Sakina Sultanali Sunesara (Momin) vs Shia Imami Ismaili Momin Jamat Samaj on 28 August, 2019

Equivalent citations: AIR 2020 GUJARAT 12, AIR 2020 GUJRAT 12, AIRONLINE 2019 GUJ 502 (2019) 3 GUJ LH 256, (2019) 3 GUJ LH 256

Author: Bela M. Trivedi

Bench: Bela M. Trivedi, G.R.Udhwani, V.P. Patel

C/AO/33/2017 CAV JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/APPEAL FROM ORDER NO. 33 of 2017

With

CIVIL APPLICATION (FOR STAY) NO. 1 of 2017

In R/APPEAL FROM ORDER NO. 33 of 2017

With

CIVIL APPLICATION (FOR BRINGING HEIRS) NO. 1 of 2018

In R/APPEAL FROM ORDER NO. 33 of 2017

With

CIVIL APPLICATION (FOR DIRECTION) NO. 2 of 2017

In R/APPEAL FROM ORDER NO. 33 of 2017

With

CIVIL APPLICATION (FOR JOINING PARTY) NO. 3 of 2017

In R/APPEAL FROM ORDER NO. 33 of 2017

With

R/APPEAL FROM ORDER NO. 16 of 2017

With

CIVIL APPLICATION (FOR BRINGING HEIRS) NO. 1 of 2018

In R/APPEAL FROM ORDER NO. 16 of 2017

With

CIVIL APPLICATION (FOR STAY) NO. 2 of 2017

In R/APPEAL FROM ORDER NO. 16 of 2017

With

CIVIL APPLICATION (FOR DIRECTION) NO. 3 of 2017

In R/APPEAL FROM ORDER NO. 16 of 2017

With

CIVIL APPLICATION (FOR JOINING PARTY) NO. 4 of 2017

In R/APPEAL FROM ORDER NO. 16 of 2017

With

R/APPEAL FROM ORDER NO. 18 of 2017

With

CIVIL APPLICATION (FOR BRINGING HEIRS) NO. 1 of 2018

In R/APPEAL FROM ORDER NO. 18 of 2017
With
CIVIL APPLICATION (FOR STAY) NO. 3 of 2017
In R/APPEAL FROM ORDER NO. 18 of 2017
With
CIVIL APPLICATION (FOR DIRECTION) NO. 4 of 2017
In R/APPEAL FROM ORDER NO. 18 of 2017
With
CIVIL APPLICATION (FOR JOINING PARTY) NO. 5 of 2017
In R/APPEAL FROM ORDER NO. 18 of 2017

With
R/APPEAL FROM ORDER NO. 19 of 2017
With
CIVIL APPLICATION (FOR BRINGING HEIRS) NO. 1 of 2018
In R/APPEAL FROM ORDER NO. 19 of 2017
With
CIVIL APPLICATION (FOR LEAVE TO APPEAL) NO. 1 of 2017
In R/APPEAL FROM ORDER NO. 19 of 2017
With
CIVIL APPLICATION (FOR STAY) NO. 3 of 2017
In R/APPEAL FROM ORDER NO. 19 of 2017
With
CIVIL APPLICATION (FOR DIRECTION) NO. 4 of 2017
In R/APPEAL FROM ORDER NO. 19 of 2017
With
CIVIL APPLICATION (FOR JOINING PARTY) NO. 5 of 2017
In R/APPEAL FROM ORDER NO. 19 of 2017
With
R/APPEAL FROM ORDER NO. 35 of 2017
With
CIVIL APPLICATION (FOR BRINGING HEIRS) NO. 1 of 2018
In R/APPEAL FROM ORDER NO. 35 of 2017
With
CIVIL APPLICATION (FOR INTERIM RELIEF) NO. 2 of 2017
In R/APPEAL FROM ORDER NO. 35 of 2017
With
CIVIL APPLICATION (FOR DIRECTION) NO. 3 of 2017
In R/APPEAL FROM ORDER NO. 35 of 2017
With
CIVIL APPLICATION (FOR JOINING PARTY) NO. 4 of 2017
In R/APPEAL FROM ORDER NO. 35 of 2017
With
R/APPEAL FROM ORDER NO. 36 of 2017
With

CIVIL APPLICATION (FOR BRINGING HEIRS) NO. 1 of 2018
In R/APPEAL FROM ORDER NO. 36 of 2017
With
CIVIL APPLICATION (FOR INTERIM RELIEF) NO. 2 of 2017
In R/APPEAL FROM ORDER NO. 36 of 2017
With
CIVIL APPLICATION (FOR DIRECTION) NO. 3 of 2017
In R/APPEAL FROM ORDER NO. 36 of 2017
With
CIVIL APPLICATION (FOR JOINING PARTY) NO. 4 of 2017
In R/APPEAL FROM ORDER NO. 36 of 2017

With
R/SPECIAL CIVIL APPLICATION NO. 20260 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE BELA M. TRIVEDI Sd/-

With
HONOURABLE MR.JUSTICE G.R.UDHWANI Sd/-

and
HONOURABLE MR.JUSTICE V.P. PATEL Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? NO

2 To be referred to the Reporter or not ? YES

3 Whether their Lordships wish to see the fair copy of the judgment ? YES

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? NO

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SAKINA SULTANALI SUNESARA (MOMIN) & 3 other(s)
Versus
SHIA IMAMI ISMAILI MOMIN JAMAT SAMAJ & 3 other(s)

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Appearance:
MR AS VAKIL(962) for the Appellant(s) No. 1,2,3,4
MR MANAV A MEHTA(3246) for the Respondent(s) No. 1
MR DJ BHATT(164) for the Respondent(s) No. 2
MR NACHIKET A DAVE(5308) for the Respondent(s) No. 2
MR DHAVAL D VYAS(3225) for the Respondent(s) No. 3
MR MEHUL S. SHAH, SR. ADVOCATE WITH MR MUKESH A PATEL(636) for the Respondent(s) No. 4
NOTICE SERVED BY DS(5) for the Respondent(s) No. 1

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CORAM: HONOURABLE MS.JUSTICE BELA M. TRIVEDI
and
HONOURABLE MR.JUSTICE G.R.UDHWANI
and

HONOURABLE MR.JUSTICE V.P. PATEL

Date : 28/08/2019

CAV JUDGMENT

(PER : HONOURABLE MS.JUSTICE BELA M. TRIVEDI)

1. The following issues have been placed for consideration before the Full Bench, pursuant to the order passed by the Single Bench on 7.12.2017 in the captioned matters:-

> "(A) In case of a decree passed by the Trial Court, on the basis of compromise between the parties ('Consent Decree'), what remedy the 'aggrieved party' would have before the Appellate Court. Whether it would be 'First Appeal' under Section 96 of CPC or 'Appeal from Order' under Order 43 Rule 1 A of the CPC.
>
> (B) Which of the following two sets of the decisions of the Division Benches of this Court, connotes the correct position of law.
>
> (i) Judgment of the Division Bench of this Court dated 04.07.2013 recorded on First Appeal No.3804 of 2012 in the case of Legal Heirs of Decd. Ullasbhai Parsottambhai (supra) and
>
> (ii) Order of the Division Bench of this Court dated 27.12.2012 recorded on Civil Application No.11987 of 2012 in the case of Indiraben Ratilal Adhia (supra).

OR

(i) The judgment of the Division Bench of this Court, in the case of M/s.

Sanskruti Infra Developers Pvt. Ltd. (supra), (dated 16.08.2016 recorded on First Appeal No.2536 of 2015) as noted in para:7.1 above, and

(ii) the judgment of the Division Bench of this Court in the case of Kantibhai Viththalbhai Ukani (supra), (Civil Application (Leave to Appeal) No.5223 of 2016 □order dated 11.08.2016), as noted in para:7.2 above.

(C) Whether an application by an 'aggrieved party' before the Trial Court for setting aside a 'consent decree', invoking Order 23 Rule 3 of CPC would be maintainable."

2. The brief facts as transpiring from the record are that the Appellants of the Appeal from Order No.16 of 2017, who are the same as the Appellants in Appeal from Order No.33 of 2017, were sued in a suit being Special Civil Suit No.6 of 2016 and Special Civil Suit No.19 of 2016 respectively through their power-of- attorney holder. The power-of-attorney holder was stated to have accepted the summons in the said two suits. The said power-of-attorney holder entered into a compromise with the plaintiffs of the said two suits, and the decrees came to be passed by the Court on the basis of the said compromise. According to the appellants, the said power-of-attorney was already cancelled since long, and therefore, the said power-of-attorney holder had acted unauthorizedly. Thus, according to the appellants of the said two Appeals from Order, though the appellants were the party to the said two suits, they were actually not the party to the consent/compromise when the decree dated 15.3.2016 and 17.12.2016 were passed in the said two suits. Being aggrieved by the said two decrees passed in the Special Civil Suit No.6 of 2016 and Special Civil Suit No.19 of 2016, which were passed after recording the compromise, the A. O. No.16 of 2017 and the A. O. No.33 of 2017 respectively have been filed under Order XLIII Rule 1-A of Civil Procedure Code, 1908 (hereinafter referred to as "the CPC").

