IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.665 OF 2019

Kumar Builder & Ors. ..Applicants

Vs

Kumar City residents Co-Operative
Housing Society Ltd. & Ors. ..Respondents

Mr.Virag Tulzapurkar a/w Mr.Mihir Govilkar i/b Govilkar and Associates LLP for the Applicants.

Mr.Anturkar, Senior Advocate for Respondent No.1.

CORAM : C.V. BHADANG, J.

RESERVED ON : 02nd December 2020

PRONOUNCED ON : 28th January 2021

JUDGMENT :

1. The challenge in this revision application is to the common order dated 11th July 2019 below application Exhibit-37 Exhibit-52 and Exhibit-86 passed by the learned Senior Civil Judge, Pune in Special Civil Suit No.556/2019. By the impugned order the learned trial court has refused to reject the plaint under Order VII Rule 11 of the Code of Civil Procedure (CPC for short).

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2. The facts necessary for the disposal of the application may be stated thus :-

The aforesaid suit has been filed by the first respondent Kumar City Residents Cooperative Housing Society Ltd (Plaintiff) against the petitioners (Defendant nos 1 to 5) and the respondent nos 2 to 4(defendant nos 6 to 8) for declaration, mandatory and prohibitory injunction, conveyance and damages etc.

Land Survey No.14 admeasuring 8 H 70.3 Ares and S No.13B Hissa No 1+2+3 admeasuring about 7H 69.5 Ares totally admeasuring about 16H 39.38 Ares i.e. 1,63,938 Sq. Mts of Village Vadgaon Sheri Tq Haveli Dist-Pune is the land which is referred to as the 'Project Land'. The said land was belonging to Tukaram Mulik and others. In the year 1991-92 the land owners had entrusted the development rights of the land to the defendant no 2 Sukumar Estates Ltd. The defendant No.2 after obtaining necessary permission has executed a residential project on the land by name 'Kumar City', comprising of Plots, Row houses and bungalows, which were transferred to the purchasers, under the Maharashtra Ownership of Flats Act 1963 (MOFA, for short) who had formed the plaintiff Society. It was represented to the members/purchasers that 'Kumar City' would be a state of the Art project having various civic amenities including a exclusive club house. At the time of the

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purchase, the members had paid club membership fees ranging from Rs 50,000/- to Rs 75,000/-. It is the material case that at the relevant time the defendant no 2 instead of providing the Club House and other Amenities as per the agreed terms had only provided the facility of a Swimming Pool,Health Club, Tennis Court, Badminton Court, Squash Court to the members, on a portion of the land admeasuring 23,096 Sq Mts from out of the Project Land. The said portion is the subject matter of dispute, which is referred to as the 'Suit Land'.

3. In the year 2007 the defendant Nos.1 to 4 started demolishing the Club House, which led the plaintiff to file RCS no 1262/2007 against the defendant Nos.1 to 4 for declaration and injunction. The parties however reached a settlement and the suit came to be decreed on the basis of Consent Terms (Ex-122) on 18th July 2011. According to the plaintiff the defendant nos 1 to 4 had accepted to provide the agreed amenities/facilities including a club house of a bigger area. It is the material case that till date the defendant Nos.1 to 4 have not complied with the agreed terms by constructing a new club house and constitution of an Advisory board of the club and by executing a conveyance deed in respect of land

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admeasuring 51,967.85 Sq Mts from out of the 'Project Land', within ninety days of the execution of the consent terms.

4. The plaintiff was required to approach the District Deputy Registrar (DDR) for an order of a deemed conveyance. Eventually the deemed conveyance was executed on **17th February 2018** in pursuance of an order dated **11th June 2015**. In short it is the material case that the defendant nos 1 to 4 failed to abide by the contractual terms, as also the terms of the consent decree, which would go to show that since inception the defendants had no intention to comply with the same. It is contended that under the consent terms the defendant Nos.1 to 4 appointed their sister concern Kumar City Club Ltd (defendant no 8) for development and the management of the Club house, which was subcontracted. It is also contended that the club facilities were mismanaged.

5. The members of the plaintiff, received a notice dated 29th May 2018 from the defendant No.8 thereby unilaterally terminating the membership of the Club House and forfeiting the one time membership fees. The plaintiff raised objection to the said unilateral action taken by the defendant no 8 in collusion with defendant Nos.1 to 4. The club facility was unilaterally closed with

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effect from 1st July 2018 purportedly for repairs. The matter was tried to be sorted out by holding meeting with the defendant No.3. However the issues are not resolved. On the basis of information obtained under the Right to Information Act (RTI Act) it was learnt that the defendant Nos.1 to 4 have obtained a development permission from the defendant nos 6 and 7 vide commencement certificate dated 8th January 2018 for construction of a huge Commercial Shopping Mall on the suit land which is reserved as a amenity space on which such development is impermissible. The permission granted is against the statutory provisions and the Development Control Rules (DC Rules) and is without obtaining the permission from the members of the plaintiff.

