A.F.R.

Reserved

Court No. - 40

Case :- MATTERS UNDER ARTICLE 227 No. - 3147 of 2019

Petitioner :- Sri Ram Krishna Vivekanand Shishu Niketan
Respondent :- Sri Onkarnath And 19 Others
Counsel for Petitioner :- Nirvikar Gupta,Tosh Kumar Sharma
Counsel for Respondent :- Shariq Shamim,Rajneesh Tripathi,Tarun Agrawal,Tarun Varma

Hon'ble Manoj Kumar Gupta,J.

An interesting question as to whether second appeal would lie against the impugned order/judgement of the first appellate court or the same is barred by Section 96 (3) of the Code of Civil Procedure (for short 'Code' or 'C.P.C.') arises for consideration in the instant petition filed before this Court invoking its supervisory jurisdiction under Article 227 of the Constitution. In case, an appeal is maintainable, this Court in view of availability of efficacious remedy under the Code would decline to entertain the instant petition.

The backdrop in which the controversy has arisen is as follows:-

Two suits were instituted by the petitioner (hereinafter referred to as 'the plaintiff') bearing Original Suit Nos.381 of 1987 and 800 of 1987. In Original Suit No.381 of 1987, the plaintiff prayed for permanent injunction, declaration of its title in respect of the suit property and mandatory injunction against respondents no.1 to 14

(hereinafter referred to as 'the defendants 1st set). The declaration of title was sought on the ground that the suit property was donated to it by Dwarika Nath Bhargava, Kedar Nath Bhargava and Onkar Nath Bhargava by an unregistered instrument dated 10.3.1969. Since then, the plaintiff had been in possession of the same as its owner without any objection from any one and thus perfected its title by adverse possession. In alternative, the plaintiff also prayed for mandatory injunction directing defendants 1 to 10 as well as defendants 11, 12 and 13 to execute registered gift deed in pursuance of an alleged agreement dated 12.2.1969. In Original Suit No.800 of 1987, the plaintiff took the same stand and prayed for permanent injunction against respondents 12 to 20 (hereinafter referred to as 'the defendants 2nd set). Both the suits were dismissed by the trial court by judgement dated 14.12.2018. The trial court held that the plaintiff was not able to prove its title to the suit property; that it also failed to prove its possession and thus, also not entitled to declaration as owner on basis of adverse possession. Aggrieved by the judgement of the trial court, the plaintiff filed an appeal under Section 96 CPC. It was registered as Civil Appeal No.213 of 2018. During pendency of the appeal, the plaintiff entered into a compromise with defendants 12/1 and 14 (Paper No.18 Ka/4). The compromise was signed by the parties/their authorised representatives and their signatures were duly

verified by respective counsel for the parties except respondents 1 to 11 and 13, who were discharged from the suit and also the compromise. There is a map annexed with the compromise, according to which, the portion of land shown with letters DEFH was admitted to be in possession of the plaintiff and would continue in its possession; ABHF was recognised as belonging to defendant 12/1 and BCDH as belonging to defendant no.14. On 22.1.2019 the date on which compromise application Paper No.18 Ga was filed before the appellate court, one Kapil Dev Upadhyay filed an application seeking his impleadment alleging title in respect of 322.66 sq. yards of the suit property on basis of a sale deed dated 18.1.2019 executed in his favour by Narain Das Agrawal, power of attorney holder of Desh Bandhu Kagaji (son of defendant no.13 of Original Suit No.381 of 1987 and defendant no.1 of Original Suit No.800 of 1987) and Manager of Phool Chandra Kagaji HUF. According to him, the original owner of the suit property namely Thakur Madan Mohan Ji Maharaj had executed registered lease deed on 29.12.1987 in favour of Phool Chandra Kagaji HUF with respect to 1320 sq. yards of the suit property. It is also his case that Phool Chandra Kagaji HUF had also obtained a sale deed dated 7.10.1987 (registered on 15.1.1988) in respect of the same land from the Bhargavas, through whom the plaintiff also claims title to the suit property. It is common ground

between the parties that the predecessor of Bhargava family namely Late Girdhar Das Bhargava obtained the said property by way of a registered perpectual lease deed dated 21.8.1943 from the then Shebiat of Thakur Madan Mohan Ji Temple, the original owner of the property. According to both the parties, after death of Girdhar Das Bhargava, his three sons inherited the suit property. According to the plaintiff society, the three sons of Girdhar Das Bhargava donated the suit land to the plaintiff and since then, it has been in possession of the same.

