

Khedoo and Others Vs. liird Additional District and Sessions Judge, Azamgarh and Another

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Court : Allahabad

Decided On : Apr-22-1999

Reported in : 1999(2)AWC1727

Judge : Sudhir Narain, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 2(2), 96, 96(2) and (3) - Order 23, Rules 3 and 3A - Order 43, Rules 1, 1(1) and 1A(2)

Appeal No. : C.M.W.P. No. 8982 of 1999

Appellant : Khedoo and Others

Respondent : liird Additional District and Sessions Judge, Azamgarh and Another

Advocate for Def. : S.C.

Advocate for Pet/Ap. : Bidhan Chandra Rai, adv.

Judgement :

Sudhir Narain, J.

1. The core question in this writ petition is as to whether the appeal is maintainable against a decree purporting to have been passed on the compromise as alleged

by one of the parties to the suit under Order XLIII. Rule 1A of the Code of Civil Procedure (in short C.P.C.) in spite of prohibition contained under Section 96(3), C.P.C. that no appeal shall lie from a decree passed by the Court with the consent of the parties.

2. Briefly stated, the facts are, that Vishwa Nath, father of respondent No. 2, filed Civil Suit No. 166 of 1979 in the Court of Second Additional Munsiff, Azamgarh for injunction and demolition against the defendant-petitioners and their father Ujagir on the allegation that the defendants had encroached upon the land of the plaintiff and started illegal constructions. The defendants contested the suit and denied that the plaintiff had any right and title over the land in question. During the pendency of the proceedings in the suit, a compromise was filed. The petitioners moved an application for recording the compromise. The plaintiff filed objection denying that he had accepted the compromise. His thumb impression was taken on blank papers and it was outcome of fraud. The statement of Vishwa Nath father of the plaintiff and Mani Ram were recorded by the Court. On consideration of the evidence, the trial court accepted the compromise and passed a decree in terms of the compromise on 18.12.1985. The plaintiff filed appeal No. 591 of 1985. The appellate court allowed the appeal and remanded the case by the impugned order dated 28.11.1998.

3. Learned counsel for the petitioner has not assailed the findings recorded by the appellate court but has urged that the appeal was not maintainable as sub-section (3) of Section 96 provides that no appeal shall lie from a decree passed by the Court with the consent of the parties and there is no other provision under which an appeal is maintainable against such a decree.

4. Sub-section (3) of Section 96 contemplates a decree which has been passed with the consent of the parties. A consent is outcome of an agreement between the parties. The party relying on a consent must prove that it satisfies all the ingredients of a valid agreement. In *Jagdish Narain v. Rasul Ahmad*. AIR 1952 All 29, it was held that when the consent upon the basis of which a decree has been passed by the Court is itself challenged in the Court of appeal, it cannot be taken for granted that the decree was a consent decree. A consent decree must mean a

decree validly consented to either by the party himself or by his duly authorised agent. In *Basant Lal and another v. Rameshwar Prasad and others*, AIR 1957 All 287, the Court taking into consideration the nature of the compromise decree held that a consent decree is no better than the original contract on the basis of which the decree is obtained. A Full Bench of this Court in *Habib Miyan and another v. M. Ahmad*, AIR 1969 All 296, considering the nature of the consent decree observed that a compromise decree is a creature of an agreement on which it is based and subject to all the incidents of such agreement, that it is but a contract with the command of a Judge super-added to it.

5. It is open to a party to file an appeal asserting that there was no valid consent on the basis of which decree has been passed. The Court can pass a decree based on the compromise under Order XXIII, Rule 3, C.P.C. 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. The proviso to Rule 3 cast a duty upon the Court to adjudicate the dispute where one party denies the adjustment or satisfaction. Rule 3A 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. If a party to the suit is prohibited to file suit under Order XXIII, Rule 3A, C.P.C., and appeal is also barred under Section 96(3), he will have no remedy to challenge a decree alleged to have been passed on a compromise or where a person says that there was compromise but the Court refuses to pass decree on such compromise. Sub-section (3) of Section 96 should be harmoniously construed read with sub-rule (2) of Rule 1A of Order XLIII, C.P.C.. which permits a party to challenge the order recording a compromise or refusing to record a compromise in an appeal against a decree passed in a suit. If a party relies upon an agreement and denied by the other party, the Court has not only to examine whether the agreement was arrived at between the parties but further whether such an agreement was the act of free will of the parties without any undue influence, fraud or coercion. In this respect, the Court will further permit the parties to lead

evidence. The appellate court in appeal will be entitled to examine the findings recorded by the trial court on all the aspects.

