Sikkim High Court Palden Bhutia And Ors. vs Januka Chettri And Ors. on 20 November, 2006 Equivalent citations: AIR 2007 Sik 15 Author: A Subba Bench: A Subba JUDGMENT A.P. Subba, J. 1. This Appeal is directed against the judgment and decree dated 24-3-2006, passed by the learned District Judge (South & West) at Namchi, in title Suit No. 9 of 2005. 2. The facts of the case, relevant for the purpose of this Appeal, in a nutshell, are that the Appellants herein, who were minors, filed a Civil Suit being Civil Suit No. 14 of 1988 through their mother and natural guardian against the present Respondent No. 1 and others in the Court of learned Civil Judge (West) at Gyalshing for declaration, recovery of possession and other reliefs in respect of a piece of land i.e. the suit land in the year 1988. In the said suit the case of the Plaintiffs/Appellants, in short, was that they were Sikkimese by birth and members of Bhutia Tribal Community of Sikkim, whereas the Defendants /Respondents were the members of Nepali Community who did not hold Sikkim Subject. The suit land was their ancestral and joint family property. As such, their father Late Gompu Bhutia, who had sold the suit land to the Respondents, had no right to alienate the same. The alienation made by him was, therefore, not binding upon the Plaintiffs/Appellants. However in course of the proceedings, the parties compromised the matter on the intervention of well-wishers of both parties and filed a joint compromise petition and the suit was disposed of by the learned Civil Judge vide order dated 17-5-1990 in terms of the said compromise. Subsequently, in the year 2005 the present Appellants who are the legal heirs of late Gompu Bhutia instituted a suit being Title Suit No. 9 of 2005 in the Court of the learned District Judge (South and West) at Namchi on 25th October, 2005 for declaration that the compromise decree dated 17-5-1990 passed by the learned Civil Judge, West Sikkim in Civil Suit No. 14 of 1988 was untenable in the eye of law, and for other reliefs including the prayer for restoration of possession after setting aside the decree. The Respondents contested the suit by filing joint written statement, raising several grounds, wherein a preliminary issue relating to maintainability of the suit was raised. On the basis of the. pleadings, the learned trial Court vide Order dated 17-12-2005 framed 13 issues, out of which issue Nos. 1, 2 and 3 were to be heard as preliminary issues. However, on the submissions made by the learned Counsel for the parties on 13-3-2006, the Issue No. 1 relating to bar of Rule 3-A of Order XXIII, CPC (Issue No. 1) was taken up first for hearing and vide, impugned judgment and decree dated 24-3-2006, the learned trial Court decided the preliminary issue, holding that the suit was barred by the provisions of Rule 3-A of Order 23 of CPC and accordingly dismissed the suit. Being aggrieved by the said judgment/decree dated 24-3-2006, the Plaintiffs/Appellants have come up in the present Appeal. 3. Mr. A. Moulik, learned Senior Counsel assisted by Mr. N. G. Sherpa and Ms. Kesang Diki Bhutia, learned Counsel appearing on behalf of the Plaintiffs/Appellants and Mr. R. K. Agarwal, learned Counsel assisted by Mr. J. B. Pradhan, learned Counsel were heard. 4. The submission of Mr. A. Moulik, the learned Senior Counsel was that, the suit filed by the Plaintiffs/Appellants for setting aside the compromise decree was maintainable in law, as it was not hit by the provisions of Rule 3-A of Order 23, CPC. Ac-

cording to him, the words 'not lawful' occurring in Rule 3-A of Order XXIII have reference only to the cases which fall within the contemplation of Section 23 of Indian Contract Act, and in all other cases the bar would not operate and a suit would lie. The submission of Shri R. K. Agarwal, learned Counsel for the Respondents, in reply, was that the grounds taken in the suit filed by the Plaintiffs /Appellants do not fall outside the purview of Section 23 of the Indian Contract Act and thus the suit was not maintainable in view of the provisions of Rule 3-A of Order XXIII of CPC. 5. The short question that falls for consideration of this Court is, whether an independent suit would lie to set aside a compromise decree, in cases where the ground taken in the suit falls outside the purview of Section 23 of the Indian Contract Act. 6. In order to appreciate the rival submissions made by the learned Counsel for the parties, it would be appropriate to briefly notice the relevant provision of C. P. C. both before and after the change brought about by the Amending Act of 1976. 