The Appellate Court, by order dated 1.2.2019, rejected the impleadment application observing that intervention of a third party at the appellate stage when the matter had remained pending for last 32 years would not be in interest of justice. However, on the same date, it proceeded to pass order on the compromise application as well. The Appellate Court accepted the compromise in part i.e. in respect of defendant no.12/1 and 14 but it refused to decree the suit in favour of the plaintiff for the suit land DEFH observing that as per boundaries, it is the same land in respect of which Kapil Dev Upadhyay had filed impleadment application claiming title on basis of registered lease deed of thirty years. The Appellate Court has held that the plaintiff had failed to bring on record any document to prove its title; consequently, the compromise application in respect of land

shown with letters DEFH was rejected. In pith and substance, the Appellate Court, in absence of any document of title with regard to the portion of land shown with letters DEFH, declined to grant declaration in favour of the plaintiff. The operative part of the order/judgement of the Appellate Court dated 1.2.2019 reads thus:-

> "उपरोक्त सम्पूर्ण विश्लेषण के प्रकाश में संधि पत्र 18क/1–3 एवं उसके साथ संलग्न नक्शा संधि पत्र 18क/4 में दर्शित सम्पत्ति निशानी अक्षर डी. ई. एफ. एच को छोड़कर शेष भाग हेतु संधि पत्र व नक्शा संधि पत्र सत्यापित किया जाता है ।
>
> तदनुसार संधि पत्र 18क/1–3 एवं नक्शा संधि पत्र 18क/4 के अनुसार यह सिविल अपील निर्णीत की जाती है। निशानी अक्षर डी. ई. एफ. एच से दर्शित सम्पत्ति को छोड़कर संधि पत्र 18क/1–3 एवं नक्शा संधि पत्र 18क/4 डिक्री का भाग होगा।
>
> पक्षकार अपना–अपना वाद व्यय स्वयं वहन करेंगे।
>
> पत्रावली नियमानुसार दाखिल दफ्तर हो।"

Being aggrieved by the above order/judgement of the Appellate Court, declining to record compromise in respect of the claim of the plaintiff while deciding the appeal, the instant petition has been filed.

Sri Diwakar Rai Sharma Advocate appearing on behalf of respondent no.14 raised a preliminary objection relating to maintainability of the instant petition under Article 227 of the Constitution. Sri Tarun Agrawal Advocate appearing on behalf of Kapil Dev Upadhyay, the applicant seeking impleadment also submitted that the petitioner has remedy of challenging the impugned judgement by filing a second appeal under Section 100 CPC. It is urged that since the remedy is available under the Code itself,

therefore, the present petition under Article 227 of the Constitution should not be entertained and the petitioner should be relegated to the remedy available under the Code. It is urged by them that a second appeal would lie against the impugned order/judgement in view of Order 43 Rule 1-A read with Order 42 Rule 1 CPC and Section 100 and 108 CPC. In support of their contention, they have placed reliance upon the judgements of the Supreme Court in **Banwari Lal Vs. Chando Devi (Smt.) (Through Lrs.) and another**[1], **Kishun alias Ram Kishun Vs. Behari**[2] and a Division Bench judgement of Madhya Pradesh High Court in **Thakur Prasad Vs. Bhagwandas**[3]**.**

On the other hand, Sri Nirvikar Gupta, learned counsel appearing on behalf of plaintiff-petitioner submitted that the impugned order recording compromise in part and declining to record other part would not amount to a decree. He points out that even no decree has been drawn in pursuance of the impugned order. It is urged that clause (m) of Rule 1 of Order 43 under which an appeal was maintainable against an order recording or refusing to record an agreement, compromise or satisfaction was omitted by Act No.104 of 1976 w.e.f. 1.2.1977. Consequently, it is submitted that no appeal would lie against such an order. He further submitted that

