AFR

Court No. - 2
Case :- WRIT - C No. - 4788 of 2015
Petitioner :- Kishan Lal Barwa
Respondent :- Sharda Saharan & Another
Counsel for Petitioner :- Sushma Singh,Manish Singh

Hon'ble Ashwani Kumar Mishra,J.

1. The present writ petition is directed against the orders passed by Civil Judge (Senior Division), Gautam Buddh Nagar, dated 26.2.2014, rejecting objection under section 47 CPC, as well as the order dated 29.5.2014, rejecting the revision filed against it. The question falling for consideration of this Court, in the instant petition, is as to whether the executing court is justified in refusing to examine plea of fraud, setup in objection under section 47 CPC, on the basis of a subsequent report of public servant, for the reason that such defence setup before civil court was not substantiated, resulting in passing of the decree itself?

2. Facts as it emerges from record are that Noida (New Okhala Industries Development Authority) executed a lease deed of a residential plot no.39, Block-C, Sector- XV, measuring 202.50 sq. meters, in favour of Ashok Kumar, on 23.5.1981. The defendant-petitioner asserts that a registered agreement to sell was executed by the lessee Ashok Kumar in favour of the defendant-petitioner on 7.8.1984, pursuant to which, the defendant-petitioner was put in actual possession and that a five story-building was constructed by him, which exists on the spot. It further appears that in respect of the same plot, the plaintiff-respondent asserts that a power of attorney was executed by the lessee Ashok Kumar in favour of respondent no.2 Ripudman Kumar Saharan on 25.10.1984, on the basis of which, a sale deed of the plot was executed on 25.2.1986 in favour of his wife Smt. Sharda Saharan, who is plaintiff-respondent no.1 in the present petition.

3. Smt. Sharda Saharan, thereafter, filed a civil suit no.842 of 1986 for permanent prohibitory injunction, in respect of the plot in question, against the defendant-petitioner with the allegation that the plaintiff-respondent has obtained a sale deed of the plot in question on 25.2.1986, which was executed by the power of attorney holder of the lessee Ashok Kumar. It was further asserted that the plaintiff-respondent has also got a map sanctioned for raising of construction upon the plot on 8.4.1986 and a temporary construction of a store was raised upon it. The suit was filed against the defendant-petitioner saying that he had no right over the suit property, yet, he is hellbent upon forcibly entering into possession, and therefore, the defendant-petitioner be restrained from interfering with the right of the plaintiff-respondent over the suit property. The suit was contested by the defendant-petitioner asserting that no power of attorney was ever executed by Ashok Kumar in favour of Ripudman Kumar Saharan, and the alleged power of attorney dated 25.10.1984 was a forged document. It was also stated that no right accrues to the plaintiff-respondent over the suit property on the basis of sale deed, as the power of attorney itself was a fraudulent document. The plaintiff-respondent no.1 Smt. Sharda Saharan was the sole plaintiff and defendant-petitioner Kishan Lal Barwa was the sole defendant. An affidavit in the suit was filed by Ashok Kumar, claiming to be lessee of the suit property, stating that he has not executed any power of attorney in favour of Ripudman Kumar Saharan and the said document contains signatures of someone other than him. It was further stated in the affidavit that the property has been agreed to be sold to the defendant-petitioner and he has been put in possession of the property. The suit was tried by the civil court and five issues were framed, first of which, was whether

the plaintiff-respondent is the owner in possession of the disputed plot? The civil court noticed the contention of the defendant-petitioner that only certified copies of the power of attorney as well as the sale deed pursuant thereto have been brought on record and that its originals have not been produced. The challenge to the power of attorney, on the ground that it is a fraudulent document, was not considered by the civil court, on the ground that the person, who has executed the power of attorney, had not disputed its execution by appearing before the civil court. It was, therefore, held that so long as the sale deed continues to exist in favour of the plaintiff-respondent, she would be treated to be the owner of the property. The civil court also found that the plaintiff-respondent is in possession of the suit property. The suit was ultimately decreed on 27.4.1991 in favour of the plaintiff-respondent. This judgment and decree was put to challenge in civil appeal no.74 of 1991 and the same was dismissed on 23.1.1992. A second appeal, being S.A. No.448 of 1992, filed against it, was also rejected by this Court on 18.2.2002. The decree passed by the civil court, granting prohibitory injunction to the plaintiff-respondent, against defendant-petitioner thus attained finality.

