

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

**APPEAL FROM ORDER NO.30 OF 2016
WITH
CIVIL APPLICATION NO.6171/2016**

Vilas Trimbak Sanap
Age:51 years, Occu.:Agriculture,
R/o. Gitewadi, Tq. Patoda,
Dist. Beed.

**APPELLANT
(Orig. Plaintiff)**

VERSUS

1. Shriram Rajendera Sanap
Age:17 years, Occu.:Education
R/o. Gitewadi, Taluka Patoda,
Dist. Beed.
2. Tribhuvan Rajendra Sanap
Age:17 years, Occu.:Education,
R/o. Gitewadi, Taluka Patoda,
District Beed
Respondent No.1 and 2 are minors
u/g of their mother Respondent No.3
3. Sangeeta Rajendra Sanap
Age:39 years, Occu.:Household,
R/o. Gitewadi, Taluka Patoda,
District Beed
4. Trimbak Govind Sanap
Age:81 years, Occu.:Agriculture,
R/o. As above
5. Kailas Trimbak Sanap
Age:56 years, Occu.:Agriculture,
R/o. As above.
6. Arun Trimbak Sanap
Age:41 years, Occu.:Agriculture,
R/o. As above.

**RESPONDENTS
(Rsp. No.1 to 3 Third Party)
(Rsp. No.4 to 6 Org. Defts.)**

Mr.Satyajit S.Bora, Advocate for Appellant/applicant;
Mr.K.U.More, Adv. for Respondent No.1 to 3.
None for Resp.Nos. 4 to 6, though served.

CORAM : P.R.BORA, J.

RESERVED ON :30th August,2016

PRONOUNCED ON:20th October,2016

JUDGMENT:

1) Heard. The appellant has filed the present appeal against Judgment and Order dated 12th January, 2016 passed by District Judge-1, Beed in Regular Civil Appeal No.50/2015.

2) The appellant had filed Regular Civil Suit No.499/2014 for partition against his father and brothers claiming his 1/4th share alleging that father and brothers had refused to give him his share in the suit properties. In the aforesaid suit, compromise took place between the parties and on the basis of the said compromise-deed, the aforesaid civil suit came to be decreed by the learned trial court.

3) Present Respondent Nos. 1 to 3, who were not party to the aforesaid suit, filed Regular Civil Appeal No. 50/2015 assailing the Judgment and Decree dated 29th December, 2014 passed by the Trial court. It was the contention of these respondents that along with the plaintiff and defendants in the subject suit, they also possess share in the suit properties and as such without their presence in the said suit, impugned decree could not have been passed merely on consent of the plaintiff and defendants therein.

. The appellant appeared in the appeal filed by Respondent Nos. 1 to 3 and resisted the same. The appellant denied the claim of the respondents that they have share in the suit properties and also objected to filing of the appeal by Respondent Nos. 1 to 3 on the ground of its maintainability. It was the contention of the present appellant before the first appellate court that the decree passed by the trial court on 29th December, 2014 being a consent decree, Respondent Nos. 1 to 3 herein, were not having

any right to challenge the said decree by filing an appeal in view of the specific bar provided under Section 96(3) of the Code of Civil Procedure, 1908 (for short, C.P.C.). The learned first appellate court, however, vide the impugned judgment, allowed the Regular Civil Appeal No.50/2015 and thereby remanded the matter to the trial court for deciding it afresh with a further direction to implead present Respondent Nos. 1 to 3 as parties to the suit. Aggrieved by, the original plaintiff has filed the present appeal.

