(2012) 08 BOM CK 0166

In the Bombay High Court

Case No : Civil Application No. 4684 of 2009 in First Appeal No. 21 of 2005

Khalil Haji Bholumiya Salar and Others — APPELLANT

Vs

Parveen and Others — RESPONDENT

Date of Decision : 07-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, Order 23 Rule 3A, Order 23 Rule 3B, Order 43 Rule 1A, 107(2)
Penal Code, 1860 (IPC) — Section 395, 397

Citation : (2013) 1 ABR 287 : (2013) 3 MhLj 182

Hon'ble Judges : R.P. Sondurbaldota, J

Bench : Single Bench

Advocate : G.S. Godbole instructed by . Mr. Sidharth Ranghe, for the Appellant; Z.A. Jariwala instructed by y. M/s. Thakore Jariwalla and Associates Advocate for Respondent No. 2-Original Defendant and Mr. S.A. Kumbhakoni, Advocate for Respondent No. 3-Original Defendant, for the Respondent

Final Decision : Dismissed

Judgement

Smt. R.P. Sondurbaldota, J.—The applicants, who are strangers to the First Appeal seek, by this Civil Application, to set aside the consent order dated 15th October, 2009 passed therein. Respondents no.1 and 2 are the appellants and original plaintiffs. Respondents no.1 to 3 are the respondents to the appeal and the original defendants. The applicants hereinafter will be referred to as ''the applicants'', respondents no.1 and 2 as ''the appellants'' and the other respondents as ''the respondents''. The undisputed facts of the case are that, one Mohammed Hanif Ahmedsaheb Karigar owned substantial properties at Solapur including final plot no. 1641 admeasuring 208.5 sq. mtrs with a bungalow standing thereon, known as " Ashiyana Bungalow" and an open piece of land admeasuring 4495 sq. mtrs at Gat No. 9/2/2B. Mohd. Hanif Karigar died on 20th April, 2004 leaving behind the respondents as his heirs. The appellants, the original plaintiffs are his widow and one daughter, Shamin. The other respondents-the original defendants are his other daughters, Parveen, Rahima and son-Nazir. The appellants filed Special Civil Suit No. 105 of 1990 against the respondents for partition and separate possession of the movable and immovable properties left behind by Mohd. Hanif Karigar. The respondents had filed counterclaim to the suit. The suit and the counter-claim came to be dismissed by the trial Court. The appellants on 30th June, 2000 filed the First Appeal herein, which came to be numbered in the year 2005 as First Appeal No. 21 of 2005. During this period, respondent no.2 by two registered documents called " Hiba Bill Iwas" dated 17th February, 2003 and 20th December, 2003 alienated his undivided share in the two properties in favour of the applicants and one more person. Within a fortnight thereafter, i.e. on 30th December, 2003 at the instance of the applicants and respondent no.2, the name of appellant no.1 came to be deleted from the revenue records and the name of the applicants added therein, as the owners of the two properties. The mutation of revenue records was challenged by respondent no.3, by filing application dated 5th February, 2004. The City Survey Officer, rejected the application by his order dated 8th March, 2004. There was also a complaint made by respondent no.3 to the Tahsildar. That complaint came to be rejected on 10th March, 2004. Then, respondents no.1 and 3 got a public notice issued in Daily Lokmat, claiming a right of pre-emption in respect of the two properties and thereafter filed Regular Civil suit No. 361 of 2004, on 23rd April, 2004, against the applicants, respondent no. 2 and the wife of respondent no.2 to exercise their rights of pre-emption in respect of the two properties. The applicants have filed their written statement to the suit.

2. During the pendency of the suit itself, applicant no.1 obtained loan in the sum of Rs. 25,00,000/- from Solapur Social Urban Co-operative Bank by mortgaging the land at Gat No. 9/2/2B to the extent of one-third share.

