

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKHAT SRINAGAR**

Reserved on: 28.02.2024

Pronounced on:06.03.2024

CR No.33/2022

GULAM NABI KHANDAY & ORS. ...PETITIONER(S)

Through: - Mr. G. A. Lone, Advocate.

Vs.

MUSHTAQ AHMAD & OTHERS ...RESPONDENT(S)

Through: - Mr. Malik Mushtaq, Advocate.

CORAM:HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1) This Civil Revision is directed against the order dated 06.10.2022 passed by the Court of Learned Munsiff, Pulwama (for short 'the trial court'), whereby the application of the petitioners under Order 7 Rule 11 CPC for rejection of the plaint has been dismissed.

2) The order has been impugned by the petitioners on the ground that the contesting respondents 1 to 5 could not have filed the suit against the petitioners for challenging the decree passed in suit titled "Ghulam Nabi Khanday & Anr. versus Mst. Azizi & Anr." by the court of learned Sub-Judge, Shopian, besides other reliefs, in view of the bar contained under Order 23 Rule 3-A CPC.

3) Mr. G. A. Lone, learned counsel for the petitioners has vehemently argued that once there was a decree passed pursuant to the compromise in respect of the suit property, the contesting respondents could not have filed the suit in view of the bar contained in Order 23

Rule 3-A CPC. Learned counsel further submitted that the judgments as reflected in the order impugned have been wrongly applied by the learned trial court. Mr. Lone, learned counsel for the petitioners has relied upon the judgment of the Hon'ble Supreme Court of India in **Triloki Nath Singh Vs. Anirudh Singh (D) thr. LRs & Ors, (2020) 6 SCC 629.**

4) *Per contra*, Mr. Malik Mushtaq, learned counsel appearing for contesting respondents submitted that the order impugned has been passed in accordance with law and since the contesting respondents were not parties to the compromise decree, they had every right to file the suit. Learned counsel relied upon the judgment passed by the coordinate Bench of this Court in the case of **“Nikhat Nabi vs. M/S Fancy Fabrics and Others (J AND K Bank Limited) (CM(M) No.265/2022 decided on 22.09.2023).**

5) Heard and perused the record.

6) The perusal of the trial court record reveals that Mst. Khatji i.e. predecessor-in-interest of the contesting respondents had filed a suit against the petitioners and proforma-respondents praying for a decree of declaration, partition with separate possession and permanent injunction. The relief of declaration included the declaration of the collusive decree dated 30.12.1995 passed by the learned Sub-Judge, Shopian as null and void qua the rights of Mst. Khatji in respect of the land measuring 10 kanals comprising survey no. 271 and

1899/1702/1322 situated at Drabgam Pulwama. A perusal of the suit titled “Ghulam Nabi Khande & Anr. versus Mst. Azizi & Anr.” reveals that the petitioner Nos. 1&2 had filed the suit against Mst. Azizi & Mst. Rehmati and Mst. Khatji, who was also the daughter of Wahab Dar was not made party in the said suit.

7) During the pendency of the suit, Mst. Khatji died and she was substituted by the contesting respondents in the suit as legal representatives of the deceased plaintiff therein. Thereafter the petitioners filed an application seeking rejection of the plaint on the ground of being barred under Order 23 Rule 3-A of CPC. The response was filed by the contesting respondents stating therein that the learned trial court had concluded the trial of the suit and when the matter was posted for final arguments, then only the aforesaid application was filed just to delay the suit. It was further stated that the contesting respondents had not claimed any right or title through any of the parties to the compromise decree and, as such, the application filed by the petitioners was misconceived.

8) The learned trial court vide order impugned rejected the application of the petitioners thereby observing that neither the plaintiff nor her predecessor-in-interest i.e. Wahab Dar, through whom the original plaintiff was claiming, was a party to the suit. It is not in dispute that it is the estate of Wahab Dar which is the subject matter of litigation.

9) The moot question that arises for consideration of this Court is as

to whether the bar created under Order 23 Rule 3-A of CPC is applicable to the suit filed by a person who is neither a party to the compromise decree nor claiming any right through the party to the compromise decree in the said suit ?

10) Order 23 Rule 3 CPC vests power in the Court to dispose of the suit wholly or in part on the basis of any lawful agreement or compromise in writing and signed by the parties. Further the proviso appended to Order 23 Rule 3 also enjoins upon the Court to decide the question when one party denies the adjustment or satisfaction as claimed by the other party. The Explanation appended to Order 23 Rule 3 CPC provides that an agreement or compromise which is void or voidable under the Indian Contract Act, 1872 shall not be deemed to be lawful within the meaning of this rule.

