

**(1985) 08 BOM CK 0017**

**In the Bombay High Court**

**Case No :** Appeal No. 499 of 1980 (In Notice of Motion No. 20 of 1976 In Summary Suit No. 1003 of 1972)

Shri Changadeo Sugar Mills Ltd.

APPELLANT

Vs

Belapur Sugar and Allied Industries Ltd.

RESPONDENT

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**Date of Decision :** 02-08-1985

**Acts Referred:**

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

**Citation :** AIR 1986 Bom 112 : (1986) 3 BomCR 332

**Hon'ble Judges :** S.P. Kurdukar, J;M.H. Kania, J

**Bench :** Division Bench

**Advocate :** D.D. Madon and K.D. Mehta, instructed by Payne and Co, for the Appellant; G.G. Desai and J.I. Mehta, instructed by . Ambubhai and Diwanji, for the Respondent

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## **Judgement**

Kania, J.—This is an appeal from an order of Bharucha, J. dated 9th October 1979 recording the agreement or compromise set out in the said order to which we shall refer in some detail a little later and passing an order in terms thereof. The appellant before us is a Company registered under the Companies Act, 1956 and was the defendant in the aforesaid Summary Suit No. 1003 of 1972. The respondent is another Company registered under the same Act and was the plaintiff in the said suit. For the sake of convenience, we propose to refer to the parties by their description in their description in the suit.

2. In order to appreciate the controversy raised before us, it is necessary to set out the relevant facts. On 6th December 1972, the plaintiff Company filed the aforesaid Summary Suit No. 1003 of 1972 against the defendant praying for a decree in the sum of Rs. 22,42,500/- of which the principal amount was Rs. 15,00,000 /- being the amount deposited by the plaintiff with the defendant, and the balance represented interest at the rate of 11% per annum. On 26th November 1973, on a summons for judgment taken out by the plaintiff, leave was granted to the defendant to defend the suit on depositing in Court Rs.

12,00,000/- as security. This deposit was not made within the time provided with the result that the plaintiff became entitled to have the suit placed on board for an ex parte decree. By his letter dated 22nd February 1974, one B.V. Mundkur , as the Receiver of the defendant Company, made certain proposals to settle the suit on the plaintiff Company, the proposal was that the defendant would pay to be plaintiff a sum of Rs. 12,00,000/- in the manner following, that is, -

- (I) Rs. 4,00,000/- on or before 28th Feb. 1974,
- (ii) Rs. 2,00,000/- on or before 13th March 1974.
- (iii) Rs. 2,00,000/- on or before 31st March 1974 &
- (iv) Rs. 4,00,000/- on or before 30th April 1974.

Regarding the balance of dues, the proposal was that the same would be paid in such manner as might be mutually agreed upon between the parties. The rest of the letter when on to state that on the defendant paying the aggregate sum of Rs. 12,00,000/- in the manner set out earlier, by 30th April 1974, the plaintiff should withdraw the suit without obtaining any decree or any order as to costs. There is a further letter dated 27th February 1974 addressed by the said Mundkur on behalf of the defendant to the plaintiff. But the said letter does not in any manner vary the terms of the proposal. All that it states is that payments towards the balance amount, that is, the balance amount after Rs. 12,00,000/- were paid as aforesaid, would depend upon release of sugar stock by the Sugar Directorate, New Delhi. By his letter dated 28th February 1974 addressed to the said Mundkur as the Receiver of the defendant, the Chairman of the plaintiff pointed out that, since the defendant was being given considerably extended time for making payment of total amount of Rs. 22,42,500/- with interest and costs which was the subject-matter of the summary suit, the defendant should at least pay the plaintiff interest at the rate which the plaintiff had to pay to its bankers on its cash credit account and should reimburse the plaintiff the costs and out of pocket expense which might be incurred by the plaintiff in the suit. The relevant portion of para 3 of the said letter runs as follows:

".....We are prepared to accept your proposal to settle this matter on your paying to us a sum of Rs. 12,00,000/- by 30th April 1974 in the manner set out in your first above mentioned letter dated 2nd February 1974 and the balance of Rs. 10,42,800/- by monthly installments of not less than Rs. 50,000/- together with interest on the amount remaining unpaid at the date of each monthly payment, from out of the total amount of Rs. 22,42,500/- at the same rate which we are required to pay to our bankers on our cash credit account. In addition, your Company should reimburse us our costs and out of pocket expenses as mentioned earlier, such reimbursement to be effected before 30th September 1974."

