
(2000) 10 BOM CK 0029

In the Bombay High Court

Case No : Notice of Motion No. 1765 of 1999 in Suit No. 987 of 1996

Mathulla Verghese and Another

APPELLANT

Vs

Mrs. Vijaya Rajaratnam and Others

RESPONDENT

Date of Decision : 18-10-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3

Citation : (2001) 3 BomCR 205 : (2001) 1 BOMLR 405

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Advocate : Mr. K.J. Presswala, instructed by Mulla and Mulla, for the Appellant;
Mr. M.R. Irani and Ms. S. Shridharan, for the Respondent

Judgement

D. G. Deshpande, J.—This notice of motion has been taken out by the plaintiffs under Order XXIII Rule 3 of the Civil Procedure Code, 1908 to record that the Suit No. 987 of 1996 i.e. the present suit has been settled between the Plaintiffs and the defendant Nos. 3 and 4 on one hand and defendant Nos. 1 and 5 on the other hand by lawful compromise/agreement in writing and signed by the parties as corrected in the presence of the advocates for the parties by Justice Gokhale, and as per prayer (b) to pass a decree in terms of the consent terms after recording the said agreement. This notice of motion was vehemently and strongly opposed by defendant No. 1 - Mrs. Vijaya Rajaratnam and defendant No. 5 Juhu Triton Co-operative Housing Society Ltd. In order to appreciate the submissions made by both the advocates and particularly by Mr. Irani for defendant No. 1. It is necessary to note the background of the notice of motion.

2. The Suit No. 987 of 1996 i.e. the present suit is in respect of flat No. 602. 6th floor in the building known as "Triton," of which defendant No. 5 is the Co-operative Housing Society, with a garage etc. This property is in occupation of defendant No. 1 and the suit was filed by the plaintiffs for removal of defendant No. 1 who was there as a rank trespasser.

3. According to the plaintiffs this property originally belonged to one Kandathil

Mathulla Mathon. He died on 2.3.1995 leaving behind the will and appointing plaintiff No. 1 as sole executor, and plaintiff No. 2 is the son, defendant Nos. 3 and 4 are the daughters, defendant No. 2 is the widow, and defendant No. 1 claims to be an old-age companion of the deceased in the suit flat. There is no dispute that defendant Nos. 2, 3 and 4 are residing in London and are British citizens. This suit was filed on 14.3.1996.

4. Plaintiffs also applied for Probate of the Will of the deceased in which defendant No. 1 filed a caveat alleging that she was lawfully wedded wife of the deceased and alleging that she was married to the deceased. Different proceedings were taken out by the parties in probate petition as well as in the suit, and ultimately parties i.e. particularly plaintiff and defendant No. 1 decided to settle the matter Amicably.

5. In the suit as well as the probate proceedings, defendant No. 1 was represented by advocate Girish Desai and the plaintiff was represented by Mr. K. J. Presswala, Advocate on record for defendant No. 1 was Ms. Shastri, and also Mr. Irani represented the defendant No. 1 both in the suit as well as in probate petition.

6. According to the plaintiffs, counsel for the defendant No. 1 handed over a draft to the plaintiffs' advocate Mr. Presswala and this draft was about the proposed consent terms and the minutes of order. Some alterations were made and suggested by the plaintiffs in the said draft and it was then handed over to Ms. Shastri. Thereafter, Ms. Shastri handed over to the plaintiffs' advocate a xerox copy of the corrected draft with alterations made in green ink. Since the parties were at variance on minor particulars they sought the assistance of the Court to/ fro out the differences on 4.2.1999. The draft was therefore corrected by advocates for both the sides and each of the corrections were signed and/or initiated, and therefore according to the plaintiffs the consent terms were finalised in all material respects.