7. Before the amendment of various provisions of CPC by the Amending Act No. 104 of 1976. Order XXIII, Rule 3, CPC provided that, where it is proved that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall pass a decree in accordance therewith, so far as it relates to the suit. Order XLIII, Rule 1(m) provided that an appeal shall lie from an order passed under Order XXIII, R. 3 recording or refusing to record a compromise. Under Section 96(3) no appeal lay from a decree passed by the Court with consent of parties. Therefore, under the law as it stood before the amendment in 1976, a consent decree could be set aside in a Misc. Appeal under Order XLIII, Rule l(m) as well as by way of a civil suit. After the amendment the above Order XXIII, Rule 3, C. P. C. stands as follows: 3. Compromise of suit - Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement of compromise, (in writing and signed by the parties) or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith (so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit): (Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question, but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.) (Explanation - An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872) shall not be deemed to be lawful within the meaning of this rule). Rule 3-A of Order XXIII, CPC which is a new rule inserted by the said Amendment is as follows: 3-A. Bar to suit - No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. A plain reading of the above provision would go to show that no suit shall lie to set aside a compromise decree on the ground that the compromise on which the decree is based was not lawful. The result is that no suit can be filed to challenge a compromise on the ground that it was not lawful, after the insertion of the above new rule. This

provision came up for consideration of various High Courts and the Apex Court in a number of decisions. As can be seen from what follows, the majority view is that an independent suit to set aside a consent decree is now barred by law. 8. A reference to the following few decisions, which have been referred to and relied on by the learned Counsel for the Respondents, would make the above position more than clear: In Smt. Tarabai v. V. S. Krishnaswamy Rao AIR 1985 Karnataka 270 it has been held that now a suit cannot be filed to challenge a compromise decree even if it was not lawful in view of the provisions contained in Order 23, Rule 3-A, CPC. In Shri Iswar Gopalji and Ors. v. Bhagwan Shaw AIR 1982 Calcutta 12, it has been similarly held that a suit for setting aside a consent decree would be barred under Order 23, Rule 3-A of CPC. In Thakur Prasad v. Bhagwan Das AIR 1985 MP 171 (DB) a Division Bench of Madhya Pradesh High Court relying on the above judgment held that now that Rule 3-A has been added to Order 23, CPC a suit cannot be filed to challenge a compromise even if it was not lawful. In (2004) 3 CHN 146 (DB) Ashish Kumar Ghosh v. Gopal Chandra Ghosh a Division Bench of Calcutta High Court has observed that Rule 3-A of Order 23, CPC, which operates after a compromise recorded, makes it specifically clear that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is passed was not lawful. In Banwari Lal v. Chando Devi , the Apex Court has held that after the amendment of 1976 neither the appeal against the order recording compromise nor a remedy by way of filing a suit is available in cases covered by Rule 3-A of Order 23. As such, a party challenging the compromise can file a petition under proviso to Rule 3 of Order 23 or an appeal Under Section 96(1) of the Code in which he can now question the validity of the compromise in view of Rule 1-A of Order XLIII of the Code. 9. The above decisions make it amply clear that the right to challenge a compromise decree by filing a suit has now been taken away and consequently, a suit to set aside a compromise decree is barred. This is how the law now stands on the point. 10. Having thus noticed the settled legal position on the point we may now deal with the submission made by Mr. Moulik, the learned Sr. Counsel. It is the specific stand taken by the learned Counsel that since Order XXXII, Rule 7(1)-A, CPC which requires an application for leave, an affidavit of the guardian in the suit, and a certificate from the pleader, to be filed in the suit was not complied with a suit to set aside the compromise decree in the present case would lie, despite the settled position being that no suit lies to set aside a compromise decree. According to him, the ambit and scope of the word 'unlawful' occurring in Order 23, Rule 3-A does not embrace within its sweep the kind of legal infirmity arising out of non-compliance of a statutory provision as in the present case. The learned Sr. Counsel in elaboration of his submission, further contended that violation of term of any agreement falls within the province of Contract Act but violation of a statutory provision falls outside it, and in such a case, the provision contained in the new Rule 3-A of Order XXIII, CPC is not attracted. Therefore, the sum and substance of the submission of Mr. Moulik is that, violation of the provisions contained in Order XXXII, Rule 7(1)-A of the Code raised by the Plaintiffs/Appellants in the case, being independent of and falling outside the