3. The Appellants of the A. O. No.18 of 2017 and of the A. O. No.19 of 2017 have also challenged the impugned decree dated 15.3.2016 in Special Civil Suit No.6 of 2016, however, the said Appellants were not the party to the said suit.

4. The Appellants of the A. O. No.35 of 2017 and of the A. O. No.36 of 2017 have also challenged the impugned decree dated 17.12.2016 passed in Special Civil Suit No.19 of 2016, however, the said appellants were also not the party to the said suit. It may be noted that the appellants of the A. O. No.18 of 2017 and the A. O. No.35 of 2017 are the same appellants, and similarly the appellants of the A. O. No.19 of 2017 and the A. O. No.36 of 2017 are also the same.

5. Thus, the appellants of A. O. No.16 of 2017 and A. O. No.33 of 2017 are the parties to the suit, but allegedly not the parties to the compromise. The appellants of A. O. No.18 of 2017 and A. O. No.19 of 2017 were neither the parties to the Special Civil Suit No.6 of 2016, nor were the parties to the compromise. Similarly, the appellants of A. O. No.35 of 2017 and A. O. No.36 of 2017 were also

neither the parties to the Special Civil Suit No.19 of 2016, nor were the parties to the compromise.

6. Having regard to the issues referred to the Full Bench by the Single Bench, the reference of the relevant provisions of the Civil Procedure Code (hereinafter referred to as "the CPC"), would be beneficial.

Relevant provisions of CPC:

7. By the Amendment Act 104 of 1976 ("Amendment Act of 1976"), following four provisions (relevant for the present issues) were deleted/inserted in the CPC viz:

(i) The 'Proviso' and 'Explanation' to Rule 3 of Order XXIII were inserted;

(ii) Rule 3A to Order XXIII was inserted;

(iii) Clause (m) of Rule (1) of Order XLIII was deleted;

(iv) Rule 1□A, to Order XLIII was inserted.

8. Rule 3 and Rule 3A of Order XXIII read as under:-

> "R.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 is 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 not 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;"
>
> "3A. 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."

9. Clause (m) of Rule 1 of Order XLIII, as it existed read as under:-

"Clause (m) of R. 1.□an order under Order XXIII, Rule 3, recording or refusing to record an agreement, compromise or satisfaction."

10. Rule 1A of Order XLIII reads as under:-

"1A. Right to challenge non□appealable orders in appeal against decrees.□(1) Where any order is made under this Code against a party and thereupon any judgement is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgement should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded."

11. Section 96 of CPC reads as under:-

"96. Appeal from original decree:□(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.

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

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Cause, when the amount or value of the subject□matter of the original suit does not exceed ten thousand rupees."

12. The learned Advocates for the parties have made their respective submissions at length, which may be summarized as under:-

(I)Submission of the learned Advocate Mr. A. S. Vakil for the appellants:-

(i) In view of the amendments made in Order XXIII and Order XLIII of CPC, no appeal lies from the order passed under Rule 3 of Order XXIII, recording or refusing to record an agreement, compromise or satisfaction. In so far as newly added Rule 1A(2) of Order XLIII is concerned, the said provision in substance provides for a remedy, which is taken away as a result of deleting Clause (m) of Rule 1 of Order XLIII. The words "appeal against a decree..." appearing in the said Rule 1A(2) of Order XLIII, clearly contemplate an appeal under Section 96(1) i.e. First Appeal and not an Appeal from Order. The deletion of Clause (m) of Rule 1 of Order XLIII by the

Amendment Act of 1976 and simultaneous introduction of Rule 1A of Order XLIII makes it clear that no Appeal from Order would lie against an order under Rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction. Hence, the remedy of the "aggrieved person" would be under Rule 1A(2) of Order XLIII, which is an enabling provision. The scope of the word "Appellant" in Rule 1A(2) is wider than the scope of the word "Party" used in Rule 1A(1) of Order XLIII. The use of the word "appellant" in Rule 1A(2) of Order XLIII would include (a) the person who is party to the suit, (b) the person who is party to the suit but not party the recording of compromise and (c) the person who is not a party to the suit. The Appeal contemplated under Order XLIII, Rule 1A(2) is an Appeal under Section 96(1) read with Order XLI of CPC.

(ii) Where there is a contest on the question whether there was a

compromise or not, a decree accepting the compromise on the resolution of that controversy cannot be said to be a decree passed with the consent of the parties. Therefore, the bar under Section 96(3) will have no application in such a situation. He further submitted that if the provision of Rule 3A of Order XXIII is read harmoniously with the simultaneously added provision of Rule 1A(2) of Order XLIII, no suit would lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

(iii) Apropos the issue contained in paragraph 12(A) of the Reference Order, he submitted that the remedy of the "Aggrieved Party" before the Appellate Court would be "First Appeal" under Section 96(1) read with Order XLI and not an Appeal From Order under Rule 1A(2) of Order XLIII of CPC.

(iv) Apropos the issue contained in paragraph 12(C) of the Reference Order he submitted that the application before the trial Court

for setting aside the consent decree invoking the proviso to Rule 3 Order XXIII of CPC will be maintainable only by the party to the suit but not by a non-party to the suit. In the said provision, the word "party" in the proviso to Rule 3 of Order XXIII assumes significance qua the word "appellant" in Rule 1A(2) of Order XLIII. The power of the Court to decide the question regarding the validity of the adjustment, or satisfaction is confined between the parties to the suit only. Insofar as non-party to

the suit is concerned, the application under Rule 3 of Order XXIII will not be maintainable.

(v) Learned Advocate Mr.Vakil, therefore, concluded that the remedy of the "aggrieved party", which could be

either a party to the suit or a party which is not a party to the suit i.e. third party, against a decree passed by the trial Court passed upon a compromise between the parties would be (i) First Appeal under Section 96(1) of CPC, for which the appellant can question the validity of the compromise in view of Rule 1-A of Order 43 CPC, or (ii) an application under the proviso to Rule 3 of Order XXIII of CPC. Both the said remedies being concurrent, the aggrieved party cannot be compelled to avail any one of the said remedies. Further, the said concurrent remedies cannot be restricted only to the parties to the suit,but would be available also to the third party.

II) Submissions of the learned Sr. Advocate Mr.Mehul S. Shah for the respondents:-

(i) The consent decree is also a decree under Section 2(2) of CPC, and

therefore, it would be amenable to be challenged by way of First Appeal under Section 96(1), however, in view of Section 96(3) no such appeal is maintainable from a decree passed by the Court with the consent of the parties. He further submitted that Rule 1A inserted in Order XLIII itself suggests that the appeal against compromise decree is maintainable. Therefore, merely because Rule 1A is inserted in Order XLIII which governs Appeal from Order, the same would not make the appeal to be filed challenging compromise decree as Appeal from Order. The appeal, if to be filed, would be under Section 96(1) of CPC only, and therefore, the appeal against the compromise decree would be in the nature of First Appeal under Section 96(1) only.

(ii) Mr.Shah further submitted that the word "consent" as is used in Section 96(3) is comprehensive to include the word "adjustment" or the word "satisfaction" as is used under Order XXIII Rule 3, and the word "adjustment" includes "agreement" or "compromise" as per Order XXIII Rule

3. Further, by virtue of insertion of the proviso to Rule 3 of Order XXIII, the same Court is conferred with the power to decide the question in case of dispute between the parties regarding the factum of adjustment or satisfaction. According to him, in

> view of Order XXIII Rule 3, in case where there is part compromise or part satisfaction, the law envisages even passing of more than one decrees in the same suit; one upon the compromise or satisfaction and the other on merits.

(iii) He further submitted that upon deletion of Clause (m) from Rule 1 of Order XLIII, an appeal would also not be maintainable under Section 96(3) of CPC. Even an independent suit challenging lawfulness of compromise decree is not maintainable. Rule 3A being in continuity with Rule 3 of Order XXIII, which applies to the parties to the suit, on the bare reading of proviso to Rule 3 of Order XXIII, it implies that the only remedy available to the party to the suit would be to raise the dispute by approaching the very same Court and get adjudication from the very same Court, either under Section 151 of CPC, or by resorting to the provisions of filing review application under Section 114 read with Order XLVII Rule 1 of CPC.

(iv) If a party files First Appeal raising disputes qua the compromise, the appellate Court before whom such dispute is raised for the first time would not have any evidence in that regard, and eventually, the appellate Court may have to remand the case or to refer the issue under Order XLI Rule 25 to the trial Court.

(v) According to Mr.Shah, if a person is not a party to the decree and feels himself to be aggrieved by such consent decree, the bar under Rule 3A of Order XXIII would not apply to him, which otherwise applies to the party to the suit.

(vi) Mr.Shah, referring various decisions of the Supreme Court, and reconciling the ratios laid down in the said decisions, submitted that the party to the consent decree has to approach the very same Court under Order XXIII Rule 3, however, once the party approaches before the same Court and the same Court thereupon adjudicates and passes a decree, such decree would be amenable for filing First Appeal under Section 96(1) read with Order XLIII Rule 1A(2).

13. Since the learned Advocates have referred to and relied upon various decisions of the Supreme Court on the interpretation of the provisions contained in Order XXIII Rule 3, Order XLIII Rule 1A and Section 96 of CPC, it would be apt to reproduce the relevant part of the said decisions.

