

(2011) 05 GUJ CK 0021
In the Gujarat High Court

Case No : Civil Application - For Orders No. 3892 of 2011 in First Appeal No. 2733 of 2009

Ramratanbhai Badriprasad Agrawal and Others

APPELLANT

Vs

Kankuben and Others

RESPONDENT

Date of Decision : 05-05-2011

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Order 23 Rule 3
Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, Order 23 Rule 3A, Order 23 Rule 3B, Order 43 Rule 1A, Order 43 Rule 1A(2)

Citation : (2011) 05 GUJ CK 0021

Hon'ble Judges : Jayant Patel, J;J.C. Upadhyaya, J

Bench : Division Bench

Advocate : S.N. Shelat, for K.D. Vasavada, for Petitioners 1, 1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.2.6 - 3, 3.2.1, 3.2.2, 3.2.3, 3.2.4, 3.2.5, 3.2.6 - 4 and Devarshi C. Shah, for Petitioners 1, 1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.2.6 - 3, 3.2.1, 3.2.2, 3.2.3, 3.2.4, 3.2.5, 3.2.6 - 4, for the Appellant; Ketty A. Mehta, for Respondents 1 and 4, Mihir Joshi, for A.J. Shastri, for Respondents 1 and 4, Mehul S. Shah, for Respondent 5, 5.2.1, 5.2.2 and 5.2.3, Suresh M. Shah, for Respondent 5, 5.2.1, 5.2.2 and 5.2.3, D.N. Pandya, for Respondent 6 and S.N. Thakkar, for Respondents 8 and 15, for the Respondent

Final Decision : Dismissed

Judgement

Jayant Patel, J.—The present application has been preferred for vacating of the interim relief, on the ground of non-maintainability of the appeal being FA No. 2733 of 2009 u/s 96 of the CPC ("Code of Civil Procedure", for short).

2. We have heard Mr. S.N. Shelat, Id. Sr. Counsel with Mr. Vasavada for the applicants and Mr. Mihir Joshi, Id. Sr. Counsel with Mr. Shastri for opponents No. 1 to 4 (original Appellants), who are the main contesting party since they are original Appellants.

3. In order to consider the question of maintainability, the relevant facts are that on 18.3.1993 the applicants herein - original Plaintiffs instituted the suit for

specific performance of Contract before the Civil Court being Special Civil Suit No. 12/1983 (new number being 4/2002). In the said suit, two separate written compromise were submitted by certain parties to the proceedings being Exhs. 600 and 635. First compromise Exh. 600 was between Plaintiffs on one side and Defendants No. 1/1 to 1/3 and Defendant No. 2 and Defendants No. 5 to 7 on the other side. It appears that, thereafter, when the first compromise, Exh. 600 was tendered, the Court was satisfied that the parties concerned had signed the compromise and the admission of the compromise was also verified by the Court and as per the trial Court, it was required to pass the decree as per the terms of the compromise qua the parties who had agreed for compromise, but as there was no compromise of Defendants No. 8 to 15 on record, the matter remained pending. Thereafter, the remaining Defendants No. 8 to 15 submitted written objections to the compromise and, subsequently, another compromise, Exh. 635, was produced and admitted by Defendants No. 8 to 15. The Plaintiffs thereafter filed reply and resisted the decree passed on the compromise, Exhs. 600 and 635. The matter was ultimately heard by the learned Judge on the aspects as to whether the decree should be passed in terms of the compromise, Exhs. 600 and 635 or not. The trial Court also considered the provisions of Order 23 Rule 3 of Code of Civil Procedure, including the objections raised to the passing of the decree based on the compromise and, ultimately, found that the decree deserves to be passed as per the compromise, Exhs. 600 and 635, and accordingly, passed the decree.

4. It appears that initially the original Appellants preferred appeal from order being No. 278 of 2007 against the decree passed by the learned civil Judge in Sp. Civil Suit No. 4 of 2002. The question of maintainability of the appeal from order was examined by the learned single Judge of this Court and, ultimately, vide judgment dated 27.8.2008, the learned single Judge found that the appeal from order is not maintainable and the same was dismissed with a liberty to the Appellants to challenge the same by way of substantive appeal u/s 96 of the Code of Civil Procedure. It appears that thereafter the present appeal being FA No. 2733 of 2009 has been preferred by the original Appellants. This Court admitted the first appeal on 4.8.2009 and the application for interim injunction was also decided on the very same day by this Court being CA No. 7364 of 2009 in FA No. 2733 of 2009 and this Court granted status-quo as to the possession and use of the suit land and also further directed that no third party interest in any manner whatsoever shall be created over the land in question.

