

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Civil Application No. 02130 of 2016
(In Second Appeal No. 0530 of 2004)

District : Ahmednagar

Shantabai Wd/o. Arun Vhatkar,
Age : Major,
Occupation : Nil,
R/o. Pipeline Road,
Bhistbaug, Ahmednagar.

.. Applicant
(Original
appellant)

versus

1. Arun Yedba Vhatkar,
Died, by his son (L.R.)
Rahul Arun Vhatkar,
Age : 32 years,
Occupation : Service,
R/o. Pipeline Road,
Bhistbaug,
Ahmednagar.
2. Sangita d/o. Arvind
Sambhudas,
Age : 48 years,
Occupation : Service at
Mahatma Gandhi Vidyalkaya,
Chikhli,
Taluka & Dist. Osmanabad.

.. Non-applicants
(Original
respondents)

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*Mr. R.R. Mantri, Advocate, holding for
Mr. R.R. Sancheti, Advocate, for the applicant.*

*Mr. Ameya N. Sabnis, Advocate, for non-applicant
no.01.*

*Mr. C.R. Deshpande, Advocate, for non-applicant
no.02.*

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With

Civil Application No. 02131 of 2016
(In Second Appeal No. 0530 of 2004)

District : Ahmednagar

Rahul Arun Vhatkar,
Age : 25 years,
Occupation : Service,
R/o. Pipeline Road,
Bhistbaug, Venkatesh Colony,
Ahmednagar.

.. Applicant

versus

1. Shantabai Wd/o. Arun
Vhatkar,
Age : Major,
Occupation : Household,
R/o. Pipeline Road,
Bhistbaug, Ahmednagar.
2. Sangita d/o. Arvind
Sambhudas,
Age : 48 years,
Occupation : Service at
Mahatma Gandhi Vidyalkaya,
Chikhli,
Taluka & Dist. Osmanabad.

.. Non-applicants
(No.01 - Original
respondent)

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Mr. Ameya N. Sabnis, Advocate, for the applicant.

Mr. R.R. Mantri, Advocate, holding for
Mr. R.R. Sancheti, Advocate, for the non-applicant
no.01.

Mr. C.R. Deshpande, Advocate, for non-applicant
no.02.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 28TH MARCH 2019

ORDER :

01. Civil Application No. 02130 of 2016 has been filed by the original appellant and Civil Application No. 02131 of 2016 is filed by added party to the appeal. Both the applications have been filed to recall the final order and decree dated 25-02-2010 passed by this Court in Second Appeal No. 530 of 2004.

02. Applicant Shantabai was married to one Arun Vhatkar on 10-11-1984. Applicant Rahul is their son. There was dispute between Shantabai and Arun and, therefore, litigation started. Applicant had filed Hindu Marriage Petition No. 70 of 1988 for restitution of conjugal rights under Section 09 of the Hindu Marriage Act, 1955, whereas Arun had filed Hindu Marriage Petition No. 179 of 1996 for divorce. The trial Court had dismissed the petition filed by the applicant and granted divorce by allowing the petition filed by Arun. Thereafter, Regular Civil Appeal No. 347 of 2002 filed by the applicant was dismissed. At the same time, the appeal filed by her, challenging the judgment and decree passed in divorce petition i.e. Regular Civil Appeal No. 355 of 2002 was allowed and the divorce petition was dismissed. Arun filed Second Appeal No. 530 of 2004.

Rahul was not a party to the said proceedings. It is stated that in January 2010, Arun by exercising pressure and coercion on Shantabai, got a compromise executed. She was fighting since 1986 for about 25 years and maintenance was not provided to her. She was brought under duress to this Court on 25-02-2010. A document was got typed in English and she signed the same. It was not read over to her. In the said compromise, it was stated that she is accepting the divorce. In fact, no grounds prescribed under Section 13 of the Hindu Marriage Act were made out in the compromise. The substantial question of law has not been decided or framed in the second appeal. Under such circumstance, the decree that was granted on the basis of compromise, deserves to be recalled. It is stated that Arun expired on 04-09-2015. Allegations are made in respect of second wife / mistress of Arun, by name, Sangita d/o. Arvind Sambhudas. In fact, before both the Courts, Sangita had contended that she has not married to Arun. However, after the compromise decree passed in this case, it was revealed that bank deposits over Rs. 62,50,559/- and pension has been transferred in the name of respondent no.02 to the application. The deposits are in State Bank of Hyderabad, Osmanabad. It is also stated that property bearing no.461 in ward no.26 at Osmanabad is the ancestral property and without any valid document, it has been transferred in her name. In view of death of Arun, respondent

no.02 is joined as proper party to the application. When it was noted that respondent no.02 is getting her name entered to the properties, the application has been filed. On these grounds, it is stated that since the compromise was got executed under pressure, the said order deserves to be recalled.

