

Ghulam Rasool Reshi Vs. Ghulam Hassan Reshi and ors.

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Court : Jammu and Kashmir

Decided On : Apr-29-2002

Reported in : AIR2003J& K6,2003(2)JKJ701

Judge : Syed Bashir-Ud-Din, J.

Acts : Jammu and Kashmir Code of Civil Procedure (CPC) , 1977 - Section 151 - Order 23, Rule 3 and 3A - Order 32, Rules 3 and 7; ;Specific Relief Act

Appeal No. : Civil 2nd Appeal No. 08 of 2000

Appellant : Ghulam Rasool Reshi

Respondent : Ghulam Hassan Reshi and ors.

Advocate for Def. : M.A. Qayoom, Adv.

Advocate for Pet/Ap. : Z.A. Qureshi, Adv.

Judgement :

Syed Bashir-ud-Din, J.

1. Respondent No. 1 filed suit, challenging the decree based on compromise passed by Munsiff Anantnag in 1968 on the ground that the respondent/ defendant to that suit, a minor was not properly represented in the suit and a guardian was not appointed for him as required under law. During pendency of this suit appellant

filed an application for rejection of the plaint on the alleged ground that the suit was hit by Order 23, Rule 3-A, CPC. The trial Court upon hearing the parties rejected the plaint. Appeal was filed against this order before District Judge Anantnag. In appeal, while the trial Court order was set aside, the suit was directed to be treated as application under Section 151 CPC. Against this first Appeal Court order dated 31-7-2000, 2nd Appeal is filed. The substantial question of law that arises for determination in this 2nd Appeal, is whether a suit challenging a compromise decree under Order 23, Rule 3-A, is competent and whether such a suit can be treated as application under Section 151 CPC by the Courts below.

2. A few facts which need to be taken note of are that a suit for declaration and injunction was filed against the Respondent No. 1 and registered so on 27-4-1968 in the Court of Munsiff Anantnag. Respondent No. 1 Hassan Reshi was a minor of about 7 to 8 years of age. This suit was compromised on 18-6-1968, after said Hassan Reshi was shown represented by one Wall Reshi as guardian ad litem. Compromise decree followed. Subsequently this compromise decree is challenged in Civil Suit 9/93 filed in Munsiffs Court Anantnag, on the ground that the compromise decree came into existence fraudulently, when in fact the minor defendant was not at all represented in the suit. No guardian was appointed on his behalf and that the decree is based on forged and false compromise in contravention of provisions of law. The respondent/appellant in the suit filed an application under Order 7 Rule 11 CPC, for rejecting plaint as no suit was alleged to be maintainable against a compromise decree under Order 23, Rule 3-A, CPC. The trial Court rejected the plaint on 27-12-1995 as barred under the said provision. The order is impugned in the 2nd Appeal. Notice is taken of the fact that on the very day and date when on 27-12-1995 trial Court rejected the plaint, application under Section 151 CPC was moved before the Court for recalling/setting aside of the compromise decree in question. This application is still pending before the trial Court.

3. The appellants counsel submits that in view of the Bar under Order 23, Rule 3-A, CPC, the decree even if unlawful and based on compromise not properly drawn, cannot be questioned in a separate suit. The trial Court has not committed

any illegality while rejecting the plaint under Order 7, Rule 11 CPC. The remedy of respondent No. 1 may be anywhere, but not the suit. The order of the appellate Court in setting aside the order of the trial Court is not sustainable in law and the appellate Court has no powers to direct the main suit to be treated as application under Section 151 CPC by the trial Court, when in fact one such application was already pending before the trial Court. The paramount legal question arising in the facts and circumstances of the case is whether a suit dismissed in view of bar created by Rule 3-A, of Order 23 CPC, can be treated as application in Appeal proceedings by the appellate Court and that too an application under Section 151 CPC when such an application was already pending before the trial Court.

4. Respondents counsel argues that once guardian was not appointed for the minor by the Court under Order 32 Rule 3 of CPC and the compromise is entered in such suit under Order 23, Rule 3 CPC, the minor is prejudiced. The decree is void ab initio. A suit can lie against a fraudulent decree. Besides, Section 151 CPC can also be resorted to by the minor to avoid the decree based on compromise vitiated by fraud and prejudice. The powers of appellate Court are same as Court of original jurisdiction.

5. Order 32, Rule 3 CPC provides that, in case of a minor defendant, the Court is to appoint proper person to be his guardian for the suit. However, the order for appointment of guardian has to be obtained upon application supported by an affidavit in the name and on behalf of minor or by the plaintiff, In affidavit, the fact that the proposed guardian has no interest in the matter in controversy in the suit adverse to that of the minor and that he is fit person for such appointment has to be mentioned. The order for appointment of guardian is to be made on the application after notice to the guardian or in absence of guardian to persons specified in Sub-rule (4) of Rule 3 of Order 32 CPC. It is only after hearing objections which may be urged against the appointment of the proposed guardian that the orders are to be made.

6. Order 23, Rule 7 CPC reads as under :--

'Agreement of compromise by next friend or guardian for the suit--

(1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(1-A). An application for leave under Sub-rule (1) shall be accompanied by an affidavit of the next friend or the guardian for the suit, as the case may be, and also, if the minor is represented by a pleader, by the certificate of the pleader, to the effect that the agreement or compromise proposed is, in his opinion, for the benefit of the minor :

(Provided that the opinion so expressed, whether in the affidavit or in the certificate shall not preclude the Court from examining whether the agreement or compromise proposed is for the benefit of the minor.)

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.'

