

# KARNATAKA HIGH COURT

S.G. Thimmappa

Vs.

T. Anantha

M.F.A. No. 1709 of 1982

(Murlidher Rao, J.)

19.03.1985

## JUDGEMENT

### **Murlidher Rao, J.**

1. This appeal is filed by the petitioner in P. Mis. No. 666 of 1980, on the file of the XII Additional City Civil Judge, Bangalore, challenging the order passed on 27-1-1982. The said application was filed for seeking permission to file the suit as an indigent person. The same has been rejected on the ground that the suit brought by the plaintiff is barred under Order 23, Rule 3A of the Civil Procedure Code. The order of rejection is passed under Clause (f) of Order 33, Rule 5 C.P.C.

2. Few facts which are necessary to appreciate the points in controversy are as follows :

Petitioner is the husband of respondent 4 A. Lakshmi; respondents 2 and 3 are his minor sons; and respondent 1 is his father-in-law, who is an Advocate. The petitioner was an adopted son in an affluent family. The adoptive mother died on 2-1-1979. During her lifetime, petitioner and respondent 4 were married on 8-5-1970. After the death of the adoptive mother, respondent 4, on her behalf and also acting on behalf of her two minor sons namely, respondents 2 and 3, instituted a suit in O.S. No. 187 of 1979, on the file of the principal Civil Judge, Bangalore District, Bangalore, The defendant in the said suit was the petitioner namely, the husband of the first plaintiff. The father-in-law (advocate) was not a party to the said suit but the suit was filed by him acting as an advocate, on behalf of the plaintiffs who were his daughter and grand children. The said suit was filed on 29-8- 1979. In the prayer portion, the following reliefs were claimed in the said suit: "a) for partition of the plaintiff's share by metes and bounds and also 5/6 of the plaintiffs be separated in the schedule mentioned immoveable properties and allotted to the share of the plaintiffs with the exclusive possession of the same;

- b) to hold an enquiry under Order 20, Rule 12 for future mesne profits from the date of suit till the date of allotment of the share of the plaintiff.
- c) to pay the costs of the suit with such other reliefs as this Hon'ble Court deems fit to grant under the circumstances of the case."

3. The schedule, given to the plaint, mentions three houses situated in Arcot Srinivasachar Street, Chamarajpet and Maistry Yellappa Galli, Chickkamavalli in Bangalore City and S. No. 33 measuring 6 acres of Anugondanahalli hobli, Hosakote taluk. These three houses in Bangalore town and the agricultural land measuring 6 acres, were valued at Rs. 10,000/- and a fixed court-fee of Rs. 200/- was paid under Section 35(2) of the Karnataka Court Fees and Suits Valuation Act. It is to be mentioned that the first plaintiff-mother did not file a separate application to permit her to act as next friend, nor did she make any specific allegation against the defendant who was the father of the minor children, indicating his adverse interest. The said suit was posted to 22-9-1979. On 19-9-1979, the plaintiffs, through their advocate, who was no other than the father of the first plaintiff and grandfather of plaintiffs 2 and 3 in that suit, filed an application to advance the date of hearing. Thereafter the date was preponed, and on 19-9-1979 itself a compromise petition was filed, signed by the plaintiff, her father who acted as an advocate, and the defendant and his advocate. The advocate appearing on behalf of the plaintiff, gave a certificate to the effect that the compromise was in the interest of the minors. On the said date namely, 19-9-1979, the matter was posted before the Court and it was ordered that the decree in terms of the compromise be drawn up and the compromise was made part of the record. It is thereafter that the present suit is filed alleging that the compromise decree was vitiated by fraud and undue influence.

4. Along with the plaint, the plaintiff filed a petition under Order 33, Rule 1 Civil Procedure Code seeking permission to file the suit as an indigent person.

5. The defendants in the present suit and petition, were the decree-holders in the previous suit namely the wife and children of the present petitioner; and plaintiff's father-in-law is impleaded as defendant-1, who is an advocate, and had appeared in the earlier suit for the plaintiffs. The application was resisted by the defendants by filing the objections. The main contention put forward by the objectors was that the present suit was barred by Order 23, Rule 3A, Civil Procedure Code. The trial Court accepted this contention and has rejected the application. This M.F.A. is filed under Order 43, Rule 1(na) of the C.P.C.

