

(2014) 09 GUJ CK 0069
In the Gujarat High Court

Case No : Appeal From Order No. 100 of 2002, Civil Application No. 42 of 2003 in Civil Application No. 1607 of 2002, Civil Application No. 1000 of 2010 in Appeal From Order No. 100 of 2002, Civil Application No. 859 of 2011 in Civil Application No. 1607 of 2002, Ci

Dayaram Nemabhai Patel		APPELLANT
	Vs	
Chhaganbhai Nemabhai Patel		RESPONDENT

Date of Decision : 11-09-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 23 Rule 3, Order 23 Rule 3A, Order 39 Rule 2A
Constitution of India, 1950 — Article 227

Citation : (2014) 09 GUJ CK 0069

Hon'ble Judges : S.G. Shah, J

Bench : Single Bench

Advocate : Manan A. Shah, Viral K. Salot and Ketty Mehta, Advocate for the Appellant; Alpesh Bhatt, AGP, A.J. Shastri, Amit V. Thakkar, Dhaval D. Vyas, Dhaval G. Nanavati, M.D. Pandya, Prashant G. Desai and R.J. Oza, Advocate for the Respondent

Judgement

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S.G. Shah, J.—Heard Ld. Advocates for the parties at length on different dates and perused the record of the Appeal From Order [hereinafter referred to as "AO"] as well as relevant paper book filed by the parties and record of Special Civil Application No. 21689/2005 [hereinafter referred to as "SCA"] Pursuant to order dated 27/4/2006, such Special Civil Application with Civil Applications are to be notified with this AO, since both the matters are arising out of the same litigation between the same parties before the trial Court.

2. Present AO is filed against judgment and order dated 23/10/2001 passed below exh. 5 in Special Civil Suit No. 377/2000 by 3rd Joint Civil Judge [S.D.] at Surat. The said Civil Suit was filed by the present appellants against present respondents, who are original defendants and now some of them are legal heirs

of original defendants, since pending the appeal, some of the original defendants have expired and their legal heirs are joined as such at relevant time as per order of the Court in concerned application preferred by the appellants for the purpose.

3. Whereas SCA is preferred against order dated 30/9/2005 passed below applications exh. 96 and 117 in the same Special Civil Suit No. 377/2000 by the 2nd Civil Judge [S.D.] Surat, whereby request to amend the pleadings and prayer clause in the suit has been rejected.

4. Considering the fact that factual details in both the matters are common and practically it is interlinked or connected though one is AO and another is SCA, but against orders in same civil suit, it would be appropriate to decide both these matters by this consolidated judgment and order.

5. The parties are referred in their capacity before the Civil Court as plaintiffs and defendants respectively.

6. The plaintiffs have filed a suit on 5/8/2000 claiming their right, title and thereby possession contending that the suit properties are ancestral properties and being legal heirs of the original land owners, plaintiffs are having an undivided share in the suit properties. It is not disputed except with reference to defendant no. 11, that plaintiffs and defendant nos. 1 to 10 are legal heirs of common ancestor, namely Nemabhai Mavjibhai, who expired in the year 1966. Some of the legal heirs of said Nemabhai Mavjibhai have expired without leaving any legal heirs of their own, before filing of such suit. Though there are several different pieces of agricultural land owned by said Nemabhai Mavjibhai, it is contended in the suit that at present the dispute is with reference to the land of revenue survey no. 157 admeasuring 5 acres and 25 guntha i.e. approximately 22,682 sq. mtrs., with a contention that it has been purchased from one Revaben Narotambhai on 3/6/1957 and 16/1/1958 and for such transaction, revenue entry no. 55 was entered into the record of rights which was approved by entry no. 1950 as well as 144 to 174. It is further contended that the said property was purchased in the name of Chimanbhai Nemabhai, Govindbhai Nemabhai, Dayaram Nemabhai, Chhaganbhai Nemabhai, Revaben Nemabhai and Benaben Nemabhai i.e., all the legal heirs of Nemabhai Mavjibhai. Therefore, though it is contended that pursuant to such sale transaction in the name of all legal heirs, present plaintiffs are entitled to 2/3rd share in such property with some other details regarding activities that had been carried out in between the year 1957 till 1975 and thereafter. That surprising and disturbing disclosure and contention is in para 4 of the plaint and application for interim injunction at exh. 5 wherein it is contended that in the year 1988 one Kishorbhai Govindbhai, who was joined as defendant no. 11 in the suit, has created one bogus and sham partition deed and the same was produced before the Court, but it was nonexecutable and voidable from the beginning since it was prepared only for technical reason to save the properties from the ceiling limit under the Urban Land Ceiling Act and even suit was filed only for such limited purpose. It is further stated that based

upon such partition deed, consent decree obtained in the suit filed for the purpose being Special Civil Suit No. 176/1988 and was never executed and it is further stated that such decree is obtained for such technical reason to avoid the ceiling, it is not executable and it was never executed.

