Supreme Court of India
Sneh Gupta vs Devi Sarup & Ors on 17 February, 2009
Author: S Sinha
Bench: S.B. Sinha, Mukundakam Sharma

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1085 OF 2009
(Arising out of SLP (C) No.4045 of 2007)

Sneh Gupta ... Appellant

Versus

Devi Sarup & Ors. ... Respondents

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. Interpretation of Order XXIII Rule 1 of the Code of Civil Procedure is involved in this appeal. It arises out of a judgment and order dated 13.9.2006 passed by a learned Single Judge of the High Court of Punjab and Haryana setting aside an order dated 29.9.2005 passed by the Additional District Judge, Jagadhari whereby and whereunder the terms of settlement entered into by way of an agreement dated 25.4.1998 between some of the parties hereto were declared illegal as also null and void.

3. Indisputably, two suits were filed being Suit No.185 of 1989 and Suit No.303 of 1992 on 20.11.1989 and 21.3.1992 before the Additional Civil Judge, Jagadhari, Haryana and Senior Division Bench and before the Civil Judge, Jagadhari, Haryana, respectively.

In the said suits, inter alia, the question as regards an order of mutation carried out in the Revenue records pursuant to or in furtherance of a transfer made by one Raghuvir Singh in favour of his wife and son stated to be under an oral gift deed representing himself as the successor of Bhanumal was in question. We would refer to the respective claims made in the said suits a little later. We may, however, at this stage, notice the genealogical tree which is as under :

Banu Mal Munni Raghbir Singh Devi Cousin of W/o O.P. Gupta Banu Mal (Kesho Devi-wife) Sneh Lata Veena Chander Pawan K.K. Vinod @ Sneh Nirwani Nirwani Gupta Gupta Gupta Gupta Devi Sarup Kusum Lata (Maya Devi - wife)

4. Raghbir Singh is said to be the third cousin of Banu Mal. Banumal is said to have executed a Will in favour of Munni Devi on or about 14.11.1937. He is again said to have executed a Will in favour of Raghbir Singh on or about 27.3.1943. According to the plaintiff, Raghbir Singh had acquired life interest in the purporting said Will without having any right to alienate, transfer, mortgage or creating any charge on the properties situated in various villages, namely, Rapri, Radur, Ghesfur etc.

5. In Suit No.185 of 1989, the cause of action is said to have arisen when order of mutation was passed in favour of the transferees of Raghbir Singh. Whereas the decree prayed for in Suit No.303 of 1992 was for a declaration that Raghubir Singh was only having a life interest in the suit property and having not abided the terms and conditions contained in the said Will dated 27.3.1943, has lost his right to manage the property in suit; an order of mutation was the subject matter of Suit No.185 of 1989, on the premise, as has been noticed by the learned Trial Judge as under :

> "i) That in the alleged mutation, Banu Mal has been shown to be without his wife and children, but in fact, he had a daughter named Jeewani @ Munni Devi, living at that time. Thus, said mutation was sanctioned by producing a fictitious person, in place of Banu Mal;

ii) that mutation was neither verified nor initialed with date by filed Kanungo, as required under para 7.4(ii) of the Punjab Land Records Manual;

(iii) that another mutation No.1423 pertaining to the partition of joint holdings, was sanctioned on 28.2.1954, but there is no mention in the disputed mutation No.1427, entered on 26.2.1954 and sanctioned on 2.3.1954, therein. Thus, disputed mutation was kept secret and later on got sanctioned, in collusion with revenue officers. The disputed mutation was sanctioned without any request of Banu Mal;

(iv) that mutation No.1422 and 1423, dated 28.2.1954 show that the consolidation work in village Rapri started on 25.8.1952 and completed on 28.2.1954 but disputed mutation was entered prior to completion of consolidation work and without any approval or sanction of the Consolidation Officer, as required to be made under the Consolidation of Holdings of Punjab Act, 1948. Had it been in the knowledge of Banu Mal, then he would have filed an application before the consolidation Officer, but no such application is available on the record;

(v) that under the will, Raghubir Singh (defendant No.4) had a life estate on the property in dispute, but he has alienated/gifted/transferred the property of the Will to different persons, without any right, title and against the dictates of the will. Thus, this fact goes to prove the mala fide and fraudulent intention of Raghubir Singh, who got the disputed mutation forged and fabricated. The disputed mutation does not show the name of the person, in whose favour of the alleged oral hiba was made by Banu Mal; and

(vi) that said Banu Mal had been residing with his religious Guru at Saharanpur (UP) and die to his illness, he was unable to work for about one year, prior to his death. He was completely confined to his bed and therefore, he was not present before the revenue officer, at the time of sanction of that mutation."

6. The cause of action for institution of the Suit No.303 of 1992 is said to have arisen as Raghbir Singh had not carried out the testator's intentions contained in the said Will dated 27.3.1943 and, thus, violated the terms of the `trust' and despite having been called upon to handover possession failed and/or refused to do so.

7. The properties in suit involved in both the suits were also different. Whereas in Suit No.185 of 1989, the subject matter of the suit was 835 kanals and 7 marlas of land (485 acres) situated in the revenue estate of village Rapri in the State of Haryana, the subject matter of in Suit No.303 of 1992 was the land measuring 221 kanal 8 marlas (about 24-25 acres) situated in village Rapri, Radaur, Ghespur and Dholra).