6. In this appeal, Mr. Srinivasa Iyer appearing for the appellant contended that the view taken by the court below that the suit is barred under Order 23, Rule 3A, Civil Procedure Code is not correct. He contended that the word 'lawful' occurring in the said rule does not include the challenge to a compromise decree on the basis of fraud, undue influence etc. He submitted that the Explanation to Order 23, Rule 3 Civil Procedure Code makes it clear that an agreement or compromise which is void or voidable, shall not be deemed to be lawful. In other words, where

the agreement or compromise is void or voidable, the said agreement cannot be treated as lawful. The agreement and compromise being voidable, it is open to the parties to bring a suit for cancellation of decree. It was his contention that the bar contained in Order 23, Rule 3A, Civil Procedure Code is applicable only in cases where the compromise is opposed to law or is prohibited by law or contains a term which is opposed to public policy.

7. Mr. V. Krishna Murthy appearing for the respondents contended that the words 'not lawful' occurring in the said rule are wide enough to embrace a challenge to the said decree on the basis of fraud, undue influence and coercion. Whether the agreement is void or voidable, once a decree is passed it becomes unassailable, no challenge can be made, by way of a separate suit in view of the bar contained in Order 23, Rule 3A, Civil Procedure Code. For this submission he depended on the judgment of *Masodkar, J. Anant Mahadeo Godbole v. Achut Ganesh Godbole*<sup>1</sup>, and *Sri Iswar Gopal Jew v. Bhagwandas Shaw*<sup>2</sup>

8. To examine the contentions urged in this appeal, it is necessary to find out the relevant provisions of the Civil Procedure Code the objects and reasons for the amendment to these provisions. Order 23, Rule 3 has been amended by Act No. 104 of 1976. Rule 3A has also been added by the said amendment. Similarly, appeal provision contained in Clause (m) of Order 43, Rule 1 which permitted filing of appeal against recording of compromise has been deleted by the said amendment. Rule 1A has been added to Order 43, Rule 1; sub-rule (2) thereof provides for an appeal being filed against a decree passed in a suit after recording a compromise or refusing to record a compromise. In other words, so far as this rule is concerned, since a specific rule in sub-rule (2) is provided in Rule 1A, the retention of Clause (m) in Order 43, Rule 1 became redundant. This is clear from the Statement of Objects and Reasons while introducing the amendment Bill. The objects and reasons for these provisions and for the Explanation found in Order 23, Rule 3 and for the amendment in the said rule, are as follows :

"Sub-clause (iii).- It is provided that an agreement or compromise under Rule 3 should be in writing and signed by the parties. This is with a view to avoiding the setting up of oral agreements or compromises to delay the progress of the suit.

The words "lawful agreement of compromise" in Rule 3 have given rise to a conflict in the matter of interpretation. One view is that agreements which are voidable under section 19A of the Contract Act are not excluded. While this stand has been taken by the High Courts of Allahabad, Calcutta, Madras and Kerala, a contrary view has been expressed by the High Courts of Bombay and Nagpur. An Explanation has, therefore, been added to the rule to clarify the position. A proviso has also been added to clarify that no adjournment should ordinarily be granted where a decision is necessary as to whether an adjustment or satisfaction has or has not been arrived at.

In view of the words "so far as it relates to the suit" in Rule 3, a question arises whether a decree which refers the terms of a compromise in respect of matters beyond the scope of the suit is executable or whether the terms of the decree relating to the matter outside the

suit can be enforced only by a separate suit. The amendment seeks to clarify the position."

The Statement of Objects and Reasons for the introduction of Rule 3A is as follows :

"Sub-clause (iv).- In a recent Mysore case, it was held that where a compromise decree passed by a Court of competent jurisdiction contains a term which is opposed to law or public policy, but the decree has not been set aside in proper proceedings, the decree operates as res judicata. The Madras and Patna High Courts have, however, taken a different view. New Rule 3A seeks to resolve the conflict between the decisions of the different High Courts."

