

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6938 OF 2009
WITH
CIVIL APPLICATION NO.11926 OF 2022 IN WP/6938/2009

Balasaheb Hanumant Jadhav
Age : 35 years, Occu.: Agri.,
R/o.: Dabadgaonkar Colony,
Majalgaon, Dist. Beed

.... Petitioner
(Orig. Defendant No.1)

Versus

1. Vaijnath Raghunath Jadhav,
Age: 48 years, Occu.: Agri.,
R/o. Ghatnandoor, Tq. Ambajogai,
Dist. Beed.
2. Hanumant Raghunath Jadhav,
Age: 65 years, Occu. Retd. Teacher,
R/o.: Dabadgaonkar Colony,
Majalgaon, Dist. Beed

.... Respondents
(R.1- Orig. Plaintiff
R.2- Orig. Defendant No.2)

.....
Mr. Vivek V. Bhavthankar, Advocate for the Petitioner
Mr. Vijaykumar C. Patil (Ashtekar), Advocate for Respondent No.1
.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 25th AUGUST, 2023

ORAL JUDGMENT :

1. This petition filed under Article 227 of the Constitution of India, the petitioner/defendant No.1 takes exception to the order passed by learned 2nd Joint Civil Judge, Junior Division, Majalgaon, below Exhibit-1 in Regular Civil Suit No.115 of 2015, thereby deciding preliminary issue as to

the maintainability of the suit in favour of respondent No.1/plaintiff.

2. Respondent No.1 filed suit against petitioner and respondent No.2 being defendant Nos. 1 and 2 respectively, claiming relief of declaration and ownership of the suit property and further claiming a declaration that decree passed in Regular Civil Suit No.82 of 2005 is not binding on him.

3. In the suit, it is the contention of respondent No.1 that, he is the owner and possessor of properties bearing Gut No.241 and Gut No.242 situated at village Mahur, Taluka Majalgaon, District Beed, which are his self acquired properties, and respondents have no concern with the said properties. He was serving as Sepoy in Military and it was difficult him to look after the suit properties. Therefore, he had executed power of attorney in favour of Respondent No.2 (his father) for looking after the agricultural lands/suit properties. The power of attorney was to be enforced till the petitioner was in service. Petitioner retired in the year 2003 from service and started looking after the transactions of the suit properties. By public notice dated 16/05/2005, the petitioner revoked the power of attorney executed in favour of respondent No.2.

Petitioner (respondent No.1 in R.C.S.No.115/2005) filed Regular Civil Suit No.82 of 2005 in respect of suit properties for declaration of ownership and for perpetual injunction against the present respondent No.1. Respondent No.2 - Power of attorney holder represented respondent No.1 in the said suit. Respondent No.2 in collusion with petitioner compromised the suit and allotted share of respondent No.1 to the petitioner. Compromise terms to that effect were filed and compromise decree was passed. Under the power of attorney, respondent No.2 was not authorized to enter into compromise. Respondent No.1, therefore, prayed that decree passed in Regular Civil Suit No.82 of 2005 is not binding on him.

4. The Petitioner/defendant No.1 raised objection to the maintainability of the suit by relying order on Order XXIII Rule 3-A of the Code of Civil Procedure. The Trial Court has rejected the preliminary objection raised by the petitioner/defendant No.1. This order is impugned in the present petition.

5. Learned advocate for the petitioner submits that in view of Rule 3-A of Order XXIII of the Code of Civil Procedure, the suit filed by the plaintiff is not maintainable, and the Trial

Court has erred in deciding preliminary issue in favour of respondent No.1/plaintiff by misinterpreting Rule 3-A of Order XXIII. In support of his submission, he relied on ***R. Janakiammal Vs. S.K. Kumarasamy (Deceased) Through Legal Representatives and others, (2021) 9 SCC 114.***

6. Per contra, learned advocate for the respondent No.1/plaintiff supported the impugned order by placing reliance on ***Jethalal C. Thakkar & others Vs. Lalbhai Hiralal Shah, 1986 (0) BCI 52.***

7. Heard the learned advocate for the petitioner and learned advocate for respondent No.1. Perused the writ petition memo, impugned order, and the citations relied upon by the learned advocates for the petitioner and respondent No.1.