14. In case of Banwari Lal Vs. Chando Devi and Anr., reported in (1993) 1 SCC 581, the subordinate Court had passed the decree on the basis of an alleged compromise entered into between the parties. The plaintiff subsequently filed an application to recall the order disposing of the suit on the ground that his Advocate had played fraud with him. The subordinate Court recalled the said order and restored the suit, considering various facts and circumstances, including the fact that the compromise petition was not signed by both the parties. The said order was challenged by the defendant by filing a revision application before the High Court. The Single Bench in High Court set aside the order of subordinate Court on the ground that the petition of compromise was really an application filed by the plaintiff for withdrawal of suit under Order XXIII Rule 1, and therefore, there was no question of treating it to be an order under Order XXIII Rule 3 of the Code. The said order passed in Revision Application came to be challenged by the plaintiff - appellant before the Supreme Court. The Supreme Court observed at paragraphs 6 to 9, 13 and 14 as under:-

"6. The experience of the courts has been that on many occasions parties having filed petitions of compromise on basis of which decrees are prepared, later for one reason or other challenge the validity of such compromise. For setting aside such decrees suits used to be filed which dragged on for years including appeals to different courts. Keeping in view the predicament of the courts and the public, several amendments have been introduced in Order 23 of the Code which contain provisions relating to withdrawal and adjustment of suit by Civil Procedure Code (Amendment) Act, 1976. Rule 1 of Order 23 of the Code prescribes that at any time after the institution of the suit, the plaintiff may abandon his suit or abandon a part of his claim. Rule 1(3) provides that where the Court is satisfied

(a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject□ matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw such suit with liberty to institute a fresh suit. In view of Rule 1(4) if plaintiff abandons his suit or withdraws such suit without permission referred to above, he shall be precluded from instituting any such suit in respect of such subject□matter. Rule 3 of Order 23 which contained the procedure regarding compromise of the suit was also amended to curtail vexatious and tiring litigation while challenging a compromise decree. Not only in Rule 3 some special requirements were introduced before a compromise is recorded by the Court including that the lawful agreement or a compromise must be in writing and signed by the parties, a proviso with an explanation was also added which is as follows:□ "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."

7. By adding the proviso along with an explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the Court which had recorded the compromise in question. That Court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The explanation made it clear that an agreement or a compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of the said Rule. Having introduced the proviso along with the explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3A in respect of institution of a separate suit for setting aside a decree on basis of a compromise saying:□3A. Bar to suit □No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

8. Earlier under Order 43, Rule 1(m), an appeal was maintainable against an order under Rule 3 of Order 23 recording or refusing to record an agreement, compromise or satisfaction. But by the amending Act aforesaid that clause has been deleted; the result whereof is that now no appeal is maintainable against an order recording or refusing to record an agreement or compromise under Rule 3 of Order 23. Being conscious that the right of appeal against the order recording a compromise or refusing to record a compromise was being taken away, a new Rule 1A has been added to Order 43 which is as follows:□1A. Right to challenge non□appealable orders in appeal against decree.□(1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded.

9. Section 96(3) of the Code says that no appeal shall lie from a decree passed by the Court with the consent of the parties. Rule 1A(2) has been introduced saying that against a decree passed in a suit after recording a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should not have been recorded. When Section 96(3) bars an appeal against decree passed with the consent of parties, it implies that such decree is valid and binding on the parties unless set aside by the procedure prescribed or available to the parties. One such remedy available was by filing the appeal under Order 43, Rule 1(m). If the order recording the compromise was set aside, there was no necessity or occasion to file an appeal against the decree. Similarly a suit used to be filed for setting aside such decree on the ground that the decree is based on an invalid and illegal compromise not binding on the plaintiff of the second suit. But after the amendments which have been introduced, neither an appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3A of Order 23. As such a right has been given under Rule 1A(2) of Order 43 to a party, who challenges the recording of the compromise, to question the validity thereof while preferring an appeal against the decree. Section 96(3) of the Code shall not be a bar to such an appeal because Section 96(3) is applicable to cases where the factum of compromise or agreement is not in dispute.

10. xxx

11. xxx

12. xxx

13. When the amending Act introduced a proviso along with an explanation to Rule 3 of Order 23 saying that where it is alleged by one party and denied by other that an adjustment or satisfaction has been arrived at, "the Court shall decide the question", the Court before which a petition of compromise is filed and which has recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on basis of any lawful agreement. To make the

enquiry in respect of validity of the agreement or the compromise more comprehensive, the explanation to the proviso says that an agreement or compromise "which is void or voidable under the Indian Contract Act..." shall not be deemed to be lawful within the meaning of the said Rule. In view of the proviso read with the explanation, a Court which had entertained the petition of Compromise has to examine whether the compromise was void or voidable under the Indian Contract Act. Even Rule 1(m) of Order 43 has been deleted under which an appeal was maintainable against an order recording a compromise. As such a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23, or an appeal under Section 96(1) of the Code, in which he can now question the validity of the compromise in view of Rule 1A of Order 43 of the Code.

14. The application for exercise of power under proviso to Rule 3 of Order 23 can be labeled under Section 151 of the Code but when by the amending Act specifically such power has been vested in the Court before which the petition of compromise had been filed, the power in appropriate cases has to be exercised under the said proviso to Rule

3."

15. In case of Kishun Vs. Behari, reported in (2005) 6 SCC 300, the plaintiff in the suit seeking cancellation of the gift deed executed by his father in favour of his brother (the defendant in the suit), filed an application before the trial Court under Order XXIII, Rule 3 asserting that there was a compromise of dispute between the parties. He provided along with the said application, an alleged joint statement said to have been signed by all the parties and filed before the Tahsildar. The said application was objected by the defendants, denying any compromise having taken place. The trial Court rejected the said application filed under Order XXIII, Rule 3 on the ground that there was no valid compromise or adjustment of disputes between the parties. The appellate Court set aside the said order of trial Court in the Appeal filed by the Original Plaintiff, and directed the trial Court to proceed with the matter in terms of the compromise petition. The original defendants filed a revision application before the High Court against the said order passed by the appellate Court, however, pending the said Revision Application, the trial Court implemented the directions of the appellate Court and passed the decree in terms of the compromise petition said to have been filed before the Tahsildar. The Revision Application came to be disposed of as having become infructuous. The original defendants filed an Appeal before the Appellate Court against the decree passed by the trial Court on the basis of the alleged compromise. The Appellate Court allowed the said Appeal observing that there was no lawful compromise of disputes between the parties. The original plaintiff filed a Second Appeal before the High Court. During the pendency of Second Appeal, both the parties i.e. the original plaintiff and the defendants expired, however, the High Court proceeded to allow the Second Appeal on the ground that an appeal against compromise decree filed by the defendant was not maintainable in view of Section 96(3) of the Code. The said decree having been challenged before the Supreme Court, the three-Judge Bench of the Supreme Court set aside the said decree passed by the High Court as it was a decree passed against the parties, who were dead, and therefore, a nullity, however, further observed in paragraph 7 as under:-

> "7. That apart, we are of the view that the High Court was in error in holding that the appeal filed by Kishun against the decree of the trial court accepting a compromise

which was disputed by him, was not maintainable. When on a dispute in that behalf being raised, an enquiry is made (now it has to be done in view of the proviso to Order 23 Rule 3 of the Code added by Act 104 of 1976) and the suit is decreed on the basis of a compromise based on that enquiry, it could not be held to be a decree passed on consent within the meaning of Section 96(3) of the Code. Section 96(3) contemplates non□appealability of a decree passed by the court with the consent of parties. Obviously, when one of the parties sets up a compromise and the other disputes it and the court is forced to adjudicate on whether there was a compromise or not and to pass a decree, it would not be understood as a decree passed by the court with the consent of the parties. As we have noticed earlier, no appeal is provided after 1.2.1977, against an order rejecting or accepting a compromise after an enquiry under the proviso to Order 23 Rule 3, either by Section 104 or by Order 43 Rule 1 of the Code. Only when the acceptance of the compromise receives the imprimatur of the court and it becomes a decree, or the court proceeds to pass a decree on merits rejecting the compromise set up, it becomes appealable, unless of course, the appeal is barred by Section 96(3) of the Code. We have already indicated that when there is a contest on the question whether there was a compromise or not, a decree accepting the compromise on resolution of that controversy, cannot be said to be a decree passed with the consent of the parties. Therefore, the bar under Section 96(3) of the Code could not have application. An appeal and a second appeal with its limitations would be available to the party feeling aggrieved by the decree based on such a disputed compromise or on a rejection of the compromise set up."