3. In April, 2009 respondent no.2 filed a criminal complaint against the applicants in relation to the two properties. The applicant and fourteen others, were arrested by the police and were in detention for some time. On 20th May, 2009 respondent no.2 filed Special Civil Suit No. 124 of 2009 against the applicants and the other co-donee for a declaration and permanent injunction relating to the two properties. He had applied for an interim reliefs against the applicants and the co-donee. That application was dismissed by the trial Court.

4. On 7th October, 2009 the appellants and the respondents executed an arbitration agreement referring the dispute in the present first appeal to the sole arbitration of Dr. Mohammed S. Razak, husband of respondent no.1. The Arbitrator passed his award on 14th October, 2009 of distribution of the properties, left by Mohd. Hanif Karigar amongst his heirs including the above-mentioned two properties. Under the Award, the land at Gat No. 9/2/2B went to the share of the respondents. In view of the arbitration award, the appellants and the respondents filed consent terms in the First Appeal on 15th October, 2009 inviting decree in terms of the consent terms and consent decree came to be passed in the First Appeal.

5. The grounds of challenge to the consent decree as set out in the application

are that, the same is not lawful and that it has been obtained by playing deliberate fraud upon the Court and with the intention of defeating the rights of the applicants. Mr. Godbole, the learned Counsel for the applicants, submits that a deliberate fraud has been played upon the Court by the appellants and the respondents by suppressing the material facts of the two alienations by " Hiba Bill Iwas" and the rights created in favour of the applicants. He submits that appellant no.2 and respondents no.1 and 2 have deliberately entered into arbitration agreement appointing husband of respondent no.1 as the sole arbitrator to obtain award favourable to them and on the strength of such an award, they have obtained the consent decree. Relying upon the decision of the Apex Court in the case of S.P. Chengalvaraya Naidu (Dead) by Lrs V/s. Jagannath (Dead) by Lrs. and Others reported in (1994) 1 SCC page 1, he submits that the consent decree is liable to be set aside since fraud vitiates every action including a contract or decree of a Court.

6. There are four affidavits filed in the Civil Application on behalf of the respondents. The application is opposed essentially by respondent no.2. Respondent no.3 has filed affidavit supporting the claim of the applicants for setting aside the consent decree. Respondent no.1 had initially filed affidavit dated 18th January, 2010 to oppose the application, but later on filed another affidavit dated 19th March, 2012 to support it. The appellants have not even appeared to oppose the Civil application.

7. Respondent no.3, in her affidavit-in-reply states that on 24th September, 2009 a stamp paper was purchased in the name of appellant no.2 for executing an agreement referring the entire dispute to the Arbitrator and appointing Dr. Mohammed S. Razak, the husband of respondent no.1 as the sole Arbitrator. She claims that, she had brought the fact of two alienations by respondent no.2 to the notice of the Arbitrator, time and again. At paragraph-10 of her affidavit-in-reply, respondent no.3 states that before passing of the award, the Arbitrator had sent her some questionnaire on her e-mail and requested for answers within two days. In reply to the questionnaire also, she had communicated to the Arbitrator about the transactions of Hiba Bill Iwas. But, the Arbitrator intentionally ignored the two documents of Hiba Bill Iwas, and passed the award. Respondent no.3, then refers to the suit filed by her alongwith respondent no.1 for declarations, for exercise of the alleged right of pre-emption and for possession and states that the suit was filed on the ground that, the two documents executed by respondent no.2 in favour of the applicants, were not the documents of Hiba Bill Iwas, but are the sale-deeds. The other defects in the Arbitrator''s award referred to by her is of inclusion of the entire property at Gat No. 745/2B1/2A in the assets of Mohd. Hanif Karigar available for distribution. She contends that, half of the property has already been sold to clear debts of the father and remaining half had been sold by respondent no.2 and appellant no.2, who have appropriated the sale proceeds thereof. As regards the property of Ashiyana Bungalow, she claims that the entire bungalow was never in possession of respondent no.2 at any point of time and that she has been in

possession of the entire top floor of the Bungalow. At paragraph-11, respondent no.3 claims to have been a victim of threat and misrepresentation. She alleges that, her signature on the consent terms had been taken at 11.00 a.m. on the date of the consent decree, without giving her an opportunity to read the contents of the consent terms and on the assurance, that the dispute in the suit would be settled later on.

