A PUSHPA DEVI BHAGAT (D) TH. LR. SMT. SADHNA RAI

v.

RAJINDER SINGH AND ORS.

JULY 11, 2006

B [B.P. SINGH AND R.V. RAVEENDRAN, JJ.]

Code of Civil Procedure, 1908—Section 96—Order XXIII, Rule 3—Landlord-tenant dispute—Compromise resulting in consent decree—Appeal C *against—Maintainability of—Held: No appeal is maintainable against a consent decree in view of the bar created by s.96—Only remedy available to a party to a 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.*

Code of Civil Procedure, 1908—Order XXIII, Rule 3—Compromise of D *suits—Difference between first and second parts of Rule 3—Explained—Suit by landlord for recovery of possession—Tenant-defendant agreed to vacate suit premises—Court recorded statements of counsels on both sides and passed consent decree—Held: The decree fell under the first part of Rule 3—Landlord could recover possession in execution of such decree in the event of tenant-defendant failing to vacate the premises within the time agreed—Attempts of* E *the tenant to protract litigation by raising frivolous and vexatious contentions regarding the compromise and going back on the solemn undertaking given to Court, deprecated.*

Constitution of India—Art. 136—Pleadings—New plea—Held: Supreme F *Court does not normally permit a new plea to be raised—But it can entertain any new plea which does not involve any question of fact or amendment of pleading and is purely one of law, particularly relating to jurisdiction of the appellate court.*

Landlords filed suit for recovery of possession of property. When G **the matter finally came up for hearing, the tenants-defendants made statement undertaking to vacate the suit premises. Statements of counsels for both the parties were recorded on oath and signed whereupon the Court passed a consent decree. Subsequently, one tenant i.e. the second defendant filed an application before the Trial Court for setting aside the**

consent decree alleging that she had not instructed her counsel to enter into any compromise on her behalf. However, the second defendant did not pursue the application and filed an appeal against the consent decree. The Appellate Court set aside the decree on the ground that there was no agreement or compromise reduced to writing and signed by the parties.

High Court however held that the consent decree in question did not fall under the first part of Rule 3 of Order 23 (requiring an agreement or compromise between the parties to be in writing signed by the parties) but fell under the second part of Rule 3 of Order 23 (relating to satisfication of the claim of the plaintiff, which did not require any document in writing signed by the parties), and that there was a valid compromise under Order 23, Rule 3 CPC and the second defendant "could not repudiate the consensus by attempting to challenge their satisfication". From the fact that the second defendant did not pursue the application before the Trial Court, and from the fact that she did not challenge the integrity of her counsel (who entered into the compromise) either before the Appellate Court or before it, the High Court drew an inference that second defendant's counsel had the authority on her behalf to make the statement leading to the consent decree. Hence the present appeal by the second defendant's legal representative.

The question which arose for consideration in the present appeal is whether an appeal filed under Section 96, CPC against the consent decree was maintainable and whether the compromise recorded by the Court resulting in a consent decree was a valid compromise under Order 23, Rule 3, CPC.

Dismissing the appeal, the Court

HELD: 1. The landlords did not contend either before the first appellate court or before the High Court that the appeal against the consent decree was not maintainable. This contention is urged for the first time in this Court. Such a plea does not require any evidence. Further, being a contention relating to the jurisdiction of the appellate court, it does not require any 'pleading'. Though this Court will not normally permit a new plea to be raised at the hearing of the special leave petition or an appeal under Article 136, where such plea does not involve any question of fact or amendment of pleading and is purely one of law, particularly relating to jurisdiction of the appellate court, it can be entertained by this

A Court.

Shanti Devi v. *Bimla Devi,* AIR (1988) SC 2141; *Zahoor* v. *State of U.P.,* AIR (1991) SC 41 and *Hiralal* v. *Kasturi Devi,* AIR (1967) SC 1853, relied on. [382-G, H; 383-A]

B 2.1. 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 deletion of C clause (m) of 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. [383-G-H; 384-A-C]

D

2.2. 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 E 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.

[384-C, E]

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2.3. 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 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 G second defendant within a few days thereafter, 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), CPC.

[384-E-F]

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3.1. Rule 3 of Order XXIII which relates to compromise of suits

consists of two parts. The first part refers to situations where an agreement or compromise is entered into in writing and signed by the parties. The said agreement or compromise is placed before the court. When the court is satisfied that the suit has been adjusted either wholly or in part by such agreement or compromise in writing and signed by the parties and that it is lawful, a decree follows in terms of what is agreed between the parties. The agreement/compromise spells out the agreed terms by which the claim is admitted or adjusted by mutual concessions or promises, so that the parties thereto can be held to their promise/s in future and performance can be enforced by the execution of the decree to be passed in terms of it. On the other hand, the second part refers to cases where the defendant has satisfied the plaintiff about the claim. This may be by satisfying the plaintiff that his claim cannot be or need not be met or performed. It can also be by discharging or performing the required obligation. Where the defendant so 'satisfies' the plaintiff in respect of the subject-matter of the suit, nothing further remains to be done or enforced and there is no question of any 'enforcement' or 'execution' of the decree to be passed in terms of it. [385-B, E-H; 386-A]