11) Order 23 Rule 3-A lays down that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. The Hon'ble Supreme Court of India in **Pushpa Devi Bhagat (Dead) through LR Sadhna Rai (Smt) vs. Rajinder Singh,** (2006) 5 SCC 566, has held as under:

“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) 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 3A.
- (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 of Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not....”

12) Further, the Hon’ble Supreme Court of India in “**R. Janakiammal v. S.K. Kumarasamy (Deceased) through Legal Representatives**”, (2021) 9 SCC 114, after taking note of its various pronouncements including **Pushpa Devi Bhagat**(supra) has in paras 47 and 58 held as under:

“47. A conjoint reading of Sections 10, 13 and 14 indicates that when consent is obtained by coercion, undue influence, fraud, misrepresentation or mistake, such consent is not free consent and the contract becomes voidable at the option of the party whose consent was cause due to coercion, fraud or misrepresentation. An agreement, which is void or voidable under the Contract Act, shall not be deemed to be lawful as is provided by Explanation to Rule 3 of Order 23.

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58. The above judgments contain a clear ratio that a party to a consent decree based on a compromise to challenge the compromise decree on the ground that the decree was not lawful i.e. it was void or voidable has to approach the same court, which recorded the

compromise and a separate suit challenging the consent decree has been held to be not maintainable. In Suit No. 1101 of 1987, the plaintiff prayed for a declaration declaring that the decree passed in OS No. 37 of 1984 is sham and nominal, ultra vires, collusive, unsustainable invalid, unenforceable and not binding on the plaintiffs. We have noted the grounds as contained in the plaint to challenge the consent decree in the foregoing paragraphs from which it is clear that the compromise, which was recorded on 6-8-1984 was sought to be termed as not lawful i.e. void or voidable. On the basis of grounds which have been taken by the plaintiff in Suit No. 1101 of 1987, the only remedy available to the plaintiff was to approach the court in the same case and satisfy the court that compromise was not lawful. Rule 3-A was specifically added by the amendment to bar separate suit to challenge the compromise decree which according to legislative intent was to arrest the multiplicity of proceedings. We, thus, do not find any error in the judgment of the trial court and the High Court holding that Suit No. 1101 of 1987 was barred under Order 23 Rule 3-A.

(Emphasis added)

13) Thus, it is evident that the consent decree can be avoided by a party to a consent decree only through an application under Order 23 Rule 3-A, whose consent has been obtained by coercion, undue influence, fraud, misrepresentation or mistake, as such consent cannot be termed as free consent and contract based on such consent becomes voidable.

14) In **Triloki Nath Singh** (supra) which has been heavily relied upon by learned counsel for the petitioners, it has been held that the intention of the legislature behind amending Order 23 thereby incorporating Rule 3-A is to grant finality to the decisions on the basis

of compromise. The scheme of Order 23 Rule 3 CPC is to avoid multiplicity of litigation and permit parties to amicably come to a settlement. In the said judgment, though the Hon'ble Supreme Court in Para 21 has mentioned that the appellant therein was not a party to the compromise decree but held that as the appellant was claiming right, title and interest through a person who was a party to the earlier compromise decree, so he could not have challenged the compromise decree

15) The Hon'ble Supreme Court in **M/S Sree Surya Developers & Promoters v. N. Sailesh Prasad, (2022) 5 SCC 736**, has held that a party to a consent decree based on a compromise to challenge the compromise decree on the ground that the decree was not lawful i.e. it was void or voidable, has to approach the same court, which recorded the compromise and a separate suit challenging the consent decree will not be maintainable. The coordinate Bench of this Court has also taken similar view, though in different facts and circumstances of the case.

16) In view of above, this Court is of the considered view that the bar contained under Order 23 Rule 3-A of CPC shall not be applicable to a stranger to the compromise decree challenging the compromise decree provided he is not claiming any right through a party to the compromise decree. The learned trial court has rightly come to conclusion that neither the original plaintiff nor her predecessor-in-interest was party to the compromise decree as such the bar contained under Order 23 Rule 3-A was not applicable in the case. Viewed thus,

there is no merit in the present petition and the same is, accordingly, dismissed.

17) Parties to bear their own costs

(Rajesh Oswal)
Judge

SRINAGAR
06.03.2024
“Bhat Altaf-Secy”

Whether the order is reportable: **Yes**

