

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9309 OF 2024

1. Anwar Liyakat Khan
2. Arvindkumar C. Rao

...Petitioners

Versus

1. Ramesh Dattatraya Dhone
2. Santosh Dattatraya Dhone
3. Manish Babasaheb Tupe

...Respondents

Mr. V. A. Thorat, Senior Advocate, i/b Arkesh Ayyagari, for
the Petitioners.

Mr. Vijay Upadhyay, for the Respondents.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 6th MARCH, 2025

PRONOUNCED ON: 9th JUNE, 2025

JUDGMENT:-

1. Rule. Rule made returnable forthwith and, with the consent of the learned Counsel for the parties, heard finally.

2. The petitioners, who were the parties to RCS/2546/2022, which came to be decreed in accordance with the Consent Terms dated 15th December, 2022, by an order dated 23rd December, 2022, and the supplementary Consent Terms, which were accepted, by an order dated 4th May, 2023, assail the legality, propriety and correctness of an order dated 6th November, 2023 passed by the learned Civil Judge in an application, being Civil Misc. Application No.1680 of 2023,

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preferred by the respondents – third parties, whereby the learned Civil Judge, by way of interim relief, stayed the effect and operation of the decree dated 23rd December, 2022 as modified by the order dated 4th May, 2023 and restored the said RCS/2546/2022 to the file of the Court granting liberty to the respondents to take steps for their impleadment under the provisions of Order I Rule 10 of the Code of Civil Procedure Code, 1908 (“the Code”).

3. The background facts necessary for the determination of this petition can be stated in brief as under:

3.1 Dara K. Irani was the holder of several properties described in Exhibit-A appended to RCS/2546/2022. Dara Irani passed away on 21st October, 2004. During his lifetime, in the year 2004, Dara Irani had executed a Deed of Assignment in favour of Anwar Khan, the defendant in RCS/2546/2022 (petitioner No.1 herein) and thereby agreed to sale, convey and alienate all his properties. Dara Iranai had allegedly received an amount of Rs.51,00,000/- from the defendant towards the part consideration. Dara Irani had executed a Power of Attorney in favour of Mr. Arvindkumar C. Rao, the plaintiff in RCS/2546/2022 (petitioner No.2 herein). It was *inter alia* agreed

that the plaintiff would recover the balance consideration from the defendant and apply the same for charitable purposes.

3.2 After the demise of Dara Irani, disputes arose between the plaintiff and defendant. Alleging that the defendant was dealing with some of the properties, left behind by the deceased Dara Irani, falsely representing that he was absolutely entitled to the said properties, without fulfilling his obligation to pay the balance consideration, the plaintiff instituted a suit to restrain the defendant from transferring, encumbering, alienating or creating any third party rights in respect of the suit properties without the consent of the plaintiff.

3.3 In the said suit, it appears, the plaintiff and defendant arrived at a settlement and the Consent Terms were executed on 15th December, 2022. Based on the said Consent Terms, by an order dated 23rd December, 2022, the learned Civil Judge passed a decree in accordance with the Consent Terms (Exhibit-12).

3.4 Subsequently, the plaintiff preferred an application being Civil Application No.23/2023 asserting, *inter alia*, that inadvertently certain properties were not mentioned in the Consent Terms. By an order dated 4th May, 2023, the learned Civil Judge accepted the supplementary Consent Terms so as to

include the properties bearing Survey Nos.74 A/1, 74 A/2, 74/B, 74/C, 82/1 and 82/2 situated at village Manjari, Taluka Haveli, District Pune, in the said consent decree.

3.5 The respondents herein preferred an application being MCA/1680/2023 in the said RCS/2546/2022 purportedly under Section 151 read with Order I Rule 10 of the Code seeking recall of the consent decree, restoration of RCS/2546/2022 to file and impleadment of the applicants as party defendants to the said suit, asserting, *inter alia*, that the applicants were the holders of the properties bearing Survey No.82 situated at village Manjari, Taluka Haveli, District Pune, which was surreptitiously and fraudulently incorporated in the consent decree by filing supplementary consent terms. In fact, the plaintiff and defendant had played fraud on the Court and obtained the consent decree by practicing fraud on the Court. Various acts of commission and omission were attributed to the parties to the said suit.