<sup>1</sup> AIR 1981 Bom 357

<sup>2</sup> AIR 1982 Cal 12

The Statement of Objects and Reasons for deleting Clause (m) in Order 43, Rule 1 reads thus :

"Clause (m) provides for an order under Rule 3 of Order 23 recording or refusing to record an agreement, compromise or satisfaction. The clause is being omitted because in an appeal against the decree the aggrieved party can take the point that the compromise ought not to have been recorded or ought to have been recorded, as the case may be.  
"

These being the objects and reasons, it becomes necessary to find out the meaning of the words 'lawful' and 'not lawful' occurring in the Explanation to Order 23, Rule 3 and Rule 3A. Before the introduction of the above Explanation, there was conflict of views with regard to the interpretation to be placed on the word 'lawful' occurring in Order 23, Rule 3 Civil Procedure Code

9. The decisions of this Court referred to above in the objects and reasons for introducing Rule 3A are *Bhima Rama Jadhav v. Abdul Rashid*<sup>3</sup> and *Bhima Rama Jadhav v. Abdul Rashid*<sup>4</sup>, The learned single Judge Hegde, J., who delivered the judgment in the first referred case observed thus (at p. 177 of AIR):

"..... As observed by Gajendragadkar, J. in Govind Waman's case AIR 1953 Bombay 412, it is the duty of the Court to see whether the compromise in question contains any illegal terms; if it does contain such terms the Court has not only the right but has the duty to refuse to make it a decree of Court. It is not the law that the Court is bound to accept every compromise and make it a decree of Court. If it has accepted a compromise and made it a decree of the Court then the compromise ceases to be a contract simpliciter; it becomes a decree of Court. The oft quoted observation that a Court of competent jurisdiction can decide a thing rightly as well as wrongly though might look odd at first sight, embodies an important principle of law i.e. the finality of decisions. It is human to

err and Judges are human. Their errors may be errors of facts as well as errors of law. If they commit any error either of fact or of law, the same can be corrected only by following the procedure laid down by law. No one can ignore a decree of a competent Court unless it is void under law. It is true that a compromise decree is open to attacks which are available against a contract and as such, it may be got set aside within the period of limitation prescribed, on grounds which may be sufficient to invalidate a contract. But the fact remains that it must be got set aside and that is what has not been done in this case....."

10. In letters patent appeal, while granting leave to appeal, Hegde, J., framed the following question:

"Where a compromise decree passed by a Court of competent jurisdiction contains a term which is opposed to law or public policy, and that decree has not been set aside in proper proceedings, can that decree be pleaded as constituting estoppel by

<sup>3</sup>(1960) 38 Mys LJ 554

<sup>4</sup>(1967) 2 Mys LJ 509

*res judicata* in a subsequent proceeding between the same parties."

After examining several decisions of various High Courts, it was held that where a compromise decree passed by a competent jurisdiction contains a term which is opposed to law or public policy and that decree has not been set aside in proper proceedings, it operates as *res judicata* in subsequent proceedings between the same parties. It is to give effect to this pronouncement that Order 23, Rule 3A is enacted; in other words, the lawfulness of the decree cannot be agitated in a subsequent suit. By lawful, it means it is not contrary to law, public policy or void ab initio, or unlawful, but it cannot include the grounds like fraud, undue influence, coercion, by which the decree can be avoided, treating it as voidable. Till it is avoided and displaced it can be treated as lawful, for the limited purpose of Order 23, Rule 3 C.P.C.

11. In *Qadri Jahan Begam v. Fazal Ahmad*<sup>5</sup> it was indicated that the word 'lawful' refers to agreements which in their very terms or nature are not 'unlawful' and may therefore include agreements which are voidable at the option of one of the parties thereto, because they have been brought about by undue influence, coercion or fraud. The same view was reiterated in *Husain Yar Beg v. Radha Kishan*<sup>6</sup>

12. In *Western Electric Co. Ltd. v. Kailash Chand*<sup>7</sup> Kania, J., observed as follows :

".....Therefore, the term "lawful agreement" as used in Order 23, Rule 3, excludes not only unlawful agreements, i.e. the object or consideration for which is unlawful as defined in the Contract Act, but all agreements which on the face of them are void and therefore will not be enforced by the Court. For this purpose, no inquiry is necessary

because the terms of the agreement themselves will show the defect. The Court therefore has to consider whether on the face of the agreement it is lawful or not as stated above. With that reservation I respectfully agree with the two Allahabad decisions mentioned above."