6. The contention of learned counsel for the petitioner is that appeal was maintainable under Order XLIII. Rule 1 (m) against an order recording the compromise under Rule 3 of Order XXIII, C.P.C. but the same having been deleted by C.P.C. Amending Act 104 of 1976, no such appeal is maintainable. An appeal under Order XLIII. Rule 1 (m) was maintainable as appealable order against an order recording compromise. But while deleting Order XLIII. Rule 1 (m), the same Amending Act has added Rule 1A in Order XLIII. Sub-rule (2) of Rule 1A of Order XLIII provides that appeal shall be against a decree passed in a suit after recording a compromise or refusing to record a compromise and it shall be open to the appellant to contest the decree on the ground that the compromise should or should not have been recorded. This is an appeal against a decree and not against an appealable order. Sub-rule (2) should be read with sub-section (3) of Section 96. C.P.C. It is in the nature of a proviso to sub-section (3) of Section 96, C.P.C. Sub-rule (2), in fact, enlarges the scope of filing the appeal not only in respect of a decree passed on consent but also where the Court refused to pass decree on the basis of the consent. Secondly, the Court can also examine whether the compromise was lawful and while examining its nature and content, the Court can further probe as to whether the agreement was obtained by duress, fraud and coercion, etc.

7. The question as to the maintainability of appeal against consent decree came up for consideration in *Deorao v. Devkinandan Bhojraj Chandak and others*, AIR 1984 Bom 474 and considering the provisions of subsection (3) of Section 96, it was held that it does not debar an appeal where the decree is itself challenged on the ground that there was no valid compromise. There is a distinction between a Misc. appeal which was being filed under Order XLIII, Rule 1 (m) before its deletion and an appeal under Order XLIII, Rule 1A which is filed against a decree after it is drawn up on the basis of a compromise recorded by the Court. A Division 1 Bench of Madhya Pradesh High Court in *Thakur Prasad v. Bhagwan Das*, AIR 1985 MP 171, on a question being referred that whether in view of deletion of sub-rule (1) (m) of Rule 1 of Order XLIII of the Code of Civil Procedure by the Amending Act

No. 104 of 1976, an appeal is competent under Order XLIII, Rule 1A. particularly when there is a bar to an appeal under Section 96(3) of the Code of Civil Procedure, held that the appeal was maintainable after considering the various authorities. The view taken by the Andhra Pradesh High Court in Gopu Peddi Reddi v. Gopu Tirupathy Reddi, AIR 1981 AP 362, was dissented wherein Hon'ble Seetharama Reddi, J. took the view that an order rejecting to record a compromise cannot be tantamount to a decree within the meaning of Section 2(2) of C.P.C., and so it is not appealable under Section 96. C.P.C. for the order cannot be held to be an adjudication which conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit as it arises independent of and de hors the pleadings. Hon'ble Raghuvir, J. however, took the view that it amounts to decree within the meaning of clause (2) of Section 2 of the Code of Civil Procedure but held that appeal was filed under sub-clause (m) of Rule 1 of Order XLIII but after its deletion by the Amending Act 104 of 1976 of the Civil Procedure Code the appeal was not maintainable. This case is otherwise distinguishable on facts. The defendant had filed Miscellaneous Appeal against an order passed by the subordinate Judge rejecting an interlocutory application filed under Order XXIII. Rule 3 of the Code of Civil Procedure to record compromise in terms of the affidavit to the petition and to pass a compromise decree. If he had filed regular appeal against the order rejecting the application to record a lawful compromise treating it as decree and not as Misc. appeal, it could have been treated as an appeal under Order XLIII, Rule 1A (2) of the Code of Civil Procedure.

8. Learned counsel for the appellant has relied on the decision Smt. Mohan Bai v. Smt. Jai Kishan and others. AIR 1988 Raj 22. wherein a compromise decree was passed in first appeal which was affirmed by the High Court in second appeal and on an application being filed before the first appellate court under Section 151 of the Code of Civil Procedure, it was held that such an application was not maintainable. In M/s. Jokhi Ram Mohan Lal v. Smt. Gita Devi Tulsyan, AIR 1978 Pat 2. the Court held that the order refusing to record compromise was appealable under Order XLIII. Rule 1 (m) of C.P.C. and the appeal was maintainable as C.P.C. (Amendment) Act, 1976 was not applicable. Similar view was taken in Jagmal v. Ram Koran and another, AIR 1979 Raj 65. These cases have no

application to the facts of the present case.

9. In view of the above discussion, the appeal filed by the plaintiff-respondent under Section 96 read with Order XLIII. Rule 1A (2) of the Code was maintainable. The writ petition is accordingly dismissed.

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