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25.07.2023

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CPAN 922 of 2022
CAN 10 of 2023
CAN 11 of 2023
CAN 12 of 2023
CAN 13 of 2023

M/s. Odisha Slurry Pipeline Infrastructure Ltd. & Anr.
Vs.
Rakesh Sharma & Ors.

Mr. Deepak Khosla, Advocate
...... for the applicants
Mr. Joy Saha, Advocate
Mr. Siddhant Kant, Advocate
Mr. Parth Gokhale, Advocate
Ms. Trisha Mukherjee, Advocate
Ms. Moulshree Shukla, Advocate
Mr. Chetan Kumar Kabra, Advocate
...... for the alleged contemnor nos. 1-11, 15,16, 18, 20 & 21
Mr. Joydip Kar, Advocate
Mr. Abhishek Swaroop, Advocate
Mr. Arkaprava Sen, Advocate
Mr. Naman Kangdar, Advocate
...... for the alleged contemnor no. 34
Mr. Jishnu Saha, Advocate
Mr. Amitabh Shukla, Advocate
Ms. Rubi Singh Ahuja, Advocate
Mr. Ashutosh P. Shukla, Advocate
..... for the alleged contemnor no. 45
Mr. Sudipto Sarkar, Advocate
Mr. Dwaipayan B. Mallick, Advocate
...... for the alleged contemnor nos. 50 to 53
& for the petitioners in CAN 6 of 2023.
Mr. Sujoy Sur, Advocate
Ms. Ashika Daga, Advocate
Mr. Deepti Priya, Advocate
...... for the alleged contemnor nos. 79, 81 to 93
Mr. S. N. Mitra, Advocate
Mr. Sankarsan Sarkar, Advocate
Mr. Aditya Kanodia, Advocate
Mr. Tanmoy Seth, Advocate
...... for the applicants in CAN 12 of 2023
Ms. Sreemoyee Mitra, Advocate
.... for the Canara Bank
Mr. Rishav Banerjee, Advocate
Mr. Zeeshan Haque, Advocate
Ms. Anjana Banerjee, Advocate
...... for the Intervener (SMAIT)

<u>Re: CAN 10 of 2023</u>

1. A disquiet litigant is beleaguered between the scope of recalling an order passed on contest and the order to

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be revisited on a perceived fraud played upon the Court at the behest of the appearing Counsel on the other side. The contempt application was taken out by the applicants in a different nomenclature and a plea of demurrer was taken which is akin to a plea of *locus standi* to maintain the said contempt application and was decided by this Court in an order/judgment dated 13.03.2023.

2. A practice has developed at the Bar in making an extensive argument, sometimes *de hors* the pleadings, sometimes by filling the documents and several applications treating the same to be a part of the record and perceiving the same to be an integral part of the pleading so as to postpone the disposal of the main matter on its merit. Even if the judgment is passed on contest, the application to recall the said order is taken out on the ground that there has been a fraud committed upon the Court in relation to certain observations made in the said judgment.

3. There is a clear distinction between recall of an order/judgment and a review of the order/judgment. The review has to be entertained on a well-defined parameter enshrined under Order XLVII Rule 1 of the Code of Civil Procedure. On the other hand, the recall to a contested order has to be decided in a limited sphere and should not be permitted to expand the horizon of the consideration or the points which have been dealt with in a judgment and order passed in pursuit of dispensation of justice and adjudication of rights of the parties. Neither the review jurisdiction nor an application for recall should be permitted for re-visitation, re-writing and/or re-appreciation of the facts as its applicability is within the limited contour envisaged under the law. The moment the plea of fraud

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is taken, it admits no ambiguity that the Court always visualized the same as a serious matter as the person who have been instrumental to the commission of the fraud, should not be permitted to reap the benefit thereof.

4. The fraud unravels all things, and a plea of fraud can be taken in a collateral proceeding. Mere using the word 'fraud' is not sufficient enough to constitute the same as the law of pleading incorporated under Order VI Rule 4 of the Code of Civil Procedure provides the particulars thereof to be succinctly narrated and/or jotted down with precision and clarity.

5. The judgments have been cited on the consequences of fraud to which we do not feel any dissent thereupon as the fraud is always considered to be a ground not only to impinge the action of the parties but have its equal application in a judicial parlance. The moment the fraud is alleged in relation to a judgment and order passed by the Court, the Court always took it seriously in order to ascertain whether there has been any fraud committed by the parties or any such fraudulent act has been done in course of the dispensation of justice.