7. Before entering into the scrutiny of the entire record which runs into hundreds of pages, it is to be noted that the plaintiffs are blowing both hot and cold in their favour i.e., though in relevant documents, which will be referred hereinafter, on one side plaintiffs were not only parties to such Special Civil Suit No. 176/1988, but they have endorsed the compromise deed filed before the Court in such suit and pursuant to such partition deed and decree, the plaintiffs have sold out several agricultural lands which was otherwise recorded and came in their share in such partition deed and decree. On other side plaintiffs have pleaded that such decree was only to save property from the Urban Land Ceiling Act. Therefore, the plaintiffs are praying appropriate prayer and relief in same litigation between the same parties and thereby whatever condition is comfortable and beneficial to them, they accepted that part and for the rest of the conditions in such partition deed and decree, now they came forward with altogether new story that the property in question was purchased by legal heirs of Nemabhai Mavjibhai and that it was not the ancestral property but coparcenary property of heirs of Nemabhai Mavjibhai. Similar another surprising and disturbing contention is with reference to the defendant no. 11 Kishorbhai Govindbhai, who is practically now deleted from the litigation by the plaintiffs themselves, when the plaintiffs have contended both, in suit and in appeal that there is no such person, namely Kishorbhai Govindbhai as one of the legal heirs of deceased Nemabhai Mavjibhai. Again surprisingly when partition deed produced in Special Civil Suit No. 176/1988, it becomes clear that therein plaintiffs have put their signatures along with signature of said Kishorbhai Govindbhai for partitioning the ancestral property as mentioned in such agreement and submitted the same before the Court, which has ultimately decreed the suit in terms of such partition. It is also obvious that if the plaintiffs want to confirm that there is no such person, namely Kishorbhai Govindbhai and that it is fictitious name, then in this suit, instead of deleting him from the cause title as defendants, the plaintiffs should have in fact proved on record through process server who has to serve the notice on such litigant by identifying that there is no such person at such address and that he is not related to the deceased Nemabhai Mavjibhai in any manner. Though the plaintiffs have tried to produce a pedigree endorsed by the plaintiffs themselves with some Panchas and Talati, the plaintiffs have failed to confirm on record that in fact no such person is in existence or at-least there is no legal heir of Nemabhai Mavjibhai, namely Kishorbhai Govindbhai. On the contrary, the plaintiffs have joined him as defendant no. 11 and thereafter, deleted from the array of cause title, while deleting respondent nos. 8 to 11, amongst whom respondent nos. 8 to 10 are sons of plaintiff no. 1 himself. It is also obvious and clear that in a partition suit, all such family members are necessary parties. However, the plaintiffs have

selected to delete some of them.

8. Therefore, when the trial Court has dismissed the injunction application by impugned judgment and order narrating all other relevant material, prima-facie I do not see any substance in the appeal. I have to record such observation at this stage so as to take up the SCA and other Civil Applications pending on record for consideration before final determination of appeal, since such SCA and Civil Applications are required to be dealt with before decision in the appeal, because in the AO one of the contentions is to the effect that if SCA and thereby amendment is allowed, then factual details and consideration would be different.

9. Whereas in one Civil Application, request is for adducing additional evidence with same submission and request. Such Civil Application No. 42/2003 is preferred by the plaintiffs for producing certain documents on record of this appeal, which is in the form of pedigree as referred hereinabove and several agreements to sell. Such application has been resisted by the defendants by filing affidavit-in-reply and producing certain registered sale-deeds.

10. Though it can be certainly said that AO is to be decided on the material which is available before the trial Court and no additional evidence can be allowed to be produced on record at such appellate stage, without entering into the minute details and merits of such application, when both the parties have annexed certain documents with their pleadings with such Civil Application and on scrutiny, when it is found that all documents are at-least throwing some light on the dispute on hand, without prejudice to the rights of both the parties regarding validity and effect of such documents in the final trial, if it is not proper evidence; at present such documents are ordered to be taken on record, more particularly when reference of such documents would be necessary to negative the plaintiffs' case. Therefore, Civil Application No. 42/2003 is disposed of in above terms.

11. Whereas Civil Application No. 14024/2012 is filed by the defendant nos. 13 to 15 for modification of order dated 14/3/2002; directing to maintain status-quo with respect to the suit land and thereby restraining them from transferring it to third party; in Civil Application No. 1607/2002 for interim relief in AO which was ultimately confirmed by the order dated 2/7/2003. Since entire AO is now decided and when there is no substance in the AO, whereby rejection of interim relief by the trial Court is to be confirmed, the interim relief granted earlier, as aforesaid, would stand vacated and, therefore, now no separate order in Civil Application No. 14024/2012 is to be passed and hence it is disposed of accordingly.