7. However, according to the plaintiffs this finalised draft was fair typed and was sent to the advocate for the defendant No. 1 by their letter dated 8.2.1999 with a request to return the consent terms duly signed by defendant No. 1 and by her advocate. They were also informed that on receipt of duly signed consent terms the plaintiffs would send them to U. K. for getting the signatures of defendant Nos. 2, 3 and 4. Defendant No. 1 was also requested to send the transfer forms duly completed and filled in all respects to be signed by plaintiff No. 1 and to be filed with the society (defendant No. 5) for transfer of the flat and garage in the name of defendant No. 1.

8. Thereafter, Ms. Shastri, advocate for defendant No. 1 along with her letter dated 12.2.1999 sent the consent terms and minutes of order both duly signed by her client, herself and advocate Mr. M. R. Irani for defendant No. 1. This was accompanied by certain printed forms of the society. Thereafter, society was joined as defendant No. 5 in the suit after taking out the chamber summons.

Consequently amendments to the plaint were carried out and in the consent terms, and thereafter in this background these consent terms were placed before Justice Gokhale who after consulting advocates for the plaintiffs and defendant No. 1 and in their presence made certain corrections which were accepted and confirmed by the advocates present. The question was however about payment of certain sum i.e. Rs. 24,00,000/- or so by defendant No. 1. Mr. Girish Desai for defendant No. 1 requested for time to deposit that amount in Court and this fact was also included by Justice Gokhale. However, Mr. Desai thereafter informed Justice Gokhale that he was unable to contact defendant No. 1 then the matter was adjourned to 3.5.1999 and at that juncture Mr. Irani, advocate, who appeared for defendant No. 1 stated that the matter was not being settled. It is in this background that the present notice of motion is taken out by the plaintiffs.

9. Defendant No. 1 was represented by advocate Irani and the plaintiffs was represented by Mr. Presswala. I heard them at length.

10. Mr. Irani raised following objections to the notice of motion and levelled a multi prompted attempt of the vitality of notice of motion and also upon the maintainability and entitlement of the plaintiffs to get any relief in the notice of motion. Mr. Irani also gave at the conclusion of his arguments a brief summary of submissions in writing, though it was not required and necessary when the parties were heard at length. Submissions of Mr. Irani to sum up were as under :

That the consent terms sought to be enforced by the plaintiffs were not signed by the parties; that they were not filed before the Court; that signatures of defendant Nos. 2, 3 and 4 were not obtained, that the consent terms are beyond the scope of the suit; that they are in violation of Rule 8 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000 (For short "FEMA Regulations"); that the consent terms are contrary to law, null and void, they are contrary to byelaws of defendant No.5, that neither advocate Girish Desai nor Ms. Shastri were authorised to alter the terms of the consent terms, that Justice Gokhale modified the consent terms at the behest of the advocate of the plaintiffs without the consent and knowledge of defendant No. 1 and in any case that the modifications or alterations made to the consent terms were not acceptable nor beneficial to the defendant No. 1 and she could not be put to additional burden without her consent.

He also raised some other objections as per his brief summary of submissions, with which I will deal at an appropriate stage. Mr. Irani also objected to the production of the original consent terms by Mr. Presswala during arguments and contended that since the copies of the original consent terms were not given to him or not made available to him nor he was allowed inspection of the same, plaintiffs should not be permitted to tender them in Court. (At this lime it is necessary to mention that when Mr. Presswala produced the original consent terms etc. I ordered them to be immediately sealed and kept in safe custody after noting the objection raised by Mr. Irani).

