

drp

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.773 OF 2021

Atmaram Narayan Sanap
Age – 46 years, Occ – Service
R.o Tandalwadi (Bhilla),
Taluka – Beed, District – Beed
Presently residing at
Janai Nivas, House nO. 2362
Narsimh Colony, Chakradhar Nagar
Shahu Nagar, Pangri Raod, Beed
Taluka and District - Beed

PETITIONER

VERSUS

Sangita Atmaram Sanap
Age – 40 years, Occ – Household
R/o Tandalwadi (Bhilla),
Taluka and District – Beed

RESPONDENT

.....

Mr. C. V. Dharurkar, Advocate for the petitioner
Mr. Girish K. Thigale (Naik), Advocate for the respondent

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 6th SEPTEMBER, 2022

ORDER :

1. This petition is directed against the order passed by the learned Civil Judge, Senior Division, Beed, below Exhibit-86, in Regular Civil Suit No. 342 of 2011.
2. Facts, which are not in dispute, are that - the petitioner is the husband and the respondent is the wife. Divorce proceedings, filed by the petitioner, bearing HMP No. 66 of 2000

were compromised and by consent decree dated 20th October, 2000, divorce was granted. Permanent alimony was paid to the wife in the said proceedings, so also half portion of land gut No. 126 admeasuring 1 Hectare 14 Are, situated at Mauje Tandalwadi was given to her, by way of a registered sale deed.

3. On 5th July, 2010, the petitioner performed second marriage. The respondent wife filed FIR against the petitioner and his family members alleging commission of offence punishable under section 498A, 420, 494, 323, 504 read with 34 of the Indian Penal Code. She also filed Regular Civil Suit No. 342 of 2011 in the Court of learned Civil Judge, Senior Division, Beed seeking a declaration that the judgment and decree dated 20th October, 2000 passed in HMP No. 66 of 2000 is null and void and the same be quashed and set aside.

4. The petitioner – husband appeared in the said suit and by filing written statement opposed contentions of the wife. On 31st January, 2012, issues were framed in RCS No. 342 of 2011. The petitioner – husband, thereafter, by filing application Exhibit-15/ D prayed for framing two additional issues. The said application was partly allowed and additional issue in respect of maintainability of the suit was framed. Thereafter the parties have led their respective evidence and the matter was fixed for

arguments. On 9th March, 2020, arguments of both the parties were concluded and the matter was adjourned for filing citations. After filing citations by the learned advocates, the respondent wife filed application Exhibit-86 and prayed for conversion of the civil suit into Miscellaneous Application. The petitioner – husband opposed the said application by filing a detail say. The Trial Court has allowed the said application. The petitioner – husband is aggrieved by the said order.

5. Heard learned advocate for the petitioner and the learned advocate for the respondent.

6. Learned advocate for the petitioner assailed the impugned order on the ground that the petitioner challenged the maintainability of the suit and has also raised the point of limitation. The suit was filed for setting aside the consent decree almost after 17 years of passing of the same, which is not maintainable in law. In that view of the matter, the Trial Court could not have allowed the application filed by the respondent-wife. By relying on the decisions in "*Banwari Lal V/s Chando Devi*" AIR 1993 SC 1139; "*Pushpa Devi Bhagat V/s Rajinder Singh and Othes*" AIR 2006 SC 2628; "*Triloki Nath Singh V/s Anirudh Singh*" AIR 2020 SC 211 and unreported decision of the Apex Court in Civil Appeal No. 5784 of 2020 (*My Palace Mutually*

Aided Co-operative Society V/s B. Mahesh and Others), he submits that the Trial Court has erred in granting permission to the respondent – wife to convert the suit, which itself was not maintainable, into Miscellaneous Application, under section 151 of the Civil Procedure Code. He submits that the powers under section 151 of the CPC cannot be exercised when there is specific remedy provided. Further submission is that the Trial Court has misread and misconstrued the decision of the Madhya Pradesh High Court, in *"Raghuvir Singh and Others V/s Ramdarshan Ramcharan Kirar and Others"* (2002) 1 MPLJ 617.

7. On the other hand, learned advocate for respondent-wife supported the impugned order. He submits that the parties have already led evidence before the Trial Court. The matter is at the stage of final arguments, no prejudice is likely to be caused to the petitioner, if civil suit is converted into Miscellaneous Application. The petitioner, by challenging the impugned order, is trying to avoid judicial scrutiny of the alleged consent decree. According to him, the Trial Court has rightly permitted conversion of the civil suit into Miscellaneous Application.

8. In reply, learned advocate for the petitioner states that his objection as to the maintainability of the suit under Order XXIII, Rule 23A of the Civil Procedure Code itself goes as soon as the

conversion is permitted. He further submits that so also the objection as to the limitation is impliedly rejected by the Trial Court.

9. I have given thoughtful consideration to the rival submissions advanced by the learned advocates for both the parties, grounds raised in the petition and the documents filed on record as well as the citations relied on by the learned advocates for the parties.

10. It is not in dispute that the consent decree passed in the year 2000 is challenged by the respondent wife by filing suit in the year 2011. Admittedly, order XXIII, Rule 3A of the Civil Procedure Code bars suit to challenge compromise/consent decree.

