

Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.186 OF 2023

The Court Receiver High Court BombayPetitioner

Versus

ITC Ltd.Respondent

Mr. Drupad S. Patil a/w Mr. Namitkumar Pansare for the Petitioner
Sr. Adv. Kevic Setalvad, Mr. Cyrus Bharucha a/w Mr. Nikhil Mutha and
Ms. Ashwini Sonawane i/b Nanu Hormasjee and Co. for the Respondent.
Mr. S. K. Dhekale Court Receiver present.

CORAM : SHARMILA U. DESHMUKH, J.
RESERVED ON : 31st October, 2023.
PRONOUNCED ON : 28th November, 2023.

ORDER :

1. By this Petition filed under Article 227 of Constitution of India, the challenge is to the orders dated 20th January, 2022 passed in T.E. & R. Suit No. 139/171 of 2013 disposing the suit as compromised and dated 2nd November, 2022 dismissing the Review Application.

2. Few facts are necessary to be noted:

One Clement Pareira was the lessee of Trustees of Port of Bombay in respect of land together with building standing thereon known as “Mark Haven” situated at Apollo Bunder. Upon his demise, Mary

Antionette Pareira succeeded to the lease hold rights and executed a lease deed dated 1st April, 1957 with Respondent- Imperial Tobacco Company of India Ltd (for short ITC) in respect of Flat No. 22 in “Mark Haven”. On 8th August, 1964, Flat No. 22 was exchanged with Flat No. 101 subject to the terms of the lease dated 1st April, 1957.

On 23rd October, 1981, Mary executed an assignment agreement with Omprakash Navani and Phool Omprakash Navani assigning her rights in “Mark Haven” building in their favour. After Mary’s demise in 1982, as per her Will, her daughters Ena and Jacqueline and Joyce Forbes are the legatees.

In August, 1983, Omprakash Navani and Phool Omprakash Navani filed Suit No. 1530 of 1983 against the heirs and legatees of Mary for specific performance, which was compromised and pursuant thereto consent of Bombay Port Trust was sought for transfer in favour of Omprakash and Phool. Due to certain non compliance of the consent terms, the consent of Bombay Port Trust was not obtained for the assignment in favour of Omprakash and Phool.

The legal heirs of Mary filed Suit No. 3091 of 2001 against Omprakash & Phool seeking direction to hand over possession of the land and the building, possession of flat on 2nd floor, for accounts and injunction against transfer/creation of tenancies. Vide order dated 4th

October, 2001 of this Court, Court Receiver came to be appointed in respect of the land and the building “Mark Haven” to protect the property with the power to collect rent from the tenants occupying the flats in the building and to make payment of the outgoings from the amount collected, to take physical possession of the southern flat on the 2nd floor and to take steps for appointment of agent in respect of the said flat.

On 2nd August, 2002, the Court Receiver sent notice to the Respondent ITC calling upon it to pay the market rent of Rs. 2,25,000/- per month, which was denied by ITC. On 22nd July, 2010, on the Court Receiver’s report, learned Single Judge of this Court directed the Court Receiver to issue notice to ITC and take further proceeding in consultation with the parties. Accordingly, on 28th October, 2010, termination notice was sent to ITC and possession of the Flat was demanded.

In 2010, ITC filed Suit No. 248 of 2010 in this Court against Junot, heirs of Mary, Omprakash, Phool and Court Receiver seeking specific performance of the exchange letter of the year 1964. In the year 2011, the suit came to be transferred to the City Civil Court and was numbered as Suit No. 3144 of 2011. In 2012, ITC filed an Application seeking transfer of the Suit No. 3144 of 2011 back to the High Court.

In December, 2012 the Court Receiver filed T.E. & R. Suit No. 139/171 of 2013 against ITC for recovery of possession and for Mesne Profits enquiry.

Misc. Civil Application No. 13 of 2020 was filed by ITC in this Court seeking transfer of the pending suits i.e. Suit No. 3144 of 2011 and T.E. & R. Suit No. 139/171 of 2013 to the High Court. In Misc. Civil Application No. 13 of 2020, consent terms came to be filed by ITC and Jacqueline - heir of Mary under which ITC agreed to handover the possession of Flat No. 101 and Jacqueline confirmed that she has no claim to any mesne profits or any another claim of any nature in respect of suit premises against ITC. Consent Terms came to be accepted by learned Single Judge of this Court vide order dated 29th October, 2021 and the Misc. Civil Application No. 13 of 2020 was disposed of in terms of the Consent Terms.

