

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on : 07.09.2022
Pronounced on : 14.09.2022

WP(C) No.1943/2022

Abdul Majeed Ganie ...Petitioner(s)

Through:- Mr. Qazi Ayaz, Advocate
V/s

Abdul Rahim Bhat and others ...Respondent(s)

Through:- Ms. Rehana Bashir, Advocate

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. The petitioner has invoked extraordinary writ jurisdiction of this Court vested by Article 226 of the Constitution of India to issue a writ of certiorari to quash judgment and decree dated 13.11.2019 passed by the Court of learned Munsiff (Additional Special Mobile Magistrate), Beerwah (“the trial Court”] in file No.56/N titled Ab. Rahim Bhat and others v. Ab. Majeed Ganie. The petitioner also seeks quashment of execution petition filed before the trial Court for executing the impugned judgment and decree.

2. From reading of the writ petition, it transpires that while a civil suit for permanent prohibitory injunction filed by the respondents against the petitioner was pending adjudication in the trial Court, the parties entered

into a compromise, which was reduced in writing in terms of deed executed on 25th October, 2019. On the basis of this compromise deed and after recording statements of both the parties, the trial Court passed a compromise decree dated 13.11.2019. The decree was accepted by all the parties including the petitioner herein. It was only on 25th October, 2021, almost three years after passing of the decree, the petitioner moved the trial Court by filing an application under Order 23 Rule 3 of the Code of Civil Procedure praying for recalling of the compromise deed dated 13.11.2019 on the ground that the same had been obtained by the respondents by putting the petitioner under coercion. The application was considered by the trial Court and vide order dated 20th July, 2022 the same was dismissed. It is this order passed by the trial Court as also the pending execution proceedings, which are called in question in the writ petition. As noted above, the petitioner also seeks quashment of the compromise decree dated 13.11.2019.

3. Having heard learned counsel for the parties and perused the material on record, I find absolutely no merit in this petition. That apart, it is trite law that the extraordinary writ jurisdiction of this Court vested by Article 226 of the Constitution of India cannot be invoked to challenge the judicial orders passed by the Civil Courts. I am fortified in taking this view by a Three-Judge Bench judgment of Hon'ble the Supreme Court in **Radhey Shyam and another v. Chhabri Nath and others, (2015) 5 SCC 423** wherein Hon'ble the Supreme Court has held in paragraph nos. 25,26,27 and 29 as under:-

“25. It is true that this Court has laid down that technicalities associated with the prerogative writs in England have no role to play under our constitutional scheme. There is no parallel system of King's Court in India and of all other courts having limited jurisdiction subject to supervision of King's Court. Courts are set up under the Constitution or the laws. All courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of Tribunals or authorities or courts other than judicial courts. There are no precedents in India for High Courts to issue writs to subordinate courts. Control of working of subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of civil court stand on different footing from the orders of authorities or Tribunals or courts other than judicial/civil courts. While appellate or revisional jurisdiction is regulated by statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to judicial courts, as rightly observed in the referring order in paras 26 and 27 quoted above.

26. The Bench in Surya Dev Rai also observed in para 25 of its judgment that distinction between Articles 226 and 227 stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observation that scope of Article 226 and 227 was obliterated was not correct as rightly observed by the referring Bench in Para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction under Section 115 CPC by Act 46 of 1999, jurisdiction of the High Court under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227 has been explained in several decisions including Waryam Singh and another vs. Amarnath, Ouseph Mathai vs. M. Abdul Khadir, Shalini Shyam Shetty vs. Rajendra Shankar Patil and Sameer Suresh Gupta vs. Rahul Kumar Agarwal. In Shalini Shyam Shetty, this Court observed :

"64. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases the High Courts, in a routine manner, entertain petitions under Article 227 over such disputes and such petitions are treated as writ petitions.

65. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory authority.

66. We may also observe that in some High Courts there is a tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to

be justified on an erroneous appreciation of the ratio in Surya Dev and in view of the recent amendment to Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expanding the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.

