

HUSSAINBHAI ALLARAKHBHAI DARIAYA & ORS.

v.

STATE OF GUJARAT & ORS.
(Civil Appeal No. 7208 of 2010)

AUGUST 31, 2010

[R.V. RAVEENDRAN AND H. L. GOKHALE, JJ.]

Code of Civil Procedure, 1908:

Or. 23, r.3 and 3-B – Compromise of a suit/appeal – Requirements to be complied with – Explained – HELD: In the instant case, the compromise alleged was not between the parties to the suit/appeal, but was between two groups of two communities – Further a decree can be made in terms of compromise only in so far as it relates to the parties to the suit – Ultimately, first appellate court made an order refusing to draw a decree in terms of the ‘compromise’ between non-parties, as the appeal was disposed of in pursuance of the memo of withdrawal.

Or. 23, r.3-B, Explanation – “Representative suit” – Explained.

s.100.– Second appeal filed with application for leave to file appeal by persons who were not parties to suit/first appeal – Maintainability of – In the instant case, the parties to the suit/appeal had not entered into any compromise and the court had not passed a decree in terms of the compromise – In fact, the court could not pass any decree in terms of the said compromise as it was not between the parties to the appeal – Request of the plaintiff/appellant was for withdrawal of the first appeal and that request was granted and the appeal was dismissed as withdrawn – When an appeal has been withdrawn by the persons who filed the appeal, it is not open to some other parties to file second appeal challenging the

- A *withdrawal of the first appeal on the ground that a 'compromise' was illegally entered – Neither O. 23, r.3, nor O. 23, r. 3-B was attracted.*

- B Plaintiff-respondent No. 6, namely, the Samast Sunni Muslim Jamat Damnagar (Jamat), represented by its Secretary, filed a suit against respondent Nos. 1 to 5, *inter alia*, for declaration that it was the owner-in-possession of old Survey No. 248. The trial court though granted the other reliefs, rejected the claim of the plaintiff as regards Old Survey No. 248. In the first appeal filed by the plaintiff,
- C a consent 'pursis' signed by 4 Trustees of the Jamat and endorsed by the Sarpanch and the Secretary of the Grampanchayat was filed. Subsequently, a compromise agreement entered into between leaders of 'Muslim Samaj' and "Samast Hindu Samaj", was filed. The first
- D appellate court disposed of the appeal in terms of the consent 'pursis' and the agreement. The appellants, who were neither parties to the suit nor to the first appeal, but claimed to be the members of the Jamat, filed a second appeal before the High Court, with an application seeking
- E permission to file the appeal. The High Court held that the Jamat had not filed the suit in a representative capacity and, therefore, the application seeking leave to file the second appeal and the second appeal filed by the appellants were not maintainable.

- F Dismissing the appeal, the Court

- G HELD: 1. The second appeal by the appellants was not maintainable and the refusal to grant leave to appeal was justified, though for reasons different from what has been mentioned by the High Court. [para 17] [745-F-G]

- H 2.1 A compromise of a suit is governed by Rule 3 of Order 23 of the Code of Civil Procedure, 1908. However, if the suit which is compromised, is a representative suit,

two additional requirements of Rule 3B will also have to be complied with. They are: (i) compromise cannot be entered without the leave of the court expressly recorded in the proceedings; and (ii) before granting such leave, the court shall give notice to such persons as may appear to it to be interested in the suit. The Explanation to Rule 3B defines four categories of suits as “representative suits” for the purpose of the said rule : (a) suits u/s 91 or section 92 of the Code; (b) suits under Order 1 Rule 8 of the Code; (c) suits in which the manager of an undivided Hindu Family sues or is sued as representing the other members of the family; and (d) suits in which the decree passed may bind any person who is not named as a party to the suit by virtue of the provisions of the Code of Civil Procedure or any other law for the time being in force. If a suit should answer the definition of a ‘representative suit’ under clause (d) of the Explanation, two conditions should be satisfied - (i) the decree passed in the suit should *bind the person who is not named as a party to the suit*; and (ii) the decree should so bind a person who is not named as a party to the suit, *by virtue of the provisions of the Code or any other law for the time being in force*. [para 10] [742-B-F]

2.2 In the instant case, the compromise alleged was not between the parties to the suit/appeal. The defendants/respondents were the State Government, the Mamlatdar, Development Officer and the Gram Panchayat. None of them were parties to the compromise. Even the Jamat represented by the Secretary, was not a party to the compromise. The alleged compromise was between two groups, namely, 14 persons representing the Muslim community and 18 persons representing the Hindu community of the locality. Therefore, it cannot be said to be a compromise between the parties to the suit or the appeal. Further, under Order 23 Rule 3, a decree can be