In the last para, the Chairman of the plaintiff requested that what was suggested by him should be confirmed by the defendant. By his letter dated 28th February

1974, Mundkur on behalf of the defendant wrote inter alia as follows:

"We refer to your letter No. PBL P.2/481 dated 28th February 1974 and write to confirm that the terms of settlement of the above matter as set out therein are correct."

We may mention here that the letter referred to in this para is the same letter of the plaintiff which we have referred to just above. With the said letter, Mundkur enclosed a cheque dated 28th February 1974 in favour of the plaintiff for Rs. 4,00,000/- and the said letter addressed by Mundkur on behalf of the defendant makes it clear that this amount of Rs. 4,00,000/- represented the amount payable by the defendant in accordance with the proposal set out in the defendant's letter dated 22nd February 1974. Thereafter, certain draft consent terms marked "without prejudice" were sent by the plaintiff's Advocates to the defendant's Advocates. These terms have never been signed, and hence need not be discussed in detail. The only notable feature of the draft consent terms is that the rate of interest has been mentioned therein as 14% per annum. By its letter dated 23rd April 1974 addressed to the plaintiff, the defendant asked the plaintiff to consider the waiver or reduction of payment of legal costs and incidental expenses and also reduction in the rate of interest. By its letter dated 27th April 1974 addressed to the defendant, the plaintiff pointed out that the interest to be specified in the terms of the consent decree would remain as 14% per annum, but the amount payable by the defendant towards the costs of the suit would be reduced to one-half of the total costs. The plaintiff by its letter dated 8th July 1974 addressed to the defendant referred to certain discussion held over the telephone between the parties' solicitors and pointed out how the amount of Rs. 22,42,500/- claimed in the suit had been worked out in the plaint. The details of their working out show that out of the said amount, the principle amount was Rs. 15,00,000/- and the balance of Rs. 7,42,500/- represented interest. By the said letter, it is set out by the plaintiff that in the aforesaid draft consent terms the date from which interest at 14% per annum on the amount of Rs. 26,28,701.50 referred to in the said terms should be stated as "28th February 1974" and not "6th December 1973". It is common ground that by this letter the plaintiff agreed that the date from which interest at 14% per annum would commence against the defendant would be 28th February 1974 and not 6th December 1973. By the said letter the plaintiff requested the defendant to instruct its solicitors to have the consent terms filed in Court in the said suit at an early date. Thereafter there has been considerable correspondence between the parties, but it is not necessary to refer to a letter dated 23rd September 1978, because some arguments were based by Mr. Madon on that letter. By that time, the said Mundkur who was formerly the Receiver of the defendant had become the Managing Director of the plaintiff Company and the said letter of 23rd September 1978 has been addressed by him as the Managing Director of the plaintiff Company to the Chairman of the defendant Company. In the earlier portion of the letter, Mundkur has set out as to what he did as the Receiver of the defendant Company and what was the nature of dispute which had arisen

between him as the Receiver of the defendant Company and one Dhondy as the Chairman of the plaintiff. The letter thereafter points out that he, that is, Mundkur had taken over as the Managing Director of the Plaintiff and records the desire on his part that an amicable settlement should be arrived at in the proper spirit. He has then written as follows:

".....I have, therefore, decided to withdraw Belapur's claim for compound interest in respect of the interest due on the principal amount of Rs. 15 lacs."

In the said letter Mundkur has pointed out that he had re-worked interest now payable by defendant to the plaintiff at simple interest of 14% per annum. The letter then refers to a statement of calculations made by him. Mundkur pointed out in the said letter that in the said statement, the balance amount payable by the defendant to the plaintiff works out of Rs. 6,84,654-52 and that in this statement all installments received from the defendant have been first adjusted towards the principal I amount with a view to reduce the burden of interest on the defendant. Thereafter Mundkur has gone on the state as follows:

"I shall be grateful if you would kindly discuss this matter at the next meeting of your Board of Directors and agree to pay this outstanding amount to Belapur as early as possible."