11. As against the submissions made by Mr. Irani. Mr. Presswala contended that under Order XXIII Rule 3 of C. P. C., 1908 filing of the original consent terms along with the notice of motion was neither necessary nor obligatory and it was open to the parties to file them at appropriate stage and therefore filing the original consent terms during his submissions was not at all illegal or it did not cause any prejudice to defendant No. 1. Mr. Presswala also contended that consent terms which the plaintiffs are seeking to enforce by obtaining a decree by this notice of motion were fully agreed upon by the defendant No. 1 and her advocates Mr. Girish Desai and Ms. Shastri and therefore defendant No. 1 could not now be permitted to retract from her stand. Mr. Presswala pointed out that when Justice Gokhale made alterations in the consent terms defendant No. 1 was represented by Mr. Girish Desai and Ms. Shastri and Mr. Irani was also present, therefore it did not lie in the mouth of defendant No. 1 to now contend that Mr. Girish Desai or Ms. Shastri were not authorised and empowered to agree to the changes or modifications made by Justice Gokhale. Mr. Presswala also contended that the consent terms were not in any way violative of FEMA Regulations by virtue of the provisions of the FEMA Act, 1999 and the provision of the earlier legislation in that regard. In short, Mr. Presswala met each of the submissions and objections of Mr. Irani and lastly contended that plaintiffs were entitled for the reliefs claimed in the notice of motion.

12. Juhu Triton Co-operative Housing Society who was joined in the suit as defendant No. 5 was represented by an advocate, who submitted that society was entitled to recover an amount of Rs. 1,00,000/- in this transaction of transfer of property out of which Rs. 70,000/- by way of premium and Rs. 30,000/- were by way of society charges and therefore interest of the society should be protected.

13. Mr. Irani in support of his contentions relied upon the following authorities, namely:

- (1) Shripatrao Dajiso Ghatage and another v. Usman Abdul Shaikh and others.
- (2) Kolhapur Motor Transport Producers and Consumers Co-operative Society Ltd. v. Ramchandra Mahipatrao Rane and others,
- (3) B. D. Mohan Rao v. Co-operative Industries Estates (Ltd.),
- (4) S. G. Thimmappa v. Anantha and others,
- (5) S. Hardit Singh Ubra v. S. Daljit Singh.
- (6) Ramasrey and others v. Dy. Director Consolidation Distt. Faizabad and others,
- (7) Dr. Fondo Shivram N. Dessa and others v. Shri Mahendra Shivram N. Dessa and others.
- (8) Banwari Lal v. Chando Devi (Smt.) (through Lrs.) and another,
- (9) Byram Pestonji Gariwala v. Union Bank of India and others,

(10) Abdulla Umar Haji Ismail Merchant v. Subai Mura Rabari, and others.

(11) Fakir Mohamed Abdul Razak v. The Charity Commissioner, Bombay and others.

(12) Harshadbhai Shah and another v. Rani Kamla Raje wd/o Kunwar Jaisinghrao Bhonsale and others.

As against this, Mr. Presswala relied upon the following judgments :

(1) The Municipal Corporation of Greater Bombay v. P. S. Malvankar and others,

(2) Byram Pestonji Gariwala v. Union Bank of India and others.

14. At the outset, it has to be mentioned that all the grounds of objections raised by the defendant No. 1 to the notice of motion are false, frivolous, bogus and she has crossed all the limits in alleging that Justice Gokhale corrected the consent terms at the behest of Mr. Presswala, advocate for the plaintiffs. This last allegation is contrary to the record, It is devoid of any substance and the litigants who go to such an extent are required to be condemned for that purpose. In addition it has to be noted that it is our day to day experience that whenever consent terms such as this are challenged by parties, the safest course adopted by such a party is to make allegation against their own earlier advocate and try to show that earlier advocate did not have the authority or acting in excess of the authority. Such submission is also required to be outright rejected because the defendant No. 1 can also make similar allegations against Mr. Irani when he argued and opposed this notice of motion by taking out another notice of motion and she can contend that she had not authorised Mr. Irani to make a particular submission in the Court. Therefore, what the Court has to see is to whether a party represented by advocate and either as advocate on record or as a counsel and whether the advocate has acted to the best of the interest of his/her client. The allegations made against the earlier advocate by such a party cannot in the absence of joining advocate as a party and in the absence of giving him an opportunity to meet those allegations be taken at their face value.