03. Applicant Rahul in his application has stated that he was not a party to the Hindu Marriage Petition. However, since it was a compromise, he got his name added to the second appeal. He was unemployed and starving. He has signed the compromise deed but it was not by his free will. He was under impression that after death of Arun, all the property would come to him. But then, respondent no.02 has started making adverse claim. He has filed application for grant of succession certificate and the same is pending before the Court of Civil Judge (Senior Division), Osmanabad. He has also, therefore, prayed for recall of the judgment and decree passed by this Court in Second Appeal No. 530 of 2004 dated 25-02-2010.

04. Heard learned Advocate Mr. R.R. Mantri, holding for learned Advocate Mr. R.R. Sancheti, for the applicant in C.A. No.2130 of 2016. Heard learned Advocate Mr. A.N. Sabnis for the applicant in C.A. No.2131 of 2016 and heard learned Advocate Mr. C.R. Deshpande for respondent no.02.

05. It has been vehemently submitted on behalf of the applicants, that the second appeal was arising out of the judgment and decree passed in Hindu Marriage Petition. Though the trial Court had granted decree for divorce, it was reversed by the first appellate Court and, therefore, Arun had filed the second appeal. There was no question of Rahul to be added as a party. However, he was added as a party by virtue of Civil Application No. 2668 of 2010. Thereafter, the compromise Pursis was passed in which terms and conditions were enumerated. As per the said terms and conditions, respondents Shantabai and Rahul had agreed to withdraw Special Civil Suit No. 03 of 2008 which they had filed before Civil Judge (Senior Division), Ahmednagar, and also undertook that they will not claim any amount towards interim maintenance or get it executed. They had also undertaken to withdraw Regular Civil Suit No. 212 of 2005 filed by them before Civil Judge (Junior Division), Barshi, in respect of property Block no. 625/2 and 627 situated at village Mauje Kari, Taluka Barshi, District Solapur. They had also undertaken to withdraw Criminal Application No. 154 of 1998 filed for recovery of amount of maintenance before Judicial Magistrate (F.C.), Ahmednagar. They also agreed to withdraw all the complaints made by them before Government of Maharashtra and other authorities. They accepted that the house property

is the self acquired property of Arun and Shantaram as well as Rahul have no right in the same. It is stated that they accept that they do not have any right in respect of the amounts of provident fund, gratuity, leave salaries, fixed deposits, LIC policies and other investments, if any, pension and other pensionary benefits payable to Arun and they undertook that they will not claim any right in the same. Arun had agreed to pay Rs. 2,50,000/- to Shantabai and Rs. 2,50,000/- to Rahul. Accordingly, demand drafts were given to them. It was also stated that they have agreed that the marriage between Arun and Shantabai stands dissolved in terms of decree passed in H.M.P. No.179 of 1996, dated 07-12-2002. It was pointed out that the said terms of compromise were in English and Shantabai was not able to understand it. The said compromise has been got executed by pressurizing them and this fraud has been noted when after death of Arun, respondent no.02 started withdrawing the amount as well as getting her name mutated to the properties.

06. Reliance has been placed on behalf of the applicants, on the decision in *United India Insurance Co. Ltd. Vs. Rajendra Singh : Sanjay Singh* [AIR 2000 SC 1165] in which, it was held that "Every Court and Tribunal has power to recall its order." In that case, it was later on revealed to the Insurance Company, that the award has been passed on fake claim and, therefore, the Company

had approached the Tribunal to recall the order and under that circumstance, the said observation has been made on the basis of maxim "Fraud and justice never dwell together." Further reliance has been placed on the decision in *State of Punjab Vs. Davinder Pal Singh Bhullar & others, etc.* [AIR 2012 SC 364], wherein it is observed, *"The allegations of judicial bias are required to be scrutinized taking into consideration the factual matrix of the case in hand. The Court must bear in mind that a mere ground of appearance of bias and not actual bias is enough to vitiate the judgment/order. Actual proof of prejudice in such a case may make the case of the party concerned stronger, but such a proof is not required. In fact, what is relevant is the reasonableness of the apprehension in that regard in the mind of the party."*