4. The plaintiff-respondent, thereafter, filed a writ petition no.38949 of 2002 with the allegation that during pendency of the proceedings, the defendant-petitioner has forcibly entered into possession of the suit property, by throwing out the plaintiff-respondent. A counter affidavit in the said writ petition was filed by the Station House Officer, stating that defendant-petitioner has remained in possession over the suit property in question since 1984 and a criminal proceeding under section 156(3) Cr.P.C. has also been got

registered at the instance of the defendant-petitioner. The aforesaid writ petition was heard and was dismissed with the observation that plaintiff had, in the facts of the case, an effective remedy under Order 21 Rule 32 CPC, for execution of decree of prohibitory injunction. It is after this order of the Division Bench of this Court dated 13.3.2008 that execution case no.20 of 2010 was filed for possession, with the allegation that the judgment debtor had forcibly entered into possession over the suit property in November, 2002, with the help of local administration, unauthorizedly and in teeth of the decree, and therefore, appropriate relief for possession was claimed. It is not in dispute that during pendency of the proceedings, aforesaid, Ashok Kumar, who undisputedly was the allottee of the plot from Noida and through whom rights were claimed by rival parties, died.

5. It further appears from the record that pursuant to an application made before the Chief Judicial Magistrate under section 156 (3) Cr.P.C., a criminal case no.499 of 2002 under section 420, 468, 467, 471 IPC was registered at the instance of the defendant-petitioner against Ripudman Kumar Saharan and Smt. Sharda Saharan. During investigation, the fingerprints of Ashok Kumar, as it appeared on lease deed executed by Noida in his favour were got tallied with the fingerprints appearing on the agreement to sell executed in favour of the defendant-petitioner and also upon the alleged power of attorney executed in favour of Ripudman Kumar Saharan on 25.10.1984. A fingerprint report was submitted by the office of Directorate, Fingerprint Experts, State of U.P., Lucknow on 30.5.2003 to the Chief Judicial Magistrate, Gautam Buddh Nagar, wherein experts of the directorate found that the fingerprints of Ashok Kumar, as

appearing on the lease deed executed by Noida in his favour, do not match with the fingerprints on the power of attorney, whereas fingerprints of Ashok Kumar do match with his fingerprints on the agreement to sell executed in favour of the defendant-petitioner.

6. In execution of the decree, aforesaid, the defendant-petitioner filed objection under section 47 CPC, wherein apart from raising other issues, it was also stated that the basis of decree in favour of the plaintiff-respondent was the sale deed executed by Ripudman Kumar Saharan, on the basis of power of attorney executed by Ashok Kumar on 25.10.1984 in his favour, which has been found to be a forged document, as such, the decree itself has been obtained by playing fraud, and therefore, is nullity and inexecutable. The plaintiff-respondent filed an objection against it. The executing court found that the decree of prohibitory injunction had been passed after contest in favour of the decree holder, after returning a finding on issue no.1 that the plaintiff-respondent is the owner in possession over the suit property, and therefore, the executing court cannot go behind the decree. Consequently, the objection under section 47 CPC has been rejected. Aggrieved against it, a revision was preferred, which has also been dismissed by the revisional court with the finding that the issue of ownership of the plaintiff-respondent since had been adjudicated and determined in original suit, thereafter, it is not open for the executing court to examine the questions, which are being urged in objection under section 47 CPC. It has been further held that once the plaintiff-respondent had been held to be owner in possession of the suit property and the execution has been filed, it is not open for the executing court to reconsider all such questions, which had attained finality with the passing of the

decree itself, and in such circumstances, the revisional court refused to interfere with the orders passed by the executing court. It is aggrieved by these two orders that the present writ petition has been filed by the defendant-petitioner.

7. Sri Manish Singh, learned counsel appearing for the defendant-petitioner, submits that only the issue, which was examined in the suit was as to whether the plaintiff-respondent was the owner in possession on the basis of sale deed over the suit property, and no issue with regard to genuineness of the power of attorney was raised or adjudicated. It is also submitted that though it was pleaded by the defendant-petitioner in the suit that no power of attorney was executed by Ashok Kumar and such stand was also taken by Ashok Kumar by filing an affidavit, but this aspect of the matter was not examined by the civil court on the ground that Ashok Kumar had not denied the execution of power of attorney by appearing before the civil court. Sri Singh further submits that subsequently, in criminal proceedings, evidence has been collected in the form of a fingerprint report submitted by a public officer of the office of Directorate, Fingerprint Experts, State of U.P., at Lucknow, which clearly establishes that the sale deed in favour of the plaintiff-respondent was obtained by playing fraud, as no power of attorney was executed on 25.10.1984 in favour of Ripudman Kumar Saharan, and therefore, the decree was inexecutable. Learned counsel has placed reliance upon section 44 of the Indian Evidence Act to contend that the judgment and decree obtained by fraud cannot be executed. It is thus submitted that the courts below have grossly erred in law, in refusing to examine the plea of fraud setup by the defendant-petitioner in execution proceedings, resulting in

failure of injustice being caused to the defendant-petitioner.