4) Shri Satyajeet Bora, The learned Counsel for appellant has assailed the impugned Judgment and Order mainly on the ground that the first appellate court failed in appreciating that the decree, which was challenged before it, was a consent decree, and as such, could not have been challenged by a third party in view of the specific bar provided under Section 96(3) of the C.P.C. In support of the contention so raised, learned Counsel relied upon two judgments of the

Hon'ble Apex Court, first in the case of Daljit Kaur and Anr. Vs. Muktar Steels Pvt. Ltd. and Ors. - (2013) 16 SCC 607 and another in the case of Pushpa Devi Bhagat (dead) through L.r. Smt. Sadhana Rai Vs. Rajinder Singh and Ors. - AIR 2006 SC 2628.

5) Shri K.U.More, learned Counsel appearing for the respondents, supported the impugned Judgment and Order. The learned Counsel submitted that Respondent Nos. 1 to 3 do have their share in the suit properties. The learned Counsel further submitted that Govind Genu Sanap was the original ancestor, who had two sons, viz. — Tulshiram Trimbak and three daughters. The learned Counsel further submitted that Tulshiram had a son viz. Rajendra, who was husband of present Respondent No.3 and father of Respondent Nos. 1 & 2. The learned Counsel further submitted that Govind Genu Sanap and one Hari had purchased the suit properties from one Chandulal Kankriya vide registered sale deed executed on

24th September, 1958 and after death of Govind, name of his sons were recorded in the revenue record to the extent of Govind's share.

. The learned Counsel further submitted that Respondent Nos. 1 to 3 being the legal heirs of Tulshiram, after death of their father, their names were recorded in the revenue records vide mutation entry No. 741 dated 13th January, 2006. The learned Counsel further submitted that after death of Rajendra, names of sons of deceased Rajendra and wife of deceased Rajendra were recorded in the revenue record pertaining to the land Survey No. 783 and 775, vide mutation entry No. 8519/723 dated 20th February, 2007.

6) The learned Counsel further submitted that before filing of Regular Civil Suit No.499/2014, earlier on two occasions, the suits were filed claiming partition in the suit properties and both the suits were withdrawn by the respective plaintiffs. The learned Counsel submitted that the present appellant and present

Respondent Nos. 5 and 6 had filed Regular Civil Suit No.61/2014 against present Respondent No.4 – Trimbak and his wife – Hausabai for partition and separate possession of the land Survey No. 783 Khasra, 775 Khasra, 53/B in the court of Civil Judge, Junior Division at Patonda on 10th February, 2014 and the said suit was withdrawn by the plaintiffs therein on 19th September, 2014.

7) The learned Counsel further submitted that thereafter Respondent No.6 in the present appeal, viz. Arun Trimbak Sanap had filed Regular Civil Suit No.376/2014 against the present appellant and the present Respondent Nos. 4 and 5 for partition and separate possession of the land Survey No.813/AA, 814/E, 815/EE, 783 Khasra, 775 Khasra and 53/B. The learned Counsel further submitted that in the aforesaid civil suit, the present Respondent Nos.1 to 3 filed an application for impleading them as party in the said suit stating that they were having shares in the suit lands. The learned Counsel further

submitted that the aforesaid civil suit was withdrawn by the plaintiff therein, i.e. Respondent No.6 herein, viz. Arun Trimbak by taking the matter on Board.

. The learned Counsel further submitted that thereafter on 29th December, 2014, the present appellant filed Regular Civil Suit No. 499/2014 against his father and brothers, i.e. present Respondent Nos.4, 5 and 6 for partition and separate possession of the suit lands 813/AA, 814/E, 815/EE, 783 Khasra, 775 Khasra and 53/B, situated at village Dhangar Jawalga, Tq. Patoda Dist. Beed. The learned Counsel submitted that on the same day, i.e. 29th December, 2014, present appellant and Respondent Nos. 4 to 6 compromised the suit and got passed consent decree from the civil court.

. Referring to the facts, as aforesaid, the learned Counsel submitted that since the decree obtained by the Trial Court was obtained by playing fraud on the court and by concealing the material facts and also without adding

present Respondent Nos.1 to 3 as party to the said suit, the first appellate court has rightly set aside the so called consent decree and has also further directed the Trial Court to implead the present Respondent Nos.1 to 3 as a party to the suit and decide the suit afresh. The learned Counsel, therefore, prayed for dismissal of the appeal.