3.2. Where the matter falls under the second part, what is reported is a completed action or settlement out of court putting an end to the dispute, and the resultant decree recording the satisfaction, is not capable of being enforced by levying execution. Where the matter falls under the first part, there is a promise or promises agreed to be performed or executed, and that can be enforced by levying execution. While agreements or compromises falling under the first part, can only be by an instrument or other form of writing signed by the parties, there is no such requirement in regard to settlements or satisfaction falling under the second part. Where the matter falls under second part, it is sufficient if the plaintiff or plaintiff's counsel appears before the court and informs the court that the subject matter of the suit has already been settled or satisfied. [386-E-G]

4.1. In a suit against the tenant for possession, if the settlement is that the tenant will vacate the premises within a specified time, it means that the possession could be recovered in execution of such decree in the event of the defendant failing to vacate the premises within the time agreed. Therefore, such settlement would fall under the first part. On the other hand, if both parties or the plaintiff submit to the court that the tenant has already vacated the premises and thus the claim for possession has been satisfied or if the plaintiff submits that he will not press the prayer

A for delivery of possession, the suit will be disposed of recording the same, under the second part. In such an event, there will be disposal of the suit, but no 'executable decree. [387-A, B]

4.2. In this case, under the settlement, the tenant undertook to vacate the suitt property on a future date and pay the agreed rent till then. The B decree in pursuance of such settlement was an 'executable' decree. Therefore the settlement did not fall under the second part, but under the first part of Rule 3. The respective statements off plaintiffs counsel and defendants' counsel were recorded on oath by the Trial court in regard to the terms of the compromise and those statements after being read over C and accepted to be correct, were signed by the said counsel. If the terms of a compromise written on a paper in the form of an application or petition is considered as a compromise in writing, it cannot be said that the specific and categorical statement on oath recorded in writing by the court and duly read over and accepted to be correct by the person making the statement and signed by him is not in writing. Also Section 3 of the D Evidence Act defines a document as any matter expressed or described upon any substance by means of letters, figures or makes or by more than one of those means intended to be used or which may be used for the purpose of recording the matter. The statements recorded by the court will, therefore, amount to a compromise in writing. Consequently, the E statements of the parties or their counsel, recorded by court and duly signed by the persons making the statements, would be 'statement in writing signed by the parties'. [387-C; 389-F-H; 390-A]

4.3. The Court, however, has to satisfy itself that the terms of the compromise are lawful. In this case it is found from the trial court records F that the second defedant had executed a vakalatnama empowering her counsel to act for her in respect of the suit and also to enter into any compromise. Hence there can be no doubt that the counsel was authorized by the second defendant to enter into a compromise. It is also found that the counsel for the plaintiffs and counsel for the defendants made solemn statements on oath before the trial court specifying the terms of G compromise, which were duly recorded in writing and signed by them. The requirements of the first part of Rule 3 of Order XXIII are fully satisfied in this case. The Court not only recorded the terms of settlement but thereafter directed that the statements of the counsel be recorded. Thereafter, the statements of counsel were recorded on oath, read over H and accepted by the counsel to be correct and then signed by both counsel.

Therefore in this case, there is a valid compromise in writing and signed by the parties (represented counsel). [390-A-D; 392-D-E] A

Gurpeet Singh v. *Chatur Bhuj Goel,* [1988] 1 SCC 270, distinguished.

Byram Pestonji Gariwala v. *Union Bank of India,* [1992] 1 SCC 31 and *Juneshwardas* v. *Jagrani,* [2003] 11 SCC 372, relied on. B

5.1. In this case, the suit was a simple suit for possession by a landlord against a tenant filed in the year 1993, Plaintiff's evidence was closed in 1998. The matter was dragged on for 3 years for defendant's evidence after the conclusion of plantiff's evidence. When the matter finally came up on 23.5.2001, no evidence was tendered. On the other hand, a statement was made agreeing to vacate the premises by 22.1.2002. The trial court took care to ensure that the statements of both counsel were recorded on oath and signed. Thereafter, it passed a consent decree. The attempts of tenants in such matters to protract the litigation indefinitely by raising frivolous and vexatious contentions regarding the compromise and going back on the solemn undertaking given to court, should be deprecated. [392-E-G] C D

5.2. Neither the second defendant nor her legal representative has attributed any improper motive to second defendant's counsel. The facts go to show nothing further could have been done for the defendants-tenants. All that the counsel for defendants had done was to get the maximum advantage to his clients in the circumstances after dragging on the matter to the extent possible. [393-D] E

Smt. Jamilabai Abdul Kadar v. *Shankarlal Gulabchand,* AIR (1975) SC 2202, relied on

F

6. The consent decree is upheld, though for reasons different from those which weighed with the High Court. The landlords (respondent) will be entitled to seek mesne profits for the period from 22.1.2002 to date of delivery of possession in accordance with law. [393-E-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2896 of 2006. G

From the Judgment and Order dated 3.3.2004 of the High Court of Delhi in FAO No. 247/2003.

U.U. Lalit, Maulik Nanavati, Shakeel Ahmed, Nithasha Nanavati and

H

A B. Vijayalakshmi Menon for the Appellant.

Sanjay Karol and Harshad V. Hameed (for K.J. John & Co.) for the Resondents.

The Judgment of the Court was delivered by

B

R.V. RAVEENDRAN, J. Leave granted.

