



2024/KER/19

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 3RD DAY OF JANUARY 2024 / 13TH POUSHA, 1945

RSA NO. 247 OF 2023

AGAINST THE DECREE AND JUDGMENT DATED 31.1.2023 IN

AS.NO.10/2020 OF SUB COURT, PUNALUR, KOLLAM.

AGAINST THE DECREE AND JUDGMENT DATED 16.1.2019 IN

OS.NO.108/1999 OF MUNSIF COURT, PUNALUR

APPELLANT/APPELLANT/1ST DEFENDANT:

ASHIYA UMMAL
AGED 70 YEARS

BY ADVS.
K.S.HARIHARAPUTHRAN
PINKU MARIAM JOSE
ANIL KUMAR T.P.

RESPONDENTS/1ST RESPONDENT AND RESPONDENTS 5 TO 8, 10 &

11/PLAINTIFF AND ADDL.DEFENDANTS 5 TO 8 AND 10 TO 11:

1 S.N. SATHY
AGED 68 YEARS

2 ABDUL NAVAZ
AGED 77 YEARS



RSA No.247/2023

3 ABDUL NAJEEB

4 ABDUL RAFEEK

5 ABDUL NEJUMAN

6 SHAMLA BEEGUM

7 SHAMEEM BEEGUM

R1 BY ADVS.
ATUL SOHAN
BIBIN JOHN
R.REJI
SREEJA SOHAN K.
K.V.SOHAN

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 08.12.2023, THE COURT ON 3.1.2024 DELIVERED THE
FOLLOWING:



"C.R"

A. BADHARUDEEN, J.

=====

R.S.A No.247 of 2023

=====

Dated this the 3rd day of January, 2024

J U D G M E N T

The 1st defendant in O.S.No.108/1999 on the files of Munsiff Court, Punalur, who is aggrieved by the decree and judgment in A.S.No.10/2020 dated 31.01.2023 on the files of the Sub Court, Punalur, assails the same in this Second Appeal filed under Order XLII Rule 1 read with Section 100 of the Code of Civil Procedure.

The 1st defendant in the above Suit is the appellant and the plaintiff and other defendants are the respondents in this case.

2. I shall refer the parties in this appeal with reference to their status before the trial court, as 'plaintiff' and 'defendants' hereafter for easy reference.



3. Heard the learned counsel for the appellant/1st defendant as well as the learned counsel appearing for S.N.Sathy, the original plaintiff in the above Suit.

4. Perused the judgments under challenge and the documents placed by the learned counsel for the 1st defendant and the learned counsel for the original plaintiff.

5. The plaintiff instituted the Suit for fixation of boundary, recovery of possession and consequential injunction. During pendency of the Suit, a compromise was entered into and accordingly the decree was passed on 16.01.2019 in terms of the compromise.

6. The learned counsel for the 1st defendant assails the said compromise on the ground that the 1st defendant did not sign in the compromise which led to passing of the decree. According to the learned counsel for the 1st defendant, since the 1st defendant did not sign the compromise, the same should not bind the 1st defendant and as such, the compromise could not be acted upon. It is



submitted that as per Order 43 Rule 1A(2) of the Code of Civil Procedure ('C.P.C' for short hereafter for easy reference), in an appeal against a decree passed in a Suit after recording a compromise or refusal 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 incorporated. Therefore, the learned counsel pressed for setting aside the compromise decree passed in the above Suit, where the 1st defendant is not a signatory.

7. The learned counsel for the plaintiff submitted that in the compromise entered into between the parties, the signatories are the plaintiff and the 5th defendant. The 5th defendant is none other than the husband of the 1st defendant. Apart from the plaintiff and the 5th defendant, Advocate Y.Joykutty, signed on behalf of the plaintiff and Advocate L.Thomas, signed on behalf of the whole defendants. It is also pointed out by the learned counsel for the plaintiff that even though the 1st defendant did not directly



put signature in the compromise, the 1st defendant thereafter acted upon the same and received benefit out of the same. Therefore, the 1st defendant, in fact, accepted the compromise and in such view of the matter, the 1st defendant could not succeed in opposing the finality of the compromise and, therefore, this appeal must fail.

8. In view of the rival contentions, the substantial questions of law arise for consideration are:

(i) whether challenge against a compromise decree is permissible by way of an appeal? If so, on what grounds?