15. Now coming to the objection raised by Mr. Irani it has to be noted that Order XXIV and Order XXIII Rule 3 of C.P.C. 1908 does not require filing of the consent terms at the time of taking out notice of motion. What it lays down is :-

"that if the Court is satisfied after proof that the suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties the Court shall record such agreement or compromise and pass a decree in accordance therewith".

Considering therefore the words and terminology used in this order XXIII Rule 3 of C.P.C. 1908 it has to be held that filing of the original consent terms along with the notice of motion was not a prerequisite for the plaintiffs. Consequently, it has to be held that plaintiff was justified in tendering the original consent terms in Court at the time of or during the arguments of Mr. Presswala, and it

has to be held in the circumstances of this case, in particular, that not filing original consent terms along with the notice of motion was a wise step taken by the plaintiffs because in view of the stand taken by defendant No. 1 in opposing to this notice of motion it was ordered that the original consent terms lay in safe custody of the plaintiffs till they were actually required by the Court.

16. The second objection of Mr. Irani was that consent terms were beyond the scope of the suit because they also effect the probate petition. He also relied upon certain judgments in this regard but it appears that he did not take into consideration amendments to Rule 3 of Order XXIII which was carried out in 1977 and now as Rule 3 of Order XXIII stands, the compromise need not be restricted to the subject matter of the suit. The amendment says that the Court may pass decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit. When provisions of law are clear in themselves and there is no bar for doubt or ambiguity it has to be held that including something about the probate proceedings and about the rights of the parties in those proceedings in the consent terms to be filed in this suit is not at all illegal.

17. The third objection of Mr. Irani was that Justice Gokhale amended the consent terms at the behest of the plaintiffs i.e. Mr. Presswala, in fact, even if defendant No. 1 insisted on raising of objection, it was expected that her advocate Mr. Irani did not press for that point (but not only he made submissions in that regard and tried to fortify the objection raised by defendant No. 1, he also mentioned them in his brief summary of submissions at paragraph No. 15) but since he has pressed for that point, I have to reject it outright as totally baseless. Firstly because those allegations are very serious and grave in nature without any iota of substance in them, and secondly because they are falsified by the record. As rightly pointed out by Mr. Presswala when Justice Gokhale made corrections or alterations in the consent terms, Mr. Girish Desai counsel for defendant No. 1 and Ms. Shastri were present, so also Mr. Irani was also present and it is in their presence and after consulting everybody and obtaining their approval the modifications or changes were made by Justice Gokhale. The matter was required to be adjourned because defendant No. 1 was to pay Rs. 24,00,000/- and Mr. Girish Desai wanted to verify within how much time the defendant No. 1 will be in a position to do so. The fact that defendant No. 1 had agreed to pay Rs. 24,00,000/- is supported by the letter dated 12.2.1999 of her advocate Ms. Shastri wherein she has stated that she is enclosing therewith a duly signed minutes or order in consent terms and since her client - the defendant No. 1 was going to pay the entire amount of Rs. 24,00,000/- at the time of filing of the consent terms, necessary changes were made in the consent terms. In this background defendant No. 1 cannot be permitted to argue or urge that Justice Gokhale made alterations in the consent terms at the behest of Mr. Presswala. It has to be noted here with distress that in order to circumvent the consent terms defendant No. 1 has invented ingenious method of dragging a

Judge of this Court and hence the false plea.

18. Next submission of Mr. Irani was that consent terms which were sent were only initiated and not signed and/or that Counsel Mr. Girish Desai was not authorised because he was a counsel and not an advocate, is also required to be outright rejected. Firstly, because so far as this Court is concerned i.e. the High Court is concerned, it is rightly argued by Mr. Presswala that advocate on record and counsel both act, plead and represent and parties and they also make statements on behalf of party/ies and those statements are accepted by the Court and counsel and advocate on record are treated at par. If the objection of Mr. Irani is accepted that only advocate on record that is who have filed their vakalatnama are authorised and empowered to represent the party and sign consent terms or make submissions or make concessions on behalf of the client and not counsels then the consequences will be disastrous and far reaching not contemplated by the system, such argument is therefore to be rejected and further this stand taken by defendant No. 1 is falsified by letter of Ms. Shastri dated 12.2.1999, referred to above, when she has stated that she is enclosing minutes of order and consent terms duly signed by her client.