Thereafter, the learned Judge proceeded to observe thus :

"..... But that will not be a sufficient answer to refuse to take into consideration the plea whether an agreement is voidable or not. That contention must stand or fall by reason of the wording of Order 23, Rule 3. I am unable to construe the word "lawful" as wide enough to include an inquiry whether the agreement is voidable at the instance of one party. In my opinion, it includes only two classes of agreements : those which are unlawful and those which on their face are void and therefore not capable of being enforced. Under the circumstances the opposition fails. If the plaintiffs have any grievance in respect of the agreement their remedy is to file a suit to set aside the agreement and the decree. (underlining is mine)"

13. It follows therefore that, according to Justice Kania, the word 'lawful' cannot be

<sup>5</sup> AIR 1928 All 494

<sup>7</sup> AIR 1940 Bom 60

<sup>6</sup> AIR 1935 All137

construed as wide enough to include whether the agreement is voidable or not.

14. In *Harbans Singh Chauhan v. Bawa Singh Chauhan*<sup>8</sup> the learned Judge after referring to the Bombay and Allahabad High Courts decisions, observed thus:

"Under the provisions of Rule 3 of Order 23 the Court must order a compromise to be recorded where it is proved to its satisfaction that a suit had been adjusted wholly or in part by any lawful agreement or compromise'. Fraud, undue influence or coercion makes a contract voidable and not void. The question arises whether, in an application under Order 23, Rule 3 the Court must consider the contract as not a lawful agreement or compromise because one party seeks to avoid it on the ground of fraud, undue influence or coercion....."

15. A bench of the Hyderabad High Court in *A. Mohiuddin v. Abdurrahman*<sup>9</sup> held that the words of Order 23 Rule 3 Civil Procedure Code signify that where a suit has been adjusted by lawful agreement, it is obligatory on the court to order such agreement or compromise, to be recorded. Where, therefore, one of the parties applies for setting aside a compromise filed by both the parties, on the ground that his signature on the petition was obtained by undue influence, his remedy is to file a regular suit for avoiding the compromise which is voidable at his option. He cannot move the court to set it aside in the same proceedings.

16. In *Putto Lal v. His Highness Maharaja Dhiraj Sumersinghji of Kishengarh*<sup>10</sup> a Division Bench examined the legal position at length and held thus (at Pp. 68-69) :

"The meaning of the word 'lawful' in the phrase "any lawful agreement or compromise" occurring in Order 23 Rule 3 is that the agreement or compromise must not be unlawful by the nature of its terms or on the face of it. In other words, it would be unlawful if the consideration or the object of the agreement is forbidden by law, or is of such a nature that if permitted it would defeat the provision of any law, or is fraudulent, or involves or implies inquiry to the person or property of another, or the Court regards it as immoral or opposed to public policy as provided by Section 23 of the Contract Act. Again, the agreement would be unlawful, if it is void on the very face of it at law such as where it may be by way of wager or in restraint of the marriage of any person or for any other similar reason. Thus it would certainly be the duty of the Court where it is asked to record a compromise under this provision to see that the compromise is or is not lawful in this sense; and if it is not so lawful it must refuse to record it. But where the contention is not that the object or the consideration of the agreement was unlawful in the sense indicated above, or that it was void on the face of it, but that it was brought about by undue influence or fraud or coercion, then such an agreement, provided of course it is proved to have been made, should not be condemned as unlawful within the meaning of this provision for it is only voidable and not void. And being voidable it could be avoided and displaced only after proper investigation and adjudication in a proceeding appropriate for the purpose,

<sup>8</sup> AIR 1952 Cal 73      <sup>10</sup> AIR 1963 Raj 63

<sup>9</sup> AIR 1953 Hyd 62

that is a suit; and until that is done, such agreements should be lawful for the limited purposes of Order 23 Rule 3. The reason is that any full-fledged investigation in this regard in what after all is said and done is an interlocutory proceeding would be highly inconvenient and the result thereof could by no means be properly accepted as conclusive for all purposes. Therefore, the courts have heavily leaned towards the view that a party disputing the compromise on any such ground should be left free to seek its remedy in this behalf by means of a separate suit....."

The above cases were considered by a Bench of the Orissa High Court in *Rama Krushna Swain v. Smt. Fulamani Kamila*<sup>11</sup> and it was held as follows (at p. 170) :

"Challenge on ground of undue influence, fraud, or misrepresentation make an agreement voidable and not void and when a compromise is challenged on such ground, the matter is not within the ambit of Rule 3 and must be left to be decided by an independent suit".

