

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

Reserved on: 17.08.2023

Pronounced on: 01.09.2023

CR No.46/2005

AUQIB QADIR & ANR.

...PETITIONER(S)

*Through: - Mr. G. A. Lone, Advocate, with
Mr. Mujeeb Andrabi, Advocate*

Vs.

ABDUL AZIZ SOFI

...RESPONDENT(S)

*Through: - Mr. Mian Tufail, Advocate, vice
Mr. M. A. Qayoom, Advocate.*

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has invoked the revisional jurisdiction of this Court to call into question orders dated 12.04.2005 and 16.04.2005, passed by learned Sub Judge, Shopian, whereby application of the respondent seeking recall of compromise decree dated 26.12.1996 has been allowed and the aforesaid decree has been set aside.

2) It appears that the petitioners (minors) through their father had filed a suit against the respondent before the Court of learned Sub Judge, Shopian (hereinafter referred to as "the trial court") seeking a declaration that they are owners in possession of land measuring 01 marlas falling under Survey No.761/532 and 02 marlas falling under Survey No.871/532 along with one storey concrete residential house situated at Hergam (Bona Bazar), Shopian, with a decree for permanent injunction restraining the defendant from interfering into their peaceful possession over the aforesaid property. It was claimed in the suit by the petitioners/plaintiffs

that the property in question has been gifted away by respondent/defendant in their favour by way of an oral gift pursuant to which they have taken over possession of the suit property. It seems that during pendency of the suit, a compromise deed was submitted by the parties before the trial court on 26.12.1996. In terms of the compromise deed, the respondent/defendant had accepted the ownership rights of the plaintiffs and had undertaken not to interfere into their peaceful possession over the property in question. It was provided in the compromise deed that the suit property had been orally gifted by the defendant to the plaintiffs a few months prior to the said deed. The learned trial court passed decree dated 26.12.1996 on the basis of the compromise arrived at between the parties thereby declaring the plaintiffs/petitioners as owners in possession of the property in question.

3) On 24.07.1997, the respondent/defendant filed an application under Order 23 Rule 3 of CPC before the trial court seeking recall of compromise deed and setting aside of compromise decree dated 26.12.1996 on the grounds that he had signed the compromise deed on the basis of coercion and pressure exerted by father of the petitioners/plaintiffs upon him. It was averred in the application that the mother of the petitioners died a natural death in the month of October, 1996 but Shri Gh. Qadir Sofi, father of the petitioners, who was having family dispute with the respondent/defendant, in order to take revenge concocted a false and frivolous case against him, as a consequence whereof, the respondent/defendant was implicated in a case relating to

murder of mother of the petitioners. It was further averred in the application that the respondent was harassed by the father of the petitioners/plaintiffs, who asked him to surrender ownership and possession of the suit property to save himself from the harassment. According to the respondent, he succumbed to the pressure and signed the papers relating to compromise deed as also the vakalatnama. In the compromise deed it was recorded that he had gifted away his house in favour of the petitioners. It was further averred that after the compromise decree was passed, Shri Gh. Qadir Sofi, father of the petitioners, appeared before the Court of learned Chief Judicial Magistrate, Shopian, and got his statement under Section 164 of Criminal Procedure Code recorded, in which he stated that his wife had died a natural death thereby exonerating the respondent. It was pleaded by the respondent that he had never gifted away the property in question in favour of the petitioners nor had he voluntarily signed the compromise deed but the same was executed by him under duress in order to save himself from the criminal prosecution.

4) The application was resisted by the petitioners by filing a reply thereto. In their reply, the petitioners submitted that the respondent had executed the compromise deed out of his free will. It was further submitted that the respondent had handed over the possession of the suit property to the petitioners a long time back and that he is estopped from challenging the compromise decree.

5) The learned trial court after recording the evidence of the parties and after analysing the material on record allowed the application of the

respondent thereby setting aside the compromise deed as well as the compromise decree. While doing so, the learned trial court vide the impugned order concluded that the compromise deed and the decree in question were unlawful and, as such, the decree passed by the said court cannot sustain.