6. It would be an idle exercise to recapitulate the law laid down on the concept of fraud as all the judgments are uniform in the context that once the Court finds that fraud has been practised, there is no fetter on the part of the Court to recall the order as dispensation of justice is the hallmark of the judicial system. The Court should be conscious when a recall is intended on an alleged fraud and would refuse to exercise its discretion if there is lack of element of fraud or the real intention is to invite the attention of the Court to various observations which may sometimes be factually incorrect or arrived erroneously. The

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moment the element of fraud is lacking and the hidden intention to reopen the entire case in the garb of a so-called fraud by creating an illusory cause of action with the clever draftsmanship, the Court should nip such litigation in the bud and in this regard the celebrated observation of Justice Krishna Aiyar in case of ***T. Arivandandam Vs. T.V. Satyapal & Anr.*** reported in ***1977 (4) SCC 467*** is required to recapitulate which runs thus:-

"the learned Munsiff must remember that if on a meaningful – not formal – reading of the plaint, it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X of the Code. An activist Judge is the answer to the irresponsible law suit."

7. An argument is sought to be advanced that the moment the plea of demurer is taken it invites two eventualities; firstly, such demurer would defeat the right of the parties to contest the issues involved therein; secondly, it is the conscious decision of the party not to answer the issues and impliedly abandoning the same as he is confident on the plea of demurer that would defeat the cause. It is sought to be contended that the plea of demurer having resorted to, would lead to an inescapable conclusion that the contesting parties have either no answer to the issues raised therein or have consciously abandoned their right to contest such issues and, therefore, the statement must be taken to be true and sacrosanct.

8. We are unable to comprehend such conception of law for the simple reason that a plea of demurer available to adversary, is one of the tool for defeating the legal proceeding but can never be expanded to deny the

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right to contest the proceeding nor would be construed to take away such right, in the event, the point of demurer fails. There are various facets of the demurer, sometime it is purely a question of law on the basis of the facts pleaded in the plaint, sometime it is a plea on fact lacking a clear right to sue or non-disclosure of the cause of action for the reliefs claimed therein. The plea of demurer has been advanced by passage of time in the Indian judicial system by insertion of various provisions under the Code of Civil Procedure.

9. It would be preposterous to suggest that the plea of demurer, as envisaged under Order VII Rule 11 of the Code has to be construed in such a manner as it would be opposed to the legislative intent behind the incorporation of such provision. The moment the plea of demurer is taken, the same is required to be decided on the facts emanates from the proceeding before it reach the stage of being decided on merit and even if the plea of demurer fails, it does not take away or denude the adversary to contest the proceeding on merit.

10. It is a misconception of the petitioner that the moment a proceeding is initiated before the Court it has to be decided after giving an opportunity to the other side to controvert the statements and/or allegations made therein as it is the primary duty of the person initiating a proceeding to prove his own case and have to pass the muster of maintainability of the said proceeding at the first.

11. A plea is taken by the other side that the applicants of the instant application cannot maintain the same which would be evident from the cause title of the said application. It is sought to be contended that somewhat identical cause title was depicted in an

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application for contempt being CPAN 922 of 2022 and a point was raised as to whether the persons shown therein as petitioners, can maintain an application for contempt. By an order dated 13.03.2023, the Court has held that the applicants of the contempt application are not entitled to initiate a proceeding nor can maintain an application for contempt after considering the various provisions of the Act and the Rules of this High Court framed in this regard. The identical plea has been taken in the instant application as there has been a little variation in the description of the petitioners. The applicants of the instant application are described as under:

"SREI MULTIPLE ASSET INVESTMENT TRUST, a Trust established under the Indian Trusts Act, 1882, operating the 'SREI MULTIPLE ASSET INVESTMENT TRUST – India Growth Opportunities Fund', the Fund registered with SEBI as a Category II 'Alternative Investment Fund' with effect from 08-10-2013 (Registration No. IN/AIF2/13-14/0077),
Having its Registered Office at:
'Vishwakarma',
86 Topsia Road (South),
KOLKATA – 700 046
Acting through a shareholder of the Trust's 52% contributory.

