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**(2010) 09 MP CK 0032**

**Madhya Pradesh High Court (Gwalior Bench)**

**Case No:** Second Appeal No. 272 of 2001

Santosh Kumar and Another

APPELLANT

Vs

Hachchu and Others

RESPONDENT

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**Date of Decision:** Sept. 21, 2010

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 3, Order 23 Rule 3A, Order 32 Rule 1, Order 32 Rule 15, Order 32 Rule 3

**Citation:** AIR 2011 MP 21 : (2011) 1 MPHT 396 : (2010) 4 MPJR 216 : (2011) 1 MPLJ 279

**Hon'ble Judges:** S.K. Gangele, J

**Bench:** Single Bench

**Final Decision:** Dismissed

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### **Judgement**

S.K. Gangele, J.

The appellants-defendants have filed this Second Appeal u/s 100 of C.P.C., against the judgment and decree dated 10-05-2001, passed by the Additional District Judge, Karera, District Shivpuri in Civil Appeal No. 107-A/1995, whereby affirming the judgment and decree dated 13-10-1995 passed in Civil Suit No. 48-A/1994. This Second Appeal was admitted for hearing vide order dated 10-10-2001 on the following substantial question of law:

i) Whether the suit giving rise to this appeal was not maintainable in view of the Bar contained in Order 23 Rule 3-A of the CPC ?

The respondents No. 1 to 3-plaintiffs filed a suit for declaration of decree dated 7-7-1980 passed in Civil Suit No. 393-A/1980 as null and void and further sought a declaration that they are the owner of the suit land. They pleaded that the defendants filed a suit on 7-7-1980 against the plaintiffs and on the date of institution of the aforesaid suit the plaintiff-Amarchand and defendants No. 1 & 2 were minor. The suit was instituted fraudulently and on the same day, on the basis

of compromise a decree was obtained, however, the plaintiffs did not submit any compromise application in the suit, neither they appeared before the court in the proceedings of Civil Suit No. 393-A/1980. The defendants played a fraud and obtained the decree. The plaintiffs came to know about the decree on 4-8-1985.

The defendants in their written statement denied the pleadings of the plaintiffs. They pleaded that a suit was instituted before the civil court on 7-7-1980 and on the same day the plaintiffs appeared before the court and submitted a compromise. On the basis of aforesaid compromise, the trial court passed a decree on the same day i.e on 7-7-1980 and declared that the defendants are the owner of the suit land. Thereafter the name of the defendants had also been mutated in the revenue record. The plaintiffs had knowledge about the judgment and decree.

The trial court after appreciation of evidence on record of the case decreed the suit of the plaintiffs-respondents No. 1 to 3 and thereafter the decree has been upheld by the appellate court also.

Learned Senior Counsel for the appellants has contended that the suit filed by the plaintiffs for declaring the decree and judgment passed in Civil Suit No. 393-A/1980 void was not maintainable in view of the order 23 Rule 3-A of the Civil Procedure Code. In support of his contentions learned Senior Counsel relied on the following judgments:

i) AIR 2007 (NOC) 841 (M.P) (Bhanwarlal Bherulal and Ors. v. Devilal Keshuram Kumawat and Ors.);

(ii) [Brajesh Kumar Awasthi and Another Vs. State of M.P. and Others,](#)

(iii) 2009 (3) MPLJ 168 (Tijauwa and Ors v. Rajmani and Anr.);

(iv) [Anant Mahadeo Godbole Vs. Achut Ganesh Godbole and Others,](#)

(v) [Sri Sri Iswar Gopal Jew and Others Vs. Bhagwandas Shaw,](#)

(vi) [Sailendra Nath Roy Chowdhury Vs. Md. Alim and Another,](#)

(vii) AIR 1985 Kart. 270;

(viii) [Union Bank of India Vs. Byram Pestonji Gariwala and others,](#)

(ix) [Lagandeo Singh Vs. Satyadeo Singh and Others](#)

(x) 1995 (2) AIHC 1348 (DB);

(xi) 1995 (4) AIHC 3270 (DB);

(xii) 1996 AIHC 3184;

(xiii) AIR 2003 Kart. 407 (DB) ; and

(xiv) [Gopal Lal Vs. Babu Lal and Others,](#)

Contrary to this, learned Counsel for the respondents-plaintiffs has submitted that the judgment and decree passed by the trial court in Civil Suit No. 393-A/1980 was void. The mandatory provisions for recording compromise on behalf of the minor were not followed by the court. Hence, the suit filed by the respondents-plaintiffs was maintainable and the provisions of Order 23 Rule 3-A of the C.P.C. would not create a bar in instituting a suit.