8. Sri Pankaj Agrawal, learned counsel appearing for the respondents, on the other hand, submits that the plaintiff-respondent is the owner in possession, which issue has already been accepted by the civil court, and has attained finality, and thereafter, the same question cannot be raised in execution, as the executing court cannot go behind the decree. He further submits that once the plea of fraud was setup in suit, it could have been established by the defendant-petitioner by leading cogent evidence, but once he failed to do so, it is not open for him to take such stand in execution. Sri Agrawal has also submitted that the defendant-petitioner in teeth of the decree has forcibly entered into possession and all frivolous objections are being raised so as to deny the benefit of the decree to the plaintiff-respondent. It is also submitted that defendant-petitioner had also got execution stalled by setting up a plea under Order 21 Rule 97 CPC by Madan Mohan, who is the son of Ashok Kumar, and now that the proceedings under Order 21 Rule 97 CPC are likely to conclude, therefore, this belated petition has been filed with the object of further harassing the plaintiff-respondent. It is also submitted that the plea of fraud though has been taken in the objection, but the same was not pressed before the courts below, and therefore, such issue cannot be permitted to be adjudicated in the writ petition arising out of such orders.

9. Learned counsel appearing for both the parties have relied upon various authorities in support of their proposition. With the consent of the learned counsel for the parties, the writ petition is being disposed of finally, at this stage. Both the parties have filed their written argument, which have been taken on record and are being

considered while deciding the writ petition.

10. From the materials placed on record, it is apparent that the suit property was leased out by Noida to Ashok Kumar, pursuant to lease deed dated 23.5.1981. The judgment debtor and decree holder both are claiming their right over the suit property through Ashok Kumar. The defendant-petitioner has setup his right over the suit property on the basis of a registered agreement to sell, pursuant to which he alleges to have been put in possession by Ashok Kumar. On the other hand, the plaintiff-respondent has setup her right, on the basis of sale deed, executed in her favour by her husband Ripudman Kumar Saharan, on the basis of a registered power of attorney claimed to have been executed by Ashok Kumar on 25.10.1984. Original Suit no.842 of 1986 had been filed by the plaintiff-respondent against the defendant-petitioner with the allegation that the defendant-petitioner had no right over the suit property, and as such, the defendant-petitioner be restrained from interfering with her possession. The suit was contested by the defendant-petitioner with the allegation that the plaintiff-respondent had no right over the suit property, as no power of attorney in favour of Ripudman Kumar Saharan was executed by Ashok Kumar and the power of attorney relied upon for executing the sale deed in favour of plaintiff-respondent is forged. It was stated that the defendant-petitioner pursuant to agreement to sell has been put in possession of the property and he is the owner in possession of the suit property. The civil court examined the question and vide issue no.1 returned a finding that the plaintiff-respondent is owner in possession over the suit property. It further appears that Ashok Kumar had filed an affidavit before the civil court, denying the

execution of power of attorney in favour of Ripudman Kumar Saharan. The civil court dealt with this aspect of the matter in following words:-

> '' जहॉ तक प्रतिवादी इस तर्क का प्रश्न है कि सेल डीड उसके पति द्व ारा की गयी है और पॉवर ऑफ अटार्नी जिसके आधार पर सेल डीड की गयी है वह साबित नहीं है चूॅकि इसके करने वाले को पेश नही किया गया है। यही सही है कि प्रस्तुत वाद में जो पॉवर ऑफ अटार्नी की प्रमाणित प्रतिलिपि दाखिल की गयी है उसको तथा बैनामें की प्रमाणित प्रतिलिपि दोनों को पी0डब्लू0–01 जो वादनी का पति है, नहीं साबित किया है, गलत है, क्योंकि यह आपत्ति उस व्यक्ति द्वारा नहीं उठाई गयी है जिसके द्वारा पॉवर ऑफ अटार्नी दी गयी है। वही व्यक्ति यह कह सकता था कि पॉवर ऑफ अटार्नी उसके द्वारा नहीं की गयी है। चूॅकि दस्तावेज रजिस्टर्ड है। अतः जब तक उसे फर्जी साबित नहीं किया जाये तब तक यदि दस्तावेज जिसके पक्ष में किया गया है वह यह साबित करता है कि दस्तावेज उसके पक्ष में निष्पादित हुआ था सही माना जायेगा। ऐसी कोई साक्ष्य प्रतिवादी ने नहीं दी है जिससे उक्त दस्तावेज फर्जी माना जाये। यद्यपि वादनी द्वारा दाखिल साक्ष्य इतनी मजबूत नही हैं जितनी की होनी चाहिये। चूॅकि असल बैनामा दाखिल नहीं है और मूल आवंटक की साक्ष्य नहीं कराई गयी है, किन्तु प्रस्तुत साक्ष्य से यह साबित होता है कि वादनी के पक्ष में विवादित प्लाट की एक रजिस्ट्री हुई है और जिससे वह मालिक है जब तक कि अन्यथा साबित न हो।''

11. The appellate court found that Ashok Kumar had not been produced before the civil court. Appellate court has also taken note of the fact that the power of attorney executed by Ashok Kumar in favour of Ripudman Kumar Saharan had been lost, and the certified copies of the power of attorney and sale deed were placed on record. The civil court relying upon the plaintiff's evidence, treated the certified copies as admissible in evidence as secondary evidence. It was also found that Ashok Kumar had neither appeared before the civil court nor he appeared before the appellate court to challenge the averments made in the plaint, and in such circumstances, the plea set up by the defendant-petitioner was rejected. The observation of the appellate court, which is relevant for the present purposes, as is contained at page 81 of the writ petition, is that *"it was not open to the defendant-petitioner to contend that these papers were forged*

papers. Until the original allottee Ashok Kumar had come before this Court to challenge the authenticity of these papers." The affidavit filed by Ashok Kumar before the civil court, however, has not been commented upon by the civil court or the appellate court. The second appeal itself was also dismissed by this Court on 18.2.2002, as no substantial question of law was found to be involved in the matter.

