(1955) 08 GAU CK 0010

In the Gauhati High Court

Case No : Civil Revision No. 11 of 1954

Mulchand Seraogi APPELLANT

Vs

Sualal Hariprasad Firm and Others RESPONDENT

Date of Decision : 05-08-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, 151

Citation : (1955) 08 GAU CK 0010

Hon'ble Judges : Ram Labhaya, J;Deka, J

Bench : Division Bench

Advocate : H. Goswami and G.N. Barua, for the Appellant; F.A. Ahmed, M.C. Pathak and B.M. Goswami, for the Respondent

Judgement

Ram Labhaya, J.—This petition of revision is directed against an order of Sri R. Hazarika, Subordinate Judge, Upper Assam Districts, dated 30-9-53, by which he disallowed the petitioner''s application, dated 7-9-53, for retting aside an order dismissing the suit lor non-prosecution passed on 9-7-53. The case came up for evidence on 8-7-53. Sitaram Scraogi, one of the two plaintiffs, was examined on 8-7-53, but his examination was not concluded, and on 9 7-53 the plaintiffs applied to withdraw from the suit.

The Court dismissed the suit for non-prosecution on the basis of the petition. The petition was signed by Sri G.N. Barua, an advocate for both the plaintiffs, and also by Sitaram Scraogi, one of the two plaintiffs.

2. The suit was for recovery of a sum of Rs. 11,350/-. It was instituted jointly by Mulchand Seraogi as Karta of the joint family and Sitaram Seraogi, a junior member of the family.

3. On 9-7-53, the petition of withdrawal was put in on behalf of both the plaintiffs. It was averted in that petition that on 9-7-53, Sitaram Mahcsri, a partner of defendant No. 1, a firm, and one Durgamall Agarwalla approached Sitaram Seraogi (plaintiff) and induced him to withdraw the suit on the

representation that the defendants would pay to the plaintiffs such sum of money as would be found to be due to them by Sitaram Seraogi. On this representation, Sitaram Seraogi, through his advocate, Sri G.N. Barua, put in a petition of withdrawal, on which the Court dismissed the suit for non-prosecution. It is alleged that the defendants practised fraud on the plaintiffs, that the dedants had no intention of paying any money to the plaintiffs, and avoided any discussion in the matter after the aforesaid withdrawal. It was also contended that Sitaram Seraogi alone had no right to compromise the matter or to withdraw the entire suit.

The learned Subordinate Judge came to the conclusion that the petition was grounded on fraud and, therefore, relief could not be given to the petitioners u/s 151, C.P.C., inasmuch as another remedy was open to them. He also found that the petition was not within the scope of Order 47, Rule 1, C.P.C. In regard to the alleged want of authority on the part of Sitaram Seraogi to withdraw the entire suit, on compromise, the learned Subordinate Judge referred to a statement of Sitaram made on 8-7-53 to the effect that he had sole authorty to carry on the business of the joint family firm, as Mulchand was very old.

He also referred to the fact that the application for withdrawal was put in by the advocate appearing for the plaintiffs.

4. On behalf of the petitioner, their learned Counsel, Mr. Goswami, has assailed the validity of the order passed by the learned Subordinate Judge on both the points raised in the petition and dealt with by him in his order of 30-9-53.

5. It may be noticed that in the petition, Mulchand, the senior member of the joint family of the plaintiffs, did not assert that Sitaram Seraogi had not informed him about the dismissal of the suit on the basis of the petition put in by him or by their learned advocate at his instance. The ground on which the petition is based is that alter the dismissal of the suit the defendants did not turn up and make any settlement and did not pay the amount as agreed upon.

Mulchand''s case was not that merely because his nephew, Sitaram Seraogi, had no authority to settle the matter with the defendant?s he was entitled to have the order set aside to the extent that it concerned him. He did not try to have the suit revived on his own behalf alone to the extent that it affected his interest. It is not his case that he became aware of the fraud immediately before he put in the petition. The attack is on the entire order on the ground that it is vitiated by fraud.

