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BANWARI LAL

v.

SMT. CHANDO DEVI (THROUGH L.R.) AND ANR.

DECEMBER 11, 1992

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[N.M. KASLIWAL AND N.P. SINGH, JJ.]

Code of Civil Procedure, 1908: Order 23, Rule 3, Proviso and Explanation—Withdrawal and adjustment of suit by parties—Compromise recorded and suit dismissed by trial court on the basis of petition of Compromise filed on behalf of appellant—Subsequently on the basis of application filed by plaintiff alleging that compromise was obtained by fraud Subordinate Judge recalling his earlier order—Validity of—High Court setting aside Subordinate Judge's recall order and restoring suit—Justification of—Amendment of Order 23, Rule 3—Effect of.

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Order 23, Rule 3, Rule 3-A, Order 43, Rule 1-A(2), Sections 96(1) and (3) and 151—Appeal against order recording compromise—Right to—Effect of amendment introduced by Amendment Act of 1976—Explained.

A suit filed by the appellant–plaintiff was dismissed by the trial court on the basis of a petition of compromise filed on behalf of the appellant. Subsequently, an application was filed on behalf of the appellant stating that no compromise had been filed by him and the Advocate engaged by him had colluded with one of the defendants and had played a fraud on him and that, as the alleged compromise itself was void, illegal and against the requirement of Rule 3 of Order 23 of the Code of Civil Procedure, the order recording such compromise be recalled and suit restored and heard on merit.

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The Subordinate Judge, refering to different facts and circumstances of the case, including that the compromise petition filed had not been signed by both the parties as required by Order 23, Rule 3 of the Code, recalled the order disposing of the suit in terms of the petition of compromise, and directed restoration of the suit to its original number.

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Aggrieved, the respondent filed a revision application before the High Court, which set aside the Subordinate Judge's order, saying that the

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petition filed as petition of compromise was really an application filed on behalf of the appellant for withdrawal of the suit under Order 23, Rule 1 of the Code and as the appellant had voluntarily withdrawn the suit there was no occasion to recall the order dismissing the suit, treating it to be an order under Order 23, Rule 3 of the Code.

Against the High Court's order, the appellant-plaintiff filed an appeal, by special leave, before this Court.

On behalf of the respondent it was contended that the High Court was justified in holding that the suit had been simply withdrawn by the appellant under Rule 1 of Order 23 and it had not been compromised in terms of Rule 3 of the said Order 23; as such, the Subordinate Judge could not have recalled his earlier order and restored the suit to its original number, for being heard on merit.

Allowing the appeal, this Court

HELD: 1.1. It is clear from the copy of the petition of compromise that the terms and conditions of settlement and agreement had been mentioned saying that both the parties had entered into a compromise because of which the appellant had thereafter no connection with the disputed land and the respondent should be deemed to be in possession, and the owner of the disputed land. The prayer made in the said petition also says that the compromise may be ordered to be accepted. On basis of that petition, the Court passed an order saying that the compromise had been accepted. In the order it has been mentioned that the suit of the appellant be "dismissed as per compromise deed". In view of these facts and circumstances, it is difficult to hold that the Court allowed the suit to be withdrawn in terms of Rule 1 of Order 23. The order of the Subordinate Judge on face of it purported to dismiss the suit of the appellant on the basis of terms and conditions mentioned in the petition of compromise. As such, the validity of that order has to be judge treating it to be an order deemed to have been passed in purported exercise of the power conferred on the Court by Rule 3 of Order 23 of the Code. The Subordinate Judge should not have accepted the petition of compromise even if he had no knowledge of the fraud alleged to have been practised on the appellant by his counsel, because, admittedly, the petition of compromise had not been signed either by the respondent or his counsel. This fact should have been discovered by the Court. The Court recorded the alleged agreement and

A compromise in a casual manner. [532-B-G]

1.2. The 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 B compromise. 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. [534-H, 535-A]

2.1. Rule 3 of Order 23 of the Code of Civil Procedure, 1908 does not C require just a seal of approval from the Court to an alleged agreement or compromise said to have been entered into between the parties. The statute requires the Court to be first satisfied that the agreement or compromise which has been entered into between the parties is lawful before accepting the same. Court is expected to apply its judicial mind while examining the terms of the settlement before the suit is disposed of D in terms of the agreement arrived at between the parties. Once such a petition of compromise is accepted, it becomes the order of the Court and acquires the sanctity of a judicial order. [533-D-F]

Byram Pestonji Gariwala v. *Union Bank of India,* A.I.R. 1991 S.C. E 2234 and *Gurpreet Singh* v. *Chatur Bhuj Goel,* A.I.R. 1988 S.C. 400, relied on.

