

**(2010) 11 KAR CK 0002**

**In the Karnataka High Court**

**Case No :** Regular Second Appeal No. 1295 of 2009

M.L. Vijaya

APPELLANT

Vs

T. Srinath, M.L. Sridhar, (Since dead by L.Rs., Smt. Saroja  
Sridhar, Naveen Narashima and Smt. Lalana Krishnamurthy)  
and M.L. Narasimhaswamy

RESPONDENT

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**Date of Decision :** 18-11-2010

**Acts Referred:**

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

**Citation :** (2011) ILR (Kar) 1787 : (2011) 3 KCCR 2269

**Hon'ble Judges :** Anand Byrareddy, J

**Bench :** Single Bench

**Advocate :** V. Srinivas Raghavan, for the Appellant; VGB Associates, S. Vivekananda, for Respondent No. 1, K.K. Vasanth, (a) to (c) and Krishnamurthy G. Hasyagar, for Caveator/Respondent No. 3, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Anand Byrareddy, J.—Heard the learned Counsel for the parties. The parties are referred to their rank before the trial court for the sake of convenience.

2. The Appellant was the Plaintiff before the trial court. The suit, numbered as OS 135/1998, was for a declaration of her right to the suit schedule property, in terms of a preliminary decree dated 9-7-1973, passed in an earlier suit, in OS 24 / 1964 and the devolution of an additional 1/5th Share in the suit schedule property, consequent upon the death of one Rajeshwaramma, which remained unaffected notwithstanding the judgment recording a compromise and decree thereon, passed in RFA 173/ 1973, dated 11-10-1977 by a Division Bench of the High Court of Karnataka as well as orders dated 28-2-1991 and 5-12-1991 passed in final decree proceedings in FDP 11/1979.

The Plaintiff was said to be arrayed as the fourth Defendant in OS 24 / 1964 (Originally OS 12 /1957). That was a suit for partition and separate possession of joint family property, which was the subject matter. The Plaintiff herein, who was

the fourth Defendant in the said suit for partition, did not contest the same. The suit was decreed and a preliminary decree was passed as on 9-7-1973. The Plaintiff herein was held entitled to 8/56th Share of the suit property therein. The Plaintiff and the first Defendant were the legal representatives of the first Defendant in OS 24/1964, he had died during the pendency of that suit, in the year 1971. The first Defendant herein, who was the second Defendant in OS 24/1964, challenged the said preliminary decree in appeal in RFA 173/1973, before a Division Bench of this Court. During the pendency of the appeal, one of the Respondents, Rajeshwaramma had died. She did not have any children. Consequently, her share of the property devolved on her legal heirs, including the Plaintiff. The Plaintiff claims she was never served with any notice of the above appeal.

In the year 1997, when the Plaintiff had occasion to make enquiries of the suit property, she had learnt of the above appeal having been filed and a compromise petition having been filed, while indicating that the Plaintiff herein, had relinquished her share in favour of the first Defendant. The Plaintiff contends that she had not relinquished her share at any point of time. And that she was never served with any notice of the appeal, nor had she engaged any counsel to represent her in the said appeal and that she was not a party to the compromise petition filed in the above appeal.

Pursuant to the appeal having been disposed of in terms of the compromise petition, final decree proceedings were initiated, without the Plaintiff being made a party on the footing that she had relinquished her share in the suit properties therein. The preliminary decree stood modified, in accordance with the compromise decree passed in appeal.

It is in the above background that the Plaintiff filed the suit in the year 1998 to claim that her rights remained unaffected by the compromise decree.

The suit was contested on the footing that the Plaintiff was a party to the compromise petition as she was represented by counsel and had also filed an affidavit to state that she had relinquished her share in the suit properties. It was further urged that the suit was barred by limitation. The trial court found in favour of the Plaintiff and decreed the suit as prayed for.

An appeal having been filed against the said judgment and decree, the lower appellate court affirmed the findings of the trial court. However, it was held that the suit was not maintainable in view of the bar under Order XXIII Rule 3 A of the Code of Civil Procedure, 1908. It is that which is under challenge in the present appeal.

3. This Court had admitted the appeal to hear on the following substantial question of law:

Whether Order XXIII Rule 3 A of the Code of Civil Procedure, 1908, bars a suit filed by a person seeking a declaration that she was not a party at all to a

compromise petition and that therefore, her rights remain unaffected by the compromise petition?

At the final hearing the following additional substantial questions of law were framed:

(1)Whether the Appellant could question the binding effect of the compromise decree which was recorded by a Division Bench of this Court by recourse to a separate independent suit?"

(2)Whether the Appellant is required to approach the very Division Bench which has recorded the compromise petition and passed an order and decree in terms thereof?"

(3)Whether the Appellant who was not a signatory to the Compromise petition would yet be bound by the decree, if the counsel who is alleged to have represented her, had affixed his signature to the Compromise petition?