3.6 By the impugned order, the l'd Civil Judge was persuaded to entertain the application and pass interim order of stay to the effect and operation of the consent decree in RCS/2546/2022 and also restore the suit to file opining that the parties had entered into the Consent Terms in respect of the properties

which were owned by the third parties, by suppressing material documents, and that constituted fraud on Court.

4. Being aggrieved, the petitioners have invoked the writ jurisdiction.

5. I have heard Mr. Thorat, the learned Senior Advocate for the petitioners, and Mr. Upadhyay, the learned Counsel for the respondents, at some length. The learned Counsel for the parties took the Court through the pleadings and the material on record.

6. Mr. Thorat, the learned Senior Advocate for the petitioners, would urge that the application for recall of the consent decree, at the instance of the petitioners, who were neither the parties to the suit nor claiming under the parties to the suit, was not maintainable. The proper remedy for the respondents - the third parties, was to institute a substantive suit challenging the legality and validity of the consent decree. The provision contained in Rule 3A of Order XXIII does not debar a person other than the parties to suit, from filing an independent suit.

7. Mr. Thorat would urge that in the instant petition and, at this stage, this Court need not delve into the merits of the allegations of fraud, and whether the property, bearing Survey No.82, over which the respondents claim proprietary title could

have been lawfully included in the Consent Terms. The pivotal question that warrants consideration is, whether the respondents, who are strangers to the consent decree, can be permitted to file an application in a disposed off suit and seek recall of the consent decree. Mr. Thorat would urge, in view of the settled position in law, such an application at the instance of the third party is not maintainable.

8. A very strong reliance was placed by Mr. Thorat on a judgment of the Supreme Court in the case of *Triloki Nath Singh vs. Anirudh Singh (Dead) through Legal Representatives and others*¹ and a judgment of the High Court of Jammu and Kashmir and Ladakh in the case of *Gulam Nabi Khanday and others vs. Mushtaq Ahmad and others*²

9. Mr. Thorat would further urge that, even recourse to the provisions contained in Section 151 of the Code was not warranted as the legal position has crystallized to the effect that the inherent powers enshrined under Section 151 of the Code exercised only where no remedy has been provided for in any other provision of the Code. To this end, reliance was placed by Mr. Thorat on a judgment of the Supreme Court in the case of

1 (2020) 6 Supreme Court Cases 629.

2 2024 SCC OnLine J&K 107.

***My Palace Mutually Aided Co-operative Society vs. B. Mahesh and others*³.**

10. Per contra Mr. Upadhyay, the learned Counsel for the respondents, urged that the impugned order, which is in the nature of an interim order, does not warrant any interference in exercise of supervisory jurisdiction, especially having regard to the egregious fraud which is self-evident. Taking the Court through the averments in the plaint in RCS/2546/2022 and the timeline of the proceedings in the said suit, Mr. Upadhyay would urge that the suit was *ex facie* collusive one. Under twenty days of the institution of the suit, a consent decree came to be passed. In the said consent decree, subsequently, the property of the respondents came to be fraudulently included. The learned Civil Judge has recorded categorical findings in paragraphs 5 to 7 of the impugned order. Such findings of facts are not open for interference, urged Mr. Upadhyay.

11. To buttress these submissions Mr. Upadhyay placed reliance on a judgment of the Supreme Court in the case of ***Ganpatbhai Mahijibhai Solanki vs. State of Gujarat and others*⁴**, wherein it was enunciated that fraud vitiates all solemn acts. If an order is obtained by reason of commission of fraud, even the

3 2022 SCC OnLine SC 1063.

4 (2008) 12 Supreme Court Cases 353.

principles of natural justice are not required to be complied with for setting aside the same.

12. Mr. Thorat joined the issue by canvassing a submission that such a finding of fraud has to be arrived at in an objective manner post an adjudicatory process, in a properly constituted suit and not in a slipshod manner, like the present case, in an application for impleadment in a disposed off suit.

13. I have carefully perused the material on record and given anxious consideration to the submissions canvassed across the bar. There is not much controversy over the facts. Indisputably, the suit properties were allegedly the properties left behind by deceased Dara Irani. During his lifetime, the deceased Dara had entered into an agreement to convey his properties to the defendant. The plaintiff was purportedly the constituted Attorney of late Dara. It was the case of the plaintiff that, without performing his reciprocal promise to pay the balance consideration, the defendant was exercising incidence of ownership over the suit properties and, therefore, the plaintiff professed to restrain the defendant.