6. Somewhere in third week of March 2019 the plaintiff learnt that the said commercial project, is being executed by **M/s Shubh Promoters** and Developers, in the suit plot.

7. It is in these circumstances that the plaintiff filed the suit seeking following reliefs:-

> *(a) The Suit of the Plaintiff may kindly be decreed with cost.*

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(b) It be declared that Consent Terms Exh.122 filed in AND Consent Decree dated 18.07.2011 passed in RCS No.1262 of 2007 are got executed by the Defendant Nos.1 to 4 by way of Fraud and misrepresentation and therefore the same are null, void and not binding upon the Plaintiff and its Members.

(c) It be declared that construction permission obtained vide Commencement Certificate No.2614 of 2017, dated 08.01.2018 is null, and not binding upon the Plaintiff AND the same be cancelled as per the provisions of Maharashtra Municipal Corporation Act.

(d) The Defendants, their assignees, agents, servants, workers, contractors etc. may kindly be restrained by a decree of Perpetual Injunction from proceeding with the construction on the basis of alleged Commencement Certificate No.2614 of 2017, dated 08.01.2018 and the Building Plans sanctioned on the basis of the same.

(e) The Defendant Nos.1 to 5 be directed to execute and register Conveyance Deed in respect of Suit Plot in favour of Plaintiff, as per the provisions of Maharashtra Ownership of Flats Act, 1963.

(f) The Defendant Nos.1 to 4 and 8 be directed by way of Mandatory Injunction to immediately re-open all the Amenities/ Facilities provided in Suit Plot for the Plaintiff and its Members, and to deliver the exclusive possession

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of the same in the hands of Plaintiff for running and managing the same at their own.

(g) The Defendant Nos.1 to 5 and 8 may kindly be perpetually restrained from entering into the Suit Plot and also from running/managing the Club Facilities in any manner.

(h) The Defendant Nos.1 to 4 be directed to erect New Club House adm.7136.95 Sq. Mtrs. As per layout sanctioned vide DPO/SE-V/0081/09/dt.12.05.2009 at the Suit Plot and hand over the possession thereof to the Plaintiff.

(i) The Defendant be further directed to pay Damages of Rs.10,00,00,000/- to the Plaintiff.

(j) Interim/ad interim orders in terms of prayer Clause Nos.(d) and (f) above be passed in favour of the Plaintiff.

(k) Any other just and equitable orders be passed in the interest of justice.

8. Three applications Ex-37, 52 and 86 came to be filed by defendant Nos.2, 5 and 4 respectively under Order VII Rule 11 of CPC for rejection of plaint, *interalia* on the ground that the plaint,

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does not disclose cause of action and the plaint from the statement made in it appears to be barred by law.

9. The applications were opposed by the plaintiff.

10. The learned trial court by the impugned common order dated 11th July 2019 has rejected the applications, thus refusing to reject the plaint as prayed, which brings the petitioners to this court

11. It may be mentioned that the learned trial court by a separate order dated 10th August 2020 below Ex-5 and Exh-129 has granted temporary injunction against defendant Nos.1 to 5 from demolishing the existing club facilities, water bodies, compound wall etc and from using the consent terms in RCS No.1262/2007 against the plaintiff and from carrying out construction on the basis of the commencement certificate dated 8th January 2018 and 23rd December 2019 pending the suit. That order is subject matter of challenge at the instance of the petitioners in AOST No. 92414/2020 and **Shubh Capital** in AOST No.92454/2020. The survival of the challenge in these appeals, eventually depends upon the outcome of the present revision application. In such circumstances the revision application is taken up for final disposal by consent of parties.

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12. I have heard Mr.Tulazapurkar the learned senior counsel for the petitioners and Mr.Anturkar the learned senior counsel for the contesting respondent no 1 (original plaintiff). With the assistance of the learned counsel for the parties I have gone through the record.

