HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

C.R.P.No.852 of 2021

ORDER:

The petitioner herein had filed O.S.No.173 of 2013 against the respondent herein before the Family Court-cum-VIII Additional District Judge, Prakasam District at Ongole, for recovery of Rs.2,05,11,560/- and for a direction to the respondent herein to vacate the plaint 'B' schedule property and handover vacant possession of the property to the petitioner.

2. The case of the petitioner was that , the petitioner, by a development agreement dated 02.05.2006 with the APSRTC, had been given development rights on a 30 year licence for developing 2020 sq. Meters of land in the bus stand premises at Ongole, Thereafter, the petitioner had constructed a multi-storied commercial complex in the said land and had given a part of the complex, described as Schedule B in the Plaint, on a sub licence to the petitioner for carrying on hotel and hospitality services on sub-licence basis. The terms of the sub-licence/licence were reduced into writing on a stamp paper by way of agreement dated 09.02.2009 and the original of this agreement was with the respondent. The petitioner stated in the plaint that this agreement with the respondent herein was for a period of 10 years commencing from 01.04.2009 to 01.04.2019. The respondent, after entering into the plaint 'B' schedule property, under the said agreement had defaulted in payment of licence fee from 01.12.2010. The petitioner issued notices dated 23.08.2011 and 10.11.2011 to the respondent demanding payment of arrears of rent with interest. As these notices did not bear fruit, the petitioner got two notices dated 20.10.2012, issued to the respondent,

terminating the license in one notice and invoking the Arbitration clause in the other notice, and informing the respondent about the arbitrator chosen by the petitioner. The respondent after receipt of the notices, replied by notice dated 01.11.2012, denying the allegations of the petitioner and refusing to accept the reference of dispute to arbitration. The petitioner after issuing a rejoinder dated 01.12.2012 had filed the suit for recovery of licence fee and eviction of the respondent.

3. After the written statement was filed by the respondent in the suit, the petitioner moved an application under Order XVA of C.P.C., for a direction to the respondent to clear arrears of rent failing which the defence of the respondent was to be struck off. This application, numbered as I.A.No.1411 of 2013 was allowed on 02.04.2015. Aggrieved by the said order, the respondent moved C.R.P.No.2472 of 2015 before the High Court which came to be dismissed. The petitioner had approached the Hon'ble Supreme Court by way of S.L.P.No.28746 of 2014 against the order of dismissal of C.R.P.No.2472 of 2015. This S.L.P. was also disposed of by the Hon'ble Supreme Court.

4. The respondent had also moved various applications, which came to be dismissed on 28.03.2016. Aggrieved by the said orders, the respondent filed civil revision petitions, which came to be dismissed by this Court, by order dated 27.07.2016.

5. The details of these applications and C.R.Ps are as follows:

Sl.No.	Date of filing	Details of Interlocutory application	Date of Dismissal	CRP Number
1.	14.03.2016	C.F.R.No.746 of 2016 filed u/s.8(2) of Arbitration Act for referring the matter to Arbitrator	28.03.2016	1889 of 2016

2.	07.10.2015	I.A.No.1169 of 2015 filed for clubbing of suits OS No.173 of 2013 and 284 of 2014	28.03.2016	1987 of 2016
3.	15.02.2015	C.F.R.No.722 of 2016 seeking permission to pay proportionate rent	28.03.2016	2023 of 2016
4.	15.02.2016	C.F.R.No.723 of 2016 for deposit of Rs.32.14 lakhs	28.03.2016	2024 of 2016
5.	12.03.2014	I.A.No.410 of 2014 for rejection of plaint since the suit document is unstamped and unregistered and barred by law	28.03.2016	2025 of 2016
6.	15.02.2016	C.F.R.697 of 2016 to permit the petitioner to implead the APSRTC and Commissioner, Ongole Municipal Corporation as party defendants.	28.03.2016	2038 of 2016
7.	07.10.2015	I.A.No.1167 of 2015 for filing additional written statement	28.03.2016	2048 of 2016
8.	12.10.2015	I.A.No.1241 of 2015 to review the video recorded in the public court.	28.03.2016	2099 of 2016

6. It would also be necessary to notice the fact that C.R.P.No.1889 of 2016 had been filed against the order of dismissal of an application filed under Section 8 of the Arbitration and Conciliation Act, 1996 (for short 'the Act'), by the respondent.