19. Next submission of Mr. Irani was that consent terms have not been signed by defendant Nos. 2, 3 and 4 and therefore they cannot be enforced. There is also no merit in this submission because the present suit is mainly and solely against defendant No. 1 and the reliefs in the prayer right from reliefs (a) to (h) are against the defendant No. 1. It is clear that defendant Nos. 2, 3 and 4 have been joined as formal parties in the suit. Secondly as rightly argued by Mr. Presswala there was no question of defendant No. 2 signing the consent terms or minutes of order because it was provided for in the agreement itself. Further defendant No. 2 was not given anything under the will and for all these reasons not obtaining signature of defendant No. 2 cannot be cause or justification for the defendant No. 1 to refuse to act upon the consent terms or to oppose notice of motion. Mr. Irani also contended that consent terms have not been signed by defendant Nos. 2, 3 and 4 also. This also cannot be a reason for the defendant No. 1 to retract from her stand. Mr. Presswala has during his arguments tendered the original consent terms along with the consent terms duly signed by defendant Nos. 3 and 4. In view of this fact nothing remains in the objection raised by Mr. Irani.

20. Mr. Irani also submitted that defendant Nos. 2, 3 and 4 have not been served with the copy of the plaint and notice of motion and therefore consent terms are in violation of Order XXIII Rule 3 of C.P.C., 1908, there is no merit in the submission because the suit is mainly and solely against defendant Nos. 2, 3 and 4 and consent terms do not give any right to defendant Nos. 2, 3 and 4 nor cast any duty upon them vis-a-vis defendant No. 1. Order XXIII Rule 3 of C.P.C., 1908 permits adjustment of a suit wholly or in a part therefore if the present compromise or consent terms or minutes of order settle the suit between plaintiffs and defendant No 1 fully and completely then the defendant No. 1

cannot insist upon signature of other defendants i.e., defendant Nos. 2, 3 and 4. (This will arise, if at all the suit is as against defendant Nos. 2, 3 and 4 which in fact is not) in fact what is reflected by the documents tendered by Mr. Presswala during his arguments is that the original consent terms have been signed by defendant Nos. 3 and 4 and plaintiff No. 2 and also by defendant No. 2 in presence of Notary England and the original consent terms have been signed by defendant No. 1 and her advocate Mr. Girish Desai and also by Mr. Irani.

21. It was next contended by Mr. Irani that the consent terms are violative of FEMA Regulations, 2000. Mr. Irani in this regard relied upon clause 8 or Rule 8 of the said Regulation which lays down that

"Save as otherwise provided in the Act or Regulations, no person, resident outside India shall transfer any immovable property in India :- Provided that the Reserve Bank may, for sufficient reasons, permit the transfer, subject to such conditions as may be considered necessary."

As against this, Mr. Presswala pointed out that under the FERA Act, 1973 it was permissible for a non-Indian to sell property and since the FEMA came into effect on 1.6.2000 and the consent terms; and the minutes of order are not affected by FEMA which were prior to 1.6.2000 and they were governed by FERA, 1973 and therefore there cannot be any legal obstacle in the way of the parties under the provisions of FEMA, 2000. I have no hesitation in accepting the submissions made by Mr. Presswala because provisions of FERA relied upon by him and applicable in this case are crystal clear.