16. In case of Pusha Devi Bhagat Vs. Rajinder Singh and Ors., reported in (2006) 5 SCC 566, the suit filed by the plaintiffs - landlords seeking possession of the suit premises let out to a partnership firm for using it as a residence by one of its partners i.e. Pushpadevi, was decreed by the trial Court on the basis of the statements of the Counsel of both the parties recorded by the Court, and signed by them in presence of the Court and in presence of the plaintiffs. As per the said statement made by the Counsel for the defendants, the defendants undertook to vacate the premises on or before a particular date. The Second defendant Pushpadevi filed an application before the trial Court under Section 151 of the Code for setting aside the said decree alleging that she had not instructed her Counsel to enter into compromise on her behalf, and that there was no written compromise between the parties duly signed by the parties. The said second defendant Pushpadevi thereafter did not pursue the said application, and filed an appeal before the District Court against the said consent decree. The said decree came to be set aside by the District Court on the ground that there was no compromise reduced into writing and signed by the parties. In the appeal against the said order preferred by the original plaintiffs - landlords, before the High Court under Order XLIII, Rule 1(u) of CPC, the High Court allowed the said appeal holding that the consent decree in question did not fall under the first part of Rule 3 of Order XXIII but fell under the second part of the said Rule, and that there was valid compromise under Rule 3 of Order XXIII. Since the original second defendant had expired during the pendency of the appeal before the High Court, her heirs challenged the said judgement of High Court before the Supreme Court. The Supreme Court raised two questions broadly as to whether the appeal filed by Pushpadevi under Section 96 of the Code against the consent decree was maintainable and whether the compromise resulting into a consent decree was

not a valid compromise under Order XXIII Rule 3 of CPC ? Thereafter, the Supreme Court considering the provisions of law, observed in paragraphs 17 to 25 as under:-

"17. The position that emerges from the amended provisions of Order 23, can be summed up thus :

> (i) No appeal is maintainable against a consent decree having regard to the specific bar contained in section 96(3) CPC.
>
> (ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) of Rule 1 Order 43.
>
> (iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3A.
>
> (iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree, is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21.8.2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27.8.2001), filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by second defendant was not maintainable, having regard to the express bar contained in section 96 (3) of the Code.

Re: Point No.(ii)

18. Order XXIII deals with withdrawal and adjustment of suits. Rule 3 relates to compromise of suits, relevant portion of which is extracted below :

> "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."

The said Rule consists of two parts. The first part provides that 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, the court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith. The second part provides that where a defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such satisfaction to be recorded and shall pass a decree in accordance therewith. The Rule also makes it clear that the compromise or agreement may relate to issues or disputes which are not the subject-matter of the suit and that such compromise or agreement may be entered not only among the parties to the suit, but others also, but the decree to be passed shall be confined 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. We are not, however, concerned with this aspect of the Rule in this appeal.

19. What is the difference between the first part and the second part of Rule 3 ? The first part refers to situations where an agreement or compromise is entered into in writing and signed by the parties. The said agreement or compromise is placed before the court. When the court is satisfied that the suit has been adjusted either wholly or in part by such agreement or compromise in writing and signed by the parties and that it is lawful, a decree follows in terms of what is agreed between the parties. The agreement/compromise spells out the agreed terms by which the claim is admitted or adjusted by mutual concessions or promises, so that the parties thereto can be held to their promise(s) in future and performance can be enforced by the execution of the decree to be passed in terms of it. On the other hand, the second part refers to cases where the defendant has satisfied the plaintiff about the claim. This may be by satisfying the plaintiff that his claim cannot be or need not be met or performed. It can also be by discharging or performing the required obligation. Where the defendant so 'satisfies' the plaintiff in respect of the subject-matter of the suit, nothing further remains to be done or enforced and there is no question of any 'enforcement' or 'execution' of the decree to be passed in terms of it. Let us illustrate with reference to a money-suit filed for recovery of say a sum of Rupees one lakh. Parties may enter into a lawful agreement or compromise in writing and signed by them, agreeing that the defendant will pay the sum of Rupees one lakh within a specified period or specified manner or may agree that only a sum of Rs.75,000 shall be paid by the defendant in full and final settlement of the claim. Such agreement or compromise will fall under the first Part and if defendant does not fulfill the promise, the plaintiff can enforce it by levying execution. On the other hand, the parties may submit to the court that defendant has already paid a sum of Rupees one lakh or Rs.75,000/- in full and final satisfaction or that the suit claim has been fully settled by the defendant out of court (either by mentioning the amount paid or not mentioning it) or that plaintiff will not press the claim. Here the obligation is already performed by the defendant or plaintiff agrees that he will not enforce performance and nothing remains to be performed by the defendant. As the order that follows merely records the extinguishment or satisfaction of the claim or non-existence of the claim, it is not capable of being 'enforced' by levy of execution, as there is no obligation to be performed by the defendant in pursuance of the decree.

Such 'satisfaction' need not be expressed by an agreement or compromise in writing and signed by the parties. It can be by a unilateral submission by the plaintiff or his counsel. Such satisfaction will fall under the second part. Of course even when there is such satisfaction of the claim or subject matter of the suit by the defendant and the matter falls under the second part, nothing prevents the parties from reducing such satisfaction of the claim/subject matter, into writing and signing the same. The difference between the two parts is this : Where the matter falls under the second part, what is reported is a completed action or settlement out of court putting an end to the dispute, and the resultant decree recording the satisfaction, is not capable of being enforced by levying execution. Where the matter falls under the first part, there is a promise or promises agreed to be performed or executed, and that can be enforced by levying execution. While agreements or compromises falling under the first part, can only be by an instrument or other form of writing signed by the parties, there is no such requirement in regard to settlements or satisfaction falling under the second part. Where the matter falls under the second part, it is sufficient if the plaintiff or plaintiff's counsel appears before the court and informs the court that the subject matter of the suit has already been settled or satisfied.

20. In a suit against the tenant for possession, if the settlement is that the tenant will vacate the premises within a specified time, it means that the possession could be recovered in execution of such decree in the event of the defendant failing to vacate the premises within the time agreed. Therefore, such settlement would fall under the first part. On the other hand, if both parties or the plaintiff submit to the court that the tenant has already vacated the premises and thus the claim for possession has been satisfied or if the plaintiff submits that he will not press the prayer for delivery of possession, the suit will be disposed of recording the same, under the second part. In such an event, there will be disposal of the suit, but no 'executable' decree.

21. In this case, under the settlement, the tenant undertook to vacate the suit property on a future date (that is 22.1.2002) and pay the agreed rent till then. The decree in pursuance of such settlement was an 'executable' decree. Therefore the settlement did not fall under the second part, but under the first part of Rule 3. The High Court obviously committed an error in holding that the case fell under the second part of Rule 3.

22. The next question is where an agreement or compromise falls under the first part, what is the meaning and significance of the words 'in writing' and 'signed by the parties' occurring in Rule 3 ? The appellant contends that the words 'in writing' and 'signed by the parties' would contemplate drawing up of a document or instrument or a compromise petition containing the terms of the settlement in writing and signed by the parties. The appellant points out that in this case, there is no such instrument, document or petition in writing and signed by the parties.

23. We will first consider the meaning of the words "signed by parties". Order 3 Rule 1 of CPC provides that any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf. The proviso thereto makes it clear that the Court can, if it so desires, direct that such appearance shall be made by the

party in person. Rule 4 provides that no pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power of attorney to make such appointment. Sub-rule (2) of Rule 4 provides that every such appointment shall be filed in Court and shall, for the purposes of sub-rule (1), be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client. The question whether 'signed by parties' would include signing by the pleader was considered by this Court in Byram Pestonji Gariwala v. Union Bank of India [1992 (1) SCC 31] with reference to Order 3 of CPC :

> "30. There is no reason to assume that the legislature intended to curtail the implied authority of counsel, engaged in the thick of proceedings in court, to compromise or agree on matters relating to the parties, even if such matters exceed the subject matter of the suit. The relationship of counsel and his party or the recognized agent and his principal is a matter of contract; and with the freedom of contract generally, the legislature does not interfere except when warranted by public policy, and the legislative intent is expressly made manifest. There is no such declaration of policy or indication of intent in the present case. The legislature has not evinced any intention to change the well recognized and universally acclaimed common law tradition .....
>
> 35. So long as the system of judicial administration in India continues unaltered, and so long as Parliament has not evinced an intention to change its basic character, there is no reason to assume that Parliament has, though not expressly, but impliedly reduced counsel's role or capacity to represent his client as effectively as in the past .....
>
> 37. We may, however, hasten to add that it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances demanding immediate adjustment of suit by agreement of compromise and the signature of the party cannot be obtained without undue delay. In these days of easier and quicker communication, such contingency may seldom arise. A wise and careful counsel will no doubt arm himself in advance with the necessary authority expressed in writing to meet all such contingencies in order that neither his authority nor integrity is ever doubted. .....
>
> 38. Considering the traditionally recognized role of counsel in the common law system, and the evil sought to be remedied by Parliament by the C.P.C. (Amendment) Act, 1976, namely, attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties, and allowing the compromise decree to comprehend even matters falling outside the subject matter of the suit, but relating to the parties, the legislature cannot, in the absence of express words to such effect, be presumed to have disallowed the parties to enter into a compromise by counsel in their cause or by their duly authorized agents. ....

> 39. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non□ resident persons. It has always been universally understood that a party can always act by his duly authorized representative. If a power□of□attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorization by vakalatnama, act on behalf of his client.. If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated."

[Emphasis supplied] The above view was reiterated in Jineshwardas v. Jagrani [2003 (11) SCC 372]. Therefore, the words 'by parties' refer not only to parties in person, but their attorney holders or duly authorized pleaders.