12. A bare perusal of the record further goes to show that so far as the plea of fraud in execution of power of attorney is concerned, the civil court had refused to examine this aspect of the matter in the absence of Ashok Kumar himself disputing the due execution of the power of attorney. In such circumstances, this Court finds that the plea of power of attorney being an outcome of fraud though was pleaded by the defendant-petitioner, but the same had not been gone into for the simple reason that executor Ashok Kumar had not appeared to take such a plea. No finding with regard to genuineness of the power of attorney was returned by the civil court.

13. This Court further finds that in execution proceedings, a specific objection has been taken by the defendant-petitioner, to contend that the basis of the decree in favour of plaintiff-respondent itself is based upon fraud, inasmuch as the sale deed in favour of plaintiff-respondent was executed on the basis of power of attorney, which has been found in the report of the Directorate, Fingerprint Experts, U.P., Lucknow, to be not that of Ashok Kumar and the claim of plaintiff-respondent based upon it, therefore, is an outcome of fraud, which renders the decree inexecutable. Such an objection has been taken under section 47 CPC. Both the courts below, while narrating the contents of the objection, have taken note of the objection in this

regard. Although Sri Pankaj Agrawal has strongly urged that this aspect of the matter was not pressed before the courts below, but such a contention is not liable to be accepted inasmuch as the civil court has taken note of the specific objection of the defendant-petitioner under section 47 CPC, and therefore, the executing court was required to examine this aspect of the matter. Even in revision it is to be found that the revisional court has taken note of the contention of the defendant-petitioner that the decree of the civil court was obtained by playing fraud, and as such, the decree itself is a nullity. This Court finds that the executing court as well as the revisional court were swayed by the fact that once an adjudication on the respective claim of the parties had been returned by the civil court, the same was not liable to be re-agitated, as a ground, in execution. Both the courts below have held that the nature of objection raised if is examined, as is being claimed by the defendant-petitioner, the object of decree itself would be frustrated, and therefore, the courts below have refused to go into the merits of the contention setup by the defendant-petitioner in objection under section 47 CPC as well as in revision by the District Judge.

14. This Court finds that the basis of petitioner's claim that the decree was obtained by fraud is a report submitted before the Chief Judicial Magistrate by the Directorate of Fingerprint Experts, according to which, the fingerprints of Ashok Kumar, as existing on the lease deed executed by Noida do not match with those upon the power of attorney claimed by Ripudman Kumar Saharan and rather matches with the agreement to sell executed in favour of the defendant-petitioner. This report has been prepared by the experts of Directorate of Fingerprint, who are public servants, and the report is

in due discharge of their official duties, and by virtue of section 114 of the Indian Evidence Act, a presumption of correctness of the report would be available in law, subject to further evidence which may be brought on record by the other side. The question as to whether a plea of fraud could be entertained even in collateral proceedings, at the stage of execution, after passing of the decree, is no longer res integra. It is settled that fraud and justice do not dwell together. It is equally settled that a court of law would do its utmost to ensure that injustice is not meted out to a party. Such right in a court of law has been recognized under section 44 of Evidence Act, which reads as under:-

> "44. **Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved**
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> Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

15. Reliance has been placed upon a decision of the Bombay High Court in **Shewa Lachha Banjar v. Bhawarilal Ganeshmal Marwadi: AIR 1973 Bom. 139**, wherein plea of fraud was setup in execution was rejected by the courts below. In such circumstances, the Bombay High Court interfered with the matter and made following observations:-

> "-----It must be observed that even in execution if it is shown that the order was made upon mistake or fraud which affects the very validity of the order under execution rendering it ineffective, it can properly be questioned by any one. Section 44 of the Evidence Act in terms applies to such matters and permits a person to lead evidence to show that the order is not binding in any such proceeding.-----"

16. Reliance has also been placed upon following decisions of the High

Courts:-

(i) In **Tribeni Mishra and others v. Ram Pujan Mishra and another: AIR 1970 Pat. 13**, para 13 has been relied upon, which reads as under:-