5. It appears that the applicant herein carried the matter before the Apex Court whereby the order of the learned single Judge in the appeal from order as well as interim relief granted in the civil application in the present appeal were challenged. The Apex Court thereafter vide order dated 3.3.2011 observed for the decision by the High Court on the issue relating to maintainability of the appeal filed u/s 96 of the CPC and also observed that upon such issue of maintainability being decided by the High Court, the High Court shall be free to decide the question of interim relief by the parties. Under these circumstances

the applicants have preferred this application for decision of this Court on the aspect of maintainability of the appeal u/s 96 of the CPC and vacating of the interim relief on that basis.

6. The relevant provisions of law can be reproduced as under for ready reference. Order 23 Rule 3 provides for compromise of the suit and Rule 3A provides for bar of the suit which reads as under:

Order 23 Rule 3 of CPC - 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 [303] [in writing and signed by the parties] or where the Defendant satisfied the Plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise satisfaction to be recorded, and shall pass a decree in accordance therewith [304][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 that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but not 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.

Explanation-An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule;

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.

6.1 We may also record that in a representative capacity by virtue of Rule 3(B) or Order 23, the compromise or agreement for compromise cannot be entered without express leave of the Court. The perusal of the aforesaid scheme of CPC Under Order 23 Rule 3 read with Rule 3A provides for finality to be attached to the compromise or agreement, including that of barring the suit for challenging the compromise on the ground that the compromise was not lawful, but the aforesaid provision of passing the decree based on the compromise is to be considered for a valid compromise or a valid agreement and a lawful decree passed on the basis thereon and the aforesaid aspect is also apparent from the language of order Rule 23 Rule 3 and more particularly the proviso therein. Section 96 of CPC reads as under:

96. Appeal from original decree:

(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree

passed by any Court exercising original jurisdiction the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex pane.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

[(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognisable by Courts of Small Cause, when the amount or value of the subject-matter of the original suit does not exceed [ten thousand rupees].

6.2 The aforesaid provisions of Section 96(3) provides that no appeal shall lie from a decree from the Court by the consent of the parties, but for enforcing the bar u/s 96(3) of CPC the condition precedent or the situation conceived is that if there is a valid decree passed by the Court with valid consent or lawful compromise or agreement. To say in other words, if the Court has exercised the power under Order 23 Rule 3, in lawful manner, any appeal u/s 96(3) of the CPC can be maintained. The parties shall be bound by such decree and no right of appeal would be available and as we have observed earlier, even no right to challenge the compromise or decree thereon by a separate suit would be available. However, in a case wherein the parties to the compromise or the parties to the suit in which the decree has been passed on the basis of compromise or agreement, by the Court, are not remediless, if as per the said party, the compromise is not lawfully arrived at or is unlawful or the decree is not validly passed, under such circumstances, it will be for the parties concerned to raise the dispute under Order 23 Rule 3 of the CPC before the same Court and the very Court has to decide the question as to whether the agreement or compromise is lawful or that the decree deserves to be passed or not and if passed, whether it can be maintained or not. The another pertinent aspect is that as per the explanation of Order 23 Rule 3, it has been also expressly provided that if the agreement or compromise, which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within meaning of this Rule and the same suggests that if in agreement or compromise, which is void or voidable is tendered to the Court, it shall not be deemed as lawful and the Court may also examine said aspects, as to whether the compromise or agreement is void or voidable. But it is the very Court, which has power to pass the decree, may be such objection is raised prior to the passing of the decree or even thereafter by bringing to the notice of the Court that the decree could not have been passed or may not be passed on the basis of so-called agreement or compromise tendered to the Court. But in a case where the objection has been raised by any parties to the suit for passing of the decree based on the alleged compromise or agreement and inspite of the same, the decree is passed or may not be passed maintained by the very Court then in such circumstances, the right to appeal is provided under Order 43 Rule 1A, which reads as under:

Order 43 Rule 1A - Right to challenge non-appealable orders in appeal decrees:

(1) Where any order is made under this Code against any judgment is pronounced against such party and a decree is drawn upon, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the Appellant to contest the decree on the ground that the compromise should, or should not, have been recorded.