12. Similarly Civil Application No. 859/2011 is filed by the plaintiffs under Order 39 Rule 2[a] of the Code of Civil Procedure [CPC] for alleged breach of the Court's order regarding maintenance of status-quo. Once injunction application is finally decided by this judgment and whereby injunction is refused, I do not see any reason to decide such application separately on merits. However, if at all

the plaintiffs succeed in the suit and if at all there is evidence on record regarding willful disobedience and breach of the Court's order at any point of time, it would be appropriate for the plaintiffs to pray for appropriate relief in the pending suit before the trial Court.

13. Then comes to Special Civil Application No. 21689/2005 filed against the order rejecting the amendment application made by the plaintiffs. If we peruse the applications at exhs. 96 and 117, which were decided by consolidated impugned order, it becomes clear that though the suit was filed in the year 2000 and though injunction application was disposed of in the year 2001, against which AO was filed in the year 2002, probably after few hearings that might have taken place before this Court in the main AO, the plaintiffs have thought it fit to make an attempt to put their house in order by such amendment applications. So far as application at exh. 96 is concerned, it is contended by the plaintiffs that pursuant to documents produced on record of the suit on 8/1/2003, they came to know that their bogus signatures were endorsed in the partition deed which was produced in Special Civil Suit No. 176/1988 wherein decree was drawn on 26/11/1988 and, therefore, contended that some such signatures were made by them on request of the defendants for the proceedings under the Urban Land Ceiling Act and in fact it was taken on blank papers, but the defendants have misused such papers and created such partition deed and produced in Special Civil Suit No. 176/1988 and, therefore, it is to be pleaded that the partition deed produced before the Court in Special Civil Suit No. 176/1988 was with forged signatures. With such story, similar details are sought to be added as para 8 in the plaint, now first time a prayer in the form of declaration that decree dated 26/11/1998 in Special Civil Suit No. 176/1988 is null and void, a prayer in para 13.5 is sought to be added only on 10/2/2003.

14. Whereas by application at exh. 117 on 4/4/2005, certain more details are sought to be amended in the pleadings with reference to the another Civil Suit No. 339/1985 contending that such fact was first time disclosed by the defendant nos. 2 to 7 before the Hon''ble Supreme Court in S.L.P. [Civil] No. 21208/2003 between the same parties wherein order of interim relief granted in Civil Application No. 1607/2002 was challenged. With such relief, now the plaintiffs have prayed to join five new defendants as subsequent purchasers of the properties in question with additional prayer as para-13-1A to declare both the decrees in both previous suits as well as transactions, handwriting, documents, etc., as non-est and nullity, with a declaration that they are not binding to the plaintiffs. It is contended that such facts are first time disclosed on 4/2/2005 and, therefore, such amendment is sought for at this stage.

15. The defendants have resisted both such applications and the trial Court has by reasoned order, rejected both the applications by impugned judgment and order dated 30/9/2005 in such SCA. On perusal of the impugned judgment and order, it becomes clear that the trial Court has taken care of rival submissions and relying upon the fact that though the plaintiffs have already disclosed in para

4 of the plaint that decree in Special Civil Suit No. 176/1988 is null and void when the plaintiffs have let gone the prayer to challenge such decree in the year 2000 while filing the suit under the provisions of Order 2 Rule 2 of the CPC, now such relief cannot be granted. The Court has reproduced the relevant provisions as referred hereinabove, which make it clear that where the plaintiff omit to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. It is clear provision of law that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted. Considering such provisions, the trial Court has come to the conclusion that the plaintiffs have omitted and/or relinquished their claims of challenging the decrees passed in Special Civil Suit No. 339/1985 as well as Special Civil Suit No. 176/1988 and, therefore, now they cannot amend such relief at such belated stage. Moreover, it is clear and obvious that for challenging decree on the ground of fraud or otherwise, separate suit is not maintainable, but aggrieved party has to file an application under Order 23 Rule 3 of the CPC before the same Court. Therefore, when relief for amendment cannot be granted by the Court in such suit filed after the long gap of 12 years, there is no reason to allow such amendment at such stage. It is also contended by the defendants that such amendment is also very belated and, therefore, considering the provisions of law of limitation, when such reliefs are beyond the period of limitation, now it cannot be allowed to be amended so as to make them within limitation. There is substance in such submission.