14. At this juncture, it is necessary to clarify that, in this proceeding, this Court need not delve into the legality and validity of the underlying transactions between the plaintiff and

defendant, or for that matter, late Dara and the defendant, enforceability of the purported agreement for sale executed by late Dara in favour of the defendant and the obligations which emanate therefrom.

15. Suffice to note that, the plaintiff instituted the suit on 2nd December, 2022. On 15th December, 2022, the plaintiff and defendant entered into Consent Terms. The parties were referred to a Judge – Mediator. Report of successful mediation was received. Thereupon, on 23rd December, 2023 the suit came to be decreed in accordance with the Consent Terms. On 13th March, 2023, the plaintiff filed an application seeking modification in the consent decree in accordance with the supplementary Consent Terms so as to include the properties, including Survey No.82, which were inadvertently not included in the Consent Terms. By an order dated 4th May, 2023, the learned Civil Judge accepted the supplementary Consent Terms and modified the decree in accordance with the supplementary Consent Terms.

16. The respondents approached the Court which passed consent decree with a case that they were the holders of the property, bearing Survey No.82, and the Consent Terms were obtained by playing fraud on the Court. The learned Civil Judge

found *prima facie* substance in the claim of the applicants. It was, *inter alia*, noted that the names of the applicants were mutated to the record of rights of the land bearing Survey No.82/1 and while obtaining the consent decree, the parties to the suit had not placed on record the copies of the record of rights of the suit properties.

17. The thrust of the submission of Mr. Thorat was that the trial court could not have entertained the application for recall of the consent decree, at the instance of a third party. Mr. Thorat would urge, under the provisions of Order XXIII of the Code, as amended by the CPC Amendment Act 1976, it is not necessary that the compromise between the parties must be with respect to the subject matter of the suit. By the said amendment, the expression, “whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit” came to be inserted. Therefore, the mere fact that the Consent Terms between the parties were also in relation to the property which was not the subject-matter of the suit can not be a ground to question the legality and validity of the compromise. Laying emphasis on the proviso to Rule 3 of Order XXIII and Rule 3A, Mr. Thorat would urge that the only

remedy available to a stranger to the consent decree was to file an independent suit.

18. Rule 3 and 3A of Order XXIII of the Code read as under:

“ORDER XXIII RULE 3 AND 3A.

3. *Compromise of suit.* - Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, 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.

Provided 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 not 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.

Explanation- An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this Rule.

3-A *Bar to suit:-* No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.”

19. Rule 3 provides that where it is proved to the satisfaction of the Court that a 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. The proviso to Rule 3, which came to be inserted by the Amendment Act, 1976, enjoins the Court to decide the question as to whether the parties have arrived at an adjustment and satisfaction in a lawful manner. The Explanation to Rule 3 makes it abundantly clear that an agreement or compromise which is void or voidable shall not be deemed to be lawful within the meaning of the said Rule.

20. The effect of introduction of the proviso alongwith the Explanation in Rule 3 is that, a party who intends to challenge the legality and validity of the compromise or settlement is required to approach the very Court before which the compromise or settlement is filed or has been accepted. This position is made further clear by incorporating a bar to the institution of a fresh suit under Rule 3A of Order XXIII, which 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.

21. These provisions are also required to be read in conjunction with Section 96(3) of the Code which proscribes an appeal against a consent decree by providing that no appeal shall lie from a decree from a Court with the consent of the parties.

22. It is in the context of these provisions, in the case of *Puspa Devi Bhagat (Dead) through LR Sadhna Rai vs. Ravinder Singh and other⁵*, the Supreme Court after noting the impact of deletion of Rule 1(m) of Order XLIII from the Code, by Amendment Act, 1976, as well as the amendment to Order XXIII, especially the insertion of Rule 3A, enunciated that an appeal against a consent decree or an order recording or refusing to record, a compromise, is not maintainable nor can a fresh suit be filed for setting aside such decree. The only remedy available to the aggrieved party is to approach the Court which recorded the compromise, under the proviso to Order XXIII Rule 3. The Supreme Court summarized the legal position as under:

“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) 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.

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 second defendant was not maintainable, having regard to the express bar contained in section 96 (3) of the Code.”