8. As already mentioned above, there are two affidavits-in-reply of respondent no.1 on record. The first affidavit is dated 18th January, 2010 filed through her Constituted Attorney, one Gulam Husain Kasam Saheb Shaikh and the other is dated 19th March, 2012. In her first affidavit, she contends that the present application is mischievous, malafide and an attempt on the part of the applicants, father of applicant no.2 and respondent no.3 to deceive this Court. She contends that, she had appointed respondent no.3 as her Constituted Attorney vide power of attorney dated 17th August, 1989. This power of attorney was misused by respondent no.3 to harass and persecute respondent no.2 and also to make false statements on behalf of respondent no.1, without her knowledge. Respondent no.3, also conducted Special Civil Suit No. 105 of 1990 in the Court of Civil Judge Senior Division, Sholapur without the knowledge and consent of respondent no.1 by using the power of attorney. Therefore, respondent no.1 had cancelled the power of attorney on 8th August, 2009. As regards the arbitration proceedings, respondent no.1, states that the same had commenced in July, 2009 and the appointment of her husband, Dr. Mohammed Razak as an arbitrator was a mutual decision of all the parties. The arbitrator had invited opinions from everybody in writing, since it was the desire of respondent no.3 that there should not be face-to-face meeting between her and respondent no.2 through arbitration. This request of respondent no.3 was honoured by the arbitrator by conducting the arbitration proceedings through written submissions. The affidavit alleges that, respondent no.3 had never disclosed the interest of the applicants in her written submissions made to the arbitrator. After conclusion of the arbitration proceedings, respondent no.3 had read and agreed with the terms of the arbitration award and sent a letter to that effect to Advocate, Nitin Jamdar appearing for her. As against the applicants, the affidavit states that they had ample opportunity to get themselves impleaded to the First Appeal, because they had knowledge of it since the year 2004 i.e. for about 5 years. The affidavit is ended with an allegation that, the application is nothing but a clever and scheming collusion between the applicants, father of applicant no.2 and respondent no.3 to derail a just and equitable settlement of the dispute, which had been simmering for almost 20 years.

9. Two years thereafter, i.e. on 19th March, 2012 respondent no.1 filed second affidavit, completely turning volte-face. She alleges that her Constituted Attorney, Gulam Husain Kasam Saheb Shaikh had filed the first affidavit without consulting her and without informing her about anything. Therefore, she had cancelled the power given to him w.e.f. 20th February, 2012. In the affidavit, she alleges that respondent no.2 had misguided the arbitrator about certain facts. As

stated in the affidavit of respondent no.3, the property at Gat No. 745/2B/1/2A described at Estate Item no.2 in the arbitration award, had been sold by respondent no.2 to partly clear the debts of the father and partly for his own benefit. In this affidavit, however, respondent no.1 does not throw any light on the proceedings before the arbitrator and her own participation in the arbitration proceedings.

10. Respondent no.2, the main contestant of the application, on his part makes allegations of collusion and unholy alliance between the applicants, respondent no.3 and father of applicant no.2 who was an Inspector of Police attached to Anti-Terrorist Squad and currently under suspension. He denies that, the applicants were unaware of the proceedings of the First Appeal. According to him, the fact of pendency of the First Appeal was disclosed in the written statement filed in Regular Civil Suit No. 361 of 2004 on 6th October, 2004. It is also contended that the Civil Application as filed is not maintainable and that it is necessary to the applicants to adopt independent proceedings. He states that independent proceedings have infact already been initiated by the applicants, by filing Civil Misc. Application No. 341 of 2009 in the Court of District Judge at Solapur to challenge the arbitration award.