16. The trial Court has also considered the difference in the nature of the litigation with reference to the total number of properties and total number of litigants as described in the decree of Special Civil Suit No. 176/1988 that in absence of similar challenge against all the properties and against all the litigants, a decree cannot be challenged for selected property and against selected litigants only. Here also there is substance in the submission by the defendants inasmuch as irrespective of total number of litigants, though presence of all of them is must, the disturbing or surprising fact is to the effect that pursuant to consent decree in Special Civil Suit No. 176/1988, the plaintiffs have got several properties in their share and by passage of time, they have sold out several agricultural land by registered sale-deed and gained the sale proceeds of such properties. Therefore, they are not challenging the consent decrees so far as those properties are concerned. Therefore, there is a classic case of taking disadvantage of approbate and reprobate by the plaintiffs inasmuch as they have admitted the consent decree in Special Civil Suit No. 176/1988 for several properties, but for present property being revenue survey no. 157, they are challenging the same decrees and that too by not selecting appropriate legal proceedings.

17. Though, in general, law relating to amendment is liberal, after reasoned order by the trial Court, I do not see any substance so as to exercise powers of

this Court under Article 227 of the Constitution so as to interfere with the impugned judgment. Even at the cost of repetition, it cannot be ignored that the plaintiffs have already disclosed in para 4 of the plaint about the decree in Special Civil Suit No. 176/1988 that it is bogus, sham and voidable. Thereby, if the plaintiffs are aware about and keen to say so in the plaint itself, then the defendants and lower Courts are right in saying that not praying for setting aside such decree in the suit itself results into relinquishing such claim by the plaintiffs and, therefore, now they are not entitled to take disadvantage of their lethargy or lacuna or negligence or selectiveness and hence there is no reason to allow such amendment. It is more so when the defendants have immediately disclosed such facts in their written statement before the trial Court, which is filed on 12/9/2000 i.e., less than 45 days of filing of the suit, wherein also it is categorically disclosed that the plaintiffs were parties to the partition deed and consent decree dated 26/11/1988 in previous suit. Now the plaintiffs could not be allowed to say that they came to know about such decree only when its copy was filed on record in the year 2003. Surprisingly, when the plaintiffs are alleging that such consent decree is bogus, sham and voidable on the date of the suit i.e. 25/2/2000, the plaintiffs have never bothered to produce copy of such decree on record and only when the defendants have produced copy of the decree on record, now plaintiffs have tried to challenge it submitting that they were not party to such decree and their signatures are forged. While referring relevant documents hereinafter, it would be made clear that in fact the plaintiffs have sold several properties which were assigned to them by the same partition deed and thereby in fact they were not only aware, but they have taken advantage of such partition deed and consent decree and, therefore, now such amendment is certainly barred by limitation and cannot be allowed.

Therefore, it is contended by the defendants that though the plaintiffs have accepted the fruits of the decree by selling their respective shares, even if presuming that the decree is nullity, all the properties would become of the joint ownership properties and HUF properties and in that case, when the plaintiffs have executed as many as 30 sale-deeds of some of the joint properties wherein at present there are residential complex constructed, where five apartments having 214 flats and 100 shops are in existence and the plaintiffs did not want to include such properties in the fresh partition while claiming 2/3rd share from the suit property, it becomes clear that the plaintiffs are taking disadvantage of judicial process. It is further contended that in fact, power of attorney holder of the plaintiffs, who has taken keen interest in the proceedings in this litigation with his advocate and consultant are creating all such unhealthy litigation. It is further contended that even before the consent decree in Special Civil Suit No. 176/1988, present plaintiff no. 3/3 Ramanbhai Govindbhai Patel had filed partition suit being Special Civil Suit No. 339/1985, which was decreed on 21/7/1987 and pursuant to such decree, relevant heirs have become absolute owners of properties which were assigned to them and, therefore, they are free to deal with such properties.