> "13. It may be mentioned here that Shri Kailash Roy, appearing for the defendant-respondents, has contended that the question as to whether there was any fraud in connection with the compromise could not be gone into in the present litigation in view of the fact that the previous suit had been decreed on basis of the compromise and the defendants had not brought any suit for setting aside the decree within the prescribed time limit under Article 95 of the Limitation Act, 1908. the prescribed period of time limit for institution of a suit for setting aside a decree obtained by fraud or for other relief on the ground of fraud was three years from the date when the fraud became known to the party and the same period of limitation has been prescribed under Article 59 of the new Limitation Act also. Hence, there cannot be any doubt that a suit by the defendants for setting aside the decree on basis of the compromise on the ground of fraud would have been barred by limitation unless filed within the prescribed time limit of three years from the date of knowledge of the fraud. Section 44 of the Evidence Act, however, provides as follows:
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> "Any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under Section 40, 41 or 42 and which has been proved by adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."
>
> The question as to whether in view of these provisions, a decree or order can be challenged on the ground of fraud in a collateral proceeding without any suit for setting aside the decree came up for consideration before a Division Bench of this Court in the case of Bishnunath Tewari v. Mst. Mirchi, AIR 1955 Pat 66. In this case, there was a divergence of opinion between the two Judges of this Court, namely, Lakshmikanata Jha, C. J. and Reuben, J. who initially heard the case, on which there was a reference to a third Judge, namely, Ramaswami, J. fas he then was) and the latter agreed with the views expressed by Lakshmikanta Jha, C. J. and observed as follows :--
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> "It is important to remember that fraud does not make a judicial act or transaction void but only voidable at the instance of the party defrauded. The judicial act may be impeached on the ground of fraud or collusion in an active proceeding for rescission by way of suit. The defrauded party may also apply for review of the judgment to the Court which

pronounced it. But the judgment may also be impeached in a collateral proceeding in which fraud may be set up as a defence to an action on the judgment or as an answer to a plea of estoppel or res judi-cata found upon the judgment."

It was further held in this case that the provision relating to limitation as provided in Article 95 of the Limitation Act has no bearing in relation to Section 44 of the Evidence Act. As would appear from the terms of Section 44 of the Evidence Act, already quoted above, this section lays down that any party to a suit or other proceeding may show that a judgment, order or decree referred to in the section, which has been proved by the adverse party, was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. The right as given by this section has not been fettered by any limitation whatsoever and it is manifest that such a right is quite independent of the right to get a judgment or decree etc. set aside by bringing regular suit for the purpose. I, therefore, fully agree with the views expressed in the earlier decision of this Court referred to above and hold that such a plea can be raised under Section 44 of the Evidence Act in a collateral proceeding irrespective of the time when the judgment was delivered or decree or order was passed. The aforesaid contention of Shri Kailash Roy is accordingly rejected as being quite untenable. This, however, makes no difference so far as the result of this appeal is concerned in view of the findings above that there was no fraud in connection with the compromise in question."

(ii) In **Khirod Chandra Mohanty v. Banshidhar Khatua: AIR 1978 Ori. 111**, para 8 has been relied upon, which reads as under:-

"8. It was urged by Mr. Mohanty that even though it was held that the ex parte decree in T.S. No. 52/64 was obtained by collusion, that decree would operate as res judicata in this case. In support of his above submission Mr. Mohanty cited the single Judge decision reported in AIR 1950 All 488 (Baboo v. Mt. Kirpa Dei). The decision in that case was rendered entirely on facts different from those in the present case. In that case the question was whether 'even if one of the defendants to the suit was in collusion with the plaintiff, the decision could be said to be binding on the defendants on the principle of res judicata.' That question was decided in the affirmative. In the present case before me, it has been found by both the courts below that the ex parte decree in T. S. No. 52/64 was obtained by the plaintiff in collusion with all the defendants in the said suit. That being so, the above decision is not applicable to the present case.

Under Section 44 of the Evidence Act any party to a suit or other proceeding may show that any judgment, order or decree, which it or was obtained by fraud or collusion. The

provision of Section 44 is not an idle provision. If it is proved that a judgment was obtained by collusion that fact will affect its force, effect, executability and value. So it will be absolutely incorrect to say that even if a judgment is obtained by fraud or collusion that will operate as res judicata in a subsequent suit. That will be giving premium to sham and illegal deals, shutting out persons striving to uphold their rightful cause or claim by exposing illegal or unconscionable bargains.

In Manchharam v. Kalidas ((1895) ILR 19 Bom 821) it was held that Under Section 44, Evidence Act, a party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud.

In Nistarini Dassi v. Nundo Lall Bose, ((1899) ILR 26 Cal 891) it was held that an innocent party may be allowed to prove in one court that a decree obtained against him in a different proceeding in another court of concurrent jurisdiction was obtained by fraud, and if the court be of opinion that such decree so obtained in the other court cannot stand it has jurisdiction to treat that decree as a nullity and render its effect nugatory.

In Section 44of the Evidence Act the word "Collusion" has been placed exactly on the same footing as the word "fraud" in the said section.