7. Subsequently, the trial was conducted and the suit was decreed in favour of the petitioner by way of judgment and decree dated 27.12.2016. The respondent filed A.S.No.98 of 2017 against the said

judgment and decree. The Hon'ble High Court had initially granted stay of operation of the said judgment and decree in I.A.No.1 of 2020 on condition of the respondent depositing 50% of the arrears by 27.04.2021. As this order was not complied, the petitioner moved E.P.No.278 of 2019 for execution of the judgment and decree dated 27.12.2016. The respondent had then moved E.A.No.56 of 2021 under Section 47 read with Section 151 C.P.C to declare the judgment and decree in O.S.No.173 of 2013 dated 27.12.2016 to be a nullity and which cannot be executed. Certain orders were passed in this application by the executing Court on 07.07.2021. Aggrieved by the said orders, the petitioner herein has moved the present revision petition.

8. The grounds on which E.A.No.56 of 2021 was moved are:-

a) There was an agreement between the petitioner and the respondent. However, this was an oral agreement. The petitioner created a written agreement dated 09.02.2009, with totally made up terms and conditions, suiting the petitioner herein and filed I. A. No. 1411 of 2013, under Order XVA, on the basis of the said fabricated document. The respondent also took the plea that if the original was produced, it would not be looked into by the Trial court, in the Order XVA application, as it was an improperly stamped, unregistered document requiring affixture of huge stamp fee and registration before it could be looked into. To get over this lacunae, the petitioner had raised a false plea that the original was with the respondent herein and, by using the said document, obtained favourable orders against the respondent, shutting out his defence and thereafter produced the original before the Court after his defence had been shut out. The respondent claimed that the same is a fraud perpetrated on the court. Consequently, the judgement and decree

obtained by the petitioner is a nullity and the said decree cannot be executed.

b) The respondent sought to demonstrate this pleading by pointing to certain contradictions in the pleadings and the documents produced by the petitioner during the course of the trial in the suit.

c) According to the respondent, the petitioner herein stated, in the plaint, that the original of the written agreement dated 09.02.2009 is with the respondent herein and the petitioner was only holding a Xerox copy of the said agreement. This statement was reiterated in I.A.No.1411 of 2013 by the petitioner herein by filing a Memo filed on 12.12.2013 calling upon the respondent herein to produce the original agreement dated 09.02.2009.

d) After the defence of the respondent had been struck off, the petitioner herein had, in the course of the Trial, filed the original of the agreement dated 09.02.2009 without explaining as to how he had obtained custody of the original of the agreement dated 09.02.2009. This would obviously show that the petitioner had fabricated the said Document and the plea that the respondent was in possession of the original of the agreement of 09.02.2009 was obviously false.

e) On the basis of the above contention, the respondent herein sought to make out a case of fraud against the petitioner herein.

9. The petitioner herein had filed a counter denying all the allegations in the Petition and contending that the petitioner had never produced the original of the agreement dated 09.02.2009 and that the document produced by the respondent in the course of trial was only the duplicate copy of the agreement but not the original.

10. The Executing Court on the basis of the above averments framed the following issues, –

1. Whether the plaintiff/D.Hr/respondent played fraud on the court before filing of the suit or during the course of proceedings or at any point of time and obtained judgment and decree in his favour?
2. Whether fair opportunity was given to the defendant/petitioner/J.Dr to defend his case before this Court during course of trial? If not whether the defendant/petitioner/J.Dr is entitled for proper opportunity to defend his suit?
3. If so, whether the petitioner is entitled to defend his case by setting aside the earlier judgment and decree of this Court in O.S,.No.173/2013 dated 27.12.2016?

11. The Executing Court answered the issues in favour of the respondent herein and allowed the petition with certain observations. These observations are essentially giving liberty to the respondent herein an opportunity to contest the suit by while keeping the judgement and decree dated 27.12.2016 in abeyance till the respondent sets out it's defence and adduces evidence. Aggrieved by the said order, the petitioner has approached this Court.

