

HARSHADA SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4864 OF 2003

Narhar Rango Kulkarni (since deceased)
through legal heirs 1A. Jaya Narhar Kulkarni Petitioner
and Ors. .. (Original Applicant)

Versus

Milind Shripad Bendre and Anr. .. Respondents

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- Mr. Shriniwas Sudhir Patwardhan a/w. Mr. Bhooshan R. Mandlik,
Advocates for Petitioner.
- Mr. Surel S. Shah i./by Mr. Prashant Darandale, Advocate for
Respondent.

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CORAM : MILIND N. JADHAV, J.
RESERVED ON : FEBRUARY 16, 2023
PRONOUNCED
ON JUNE 05, 2023

JUDGMENT:

1. This Writ Petition is filed for the following relief:-

“A. That this Hon’ble Court be pleased to issue a writ mandamus or writ in the nature of mandamus or any other appropriate writ direction or order under Article 227 of the Constitution of India, 1950, quashing and setting aside judgment and order passed by the IInd Joint Civil Judge, Senior Division, Pune in Misc. Application No.611/99 on 1st July 2002 and be pleased to allow the same and quash and set aside the Compromise Decree passed in Special Civil Suit No. 1226 of 1998 passed by IInd Joint Civil Judge, Sr. Division, Pune.”

2. Writ Petition was filed in 2003 by the original Petitioner - Narhar Rango Kulkarni. He expired in 2017. Writ Petition is prosecuted by his legal heirs ie. Petitioner No.1A, his wife and Petitioner No.1b i.e. his son. Respondent No.1 is Milind Shripad Bendre. On 18.08.2003 when this Writ Petition was filed and moved

for interim relief this Court passed the following order:-

“Mr. Shah appears for the sole Respondent.

Heard. Mr. Shah, for the Respondent, submits that this writ petition is not maintainable in view of the order passed by this Court on 11th August 1999 in Writ Petition No.4412 of 1999, read with the order passed by the Civil Judge, Senior Division, Pune dated 28th July 1999. According to him, the issues sought to be raised are already concluded against the Petitioner in the said proceedings. Whereas, according to Mr. Anturkar for the Petitioner the opinion expressed by the Court in the earlier proceedings was only on prima facie consideration and even if the same has become final, this writ petition will have to be decided on its own merits in view of the substantive application filed by the Petitioner before the Court below on the assumption that the suit as filed by the Petitioner was not maintainable in law.

Arguable questions are raised. Rule.

The question regarding the maintainability of the writ petition and the said application from which the present writ petition arises is left open, to be considered at the time of final hearing of this writ petition.

Insofar as interim relief is concerned, even if the petitioner's argument was to be accepted as correct, in view of the compromise terms as filed, the Petitioner was liable to pay a principal sum of Rs. 2,25,000/- and interest even as per the damdupat rate, being a sum of Rs.2,25,000/-.

In the circumstances, the petitioner to deposit sum of Rs.5,50,000/- in this Court within 3 months from today, failing which the interim order as passed hereunder shall stand vacated forthwith without further reference to the Court.

The amount shall be deposited in this Court and if so deposited, it will be open to the Respondent to apply for withdrawal thereof on which application the Court may pass appropriate orders as may be advised.

Accordingly, interim relief in terms of prayer clause (b) on the above condition.

Petition be placed for final hearing on 17th December 2003 at the bottom of the Board to be notified for 17th December 2003.

All concerned to act on the ordinary copy duly authenticated by the Court Stenographer.”

3. By virtue of the above order, execution of the compromise

decree passed in Special Civil Suit No.1226 of 1998 was stayed.

4. Before I advert to the submissions made by the learned Advocates appearing for the respective parties, such relevant facts required for consideration of the *lis* are outlined hereinunder:-

4.1. The original Petitioner is the original Defendant in Special Civil Suit No.1226 of 1998 and present Respondent No.1 is the original Plaintiff in the said Suit. Parties shall be referred to as Petitioner (Original Defendant) and Respondent (Original Plaintiff) for convenience.

4.2. The Petitioner was serving as Taluka Inspector of Land Records in the Land Revenue Department of the Government of Maharashtra at Pune. He was in need of money for construction of his house. Respondent was his old friend of about 25 to 30 years. Respondent gave to the Petitioner a hand loan amount of Rs.2,25,000/- at the rate of compound interest of 3% p.m. in 1993.

4.3. However as the original Petitioner failed to repay the amount to the Respondent, and cheques given by the Petitioner on several occasions for repayment of the loan were dishonoured, Respondent instituted Special Civil Suit No.1226 of 1998 against the Petitioner for recovery of amount of Rs.10,06,848.86. Copy of the Plaint in Special Civil Suit No.1226 of 1998, is enclosed to the memo of this Writ Petition.

