

NAGPUR HIGH COURT

Supaji Sahu

Vs

Nagorao Sakharam

Misc. Civil Case No. 208 of 1951. decided on 17.4.1953

(R. Kaushalendra Rao and Deo, JJ.)

17.04.1953

JUDGMENT

R. Kaushalendra Rao,J.

1. This application is for restoration to file and decision on merits of First Appeal No. 90 of 1945 which was dismissed for want of prosecution in the following circumstances. The applicant was appellant No. 2 to the appeal.

2. The appeal came up for hearing on 24th September 1951. On that date an application was filed by the two appellants. The application is as follows :

"The respondent No. 1 Mahadeo for himself and respondents 3 and 2 have undertaken to hand over the portion of (marked A in the plaint map) the building to a registered society of members of Mahar community to be formed for the purposes of running a hostel for Mahar students and to use a part thereof as a Dharmashala as is being used today. The society shall be handed over this building on condition that the said building will be used only for the purpose of running a hostel and Dharmashala and no other purpose and the said society shall maintain the building in good state of repairs and pay regularly all the taxes of municipal committee and the taxes due to the Government; and the hostel will be known as Shrawgi Hostel. In view of this statement the appellants do not press the appeal and it be dismissed for want of prosecution. Plaintiff-appellant and defendants-respondents 1 to 6 to bear their costs as incurred and the question of costs of defendants 7-8 and 10 and 11 are left to the discretion of this Honourable Court.

Sd. K.B. Tare, counsel
for plaintiff-appellants

No. 1 and 2.

Nagorao Sakharam applt.

The respondents, 1 to 6 have no objection to orders being passed as prayed for."

3. The Court passed the following order on the application :

"24-9-51 : Shri K.B. Tare counsel for the appellants. Shri N.A. Athlay counsel for the respondents 1 to 6, Shri S.T. Bhawe for the respondents 7, 8 and 10. Application No. 8959 filed today by appellants 1 and 2 and respondents 1 to 6 have no objection to the prayer of the appellants that the appeal be dismissed for want of prosecution. Accordingly the appeal is dismissed. Respondents 7, 8 and 10 will be entitled to the costs of the appeal including Rs. 20 as counsel's fee. Other respondents will bear their costs as incurred. Respondent No. 11 in person."

4. The applicant alleges that he never desired to get the appeal dismissed. He complains that the action taken by his learned advocate was unauthorized and unwarranted. The applicant, however, does not say that the advocate was by a special direction prohibited or restricted from entering into any compromise. Though the applicant alleges collusion between the first appellant and the first respondent, the applicant does not impeach the 'bona fides' of his learned advocate. Nor is it suggested that the advocate's consent is vitiated because of any mistake induced or fraud practiced by the appellant and the respondent alleged to be colluding. So the vague allegation about collusion between them is immaterial for the decision of the present application.

5. We have recorded the statement of Shri Tare. Shri Tare does not say that his consent to the application was induced by either fraud or mistake. He candidly admitted that he had no instructions from the applicant for the compromise. But it is evident that Sri Tare's action was deliberate after weighing the pros and cons of the matter. From the application filed it is clear that respondent No. 1 for himself and for respondents 2 and 3 undertook to hand over a portion of the building to a registered society of the Mahar community to be formed for the purpose of running a hostel and for using a part thereof as a Dharmashala. Shri Tare explains why he got the appeal dismissed for want of prosecution instead of getting a decree passed in terms of the compromise. Had there been a decree in terms of the compromise, the court-fees would have been a charge on the subject-matter of the suit because the appellants' suit had originally been filed in 'forma pauperis' vide Order 23, Rule 1, Civil Procedure Code. The society to be formed is enabled to get a portion of the property in suit free from any burden and further litigation. It may also be mentioned that it was because of the settlement that the Court did not make any order as to costs against the appellants in respect of the costs of the first six respondents, though there was such an order with respect to respondents 7, 8 and 10. So it is not the case that the appeal was got dismissed without any consideration. The appellants secured from the respondents an undertaking to use a portion of the building as a hostel and Dharmashala, avoided a decree which would have resulted in a charge on the property and also avoided the cost of the six respondents in the appeal. In the circumstances, it is not for the Court to weigh the Balance of advantage to the parties.