7. The aforesaid Rule 1A, has been simultaneously inserted in the CPC by the amendment of Act No. 4 of 1976, with effect from 1.2.1977. Section 96(4) of the CPC also amended simultaneously by retaining Section 96(3) of Code of Civil Procedure, which suggests that if the decree is drawn against any party, based on the judgment in a matter after recording compromise for refusing to record the compromise, it will be open to the Appellants to contest the decree on the ground that the compromise should or should not have been recorded. Therefore, such grievance can be ventilated by the parties whose objections were not accepted by the Court against passing of the decree passed on the compromise or agreement as per the provisions of order 43 Rule 1A. If the provisions are inserted in the statute book by amendment, there has to be some room for operation of Rule 1A of Order 43 of CPC and consequently the appeal. Order 43 Rule 1 does not provide for any appeal from order passed by the Court under Order 23 Rule 3 of CPC may be of accepting or rejecting the objections in a matter of passing consent decree or a decree on compromise. Therefore, naturally right to appeal from order would not be available. If Section 96(3) of CPC is read in a manner foreclosing right of appeal against decree passed by the Court with the consent of the parties in absolute manner by ignoring provisions of Rule 1A of Order 43 of Code of Civil Procedure, then no room would be available for giving effect to the amended provisions of Order 43 Rule 1A of Code of Civil Procedure. The distinction between the appeal from order and appeal against the decree are that in a matter where decree has been passed, the provisions of Section 96 of CPC would apply, whereas in case of an order the challenge is permissible u/s 104 of Code of Civil Procedure, but there has to be an express provision for such purpose in Code of Civil Procedure. As observed earlier, there is no express provisions of appeal from order passed by the Court for accepting or rejecting the objection against recording of the compromise. However, if the objections are rejected against recording of the compromise and the decree has been passed by the Court, the general provisions of Section 96(1) of the CPC giving right to prefer appeal would apply. To say in other words, in a case where there is no challenge or resistance or objection raised to the decree passed by the Court based on compromise or agreement, the provisions of Section 96(3) of the CPC would apply, which bars the appeal from such decree. But in a case where objections were raised against the decree and thereafter irrespective of the fact that whether such objections are accepted or rejected and, subsequently, if the decree is passed by the Court, then in that case, the

appeal u/s 96(1) read with Order 43 Rule 1A would be available and such appeal under these circumstances can be said as maintainable.

8. We may now refer to the case-law on the aforesaid aspects. The Apex Court in case of Banwari Lal Vs. Smt. Chando Devi (through L.R.) and another, had an occasion to incidentally consider the said aspects and it was observed by the Apex Court at paragraphs 8 and 9, which reads as under:

8. Earlier under Order 43, Rule 1(m), an appeal was maintainable against an order under Rule 3 of Order 23 recording or refusing to record an agreement, compromise or satisfaction. But by the amending Act aforesaid that clause has been deleted; the result whereof is that now no appeal is maintainable against an order recording or refusing to record an agreement or compromise under Rule 3 of Order 23. Being conscious that the right of appeal against the order recording a compromise or refusing to record a compromise was being taken away, a new Rule 1A has been added to Order 43 which is as follows:

1A. Right to challenge non-appealable orders in appeal against decrees.

(1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the Appellant to contest the decree on the ground that the compromise should, or should not, have been recorded.