4.4. Original Petitioner for the first time requested Respondent to lend him Rs.2,00,000/- as he was in urgent need of money. This request was made in the year 1993-1994. Respondent advanced the amount of Rs.2,00,000/- by cheque No.4594 drawn on Pune People's Co-operative Bank Limited, Perugate Branch, Pune to the Original Petitioner on the condition that he would pay compound interest on the loan amount @ 3 % p.m. On 10.05.1994, another amount of Rs.25,000/- was advanced to the Original Petitioner on his request by cheque No.4597 drawn on the same bank on the same terms and conditions. Original Petitioner represented that he required the loan amount only upto 20.05.1994 and therefore on that date i.e. 20.05.1994 he handed over two cheques viz. cheque No.509091 of Rs.2,03,000/- and cheque No.509099 of Rs.25,350/-, both drawn on the Cosmos Cooperative Bank Limited, Kothrud, Pune for repayment of the aforesaid loan amounts received by him. On 20.05.1994, original Petitioner also gave two letters acknowledging the transaction and his liability to pay. Respondent deposited cheque no.509091 in his bank account on 27.05.1994 but the same was returned unpaid for want of funds. Second cheque was not presented at the request of the original Petitioner. Original Petitioner assigned the reason that because of non-receipt of his expected dues, the cheques could not be honoured and he was expected to receive his amounts around 15.10.1994 and therefore in view thereof he delivered a fresh cheque

bearing No.255531 for Rs.2,60,000/- dated 15.10.1994 and also gave a written letter of even date acknowledging and admitting the amounts payable and the aforementioned circumstances.

4.5. Original Petitioner thereafter in October, 1994 informed the Respondent not to present the cheque for encashment and sought further extension of time for repayment upto March, 1995. On 20.03.1995, Original Petitioner delivered another cheque bearing No.255536 of Rs.2,91,000/- drawn on the Cosmos Cooperative Bank Limited, Kothrud Branch, Pune in substitution of the earlier cheque no.255531 alongwith a letter of even date acknowledging his liability to pay the amounts. Respondent presented the cheque to his Bank which was dishonoured after repeated presentations. Respondent received letter of dishonour dated 17.04.1995 alongwith letter from Cosmos Cooperative Bank Limited i.e. Original Petitioner's Bank dated 29.03.1995 stating that the cheque was dishonoured for the reason of "refer to Drawer". Being aggrieved Respondent issued notice dated 28.04.1995 to the Original Petitioner and sought repayment of the amount. By reply dated 15.06.1995, Original Petitioner admitted his liability to pay and acknowledged the dishonour of cheque dated 20.03.1995, as also, the subsequent cheques and assured that another fresh cheque given by him dated 15.06.1995 bearing No.255540 dated 30.06.1995 for Rs.3,20,318/- would be honoured and requested the

Respondent to stay any legal action against him. Respondent deposited the cheque dated 30.06.1995 in his Bank account. On 26.07.1995, the cheque was dishonoured for the reason "refer to Drawer". Upon informing the Original Petitioner, he immediately apologized to the Respondent and informed him by his letter admitting his liability to pay the amounts and admitting that the cheque was dishonoured for want of money arrangement. The original Petitioner gave a fresh cheque to the Respondent bearing No.255541 for Rs.3,29,600/- which was once again dishonoured on 03.08.1995.

4.6. Respondent issued notice dated 16.08.1995 to the Original Petitioner. Since amounts were not paid, Respondent filed a criminal case bearing No.2880 of 1995 in the Court of J.M.F.C. (A.C.), Pune against the original Petitioner under Section 138 of the Negotiable Instruments Act, 1881. In the said proceedings, original Petitioner admitted his liability before the Court in writing filed on 25.11.1995 and 24.06.1997 about his liability to pay the amounts and assured that he would make the payment by 24.07.1997. However, the original Petitioner did not make the payment and hence Respondent filed Special Civil Suit No.1226 of 1998 for recovery of the said amount.

4.7. On 05.02.1999, compromise *pursis* was filed by the parties namely original Petitioner and the Respondent wherein original

Petitioner fully admitted the suit claim and agreed to pay the said amount settled at Rs.6,13,929/- with future interest as stated therein. The original Petitioner also agreed he was owner of immovable property described in the Schedule to the *pursis* namely property consisting of land and whole of the superstructure standing thereon on Survey No.128/2, Plot No.5, Shriniketan Society at Kothrud, Pune and gave the said property as security for realization of the entire claim arising out of the said compromise decree. Terms of the compromise ultimately culminated into passing of a decree in terms of the terms of compromise *pursis* on 05.02.1999. I have perused the Suit plaint in Special Civil Suit No.1226 of 1998 and the compromise decree which are annexed as Annexure A1 and Annexure A2 to the paper book.