67. As a result of frequent interference by the Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice. This Court hopes and trusts that in exercising its power either under Article 226 or 227, the Hon'ble High Court will follow the time honoured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest courts of justice within their jurisdiction will adhere to them strictly."

(emphasis added)

27. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.

28.

29. Accordingly, we answer the question referred as follows :

29.1. Judicial orders of civil court are not amenable to writ jurisdiction under Article 226 of the Constitution.

29.2. Jurisdiction under Article 227 is distinct from jurisdiction under Article 226.

29/3. Contrary view in *Surya Dev Rai* is overruled."

4. In view of the explanation appended to Rule 3 of Order 23, an agreement or compromise which is void or voidable under the Contract Act shall not be deemed to be 'lawful' within the meaning of Rule. It is, thus, trite that a compromise decree which is vitiated by fraud, coercion or misrepresentation, undue influence or mistake can be recalled by the same Court under proviso to Rule 3 of Order 23 and separate suit to challenge such decree is clearly barred by Rule 3A of Order 23 CPC. The issue is no longer res-integra. The Supreme Court in the case of **R. Jankiammal v. S. K. Kumarasamy, (2021) 9 SCC 114**, has elaborately discussed it.

Paragraphs No. 41 to 47 are relevant and, therefore, are set out herein below:-

“41. Order 23 Rule 3 provides for compromise of suit. In Rule 3 amendments were made by Act No. 104 of 1976 by which a proviso and an Explanation was added. Order 23 Rule 3 as amended is to the following effect:

“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 subjectmatter 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;”

42. By the same amendment Act No.104 of 1976, a new Rule, i.e., Rule 3A was added providing:

“3A. Bar to suit. No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.”

43. Determination of disputes between persons and bodies is regulated by law. The legislative policy of all legislatures is to provide a mechanism for determination of dispute so that dispute may come to an end and peace in society be restored. Legislative policy also aims for giving finality of the litigation, simultaneously providing higher forum of appeal/revision to vend the grievances of an aggrieved party. Rule 3A which has been added by above amendment provides 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. At the same time, by adding the proviso in Rule 3, it is provided that when there is a dispute as to whether an adjustment or satisfaction has been arrived at, the same shall be decided by the Court which recorded the compromise. Rule 3 of Order 23 provided that 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, the Court shall order such agreement or compromise to be recorded and pass a decree in accordance therewith. Rule 3 uses the expression “lawful agreement or compromise”. The explanation added by amendment provided that an agreement or a compromise which is void or voidable under the Indian Contract Act, 1872, shall not be deemed to be lawful.”

44. Reading Rule 3 with Proviso and Explanation, it is clear that an agreement or compromise, which is void or voidable, cannot be recorded by the Courts and even if it is recorded the Court on challenge of such recording can decide the question. The Explanation refers to Indian Contract Act. The Indian Contract Act provides as to which contracts are void or voidable. Section 10 of the Indian Contract Act provides that all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

45. Section 14 defines “free consent” in following words:

“14. “Free consent” defined.—Consent is said to be free when it is not caused by:

- (1) coercion, as defined in section 15, or
- (2) undue influence, as defined in section 16, or
- (3) fraud, as defined in section 17, or
- (4) misrepresentation, as defined in section 18, or
- (5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.”

46. A consent when it is caused due to coercion, undue influence, fraud, misrepresentation or mistake is not free consent and such agreement shall not be contract if free consent is wanting. Sections 15, 16, 17 and 18 define coercion, undue influence, fraud and misrepresentation. Section 19 deals with voidability of agreements without free consent. Section 19 is to the following effect:

“19. Voidability of agreements without free consent.—When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.”

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

5. The plea of the learned counsel for the respondent that the remedy of the petitioner to challenge the compromise decree on the ground of coercion was by way of separate suit is, thus, not tenable. The compromise deed is essentially a contract between the parties superimposed by the decree of the Court. Such decree can be avoided only by approaching the same Court and demonstrating before it that the compromise on the basis of which decree is passed is not lawful.