11. It is a matter of record that the parties have led their respective evidence and the matter is finally heard by the Trial Court. At that stage, the application was moved by the respondent – wife, when it was realized that the suit filed by her is not maintainable. The Trial Court has allowed the application holding that since the parties are contesting the matter since long, it is judicious to decide the controversy on merit rather than on technicalities. By relying on the decision of the Madhya

Pradesh High Court in "**Raghuveer Singh**" (*supra*), the Trial Court came to a conclusion that there is no procedural hurdle in treating this suit, which is not legally maintainable under section 151 of the Civil Procedure Code for enquiring whether the compromise was unlawful and a product of fraud, as Miscellaneous Application. The Trial Court has further recorded a finding that treating this suit as Miscellaneous Application, as aforesaid, will not cause any prejudice to the defendant and adjudication of the litigation will be entirely on merits.

12. In the peculiar facts of the present case, this Court is of the opinion that the impugned order is not liable to be interfered with. Having realized the fact that it is a settled legal position that no suit is maintainable to challenge a compromise decree, at the fag end of the matter, the wife has sought permission to convert the suit into Miscellaneous Application under section 151 of the CPC. As the parties have already led evidence and have argued the matter at length, the Trial Court was justified in holding that the controversy between the parties needs to be decided on merits rather than on technicalities. The approach of the Trial Court is judicious and warrants no interference.

13. In "**Banwari Lal**" (*supra*), the Apex Court has held -

13. When the amending Act introduced a proviso along with an

explanation to Rule 3 of O.23 saying that where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, “the Court shall decide the question”, the Court before which a petition of compromise is filed and which has recorded such compromise, has to decide the question whether an adjustment or satisfaction has been arrived at on basis of any lawful agreement. To make the enquiry in respect of validity of the agreement or the compromise more comprehensive, the explanation to the proviso says that an agreement or compromise “which is void or voidable under the Indian Contract Act...” shall not be deemed to be lawful within the meaning of the said Rule. In view of the proviso read with the explanation, a Court which had entertained the petition of compromise has to examine whether the compromise was void or voidable under the Indian Contract Act. Even R1 (m) of O. 43 has been deleted under which an appeal was maintainable against an order recording a compromise. As such 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.

14. *The application for exercise of power under proviso to R-3 of O.23 can be labeled under S. 151 of the Code but when the amending Act specifically such power has been vested in the Court before which the petition of compromise has 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 Kar1; Bindeshwari Pd. Chaudhary V. Debandra 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 been recorded such agreement or compromise on 27.2.21991. 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.”

14. In **"Pushpa Devi Bhagat"** (*supra*), the Apex Court has held that no appeal is maintainable against consent decree. It is observed that -

“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.”

15. In **"Triloki Nath Singh"** (*supra*), the Apex Court was considering the challenge of the compromise decree, by a

stranger. While considering said challenge, it is held that the decree passed on a compromise cannot be challenged by stranger to proceedings in a separate suit, in view of specific bar under Rule 3A of Order 23 of the Civil Procedure Code.

16. In Civil Appeal No. 5784 of 2022, the Apex Court has held:

“25. In response to the first leg of challenge i.e. on the procedural aspect, we may note that the recall application was filed under Section 151 of the CPC against the final decree dated 19.09.2013. It is in this context that we must ascertain whether a third party to a final decree can be allowed to file such applications, by invoking the inherent powers of the Court under Section 151 of the CPC.

26. Section 151 of the CPC provides for Civil Courts to invoke their inherent jurisdiction and utilize the same to meet the ends of justice or to prevent abuse of process. Although such a provision is worded broadly, this Court has tempered the provision to limit its ambit to only those circumstances where certain procedural gaps exist, to ensure that substantive justice is not obliterated by hyper technicalities. As far as in 1961, this Court in Padam Sen V. State of U.P. AIR 1961 SC 218, observed as under:

‘8. The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well recognized that the inherent power is not to be exercised in a manner which will

be contrary to or different from the procedure expressly provided in the Code.’

28. *Section 151 of the CPC can only be applicable if there is no alternate remedy available in accordance with the existing provisions of law. Such inherent power cannot override statutory prohibitions or create remedies which are not contemplated under the Code. Section 151 cannot be invoked as an alternative to filing fresh suits, appeals, revisions or reviews. A party cannot find solace in Section 151 to allege and rectify historic wrongs and bypass procedural safeguards in the CPC.*

17. In **"Ram Prakash Agarwal V/s Gopi Krishan" (2013) 11 SCC 296**, the Apex Court has held :

“19. In view of the above, the law on this issue stands crystallised to the effect that the inherent powers enshrined under Section 151 CPC can be exercised only where no remedy has been provided for in any other provision of CPC. In the event that a party has obtained a decree or order by playing fraud upon the court, or where an order has been passed by a mistake of the court, the court may be justified in rectifying such mistake, either by recalling the said order, or by passing any other appropriate order. However, inherent powers cannot be used in conflict of any other existing provision, or in case a remedy has been provided for by any other provision of CPC. Moreover, in the event that a fraud has been played upon a party, the same may not be a case where inherent powers can be exercised.”

18. In the light of the aforesaid ratio and the peculiar facts of the present case, if the conversion as prayed by the wife is not permitted she will be rendered remediless and taking into

consideration the fact that the parties have led their evidence and have advanced final arguments, this Court is not inclined to interfere in the impugned order. Pursuant to the conversion the Trial Court shall decide the matter on its own merits, without further hearing the parties, merely because conversion is permitted.

19. In the result, the writ petition is dismissed. It is, however, made clear that the Trial Court shall decide Miscellaneous Application on the basis of evidence led before it and the arguments already advanced, in accordance with law. All the respective contentions of both the parties on merits are kept open. Trial Court shall render its decision within a period of six weeks from the date of receipt of writ of this order.

[NITIN B. SURYAWANSHI]
JUDGE