(ii) What is the legal effect of a compromise where a party did not sign?

(iii) If a party, who did not sign a compromise, if acts upon the same subsequently, can he avoid the compromise decree thereafter merely on the ground that he did not put his signature in the compromise?

9. While answering the above substantial questions of law, it is relevant to note that compromise was entered into on



16.01.2019 and the signatories in the compromise are the plaintiff, her counsel, 5th defendant and the counsel for the whole defendants. In so far as the question as to legality and validity of settlement/compromise, it is relevant to refer paragraphs 93, 100 and 104 of the decision of the Apex Court in ***Prasanta Kumar Sahoo v. Charulata Sahu***, reported in [2023 (2) KLT 625 (SC)], wherein it was held as under:

“93. It is now well settled that under Order XXIII Rule 3 of the CPC as it now stands, when a claim in suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them. To constitute an adjustment, the agreement or compromise must itself be capable of being embodied in a decree.

100 & 104: The third question that arises for our consideration in context with the legality and validity of the settlement is whether the learned advocate appearing for the cross-objector i.e., Defendant No.2 could have signed the compromise petition without an express consent. It is an imperative duty of the Court to ascertain the genuineness and lawfulness of the compromise deed. Indisputably, in the case on hand, the First Appellate Court had neither recorded the statements of the parties in the Court nor had made any inquiry into



the terms of the settlement. It is in such circumstances that the High Court in its impugned order has observed that the Compromise Petition was signed by the advocate without any express authority or without special vakalatnama executed in favour of the advocate. In fact, the authority was expressly curtailed in the compromise deed. Thus, in view of the aforesaid discussion, we hold that the High Court committed no error in holding that the settlement between the Defendant Nos.1 and 2 respoly was unlawful.”

10. Thus the law is clear that when the compromise is not signed by a party and signed by the concerned lawyer alone, without any express authority or without special vakalatnama executed in favour of the Advocate to sign in the compromise, the compromise signed by the Advocate for and on behalf of his client is unlawful. But the legality of such a compromise to be addressed by scanning the consent of the party from the attending circumstances, including the subsequent conduct of the party.

11. Coming to the question as to whether challenge against a compromise decree is permissible by way of an appeal ? If so, on what grounds ?, a detailed discussion is necessary. Under Order XLIII Rule 1A (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. At the same time, Section 96(3) of the C.P.C. provides that, no appeal shall lie from a decree passed by the court with the consent of parties. The Apex Court in ***Bryam Pestonji Gariwala v. Union Bank of India*** reported in [AIR 1991 SC 2234] (Civil Appeal No. 3698 of 1991, decided on 20.09.1991) stated in paragraph 43 as follows:-

"43. A judgment by consent is intended to stop litigation between the parties just as much as a judgment resulting from a decision of the Court at the end of a long drawn out fight. A compromise decree creates an estoppel by judgment."

12. Order XXIII Rule 3 C.P.C. reveals the mode of recording compromise. Order XXIII Rule 3 C.P.C runs as under:

"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 or 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 that 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. [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]"

13. Reading Order XXIII Rule 3 C.P.C, the same provides the procedure and the relevant aspects to be taken into consideration by a court while recording a compromise and to pass a decree on the basis of the said compromise. Before the amendment of C.P.C in the year 1976, an order recording or refusing to record an agreement, compromise or satisfaction was amenable to appeal under Order XLIII Rule 1(m) C.P.C. The Amendment Act of 1976 brought exhaustive changes in various



provisions of the Code including one applicable to compromise decrees. Prior to the said amendment, the prevailing practice was to file a separate suit to challenge a consent decree with prayer to set aside the same on various grounds, and the same led to multiplicity of litigations. In order to prevent the menace of multiplicity of litigations, Rule 3 of Order XXIII C.P.C. was amended. The Amendment Act inserted a requirement that all lawful agreements or compromise would be in writing and signed by the parties, to enable the court to satisfy itself about the authenticity of the compromise/agreement. The intent behind proviso to Order XXIII Rule 3 C.P.C is this. As per the proviso, 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 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.