6) It seems that while passing the impugned order dated 12.4.2005, the learned trial court had directed that the file of the case shall go to records but thereafter the learned trial court realised that with the setting aside of the decree, the main suit has to proceed further in accordance with law, therefore, the impugned order dated 16.04.2005 came to be passed whereby the aforesaid error was set right by the learned trial court.

7) The petitioners have challenged the impugned orders passed by the learned trial court on the grounds that during the proceedings pertaining to cancellation of the compromise decree, guardian of the petitioners, who happened to be the respondent in the application, was not appointed by the trial court. It has been contended that the mandatory provisions of Order 32 Rule 3 and 4 of the CPC have not been adhered to by the learned trial court, as such, the impugned orders deserve to be set aside. It has been next contended that the decree under challenge before the trial court had been passed in terms of Order 12 Rule 6 of the CPC and it was not a compromise decree, as such, the same could have been challenged only by way of a suit and not by way of recall application. It has been contended that the evidence led by the application/respondent before the

trial court is beyond his pleadings, as such, the same could not have been accepted by the learned trial court. Lastly, it has been argued that merely because a criminal prosecution was lodged against the respondent, it cannot be stated that he had signed the compromise deed under coercion, particularly when there is no material on record to show that father of the petitioners had exerted any pressure upon him to sign the compromise decree.

8) I have heard learned counsel for parties and perused the record of the case including the record of the trial court.

9) So far as the first contention of learned counsel for the petitioners is concerned, it appears from the record of the trial court that though initially the respondent had filed the application against the petitioners by impleading them as respondents through their father yet there was no formal order made by the trial court appointing him as a guardian. The record shows that it was only on 14.09.1999, when on an application filed by the respondent, the father of the petitioners was appointed as their guardian. Prior to that, the petitioners had filed their objections to the application through their father wherein it was specifically pleaded by the petitioners that unless formal guardian is appointed for them to defend the suit, no objections can be submitted on their behalf. However, the father of the petitioners did file the objections controverting the averments made by the respondent in his application for recall of the compromise.

10) Learned counsel for the petitioners has vehemently argued that a proceeding filed against a minor without appointment of guardian is a

nullity. It has been contended that as per Rule 3 of Order 32 of CPC, the Court has to appoint a proper person to be the guardian of a minor defendant and in this regard an application has to be made by the plaintiff, whereafter a notice has to be issued to the proposed guardian, without which no order for appointment of guardian can be passed. The learned counsel, while referring to Rule 4 of Order 32 of CPC, has submitted that no person can be appointed as a guardian without his consent in writing and against his will. It has been contended that in the instant case, while appointing the father of the petitioners as their guardian, the learned trial court did not adhere to the provisions contained in Order 32 Rules 3 and 4 of CPC, therefore, the proceedings conducted by the trial court in the application filed the respondents are a nullity.

11) It is true that no written consent of father of the petitioners has been taken by the learned trial court while appointing him as their guardian and it is also a fact that father of the petitioners had raised an objection at the very outset that unless guardian of the petitioners is appointed, it would not be possible to file proper objections against the application. However, in the instant case, father of the petitioners has been appointed as their guardian by the trial court vide its order dated 14.09.1999 and it is recorded in the order that father of the petitioners has been informed about his appointment as guardian by the court. The father of the petitioners never objected to this order and continued to represent the interests of the petitioners before the trial court. In fact, the suit was filed by the petitioners through their father and even the present petition has been

filed by the petitioners through their father. A perusal of the record of the proceedings shows that the father of the petitioners has effectively projected and defended the interests of the petitioners at various stages of the proceedings. The question that arises for determination is as to whether in these circumstances merely because there has been a procedural irregularity in the appointment of father of the petitioners as their guardian by the trial court, the whole proceedings would get vitiated.