Title Suit No.185 was decreed by a judgment and decree dated 30.10.1996 passed by the Additional Civil Judge, Senior Division Jagadhari, Haryana, holding :

> "As a result of my findings and observations on above issues and more particularly, on issue No.1, 2 and 9, the suit of the plaintiff is decreed with cost, against the defendants No.1 to 4 and 11 to 24, with the declaration that mutation No.1427, sanctioned on 2.3.1954 (Ex.P-8) and sale deeds and mutations, subsequent thereto, are illegal, null and void, ineffective, ultra vires and not binding upon the rights of plaintiff and defendants No.5 to 9 and plaintiff and defendants No.5 and 9 are also entitled to the possession of the suit land and defendants No.1 and 4 and 11 to 24 are also restrained from further alienating, transferred or creating any charge on the suit land, in any manner."

8. In passing the said judgment and decree, the Court arrived at a finding that Raghbir Singh played a fraud in making transfer of the properties purported to be under a `hiba' made by Banumal. It was furthermore held that order of mutation was not passed in presence of Banu Mal. The learned Judge pointed out that while Banu Mal had been shown to be without any issue before the Revenue Officer although , admittedly, he had a daughter named Munni Devi @ Jeewani.

It was, therefore, opined that the purported gift in terms whereof the mutation was sanctioned in favour of the respondent Nos.1, 2 and 3 and their mother was an act of fraud and misrepresentation on their part to deprive the children of Munni Devi, the daughter of Banu Mal, of their properties.

9. Respondent Nos. 1 to 3 herein and Raghbir Singh filed appeals thereagainst before the District Judge which were marked as Appeal No.254/33 of 1996. As some properties had been transferred, the transferees thereof also preferred appeals which were marked as Appeal Nos.218 and 220 of 1996.

10. It is not in dispute that during the pendency of the said appeals, the plaintiff and the respondent No.3 entered into a compromise. A compromise petition was filed in Civil Appeal No.254 of 1996, the terms whereof are as under :

> "That the parties have compromised. As per compromise, the appeal of the appellant may kindly be allowed and the suit of the respondents may kindly be dismissed as withdrawn and the parties be left to bear their costs. The appellants are the absolute owners of the suit property."

11. The learned Additional District Jagadhari in whose court the said appeal was transferred for disposal recorded the compromise allowing the appeal and dismissing the suit of Veena Nirwani. A declaration was also made that the appellants therein (Respondents Nos. 1 to 3 herein) were the absolute owners of the said property.

It is not in dispute that the appellant and/or other heirs and legal representatives of the said Munni Devi were not parties to the said compromise.

A compromise was also said to have been entered into by Veena Nirwani-plaintiff with Raghbir Singh and others in Suit No.303 of 1992, the terms whereof read as under :

> "1. That the suit of the plaintiff is to be decreed as prayed for in the plaint except the land measuring 42 Kanals 3 marlas i.e. 1/3rd share of the land measuring 126 Kanals 9 marlas fully detailed and described in para `C' of the heading of the plaint.
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> 2. That the defendant No.1 has delivered/handed over the whole property fully detailed and described in the heading of the plaint to the plaintiff and defendants Nos.2 to 6 at the spot and now the plaintiff and defendants Nos.2 to 6 are in actual and physical possession being its owners and defendant No.1 or his successors or LRs will have no right, title or interest of any kind in the land in suit.
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> 3. That the defendant No.1 has an electric tube-well in the area of village Dhaulra and defendant No.1 will be bound to give water for irrigation to the plaintiff and defendant Nos. 2 and 6 for one year.
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> 4. That the plaintiff and defendants Nos.2 and 6 are owners in possession of tree etc. standing in the land in suit and the plaint has been delivered to the plaintiff and defendant Nos.2 and 6. However, some portion of these properties are under the tenancy of different persons and now the plaintiff and defendants Nos.2 and 6 will have a right to recover the rent of these properties and deal with the properties in the manner they like i.e. they have each and every right to eject the tenant and get possession of the same and to alienate etc. Shops mentioned at point G & H have already been alienated by the defendants and the relief regarding these shops is relinquished by the plaintiff.

> 5. That according to the aforesaid compromise the possession has been changed and now the plaintiff and defendant Nos.2 to 6 can get the entries corrected in their name in the revenue records well as in the relevant municipal record etc."

12. The said compromise petition was also accepted. It is stated that pursuant to or in furtherance thereof, Raghbir Singh delivered possession of 2/3rd of the property in suit in favour of Respondent Nos.4 to 8 herein as also the appellant, retaining the 1/3rd thereof. The suit was decreed in part.

13. Appellant filed an application before the Court of Additional District Judge, Jagadhari questioning the compromise entered into by and between the plaintiff and the respondent Nos.1 to 3 pursuant whereto the said suit No.185 of 1989 was allowed to be withdrawn on the premise it had been done without her knowledge and consent and despite the fact that she had got vested rights therein in terms of the judgment and decree passed by the trial court in suit No.185 of 1989. It was furthermore contended that prior to acceptance of the said compromise, it was obligatory on the part of the learned Judge to issue notice upon the appellant and others who derived benefit under the said judgment and decree dated 30.10.1996 passed in Suit No.185 of 1989. The learned Additional District Judge by an order dated 29.9.2005 accepted the said contentions of the appellant and set aside the compromise decree dated 25.4.1998 opining that the same was illegal, null and void.