(emphasis supplied)

23. Mr. Thorat would urge that the aforesaid proposition of law would govern a case where a party to the suit, in which a decree has been passed on the basis of the Consent Terms, assails the legality and validity of the consent decree. Such a party, as envisaged by the proviso to Rule 3, must approach the very Court which had passed the consent decree. However, where a stranger to a consent decree professes to assail the legality and validity of the consent decree, on any ground whatsoever, he has to institute an independent suit. To such a third party, the bar under the proviso to Rule 3 read with Rule 3A does not operate. Mr. Thorat would further urge that the learned Civil Judge misconstrued the ratio of the judgment of the Supreme Court in the case of *Triloki Nath Singh* (supra).

24. In the case of *Triloki Nath Singh* (supra) the Supreme Court considered the question whether the decree passed on a compromise can be challenged by a stranger to the proceedings in a separate suit. Answering the question in the negative, the Supreme Court held that the suit instituted by the appellant, who was a stranger to the decree, was not maintainable in view of the specific bar under Rule 3A of Order XXIII. In the process, the Supreme Court expounded the law with reference to the legislative change brought about by the Amendment Act, 1976. The observations of the Supreme Court in paragraphs 17 to 23 are instructive and, hence, extracted below:

“17. By introducing the amendment to the Civil Procedure Code(Amendment) 1976 w.e.f. 1st February, 1977, the legislature has brought into force Rule 3A to Order 23, which create bar to institute the suit to set aside a decree on the ground that the compromise on which decree is based was not lawful. The purpose of effecting a compromise between the parties is to put an end to the various disputes pending before the Court of competent jurisdiction once and for all.

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 3A 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 Rule 3 of Order 23 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 Rule 3 of Order 23. 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 proviso to Rule 3 of Order 23 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.

21. In the present case, the partition suit was filed in 1978 and after the decision of the trial Court, the matter went in first appeal and eventually, Second Appeal No. 495/86 before the High Court. During the pendency of first appeal being continuation of the suit as stated, one of the parties to the pending proceedings, namely, Sampatiya allegedly entered into a sale deed with the appellant on 6th January, 1984. Indubitably the issue regarding right, title and interest in respect of the land which was the subject matter of sale deed dated 6th January, 1984, was still inchoate and not finally decided. In that sense, the claim of the appellant was to be governed by the decision in favour of or against Sampatiya in the pending appeal. It must follow that the alleged transaction effected in favour of the appellant by a sale deed dated 6th January, 1984 ought to abide by the outcome of the said proceedings which culminated with the compromise decree passed by the High Court in Second Appeal No. 495/86 dated 15th September, 1994.

22. Indeed, the appellant was not a party to the stated compromise decree. He was, however, claiming right, title and interest over the land referred to in the stated sale deed dated 6th January, 1984, which was purchased by him from Sampatiya - judgment debtor and party to the suit. It is well settled that the compromise decree passed by the High Court in the second appeal would relate back to the date of institution of the suit between the parties thereto. In the suit now instituted by the appellant, at the best, he could seek relief against Sampatiya, but cannot be allowed to question the compromise decree passed by the High Court in the partition suit. In other words, the appellant could file a suit for protection of his right, title or interest devolved on the basis of the stated sale deed dated 6th January, 1984, allegedly executed by one of the party (Sampatiya) to the proceedings in the partition suit, which could be examined independently by the Court on its own merits in accordance with law. The trial Court in any case would not be competent to adjudicate the grievance of the appellant herein in respect of the validity of compromise decree dated 15th September, 1994 passed by the High Court in the partition suit.

23. In other words, the appellant can only claim through his predecessor - Sampatiya, to the extent of rights and remedies available to Sampatiya in reference to the compromise decree. Merely because the appellant was not party to the compromise decree in the facts of the present case, will be of no avail to the appellant, much less give him a cause of action to question the validity of the compromise decree passed by the High Court by way of a substantive suit before the civil Court to declare it as fraudulent, illegal and not binding on him. Assuming, he could agitate about the validity of the compromise entered into by the parties to the partition suit, it is only the High Court, who had accepted the compromise and passed decree on that basis, could examine the same and no other Court under proviso to Rule 3 of Order 23 CPC. It must, therefore, follow that the suit instituted before the civil Court by the appellant was not maintainable in view of specific bar under Rule 3A of Order 23 CPC as held in the impugned judgment.”