sphere of Contract Act Order XXIII, Rule 3-A is not attracted. Hence, in case of compromise decree involving non-compliance of Order XXXII, Rule 7(1) A, a separate suit to set aside such compromise decree would lie in spite of the specific provision contained in Order XXXIII, Rule 3-A of the Code. Before proceeding further with the consideration as to whether the above submission urged by the learned Senior Counsel has any force, it would not be out of place to take notice of the fact, that a similar point raised on behalf of the Appellant in Anant Mahadeo Godbole v. Achut Ganesh Godbole and Ors. (referred to by the Respondents) was rejected by a learned single Bench of Bombay High Court. What was contended in the said case was that, if the cause of action alleged covers cases, which are treated as not lawful by Section 23 of the Indian Contract Act, then and then only the bar of Rule 3-A of Order XXIII, CPC would be attracted. While repelling the contention, it was observed that the words not lawful by their very nature, are wide enough and would take in the cases where parties set up want of authority or exceeding of authority in the matter of agreements or compromise on the basis of which the decrees are made and, as such, all those types of challenges cannot now, because of the bar to suit, be the subject matter of second suit. It was then accordingly held that a second suit based on the cause of action that the compromise itself was not lawful, is clearly barred under the provision contained in Rule 3-A of Order XXXIII, CPC. Since the issue involved in the present case is identical, there is no doubt that this decision squarely covers the controversy raised by the parties. However, it is the claim of Mr. Moulik that the stand taken by him finds support from several decisions of other High Courts, and as such, it would be appropriate to glance through the different decisions relied on by the learned Senior Counsel before coming to any final conclusion on the issue. The following are the relevant decisions relied on by Mr. Moulik in support of his submission: (3) and 11. In order to ascertain the specific points of law decided in the above cases, so as to see if it supports the stand taken by the Ld. Sr. Counsel, it would be necessary to briefly notice the relevant facts and the legal issues that were involved and that were decided in all the above cases In Chandreswar Sharma and Anr. v. Jai Krishna Sharma the question that came for consideration was, whether a suit would lie to set aside a com-promise decree passed without complying with the provisions contained in Order XXXII, Rule 7, CPC. The relevant facts in the case were that, an appeal was filed by 'the defendants against a preliminary decree passed in the partition suit. This appeal was permitted to be withdrawn on the submission that the suit was going to be disposed of on the basis of a compromise. Subsequently, the plaintiffs filed a petition objecting to the compromise on the ground that the same was not genuine, as no leave had been asked for on behalf of the minors for entering into a compromise petition. In these circumstances, it was held that recording of compromise in absence of any petition under Order XXXII, Rule 7 for leave to enter into compromise was illegal and the matter was remanded back to the trial Court for consideration. In Jadumani Naik and Ors. v. Jyotsna Naik and Ors. , the permission sought by the guardian appointed to represent the minor plaintiffs to sign the compromise petition on behalf of the minors having been granted by the Court, the guardian