The defendants Santosh Kumar and Ashok Kumar filed a suit for declaration before the trial court. In the aforesaid suit Hachchu, Suttu, Bhaggu and Amarchand were added as defendants and the age of Amarchand was mentioned as 7 years and his uncle Bhaggu, S/o Baldev was guardian of the defendant No. 4. The plaint was filed through guardian Balkrishna because plaintiffs- Santosh Kumar and Ashok Kumar were minor. It is said that on the same day a compromise application was filed before the court and the trial court accepted the compromise on the same day and passed the judgment and decree. The order of the trial dated 7-7-1980 passed in Civil Suit No. 393-A/80 has been filed as Ex.P/I and certified copy of the judgment and decree of the aforesaid suit has been filed as Ex.P/II. The following order was passed by the trial court on 7-7-1980:

Today a suit has been filed by Mr. Vishesh Kumar Mishra, Advocate. Reader submitted his report, perused and case be registered as Civil Suit "A".

At that time defendants along with Shree P.D. Gupta, Advocate appeared. A copy of the Civil Suit was supplied and thereafter the defendants produced the compromise, it was verified and accepted. Statement of the defendants were recorded and as per the compromise suit has been decreed

Bhaggu (P.W.1), Hachchu (P.W.2) in their evidence specifically deposed that they did not receive any notice of the suit, neither they appeared before the court, nor they submitted any compromise before the court and at that time Amarchand was minor, who was aged about 5-6 years. This decree was obtained by playing a fraud. They further pleaded that they were in possession of the suit property.

On behalf of the defendants, Balkrishna in his evidence deposed that the defendants were in possession over the suit land and the suit was filed and the defendants were present before the court. At that time Amarchand was aged about 7 years. A compromise was filed before the court and thereafter the suit was decreed.

Plaintiffs Santosh Kumar and Ashok Kumar, who filed the suit No. 393-A/1980 were minor. The defendant No. 4-Amarchand was also minor. He was sued through his uncle Bhaggu, S/o Bladeva and on the same day i.e. 7-7-1980, the suit was filed. It is said that a compromise application was also filed and the suit was decreed. No notice was issued to the defendants.

Order XXIII Rule 3 of the CPC prescribes provision for compromise of suit which is 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 and 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];

Rule 3-A which has been added by way of amendment of CPC (Amendment) Act, 1976 w.e.f. 1-2-1977 bars institution of a suit to set aside a decree on the ground of compromise. The relevant provision is as under

3-A. 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.

Order XXXII prescribes provisions in regard to Suits by or Against Minors and Persons of Unsound Mind. Order XXXII Rule 1 is as under:

1. Minor to sue by next friend. - Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

Rule 3 of Order XXXII prescribes that a guardian for the suit to be appointed by Court for minor defendant. The relevant provision is as under:

3. Guardian for the suit to be appointed by Court for minor defendant.-(1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

Rule 7 of Order XXXII prescribes procedure in regard to agreement or compromise by next friend or guardian for the suit. The relevant provision is as under:

Agreement or compromise by next friend or guardian for the suit.- (1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

[(1-A) An application for leave under Sub-rule (1) shall be accompanied by an affidavit of the next friend or the guardian for the suit, as the case may be, and also, if the minor is represented by a pleader, by the certificate of the pleader, to the effect that the agreement or compromise proposed is, in his opinion, for the benefit of the minor:

Provided that the opinion so expressed, whether in the affidavit or in the certificate shall not preclude the Court from examining whether the agreement or

compromise proposed is for the benefit of the minor.]

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.

From the aforesaid provisions, it is clear that when the defendant is a minor, the court shall appoint a proper person to be guardian in the suit for such minor. In Civil Suit No. 393-A/1980 instituted by the plaintiffs namely, Santosh Kumar and Ashok Kumar, the defendant No. 4-Amarchand was a minor. No guardian was appointed by the court of defendant No. 4. The suit was filed mentioning his uncle as guardian and the compromise application was also said to be submitted by the uncle of Amarchand. However, the defendants denied the fact that they submitted the application for compromise. Even assuming the application was submitted as pleaded by the defendants, then also the uncle was not competent to enter into a compromise as per Order XXXII Rule 7 of the CPC because he was not appointed as guardian of Amarchand as per the provisions of Order XXXII Rule 3 of C.P.C.