13. Mr.Tulazapurkar the learned counsel for the petitioners has made the following submissions:-

(i) A meaningful reading of the plaint shows that it essentially challenges the consent decree dated 18th July 2018 on the ground that it was obtained by fraud and misrepresentation. Such a challenge is impermissible under Order XXIII Rule 3A of CPC. It is submitted that under Explanation to Order 23 Rule 3 of CPC any 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. It is submitted that section 19 and 19 A of the Contract Act make it clear that when the consent to an agreement is obtained by coercion, fraud, misrepresentation or undue influence such agreement is voidable in nature. Thus an agreement that is alleged to be vitiated by coercion, fraud, misrepresentation or undue influence, is covered by the provisions of Order 23 and the suit to set aside any such decree would be barred under Order XXIII Rule 3A of CPC.

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(ii) Reliance in this regard is placed on the decision of the Supreme Court in *Banwarilal Vs Chando Devi Horil Vs Keshav* and *Triloki Nath Singh Vs Aniruddha Singh and ors* and a decision of the Delhi High Court in *Bhai Sarabjit Singh Vs Indu Sabharwal and Rajwanti Vs Kishan Chand Shehrawat.*

(iii) It is submitted that reliance placed by the plaintiff on the decision in *Dadu Dayal Mahasabha*, is misplaced as it relates to a compromise prior to 1977 that is before introduction of Rule 3A.

(iv) It is submitted that the reliance on the decision of a learned Single Judge of this court in *Jethallal Thakkar Vs Lalbhai Hiralal Shah* and *Shreyas Alias Ashok Narayan Pathare Vs CVK Associates* is impermissible in view of the Division Bench Judgment in *Vishankumar Udaysingh Varma and Ors Vs Vijaysingh Rajsingh Varma and Ors.*

(v) It is submitted that the learned trial Court was in error in placing reliance on A A Gopalkrishnan, as it involved a writ petition, filed by a third party challenging a compromise and contained allegations against a statutory authority

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(vi) It is submitted that the suit is otherwise based on a illusory cause of action and is vexatious in as much as there are no allegations of fraud relatable to the time of passing of the consent decree. It is submitted that the plaintiff has no interest in the larger land except 51967.85 Sq Mts. as recorded in the consent decree. Thus the plaintiff has no right or claim in respect of the land on which the club facilities stand.

(vii) It is submitted that the alleged non compliance by the petitioners with the terms of the consent decree subsequent to the passing of the same are not relevant to decide whether the consent decree is vitiated by alleged fraud or misrepresentation.

(viii) The plaintiff has accepted that it has no right to file a suit on the subject matter of the consent decree.

(ix) It is submitted that the allegations about a mortgage on the land and the involvement of Kumar City cooperative Housing Society Ltd are vexatious and and an eyewash to create an illusion of cause of action.

(x) It is submitted that the prayer for conveying the amenity plot is beyond limitation. Mr Divender Kumar Dhamija Is not shown to be authorised to file the suit. The defendant no 5 being a cooperative society the suit is barred by the provisions of section 163(1) (b) read with section 91(1)(e) of the Maharashtra Cooperative

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Societies Act. 1960. The suit against the municipal Corporation is not competent in view of the provisions of the Maharashtra Regional and Town Planning Act ('MRTP Act' for short) and the Development Control rules (DC Rules).

14. Mr Anturkar the learned Senior counsel for the first respondent has supported the impugned order. Mr.Anturkar has made the following submissions.

(I) That there is a distinction between fraud played on the court and a case where the consent terms and the consequent decree is vitiated on account of a party playing fraud and inducing the other to enter into the compromise/settlement. It is submitted that this distinction continues even after the 1976 amendment to order XXIII Rule 3 of CPC.

(II) Is submitted that Rule 3A of Order XXIII uses the term 'lawful' not in a generic sense but it has to be understood in the context of the meaning assigned to it under the proviso appended there to. In the submission of the learned senior counsel a Civil Suit would be barred only when the question of fraud is so palpable

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which “cries hoarse” from the record and it can be decided without granting any adjournment or leading evidence, in as much as, the jurisdiction under provisio to order XXIII Rule 3 is summery in nature.

(III) It is submitted that where the case of one party practicing fraud on the other (which is distinct from the fraud practiced on the court itself) such question cannot be decided in the limited/summary jurisdiction under Order XXIII Rule 3 of CPC. Consequently a separate suit in such a case cannot be said to be barred under Order XXIII Rule 3A of CPC.