3. Subsequent thereto, by communication dated 8th November, 2021 addressed to the Court Receiver, ITC sought the statement of dues in respect of the flat, which statement was supplied by the Court Receiver showing a sum of Rs.1,25,460/- as due towards rent from May, 2014 to October, 2021 which was duly paid by ITC under their covering letter dated 15th November, 2021 recording that the amount of Rs.1,25,460/- is paid in full and final settlement of ITC's dues in respect of the said Flat.

4. On 17th November, 2021, the Court Receiver fixed an appointment on 22nd November, 2021 for taking possession and communicated the same to the heirs of Mary & Omprakash, Phool Navani and ITC. In compliance of the consent terms, ITC handed over the said Flat which was acknowledged by the Court Receiver by its Possession Receipt dated 22nd November, 2021.

5. On 5th January 2022, the Advocate appointed to represent the Court Receiver in T.E. & R. Suit No.139/171 of 2013 addressed a communication to the Court Receiver requesting them to make alternate arrangement for engaging another Advocate to prosecute the suit before the Small Causes Court. On 20th January, 2022, ITC filed compilation of documents in the T.E. & R. Suit No. 139 /171 of 2013 which included the order passed by the learned Single Judge of this Court dated 29th October, 2021 accepting the Consent Terms, the report of the Court Receiver, copy of the Consent Terms, correspondence between the ITC and the Court Receiver etc. The Advocate for the Court Receiver filed a pursis on 21st January, 2022 expressing her inability to appear in the Suit and enclosed the copy of the communication sent to the Court Receiver to make alternate arrangement. On 20th January, 2022 the Court of the Small Causes disposed of the T.E. & R. Suit No. 139/171 of 2013 by the following order :

: ORDER :

1. In view of the compilation of documents filed by the Defendant at Exhibit No. 39 and pursis filed by the plaintiff at Exhibit No. 41, the suit is compromised and hence, accordingly disposed of.
2. Consent decree be drawn accordingly.
6. As against this Order, Review Application was filed in the Small Causes Court which came to be rejected leading to filing of the present Petition.
7. Heard Mr. Patil, learned counsel For the Petitioner and Mr. Setalvad, learned Senior Advocate for the Respondent.
8. Mr. Patil, learned Counsel for the Petitioner submits that, the order of 20th January, 2022 does not record any satisfaction by the Court that the suit has been adjusted by any lawful agreement which is the requirement of Order 23 Rule 3 of CPC. According to him, the handing-over of the possession by the ITC cannot be considered as an adjustment of the entire suit as the claim for mesne profit remained. Drawing attention of this Court to the communication addressed by the Advocate for the Court Receiver, he would submit that the Advocate had expressed her inability to appear in the suit and despite thereof, the Small Causes Court has recorded the compromise based on the documents submitted by the Respondent. Pointing out the order of 29th October, 2021, he

would submit that the Consent terms filed in the Misc. Civil Application No. 13 of 2020 was not signed by the Petitioner and there is no application filed by the Petitioner accepting the compromise of the suit. Mr. Patil would further contend that the review was filed seeking the review, recall or modification of the order dated 20th January, 2022 which is in nature of an application under proviso to Rule 3 of Order 23 of CPC.

9. Mr. Setalvad, learned Senior Advocate for the Respondent points out the order dated 29th October, 2021 accepting the Consent Terms as well as the subsequent correspondence with the office of Court Receiver and submits that the record indicates that after acceptance of Consent Terms, the same was duly acted upon as the possession of the flat was handed over and amount of Rs. 1,25,460/- was paid in full and final settlement. He submits that Jacqueline- heir of Mary agreed to waive the claim for mesne profits and as such, nothing further remained for adjudication in T.E.& R. Suit No. 139/171 of 2013. He submits that, the Court Receiver is acting at the instance of the Omprakash and Phool whereas the Court Receiver has been appointed at instance of Jacqueline against Omprakash and Phool Navani. He would submit that, at the time of the passing of the consent order, on 29th October, 2021, not only the Navani's were represented but also the Second Assistant of the Court Receiver was present and the Consent Terms were filed to their

knowledge. According to him, any order of setting aside the compromise recorded by the Small Causes Court would have the effect of upsetting the order dated 29th October, 2021. He submits that, there can be no claim for Mesne Profits at the behest of Omprakash and Phool as there are no proceedings initiated by Navani's which are pending. He would question the locus of the Court Receiver to initiate the present proceedings after having accepted, the amount in the full and final settlement in respect of flat whose possession has been handed-over.