This appeal is directed against the judgment dated 3.3.2004 passed by learned Single Judge of Delhi High Court in FA No.247 of 2003.

C 2. Respondents 1 & 2 are the landlords of the suit property (front portion of residential premises no. C-25, Friends Colony, New Delhi). Respondents 1 & 2 and their father Late Brig. S. Rameshwar let out the suit property with the fittings and fixtures to M/s Usha Fisheries Agriculture and Dairy Farm, a partnership firm (third respondent herein) for a period of three years under a registered lease deed dated 6.6.1979, the purpose being the D residential use of a partner of the firm. Pushpa Devi (mother of the appellant) and respondents 4, 5 & 6 were its partners. The suit property was being used by Pushpa Devi for her residential use. The tenancy was continued after the lease term of three years.

E 3. The landlords (Respondents 1 & 2 and their father) terminated the said tenancy as at the end of 31.3.1989 by notice dated 9.2.1989 and filed a suit against the firm and Pushpa Devi in the court of the District Judge, Delhi on 10.4.1989 for recovery of the possession of the suit property. It was originally numbered as RC Suit No. 265 of 1989 and later, transferred to the court of the Sub-Judge, New Delhi (later, Civil Judge, Delhi) and renumbered F as Suit No. 52 of 1993. Pushpa Devi, second defendant, resisted the suit *inter alia* on the ground that the first defendant firm had been dissolved and as a consequence all its partners including herself became the co-tenants and the suit was not maintainable without impleading the other partners. Subsequently, M.L. Wadhwa, S. K. Mittal and Badan Singh (the other three partners of the G firm), were impleaded as defendants 3 to 5. During the pendency of the suit, the first plaintiff S. Rameshwar died, and the suit was continued by showing his two sons (original plaintiffs 2 & 3) as plaintiffs 1 & 2. The fifth defendant also died and his son Chaman Lal Gahlot was brought on record in his place as the fifth defendant.

H 4. Two witnesses were examined on behalf of the plaintiffs and their

evidence was closed on 16.9.1998. Thereafter, the case was adjourned a number of times for defendants' evidence. Shri Dinesh Garg, counsel for defendants stated that as the first defendant firm was dissolved, he will not appear for the firm. In view of it, after issuing court notice, the first defendant was placed *ex parte* on 24.4.2000. The order-sheet dated 7.7.2000 shows that as defendants 2 & 3 did not let in any evidence, their evidence was closed and the matter was listed for evidence of defendants 4 & 5. On 19.5.2001, the court made the following order :-

> "The case was filed in the year 1989. Keeping in view the fact that it has already been delayed, defendant no. 4 and newly added defendant no.5 are given only one (more) opportunity to lead their evidence otherwise the same will be closed on the next date of hearing i.e. 23.5.1991."

On 23.5.1991, the two plaintiffs and their counsel and Shri Dinesh Garg, counsel for the Defendants were present. On the basis of the submissions made, the court recorded the following submissions in the order sheet :

> "It is stated that the matter has been compromised between the parties. The defendants *undertakes* to vacate the suit premises by 22.1.2002 and will keep on paying the rent/damages of the suit premises @ Rs.4800/- with effect from 1.5.2001, till the time of vacation of the suit premises. *Let the statement of both the parties be recorded.*"
>
> (emphasis supplied)

Thereafter, the following statement of Shri Dinesh Garg, counsel for defendants was recorded by the court :

> "Statement of Shri Dinesh Garg, Adv. for the defendants.
> W.O.
>
> I have instructions on behalf of the defendants to make the present statement that the defendants undertake to vacate the suit premises by 22.1.2002 and will keep on paying the rent/damages @ Rs.4800/- w.e.f. 1.5.2001, till the vacation of the suit premises. The rent upto 30.4.2001 already stands paid.
>
> Sd/- Dinesh Garg, Adv. R.O.A.C.
> (Sd. Civil Judge)

A Thereafter, the following statement of Shri B. Khan, counsel for the plaintiffs was recorded :

> "Statement of Shri B. Khan, Counsel for both the plaintiffs.
> W.O.
>
> B I have instructions on behalf of plaintiffs to make the present statement that in view of the statement made by the counsel for the defendants, on behalf of the defendants, the suit may kindly be disposed of accordingly. I accept the terms of the statement of counsel for defendants. The plaintiffs are also present today in the court and will countersign this statement.
>
> C Sd/- B. Khan, Adv. R.O.A.C.
> (Sd/- Civil Judge)

In addition to the learned counsel for plaintiffs and defendants signing the order sheet, plaintiffs 1 & 2 who were present in court, also signed the order D sheet. Thereafter, the court made the following order :-

> "ORDER
>
> In view of the statement made by the counsel for parties in the presence of both the plaintiffs, the suit stands disposed off as settled. Parties E to be bound by their statements made today.
>
> File be consigned to R/R. Decree sheet in terms of said compromise be prepared.
>
> 23.5.2001 Sd/Savita Rao
> F Civil Judge, Delhi"

5. It was subsequently found that Shri Dinesh Garg though appearing for all defendants, had not filed Vakalatnama for defendants 3 & 4 and one Shayam Kishore had entered appearance for them. Therefore, an application under sections 151 and 152 CPC was moved. Shri Dinesh Garg filed the G Vakalatnama on behalf of the defendants 3 & 4 on 18.7.2001. In view of it, the trial court made the following order on 18.7.2001 :