(IV) It is submitted that the explanation to Rule 3 of Order 23 applies only to that Rule and not Rule 3A of Order 23 CPC. It is submitted that the only change brought about by the 1976 amendment is that prior to the said amendment even a voidable contract/agreement could form the basis of a compromise/consent terms without the party who was entitled to avoid the contract/agreement taking steps to avoid/rescind the same or it being set aside by the court

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as required under section 19A of the Contract Act. However after the 1976 amendment such an agreement/Contract cannot be termed as 'lawful', within the meaning of the Explanation, because the court cannot be asked to act or be a party in putting its seal on such agreement,elevating it to the status of a decree.

(V) The learned counsel however in all fairness did not dispute that the case of Dadudayal Mahasabha would not be applicable as it arose prior to 1976 and out of the unamended provisions of Order 23 Rule 3 of CPC.

(VI) It is submitted that the decisions relies upon on behalf of the petitioners all involved case of fraud being practiced on the court, unlike in the present case. He therefore submitted that those decisions would be of no help.

(VII) Mr Anturkar the learned Senior Counsel, has then pointed out the pleadings of fraud as made in the

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plaint. Broadly speaking he has pointed out ten such heads/instances which according to the learned counsel clearly make out a case of a fraud being practiced on the respondent/plaintiff which induced the plaintiff to enter into the consent terms in RCS 1262/2007.

(VIII) The instances of fraud are (a) non execution of a conveyance as agreed and opposing the application for deemed conveyance before the competent authority. (b) Failure to provide new club house within two years as agreed and on the contrary closing down of the existing club facility with a proposal for construction of a multistoried commercial Mall which is explained in paras 11, 21 and 25 of the plaint. (c) Concealment of the Sanctioned plan dt 14th May 2010 thereby reducing the area of the club house to 1792.37 Sq Mts from 7136.95 Sq mts in the plan dt 12th May 2009. (d) Failure to form an advisory board for the Club House particularly when the petitioners had agreed to take two members of the plaintiff on the advisory board. (e) Failure to disclose the term loan obtained from ICICI Bank on the suit plot on 13th June 2011 prior to the

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execution of the consent terms on 18th July 2011. The existing club facilities as well as the proposed new club facilities were to be developed on the suit Plot and thus it was incumbent on the petitioners to disclose the same. (Para 23 of the plaint) (f) As per the draft Conveyance deed attached to the Consent terms Plot no 24 1 and 3 from Cluster no 1 was shown reserved. However the same was 'smartly separated' from the sanctioned layout without the order from the competent authority. The plaintiff has an undevided interest in the said plot no 17 admeasuring 666.92 Sq Mts which is illegally merged in the reserved plot which is 'active concealment' according to the plaintiff (para 24 of the plaint). (g) The petitioners had formed Kumar City Co-op Housing Society, much prior to the formation of the plaintiff society. A conveyance in respect of 13 H 16 Ares of land was executed in favour of the said Society on 4th January 2005 which was concealed, while executing the consent terms (Para 26) (h) At the time of the consent terms Kumar City Club Pvt Ltd was a Professional Company to run the Club effectively. However it subsequently turned out to be the sister

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concern of the petitioners which is acting in collusion with the petitioners, in terminating the club membership of the members of the plaintiff and forfeiting the membership fees. (I) the water storage tank, transformer room is situated within the suit plot which can be gathered from the consent terms. However the existing Building plans relating to the suit plot were changed behind the back of the plaintiff (j) This according to the plaintiff amounts to fraud and misrepresentation under section 17 to 19 of the Contract Act.

(IX) It is submitted that while examining the question of rejection of plaint the court has to confine to the averments in the plaint and cannot look into any defence. It is therefore submitted that the learned trial court has rightly refused to reject the plaint.

15. I have carefully considered the rival circumstances and the submissions made.

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16. The following points fall for determination in this application.

(i) What is the scope of the bar under Order XXIII Rule 3A of the C.P.C ? Whether it applies only to a case where the fraud is alleged to be practiced on the Court and not where the fraud is allegedly practiced on the plaintiff ?

(ii) Whether on a meaningful reading of the plaint and the documents filed along with it, a case of fraud being practiced on the plaintiff can be made out ?

(iii) Whether the impugned order suffers from infirmity requiring interference ?

17. Point No.(i):-

In order to appreciate the rival contentions it is necessary to reproduce Rule 3 and 3A of Order XXIII of CPC as under:-

"Rule 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 agrement of compromise

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(in writing and signed by the parties), or where the defendant satisifies 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 satisfcation to be recorded, and shall pass a decree in accordance therewith [so far as it relates to the parties tot he 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].

3A Bar to suit- Not suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."

18. Rule 3A and the proviso and the explanation to Rule 3 were added by the amendment of the year 1976 with effect from 1st February 1977.