22. Mr. Irani further contended that plaintiff No. 2 has not acquired any right, title and interest in the disputed flat as probate has not been granted to him and therefore he cannot transfer or sell the flat to the defendant No. 1. In fact such an objection should be taken by plaintiff No. 1 challenging the authority of plaintiff No. 2 in entering into compromise with defendant No. 1. The defendant No. 1 cannot raise such an objection and further under the Will plaintiff No. 1 is the sole executor of the estate of the deceased and therefore if the sole executor who is plaintiff No. 1 enters into compromise and when plaintiff Nos. 1 and 2 are represented by one common advocate, then defendant No. 1 cannot contend that till the plaintiff No. 2 gets the probate he has no right to transfer or sell the suit flat. This is obviously an after thought and invention on the part of the defendant No. 1 to give go by to the consent terms by whatever means possible. It was contended by Mr. Irani that modifications in the consent terms were carried out when the defendant No. 1 was at home lying sick on the bed and when her counsel was aware of her ill health. There is no substance in the submissions, firstly because the matter regarding consent terms between the plaintiffs and defendant No. 1 was not concluded on one single day. It was going on between the parties for a considerable long time during which defendant No. 1 was represented by Ms. Shastri, Mr. Girish Desai and Mr. Irani. Further nothing new was added to the consent terms by way of modifications.

23. When Mr. Irani was making the aforesaid submissions, I put in the following three questions :

(1) Whether the consent terms signed by defendant No. 1 and consent terms before Justice Gokhale were materially different?

(2) Whether there is something in the consent terms signed by the defendant No. 1 in the form of benefit or addition that is taken away in the subsequent consent terms?

(3) Whether the subsequent consent terms put some additional burden or obligation upon defendant No. 1 which was not there in the consent terms which she had signed?

However, to none of these queries Mr. Irani could give satisfactory explanation. He tried to contend that defendant No. 1 has been put to additional burden by requiring to pay society charges to the tune of Rs. 1,00,000/-.

24. Mr. Presswala has during his arguments submitted both the copies of the minutes of order, namely, signed by defendant No. 1 and both her advocates on record and second copy is a copy of the consent terms initialled by counsel for the plaintiff, counsel for defendant No. 1 and counsel for defendant No. 5 after the same were corrected by Justice Gokhale with the consent of the above parties. I have marked the same at this juncture for the purpose of identification and easy reference as Exhibit "Y-1". Mr. Presswala has done this for easy comparison between the two sets of consent terms and a perusal of both these consent terms simultaneously and comparatively shows that clause No. 16 is there in the consent terms which was corrected by Justice Gokhale and it is also there in the consent terms signed by defendant No. 1 and both her advocates on record. It is clear that defendant No. 1 signed the consent terms and she agreed and declared to pay stamp duty and registration charges in respect of the flat and the garage. It cannot therefore be said that the consent terms corrected by Justice Gokhale put an additional burden upon the defendant No. 1.

25. Mr. Irani in this regard also contended that plaintiffs had agreed to give indemnity and which is not now available to the defendant No. 1 In this regard Mr. Presswala made a statement across the bar that the plaintiffs are willing to give blanket indemnity to the defendant No. 1 so that her interest is protected. This statement being consistent with the stand taken by the plaintiffs is taken note by me and recorded and from this statement it is clear that such an indemnity will protect the interest of the defendant No. 1. So far as society transfer charges are concerned, I find from Exhibit "Y-1" as stated above that the consent terms signed by the defendant No. 1 and both her advocates on record in paragraph 6 provided.

"that defendant No. 1 may at her cost and expense apply for the acquisition of the membership of the said society as a successor of the said deceased"

The same thing is included in paragraph 6 in the consent terms corrected by Justice Gokhale. It will therefore be clear from the comparison of both clause No. 6 in both the consent terms that it is defendant No. 1 who has agreed to bear the cost and expenses for acquisition of the membership of the society. It cannot therefore be said that the new consent terms or the consent terms corrected by Justice Gokhale put any additional burden upon the defendant No. 1.

