 CPC may adopt any procedure to do justice, unless the same is expressly prohibited.
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> 19. In view of the above, the law on this issue stands crystallised to the effect that the inherent powers enshrined under Section 151 CPC can be exercised only where no remedy has been provided for in any other provision of CPC. In the event that a party has obtained a decree or order by playing a fraud upon the court, or where an order has been passed by a mistake of the court, the court may be justified in rectifying such mistake, either by recalling the said order, or by passing any other appropriate order. However, inherent powers cannot be used in conflict of any other existing provision, or in case a remedy has been provided for by any other provision of CPC.

Moreover, in the event that a fraud has been played upon a party, the same may not be a case where inherent powers can be exercised." (emphasis supplied)

34. The High Court, relying upon the above judgments of this Court which recognizes the power to recall, seems to have lost sight of the restrictions imposed while exercising jurisdiction under Section 151 of the CPC, which were elaborately discussed by this Court in the above referred judgment about exercising of the power under Section 151 of the CPC being only in circumstances where alternate remedies do not exist.

35. Therefore, we are of the firm opinion that recalling a final decree in such circumstances cannot be countenanced under Section 151 of the CPC. The High Court erred in exercising its jurisdiction under Section 151 of the CPC, to hear and pass a detailed judgment recalling its earlier final decree dated 19.09.2013, rather than directing the respondents to pursue the effective alternate remedies under law. Having said the above, we must clarify that we are not, in any way, doubting the proposition of law that fraud nullifies all proceedings, or that the Court has power to recall an order which was passed due to a fraud played on the Court. However, while exercising the power under Section 151 CPC for setting aside the final judgment and decree, the Division Bench should have taken into consideration the restriction which was observed by this Court in the captioned judgment. Once we have come to the irresistible conclusion that exercising power under Section 151

CPC in the facts and circumstances of the case is bad, we are not inclined to go into further issues that were extensively argued.

36. The other ground that the learned senior judge who passed the present impugned order had represented one of the opposite parties in certain collateral proceedings related to the subject property, merits some discussion. It appears that although the appellant raised this ground before us, it was neither raised before the High Court nor brought to the attention of the learned senior Judge. The party ought to have raised this issue also at the time of arguments, particularly when the issue of recusal of the learned Judge had been specifically raised on the other ground that he had been the presiding member of the Bench which had dismissed the appeal filed by the State.

37. When an issue was not raised before the learned Division Bench, we do not wish to spill much ink on this issue. However, the material placed on record by the counsel for the appellant cannot be ignored. Annexure P8 of the appeal paper book indicates that the Senior Judge heading the Division Bench, while being an advocate, had represented the Andhra Pradesh State Financial Corporation in one of the connected proceedings related to this case.

38. Although we have no doubt in our mind about the absence of bias of any form of the learned senior Judge, we must at the same time also look at the issue of whether right minded persons could consider there exists any real likelihood of bias. In the case of State of West Bengal v. Shivananda Pathak, 1998 5 SCC 513, this Court held as under:

> "34. In Metropolitan Properties Co. v. Lannon [(1968) 1 WLR 815 : (1968) 1 All ER 354] it was observed "whether there was a real likelihood of bias or not has to be ascertained with reference to right-minded persons; whether they would consider that there was a real likelihood of bias". Almost the same test has also been applied here in an old decision, namely, in Manak Lal v. Dr Prem Chand Singhvi [AIR 1957 SC 425 : 1957 SCR 575] . In that case, although the Court found that the Chairman of the Bar Council Tribunal appointed by the Chief Justice of the Rajasthan High Court to enquire into the misconduct of Manak Lal, an advocate, on the complaint of one Prem Chand was not biased towards him, it was held that he should not have presided over the proceedings to give effect to the salutary principle that justice should not only be done, it should also be seen to be done in view of the fact that the Chairman, who, undoubtedly, was a Senior Advocate and an ex-Advocate General, had, at one time, represented Prem Chand in some case. These principles have had their evolution in the field of administrative law but the courts performing judicial functions only cannot be excepted from the rule of bias as the Presiding Officers of the court have to hear and decide contentious issues with an unbiased mind. The maxim nemo debet esse judex in propria sua causa and the principle "justice should not only be done but should manifestly be seen to be done" can be legitimately invoked in their cases." (emphasis supplied)

39. It is a well-established principle, both in our jurisprudence and across the world, that "[N]ot only must justice be done; it must also be seen to be done".1 In the present circumstances, it may

have been more apposite for the concerned Judge to have recused from this case. The appellant should have brought it to the notice of the learned senior Judge at the very first instance, and not at this belated stage.

1 R v. Sussex Justices, ex parte McCarthy, 1924 (1) KB 256.

40. In the above circumstances, we are of the opinion that the High Court should not have decided the recall application filed by the respondents, let alone pass such extensive orders which has the effect of unsettling proceedings and transactions which have a history of more than 60 years in a proceeding, basing on an application filed under Section 151 of the CPC.

41. In view of the above, the appeal is allowed by setting aside the order dated 21.09.2021 passed in I.A No. 5/2020 in Application No. 837 of 2013 in CS No. 7 of 1958.

.....CJI.

(N. V. RAMANA) .....J. (KRISHNA MURARI) .....J. (HIMA KOHLI)
NEW DELHI;

AUGUST 23, 2022.