07. Per contra, learned Advocate appearing for respondent no.02 submitted that the husband expired on 04-09-2015. However, in fact, the compromise had taken place on 25-02-2010. For 05 years, there was no action by the applicants to say that the compromise has taken place due to pressure. In fact, the recall or review ought to have been filed within limitation i.e. reasonable time. Under Article 137 of the Limitation Act, it should have been filed within three years. Further it is to be noted that the said compromise has been acted upon by both the applicants. They have withdrawn the suit on 14-09-2010. They have accepted the amount that was given by way of demand draft to them. Under such

circumstance, there is no question of recalling the order. Further, both the applicants have not come with a case, that any fraud has been played upon Court. No evidence has been produced to that effect. Therefore, Section 151 of the Code of Civil Procedure, 1908 will not be applicable. What has been accepted by the wife while accepting the divorce decree, that she is accepting on the basis or reasons given by the learned trial Court. The divorce was given by the learned trial Court on the basis of desertion. Therefore, it cannot be stated that the decree for divorce by way of compromise was not based upon any reasons mentioned in Section 13 of the Hindu Marriage Act.

08. Learned Advocate for respondent no.02 has placed reliance on the decision in *Ramesh Chand Sharma Vs. Udham Singh Kamal and others* [AIR 1999 SC 3837], wherein it is stated that if no explanation is given for delay and no foundation has been led before the Tribunal, then such delay cannot be condoned. Further reliance has been placed on the decision in *Ballumal A. Jaisingh Vs. M/s. J.J. Builders and others* [2003(3) Mh.L.J. 238], wherein it has been held that in absence of proper application for condonation of delay, the Court has no jurisdiction to condone the delay. Same view was taken in the case of *Ragho Singh Vs. Mohan Singh & others* [2001 AIR SCW 2351]. Reliance has also been placed on the decision in *Secretary to Govt. of India & others Vs. Sivram Mahadu Gaikwad*

[1994 AIR SCW 2562], wherein it has been held that the delinquent made no effort to explain delay and seek condonation and, therefore, the application was barred by limitation. Further reliance has been placed on the decision in *Salkia Businessmen's Association & others Vs. Howrah Municipal Corporation & others* [AIR 2001 SC 2790], wherein it has been observed that "*The memorandum and terms of the compromise in this case became part of the orders of the High Court itself when the writ petition was finally disposed of in terms of the compromise reached between the parties.*" Further reliance has been placed on the decision in *Smt. Anita Vs. R. Rambilas* [AIR 2003 AP 32], wherein it has been held that *the review petition would be maintainable under Section 151 only if one of the party proved to have played fraud on Court.* In this case also, there was a petition for divorce and the wife who had educated lady had all opportunities to complain about fraud played on her by husband, but she did not choose to do so. It was held that the petition for recall or review is not maintainable. Similar view was taken in *Sailendra Nath Roy Chowdhury Vs. Md. Alim & another* [AIR 1983 Calcutta 180]. Reliance has also been placed on the decision in *Gangadeep Pratisthan Pvt. Ltd. & others Vs. M/s. Mechano & others* [AIR 2005 SC 1958]. Further reliance has been placed on the decision in *Pushpa Devi Bhagat (D) by L.R. Vs. Rajinder Singh & others* [AIR 2006 SC 2628]. It is held thus :-

" The position that emerges from the amended provisions of O. 23 can be summed up thus : (1) No appeal is maintainable against a consent decree having regard to the specific bar contained in S.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 Cl.(m), R.1, O.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 R.3-A; (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 R.3 of O.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."

Similar view was also taken in *Sunita Vs. Bharat Bhushan* [AIR 2012 Delhi 104].

09. The first and the foremost fact that is required to be considered, is the second appeal was filed by Arun challenging the judgment and decree passed in appeal filed by Shantabai, whereby the decree for divorce was reversed. The said appeal was admitted by this Court on 11-04-2007 and substantial questions of law were framed. Thereafter, it was waiting for its turn for final decision. Thereafter, an application came to be filed by Rahul bearing Civil Application No. 2668 of 2010, to implead him as party to the proceedings and alternatively, it was prayed that he be permitted to sign the compromise Pursis as party to the compromise. Thus, it can be seen that he himself had filed that application through Advocate. Thereafter, he signed the compromise Pursis which was read and recorded by this Court on 25-02-2010. Parties were present before the Court on that day. They were identified by the Advocates and taking into consideration the fact that they had signed the Pursis, the second appeal was disposed of in terms of compromise. It was specifically stated that in view of the compromise, the Hindu Marriage Petition No.179 of 1996 stood decreed as prayed and the decree passed in Regular Civil Appeal No. 355 of 2002 dated 01-10-2003 was set aside. Now, Shantabai is coming with a case that her