2.2. In view of the proviso read with the explanation to Rule 3 of Order 23 of the Code, inserted by the Amending Act of 1976, a Court which had entertained the petition of compromise has to examine whether the F compromise was void or voidable under the Indian Contract Act. Even Rule 1 (m) of Order 43 under which an appeal was maintainable against an order recording a compromise has been deleted by the Amending Act. As such, a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23, or an appeal under Section 96(1) of the Code, in which he can now question the validity of the compromise in view G of Rule 1A of Order 43 of the Code. [534-B-C]

2.3. The application for exercise of power under proviso to Rule 3 of Order 23 can be labelled under Section 151 of the Code, but when by the amending Act specifically such power has been vested in the Court H before which the petition of compromise had been filed, the power in

appropriate cases had to be exercise under the said proviso to Rule 3. [534-D] A

2.4. 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 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. [534-G] B

Smt. Tara Bai **v.** *V.S. Krishnaswamy Rao,* **A.I.R. 1985 Karnataka 270;** *S.G. Thimmappa* **v.** *T. Anantha,* **A.I.R. 1986 Karnataka 1;** *Bindeshwari Pd. Chaudhary* **v.** *Debendra Pd. Singh,* **A.I.R. 1958 Patna 618;** *Mangal Mahton* **v.** *Behari Mahton,* **A.I.R. 1964 Patna 483 and** *Sri Sri Iswar Gopal Jew* **v.** *Bhagwandas Shaw,* **A.I.R. 1982 Cal. 12, approved.** C

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5299 of 1992. D

From the Judgment and Order dated 1.6.92 of the Punjab & Haryana High Court in C.R. No. 3376 of 1991.

E.C. Agarwalla, Anant Vijay Palli and Mrs. Rekha Palli for the Appellant. E

S.M. Ashri Advocate for the Respondents.

The Judgment of the Court was delivered by F

N.P. SINGH, J. Special leave granted.

This appeal has been filed for setting aside an order passed by the High Court on the revision application filed on behalf of the respondent. By the impugned order the learned Judge has held that the Trial Court could not have entertained the application filed on behalf of the appellant, for recall of the order recording a compromise alleged to have been entered between the appellant and the respondent. G

The suit in question had been filed on behalf of the appellant on 14.9.1990. It appears that on 27.2.1991 a petition of compromise was filed, H

A on behalf of the appellant, saying that both parties have entered into a compromise on the basis whereof the appellant had delivered the possession of the disputed land to the respondent. A prayer was made that in view of the compromise arrived at between the parties the suit be dismissed. It may be mentioned that the said petition had not been signed by the contesting respondent or by his counsel. It appears that one Shri Soran B Ram, Advocate, had made a note - 'Thumb impression has been marked in my presence' - meaning thereby that thumb impression had been given by the appellant in his presence. On the same day the learned Subordinate Judge passed the following order:-

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> "Compromise deed Ex. C, tendered by plaintiff Banwari Lal. Statement of the Counsel for the plaintiff is also recorded to that effect. The Counsel for the plaintiff has stated that the suit of the plaintiff to be dismissed as withdrawn as per compromise deed Ex. C. The possession of the property has already been delivered to the defendant D and Defendant No. 2 Smt. Chando Devi is in possession of the disputed land as owner as per compromise deed. Hence the suit of the plaintiff is dismissed as per compromise deed Ex. C. Decree sheet be prepared accordingly."

E On 3rd April, an application was filed on behalf of the plaintiff-appellant in the said suit that he had engaged Shri Soran Ram, Advocate, Karnal, to appear on his behalf, who had told the appellant that the date fixed for the hearing of the suit was 5.3.1991. When the appellant went to him on 5.3.1991 the counsel informed him that the case had been adjourned F to 2.4.1991. On 2.4.1991 the appellant learnt from the cause list that the case was not on the cause list. Then he approached his counsel aforesaid Shri Soran Ram along with Shri I.D. Swamy, a retired IAS Officer. His counsel informed him that the suit had been dismissed as withdrawn. The appellant got the records of the case inspected which revealed that Shri Soran Ram, Advocate of the appellant, in collusion with defendant No. 2 G of the said suit had played a fraud on the appellant by filing a fabricated petition of compromise although no compromise had been effected between the appellant and the respondent. Further details of fraud were mentioned in the said petition and it was stated that as the alleged compromise itself was void, illegal and against the requirement of Rule 3 H of Order 23 of the Code of Civil Procedure (hereinafter referred to as "the

Code"), the order recording such compromise be recalled and suit be restored and be heard on merit. About his counsel aforesaid Shri Soran Ram, it was said that the appellant had learnt that he had cheated several persons and because of that a case had been registered against him.

