

**(1981) 03 BOM CK 0041**

**In the Bombay High Court**

**Case No :** First Appeal No. 79 of 1980 with Civil Application No's. 372 and 2935 of 1908

Anant Mahadeo Godbole

APPELLANT

Vs

Achut Ganesh Godbole and Others

RESPONDENT

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**Date of Decision :** 23-03-1981

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, Order 23 Rule 3A, Order 33 Rule 3, Order 43 Rule 1, Order 43 Rule 1A  
Contract Act, 1872 — Section 19A

**Citation :** AIR 1981 Bom 357 : (1981) MhLj 640

**Hon'ble Judges :** Masodkar, J

**Bench :** Single Bench

**Advocate :** V.A. Thorat, for V.R. Bhonsale, for the Appellant; G.V. Limaye and V.V. Divekar, for the Respondent

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## **Judgement**

1. The narrow question in the present appeal is whether the trial Court rightly applied the amended provisions of Order XXIII, Rule 3A of the Code of Civil Procedure, which has enacted the bar to the effect that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

2. A few undisputed facts are that the present appellant-plaintiff filed the present suit, being Special Civil Suit No. 13 of 1977 for getting declarations to set aside and cancel the compromise decree recorded in the earlier suit, being Special Civil Suit No, 17 of 1973. Inter alia the plaintiff prayed that the decree in that suit at Ex, 105 be cancelled and the compromise in that suit at Ex. 104 be declared illegal. Similarly, he prayed that the Vakalatnama given to the advocate in that suit, who is joined as defendant No. 13 in this suit, be declared illegal.

3. The plaint alleged that the earlier suit was for partition and taking accounts and that the present plaintiff was defendant No. 4 therein. The present plaintiff and defendant No. 5 in the present suit had engaged advocate Shri M.A. Patil by

giving him the Vakalatnama. In the earlier suit, on the compromise at Ex. 104, the said advocate, Shri Patil, because of the Vakalatnama, signed the compromise and the compromise so recites, but the plaintiff in the suit has asserted that he had not authorised the said Shri Patil to sign that compromise. The signature of Shri Patil, Advocate, therefore, was entirely unauthorised and hence the compromise is not binding. Similar allegations are reasserted in para 3 of the plaint, in that the said advocate Shri Patil had not been given the authority to sign the compromise. In para 4, it is further asserted that on the day the Vakalatnama was given, neither the plaintiff could confer nor the advocate could accept the authority to compromise the cause and, therefore, the contrary Vakalatnama was not in accordance with law. For that reason also the compromise is bad. In further allegations it is stated that on the day the compromise was recorded, the matter in court was only fixed for filing the list of witnesses and, therefore, the present plaintiff (defendant No. 4 in that suit) was not present in the Court. This would show that the advocate had not been conferred with any authority to compromise the matter. He should have taken the prior consent and should have got the matter adjourned for obtaining such a consent before he signed the compromise in the Court.

4. These are the main recitals which constitute the cause of action for the purpose of this second suit, which is, as stated above, a suit for cancellation of the earlier compromise and a declaration for that purpose.

5. As far as the suit allegations are concerned, briefly stated, the cause of action is based on want of authority of the advocate to enter into compromise. It is thus clear that the total cause of action seeks to put in issue the authority of the advocate so as to compromise the earlier suit. Though the Court has not decided the matter on merits, it has referred to Ex. 89, which clearly shows that such an authority did exist in favour of the advocate concerned.

6. What is important for the decision of the present appeal is, whether the amended Rule 3A enacted a bar to entertain the second suit.

7. Mr. Thorat argues that such type of grievance can still be agitated in spite of enactment of Rule 3A. According to the learned Counsel, the words "not lawful" used in Rule 3A have a reference only to the cases which may presumably fall within the contemplation of Section 23 of the Indian Contract Act. In other words, if the cause of action alleged covers cases which are treated as not lawful by Section 23, then and then only the bar of Rule 3A would be attracted. In all other cases, the bar would not be available and the suit would lie. According to the learned counsel, want of authority of the advocate does not fall within the category of the compromise being "not lawful." On the other hand, it is an allegation that no compromise in fact could be arrived at and, therefore, the suit was tenable.

8. It is indeed difficult to accept this line of submissions. The very object of introducing Rule 3A in the body of Order XXIII of the CPC was to bar the filing of

a second suit on the ground that the compromise was not lawful. Want of authority is a species of such challenges So also where exceeding of authority is alleged by a litigant against the admitted representative. The present case falls in the second part of the category. Here, it is not in dispute that Advocate Shri Patil was engaged to defend that suit and did represent the plaintiff in the suit. The engagement as an advocate is not in dispute. What is in dispute is his exceeding the authority in accepting a particular compromise for and on behalf of the present plaintiff. Such a challenge is clearly a challenge to the compromise on the ground that it is not lawful and in view of the bar enacted by Rule 3A, no second suit lies to establish such a challenge.