11. According to respondent no.2, the father of applicant no.2 and respondent no.3, have been harassing him with an intent that respondent no.2, surrenders his share in the inheritance. For the sake of getting larger share of the estate, respondent no.3 is alleged to have, gone to the extent of alleging that respondent no.2, is not the son of her father but is the son of her mother. As regards the father of applicant no.2, it is alleged that he is a renegade police officer, who has in the past falsified evidence and had been dismissed from service on 28th November, 2006.Later, with the political intervention he was reinstated. He is alleged to have abused his official position to intimidate various people and to cheat them of their rights which complaints are under enquiry by the police department.

12. Respondent no.2, alleges that the two documents of gift, Hiba Bill Iwas had been executed by him in duress which is a part of an on-going enquiry by the police. He had immediately cancelled the gift deeds. The cancellation has been confirmed by one of the donees, Abdul Rashid Mohd. Hanif Shaikh by executing document dated 20th December, 2003 wherein he confirms return of the entire consideration under Hiba Bill Iwas, by five bankdrafts to himself and the applicants. As regards the mutation entries claimed by the applicants, respondent no.2 states that the application was made by one, Madan Chakote who had no authority to act on behalf of respondent no.2. He had filed the application in collusion with the applicants. Therefore, respondent no.2 has initiated criminal proceedings against him for misrepresentation. The affidavit contains serious allegations against respondent no.3, who alongwith the applicants, is facing charge u/s 395 and 397 of Indian Penal Code for attacking respondent no.2 and his family. It is alleged that, respondent no.3 had an extra-