9. Section 96(3) of the Code says that no appeal shall lie from a decree passed by the Court with the consent of the parties. Rule 1A(2) has been introduced saying that against a decree passed in a suit after recording a compromise, it shall be open to the Appellant to contest the decree on the ground that the compromise should not have been recorded. When Section 96(3) bars an appeal against decree passed with the consent of parties, it implies that such decree is valid and binding on the parties unless set aside by the procedure prescribed or available to the parties. One such remedy available was by filing the appeal under Order 43, Rule 1(m). If the order recording the compromise was set aside, there was no necessity or occasion to file an appeal against the decree. Similarly a suit used to be filed for setting aside such decree on the ground that the decree is based on an invalid and illegal compromise not binding on the Plaintiff of the second suit. But after the amendments which have been introduced, neither an appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3A of Order 23. As such a right has been given under Rule 1A(2) of Order 43 to a party, who challenges the recording of the compromise, to question the validity thereof while preferring an appeal against the decree. Section 96(3) of the Code shall not be a bar to such an appeal because Section 96(3) is applicable to cases where the factor of

compromise or agreement is not in dispute.

9. The concluding observations were made at paragraph 13, which reads as under:

As such a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23, or an appeal u/s 96(1) of the Code, in which he can now question the validity of the compromise in view of Rule 1A of Order 43 of the Code.

10. In a case of Kishun @ Ram Kishun (Dead) through LRs. Vs. Bihari (D) by LRs., again the Apex Court had occasion to consider the aforesaid aspects and at paragraph 6 it was observed thus:

6. That apart, we are of the view that the High Court was in error in holding that the appeal filed by Kishun against the decree of the trial Court accepting a compromise which was disputed by him, was not maintainable. When on a dispute in that behalf being raised, an enquiry is made (now it has to be done in view of the proviso to Order XXIII Rule 3 of the Code added by Act 104 of 1976) and the suit is decreed on the basis of a compromise based on that enquiry, it could not be held to be a decree passed on consent within the meaning of Section 96(3) of the Code. Section 96(3) contemplates non- appellability of a decree passed by the court with the consent of parties. Obviously, when one of the parties sets up a compromise and the other disputes it and the court is forced to adjudicate on whether there was a compromise or not and to pass a decree, it could not be understood as a decree passed by the court with the consent of parties. As we have noticed earlier, no appeal is provided after 1.2.1977, against an order rejecting or accepting a compromise after an enquiry under the proviso to Order XXIII Rule 3, either by Section 104 or by Order XLIII Rule 1 of the Code. Only when the acceptance of the compromise receives the imprimatur of the court and it becomes a decree, or the court proceeds to pass a decree on merits rejecting the compromise set up, it becomes appealable, unless of course, the appeal is barred by Section 96(3) of the Code. We have already indicated that when there is a contest on the question whether there was a compromise or not, a decree accepting the compromise on resolution of that controversy, cannot be said to be a decree passed with the consent of the parties. Therefore, the bar u/s 96(3) of the Code could not have application. An appeal and a second appeal with its limitations would be available to the party feeling aggrieved by the decree based on such a disputed compromise or on a rejection of the compromise set up.

11. In our view, the aforesaid observations and the decision of the Apex Court in case of Kishun (supra) makes it clear that when there is contest on the question as to whether there was a valid compromise or not and a decree by accepting the compromise has been passed upon the decision of any controversy raised, it cannot be said to be a decree passed with the consent of the parties and, therefore, the bar u/s 96(3) of the CPC could have no application and

consequently the appeal u/s 96(1) of CPC would be maintainable.

12. Much reliance was placed by the learned Counsel for the applicants upon the decision of the Apex Court in case of Pushpa Devi Bhagat (D) th. LR. Smt. Sadhna Rai Vs. Rajinder Singh and Others, and more particularly the observations made by the Apex Court at paragraph 12 and it was contended that as observed by the Apex Court, no appeal is maintainable against any consent decree having regard to the specific bar contained in Section 96(3) of CPC and, therefore, it was submitted that the appeal cannot be said as maintainable.