1 (1993) 1 SC 581
2 (2005) 6 SCC 300
3 1984 Law Suit (MP) 120

since rights of parties have not been decided under the impugned order, therefore, it would not amount to a judgement nor would result in a decree, therefore, Order 43 Rule 1-A (2) will also have no application. He placed a strong reliance on Section 96 (3) CPC and the same judgments upon which reliance was placed by the other side in contending that no appeal is maintainable from a decree passed by court with consent of the parties.

Before adverting to the submissions advanced by learned counsel for the parties, certain amendments carried out in the Code by Act No.104 of 1976 are worth noticing. Order 23 Rule 3 CPC envisages compromise of suit. Prior to its amendment by Act No.104 of 1976, it read as follows in its application to the State of Uttar Pradesh:-

> *"**R.3.** 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, 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 suit."*
>
> *" ALLAHABAD.- (1) In Rule 3 of Order 23 between the words " or compromise" and "or where" insert the words "in writing duly signed by parties"; and between the words "subject matter of the suit" and the words "the Court" insert the words "and obtains an instrument in writing duly signed by the plaintiff."*
>
> *(2) At the end of the Rule 3 of Order 23 add the following, namely:*

> *"Provided that the provisions of this rule shall not apply to or in any way affect the provisions of Order XXXIV, Rules 3, 5 and 8.*
>
> *Explanation.- The expression "agreement" and "compromise", include a joint statement of the parties concerned or their counsel recorded by the Court, and the expression "Instrument" includes a statement of the plaintiff or his counsel recorded by the Court"- U.P. Gaz., 31-8-1974, Pt.II, p.52 (31-8-1974)"*

Order 43 Rule 1 (m) enabled a party aggrieved by an order passed under Rule 3 of Order 23 recording or refusing to record an agreement, compromise or satisfaction to challenge the order in appeal. Clause (m) was to the following effect:-

> *"(m) an order under Rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction;"*

Section 96 (3) placed a specific embargo on maintainability of appeal from a decree passed by the court with the consent of parties. It reads thus:-

> *"96 (3). No appeal shall lie from a decree passed by the Court with the consent of parties."*

Under Order 43 Rule 1 (m), an order recording or refusing to record an agreement, compromise or satisfaction could be directly challenged by filing an appeal even before the final judgement is passed in the suit. In cases where the decree is passed by the court with consent of parties, no appeal would lie in view of the prohibition contained under Section 96 (3). It was settled by a series

of precedents that the prohibition under Section 96 (3) would remain limited to cases where the parties, after complying with the procedure prescribed under Order 23 Rule 3 CPC, invites the court to pass decree in a particular manner to which they had agreed to and the court acts accordingly. However, in cases where a party disputes being signatory to the compromise or the compromise decree is challenged on ground of fraud, undue influence or misrepresentation, the bar stipulated under Section 96 (3) would not come in way of filing an appeal. It was also open to such a party to file a regular civil suit challenging the compromise decree on the ground of it being void or voidable.

After the Code was amended by Act No.104 of 1976, clause (m) of Rule 1 of Order 43 was omitted, meaning thereby that an order recording or refusing to record an agreement, compromise or satisfaction is no more appealable. By the same amendment, Rule 1-A was inserted in Order 43. Sub-rule (2) thereof, which is relevant for our purpose, is as follows:-

> *"(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, certain amendments were also made in Rule 3 of Order 23 conferring jurisdiction upon the same court to decide

whether adjustment or satisfaction has been arrived at where it is so alleged by one party while denied by the other. It has also been made mandatory that the compromise should be in writing and signed by the parties. An *Explanation* has also been inserted clarifying that an agreement or compromise, which is void or voidable under the Indian Contract Act, 1872, shall not be deemed to be lawful within the meaning of this rule. Rule 3-A, inserted by the same Amending Act of 1976 specifically bars a suit before civil court for setting aside a compromise decree on the ground that it was not lawful. Order 23 Rule 3 and Rule 3-A as amended by Act No.104 of 1976 are as follows:-