4. The learned Counsel were heard on these questions.

5. The learned Counsel for the Appellant contends that in the absence of a plea, either before the trial court or before the lower appellate court, by the other side as to the suit being barred under Order XXIII Rule 3A Code of Civil Procedure, the appellate court ought not to have considered that aspect of the matter at all. It is contended that Order XXIII Rule 3A would at the most operate as a bar to a suit only at the instance of a person who is a party to the compromise petition and not at the instance of a person who is not a party to the compromise petition. In the face of findings of fact, by both the courts below, that the Plaintiff was not a party at all to the compromise petition - nor was she represented by counsel, it could never be said that the same was binding on her. Hence, it cannot be said that the bar under Order XXIII Rule 3A applied to the suit filed by the Plaintiff. The relief claimed in the suit was for a declaration that the Plaintiff's share in the suit property as declared in terms of the preliminary decree remained unaffected by the compromise decree, as she was not a party thereto. Hence seeking such relief by a separate suit was not barred under the above provision. It is contended that the said provision is apparently intended to bar a suit by a person who is a party to the compromise petition seeking to set aside a compromise decree on the grounds of fraud, mistake, misrepresentation and such other contentions. It could never be a bar for a person who was not a party to the compromise petition. Reliance is placed on several authorities in support of the above contentions.

6. On the other hand the learned Counsel for the Respondents contend that the appellate court has rightly held that the suit was barred under Order XXIII Rule 3A, the fact that such an objection was not pleaded by the Defendants was wholly immaterial in the appellate court having expressed the legal effect of the Petitioner being shown as a party to the appeal before the High Court and the scope of the provision in question. It is also contended that the suit was

hopelessly barred by limitation. The learned Counsel has cited several authorities in support of his contention.

7. To address the rival contentions and in order to ascertain the sequence of events, the records in RFA 173 /173 which was disposed of on 11-10-1977, was called for. Having regard to the age of the case, the record contains the memorandum of appeal, the compromise petition filed by the parties, affidavits of some of the Respondents, the order sheet and the judgment passed by the Court. There are no other papers. The vakalath of the counsel who is alleged to have represented the Plaintiff in the said appeal is not available. It is seen that it is recorded in the judgment in RFA 73/ 1973, that the present Plaintiff who was arrayed as Respondent No. 3 (d) therein, was served, with notice of the appeal, had remained absent and was unrepresented. It is further recorded in the body of the judgment as follows:

On going through the compromise petition, we are satisfied that the subject matter of the appeal has been adjusted lawfully. We, therefore, direct that the compromise be recorded and decree drawn in terms thereof in substitution of the decree passed by the court below. Etc.

8. It is seen from the Order Sheet dated 11-10-1977, that Shri. M.C. Ranganna has entered appearance for Respondents No. 1, 3(e) & (f). However, it is urged by the counsel for the Respondents that the counsel Shri. Ranganna has affixed his signature to the Compromise petition on behalf of Respondents 3 (d) & (f). On this controversy it is sought to be urged that if the Plaintiff was indeed represented by counsel, she would be bound by the compromise petition, even if she had not affixed her signature, in the absence of fraud or misrepresentation or such other vitiating factor. It is in that context a substantial question of law would arise whether the suit could have been entertained to address the above controversy-can even this bench sitting singly address the same, to hold one way or the other?

9. It is to be kept in view that the compromise recorded was in relation to a compromise petition filed before a Division Bench of the High Court in a pending appeal against a judgment and decree of the trial court. The said Compromise Petition reads as follows:

I. During the pendency of this appeal, the first Respondent (5th Defendant) Rajeswaramma died as widow issueless, and intestate on 23.11.1975.

II. The Appellant and the Respondent viz., the sons, the daughters and daughters' son of her husband's brother are the heirs of the deceased and are entitled to her 14/56th share decreed by the trial court in the properties in equal shares, as agreed to by the parties in this appeal. Hence, (2.2/6)/56 share has to be added to their shares decreed. There are no minors in this appeal.

III. The Respondent 3 (C) M.L. Sujaya - the third Defendant and Respondent 3 (E) Jayamma the Defendant 1(E) have renounced their shares in favour of the

Plaintiff and the

2nd Defendant in equal shares and agreed that their shares in the properties may be added to those of the Plaintiff M.L. Narashima Swamy and the 2nd Defendant M.D. Shridhara. They have also filed affidavits to the same effect. Hence their shares declared in the trial court decree have to be modified to deletion and their shares to be added to their brothers. M.L. Vijaya (4th Defendant) has transferred her share to Sreenath.

IV. Statement of shares:

Decreed in the trial court L.R. of 5th Defendant Sisters Total

1. M.L. Narasimha Swamy  $14/56$  ( $2.2/6$ )/56 + ( $5.5/6$ )/56 ( $22.1/6$ )/56
2. M.L. Sridhara -do- -do- ( $22.1/6$ )/56
3. M.L. Vijaya  $5/56$  ( $2.2/6$ )/56 ( $7.2/6$ )/56 transferred to R.4
4. Sreenath  $2/56$  ( $2.2/6$ )/56 ( $2.2/6$ )/56 + ( $7.2/6$ )/56 = ( $11.4/6$ )/56
5. Sujaya  $5/56$  ( $2.2/6$ )/56 Transferred to 1 & 2
6. Jayamma  $2/56$  ( $2.2/6$ )/56 above.