18. If we peruse page no. 178 of record of SCA, it becomes clear that such suit was filed by Ramanbhai Govindbhai for himself and as Karta of his branch, wherein list of survey numbers includes survey no. 157, which is subject matter of present litigation, is disclosed as an ancestral properties, contending that all the litigants are legal heirs of ancestor, namely, Nemabhai Mavjibhai. It is also clear that in such suit, no third party is litigant except actual legal heirs of Nemabhai Mavjibhai and, therefore, there is no reason for any misdeed or anything. It is also clear that such photocopy of certified copy shows the signature of plaintiff no. 3/3 Ramanbhai Govindbhai in the plaint and consent terms dated 21/7/1987 produced in such suit at exh. 35 also bears signatures of all legal heirs of Nemabhai Mavjibhai and defendant no. 13 herein, since he was added as defendant on later date by amendment application. Such consent terms also specifically confirms some agreements to sell in favour of defendant no. 13 and categorically discloses that which survey number came into whose share in general terms, but so far as survey no. 157, for which present litigation is filed, is concerned, there is specific statement that it goes in the share of present defendant no. 1 Chhaganbhai Nemabhai with Hiraben and Niruben Chhaganbhai being daughters of Chhaganbhai Nemabhai. As stated above, such consent terms are signed by all the litigants and all the learned advocates and it was recorded by the Court on 27/7/1987 and based upon which consent decree was drawn on the same day. The defendants have also produced the Vakalatnama and other applications bearing signature of plaintiff no. 1 in such suit to confirm that the plaintiffs were aware about such suit. Copy of written statement filed by the defendants in such suit is also on record, wherein in fact, a stand was taken that survey no. 157 is purchased by them, but ultimately it was partitioned with other properties as aforesaid.

19. Relevant citations to arrive at such conclusion are discussed hereinafter, after discussing the merits of main appeal, since some of the citations are applicable to both, AO as well as SCA.

20. Therefore, if the plaintiffs have not challenged such decree in time after the year 1987 and 1988 till the year 2003 and 2005 respectively, there is no substance in such amendment application and, therefore, there is no reason to interfere with the impugned order. Otherwise also, according to the provisions of the CPC, challenge of such consent decree is not permissible in such suit and hence SCA is dismissed.

21. Pursuant to dismissal of SCA as aforesaid, Civil Application No. 820/2013 for early hearing does not survive and hence it stands disposed of accordingly.

22. If we turn to the merits of the AO, in addition to what is stated hereinabove for determining the SCA wherein it has been confirmed that the plaintiffs have not bothered to produce decrees in Special Civil Suit Nos. 176/1988 and 339/1985 and failed to challenge them by appropriate mode and thereby setting aside such decrees and in fact pursuant to such decrees, they have entered into several sale transactions for the properties which are assigned to their share by

such decrees, prima-facie the plaintiffs have no case whatsoever in such suits so as to restrain the defendants, as prayed for, and, therefore, AO also deserves to be dismissed. It is evident from the record that in both such previous suits, present plaintiffs were parties and as explained hereinabove, the plaintiff no. 3/3 had filed Special Civil Suit No. 339/1985 as a plaintiff. If at all the plaintiffs want to plead and submit that they have never filed such suit or signed any such consent terms, based upon which decree was drawn, then the plaintiffs could not and should not have entered into sale transactions of the properties which are assigned to their share pursuant to such decrees. In view of such facts, all such properties i.e., the properties which are sold by the plaintiffs from the year 1988 till the year 2000 when the suit is filed, would also remain joint property and it would be also subject to partition. Therefore, the plaintiffs cannot act in both ways i.e., approbate and reprobate as per his desire and hence there is no substance in the AO.

It is also clear that for challenging the consent decree, the plaintiffs have to take appropriate action in accordance with law before the same Court and when they say that they have never signed such consent terms, if it is so, nobody has restrained or refrained them from filing an application to lodge complaint against the plaintiffs of Special Civil Suit No. 339/1985 for filing forged documents on record. However, so far as Special Civil Suit No. 176/1988 is concerned, since present plaintiff no. 3/3 is the only plaintiff in such suit, he has also to face consequences of such complaint. If at all the plaintiffs want to plead and submit that even Civil Suit No. 339/1985 was not filed by them, then in that case, they should have asked for examination of original plaint and consent terms filed before the Court in such previous suits by handwriting experts at the earliest possible when they came to know about such fraudulent documents. But simply pleading that they have not entered into such compromise and that too after 12 years of compromise and then again waiting for another 12 years in such appeal, certainly goes to show that the plaintiffs are taking disadvantage of judicial proceedings inasmuch as there is interim relief in their favour in this AO.

23. It cannot be ignored that certified copies of relevant consent terms in both the previous suits, copies of consent decrees, copies of sale-deeds executed by the plaintiffs, for the land which came to their share pursuant to such consent decree, are on record and, therefore, what is argued and submitted by the defendants is clear and certain that the plaintiffs are taking advantage of the consent decree for the properties which are assigned to them by such decree and objecting the consent decree for the only survey no. 157, which is assigned to respondents in the same consent decree. On verification of all such consent terms, it becomes clear that it bears signatures of all the plaintiffs. Therefore, now unless the plaintiffs get the consent decree quashed and set aside only because of their statement that they have not signed the consent decree would not make them entitle to have a prohibitory order in their favour and that too after gap of 12 years from the date of such consent decree. Though it can be argued that if there is a fraud, the limitation would not preclude the victim to

prove the fraud and to pray for appropriate relief because of such fraud. However, once the plaintiffs have come to know about such fraud or illegality, it was necessary for the plaintiffs to initiate proceedings and when no proceedings are selected for more than decade from the date of such consent decree, there is no reason to continue the interim relief granted earlier when appeal itself deserves to be dismissed.