14. Applications under Article 227 of the Constitution of India preferred thereagainst which were marked as C.R. 6473 and 6588 and 6589 of 2005 have been allowed by a learned Single Judge of the High Court by reason of the impugned Judgment.

15. In these appeals, except Veena, all other children of Munni Devi supported the appellant, although they did not file any application for setting aside the said consent decree.

16. Mr. Jayant Bhushan, learned counsel appearing on behalf of the appellant, would submit that the learned Additional Civil Judge, Senior Division, Jagadhari, having opined in its judgment and decree dated 30.10.1996 that not only Veena but also the appellants and her other brothers and sisters were entitled to recovery of possession of the lands in suit, the purported compromise entered into by and between the original plaintiff and the contesting defendants must be held to be illegal and without jurisdiction. The learned counsel submitted that for all intent and purport, the suit was filed by Veena in a representative capacity and, thus, in absence of other heirs and legal representatives of Munni Devi, the compromise petition could not have been accepted.

17. Mr. Rakesh Dwivedi, learned senior counsel appearing on behalf of the respondent, on the other hand, would contend :

1) In terms of Order XXIII Rule 1 of the Code of Civil Procedure, it is the privilege of the plaintiff alone to withdraw the suit at any stage of the proceedings and the appellant being only one of the defendants did not have any locus standi to object thereto.

2) Both the compromise petitions filed in Suit No.185 of 1989 and Suit No.303 of 1992 entered into by and between the parties should be treated to be a comprehensive one keeping in view the representative right, title and interest claimed by them in support of the properties involved in both the suits and in that view of the matter the appellant herein being a party to the compromise petition filed in Suit No.303 of 1992 and having accepted the benefit arising out of the same, is estopped and precluded from challenging the validity or otherwise of the compromise petition filed in Suit No.185 of 1989.

3) In any view of the matter, the appeal as against the respondent No.19 having been dismissed as his name was deleted at the risk and cost of appellant by order dated 25.3.2008 and the said order having attained fanility, this Court should not pass any order which would result in passing of inconsistent and contradictory decrees.

18. Before adverting to the rival contentions of the parties, we may notice some provisions of the Code of Civil Procedure (the Code). Sub-rule (1) of Rule 1 of Order XXIII and Rule 3 of the Code read as under : "1. Withdrawal of suit or abandonment of part of claim.--(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

XXX XXX XXX

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 dented 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."

19. It is not a case where the original plaintiff applied for withdrawal of the suit similicitor. She did so relying on or on the basis of a compromise entered into by and between the parties. If a suit is to be decreed or dismissed on the basis of a compromise, even permission to withdraw the suit

pursuant thereto, in our opinion, order XXIII Rule 1 of the Code may not have any application. Even in such a case, a permission to withdraw the suit could have been given only with notice to the respondents who had become entitled to some interest in the property by reason of a judgment and decree passed in the suit. The Court for the purpose of allowing withdrawal of a suit after passing the decree, viz., at the appellate stage, is required to consider this aspect of the matter. Veena, although was a plaintiff, did not claim any exclusive title to the property in herself. She claimed title to the property as one of the daughters of Munni Devi. Interest of the appellant and her other sisters and brothers also stood on the same footing. They also, for all intent and purport, could have independently maintained a suit either in their individual capacities or jointly.

20. The claim put forth by Raghbir Singh on the basis of an oral `hiba' purported to have been made by Banu Mal before the Revenue authorities was found to be tainted with fraud. A finding of fact was arrived at that no such transaction had taken place as Banu Mal was seriously ill and had been residing at some other place. The learned Trial Judge also arrived at a finding that before the Revenue Authorities, a misrepresentation had been made stating that Banu Mal was issueless.

21. Things as they stand now, there cannot be any doubt or dispute that the appellant is one of the heirs and legal representatives of Banu Mal being a daughter of Munni Devi. She, therefore, indisputably was entitled to a share in the property of Munni Devi as one of her legal heirs. Even if Order XXIII, Rule 1 of the Code of Civil Procedure was applicable, in terms of Rule 1A of the said Order, the appellant as a defendant in the suit could have applied for being transposed as a plaintiff in terms of Order I Rule 10 of the Code of Civil Procedure and the Court was bound to pass an order having due regard to the question as to whether she had a substantial question to be decided as against any of the other defendants. Aappellant, indisputably, claimed and was found to have rightly claimed a share in the suit property.

Having got a decree in her favour, she was entitled to protect the same. By reason of an agreement between some of the parties or otherwise, a litigant cannot be deprived from the fruit of the decree.

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

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

A consent decree, as is well-known, is merely an agreement between the parties with the seal of the court superadded to it. {See Baldevdas Shivlal and Another v. Filmistan Distributors (India) P. Ltd. and Others [(1969) 2 SCC 201], Parayya Allayya Hittalamani v. Sri Parayya Gurulingayya Poojari and Ors. [JT 2007 (12) SC 352]}.

24. If a compromise is to be held to be binding, as is well known, must be signed either by the parties or by their counsel or both, failing which Order XXIII, Rule 3 of the code of Civil Procedure

would not be applicable.

