

KISHUN @ RAM KISHUN (DEAD) THROUGH LRS.

v.

BIHARI (DEAD) BY LRS.

AUGUST 5, 2005

[R.C. LAHOTI, CJ, C.K. THAKKER AND P.K.
BALASUBRAMANYAN, JJ.]

Code of Civil Procedure, 1908 :

Section 96(3), Order XXIII, Rule 3, Order XIII, Rules 1 and 1(m)—Appeal against a decree based on a disputed compromise—Maintainability of—Held, when an inquiry has to be made in view of proviso to Order XXIII Rule 3 as to existence of a disputed compromise, and suit is decreed on basis of such compromise, it cannot be held to be a decree passed on consent within the meaning of Section 96(3), and bar under the Section would not be applicable.

Appeal—Abatement of—Appellant and one of the defendants dying during pendency of second appeal before High Court—No substitution application filed—High Court dismissing the appeal—Held, decree passed by High Court is a nullity—Second appeal stood abated.

In a suit filed by 'B' challenging a gift deed in favour of his brother executed by his father, the plaintiff filed an application under Order XXIII Rule 3 that the suit be decreed in terms of a compromise stated to have been signed by all the parties before the Tehsildar. The defendants filed objections denying the compromise. The trial court on an inquiry into existence and acceptability of the compromise rejected the application, but later, on directions by the first appellate court, decreed the suit in terms of the said compromise. The first appellate court set aside the compromise decree. The plaintiff filed the second appeal.

During the pendency of the second appeal, defendant No. 1 and the plaintiff died. No steps were taken to bring on record legal representatives of either of the two. However, the High Court, after hearing counsel for the plaintiff-appellant allowed the second appeal holding that the appeal filed by the defendants against compromise decree was not maintainable.

A Aggrieved, legal representatives of defendant No. 2 filed the present appeal.

Allowing the appeal, the Court

B HELD : 1. The decree passed by the High Court in favour of party who was dead and against a party who was dead, is a nullity. Legal representatives of the parties not having been brought on record, the second appeal stood abated. [386-H; 387-A-B]

C 2.1. Besides, the High Court was in error in holding that the appeal filed by the defendant against the decree of the trial court accepting a compromise, which was disputed by him, was not maintainable. When on a dispute in that behalf being raised, an enquiry is made and the suit is decreed on the basis of a compromise based on that enquiry, it could not held to be a decree passed on consent within meaning of Section 96(3) of the Code of Civil Procedure, 1908. Therefore, the bar under Section 96(3) of the Code could not have application. [387-B-C; 387-F-G]

D 2.2. In the instant case, a proper enquiry as to whether there was a compromise or an adjustment of the dispute, in terms of the proviso to Order XXIII Rule 3 of the Code is warranted. Orders and decrees passed by all the courts below are set aside. The suit is remanded to the trial court for decision afresh making a proper enquiry into the question whether there was a compromise of the disputes between the parties and to record a finding thereon in terms of the proviso to Order XXIII Rule 3 of the Code. [387-G-H; 388-A-B]

E CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4802-4803 of 2005.

From the Judgment and Order dated 24.11.99 and 28.8.2003 of the Allahabad High Court in S.A. No. 825/80 and C.M.A. No. 827 of 2003.

G Anurag Kishore, Ashwani Garg and Rajesh Kumar for Appellant.

T.M. Mohd. Yousuf, Shakil Ahmed Syed and Mohd. Taiyab Khan for the Respondent.

H The Judgment of the Court was delivered by

P.K. BALASUBRAMANYAN, J. : Leave granted.

1. One Ram Charan had two sons, Ram Kishun called Kishun and Ram Prasad called Behari. On 22.09.1966, Ram Charan gifted a piece of agricultural land to his son Kishun by way of a deed of gift. Thereupon, Behari filed a suit for cancellation of that gift impleading Kishun as defendant No.1 and his father Ram Charan, as defendant No. 2. He contended that the property was joint family property and hence could not be gifted by the father Ram Charan and that in any event the deed of gift was got executed by Kishun, by practicing fraud. Kishun and Ram Charan filed written statement denying the claim of Behari.

2. Pursuant to the deed of gift in his favour, Kishun had approached the Tehsildar for effecting mutation. It is claimed by Behari that before the Tehsildar, a compromise was entered into and an application for recording the compromise was moved. Under the compromise, according to Behari, the parties agreed that the property would be taken half and half by the two brothers. Since this compromise set up by Behari was not accepted by Kishun and Ram Charan, the Tehsildar did not pass any final order either in respect of the compromise or in respect of the dispute.

3. In the suit, Behari filed an application under Order XXIII Rule 3 of the Code of Civil Procedure (for short "the Code") asserting that there was a compromise of the dispute between the parties and that the same may be accepted and the seal of approval affixed thereon by the court. Along with the application, he produced the alleged joint statement said to have been signed by all the parties and filed before the Tehsildar. Kishun and Ram Charan filed objections to the application denying that there was a compromise or an adjustment of the dispute. Since the compromise was not by way of an application in the suit itself satisfying the requirements of Order XXIII Rule 3 of the Code and since one of the parties had alleged that there was a compromise of the dispute and the other party had denied the same, an enquiry was made by the court on the existence and acceptability of the adjustment of the dispute pleaded. Thereafter, the trial court held that there was no valid compromise or adjustment of the dispute between the parties. Hence, it rejected the application filed by Behari under Order XXIII Rule 3 of the Code.