M/s. SREI INDUSTRIAL FINANCE LTD.,
A Company registered in India under the provisions of the Companies Act, 1956.
Having its Registered Office at:
Vishwakarma
86-C Topsia
KOLKATA – 700 046
Email : sreiadministrator@srei.com;
Acting through
Mr. Vir Jai Khosla
D-328 Defence Colony
NEW DELHI – 110 024

And in the matter of:
Mr. Vir Jai Khosla
D-328 Defence Colony

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NEW DELHI – 110 024

....APPLICANT.

12. The applicants of the contempt application appear to be identical except its representation manifest from the quoted portion as above. In the judgment and order dated 13.03.2023, this Court held that the petitioners of the contempt application cannot maintain the said application in the name of the Trust without the Trustees having impleaded therein. The instant application is filed by the same Trust acting through a shareholder of the Trust having 52% contributory in India Growth Opportunity Fund and Srei Industrial Finance Limited (Srei Infrastructure Finance Limited), acting through a person who claims himself to be the shareholder. A plea is taken that so far as the SIFL is concerned, its dues have been cleared off and there is no due as on the date and, therefore, cannot have any grievance. On the other hand, the applicant says that the interest component has not been paid.
13. Be that as it may, it is a Company incorporated under the Companies Act, 1956 and it does not appear from the averments made in the instant application that the person who claims himself to be the shareholder, have been authorized. However, it is averred in the said application that the said shareholder is aggrieved both in his individual capacity as well as in the capacity of a shareholder but did not specify the percentage of holding of such share therein. It further appears from the pleading that the SIFL is also claiming a derivative right through its shareholders and intended to invoke the provisions contained under Article 215 of the Constitution of India as a Court of record ad further asserted that the Court can act *suo motu* if the Court found that its records are not correct.

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14. It is no longer *res integra* that the High Court is a Court of record and has been bestowed power to punish for its contempt. The moment the Court finds that there is an error apparent on the face of the record in order to correct the records such constitutional right can be activated and we do not find any quarrel to such powers enshrined under the aforesaid Article. The moot question arises whether there has been a case made out for putting the record straight or correcting the error manifest from the record.
15. As indicated above, in absence of any disclosure of the percentage of shares held in SIFL by the alleged shareholder and when the Company itself does not intend to proceed with the litigation nor have authorized such shareholder to do so, we do not find that an application can be maintained at the behest of such shareholder.
16. However, a point is sought to be taken that Order I Rule 8A of the Code of Civil Procedure imbibe within itself every person interested on a question of law can be permitted to participate in the proceeding as such question of law would affect the public at large. We find that the aforesaid provision though relied upon by the applicant cannot be applied in the present case. The said provision provides that while trying a suit, the Court may satisfy that a person or body of persons interested in any question of law which is directly and substantially the issue in the suit and that it is necessary for the public interest to allow that person or body of persons to represent him or his opinion on that question of law permitted that person to present such opinion to take part in the proceeding of the suit as the Court may specify.
17. It applies in a special circumstances where the suit

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between two litigant involves an issue which may have a larger effect on the public, but does not cloth any power upon such person to take a responsibility upon itself and the proceeding between two individuals are diverted in the hands of such person and the order passed therein is amenable to be recalled and/or challenged by a third party in a Court of law. It has a restricted applicability on the question of law, which again must be directly or substantially an issue in the suit and having a larger impact on the public and, therefore, the Court may take an opinion of such person and may also permit him to participate in the proceeding. In our opinion such provision is misplaced in the context of the instant disputes and, therefore, such applicant acting through the shareholder cannot maintain the instant application to recall an order passed on contest. Though we may not have ventured to proceed further after having held so, yet we feel that we will be failing in our duty, if we do not address the issue sought to be raised in the instant application.

18. The application running to several pages is intended to recall the order dated 13th March, 2023 acting suo motu being a product of fraud played by the respondents upon the Court on the basis of the false statement made orally across the Bar, which is reflected in paragraph 25 of the said judgement.

19. The core issue raised in the instant application is that a serious fraud has been played upon the Court by the respondents, which led to the finding in relation to the ownership of the pipeline.

20. It is contended that the resolution plan never imbibed within itself the rights of the parties thereto over the pipeline and, therefore, such finding that the pipeline is belonged to the respondent no. 34 therein is an act of

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fraud and, therefore, the Court should recall the entire order. The arguments on behalf of the respondents are uniform in this regard that such finding cannot be construed to have declared the right over the pipeline, as the sentence comprised in paragraph 25 has to be read conjointly and should not be read in isolation of one and another. A further argument is advanced that even if the said finding is taken out from the judgement the other findings, which are independent, can withstand and there cannot be any incongruity or inconsistency therewith.