The order dismissing the suit for non-prosecution was not sought to be challenged on the ground that neither the advocate nor Mulchand''s nephew, Sitaram, could bind Mulchand by consenting to the dismissal of the suit. He had the option to challenge the order by a petition of revision. Mulchand, however, did not pursuo (hat remedy. His own counsel had signed the petition on his behalf. Authority to withdraw the suit had been given to him specifically in the power of attorney. Withdrawal of the suit was by his authorised counsel and on his behalf.

His bona fides were not open to question. Mulchand and had obvious difficulties in challenging the order merely, so far as it affects his interest. He therefore, prayed for reversal of the entire order by which the suit was dismissed, in the interest of both the plaintiffs on the ground of fraud. The petition was grounded, on fraud, though incidentally the fact that Sitaram Scraogi had no authority to bind Mulchand, was mentioned. In the circumstances of the case, this fact, even if true, does not assist the petitioner.

6. So far as relief on the basis of fraud is concerned, the learned Judge was correct in the view that relief could not be given to the petitioners u/s 151, C.P.C. The inherent powers of the Court may be exercised in cases where there is no other specific remedy available to a suitor. An error or mistake on the part of the Court may be rectified in the exercise of its powers u/s 151.

Similarly, where fraud is practised on the Court, it may very well utilise its inherent jurisdiction to undo the effect of fraud. Where, however, a fraud has been committed by one of the Parties upon the other such a fraud also may vitiate the proceeding or the order, but the remedy would be by a suit, and not by an application u/s 151, C.P.C. Remedy by an application u/s 151 is no substitute for a suit by which a reversal of the order which has been obtained by fraud can be secured.

Fraud can vitiate solemn acts of the Court, and relief may be given against such fraud in a suit instituted by the aggrieved party in a competent Court. The inherent powers of the Court cannot be utilised in such cases. Mr. Goswami has referred us to-- AIR 1949 366 (Nagpur) This case does not support him. On the other hand, it supports the view enunciated above. It was laid down by Sarwate, J. in this case that

the inherent powers may be exercised in case where the Court has been misled by a fraud practised upon it because in such a case the Court would be under a duty to correct its own proceedings which, in the absence of any other provision, it would do by resort to inherent powers. But when it is a case of fraud between the parties and the aggrieved party has another remedy of a suit open to it, there should be no occasion for invoking inherent powers, of the Court.

We are in full agreement with the proposition. This ruling would disentitle the plaintiff to relief by an application u/s 151, C.P.C. It may be observed that the use of the inherent powers in such circumstances can prejudice the other side. Any order that may be passed in a proceeding u/s 151, C.P.C. would not be open to appeal.

7. Mr. Goswami has tried to limit the scope of the proposition laid down in the Nagpur case. He has pointed out that this was a case of partition, and, therefore, on the facts of the case it could be held that there was another remedy open to the petitioner. A party to a partition suit would retain his right to institute a fresh

suit after the withdrawal of a partition suit, but in this case, there is no such remedy.

The decision does not support him on this point. The view laid down there was that u/s 151, C.P.C. relief cannot be given in the exercise of inherent powers, where another remedy is open. On facts, it was no doubt held that the remedy by suit for obtaining partition existed, but Mr. Goswami can derive no support for the decision for his proposition that the petitioner in the present case had no right to institute a suit for setting aside the order in question on the ground of fraud.

As I have observed, any order or decree may be set aside if it can be established that it was obtained by fraud. Another and a more suitable remedy is obviously open to the petitioner, and the principle laid down in the case is fully applicable to the present case, even though the petition does not arise out of a partition suit.

8. It may be observed that the relief claimed in this case is reversal or setting aside of the entire order, and this can be claimed only if the petition of withdrawal was induced by fraud. If inherent jurisdiction of the Court cannot be invoked, the petition for reversal could not be entertained under any other provision of the Code. A regular suit was the only remedy available to the plaintiffs if they were induced by fraud to apply for withdrawal.

9. The petitioner may, if so advised, seek relief by a suit. The order passed by the learned Subordinate judge is not open to question. The petition, therefore, is dismissed, and the Rule discharged. We make no order as to costs.

Deka, J.

10. I agree.

