

AGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.4 OF 2023

Bandu Dhulappa Girmal (deceased)
through LR's Tatyaso Bandu Girmal
& Ors. ... Applicants

V/s.

Vrushabh Chandrakant Girmal & Ors. ... Respondents

Mr. N.J. Patil i/by Mr. Akshay N. Patil for the
applicants.

Mr. S.S. Jagtap for the respondents.

CORAM : AMIT BORKAR, J.

DATED : SEPTEMBER 15, 2023

P.C.:

1. By this civil revision application under Section 115 of the Code of Civil Procedure, 1908 ("CPC" for short), the applicant/original defendant is challenging impugned order dated 12 March 2020 rejecting application under Order 7 Rule 11 clause (d) of the CPC seeking dismissal of the suit for partition to challenge compromise decree signed by guardian on behalf of the minor.

2. Respondent No.1/original plaintiff filed Regular Civil Suit No.242 of 2015 before the learned Civil Judge Junior Division, Kurundwad seeking partition of the suit property and consequential possession. Reference is made to the compromise decree as regards suit property executed on 28 November 2002 by

the guardian (mother) of the plaintiff on the ground that the compromise was made in collusion with other co-sharers. Additionally, it is pleaded that permission before appointment of legal guardian was not obtained.

3. The applicants filed an application under Order 7 Rule 11 of the CPC seeking rejection of the plaint. The Trial Court by order dated 12 March 2020 rejected the application. However, the Trial Court rejected the application holding that the present suit is filed to set aside compromise decree based on the ground that it was not lawful. It is held that the ground pleaded in the plaint is allegation that compromise decree is void, ab initio. The application for review is rejected by order dated 20 June 2022. The applicants, therefore, filed present civil revision application.

4. Learned advocate for the applicants submitted that the suit in its present form is barred by Order 23 Rule 3A of the CPC. According to him, only remedy available to such aggrieved person is to file an application before same Court to recall such compromise decree on whatever grounds which are permissible in law. In support of his submission, he placed reliance on **Bhau Ram v. Janak Singh** reported in 2012 (6) Mh.L.J. 758; **Pushpa Devi Bhagat (D) by LR v. Rajinder Singh & Ors.** reported in AIR 2006 SC 2628; **Sushil Sonahlal Agrawal v. Harishankar Ramnivas Sharma & Anr.** reported in 2016 (4) Mh.L.J. 904; **Bridgestone India Pvt. Ltd. v. Inderpal Singh** reported in 2016 (4) Mh.L.J. 911; **R. Rajanna v. S.R. Venkataswamy & Ors.** reported in AIR 2015 SC 706; **Vaishankumari Udaysingh Varma, through her daughter & Constituted Attorney**

Manju U. Varma & Anr. v. Vijaysingh Rajasingh Varma & Ors. reported in 2016 (4) Mh.L.J. 805; **Byram Pestonji Gariwala v. Union Bank of India & Ors.** reported in AIR 1991 SC 2234; **Shankar Sitaram Sontakke & Anr. v. Balkrishna Sitaram Sontakke & Ors.** reported in AIR 1954 SC 352; **Indira Bal Patel v. B.A. Patel** reported in AIR 1974 AP 303; **Banwari Lal v. Smt. Chando Devi (through L.R.) & Anr.** reported in 1993 Mh.L.J. 773; **Laxmibai Laxman Medhi & Ors. v. Kesarimal Premchand Parmar & Ors.** reported in 2007 (5) Mh.L.J. 219; **Sree Surya Developers & Promoters v. N. Sailesh Prasad** reported in AIR 2022 SC 1031.

5. On perusal of the plaint, it appears that the plaintiff has pleaded collusion between the legal guardian and other co-sharers. If such ground is pleaded and accepted by the Court, the decree passed earlier would be treated as nullity under Section 44 of the Evidence Act, 1872. This view is based on judgment of the three-Judge Bench of the Apex Court in **Asharfi Lal v. Smt. Koili (dead) by LRs** reported in AIR 1995 SC 1440 where the Apex Court observed that in case where an inference of fraud or collusion can be drawn from the negligence or gross negligence of next friend, it would be permissible for a minor to avoid judgment or decree passed in earlier proceedings by invoking Section 44. It is held that if such judgment falls within the ambit of Section 44, it can be avoided in the proceedings in which it is sought to be relied upon and it is not necessary to have it set aside by instituting independent proceedings in a competent Court. The Apex Court in paragraph 14 observed as under:

“14. The question for consideration is whether, apart from filing a separate suit for setting aside a decree on the ground of gross negligence on the part of his next friend, it is permissible for a minor to avoid a decree, if relied upon in a subsequent proceeding, on the ground that the said decree was obtained on account of gross negligence on the part of his next friend in the previous suit. This would be permissible only if Section 44 of the Evidence Act can be invoked. As pointed out earlier, the Privy Council in *Talluri Venkata Seshayya v. Thadikonda Kotiswara Rao* (AIR 1937 P.C. 1) (supra) has laid down that Section 44 of the Evidence Act cannot be extended to cases of gross negligence. But in the said case the Privy Council has observed that the Court cannot treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts. In other words, in cases where an inference of fraud or collusion can be drawn from the negligence or gross negligence of the next friend it would be permissible for a minor to avoid the judgment or decree passed in the earlier proceeding by invoking Section 44 of the Evidence Act without taking resort to a separate suit for setting aside the decree of judgment.”

6. In the facts of the present case, the plaintiff has pleaded that on the date of entering into compromise, he was minor. The compromise was entered into by his natural guardian mother. The allegations of collusion are made. Whether based on such allegations and the evidence placed on record by the parties, an inference of collusion can be drawn or not is a matter to be adjudicated at the time of trial. Therefore, the application under Order 7 Rule 11 which needs to be construed strictly as it disentitles a party from claiming relief at threshold of the proceedings. With such averments, opportunity needs to be

granted to the plaintiff to prove averments made in the plaint during trial. Therefore, the impugned order does not suffer from error of jurisdiction.

7. The judgments relied upon by the applicants do not lay down a proposition of law inconsistent with the three-Judge Bench decision of the Apex Court in **Asharfi Lal** (supra). The judgment in the case of **Sree Surya Developers & Promoters v. N. Sailesh Prasad** (supra), the Apex Court was considering a suit where earlier decree was challenged on the ground that the compromise was not lawful. Therefore, the Apex Court held that such a suit is not maintainable. In the cases relied upon, the Courts concerned were not dealing with the pleadings alleging collusion under Section 43 of the Evidence Act. Therefore, the judgments relied on behalf of the applicants have no application to the facts of the present case.

8. The civil revision application, therefore, stands rejected. No costs.

(AMIT BORKAR, J.)