The Hon"ble Supreme Court in the case of [Ram Chandra Arya Vs. Man Singh and Another](#), has held as under in regard to a decree passed against the minor without appointment of a guardian:

(3) As has been mentioned above, the suit was dismissed by the trial Court and that decision has been upheld by the first and the second appellate Courts on the ground that the decree against Ram Lal was a nullity and the sale held in execution of that decree was, therefore, void. It appears from the judgment of the High Court that, in that Court, no attempt was made on behalf of the appellant to contend that the decree which was obtained against Ram Lal and in execution of which the house was sold was not null and void and was not a nullity. On the face of it, the decree was passed in contravention of the provisions O.32, R.15 of the Code of Civil Procedure. It has been found as a fact that Ram Lal was insane when suit No. 354 of 1939 was instituted as well as when the house was sold in execution of the decree passed in that suit. It is now a well-settled principle that, if a decree is passed against a minor without appointment of a guardian, the decree is a nullity and is void and not merely voidable. This principle becomes applicable to the case of a lunatic in view of R.15 of O.32 of the CPC so that the decree obtained against Ram Lal was a decree which has to be treated as without jurisdiction and void. In these circumstances, the sale held in execution of that decree must also be held to be void.

From the judgment of the Hon"ble Supreme Court, it is clear that "if a decree is passed against a minor without appointment of guardian, the decree is a nullity and is void and not merely voidable."

The Hon"ble Supreme Court in the case of [Kaushalya Devi and Others Vs. Baijnath Sayal and Others](#), has held as under in regard to a decree passed by the court without complying the provisions of Order XXXIII Rule 7(1),:

The effect of the failure to comply with Order 32, R. 7(1) (which requires the sanction of the Court to the compromise entered into on behalf of the minor to be recorded) is specifically provided by Order 32 R. 7 (2) which says that any such agreement or compromise entered into without the leave of the court so recorded shall be voidable against all parties other than the minor. What the rule really means is that the impugned agreement can be avoided by the minor against the parties who are major and that it cannot be avoided by the parties who are major against the minor. It is voidable and not void. It is voidable at the instance of the minor and not at the instance of any other party. It is voidable against the parties that are major but not against a minor. If the minor avoids the said agreement it would be set aside but in no case can the infirmity in the agreement be used by other parties for the purpose of avoiding it in their own interest. The non-observance of the condition laid down by R. 1 does not make the agreement or decree void for it does not affect the jurisdiction of the court at all. The non-observance of the said condition makes the agreement or decree only voidable at the instance of the minor and not void against him. AIR 1946 72 (Privy Council) Explained. ILR 32 Cal 296 (PC), AIR 1916 PC 2, Distinguished.

The Hon"ble Supreme Court in the case of [Rafique Bibi \(D\) by Lrs. Vs. Sayed Waliuddin \(D\) by Lrs. and Others](#), has held as under in regard to "void decree":

6. What is "void" has to be clearly understood. A decree can be said to be without jurisdiction, and hence a nullity, if the court passing the decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in a nullity. The lack of jurisdiction in the court passing the decree must be patent on its face in order to enable the executing court to take cognizance of such a nullity based on want of jurisdiction, else the normal rule that an executing court cannot go behind the decree must prevail.

It is well settled principle of law that even executing court has a right to drop the execution proceedings if it came to the satisfaction that the decree is void.

The Hon"ble Supreme Court in the case of [Sneh Gupta Vs. Devi Sarup and Others](#), has held as under in regard to binding nature of compromise decree:

24. Order 23 Rule 3 of the CPC provides that a compromise decree is not binding on such defendants who are not parties thereto. As the appeal has been allowed by the High Court, the same would not be binding upon the appellant and, thus, by reason thereof, the suit in its entirety could not have been disposed of.

The court has also a duty to prevent injustice to any of the parties to the litigation. It cannot exercise its jurisdiction to allow the proceedings to be used to work as substantial injustice.

A consent decree, as is well known, is merely an agreement between the parties with the seal of the court superadded to it. [See Baldevdas Shivilal v. Filmistan

Distributors (India) (P) Ltd. and Parayya allayya Hittalamani v. Parayya Gurulingayya Poojari.]"