In the case reported in AIR 1955 Pat 66 (Bishunath Tewari v. Mst. Mirchi) it has been observed:--

"Thus, a survey of the authorities of the different High Courts, shows that a judgment, decree or order of a court of competent jurisdiction can be treated as a nullity under Section 44, Evidence Act and its effect rendered nugatory if it is shown that it was obtained by fraud or collusion of the antagonist".

On the above discussion I reject the above-mentioned contention of Mr. Mohanty.

(iii) In **Nechhittar Singh v. Smt. Jagir Kaur and others: AIR 1986 PH 197,** para 6 has been relied upon, which reads as under:-

"6. The learned counsel for the defendant appellant vehemently contended that the decree could only be challenged under S. 44 of the Evidence Act and that too by a third party and not by a party to the suit in which that said decree was passed. In support of this contention he referred to Mt. Parbati v. Garaj Singh, AIR 1937 All 28, Shripadgouda Venkangouda Aparanji v. Govindgouda Narauangouda Aparanji, AIR 1941 Bom 77, Parameswearn Naair v. Aiyappan Pillai, AIR 1959 Ker 206 and Laxmi Narain Gododia v. Mohd. Shafi Bari, AIR 1949 East Punjab 141. On this question I do not find any merit in the contention raised on behalf of the

appellant. S. 44 of the Evidence Act reads as follows:--

"Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.-Any party to a suit or other or decree which is relevant under S. 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

Reading S. 40 with S. 44 it is evident the under S. 40 the previous judgments are relevant to bar a second suit or trial., In other words, the earlier judgment operates as respondent judicata. That will only be ordinarily between the same parties, and if that is so then the said judgment being relevant u/s 40 could be challenged if it was proved by the adverse party that the same was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. It is only u/ss. 41 and 42 of the Act when the judgment is relevant that even a third party can show that the same was delivered by a Court not competent to deliver it or that it was obtained by a fraud or collusion. Even the judgments relied on by the learned counsel for the appellant do not support his contention. In Laxmi Narian Goddodia's case (supra) it was held that S. 44 is the only provision of law under which a judgment or an order or a decree which is sought to be proved with a view to establish the plea of respondent judicata can be avoided. similarly, in Tribeni Mishra v. Rampuijan Mishra. AIR 1970 Patna 13. it was held that the right as given by S. 44. Evidence Act has not been fettered by any limitation whatsoever and it is manifest that such a right is quite independent of the right to get a judgment or a decree. etc., set aside by bringing a regular suit for the purpose. A decree or an order can be challenged on ground of fraud in a collateral proceeding without any suit for setting aside the decree irrespective of the time when the judgment was delivered or the order of the decree was passed. Similarly, in Mt. Parbati's case (supra) it was held that the meaning of S. 44 of the Evidence Act is that if collusion is proved between the parties to previous suit then the judgment in that suit which is relevant u/s 40 cannot act as a bar. Thus, the contention that no decree could be challenged by a party to the suit subsequently on the basis of fraud or collusion cannot be accepted as such. The authorities relied on by the learned counsel for the appellant do not lay down such a law and, in any case the same are distinguishable on facts."

17. The Apex Court in **Gram Panchayat of Village Naulakha v. Ujagar Singh: 2000 (7) SCC 543** relying upon various decisions has been pleased to hold as under in para 4, 5 & 6:-

"4. On this point, we have heard the learned counsel for

the respondents who contended that the principle laid down by the Full Bench in Jagar Ram's case is correct and that the earlier judgment in the present case is binding on the basis of the principle of res judicata. The panchayat cannot therefore raise a plea of collusion in the latter proceeding unless it has first filed a suit and obtained a declaration or unless it took steps to have the earlier decree set aside.

5. We may state that the view taken by the Full Bench of the Punjab & Haryana High Court in Jagar Ram's case is not correct and in fact, it runs contrary to the provisions of section 44 of the Indian Evidence Act. That section provides that: Any party to a suit or proceeding may show that any judgment, order or decree which is relevant under sections 40, 41, 42 and which has been delivered by a Court not competent to deliver it or was obtained by fraud or collusion. (Section 40 refers to the relevances of previous judgments which are pleaded as a bar to a second suit or trial and obviously concerns section 11 CPC).

6. It appears from commentary in Sarkar's Evidence Act (13th Ed., reprint) (at p. 509) on section 44 that it is the view of the Allahabad, Calcutta, Patna, Bombay High Courts that before such a contention is raised in the latter suit or proceeding, it is not necessary to file an independent suit. The passage from Sarkar's Evidence which refers to various decisions reads as follows:

"Under Section 44 a party can, in a collateral proceeding in which fraud may be set up as a defence, show that a decree or order obtained by the opposite party against him was passed by a court without jurisdiction or was obtained by fraud or collusion and is not necessary to bring an independent suit for setting it aside, Bansi v. Dhapo, ILR 24, All 242; Rajib v. Lakhan, ILR 17 Cal. 11; Parbati v. Gajraj, AIR (1937) All. 28; Prayag v. Siva, AIR 1926 Cal. 1; Hare Krishna v. Umesh, AIR (1921) Pat. 193; Aswini v. Banamali, 21 CWN 594; Manchharam v. Kalidas, ILR 19 Bom. 821; Ranganath v. Govind, ILR 28 Bom. 639; Kamiruddin v. Jhadejanessa, AIR (1929) Cal. 685; Bhagwandas v. Patel & Co., AIR (1940) Bom. 131; Bishunath v. Mirchi, AIR (1955) Pat. 66 and Vijaya v. Padmanabham, AIR (1955) AP 112."

