

# SUPREME COURT OF INDIA

Harjas Rai Makhija

Vs.

Pushparani Jain & Anr.

C.A.No.11491 of 2016

(Madan B.Lokur and Adarsh Kumar Goel,JJ.,)

02.01.2017

## JUDGMENT

**Madan B.Lokur,J.,**

1. The appellant (Harjas Rai Makhija represented by his legal representatives) is aggrieved by the judgment and order dated 3rd April, 2012 passed by the High Court of Madhya Pradesh at Jabalpur in FA No.961 of 2010 whereby his appeal has been dismissed with costs of Rs.25,000/-.

2. Respondent No.1, Pushparani Jain (Pushparani) was allotted Plot No.251 in Major Shopping Centre Zone - II, Habibganj, Bhopal under Scheme No.13 of the Bhopal Development Authority (for short BDA). Since she was a resident of the United States of America and had some difficulty in completing the formalities with regard to the allotment, she appointed her brother Jinendra Jain as her attorney on or about 28th August, 1981. This was communicated by her to the Chairman of the BDA by a letter of the same date.

3. On the basis of the communication sent by Pushparani to the BDA, and on the basis of the Power of Attorney given by her to Jinendra Jain, she was able to obtain possession of the plot allotted to her and complete the necessary formalities.

4. According to the appellant Harjas Rai Makhija (Makhija), another Power of Attorney had been executed by Pushparani on 30th April, 1983 in favour of Jinendra Jain. The original of this document has not been produced by anybody. Be that as it may, on the basis of the alleged Power of Attorney dated 30th April, 1983, an agreement was entered into between Jinendra Jain and Makhija on 16th October, 1988 to sell the plot allotted to Pushparani in favour of Makhija. In terms of the agreement, the sale deed was to be executed on or before 30th April, 1989.

5. When Pushparani came to know about the agreement for sale in respect of the plot allotted to her, she filed a civil suit before the District Judge, Bhopal and that suit subsequently came to be numbered as Suit No. 51-A of 1999. The prayer made by

Pushparani in the plaint was for a declaration that the agreement for sale dated 16th October, 1988 was without any authority given to Jinendra Jain. She also made a prayer for recovery of possession and grant of mesne profits since possession of the plot had been given by Jinendra Jain to Makhija.

6. Makhija also filed a civil suit before the District Judge which subsequently came to be numbered as Suit No.52-A of 1999. The prayer made by Makhija was for specific performance of the agreement dated 16 th October, 1988 entered into by him with Pushparani through her attorney Jinendra Jain.

7. Both the suits one filed by Pushparani and the other by Makhija were taken up and heard together. By a judgment and decree dated 4 th October, 1999 the suit filed by Pushparani was decreed with the result that the agreement for sale dated 16th October, 1988 was declared to be illegal. It was also decreed that Makhija shall handover possession of the suit property to Pushparani and pay monthly compensation of Rs.5,000/- per month. The suit filed by Makhija was dismissed.

8. Feeling aggrieved by the result of the two suits mentioned above, Makhija preferred two appeals before the High Court being F.A. No. 607 of 1999 and F.A. No.638 of 1999 challenging the decree granted in favour of Pushparani and the dismissal of his suit.

9. During the pendency of the aforesaid appeals, Makhija filed an application before the High Court under Order XLI Rule 27 of the Code of Civil Procedure<sup>1</sup> (for short the CPC) for adducing additional evidence. By virtue of this application, Makhija sought to bring on record an application said to have been filed by Jinendra Jain with the BDA on behalf of Pushparani as her attorney for the grant of a No Objection Certificate in respect of the suit property. According to the averment made in the application, Jinendra Jain had moved the application before the BDA on 1st June, 1983.

10. By a judgment and order dated 13th September, 2002 the High Court dismissed both the appeals filed by Makhija as well as the application under Order XLI Rule 27 of the CPC.

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<sup>1</sup> Order XLI Rule 27. - Production of additional evidence in Appellate Court. - (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if –

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

While dismissing the appeals and the application, the High Court held that no document was produced before the Trial Court to establish that Pushparani had executed a Power of Attorney in favour of Jinendra Jain on 30th April, 1983. The High Court also noted that according to Makhija what was produced before the BDA as the Power of Attorney dated 30th April, 1983 was in fact a photocopy of the alleged Power of Attorney. Therefore, the High Court took the view that a photocopy produced before it was a photocopy of another photocopy (filed before the BDA) and as such it could not even be considered as secondary evidence. Even otherwise, the High Court concluded that there was no material to indicate that Jinendra Jain was authorized to enter into an agreement for sale the suit property on behalf of Pushparani.

11. Feeling aggrieved by the dismissal of the appeals as well as the application, Makhija preferred S.L.P.(C) Nos.524-525 of 2003 which came to be dismissed by this Court on 25th July, 2003. The review petitions filed by Makhija also came to be dismissed by this Court on 9th September, 2003.

12. Notwithstanding the dismissal of Makhija's case, he was unrelenting and filed yet another suit before the Additional District Judge, Bhopal which came to be numbered as Suit No.471-A of 2008. In this suit, he produced a certified copy of the Power of Attorney dated 30th April, 1983 allegedly filed by Jinendra Jain before the BDA. The prayer made in the plaint filed by Makhija was for a declaration that the decree dated 4th October, 1999 passed in favour of Pushparani was obtained in a fraudulent manner and is void and not worthy of being executed. This suit came to be dismissed by the Additional District Judge by the judgment and decree dated 28th September, 2010.