{See Gurpreet Singh v. Chatur Bhuj Goel [(1988) 1 SCC 270]} In Dwarka Prasad Agarwal (D) By LRS. and Another v. B.D. Agarwal and Others [(2003) 6 SCC 230], this Court held:

> "32. The High Court also failed and/or neglected to take into consideration the fact that the compromise having been entered into by and between the three out of four partners could not have been termed as settlement of all disputes and in that view of the matter no compromise could have been recorded by it. The effect of the order dated 29-6-1992 recording the settlement was brought to the notice of the High Court, still it failed to rectify the mistake committed by it. The effect of the said order was grave. It was found to be enforceable. It was construed to be an order of the High Court, required to be implemented by the courts and the statutory authorities.
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> 35...Even if the provisions of Order 23 Rule 3 of the Code of Civil Procedure and/or principles analogous thereto are held to be applicable in a writ proceeding, the Court cannot be permitted to record a purported compromise in a casual manner. It was suo motu required to address itself to the issue as to whether the compromise was a lawful one and, thus, had any jurisdiction to entertain the same..."

{See also K. Venkatachala Bhat and Another v. Krishna Nayak (d) by LRs. and Others [(2005) 4 SCC 117]}.

In R. Rathinavel Chettiar and Another v. V. Sivaraman and Others [(1999) 4 SCC 89], this Court opined :

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

25. It is also not a case where the compromise can be said to be a family arrangement. A family arrangement must be entered into by all the parties thereto. Compliance of the requirements laid down in Order XXIII, Rule 3 of the Code of Civil Procedure is imperative in character. A compromise or satisfaction must satisfy the conditions of a lawful agreement.

26. Causes of action of both the suits furthermore were different. The subject matter of the suit was also different although may be overlapping to some extent. If the compromise entered into by and between the parties to Suit No. 303 of 1999 was to be given effect to, the same for all intent and purport clearly goes to show that Bhanu Mal had the title over the property. The learned Trial Judge in Suit No.185 of 1989 having found that Bhanu Mal did not pass his title by way of oral Hiba/gift in

favour of Raghbir Singh, subject to the conditions in the Will, his title must be held to have been accepted. Bhnau Mal, therefore, could dispose of his property in accordance with law. If Raghbir Singh did not acquire any title by reason of oral Hiba, on his death, subject to proof of compliance of the terms of the Will, the same must be held to have vested in Munni Devi and on her death upon her children.

27. Title to a property must be determined in terms of the statutory provision. If by reason of the provisions of the Hindu Succession Act, 1956 the appellant herein had derived title to the property along with her brothers and sisters, she cannot be deprived thereof by reason of an agreement entered into by and between the original plaintiff and the contesting defendants. If a party furthermore relinquishes his or her right in a property, the same must be done by a registered instrument in terms of the provisions of Indian Registration Act.

28. It is also well known that a suit cannot be withdrawn by a party after he acquires a privilege. In R. Ramamurthy Ayer v. Raja V. Rajeswara Rao [(1972) 2 SCC 721], this Court held :

> "12. Coming back to the question of withdrawal of a suit in which the provisions of Sections 2 and 3 of the Partition Act have been invoked we find it difficult to accede to the contention of the appellant that the suit can be withdrawn by the plaintiff after he has himself requested for a sale under Section 2 of the Partition Act and the defendant has applied to the court for leave to buy at a valuation the share of the plaintiff under Section 3. In England the position about withdrawal has been stated thus, in the Supreme Court Practice, 1970 at p. 334:
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> "Before Judgment.-- Leave may be refused to a plaintiff to discontinue the action if the plaintiff is not wholly dominus litis or if the defendant has by the proceedings obtained an advantage of which it does not seem just to deprive him."
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> As soon as a shareholder applies for leave to buy at a valuation the share of the party asking for a sale under Section 3 of the Partition Act he obtains an advantage in that the court is bound thereafter to order a valuation and after getting the same done to offer to sell the same to such shareholder at the valuation so made. This advantage, which may or may not fulfil the juridical meaning of a right, is nevertheless a privilege or a benefit which the law confers on the shareholder. If the plaintiff is allowed to withdraw the suit after the defendant has gained or acquired the advantage or the privilege of buying the share of the plaintiff in accordance with the provisions of Section 3(1) it would only enable the plaintiff to defeat the purpose of Section 3(1) and also to deprive the defendant of the above option or privilege which he has obtained by the plaintiff initially requesting the court to sell the property under Section 2 instead of partitioning it. Apart from these considerations it would also enable the plaintiff in a partition suit to withdraw that suit and defeat the defendant's claim which, according to Crump J., cannot be done even in a suit where the provisions of the Partition Act have not been invoked."

> Yet again in R. Rathinavel Chettiar v. V. Sivaraman [(1999) 4 SCC 89], this Court, stated the law, thus :
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> "22. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained."
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> 29. A right to withdraw a suit in the suitor would be unqualified, if no right has been vested in any other party. [See Bijayananda Patnaik v.

Satrughna Sahu and Ors. [(1964) 2 SCR 538] and Hulas Rai Baij Nath v. Firm K.B. Bass & Co. [(1967) 3 SCR 886].