24. Let us now turn to the requirement of 'in writing' in Rule 3. In this case as noticed above, the respective statements of plaintiffs' counsel and defendants' counsel were recorded on oath by the trial court in regard to the terms of the compromise and those statements after being read over and accepted to be correct, were signed by the said counsel. If the terms of a compromise written on a paper in the form of an application or petition is considered as a compromise in writing, can it be said that the specific and categorical statements on oath recorded in writing by the court and duly read over and accepted to be correct by the person making the statement and signed by him, can be said to be not in writing? Obviously, no. We may also in this behalf refer to Section 3 of the Evidence Act which defines a document as any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means intended to be used or which may be used for the purpose of recording the matter. The statements recorded by the court will, therefore, amount to a compromise in writing.

25. Consequently, the statements of the parties or their counsel, recorded by the court and duly signed by the persons making the statements, would be 'statement in writing signed by the parties'. The court, however, has to satisfy itself that the terms of the compromise are lawful. In this case we find from the trial court records that the second defendant had executed a vakalatnama empowering her counsel Sri Dinesh Garg to act for her in respect of the suit and also to enter into any compromise. Hence there can be no doubt that Sri Dinesh Garg was authorized by the second defendant to enter into a compromise. We also find that the counsel for the plaintiffs and counsel for the defendants made solemn statements on oath before the trial court specifying the terms of compromise, which were duly recorded in writing and signed by them. The requirements of the first part of Rule 3 of Order XXIII are fully satisfied in this case."

17. In case of Mahalaxmi Cooperative Housing Society Limited and Ors. Vs. Ashabhai Atmaram Patel and Ors., reported in (2013) 4 SCC 404, the Supreme Court following the Pushpadevi's case on interpretation of the provisions contained in Order XXIII Rule 3, observed in paragraphs 40 to 42 as under:-

> "40. Rule 3 of Order XXIII, on the other hand, speaks of compromise of suit. Rule 3 of Order XXIII refers to distinct classes of compromise in suits. The first part refers

to lawful agreement or compromise arrived at by the parties out of court, which is under the 1976 amendment of the CPC required to be in writing and signed by the parties. The second part of the Rule deals with the cases where the defendant satisfies the plaintiff in respect of whole or a part of the suit claim which is different from first part of Rule 3. The expression 'agreement' or 'compromise' refer to first part and not the second part of Rule 3. The second part gives emphasis to the expression 'satisfaction'. In Pushpa Devi Bhagat v. Rajinder Singh, (2006) 5 SCC 566 : (AIR 2006 SC 2628), this court has recognised that the distinction deals with the distinction between the first part and the second part.

"19. What is the difference between the first part and second part of Rule 3? The first part refers to situations where an agreement or compromise is entered into in writing and signed by the parties. The said agreement or compromise is placed before the court. When the court is satisfied that the suit has been adjusted either wholly or in part by such agreement, or compromise in writing and signed by the parties and that it is lawful, a decree follows in terms of what is agreed between the parties. The agreement/compromise spells out the agreed terms by which the claim is admitted or adjusted by mutual concessions or promises, so that the parties thereto can be held to their promise(s) in future and performance can be enforced by the execution of the decree to be passed in terms of it. On the other hand, the second part refers to cases where the defendant has satisfied the plaintiff about the claim. This may be by satisfying the plaintiff that his claim cannot be or need not be met or performed. It can also be by discharging or performing the required obligation. Where the defendant so 'satisfies' the plaintiff in respect of the subject□matter of the suit, nothing further remains to be done or enforced and there is no question of any 'enforcement' or 'execution' of the decree to be passed in terms of it."

41. Further, it is relevant to note the word 'satisfaction' has been used in contradistinction to the word 'adjustment' by agreement or compromise by the parties. The requirement of 'in writing and signed by the parties' does not apply to the second part where the defendant satisfies the plaintiff in respect of whole or part of the subject□matter of the suit.

42. The proviso to Rule 3 as inserted by the Amendment Act, 1976 enjoins the court to decide the question where one party alleges that the matter is adjusted by an agreement or compromise but the other party denies the allegation. The court is, therefore, called upon to decide the lis one way or the other. The proviso expressly and specifically states that the court shall not grant such adjournment for deciding the question unless it thinks fit to grant such adjournment by recording reasons."

18. In case of Daljit Kaur and Anr. Vs. Muktar Steels Pvt. Ltd. & Ors., reported in (2013) 16 SCC 607, the trial Court after appreciating the oral and documentary evidence led in the suit, opined that the compromise as stated by the plaintiff but disputed by the defendant, was arrived at between the parties, and decreed the suit accordingly. In the appeal before the City Civil Court, Hyderabad also, the appellate Court reappreciated the evidence and held that both the parties had arrived at a compromise in question, and that the decree passed by the trial Court being a consent decree, no

appeal under Section 96(3) would lie. The Second Appeal preferred before the High Court was also dismissed by the Single Bench. In the Appeal, by special leave, the Supreme Court distinguishing the ratio laid down by the two-Judge Bench in Pushpadevi's case and following the ratio laid down by the three-Judge Bench in Kishun's case, observed as under in paragraph 18:-

> 18. The ratio laid down in the aforesaid case applies on all fours to the case at hand. The defendants□respondents had raised a dispute with regard to validity of the compromise and the concerned court had conducted an enquiry. Thus, a decree had been passed on the basis of the compromise based on that enquiry and, therefore, it cannot be said to be a consent decree. The decision in Pushpa Devi Bhagat (supra) has to be understood that when a decree is passed without any dispute being raised or contested in the court of first instance, the decree being passed on consent cannot be appealed against. As the present controversy is covered by the decision rendered in Kishun (supra), we are not required to dwell upon the applicability of Order XLIII, Rule 1A of the CPC."

> 19. In case of R. Rajanna Vs. S. R. Venkataswamy and Ors., reported in (2014) 15 SCC 471 the question was whether the validity of a decree passed on a compromise be challenged in a separate suit ? In the said case, the plaintiff's suit for declaration and injunction in respect of a gift deed was decreed against the defendant by the trial Court. In the appeal filed before the High Court a compromise was allegedly arrived at between the parties, on the basis of which High Court set aside the decree passed by the trial Court and allowed the Appeal. Being aggrieved by the said decree, the aggrieved original plaintiff filed a separate suit praying for setting aside the compromise recorded by the High Court and the decree passed thereon, alleging commission of fraud by the other party i.e. the original defendant. In the said subsequent suit, the defendant filed an application under Order VII, Rule 11 of CPC on the ground that separate suit was barred under Order XXIII, Rule 3A. The said application came to be allowed and the plaint came to be rejected by the trial Court. After the rejection of the plaint, the original plaintiff filed an application in the original First Appeal before the High Court praying for setting aside its earlier order, whereby the High Court had set aside the decree passed in the first suit on the basis of the compromise allegedly arrived at by the parties pending the appeal. The High Court took the view that even if the compromise was fraudulent, since the plaintiff had filed the separate suit for declaration, he ought to pursue the same to its logical conclusion. The High Court further held that even if the plaint filed by the plaintiff was rejected under Order VII, Rule 11, the plaintiff ought to seek redress against any such order of rejection. The High Court, therefore, declined to consider the prayer to set aside the decree passed on compromise. In the appeal before the Supreme Court it was observed in paragraph 11 as under:-

> "11. It is manifest from a plain reading of the above that in terms of the proviso to Order XXIII Rule 3 where one party alleges and the other denies adjustment or satisfaction of any suit by a lawful agreement or compromise in writing and signed by

> the parties, the Court before whom such question is raised, shall decide the same. What is important is that in terms of Explanation to Order XXIII Rule 3, the agreement or compromise shall not be deemed to be lawful within meaning of the said rule if the same is void or voidable under Indian Contract Act, 1872. It follows that in every case where the question arises whether or not there has been a lawful agreement or compromise in writing and signed by the parties, the question whether the agreement or compromise is lawful has to be determined by the Court concerned. What is lawful will in turn depend upon whether the allegations suggest any infirmity in the compromise and the decree that would make the same void or voidable under the Contract Act. More importantly, Order XXIII Rule 3A clearly bars a suit to set aside a decree on the ground that the compromise on which the decree is based was not lawful. This implies that no sooner a question relating to lawfulness of the agreement or compromise is raised before the Court that passed the decree on the basis of any such agreement or compromise, it is that Court and that Court alone who can examine and determine that question. The Court cannot direct the parties to file a separate suit on the subject for no such suit will lie in view of the provisions of Order XXIII Rule 3A of CPC. That is precisely what has happened in the case at hand. When the appellant filed OS No.5326 of 2005 to challenge validity of the compromise decree, the Court before whom the suit came up rejected the plaint under Order VII Rule 11 CPC on the application made by the respondents holding that such a suit was barred by the provisions of Order XXIII Rule 3A of the CPC. Having thus got the plaint rejected, the defendants (respondents herein) could hardly be heard to argue that the plaintiff (appellant herein) ought to pursue his remedy against the compromise decree in pursuance of OS No.5326 of 2005 and if the plaint in the suit has been rejected to pursue his remedy against such rejection before a higher Court."

20. In the light of the afore-stated legal position settled by the Supreme Court let us consider the questions referred by the Single Bench. So far as the first question posed by the Single Bench in the Reference Order is concerned, it reads as under:-

> "In case of decree passed by the trial Court on the basis of compromise between the parties (consent decree), what remedy the aggrieved party would have before the appellate Court. Whether it would be "First Appeal" under Section 96 of CPC or "Appeal from Order" under Order XLIII Rule 1A of CPC?"