entered into a compromise and the compromise was accordingly recorded. Subsequently, the compromise so entered into, was challenged by one of the minor plaintiffs on attaining majority, on the ground that the compromise was fraudulently obtained and the requirement of Order XXXII, Rule 7, CPC had not been complied with. In these circumstances, it was held that the minor on attaining majority, can reopen a compromise which is vitiated by non-compliance of new Sub-rule (1A) of Rule 7 of Order XXXII. In Dhirendra Kumar Garg and Ors. v. Smt. Sugandi Jain the relevant facts were that, an application purporting to be a compromise petition was filed on behalf of all parties, which was recorded and the suit which was an eviction suit, was disposed of in its terms by the Appellate Court on 23-4-1966 setting aside the entire decree with the parties bearing their own cost. The compromise appeared to be one sided on the face of it, in so far as the minors were giving up their right under the trial Courts decree both in respect of eviction as well as in respect of arrears of rent and damages. On the said compromise decree being challenged by the Respondents, it was held that the guardian of the minors was guilty of gross negligence in entering into compromise by failing to take into account the interest of the minors. In these circumstances, it was held that the compromise decree was liable to be set aside. In Ashrafi Lal v. Smt. Koli , the question that arose for consideration was, whether the judgment in an earlier declaratory suit fell within the ambit of Section 44 of the Evidence Act, and for that purpose, whether it was necessary to examine if an inference of fraud or collusion could be drawn from the gross negligence on the part of the next friend of the minor, in conducting the earlier declaratory suit. It was held that, if an inference of fraud or collusion can be drawn from the negligence or gross negligence of the next friend, it would be permissible for the minor to avoid the judgment or decree passed in the earlier proceedings, by invoking Section 44 of the Evidence Act, without taking resort to a separate suit for setting aside the decree or judgment. As it can be noticed, none of the above decisions deal with the question as to whether a separate suit would lie, to set aside an unlawful compromise decree. The only decision that deals with such question is the decision of Jammu & Kashmir High Court in Gulam Rasol Reshi v. Gulam Hasam Reshi . As can be noticed from the relevant facts of the case, the decision deals with the direct question of maintainability of separate suit to set aside a compromise decree on the ground of unlawfulness. As per the facts narrated in the case, a suit for declaration and injunction was filed against the Respondent No. 1 in the Court of Munsiff, Anantnag on 26-4-1968. The Respondent No. 1 was minor at the relevant time. The suit was compromised on 18-6-1968 after showing that the minor Respondent No. 1 was represented by a guardian ad litem. The compromise decree was followed. Subsequently, this compromise decree was challenged by filing a civil suit being Civil Suit No. 9 of 2003 in Munsiffs Court, Anantnag on the ground that the compromise decree was brought into existence fraudulently in so far as the minor Respondent was not at all represented in the suit. The question of law that arose for determination of the Court was, whether a suit challenging a compromise decree under Order XXIII, R. 3-A was competent and whether such suit can be treated as an application under Section 151, CPC by the Courts

below. It was observed that "Legal implications of contravening provisions of Rules 3 and 7 of Order XXXII, CPC has to be read in Order XXIII, Rule 3-A CPC. So viewed, Order XXIII, Rule 3-A CPC does not bar a suit or proceeding to that end. The minor can and is within his rights to bring a suit besides other conditions applying to move an application under Section 151, CPC for recalling/canceling the decree passed by fraud, forgery with prejudice to minor". 12. No doubt, the above decision clearly lays down that Order XXIII, Rule 3-A does not bar a suit or proceeding to set aside the compromise decree and such suit or proceeding would be maintainable. It is, however, to be noted that the decision is not in accord with the law laid down by the Apex Court in the above Banwari Lal's case AIR 1993 SC 1139 (supra). It is also to be noted that the decision being of a coordinate authority has only a persuasive value as far as this Court is concerned. However, before expressing my disagreement or otherwise with the view taken in the above decision, it would not be out of place to see if the interpretation placed by the Id. single Judge on the provision in question, serves the legislative object and is in accordance with the object and the principle underlying the new Rule 3-A of Order XXIII, CPC. 13. In the above Bombay case , it has been observed that the very object of introducing Rule 3-A in the body of Order XXIII of the Code was to bar the filing of a second suit on the ground that the compromise was not lawful. As already noted above, it was held in that