4.8. In view of the above in June, 1999 Respondent withdrew the criminal case No.2880 of 1995 filed by him under Section 138 of the Negotiable Instruments Act, 1881 as per the compromise decree. However, within seven days of withdrawal of the criminal case by the Respondent, the original Petitioner filed Special Civil Suit No.788 of 1999 for setting aside of the compromise decree passed in Civil Suit No.1226 of 1998. On 21.07.1999, Respondent filed Application under Section 9(A) of the Civil Procedure Code, 1908 (for short '**C.P.C.**') for dismissal of the Suit. On 28.07.1999, the said Special Civil Suit No.788 of 1999 was dismissed by holding it to be not maintainable

and stay to the compromise decree was refused to the original Petitioner.

4.9. Being aggrieved the original Petitioner filed Writ Petition No.4412 of 1999 to challenge the dismissal of Special Civil Suit No.788 of 1999. By order dated 11.08.1999 this Court rejected the Writ Petition on merits. The order dated 11.08.1999 was not challenged by the original Petitioner and the same has become absolute and final and still subsists as on date.

4.10. On 19.08.1999, original Petitioner filed Miscellaneous Civil Application No.611 of 1999 under Order XXIII Rule 3 of C.P.C. before the Trial Court for setting aside the compromise decree dated 05.02.1999 on the ground of undue influence and fraud. On 26.10.1999, the learned Trial Court passed an order under Exhibit-5 in Miscellaneous Civil Application No.611 of 1999. Though the said order was challenged by Respondent in Civil Revision Application No.133 of 2001 in this Court, the Civil Revision Application was disposed of. On 01.06.2002, Miscellaneous Civil Application No.611 of 1999 was dismissed by the Trial Court. On 26.07.2002, original Petitioner filed Civil Revision Application No.1315 of 2002 in this Court. However, on 01.07.2003, the said Civil Revision Application was disposed of by this Court on the ground of maintainability in view of the 2002 Amendment to the C.P.C.

4.11. On 24.07.2003, the original Petitioner filed the present Writ Petition and on 18.08.2003, interim order was passed by this Court.

5. Mr. Patwardhan, learned Advocate appearing for the Petitioners (legal heirs of original Petitioner) has made the following submissions:-

5.1. At the outset on the aspect of maintainability of the present Writ Petition he would submit that in the facts of the present case, considering that an appeal against a compromise decree is expressly barred by Section 96 of the C.P.C. and the C.P.C. also does not provide any appeal against the order rejecting an application for setting aside a compromise decree, the only available remedy to the Petitioner was to file the present Writ Petition. He would submit that the application filed under Order XXIII Rule 3 of the C.P.C. by the original Petitioner is the only available remedy in law to challenge the compromise decree. He would submit that he filed Miscellaneous Civil Application which was dismissed by the trial Court on 01.06.2002. Thereafter, Civil Revision Application No.1315 of 2002 was filed in this Court which was however disposed of in view of the 2002 Amendment to the C.P.C. Hence, in that view of the matter the present Writ Petition was the only remedy available to the original Petitioner to challenge the compromise decree.

5.2. Next he would submit that the reasoning given by the learned Trial Court is clearly erroneous for rejection of Application under Order XXIII Rule 3 of C.P.C. in the impugned order dated 01.06.2002. He would submit that the learned Trial Court has failed to note that the dismissal of the Petitioner's suit, being Special Civil Suit No.1226 of 1998 was because it was not maintainable, in view of Rule 3A of Order XXIII of C.P.C., although the learned Trial Court has referred to arguments of the parties. The confirmation of this judgment and order dated 28.07.1999 below Exhibit-5 and Exhibit-23 by this Hon'ble Court by its order dated 11.08.1999 amounts to confirmation of the view of the learned Trial Court that the Petitioner's Suit was not maintainable in view of the bar contained under Rule 3-A of Order XXIII of C.P.C. Rejection of Petitioner's Suit was not on a finding that the questioned compromise decree is legal, nor are the Petitioner's arguments about the illegality of such decree dealt with and / or rejected by the Trial Court. To attribute the status of *Res Judicata* to such judgment and order dated 21.07.1999 passed by the Trial Court below Exhibit-5 and Exhibit-23 in Special Civil Suit No.788 of 1999 and the order dated 11.08.1999 passed by this Hon'ble Court in Writ Petition No.4412 of 1999, is clearly incorrect and misconceived.

5.3. Next he would submit that while rejecting Petitioner's

Application, being Miscellaneous Civil Application No.61 of 1999, the Trial Court has held that the Application was itself not maintainable resulting in vacuum on jurisdiction. If such was the case, the Trial Court could not have adjudicated the other issues on merits of the controversy, although the learned Court does so perfunctorily. That the Supreme Court in the case of **Dwarka Prasad Agarwal V/s. B. D. Agarwal**¹ has clearly taken a view that in the proceeding that is not maintainable / beyond the jurisdiction of the adjudicating Court, any finding on other facets of the case should not be endeavoured. If done, they are nullity, and would beget further nullity if acted upon.

