

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
(Civil Appellate Jurisdiction)

SECOND APPEAL NO. 203 of 1993

Shri Pandurang Shidu Chinchkar,
Died pending the suit
Through his heirs & legal representative
Daughter
Mangala Mahadev Gavali,
Since deceased through legal Representatives

- 1] Shri Mahadev Dnyanoba Gavali,
aged about 50 years,
Occupation : Agriculture,
- 2] Shri Pramod Mahadev Gavali,
aged about 30 years,
Occupation Driver,
- 3] Shri Vinod Mahadev Gavali,
aged about 26 years,
Occupation Agriculturist,

All R/o. Bhuij, Tal. Wai,
District : Satara

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APPELLANTS
Org. Pltffs.

.. **Versus** ..

- 1] Shri Shrirang Rajaram Chinchkar,
aged 43 years, Occ. Service,
- 2] Shri Vishnu Rajaram Chinchkar,
aged 32 years, Occ. Agriculturist,
- 3] Smt.Yashodabai Baburao Padwal,
aged 45 years, Occ. Household,

- 4] Smt. Hirabai Dattatraya Nagale,
aged 40 years, Occ.Household,
- 5] Smt.Bhagirathabai Rajaram Chinchkar
(Deleted as per order dated
12.09.2001)
- 6] Shri Arun Rangu Nikam
Aged Adult, Occ. Agriculturist,
Residing at Kaloshi,
Post Ambode Khurd,
Taluka & Distt. Satara,
- 7] Mrs. Asha Ashok Dighe,
Household, Resident at 700-B,
Shaniwar Peth, Satara,
- 8] Mrs. Pushpa Shankarrao Deshmukh,
aged Adult, Occ. Service & Agriculturist,
Residing at 13, Jaihind Colony,
Shahupuri, Tal & Distt. Satara,
- 9] Shri Nathu Ganpati Kadam,
since deceased through his L.Hs
- 9a] Smt. Krishnabai Nathu Kadam
(Deleted as per court's order
dated 09.10.2005)
- 9b] Trimbak Nathu Kadam,
Age Adult, Occ. Agriculturist,
Residing at 15, Survey No. 43,
Somnath Nagar, Vadgaon Sheri,
Pune-411 014.
- 9c] Ravindra Nathu Kadam,
age 45 years
(Dismissed as per Registrar's
order dated 07.03.2013)
- 9d] Vilas Ganpati Kadam,
age 40 years,
(Dismissed as per Registrar's
order dated 07.03.2013) ..

RESPONDENTS
Org. Defts.

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Mr. Sharad T. Bhosale, Advocate, I/b Mr. Dilip Bodake, Advocate, for appellants.

Mr. R.A.Thorat, Advocate for Respondents

CORAM : R.K.Deshpande, J.
DATED : 25th JUNE, 2015.

ORAL JUDGMENT

1] One Pandurang Shidu Chinchkar filed Regular Civil Suit No. 324 of 1973 for partition and separate possession against the cousin brother. Pandurang died during the pendency of the suit and his daughter Smt. Mangala Mahadev Gavali was brought on record. The parties to the suit filed compromise pursis on 04.03.1987. The trial Court passed an order recording the compromise as under;

Compromise is read over and explained to parties. They admit the contents. Hence it is read and recorded.

2] Immediately on the next date i.e. on 05.03.1987 Smt. Mangala filed an application to set aside this compromise on the ground that this was got executed from her by exercising coercion and undue influence. The trial Court passed an order on this application on 05.03.1987 itself, as under;

At the time of filing of the compromise purshis, both Plaintiff, Defendants and their Advocates were present. Both the parties admitted the contents of compromise, when read over and explained to them. In these circumstances, the suit was disposed off resulting into decree in terms of compromise.

In view of this position that the suit is already disposed off, the application in this Court cannot be entertained in this Court. Hence stands rejected."

The trial Court has held that the suit has already been disposed of and therefore, such an application cannot be entertained.

3] Regular Civil Appeal No. 548 of 1987 was preferred by Smt. Managala, under Section 96 of C.P.C challenging the order dated 04.03.1987 passed by the trial Court recording the compromise and passing the decree. This appeal has been dismissed on 14.08.1992 by the lower appellate Court holding that the same is not maintainable in view of the bar created by sub-section (3) of Section 96 of C.P.C. This second appeal is preferred against the order dated 14.08.1992 passed by the lower appellate Court.

4] Though the appeal was admitted by this Court on 05.04.1993, no substantial question of law was framed and

hence, the parties are heard on merits of the matter, keeping open all the issues.

5] The question involved is whether the appellate Court was right in dismissing the appeal filed under Section 96 of C.P.C., challenging the compromise decree passed by the trial Court on 04.03.1987 in Regular Civil Suit No. 324 of 1973, as not maintainable, in view of the bar created under sub-section (3) therein?

6] The learned counsel appearing for the appellant has relied upon the decision of the learned Single Judge of this Court in the case of **Deorao vs. Devkinandan Bhojraj Chandak and another**, reported in **AIR 1984 BOMBAY 474** and the decision of the Apex Court in the case of **Kishun @ Ram Kishun (dead) through L.Rs. Vrs. Bihari (D) by L.Rs**, reported in **2005 (5) ALL MR (S.C.) 936**. He has urged that in both these decisions, this Court as well as the Apex Court has held that the appeal challenging the compromise is not barred by sub-section (3) of Section 96 of C.P.C., and it will be covered by sub-rule (2) of Order XLIII, Rule 1A of C.P.C.