17. The above decisions of various High Courts make it clear that where the decree is challenged on the ground of fraud, undue influence etc., it becomes voidable at the instance of the party who

makes these allegations.

18. In *Sumitra Devi Agarwalla v. Sulekha Kundu*<sup>12</sup> a Bench of the Calcutta High Court was dealing with the words 'lawful agreement' under Order 23 Rule 3 Civil Procedure Code. The Court observed thus (at p. 200) :

"..... It has been already observed that if the consent of one party is obtained by fraud, undue influence or coercion, it cannot be said that he has agreed to the term to which his consent has been so obtained and consequently the Court has to come to the finding that there is no agreement. If it is required under Order 23, Rule 3 that the Court has to be satisfied as to whether an agreement has in fact been reached as held by the Allahabad High Court in the above two decisions, we are of the opinion that an enquiry by the Court for such satisfaction will include also an enquiry into the allegation of a party that his consent to the terms of the agreement has been procured by fraud, undue influence or coercion. It is true that fraud, undue influence or coercion makes a contract a voidable one and not void. But as soon as a party complains about the practice upon him of fraud, undue influence or coercion by another party, he avoids the contract. If the party complains to Court that his signature to a document containing the terms has been obtained by the other party at the point of a revolver, would the Court refuse to make an enquiry into the same on the ground that the agreement is only voidable and not void? With due respect, we are unable to subscribe to such a bold proposition and, in our opinion, to consider whether or not an agreement has been reached between the parties, the Court will of necessity embark upon an enquiry as to the allegation of a party that his consent to the agreement or his signature on the document containing the terms, has been obtained by fraud, undue influence or coercion. It is true that the party complaining has his remedy by way of suit. He

<sup>11</sup> AIR 1975 Ori166

<sup>12</sup> AIR 1976 Cal 196

can obtain a declaration that the contract is vitiated by fraud, undue influence or coercion and, as such, is not binding upon him. In our opinion, to drive such a party to a separate suit will be against justice, equity and good conscience."

The above statement makes it clear that the party who challenges the compromise on the basis of fraud, undue influence or coercion, has two remedies open to him firstly by filing a suit, secondly, making an application under Section 151 Civil Procedure Code. The fact that the Courts can exercise their inherent powers under Section 151 does not mean that there is a bar for filing a suit which remedy is available to the party. 18A. A contract or agreement may be lawful but it can still be challenged on the ground that it was entered into or achieved by exercising fraud, undue influence or coercion and can be avoided. This aspect of the matter is not covered by the words 'not lawful' occurring in Rule 3A of Order 23 Civil Procedure Code. Therefore, to hold that the compromise decree cannot be challenged on the ground of fraud, undue influence or coercion under Rule 3A would not be correct. In my opinion, the court below has erred in

holding to the contrary.

19. Coming to the two decisions cited by Mr. Krishna Murthy, it has to be mentioned that in first of these cases rendered by Masodkar, J., Of Bombay High Court, the learned Judge was examining the case where the compromise was entered by persons who had no authority. The learned Judge was not dealing with a case, where the challenge was based on grounds of fraud, undue influence etc. It would not be correct to say that under the amended provision, the compromise decree becomes unassailable, on any grounds whatsoever. The case reported in AIR 1982 Calcutta 12, was one where compromise decree was passed on oral agreement, quite contrary to the amended provision, which requires it to be in writing. The court held that it could be challenged under Section 151 Civil Procedure Code. The statement of objects and reasons make it clear that Order 23 Rule 3A was incorporated only to resolve the conflict of decisions of this Court in Bhima Rama Jadhav's case (1967) 2 Mys LJ 509 and the decisions of other Courts, taking a different view.

20. The object was not to make the compromise decree unassailable on any ground whatsoever. Therefore I am of the view that the rejection of the application on this ground is clearly unsustainable.

21. For the aforesaid reasons, I allow this appeal and set aside the order dated 27-1-1982 passed by the XII Additional City Civil Judge, Bangalore, and remit the case to the court below to consider and decide the application filed by the appellant and find out whether he has sufficient means to pay the court fee or not. No costs.

Appeal allowed.