A made in terms of the compromise only insofar as it relates to the parties to the suit. Where either plaintiff-appellants or the defendant-respondents were not parties, it cannot be said that there was a compromise between the parties to the suit or appeal. [para 14] [744-D-G]

B 1:3 The pursis (Memo - Ex.17) filed by the appellants in the first appeal stated that the trustees of the Jamat were withdrawing the appeal unconditionally, in view of the compromise reached between two groups of people who were not parties to the appeal. The parties to the
C appeal, that is the appellants and respondents, did not sign or file any compromise petition before the court. The first appellate court could not, therefore, direct that a decree be drawn up in terms of the 'compromise' between two sets of non-parties, while dismissing the
D first appeal as withdrawn. Though the order disposing of the first appeal stated that a decree shall be drawn according to the "agreement" submitted along with the consent pursis, no such decree has been drawn. It has also been brought to the notice of the Court that recently
E the first appellate court has made an order refusing to draw a decree in terms of the compromise between non-parties, as the appeal was disposed of in pursuance of the memo of withdrawal. [para 15] [744-H; 745-A-C]

F 1:4 When an appeal has been withdrawn by the persons who filed the appeal, it is not open to some other parties to file an appeal challenging the withdrawal of the first appeal on the ground that a 'compromise' was illegally entered. In the instant case, the parties to the suit had not entered into any compromise and the court had
G not passed a decree in terms of the compromise. In fact, the court could not pass any decree in terms of the said compromise as it was not between the parties to the appeal. The request of the Jamat was for withdrawal of the first appeal and that request was granted and the
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appeal was dismissed as withdrawn. Neither Order 23 Rule 3, nor Order 23 Rule 3-B was attracted. Therefore, a second appeal would not lie at the instance of any non-party, as there is no appealable order or decree. [para 16] [745-C-F]

CIVIL APPELLATE JURISDICTION.: Civil Appeal No. 7208 of 2010.

From the Judgment & Order dated 13.10.2006 of the High Court of Gujarat at Ahmedabad in Civil Application No. 3427 of 2006 with Civil Application No. 3429 of 2006 with Second Appeal 70 of 2005 with Civil Application 1985 of 2005 in Second Appeal 70 of 2005.

Huzefa Ahmadi, Ejaz Maqbool, Sakshi Banga, Garima Kapoor, Mohd. Tahir Hakim for the Appellants.

Raju Ramachandran, Mitul Shehlat, Milind Kumar, Madhvi Divan, Hemantika Wahi, Jesal for the Respondents:

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1: Leave granted.

2. The appellants are aggrieved by the rejection of their application seeking permission to file a second appeal. The Samast Sunni Muslim Jamat, Damnagar (6th respondent herein, for short the 'Jamat') represented by its Secretary filed a suit against respondents 1 to 5 in the court of the Civil Judge (Senior Division), Amreli (Regular Civil Suit No.240/1995) for a declaration that they are the owners in possession of land bearing old survey No.248, Damnagar. They also sought a permanent injunction restraining the fifth respondent Damnagar Gram Panchayat (now Damnagar Nagarpalika) from interfering with the right of the plaintiff to construct a compound wall/fencing around the Kabrastan. They also sought a direction to respondents 1 to 5 to remove any encroachments over the said Kabrastan land.

A 3. After contest, the said suit was decreed in part by the
 Civil Judge, Senior Division, Amreli by judgment and decree
 dated 29.11.2003. The trial court declared that the plaintiff
 B Jamat was the owner of plot Nos. 23, 24, 25,26 and 28
 (described in the annexed order of District Development Officer
 dated 13.10.1977, canceling the auction of those plots) and
 granted a permanent injunction restraining the defendants from
 obstructing or interfering with the possession of the plaintiff
 Jamat. The trial court however rejected the claim of the plaintiff
 Jamat in regard to old survey No.248 in the absence of exact
 C measurements and boundaries of the said land.

4. Feeling aggrieved, the said Jamat filed an appeal
 before the Assistant District Judge, Amreli (Regular Civil
 Appeal No.67/2003). In the said appeal, the following *pursis*
 dated 3.8.2004 (Ex.17) was filed by the four trustees of the
 D Jamat :

"We, the appellants submit the said *pursis* in this case and
 declare that :-

E (1) We, the appellants have filed the present appeal
 against the respondent. In the said appeal, the consent
pursis and agreement has been made between the
 members of both community and the Panchayat in the
 decree of the trial court. Therefore, the appeal does not
 F remain to be tried further. Therefore, we withdraw the
 appeal unconditionally.