24. It would be not inappropriate to recollect certain previous orders passed in this AO. By order dated 15/6/2010 this Court has directed to decide this appeal on priority basis, also directed the trial Court to proceed with the suit and to decide the same expeditiously and preferably within 12 months from the date of such order and it seems that unfortunately, may be because of pendency of this AO, suit is yet not decided finally.

25. The order dated 6/4/2011 discloses that after hearing the matter at length, this High Court was not inclined to entertain the appeal and at such stage, Ld. Advocate for the appellants has sought time to take instruction for withdrawal of the AO since it is his statement that he does not have instruction for withdrawal. Unfortunately, there is no clarity about withdrawal of appeal or otherwise till date. If such orders are strictly followed before the same Court, probably not only the AO, but also the main suit could have been decided on early date. Unfortunately litigants are taking disadvantage of the judicial process.

26. It is already discussed while considering the SCA that if at all the plaintiffs want to confirm that there is no person like Kishorbhai Govindbhai, who was plaintiff in Special Civil Suit No. 176/1988, present plaintiffs could not have deleted him from the array of the parties, but should have tried to confirm that no such person is in existence.

27. The defendants have relied upon following citations, both for AO as well as SCA, which confirm that there is no option but to dismiss the AO being meritless.

I] Pushpa Devi Bhagat (D) th. LR. Smt. Sadhna Rai Vs. Rajinder Singh and Others, wherein though there are several issues, the Hon"ble Apex Court has dealt with the provisions of Orders 23 and 43 of the CPC with reference to consent decree and held that no appeal is maintainable against a consent decree and pursuant to provisions of Order 23 Rule 3, consent decree can only be set aside on an application made under such provision before the same Court on the ground that there was no compromise entered into by the applicant. The Court has, after referring to concerned provisions, made it clear that with effect from 1/2/1977 pursuant to amendment of Rule 3-A in Order 23, even fresh suit is barred to set aside a decree on the ground that compromise, on which decree is based, was not lawful. Summarizing the provision that emerges from the amended provision of Order 23, the Hon"ble Apex Court has made it clear, in addition to other provisions, so far as present issue is concerned, that no independent suit can be filed for setting aside compromise on the ground that it was not lawful in view of the bar contained in Rule 3-A and 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 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 and made a decree in terms of it. In such an application, such party has to establish that there was no compromise. In that event, the Court which recorded 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. Therefore, the validity or otherwise of the compromise is initially to be examined by the same Court.

II] In *M. Meenakshi and Others Vs. Metadin Agarwal (D) by LRs. and Others*, it is made clear that it is well settled principle of law that even void order is required to be set aside by the competent Court of law inasmuch as an order may be void in respect of one person but may be valid in respect of another. A void order is necessarily not non-est. An order cannot be declared to be void in a collateral proceeding and that too in the absence of the authorities who were the authors thereof. The orders passed by the authorities were not found to be wholly without jurisdiction and thus they were not nullities.

In the present case, surprisingly the plaintiffs are seeking declaration of such decree as non-est and nullity qua one property, but want to confirm the same for rest of the properties which they have already sold.

III] In *T.L. Muddukrishanan and another Vs. Smt. Lalitha Ramchandra Rao, and Radhika Devi Vs. Bajrangi Singh and others*, while considering the issue regarding amendment of the pleadings, the Hon'ble Apex Court has held that if prayer is barred by limitation, is sought to be added after such period of limitation, then such amendment cannot be allowed. In the present case, certainly the prayer to quash and set aside the decrees in previous suits are prayed to be amended after long time and certainly beyond the period of limitation. It was held that if such amendment is allowed, would defeat right accrued in favour of defendant.

IV] In [1] *Liliben Through Power of Attorney and Others Vs. Ramilaben Patel*, , [2] *Shiv Gopal Sah @ Shiv Gopal Sahu Vs. Sita Ram Saraugi and Others*, and [3] *Rajkumar Gurawara (Dead) thr. L.Rs. Vs. S.K. Sarwagi and Co. Pvt. Ltd. and Another*, , the Division Bench of this High Court in [1] *Liliben's* case and Hon'ble Apex Court in other decisions at nos. [2] and [3] have enumerated certain conditions for grant of application for amendment of the plaint viz., nature of suit, introducing new cause of action and law of limitation. It was confirmed that if any of such condition is otherwise, then amendment cannot be allowed.