30. If the contention of Mr. Dwivedi that parties had entered into a comprehensive agreement covering both the suits was correct, there was absolutely no reason as to why the appellant or others were not made parties to the second consent decree as well. While entering into a comprehensive agreement, the parties are bound to see that terms of one agreement do not come in conflict with the terms and conditions of the other. When the parties have separately entered into more than one agreement, either one is dependant of the other or both are independent of each other. In the latter case, signing of the agreement by the parties or their counsel thereon must be held to be imperative in character.

Amteshwar Anand v. Virender Mohan Singh and Others [(2006) 1 SCC 148], whereupon reliance has been placed by Mr. Dwivedi, is a case of family settlement. Three agreements entered into therein were found to be in consonance with each other.

31. Herein, we are not concerned with the effect of the earlier litigation. We are also not concerned with regard to the conduct of Smt. Veena Nirvani vis-`-vis the appellant and the other defendants and/or as to whether the litigation was being fought through the lawyers of the same chamber.

Both the suits were compromised. Indisputably, the date fixed in the matter was July, 1998. The impugned compromise petition, however, was filed on 25.04.1998. For the aforementioned purpose, the date was preponed. Indisputably, the appellant was not informed thereabout. She was not given any notice of preponement of the date. The question as to whether the appellant knew thereabout or not is essentially a question of fact to which we would advert to a little later. It is, however, difficult for us to agree with the High Court as also the submissions of Mr. Dwivedi that the compromise was a comprehensive one.

32. The learned Additional District Judge, on the basis of the materials brought on record by the parties arrived at a finding of fact that the settlement was not a comprehensive one. He,

furthermore, opined that none of the respondents appeared in the witness box to substantiate the terms and conditions of the compromise nor did they examine any other witness. The purported circumstances that Smt. Veena Nirwani was at the helm of the affairs in respect of both the matters sought to be emphasized before us being not based on any material on record, we are of the opinion that the finding of the High Court that a comprehensive settlement was arrived at must be held to be wholly incorrect.

33. The High Court moreover was exercising its jurisdiction under Article 227 of the Constitution of India. While exercising the said jurisdiction, the High Court had a limited role to play. It is not the function of the High court while exercising its supervisory jurisdiction to enter into the disputed question of fact. It has not been found by the High Court that the findings arrived at by the learned Additional District Judge were perverse and/ or in arriving the said findings, the learned Additional District Judge failed and/ or neglected to take into consideration the relevant factors or based its decision on irrelevant factors not germane therefor. It could intervene, if there existed an error apparent on the face of the record or, if any other well known principle of judicial review was found to be applicable.

{See Yeshwant Sakhalkar and Another v. Hirabat Kamat Mhamai and Another [(2004) 6 SCC 71]}.

It is on the aforementioned backdrop, we may consider the legal effect of non-signing of the compromise petition by the appellant herein as also the respondent Nos. 4 to 8 herein.

34. We have noticed hereinbefore that not only the properties were different, the nature of the litigations was different. Even the parties were different. Both the compromise petitions do not refer to each other. Assuming that the parties knew thereabout, it is beyond anybody's comprehension as to why signature of all the parties were not obtained for the aforementioned purpose, if not for any other reason, but to satisfy the requirements of law.

35. Appeals arising out of Suit No. 185 of 1989 and Suit No. 303 of 1999 were pending before different courts and in that view of the matter it is difficult to agree with the High Court that only for that purpose, the date in the appeal was preponed. Even otherwise, in law, they are not members of the same family. They have been inherited definite share from their predecessors.

36. The question of estoppel and/or election as also the doctrine of approbate or reprobate, whereupon reliance has been placed, has exceptions, one of them being that there is no estoppel against statute.

37. Submission of the learned senior counsel that Veena and the appellant were in the same boat as would appear from the fact that they had engaged lawyers from the same chamber and, in fact, the lawyer of the appellant had no independent practice itself would go to show that she knew about both the compromise petitions cannot be accepted. A counsel appearing for a party is expected to be independent. There is no presumption that only because two lawyers are practicing from the same chamber, they would breach their confidentiality or commit some act which would amount to professional misconduct. Only because two compromise petitions were filed on the same day or

Veena was a party to both of them, in our opinion, would not by itself lead to any inference that appellant also knew about the second compromise through her counsel.

We would, however, deal with the question of her acquiring knowledge thereof at appropriate stage.

38. Whether the preponement of the date was only at the instance of Veena or at the instance of both the parties to the consent is a matter which is of little relevance so far as this Court is concerned inasmuch as the only issue which would arise for our consideration is the consequences of such preponement. If the hearing of a case is preponed, it should be done with notice to all the parties. It is not the case of the first respondent that notice had been given to all the parties or otherwise also they were aware thereof.

39. In that view of the matter, it is difficult to accept the submission of Mr. Dwivedi that the appellant is estopped and precluded from raising the said contention of violation of the principles of natural justice or that only because he had sold some property, she cannot be allowed to approbate and reprobate.

Our attention has been drawn to a recent decision in Kashmir Singh v. Union of India & Ors. [(2008) 7 SCC 259] wherein this Court observed :

> "75. By reason of the Notification dated 19-10- 1978, the Central Government has not delegated its power. The 1966 Act has an extraterritorial application. It is not in dispute that no law has been enacted either by the State of Haryana or by the State of Himachal Pradesh. In absence of any law having been enacted to the contrary, the functions under the 1966 Act must be performed by some authority. The Central Government with the consent of the State of Haryana has merely nominated the State of Punjab to do so. By reason thereof, it has not delegated any power. Sub- section (1) of Section 72 of the 1966 Act envisages a direction upon the Central Government. Such a direction has been issued by reason of the impugned notification. When a power has been conferred upon the State of Punjab by the Central Government, it exercises a statutory power. It would, therefore, not be a case where the functions of the State Government must be held to be confined to its territorial jurisdiction."

