

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Amk

APPEAL FROM ORDER NO. 1348 OF 2012
WITH
CIVIL APPLICATION NO. 1834 OF 2012
IN
APPEAL FROM ORDER NO. 1348 OF 2012

Mr. Pradeep Namdev Giri

...Appellant

Versus

Chaya Mohan Giri & Ors.

...Respondents

.....

Mr. Ashok B. Tajane for the Appellant.

Mr. Vijay Killedar for the Respondents.

CORAM : G. S. KULKARNI, J.

DATE : 22nd APRIL, 2016.

P. C. :

1. This appeal is directed against the judgment and order dated 16.07.2012 passed by the learned District Judge-2, Solapur whereby the appeal filed by respondent Nos.1 & 2 challenging the judgment and decree passed by the learned Civil Judge J. D., Barshi in R.C.S. No. 249/2005 has been set aside with a further direction that the matter be remanded to the Civil Judge J.D., Barshi for a fresh trial. The contention of the respondents before the learned District Judge was that the judgment and decree prejudicially affected their

legal rights and that they were necessary parties to the suit as instituted on behalf of the appellant/plaintiff. The dispute was family dispute pertaining to certain properties where. The rival parties have asserted their rights in these properties.

2. The Civil Appeal before the learned District Judge at Solapur was filed under Section 96 of the Code of Civil Procedure which stands allowed by the impugned order.

3. In view of this position learned counsel informs the Court that it was discussed on the earlier occasion as to whether the impugned order would be required to be assailed in a second appeal under Section 100 of the Code of Civil Procedure.

4. However on what has transpired today this issue does not arise for consideration as also the appeal would not require any consideration as the learned counsel for the respondents on instructions from his client, as also relying on the decision of the Apex Court in the case of **Banwari Lal Vs. Smt. Chando Devi, AIR 1993 SC 1139** submits that the respondents would like to approach the Trial Court in an application for setting aside the decree on the ground that the compromise decree which is in question was not lawful and/or that there was no compromise in the eye of the law and/or it was obtained fraudulently. It is submitted that the

respondents are taking recourse to this position in view of the following observations recorded in para 14 of the decision in the case of **Banwari Lal** (supra):

14. *The application for exercise of power under proviso to R. 3 of O. 23 can be labelled under S.151 of the Code but when by the amending Act specifically such power has been vested in the Court before which the petition of compromise had been filed, the power in appropriate cases has to be exercised under the said proviso to R.3. It has been held by different High Courts that even after a compromise has been recorded, the Court concerned can entertain an application under S. 151 of the Code, questioning the legality or validity of the compromise. Reference in this connection may be made to the cases Smt. Tara Bai v. V. S. Krishnaswamy Rao, AIR 1985 Kar 270; S. G. Thimmappa v. T. Anantha, AIR 1986 Kar 1, Bindeshwari Pd. Chaudhary v. Debendra Pd. Singh, AIR 1958 Pat 618; Mangal Mahton v. Behari Mahton, AIR 1964 Pat 483 and Sri Sri Iswar Gopal Jew v. Bhagwandas Shaw, AIR 1982 Cal 12, where it has been held that application under S. 151 of the Code is maintainable. The Court before which it is alleged by one of the parties to the alleged compromise that no such compromise had been entered between the parties that Court has to decide whether the agreement or compromise in question was lawful and not void or voidable under the Indian Contract Act. If the agreement or the compromise itself is fraudulent then it shall be deemed to be void within the meaning of the explanation to the proviso to R. 3 and as such not lawful. The learned Subordinate Judge was perfectly justified in entertaining the application filed on behalf of the appellant and considering the question as to whether there had been a lawful agreement or compromise on the basis of which the Court could have recorded such agreement or compromise on 27.2.1991. Having come to the conclusion on the material produced that the compromise was not lawful within the meaning of R.3, there was no option left except to recall that order.*

5. In the light of the above position the learned counsel for the respondents seeks leave to withdraw their appeal being Appeal No. 82 of 2007 filed before the Court of learned District Judge-2, Solapur. Appeal No. 82 of 2007 is accordingly allowed to be withdrawn.

6. In view of these statements and submissions as made on behalf of the learned counsel for the respondents the adjudication of the Appeal from Order is not warranted. The respondents are at liberty to approach the Trial Court in appropriate proceeding as they desire.

7. The Appeal from Order is disposed of in the above terms. No order as to costs.

8. As the Appeal from Order is disposed of, the Civil Application does not survive and hence disposed of as such.

9. Needless to observe that the Trial Court would dispose of the application if any to be made by the respondents on its own merits and without being influenced by any observations made in the interim orders.

(G. S. KULKARNI, J.)