10. Considered the submissions and perused the record.

11. The Petitioner is aggrieved by the recording of the compromise as according to the Petitioner, the consent terms executed before this Court in Misc. Civil Application No. 13 of 2020 were not signed by the Petitioner and there is no compromise as the claim for Mesne Profits remained to be adjudicated. In other words there is denial by the Petitioner who is the Plaintiff in T.E.& R. Suit No. 139/171 of 2013 that there has been any adjustment or settlement between the parties. The statutory provisions governing the withdrawal and adjustment of suits is contained in Order 23 of Code of Civil Procedure, 1908 (for short CPC). Rule 3 of Order 23 of CPC provides that where it is proved to the satisfaction of the Court that the suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the

parties, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit. Proviso to Rule 3 of Order 23 of CPC provides that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at the Court shall decide the question but no adjournment shall be granted for the purpose of deciding the question unless the Court for reasons to be recorded thinks fit to grant such adjournment.

12. Against the background of the legal provisions, if the order of 20th January, 2022 is perused, the Small Causes Court has considered the compilation of the documents filed by ITC and pursis at Exhibit No. 41 and has disposed of the suit by recording that the suit is compromised. The rival contentions border on the issue as to whether Suit pending before the Small Causes Court initiated by the Court Receiver can be stated to be compromised in view of the consent terms executed between ITC and Jacqueline-heir of Mary. ITC contends that as the Court Receiver has been appointed at the instance of Jacqueline any compromise by Jacqueline has to be construed as compromise of the relief claimed by the Court Receiver whereas the Petitioner denies that there has been

satisfaction of claim by virtue of the consent terms which are not signed by the Court Receiver. This is precisely the eventuality which is covered by the proviso to Rule 3 of Order 23 which provides that in event the compromise is questioned by any party to the proceedings, the Court which recorded the compromise has to decide the question.

13. At this stage, it will be beneficial to refer to the judicial pronouncements on the subject. In the case of *R. Ranjanna vs. S.R. Venkataswamay & Ors.*, [(2014) 15 SCC 471], the Apex Court in paragraph No. 11 held as under:

“11. It is manifest from a plain reading of the above that in terms of the proviso to Order 23 Rule 3 where one party alleges and the other denies adjustment or satisfaction of any suit by a lawful agreement or compromise in writing and signed by the parties, the Court before whom such question is raised, shall decide the same. What is important is that in terms of Explanation to Order 23 Rule 3, the agreement or compromise shall not be deemed to be lawful within the meaning of the said Rule if the same is void or voidable under the Contract Act, 1872. It follows that in every case where the question arises whether or not there has been a lawful agreement or compromise in writing and signed by the parties, the question whether the agreement or compromise is lawful has to be determined by the court concerned. What is lawful will in turn depend upon whether the allegations

suggest any infirmity in the compromise and the decree that would make the same void or voidable under the Contract Act. More importantly, Order 23 Rule 3-A clearly bars a suit to set aside a decree on the ground that the compromise on which the decree is based was not lawful. This implies that no sooner a question relating to lawfulness of the agreement or compromise is raised before the court that passed the decree on the basis of any such agreement or compromise, it is that court and that court alone who can examine and determine that question.....”

14. In the case *R. Janakiammal vs. S.K. Kumarasamy*, [(2021) 9 SCC 114], the Apex Court held in paragraph No. 56 as under:

“56. The judgments of *Pushpa Devi* as well as *Banwari Lal* were referred to and relied on by this Court. This Court held that no sooner a question relating to lawfulness of the agreement or compromise is raised before the court that passed the decree on the basis of any such agreement or compromise, it is that court and that court alone which can examine and determine that question.

15. In the case of *Triloki Nath Singh vs. Anirudh Singh (D) Thr. Lrs.*, [(2020) 6 SCC 629], the Apex Court held in paragraph Nos. 18 to 20 as under:

“18. Finality of decisions is an underlying principle of all adjudicating forums. Thus, creation of further litigation should never be the basis of a compromise between the

parties. Rule 3-A of Order 23 CPC put a specific bar 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. The scheme of Order 23 Rule 3 CPC is to avoid multiplicity of litigation and permit parties to amicably come to a settlement which is lawful, is in writing and a voluntary act on the part of the parties. The Court can be instrumental in having an agreed compromise effected and finality attached to the same. The Court should never be party to imposition of a compromise upon an unwilling party, still open to be questioned on an application under the proviso to Order 23 Rule 3 CPC before the Court.