V. The above parties pray that the preliminary decree declaring their shares in O.S. No. 24 of 1964 on the file of the Principal Civil Judge, Mysore may be modified by substitution of the decree of this Court as under:

1. M.L. Narasimha Murthy (Plaintiff) ( $22.1/6$ )/56
2. M.L. Shridhara (2nd Defendant) ( $22.1/6$ )/56
3. M.L. Vijaya (4th Defendant) ( $7.2/6$ )/56
4. Sreenath L.R.1(F) ( $11.4/6$ )/56
5. Jayamma (3rd Defendant) Nil delete
6. Jayamma (L.R. 1(e)) Nil delete

This is without prejudice to the contentions in R.F.A. No. 208 of 1973 and R.F.A. No. 69 of 1974.

That the Appellant prays for refund of half the institution fee on the appeal memo.

Sd/- Sd/-

1. M.L. Narasimha Swamy H.V. Narayana Rao, Advocate for Appellant.

Sd/-

2. M.L. Sreedharan

Sd/-

3. Jayamma (1(e) = 3(e))

Sd/-

4. M.L. Sujaya (3rd Defendant - 3(c))

Sd/-

P. Ganapathy Bhat, Advocate for Respondent No. 2 and 3(a)

Sd/- Sd/-

Ranganna Advocate for Defendant 3(e) & 3(f) M.R. Achar Advocate for 3C and 3E

10. The Plaintiff who was shown to have been served with notice of the appeal has failed to appear before the court and was not represented by counsel. Can it then be said that she was not a party to the proceedings? Though there is no formal order of the court to the effect that she was set ex-parte, for all practical purposes she was.

11. In order to address the substantial questions of law that are framed in this appeal, we may usefully extract the relevant provisions:

Order XXIII Rule 3: Compromise of Suit: Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise (in writing and signed by the parties), or where the Defendant satisfies the Plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a 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):

(PROVIDED that where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.)

3A. Bar to suit

No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

12. It is apparent that 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 XLIII Rule 1 Aof the Code of Civil Procedure. 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. Such a person's right to file a separate suit seeking an appropriate remedy would remain unaffected.

13. In the case on hand we are concerned with a compromise entered into in an appeal before the High Court, to modify the terms of a preliminary decree passed in a suit for partition. The Appellant was a party to the appeal. The claim that she had not been served with notice of the appeal, that she was not represented by counsel, that she had not consented to the compromise and had not relinquished or transferred her share of the property as mentioned in the compromise petition- would not enable her to claim that she was not a party to the appeal before the High Court. Therefore, the bar under Rule 3 A would equally apply to the Appellant and she could not have filed an independent suit to have the effect of the Compromise Decree nullified, no matter the tenor in which the suit prayer was couched.

14. It was also incongruous for the trial court to have entertained the suit - when the only remedy open to the Plaintiff was to approach the High Court which had passed the judgment and decree recording the compromise, to possibly contend that the compromise was not binding on her. It was also unfortunate that the Defendants also remained resigned to the impression that the suit was maintainable.

15. But the incredible approach of the trial court in addressing the suit deserves to be noted. The trial court framed the following issues, apart from others:

1. Whether Plaintiff proves that the Defendant No. 2 has not taken any steps to get the notice of R.F.A. No. 173/73, on the file of Hon"ble High Court of Karnataka, served on the Plaintiff and thereby she was kept in dark about its outcome?

2. Whether the Defendant of this suit prove that the present Plaintiff had filed an affidavit in R.F.A. No. 208/1973 and also in R.F.A. No. 6/1974 on the file of Hon"ble High Court of Karnataka that she has renounced her share in the properties in favour of the 1st Defendant?

3. Whether Plaintiff proves that the decree dated 11.10.1977, passed in R.F.A. No. 173/73, is null and void and also inoperative and unenforceable with regard to the share of the Plaintiff, pertaining to the plaint schedule property, as vitiated by fraud and misrepresentation, played by the Defendants 1 and 2?

16. The trial has then proceeded to enthusiastically dissect the proceedings of the High Court in the several appeals in question, which even a Division Bench of the High Court with co-ordinate jurisdiction might have baulked at, and has pronounced that the judgment and decree of the High Court was not binding on the Plaintiff. This is unfortunate. The trial court should have religiously avoided such an exercise.

17. Be that as it may, in the opinion of this Court it cannot be said that the Plaintiff was not a party to the appeal in which the compromise was recorded, her non-participation in the proceedings is not the relevant criteria. No suit could be entertained to nullify the effect of a judgment and decree of the High Court.

The Plaintiff's remedy if any was to approach the High court itself to modify the Decree passed by it, or to challenge the same before the apex court, assuming that a ground of challenge was available to the Appellant. The compromise decree would certainly bind the Plaintiff unless the same is modified or set aside. The substantial questions framed are therefore answered as above.

18. The appeal is dismissed with costs.