9. Normally, matters arising and concluded in one suit should be binding on the parties to that suit and that appears to be the scheme with regard to even the matters concluded by compromise. The party aggrieved by such a decree based on compromise was afforded a remedy by Order XLIII. Rule 1 (m) of the CPC to question an order under Rule 3 of Order XXXIII either recording or refusing the compromise. By amendments introduced and enacted in the Code, Order XLIII, Rule 1 (m) has been deleted. Before amendment and such deletion, an appeal lay against an order and not against the decree following. In view of Sub-section (3) of Section 96 of the Code, a debate arose whether in what cases even the consent decrees, which followed such orders, could be subjected to appeals. Mainly two types of cases came before the Courts, firstly, where the very fact of compromise was in dispute and, secondly, where the question was about legality of the compromise itself. Under Clause (m) of Rule 1 of Order XLIII, it was well recognised that appeal lay as to the factum or validity of the compromise itself. See *Onkar Bhagwan v. Gamna Lakhaji & Co.* AIR 1933 Bom 205, and *Gulabchand Ramsukh v. Ramsukh Rampratap* AIR 1926 Bom 39. It was further found that appeal would lie against an order, although a decree had been passed in terms of the compromise. (See *Mathura Prasad Phool Chand and Others Vs. Parmanand Thakur Das and Others*, , dissenting from AIR 1933 Bom 205. In *Misrilal Jalamchand and Another Vs. Sobhachand Jalamchand and Others*, , this Court further recognised the principle that though a composite order has been passed recording a compromise and passing a decree in terms of the compromise, an appeal preferred against it can be treated as one under Order XLIII, Rule 1 (m). After a decree was passed, an application filed to set aside the compromise itself was dealt with by some Courts u/s 151 of the Code. (See *Mangal Mahton Vs. Behari Mahton and Others*, . All this controversy mainly arose because of the terms of Section 96(3) of the Code, for that provision did not permit appeal against the consent decree and that the foundation of the debate was, what results upon an order accepting the compromise was nothing but a consent decree made non-appealable under the Code of Civil Procedure. Even before, the debate was not free from doubt and appeals were entertained when the grievance was that the compromise recorded was hit by the defect of want of authority. (See *Thenal Ammal v. Sokkammal* ILR (1918) 41 Mad 233 : AIR 1918 Mad 656.

10. What are the changes now brought about by several amendments which have revised to a large extent, the provisions of the CPC on this aspect of the matter? It may be observed that when revision of the Code is undertaken and amendments are introduced, the primary object of such amendments is to provide for uniformity in the matters of administration of justice and remedial forums. That being the principle, it behoves the Court to take into account all the relevant amendments with regard to a particular question in issue.

11. As far as Section 96 of the Code, which in the part of the Chapter dealing with appeals from original decrees, is concerned, Sub-section (3) has been retained in the original form and it still contains an injunction that no appeal shall lie from a decree passed by the Court with the consent of parties. The phraseology of Sub-section (3) of Section 96 implies the preceding agreements between the parties on the basis of which decrees follow. Such decrees under the Code are valid and binding, unless set aside by a proper judicial proceeding. (See *Raja of Killikota v. Chaitana Sahu* (1920) 47 Ind App 200 : AIR 1920 PC 139. The right of appeal under Order XLIII, Rule 1 (m) is not affected by the mere passing of the decree u/s 96(3) of the Code. (See *Umashankar v. Shivshankar* AIR 1944 Bom 239 (2); *Onkar Bhagwan v. Gamna Lakhaji & Co.* AIR 1933 Bom 205 and (*Seethamraju*) *Ramanarayana Rao Vs. (Seethamraju) Ramkrishna Rao and Another*, . Because of this provision, the modality of questioning consent decrees was left to the process of law either by filing review or by a regular suit but not by way of an appeal. (See AIR 1932 251 (Privy Council))

12. This being the legal position u/s 96(3) of the Code, the legislative amendments introduced a new scheme by omitting Order 43, Rule 1 (m) altogether and enacting a separate rule, being Rule 1A under Order XLIII. Along with this change, the Legislature came out with further enactment to Order XXIII by enacting Rule 3A in the body thereof.