5.4. He would submit that having dismissed Petitioner's Special Civil Suit No.788 of 1999 as not maintainable under Rule 3A of Order XXIII of C.P.C., the learned Trial Court ought to have heard the Petitioner on the merits of the controversy in his Miscellaneous Civil Application No.611 of 1999, instead of rejecting it as not maintainable.

5.5. On the aspect of maintainability he would submit that once the Petitioner's Suit is dismissed as not maintainable, Petitioner cannot be rendered remediless when on the basis of law as propounded by the Supreme Court, he has a remedy under Rule 3 of Order XXIII of C.P.C. Rejection of the Petitioner's Application, under Rule 3 of Order XXIII of C.P.C., as not maintainable, is thus a clear failure to exercise

¹ (2003) 6 SCC 230

jurisdiction vested in the learned Trial Court, by law. The same then becomes questionable only by way of the present Writ Petition (since the 1999 amendment of C.P.C. has taken away the remedy of revision for the Petitioner) and that the Petitioner has no other alternate remedy. The question about maintainability of the present proceeding / Writ Petition, as framed by this Hon'ble Court while admitting that the present Writ Petition on 18.08.2003, deserves to be therefore answered in favour of the Petitioner.

5.6. He would submit that the Trial Court thus could not have rejected the Petitioner's Application for recall of the consent decree under Rule 3 of Order XXIII of C.P.C. as not maintainable. Trial Court, who heard the oral submissions of the parties was also apprised of the order dated 10.01.2001 passed by this Hon'ble Court in Civil Revision Application No.133 of 2001. The principal argument of the Respondent (Petitioner in Civil Revision Application No.133 of 2001) was about the maintainability of the Miscellaneous Civil Application No.611 of 1999 only. Yet, this Hon'ble Court took a view that ends of justice would be met if the Trial Court is directed to dispose of Civil Miscellaneous Application No.611 of 1999 expeditiously; which is implied rejection of the Respondent / Plaintiff's argument about want of maintainability of the Petitioner's Application under Rule 3 of Order XXIII of C.P.C. That the Trial Court has further missed the order dated

11.08.1999 passed by this Hon'ble Court in Writ Petition No.4412 of 1999 which was placed for consideration before this Court on 10.01.2001 in Civil Revision Application No.133 of 2001 and yet this Hon'ble Court has opined that ends of justice would be met if the learned Trial Court is directed to dispose of the Petitioner's Civil Miscellaneous Application No.611 of 1999. That this was sufficient indication to the learned Trial Court that the order dated 11.08.1999 passed by this Court in Writ Petition No.4412 of 1992 was a Ruling on the maintainability of the Suit challenging the compromise decree and nothing further, which the learned Trial Court unfortunately missed out completely.

5.7. That the Petitioner led oral evidence in support of Miscellaneous Application No.611 of 1999 and nothing serious has come out of the cross examination of the Petitioner as also his witnesses. Petitioner, on the contrary, has proved through his oral evidence that an amount of Rs.3,45,000/- has actually been paid to the Respondent from time to time, one of the tranches of such payment being by Demand Draft dated 21.10.1995. Petitioner has also pleaded about the same in the evidence tendered by him. The only lame defence of Respondent is contained in paragraph No.11 of his reply, which stated that :- "The Applicant has not paid any amount to the Defendant towards his dues under the suit transactions up to today.

There is no legally tenable evidence on record in this respect.” That the Respondent did not enter into the witness box to disprove the Petitioner’s case. Petitioner also applied to the learned Trial Court for permission to cross examine the Respondent, which was denied. In effect, Petitioner would submit that he has led strong and sufficient evidence, whereas there is no evidence on behalf of the Respondent. The Trial Court, however, did not even discuss any evidence while dealing with his Application being Miscellaneous Civil Application No.611 of 1999. The order of the Trial Court, impugned in the present Writ Petition, is thus completely perverse and deserves to be quashed and set aside.

5.8. He would further submit that the compromise decree dated 05.02.1999 is otherwise also liable to be set aside on account of non-application of mind by the learned Court recording the same. The Petitioner submits that any Court, before whom parties appear for recording of any compromise, needs to be satisfied that the suit has been adjusted wholly or in part by any lawful agreement or compromise. The learned Court recording such compromise also needs to keep in mind that an agreement and / or compromise which is void or voidable under the Indian Contract Act, 1872 is not “lawful” within the meaning of Rule 3 of Order XXIII of C.P.C. The recording of the compromise decree without (a) recording the satisfaction by the

learned Court that the suit has been adjusted by lawful agreement and / or compromise and; (b) checking if the terms of compromise are lawful, is not permissible. The learned Trial Court, having failed on both the accounts, the recording of the compromise decree by him on 05.02.1999 deserves to be reopened. The decree dated 05.02.1999, deserves to be quashed and set aside. The ratio of the judgement of the Hon'ble Apex Court in the case of *Pruthvichand Ramchand Sablok V/s. S. Y. Shinde*² needs to be applied to the facts of the present case and the order dated 05.02.1999, recording compromise between the parties needs to be quashed and set aside.