12. Sri M.V.S. Suresh Kumar, learned Senior Counsel appearing for Sri Aravala Srinivasa Rao, learned counsel for the petitioner would contend that the only ground raised in the interlocutory application was the ground of fraud on account of non-filing of original of agreement dated 09.02.2009 despite the said original being in the custody and possession of the petitioner herein. He submits that this issue had been raised before the trial Court at the time of disposal of the suit and the said contention had been negatived by the trial Court and as such the said

issue cannot be agitated before the executing court. The relevant part of the said order is in internal page 24 of the judgment and decree, which reads as follows:

> "In the instant case from the beginning the case of the plaintiff is that the original deed is with the sub licensee-the defendant and he produced copy of it in the Court and it is not the case of the defendant that there is no sub-licence agreement at all and it is not a surprise to the defendant and the defendant also relied on the copy of the said deed and admitted the arrears before the Hon'ble Supreme Court, so the question of playing fraud does not arise."

13. Sri M.V.S. Suresh Kumar, learned Senior Counsel submits that the respondent herein, had also contended that the petitioner herein had created an agreement dated 09.02.2009 containing clauses which are favouring the petitioner and had obtained orders from the Court on the basis of such a document even though there was no such document in existence and there was only an oral agreement of lease between the petitioner and the respondent. Sri M.V.S. Suresh Kumar submits that this contention of the respondent is belied by the admissions of the respondent, which have been set down in the judgment and decree of the trial Court dated 27.12.2016.

14. The trial Court at internal page 41 of the judgment and decree had recorded the admissions made by the respondent herein in Ex.A.7 reply notice dated 01.11.2012. They are –

> II) With regard to Admissions in Ex.A.7 reply notice dated 01.11.2012:
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> "In para No.2 "it is relevant to note that the licensee to referred to in alleged leave and sub license

agreement, dated 09.02.2009 referred to in your notice subscribed on such agreement in the capacity of authorized signatory for Jyothi Plaza, but not in an individual capacity as referred to in your legal notice."

In para No.4: "Our client (defendant) under bona fide impression believed words of your client (plaintiff) and signed such agreement which was never intended to be acted upon not to be enforced."

15. The trial Court had also considered the admissions made by the respondent in W.P.No.4878 of 2013 filed by the respondent wherein the respondent had specifically stated that there was a sub-licence in favour of the respondent by agreement dated 09.02.2009.

16. Sri M.V.S. Suresh Kumar would therefore contend that there is no case of fraud made out against the petitioner herein to hold that the judgment and decree dated 27.12.2016 is a nullity. He would further submit that the Executing court could not have framed the second and third issues as they are beyond the purview of an application made under section 47 of C.P.C. and the findings given on these issues and consequent directions are an act of judicial indiscipline, to say the least. Sri M.V.S. Suresh Kumar has taken this Court through the grounds of appeal filed in the main appeal, to contend that there is no reference to fraud anywhere in the grounds of appeal. He submits that the application was filed by the respondent, without any basis for agitating a dead issue and the Executing court could not have gone into any of these issues. He would also submit that the order of the executing court is without any basis and beyond the jurisdiction of the court and requires to be set aside.

17. Sri V.S.R. Anjaneyulu, learned Senior Counsel appearing for Sri Jada Sravan Kumar, learned counsel for the respondent contested the revision petition on three grounds:-

a) The revision petition under Article 227 of the Constitution of India is not maintainable and it would only have to be filed under Section 115 C.P.C.

b) As stated in the plaint itself, arbitration proceedings had been initiated due to the presence of an arbitration clause in the agreement dated 09.02.2009. Once such arbitration proceedings have been initiated, a civil suit would not be maintainable and Section 8 of the Arbitration Act would clearly bar such a suit. In the circumstances, it must be held that the judgment and decree dated 27.12.2016 is without jurisdiction and consequently a nullity.

c) Once the Executing Court had found that there was fraud, the natural consequences of such a finding is that the judgment and decree becomes a nullity and incapable of execution.