> ***"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]:*
>
> *[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.]"*

> *"**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."*

In **Pushpa Devi Bhagat Vs. Rajinder Singh**[4], a two Judge Bench of the Supreme Court, after considering Rule 3 and 3-A of Order 23, summed up the statement of law emerging from these provisions as follows:-

> *"13.1. no appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC;*
>
> *13.2. 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) of Rule 1, Order 43;*
> *13.3. 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 3-A; and*
> *13.4. 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."*

Even before the above principles were laid down by the Supreme Court, another Division Bench in **Banwari Lal (supra)** considered the interplay between Order 43 Rule 1-A added by Act No.104 of 1976 and Section 96 (3) as well as the impact of deletion of clause (m) of Rule 1 of Order 43. The Supreme Court has observed that the amendments were carried out taking into consideration the past experiences, as on many occasions, parties

4 (2006) 5 SCC 566

used to file compromise on basis of which suit used to be decreed but later on, for one reason or the other, the validity of such compromise was challenged by way of separate suit dragging the litigation for years together. By the amendments made by 1976 Act, special requirements were introduced before a compromise is recorded by the court. The compromise should be lawful, must be in writing and signed by the parties. The relevant observations made in this regard by the Supreme Court in **Banwari Lal (supra)** are extracted below:-

> ***"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 3-A in respect of institution of a separate suit for setting aside a decree on basis of a compromise saying:*
>
> > *"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."*
>
> ***8.*** *Earlier under Order 43, Rule 1(m), an appeal was maintainable against an order under Rule 3 of Order 23 recording or refusing to record an agreement, compromise or satisfaction. But by the amending Act aforesaid that 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 that the right of appeal against the order recording a compromise or refusing to record a compromise*

> *was being taken away, a new Rule 1-A has been added to Order 43 which is as follows:"*

The 1976 Amendment, while on one hand conferred right to challenge decree passed in suit after recording a compromise or refusing to record a compromise by filing regular appeal but at the same time, Section 96 (3) of the Code, which says that no appeal shall lie from a decree passed by the court with the consent of the parties, was left untouched. The impact of insertion of Rule 1-A (2) upon Section 96 (3) was explained thus:-

> *"9. Section 96(3) of the Code says that no appeal shall lie from a decree passed by the Court with the consent of the parties. Rule 1-A(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 Section 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 Order 43, Rule 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 Rule 3-A of Order 23. As such a right has been given under Rule 1-A(2) of Order 43 to a party, who challenges the recording of the compromise, to question the validity thereof while preferring an appeal against the decree. Section 96(3) of the Code shall not be a bar to such an appeal because Section 96(3) is applicable to*

> *cases where the factum of compromise or agreement is not in dispute."*

Once again, in paragraph 13 of the Law Report, the Supreme Court explained the interplay between the above provisions as follows:-

> *"13. When the amending Act introduced a proviso along with an explanation to Rule 3 of Order 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 Rule 1(m) of Order 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 Rule 3 of Order 23, or an appeal under Section 96(1) of the Code, in which he can now question the validity of the compromise in view of Rule 1-A of Order 43 of the Code."*
>
> *(emphasis supplied)*

Again, in **Kishun alias Ram Kishun (supra)** it was held that where the compromise is contested, the bar under Section 96 (3) will not come into play. The order passed by the court on such contest and the resultant decree would be subject to appeal and second appeal. It has been observed that *"when there is a contest on the*

question whether there was a compromise or not, a decree accepting the compromise on resolution of that controversy, cannot be said to be a decree passed with the consent of the parties. Therefore, the bar under Section 96(3) of the Code could not have application. An appeal and a second appeal with its limitations would be available to the party feeling aggrieved by the decree based on such a disputed compromise or on a rejection of the compromise set up."