5.9. Next he has referred to the provisions of the Section 23 and Section 24 of the Indian Contract Act, 1872, in this context also. The Indian Contract Act, 1872 declares the consideration or object of an agreement as unlawful, if it is forbidden by law, or is of such nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral, or is opposed to public policy. The purported agreement between the parties, which is recorded as per consent decree by the learned Trial Court is forbidden by law and is of such nature that, if permitted, it would defeat the provisions of several statutes and is fraudulent and involves injury to the Petitioner and / or his property and is also opposed to public

2 AIR 1993 SC 1929

policy. The order recording such an agreement as “consent decree” is thus stamping of an agreement as lawful, whose consideration and / or objects are unlawful. Section 24 of the Indian Contract Act, 1872 also declares agreement between the parties to be void if the considerations and objects thereof are unlawful even in part. The learned Trial Court has clearly failed to apply the provisions of the Indian Contract Act, 1872 as aforesaid. The recording of compromise under Rule 3 of Order XXIII of C.P.C. is thus not lawful and not actuated by a lawful agreement and / or compromise. According to him, the order dated 05.02.1999, recording the compromise between the parties, therefore, deserves to be quashed and set aside.

5.10. Next he has referred to the Agreement between the parties, which is turned into consent decree on sanction of the Court on 05.02.1999 is unregistered. That the compromise *pursis* between the parties contemplates creation of charge over the Petitioner’s house as security for the performance of the consent decree. That it is thus “Charge” under Section 100 of the Transfer of Property Act, 1882. The said document is thus “Simple Mortgage” as defined under Section 58 of the Transfer of Property Act, 1882. The said compromise *pursis*, therefore requires registration under Section 17 of the Registration Act, 1908. The non-registration of the said compromise *pursis* prohibits the same from being received as evidence of any transaction

affecting any property or conferring any power under Section 49 of the Registration Act, 1908. That this Hon'ble Court should examine the ratio of the judgments of the Hon'ble Apex Court in case of *Bhoopsingh V/s. Ramsingh and Ors.*³ and in case of *Haryana Financial Corporation V/s. Gurucharansingh and Anr.*⁴. Therefore the compromise *pursis* between the parties suffers from the defect of want of registration and therefore cannot be looked into for any purpose. The learned Trial Court, recording the compromise terms as the consent decree between the parties on 05.02.1999 ought to have insisted for the registration of the compromise terms before they were recorded as consent terms.

5.11. Finally he would submit that there is a clear jurisdictional failure on 05.02.1999, since the learned Court recording the compromise has failed to appreciate that the parties may be entering into an agreement, but they cannot be permitted to do so beyond legal limits and in any case, Courts cannot stamp their approval by ordering decree to be passed in terms thereof. The learned Court hearing the Petitioner's Application for recall of the consent decree similarly lost sight of very important legal principle that the parties can always set up the defence of illegality *vis-a-vis* of contract and there is no estoppel against the statutory provisions. According to him, both the

3 (1995) 5 SCC 709

4 (2014) 16 SCC 722

learned Courts thus ought to have seen that the contract, on the basis of which the consent decree is founded is itself against the Public Policy of India. The learned Court recording the compromise in the first place, thus, could not have done so; and the learned Court hearing the Application for recall of such consent decree could not have applied the principle of estoppel on arguments on statutory provisions. Both the said orders/decrees dated 05.02.1999 and 01.07.2002, therefore, deserve to be quashed and set aside.

5.12. Mr. Patwardhan has referred to and relied upon following decision in support of his submission :-

(i) **Pushpa Devi Bhagat (Dead) through LR. Sadhna Rai (Smt)**

Versus Rajinder Singh and Others.⁵

6. *PER CONTRA* Mr. Shah, learned Advocate appearing on behalf of Respondent would submit that the original Petitioner with his full knowledge and as per his desire and will voluntary arrived at as per his own request for his own benefit and compromised the earlier Special Civil Suit No.1226 of 1998 with the Respondent before the Civil Court. The original Petitioner has admitted voluntarily compromise terms and *pursis* before the Court after understanding and knowing its contents and after seeking legal advice in respect of that compromise *pursis* and settled the Suit. When parties were