The principle enunciated therein is unexceptional but the same has no application in the factual matrix obtaining in this case.

40. The submission of Mr. Dwivedi that by reason of conduct of the appellant, they would be deemed to have ratified the second compromise also cannot be accepted. It is not a ratification of a contract. If ratification has to be done, all should be parties thereto. If the court had no jurisdiction to accept the compromise in defiance of the mandatory provisions contained in Order XXIII Rule 3 of the Code of Civil Procedure, the question of invoking the doctrine of ratification would not arise. The doctrine of ratification may be applicable in the realm of private law regime but not for the purpose of amendment or modification of a decree. Reliance has been placed by Mr. Dwivedi on Jai Narain Parasrampuria v. Pushpa Devi Saraf [(2006) 7 SCC 756], wherein it has been held :

> "27. The Company upon incorporation has accepted the contract and communicated such acceptance to the other party. Besides that, purchase of the property was for the purpose of the Company. Submissions of Mr Sudhir Chandra that acquisition of a property for the benefit of the Company must find place in the articles of association of the Company, is wholly misplaced. What is meant by acceptance of the contract by the Company which is to be warranted by its incorporation, is that it is not ultra vires the purpose for which the Company had been incorporated. The distinction sought to be made by the learned counsel between Section 27 of the Specific Relief Act, 1877 and Section 19 of the 1963 Act is not of much significance. Under the 1877 Act, not only ratification and adoption of the contract was mandatory, such contract was to be warranted by the terms of the incorporation. The words "ratified and adopted" have been dropped from the main section and in Section 19 of the 1963 Act, a proviso has been added that the company has accepted the contract and communicated such acceptance to the other party of the contract. An express ratification of the contract, therefore, is no longer warranted. In view of the fact that the Company, in the suit filed against Verma, sought for a declaration that it was the owner of the property, the same, in our opinion, would amount to acceptance of the contract and communication thereof to the other party thereto."

The dicta laid down therein itself suggests that the said principles were laid down in the context of the provisions of the Specific Relief Act. In T.V.R. Subbu Chetty's Family Charities v. Raghava Mudaliar [AIR 1961 SC 797], whereupon again Mr. Dwivedi places reliance, this Court applied the said doctrine against a presumptive reversioner having regard to the fact and circumstances thereof. We are not concerned with such a case.

41. This brings us to the question of limitation. Article 123 of the Schedule appended to the limitation Act reads, thus :

"Description of suit Period of Time from which period limitation begins to run 123 To set aside a decree passed Thirty days The date of the decree or . ex parte or to re-hear an where the summons or appeal decreed or heard ex notice was not duly parte. served, when the Explanation. -- For the applicant had knowledge purpose of this article, of the decree."

substituted service under rule 20 of Order V of the Code of Civil Procedure, 1908 (5 of 1908) shall not be deemed to be due service.

42. There cannot be any doubt that even if an order is void or voidable, the same must be set aside, as has been held by this Court in M. Meenakshi v. Metadin Agarwal [(2006) 7 SCC 470] and Sultan Sadik v. Sanjay Raj Subba [(2004) 2 SCC 377].

43. It is not a case where the Court lacked inherent jurisdiction. It had jurisdiction with regard to subject matter of appeal.

In Rajasthan State Road Transport Corporation and others v. Zakir Hussain [(2005) 7 SCC 447], this Court held :

> "21. It is a well-settled principle of law as laid down by this Court that if the court has no jurisdiction, the jurisdiction cannot be conferred by any order of court. This Court in the case of A.R. Antulay v. R.S. Nayak, AIR paras 40 to 42 wherein it is, inter alia, held and observed as under:
>
> `38[40]. ... This Court, by its directions could not confer jurisdiction on the High Court of Bombay to try any case which it did not possess such jurisdiction.... 39[41]. ... The power to create or enlarge jurisdiction is legislative in character.... Parliament alone can do it by law and no court, whether superior or inferior or both combined can enlarge the jurisdiction of a court or divest a person of his rights of revision and appeal. ...
>
> 40[42]. ... But the superior court can always correct its own error brought to its notice either by way of petition or ex debito justitiae. See Rubinstein's Jurisdiction and Illegality.'"
>
> The limitation, however, in a case of this nature would not begin to run from the date of knowledge.

In State of Punjab and Others v. Gurdev Singh [(1991) 4 SCC 1], this Court held:

> "10. It will be clear from these principles, the party aggrieved by the invalidity of the order has to approach the court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the court within the prescribed period of limitation. If the statutory time limit expires the court cannot give the declaration sought for."

44. Mr. Jayant Bhushan would submit that the limitation would start to run from the date of knowledge. It is difficult to accept the said contention. Article 123 of the Limitation Act is in two parts. In a case where summons have been served upon a party, the first part shall apply. However, in a case where the summons have not been served, the second part shall apply. In this case, summons were served upon the appellant. They knew about the proceedings. They had engaged a lawyer. Indisputably, the case was fixed in July 1998. The only question, which would, thus, arise for our consideration is the effect of the preponement of the date.