(emphasis supplied)

25. In the case of *Gulam Nabi Khanday* (supra) a learned Single Judge of the Jammu and Kashmir and Ladakh High Court after considering the decision in the case of *Triloki Nath Singh* (supra) observed that the bar contained in Order XXIII Rule 3A of the Code shall not be applicable to a stranger to the

compromise decree challenging the compromise decree provided he is not claiming any right through a party to the compromise decree.

26. Mr. Thorat attempted to carve out a distinction where the suit is instituted by a third party, who does not claim through a party to the suit, and a case where the third party is claiming through one of the parties to the suit in which a consent decree has been passed. In the latter case, according to Mr. Thorat, the bar would operate and such a party would be required to approach the Court which passed the consent decree and would not be entitled to institute a separate suit.

27. I am afraid, such a distinction can be legitimately sustained, especially in view of the clear language of Rule 3A of Order XXIII. Rule 3A is plain and peremptory: no suit to set aside a decree on the ground that the compromise on which the decree is based was lawful shall lie, is the mandate of Rule 3A. The distinction sought to be made in the character of the party, who happens to question the legality of the underlying compromise, does not seem to find support in the text of rule 3A. On its plain reading, it appears to be party – agnostic.

28. A somewhat similar question of tenability of the application for recall of consent decree, which was forcefully

mounted by Mr. Thorat, was considered by the Supreme Court in a decision in the case of *Banwari Lal vs. Chando Devi (Smt) (through LRs) and another*⁶. In the said case, the challenge before the Supreme Court was to an order passed by the High Court holding that the trial court could not have entertained an application filed on behalf of the appellant therein for recall of the order recording a compromise alleged to have been entered into between the appellant and respondent. A contention was raised on behalf of the respondent therein that the learned Civil Judge could not have entertained the application which was purportedly preferred under Section 151 of the Code and recalled the order accepting the compromise and restored the suit to its original number.

29. Holding that such an application was tenable, the Supreme Court observed, *inter alia*, as under:

“14. The application for exercise of power under proviso to Rule 3 of Order 23 can be labeled under Section 151 of the Code but when by the amending Act specifically such power has been vested in the Court before which the petition of compromise had been filed, the power in appropriate cases has to be exercised under the said proviso to Rule 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 Section 151 of the Code, questioning the legality or validity of the compromise. Reference in this connection may be made to the cases *Smt. Tarn Bai v. V.S. Krishnaswamy Rao AIR 1985 Karnataka 270*, *S.G. Thimmappa v. T. Anantha AIR 1986 Kant 1*, *Bindeshwari Pd. Chaudhary v. Debendra Pd. Singh AIR 1958 Pat 618*, *Mangal Mahton v. Behari Mahton AIR 1964 Pat 483*

6 (1993) 1 Supreme Court Cases 581.

and Sri Sri Iswar Gopal Jew v. Bhagwandas Shaw AIR 1982 Cal 12, where it has been held that application under Section 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 Rule 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 recorded such agreement or compromise on February 27, 1991. Having come to the conclusion on the material produced that the compromise was not lawful within the meaning of Rule 3, there was no option left except to recall that order.

(emphasis supplied)

30. Following the aforesaid pronouncement in the case of *Banwari Lal* (supra) in the case of *Navratan Lal Sharma vs. Radha Mohan Sharma and others*⁷, the Supreme Court held that an application for recall of the consent decree on the ground that it was obtained by fraud was maintainable. The observations in paragraphs 11 and 13 read as under:

“11. This Court in *Banwari Lal v. Chando Devi* (supra) has laid down the law on the disposal of a proceeding in accordance with a compromise between the parties and on recall of a compromise decree. It held that under Order 23, Rule 3, the Court must be satisfied upon applying judicial mind that the agreement between the parties is lawful before accepting the same and disposing the suit. Further, the proviso and the Explanation to Order 23, Rule 3 mandate that the court must “decide the question” of whether an adjustment or satisfaction has been arrived at, and it is clarified that void and voidable agreements under the Indian Contract Act, 1872 3 shall be deemed to be not lawful. Upon such reading of the provision, it held that the court recording the compromise can examine the legality of the agreement, in accordance with the provisions of the Contract

Act, even after the compromise decree is passed and when a party moves an application for recall.

.....