> "Reply to application under section 151 and 152 filed. Copies given.
>
> As stated Vakalatnama on behalf of the defendants 1, 2, & 5 is H already on record but inadvertently, the Vakalatnama on behalf of the

defendants 3 & 4 was not filed which the counsel Shri Dinesh Garg is filing today. It be taken on record. Counsel for defendant states that when he gave the statement, he was duly authorized on behalf of the defendants for making statement. He further states that defendant no. 1 is a partnership firm which has now been dissolved and is not in existence and even if the decree is passed against defendant no.1 then also it will be executable against defendents 2 to 5 only. However, I pass a decree against all the defendants. Let the decree be modified and a fresh decree sheet be prepared mentioning therein that the defendants will vacate the suit premises by 22.1.2002 and will keep on paying the rent/damages @ Rs.4800/- with effect from 1.5.2001 till the vacation of the suit premises, i.e., front portion forming part of premises No.C-25, Friends Colony, New Delhi as shown red in the site plan annexed with the plaint. File be sent to RR.

Sd/Civil Judge"

Accordingly, a fresh decree was drawn on 18.7.2001 in terms of the final order dated 23.5.2001.

6. On 21.8.2001, second defendant (Pushpa Devi) filed an application under section 151 CPC for setting aside the decree dated 18.7.2001 alleging that she had not instructed her counsel Shri Dinesh Garg to enter into any compromise on her behalf that there was no "written compromise between the parties duly signed by the parties", and therefore, there was no lawful agreement or compromise. The court issued notice of the said application to Shri Dinesh Garg, counsel for the defendants as also the plaintiffs. Shri Dinesh Garg filed a detailed statement dated 7.12.2001. We extract below the relevant portions of the said statement :

"The counsel had represented the defendant no. 2 for about 12 years in the aforesaid matter. The counsel was getting the instructions from the defendant no. 2 most of times through her daughter Ms. Sadhna Rai or her son in law, Shri Vinay Rai or through Group Head of Law Department Dr. M.C. Gupta. All the proceedings were always communicated to the defendant no.2.

After the closing of evidence by the plaintiff, the case was listed for the defendant's evidence time and again and under instructions of the defendant no. 2, the counsel took adjournments for evidence for several years. The adjournment were taken on 4.12.1998, 5.4.1999 and

A 21.5.1999. When the case fixed for 12.7.1999 for evidence of defendant no. 2, she again did not come and sent her medical certificate which was placed on record and case was adjourned to 8.9.1999. Again adjournment was sought and the case was adjourned to 22.10.1999 as last and final opportunity for her evidence. A written communication dated 20.9.1999 was sent by registered post to B defendant no. 2, but she did not appear. Again adjournment was sought as per her instructions and this time the case was adjourned for 30.11.1999 for her evidence subject to cost of Rs.500/- which was paid by her but still she did not appear in witness box. Even thereafter case was adjourned on 13.1.2000, 24.4.2000, 7.7.2000, 4.9.2000, C 16.10.2000, 20.12.2000 and 26.4.2001 for evidence of remaining defendants but none appeared in witness box.

After contesting the matter for about 10 years when it was not possible to take any further date for recording of the evidence of the defendants, the counsel advised the defendant no. 2 to lead evidence and made D it clear that it will not be possible for the counsel to meet any further adjournment.

However, she requested for getting her some time to enable her to find an alternative accommodation. The counsel took her oral instructions under good faith and because of level of confidence E developed after representing Usha Group for about 18 years, started negotiations with the plaintiff which went on for several months, during which period there were several offers and counter offers duly communicated to the defendants. Ultimately when plaintiff came out with plea to first clear the arrears of rent with effect from 01.10.1999, F the counsel asked defendant no. 2 to clear the arrears which were sent to counsel vide communication of their Law Officer dated 9.4.2001 through the Head of Law Department Dr. M.C. Gupta.

After that, the term are negotiated and ultimately, with prior approval of defendant no. 2 a statement was made on behalf of the defendant G no. 2 as well on behalf of the other defendants and the decree was obtained based on admission. Pursuant to request of the counsel, the plaintiff as well as this Hon'ble Court was pleased to allow time upto 22.1.2002 to the defendants to vacate the premises. Immediately after recording of the statement, a written communication dated 24.5.2001 was sent to the defendant no. 2 as well as to Dr. M.C. Gupta, Head H of the Law Department of Usha Group of Companies was sent by

Registered A.D. post clearly indicating therein that a statement has been made as per the instructions and that the decree has been passed. This communication was duly received by the defendant no. 2 as well as Dr. M.C. Gupta. The copy of the letter, postal receipts and the AD card duly signed by the defendant as received are annexed."

7. The second defendant did not, however, pursue her application dated 21.8.2001 for setting aside the consent decree. On 27.8.2001, within six days of filing the application dated 21.8.2001 before the trial court for setting aside the decree, the second defendant filed an appeal against the said consent decree before the District Judge, Delhi. The appellate court by judgment dated 21.12.2002 set aside the consent decree on the ground that there was no agreement or compromise reduced to writing and signed by the parties. The matter was remanded to the trial court with a direction to proceed with the trial of the suit in accordance with the law by ignoring the statement of the counsel made on 23.5.2001.