Consideration of Court:

18. Before considering the order of the Executing Court, the issues raised by Sri V.S.R. Anjaneyulu require to be considered. A preliminary objection has been raised by Sri V.S.R. Anjaneyulu, learned Senior Counsel, regarding the maintainability of the present revision petition. Sri V.S.R. Anjaneyulu relying upon an order of the Division Bench of the erstwhile High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in C.R.P.No.6917 of 2018 dated 26.11.2016 contends that the revision petition would be

maintainable only under Section 115 C.P.C., and not under Article 227 of the Constitution of India.

19. A perusal of the judgment relied upon by Sri V.S.R. Anjaneyulu would show that the Division Bench had held that a revision under Section 115 C.P.C., would be barred, under proviso to Section 115 C.P.C., if the order under revision would not finally dispose of the suit if it is passed in favour of the party applying for revision.

20. In the present case, the application was moved by the respondent to declare the judgment and decree dated 27.012.2016 is a nullity and cannot be executed. If this application had been dismissed in favour of the petitioner, it would only mean that the execution petition would have continued. There would be no disposal of the execution petition itself and the bar under the proviso would apply.

21. In the circumstances, a petition under Section 115 C.P.C would not be maintainable and the petition was rightly filed under Article 227 of the Constitution of India.

22. Sri V.S.R. Anjaneyulu, learned Senior Counsel had also raised the issue that once arbitration proceedings had been initiated under the arbitration clause of 09.02.2009, a civil suit would not be maintainable and as such the judgment and decree dated 27.12.2016 would be without jurisdiction and consequently a nullity.

23. Sri M.V.S. Suresh Kumar, learned Senior Counsel for the petitioner would submit that this issue had never been raised before the Executing Court in E.A.No.56 of 2021 nor did the Executing Court advert to or decide such an issue. In the circumstances, the said issue cannot be raised at this stage before the Court.

24. This Court agrees with the view expressed by Sri M.V.S. Suresh Kumar as to the maintainability of the issue in the present revision petition.

25. However, since the said issue had been raised, it would be appropriate to deal with the issue. The respondent had raised this issue before the trial Court by way of C.F.R.No.746 of 2016 under Section 8(2) of the Act and sought reference of the dispute to an arbitrator. This application was dismissed by the trial Court on 28.03.2016 and the respondent had filed C.R.P.No.1889 of 2016 before the erstwhile High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh. The learned Single Judge had considered this issue and held that once the defence of the respondent had been struck off, the respondent is not entitled to file applications such as C.F.R.No.746 of 2016 and that the order of dismissal by the trial Court is not erroneous warranting interference of the High Court. In view of the above judgment, the question of the arbitrability of the dispute does not survive.

26. Even if the issue is to be considered, de hors the above findings of this Court, no case would be made out to take the view that the arbitration clause in the agreement would render the judgment and decree under execution a nullity. This is for the following reasons:

a) It is the case of the respondent that there is only an oral lease and there is no written document containing the terms of the agreement between the petitioner and the respondent. Section 7 of the Act mandates that any agreement of arbitration has to be in writing. In that view of the matter, the question of arbitrability of the dispute does not arise. Further, the respondent while contending that there is no written agreement,

cannot turn around and rely upon a written agreement pleaded by the petitioner to contend that the matter requires to be sent to arbitration.

b) The petitioner had issued a notice dated 20.10.2012 invoking the arbitration clause said to be contained in the written agreement dated 09.02.2009. The respondent herein had refused the said request. In the circumstances, the respondent cannot contend that the civil Court had no jurisdiction to pass the order and decree dated 27.12.2016.

c) Sri V.S.R. Anjaneyulu, learned Senior Counsel contends that once an arbitration has commenced under an arbitration clause contained in an agreement, a civil suit would not be maintainable on the same cause of action. He relies upon a judgment of the Hon'ble Supreme Court in the case of **National Aluminium Company Limited vs. Subhash Infra Engineers Private Limited and Anr.,**[1] to contend that even if the respondent had disputed the jurisdiction of the arbitrator, it would always be open to the respondent to move an application for reference of the dispute to arbitration. He relied upon paragraphs 11 and 12 of the said judgment, which read as under:

> "11. The learned counsel for the appellant has placed reliance on judgment in *Kvaerner Cementation (India) Ltd.* v. *Bajranglal Agarwal* [*Kvaerner Cementation (India) Ltd.* v. *Bajranglal Agarwal*, (2012) 5 SCC 214] .
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> 12. It is a case of the appellant Company that even if the first respondent disputes the jurisdiction of the arbitrator, it is open for the first respondent to move an application before the arbitrator under Section 16 of the Act, but at the same time, the suit filed by the first respondent, for declaration and injunction is not maintainable."

As can be seen from the above passage, the extract relied upon by the learned Senior Counsel is a record of the contentions raised by the counsel and not a finding given by the Hon'ble Supreme Court. That apart, the issue that was raised in the said judgment was on the question

[1] (2020) 15 SCC 557

of the right of a party to approach the Court under Section 16 of the Arbitration Act where the existence or validity of the arbitration agreement itself is in dispute. The said judgment would not be applicable to the question of an application under Section 8 of the Act

d) Sri V.S.R. Anjanayulu would submit that the provisions of Section 8 of the Act would apply where a suit has been filed. He relies upon the judgment of the Hon'ble Supreme Court in the case of **P. Dasa Muni Reddy vs. P. Appa Rao**[2] to contend that the question of waiver does not arise in relation to the jurisdiction of the Court over the subject matter of the suit. There can be no quarrel with the said proposition. However, the case here is on the question of waiver of an arbitration clause and not waiver of jurisdiction conferred, by law, on a Court of competent jurisdiction. It is settled law that an arbitration clause in an agreement would at best entitle a party to the said arbitration clause to insist upon referring disputes to arbitration rather than submit such disputes to a Court of competent jurisdiction. This right is not an absolute right and is subject to the condition that the request for arbitration has to be made before the first statement of defence is filed before the Court. In the present case, the respondent after denying the arbitration clause and refusing to submit to Arbitration had filed a written statement, submitting itself to the jurisdiction of the civil court. Thereafter, an application under Section 8 of the Act was filed subsequent to the filing of the written statement, and was rejected by the trial court and the same was affirmed by the High court. The question of the trial court losing jurisdiction does not arise in such a situation.

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[2] (1974) 2 SCC 725

27. The third issue raised by Sri V.S.R. Anjaneyulu, learned Senior Counsel was that the non-production of the original of the agreement dated 09.02.2009 by the petitioner herein is a fraud on the Court and as such the decree is a nullity and cannot be executed.

28. Sri V.S.R. Anjaneyulu would submit that suppression of a relevant document is a legal fraud and relies upon the judgments of the Hon'ble Supreme Court in **State of A.P. and Anr., vs. T. Suryachandra Rao[3]; A.V. Papayya Sastry and Ors., vs. Government of A.P. and Ors.,[4]; United India Insurance Co. Ltd., vs. Rajendra Singh and Ors.,[5]; Ram Chandra Singh vs. Savitri Devi and Ors.,[6] and a judgment of this Court in Captain Paid Janardhana Reddy and Anr. vs. State of Andhra Pradesh, rep. by its Commissioner & Inspector General, Registration & Stamps Department**[7].

29. The ratio laid down by the aforesaid judgments can safely be encapsulated by referring to the following extracts of the judgment of the Hon'ble Supreme Court in **A.V. Papayya Sastry and Ors., vs. Government of A.P. and Ors.** Paragraphs 21 to 30 of the above judgment read as under:

> 21. Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:
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> > "Fraud avoids all judicial acts, ecclesiastical or temporal."
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> 22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the

[3] 2005 (6) SCC 149
[4] 2007 (4) SCC 221
[5] 2000 (3) SCC 581
[6] 2003 (8) SCC 319
[7] 2020 (3) ALD 179

law. Such a judgment, decree or order—by the first court or by the final court—has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

23. In the leading case of *Lazarus Estates Ltd.* v. *Beasley* [(1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502 (CA)] Lord Denning observed : (All ER p. 345 C)

> "No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud."