The learned Subordinate Judge, after hearing both the parties and refering to different facts and circumstances of the case including that the compromise petition filed on 27.2.1991 had not been signed by both the parties as required by Order 23, Rule 3 of the Code, recalled the order disposing of the suit in terms of the petition of compromise. He directed restoration of the suit to its original number. Against that order a revision application was filed before the High Court on behalf of the respondent. A learned Judge, as already stated above, set aside the aforesaid order passed by the learned Subordinate Judge saying that the petition which was filed on 27.2.1991 as petition of compromise was really an application filed on behalf of the appellant for withdrawal of the suit under Order 23, Rule 1 of the Code and as the appellant had voluntarily withdrawn the suit there was no occasion to recall the order dated 27.2.1991 treating it to be an order under Order 23, Rule 3 of the Code.

The experience of the courts has been that on many occasions parties having filed petitions of compromise on basis of which decrees are prepared, later for one reason or other challenge the validity of such compromise. For setting aside such decrees suits used to be filed which dragged on for years including appeals to different courts. Keeping in view the predicament of the courts and the public, several amendments have been introduced in Order 23 of the Code which contain provisions relating to withdrawal and adjustment of suit by Civil Procedure Code (Amendment) Act, 1976. Rule 1 of Order 23 of the Code prescribes that at any time after the institution of the suit, the plaintiff may abandon his suit or abandon a part of his claim. Rule 1 (3) provides that where the Court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw such suit with liberty to institute a fresh suit. In view of Rule 1 (4) if plaintiff abandons his suit or withdraws such suit without permission referred to above, he shall be precluded from instituting any such suit in respect of such subject-matter. Rule 3 of Order 23 which contained the procedure regarding

A compromise of the suit was also amended to curtail vexatious and tiring litigation while challenging a compromise decree. Not only in Rule 3 some special requirements were introduced before a compromise is recorded by the Court including that the lawful agreement or a compromise must be in writing and signed by the parties, a proviso with an explanation was also added which is as follows:-

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> "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 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.
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> 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."

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By adding the proviso along with an explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the Court which had recorded the compromise in question. That Court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The explanation made it clear that an agreement or a compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of the said Rule. Having introduced the proviso along with the explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3A in respect of institution of a separate suit for setting aside a decree on basis of a compromise saying :-

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> "3A. *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."

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Earlier under Order 43, Rule 1(m), an appeal 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 that clause has been deleted; the result whereof is that now no

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appeal is maintainable against an order recording or refusing to record an agreement or compromise under Rule 3 of Order 23. Being conscious 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 has been added to Order 43 which is as follows:-

> "1A. *Right to challenge non-appealable orders in appeal against decrees.-*
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> (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.
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> (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."

Section 96(3) of the Code says that no appeal shall lie from a decree passed by the Court with the consent of the parties. Rule 1A(2) has been introduced saying that against a decree passed in a suit after recording a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should not have been recorded. When Section 96(3) bars an appeal against decree passed with the consent of parties, it implies that such decree is valid and binding on the parties unless set aside by the procedure prescribed or available to the parties. One such remedy available was by filing the appeal under Order 43, Rule 1 (m). If the order recording the compromise was set aside, there was no necessity or occasion to file an appeal against the decree. Similarly a suit used to be filed for setting aside such decree on the ground that the decree is based on an invalid and illegal compromise not binding on the plaintiff of the second suit. But after the amendments which have been introduced, neither an 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. As such a right has been given under Rule 1A(2) of Order 43 to a party, who challenges the recording of the compromise, to question the validity thereof

A while prefering an appeal against the decree. Section 96(3) of the Code shall not be a bar to such an appeal because Section 96(3) is applicable to cases where the factum of compromise or agreement is not in dispute.