8) The learned Counsel has relied upon the following judgments, -

- i) Banwari Lal Vs. Smt. Chando Devi (Through L.R.) and Anr. - 1993 BCI 139 (SC)
- ii) Kishun alias Ram Kishn (dead) through L.Rs. Vs. Bihari (D) by L.Rs. - AIR 2005 SC 3799 -
- iii) Kantaben T. Shah and Ors. Vs. Devendrakumar C.Shah and Ors. - AIR 2002 Guj.160; and
- iv) Chandrabhan Chunilal Agarwal and Anr. Vs. Sharad Ramgopal Radhavallab Agarwal and Ors. - 2014 3 Bom.C.R. 566.

9) After having heard the learned Counsel appearing for the respective parties and on

perusal of the impugned judgment and the other material placed on record by the parties, the following questions arise for consideration of this Court, -

- i) Whether the appeal filed by present Respondent Nos. 1 to 3 before the first appellate court against the decree passed on 29th December, 2014 by the trial court was maintainable?
- ii) Whether the decree passed by the Trial Court on 29th December, 2014 can be held to be a consent decree?
- iii) Whether the impugned judgment is sustainable?

10) Perusal of the order passed by the Civil Judge, Junior Division, Patonda in Regular Civil Suit No.499/2014 on 29th December, 2014, apparently demonstrates that the aforesaid suit was decreed in terms of deed of compromise (Exh.20) which was arrived at between the parties to the said civil suit. The aforesaid order was assailed by present Respondent Nos.1 to 3 before the first appellate court by filing Regular Civil

Appeal No.50/2015. As has been argued by learned Counsel appearing for the appellant, since the decree passed by the Trial Court was a consent decree, was not liable to be challenged in an appeal by a third party and filing of such an appeal is specifically barred in view of provisions contained in Section 96(3) of C.P.C. Section 96 of C.P.C. reads thus, -

"96. Appeal from original decree.-

(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decisions of such court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by courts of small causes, when the amount or value of the subject matter of the original suit does not exceed ten thousand rupees."

11) Considering the controversy arisen in the present matter, I deem it appropriate to reproduce herein below the observations made by the Hon'ble Apex Court in the case of Pushpadevi (cited supra) in paras 11 and 12 of the said judgment, which are thus, -

"11. Section 96 provides for appeals from original decrees. Sub-section (3) of section 96, however, provided that no appeal shall lie from a decree passed by the court with the consent of the parties. We may notice here that Order 43 Rule 1 (m) of CPC had earlier provided for an appeal against the order under Rule 3 Order 23 recording or refusing to record an agreement, compromise or satisfaction. But clause (m) of Rule

1 Order 43 was omitted by Act 104 of 1976 with effect from 1.2.1977. Simultaneously, a proviso was added to Rule 3 Order 23 with effect from 1.2.1977. We extract below the relevant portion of the said proviso :

"Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the court shall decide the question"

Rule 3A was also added in Order 23 with effect from 1.2.1977 barring any suit to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

12. The position that emerges from the amended provisions of Order 23, can be summed up thus :

(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in section 96(3) CPC.

(ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) Rule 1 Order 43.

(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3A.

(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise

will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree, is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21.8.2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27.8.2001), filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by second defendant was not maintainable, having regard to the express bar contained in section 96 (3) of

the Code."

12) In the case of Daljit Kaur (cited supra), the Hon'ble Apex Court has relied upon the law laid down in Pushpadevi's case.

13) In view of the law laid down as above, ostensibly, the argument advanced on behalf of the appellant appears convincing. However, considering the peculiar facts involved in the present case, it appears to me that some more scrutiny is required of the facts involved in the present case in reference to the legal provisions, which are referred by the learned counsel appearing for the parties during the course of their arguments, more particularly the provisions under Section 96(3); Rule 3 of Order XXIII and Rule 1 of Order 43 of C.P.C.