13. In the present case, the appellant has alleged fraud by the respondents in his recall application, which he bears the burden to prove.⁸ The Explanation to Order 23, Rule 3 clearly states that void and voidable agreements under the Contract Act shall not be deemed to be lawful. By alleging fraud in his recall application, the appellant is effectively impugning the legality of the compromise as proving the same would render the agreement voidable under the Contract Act. When the court disposes of a proceeding pursuant to a compromise under Order 23, Rule 3, it bears the duty to examine this issue and be satisfied that the agreement or compromise is lawful. The proviso explicitly obligates the court that entertains the petition of compromise to determine this issue, and as per the law laid down by this Court in *Banwari Lal (supra)*, this issue can be agitated by way of a recall application even after the compromise decree has been passed.

(emphasis supplied)

31. In any event, the challenge to the tenability of the application does not seem to be premised on any statutory bar, like the one to the institution of a separate suit as envisaged by Rule 3A of Order XXIII. The submission is converse. The bar under Rule 3A does not apply to a stranger to the decree, who does not claim under a party to the decree.

32. In view of the nature of power conferred on the Court, which records the compromise, as envisaged by the proviso to Rule 3 and the Explanation appended thereto, there is a consistent line of decisions which holds that, the legality and validity of the consent decree can be examined by the Court which has recorded the compromise or settlement and passed the consent decree. Conversely, there does not seem to be any

absolute prohibition, in law, for filing an application for recall of the consent decree before the Court which has passed the decree. The decisions in the cases of *Banwari Lal* (supra) and *Navratan Lal Sharma* (supra), in a sense, set the controversy at rest.

33. The matter can be looked at from another perspective. As is well recognized, a fraud vitiates all acts. A judgment or order obtained by playing fraud is a nullity and non-est in the eye of law. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings. (*S. P. Chengalvaraya Naidu vs Jagannath*⁸ and *A.V. Papayya Sastry & Ors. Vs. Government of A.P. & Ors.*⁹). Such being the vitiating effect of a fraud, the prayer to set aside the consent decree allegedly obtained by fraud need not be entertained by way of an independent suit alone. The medium through which the validity of such a decree, allegedly obtained by fraud, is questioned pales in significance and becomes secondary to the substance of allegation of fraud.

34. The conspectus of aforesaid consideration is that, the challenge to the tenability of the application to set aside the

8 (1994) 1 SCC 1.

9 (2007) 4 SCC 221.

consent decree on the ground that it was obtained by fraud, does not merit acceptance.

35. Nonetheless, there is an aspect of the matter which deserves consideration. From the perusal of the impugned order, one gets an impression that, the trial court has yet not conclusively determined the application for impleadment of the respondents as party defendants to the suit. Having drawn a *prima facie* inference that the consent decree was obtained by suppression of documents and material and that constituted a fraud on the Court, the learned Civil Judge considered it appropriate to stay the execution and operation of the consent decree in RCS/2546/2022 and restore the said suit to file awaiting adjudication of the prayer to recall the consent decree and implead the respondents herein as party defendants to the suit. Evidently, the substantive prayers in the application are yet to be decided.

36. It would, therefore, be expedient in the interest of justice to provide an effective opportunity of hearing to the petitioners – the parties to RCS/2546/2022, to oppose the prayer of the respondents to recall and set aside the consent decree, restore the suit to file and implead the respondents as party defendants to the said suit. It would, therefore, be appropriate to clarify

that the impugned order staying the effect and operation of the decree in RCS/2546/2022 shall be treated as an interim order in CMA/1680/2023 till the determination of the said application.

37. Hence, the following order:

: O R D E R :

- (i)** The petition stands partly allowed.
- (ii)** The impugned order staying the effect and operation of the consent decree in RCS/2546/2022 be treated as interim order in CMA/1680/2023.
- (iii)** The restoration of RCS/2546/2022 to the file of the Court is, for the present, only for the purpose of determining the prayers in CMA/1680/2023, namely, the impleadment of the respondents as party defendants to the said suit and setting aside of the consent decree in RCS/2546/2022.
- (iv)** The petitioners – parties in RCS/2546/2022 are at liberty to file reply to the said CMA/1680/2023 within a period of four weeks from the date of this order.
- (v)** The learned Civil Judge shall decide the said application after providing an effective opportunity of hearing to the parties, on its own merits and in accordance with law,

without being influenced by any of the observations in the impugned order and this order.

- (vi) Rule made absolute to the aforesaid extent.
- (vi) No costs.

[N. J. JAMADAR, J.]