21. The Counsel for the applicants has taken an exception to the aforesaid submission and persistently insisted the Court to read the said finding as an act of fraud declaring that the pipeline is under the ownership of the respondent no. 34, which is apparently a false statement as the stand of the parties in course of the proceeding would reveal that such pipeline is still a subject matter of disputes as the respondents have, in fact, prevaricated their stand at different stages. It is sought to be contended by the Counsel for the appellant that in absence of any document, more particularly the resolution plan the Court cannot arrive at such finding, as the Court cannot based its decision on his personal knowledge, but must be guided upon the pleadings or the documents filed in the proceeding.

22. The first and foremost question involved in this regard is where there is any finding made by the Court in the said paragraph 25 of the judgement dated 25th March, 2023 that the pipeline is owned by the respondent no. 34 or it is a mere observation not touching upon the merit but based upon the perception of a Judge in delivering the judgement. It would be apposite and profitable to quote the observations made in paragraph

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25 of the judgement dated 13th March, 2023, which runs thus:

“In the interregnum, the proceeding before the NCLT was initiated and ultimately the resolution plan has been approved and implemented by the parties. The resolution plan would reveal that the said aforesaid pipeline was always intended to be a property of the respondent no. 34 and after the approval of the resolution plan recognising the alleged contemnor no. 34 as a successful resolution plan applicant. No further deliberation is required thereupon as the order approving the resolution plan was affirmed up to the Supreme Court and, therefore, whatever has been expressly provided therein is binding on the parties.”

23. It is no longer *res integra* that while interpreting a judgment or considering the error having made by the Court, the judgment has to be read as a whole and not in a piecemeal manner. The Court should deprecate the segregation and/or culling out one sentence out of the context and interpreted the same in a manner never intended by the Judge in the said judgment. The sequel of the events narrated in various paragraphs of the said judgment has to be read conjointly with paragraph 25 onwards and in the event it is found that the said finding is perverse and based on no material, there is no impediment on the part of the Court to either correct the same or to recall the order.

24. It is no doubt true that the resolution plan approved by the NCLT was affirmed by the appellate Tribunal and ultimately reached to the Supreme Court and the challenge to the same was rendered futile. In the said paragraph the Court recorded that the resolution plan so approved was duly implemented by the parties and it was further said that it would reveal from the said plan that the aforesaid pipeline was always intended to be the property of the respondent no. 34 and after approval of the resolution plan recognizing the alleged contemnor no. 34 as successful resolution plan applicant. Thereafter the Court proceeded that no

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further deliberation is required as the order approving the resolution plan was affirmed up to the Supreme Court and, therefore, *"whatever has been expressly provided therein is binding on the parties".*

25. In paragraph 24 of the judgment, this Court found that the entire allegation running into several pages was founded on the assertion that the moment the pipeline was transferred to the petitioner no. 1 by the alleged contemnor no. 34 and the deed of cancellation is the subject matter of challenge in the suit before the Sealdah Court was subject to the approval of the lender and the stakeholder including the shareholder, the same cannot be regarded as complete transfer of such pipeline and, therefore, was not given effect to any point of time. The Court further records that the cancellation deed is the subject matter of challenge in the suit before the Sealdah Court wherefrom the appeal originated and an order of *status quo* with regard to transfer and alienation of the pipeline is passed therein.

26. Such observation does not, in our opinion, declares any right of the parties nor can be said to have created any impact on the right of the parties as what is provided in the resolution plan approved up to the Supreme Court binds the parties thereto. In the event, the resolution plan does not contain any averments or rights of the parties over the said pipeline, such observation cannot be regarded as a foundation of the entire judgment. Furthermore, the language, which was used, was that what the Court perceived from the conduct of the parties and cannot be regarded as a conferment of any right *de hors* the rights recognized under the resolution plan; otherwise the next sentence used in the said paragraph would be rendered meaningless and/or otiose.