V] *Horil Vs. Keshav and Another*, wherein it was held that fraudulent compromise includes in the terms of "not lawful" for which provision is made in Rule 3-A of

Order 23. Confirming that a compromise forming basis of the decree can only be questioned before the same Court that recorded compromise and fresh suit for setting aside compromise decree is expressly barred under Order 23 Rule 3-A and expression "not lawful" used in Order 23 Rule 3-A also covers a decree based on a fraudulent compromise. In view of such specific determination and provisions of law, when compromise decree cannot be challenged in the present suit, the amendment cannot be allowed since it would change the nature of the suit and when such decree is not quashed and set aside, the plaintiff has no case in his favour.

VI] C. Beepathumma and Others Vs. V.S. Kadambolithaya and Others, wherein the Hon''ble Apex Court has dealt with doctrine of election and held that he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument and must conform to all its provisions and renounce all rights that are inconsistent with it. This principle is often put in another form that a person cannot approbate and reprobate the same transaction.

Therefore, in the present case, when the plaintiffs are taking advantage of decree for some properties, now they have to accept the entire compromise and they cannot be allowed to object the same. Hence, there is no substance in the appeal at all.

VII] Sita Ram Vs. Radhabai and Others, [by three Judges Bench], wherein the Hon''ble Apex Court has dealt with maxim "in pari delicto potior est conditio defendentis" and explained the same with reference to the Contract Act and Civil Procedure Code. It explained the principle that the Court will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud, is expressed in the maxim.

VIII] In Jadav Prabhatbhai Jethabhai Vs. Parmar Karsanbhai Dhulabhai, [Full Bench of this High Court], it is made clear that after discussing the decision on the subject by the Hon''ble Apex Court, suit for declaration that any order is nullity has to be filed within the period of limitation, which is three years. Thereby allegation that decree in the suits of the years 1985 and 1988 are nullity, the same are required to be challenged within three years.

In the present case, it was challenged after 10 years and that too only by filing an amendment and in a fresh suit which is otherwise barred and, therefore, when suit is barred by limitation and not maintainable, there is no reason to entertain the appeal.

By referring some judgments of the Hon''ble Apex Court, it is observed by the Full Bench that an order even if not made in good faith still an act capable of legal consequences. Unless necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose. It is further observed that the Court invalidate an order only if the right remedy is sought by the person in the right proceedings and circumstances. Even if the order may be hypothetically a nullity,

but the Court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy and because he has waived his rights.

IX] In The Joint Action Committee of Airlines Pilots Associations of India and Others Vs. The Director General of Civil Aviation and Others, the Hon''ble Apex Court has reconfirmed that the appellant cannot approbate and reprobate.

X] In Mashyak Grihnirman Sahakari Sanstha Maryadit Vs. Usman Habib Dhuka and Others, the Hon''ble Apex Court has reconfirmed that amendment sought in the plaint is, if belated and also an afterthought, it is not liable to be allowed. Similar situation is there in the present suit and, therefore, I do not hesitate to disallow such an amendment.

XI] In Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Regd.) Vs. Ramesh Chander and Others, the Hon''ble Apex Court has considered provisions of Order 2 Rule 2 that when there is any omission to claim relief while filing the suit, it would amount to relinquishment of that part of suit and thereby subsequent inclusion of same plea cannot be allowed when it is barred by limitation.

28. As against above settled legal propositions in the aforesaid cases, the plaintiffs-appellants are relying upon a judgment rendered in the case of A.V. Papayya Sastry and Others Vs. Government of A.P. and Others, wherein it is stated that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. There cannot be any second thought on principle, but it cannot be ignored that in the same judgment the Hon''ble Apex Court has also observed that litigant who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation, if he withholds a vital document in order to gain advantage, then he would be guilty of playing fraud on the Court as well as on the opposite party. Such condition is applicable to plaintiffs herein. Therefore, only because of one such judgment which simply confirms the settled legal position, without considering the facts and circumstances of the case on hand, it cannot be held that the plaintiffs have a right to sue and get interim relief, as prayed for.

29. The defendants have submitted a list of properties and sale-deeds executed by the plaintiffs which are in the year 1989 i.e., after the consent decree, as well as list of properties assigned to different successors pursuant to such decree. Such details are not material at present since it is on record which confirms that the plaintiffs have sold several properties in the year 1989.