14. The proviso empowers the court by whom a compromise decree was passed to determine the legality of the compromise, so arrived at between the parties. The explanation appended to the proviso further clarifies that an agreement or compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of this rule. A new Rule 3A was also inserted in Order XXIII in the C.P.C. by the same Amendment Act which bars institution of a separate suit to challenge a decree passed on the basis of a compromise, on the ground that such compromise is not lawful. Thus the legislature intention behind the amendments in Rule 3 as well as insertion of new Rule 3A is to check multiplicity in litigation by empowering the court which passed the decree to decide whether a compromise on the basis of which the decree was passed was legal or not.

15. The said Amendment Act of 1976 also deleted Order XLIII, Rule 1 (m) C.P.C. which provided for an appeal against such order, recording or refusing to record a compromise under



Order XLIII, Rule 3, C.P.C. Further, at the same time a new provision was added to the C.P.C. by the same Amendment Act i.e. Order XLIII, Rule 1A, as already extracted herein above.

16. The essential difference between Rule 1(m) and Rule 1A, C.P.C. is that Rule 1(m) C.P.C. provided for an appeal from orders recording or refusing to record compromise, however, Rule 1A C.P.C. is wider in its scope. It provides for a 'right to challenge non - appealable orders in appeal, against decrees.'

17. Rule 1A of Order XLIII C.P.C. does not provide for an appeal against an order simpliciter, but for an appeal against the decree as a whole wherein the order (non - appealable) on the basis of which such decree was passed can be challenged. Therefore, as per the recommendation of Law Commission in its 44 report the orders which are in the nature of final adjudication can now be challenged by preferring an appeal against the decree.

18. Be it as may, an apparent conflict between the two provisions of the Code, viz. S.96(3) C.P.C. which bars an appeal



against a compromise decree and Order XLIII, Rule 1A(2) C.P.C. which allows an appellant to question the validity of a compromise by preferring an appeal against a decree passed on the basis of such compromise, looms large. The fundamental principle of interpretation of Statute is that when there appears to be some conflict between two provisions of a statute, they must be harmoniously construed so as to give effect to the intent of the legislature. Each provision in a statute book has to be read to have been enacted with a definite purpose and the said legislative intent to be safeguarded. This controversy has been resolved by the Supreme Court in the decision in ***Banwari Lal v. Smt.Chando Devi*** reported in [1993 (1) SCC 581] : [AIR 1993 SC 1139] wherein the Supreme Court has observed as under:

"9. S.96(3) of the Code says that no appeal shall lie from a decree passed by the Court with the consent of the parties. R.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 S.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 0.43, R.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 R.3A of O.23. As such a right has been given under R.1A(2) of 0.43 to a party, who challenges the recording of the compromise, to question the validity thereof while preferring an appeal against the decree. S.96(3) of the Code shall not be a bar to such an appeal because S.96(3) is applicable to cases where the factum of compromise or agreement is not in dispute."

19. The Apex Court in the decision in ***Vipan Aggarwal and another v. Raman Gandotra and others*** reported in [AIR OnLine 2022 SC 943] has reiterated the said ratio as laid down in ***Banwari Lal's*** case (*supra*) as under:

"13. When the amending Act introduced a proviso along with an explanation to R.3 of O.23 saying that where it is alleged by one party and denied by other that an adjustment or satisfaction has



been arrived at, 'the Court shall decide the question', the Court before which a petition of compromise is filed and which has recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on basis of any lawful agreement. To make the enquiry in respect of validity of the agreement or the compromise more comprehensive, the explanation to the proviso says that an agreement or compromise 'which is void or voidable under the Indian Contract Act...' shall not be deemed to be lawful within the meaning of the said Rule. In view of the proviso read with the explanation, a Court which had entertained the petition of Compromise has to examine whether the compromise was void or voidable under the Indian Contract Act. Even R.1(m) of O.43 has been deleted under which an appeal was maintainable against an order recording a compromise. As such a party challenging a compromise can file a petition under proviso to R.3 of O.23, or an appeal under S.96(1) of the Code, in which he can now question the validity of the compromise in view of R.1A of O.43 of the Code."

