

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL NO. _____ OF 2022
(ARISING OUT OF S.L.P.(C) NO. 13941 OF 2021)

M/S GARMENT CRAFT APPELLANT(S)

VERSUS

PRAKASH CHAND GOEL RESPONDENT(S)

J U D G M E N T

SANJIV KHANNA, J.

Leave granted.

2. Limited issue which arises for our consideration in this appeal is whether the High Court was justified and correct in law and on facts in exercising powers under Article 227 of the Constitution of India to set aside the order dated 24th July 2018 allowing the application under Order IX Rule 13 of the Code of Civil Procedure, 1908 (“the Code”) filed by Shailendra Garg, sole proprietor of M/s Garment Craft – the appellant before us.

3. In 2011, Prakash Chand Goel – the respondent before us, filed a civil suit on the original side of the Delhi High Court for the recovery

of Rs.81,24,786.23p against the appellant.

4. The appellant contested the suit by filing written statement on various grounds, *inter alia*, claiming that the goods were not accepted or returned due to reasons mentioned in debit notes and in fact, the respondent owes Rs.88,785/- to the appellant.
5. After the admission and denial of documents and framing of issues, the suit was set for trial. The respondent as the plaintiff lead evidence which concluded on 1st May 2015 and the case was put up for the appellant's evidence on 28th October 2015.
6. On 29th September 2015, Shailendra Garg, the sole proprietor of the appellant was arrested by the Rajasthan Police in an unrelated case, and thereafter on 6th October 2015, he was sent to judicial custody and detained in Central Jail, Jaipur. He was released on bail on 6th May 2017. It is the appellant's case that due to the detention, the appellant was prevented from effectively contesting and participating in the civil suit. Consequently, since none appeared for the appellant, *vide* the order dated 28th October 2015, the Joint Registrar, Delhi High Court, directed closure of the defence evidence.

7. On raising the plea of pecuniary jurisdiction, the suit was transferred to the court of District Judge, Tis Hazari, Delhi.
8. On an application moved by the appellant, the Additional District Judge, *vide* order dated 14th March 2016, recalled the order directing closure of defence evidence and the appellant was granted opportunity to lead defence evidence subject to costs of Rs.5,000/-.
9. As Shailendra Garg was incarcerated, the Additional District Judge, (Central), Tis Hazari, Delhi, on the next date of hearing on 22nd April 2016 observed that the counsel for the appellant should have filed an application for issuance of production warrant to enable Shailendra Garg to appear before court. Cost of Rs.5,000/- was imposed and the case was adjourned for recording of the defence evidence on 31st May 2016.
10. Consequent to the order, the counsel for the appellant moved an application for issuance of production warrant for the appearance of Shailendra Garg. Accepting the application, *vide* order dated 11th May 2016, the Additional District Judge, (Central), Tis Hazari, Delhi, ordered for the issuance of production warrant for appearance of Shailendra Garg from Central Jail, Jaipur.

11. Constable Jitendra Kumar, thereupon, had appeared along with written communication from the Jail Superintendent, Jaipur, Rajasthan, seeking clarifications whether Shailendra Garg was on bail in that matter or not. The Additional District Judge, (Central), Tis Hazari, Delhi rejected the request for clarifications observing that Shailendra Garg should have been produced, but did not issue further directions as it was stated by the respondent that the suit was required to be re-transferred to the High Court in view of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. It was listed for arguments on 8th June 2016 on the said aspect.
12. After hearing arguments on 8th June 2016, the suit was directed to be transferred to the High Court, but *vide* order dated 10th August 2016 the suit was directed to be renumbered and listed before the Additional District Judge, (Central), Tis Hazari, Delhi.
13. On 22nd August 2016 the suit was listed before Additional District Judge, (Central), Tis Hazari, Delhi, and directed to be listed for defence evidence on 9th September 2016. The counsel for the appellant on 9th September 2016 filed an application for the issuance of production warrant of Shailendra Garg. The Additional District Judge, (Central), Tis Hazari, Delhi, rejected the request for want of an appropriate affidavit, notwithstanding that it was known

that Shailendra Garg was in jail and not in the position to appear and follow up the civil suit. After recording the aforesaid position, the suit was nevertheless adjourned to 4th November 2016 for recording of defence evidence on payment of costs of Rs.5000/-.

14. On 4th November 2016 the counsel for the appellant did not appear and the defence evidence was closed. Final arguments were heard on 7th November 2016 and the case was fixed for clarification on 8th November 2016. On 8th November 2016, an *ex-parte* judgment was passed, decreeing the suit filed by the respondent in the sum of Rs.81,24,786.23p along with pendente lite interest at the rate of 24 percent per annum and post decree interest at the rate of 18 percent per annum till the realization.
15. Shailendra Garg was released on bail on 6th May 2017 and within 10 days of his release on 16th May 2017, he filed an application under Order IX Rule 13 of the Code for setting aside of the *ex-parte* decree. In particular, it was pleaded that the High Court had failed to issue production warrant for appearance of Shailendra Garg before closing the defence evidence, despite the fact that earlier production warrant had been issued and Constable Jitendra Kumar had appeared seeking clarifications. It was highlighted that Shailendra Garg being in detention, could not follow up the

proceedings in the suit and it was very difficult for him to communicate with and give instructions to his counsel.