13. It is hardly required to be stated that any decision of the Apex Court cannot be pressed into service by citing observation in absolute, but it has to be understood and applied to the facts of the case. The pertinent aspect is that in the case of Pushpadevi Bhagat (supra) at paragraph 7, it has been recorded that the application to set-aside the consent decree was preferred by the second Defendant, however, he did not pursue the said application nor any order was passed by the trial Court on such application and the appeal was directly filed thereafter before the District Court. Therefore, the Apex Court was dealing with the case in which the consent decree was passed, but no challenge was ever pursued or decided by the very Court, which had passed the consent decree. Therefore, keeping in view the facts of the said case, the bar of Section 96(3) of CPC could apply and was applied by the Apex Court, but as observed earlier, there was no occasion in the said case to consider the question of a case where the objection was raised against any compromise or agreement or any objections were raised to the Court for acting upon the compromise or agreement, which were rejected by the Court and, thereafter, the decree was passed. In our view, in the present case, it is not a matter where any resistance was made against the passing of the consent decree and, thereafter, was not pursued by the parties to the proceedings, but on the contrary the resistance was pursued and the Court has rendered the decision by rejecting the objection and, thereafter, the consent decree has been passed. Therefore, the present case would be covered, as observed earlier by the decision by the Apex Court in the case of Banwarilal (supra) as well as Kishun @ Ram Kishun (supra). Therefore, it is not possible for us to accept the contention of the learned Counsel for the applicant that the bar of Section 96(3) of CPC would apply in the present case and the appeal could be said as non-maintainable.

14. It was next contended by learned Counsel for the applicant that there could be no substantive right of appeal under Order 43 Rule 1A of Code of Civil Procedure, since Order 43 is only a procedural order of the Code of Civil Procedure. It is submitted that when by express provision of Section 96(3) of CPC the right of appeal is barred, Rule 1A of Order 43 of CPC can neither can be read to nullify the effect of the bar nor can be read to have the statutory right to prefer an appeal.

15. In our view, the said contention is misconceived on two grounds, one is that it is by now well settled that CPC is not only a procedural law, but it is also the

substantive law on so many aspects. The another is that it is not a matter of diluting the effect of Section 96(3) of the Code of Civil Procedure, but the right is read in a case, as observed earlier, keeping in view the provisions of Order 43 Rule 1A read with Section 96(1) of Code of Civil Procedure. The additional aspect in the present case is that when the Parliament has amended the provisions of Rule 1A of Code of Civil Procedure, inspite of the existence of Section 96(3) of Code of Civil Procedure, by interpretative process also, the room has to be kept for enforcement or implementation of Order 43 Rule 1A of Code of Civil Procedure. As such, Rule 1A under Order 43 of CPC can only be pressed into service in a case where after the objections were accepted or rejected by the trial Court, a decree is drawn based on the so-called agreement or compromise, which as per the Appellant may be unlawful or that the trial Court ought not to have drawn the decree on the said basis. The additional aspect is that when Rule 1A under Order 43 of CPC was inserted in the statute book, simultaneously under Order 23 Rule 3 the explanation, has also been inserted by the Parliament while amending Code of Civil Procedure. It is by now well settled that normally when the provision is inserted in the statute book, it is to be read with the intention of the law making body, which is Parliament, in the present case with the specific purpose to deal with the situation of such type. Under such circumstances, we are not inclined to accept the contention that merely because there is reference under Order 43 Rule 1A of right to challenge the non-appealable order in the appeal against the decree, same should not be given way for enforcement. Further as observed earlier, it does not come in conflict with the provisions of Section 96(3) of CPC as sought to be canvassed. Since the examination on the said aspect is already made herein above, no further discussion would be required.

16. The aforesaid leads us to hold that, keeping in view the facts and circumstances of the case and more particularly in view of the objections raised before the trial Court under Order 23 Rule 3 of CPC in passing the decree based on the agreement or compromise, the present appeal u/s 96(1) would be maintainable and the preliminary objection raised on behalf of the applicant cannot be sustained, hence, rejected.

17. As a consequence thereof, the interim relief, which has been granted cannot be vacated on the ground that the appeal is not maintainable u/s 96 of Code of Civil Procedure.

18. Apart from the above, Mr. Shelat, Sr. advocate lastly contended that even on facts, this Court may vacate the interim relief on the ground that Respondents No. 8 to 15 have purchased the property and, therefore, no equity would be available to the Appellants. In our view, such aspects did exist at the time when the trial Court decided the question of rejecting the objection and it was also in existence when this Court earlier granted interim relief in CA No. 7364 of 2009 in FA No. 2733 of 2009. Under the circumstances, there is no cause to vacate the interim relief.

19. In view of the aforesaid observations and discussions, the application is dismissed.