(2) The Grampanchayat Damnagar, villagers and the
 members of the community have to do and behave as per
 the compromise agreement herewith and carry out the
 G agreement specifically and we withdraw the appeal
 accordingly.

(3) Therefore, we agree and declare by the *pursis* that the
 appeal may be disposed off accordingly."

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The said pursis also contained an endorsement by the Sarpanch and Secretary of Damnagar Grampanchayat confirming that they would not insist for any costs of the suit.

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5. The compromise agreement referred to in the said pursis dated 3.8.2004 was entered into between two groups of residents of Damnagar, namely the Samast Sunni Muslim Jamat as the leaders of the Muslim Samaj and the leaders of the Samast Hindu Samaj. The said compromise is extracted below :

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“(1) The status quo which is obtained by Bavbhai Gajibhai Chudasama and others with respect to the land admeasuring 30,000 Sq.Feet, situated at the eastern side at Chhabhadia Road, allotted vide the Government Order to Shree Akshar Purshottam Swaminarayan Trust shall be withdrawn.

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(2) The land admeasuring 120m x 90 feet = 10,800 Sq. Feet situated after leaving the road from Dargah at the western side from the land allotted to the Trust, shall be left for the Sunni Muslim Jamat.

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(3) For the social activity no construction activity for constructing the houses by the Sunni Muslim Jamat shall be allowed. The land shall be left for open place.

(4) Pursuant to the order of the Honourable Court from amongst the five plots, the present land is allotted.

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(5) Except the land admeasuring 10,800 Sq. Feet allotted to the Sunni Muslim Jamat, all the entire land shall remain of the Akshar Purshottam Trust.

G

(6) With regard to the said land, now after any party from amongst both the party shall not raise any dispute before the Government Office or in the Court.

(7) With regard to the land allotted to the Akshar

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A Purshottam Trust any dispute which is raised previously and with reference to the said dispute any party shall give the consent in the Government Office or before the Court in respect of the point of Compromise.

B (8) The case which is proceeding in the Tribunal with reference to the land of the said Trust, for the same Bavjibhai Gajibhai Chudasama and Daudbhai R. Pathan shall withdraw the case.

C The said Agreement of Compromise is executed with aim to prevail peace and harmony in between the Hindu and Muslim and for maintaining Hindu Muslim unity for years to come and with an aim of avoiding any obstruction in the peace and harmony and the recent festival cannot be affected and for the larger interest of the future and which is executed by our consent and willingness and for the same we are putting our signature below."

E The said agreement was not a compromise petition between the plaintiffs and the defendants in the suit, or between the appellants and respondents in the appeal, but an agreement said to have been reached by the leaders of two communities, signed by 14 persons on behalf of the Sunni Jamat and 19 persons on behalf of the Hindu Samaj.

F 6. On the said *pursis* dated 3.8.2004 (Ex.17) filed by the Jamat, the first appellate court made the following order dated 3.8.2004 :

G "Both the parties present before the Court and have submitted the joint consent pursis. Moreover, the L.A. for the concerned party as well as Sarpanch and Secretary of Damnagar Gram Panchayat have also signed the consent pursis. Further more, the consent pursis has read over to the parties who have submitted one agreement along with the consent pursis is also read over to them and they have also admitted the facts of the agreement

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which is submitted along with the consent pursis and they A
have stated in their consent pursis that as per the
agreement, the appeal should be disposed of and as per
their contentions contained in the consent pursis and
agreement, this application is hereby granted, with no
order as to costs." B

The appeal was disposed of by the following order dated
3.8.2004:

"In view of the consent pursis along with the agreement C
submitted by both the parties before this Court on 03-08-
04 and have agreed to dispose of this appeal according
to the consent pursis and agreement, have also agreed
to draw the decree according to the agreement which has
been submitted along with the consent pursis and, D
therefore, the consent pursis has been granted by this
Court. So, this appeal is hereby disposed of according to
the consent pursis at Exh. 17 along with the agreement and
the decree is hereby drawn according to the agreement
which submitted along with the consent pursis and hence,
this appeal is hereby disposed of accordingly, with no E
order as to costs."

7. The appellants who claimed to be the individual
members of the Sunni Jamat, and who were not parties either
to the suit or the first appeal, were aggrieved by the said
compromise resulting in disposal of the first appeal as F
according to them, 30,000 sq. ft. of Kabrastan land had been
unauthorisedly given to Akshar Purshottam Trust. According to
appellants the Sunni Jamat had no legal authority to deal with
or give away the Kabrastan (wakf) land for any purpose other
than the use of Muslims in Damnagar. They therefore filed a G
second appeal before the Gujarat High Court challenging the
order disposing of the first appeal. As they were not parties to
the first appeal, they also filed an application seeking
permission to file the appeal.