45. If the compromise has been accepted in absence of all the parties, the same would be void. But if the same having resulted in grant of a decree, the decree based on compromise was required to be set aside. The compromise may be void or voidable but it is required to be set aside by filing a suit within the period of limitation. {[See Mohd. Noorul Hoda v. Bibi Raifunnisa & Ors. [(1996) 7 SCC 767]}. Limitation is a statute of repose. If a suit is not filed within the period of limitation, the remedy would be barred. As appellant had appeared in the appeal, as indicated hereinbefore, the

first part shall apply. The suit was filed on 28.2.2002, i.e., after a gap of four years. There is no reason as to why the factum in regard to passing of the decree could not have been known in July or soon thereafter.

46. The High Court has arrived at a finding of fact that the appellant cannot be said to have acquired knowledge about the passing of the decree on 7.2.2002, stating "... If the said compromise deed dated 24.4.1998 was passed by preponing the appeal fixed in July 1998 her counsel Shri Lalit Gupta could have come to know in July 1998 itself which was the original date fixed in this appeal that this appeal was preponed and compromise decree was passed on 25.4.1998. He could have informed Smt. Sneh Gupta Respondent immediately thereafter. No reasons have been given by Shri Lalit Gupta for not deriving the knowledge of order dated 25.4.1998 in July 1998 when the file was originally fixed and when he was supposed to appear in the Appellate Court. He has also not given the reasons why he did not inform his party after coming to know in July 1998 that the said appeal was preponed to 25.4.1998 and was decided as compromised."

It is interesting to notice that the appellant while examining herself as AW-2, accepted that a compromise had been arrived at Panipat in April 1998, stating :

> "It is correct that a compromise settlement was arrived at in Panipat in April 1998 but I do not know details of it. I do not know whether in pursuance of that compromise, all the litigation were settled and withdrawn from different courts..."

47. Mr. Jayant Bhushan has placed strong reliance upon a judgment of this Court in Nahar Enterprises v. Hyderabad Allwyn Ltd. & Anr. [(2007) 9 SCC 466]. He placed reliance on the following paragraphs :

> "4. The respondent herein filed a suit for recovery of a sum of Rs.1,87,904.62 with future interest at the rate of 18.5% per annum against the appellant. It appears that in the summons sent to the appellant, 10-10-1988 was fixed for his appearance. However, as the summons had not been served, the court adjourned the matter to 2-

12-1988. Summons were served on the appellant on 14-10-1988, but according to him a copy of the plaint was not annexed thereto. He sent a telegram on 17-10-1988 and also a letter to the court concerned but, admittedly, the same was not responded to. Without issuing any further summons fixing another date for his appearance, the court fixed a date and having found the appellant absent on that date, fixed another date for ex parte hearing. On 13-12-1988 the suit was decreed with costs.

5. An execution case was filed by the respondent herein to execute the said decree. According to the appellant, the bailiff came to serve a copy of summons on him on 2-12-1991. The said summons having been served upon the appellant, he came to learn that ex parte decree has been passed. An application for setting aside the said ex parte decree was filed on 13-12-1991. By an order dated 17-1-1992 the learned Judge, City Civil Court, Hyderabad dismissed the said application inter alia opining:

(1) ...

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(2)    ...
(3)    An ex parte decree having been passed on
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13-12-1988 and an application for setting aside the ex parte decree having been filed on 13-12-1991, the same was barred by limitation.

XXX XXX XXX

12. The third ground on which the learned trial Judge dismissed the application for setting aside the ex parte decree was that it was barred by limitation. The said ground in our opinion, is also without substance. The summons had not been duly served upon the appellant inasmuch as the provisions of Order 5 Rule 2 CPC or provisions of Order 9 Rule 6(1)(c) had not been complied with. In that view, the second part of Article 123, in terms whereof an applicant would be deemed to have knowledge of passing of the said ex parte decree would be the date from which the limitation will begin to run, would be attracted in the instant case and not the first part thereof."

In that case, the copy of the plaint was not annexed with the summons. Summons was served after the date fixed in the suit expired. The Court had in that situation under a legal obligation to serve another summons fixing another date of hearing in terms of Order V, Rule 2 of the Code of Civil Procedure. It was in the aforementioned fact situation, the Court held that the summons served was not in accordance with law and, thus, the second part shall apply. Such is not the case here.

Reliance has also been placed by Mr. Jayant Bhushan on a decision of this case in Manick Chandra Nandy v. Debdas Nandy & Ors. [(1986) 1 SCC 512]. The law in that case itself was laid down in the following terms :

> "11. Under Article 123 in the Schedule to the Limitation Act, 1963, the period of limitation for making an application to set aside a decree passed ex parte is thirty days from the date of the decree or when the summons or notice was not duly served, when the applicant had knowledge of the decree. The question of knowledge of the decree by the applicant only arises where the summons or notice was not been duly served."

However, in the facts of that case, it was found that summons had not been served. In Pannalal v. Murarilal [(1967) 2 SCR 757], this Court held :

> "Under Article 164 of the Indian Limitation Act, 1908, the period of limitation for an application by a defendant for an order to set aside a decree passed ex-parte was 30 days from "the date of the decree or when the summons was not duly served, when the applicant had knowledge of the decree". The onus is on the defendant to show that the application is within time and that he had knowledge of the decree within 30 days of the application. If the defendant produces some evidence to show that the application is within time, it is for the plaintiff to rebut this evidence and to establish satisfactorily that the defendant had knowledge of the decree more than 30 days before the date of the application."

