

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION No.7675 OF 2018**

Vasantrao Tukaram Nazirkar & anr.

... Petitioners

Vs.

Baban Gajanan Khomane & Ors.

... Respondents

Mr.Surel Shah for the Petitioners

Mr.Rahul Kadam for the Respondent Nos.1 to 10

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: AUGUST 31, 2018**

P.C. :

1. Rule. By consent of the parties, Rule made returnable forthwith and heard finally.

2. This petition is filed by a third party against respondent Nos.1 to 10, who are the original plaintiffs and respondent Nos.11 to 15, who are the original defendant Nos.1 to 5 and respondent nos.17 to 25, i.e., the defendants, who were added subsequent to the amendment to the plaint. This Writ Petition takes exception to the judgment and order dated 30.8.2013 passed by the learned District Judge IV, Pune, in Civil Appeal No.238 of 2005 wherein the appeal preferred by respondent No.1 i.e., the original plaintiff No.1, was allowed and the judgment and order dated 30.8.2013 passed

by the learned District Judge IV, Pune in Civil Appeal NO.238 of 2005 wherein the appeal preferred by respondent No.1 i.e., the original plaintiff No.1 was allowed and the judgement and decree dated 19.12.2001 passed in Regular Civil Suit No.30 of 1997 on the basis of compromise purshis below exhibit 69 was set aside and the appellate Court remanded the said matter to the trial Court.

3. The original plaintiffs have filed suit against the respondents in respect of the suit property i.e., the agricultural land. The original plaintiffs and the defendants are related to each other. The plaintiffs have filed suit for declaration that the suit properties are owned by the plaintiffs and defendants have no right in the suit properties and the defendants are to be restrained from creating any third party right or any transaction in respect of the suit properties. The said suit was compromised between the parties on 19.12.2001. The original plaintiff No.1 filed Civil Appeal No.236 of 2005 against all the defendants challenging the said compromise on the point that the appellant and the other plaintiffs did not give power to compromise the suit to original plaintiff No.3, however, taking undue advantage of the said power dated 18.7.2000 (exhibit

31), the original plaintiff No.3 in collusion with the respondents filed compromise purshis behind the back of the appellant and other plaintiffs. In the said appeal, all the respondents appeared and opposed on the ground that the respondents have acted upon the said compromise purshis and the record of rights is mutated. So also, that the original plaintiff No.3 and the other persons have effected sale deed of some portion of the suit land after this compromise and partition. The appellate Court, however, after considering the documents before it, held that on record it is very clear that plaintiff No.1 had not assigned to plaintiff No.3 the power/right to compromise and so, the compromise effected at exhibit 69 was behind the back of plaintiff No.1 i.e., the appellant and, therefore, the appellate Court held that the decree is not binding on the plaintiff; so the learned Judge allowed the appeal and set aside the judgment and decree passed by the learned Civil Judge, Saswad by order dated 30.8.2013 and now the matter is restored to its file and is pending before the learned Civil Judge, Junior Division, Saswad.

4. The petitioners were not party either to the suit or the appeal but they have purchased some portion of the property vide

registered sale deed from plaintiff No.3 and other persons and as the decree is set aside, they are directly going to be affected persons. Hence, this petition.

5. Mr.Surel Shah, learned Counsel for the petitioners, made a two-fold submissions. There is a delay in challenging the appeal order because the petitioners were never the party to the suit and they had no knowledge about the appellate proceedings. However, he is aggrieved by the appellate Court order as the decree is going to be set aside and has right to challenge the said order before the writ Court. He submitted that the appeal itself is bad in law because the compromise decree which was passed under Order 23 Rule 3 of the Civil Procedure Code, is not appealable u/s 96(3).

6. The learned Counsel has further elaborated his second submission that instead of filing an Appeal from Order, challenging the order of remand passed by the appellate Court under Order 43 (1U), he has challenged this order in writ petition because if the subordinate Court has assumed jurisdiction which it does not have and has failed to exercise the jurisdiction which it does have, then, as it is a failure of justice, such order passed without jurisdiction

can be challenged in the writ jurisdiction of this Court. He has submitted that the remedy is open under Article 227 of the Constitution of India where the writ Court can exercise the power of superintendence. In support of his submissions, he heavily relied on the order of this Court dated 7.7.2015 in **Writ Petition No.5402 of 2015 (Zaid Naim Shaikh & ors. vs. Saheblal Ahmed Saheb Valsangkar & Ors.)**. On the point of maintainability of appeal on setting aside the compromise decree, he relied on the judgment of the Division Bench of the Gujarat High Court in the case **Ramratanbhai Badriprasad Agrawal vs. Kankuben Parshottamdas Jordas**¹. The learned Counsel relied on another Division Bench judgment of the Bombay High Court in the case of **Vishankumari Udaysingh Varma through her daughter & C.A. Manju U. Varma & anr. vs. Vijaysingh Rajasingh Varma & Ors.**².