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The contention on behalf of the applicant is that the suit is barred under order 3A while according to the respondent no1 the present case of the fraud being played on the plaintiff would not be covered by the bar under section 3A. In short according to the first respondent this is not case where the issue can be decided under a limited and summery enquiry under proviso to Rule 3.

19. In my considered opinion the issue is no longer resintegra as it is covered by the decision of the Supreme Court and this Court. First a reference needs to be made to the decision of the Supreme Court, in the case of *Pushpadevi Bhagat*. In that case the plaintiffs/landlords filed a suit for eviction against five defendants, the defendant no 1 being a partnership firm. On 23rd May 1991 the plaintiffs along with their counsel and the counsel for the defendants made a statement that the matter has been compromised and the defendants had *interalia* undertaken to vacate the premises by a particular date. The trial court directed the statement of both the parties to be recorded. It subsequently transpired that the counsel appearing for the defendants in whose presence the statement/compromise was recorded had filed Vakalatnama only for defendant nos 1 2 and 5 and not the defendant nos 3 an 4. Subsequently an application was made under section 151 and 152

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of CPC after the counsel filed Vakalatnama for defendant nos 3 and 4 also. It was pointed out that the the defendant no1 partnership was already dissolved. Accordingly a fresh decree was drawn on 18th July 2001 in terms of the final order dated 23rd May 2001.

20. On 21st August 2001 the second defendant filed an application under section 151 of the CPC for setting aside of the said decree *interalia* on the ground that she had not instructed the counsel to enter into any compromise on her behalf and there was no written compromise between the parties duly signed by the parties. It was thus contended that there was no lawful agreement or compromise. The second defendant however did not pursue the application and instead filed an appeal challenging the said decree. The appellate court allowed the appeal and remitted the suit back for trial in accordance with law after ignoring the statement of the counsel made on 23rd May 1991. The landlords challenged the same before the Delhi High Court in an appeal under order 43 Rule (1) (u) of CPC. The second defendant died during the pendancy of the appeal and her daughter was brought on record as her legal representative. The High Court allowed the appeal *interalia* holding that the consent decree in the case fell under second part of Rule 3 of order XXIII which did not require any document in writing signed

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by the parties. It was also held that the counsel indeed had authority to enter into the compromise. That is how the matter reached the Supreme Court, at the instance of the daughter of second defendant(since deceased).

21. The Supreme Court after considering the 1976 amendment summerised the principles in para 17 of the Judgment thus:-

> *"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.*
>
> *17. ..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*

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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. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21-8-2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27-8-2001) filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by the second defendant was not maintainable, having regard to the express bar contained in Section 96(3) of the Code."

(Emphasis Supplied)

22. In *R Rajanna,* a Suit was filed by the plaintiff in the year 1982 which was decreed by the trial court in 1991. The defendant challenged the same before the High Court where the matter was compromised. Subsequently in the year 2005 the plaintiff filed a suit

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challenging/disputing the validity of the Compromise. The defendant sought rejection of the plaint as being barred by order XXIII Rule 3A of CPC. The trial court rejected the plaint in the 2005 suit. Subsequently the plaintiff approached the High Court and reopened the appeal by filing an application under order XXIII rule 3A of CPC. The High Court dismissed the application holding that the plaintiff had not taken the 2005 Suit to its logical conclusion. The plaintiff challenged the same before the Hon'ble Supreme Court. The Hon'ble Supreme Court placing reliance on the decision in the case of *Pushadevi Bhagat* held that the separate suit to challenge the compromise decree was not maintainable and remitted the matter back to the High Court.

23. The Supreme Court found that the precise question which fell for consideration was whether the High court was right in directing the appellant/plaintiff to seek redress in the suit having regard to the provisions of Order XXIII Rule 3 A of CPC. In the context of the said issue this is what is held in para 11 of the Judgment.