24. In *Duchess of Kingstone, Smith's Leading Cases*, 13th Edn., p. 644, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be res judicata and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was "mistaken", it might be shown that it was "misled". There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.

25. It has been said: fraud and justice never dwell together (*fraus et jus nunquam cohabitant*); or fraud and deceit ought to benefit none (*fraus et dolus nemini patrocinari debent*).

26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of "finality of litigation" cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants.

27. In *S.P. Chengalvaraya Naidu* v. *Jagannath* [(1994) 1 SCC 1] this Court had an occasion to consider the doctrine of fraud and the effect thereof on the judgment obtained by a party. In that case, one *A* by a registered deed, relinquished all his rights in the suit property in favour of *C* who sold the property to *B*. Without disclosing that fact, *A* filed a suit for possession against *B* and obtained preliminary decree. During the pendency of an application for final decree, *B* came to know about the fact of release deed by *A* in favour of *C*. He, therefore, contended that the decree was obtained by playing fraud on the court and was a nullity. The trial court upheld the contention and dismissed the application. The High Court, however, set aside the order of the trial court, observing that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". *B* approached this Court.

28. Allowing the appeal, setting aside the judgment of the High Court and describing the observations of the High Court as "wholly perverse", Kuldip Singh, J. stated : (SCC p. 5, para 5)

> "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*."
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> (emphasis supplied)

29. The Court proceeded to state : (SCC p. 5, para 6)

> "A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

30. The Court concluded : (SCC p. 5, para 5)

> "The principle of 'finality of litigation' cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants."

30. There can be no quarrel with the aforesaid ratio laid down by the Hon'ble Supreme Court and this Court is bound by the said ratio. However, the question that arises is whether the facts of the present case would lend themselves to be governed by the aforesaid ratio.

31. Shorn of all details, the contention of the respondent is that firstly, the petitioner created a false document and secondly to get over the problem of admissibility of the said document, came up with a false story of the original of the document being in the custody of the respondent and on the basis of this false story was able to induce the Court to reject the defence of the respondent herein.

32. The first contention of the respondent is that the terms of the agreement between the respondent and the petitioner have never been reduced into writing and the contract between them is a oral lease. The trial Court, in the course of its judgment, had referred to various admissions, which have been extracted above and can be stated thus, –

a) The respondent, in its reply dated 01.11.2012 to the notices issued by the petitioner had stated that the respondent had signed an agreement dated 09.02.2009 and the said agreement was never intended to be acted upon.

b) The respondent admitted that the petitioner had called upon the respondent to execute a formal deed in the name and style of leave and licence agreement.

c) In the writ petition bearing W.P.No.4878 of 2013 filed by the respondent before the High Court, the respondent had admitted that there was an agreement dated 09.02.2009 between the petitioner and the respondent in relation to the hotel being run by the respondent.

33. In the light of these admissions, it is clear that the contention of the respondent that there is no written document is incorrect.

34. The respondent contended that the petitioner took the plea that the original of the agreement dated 09.02.2009 was with the respondent to get over the problem of admissibility of the document, and got the defence of the respondent struck off on the basis of the said document. Thereafter, the petitioner produced the original of the said document in the process of marking it in the trial and the same amounts to fraud.

35. To demonstrate these facts Sri V.S.R. Anjaneyulu, learned Senior Counsel, drew the attention of this Court to the pleadings and order in I.A.No.289 of 2016 in the above suit. This application had been filed for leave of the Court to file certain documents for the purpose of exhibiting the same in the trial. It is the case of Sri V.S.R. Anjaneyulu that the list of documents in I.A.No.289 of 2016 describes Item-10 as leave and sub-licence agreement executed by the defendant in favour of the plaintiff. He submits that this would make it clear that what is being filed was the original of the document. He would also refer to the order dated 01.10.2016 passed in the said I.A. wherein the trial Court recorded the statement of the respondent herein, that to the surprise of the respondent, the original of the document dated 09.02.2009 had been filed. He would also rely upon the affidavit filed by the petitioner herein, in the pending appeal before the High Court in A.S.M.P.No.1512 of 2017 wherein the document produced by the petitioner in I.A.No.289 of 2016 was described as a duplicate copy as opposed to the description of the document filed with the plaint as a Xerox copy.