In the said letter, Mundkur has thereafter expressed hope that the defendant would agree. It is common ground that no such agreement as was contemplated by Mundkur was arrived at and the defendant did not pay the aforesaid amount of Rs. 6,84,654-52 within any reasonable time of 23rd September 1978. All that has happened in this regard is that, during the pendency of this appeal, the defendant has deposited Rs. 6,84,654-52 in the Court and the plaintiff has withdrawn this amount with the leave of the Court without prejudice to its rights and contentions. The learned Judge has not given any reason for his order, but by his impugned order, he recorded the agreement of compromise arrived at between the plaintiff and the defendant as contained I the two letter both dated 28th February 1974 subjected to the modification by the plaintiff's letter dated 8th July 1974 and on the footing passed a decree against the defendant and in favour of the plaintiff for a sum of Rs. 25,459,44/- for debt and a sum of Rs. 6,25,451.98 for interest at the rate of 14% per annum on the sum of Rs. 21,45,944/- together with a sum of Rs. 18,813/- for costs of the suit, which amounts in the aggregate to a sum of Rs. 31,90,203.98. Further interest has been directed to be paid at the rate of 14% per annum on the principal amount of Rs. 6,96,944/-. It may be mentioned, since there is no controversy about it, that the chances of the plaintiff recovering even a reasonable portion of this amount is very remote, looking to the dire financial condition of the defendant Company.

3. The first submission of Mr. Madon, learned Counsel for the defendant is that there was no compromise at all arrived at, the parties were never ad idem and that the matter had remained merely at the stage of negotiations. In our view,

this submission cannot be sustained. We have referred to the contents of the relevant letters. It is not disputed that the persons who addressed these letter had the authority from the parties on whose behalf they addressed these letters to settle the dispute. In our view, the defendant by its letter dated 22nd February 1974 made a proposal to settle the suit on the terms that the defendant would pay to the plaintiff a sum of Rs. 12,00,000/- in the manner set out in the said letter, that on such payment, the last payment being made by 30th April 1974, the plaintiff was to withdraw the suit and as far as the balance of the amount was concerned, it would be paid in mutually agreed installments. By its letter dated 28th February 1974 addressed to the defendant, the plaintiff accepted the said offer, but on certain conditions with the result that, in effect, by the said letter, the plaintiff made a counter offer that on the defendant paying a sum of Rs. 12,00,000/- by 30th April 1974 in the manner set out in the defendant's letter dated 22nd February 1974 and further agreeing to pay the balance of Rs. 10,42,800/- by monthly installments of not less than Rs. 50,000/- together with interest on the amount remaining unpaid at the date of each monthly installments of not less than Rs. 50,000/- together with interest on the amount remaining unpaid at the date of each monthly payment from out of the amount of Rs. 22,42,500/- at the same rate which the plaintiff was required to pay to its bankers in its cash credit account and the costs and out of pocket expenses of the suit, the suit would be treated as settled on that footing. By its said letter dated 28th February 1974, the defendant accepted that offer unconditionally and sent a cheque of Rs. 4,00,000/- in pursuance of the settlement. There has been thereafter no further agreement as such between the parties. However, it appears that by its letter dated 27th April 1974 addressed to the defendant, the plaintiff agreed that the rate of interest charged would be 14% per annum which admittedly was less than the rate of interest paid by the plaintiff to its bankers in its cash credit account. By its letter dated 8th July 1974 addressed to the defendant, the plaintiff confirmed having agreed that interest would be charged at 14% per annum on the amount of Rs. 26,28,701-50 as recorded in the first para of the draft consent terms at 14% per annum but the payment of interest would commence on 28th February 1974 and not 6th December 1973. By Mundkur's letter dated 23rd September 1978 addressed as the Managing Director of the plaintiff, the plaintiff decided to withdraw its claim for compound interest and confirmed that the interest payable by the defendant to the plaintiff would be simple interest at the rate of 14% per annum. It is true, as pointed out by Mr. Madon that in the said letter there is reference to a statement sent by the said Mundkur on behalf of the plaintiff showing the calculations of the amount payable on the footing of simple interest being 14% per annum and further on the footing that the payments made by the defendant would be first adjusted towards the principal and recording that on the footing the sum payable worked out at Rs. 6,84,654-52. It was urged by Mr. Madon that in view of this, if there was a compromise, under the compromise only a sum of Rs. 6,84,654-52 remains payable by the defendant to the plaintiff. We are unable to accept that contention. It is true that in the statement it is shown that the