> *"11. It is manifest from a plain reading of the above that in terms of the proviso to Order XXIII Rule 3 where one party alleges and the other denies adjustment or*

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satisfaction of any suit by a lawful agreement or compromise in writing and signed by the parties, the Court before whom such question is raised, shall decide the same. What is important is that in terms of Explanation to Order XXIII Rule 3, the agreement or compromise shall not be deemed to be lawful within meaning of the said rule if the same is void or voidable under Indian Contract Act, 1872. It follows that in every case where the question arises whether or not there has been a lawful agreement or compromise in writing and signed by the parties, the question whether the agreement or compromise is lawful has to be determined by the Court concerned. What is lawful will in turn depend upon whether the allegations suggest any infirmity in the compromise and the decree that would make the same void or voidable under the Contract Act. More importantly, Order XXIII Rule 3A clearly bars a suit to set aside a decree on the ground that the compromise on which the decree is based was not lawful. This implies that no sooner a question relating to lawfulness of the agreement or compromise is raised before the Court that passed the decree on the basis of any such agreement or compromise, it is that Court and that Court alone who can examine and determine that question. The Court cannot direct the parties to file a separate suit on the subject for no such suit will lie in view of the provisions of Order XXIII Rule 3A of CPC. That is precisely what has happened in the case at hand. When the appellant filed OS No.5326 of

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> *2005 to challenge validity of the compromise decree, the Court before whom the suit came up rejected the plaint under Order VII Rule 11 CPC on the application made by the respondents holding that such a suit was barred by the provisions of Order XXIII Rule 3A of the CPC. Having thus got the plaint rejected, the defendants (respondents herein) could hardly be heard to argue that the plaintiff (appellant herein) ought to pursue his remedy against the compromise decree in pursuance of OS No.5326 of 2005 and if the plaint in the suit has been rejected to pursue his remedy against such rejection before a higher Court."*
>
> **(Emphasis supplied)**

24. In a more recent decision in the case of T*riloki Nath Singh* the question before the Supreme Court was whether a decree passed on a compromise can be challenged by a stranger to the proceedings in a separate suit. The Supreme Court after taking note of the earlier decision in the case of *Pushpadevi Bhagat and R. Rajanna* held that it could not be done. Following observations in paras 16 to 19 on the changes brought about by the 1976 amendment and introduction of rule 3A of Order 23 of CPC are to the point.

> *16. By introducing the amendment to the Civil Procedure Code(Amendment) 1976 w.e.f. 1st February, 1977, the legislature has brought into force Rule 3A to*

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Order 23, which create bar to institute the suit to set aside a decree on the ground that the compromise on which decree is based was not lawful. The purpose of effecting a compromise between the parties is to put an end to the various disputes pending before the Court of competent jurisdiction once and for all.

17. Finality of decisions is an underlying principle of all adjudicating forums. Thus, creation of further litigation should never be the basis of a compromise between the parties. Rule 3A of Order 23 CPC put a specific bar 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 scheme of Order 23 Rule 3 CPC is to avoid multiplicity of litigation and permit parties to amicably come to a settlement which is lawful, is in writing and a voluntary act on the part of the parties. The Court can be instrumental in having an agreed compromise effected and finality attached to the same. The Court should never be party to imposition of a compromise upon an unwilling party, still open to be questioned on an application under the proviso to Rule 3 of Order 23 CPC before the Court.

18. It can be further noticed that earlier under Order 43 Rule 1(m), an appeal which recorded the compromise and decide as to whether there was a valid compromise or not, was maintainable against an order

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under Rule 3 of Order 23 recording or refusing to record an agreement, compromise or satisfaction. But by the amending Act, aforesaid clause has been deleted, the result whereof is that now no appeal is maintainable against an order recording or refusing to record an agreement or compromise under Rule 3 of Order 23. Being conscious of this fact that the right of appeal against the order recording a compromise or refusing to record a compromise was being taken away, a new Rule 1A was added to Order 43 which is as follows:

> *"1A. Right to challenge nonappealable orders in appeal against decree.— (1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.*
>
> *(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."*

19. 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 3A of Order 23 CPC. As such, a right has been given under Rule

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1A(2) of Order 43 to a party, who denies the compromise and invites order of the Court in that regard in terms of proviso to Rule 3 of 23 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.

25. In *Banwarilal* the compromise was signed by the parties challenging the same. It was *interalia* held thus in para 7 of the Judgment:-

"7. By adding the proviso along with an explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the Court which had recorded the compromise in question. That Court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The explanation made it clear that an agreement or a 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. Having introduced the proviso along with the explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3A in respect of institution of a separate suit for setting aside a decree on basis of a compromise."