36. The entire case of the respondent is that on account of these descriptions, an inference needs to be drawn by the Court that the petitioner had produced the original of the agreement dated 09.02.2009 under I.A.No.289 of 2016. However, a perusal of the affidavit of the petitioner in A.S.M.P.No.1512 of 2017 would show that the petitioner had made a claim that the document filed along with I.A.No.289 of 2016 was only a duplicate copy of the sub-licence agreement dated 09.02.2009 and as the same could not be rectified by payment of stamp duty and penalty, the said document had been withdrawn and was returned by the trial Court on 08.07.2017 on the basis of a Memo filed on 02.06.2017.

37. It is a settled proposition of law that where an allegation of fraud is made against the petitioner, the said allegation would have to be proved beyond any reasonable doubt. In the present case, no such effort has been made by the respondent except to point out to the alleged discrepancies in the description of the document at various places to contend that the petitioner has the custody of the original of the agreement dated 09.02.2009. Such an exercise is not sufficient to make out a case of fraud against the petitioner herein.

38. In these circumstances, the respondent has not made out a case of fraud for the Executing Court to pass any order in E.A.No.56 of 2021.

39. Having dealt with the issues raised by the respondent, it is now necessary to look at the order passed by the Executing Court. As set out above, the Executing Court had framed three issues. The first issue was whether the petitioner herein had played fraud on the Court either before the filing of the suit or during the proceedings of the suit. The Executing Court discussed the said issue from page 10 to page 22 of the

order and extracted various judgments of the Hon'ble Supreme Court, Hon'ble Allahabad High Court and the erstwhile High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh. However, the interesting, part of this order is that the Executing Court does not give any finding as to whether the petitioner herein had committed fraud or not. Sri V.S.R. Anjaneyulu was called upon to point out the passage wherein the Executing Court had given a finding of fact, he had relied upon the following passage in paragraph 21 of the order, which is extracted below:

> "Upon considering the arguments of both the parties and upon gone through the judgments of the Hon'ble Apex Court of India referred above (the judgments relied upon by the respondent are not applicable to the facts of the present case) and upon perusal of the entire record of the present case, in the present case the contention of the petitioner/defendant/J.Dr is that the original document is with the plaintiff and he intentionally suppressed to file the same before this court. The contention of the respondent/defendant/D.Hr is that the original document is with the petitioner herein."

40. As can be seen, the said paragraph only records the contention of the respondent and does not give any finding on the contention. The Executing Court after extracting the said contention in paragraph 21, takes the view in paragraph 22, that the question of who has the custody of the original document had not been framed by the trial Court and non-framing of the said issue is fatal to the suit, and therefore Issue No.1 was being answered in favour of the respondent herein and against the petitioner herein. It is not clear as to how the omission to frame an issue could result in a finding that the petitioner herein had

played fraud on this Court by suppressing the original of the agreement dated 09.02.2009.

41. The executing Court does not stop at this point and goes on to consider Issues 2 and 3 framed above. The Executing Court goes on to hold that the docket orders of the trial Court show that no adjournment was given to the respondent herein to submit his evidence or produce documents and since the respondent was not given a fair opportunity to defend his case, it is necessary to give the respondent such an opportunity for producing his evidence, if any, and to file documents, if any, and that such an opportunity would not cause prejudice to any of the parties. Thereafter, the Executing Court allows the application with the following observations.

> "Declaring the Judgment ad decree dated 27.12.2016 passed by this Court as nullity. However, as the defence of the petitioner/defendant was struck off by this court on 29.11.2016. Hence, the petitioner/defendant has to be given an opportunity to contest his claim / right in the suit. Without declaring the judgment of this court as nullity as prayed by the petitioner/defendant, it will have the effect of enforceability. If the judgment and decree passed by this Court was declared as nullity, it will have the effect of interfering with the powers of the Hon'ble High Court, as the Appeal in A.S.No.98 of 2017 is pending. Therefore, the petitioner/defendant can put up his defence and adduce any evidence on his behalf keeping the judgment passed by this court shall be kept in abeyance (which shall mean the Decree Holder/plaintiff shall not be entitled to execute the decree till the petitioner/defendant produced his pleadings/evidence if any) will meet the ends of justice. The petitioner/defendant is directed to complete his defence as early as possible, and this order will be subject to the result of the appeal in A.S.No.98 of 2017, which was pending before the Hon'ble High Court."