13. Feeling aggrieved by the dismissal of the suit filed by him, Makhija preferred FA No. 961 of 2010 in the High Court of Madhya Pradesh. The appeal was taken up for consideration by the High Court and by judgment and order dated 3rd April, 2012 (impugned) the appeal was dismissed. The High Court took the view that the alleged Power of Attorney dated 30th April, 1983 could not be accepted as a valid piece of documentary evidence being a certified copy of a photocopied document. It was also held that Makhija had an opportunity to raise the same issue when the application for leading additional evidence was filed but did not do so and cannot have a second shot for the same purpose. The allegation of fraud leveled by Makhija was not accepted by the High Court.

14. Learned counsel for Makhija raised quite a few submissions before us but in our opinion, the present appeal deserves to be dismissed on the ground that no fraud has been alleged in the plaint filed by Makhija or found in respect of the decree dated 4th October, 1999.

15. There is no doubt that a decree was passed in favour of Pushparani by the District Judge on 4th October, 1999 after a full-fledged trial and that decree was upheld not only by the High Court but also by this Court. Makhija made an application before the High Court to produce additional evidence to suggest that the agreement for sale entered into by him with

Pushparani through her attorney Jinendra Jain on 16th October, 1988 was genuine and based on the Power of Attorney given by her to Jinendra Jain on 30th April, 1983. Not only was the application for bringing on record additional evidence dismissed by the High Court but the decree dismissing the suit for specific performance of the agreement for sale filed by Makhija was dismissed by the High Court. That dismissal attained finality when the petitions for special leave to appeal filed by Makhija were dismissed by this Court.

16. It is significant to note that Makhija has not sought (and indeed could not seek) to reopen the proceedings pertaining to the dismissal of his suit for specific performance. As such, as mentioned above, the decree dismissing his suit for specific performance of the agreement dated 16th October, 1988 has become final. Therefore, under no circumstances can Makhija now collaterally pray for a decree of specific performance in respect of that agreement.

17. Through a collateral attack, Makhija has now sought to deprive Pushparani of her allotment of the suit property by alleging that she had concealed the Power of Attorney executed by her in favour of Jinendra Jain on 30th April, 1983 and had thereby committed a fraud on the courts.

18. We have been taken through the plaint filed by Makhija in Suit No. 471-A of 2008 and find that he has nowhere made any specific allegation of a fraud having been played by Pushparani on the Trial Court while obtaining the decree dated 4th October, 1999.

19. During the course of submissions, it was contended on behalf of Makhija that it is a settled proposition of law that a decree obtained by playing fraud on the court is a nullity and that such a decree could be challenged at any time in any proceedings. Reliance was placed on *A. V. Papayya Sastry v. Government of A.P.*<sup>2</sup>. This proposition is certainly not in dispute.

20. Learned counsel also placed reliance on *Union of India v. Ramesh Gandhi*<sup>3</sup> which reads as under :-

“27. If a judgment obtained by playing fraud on the court is a nullity and is to be treated as non est by every court, superior or inferior, it would be strange logic to hear that an enquiry into the question whether a judgment was secured by playing fraud on the court by not disclosing the necessary facts relevant for the adjudication of the controversy before the court is impermissible. From the above judgments, it is clear that such an examination is permissible. Such a principle is required to be applied with greater emphasis in the realm of public law jurisdiction as the mischief resulting from such fraud has larger dimension affecting the larger public interest.” (Emphasis supplied by us).

21. We agree that when there is an allegation of fraud by non-disclosure of necessary and relevant facts or concealment of material facts, it must be inquired into. It is only after evidence is led coupled with intent to deceive that a conclusion of fraud could be arrived at. A mere concealment or non-disclosure without intent to deceive or a bald allegation of fraud

without proof and intent to deceive would not render a decree obtained by a party as fraudulent. To conclude in a blanket manner that in every case where relevant facts are not disclosed, the decree obtained would be fraudulent, is stretching the principle to a vanishing point.

22. What is fraud has been adequately discussed in *Meghmala & Ors. v. G. Narasimha Reddy & Ors*<sup>4</sup>. Unfortunately, this decision does not refer to earlier decisions where also there is an equally elaborate discussion on fraud. These two decisions are *Bhaurao Dagdu Paralkar v. State of Maharashtra & Ors*<sup>5</sup>. and *State of Orissa & Ors. v. Harapriya Bisoi*<sup>6</sup>. In view of the elaborate discussion in these and several other cases which have been referred to in these decisions, it is clear that fraud has a definite meaning in law and it must be proved and not merely alleged and inferred.

23. In so far as the present appeal is concerned, there is no doubt that Makhija had an opportunity to prove the allegation of fraud when he filed an application under Order XLI Rule 27 of the CPC. However, he missed that opportunity right up to this court. Makhija took a second shot at alleging fraud and filing another suit against Pushparani. However, the evidence that he relied upon was very thin and could not even be considered as secondary evidence. Accordingly both the Trial Court as well as the High Court rejected the allegation of fraud by not accepting the evidence put forward by Makhija to allege that fraud had been committed by Pushparani when she obtained the decree dated 4th October, 1999.

24. Fraud not having been proved but merely alleged, we do not find any reason to differ with the judgment and order passed by the High Court and the Trial Court.

25. The appeal is dismissed with costs quantified at Rs.50,000/-.

Judgment Referred.

<sup>2</sup>(2007) 4 SCC 0221

<sup>3</sup>(2011) 12 SCALE 0544

<sup>4</sup>(2010) 8 SCC 0383

<sup>5</sup>(2005) 7 SCC 0605

<sup>6</sup>(2009) 12 SCC 0378