16. Upon consideration of the facts, *vide* detailed reasoned order dated 24th July 2018, the application under Order IX Rule 13 of the Code was allowed, setting aside the *ex-parte* decree, restoring it to its original number and listing it for defence evidence. Paragraphs 8, 11 and 12 of the order read thus:

“8. From the certified copy of the proceedings of the suit filed by the applicant/defendant, it is evident that matter was transferred from the Hon'ble High Court to the District Court *vide* order dated 17.12.2015 and the same was assigned to the Court of my Ld. Predecessor on 18.02.2016. It is recorded in the order dated 14.03.2016 that defendant had been sent to jail on 06.10.2015 and thus found sufficient cause for non-filing of list of witnesses by defendant and therefore gave further time to file list of witnesses subject to costs of Rs.5,000/- and fixed the matter for 22.04.2016. On 22.04.2016, none had appeared on behalf of plaintiff whereas associate counsel for defendant had appeared who made further submissions that defendant is in judicial custody and matter was adjourned for 3.00 PM and at 3.00 PM the associate counsel produced the certificate issued by jail dated 24.01.2016 as per which defendant was in JC in connection with FIR bearing no.422/2014 in Jaipur Jail from 06.10.2015 till 24.02.2016. Therefore, the Court was of the opinion that the defendant's counsel should have moved an application for issuance of production warrants and since same was not moved the case was adjourned for DE for 31.05.2016 subject to further cost of M. No.264/17 Prakesh Chand Goel Vs. M/s Garment Craft Page 5 of 9 Rs.5,000/-. On 11.05.2016, file was again taken up on an application filed by the defendant for issuance of production warrants and accordingly production warrants were issued in the name of SSP concerned for 31.05.2016. On 31.05.2016, the counsel for the plaintiff as well as counsel for the defendant appeared and one Ct. Jitender appeared from the

Jaipur Jail who filed some written clarifications sought from (though it should be by) concerned Jail Superintendent whether defendant is on bail in the said matter or not and the Hon'ble court found the said clarification baseless and directed against Jail Superintendent to produce the defendant and the matter was adjourned for 08.06.2016. On 08.06.2016, in view of the circular of the Hon'ble High Court, matter was sent back to the Ld. District Judge to transfer the case to the Hon'ble High Court. Thereafter, on 10.08.2016, the matter was again sent to the Ld. ADJ and then matter was listed for 22.08.2016. On 22.08.2016, the Court fixed the case for DE for 09.09.16. On 09.09.2016, proxy counsel for the defendant has appeared and filed an application for issuance of production warrants. The Court observed that it is incline to issue production warrants provided proper affidavit filed either by plaintiff or his counsel that defendant is actually happened to be in jail till date along with particular of the case and that he has not been released from jail and court adjourned the matter for 04.11.2016. On 04.11.2016, only plaintiff counsel has appeared but M. No.264/17 Prakesh Chand Goel Vs. M/s Garment Craft Page 6 of 9 none appeared on behalf of defendant, hence after noting down the previous proceedings, DE was closed and case was listed for final arguments for 07.11.2016. On 07.11.2016, the case was fixed for clarifications for 08.11.2016 and on 08.11.2016 judgment was passed.

XX

XX

XX

11. Since technically on 04.11.2016 defendant was not proceeded ex parte hence in technical sense the judgment cannot be said as an ex parte judgment but actually this is an ex parte judgment as for all practical purpose defendant has been proceeded ex parte on 04.11.2016 when his DE was closed in his absence. Hence I consider the judgment dated 08.11.2016 as ex parte judgment. Therefore, in my view application U/o 9 Rule 13 CPC filed by the defendant is maintainable.

12. Now coming to the merits. From the aforesaid order sheets, it is evident that the fact of defendant being in JC was intimated by the defendant's counsel on 22.04.2016 and in fact thereafter Ld. Predecessor has

issued the production warrants on 11.05.2016 for production of the defendant from the jail. But he was not produced by the Jail Superintendent from Jaipur jail and court has again directed to produce him for 08.06.2016. But in between matter was transferred to the Hon'ble High Court and then again transferred to the District Court for 09.09.2016. On 09.09.2016, my Ld. Predecessor was not sure that accused is in JC therefore she has asked for the affidavit of the counsel for the defendant regarding the defendant being still in JC on 09.09.2016 and apparently same was not furnished when the case was listed on 04.11.2016. In fact some proxy counsel appeared on behalf of applicant/ defendant on that day to apprise the status of defendant whether he was in JC or not, due to which court closed the DE. As M. No.264/17 Prakesh Chand Goel Vs. M/s Garment Craft Page 8 of 9 averred by the defendant, he was in JC and only released from jail on 06.05.2017. This fact has not been contradicted by the applicant/ plaintiff. Therefore in my view there was no fault for his non-appearance for leading DE or not filing the list of witnesses as same was beyond his control. The record shows that some proxy counsel might be appearing on his behalf but when a person remains in jail and that too in Jaipur jail it become very difficult to give instructions to his counsel on each and every date. Even the counsel also become lethargic as he might not be getting his fees therefore even proxy counsel was not appeared on 04.11.2016 due to which DE was closed. Hence in these circumstances, in my view there is sufficient ground to set aside the order dated 04.11.2016 closing DE in the interest of justice.”