8. The said judgment of the Appellate Court was challenged by the landlords in FAO No. 247 of 2003 on the file of the Delhi High Court, under Order 43 Rule (1)(u) of CPC. During the pendency of the said appeal before the High Court, Pushpa Devi died, and her daughter (the Appellant) came on record and pursued the appeal. The High Court allowed the landlords' appeal by judgment dated 3.3.2004. The High Court held that the consent decree in question did not fall under the first part of Rule 3 of Order 23 (requiring an agreement or compromise between the parties to be in writing and signed by the parties), but fell under the second part of Rule 3 of Order 23 (relating to satisfaction of the claim of the plaintiff, which did not require any document in writing signed by the parties), and that there was a valid compromise under Order 23 Rule 3 CPC and the second defendant "could not repudiate the consensus by attempting to challenge their satisfaction". From the fact that the second defendant did not pursue the application dated 21.8.2001 filed before the trial court, and from the fact that she did not challenge the integrity of her counsel (who entered into the compromise) either before the appellate court or before it, the High Court drew an inference that second defendant's counsel Sri Dinesh Garg, had the authority on her behalf to make the statement leading to the consent decree.

9. The judgment of the High Court is challenged by the appellant (second defendant's legal representative) in this appeal. Learned counsel for the appellant contended that the High Court having held that the case did not

A fall under the first part of Rule 3 of Order 23, committed a serious error in holding that the case fell under the second part of the said Rule. It is contended that the second part applies only where the defendant satisfies the plaintiff in regard to the whole or part of the subject matter of the suit. It is pointed out that the second part refers to completed acts, that is acts which have been already executed or performed, where nothing more remains to be done in B future by a defendant. He submitted that in this case when the counsel for the defendants agreed to vacate the suit premises on a future date, that is on or before 22.1.2002, it was a promise or an agreement to do an act in future to satisfy the suit claim, and not a case where "defendant satisfies the plaintiff in respect of the subject matter of the suit". He pointed out that if the defendants C had vacated and delivered the premises to the plaintiffs and thereafter the counsel for the defendants had confirmed the same and the suit had been disposed of recording the said submission, then it would fall under the second part. The appellant contends that the High Court having held that the case did not fall under the first part of Rule 3, and the case demonstrably not falling under the second part of Rule 3, it has to be held that there was no lawful D agreement or compromise. It is submitted that the first appellate court was justified in setting aside the consent decree and remanding the matter to the trial court. On the other hand, the learned counsel for the landlords contended that the District Court had no jurisdiction to entertain the appeal against a consent decree. It is also contended that there was a compromise by admitting E the claim of the plaintiffs, and, therefore, the consequential decree is valid and binding. On the contentions raised, the following two questions arise for consideration :

(i) Whether the appeal filed by Pushpa Devi under section 96 of the Code of Civil Procedure, against the consent decree was F maintainable.

(ii) Whether the compromise on 23.5.2001 resulting in a consent decree dated 18.7.2001 was not a valid compromise under Order 23 Rule 3 CPC.

G *Re: Point No. (i)*

10. It is no doubt true that the landlords did not contend either before the first appellate court or before the High Court that the appeal against the consent decree was not maintainable. This contention is urged for the first time in this Court. The contention relates to jurisdiction of the appellate court H and is evident from the record. Such a plea does not require any evidence.

Further, being a contention relating to the jurisdiction of the appellate court, it does not require any 'pleading'. Though this Court will not normally permit a new plea to be raised at the hearing of the special leave petition or an appeal under Article 136, where such plea does not involve any question of fact or amendment of pleading and is purely one of law, particularly relating to jurisdiction of the appellate court, it can be entertained by this Court. (See *Shanti Devi* v. *Bimla Devi,* AIR (1988) SC 2141 and *Zahoor* v. *State of U.P.*, AIR (1991) SC 41; In *Hiralal* v. *Kasturi Devi,* AIR (1967) SC 1853, this Court observed :

> "....though the question of jurisdiction had not been urged before the High Court, it stares one in the face of the judgment of the appellate court. We are satisfied that the appellate court had no jurisdiction.....though this point was not raised in the High Court, it is so obvious that we have permitted the plea to be raised before us."

In this case, the contention raised being one relating to jurisdiction of the appellate court, we have permitted the said contention and heard both sides thereon.

11. Section 96 provides for appeals from original decrees. Sub-section (3) of section 96, however, provided that no appeal shall lie from a decree passed by the court with the consent of the parties. We may notice here that Order 43 Rule 1(m) of CPC had earlier provided for an appeal against the order under Rule 3 Order 23 recording or refusing to record an agreement, compromise or satisfaction. But clause (m) of Rule 1 Order 43 was omitted by Act 104 of 1976 with effect from 1.2.1977. Simultaneously, a proviso was added to Rule 3 Order 23 with effect from 1.2.1977. We extract below the relevant portion of the said proviso :

> "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...."

Rule 3A was also added in Order 23 with effect from 1.2.1977 barring any suit to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

12. The position that emerges from the amended provisions of Order 23, can be summed up thus :

A (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.

B (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, C 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 D 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 E 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, F 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.

G *Re : Point No. (ii)*

13. Order XXIII deals with withdrawal and adjustment of suits. Rule 3 relates to compromise of suits, relevant portion of which is extracted below:

"3. *Compromise of suit.*—Where it is proved to the satisfaction of the H 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."