signature on the compromise was obtained by fraud by Arun. In fact, she had every opportunity to disclose the said fact before this Court when she was present on the day, the compromise was read and recorded. Applicants in both the applicants have not come with a case that there was a fraud played on the Court but they contend that the fraud has been played upon them by Arun, who is no more. They have stated that they have realized about the fraud after they say that respondent no.02 is getting her name mutated and withdrawn amount from the Bank. It will not be out of place to mention here, that there is no ambiguity or use of bombastic words in the compromise Pursis. Both the applicants herein were represented by Advocate. Therefore, it cannot be stated that the Advocate had mislead them because there is no such recital in the application. Definitely, when they were entering into a contract in the form of compromise, it will have to be presumed that the consequences of the said terms were made known to the applicants. They have acted upon the compromise. They accepted the money that was given by way of demand draft by Arun and they have withdrawn the suits. This could not have been done without understanding the terms of the compromise. Under such circumstance, now the applicants cannot be allowed to resile from the compromise that had arrived at.

10. Respondent no.02 was not a party to the proceedings and, therefore, order of recall cannot be passed by making her as respondent no.02 in the applications. She has not been added as heir left by Arun. On the contrary, if we see Civil Application No. 2130 of 2016, the respondent no.01 is stated to be Arun and by showing him as dead, his legal representative has been shown as Rahul. When the compromise has been acted upon, there is no question of fraud played on the applicants. Therefore, definitely, the ratio laid down in *Pushpa Devi's case (supra)* is applicable here. So also, decisions in *AIR 2003 AP 32*, *AIR 1983 Calcutta 180* and *AIR 2012 Delhi 104* would support the submissions made on behalf of respondent no.02.

11. The ratio laid down in the case of *United India Insurance Co. Ltd. (supra)* cannot be disputed. However, in that case, what has been held is that the Company can approach the Tribunal for recalling of the award. That means, the maintainability of the application was in question and, therefore, it was answered in the affirmative. Here, even if we accept that the application to recall is maintainable, yet, whether the grounds to recall have been made or not, is a different aspect which will have to be assessed on the basis of facts of each case.

12. Learned Advocate for the appellant has also

relied on the decision in *Banwari Lal Vs. Smt. Chando Devi (through L.R.) and another* [AIR 1993 SC 1139], wherein it has been held that the trial Court can entertain application of plaintiff for considering that the compromise is not lawful. In that case, material was placed on record showing that the compromise was not lawful and, therefore, the order recording compromise was held to be recalled. As aforesaid, the facts of the present case does not reveal that any fraud was practiced on Court. Further, it has not been shown that the compromise which was arrived at is unlawful. There is no substance in the say on behalf of Shantabai that the compromise for declaration of divorce could not have been passed in absence of any ground under Section 13 of the Hindu Marriage Act. At the cost of repetition, it can be said that para "H" of compromise specifically states that the marriage shall stand dissolved in pursuance of the decree passed in H.M.P. No.179 of 1996, dated 07-12-2002. That means, she was accepting the reasons given in the said decree for divorce. That decree was passed on the ground of desertion. Therefore, on the face of it, it cannot be stated that the compromise that was arrived at was unlawful or could not have been recorded lawfully in any manner.

13. Now, turning towards the limitation, it is to be noted that the compromise has arrived at and recorded by this Court on 25-02-2010. No action was

taken by the applicants till Arun expired on 04-09-2015 and the present applications have been filed on 24-01-2016. That means, the order that was passed on 25-02-2010 was sought to be recalled on 24-01-2016. Definitely, there is inordinate delay. There is no delay condonation application filed by the applicants. Merely by saying that there is inherent power, it cannot be stated that the applicants can give a go by to the Limitation Act. Even if we accept that the application can be filed under Section 151 of C.P.C., yet, the application for recall will have to be filed within reasonable period from the date of the order. Therefore, the ratio laid down in AIR 1999 SC 3837, 2003(3) Mh.L.J. 238, 2001 AIR SCW 2351, 1994 AIR SCW 2562 and AIR 2001 SC 2790, are definitely applicable here.

14. Taking into consideration the above said reasons, both the applications are hereby rejected.

(Smt. Vibha Kankanwadi)
JUDGE

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