20. The Apex Court in **Banwari Lal's** case (*supra*) has thus categorically held that a party challenging a compromise decree can file an application under the proviso to Order XXIII, Rule 3 C.P.C. before the same court by which the said decree was passed or an appeal under S.96(1) C.P.C. wherein it would be open for a party to question the validity of the compromise in view of Order



XLIII, Rule 1A of the Code. While discussing the ratio of law laid down in *Banwari Lal's* case (*supra*), the Apex Court in the decision reported in [2021 (5) SCC 241 : AIR OnLine 2021 SC 269], *H.S. Goutham v. Rama Murthy and another* held that an appeal against a compromise decree in terms of Order XLIII, Rule 1A C.P.C. was maintainable. The Apex Court in the decision reported in [2014 (15) SCC 471 : AIR 2015 SC 706], *R.Rajanna v. S.R.Venkataswamy and others* held that a separate suit challenging a consent decree was not maintainable, however a party aggrieved by a decree passed on the basis of a compromise could apply before the same court which passed the decree to challenge the validity of the compromise.

21. Thus the legal position can be summarised holding that 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 R.3A of O.23. As such a right has been given under R.1A(2) of O.43 to a party,



who challenges the recording of the compromise, to question the validity thereof while preferring an appeal against the decree. S.96(3) of the Code shall not be a bar to such an appeal because S.96(3) is applicable to cases where the factum of compromise or agreement is not in dispute.

22. Coming to the question as to whether, if a party, who did not sign a compromise which led to passing of a compromise decree, if acts upon the same subsequently, can he avoid the compromise decree thereafter merely on the ground that he did not put his signature in the compromise ?, it is necessary to refer the conduct of the party and terms of the compromise. The terms of the compromise as extracted in the decree passed in O.S.No.108/1999 are as under:

“a) It is agreed between the plaintiff and the 1st defendant that they shall mutually exchange their property (plaint item A property of the plaintiff and the plaint item B property of the 1st defendant) by executing deed of exchange.

b) It is agreed that one cent of the plaint item A property which is to be given to the 1st defendant should be assigned with



road frontage of 2.75 metres on the eastern side.

c) After executing exchange deed the northern boundary of the plaint item A property shall be constructed by the 1st defendant on the plaint item A property and the southern boundary of the plaint item B property shall be constructed by the plaintiff on the plaint item B property.

d) Both the parties have agreed that after executing document the possession of the plaint item B property shall be given to the plaintiff and the possession of the plaint item A property (one cent) should be given to the possession of the 1st defendant.

e) Parties have agreed to execute the said document within one month of the date of compromise by bearing the expense equally. Further they have also agreed to put up boundaries of their respective properties.

f) The plaintiff has agreed that the amount payable by her as per the decree in OS 471/15 shall be paid after adjusting the amount due to her as per the decree in OS.108/99 and also as per the order in BRC (OP) 9/05 and the 1st defendant has agreed to accept the said amount.

g) Both the parties have agreed to submit statement of account before the court with respect to the due amounts and to settle the account as per the decision of the court.

h) The parties have agreed that after executing document the defendants will have no right over the boundary fixed by the plaintiff on the southern extremity of the plaint item B property and the plaintiff will have no right over the boundary constructed by the 1st defendant on the northern extremity of the plaint item A property.



i) *The parties have also further agreed that the roof of the plaintiff item A property will not touch on the boundary structure of the plaintiff's property and likewise the roof of the plaintiff item B property shall not touch the boundary structure of the 1st defendant's plaintiff item A property.*

j) *Parties have agreed that at the time of renovation of the plaintiff item A and B properties the 1st defendant shall not obstruct the construction of structures on the northern side of the northern boundary of the plaintiff item A property and likewise the plaintiff has agreed that she will not obstruct the construction of structure on the southern side of the southern boundary of the plaintiff item B property by the 1st defendant. Both parties shall give consent for such constructions.*

k) *After taking possession of the plaintiff item A and B properties by the respective parties and after settling the financial transaction between them the plaintiff will have no right over the plaintiff item A property and the 1st defendant will have no right over the plaintiff item B property.*

l) *If any of the parties fails to comply the terms of the compromise the other party can seek the remedy through execution proceedings.*

m) *Parties are directed to bear their respective cost.*

n) *The compromise petition shall form part of the decree."*

23. In the case at hand, no dispute that the 1st defendant is not a signatory in the compromise and on her behalf her lawyer



signed. At the same time, the husband of the 1st defendant (5th defendant) also signed in the compromise. But as already pointed out, when the lawyer on behalf of the client signs a compromise without express authority to do so, the same is unlawful. But the position would become different when the authority of the lawyer to sign the compromise for and on behalf of his client to be inferred or established by the subsequent conduct of the client acting upon the compromise where the parties did not sign. In this case, after passing decree in terms of the compromise as on 16.1.2019, subsequently the 1st defendant filed an affidavit before the Munsiff Court on 02.03.2019 and claimed the amount in terms of clause 5 of the compromise petition. Annexure-R1.D placed by the learned counsel for the plaintiff is the copy of the said affidavit and the learned counsel for the 1st defendant also did not dispute the said affidavit. The affidavit runs as under:

I ASHIYA UMMAL aged 64 years, W/o Abdul Navas,



residing at Mangalathu House, Nadukunnu Muri, Pathanapuram Village, Pathanapuram taluk do hereby solemnly state on oath and affirm as follows:-

1. That I am the first defendant in the said case and I am swearing this affidavit for and on behalf of defendants Nos.5,6, 7, 8, 10 and 11 also.
2. That the said case was settled in terms of compromise petition dated 16.01.2019.
3. As per clause 5 of the said compromise petition the parties are directed to file separate statements Accounts.

STATEMENT OF ACCOUNT

1)	The amount claimed in OS No.471/2015	: Rs.73303
2)	Interest @ do -do	: Rs.25649
3)	Cost -do	: Rs.14891
4)	One half of the amount received by the plaintiff before 23.03.2012 = $79900 \times \frac{1}{2} =$: Rs.39950
5)	One half of the rent amount received by the plaintiff after the period covered under O.S.471/2015 = $25020 \times \frac{1}{2} =$: Rs.12510
6)	Interest for item No.4	: Rs.16600
7)	Interest for item No.5	: Rs. 2600
8)	Excess amount remitted	: Rs. 4039

	Total	: Rs.189542

=====

Additional statement is also filed showing the remittance of rent by



challan/direct payment made by defendants. The plaintiff may be directed to a total sum of Rs.189542/- as per the statement made here in above.

What all stated above are true and correct to the best of my knowledge, information and belief.

*Sd/-
Deponent
Ashiya Ummal*

24. Reading the affidavit, it is vivid that in paragraph No.2 thereof, the 1st defendant affirmed that “*the said case was settled in terms of compromise petition dated 16.1.2019*”. In paragraph No.3 it is affirmed by the 1st defendant that “*as per clause 5 of the said compromise petition, the parties are directed to file separate statements of accounts.*”. Accordingly, statements of account claiming Rs.1,89,542/- was filed in the form of affidavit.

25. Similarly, the 5th defendant, who is none other than the husband of the 1st defendant and signatory to the compromise, also filed an affidavit as Annexure-R1.C, in terms of the compromise. On perusal of Annexure-R1.D affidavit filed by Ashiya Ummal, the 1st defendant herein, it is emphatically clear that Ashiya Ummal agreed and consented the compromise and subsequently



acted upon the same though she did not sign the compromise. A relevant aspect forthcoming is the consent of the 1st defendant in the compromise in view of filing of affidavit accepting and acting upon the same.

26. In law, nobody is allowed to approbate and reprobate. To put it differently, a person, who enjoys the benefit of a compromise, he did not sign, after filing an affidavit acting upon the same and obtained the money in terms of the compromise, cannot deviate from the said compromise on the ground that he or she did not sign the same after acting upon the same. Therefore, it has to be held that even though the 1st defendant did not sign the compromise, she had given consent to his lawyer to effectuate the compromise and she acted upon the same in view of Annexure-R1.D affidavit. Therefore, the appellant herein who had given consent and acted upon the compromise cannot withdraw the consent thereafter and accordingly, it is held that the compromise shall bind the 1st defendant/appellant. Thus, it appears that the



appellate court rightly negated the contentions raised to unsustain the compromise by filing appeal. Answering the substantial questions, as discussed herein above, this Second Appeal is found to be meritless and is liable to be dismissed.

27. In the result, this Second Appeal stands dismissed .

28. All the interlocutory orders stand vacated and all interlocutory applications pending in this Second Appeal, stand dismissed.

Registry shall inform this matter to the trial court as well as the appellate court, forthwith.

Sd/-

(A.BADHARUDEEN, JUDGE)

rtr/