The said Rule consists of two parts. The first part 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 or compromise to be recorded and shall pass a decree in accordance therewith. The second part provides that where a defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such satisfaction to be recorded and shall pass a decree in accordance therewith. The Rule also makes it clear that the compromise or agreement may relate to issues or disputes which are not the subject-matter of the suit and that such compromise or agreement may be entered not only among the parties to the suit, but others also, but the decree to be passed shall be confined 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. We are not, however, concerned with this aspect of the Rule in this appeal.

14. What is the difference between the first part and the second part of Rule 3 ? The first part refers to situations where an agreement or compromise is entered into in writing and signed by the parties. The said agreement or compromise is placed before the court. When the court is satisfied that the suit has been adjusted either wholly or in part by such agreement or compromise in writing and signed by the parties and that it is lawful, a decree follows in terms of what is agreed between the parties. The agreement/ compromise spells out the agreed terms by which the claim is admitted or adjusted by mutual concessions or promises, so that the parties thereto can be held to their promise/s in future and performance can be enforced by the execution of the decree to be passed in terms of it. On the other hand, the second part refers to cases where the defendant has satisfied the plaintiff about the claim. This may be by satisfying the plaintiff that his claim cannot be or need not be met or performed. It can also be by discharging or performing the required obligation. Where the defendant so 'satisfies' the plaintiff in

A respect of the subject-matter of the suit, nothing further remains to be done or enforced and there is no question of any 'enforcement' or 'execution' of the decree to be passed in terms of it. Let us illustrate with reference to a money-suit filed for recovery of say a sum of Rupees one lakh. Parties may enter into a lawful agreement or compromise in writing and signed by them, agreeing that the defendant will pay the sum of Rupees one lakh within a B specified period or specified manner or may agree that only a sum of Rs.75,000 shall be paid by the defendant in full and final settlement of the claim. Such agreement or compromise will fall under the first Part and if defendant does not fulfil the promise, the plaintiff can enforce it by levying execution. On the other hand, the parties may submit to the court that defendant has already C paid a sum of Rupees one lakh or Rs.75,000/- in full and final satisfaction or that the suit claim has been fully settled by the defendant out of court (either by mentioning the amount paid or not mentioning it) or that plaintiff will not press the claim. Here the obligation is already performed by the defendant or plaintiff agrees that he will not enforce performance and nothing remains to be performed by the defendant. As the order that follows merely D records the extinguishment or satisfaction of the claim or non-existence of the claim, it is not capable of being 'enforced' by levy of execution, as there is no obligation to be performed by the defendant in pursuance of the decree. Such 'satisfaction' need not be expressed by an agreement or compromise in writing and signed by the parties. It can be by a unilateral submission by the E plaintiff or his counsel. Such satisfaction will fall under the second part. Of course even when there is such satisfaction of the claim or subject matter of the suit by defendant and the matter falls under the second part, nothing prevents the parties from reducing such satisfaction of the claim/subject matter, into writing and signing the same. The difference between the two parts is this : Where the matter falls under the second part, what is reported is a F completed action or settlement out of court putting an end to the dispute, and the resultant decree recording the satisfaction, is not capable of being enforced by levying execution. Where the matter falls under the first part, there is a promise or promises agreed to be performed or executed, and that can be enforced by levying execution. While agreements or compromises falling G under the first part, can only be by an instrument or other form of writing signed by the parties, there is no such requirement in regard to settlements or satisfaction falling under the second part. Where the matter falls under second part, it is sufficient if the plaintiff or plaintiff's counsel appears before the court and informs the court that the subject matter of the suit has already been settled or satisfied.

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15. In a suit against the tenant for possession, if the settlement is that the tenant will vacate the premises within a specified time, it means that the possession could be recovered in execution of such decree in the event of the defendant failing to vacate the premises within the time agreed. Therefore, such settlement would fall under the first part. On the other hand, if both parties or the plaintiff submit to the court that the tenant has already vacated the premises and thus the claim for possession has been satisfied or if the plaintiff submits that he will not press the prayer for delivery of possession, the suit will be disposed of recording the same, under the second part. In such an event, there will be disposal of the suit, but no 'executable' decree.

16. In this case, under the settlement, the tenant undertook to vacate the suit property on a future date (that is 22.1.2002) and pay the agreed rent till then. The decree in pursuance of such settlement was an 'executable' decree. Tnerefore the settlement did not fall under the second part, but under the first part of Rule 3. The High Court obviously committed an error in holding that the case fell under the second part of Rule 3.

17. The next question is where an agreement or compromise falls under the first part, what is the meaning and significance of the words 'in writing' and 'signed by the parties' occurring in Rule 3 ? The appellant contends that the words 'in writing' and 'signed by the parties' would contemplate drawing up of a document or instrument or a compromise petition containing the terms of the settlement in writing and signed by the parties. The appellant points out that in this case, there is no such instrument, document or petition in writing and signed by the parties.