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27. It would not be incorrect, in our opinion, what we gather from the stand of the applicants that the instant application has been taken out to achieve a thing indirectly, which cannot be achieved directly. What is intended by filing the instant application is the re-visitation of the judgment rendered in the contempt application and any findings incidentally or accidentally made in the instant judgment to take advantage thereof, which, in our opinion, should be deprecated.
28. We have indicated in the judgment dated 13th March 2023 that the words "of inconsequential significance is being projected and the judicial hour of the Court is consumed at the expenses of the other litigants, who have an equal right under the Constitution to have their matter disposed of at an earliest". The manner in which the argument is advanced, it leaves an impression in us that a desperate attempt is made to have the order reviewed in the garb of recall.
29. We do not find any element of fraud either from the pleading or otherwise. As indicated above, slew of litigation are filed after each days of hearing culling out something from the submissions advanced at the Bar and inviting the attention of the Court to invoke and activate the process under the criminal law.
30. Even a live streaming, which has started with the avowed object is being misused and/or abused despite the disclaimer having been shown therein. Every bit of interaction in course of hearing is being taken as sacrosanct and a part of the affirmative stand of the parties. The disclaimer would reveal that no person shall be allowed to record the live streaming, which is primarily aimed to make aware of the common man of the country to understand the mannerism in which the proceedings are dealt by the Court and the procedures

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adopted. It further aimed to bring transparency and fairness in a journey of dispensation of justice but can never be abused and misused to such extent.

31. We do not intend to say any more words and leave it to the wisdom to the respective Members of the Bar to ponder upon the same as we still have a firmed believe that the live streaming may bring a radical change in the Court's system and may also percolate the awareness into a common people on the nuances of the procedures adopted in this regard.

32. The erudite submission was advanced at the behest of the Counsel appearing for the applicants on a proposition of law that any act done on the teeth of an order of temporary injunction is always regarded as illegal and should not be permitted to continue and there is no fetter on the part of the Court to put the parties to a position prevalent at the time of passing an order of status quo. Firstly, the contempt application was dismissed on the ground that the applicants/ petitioners are not entitled to maintain the same; even the Court has considered whether the Court should initiate a *suo motu* contempt proceeding treating the applicants/petitioners as informants and ultimately did not find any merit therein and dismissed the said application.

33. The applicants cannot be permitted to take a circuitous route and approach the Court to reopen the entire issue already decided by engaging a Counsel, who in his rhetoric invited the Court in every beat of the merit of the case.

34. We, thus, do not find that it is a fit case where we should recall our order. However, the conduct of the parties would not deter us from imposing the costs for unnecessarily inviting the Court to invest the time on

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such frivolous points. We, therefore, dismiss the instant application with costs assessed at Rs. 5,00,000/- (Rupees Five Lakh only) to be deposited with the State Legal Services Authority, West Bengal by the applicants/petitioners within two weeks from date.

35. In the event of the deposit of the said amount, the same shall be invested in an account maintained for juveniles and shall be utilized for their betterment.

36. After the judgment was dictated, the attention of this Court is drawn by the learned Counsel for the applicants that the instant application contains two prayers; one is substantive and other in alternative, which should not be construed in such fashion, but to be treated as a substantive prayer. Going by the language used in the second prayer having made in alternative, the applicants invited the Court to act *suo motu* in alignment with the views of the Supreme Court rendered in case of ***State of Bihar Vs. Bharat Coking Coal Limited*** reported in ***1987 Suppl. SCC 398*** relatable to the duty of the Court of records under Article 215 of the Constitution of India to correct and make accurate records and to make reference of the documents.

37. As indicated above, the parties in the proceedings have resorted the procedure in taking out slew of applications disclosing certain documents and inviting the Court to consider each and every documents whether having any relevance to the core issue or not. The manner in which the said prayer is couched, in our opinion, is intricately related to the substantive prayer made therein and the points have already been addressed in a preceding paragraphs of the instant order and, therefore, we do not find that any further deliberation is required thereupon, more particularly, when we held that the applicants of the instant

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application cannot maintain the same.

38. After the completion of the dictation in open Court, the Counsel for the applicants submits that he has been consistently requesting the Court to list CAN 7 of 2023 filed under FMAT 13 of 2016 along with the instant application. Since the arguments were advanced in the instant application as we are primarily concerned with the recall of the order/judgment dated 13th March 2023, we decided to hear out the application one after another as clubbing of the several applications would invite the endless arguments to be advanced at the Bar. A further request is made to list the said application tomorrow, but we are unable to accede to such prayer as one of us would hold the Circuit Bench from next week. Furthermore, the present application, which has been disposed of, has been extensively argued at the Bar at the expense of the other matters listed today and we, therefore, do not think that such prayer can be accepted at this stage.

39. List the said applications in the third of week of August 2023.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)

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