13. Now, as far as Rule 3A of Order XXIII is concerned, it is clearly intended to pre-empt uniformity in the place of diversity because of decisions of different High Courts. Rule 3A will have to be interpreted on the basis of its own terms and if the words be clear they will have to be given their natural meaning. This Rule 3A provides bar to suit and it provides that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. Therefore, it is apparent that this insertion of Rule 3A bars the remedy of a second suit on the cause of action that the compromise which resulted in the passing of the decree was not lawful. It is not necessary to refer back to the terms of Rule 3 of Order XXIII itself to understand the bar introduced by this new amendment, though the words "not lawful" are the part of the amending enactment. It is enough to say that the Explanation, which is added to Rule 3, provides that an agreement or a compromise which is void or voidable under the Indian Contract Act, 1872, shall not be deemed to be lawful within the meaning of this Rule. In other words, agreements or compromises should be free from the challenges on the ground that they are void or voidable under the provisions of

the Indian Contract Act. The Explanation so enacted has a purpose to make it clear that it is only lawful agreements or compromises that can be the basis of passing the decrees. The Explanation adds a clarification again because of the earlier conflict as to whether voidable agreements within the meaning of Section 19A of the Indian Contract Act were or were not excluded from the operation of Rule 3 itself. The Explanation and the amendments introduced in Rule 3 are self-contained and will have to be restricted to the recording of the compromise and making orders therefor. These cannot further be read in the body of Rule 3A so as to restrict the meaning of the words "not lawful". By their very nature, the words "not lawful" are wide enough and would take in the cases where parties set up want of authority or exceeding of authority in the matters of agreements or compromises on the basis of which the decrees are made. All those types of challenges cannot now, because of bar to suit, be the subject-matter of a second suit.

14. The underlying principle of the enactment of Rule 3A is to obviate the controversy as to whether a second suit lies on the ground that the compromise on which the decree was based was not lawful and, similarly, to provide that the matters of such compromise, which bind the parties, should be agitated in one and the same uniform proceedings. That is made obviously clear by the enactment of Rule 1A to Order XLIII and by the deletion of clause (m) from Rule 1 of that Order. Having barred the suit because of Rule 3A of Order XXIII, the Legislature has now provided by Rule 1A that where any order is made against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced. Sub-rule (1) of this amended Rule provides for a general remedy to question orders on the basis of which the judgment and decree followed. Every order, which results, in judgment and decree, thus is made appealable independently of Rule 1 of Order XLIII. As already indicated, the scheme of Order XXIII, Rule 3 is to the effect that it enjoins upon the Courts make an order and then proceed to pass a decree. Under Sub-rule (1) of this amended Rule 1A of Order XLIII, now both the order as well as the judgment of the court could be subjected to appeal. The words used by the amended Rule 1A show that this is treated to be an appeal against the decree so made. It is only however, limited by the words "that this remedy is available to the party against whom an order is made by the Court." It is, therefore, only an aggrieved party who is given the right of appeal against the decree that follows upon making the order and judgment. Sub-rule (2) of this amended Rule 1A is another independent provision dealing with an appeal against a decree passed after recording a compromise or refusing to record a compromise and it permits the appellant to contest the decree on the ground that the compromise should or should not have been recorded. Sub-rule (2), therefore, clearly confers the right of appeal against the decree after recording a compromise or refusing to record a compromise in terms of Order XXIII, Rule 3. It further provides that in such

appeal, the appellant would be entitled to contest the decree itself on the ground that the compromise should not have been recorded.

15. These amended provisions together show that, firstly, after the decree is made by the Court with the consent of parties upon making an order, that decree is not appealable u/s 96(3) of the Code, and, secondly, a second suit is barred to set aside that decree on the ground that the compromise was not lawful. It is not necessary to consider in what residuary cases the suit would lie. Having enacted the bar to suit in this manner. Order XLIII, Rule 1A (1) clearly provides an appeal against the decree based on such orders and Sub-rule (2) makes it clear that it is an appeal against the decree and in such appeal, when the decree is based on compromise, it is open to the appellant of the kind mentioned in Sub-rule (1) to contest the decree on the ground that the compromise should not have been recorded. All the grounds, including the one available under the Indian Contract Act, to avoid an agreement which is the basis of the compromise could, therefore, be the subject-matter of appeal. Thus, the revision of the Code by these amendments has enacted a clear scheme of providing one uniform proceeding even in the matter of decrees which are based upon compromises or which are made upon orders in that regard made by the Court under Order XXIII, Rule 3.

16. Thus, a party to a suit, which was decreed after accepting the compromise, is only relegated to the remedy of questioning the same under Rule 1A of Order XLIII and a second suit based on the cause of action that the compromise itself was not lawful is clearly barred.

17. The grievance of the present kind of the appellant clearly falls within the bar enacted by Rule 3A of Order XXIII, for, as is already set out, the entire cause of action in the suit is that of want of authority in favour of the advocate to enter into the compromise. That is another way of asserting a cause or raising a grievance that the compromise was not backed with necessary consent and as such was not lawful. Such a challenge by a party to the suit can only be agitated in an appeal and not by filing a second suit.

18. In the result, it has to be concluded that there is no merit in the appeal. The same is dismissed with costs. The stay granted in Civil Application No. 2935 of 1980 as well as the injunction granted in Civil Application No. 372 of 1980 are vacated. Respondents Nos. 1 to 4 to get the costs in one set. while respondent No. 13 in another set, of this appeal.

19. Appeal dismissed.