

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

Civil Application No. 04433 of 2019
(In Second Appeal No. 0344 of 2007)

District : Jalgaon

Dwarkabai d/o. Hari Bari
(Died on 28.10.15),

Since deceased through L.Rs.:

A] Gajanan s/o. Prabhakar Lavne,
Age : 21 years,
Occupation : Agriculture,
R/o. Shirsoli,
Taluka & Dist. Jalgaon.

B] Anil s/o. Hiranman Tade,
Age : 42 years,
Occupation : Agriculture,
R/o. Shirsoli,
Taluka & Dist. Jalgaon.

.. Applicants.

versus

01. Pundlik s/o. Hari Bari,
Age : 68 years,
Occupation : Retired,
R/o. N-41, V/C, 1/1/10,
Savta Nagar, Subhash Chowk,
CIDCO, Nashik - 8.

02. Ashok s/o. Narayan Bari
(Deceased),
Through L.Rs.,

2-A] Smt. Chandrakala
w/o. Ashok Bari,
Age : 48 years,
Occupation : Household.

2-B] Mahindra s/o. Ashok Bari,
Age : 32 years,
Occupation : Labour.

2-C] Smt. Ujwala Sandip
Rokde (Bari),
Age : 31 years,
Occupation : Household.

2-D] Mrs. Pushpa Pradip Age
(Bari),
Age : 26 years,
Occupation : Household.

2-E] Ms. Suvarna d/o. Ashok
Bari,
Age : 21 years,
Occupation : Student

All above R/o. Shirsoli,
Taluka Jalgaon.

03. Sau. Kalabai Rambhau Bari,
Age : 55 years,
R/o. Waghod, Tal. Raver,
Dist. Jalgaon.

04. Sau. Sushilabai Prabhakar
Bari,
Age : 48 years,
Occupation : Household,
R/o. Yawal, Tal. Yawal,
Dist. Jalgaon.

05. Chhababai w/o. Namdeo Bari,
Age : 85 years,
R/o. Shirsoli,
Tal. & Dist. Jalgaon.

06. Shamrao Namdeo Bari,
Age : 59 years,
R/o. Shirsoli,
Tal. & Dist. Jalgaon.

07. Subhash Namdeo Bari,
Age : 57 years,
R/o. Shirsoli,
Tal. & Dist. Jalgaon.

08. Leelabai w/o. Shavaji Bodke,
Age : 55 years,

C/o. Shivilal (Shiwaji)
Vitthal Bodke,
R/o. Shendurni,
Tal. Jamner, Dist. Jalgaon.

09. Shobhabai w/o. Raju Bari,
Age : 53 years,
C/o. Raju Laxman Fuse,
At Pahur, Tal. Jamner,
Dist. Jalgaon.

10. Mangalabai w/o. Prabhakar
Lawne,
Age : 63 years,
C/o. Prabhakar Dattatraya
Lawne, R/o. Shirsoli,
Tal. & Dist. Jalgaon.

11. Akkabai Namdeo Bari,
Age : 46 years,
C/o. Dashrat Mahadu Naik,
R/o. Shirsoli,
Tal. & Dist. Jalgaon.

12. Jagannath Khushal Tade,
Age : 60 years,
C/o. Sau. Viju Jagannath
Tade, Opp. Barak No.1395,
Maratha Section No.32,
Ulhasnagar, No.4,
Dist. Thane.

13. Eknath Khushal Tade,
Age : 71 years,
Occu. : Not known,
R/o. Opp. Barak No.1395,
Maratha Section No.32,
Ulhasnagar, No.4,
Dist. Thane.

14. Dilip Kushal Tade,
Age : 60 years,
Occu. - Not known,
R/o. Opp. Barak No.1395,
Maratha Section No.32,
Ulhasnagar, No.4,
Dist. Thane.

15. Shantaram Khushal Tade,
Age : 65 years,

Nos.12, 13 & 14 R/o.
Opp. Barak No.1395,
Maratha Section No.32,
Ulhasnagar No.4,
Dist. Thane.

16. Pravin Khushal Tade,
Age : 71 years,
R/o. Shirsoli,
Tal. & Dist. Jalgaon.

17. Vimal w/o. Mongal Bari,
Age : 55 years,
R/o. P.F. At Dahanu,
Tal. & Dist. Thane.

18. Bhagabai w/o. Hiranman
Tade,
Age : 77 years,
R/o. Shirsoli,
Tal. Jalgaon.

19. Nagabai w/o. Omkar Tade,
Age : 77 years,
R/o. Shirsoli,
Tal. Jalgaon.

.. Non-applicants.

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Mr. Ajit M. Gholap, Advocate, for the applicants.

*Mr. B.S. Deshmukh, Advocate, for non-applicant no.01
(i.e. appellant in SA).*

*Mr. A.G. Talhar, Advocate, for non-applicants
no.2A to 2E (i.e. respondents no.1A to 1E in SA).*

Non-applicants no.05 & 07 died.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 01ST APRIL 2019

ORDER :

01. Present application has been filed to recall the order dated 13-07-2017 passed by this Court in Second Appeal No. 344 of 2007.

02. The applicants are contending that they are the legal heirs of original respondent no.19 / defendant no.19. They claim to be the heirs of respondent no.19 on the basis of will executed by respondent no.19 on 16-10-2015. Present respondent no.01 had filed Regular Civil Suit No. 442 of 1993 before 4th Joint Civil Judge (Junior Division), Jalgaon, for declaration and possession. It came to be dismissed on 28-09-1999. He challenged the said judgment and decree in Regular Civil Appeal No.203 of 1999. It was heard by learned District Judge-1, Jalgaon and it was dismissed on 13-09-2006. Therefore, he filed the second appeal.