21. The afore-stated question appears to have been framed under the premise that the remedy of filing an appeal is provided under Order XLIII Rule 1A of CPC. However, on the careful reading of the said provision it transpires that no such remedy of filing an Appeal either against any order or any decree is provided therein. The first part of Rule 1A of the said Order XLIII states that where any order is made under the Code against the party and thereupon any judgement is pronounced against such party and the decree is drawn up, such party may in an appeal against the decree contend that such order should not have been made and the judgement should not have been pronounced. We are not much concerned with the first part of Rule 1A i.e. Sub-rule (1) of Rule 1A, and therefore, the same is not being dealt with in detail. Sub-rule (2) of Rule 1A, which is more

relevant for our purpose, states that in an appeal against the decree passed in the suit after recording a compromise or refusing to record a compromise it shall be open to the appellant to contest the decree on the ground that the compromise should or should not have been recorded. In this regard, it may be noted that the very opening words contained in Sub- rule (2) i.e. "in an appeal against the decree"

> implies that when an appeal is filed against the decree passed in the suit after recording the compromise or refusing to record compromise, the appellant could raise the contention that the compromise should or should not have been recorded. The said provision itself does not give any right to file any appeal either against the order or against the decree based on the compromise in the suit. It is true that before the deletion of Clause (m) of Rule 1 of Order XLIII, an Appeal from Order was maintainable under the said Rule against an order made under Order XXIII Rule 3 recoding or refusing to record an agreement, compromise or satisfaction.
>
> However, on deletion of the said Clause and simultaneous insertion of Rule 1A in Order XLIII, the right to file an Appeal from Order has been taken away and the concerned party has been permitted to contest the decree and raise the contention in the appeal that such a compromise should or should not have been recorded.

22. It cannot be gainsaid that an appeal would lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court under Section 96(1) read with Order XLI of CPC. As held by the Supreme Court in Banwarilal's case, after the amendments, neither an appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered under Rule 3A of Order XXIII. Such a right has been given under Rule 1A(2) of Order XLIII to a party, who challenges the recording of the compromise, to question the validity thereof while preferring an appeal against the decree passed in the suit.

23. Having said that let us examine as to what remedy an aggrieved party would have against the decree passed in the suit by the trial Court on the basis of the compromise between the parties (consent decree). The aggrieved party could be one of the parties to the suit who had signed the compromise. He could be the party to the suit but not the party to the compromise in the sense that the compromise might not have been signed by himself but by his authorized agent or pleader or power-of-attorney holder. The aggrieved party could also be a third party who was not the party to the suit. Hence, the Court will have to examine the issue taking into consideration different possible situations under which the decree under Order XXIII, Rule 3 could be challenged.

24. In order to deal with this issue, it would be apposite first refer to the provisions contained in Order XXIII Rule 3, which pertain to the compromise of the suit. The bare reading of the said provision implies that the said Rule is in two parts. The first part refers to the situation, where it is proved to the satisfaction of the Court that the suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties; and the second part refers to the situation where the defendant satisfies the plaintiff in respect of the whole or in part of the subject matter of the suit. In all the situations referred to in both the parts, the Court has to order such

agreement, compromise or satisfaction to be recorded, and 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. The Court, when it passes the decree considering the first part of the said provision, has to record its satisfaction that the suit has been adjusted wholly or in part by a lawful agreement or compromise and that the said agreement or compromise is in writing and is signed by the parties. As per the Explanation to the said Rule 3, an agreement or compromise which is void or voidable under the Indian Contract Act, 1872 shall not be deemed to be lawful within the meaning of the said Rule. Therefore, it would be incumbent on the part of the Court to record its satisfaction keeping in mind the provisions contained in the Indian Contract Act as to whether the agreement or compromise arrived at between the parties, is a lawful agreement or compromise. The second part of the said Rule deals with the situation, where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit. In the second part, the questions as to whether the suit has been adjusted by any compromise or agreement signed by the parties etc., do not arise. The Supreme Court in case of Pusha Devi Bhagat Vs. Rajinder Singh (supra) very precisely put the difference as under:-

> "19. ... The difference between the two parts is this : Where the matter falls under the second part, what is reported is a completed action or settlement out of court putting an end to the dispute, and the resultant decree recording the satisfaction, is not capable of being enforced by levying execution. Where the matter falls under the first part, there is a promise or promises agreed to be performed or executed, and that can be enforced by levying execution. While agreements or compromises falling under the first part, can only be by an instrument or other form of writing signed by the parties, there is no such requirement in regard to settlements or satisfaction falling under the second part. Where the matter falls under the second part, it is sufficient if the plaintiff or plaintiff's counsel appears before the court and informs the court that the subject matter of the suit has already been settled or satisfied."

25. Now, so far as the proviso to the said Rule 3 of Order XXIII is concerned, it states that when it is alleged by one party and denied by the other that an adjustment or the satisfaction has been arrived at, the Court has to decide the question; but the Court should not grant adjournment for the purpose of deciding the question, unless the Court for the reasons to be recorded, thinks fit to grant such adjournment. The said proviso applies to both the parts of the said Rule namely where the suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant has satisfied the plaintiff in respect of the whole or any part of the subject matter of the suit. Thus, when such adjustment or satisfaction is disputed by either of the parties to the suit, the Court has to decide the question without granting any adjournment. It is further contemplates passing of a decree in the suit between the parties to the suit, and the proviso to the said Rule also contemplates the dispute to be raised by the parties to the suit, inasmuch as it states 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". Further, such question could be raised by either of the parties to the suit before or after the decree is passed by the Court under Order XXIII, Rule 3 and the Court is obliged to decide such question. When no such question is raised by either of the parties and the decree is passed, it assumes the character of "Consent Decree" but when the dispute is raised and the Court

passes the decree after deciding such dispute or question, it could not be called a "consent decree", and therefore, not barred by Section 96(3) of CPC. As held by three-Judge Bench of Supreme Court in case of Kishun (supra), where there is a contest on the question whether there was a compromise or not, a decree accepting the compromise on resolution of that controversy can not be said to be a decree passed with the consent of the parties, and therefore, the bar under Section 96(3) of the Code would not have application. Thus, either of the parties who is aggrieved by such decree which is not a consent decree, could certainly file an Appeal under Section 96(1) of CPC. In such an appeal filed against the decree passed in the suit after recording a compromise, the appellant can contest the decree on the ground that the compromise should, or should not, have been recorded, in view of Rule 1A(2) of Order XLIII of CPC.

26. Now, there could be a situation where the parties to the suit arrive at a compromise, sign such compromise and request the Court to pass a decree, and the Court passes the decree, however, subsequently one of the parties realises his mistake or comes to know that some fraud was committed while arriving at the compromise with the other party. In such a situation, the aggrieved party, who was party to the compromise, can not file either the Appeal under Section 96(1) against such decree, the same being the consent decree, on account of the bar contained in Section 96(3), or a separate suit, on account of the bar contained in Rule 3A of Order XXIII. The only option open to such party, therefore, would be to approach the same Court which had passed the decree. As held by Supreme Court in case of R. Rajanna (supra), no sooner a question relating to the lawfulness of the agreement or compromise is raised before the Court that passed the decree on the basis of the compromise, it is that Court and that Court alone who can examine and determine that question. In Pushpadevi's case also the Court has categorically summarized the legal position and held that the only remedy available to the party to the consent decree to avoid such consent decree, is to approach the Court which recorded the compromise and made a decree in terms of it, and establish that there was no lawful compromise or agreement. In that event, the Court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. When the said question is decided by the Court which had passed the decree, the aggrieved party could file an appeal under Section 96(1), and the bar under Section 96(3) would not be attracted, as when the factum of compromise is disputed by either of the party, and such question is decided by the Court, it no longer remains a "consent decree" between the parties. In such an appeal filed against the decree passed in a suit after recording a compromise or refusing to record a compromise, the appellant can contest the decree on the ground that the compromise should, or should not have been recorded in view of Rule 1A(2) of Order XLIII of CPC.

27. It was sought to be submitted by the learned Advocates for the parties relying upon the decisions of the Supreme Court that there is an anomaly in the observations made by the Supreme Court in case of Banwarilal (supra) and in case of Pushpadevi (supra), inasmuch as in case of Banwarilal (supra), it has been observed that the party challenging the compromise can file a petition under the proviso to Rule 3 of Order XXIII or an appeal under Section 96(1) of the Code, in which he can question the validity of the compromise in view of Rule 1A of Order XLIII of the Code, whereas in case of Pushpadevi (supra), it has been held that the only remedy available to the party to a consent decree to avoid such consent decree is to approach the Court, which recorded the compromise and made a decree in terms of it and establish that there was no compromise. In the opinion of the

Court, there is hardly any anomaly in the observations made by the Supreme Court in the said two cases. The observations made by the Supreme Court in both the cases are required to be appreciated in the context in which they were made. In case of Banwarilal (supra) it has been held that Section 96(3) of the Code is applicable to the cases where the factum of compromise or agreement is not in dispute. It has also been held that when the amending Act introduced a proviso along with an explanation to Rule 3 of Order XXIII saying that where it is alleged by one party and denied by the other that the adjustment or satisfaction has been arrived at, "the Court shall decide the question", the Court before which a petition of compromise is filed and which had recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on the basis of any lawful agreement. Similarly in case of Pushpadevi (supra) also it has been held that no appeal is maintainable against the consent decree having recorded to the specific bar contained in Section 96(3) of CPC and that a consent decree operates as an estoppal and is valid and binding unless it is set aside by the Court, which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order XXIII. In any case, as per the settled legal position, if there is any anomaly or conflict in the decisions delivered by co-equal Benches of the Supreme Court the High Court should follow that decision which appears to it to state the law more elaborately and accurately. The Supreme Court in Pushpadevi's case has elaborately considered the provisions contained in Order XXIII, Rule 3 and Rule 3A, in the light of earlier judgements and thereof. The said principles have been followed in many subsequent judgements. The Court, therefore, has no hesitation in following the said principles and in holding that the only remedy available to a party to a consent decree to avoid such decree, is to approach the Court which recorded the compromise and made decree in terms of it, by filing an application under the proviso to Rule 3 of Order XXIII.