18. We will first consider the meaning of the words "signed by parties". Order 3 Rule 1 of CPC provides that any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, *or by a pleader appearing, applying or acting, as the case may be, on his behalf.* The proviso thereto makes it clear that the Court can, if it so desires, direct that such appearance shall be made by the party in person. Rule 4 provides that no pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power-of-attorney to make such appointment. Sub-rule (2) of Rule 4 provides that every such appointment

A shall be filed in Court and shall, for the purposes of sub-rule (1), be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client. The question whether 'signed by parties' would include signing by the pleader was considered by this Court in *Byram Pestonji* B *Gariwala* v. *Union Bank of India,* [1992] 1 SCC 31 with reference to Order 3 of CPC :

"30. There is no reason to assume that the legislature intended to curtail the implied authority of counsel, engaged in the thick of C proceedings in court, to compromise or agree on matters relating to the parties, even if such matters exceed the subject matter of the suit. The relationship of counsel and his party or the recognized agent and his principal is a matter of contract; and with the freedom of contract generally, the legislature does not interfere except when warranted by public policy, and the legislative intent is expressly made manifest. D There is no such declaration of policy or indication of intent in the present case. The legislature has not evinced any intention to change the well recognized and universally acclaimed common law tradition........

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35. So long as the system of judicial administration in India continues unaltered, and so long as Parliament has not evinced an intention to change its basic character, there is no reason to assume that Parliament has, though not expressly, but impliedly reduced counsel's role or capacity to represent his client as effectively as in the past.............

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37. We may, however, hasten to add that it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances demanding immediate adjustment of suit by G agreement of compromise and the signature of the party cannot be obtained without undue delay. In these days of easier and quicker communication, such contingency may seldom arise. A wise and careful counsel will no doubt arm himself in advance with the necessary authority expressed in writing to meet all such contingencies in order that neither his authority nor integrity is ever doubted

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38. Considering the traditionally recognized role of counsel in the common law system, and the evil sought to be remedied by Parliament by the C.P.C. (Amendment) Act, 1976, namely, attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties, and allowing the compromise decree to comprehend even matters falling outside the subject matter of the suit, but relating to the parties, *the legislature cannot, in the absence of express words to such effect, be presumed to have disallowed the parties to enter into a compromise by counsel in their cause or by their duly authorized agents.*

39. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorized representative. If a power-of-attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorization by vakalatnama, act on behalf of his client..... If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated."

[Emphasis supplied]

The above view was reiterated in *Jineshwardas* v. *Jagrani,* [2003] 11 SCC 372. Therefore, the words 'by parties' refer not only to parties in person, but their attorney holders or duly authorized pleaders.

19. Let us now turn to the requirement of 'in writing' in Rule 3. In this case as noticed above, the respective statements of plaintiffs' counsel and defendants' counsel were recorded on oath by the trial court in regard to the terms of the compromise and those statements after being read over and accepted to be correct, were signed by the said counsel. If the terms of a compromise written on a paper in the form of an application or petition is considered as a compromise in writing, can it be said that the specific and categorical statements on oath recorded in writing by the court and duly read over and accepted to be correct by the person making the statement and signed by him, can be said to be not in writing? Obviously, no. We may also in this behalf refer to Section 3 of the Evidence Act which defines a document as any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means intended to be used or

A which may be used for the purpose of recording the matter. The statements recorded by the court will, therefore, amount to a compromise in writing.

20. Consequently, the statements of the parties or their counsel, recorded by the court and duly signed by the persons making the statements, would be 'statement in writing signed by the parties'. The court, however, has to satisfy B itself that the terms of the compromise are lawful. In this case we find from the trial court records that the second defendant had executed a vakalatnama empowering her counsel Sri Dinesh Garg to act for her in respect of the suit and also to enter into any compromise. Hence there can be no doubt that Sri Dinesh Garg was authorized by the second defendant to enter into a C compromise. We also find that the counsel for the plaintiffs and counsel for the defendants made solemn statements on oath before the trial court specifying the terms of compromise, which were duly recorded in writing and signed by them. The requirements of the first part of Rule 3 of Order XXIII are fully satisfied in this case.

D 21. The matter can be viewed from a different angle also. After the issues were framed by the trial court, the plaintiffs had examined two witnesses and closed their evidence and thereafter the matter was set down for the evidence of defendants. The first defendant was treated as *ex parte*. As defendants 2 and 3 did not lead any evidence in spite of numerous opportunities, their evidence was treated as closed. On 17.5.2001, the matter E was finally adjourned to 23.5.2001 for the evidence of defendants 4 and 5 with a condition that if they do not lead evidence on that date there evidence will be closed. On 23.5.2001, defendants 4 and 5 did not lead any evidence. On the other hand, the counsel for defendants made a statement on oath that the premises will be vacated on 22.1.2002. Thereafter, counsel for the plaintiff F also made a statement agreeing to grant of time till 21.1.2002. There was also agreement that the plaintiffs will be entitled to the payment of only Rs.4,800/- per month (equivalent to the rent) and nothing more up to 22.1.2002. The effect of it is that the parties have gone to trial on the issues and the only evidence led by defendants is that they will vacate the premises on 22.1.2002. No other evidence being led, the necessary conclusion is that the defendants G admitted the plaintiffs' claim and merely sought time to vacate. Therefore, the suit can be said to have been decreed on the basis of evidence and the admissions made by the defendants. In *Jineshwardas* (supra), such a situation was noticed. In that case, the High Court made an order on a consensus expressed by both the learned counsel at the time of hearing of the second H appeal, that the respondents will pay Rs.25,000/- within a period of one

month with interest in the manner stipulated. The appellant subsequently filed an application for review, contending that the said order disposing of the appeal was a compromise decree, and as it was not in writing and signed by the parties, the appeal could not have been disposed of on the basis of the submissions. The High Court, however, refused to entertain such objections. This Court while upholding the decision of the High Court and holding that there was a valid compromise, also observed :

> "That apart, we are also of the view that a judgment or decree passed as a result of consensus arrived at before court, cannot always be said to be one passed on compromise or settlement and adjustment. It may, at times, be also a judgment on admission, as in this case."