case that a party to a suit, which was decreed after accepting the compromise, is only relegated to the remedy of questioning the same under Rule 1-A of Order XLIII and a second suit challenging the compromise decree was clearly barred. Similar is the observation made by the Division Bench of M. P. High Court in the aforementioned Thakur Prasad's case AIR 1985 MP 171. It was observed that the intention of the Legislature in making the amendments in the Civil Procedure Code was to simplify the procedure and avoid multiplicity of proceedings in order to curtail litigation. Therefore, the clear intention in enacting Order XXIII, Rule 3-A and deleting Order 4, Rule 1 (m) and adding Rule 1-A to Rule XLIII was that, whatever objection may be against a recording or non-recording of the compromise, should be in the same proceedings, i.e., firstly in the suit, then in appeal Under Section 96. 14. The above view taken by two High Courts, namely, Bombay High Court and Madhya Pradesh High Court in the two cases cited above, are in consonance with the law laid down by the Apex Court in . In paragraph 7 of the judgment it has been held by the Apex Court as follows: 7. By adding the proviso along with an explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the Court which had recorded the compromise in question. That Court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The explanation made it clear that an agreement or compromise, which is void or voidable under the Indian Contract Act, shall not be deemed to be lawful within the meaning of the said rule. Having introduced the proviso along with the explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3-A in respect of institution of a separate suit for setting aside a decree

on basis of a compromise saying: 3-A. Bar to suit - No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. The Apex Court further held in paragraph 13 as follows: 13... To make the enquiry in respect of validity of the compromise more comprehensive, the explanation to the proviso says that an agreement or compromise "which is void or voidable under the Indian Contract Act -"shall not be deemed to be lawful within the meaning of the said Rule. ... As such a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23, or an appeal under Section 96(1) of the Code, in which he can now question the validity of the corn-promise in view of Rule 1-A of Order 43 of the Code. The above makes it clear that a suit is not an appropriate remedy for setting aside a compromise decree on the ground that it is not lawful. As further observed by the Apex Court in other paragraphs of the judgment, the legislature having introduced the proviso along with the explanation in Rule 3 of Order XXIII, in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3-A in respect of institution of a separate suit for setting aside a decree based on compromise and being conscious of the fact that the right of appeal against the order recording a compromise or refusing to record a compromise was being taken away, a new Rule 1 -A has been added to Order XLIII. It is under this new rule inserted in Order XLIII that a right has now been given to a party to challenge the recording of a compromise, questioning the validity thereof, while preferring an appeal against the decree. It has been made clear that Section 96(3) of the Code shall not be a bar to such an appeal, because Section 96(3) is applicable to cases where the factum of compromise or agreement is not in dispute. 15. It is a well recognized canon of interpretation that the object behind an enactment cannot be lost sight of while interpreting a provision of law. The object behind enacting Rule 3-A of Order 23 of the Code as already noted above, is to avoid multiplicity of suits and long litigation. In view of this, it goes without saying that it may not at all be the legislative intent to recognize two categories of unlawful grounds which vitiate a compromise and include one category within the ambit and scope of the word 'unlawful' occurring in Rule 3-A and exclude the other category altogether from its purview, thereby taking it out of the ambit of Rule 3-A of Order XXIII and leaving a scope open for filing a separate suit to set aside a compromise decree. If the contention urged on behalf of the Appellants is accepted, the result would be that a separate suit would still lie to set aside a compromise decree if it is vitiated by non-compliance of the provision contained in Order XXXII, Rule 7(1) A. Such interpretation will, to say the least, be devoid of the concept of purpose with which Rule 3-A was inserted in Order 23, CPC, and will thus fail to redress the mischief which was the objective behind the enactment. As has been observed by the Apex Court in AIR 1991 SC 735 a statute has to be construed in the light of the mischief it was designed to remedy. In Venkataswami Naidu R. v. Naraswami Naraindas , the Apex Court has laid down the rule of interpretation in the following clear words: If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the legislature. Similarly, the Apex Court in Union of India