48. Mr. Jayant Bhushan, then submits that as the principles of natural justice had been violated, the judgment would be a nullity. Strong reliance in this behalf has been placed on A.R. Antulay v. R.S. Nayak & Anr. [(1988) 2 SCC 602], wherein, it was stated :

> "55. Shri Jethmalani urged that the directions given on February 16, 1984, were not per incuriam. We are unable to accept this submission.

It was manifest to the Bench that exclusive jurisdiction created under Section 7(1) of the 1952 Act read with Section 6 of the said Act, when brought to the notice of this Court, precluded the exercise of the power under Section 407 of the Code. There was no argument, no submission and no decision on this aspect at all. There was no prayer in the appeal which was pending before this Court for such directions. Furthermore, in giving such directions, this Court did not advert to or consider the effect of Anwar Ali Sarkar case which was a binding precedent. A mistake on the part of the court shall not cause prejudice to anyone. He further added that the primary duty of every court is to adjudicate the cases arising between the parties. According to him, it is certainly open to a larger Bench to take a view different from that taken by the earlier Bench, if it was manifestly erroneous and he urged that the trial of a corrupt Chief Minister before a High Court, instead of a judge designated by the State Government was not injurious to public interest that it should be overruled or set aside. He invited us to consider two questions: (1) does the impugned order promote justice? and (2) is it technically valid? After considering these two questions, we are clearly of the opinion that the answer to both these questions is in the negative. No prejudice need be proved for enforcing the fundamental rights. Violation of a fundamental right itself renders the impugned action void. So also the violation of the principles of natural justice renders the act a nullity. Four valuable rights, it appears to us, of the appellant have been taken away by the impugned directions:

`(i) The right to be tried by a Special Judge in accordance with the procedure established by law and enacted by Parliament.

(ii) The right of revision to the High Court under Section 9 of the Criminal Law Amendment Act.

(iii) The right of first appeal to the High Court under the same section.

(iv) The right to move the Supreme Court under Article 136 thereafter by way of a second appeal, if necessary.'"

We are concerned herein with a question of limitation. The compromise decree, as indicated hereinbefore, even if void was required to be set aside. A consent decree, as is well known, is as good as a contested decree. Such a decree must be set aside if it has been passed in violation of law. For the said purpose, the provisions contained in the Limitation Act, 1963 would be applicable. It is not the law that where the decree is void, no period of limitation shall be attracted at all.

In State of Rajasthan v. D.R. Laxmi [(1996) 4 SCC 445], this Court held :

> "10. The order or action, if ultra vires the power, becomes void and it does not confer any right. But the action need not necessarily be set at naught in all events. Though the order may be void, if the party does not approach the Court within reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner. When the discretion has been conferred on the Court, the Court may in appropriate case decline to grant the relief, even if it holds that the order was void. The net result is that extraordinary jurisdiction of the Court may not be exercised in such circumstances. It is seen that the acquisition has become final and not only possession had already been taken but reference was also sought for; the award of the Court under Section 26 enhancing the compensation was also accepted. The order of the appellate court had also become final. Under those circumstances, the acquisition proceedings having become final and the compensation determined also having become final, the High Court was highly unjustified in interfering with and in quashing the notification under Section 4(1) and declaration under Section 6."

Yet again, in M. Meenakshi v. Metadin Agarwal [(2006) 7 SCC 470], this Court held :

> "18. It is a well-settled principle of law that even a void order is required to be set aside by a competent court of law inasmuch as an order may be void in respect of one person but may be valid in respect of another. A void order is necessarily not non est. An order cannot be declared to be void in a collateral proceeding and that too in the absence of the authorities who were the authors thereof. The orders passed by the authorities were not found to be wholly without jurisdiction. They were not, thus, nullities."

Yet again, in Sultan Sadik v. Sanjay Raj Subba [(2004) 2 SCC 377], this Court held :

> "39. An order may be void for one and voidable for the other. An invalid order necessarily need not be non est; in a given situation it has to be declared as such. In an election petition, the High Court was not concerned with the said issue."

49. Even otherwise, we do not think that any error has been committed by the High Court in arriving at the finding that the appellant had knowledge of the passing of the compromise decree much earlier. She did not file any application for condonation of delay. She filed two more applications for recall of the order dated 6.11.2004 in other enacted appeals. Those applications were also filed after expiry of the period of limitation and none of those applications were also accompanied with an application for condonation of delay. In absence of any application for condonation of delay, the Court had no jurisdiction in terms of Section 3 of the Limitation Act, 1963 to entertain the application for setting aside the decree. [See Dipak Chandra Ruhidas v. Chandan Kumar Sarkar [(2003) 7 SCC 66]; and Sayeda Akhtar v. Abdul Ahad [(2003) (7) SCC 52].

50. For the reasons aforementioned, there is no merit in this appeal. The same is dismissed accordingly. There shall, however, be no order as to costs.

.....J.

[S.B. Sinha] .....J.

[Dr. Mukundakam Sharma] New Delhi;

February 17, 2009