14) Order XXIII deals with withdrawal and adjustment of the suit. Rule 3 thereof relates to compromise of suits, relevant portion of which

is extracted below, -

"3. Compromise of suit. - Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit."

15) Apparently there appears no mistake in the order passed by the Trial court thereby accepting the terms of compromise and consequently passing a consent decree. However, in view of the facts brought on record by Respondent Nos. 1 to 3 in the first appeal, it

appears to me that the present matter needs to be viewed from a different angle also.

16) The learned Counsel for the appellant has not disputed the facts as are enumerated by the first appellate court in the impugned judgment that prior to filing of Regular Civil Suit No.499/2014, two more suits were filed wherein the same parties were involved who were the parties to the said Regular Civil Suit No.499/2014. All the said suits,i.e. Regular Civil Suit No.61/2014, Regular Civil Suit No.376/2014 and Regular Civil Suit No.499/2014 were filed for partition and separate possession, though every suit was filed by a different plaintiff. All the aforesaid suits were between the present appellant and present Respondent Nos. 4 to 6. The material on record further reveals that the properties, which were involved in all the aforesaid suits, were also same. There further seems no dispute that the Regular Civil Suit No.61/2014 filed by the present appellant

and present Respondent Nos. 5 and 6, was withdrawn by them on 19th September, 2014. As is revealing from the material on record, present Respondent No.6, viz. Arun Trimbak Sanap, filed Regular Civil Suit No.376/2014 for partition and separate possession of the same properties, which were the subject matter of earlier Regular Civil Suit No.61/2014. The present appellant has not disputed the further fact that in Regular Civil Suit No.376/2014, an application was filed by the present Respondent Nos.1 to 3, seeking their impleadment as necessary parties to the said suit, claiming that they were having shares in the suit lands. The present appellant has further not disputed that the aforesaid Regular Civil Suit No.376/2014 was also withdrawn by the plaintiff therein on 15th December, 2014, before rendering of any decision by the Court on the application which was filed by present Respondent Nos.1 to 3 in the said Regular Civil Suit seeking their intervention. There is further no dispute that thereafter within fortnight, Regular Civil

Suit No.499/2014 came to be filed by present appellant against his father and brothers, i.e. Respondent Nos.5 and 6 herein, alleging therein that father and brothers were refusing to give him his share in the suit properties.

17) As is revealing from the contentions raised by the present appellant in Regular Civil Suit No.499/2014 filed by him in the court of Civil Judge, Junior Division, at Patoda on 29th December, 2014, cause of action had arisen for him to file the said suit on 28th December, 2014, when he requested the defendants therein, i.e. his father and brothers to give his separate 1/4th share in the suit properties and the request so made by him was turned down by the said defendants. It is further interesting to note that the defendants who were alleged to have refused to give the share of the plaintiff in the suit properties on 28th December, on the very next day, i.e. on 29th December, suo-motu appeared in the said suit within few hours after filing of

the said suit. It is further undisputed that on the same day, the compromise terms were filed on record and the trial court was requested to record the said compromise and pass a consent decree in terms of the said compromise. It is further the matter of record that accordingly, the learned trial court passed a consent decree and closed the proceedings.

. In view of the facts, which I have elaborately narrated herein above, the questions arise, - whether the trial court had applied its mind before affixing the seal of the court over the compromise terms allegedly entered into by the parties thereto and whether has recorded its satisfaction regarding the lawfulness and genuineness of the compromise so arrived at between the parties and whether such a decree can be accepted and termed as a consent decree.?