Even the unamended provisions of Rules 3 and 7 of Order 32 CPC, have not been at all complied with in the suit (Cos. 47/68). In fact the compromise and decree has been passed without appointing guardian ad litem of the minor Hassan Reshi. Besides, it is to be noted that one Wall Reshi shown as guardian for the minor Hassan Reshi in the said suit has admitted in the written statement which he filed in another suit (Suit No. 142 of 96. Hassan Reshi v. Amma Reshi and others on the file of Munsiff Anantnag) that he has no knowledge of his appointment as guardian of Hassan Reshi and that he has neither signed nor entered into any compromise whatsoever in any Us, on behalf of said Hassan Reshi. Seen thus, the decree based on the compromise is not only in violation of mandatory provisions of Rule 7 of the Order 32, but it even suffers from and is vitiated by forgery and fraud, obviously to the manifest prejudice of the minor respondent No. 1.

7. In Ram Chandra v. Man Singh, AIR 1968 SC 954, it is observed (Para 3) :--

'..... It is now a well settled principle that if a decree is passed against a minor without appointment of a guardian the decree is a nullity and is void and not merely voidable. This principle becomes applicable to the case of a lunatic in view of Rule 15 of Order 32 of the Code of Civil Procedure so that the decree obtained against Ram Lal was a decree which has to be treated as without jurisdiction and void. In these circumstances, the sale held in execution of that decree must also be held to be void.'

Explanation to Rule 3 of Order 23 CPC reads as :--

'An agreement or compromise which is void or voidable under the Contract Act, Svt. 1977, shall not be deemed to be lawful within the meaning of this rule.'

Rule 3-A, of Order 23 CPC introduced by amendment XI of 1983 reads as under :--

'(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.)'

8. The word lawful means not contrary to law, public policy or void ab initio, or unlawful. The word lawful cannot include the grounds like fraud, undue influence, coercion, by which the decree can be avoided, treating it as voidable.

9. An agreement may be lawful yet can be challenged on the ground that it is vitiated by fraud, undue influence, coercion. It can be avoided. When one reads between the lines, this aspect of the matter is in all probability not covered by word 'not lawful' occurring in Rule 3-A of Order 23 CPC.

10. Viewed thus, it cannot be said that a compromise decree cannot be challenged on the ground of fraud, undue influence or coercion under Rule 3-A.

11. Compromise recorded in violation of Order 32, Rules 3 and 7 CPC goes to the very root of the decree based on such compromise. Such a situation cannot be allowed to be used by the other side to the prejudice of the minor.

12. In Mahabir Mahton v. Chandeshwar Mahton, (AIR 1985 Patna 251), a learned Judge of Patna High Court held that the compromise decree can be set aside

either in regular suit or review application filed by the minor. See also *Gosto Behari Pramanik v. Smt. Malati Sen*, AIR 1985 Cal 379.

13. In *Gurpreet Singh v. Chatter Bhuj Goel*, AIR 1992 Punj & Har 95, it is observed, that where the matter involving a minor was compromised without any application under Rule 3 of Order 32 CPC for appointment of a guardian and the person acted as guardian without authority, the prejudice is presumed and the decree is void. Obviously, the decree can be avoided or ignored.

14. In *Smt. Tara Bhai v. Krishnaswamy Rao*, (AIR 1985 Karnataka 270), suit to question compromise decree on grounds of fraud or misrepresentation was found barred by Order 23, Rule 3-A, but Section 151 CPC was held to be applicable inasmuch as, Court cannot shut its eyes to fraud or misrepresentation which vitiated the compromise.

15. Violation of Rules 3 and 7 of Order 32 CPC read with Order 23, Rule 3 CPC, has the effect of rendering the decree, based on compromise marred by non-appointment of guardian ad litem for the minor defendant and non-compliance with above mandatory provisions of law, unlawful for want/lack of jurisdiction and as one beyond pale of law with manifest prejudice to the minor.

16. The contended fraud/misrepresentation alleged in obtaining the compromise decree is in effect fraud on the minor party and abuse of Court proceedings between the parties. Compromise brought about on behalf of minor without complying with the mandatory provisions of Rules 3 and 7 of Order 32 CPC, renders such compromise open to challenge by way of relief in a suit so long it results in prejudice to the interest of minor. Besides, the fraud/mistake committed in the manner and matter, also enables the minor to claim cancellation/rectification of the decree and declaration of rights of minor in the decreed property under Specific Relief Act. (See Sections 31, 39 and 42). Court cannot close its eyes to commission of fraud/misrepresentation, thoroughly vitiating the compromise, Legal implications of contravening provisions of Rules 3 and 7 of Order 32 CPC. has to be read in Order 23, Rule 3A, CPC. so viewed, Order 23, Rule 3A CPC, does not bar a suit or proceeding to that end. The minor can and is within his rights to bring a suit, besides other conditions applying to move an application under Section 151

CPC for recalling/cancelling the decree passed by fraud, forgery with prejudice to the minor.

17. The Appellate Court has same powers and also to perform the same duties as are enjoined upon the Court(s) of original jurisdiction in respect of suits instituted as is envisaged even by Section 107 CPC.

18. The legal questions raised are determined and replied accordingly.

19. In my view, the Appellate Court's impugned order of setting aside the order of Munsiff Anantnag in rejecting the plaint is within confines of law and not vitiated. However, in so far as the direction of treating the suit only as an application under Section 151 CPC, is concerned, same is not sustainable, notwithstanding, that an application under Section 151 CPC, was already pending before trial Court. Once the order is so held to be bad, the same after being set aside, would require the transmission of record to the trial Court for proceeding further in the matter as directed. The trial Court would proceed and determine the matter at the earliest in the light of the observations made above.

20. Send record. Inform Court below of the order. Disposed of.

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