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26. A useful reference can now be made to the decision of the Division Bench of this Court in *Vishankumari*. In that case the trial court had dismissed the suit as not maintainable in view of the bar contained in Order XXIII Rule 3A of CPC. In that case the suit was filed challenging a compromise decree on the ground of fraud. The objection based on the bar under order XXIII Rule 3 A of CPC was taken by the defendant no 24. It was contended before this court on behalf of the plaintiff that apart from the challenge to the compromise decree there are other independent prayers in the suit. On behalf of the plaintiff reliance was placed on the decision of the learned single Judge of this court in J*ethalal Thakkar Vs Lalbhai Hiralal Shah (1985 Mh.L.J. 299)* and the decision of the Andhra Pradesh High Court in *Smt Anita Vs Rambilas (AIR 2003 AP 32)*. The Division Bench after taking note of the decision of the Supreme Court in *(i) Banwarilal (ii) Pushpadevi Bhagat* and *(iii) R. Rajanna* found that the suit was rightly dismissed as not maintainable. The Division Bench in para 13 held thus:-

> *"13. In view of the authoritative pronouncements of the Supreme Court in the case of Banwarilal (supra) and in the case of R.Rajanna (supra) reliance on behalf of the appellants on the decision of the learned single Judge of this Court in Jethalal Thakkar's case (supra) is inappropriate. We may note that in Banwarilal the*

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Supreme Court had considered issue of collusion and fraud as had arisen in the said case namely a contention that a fabricated petition of compromise was filed, which is clear from the contents of para 4 of the decision of the Supreme Court examining the said issue the Supreme Court had come to a conclusion that a separate suit was not maintainable as noted by us above in extension. In view of this clear position in law as laid down in Banwarilal (supra), the appellants contention relying on Jethalal Thacker's case, that as the appellant had pleaded fraud in relation to the compromise a separate suit was maintainable, cannot be accepted."

27. Coming to the decisions relied upon on behalf of the first respondent, in so far as the decision of the Supreme Court in the case of *Dadudayal Mahasabha* is concerned the learned senior counsel for the first respondent as noticed earlier in all fairness did not dispute that the said case arose prior to the 1976 amendment. In that case a suit instituted by a registered society was withdrawn by a unauthorised person representing that he was the elected secretary of the Society. In such circumstances the application made under section 151 of CPC by the duly elected Secretary for recalling the order of withdrawal was held to be maintainable.

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28. On behalf of the first respondent strong reliance is placed on the decision of this court in the case of *Jethalal Thakkar.* However it would appear that in view of the subsequent decisions of the Supreme Court as referred above the Division Bench of this court in the case of *Vishankumari* has observed that the reliance on the decision in *Jethalal Thakkar* is inappropriate. It was submitted on behalf of the first respondent that the Division Bench has not either overruled or dissented from the decision in *Jethalal* and therefore the law as laid down in *Jethalal* needs to be considered. The contention in my considered view cannot be accepted. The Division Bench in *Vishankumari* has held that in view of the law laid down by the Supreme Court the reliance on *Jethalal* is inappropriate.

29. In the case of *CVK and Associates* before another Single Judge of this court, one *Pathare* had filed a suit in the year 2010 *interalia* for setting aside a sale deed dated 13th December 2007 and the addendum dated. 5th August 2009 as vitiated by fraud and for a declaration that these were not binding on him and for several other reliefs including for a direction to the defendant CVK to restore the first floor flat to its original condition and for injunction restraining *CVK* from applying for regularization. It can thus be seen that in that

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case there were several reliefs sought apart from cancellation of an agreement as recorded in the order passed on 2nd/6th July 2009. In that case *CVK* had filed a notice of Motion under order VII Rule 11 of CPC for rejection of plaint on the ground that a separate suit does not lye. What is significant is that the notice of motion was allowed by this court and the plaint was rejected granting liberty to *Pathare* to file appropriate proceedings in the execution case filed by *CVK* arising out of a 2006 suit which was decreed by consent. In my considered view the case turned on its own facts.

30. The reliance placed on the decision of the Andhra Pradesh High Court in *Anita V/s. Rambilas* to my mind is misplaced. That was a case where the parties who were husband and wife had filed a petition under Section 13(B) of the Hindu Marriage Act for dissolution of marriage by consent. After the petition was kept pending for six months for reconciliation, the same came to be allowed and the marriage was dissolved by mutual consent. After six months of the said decree the applicant wife filed an interim application in the original petition under Section 13B for recalling/reviewing of the decree on the ground that the consent of wife was obtained by the husband by threat, undue influenced/coercion. The parties led evidence and the Trial Court

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dismissed the application which was subject matter of challenge before the High Court, at the instance of the wife. The question which fell for consideration of the High Court as noticed in paragraph 15 is whether the review/recall petition was maintainable against a consent decree. The High Court taking note of Section 151 of the C.P.C. held that the review/recall petition would not lie. In that case on facts it was held that the wife had failed to establish that there was any fraud coercion and undue influence practiced. Be that as it may it does not appear from the said judgment that the issue about the maintainability of the petition fell for consideration of the High Court in the context of the provisions of Order XXIII Rule 3A of the C.P.C.