marital affair with one, Abu Munshi, whom she married after divorcing her husband, Colonel. Latif. She was already embroiled with the relatives of Abu Munshi in a property dispute. In the year 1989, Abu Munshi died in a traffic accident. Then, respondent no.3 approached respondent no.2 alongwith her current escort, Mr. Ibrahim Shaikh and demanded that he transfers his share in the property, to her and threatened to otherwise falsify accuse him of murdering her husband, Abu Munshi. Respondent no.2, refused to succumb to the demand. Then, when the death of Abu Munshi was recorded as an accidental death, respondent no.3 filed a Writ Petition No. 1358 of 1989 in this court against the Superintendent of Police, alleging that he had not registered proper case of murder because of pressure from respondent no.2. Pursuant to the orders of the High Court, the case came to be registered and transferred to State, CID Crime, Pune for investigation. The investigation revealed that, it was a false complaint made to pressurize respondent no.2 in a property dispute. Finally, a B-Summary report was filed in the court of Judicial Magistrate First Class, Solapur. Respondent no.3, then filed another petition, being Writ Petition No. 836 of 1990 challenging the acceptance of B-Summary by the learned Magistrate. By the orders passed on the petition, the matter was referred back to the learned Judicial Magistrate, First Class for disposal. He once again studied the case and gave detailed judgment of forty pages, supporting the acceptance of B-Summary. This order again came to be challenged by respondent no.3 by filing Writ Petition No. 447 of 1991. This time the petition was rejected with observations that, an ordinary, pure and simple accident case had been sought to be converted into a murder case purely on account of previous enmity. Respondent no.2, alleges that it took about 3 1/2 years for the entire episode of death of Abu Munshi, to get cleared. During this period, he, who is a resident of Canada was forced to remain in India. Consequently, he suffered huge financial losses which has almost ruined his business in Canada. Respondent no,2, then disheartened by the harassment of respondent no.3, decided to go away permanently to Canada by gifting his share in the properties to his friend, one Rashid Shaikh. The decision of gift came to be disclosed by Rashid Shaikh to Mehmoob Mujawar, father of applicant no.2. Mr. Mujawar, then approached respondent no.2 with a request to include the name of applicant no.2, his daughter in the gift. When respondent no.2, refused the proposal of Mehboob Mujawar, he threatened to involve respondent no.2 in the incident dated 8th to 10th August, 2003 when some bombs were discovered at Sholapur and about 30-40 muslim boys had been arrested and charged for making the bombs and placing them in the city. In order to escape the demands of Mehboob Mujawar, respondent no.1, left India on 23rd August, 2003 and went to Canada without informing Mujawar. But thereafter, Mujawar went on badgering him with telephone calls for 2 months, threatening to have him extradited through an Inter-Pol, `Red-Corner Notice''. Being thoroughly intimidated about this and feeling concerned about his reputation built up in Canada over last 25 years, respondent no.2 returned to India. Mehboob Mujawar then introduced respondent no.2, to applicant no.1 a local businessman and demanded that his name be also included in the gift as he was to finance the further development of the property. Thereafter, the two documents of Hiba Bill Iwas, came to be executed. Thereafter, respondent no.2 was informed by his brother-in-law, Mr. Noorul Hasan Alati, that an appeal had been filed in the matter of Special Civil Suit No. 105 of 1990 and that the act of gift by respondent no.2 vide Hiba Bill Iwas would tantamount to contempt of court. Respondent no.2 then, immediately informed the donees that the gift was void since the matter was subjudice and returned the amount of ''Iwaz'' to the main donee, Mr. Rashid Shaikh by bank drafts who issued receipts for return of money and acceptance of the cancellation. Mehboob Mujawar had no option but to accept the situation. However, respondent no.3, on behalf of herself and acting on the power of attorney of respondent no.1, filed Regular Civil Suit No. 361 of 2004 alleging that the gift was infact a sale and seeking to exercise their right of pre-emption. In the year 2004, Mehboob Mujawar was suspended on an anti-corruption charge. This brought an end to the pressure exerted by him upon respondent no.2. In the year 2006, respondent no.2 returned to India to live here permanently. However, this upset respondent no.3 and Mujawar. In the year 2008, Mujawar was reinstated and came to be attached to Anti-Terrorist squad. With that, he once again started badgering respondent no.2 and demanding the property from him. Then, respondent no.3, Mujawar and applicant no.1 hatched a conspiracy by dispossessing respondent no.2 from the house, i.e. Ashiyana Bungalow. On 12th April, 2009 Mujawar and others broke into the premises and dumped their junk furniture there. In a complaint with the police vide C.R. No. 80 filed at the instance of respondent no.2, all the three persons were arrested. Since the incident, the police have given protection to respondent no.2 at his house, Ashiyana. On 14th April, 2009 Mehboob Mujawar, threatened respondent no.2 with a revolver, in respect of which a complaint, vide C.R. No. 83 has been filed. On the same day, Mehboob Mujawar and his wife were warned not to disturb the peace. On 15th April, 2009 Mujawar, respondent no.3, her escort, her son, applicant no.2 and some more persons entered into the house of respondent no.2, and attacked him. In connection with that incident, complaint vide C.R. No. 86/2009 has been filed with the police.

13. Having failed in the attempts of browbeating respondent no.2, another scheme was hatched by respondent no.3 who held the power of attorney from respondent no.1 to appoint Dr. Mohammed Razak as the Arbitrator, thinking that he would be pliable and would give a biased award in favour of respondent no.3. In the meanwhile, respondent no.1 learnt about the criminal activities of respondent no.3 and revoked the power of attorney given to her on 8th August, 2009. Dr. Mohammed Razak, acting independently made and published his award on the basis of which the consent terms were signed and filed in this Court. He had invited written submissions from all the three parties.

14. Thus according to respondent no.2, the applicants have no interest whatsoever in any of the properties and the present application is nothing but an attempt to grab the property. It is also contended by respondent no.2 that, the present Civil Application for setting aside the consent decree is not maintainable,

the applicants not being parties to the suit and that the appellants are required to file independent proceedings.