The law laid down in **Ram Kishun** has been reiterated by the Supreme Court in a more recent judgement in **Daljit Kaur and another Vs. Muktar Steels Private Limited and others**[5] holding that bar under Section 96 (3) CPC will not get attracted where the compromise is disputed. In my considered opinion, the same would also be the position where the court refuses to record compromise or part of it on the ground that it is not lawful, as in the instant case.

The legal position which thus emerges after amendment of Civil Procedure Code by Act No.104 of 1976 is that the appellant in an appeal against a decree passed in suit after recording a compromise or refusing to record a compromise is entitled to contest the decree on the ground that the compromise should, or should not, have been recorded (Order 43 Rule1-A). The same principle would apply where the court records some part of the compromise while

5 (2013) 16 SCC 607

declines to record the remaining part. In such cases, the bar contained under Section 96 (3) CPC would not get attracted. These principles would also apply to appeals from appellate decrees in view of Order 42 Rule 1 read with Section 108 CPC.

In the instant case, as would appear from the facts noted above, the appellate court, while deciding appeal under Section 96 CPC, has passed a composite order recording compromise in part and refusing to record other part of compromise in so far as it relates to the plaintiff-petitioner. On the same date, the appellate court has also proceeded to decide the appeal finally. This takes the Court to the other limb of the argument of learned counsel for the petitioner i.e. the order passed by the appellate court would not qualify to be a decree, as there had been no adjudication of its rights. Consequently, no appeal would lie at this stage.

The submission made in this regard, albeit attractive, is bereft of any substance. A plain reading of the order passed by the appellate court on 1.2.2019 reveals that the appellate court has not only recorded the compromise in part and refused to record the remainder, but has also proceeded to pass a decree in terms thereof. The order specifically provides that the compromise application and the map would form part of the decree except in respect of property shown with letters DEFH. There is a specific direction for consigning the

file to the record room. The operative part evinces a clear intention that the proceedings of the appeal have thereby terminated. It is not the case of the petitioner that the appellate court is incompetent to pass a composite order verifying/refusing to verify the compromise and also pass decree in accordance therewith on the same date. The main thrust of the argument of learned counsel for the petitioner is that the appellate court has not adjudicated the rights of the plaintiff in the suit land, consequently, the order impugned would not qualify to be a 'decree' within the meaning of Section 2 (2) CPC.

In **Rana Narang Vs. Ramesh Narang**[6], the Supreme Court has held that a compromise decree is as much a decree as a decree passed on adjudication. It is not merely an agreement between the parties. In passing the decree by consent, the court adds its mandate to the consent.

A similar controversy arose before a Three Judges Bench of the Supreme Court in **Shyam Sunder Sharma Vs. Pannalal Jaiswal and others**[7] though in a slightly different context. The issue before the Supreme Court was whether an order of dismissal of appeal as barred by limitation would amount to a decree or not. The contention before the Supreme Court was that in such a case there is no adjudication of lis on merits, therefore, it is merely an 'order' and

6 (2006) 11 SCC 114
7 AIR 2005 SC 226

would not amount to a 'decree'. The Supreme Court, while deciding the said issue, considered an earlier judgement by Two Judges Bench in **Ratan Singh Vs. Vijayasingh and others**[8], wherein it was held that dismissal of an application for condonation of delay would not amount to a decree, therefore, dismissal of appeal as time barred was also not a decree. The Supreme Court overruled the said judgement relying on previous judgments by Larger Bench taking a contrary view. The Supreme Court observed as follows:-

> *"12. Learned counsel placed reliance on the decision in Ratansingh vs. Vijaysingh and others [(2001) 1 SCC 469] rendered by two learned Judges of this Court and pointed out that it was held therein that dismissal of an application for condonation of delay would not amount to a decree and, therefore, dismissal of an appeal as time barred was also not a decree. That decision was rendered in the context of Article 136 of the Limitation Act, 1963 and in the light of the departure made from the previous position obtaining under Article 182 of the Limitation Act, 1908. But we must point out with respect that the decisions of this Court in Messrs Mela Ram and Sons and Sheodan Singh (supra) were not brought to the notice of their Lordships. The principle laid down by a three Judge Bench of this Court in M/s Mela Ram and Sons (supra) and that stated in Sheodan Singh (supra) was, thus, not noticed and the view expressed by the two Judge Bench, cannot be accepted as laying down the correct law on the question....."*