26. Mr. Irani also contended that consent terms are contrary to the byelaws of the society which mandatory requires that prescribed forms are to be signed by the seller of the flat i.e. plaintiff No. 1 and 2. There is no substance in the submissions, firstly, because society was joined in this case after adopting proper procedure. Society was represented when the order in that regard was passed and society was also signatory of the consent terms corrected by Justice Gokhale and there is therefore no illegality in the consent terms nor they in any manner violate the mandatory byelaws of the society. Further even if the byelaws require that seller should sign prescribed forms, when the consent terms are clear in themselves the plaintiff No. 1 will get all the rights to sign the byelaws. There cannot therefore be any breach of the byelaws by the consent terms. The interest of the society in this litigation is absolutely limited and therefore they cannot have any objection to the consent terms.

27. Mr. Irani also contended that modifications carried out to the consent terms were not in the interest of defendant No. 1 and they were carried out when she was lying sick at home on the bed and that she recalled her brief from her counsel. This is an after thought to circumvent the consent terms and I have already discussed and held that Mr. Girish Desai and Ms. Shastri were fully authorised and there is nothing in the consent terms which is against the interest of the defendant No. 1. Having considered the submissions on fact, it is now necessary to consider the authorities relied upon by Mr. Irani, in particular:-

28. Mr. Irani relied upon the judgment reported in Fakir Mohamed Abdul Razak v. The Charity Commissioner, Bombay and others, and in particular paragraph 26. In that case in a very hotly contested matter regarding Public Trust and which was in litigations since 1946 regarding Haji Malang Bawa Dargah, the District Judge recorded :

"that in view of what Shri Dabke and Shri Oke, Advocates, have stated above, my clients would not object to the framing of the Scheme and appointing a panel of Trustees which would include the defendant Gopal Ketkar as a Managing Trustee. They would not press contentions in their objections"

(paragraph 3 of the said judgment)

Then having recorded the aforesaid statement the District Judge proceeded straightaway to pronounce his judgment on that very day and passed a decree accepting the scheme with modifications. It was this judgment which was challenged and therefore in the course of deciding the appeal the Court found that it was not a consent decree at all because there was nothing on record to

show that any of the parties had agreed to any consent decree. The parties and their advocates have not signed any consent terms, and the statements which the District Judge recorded are only the statements of advocates. Obviously this judgment has no application in the instant case because it is not that in that statement of advocates a decree is prayed by the plaintiffs in this notice of motion.

29. Next judgment relied upon by Mr. Irani is Shripatrao Dajiso Ghatage and another v. Usman Abdul Shaikh and others. In that case an order passed by the Civil Judge, Junior Division, Kagal was challenged in Revision before the High Court. The dispute was in respect of vacant piece of land and structures standing thereon. On the date of hearing a joint pursis came to be filed on behalf of plaintiffs and defendant No. 1 to the effect that there was a compromise between the said parties, whereunder defendant No. 1 accepted the suit property as of the absolute ownership of the plaintiffs etc. On this, Civil Judge passed an order i.e.

"The contents are read over before plaintiff and defendant No. 1 and before advocates. They admit the same; hence it is read and recorded."

Further no consequential order was passed upon the plaint in pursuance of this pursis and then subsequently other defendants challenged the pursis and the said compromise. It will therefore be clear that the observations made by Justice Datar in Judgment are referable to the facts in that case and no ratio has been laid down. Further so far as facts as pleaded by defendant No. 1 in this notice of motion are concerned, I have given findings and all are against defendant No. 1.

30. Next Judgment relied upon by Mr. Irani was 1989 Mh. L. J. 646 wherein the suit for recovery of arrears of rent was filed by the landlord against the tenant, the matter was compromised. Decree was passed for payment of installment of arrears with condition that in case of defaults the landlord would be entitled to recover arrears of rent and possession. The decree was challenged. It was therefore held that the money claim cannot be permitted to be transferred and expanded in the larger claim for possession which was never asked for and by such permit the parties cannot be allowed to get decree of possession which will fall outside the purview and scope of Bombay Rent Act. The Court therefore held that no decree for possession could have been passed on the basis of such compromise. It is therefore clear that while deciding the particular case the Court has mainly concerned with the provision of Bombay Rent Act and the scope of the suit of the landlord for recovery of rent and the relief which he sought in the nature of getting possession of the house in case of default. Justice Kotwal who delivered the said Judgment has relied upon a number of other judgments, most of which are under the Rent Act in suits in compromise between landlord and tenant. No submissions were made by Mr. Irani that the compromise sought to be enforced in the present notice of motion is beyond the scope of the suit or beyond the jurisdiction of this Court, hence the Judgment is of no use to the defendant No. 1.