sum of Rs. 6,84,654-52 remains payable by the defendant to the plaintiff on the footing just set out earlier, but the latter part of the letter makes it quite clear that this calculation was made by way of a without prejudice offer and that the plaintiff was willing to accept the said amount and proceed on the footing that the payments by the defendant to the plaintiff should be first adjusted towards the principal and then interest on condition that the defendant agreed that the said amount had to be paid and agreed to pay the same to the plaintiff at an early date. It is common ground that the defendant agreed to no such payment and no payment of this amount was made within a reasonable time for 23rd September 1978. In view of this, all that can be said about the said letter of 23rd September 1978 is that under the letter, the plaintiff's claim for compound interest was given up. In our view, therefore, there was a compromise of the suit on the basis of the terms set out in the letters both dated 28th February 1974 subjected to modification as aforesaid by the plaintiff's letter dated 8th July 1974 which are Exs. "A" and "B" (collectively to the affidavit modification that the interest was to be calculated at 14% per annum simple interest and was to begin from 28th February 1974 and not 6th December 1973).

4. It was next submitted by Mr. Madon that if there was a compromise, it was on the footing that on the payment of Rs. 12,00,000/- by the defendant to the plaintiff by 20th April 1974, the plaintiff would withdraw the suit. This submission is based on the proposal contained in the defendant's letter dated 22nd February 1974. It was pointed out by Mr. Madon that para 3 of the plaintiff's said letter dated 28th February 1974 contains a statement a part of which runs as follows:

"..... we are prepared to accept your proposal to settle this matter on your paying to us a sum of Rs. 12,00,000/- by 30th April 1974 in the manner set out in your first above mentioned letter dated 2nd February 1974....."

In our view, there is no substance whatever in this contention. What is relied on by Mr. Madon is really a part of a sentence in paragraph 3 of the said letter. A plain reading of the said paragraph makes it clear that the aforesaid proposal made in the defendant's said letter dated 22nd February 1974 was accepted only on certain conditions regarding the payment of balance amount, costs and interest as we have set out earlier, and hence there was no acceptance at all of the defendant's said offer by the plaintiff's letter dated 28th February 1974 and in law, the said letter of the plaintiff dated 28th February 1974 amounted to a counter-offer as we have already pointed out.

5. The next submission of Mr. Madon was that, in so far as the compromise recorded was on the footing that interest was payable by the defendant to the plaintiff at 14% per annum, the compromise was beyond the scope of the suit as the interest claimed in the suit was only at the rate of 11% per annum. In support of this submission, reliance was placed on the provisions of R.3 of O. XXIII of the Civil P.C. 1908, as it stood prior to its amendment in 1976. The relevant part of the said Rule runs thus:

"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, 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 suit."

It was submitted by him that in view of this Rule, if any compromise provides for payment of interest at a rate higher or for payment of an account higher than that claimed in the suit, such compromise could be beyond the scope of the suit, and cannot be recorded in the form of a decree.

6. In support of this submission, Mr. Madon placed strong reliance upon the decision of a Division Bench of the Patna High Court in *Gouri Dutt v. Dohn Thaku*, AIR 1918 Pat 635. In that case, the appellant who was the decree-holder had instituted a suit for the recovery of Rs. 7,018.67 against the defendant on a "bahi khata". Before the disposal of the suit, a compromise was effected between the parties and a petition was put in embodying the terms of the compromise. It was agreed that the defendant should pay to the plaintiff the sum of Rs. 2,500/- on or before 30th June 1915, and that, if the money was paid by that date, interest should run at the rate of 12 annas per cent, per mensem. It was further agreed that if the money was not paid on or before 30th June 1915, interest should run at the rate of compromise to the date of realisation. A decree was prepared in terms of the compromise and the plaintiff put that decree into execution and in doing so calculated the interest at there rate of 24 percent, per annum. The defendant raised an objection under S. 47, Civil P.C. The executing Court allowed the objection holding that the higher rate of interest was a penalty. An appeal was preferred against that decision to the High Court, Sharfuddin, J., in the leading judgment, held that from the compromise terms themselves, it was very clear that the rate of interest agreed upon was really 9 per cent per annum and the decree holder was entitled to obtain from the defendant Rs. 2,500/- with interest at the rate of 9 per cent per annum. As to the stipulation that the rate of interest will be 24 per cent per annum upon failure to pay the money agreed upon on the date agreed upon it was a matter which according to Sharfuddin, J. was to quote his own words, "altogether superfluous". Roe, J. in his concurring judgment held that the agreement to pay after the specified period a rate of interest not claimed in the plaint was outside the scope of the suit, was invalid, and ought not have been included in the decree and could not be executed as part of the decree.