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A 8. A learned Single Judge of the High Court dismissed the
application for permission to file the second appeal.
Consequently the second appeal was also dismissed by order
dated 13.10.2006. The High Court held that the Sunni Jamat
B had not filed a suit in a representative capacity under Order 1
Rule 8 of the Code of Civil Procedure ('Code' for short); that it
was not the contention of the appellants that the Secretary of
the Sunni Jamat was not entitled or authorized to file a suit; that
if the Secretary represented the interests of the members of
the Jamat, then the suit was by a person authorized by the
C members of the Jamat and not by a person filing a suit in his
representative capacity; that as the suit by the Secretary of the
Jamat was not a representative suit either for purpose of
section 92 or for the purpose of Order 1 Rule 8 of the Code, it
cannot be taken to be a representative suit for the purpose of
Order 23 Rule 3B of the Code; and that therefore the application
D seeking leave to file the second appeal and the second appeal
by the appellants were not maintainable. The said judgment is
challenged by the appellants in this appeal by special leave.

E 9. We may have to notice the relevant provisions of law
before referring to the rival contentions. Rule 1 of Order 23
provides for withdrawal of a suit or abandonment of a part of a
claim. Rule 3 of Order 23 provides for compromise of a suit
and the relevant portion thereof is extracted below :

F "**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
G 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."

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Rule 3A of Order 23 provides that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. Rule 3B of Order 23 provides that no agreement or compromise shall be entered in a representative suit without leave of court. The said rule is extracted below :

“3B. No agreement or compromise to be entered in a representative suit without leave of Court.—(1) No agreement or compromise in a representative suit shall be entered into without the leave of the Court expressly recorded in the proceedings; and any such agreement or compromise entered into without the leave of the Court so recorded shall be void.

(2) Before granting such leave, the Court shall give notice in such manner as it may think fit to such persons as may appear to it to be interested in the suit.

Explanation.—In this rule, “representative suit” means,—

(a) a suit under section 91 or section 92,

(b) a suit under rule 8 of Order I,

(c) a suit in which the manager of an undivided Hindu family sues or is sued as representing the other members of the family,

(d) any other suit in which the decree passed may, by virtue of the provisions of this Code or of any other law for the time being in force, bind any person who is not named as party to the suit.”

Order 43 Rule 1A relates to right to challenge non-appealable orders in appeal against decrees and sub-rule (2) thereof is extracted below :

“(2) In an appeal against a decree passed in a suit after

A 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.”

B 10. A compromise of a suit is governed by Rule 3 of Order 23 of the Code. However, if the suit which is compromised, is a representative suit, two additional requirements of Rule 3B will also have to be complied with. They are : (i) compromise cannot be entered without the leave of the court expressly recorded in the proceedings; and (ii) before granting such leave,

C the court shall give notice to such persons as may appear to it to be interested in the suit. The Explanation to Rule 3B defines four categories of suits as “representative suits” for the purpose of the said rule : (a) suits under section 91 or section 92 of the Code; (b) suits under Order 1 Rule 8 of the Code; (c) suits in

D which the manager of an undivided Hindu Family sues or is sued as representing the other members of the family; and (d) suits in which the decree passed may bind any person who is not named as a party to the suit by virtue of the provisions of the Code of Civil Procedure or any other law for the time being

E in force. If a suit should answer the definition of a ‘representative suit’ under clause (d) of the Explanation, two conditions should be satisfied – (i) the decree passed in the suit should *bind the person who is not named as a party to the suit*; and (ii) the decree should so bind a person who is not named as a party

F to the suit, *by virtue of the provisions of the Code or any other law for the time being in force*.

11. Learned counsel for the appellants contended that the High Court committed a serious error in assuming that the leave of the court for entering into a compromise would be required

G only in a representative suit filed under section 91 or 92 of the Code or under Order 1 Rule 8 of the Code, or a suit in which the manager of an undivided family sues or is sued as representing the other members of the family. According to appellants, having regard to the Explanation under Rule 3B,

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even if a suit is not filed under Order 1 Rule 8 of the Code, if the decree passed in a suit would bind any person who is not a party to such suit, by virtue of the provisions of the Code or any other law for the time being in force, then it will be a "representative suit" for the purpose of Order 23 Rule 3B of the Code, having regard to clause (d) of the Explanation. It is submitted that as the decree in a suit to which a Jamat is a party, would bind all members of the Jamat who are not parties to such suit, the suit by or against the Jamat is to be considered as a representative suit for the purpose of clause (1) of Rule 3B of Order 23 and consequently a compromise could be entered in a suit to which the Jamat is a party, only with the leave of the court granted after giving notice to all the members of the Jamat. It is submitted that as the leave of the court was not obtained for entering into such a compromise and as the court did not give notice to persons interested in the suit, the compromise was not a valid compromise and any person affected by the said compromise could challenge the same by filing a second appeal having regard to the provisions of Order 43 Rule 1A(2). The appellants submit that category (d) under the Explanation to Rule 3B was ignored by the High Court.