4. An appeal against the order rejecting the application under Order XXIII Rule 3 of the Code was filed by Behari before the First Appellate

A Court. Such an appeal was provided by Order XLIII Rule 1(m) of the Code as it stood before the amendment, by Act 104 of 1976, dropping clause (m). The Appellate Court, set aside the order of the trial court and directed, that the trial court should proceed with the matter in terms of the compromise petition moved before the Tehsildar and relied on by Behari in the suit. This decision was challenged by Kishun in a revision. While this revision was pending, the trial court passed an order on 05.10.1976 implementing the direction of the appellate court and decreeing the suit in terms of the compromise petition said to have been filed before the Tehsildar. The revision, when it came up for hearing, was disposed of as infructuous, in view of the fact that the suit had been decided afresh by the trial court, pursuant to the order of the appellate court. Kishun challenged the decree in the suit based on the alleged compromise, by way of an appeal before the court of the Additional District Judge. The Additional District Judge held that it was not proved that there was a lawful compromise of the dispute. He took the view that the remedy open to Behari was to approach the revenue court and get his title and interest in the agricultural land declared. Thus, the compromise decree passed by the trial court was effectively set aside. Behari filed a second appeal before the High Court of Allahabad some times in October 1989, challenging the decision of the Additional District Judge. While the second appeal was pending, Kishun, the first defendant in the suit and the respondent in the second appeal, died in the year 1990. Behari, the appellant, died in the year 1993. No steps were taken to bring on record the legal representatives of either the deceased appellant or the deceased respondent. The second appeal in fact abated. But it is seen that on 24.11.1999, the High Court of Allahabad after hearing counsel for the appellant (appellant Behari had died six years before), proceeded to allow the second appeal on the ground that the appeal against the compromise decree filed by Kishun before the Additional District Judge, was not maintainable in view of Section 96(3) of the Code which provides that no appeal shall lie from a decree passed by the court with the consent of parties. The High Court, therefore, held that the First Appellate Court had no jurisdiction to entertain the appeal and to allow the same. There was no consideration of the merits. This decision rendered in second appeal by the High Court of Allahabad is challenged in this appeal, by the legal representatives of Kishun. The son of Behari is impleaded as the respondent.

5. As rightly pointed out by learned counsel for the appellants and fairly agreed to by learned senior counsel for the respondent, the decree passed by

the High Court in favour of a party who was dead and against a party who was dead, is obviously a nullity. It is conceded that the legal representatives of neither of the parties were brought on record in the second appeal and the second appeal stood abated. On this short ground this appeal is liable to be allowed and the decision of the High Court set aside.

6. That apart, we are of the view that the High Court was in error in holding that the appeal filed by Kishun against the decree of the trial court accepting a compromise which was disputed by him, was not maintainable. When on a dispute in that behalf being raised, an enquiry is made (now it has to be done in view of the proviso to Order XXIII Rule 3 of the Code added by Act 104 of 1976) and the suit is decreed on the basis of a compromise based on that enquiry, it could not be held to be a decree passed on consent within the meaning of Section 96(3) of the Code. Section 96(3) contemplates non-appellability of a decree passed by the court with the consent of parties. Obviously, when one of the parties sets up a compromise and the other disputes it and the court is forced to adjudicate on whether there was a compromise or not and to pass a decree, it could not be understood as a decree passed by the court with the consent of parties. As we have noticed earlier, no appeal is provided after 1.2.1977, against an order rejecting or accepting a compromise after an enquiry under the proviso to Order XXIII Rule 3, either by Section 104 or by Order XLIII Rule 1 of the Code. Only when the acceptance of the compromise receives the imprimatur of the court and it becomes a decree, or the court proceeds to pass a decree on merits rejecting the compromise set up, it becomes appealable, unless of course, the appeal is barred by Section 96(3) of the Code. We have already indicated that when there is a contest on the question whether there was a compromise or not, a decree accepting the compromise on resolution of that controversy, cannot be said to be a decree passed with the consent of the parties. Therefore, the bar under Section 96(3) of the Code could not have application. An appeal and a second appeal with its limitations would be available to the party feeling aggrieved by the decree based on such a disputed compromise or on a rejection of the compromise set up.

7. We think that in this case, a proper enquiry as to whether there was a compromise or an adjustment of the dispute, in terms of the proviso to Order XXIII Rule 3 of the Code is warranted. The decision in the Second Appeal is also a nullity since it was passed in favour of a deceased appellant against a deceased respondent.

A 8. In this situation, we think that interests of justice would be sub-served
if the orders and decrees passed in the suit, in the appeals and in the second
appeal, are set aside and the suit remanded to the trial court for making a
proper enquiry into the question whether there was a compromise of the
disputes between Behari on the one hand and Kishun and Ram Charan on
B the other and to record a finding thereon in terms of the proviso to Order
XXIII Rule 3 of the Code. Now that the legal representatives are before us,
the trial court will direct the formal correction of the cause title in the plaint,
giving an opportunity to the supplemental plaintiff to bring on record other
legal representatives of the parties to the suit, if any. The trial court will
C thereafter proceed to decide the question of the existence or otherwise of a
compromise or an adjustment of the dispute. If it comes to the conclusion
that there was a compromise of the dispute, it will consider whether the
compromise is lawful and could be accepted by the court. In case it is found
to be lawful, a decree would be passed in terms of the compromise. But if
it is found that no compromise, as asserted has been proved, or an adjustment
D of the dispute is proved, the trial court will proceed to decide the suit on
merits after giving the parties before it, the necessary opportunity to establish
their respective cases. If sought for by the parties, the trial court will permit
the parties to amend their respective pleadings. Considering that the suit is
by now a vintage one, the trial court will expedite the fresh trial and disposal
E of the suit.

9. In the result, we allow these appeals, and setting aside the decision
of the High Court and all the decisions and orders of all the courts below
thus far rendered in this suit, remand the suit to the trial court for a fresh
decision as indicated in the previous paragraph and for a final disposal of
F the suit as indicated therein. The parties will appear before the trial court on
26.09.2005.

R.P.

Appeal allowed.