⁵ 5 Supreme Court Cases 566

before the Court and thereafter Court has allowed and passed order in the Suit and Suit is settled, the original Petitioner is bound by the contents of the said compromise decree. It is in the nature of a consent decree. It is admitted fact that the Suit was compromised and compromise decree was passed on 05.02.1999 in Special Civil Suit No.1226 of 1998. He would submit that the original Petitioner was a well educated person and well conversant with the legal aspect and he himself was a Government servant holding post of Taluka Inspector of Land Records in the Revenue Department. That he was well aware about the legal position and effect and nature of his action. The original Petitioner has after considerable time even after passing of the compromise decree did not dispute the same but on the contrary relied upon and acted upon the same. He therefore could take advantage of the compromise decree having been passed on concocted grounds in the Miscellaneous Civil Application with a view to avoid his legal obligations by misusing the machinery of the Court. Mr. Shah would contend that the original Petitioner has abused the due process of law. That the original Petitioner is guilty of serious offences of giving false and fabricated evidence. Further, the Trial Court has no jurisdiction to entertain and try the Miscellaneous Civil Application as the matter was already compromised in the earlier proceedings and therefore Miscellaneous Civil Application was not maintainable.

6.1. Next he would submit that the original Petitioner has not filed any Appeal against the dismissal of Civil Suit No. 788 of 1999 and the subsequent dismissal of the Writ Petition by the Court. Civil Suit No. 788/1989 was filed for setting aside the compromise decree. Therefore the said decree has even otherwise become final and conclusive. Had the original Petitioner being aggrieved by the same he could have filed the Appeal before proper forum and could have taken the contention which are taken in the present proceedings.

6.2. Next he would submit that the compromise decree was acted upon and was used to his own advantage by the original Petitioner. The Respondent has withdrawn Criminal Case No.2880 of 1995 on account of the terms of compromise decree that took place in the Suit and the said criminal case was withdrawn (which was filed by the Respondent against the original Petitioner in J.M.F.C. (A.C.) Court, Pune). The original Petitioner and his Advocate filed Application in that criminal case as per the terms of compromise decree and the said criminal case has been withdrawn and disposed of alongwith the Application and compromise *pursis* in that criminal case. Therefore, now the original Petitioner is estopped from challenging the compromise decree of which he himself has relied upon to gain advantage into himself. Thereafter the original Petitioner filed Special Civil Suit No.788 of 1999 in the Court of Civil Judge, Senior Division,

Pune and sought interim relief therein. The contention in the said Suit and the contentions in the present MCA-Application of the original Petitioner are one and the same. The said Suit alongwith Interim Application was dismissed on merits by the Court by order dated 27.07.1999. In the said judgment given by the Court in Special Civil Suit No.788 of 1999, the Court has observed that it cannot be said that there was fraud, coercion and undue influence on the original Petitioner at the time of compromise. This finding subsists till today and has not been set aside. Similarly, Court has also observed that it cannot be said that Respondent has brought undue influence, coercion or any pressure on the original Petitioner while recording compromise in Civil Suit. The said Special Civil Suit No.788 of 1999 was dismissed on merits on 28.07.1999 between the parties in which the same relief was claimed by the original Petitioner which has been claimed in the instant Application in the present proceeding from which the Petition has been preferred. The original Petitioner filed Writ Petition No. 4412 of 1999 before this High Court against the judgment and order dated 27.7.1989 and the same was rejected upholding the earlier order of the trial Court of dismissal of the Suit and the Application virtually confirming the observations and findings. Therefore, the grievance of the Original Petitioner has been finally and conclusively decided by the Civil Courts and the fresh MCA-Application filed by the original Petitioner against the Respondent could not have been

entertained as maintainable in law. No legal right can be created in the Miscellaneous Civil Application in favour of the original Petitioner by way of filing the under Order XXIII Rule 3 of the C.P.C.

6.3. Next he would submit that the original Petitioner himself has repeatedly admitted in his own pleadings that he was aware of all terms and conditions of the transaction well in advance before the Suit transaction took place and even after knowing them he chose to take advances from the Respondent. Original Petitioner has admitted about the receipt of loan or advance amount in full. That he has given various writings from time to time and issued various cheques from time to time and gave various promises which were never disputed in the earlier Suit proceedings and criminal litigation and even in Special Civil Suit No.788 of 1999. That even in the criminal case he has clearly admitted his liability and never disputed the same. Original Petitioner persuaded the Respondent to give some concession and advantage and compromised the Suit claim and thus benefited from the same. The original Petitioner has acted upon and taken advantage of the compromise decree and accordingly there was withdrawal of the said criminal case against him on the basis of the said compromise decree. That he has never stated anything about the alleged repayment of any amount to the Respondent in any earlier proceedings or in writing. The original Petitioner now after securing

all the advantages and when there is no legal right vested in him in view of the circumstances, filed the present Application as a complete after thought to frustrate the decree.