28. Now, there could be one more situation where the parties or one of the parties themselves would not have signed such compromise but his/their authorized agent or power-of-attorney holder would have signed the compromise on behalf of the concerned party, with or without the knowledge of such party, and the Court passes the decree on the basis of such compromise. If such decree is sought to be challenged by the party aggrieved, on the ground that the person who had signed the compromise had no authority to enter into such compromise or sign such compromise, then the question, may arise as to whether such a decree could be said to be a "consent decree" ? In the opinion of the Court, the decision in Pushpadevi's case, clinches the issue. The Supreme Court, in the said case considering the earlier decisions in the light of the provisions contained in Order III Rule 1 of CPC has held inter alia that the words "singed by the parties" would include the compromise signed by the duly authorized pleaders and their attorney holders. As stated earlier, in the said case, the decree was passed under Order XXIII, Rule 3 on the basis of the statements of the Counsel recorded by the Court and signed by them, and subsequently the defendant filed application under Section 151 for setting aside the said decree on the ground that she had not instructed her Counsel to enter into compromise. She without pursuing the said application also filed an appeal before the appellate Court against the said consent decree. The Supreme Court in the said case referred to the ratio in case of Byram Pestonji Gariwala Vs. Union Bank of India and Ors., reported in (1992) 1 SCC 31 in which similar issue as to whether the party himself should signed the compromise was dealt with, and it was observed as under:-

"39. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorised representative. If a power-attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorisation by vakalatnama, act on behalf of his client. Not to recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in court. If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated.

29. The said view has also been reiterated in case of Jineshwardas (D) by LRs and Ors.Vs. Jagrani (Smt) and Anr., reported in (2003) 11 SCC 372. In view of the said legal position, it is required to be held that the words "signed by the parties" referred to in Rule 3 of Order XXIII pertain to the compromise signed by not only the parties in person, but also by their authorized agents including the persons holding powers-of-attorney and their pleaders. It, therefore, follows that the decree passed in the suit on the basis of the compromise signed by the power-of-attorney holder or by duly authorized agent or pleader on behalf of the concerned party would be construed as the compromise signed by the concerned party. Such a decree would, therefore, be construed as the "consent decree" and hit by Section 96(3) and also by Order XXIII, Rule 3A of CPC. At this juncture, we may hasten to add that the Court while recording such compromise and passing the decree on the basis of such compromise signed by the power-of-attorney holders or pleaders on behalf of the concerned parties, should be little more cautious and must verify the genuinity and validity of the authority of the person signing on behalf of the concerned party.

30. Still there could be one more situation, where the third party who was not the party to suit or the party to the compromise but had an interest in the subject matter of the compromise, is aggrieved by the decree passed by the Court under Order XXIII, Rule 3 on the basis of the compromise arrived at between the parties to the suit. So what remedy would be available to him ? It cannot be gainsaid that the decree based on the compromise between the parties under Order XXIII, Rule 3, if remains unchallenged would be a "consent decree" binding to the parties to suit. However, when the person aggrieved is third party who was neither a party to the suit nor a party to the compromise on the basis of which the decree was passed by the Court in the suit, would not be bound by such decree. Such a decree could not be said to be a "consent decree" qua such third party, and therefore, neither the bar contained in Section 96(3) nor the bar under Rule 3A of Order XXIII would be application to him. Such an aggrieved party, with the leave of the Court can always file an appeal under Section 96(1) against the decree passed by the Court on the basis of the compromise, and can contest the decree on the ground that the compromise should, or should not have been recorded by the Court in view of Rule 1A(2) of Order XLIII of CPC. When the third party is vitally and adversely affected by the decree passed by the Court

under Order XXIII, Rule 3 on the basis of the compromise arrived at between the parties to the suit on the subject matter or otherwise of the suit, he can certainly, with the leave of the appellate Court, prefer an appeal and can contest such a decree passed under Order XXIII, Rule 3. One of the grounds to contest the decree could be that such a compromise should or should not have been recorded by the Court.

31. At this juncture, the word "party" used in Sub-rule (1) and the word "appellant" used in Sub-rule (2) of Rule 1A of Order XLIII assume importance. The Sub-rule (1) of Rule 1A relates to the order passed against the 'party' to the suit, and the appeal filed by 'such party', whereas the Sub-Rule (2) of the said Rule 1A relates to the appeal filed by the 'appellant'.

Such appellant may or may not be a party to the suit. The Sub-rule (2) is not confined to the appeal filed by the "party" to the suit. Hence, the third party, in the appeal against the decree passed in the suit under Rule 3 of Order XXIII can also contest such decree on the ground that such a compromise should not have been recorded.

32. In the opinion of the Court, such an aggrieved third party would also have an option to file an application for Review of the order recording the compromise or for Review of the decree based on the compromise between the parties to the suit, under Section 114 read with Order XLVII, Rule 1 of CPC, if the conditions precedent mentioned therein are satisfied. It has been held by the Supreme Court in case of Board of Control for Cricket, India Vs. Netaji Cricket Club, reported in AIR 2005 SC 592, that an application for Review under Order XLVII Rule 1 would be maintainable not only upon discovery of a new and important piece of evidence, or when there exists an error apparent on the face of record but also if the same is necessary on account of some mistake or for any other sufficient reason. What would constitute sufficient reason would depend upon facts and circumstances of each case. The words "sufficient reason" in Order XLVII, Rule 1 are wide enough to include a misconception of fact or law by a Court or by an advocate. An application for review may be necessitated by way of invoking he doctrine "actus curiae neminem gravabit", which means that the act of the Court shall prejudice no one. Therefore, it any person considers himself aggrieved by the order or decree passed under Order XXIII, Rule 3 may for sufficient reason apply for review of such decree or order under Order XLVII, Rule 1, subject to the conditions mentioned therein.

When an application for review is granted, the Court may at once re-hear the case or make such order in regard to the rehearing as it thinks fit, as contemplated in Rule 8 of Order XLVII of CPC.

33. In view of the aforesaid discussion and findings, the first and third questions referred by the Single Bench stand answered accordingly.

The second question as such would not survive, however, since it is raised, let us examine the cases referred in the said question. The second question posed is, as to which two sets of the decisions of the Division Benches connote the correct position of law - (i) the judgement of the Division Bench in case of the Legal Heirs of the deceased U. Parshotambhai (supra) and (ii) the order of the Division Bench in case of Indiraben R. Adhia (supra) OR (i) the judgement of the Division Bench in case of M/s.Sanskruti Developers Private Limited (supra) and (ii) the judgement of the Division Bench in case of Kantibhai Viththalbhai Ukani (supra).

34. In the case of U. Parshotambhai, the appellants, who were the original defendants had filed the First Appeal under Section 96 of the Code against the decree passed by the Civil Court on the strength of a settlement arrived at between the parties outside the Court. The appellants had also challenged the order passed by the Civil Court rejecting the application filed in the said suit by the defendants to declare the settlement arrived at between the parties as a nullity on the ground that the same was obtained by fraud and coercion. In the First Appeal before the Division Bench, the objections were raised as regards the maintainability of the appeal. The Division Bench after referring the provisions contained in Order XXIII Rule 3 and the judgements of the Supreme Court in case of Banwarilal (supra) and Pushpadevi (supra) and other judgements held the appeal maintainable by observing inter alia that when on a dispute as regards the legality or validity of a compromise is raised, an inquiry is made in view of the proviso to Rule 3 of Order XXIII, and the suit is decreed on the basis of a compromise based on that inquiry, it could not be held to be a decree passed on consent, and therefore, a bar under Section 96(3) of the Code would not be applicable.

35. In case of Indiraben Ratilal Adhia (supra), the applicants/appellants being not party to the suit had filed an application seeking leave to file an appeal for assailing the judgement and decree passed in the suit by the trial Court on the basis of the compromise arrived at between the parties to the suit. The said application seeking leave to file appeal was contested on the ground of maintainability by contending that as per the provisions contained in Section 96, an aggrieved party has a remedy under the provisions of Order XLIII Rule 1A of the Code, and therefore, an Appeal from Order and not a First Appeal would be maintainable. The Division Bench after considering the judgements of the Supreme Court in case of Banwarilal (supra) and other cases, repelled the contentions that an Appeal from Order would lie and not the substantial appeal. It further held that the applicants had options either to move the same Court or the appellate Court and that the appeal would lie by a person, who was not a party in the Court below.