The judgement rendered in **Sheodan Singh Vs. Daryao Kunwar**[9] was rendered by Four Judges Bench of the Supreme Court holding thus:-

> *"We are therefore of opinion that where a decision is given*

8 (2001) 1 SCC 469
9 AIR 1966 SC 1332

> *on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits, itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal."*

In **Messrs Mela Ram and Sons Vs. The Commissioner of Income Tax, Punjab**[10] on which reliance was placed by the Supreme Court in **Shyam Sunder Sharma (supra)**, it was held as follows:-

> *".....although the Appellate Assistant Commissioner did not hear the appeal on merits and held that the appeal was barred by limitation his order was under Section 31 and the effect of that order was to confirm the assessment which had been made by the Income-tax Officer."*

The Supreme Court concluded by holding that dismissal of an appeal on ground of delay in filing the same has the effect of confirming the decree appealed against. Para 10 from the said judgement reads thus:-

> *"10. The question was considered in extenso by a Full Bench of the Kerala High Court in Thambi vs. Mathew (1987 (2) KLT 848). Therein, after referring to the relevant decisions on the question it was held that an appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3A of Order XLI introduced by Amendment Act 104 of 1976 to the Code, did not in any way affect that principle. An appeal registered under Rule 9 of Order XLI of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against. Thus, the position that emerges on a survey of the*

10 AIR 1956 SC 367

> *authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal. ”*

The order by the appellate court deciding appeal results in merger of the judgement of the trial court with that of the appellate court. A perusal of the operative part of the judgement would reveal that the judgement passed by the trial court stands superseded by the decree now passed by the appellate court whereunder rights of respondents 12/1 and 14 have been specifically recognised, while that of the plaintiff in respect of part of the suit land shown with letters DEFH has not been accepted. It is the judgement of the appellate court which would govern the rights of the parties and not the one passed by the trial court.

The questions (i) whether the appellate court was justified in declining to record part of the compromise, (ii) whether it was justified in dismissing the claim of the plaintiff straightaway after refusing to record part of the compromise without giving the petitioner opportunity to establish its claim on basis of other material on record and (iii) whether the finding recorded in the impugned order that there is no evidence on record to establish the title of the plaintiff-appellant in respect of property DEFH may or may not be correct, but on that score the remedy of further appeal provided

under the Code would not be lost. The nature of the order has to be ascertained in accordance with the legal principles discussed above. The preparation of decree or formal order in terms of the impugned judgement is a ministerial act. Even if a formal order has been prepared and not decree in pursuance of the impugned judgement of the appellate court, it would not detract from the true nature of the order nor would denude the petitioner of its right to avail the statutory remedy of filing second appeal.

Before parting, I would also like to deal with an alternative submission made by Sri Tarun Agrawal, learned counsel appearing for the applicant seeking impleadment. He urged that the bar contained under Section 96 (3) regarding filing of appeal against consent decree is only applicable to first appeals and not to second appeals filed under Section 100 CPC. However, the submission is devoid of any force. Section 108 CPC specifically provides that the provisions of Part VII relating to appeals from original decree shall as far as may be applied to appeals from appellate decrees. Section 96 (3) is contained in Part VII. Section 96 (3), as noted above, is based on doctrine of estoppel which would equally apply to a consent decree passed in appeal. However, for other reasons stated in earlier part of the judgement, the bar under Section 96 (3) C.P.C. would not come in way of the petitioner in filing second appeal.

In consequence, the instant petition is dismissed on the ground of availability of alternative remedy of second appeal under the Code itself. The petitioner shall be free to avail the said remedy, in which event, nothing observed herein would be taken as expression of opinion on merit of the case.

Office is directed to return certified copies of the impugned judgments to counsel for the petitioner after retaining photo copies on record.

(Manoj Kumar Gupta, J)

Order Date :- 3.9.2019
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