7. Mr.Kadam, the learned Counsel appearing for the respondents/original plaintiffs, has submitted that the plaintiffs did not assign the right to compromise the matter to plaintiff No.3. He relied on and referred to exhibit 31, the power of attorney. He supported the order of dated 30.8.2013 passed by the learned

1 LAWS(GJH)-2011-5-119

2 2016(4) Mh.L.J. 805

District Judge, Pune, wherein it is held that the compromise was effected at exhibit 69 behind the back of plaintiff No.1 by all the parties to the suit and hence, it is not binding on him. He further submitted that the objection that the decree of compromise is not appealable in view of the bar u/s 96 of the Code of Civil Procedure, was not raised before the learned District Judge. The petitioner was not a party before the first appellate Court and has no locus to file the writ petition. The learned Counsel argued that the present petitioner No.1 was an advocate on record of the plaintiff in the said suit and as per the ethics and norms stated in the Advocates Act, the petitioner ought not to have compromised the suit and should not have purchased the said suit property. The learned Counsel has submitted that the petitioner No.1 is an advocate by profession and appeared in the suit for the plaintiff/respondent, has defrauded the plaintiff and thus, the said decree was obtained fraudulently in collusion. He has further submitted that whatever objection the petitioner has, he should have made application before the appeal Court and not in the writ jurisdiction. In support of his submissions, he relied on the judgments in **Narayanan vs. Kumaran & Os.**³

³ (2004) 4 SCC 26

8. On the point of locus of filing the Writ Petition by the petitioners, the learned Counsel relied on the judgment in the case of **Sadhana Lodh vs. National Insurance Company Ltd. and anr.**⁴ The learned Counsel further relied on the judgment in the case of **Radhey Shyam & anr. vs. Chhabi Nath & Ors.**⁵

9. Before dealing with the present case, the ratio laid down on the point of bar under Order 23 Rule 3 and Section 96 (3) of the Civil Procedure Code to file appeal in compromise decree is to be discussed.

10. In the case of **Ramratanbhai Badripasad Agrawal (supra)**, the Division Bench of the Gujarat High Court has discussed the provisions of section 96(3) which provides that no appeal shall lie from a decree from the Court by consent of the parties, but for enforcement of the bar u/s 96(3) of Civil Procedure Code, the condition precedent or the situation conceived is that there should be a valid decree passed by the Court with valid consent or lawful compromise or agreement. However, it held that if at all the decree is not valid, the party is not remediless and the party has to

4 AIR 2003 SC 156

5 (2015) 5 SCC 423

approach the same Court under Order 23 Rule 3, which passed the compromise decree and ask for setting aside the said decree. When such objection is raised by any party to the suit for passing of decree based on alleged compromise and despite this, the decree is passed, then, under such circumstances, right to appeal is provided under Order 43 Rule 1A which states about right to challenge non-appealable orders in appeal decrees. Order 43 Rule 1A was inserted in CPC by amendment in the year 1976. Thus, the grievance of the party taking objection to the compromise decree can be ventilated by the parties by filing appeal under Order 43 Rule 1A against the order of the decree Court rejecting the objection. The Division Bench of Gujarat High Court has described elaborately what procedure is to be adopted under different circumstances where the party to the compromise decree wants to challenge and which remedy is available to it as section 96(3) forecloses the right of appeal against the said decree and so also, under Order 23 Rule 3A, no suit shall lie to set aside the decree on the ground that compromise on which the decree is based, was not lawful. Thus, the only remedy available to the parties is under Rule 1A of Order 43.

11. In the case of **Daljit Kaur & anr. vs. Muktar Steels Pvt. Ltd.**⁶, where the Supreme Court dealt with the scope of section 96(3) and Order 23(3). In the said case, the validity of the compromise was challenged in same Court passing decree and after conducting enquiry, the compromise was maintained. The said order was challenged in appeal. If there is a decree on consent and without dispute, then, it is not appealable. So, the Supreme Court held that though the decree was passed on the basis of compromise, if challenged before the same Court, then the order passed in the enquiry cannot be said as a consent decree. Therefore, it is not necessary to dwell upon the applicability of Order 43 (1A) of Civil Procedure Code.

12. The Supreme Court in the case of **Daljit Kaur (supra)**, placed reliance in the judgment in **Pushpadevi Bhagat vs. Rajinder Singh**⁷ and held that the appeal under section 96 (3) is not maintainable against order on compromise by the parties.