30. The plaintiffs have emphasized that there is no dispute regarding purchase of survey no. 157 of Village Umra in June 1958 in personal capacity by the plaintiffs and, therefore, it cannot be treated as an HUF property. However, fact remains that when property is purchased in joint name of all the members of HUF family, only because HUF is not disclosed as purchaser, at this stage it cannot be said that it is not HUF property. It is settled legal position that if member of the HUF

earns or procures property, it is to be entered into common hotchpot and such properties are to be treated as a joint property. In any case, at such interim stage it cannot be determined and concluded that particular property is not ancestral property when it was part of the pleadings and compromise in previous suit wherein the plaintiffs have also put their signatures. So far as the plaintiffs' allegation regarding validity of such previous compromise and partition decree is concerned, as aforesaid, the plaintiffs are free to initiate appropriate steps, but in any case fresh suit is not maintainable.

31. It is also emphasized by the plaintiffs-appellants that when builder was made party in such previous suit for partition, it becomes clear that the suit was filed with some collusion since there was no need of a builder to be joined in a partition suit as a defendant. Though such arguments look to be attractive, the fact remains that in such partition suit the plaintiffs were also not only party but signatory of the compromise deed, builder was joined pending the suit and that too only because some of the coparceners had created some interest in favour of the builder. In any case, if particular person is a necessary party to decide certain thing, it cannot be said that why suit is filed against him. It is yet to be proved on record that actually who is in possession and in any case, if possession of the property is that with third party, it would be necessary to join him as a defendant to get possession from him. It is also obvious that the plaintiff is supposed to take pleas and to pray all possible prayers in the suit and, therefore, if any, third party is claiming any right over the suit properties which is to be partitioned amongst coparceners, then there is nothing wrong in joining such third party as a defendant litigant in such suit.

32. So far as limitation is concerned, it is tried to be emphasized that in the year 2000 they saw board of the builder in the suit property and, therefore, they came to know about the disputed documents. Whereas so far as several signatures are concerned, it is pleaded and admitted that their signatures were taken for releasing the land from urban land ceiling and they signed it in good faith. Some power of attorney deed was also for the same purpose. Therefore, when the plaintiffs admit their signatures on certain documents, now unless they allege and prove fraud, if any, committed by the otherside with the help of such document, bare version of the plaintiffs cannot be accepted, more particularly after more than a decade.

33. The plaintiffs have also relied upon some statements from police investigation wherein Paresh Dalal is alleged to be stated that he signed as Kishor Govindbhai and said Paresh Dalal was serving with the builder. However, though such evidence may help the appellants -plaintiffs to prove fraud by the otherside, if such evidence is properly produced on record, at present such a statement, which is not signed by Paresh Dalal, but recorded by the Investigating Officer in the name of Paresh Dalal cannot be considered against the defendants.

34. It cannot be ignored that there is allegation regarding commission of fraud by Paresh Dalal, Ranchhodbhai Patel, Navinbhai Patel and advocate Mr. Ashok.

However, in absence of evidence regarding any fraud, bare words of any one person cannot be taken into consideration for determining the issue at-least at such preliminary stage in absence of proper scrutiny of such evidence by way of cross-examination of such person by otherside.

35. It is also emphasized by the plaintiffs that distribution in partition deed and consent decrees are not equal and hence it is not valid. This is not the correct position of law and only on that ground it cannot be said that entire proceedings and partition is fraud and thereby null and void, more particularly when the plaintiffs have admitted such partition and consent decree for the lands which are endorsed in their names.

36. I have gone through the synopsis of submissions of respondent nos. 12 to 15 and perused the citation referred by them. Since I am dismissing the appeal which is in their favour, minute details of such synopsis are not relevant at present, since most of the points are taken care of by the respondent nos. 1 to 11 which are considered hereinabove.

37. In view of the above facts and circumstances, I do not find any substance in the appeal and hence Appeal From Order is dismissed.

38. Since the Appeal is dismissed, interim relief granted earlier in Civil Application No. 1607/2002 stands vacated and all such Civil Applications praying for interim relief, for vacating such interim relief and for fixing date stand disposed of, as aforesaid. Rule, if any, is discharged.

39. So far as Civil Application No. 8341/2009 is concerned, since main AO is dismissed, there is no reason to entertain any such application for bringing heirs of deceased respondent on record at this stage. The proposed legal heirs are otherwise present before this Court as litigants in their personal capacity. However, parties are at liberty to apply for such amendment in the suit where period of pendency of such application is to be excluded for calculation of limitation. Hence the application stands disposed of accordingly.

Further Order : [page 39]

40. After pronouncement of the judgment, Ld. Advocate Mr. N M Kapadia is requesting to stay the operation of this judgment for eight weeks since there was interim relief in their favour for 11 years. Considering the facts and circumstances, though there is now no necessity to continue interim relief which was in their favour for couple of years when the matter has been dragged for a decade with such interim relief, it would be appropriate to extend the same for couple of weeks only. Therefore, operation of this judgment is stayed for four weeks hereinafter.