

...RESPONDENTS

(BY SRI S A SONDUR, ADVOCATE FOR R2 TO R8
(VAKALATH NOT FILED)
SRI L T MANTAGANI, ADVOCATE FOR R1
NOTICE TO R9 TO R25 IS DISPENSED WITH VIDE ORDER
DATED 3.08.2023)

THIS CRP IS FILED UNDER SEC.115 OF CPC, PRAYING TO CALL FOR RECORDS OF OS NO. 152/2021 ON THE FILE OF THE SENIOR CIVIL JUDGE, BAILHONGAL AND SET ASIDE THE ORDER DATED 13.06.2023 ON IA NO. IV PASSED IN OS NO. 152/2021 ON THE FILE OF THE SENIOR CIVIL JUDGE, BAILHONGAL, IN THE INTEREST OF JUSTICE AND EQUITY AND ETC.

THIS CRP HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 04.01.2024 AND COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT DELIVERED THE FOLLOWING:

ORDER

The present petition is filed under Section 115 of the Code of Civil Procedure Code (hereinafter referred to as 'the CPC') challenging the order dated 13.6.2023 passed on IA.No.4 in OS No.152/2021 by the Senior Civil Judge, Bailhongal, (hereinafter referred to the 'the Trial Court') whereunder IA.No.4 filed by defendant No.5 under Order

VII Rule 11 of the CPC has been dismissed by the Trial Court.

2. The parties herein are referred to by their rank before the Trial Court for the sake of convenience.

3. The relevant facts necessary for consideration of the present petition are that the plaintiff instituted a suit in OS No.152/2021 for partition and separate possession. The defendant No.5 entered appearance in the said suit and contested the case of the plaintiff. Defendant No.5 filed IA.No.4 under Order VII Rules 11(a) and (b) of the CPC to reject the plaint as barred by law. The said application is opposed by the plaintiff. The Trial Court by its dated 13.6.2023 dismissed the said application. Being aggrieved the present petition is filed.

4. Learned Counsel for the petitioner Sri Chetan Munnoli, assailing the order of the Trial Court submits that admittedly in the earlier suit OS No.101/2021 filed for partition a compromise decree was entered in to between the parties and the father of the plaintiff was allotted a

share in the said compromise. Hence, it is not open for the plaintiff to file the present suit and he has to claim a share only from the father. It is further contended that the Trial Court erred in dismissing the application filed by defendant No.5 without noticing the bar contained under Order XXIII Rule 3A of the CPC. Hence, he seeks for allowing of the present petition and granting of the reliefs sought for.

5. Per contra, learned counsel for the first respondent Sri Mantagani, justifies the order passed by the Trial Court and submits that the contention put forth by defendant No.5 and the application having been rejected, the said order is not liable to be interfered with by this Court in the present petition.

6. Both the learned counsel have relied on various judgments, which shall be considered during the course of this order.

7. The submissions of both the learned Counsel have been considered and the material on record have

been perused. The question that arises for consideration is, *whether the order passed by the Trial Court is liable to be interfered with?*

8. The necessary facts are undisputed, inasmuch as a suit in OS No.101/2021 was filed against the father of the plaintiff and his brothers and sisters which suit was decreed pursuant to a compromise entered into between the parties in the Lok Adalath and the father of the plaintiff was allotted a share in the said compromise. Admittedly, the plaintiff was not arrayed as a party to the said suit.

9. The plaintiff has filed the present suit for a declaration that he is not bound by the compromise passed in OS No.101/2021 and also seeking for a share in the suit properties. In the plaint, the plaintiff has averred that he was not arrayed as a party to OS No.101/2021 and hence, the said compromise is not binding upon him. It is further averred that he has a right in the suit properties.

10. Order XXIII Rule 3A of the CPC states as follows:

*"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."*

11. The Hon'ble Supreme Court in the case of ***Pushpa Devi Bhagath vs. Rajinder Singh***¹ after taking note of the scheme of Order XXIII Rule 3 and Rule 3A of the CPC, has held as follows:-

"17. The position that emerges from the amended provisions of Order 23 can be summed up thus:

(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC.

(ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) of Rule 1 Order 43.

(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3-A.

(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 Order 23."

¹ (2006) 5 SCC 566

12. In the case of ***Triloki Nath Singh v. Anirudh Singh (dead) through legal representatives & Ors.***² relied upon by the learned counsel for the petitioner the Hon'ble Supreme Court was considering a case wherein the appellant was the purchaser from a party to the *lis* during the pendency of the proceedings before the first Appellate Court. The original *lis* was compromised between the parties when the same was pending before the second Appellate Court. The appellant who was the purchaser, subsequently filed a suit claiming that he was not bound by the compromise. The Hon'ble Supreme Court noticing that the appellant has purchased the property during the pendency of the *lis* between the parties as also noticing that he was claiming through one of the parties to the *lis* held as follows:

"20. Thus, after the amendment which has been introduced, neither any appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3-A of Order 23 CPC. As such, a right has been given under Rule 1-A(2) of Order 43 to a party, who denies the compromise and invites order of the

² (2020) 6 SCC 629

court in that regard in terms of the proviso to Order 23 Rule 3 CPC while preferring an appeal against the decree. Section 96(3) CPC shall not be a bar to such an appeal, because it is applicable where the factum of compromise or agreement is not in dispute.”

(emphasis supplied)

13. Learned counsel for the petitioner further relied on the judgments in the cases of ***State of Punjab v. Jalour Singh***³ and ***Bhargavi Constructions v. Kothakapur Muthyam Reddy***⁴ to contend that a party challenging an award passed by a Lok Adalath is required to challenge the same only by filing a writ petition. However, the said judgment will not apply to the present case inasmuch as the plaintiff was not a party to the compromise and the said judgment is applicable only to the parties to the compromise before the Lok Adalath.

14. It is further contended by the learned counsel for the petitioner that in the law that is applicable to the region where the parties are residing, a party is not entitled to a partition without the assent of his father and

hence, the plaintiff can make a claim for partition only through the father, and that the suit of the plaintiff is not maintainable. In support of the said contention, he relied on the extract from Mulla's Hindu Law – 24th Edition. He also relies on the Division Bench judgment of Gujarath High Court in the case of ***Aher Amir Duda v. Aher Amir Arjan***⁵ as well as the judgment of a coordinate Bench of the Madhya Pradesh High Court in the case of ***Shiv Ratan v. Kanhaiyalal***⁶ .

15. The said contention of the learned counsel for the petitioner is not liable to be accepted having regard to the fact that the said contention was not urged/averred when IA.No.4 was filed before the Trial Court. IA.No.4 under Order VII Rule 11(a) and (d) was filed only on the ground that the earlier suit for partition was compromised between the parties. Hence, the petitioner cannot be permitted to raise a new ground before this Court for the

³ (2008) 2 SCC 660

⁴ (2018) 13 SCC 480

⁵ AIR 1978 GUJ 10

⁶ 1993 MP.LJ 367

first time and he is entitled to urge the same as his defence in the suit.

16. Learned counsel for the petitioner further relies on a Division bench judgment of this Court in the case of ***Bahubali Ramappa Padnad v. Babu @ Baburao S.Padnad***⁷ to contend that the suit of the plaintiff is not maintainable. However, the judgment in the case of ***Bahubali Ramappa Padnad***⁷ is not applicable having regard to the fact that a Division Bench of this Court in the case of ***Siddalingeshwar & Ors., v. Virupaxgouda & Ors.***⁸ has considered a question as to whether the bar under Order XXIII Rule 3A of the CPC will apply if Rule 3B is not complied with. In considering the said question, this Court has held as follows:

"15. The effect of the amendments to provisions of Orders 23 and 41 of CPC, effected by Act No. 104/1976, can conveniently be summarised thus:

(i) If a party to a suit who enters into a compromise in terms of which a consent decree is made wants to challenge it, on the ground that it is not lawful, he need not be driven to file a separate

⁷ ILR 1999 KAR 3344

⁸ AIR 2003 KAR 407

suit to set aside such decree. In fact such a suit is barred by Rule 3A of Order 23. His remedy is to file an appeal under Order 43 Rule 1A of CPC contending that the compromise not being lawful, it should not have been recorded. Alternatively, he can file an application in the very suit in which the compromise is recorded to recall the consent decree on the ground that compromise is not lawful or is vitiated by fraud.

(ii) If a suit is a representative suit (as enumerated in the explanation to Rule 3B), no compromise or agreement can be entered without the leave of the Court, expressly recorded in the proceedings, after issue of notice to the persons interested, as provided in the said Rule. Any party to a representative suit, either suing or being sued in a representative character, should therefore seek leave of the Court to enter into such compromise/Agreement. The Court should give notice of such compromise/agreement to such persons as may appear to it to be interested in the suit before granting such leave. After such notice, and after satisfying itself that the proposed Compromise/Settlement is not disadvantageous to the persons interested, the Court may grant leave, by expressly recording it. Failure to comply with the mandatory provisions of Rule 3B will render the agreement or compromise void.

(iii) The object of the amendments to Order 23 and Order 43 is to have finality to proceedings and at the same time enable to party to a compromise, to challenge the decree passed in terms of such compromise, either by way of an appeal under Order 43 Rule 1A or by way of an application in the very suit, without resorting to a separate suit, if the compromise is not lawful. The said amendments are not intended to bar persons who were not parties to the suit (but nevertheless bound by the decree by virtue of the fact that the suit is a representative suit) from challenging such consent decree even where such decree was passed

without following the mandatory procedure prescribed under Rule 3B. A decree in a representative suit can bind non-parties, only if the procedural safeguards prescribed for representative suits are complied with. Similarly a consent decree in a Representative Suit will attract the bar under Order 23 Rule 3A only if the procedural safeguards prescribed under Order 3B are complied with and not otherwise."

(emphasis supplied)

15.1 This Court⁸ further held as follows:

17. In a suit for partition, where the heads of branches alone are made parties, any decision rendered would bind not only the heads of the branches, but also the members of the branches represented by the respective heads (who have been made parties). Therefore, a partition suit where only the heads of branches are made parties, without impleading the other members who are entitled to shares, will be a representative suit for the purpose of Order XXIII Rule 3-B of CPC, having regard to the explanation (d) to the said Rule. In such a representative suit, no agreement or compromise can be entered into without the leave of the Court, expressly recorded in the proceedings after issuing notice to all parties interested in the suit."

(emphasis supplied)

17. It is relevant to note here that in the case of **Siddalingeshwar**⁸, this Court also noticed the judgment of the Division Bench of this Court in the case of **Babhubali Ramappa Padnad**⁷ and held that the said judgment is rendered *per incuriam* and is not a binding

precedent since it did not take note of Rule 3B of Order XXIII.

18. It is clear that in the present case the plaintiff not being a party to OS No.152/2021 and the compromise in the said suit was not recorded after complying with Rule 3B of Order XXIII of the CPC is entitled to file the suit. The Trial Court has considered the application and held that the plaintiff has pleaded about the compromise in OS No.101/2021 and having regard to the fact that the plaintiff was not a party to the earlier suit and since he was not allotted a share, has dismissed the application filed by defendant No.5.

19. In view of the discussion made above, the petitioner – defendant No.5 has failed in demonstrating that the order passed by the Trial Court is liable to be interfered with and the relief sought in IA.No.4 before the Trial Court is liable to be granted. Hence, the question framed for consideration is answered in the negative.

20. In view of the aforementioned, the above revision petition is dismissed as being devoid of merit.

No costs.

**Sd/-
JUDGE**

nd/-