13. In the case of **Vishankumari Udaysingh Varma (supra)**, mainly Rule No.3 and 3A i.e., in Order 23 of Civil Procedure Code placing bar on filing a fresh suit to assail the decree of a Court

⁶ (2013) 16 SCC 607

⁷ (2006) 5 SCC 566

under compromise is discussed. It also held that the objection or challenge to the compromise is required to be raised before the same Court that passed such decree and it is that Court alone which can examine and determine that question as Order 23 Rule 3A bars a suit and the High Court has right to direct the appellant to seek redressal in a suit having regard to the provisions of Order 23 Rule 3 and 3A of the Civil Procedure Code. In the case of **Narayanan vs. Kumaran & Os. (supra)**, the Supreme court while dealing with the scope of Order 43 Rule 1(u) and section 100 of the CPC, has observed that the appeal Court has to be confined to the question of facts having a bearing on the order of remand and the Court should not go into the facts threadbare and appreciate the evidence.

14. In the present case, the learned Counsel for the petitioner has challenged the order of remand. Thus, the order undoubtedly falls under Order 43 Rule 1(u) of Code of Civil Procedure. Thus, if there is a specific provision of challenge of the order of remand passed by the appeal Court, then, the procedure of further appeal under Order 43 is required to be followed and not the avenue of writ jurisdiction is to be explored.

15. In the case of **Sadhana Lodh vs. National Insurance Company Ltd. and anr.** (supra), the Supreme Court has dealt with the maintainability of the Writ Petition where the remedy of appeal is provided under the statute. The scope of supervisory jurisdiction of the High Court under Article 227 of the Constitution of India is discussed by the Supreme Court and held that the High Court should be confined only to see whether an inferior Court or Tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, muchless of an error of law. In exercising the supervisory power under Article 227 of the Constitution of India, the High Court does not act as an appellate Court. The right of appeal is a statutory right and if there is a provision under the statute, there is legal propriety to avail of the said remedy instead of invoking the writ jurisdiction of the High Court.

16. In the case of **Radhey Shyam & anr. vs. Chhabi Nath & Ors.**,⁸ the Full Bench of the Supreme Court while deciding the scope of writ jurisdiction, referred to various precedents of the Supreme Court and especially in the case of **Shalini Shyam**

⁸ (2015) 5 SCC 423

Shetty vs. Rajendra Rahul Kumar Agarwal⁹, wherein the court has observed thus:

“64. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases High Courts, in a routine manner, entertain petition under Article 227 over such disputes and such petitions are treated as writ petitions.

65. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown, that a private individual is acting in collusion with a statutory authority.”

17. Thus, the remedy available to the aggrieved person of the compromise is to approach the same Court under Order 23 and the said Court after conducting the enquiry, may uphold the decree or may set aside and that order being passed in a disputed issue, can be challenged in appeal first under Order 43 (1A). the main bone of argument of the learned Counsel Mr.Shah is that the appellate Court did not have any jurisdiction to entertain this appeal in view of the bar under Order 23(3) and section 96(3) of

⁹ (2013) 9 SCC 374

the Civil Procedure Code, the order of remand is illegal and, therefore, this Court is required to invoke its supervisory jurisdiction under Article 227 of the Constitution of India, send the matter directly to the trial. This contention is supported by the view taken by the learned Single Judge of this Court in the case of **Zaid Naim Shaikh & Ors. vs. Saheblal Ahmed Saheb Valsangkar & Ors. (supra)**. However, in the present case, the applicant or the petitioner was neither a party to the suit nor a party in the appeal. He is a third party who has purchased the property after decree is passed. Naturally, if the decree is set aside, he is going to be an affected party. However, in the present case, the transaction is not plain but the respondent have made allegations of fraud against the present applicant who happen to be a lawyer by profession and has represented the plaintiff i.e., the respondent in the suit. Thus, though the appeal is filed by the respondent/plaintiff before the learned District Judge and the learned District Judge has set aside the judgment and decree and remanded the matter, the validity of that order can be tested under Order 43 Rule (1U) which specifically states that the order of remand passed by the appellate Court is to be challenged by filing appeal under Order 43 of the Civil Procedure Code. Thus, when there is a specific provision of

appeal against the order under Order 43(1U) of the Civil Procedure Code.

17. In view of the ratio laid down in **Radhey Shyam & anr. (supra)**, **Narayanan vs. Kumaran & Os. (supra)**, **Sadhana Lodh vs. National Insurance Company Ltd. and anr (supra)** and **Shalini Shyam Shetty vs. Rajendra Rahul Kumar Agarwal (supra)**, I think it is appropriate to restrain to entertain and decide this matter under writ jurisdiction. The present applicants being a third party, may file his application before the Court taking up Appeal from Orders and the said court will decide its locus, right and legality of the order of remand passed by the appellate Court. I have also noted that the point of maintainability in the light of bar u/s 96(3) and under Order 23(3) of Civil Procedure Code, was not raised before the appellate Court and was not argued. In view of this, this Writ Petition deserves to be dismissed on the ground of maintainability .

18. In these circumstances, the Writ Petition is dismissed, with liberty to file Appeal from Order or take appropriate steps.

(MRIDULA BHATKAR, J.)

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