6.4. He would submit that since the original Petitioner did not make any payment as promised repeatedly in writing Respondent was compelled to file Special Civil Suit No.1229 of 1998. There was “no written statement” order passed in that Suit and the original Petitioner did not take any steps to get it set aside in the said Suit. The original Petitioner was taking continuous legal advice from his Advocate and was also aware of the proceedings pending before the Court. Accordingly, he himself argued to the compromise decree which was duly passed. In the said compromise decree the original Petitioner admitted to the principal amount which was finally settled at Rs.6,13,929/-. The Respondent never compelled the original Petitioner to compromise the matter. That upto the date of filing of the Special Civil Suit No.788 of 1999, original Petitioner has not challenged the said decree or compromise *pursis*. Original Petitioner in the compromise *pursis* has admitted that the house property is not mortgaged to the any Bank but there is only an agreement of mortgage. That the original Petitioner voluntarily signed all papers and no pressure was put by the Respondent or any fraud, undue influence or coercion exercised on the original Petitioner. The

compromise *pursis* was prepared as per mutual discussion after confirming the same from the Advocate of the Original Petitioner himself and no question of compelling the original Petitioner to sign the same could have arisen. The Original Petitioner voluntarily signed the compromise *pursis* and admitted to the terms of compromise before the Civil Court. All terms of compromise are self explanatory and they are voluntarily and freely agreed upon by the original Petitioner. He would submit that the Respondent is not into any money lending business and the Suit transaction in that Suit was not a money lending transaction but was on a negotiable instrument and therefore the Bombay Money-Lenders Act, 1946 would not be applicable to the present proceedings.

6.5. That the Original Petitioner has not given full and detailed particulars in the Application about the undue influence, fraud, etc. Therefore the decree of the Court cannot be nullity and it is legal and proper and the original Petitioner is bound by it. The compromise decree is not against any provisions of law or it is not illegal. Even the compromise decree cannot be challenged on this ground alleged in the MCA Application. The cheques mentioned in the decree are for payment of the decretal dues and not without any consideration. The decree is not required to be registered under any law. That the decree is not contrary to the provisions of Contract Act.

6.6. On the basis of the above submissions Mr. Shah would submit that it could not be contended that the compromise decree was illegal or drawn up fraudulently when there is complete absence of fraud and undue influence. Further having acted upon the decree pursuant to the compromise, the original Petitioner cannot challenge the compromise decree especially when the Respondent acting upon the compromise has withdrawn the Criminal complaint under Section 138 of Negotiable Instruments Act, 1881. That the Original Petitioner cannot contend that the compromise is illegal on account of alleged various contraventions of law when after signing the compromise and subsequent withdrawal of the complaint against him under Section 138 of the Negotiable Instrument Act, 1881 by a joint application plea stood waived or abandoned. Further in absence of challenge to the Judgment and order dated 11.08.1999 in Writ Petition No.4412 of 1999, the Petitioner cannot agitate the same ground of undue influence / coercion/ fraud without furnishing any details whatsoever.

6.7. Mr. Shah, on the basis of his submissions has prayed for dismissal of the Writ Petition.

7. I have heard Mr. Patwardhan, learned Advocate for the Petitioners and Mr. Shah, learned Advocate for the Respondents and with their able assistance perused the pleadings in the present case. Submissions made by the Advocates has received due consideration of

the Court.

8. At the outset, it is seen that in any proceedings if fraud is alleged, parties are required to furnish details of such fraud. Here in this case, fraud is alleged in entering into the compromise decree dated 05.02.1999. What is the fraud is not spelt out? The timeline of the present dispute beginning from 1993 onwards which is alluded to hereinabove would show how the original Petitioner has taken repeated advantage of the legal system and its procedural technicalities to avoid paying the amounts under his admitted liability. Beginning from 1993 upto 1997, the original Petitioner gave 5 cheques, one after the other after each one of them was dishonoured one by one alongwith written assurance of acknowledging his liability to pay the outstanding amounts to the Respondent No.1. He left no option open to the Respondent No.1 who filed Criminal Case No.2880 of 1995 under Section 138 of the Negotiable Instruments Act, before the J.M.F.C. (A.C.), Pune. Even during pendency of the said case the original Petitioner admitted in writing before the Court that he shall pay the amounts by 24.07.1997, but did not keep his word. Civil Suit was filed thereafter being Suit No.1226 of 1998. Record shows that “no WS” order is passed against the Original Petitioner. He admitted his liability before the Civil Court and entered into a settlement (compromise) admitting to pay the amount of Rs.6,13,929/- as on

05.02.1999 (date of decree) alongwith further interest and in lieu thereof mortgaged his property. It is clear that he acted very fast only to ensure withdrawal of the criminal case pending against him which was withdrawn by both parties immediately by filing a joint application. It needs to be mentioned that the Original Petitioner was a T.I.L.R., a Revenue Official and pendency of the criminal case was detrimental to his prospects and service as a Government servant. Reason for mentioning this is because, the Original Petitioner has subsequently after withdrawal of the criminal complaint challenged the compromise decree on the ground of fraud and undue influence. After gaining undue advantage, it cannot lie in the mouth of the Original Petitioner to allege fraud without even spelling it out. The above circumstance and what followed thereafter would clearly point out to the fraudulent conduct of the Original Petitioner in circumventing the provisions of law and gaining advantage by filing frivolous and vexatious proceedings to overcome his own liability to pay the amounts agreed in the compromise decree.