31. In any event in view of the authoritative pronouncement of the Supreme Court as referred above and the decision of the Division Bench of this Court in the case of *Vishankumari* it is not possible to accept that the suit is maintainable in view of the bar under Order XXIII Rule 3 A of CPC.

32. It was submitted on behalf of the first respondent that the enquiry contemplated under the proviso to Rule 3 is a summery enquiry wherein the court is required to decide “the question”

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without granting an adjournment. It is thus submitted that only such cases where the fraud is so palpable which 'cries hoarse', from the record which can be decided under the said proviso and in only such cases a separate suit would be barred. The contention in my considered view cannot be accepted. Even assuming that the inquiry contemplated is a summery enquiry where the court is required to decide the question without granting any adjournment, the subsequent part of the rule would show that in an appropriate case the court can grant such adjournment if found fir for reasons to be recorded.

33. In my humble view, in view of the decisions of the Supreme Court as noted above it is not now open for this Court to revisit these provisions and to arrive at a different conclusion/interpretation.

34. It can thus be seen that an independent suit challenging the consent decree is barred in view of the provisions of Order XXIII Rule 3 of the C.P.C. as held by the Supreme Court. The point is answered accordingly.

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35. Point No.(ii) :-

I have already reproduced in all 10 heads in paragraph 15(VIII) which according to the first respondent are the instances of the fraud practiced. The contention on behalf of the applicant is that any such allegations regarding fraud have to be antecedent to the execution of the consent terms. It is submitted that if the allegations are about non-compliance of the consent terms it is essentially subsequent to the passing of the consent decree and at the highest it would be in the nature of a breach or non-compliance of the consent terms/decree. In order to buttress the said contention it is pointed out that the first respondent had relied upon the consent decree before the DDR in an application for Deemed Conveyance.

36. I have carefully considered the circumstances and the grounds as set out by the first respondent and the contention raised on behalf of the applicant and at least *prima facie,* I do not find that the material allegations would make out any case of fraud as alleged. The averments in the plaint at the highest are predominantly about breach/non-compliance of the consent terms/consent decree. It is trite that there is a clear distinction between a case of an agreement/contract being result of fraud and

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the case of breach of contract. In the later the breach is essentially subsequent to the entering of the agreement/contract. In order to show that the agreement/contract or the consent terms, were a result of fraud and or misrepresentation, the allegations must be antecedent to the entering of such contract/agreement/consent terms. However I would hasten to add that these observations are limited for the purposes of the examination of the issue about the rejection of the plaint. It is thus made clear that if the first respondent resorts to the appropriate remedy under Order XXIII Rule 3 of C.P.C., if so advised the trial Court shall not be influenced by the same.

The point is answered accordingly.

37. Point No.(iii) :-

A perusal of the impugned order shows that the trial Court had held that in the suit apart from challenge to the consent decree there are other reliefs sought and therefore in the opinion of the Trial Court at this stage it cannot be said that the plaintiff has no clear cause of action or the plaint is barred by Order XXIII Rule 3 of the C.P.C. It is necessary to note that the reliefs are principally based on the challenge to the consent decree, else otherwise all the disputes between the parties were settled by the said consent decree

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in the suit of the year 2007. Thus in my considered view the trial Court is not right in refusing to reject the plaint on the ground that there are other reliefs than the challenge to the consent decree.

38. The rival contentions of the parties during the course of the argument at a bar principally entered around the bar of separate suit, under Order XXIII Rule 3 of the C.P.C. In view of the fact that on a meaningful reading of the plaint as a whole, it is found that the plaint is barred under Order XXIII Rule 3A of the C.P.C., the revision succeeds.

39. In the result, the Revision Application is allowed. The impugned order is hereby set aside. Consequently, the plaint in Special Civil Suit No.556 of 2019, stands rejected as being barred by the provisions of Order XXIII Rule 3A of the C.P.C.

40. In the circumstances, the parties to bear their own costs.

41. At this stage, the learned counsel for the respondent No.1 states that the operation and effect of this order be stayed for a period of six weeks in order to enable the respondent to take

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further steps as may be advised in the mater. The learned counsel for the applicant, strenuously opposed the same. However, considering the overall circumstances, in order to afford a fair opportunity to the respondent no.1, the operation and effect of the present order is stayed for a period of six weeks from today.

C.V. BHADANG, J.

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