19. It can be further noticed that earlier under Order 43 Rule 1(m), an appeal which recorded the compromise and decide as to whether there was a valid compromise or not, was maintainable against an order under Rule 3 of Order 23 recording or refusing to record an agreement, compromise or satisfaction. But by the amending Act, aforesaid clause has been deleted, the result whereof is that now no appeal is maintainable against an order recording or refusing to record an agreement or compromise under Order 23 Rule 3. Being conscious of this fact that the right of appeal against the order recording a compromise or refusing to record a compromise was being taken away, a new Rule 1A was added to Order 43 which is as follows:-“1-A. Right to challenge non-appealable orders in appeal against decree.— (1) Where any order is made under this Code against a party and thereupon any

judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded.”

20. Thus, after the amendment which has been introduced, neither any appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3A of Order 23 CPC. As such, a right has been given under Rule 1A(2) of Order 43 to a party, who denies the compromise and invites order of the Court in that regard in terms of the proviso to Order 23 Rule 3 CPC while preferring an appeal against the decree. Section 96(3) CPC shall not be a bar to such an appeal, because it is applicable where the factum of compromise or agreement is not in dispute.”

16. It is evident from the reading of the statutory provisions governing the withdrawal and adjustment of suit and the legal position enumerated by the decisions noted above that the compromise if alleged by one party and denied by other is to be questioned and determined by the Court which recorded the compromise. As held by the Apex Court in the case of *Triloki Nath Singh* (supra) a right has been given under Rule 1A(2) of

Order 43 to the party which denies the compromise to contest the decree on the ground that the compromise should not have been recorded.

17. Despite the statutory remedies available, in the instant case, against the order dated 20th January, 2022 recording the compromise, review was preferred which came to be dismissed. The proper course to be adopted was to file an application under proviso to Rule 3 of Order 23 of CPC before the Court which was empowered to decide the issue. Instead a review application had been preferred and against both the orders present Petition has been filed invoking the jurisdiction of this Court under Article 227 of Constitution of India.

18. The scope of jurisdiction under Article 227 of Constitution of India was explained by the Apex Court in the case of *Estralla Rubber vs. Dass Estate (P) Ltd.*, [(2001) 8 SCC 97], where the Apex Court has observed in paragraph No. 6 as under:-

“6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involved a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all

kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to.”

19. What follows is that a limited jurisdiction is exercised by this Court under Article 227 of Constitution of India in the nature of correctional jurisdiction. The Petitioner has clearly a legal remedy available and this remedy is not only adequate but more comprehensive than the supervisory jurisdiction under Article 227 of Constitution of India. This Court is conscious of the fact that the existence of the legal remedy is not a bar to exercise of jurisdiction under Article 227 of Constitution of India, but it needs to be noted that the supervisory jurisdiction is to be exercised

sparingly and in appropriate cases. In the present case, in my view, no exceptional circumstances exist to exercise the supervisory jurisdiction especially in teeth of the remedy available which is more adequate.

20. The submission of Mr. Patil is that against the order of 20th January, 2022, accepting the compromise the application for review was filed, which according to him, is an application under the proviso to Rule 3 of Order 23 of CPC. I am not inclined to accept the submission for the reason that the application did not seek any relief of adjudicating the issue whether there has been an adjustment or satisfaction arrived at between the parties. The application is clearly a review application filed on the basis that there has been an error apparent on the face of record and the Trial Court rightly rejected the same holding that the scope of power of review is very limited. What was expected of the Petitioner was to file an application under the proviso to Rule 3 Order 23. In my view, an application for review cannot be equated with an application under the proviso to Rule 3 of Order 23 as the scope of both these applications is distinct and separate.

21. The Petitioner has approached this Court directly against the order recording the compromise and wants this Court, in exercise of its supervisory jurisdiction, to examine the validity of the compromise decree and to render a finding as to whether there has been an adjustment or

satisfaction as contemplated under the proviso to Rule 3 of Order 23 of CPC which I am not inclined to do without the question being first determined by the Small Causes Court which is empowered to decide the issue.

22. Having regard to the discussion above, the Petition fails. However, the Petitioner is at liberty to adopt appropriate legal remedy as indicated hereinabove to question the validity of the compromise, if so advised. It is clarified that this Court has not expressed anything on the validity of the compromise and the same shall have to be decided and considered by the concerned Court in event any such proceedings are adopted by the Petitioner. All rights and contentions of both the parties are expressly kept open.

(SHARMILA U. DESHMUKH, J.)