The learned counsel appearing for the respondent took a stand that the High Court was justified in taking the view that the suit had been simply B withdrawn by the plaintiff-appellant under Rule 1 of Order 23 and it had not been compromised in terms of Rule 3 of the said Order 23; as such there was no occasion for the appellant to file an application for recall of the said order and for restoration of the suit in question for being heard on merit. From the copy of the petition which was filed on 27.2.1991 it C appears that the terms and conditions of settlement and agreement had been mentioned saying that both parties had entered into a compromise because of which the plaintiff-appellant had thereafter no connection with the disputed land and defendant- respondent shall be deemed to be in possession and the owner of the said disputed land. The prayer made in the said petition also says that the compromise may be ordered to be D accepted. On basis of that petition, as already mentioned above, the Court passed an order saying that the compromise had been accepted. In the order it has been mentioned that the suit of the plaintiff be "dismissed as per compromise deed Ex. C". In view of the aforesaid facts and circumstances, it is difficult to hold that by order dated 27.2.1991 the Court allowed E the suit to be withdrawn in terms of Rule 1 of Order 23. The order on face of it purported to dismiss the suit of the plaintiff on basis of the terms and conditions mentioned in the petition of compromise. As such, the validity of that order has to be judged treating it to be an order deemed to have been passed in purported exercise of the power conferred on the Court by F Rule 3 of Order 23 of the Code. The learned Subordinate Judge should not have accepted the said petition of compromise even if had no knowledge of the fraud alleged to have been practised on the appellant by his counsel, because admittedly the petition of compromise had not been signed either by the respondent or his counsel. This fact should have been discovered by the Court. In the case of *Gurpreet Singh* v. *Chatur Bhuj Goel*, G AIR 1988 SC 400, it has been said:-

> "Under R.3 as it now stands, when a claim in suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed H by the parties and there must be a completed agreement

between them. To constitute an adjustment, the agreement or compromise must itself be capable of being embodied in a decree. When the parties enter into a compromise during the hearing of a suit or appeal, there is no reason why the requirement that the compromise should be reduced in writing in the form of an instrument signed by the parties should be dispensed with. The court must therefore insist upon the parties to reduce the terms into writing."

The requirement of the petition of compromise being signed by the parties concerned has been considered also in the case of *Byram Pestonji Gariwala* v. *Union Bank of India*, AIR 1991 SC 2234. It appears the attention of learned Judges was not drawn to the aforesaid case of this Court in *Gurpreet Singh* v. *Chatur Bhuj Goel* (supra).

The present case depicts as to how on 27.2.1991 the Court recorded the alleged agreement and compromise in a casual manner. It need not be impressed that Rule 3 of Order 23 does not require just a seal of approval from the Court to an alleged agreement or compromise said to have been entered into between the parties. The statute requires the Courts to be first satisfied that the agreement or compromise which has been entered into between the parties is lawful, before accepting the same. Court is expected to apply its judicial mind while examining the terms of the settlement before the suit is disposed of in terms of the agreement arrived at between the parties. It need not be pointed out that once such a petition of compromise is accepted, it becomes the order of the Court and acquires the sanctity of a judicial order.

On behalf of the respondent a stand was taken that the learned Subordinate Judge by his order dated 20.9.1991 could not have recalled the order dated 27.2.1991 and restored the suit to its original number. It cannot be disputed that the respondent can support the order of the High Court setting aside order dated 20.9.1991 on any other reason than the reason given by the High Court.

When the amending Act introduced a proviso along with an explanation to Rule 3 of Order 23 saying that where it is alleged by one party and denied by other that an adjustment or satisfaction has been arrived at, "the Court shall decide the question", the Court before which a petition of

A compromise is filed and which has recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on basis of any lawful agreement. To make the enquiry in respect of validity of the agreement or the compromise more comprehensive, the explanation to the proviso says that an agreement or compromise "which is void or voidable under the Indian Contract Act..." shall not be deemed B to be lawful within the meaning of the said Rule. In view of the proviso read with the explanation, a Court which had entertained the petition of compromise has to examine whether the compromise was void or voidable under the Indian Contract Act. Even Rule 1(m) of Order 43 has been deleted under which an appeal was maintainable against an order record- C ing a compromise. As such a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23, or an appeal under Section 96 (1) of the Code, in which he can now question the validity of the compromise in view of Rule 1A of Order 43 of the Code.

D 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, E 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. Tara Bai* v. *V.S. Krishnaswamy Rao,* AIR 1985 Karnataka 270, *S.G. Thimmappa* v. *T. Anantha,* AIR 1986 Karnataka 1, *Bindeshwari Pd. Chaudhary* v. *Debendra Pd. Singh,* AIR F 1958 Patna 618, *Mangal Mahton* v. *Behari Mahton,* AIR 1964 Patna 483 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 G 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 H 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 27.2.1991. 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. A

Accordingly the appeal is allowed. The order passed by the High Court is set aside. In the circumstances of the case, there shall be no order as to costs. B

N.P.V. Appeal allowed.