Thus, in order to contend in a latter suit or proceeding that an earlier judgment was contained by collusion, it is not necessary to file an independent suit as stated in Jagar Ram's case for a declaration as to its collusive nature or for setting it aside, as a condition precedent. In our opinion, the above cases cited in Sarkar's Commentary are correctly decided. We do not agree with the decision of the Full Bench of the Punjab & Haryana High Curt in Jagar Ram's case. The Full Bench has not referred to section 44 of the Evidence Act not to any other precedents of other Courts or to any basic

legal principle."

18. Similar view has also been expressed by the Apex Court in **Asharfi Lal v. Koili (dead) by LRs : JT 1995 (5) SC 496.**

19. It is well settled that once the plea of fraud has been setup by the defendant-petitioner before the executing court, and credible evidence in support of such plea was also placed, it was incumbent upon the executing court to have examined the issue of fraud, on merits, and such plea ought not to have been rejected merely on the ground that a decree in favour of the plaintiff-respondent had been passed, and the executing court, as such, had no occasion to examine the plea of fraud. It is also well settled that fraud vitiates all solemn acts. Though a plea of fraud was taken up before the civil court, but such plea was not adjudicated, which is clarified in the judgment of the civil court itself. However, if a credible material has come into existence, which if is found proved vitiates the decree itself, it is the duty of the executing court to consider such plea on merits. It was open for the executing court to have examined the report of the Directorate, Fingerprint Experts, in accordance with law, and for such purpose an opportunity was liable to have been allowed to the plaintiff-respondent. The executing court could have adjudicated as to whether the plea of fraud was made out on facts or not? but it was not open for the executing court to brush aside the objection itself and thereby refused to go into such issue itself.

20. The judgment of the Apex Court relied upon by Sri Pankaj Agrawal, learned counsel for the respondents, in **Atma Ram Builders Pvt. Ltd. v. A.K. Tuli and others: (2011) 6 SCC 385** and **Smt. Kastoori Devi & another v. Harbansh Singh: AIR 2000 Punjab and Haryana 271,** are not relevant for the present purposes,

inasmuch as no plea of fraud or interpretation of section 44 of the Evidence Act was involved therein. It was observed, in the facts of the case where no issue of fraud was involved, that once the suit had been decreed, thereafter unnecessary objections should not be entertained and the benefit of decree must be ensued at the earliest. The proposition, aforesaid, is too well settled but has no application in the facts of the present case, where a plea of fraud has been taken and substantiated with prima facie evidence.

21. The Apex Court also had an occasion to consider the aspect of playing of fraud upon the court in **Hamza Haji v. State of Kerala and another: (2006) 7 SCC 416**. Para 10 to 24 of the said judgment is reproduced:-

> "10. It is true, as observed by De Grey, C.J., in Rex Vs. Duchess of Kingston [2 Smith L.C. 687] that:
>
> "'Fraud' is an intrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial
> acts ecclesiastical and temporal".
>
> 11. In *Kerr on Fraud and Mistake*, it is stated that:
>
> "in applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest Court of judicature in the realm, but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud."
>
> 12. It is also clear as indicated in *Kinch Vs. Walcott* [1929 APPEAL CASES 482] that it would be in the power of a party to a decree vitiated by fraud to apply directly to the Court which pronounced it to vacate it. According to Kerr:
>
> "In order to sustain an action to impeach a judgment, actual fraud must be shown; mere constructive fraud is not, at all events after long delay, sufficient..... but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury."
>
> (See the Seventh Edition, Pages 416-417)

13. In *Corpus Juris Secundum*, Volume 49, paragraph 265, it is acknowledged that,

"Courts of record or of general jurisdiction have inherent power to vacate or set aside their own judgements".

In paragraph 269, it is further stated,

"Fraud or collusion in obtaining judgment is a sufficient ground for opening or
vacating it, even after the term at which it was rendered, provided the fraud was extrinsic and collateral to the matter tried and not a matter actually or potentially in issue in the action.

It is also stated:

"Fraud practiced on the court is always ground for vacating the judgment, as where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair".

14. In *American Jurisprudence*, 2nd Edition, Volume 46, paragraph 825, it is stated,

"Indeed, the connection of fraud with a judgment constitutes one of the chief causes for interference by a court of equity with the operation of a judgment. The power of courts of equity in granting such relief is inherent, and frequent applications for equitable relief against judgments on this ground were made in equity before the practice of awarding new trials was introduced into the courts of common law.