12. On the other hand, the respondents contended that the suit by the Jamat was not a representative suit. They submitted that the appellants admitted that the suit of the Jamat did not fall under categories (a) to (c) enumerated in the Explanation to Rule 3B. They contended that for a suit to fall under clause (d) of the Explanation to Rule 3B, it is necessary that the decree made in such suit should bind a person who is not a party to the suit *by virtue of the special provisions in the Code or any other law*. It is submitted that there is no provision in the Code or any other law which make the decree in a suit by or against the Jamat, binding on a person who is not a party to the suit. It is submitted that the argument of the appellants if accepted, would mean that even where a compromise is entered in suits to which a company (incorporated under the Companies Act) or a co-operative society (registered under the Cooperative

- A Societies Act) or a society (registered under the Societies Registration Act) is a party, it would be necessary to treat them as representative suits and issue notice to all members thereof on the ground that the decree passed in such suits, would bind members of such company, co-operative society or society, who are not parties to the suit. The respondents submitted such a position would be untenable.

13. It is unnecessary to examine the question as to the constitution of the Jamat or the question whether a suit by or against the Jamat will bind all members of the Jamat or the question whether the members of the Jamat will be so bound by virtue of any specific provision in the Code or any other law, as these questions do not arise in this case.

14. The compromise alleged was not between the parties to the suit/appeal. As noticed above, the defendants/respondents were the State of Gujarat, the Mamlatdar of Lathi, Amreli District Panchayat, the Taluka Development Officer of Lathi and the Damnagar Gram Panchayat. None of them were parties to the compromise. Even the Jamat represented by the Secretary, was not a party to the compromise. The alleged compromise was between two groups, namely, 14 persons representing the Muslim community of Damnagar and 18 persons representing the Hindu community of Damnagar. Therefore, it cannot be said to be a compromise between the parties to the suit or the appeal. Further under Order 23 Rule 3, a decree can be made in terms of the compromise only insofar as it relates to the parties to the suit. Where either plaintiff-appellants or the defendant-respondents were not parties, it cannot be said that there was a compromise between the parties to the suit or appeal.

15. The *pursis* (Memo – Ex.17) filed by the appellants in the first appeal stated that the trustees of the Jamat were withdrawing the appeal unconditionally, in view of the compromise reached between two groups of people who were not parties to the appeal. The parties to the appeal, that is the

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appellants and respondents did not sign or file any compromise A
petition before the court. The first appellate court could not
therefore direct that a decree be drawn up in terms of the
'compromise' between two sets of non-parties, while
dismissing the first appeal as withdrawn. Though the order
dated 3.8.2004 disposing of the first appeal stated that a B
decree shall be drawn according to the "agreement" submitted
along with the consent *pursis*, no such decree has been drawn.
We are informed that recently the first appellate court has made
an order refusing to draw a decree in terms of the compromise
between non-parties, as the appeal was disposed of in C
pursuance of the memo of withdrawal. Be that as it may.

16. When an appeal has been withdrawn by the persons
who filed the appeal, it is not open to some other parties to file
an appeal challenging the withdrawal of the first appeal on the D
ground that a 'compromise' was illegally entered. As noticed
above, the parties to the suit had not entered into any
compromise and the court had not passed a decree in terms
of the compromise. In fact the court could not pass any decree
in terms of the said compromise as it was not between the E
parties to the appeal. The request of the Jamat was for
withdrawal of the first appeal and that request was granted and
the appeal was dismissed as withdrawn. Neither Order 23 Rule
3, nor Order 23 Rule 3B was attracted. Therefore a second
appeal would not lie at the instance of any non-party, as there
is no appealable order or decree. F

17. We are therefore of the view that the appeal by the
appellants was not maintainable and the refusal to grant leave
to appeal was justified, though for reasons different from what
has been mentioned by the High Court. We however make it G
clear that the refusal to grant leave would not come in the way
of the appellants pursuing any claim or remedies, if any,
available in accordance with law.

R.P.

Appeal dismissed.

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