18) From the material on record it is discernible that the trial court did not take any pains to even cursorily read the averments in the

plaint. Though I have earlier also mentioned as about the cause of action for filing Regular civil Suit No.499/2014 by the present appellant, I deem it appropriate to reproduce herein below para 7 of the suit plaint in the aforesaid suit, which reads thus, -

“ ७) दाव्यास कारण :- हे की, सदरील प्रकरणातील वादीने दिनांक २८/१२/२०१४ रोजी वादग्रस्त जमिनीचे सरसनिरस मानाने वाटप करून त्याचा कायदेशिर १/४ हिस्साचा पृथक ताबा देण्याची विनंती केली असता प्रतिवादी यांनी स्पष्ट नकार दिला. म्हणून वादीस सदरचा दावा देण्यास कारण घडलेले आहे. ”

The appellant - plaintiff was thus compelled to file the aforesaid civil suit claiming partition of the suit properties since the defendants therein, i.e. father and brothers of the appellant, despite the request from the plaintiffs, had flatly refused on 28th December, 2014 to give his 1/4th share in the suit properties and separate possession thereof. In this background, it would be material to see the further events which had happened in the aforesaid civil suit. With the cost of

repetitions, it has to be stated that the defendants, who as alleged by the appellant/plaintiff, had flatly refused to consider the request of the appellant to give him his 1/4th share in the suit properties, appeared in the suit for partition without waiting for any formal notice from the Court and suo-motu appeared in the said suit on the very date of filing of the suit and within few hours of filing of such suit by the appellant-plaintiff. Not only that, the defendants appeared in the aforesaid civil suit, the compromise terms were also settled on the same day and the consent decree was obtained from the learned Civil Judge on the same day. Had the learned Civil Judge perused the suit plaint, and more particularly para 7 thereof, he would have certainly not made any haste in accepting the terms of compromise and would also not have instantaneously passed the consent decree. The learned Trial Court was supposed to get satisfied about genuineness of the compromise before passing the consent decree

on the basis of the said compromise. From the events, as noticed to have happened, no further proof is required to draw an inference that it was all camouflage. In fact, it was a joint venture of the present appellant and the present Respondent Nos.4 to 6 to obtain a seal of the Court on an arrangement mutually arrived at in between them as regards to the partition of suit properties amongst them.

19) The present appellant and the present Respondent Nos. 4 to 6 were obviously aware of the previous proceedings, i.e. Regular Civil Suit No.61/2014 and 376/2014. They were also aware of the fact that the present respondent Nos. 1 to 3 had made an application seeking intervention in Regular Civil Suit No.376/2014, claiming that they were having share in the suit properties. From the material on record, it is further clear that the properties, which were the subject matter of Regular civil Suit No. 499/2014 were involved in the earlier aforesaid two civil

suits. However, neither in the suit plaint of Regular Civil Suit No. 499/2014 nor in the terms of compromise, anything is stated about the said previous proceedings. In fact, all those facts ought to have been disclosed either in the suit plaint or at the time of entering into the compromise. Suppressing all those facts, the consent decree was obtained by the present appellant and Respondent Nos. 4 to 6 from the learned Civil Judge and when in the First Appeal, the first appellate court has set aside the said decree and remitted back the matter to the trial court for its fresh decision by directing impleadment of present Respondent Nos. 1 to 3 in the said suit, now a plea has been taken by the appellant that the appeal so filed before the first appellate court could not have been entertained by the said court in view of the specific bar provided under Section 96(3) of the C.P.C., since the decree under challenge was a consent decree.

20) The consent decree undisputedly cannot be challenged by a third party under Section 96(3) of C.P.C. and the only remedy for such a person is to approach the same Court which has passed the said decree or to file a separate suit claiming declaration that the decree so passed in the said suit, is not binding on him. The question is, whether the bar so provided under Section 96(3) of C.P.C. would be applicable in the present case and whether the decree involved in the present appeal can, in fact, be termed as a consent decree?