7. We find it difficult to accept the submission of Mr. Madon. It is well settled that under r. 3 of O.XXIII of the Civil P.C. Prior to its amendments in 1976, only an agreement or compromise which related to the suit could be recorded in the form of a decree. If an agreement compromising the disputes did not relate to the suit or went beyond the scope of the suit as such, that part of the agreement which went beyond that scope of the suit could not be incorporated in the decree. In

our view, in the present case, the scope of the suit is the claim of the amount lent and advanced by the plaintiff to the defendant and the rate of interest is merely incidental. Therefore, even though a higher rate of interest is provided in the compromise than claimed in the suit, it could not be said that it went beyond the scope of the suit. A distinction has to be borne in mind between the prayers in the plaint and the scope or the subject-matter of the suit. Although the provision for higher rate of interest went beyond the prayers in the plaint, we fail to see how it can be said that it goes beyond the scope of the suit or the subject matter of the suit. As for the decision of the Patna High Court referred to earlier, we find that, in the leading judgment, Sharfuddin, J. has said really nothing on this point at all. What Sharfuddin, J. held in terms was only that in so far as the rate of interest provided for in the compromise was higher than the rate of interest which was really agreed upon between the parties, it was "superfluous". As far as the decision of Roe, J. is concerned, with respect, we are unable to agree with the same. It appears to us, with respect, that the learned Judge has restricted the scope of the suit to the prayers in the suit, which in our view, is not warranted in law. We find that the view which we are taking, finds support from the decision of a Division Bench of this Court in Vishnu Sitaram Auchat Vs. Ramchandra Govind Joshi, Patkar, J. who delivered the judgment of the Court stated that the law not merely entitles the parties but compels the Court to record a compromise in accordance with the terms "so far as it relates to the suit" under O.XXIII, R. 3, but where the compromise is plainly outside the suit, the Court might refuse to incorporate it in the decree; but where a term in the compromise is a consideration of the compromise and therefore intimately connected with, the words "relates to the suit" are wide enough to embrace such a term of the compromise, as for instance, the consideration for the compromise even though this consideration may be entirely outside the scope of the suit. In the case before us, under the compromise the plaintiff who had already become entitled to have the suit set on board for an ex parte decree by reason of the failure of the defendant to comply with the condition on which leave to defend was granted, agreed to give a much longer time to the defendant to pay the amount in question and also granted the facility of payment by installments. In view of this, it is quite clear that the higher rate of interest provided was really a consideration for the other terms of the compromise being agreed to by the plaintiff and it cannot be said that such a term went beyond the scope of the suit. A similar view has been taken by a learned single Judge of this Court in Bajirao Narhar Peshwa Vs. Sakharan Balvant Peshwa, . In fact we find that in Ramjanam Tewary and Another Vs. Bindeshwari Bai, a Division Bench of the Patna High Court has taken the view that the question whether a particular term of a compromise relates to the subject-matter of the suit has to be answered on the frame of the suit, the relief claimed and the matter which arose for decision in the case on the pleadings of the parties. It was further held that there is a large body of authority to show that where a compromise relating to matters outside the scope of the suit is a part of the consideration for the agreement as to matters in suit, the entire compromise an integral whole must be recorded and

decreed as relating to the suit (para 16 of the report). In view of this, the last submission of Mr. Madon must also be rejected.

8. In the result, the appeal fails and is dismissed with costs save and except that, if necessary, the decree will be varied as set out in the last portion of para 3 of our judgment. Appeal dismissed.