22. Strong reliance was placed by the appellant on the following observations of this Court in *Gurpreet Singh* v. *Chatur Bhuj Goel,* [1988] 1 SCC 270 to contend that a compromise should be reduced into writing in the form of an 'instrument' and signed by the parties to be valid under Order 23 Rule 3. He submitted that recording of the statements of the parties or their counsel, would not be an instrument of compromise. An 'instrument', according to him, connotes a regular document drawn up in the form of an agreement. We extract below the observations relied on by the appellant :

> "10. Under Rule 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 by the parties and there must be a completed agreement between them. To constitute an adjustment, an 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."

We have already referred to the definition of the term document. The term instrument used in *Gurpreet Singh* (supra) refers to a writing of a formal nature and nothing more. Further, we will have to understand the observations in the context in which they were made. In that case when the hearing of a Letters Patent Appeal commenced before the High Court, the parties took time to explore the possibility of a settlement. When the hearing was resumed the appellant's father made an offer for settlement which was endorsed by

A counsel for the appellant also. The respondent who was present also made a statement accepting the offer. Evidently, the said offer and acceptance were not treated as final as the appeal was not disposed of by recording those terms. On the other hand, the said 'proposals' were recorded and the matter adjourned for payment in terms of the offer. When the matter was taken up on the next date of hearing, the respondent stated that he was not agreeable. B The High Court directed that the appeal will have to be heard on merits as the respondent was not prepared to abide by the *proposed compromise*. That order was challenged by the appellant by contending that the matter was settled by a lawful compromise by recording the statements of the appellant's counsel and respondent's counsel, and the respondent could not resile from C such compromise and therefore, the High Court ought to have disposed of the appeal in terms of the compromise. It is in this factual background, that is, where there was no consent decree, the question was considered by this Court. The distinguishing feature in that case is that though the submissions made were recorded, they were not signed by the parties or their counsel. Nor did the court treat the submissions as a compromise. In this case, the court D not only recorded the terms of settlement but thereafter directed that the statements of the counsel be recorded. Thereafter, the statements of counsel were recorded on oath, read over and accepted by the counsel to be correct and then signed by both counsel. Therefore in this case, there is a valid compromise in writing and signed by the parties (represented counsel). The E decision in *Gurpreet Singh* (supra) is therefore of no assistance to the appellant.

23. At the cost of repetition, we may recapitulate the facts of this case. The suit was a simple suit for possession by a landlord against a tenant filed in the year 1993. Plaintiff's evidence was closed in 1998. The contesting defendant (defendant No.2) did not lead any evidence, and her evidence was F treated as closed. The matter was dragged on for 3 years for defendant's evidence after the conclusion of plaintiff's evidence. It was noted on 19.5.2001 that no further adjournment will be granted for the evidence of defendants 4 and 5 (who are not contesting the matter), on the next date of hearing (23.5.2001). When the matter finally came up on 23.5.2001, no evidence was G tendered. On the other hand, a statement was made agreeing to vacate the premises by 22.1.2002. The trial court took care to ensure that the statements of both counsel were recorded on oath and signed. Thereafter, it passed a consent decree. The attempts of tenants in such matters to protract the litigation indefinitely by raising frivolous and vexatious contentions regarding the compromise and going back on the solemn undertaking given to court, should H be deprecated. In this context, we may refer to the observation made by this

Court in a similar situation in *Smt. Jamilabai Abdul Kadar* v. *Shankarlal Gulabchand,* AIR (1975) SC 2202 :

> "23. On the facts of the present case we have little doubt the pleader has acted substantially with the knowledge of and encouraged by his client.
>
> x x x x x
>
> 24. We feel no doubt that the broad sanction for the compromise came from the tenant, that no shady action is imputable to respondent 4 and that his conduct has been motivated by the good of his client.
>
> 25. The last posting was for reporting the compromise. But, on that date, the Court declined further adjournment and the party being absent and away, the pleader for the appellant had no alternative but to suffer an eviction decree or settle it to the maximum advantage of his party....."

Similar are the facts here. Neither the second defendant nor her legal representative has attributed any improper motive to second defendant's counsel. The facts go to show nothing further could have been done for the defendants-tenants. All that the counsel for defendants had done was to get the maximum advantage to his clients in the circumstances after dragging on the matter to the extent possible.

24. This appeal is, therefore, liable to be dismissed as being devoid of merit. The consent decree is upheld, though for reasons different from those which weighed with the High Court. The landlords (respondents) will be entitled to seek *mesne* profits for the period from 22.1.2002 to date of delivery of possession in accordance with law. The appeal is accordingly dismissed with costs. The costs payable by the appellant are quantified at Rs.25,000.

B.B.B. Appeal dismissed.