. From the facts on record, I am afraid the decree so passed by the trial court termed as a consent decree by the present appellant as well as present Respondent Nos. 4 to 6 can be held to be a consent decree merely because the trial court has affixed its seal over the compromise arrived at between present appellant and Respondent Nos. 4 to 6 in respect of the suit properties.

21) As has been observed by the learned first appellate court, present Respondent Nos. 1 to 3, prima facie, have interest in the suit properties being heirs of deceased Rajendra, who was son of Tulshiram and grand-son of Govind, i.e. original ancestor. I fully agree with the observations made by the learned first appellate court that the manner in which the present appellant and Respondent Nos. 4 to 6 obtained the compromise decree is highly objectionable and the said attempt on their part was laced with a design to deprive present Respondent Nos. 1 to 3 from adjudication on their rights. The decree stated to be a consent decree is thus not a consent decree, but a collusive decree.

22) "Collusion" is defined in Wharton's Law Lexicon as follows, -

"Collusion in judicial proceedings is a secret agreement between two persons that one should institute a suit against the other, in order to obtain the decision of a judicial

Tribunal for some sinister purpose

23) As observed by the High Court of Mysore in the case of Tirukappa Vs. Kamalamma – AIR 1966 Mysore 1, "Collusion" means agreement or understanding between the parties, whereby the court is made to believe in the existence or truth of the circumstances which to the knowledge of the parties are non-existent or false.

24) The hot haste committed in proceeding with the civil suit and quick succession of events which all happened on a single day, i.e. 29th December, 2014 and which resulted in passing of a 'consent decree' apparently demonstrate and lead to only one conclusion that the present appellant and present respondent Nos. 4 to 6 were in collusion with each other for the purpose of obtaining the said decree. It is writ large that the only

purpose behind it was to deprive the present Respondent Nos. 1 to 3 from adjudicating their rights in the suit properties.

25) Merely because a decree is stated to be a 'consent decree', it would not *ipso facto* operate as a bar contained in Section 96(3) of C.P.C. for filing an appeal against it by a person not party to the said suit. It would be open for the appellate court in appropriate cases to consider the contentions raised by the third party along with the pleadings of the parties to the *lis* and examine the circumstances leading up to the compromise and resulting into passing of a consent decree to find out whether the compromise arrived at between the parties is genuine and lawful or otherwise.

26) For the reasons stated above and after having considered the entire material on record, I have no hesitation in recording a finding that the decree which has been termed

as consent decree by the present appellant, cannot be, in any case, held to be a consent decree. The bar provided under Section 96(3) of C.P.C. would, therefore, not apply in the present case. Since the appellant and Respondent Nos. 4 and 6 in collusion with each other have procured the decree from the trial court, Respondent Nos. 1 to 3 herein were having every right to challenge the said decree by filing an appeal before the District Court under 96(1) of Civil Procedure Code, as they were claiming interest in the suit properties and were also claiming to be prejudicially affected because of the decree passed by the trial Court. The first appellate Court has thus, not committed any error in allowing the appeal by setting aside the decree passed by the Trial court. It further does not appear to me that the Trial court has committed any error in issuing the

further direction to original plaintiff to implead the appellants in the appeal before it, i.e. present Respondent Nos. 1 to 3, as party to the suit before the trial court in view of the finding recorded by it that present Respondent Nos. 1 to 3, prima facie, have interest in the suit properties being the heirs of Rajendra, who was son of Tulshiram and grand-son of Govind. I, therefore, do not see any reason to cause any interference in the impugned judgment.

. It is, however, clarified that the observations made by this court as about the rights of Respondent Nos. 1 to 3 in the suit properties, are all prima facie in nature. Whether Respondent Nos. 1 to 3 possess any rights in the suit properties is left to be adjudicated by the trial court on its own merits without getting influenced by the prima facie observations made by this court.

27) The present appeal being devoid of merits stands dismissed with costs. Pending CA if any stands disposed of.

(P.R.BORA)
JUDGE

bdv/
fldr 5.10.16