12) There has been a consistent view of the various High Courts and the Supreme Court that a decree cannot be set aside even where certain formalities of the appointment of a guardian *ad litem* to represent the defendant have not been observed. The High Courts have observed that in the case of minor defendants, where the permission of the court concerned under Order 32 Rule 3 of the Code is not taken, but the decree has been passed, in the absence of prejudice to the minor defendant, such decree cannot be set aside. The main test in this regard is as to whether or not prejudice to the minor defendant has been caused or not. In my aforesaid view I am supported by the judgment of the Supreme Court in the case of **Nagaiah and another vs. Chowdama (dead) by LRS and another**, (2018) 2 SCC 504.

13) A similar view has been taken by the High Court of Delhi in the case of **Shri Mohd. Yusuf and others vs. Shri Rafiquddin Siddiqui**, ILR (1974) I Delhi 825. In the said case, the High Court of Delhi has observed that too technical construction on the provisions of Order 32 Rule 3 of CPC, which does not leave room for reasonable elasticity of

interpretation is not to be adopted. The Court further observed that the procedure provided for ensuring that at the hearing of a suit, the defendants, who are minor, are properly represented is designed to facilitate justice and the means designed for furtherance of justice cannot be used to frustrate it.

14) In the face of foregoing position of law on the subject, it is clear that unless it is shown that the interests of the petitioners, who are minors, were not properly represented before the trial court, as a result of which prejudice was caused to their interest, it cannot be stated that just because there was some irregularity committed by the trial court in the appointment of their father as their guardian, the impugned order passed by the trial court would become a nullity. As already indicated hereinbefore, the interest of the minor petitioners has been properly represented before the trial court and it was their father who has all along represented them, initially at the time of filing of the suit, later on at the time of defending application of the respondent and now at the time of challenging the order of the trial court. Therefore, the argument of learned counsel for the petitioners that because of strict non-adherence to the provisions contained in Order 32 Rules 3 and 4 of CPC, the impugned order has become a nullity, cannot be accepted.

15) That takes us to the second contention of the petitioners that the application for recall filed by the respondent was not maintainable because the decree was passed in terms of Order 12 Rule 6 of the CPC.

The contention raised by learned counsel for the petitioner in this regard is

without any merit for the reason that a bare perusal of the compromise deed and the decree passed by the trial court would clearly show that it is a decree passed in terms of Order 23 Rule 3 of the CPC, inasmuch as, as per the said compromise, the respondent/defendant had accepted the whole of the claim of the petitioners/plaintiffs and a compromise was recorded which resulted in passing of the compromise decree. The same satisfies all the requirements of Order 23 Rule 3 of the CPC. It was not a case where defendant/respondent filed his written statement whereby he admitted the claim of the petitioners/plaintiffs. So, the decree was not based on admission made in the pleadings as contemplated by Order 12 Rule 6 of the CPC.

16) In the aforesaid circumstances and in view of the provisions contained in Explanation to Order 23 Rule 3-A of the CPC which creates a bar to filing of a suit to challenge a decree on the ground that the compromise on which the decree is based was not lawful, the only course open to the respondent/defendant was to file an application for recall of the compromise and the setting aside of the decree. In this regard, I am supported by the ratio laid down by the Supreme Court in the case of **Horil vs. Keshav and another**, (2012) 5 SCC 25. In the said case, the Supreme Court has held that challenge to a compromise decree on the ground that it was obtained by fraudulent means would also fall under the provisions of Order 23 Rule 3-A of CPC. Thus, the respondent, who had challenged the compromise decree on the ground that the same was not lawful, could not have challenged it by way of a suit in view of the bar

contained in Order 23 Rule 3-A of the CPC. The argument of learned counsel for the petitioner is, therefore, without any merit.

17) Next it has been argued by learned counsel for the petitioner that the evidence led by the respondent before the trial court was beyond his pleadings, inasmuch as, as per the pleadings, he had signed the compromise deed under duress and pressure from the father of the petitioners but in his statement before the Court he has deposed that he had signed on blank papers in order to get bail.