31. Next Judgment relied upon by Mr. Irani was B. D. Mohan Rao v. Cooperative Industries Estates (Ltd.) which laid down that :

"The recording of a compromise is not purely a formal matter, but a question of substance. Under Order 23, Rule 3 the Court has to find out if there is any agreement between the parties for compromise. The terms of settlement must be examined with care and caution and see that the parties understood the terms of the compromise and there is no fraud or misrepresentation."

Admittedly in the instant case no fraud or misrepresentation is alleged, hence this Judgment and other judgment relied upon by Mr. Irani in S. G. Thimmappa v. Anantha and others, on the basis of fraud. Undue influence and coercion has no application.

32. Next judgment relied upon by Mr. Irani was S. Hardit Singh Ubra v. S. Daljit Singh. In this case compromise decree was passed in terms of the compromise petition. When execution was started for enforcing the compromise, certain objections were raised and the Single Judge of the Delhi High Court held that the suit of the appellant had been adjusted by lawful agreement between the parties, the only question was a decree should be in conformity with the compromise and ultimately the Full Bench of the Delhi High Court came to the conclusion that compromise related to the suit.

33. Mr. Irani also relied upon a judgment of Supreme Court reported in Ramasrey and others v. Dy. Director Consolidation Distt. Faizabad and others. In that case compromise was entered into between the parties by lawyer Shri Kailash Nath Srivastava without any authority from the appellants and the appellants did not execute any vakalatnama in favour of the said advocate. In that view of the matter it was held by the Supreme Court that it will be open to parties to approach the Bar Council for appropriate action against the advocate. This case has no application in this case because consent terms were signed and agreeable to the advocate on record and also the counsel for the defendant No. 1.

34. Mr. Irani also relied upon the judgment of this Court in Byram Pestonji Gariwala Vs. Union Bank of India and others, . This last judgment of the Supreme Court recognises the right of the counsel to enter into a compromise and therefore it has been held by the Supreme Court that the compromise in writing and signed by counsel representing the parties but not signed by the parties in person is valid and binding on the parties and is executable even if compromise relates to matter relating to the parties. This judgment therefore meets the argument of Mr. Irani that counsel is not authorised to enter into agreement. On other judgments there are no discussions because they are peculiar to those cases.

35. Another judgment relied upon by Mr. Irani is Abdulla Umar Haji Ismail Merchant and others v. Subai Mura Rabari and others, also recognises the right of the counsel to enter into compromise on behalf of the client.

36. For the aforesaid discussions it is clear that from all the objections raised, none of the objections raised by defendant No. 1 to the notice of motion have any force nor they can be accepted. Therefore all of them are rejected and consequently the plaintiffs are entitled to the claim in the notice of motion. I therefore pass the following order :

ORDER

Notice of Motion is made absolute in terms of prayers (a) and (b). Consequently, there will be a decree in terms of the consent terms modified by Justice Gokhale.

The defendant No. 1 will bear the costs of the plaintiffs and in addition she will pay compensatory costs of Rs. 3,000/- to the plaintiff for raising the false and vexatious defence u/s 35-A of the Civil Procedure Code, 1908.

Notice of Motion disposed of accordingly.

Certified copy expedited.

After this order was pronounced, counsel for the defendant No. 1 prayed for staying operation of this Order. Operation of order is stayed for six weeks from today.