17. Thereupon, the respondent preferred a miscellaneous petition under Article 227 of the Constitution of India, which *vide* the impugned order dated 4th July 2019 has been allowed primarily for the reason that the counsel for the appellant had applied and taken certified copy of the judgment dated 8th November 2016 in December, 2016 which shows that the appellant was represented by his counsel even at that stage. The contention of the appellant

that he acquired knowledge of the decree only after his release from custody on 6th May 2017 was wrong. In view of the aforesaid facts, the trial court should not have accepted the argument that the appellant and his counsel were not in communication during the period when the appellant was in judicial custody. Earlier, the application for reopening the defence evidence was filed by *paikar* of the appellant.

18. Having heard the counsel for the parties, we are clearly of the view that the impugned order is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal.¹ The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse,

¹ Celina Coelho Pereira (Ms) and Others v. Ulhas Mahabaleshwar Kholkar and Others, (2010) 1 SCC 217

violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice. Explaining the scope of jurisdiction under Article 227, this Court in ***Estralla Rubber v. Dass Estate (P) Ltd.***²

has observed:-

“6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to.”

² (2001) 8 SCC 97

19. The factum that the counsel for the appellant had applied for the certified copy would show that the counsel for the appellant was aware that the *ex-parte* decree had been passed on the account of failure to lead defence evidence. This would not, however, be a good ground and reason to set aside and substitute the opinion formed by the trial court that the appellant being incarcerated was unable to lead evidence and another chance should be given to the appellant to lead defence evidence. The discretion exercised by the trial court in granting relief, did not suffer from an error apparent on the face of the record or was not a finding so perverse that it was unsupported by evidence to justify it. There could be some justification for the respondent to argue that the appellant was possibly aware of the *ex-parte* decree and therefore the submission that the appellant came to know of the *ex-parte* decree only on release from jail on 6th May 2017 is incorrect, but this would not affect the factually correct explanation of the appellant that he was incarcerated and could not attend the civil suit proceedings from 6th October 2015 to 6th May 2017. If it was felt that the application for setting aside the *exparte* decree was filed belatedly, the court could have given an opportunity to the appellant to file an application for condonation of delay and costs could have been imposed. The facts as known, equally apply as grounds for condonation of delay.

It is always important to take a holistic and overall view and not get influenced by aspects which can be explained. Thus, the reasoned decision of the trial court on elaborate consideration of the relevant facts did not warrant interference in exercise of the supervisory jurisdiction under Article 227 of the Constitution.

20. Consequently, we set aside the impugned order dated 4th July 2019 and restore the order dated 24th July 2018 passed by the Additional District Judge, (Central), Tis Hazari, Delhi, allowing the application under Order IX Rule 13 of the Code and setting aside *ex-parte* decree and the judgment dated 8th November 2016.
21. We should not, however, be misunderstood as prescribing or accepting that a production warrant must invariably be issued when a party is in custody. It would depend upon the facts of each case and whether the party can adduce evidence to prove its case, given the assertion that witness is in custody. The purpose and objective is to give an adequate and fair opportunity to the party to establish their case. The appellant is a sole proprietor and in the given facts, production warrant was issued for recording of his testimony, including examination-in-chief in the court. In any case, he had to appear for cross-examination.

22. Parties or their representatives would appear before the trial court on 2nd February 2022 when the appellant would file list of witnesses as well as his affidavit by way of evidence. The trial court will fix three consecutive dates on which the appellant would lead third party evidence, if any, and the witnesses will be subjected to cross-examination. These dates would be given on the first date of hearing on 2nd February 2022.
23. During the course of hearing, it was pointed out that the properties belonging to the appellant have been put to auction and even bids have been received. It is obvious that the proceedings for enforcement of the decree which we have set aside, shall be treated as void. However, to protect the interest of the respondent, who has pleaded and argued that the appellant is trying to dissipate or transfer his assets, we deem it appropriate to direct the appellant to file details of all of his movable and immovable assets as in existence on the date of filing of the suit in an affidavit which will be filed within three weeks from the pronouncement of this order.³ The affidavit should also indicate his present assets and transfers including relinquishment etc. of the appellant's movable and immovable properties/assets during the pendency of the suit. It will

³ The order dated 21st May 2013 passed by the High Court, by which the applications of the respondent under Order XXXIX, Rules 1 and 2 and Order XXXVIII, Rule 5 were rejected, does refer to the immovable assets owned by the appellant.

be open to the respondent to file an application under Order XXXVIII Rule 5 of the Code before the trial court, which application if filed, will be dealt with in accordance with the law.

24. The appeal is allowed in the aforesaid terms with no order as to costs.

.....J.
(SANJIV KHANNA)

.....J.
(BELA M. TRIVEDI)

**NEW DELHI;
JANUARY 11, 2022.**