18) If we have a look at the statement of the respondent/applicant made by him before the trial court, he has deposed that he signed certain blank papers in the office of his advocate, namely, Aijaz Hussain, and he was told that he will get bail. In his cross-examination also, he has stated that he has not made any statement before the Court but has only signed on blank paper. From the aforesaid statement of the respondent, it can be inferred that he was made to sign on blank documents with the object of getting bail. The original compromise deed, which is on the record of the trial court, shows that it has been signed by the respondent in such a manner which gives an impression that it was signed by him while it was blank and the contents of the document have been filled in later on. The respondent has pleaded in his application before the trial court that he was pressurized to sign the documents so that he could be saved from the criminal prosecution as he was being harassed by the police as well as by father of the petitioners in connection with the case relating to murder of mother of the petitioners. He has repeated these assertions in his statement

before the trial court. He has also stated before the trial court that father of the petitioners told him to part away with his house in favour of the petitioners.

19) The statement of the respondent, when read as a whole, is absolutely in consonance with his pleadings before the trial court and there is no contradiction or inconsistency between the two. It is clear from the statement of the respondent that father of the petitioners wanted him to give away his house to the petitioner. In this connection, he was made to sign blank documents to get bail. This was exactly the case pleaded by the respondent in his recall application. Thus, the argument of learned counsel for the petitioners in this regard is misconceived.

20) Lastly, it has been argued by learned counsel for the petitioners that merely because a criminal prosecution was lodged against the respondent, it cannot be stated that he had signed the compromise deed under coercion, particularly when there is no material on record to show that father of the petitioners had exerted any pressure upon him to sign the compromise deed.

21) If we have a look at the sequence of events, it is revealed that the mother of the petitioners had died in the month October, 1996 whereafter First Information Report came to be registered implicating the respondent in the said case and he absconded from his house. The suit came to be filed by the petitioners before the trial court on 24.12.1996 and on 26.12.1996, compromise came to be executed between the parties, in

consequence whereof, the decree was passed in favour of the petitioners. It is immediately thereafter that father of the petitioners made a statement before the Chief Judicial Magistrate, Shopian, where he took a U-turn and stated that his wife had died a natural death. This paved way for grant of bail to the respondent. Another important event took place after the respondent filed application for recall of compromise before the trial court. The father of the petitioners filed an application before the Chief Judicial Magistrate, Shopian, seeking re-investigation of the case. All these events clearly point to one and only one inference that the compromise, whereby the respondent gifted away his property to the petitioners, was result of pressure exerted by father of the petitioners upon the respondent by way of criminal proceedings. It also appears that the respondent gave away his property to the petitioners for saving himself from criminal prosecution and in consideration of the same, father of the petitioners agreed to compound the murder case against the respondent. This finding is supported by the evidence led by the parties before the trial court, where not only the witnesses of the respondent but even the witnesses examined by the petitioners have, in no uncertain terms, stated that the consideration for transfer of the property was the compounding of murder case by father of the petitioners.

22) A compromise which is arrived at for compounding a non-compoundable offence is certainly an unlawful agreement and is not enforceable at law being opposed to the public policy under Section 23 of the Contract Act. In this regard it would be apt to notice the following

observations of the Supreme Court in the case of **Ouseph Poulo vs. The Catholic Union Bank Ltd. and others**, AIR 1965 SC 166:

Before dealing with the merits of the controversy between the parties, it is necessary to state briefly the true legal position in regard to the agreements which are held to be unenforceable on the ground that the consideration for which they are made is opposed to public policy. It is well-settled that agreements which are made for stifling prosecution are opposed to public policy and as such, they cannot be enforced. The basis for this position is that the consideration which supports such agreements is itself opposed to public policy. In India, this doctrine is not applicable to compoundable offences, nor to offences which are compoundable with the leave of the court where the agreement in respect of such offences is entered into by the parties with the leave of the Court. With regard to non-compoundable offences, however, the position is clear that no court of law can allow a private party to take the administration of law in its own hands and settle the question as to whether a particular offence has been committed or not, for itself. It is obvious that if such a course is allowed to be adopted and agreements made between the parties based solely on the consideration of stifling criminal prosecutions are sustained, the basic purpose of criminal law would be defeated; such agreements may enable the guilty persons to escape punishment and in some others they may conceivably impose an unconscionable burden on an innocent party under the coercive process of a threat of the criminal prosecution. In substance, where an agreement of this kind is made, it really means that the complainant chooses to decide the fate of the complaint which he has filed in a criminal court and that is clearly opposed to public policy.