9. Another very important circumstance which clearly militates against the Original petitioner is his filing of Civil Suit No.788 of 1999 in the Civil Court for setting aside the compromise decree dated 05.02.1999 on the ground of fraud and undue influence. By order dated 28.07.1999 the said Civil Suit alongwith Interim Application

were dismissed on merits. Annexed at page Nos.31 to 49 of the paper book, the Civil Court by a detailed reasoned order dismissed the Exhibit-5 Interim Application and also came to the conclusion that the suit was not maintainable. Paragraph No.25 of the said order is relevant and reproduced herein:-

“25. The learned advocate representing the defendant has brought to my notice the various documents annexed with list Exh.21. Plaintiff wrote letters to defendant which are at Exh.21/1 to Exh.21/4 dated 20.5.1994 to 20.3.1995. He has also produced office copy of notice addressed to the plaintiff on 28.4.1995 at Exh.21/5. Letter of plaintiff addressed to defendant at Exh.21/6 to Exh.21/9. Defendant has produced office copy of notice addressed to plaintiff dtd.16.8.1995 at Exh.21/10 and letter from plaintiff dated 25.11.1995, and 24.6.1997 which are at Exh.21/11 and 21/12. It seems that these letters are addressed by the plaintiff to the defendant in his own hand-writing he nowhere mentioned that some pressure or undue influence was brought on him. Plaintiff himself admitted in his letter Exh.21/11 dated 25.11.1995 that he is dues of Rs.3,29,600/- and he is making arrangement of payment upto 18.1.1996.even, he admitted that he gave amount of Rs.50,000/- to the defendant in respect of other transaction by draft on 20.10.1995. Even in letter dated 24.6.1997 which is Exh.21/12 plaintiff assured to make payment of Rs.4,64,620/-.”

10. All parameters and grounds / allegations of the original Petitioner regarding he having entered into the compromise decree on the ground of undue influence have been dealt with in detail and negated by the Civil Court against the original Petitioner. Writ Petition against the order of the Civil Court is also dismissed by this Court. Therefore in that view of the matter, filing of MCA No.611 of 1999 for setting aside the compromise decree once again on the same cause of action / fraud and undue influence is a gross abuse of the due process

of law. The Original Petitioner does not deserve any sympathy in the gross facts of the case seen hereinabove.

11. Record and pleadings clearly indicate that the Original Petitioner entered into the compromise decree with full knowledge and voluntarily. All throughout the proceedings it is clearly observed that the Original Petitioner has circumvented the due process of law at every opportunity which beckoned him and took full advantage of the infirmities in the legal system by filing repeated proceedings on the same cause of action. Conduct of the Original Petitioner is deplorable. On the other hand, Respondent has been a law abiding citizen whose only mistake was to believe the word of the Original Petitioner who was his friend and lend him the loan / amount in 1993 for building the house. Record indicates that Respondent has at no point of time taken law into his hands. He has defended all actions of the Original Petitioner since 1993 waiting for return of his money until 1999 and thereafter in the Courts of law. Present Petitioners being the legal heirs are not on any better footing than the Original Petitioner.

12. In view of the above observations and findings, I am inclined to accept the submissions of Mr. Shah. All contentions of the Original Petitioner stand comprehensively rejected. I hold that filing of MCA No.611 of 1999 itself was an abuse of the due process of law once the Original Petitioner's Suit for declaration and injunction being Suit

No.788 of 1999 was dismissed by the Civil Court and Writ Petition against the said order also having been dismissed by this Court. Writ Petition is held to be not maintainable.

13. The order dated 01.07.2002 impugned in the present Writ Petition does not call for any interference whatsoever and is upheld. The compromise decree dated 05.02.1999 in Special Civil Suit No.1226 of 1998 passed by the IInd Joint Civil Judge, Senior Division Pune is also upheld. Writ Petition stands dismissed. Interim order dated 18.08.2003 is vacated. No costs.

14. Writ Petition is dismissed.

[MILIND N. JADHAV, J.]

15. After the judgment is pronounced, Mr. Patwardhan learned Advocate has made an oral application seeking stay of the judgment / order for a period of ten weeks to enable the Petitioner to approach the Supreme Court.

16. Considering that the interim order was in operation since 18.08.2003, the request made by Mr. Patwardhan, though opposed by Mr. Darandale, learned Advocate for Respondents, is however granted. The present Judgment / Order shall remain stayed for a further period of ten weeks from today.

[MILIND N. JADHAV, J.]