v. Elphinstone Spinning and Weaving Co. Ltd. and Ors. has thrown light on the correct approach to be adopted by Courts for arriving at the correct legal meaning that can be assigned to an enactment. It was observed that it is the cardinal principle of construction of statutes that the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. Thus construed in the light of the guidelines laid down in the above cases, Rule 3-A of Order XXIII, CPC leave no scope for any conclusion that the words 'not lawful' cover only such cases which fall within the purview of Section 23 of the Indian Contract Act and the bar would not operate in all other cases. This demonstrates the fallacy of the above contention raised by Mr. Moulik and also the reason as to why it cannot be accepted as sound. 16. The next submission made by Mr. Moulik is that, the learned trial Court while passing the impugned order dismissing the suit of the Plaintiff as being hit by Order XXIII, Rule 3-A of the Code, failed to take into account the case of the Plaintiff that the compromise was vitiated by undue influence, fraud and coercion and erroneously held that, as the challenge to the compromise decree in the present case was not on such ground, the observation made in that a suit to set aside compromise decree vitiated by fraud, undue influence and coercion etc., lies, would be of no assistance to the Plaintiffs/Appellants. A perusal of the decision (S. G. Thiruappa v. T. Ananda) does go to show that it has been observed that a compromise decree can be challenged on the ground that it was entered into or achieved by exercising fraud, undue influence and coercion arid it would not be correct to say that a compromise decree cannot be challenged on such grounds in view of Rule 3-A. In his reply, Mr. R. K. Agarwal, the learned Counsel for the Respondents submitted that this judgment was of no assistance to the Appellants as it was per incuriam in view of the prior existence of a judgment of the coordinate bench of the same High Court reported in AIR 1985 Karnataka 270. 17. A perusal of the above judgment does show that a coordinate bench of the same High Court had held earlier that a suit to question compromise decree on the grounds of fraud or misrepresentation is barred by Order XXIII, Rule 3-A and filing an application Under Section 151, CPC was the only remedy an aggrieved party could take resort to. The Hon'ble Supreme Court in State of Bihar v. Kalika Kuer alias Kalika Singh and Ors. has held that an earlier decision of a coordinate Bench of the same High Court is binding on later coordinate Bench and the later coordinate Bench must either follow it or refer the matter to larger Bench (Paras 4 & 10). Since no such approach was adopted by the coordinate Bench of the same High Court in the later decision rendered in the above case , the decision must be taken as per incuriam. It is a well settled principal of law that decisions, which are per incuriam, do not have the binding force of precedent . Besides, it is now well settled after the law laid down by the Hon'ble Supreme Court in Banwari Lal's case (supra), that neither an appeal against the order recording or refusing to record a compromise would lie nor a remedy by way of filing as separate suit is available in view of Rule 3-A of Order 23. 18. Lastly, Mr. Moulik submitted that the question whether a suit is maintainable or not

involves mixed questions of law and fact and such a question cannot be tried as a preliminary issue. It is, however, conceded by the learned Sr. Counsel that the preliminary issue in the case was taken up for hearing on the request of the learned Counsel for both sides. Admittedly, the present Plain tiffs/Appellants participated during the hearing of the preliminary issue. In view of this, it is plain that the Appellants cannot now be allowed to re-agitate the question. 19. Therefore, it follows from the above discussion and the observations made that the impugned order does not suffer from any legal infirmity and consequently, the appeal is devoid of merit. In the result, the Appeal is hereby dismissed. In the circumstances of the case, there shall be no order as to cost. Records of the lower Court may be returned forthwith.