8. It is a matter of record that the petitioner filed Regular Civil Suit No.82 of 2005 against respondent No.1 for declaration of ownership and perpetual injunction in respect of land bearing Gut No.241 admeasuring 02 Hectares 41 R and land bearing Gut No.242 admeasuring 2 Hectares 10 R. Admittedly, in the said suit, respondent No.2 represented respondent No.1 as his power of attorney holder. Petitioner

and Respondent No.2 compromise the suit and filed compromise terms, accordingly compromise decree is passed.

9. In *Pushpa Devi Bhagat (Dead) Through LR. Sadhna Rai (Smt.) Vs. Rajinder Singh and Ors., (2006) 5 SCC 566*, it is held;

"17. 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) of 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 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 Rule 3 Order 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. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21-8-2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27-8-2001) filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by the second defendant was not maintainable, having regard to the express bar contained in Section 96(3) of the Code."

The aforesaid decision is followed in ***R. Janakiammal*** (supra).

10. In Regular Civil Suit No.115 of 2015, respondent No.1 ha claimed that he had not given power of attorney holder/respondent No.2 any authority to enter into compromise and that the suit properties are his self acquired properties, therefore, the petitioner and respondent No.2 have

not right to the said properties. He, therefore, claimed a relief that compromise decree passed in Regular Civil Suit No.82 of 2005, on the basis of compromise between petitioner and respondent No.2 is not binding on him.

11. Rule 3-A of Order XXIII of the Code of Civil Procedure provides that, "*No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.*"

12. In this view of the matter and in view of provision of Order XXIII Rule 3-A of the Code of Civil Procedure and in the light of aforesaid ratio, respondent No.1 has a remedy to approach the same Court, which recorded compromise and passed the compromise decree and establish that there was no valid compromise. Only that Court has jurisdiction to entertain the application filed by Respondent No.1.

13. In view of the aforestated settled legal position, the prayer made by Respondent No.1 in respect of compromise decree in Regular Civil Suit No.82 OF 2005 is not maintainable in the present suit, as he is not entitled to file suit challenging the compromise decree. However, other prayers made by him

in the present suit in respect of declaration and ownership and injunction are maintainable before the Trial Court.

14. Considering the peculiar facts of the present case, in my opinion, following order would meet the ends of justice:

ORDER

- (I) The writ petition is partly allowed.
- (II) Impugned order dated 15/09/2009 passed by learned 2nd Joint Civil Judge, Junior Division, Majalgaon below Exhibit-1 to the extent of it holds that in the present suit filed by respondent No.1 claiming relief in prayer clause (क) is maintainable, is hereby quashed and set aside.
- (III) Preliminary objection raised by the petitioner in respect of relief claimed by Respondent No.1 in prayer clause (क) of the present suit that, decree passed in Regular Civil Suit No.82 of 2005 is not binding on him, is upheld.
- (IV) Respondent No.1 is at liberty to file application for setting aside the compromise decree in Regular Civil Suit No.82 of 2005 by approaching the same Court, which has passed the said decree.

In case such application is filed, the same shall be decided on its own merits.

The time spent by the parties in prosecuting the present suit and writ petition shall be taken into consideration at the time of condonation of delay, if any.

On filing of application for setting aside the decree in Regular Civil Suit No.82 of 2005, said application and the present suit shall be clubbed together and be placed before the same Court, which will decide the application.

- (V) Respondent No.1/plaintiff is entitled to prosecute the present suit to the extent of other prayers in prayer clauses (अ), (ब), (ड) and (ई) of the suit.

Rule is made absolute in above terms with no order as to costs.

15. In view of disposal of writ petition, civil application is disposed of.

[NITIN B. SURYAWANSHI]
JUDGE

S.P Rane