42. E.A.No.56 of 2021 was filed under Section 47 read with Section 151 C.P.C for a declaration that the judgment and decree dated 27.12.2016 was a nullity and cannot be executed. The Executing Court does not give any finding on the question of fraud committed by the petitioner herein. However, in the operative part, the Executing Court, on a totally irrelevant ground, holds that the judgment and decree dated 27.12.2016 is a nullity. After holding that the judgment and decree is a nullity, the Executing Court again takes the view that if the judgment and decree is declared as a nullity, it would have the effect of interfering with the powers of the High Court in A.S.No.98 of 2017, which is pending before the High Court. On the basis of this contradictory view, the Executing Court goes on to direct that the respondent herein can put up his defence and adduce any evidence in his defence in the suit while keeping the judgment in abeyance. The Executing Court further elaborated the meaning of keeping the judgment in abeyance to mean that the petitioner would not be entitled to execute the decree till the respondent produces his pleadings and evidence, if any.

43. The right of the respondent to raise any defence by way of pleadings had been forfeited by the trial Court under E.A.No.1411 of 2013 by order dated 02.04.2015. This order of forfeiture was confirmed by the High Court by order dated 18.09.2015 in C.R.P.No.2472 of 2015. On appeal, the Hon'ble Supreme Court by order dated 16.10.2015 in S.L.P.(C).No.28746 of 2015, had directed, on a submission made by the learned Senior Counsel appearing for the respondent, that the arrears of rent, directed to be paid by the order dated 02.04.2015, should be paid within four months from the date of the order of the Supreme Court, failing which the defence of the petitioner shall be deemed to be struck of.

44. The order of the Executing Court, permitting a fresh opportunity of defence and adducing evidence, in the face of the directions of the Hon'ble Supreme Court, is a clear case of over reach and judicial indiscipline, which requires to be deprecated in the strongest possible terms.

45. Further, the power of the Court to declare a decree as a nullity has been set out in the judgment cited by Sri V.S.R. Anjaneyulu. It is only in the limited circumstances, such as a case of fraud being made out or a case of judgment being passed without jurisdiction, that a decree can be declared as nullity. An erroneous order or an order alleged to have been passed without adequate opportunity being given to the respondent herein cannot be treated as an order, which is a nullity. The Executing Court does not elucidate as to the provision of law or the principle of law under which the respondent could be given further opportunity to raise pleadings or to adduce evidence on the sole ground that the Executing Court is of the opinion that adequate opportunity was not given to the respondent herein. The prayer in the application was for a declaration that the judgement and decree are a nullity. There is no other prayer. However, the executing court frames issues which do not arise and gives reliefs which are not sought.

46. It is clear, that the respondent herein having tried out all methods of delaying the inevitable had filed the present application raising issues which have already been looked into and decided in the earlier proceedings and which had become final. The Executing Court displaying extreme judicial indiscipline goes on to issue directions, which, by any stretch of imagination, cannot be given in the circumstances of the case. The entire exercise is a gross abuse of the process of the Court.

47. In the aforesaid circumstances, the civil revision petition is allowed, by setting aside the order dated 07.07.2021, in E.A.No.56 of 2021 in E.P.No.278 of 2019 passed by the Family Court-cum-VIII Additional District Judge, Prakasam District at Ongole, permitting the petitioner to prosecute E.P.No.278 of 2019, with exemplary costs of Rs.50,000/- (Rupees fifty thousand only) payable by the respondent to the petitioner within a period of four weeks from the date of this order.

As a sequel, pending miscellaneous petitions, if any, shall stand closed.

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R. RAGHUNANDAN RAO, J.

02nd February, 2022
Js.

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

C.R.P.No.852 of 2021

02nd February, 2021

Js.