6. True it is that the impugned judgment and decree is not appealable and the remedy to recall a compromise decree obtained by fraud, coercion or undue influence is provided under Order-23 Rule-3 of the Code of Civil Procedure. As is rightly observed by the trial Court, the writ petitioner has failed to make out a case for recalling of the decree.

7. From the facts projected by the petitioner in the writ petition, it transpires that while the civil suit was pending between the parties, there was also an FIR being FIR No.93/2018 under Sections 341, 323 RPC registered in Police Station, Beerwah against Ishfaq Ahmed, son of the petitioner. The son of the petitioner was appointed as Constable in Jammu & Kashmir Executive Police but his appointment was subject to obtaining

police verification regarding his antecedents. However, due to pendency of the criminal case, the police could not give him clearance for appointment and, thus, the petitioner entered into a compromise with the respondents and as a result of this compromise, not only the criminal case pending against the son of the petitioner was settled but the civil suit pending in the trial Court, too, was amicably settled. A compromise in this regard was executed and submitted to the trial Court. The trial Court not only took on record the compromise deed but also recorded statements of the parties in support of the compromise. None of the parties including petitioner objected to the compromise deed or contents thereof. In these circumstances, the compromise decree was passed by the trial Court.

8. It appears that after the criminal case was settled and son of the petitioner succeeded in getting appointment as Constable, the petitioner thought of re-opening of the civil suit by seeking recall of the compromise decree. This was done by the petitioner after nearly three years of the passing of the compromise decree and only when the decree was put to execution by the respondents. The plea of the learned counsel for the petitioner that the judgment and compromise decree passed by the trial Court is not capable of being executed, cannot be made subject matter of adjudication in these proceedings, for, the remedy of the petitioner lies before the Executing Court.

9. Order 21 of the Code of Civil Procedure lays down elaborate procedure for execution of decree of the Civil Courts and provides ample opportunities to the judgment debtor to resist execution on well recognized

grounds. The petitioner instead of contesting the execution before the Executing Court has straightway invoked the extraordinary writ jurisdiction of this Court.

10. I ventured to go into the merits of the case only to find out as to whether the case on hand would fall within the parameters laid down by the Supreme Court for exercise of power of superintendence vested in this Court by Article 227 of the Constitution of India. In that eventuality this Court would have no difficulty in treating this petition filed under Article 226 of the Constitution of India as the one under Article 227 of the Constitution of India. However, despite deep scrutiny of the facts and hearing learned counsel for the parties at length, I could not find it a fit case for exercising such discretion. Hon'ble the Supreme Court in **Umaji Keshao Meshram and others v. Radhikabai and another, 1986 (Supp) SCC 401** has clearly brought out distinction between Article 226 and Article 227 of the Constitution. Proceedings under Article 226 are in the exercise of original jurisdiction of the High Court while proceedings under Article 227 are not original but only supervisory. The supervisory power may be exercised in the following cases of grave injustice and failure of justice:-

- (i) The Court or Tribunal has assumed jurisdiction which it does not have;
- (ii) Jurisdiction though available is being exercised in a manner which tantamounts to overstepping limits of jurisdiction.

The supervisory jurisdiction which is exercised primarily to keep the inferior Courts and Tribunals within the bounds of their jurisdiction, is exercised sparingly, either *suo moto* or on an application by the aggrieved party. The order passed by the learned trial Court is well considered and takes care of all aspects highlighted by the petitioner during the course of arguments. It does not suffer from any serious jurisdictional error resulting in failure of justice.

11. The petitioner cannot be permitted to blow hot and cold in the same breath, as on the one hand he succeeds in getting the criminal proceedings pending against his son quashed and on the other hand wants this Court to believe that he was under coercion to compromise the suit, which was decreed by the learned trial Court in terms of the impugned compromise decree.

12. For all these reasons, this petition is not maintainable in law nor do I find any merit to invoke the power of superintendence vested in this Court by Article 227 of the Constitution to grant the reliefs prayed for by the petitioner in the writ petition.

13. Accordingly, this writ petition is dismissed.

**(Sanjeev Kumar)
Judge**

SRINAGAR
14.09.2022
Anil Raina, Addl.Reg/Secy

Whether the order is reportable : Yes