36. In case of M/s.Sanskruti Infra Developers Pvt. Ltd., the First Appeal was filed by the original defendant under the provisions contained in Section 96 read with Order XLIII Rule 1A of CPC before the Devision Bench. In the said case, the Special Civil Suit was filed by the original plaintiff against the defendant (appellant) for specific

performance of the agreement and for declaration and permanent injunction, in which one Nilay Desai posing himself to be an authorized signatory of the defendant Company (the appellant) appeared in the suit and entered into a settlement with the plaintiff. The trial Court on the basis of the consent terms arrived at between the parties passed the judgement and decree, which came to be challenged by the original defendant company on the ground that the said decree was obtained by the plaintiff in collusion with the said alleged authorized signatory Nilay Desai on behalf of the defendant. The respondent (original plaintiff) in the First Appeal having raised objection with regard to the maintainability of the appeal in view of the bar contained in Sub-section (3) of Section 96 of CPC, the Division Bench held inter alia that in view of the decision of the Supreme Court in case of Banwarilal, the appeal under Section 96 against the consent judgement and decree would not be maintainable. It further held that the aggrieved party like the appellant would have remedy available either to approach the very Court, which recorded the consent terms and passed the consent decree, and/or to prefer Appeal from Order as provided under Order XLIII Rule 1A of CPC.

37. In case of Kantibhai Viththalbhai (supra), the Civil Application seeking leave to prefer First Appeal was filed by the third party applicants for challenging the decree passed by the trial Court on the basis of the consent terms arrived at between the plaintiff and the defendant. The said third party applicants had also instituted a separate suit against the original owner of the land in question seeking specific performance of the agreement executed by the said owner prior in point of time. Hence, the decree based on consent terms was challenged by them on the ground that it was a collusive consent decree. In the said appeal, the learned Advocate for the respondents (original plaintiff and the defendants) had raised a preliminary objection as regards the maintainability of the appeal in view of the bar contained in Sub-

section (3) of Section 96. The respondents also contended that as such the consent decree could not be said to have affected the rights of the applicants/appellants in the suit filed by them, and that the applicants could amend their plaint in view of the subsequent development. The Division Bench dismissed the application of the applicants/appellants seeking leave to appeal by holding inter alia that the appeal would not be maintainable against the consent decree in view of the bar contained in Sub-section (3) of Section 96 of CPC, keeping the right of the applicants open to submit appropriate application for amendment, amending the plaint in their suit.

38. In view of the above, it is clear that in all the four judgements referred in the second question formulated by the Single Bench, the fact situations were different. The respective Division Benches have rendered the decisions considering the factual and legal aspects involved in the Appeals. Of course, we do not agree with some of the observations made by the Division Bench in case of M/s.Sanskruti Infra Developers (supra) and in case of Kantibhai Viththalbhai (supra). In case of M/s.Sanskruti (supra) it is observed by the Division Bench that the aggrieved party could prefer

Appeal from Order as provided under Order XLIII, Rule 1A. We have already held earlier that Rule 1A(2) of Order XLIII does not confer any right to file an Appeal from Order. The Supreme Court in Banwarilal's case (supra), has also held that after the amendments, neither an appeal against the order recording a compromise nor remedy by way of filing a suit is available in cases covered under Rule 3A of Order XXIII. Such a right has been given under Rule 1A(2) of Order XLIII to a party who challenges the recording of a compromise, to question the validity thereof while preferring an appeal against the decree passed in the suit. It follows that when an appeal is filed against the decree passed in the suit after recording a compromise or refusing to record compromise, the appellant can contest such decree on the ground that the compromise should or should not have been recorded, in view of the said provision contained in Rule 1A(2) of Order XLIII. The said provision itself does not provide any substantive right to prefer an appeal against any such order or decree. Hence, the observations made by the Division Bench in the said case to the extent it held that the aggrieved party i.e. the appellant in the said case could prefer an Appeal from Order as provided under Order XLIII, Rule 1A, could not be vindicated, and the said finding can not be said to connote correct position of law.

39. Similarly, the observations made by the Division Bench in case of Kantibhai Viththalbhai (supra) also do not connote correct position of law, when it held that the Appeal would not be maintainable against the consent decree in view of the bar contained in Section 96(3) of CPC. It may be noted that in the said case, the appellant was the aggrieved third party, who was not the party to the suit or party to the compromise on the basis of which the decree under challenge was passed. Such a decree qua the appellant - third party could not be construed as the "consent decree" so as to attract the bar under Section 96(3) of CPC. If the right of third party is vitally and adversely affected by the decree passed by the Court on the basis of the compromise arrived at between the parties to the suit, under Order XXIII, Rule 3, he can certainly file an appeal with the leave of the appellate Court under Section 96(1) of CPC. Such a decree being not a "consent decree" so far as third party appellant was concerned, the bar under Section 96(3) could not be made applicable to him. If the third party appellant is able to convince the appellate Court that his right is substantially and adversely affected by the passing of such compromise decree, and the leave to appeal is granted by the appellate Court, his appeal against such decree based on the compromise, would be maintainable under Section 96(1) read with Order XLI of CPC. The second question stands answered accordingly.

40. The upshot of the above may be summed up as under:-

(i) After the deletion of Clause (m) of Rule 1 of Order XLIII, by the amendment Act 104 of 1976, no Appeal from Order against the order passed under Rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction would lie under Rule 1 of Order XLIII of CPC. Rule 1A of Order XLIII does not provide for any remedy to file an appeal either against any order or against any

decree.

(ii) It is only in an appeal filed under Section 96(1) read with Order XLI of CPC, against the decree passed in the suit after recording of compromise or refusing to record compromise, the appellant can contest such decree on the ground that the compromise should or should not have been recorded, in view of Rule 1A(2) of Order XLIII.

(iii) No appeal would be maintainable from a decree passed by the Court with the consent of the parties i.e. on the basis of the compromise arrived at between the parties in the suit under Rule 3 of Order XXIII, in view of the bar contained in Section 96(3) of CPC.

(iv) No suit shall lie to set aside a decree passed under Rule 3 of Order XXIII on the ground that the compromise on which the decree is based was not lawful in view of the bar contained in Rule 3A of Order XXIII.

(v) If the aggrieved party was the party to the suit, the only remedy available to him against the decree passed by the Court on the basis of compromise between the parties (consent decree), would be to file an application under the proviso to Rule 3 of Order XXIII, disputing such compromise. The Court which passed the compromise decree has to decide the said dispute or question raised by the party.

(vi) When there is a dispute raised by either of the parties to the suit on the question as to whether there was a compromise or not, a decree accepting the compromise on resolution of that controversy, cannot be said to be a decree passed with the consent of the parties. Therefore, the bar under Section 96(3) of the Code would not have any application.

Section 96(3) is applicable to cases where the factum of compromise or agreement is not in dispute.

(vii) If the aggrieved party was not the party to the suit, the remedy available to him to challenge the decree passed by the Court on the basis of compromise between the parties to the suit (consent decree), would be to file an appeal under Section 96(1) of CPC, with the leave of the appellate Court, or to file a review application before the Court, which passed the decree, as may be permissible under Section 114 read with Order XLVII of CPC.

(viii) The words "signed by the parties"

contained in Rule 3 of Order XXIII would include the compromise signed by the duly authorized pleaders or the power-of-attorney holders or the recognized agents of the parties concerned.

41. Ergo, the questions referred may be answered as under:-

(A) In case of a decree passed by the trial Court on the basis of the compromise between the parties (consent decree), the remedy available to the aggrieved party, who was party to the suit would be to file an application under the proviso to Rule 3 of Order XXIII disputing such compromise, and the remedy available to the aggrieved party, who was not party to the suit would be to file an appeal under Section 96 of CPC with the leave of the appellate Court, or to file a review application before the Court, which passed the decree on the basis of compromise, as may be permissible under Section 114 read with Order XLVII of CPC. Order XLIII, Rule 1A of CPC does not provide for any remedy for filing an appeal either from any order or any decree.

(B) The judgement in case of legal heirs of deceased Ullasbhai Parsottambhai (supra) and the order in case of Indira R. Adhia (supra) connote correct position of law, whereas the judgement in case of M/s Sanskruti Infra Developers (supra) does not connote correct position of law to the extent it held that the aggrieved party can prefer an Appeal from Order as provided under Rule 1A of Order XLIII of CPC. Similarly, the judgement in case of Kantibhai (supra) also does not connote correct position of law to the extent it held that the appeal at the instance of the appellant, who was the third party challenging the decree passed by the trial Court on the basis of the consent terms arrived at between the parties to the suit, would not be maintainable in view of the bar contained in Section 96(3) of CPC.

(C) The answer is covered in the answer (A).

42. The Registry is directed to do the needful for placing the matters before the appropriate Bench on or before 6.9.2019. Interim relief granted earlier to continue till 6.9.2019.

Sd/-

(BELA M. TRIVEDI, J) Sd/-

(G.R.UDHWANI, J) Sd/-

(V. P. PATEL,J) V.V.P. PODUVAL