15. Since there is an objection taken to the maintainability of the Civil Application, that question will have to be decided before touching upon the merits of the case. Mr. Godbole, the learned Counsel for the applicants submits that, it is well established by several decisions of the Apex Court that in view of the provisions of Order 43 Rule 3A CPC (hereinafter referred to as ''CPC''), independent proceedings for revoking a compromise decree are not maintainable. Mr. Jariwala, learned Counsel for respondent no.2, submits per-contra that, the provision of Order 43 Rule 3A CPC, is not applicable to strangers to the compromise decree. It is applicable only to the parties to the proceedings. In this connection, he relies upon decision of Allahabad High Court in the case of Smt. Suraj Kumari Vs. District Judge, Mirzapur and others, for the following observations therein :

22. The petitioner''s second submission regarding the applicability of O.23, R. 3-A of the CPC is misconceived the provision is confined only to the parties to the suit. The said provision is not applicable to a stranger to the said compromise decree. A suit by stranger to set aside the compromise decree, which affects his rights is not barred by the said provision. Order 23, Rule 3-A of the CPC cannot be read dehors its earlier provision of the same chapter. The said provision is only a part of the entire Chapter of Order 23 of the CPC which prescribes provisions for withdrawal and adjustment of the suit. Order 23, Rule 3 of the CPC provides for a situation where the parties have arrived at a compromise. Order 23, Rule 3 and Rule 3-A of the CPC as added by Amending Act No. 104 of 1976 read together, makes it clear that a party to the suit is debarred from filing suit for setting aside compromise decree on the ground of being unlawful. Such a party has remedy by moving appropriate application before the Court concerned which has passed the compromise decree.

Identical question had arisen before the Karnataka High Court in Siddalingeshwar and Others V/s. Virupaxgouda and Others, reported in AIR 2003, Karnataka, page 407. In that case, Karnataka High Court was considering challenge to a decree in compromise in a representative suit passed without complying Rule 3B of Order 23. The challenge was by the persons interested in the representative suit, to whom no notice was issued under Rule 3B of Order 23. Such persons were held as persons who are not parties to the suit and entitled to file a separate suit seeking appropriate relief in regard to compromise decree. The relevant observations in the judgment are :

A bar is imposed to challenge the compromise in a separate suit because a party to a compromise is entitled to challenge the compromise as not lawful, either by filing an application in the same suit or by filing an appeal under Order 43 Rule 1A. But such remedies are available only to the parties to the suit. A person who is not a party to the suit, cannot obviously file an application in the suit, or an appeal, to challenge a compromise as being not lawful.

Order 23 of CPC deals with adjustment/compromise of a suit. An appeal is a continuation of the suit. Section 107 (2) CPC provides that subject to sub-section 1, the appellate Court shall have same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein. Therefore, the provisions of Order 23 apply in full force to appeal proceedings. By amendment of CPC, Rule 3A has been inserted in Order 23 to bar a suit to set aside a decree on the ground that the compromise on which the decree is based is not lawful. Therefore, if a party to a suit who enters into a compromise in terms of which a consent decree is made, wants to challenge it on the ground that it is not lawful, the remedy available to him, is either to file an application in the very suit to recall the consent decree on the ground that compromise is not lawful, or is vitiated by fraud, or to file an appeal under Order 43 Rule 1A CPC, contending that the compromise was not lawful and that it ought not to have been recorded. A compromise decree is based on the agreement arrived at between the parties, which gets a seal of approval from the Court. A stranger to the suit is obviously a stranger to the agreement of compromise. He cannot file an application either in the suit or in the appeal proceedings to challenge a compromise decree as he is not a party to the suit. Therefore, the bar under Rule 3A of Order 23 cannot be extended to him. The provision must confine only to the parties to the suit, who are parties to the agreement to compromise. Hence, I am in respectful agreement with the decisions of the Allahabad High Court and Karnataka High Court, holding that a stranger to a compromise decree cannot file an application in a suit or an appeal to challenge a compromise, as not being lawful, but must file a separate suit for the purpose. The application filed by the applicants, therefore, is required to be dismissed as not maintainable. Since the application is not at all maintainable, there is no need to enter into discussion on the rival contentions as regards the merits of the application. The Civil Application is dismissed.