7] The learned counsel appearing for the respondents

has relied upon the decision of the Apex Court in the case of ***Pushpa Devi Bhagat vrs. Rajinder Singh and others***, reported in **(2006) 5 SCC 566**, to urge that the Apex Court has considered the position that emerges from the amendment to the provisions of Order XXIII and in view of the said decision, the appeal challenging the compromise decree is not maintainable. According to the learned counsel for the respondents, the remedy was available to the appellants to challenge the order dated 05.03.1987 passed by the trial Court rejecting the application filed by the appellant to set aside the compromise decree on the ground of coercion and undue influence. He submits that this order dated 05.03.1987 could have been challenged by filing an appeal under Section 96 of C.P.C., but the appeal in question challenges the compromise decree passed on 04.03.1987. He, therefore, submits that the appellate Court was right in dismissing the appeal as not maintainable.

8] It is not in dispute that the suit was filed in the year 1973 and the right of appeal shall, therefore, be governed as per the provisions of law prevailing on the date of institution of suit. Undisputedly, when the suit was instituted, there was an appeal provided under Order XLIII, Rule 1(m) of C.P.C to

challenge the order dated 04.03.1987 passed by the trial Court passing a compromise decree. Undisputedly, the appeal in question was not filed under Order XLIII, Rule 1(m) of C.P.C., challenging the order dated 04.03.1987 but it was an appeal under Section 96 therein challenging the order dated 05.03.1987. The provision of Section 96(3) of C.P.C which stood even on the date of filing of the suit states that no appeal shall lie from a decree passed by the Court with the consent of the parties. Hence, there was a clear bar to entertain, try and decide the appeal under Section 96 of C.P.C, which operated even on the date of filing an appeal.

9] In the light of the position which emerges from the amended provision as stated in paragraph 17 of the Apex Court decision, the only remedy available was under Order XXIII, Rule 3 proviso of the Code of Civil Procedure to approach the same court for setting aside the compromise decree and the appeal was not maintainable to challenge the compromise decree. The appellant in the present case had preferred such application on 05.03.1987 and it was rejected on the same day. I have gone through the memo of appeal and I do not find any challenge to the order dated 05.03.1987 raised before the appellate Court. The said order has attained the finality.

The order recording compromise passed on 04.03.1987 could have been challenged by filing an appeal challenging the order dated 05.03.1987 passed by the trial Court. Since the appeal before the lower appellate Court was not against the order passed on 05.03.1987, it was not maintainable.

10] The decision of the learned Single Judge of this Court in the case of Deorao, cited supra, does not take into consideration the proviso introduced below Order XXIII, Rule 3 of C.P.C w.e.f. 01.02.1977. Be that as it may, the judgment as it stands also does not help the appellant for the reason that in paragraph 8 of the judgment, it has been held that, "it is not possible to agree with the learned Counsel for the applicant that sub-rule (2) of R. 1A of O. XLIII confers a right of appeal on a party which is dissatisfied with the order passed by the trial Court recording or refusing to record a compromise".

11] The another decision of the Apex Court in case of Kishun, cited supra by the learned counsel for the appellant, it has been held that, when there is a contest on the question whether there was a compromise or not, a decree accepting the compromise on resolution of that controversy, cannot be said to be a decree passed with the consent of the parties.

Therefore, the bar under Section 96(3) of the Code could not have application. It is further held that an appeal and a second appeal with its limitations would be available to the party feeling aggrieved by the decree based on such a disputed compromise or on a rejection of the compromise set up.

12] The appellate Court has commented upon the merits of the compromise entered into between the parties in paragraph 5 of the judgment. The relevant portion is reproduced below.

"5. In the instant case, Appellant admit she signed the compromise and admitted the contents of the compromise before the Court. Order of the Court go to show, contents of the compromise deed were read over to both sides and only then after and only after admitting it, it was recorded and decree was passed on its basis. On the very next day of this compromise, the plaintiff filed an application stating Defendants compelled her to sign the compromise. Compromise deed go to show husband of the Appellant Plaintiff signed this compromise. Appellant admits this in her appeal memo. In Appeal memo Appellate states, at the place when she and her son were alone at home, Defendant took her to the Court and made her to sign the compromise. But at other place, she states, her husband was present when she signed the compromise. At the time of compromise Plaintiff is identified by her Advocate. By compromise, Plaintiff left her rights in the

suit property, in favour of the Defendant and in its exchange Defendant agreed to construct a house for Appellant Plaintiff as described in the compromise deed. It was agreed, if Defendants fail to construct that house within given period then Plaintiff was given right to recover Rs. Sixteen thousand from the Defendant Respondents. If these terms and conditions are seen alongwith the suit property of that suit, it go to show, Plaintiff may have consented that compromise deed. In that suit, Defendant were stating, Plaintiff who was father of the present Appellant was not legitimate son of his father. So these circumstances go to show Appellant's intention is deceptive.

It is thus apparent that the appellant admitted the signature on the compromise. The contents are also admitted. Those were read over and explained to her as is apparent from the order recording compromise itself and therefore, it cannot be said that it was a case covered by the ratio in para 6 of the decision of the Apex Court in Kishun vrs. Bihari's case cited supra. There is no substantial question of law which arises in this second appeal, the same is dismissed. No order as to cost.

(R.K.Deshpande, J.)

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^ Rvjalit/P.A.