In dealing with such agreements, it is, however, necessary to bear in mind the distinction between the motive which may operate in the mind of the complainant and the accused and which may indirectly be responsible for the agreement and the consideration for such an agreement. It is only where the agreement is supported by the prohibited consideration that it falls within the mischief of the principle that agreements which intend to stifle criminal prosecutions are invalid. The sequence of events, no doubt, has relevance in dealing with this question; but from mere sequence it

would not be safe to infer the existence of the prohibited consideration. If in order to put an end to criminal proceedings, an agreement is made in the execution of which persons other than those who are charged in a criminal court join, that may afford a piece of evidence that the agreement is supported by the consideration that the criminal proceedings should be terminated. If the nature of the liability imposed upon a debtor by a previous dealing is substantially altered with a view to terminate the criminal proceedings, that itself may be another factor which the Court may take into account in deciding whether the agreement is supported by the prohibited consideration. But in weighing the different relevant considerations in such a case, courts must inevitably enquire: did one party to the transaction make his promise in exchange or part exchange of promise of the other "not to prosecute or continue prosecuting"? As Lord Atkin observed in *Bhowanipur Banking Corporation, Ltd. v. Durgesh Nandini Desi*, "In all criminal cases reparation where possible is the duty of the offender, and is to be encouraged. It would be a public mischief if on reparation being made or promised by the offender or his friends or relatives mercy shown by the injured party should be used as a pretext for avoiding the reparation promised". That, however, is not to say that if reparation is made as a consideration for a promise to give up criminal proceedings, it would not amount to an abuse of the right of private prosecution and would not attract the provisions of s. 23 of the Act. The main point to remember is that the party challenging the validity of the impugned transaction must show that it was based upon an agreement to stifle prosecution. If it is shown that there was an agreement between the parties that a certain consideration should proceed from the accused person to the complainant in return for the promise of the complainant to discontinue the criminal proceedings, that clearly is a transaction which is opposed to public policy (vide *V. Narasimha Raju v. V. Gurumurthy Raju, Maharaja Srish Chandra Nandy v. Supravat Chandra, Sudhindra Kumar Ray Chaudhuri v. Ganesh Chandra Ganguli; and Kamini Kumar Basu, v. Birendra Nath Basu*).

Similar views have been expressed by the Supreme Court in the case of **V. Narsimharaju vs. Gurumurthy Raju and others**, AIR 1963

SC 107.

23) Thus, from the foregoing analysis of law on the subject, it is clear that where consideration for an agreement is a promise not to prosecute for an offence, which is not compoundable, the agreement is not enforceable at law. In the instant case, the consideration for the promise that was arrived at between the parties before the trial court was the promise of the father of the petitioners not to prosecute the respondent in a murder case which is definitely a non-compoundable offence. Therefore, the consideration itself was not lawful as the same was against the public policy. Thus, the compromise arrived at between the parties was unlawful and liable to be set aside.

24) For the foregoing reasons, I do not find any illegality or irregularity in the impugned order passed by the learned trial court. The same does not call for any interference. The petition is, accordingly, dismissed.

25) The trial court record along with a copy of this judgment be sent back.

(Sanjay Dhar)
Judge

SRINAGAR
01.09.2023
"Bhat Altaf, PS"

<i>Whether the order is speaking:</i>	<i>Yes/No</i>
<i>Whether the order is reportable:</i>	<i>Yes/No</i>