If a compromise is to be held to be binding, as is well known, it must be signed either by the parties or by their counsel or both, failing which Order 23 Rule 3 of the CPC would not be applicable.(See Gurpreet Singh v. Chatur Bhuj Goel).

In Dwaraka Prasad Agarwal v. B.d. Agarwal, this Court held:(SCC pp.243-44, paras 32 and 35)

The High Court also failed and/or neglected to take into consideration the fact that the compromise having been entered into by and between the three out of four partners could not have been termed as settlement of all disputes and in that view of the matter no compromise could have been recorded by it. The effect of the order dated 29-6-1992 recording the settlement was brought to the notice of the High Court, still it failed to rectify the mistake committed by it. The effect of the said order was grave. It was found to be enforceable. It was construed to be an order of the High Court, required to be implemented by the courts and the statutory authorities.

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.. Even if the provisions of Order 23 Rule 3 of the CPC and/or principles analogous thereto are held to be applicable in a writ proceeding, the Court cannot be permitted to record a purported compromise in a casual manner. It was suo motu required to address itself to the issue as to whether the compromise was a lawful one and, thus, had any jurisdiction to entertain the same."

(See also K. Venkatachala Bhat v. Krishna Nayak.)

In R. Rathinavel Chettiar v. V. Sivaraman this Court opined: (SCC pp. 96-97, para 22)

22. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained.

From the aforesaid judgment of the Hon"ble Supreme Court, it is clear that a compromise decree is not binding on such defendants, who are not parties thereto. In the present case, it is clear that Amarchand was minor at the time of passing of the decree of civil suit No. 393-A/1980. No guardian was appointed on behalf of him. Hence, it could be held that Amarchand was not a party to the decree. In such circumstances, the judgment and decree passed by the trial court in Civil Suit No. 393-A/1980 is not binding on Amarchand. The Provision of Order 23 Rule 3-A is

applicable only to the persons, who are parties to the compromise, however, the persons, who were not party to the compromise, can institute a suit. The decree passed in Civil Suit No. 393-A/1980 is a decree against all the four persons including Amarchand. If it is not executable against Amarchand, then the decree is also not executable against the other defendants. Hence, the decree was void and in that circumstances, the suit filed by the plaintiffs-respondents was maintainable.

I am conscious the judgments passed by this Court and other High Courts to the effect that in view of the Order 23 Rule 3-A of the Civil Procedure Code, an independent suit is not maintainable to challenge a compromise decree, however, if a person is not a party to the decree and the decree is void, then certainly a suit is maintainable and the bar of Order 23 Rule 3-A would not be applicable in that case.

The matter can also be looked into from another angle. The present appellants did not raise a plea that the suit filed by the plaintiffs was not maintainable in view of the provisions of Order 23 Rule 3-A of the Civil Procedure Code, neither any issue was framed by the trial court to this effect. The present appellants contested the suit and submitted to the jurisdiction of the court and at the time of second appeal, the point has been raised for the first time. When the appellants themselves submitted to the jurisdiction of the court and went to the trial, in my opinion, they are stopped on the principle of acquiescence raising the point of jurisdiction of the court in the facts when the compromise decree passed by the trial court, is patently illegal.

The Hon"ble Supreme Court in the case of Sneh Gupta (supra) has clearly held that the court has a duty to prevent injustice to any of the parties to the litigation. It cannot exercise its jurisdiction to allow the proceedings to be used to work as injustice. In the facts and circumstances of the present case, if the decree be set aside passed by the trial court and affirmed by the appellate court, it would amount that this Court is exercising its jurisdiction to create injustice and it is against the basic concept of law. A bare perusal of the order passed by the trial court in Civil Suit No. 393-A/1980, shocks the conscience of the court. It is in naked violation of the provision of Civil Procedure Code. Hence, in my opinion, both the courts below have rightly set aside the main judgment and decree.

Consequently, I held that civil suit filed by the plaintiffs was maintainable and the provisions of Order 23 Rule 3-A of CPC are not applicable in the facts and circumstances of the case. I answer the substantial question of law accordingly. Hence, I do not find any merit in this appeal. It is dismissed with cost. Appellants shall pay cost to the defendants No. 1 to 3 of all the courts.

Counsel fee in the present case be certified as Rs. 2000/-.