6. The question that arises is whether Shri Tare was authorized to get the appeal dismissed on the settlement arrived at as disclosed in the application without reference to his client. The learned counsel for the applicant relies on - *Hussain*

*Habibullah v. Vali Mahammad*¹, *Keshav Ramkrishna v. Subba Manga*²,

¹ AIR 1941 Sind 28

² AIR 1939 Bom 490

*Sarathkumari v. Amulyadhan*³, and - '*Sourindra Nath v. Heramba Nath*⁴', in support of the contention that Shri Tare could not do so. The last three cases cited were concerned with the power of a pleader or a vakil and not an advocate. Shri Tare is an advocate of this Court. The first case is in support of the contention, but we cannot act on that view because of a Full Bench decision of our own Court in - '*Jiwibai v. Ramkuwar Shrinivas*⁵',

7. The Full Bench examined the question whether an advocate can compromise claims without the authority or consent of his client and answered it in the affirmative. The Full Bench extended the rule laid down by Lord Atkin in - '*Sourenaranath Mitra v. Tarubala Dasi*⁶', with respect to an advocate entitled to appear without a power from his client to the case of all advocates. According to the Full Bench, the authority to compromise is implicit in the appointment of an advocate unless it is expressly countermanded and that whether there is authority expressly conferred by the power or not. The Full Bench also expressed the view that there is no distinction in this matter between an advocate and a pleader. The two decisions of the Privy Council, - '*Sarathkumari v. Amulyadhan*' and - '*Sourindra Nath v. Heramba Nath, (supra)*', were not noticed by the Full Bench. As we are, in the present case, concerned with the authority of an advocate, it is not necessary to examine the question whether a vakil or a pleader can without reference to his client bring about a compromise when the power filed by him confers no such authority. That was the question dealt with in - '*Sarathkumari v. Amulyadhan*' and - '*Sourindra Nath v. Heramba Nath (D)*' (supra).

8. The applicant does not plead any express prohibition or limitation on the authority of Shri Tare. On the contrary, the power to make a compromise is expressly included in the powers conferred on the advocate by the vakalatnama filed in the case. It must therefore be held that there is nothing in the instant case to take it out of the general rule as stated by the Full Bench.

9. The point that remains for consideration is whether an agreement not to prosecute the appeal and get it dismissed can be said to be included within the power to compromise. The applicant must lose on this point also. Reference may be made to the decision in - '*In re West Devon Great Consols Mine*', (1988), 38 Ch D 51 (G). In that case on the hearing of the motion as to the allowance of certain claim the Vice-Warden decided in favour of the claims. But the case was not ended for he had not decided as to costs. Then on counsel for the contributories consenting not to appeal the Vice-Warden allowed them their costs. Later there was an application by the contributories to withdraw the consent given by their counsel at the hearing of the motion. The questions were raised in argument whether an undertaking not to appeal could at all be given by a counsel without express authority, and, if it could, whether it could be given after the decision on the merits. Lord Justice Cotton observed :

"every compromise involves an undertaking not to appeal, it therefore cannot be beyond the authority of counsel to undertake that his clients shall not appeal. As to the other point the counsel in fact says : 'The Judge has given a

3 AIR 1923 PC 13

5 AIR 1947 Nag 17

4 AIR 1923 PC 98

6 AIR 1930 PC 158

decision adverse to my client, and in consideration of his receiving his costs I undertake that he shall not appeal against it.' That is a compromise. The undertaking, therefore, is 'prima facie' binding."

If an undertaking by a counsel not to appeal must be held to be within his authority, a counsel's action in not prosecuting an appeal once filed because of a settlement must likewise be held to be included in his authority.

10. We therefore see no adequate reason for setting aside the order of dismissal and restoring the case to file. We accordingly reject the application with costs.
Application rejected.