03. The second appeal was admitted by this Court on 03-02-2009 on a substantial question of law. However, the applicants contend that the basis on which the substantial question of law arose, was in fact, not subject matter of the suit. It is stated that the plaintiff had relied on will dated 03-02-1990, whereas the substantial question of law was in respect of will dated 11-09-1984. But then, during the pendency of the second appeal, the original

appellant and respondent no.01's heirs filed compromise Pursis before this Court on 16-06-2017. Thereafter this Court had directed learned Registrar (Judicial) to verify and then the matter was placed again before the Court on 13-07-2017. After perusing the report filed by the learned Registrar (Judicial), this Court disposed of the second appeal in terms of compromise.

04. It has been contended by the applicants, that the said compromise was not signed by them. Nobody had represented deceased respondent no.19 and without compliance of Order I Rule 8(4) and Order XXIII Rule 03 of the Code of Civil Procedure, 1908, the compromise has been recorded. The applicants contend that by virtue of the will left by respondent no.19, they have received the property as per the will and when respondents went to get the land mutated as per the will, they came to know about the compromise. In fact, the compromise ought not to have been accepted when the legal representatives of deceased respondent no.19 were brought on record and, therefore, it is stated that the said order passed by this Court on 13-07-2017 deserves to be recalled.

05. Heard learned Advocate Mr. A.M. Gholap for the applicants. Heard learned Advocate Mr. B.S. Deshmukh for non-applicant no.01 and heard learned Advocate Mr. A.G. Talhar for non-applicants no.2-A to

2-E. It is not necessary to issue notice to other non-applicants.

06. It has been submitted on behalf of the applicants, that the compromise has not been properly recorded. It was never signed by original respondent no.19. In fact, she had executed will on 16-10-2015 in favour of the applicants and thereafter they have got their names mutated to the property received. Under such circumstance, notice ought to have been issued to them before recording the compromise. Even the report that was given by the learned Registrar (Judicial) would show that the compromise was not signed by the other respondents. It is also submitted that in view of the decision in *Banwari Lal Vs. Smt. Chando Devi (through L.R.) and another* [AIR 1993 SC 1139], this Court can cancel the order recording compromise. It has been held in the said case, as under :-

" A party challenging a compromise can file a petition under proviso to R.3 of O.23, or an appeal under S.96(1) of the Code, in which he can now question the validity of the compromise in view of R.1A of O.43 of the Code. 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. In the instant case, the plaintiff challenged the order recording compromise on the ground his counsel in collusion with defendant of the said suit had plead a fraud on him by filing a fabricated petition of compromise although no compromise had been effected between him and the defendant.

Further details of fraud were mentioned in the said petition and it was stated that the alleged compromise itself was void, illegal and against the requirement of O.23, R.3. Therefore, the entertaining of the application filed on behalf of plaintiff 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, by the trial Court was proper. Since the material produced on the record showed that the compromise was not lawful within the meaning of R.3, the order recording compromise could be recalled."

07. Per contra, learned Advocates appearing for non-applicant no.01 and non-applicants no.2A to 2E submitted that at the time recording the compromise, all precautions have been taken and it was verified as to who has signed the documents. Note has also been taken regarding who has signed the same. The appellant as well as legal representatives of original respondent no.01 were present before the learned Registrar (Judicial) and each one of them have signed it. Therefore, said compromise was accepted and then the second appeal was disposed of.

08. It is not necessary to go into the merits of the matter now. The limited point that is required to be considered is, as to whether the present applicants can seek recall of the compromise. The present applicants are not the party in the second appeal. They claim that respondent no.19 has left will dated 16-10-2015 by which the property has been

bequeathed to them. It is the property which she had inherited from testamentary succession from her father namely, Hari Bari. Respondent no.19 had expired on 28-10-2015. It is to be noted that after the death of respondent no.19, there was no attempt by the applicants to get themselves joined as party to the second appeal. Therefore, there was no question of issuing any notice to the applicants. The entire application is silent as to why they did not get themselves added as party to the second appeal. It is not their case, that they were not having any knowledge about pendency of the litigation. The order of recall cannot be at the instance of a third party or by such a party who has allegedly received any interest in the property without getting their right ascertained. The ratio laid down in *Banwari Lal's case (supra)* cannot be disputed. However, the application therein was by the plaintiff, that means, party to the suit. If at all the said compromise is not binding on the applicants, by virtue of some right which they claim to have been received, then the remedy is elsewhere and not by way of recall of the order passed by this Court. The 7/12 extract produced by the applicants themselves would show that in the 'other rights column', there is specific mention of the second appeal pending before this Court and that entry was taken on 03-09-2015, which is in respect of *lis pendense*. There was no hurdle for the applicants to get themselves joined

to the second appeal immediately after death of respondent no.19. It will have to be shown by the applicants, as to how their rights are affected or how there can be said to be a collusion between plaintiff and defendants no.01 and 02. Even if we consider the will stated to have been left by respondent no.19, what she had bequeathed is her share from the properties. In the compromise also, shares have been mentioned. It is not described by boundaries. Therefore, definitely without the applicants getting themselves impleaded in the appeal, at their behest, the order cannot be recalled. It is reiterated that if there is any right available to the applicants, it is elsewhere and not by way of recall.

09. In the light of above, the application is hereby rejected.

(Smt. Vibha Kankanwadi)
JUDGE

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