Where fraud is involved, it has been held, in some cases, that a remedy at law by appeal, error, or certiorari does not preclude relief in equity from the judgment. Nor, it has been said, is there any reason why a judgment obtained by fraud cannot be the subject of a direct attack by an action in equity even though the judgment has been satisfied."

15. The law in India is not different. Section 44 of the Evidence Act enables a party otherwise bound by a previous adjudication to show that it was not final or binding because it is vitiated by fraud. The provision therefore gives jurisdiction and authority to a Court to consider and decide the question whether a prior adjudication is vitiated by fraud. In Paranjpe Vs. Kanade [ILR 6 BOMBAY 148], it was held that:

"It is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud;"

16. In *Lakshmi Charan Saha Vs. Nur Ali* [ILR 38 Calcutta 936], it was held that:

"the jurisdiction of the Court in trying a suit questioning the earlier decision as being vitiated by fraud, was not limited to an investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant. The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree."

17. In Manindra Nath Mittra Vs. Hari Mondal [24 Calcutta Weekly Notes 133], the Court explained the elements to be proved before a plea of a prior decision being vitiated by fraud could be upheld. The Court said:

"with respect to the question as to what constitutes fraud for which a decree can be set aside, two propositions appear to be well established. The first is that although it is not permitted to show that the Court (in the former suit) was mistaken, it may be shown that it was misled, in other words where the Court has been intentionally misled by the fraud of a party, and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment. The second is that a decree cannot be set aside merely on the ground that it has been procured by perjured evidence".

18. The position was reiterated by the same High Court in Esmile- Ud-Din Biswas and Anr. Vs. Shajoran Nessa Bewa & Ors. [132 INDIAN CASES 897]. It was held that:

"It must be shown that fraud was practised in relation to the proceedings in the
Court and the decree must be shown to have been procured by practising fraud of some sort upon the Court."

19. In Nemchand Tantia Vs. Kishinchand Chellaram (India) Ltd. [63 Calcutta Weekly Notes 740], it was held that:

"a decree can be re-opened by a new action when the court passing it had been misled by fraud, but it cannot be re-opened when the Court is simply mistaken; when the decree was passed by relying on perjured evidence, it cannot be said that the court was misled."

20. It is not necessary to multiply authorities on this question since the matter has come up for consideration before this Court on earlier occasions. In S.P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by LRs & Ors. [(1993) Supp. 3 SCR 422], this Court stated that:

"it is the settled proposition of law that a judgment or decree

obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree --- by the first court or by the highest court --- has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

The Court went on to observe that the High Court in that case was totally in error when it stated that there was no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence. Their Lordships stated:

"The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property - grabbers, tax - evaders, Bank - loan -dodgers, and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation".

21. In Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education & Others [(2003) Supp. 3 SCR 352], this Court after quoting the relevant passage from Lazarus Estates Ltd. Vs. Beasley [(1956) 1 All ER 341] and after referring to S.P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by LRs & Ors. (supra) reiterated that fraud avoids all judicial acts. In State of A.P. & Anr. Vs. T. Suryachandra Rao [(2005) 6 SCC 149], this Court after referring to the earlier decisions held that suppression of a material document could also amount to a fraud on the Court. It also quoted the observations of Lord Denning in Lazarus Estates Ltd. Vs. Beasley (supra) that:

"No judgment of a Court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

22. According to Story's Equity Jurisprudence, 14th Edn., Volume 1, paragraph 263:

"Fraud indeed, in the sense of a Court of Equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."

23. In Patch Vs. Ward [1867 (3) L.R. Chancery Appeals 203], Sir John Rolt, L.J. held that:

"Fraud must be actual positive fraud, a meditated and

> intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case, and obtaining that decree by that contrivance."
>
> 24. This Court in Bhaurao Dagdu Paralkar Vs. State of Maharashtra & Ors. [2005 (7) SCC 605] held that:
>
> "Suppression of a material document would also amount to a fraud on the court. Although, negligence is not fraud, it can be evidence of fraud."

22. In view of the discussions made above, this Court finds that the orders impugned dated 26.2.2014 and 29.5.2014, passed by the courts below, cannot be sustained and are hereby quashed. The executing court is directed to reconsider the objection under section 47 CPC, afresh, in light of the observations made above. For such purposes, the executing court will go into the allegations of fraud on merits, in accordance with law, and after affording opportunity to both the parties, the plea of fraud would be adjudicated on merits. Since the proceedings have dragged for the last 13 years, therefore, the objection on merits would be decided forthwith, by fixing short dates, in accordance with law, without granting any adjournment to either of the parties, except upon imposition of cost, which shall not be less than Rs.500/-.

23. Accordingly, the writ petition stands allowed. There shall be no order as to costs.

Order Date :- 18.2.2015
Ashok Kr.