CASE NO.:
Appeal (civil) 1604 of 2005

PETITIONER:
K. Venkatachala Bhat and Anr.

RESPONDENT:
Krishna Nayak (D) by Lrs. And Ors.

DATE OF JUDGMENT: 09/03/2005

BENCH:
Arijit Pasayat & S.H. Kapadia

JUDGMENT:
JUDGMENT

ARIJIT PASAYAT, J.

Leave granted.

By the impugned judgment a Division Bench of the Karnataka High Court refused to condone the delay of 1440 days in filing the writ appeal. The writ petition no. 28336 of 1997 was disposed of by order dated 4.9.1998 by a learned Single Judge of the High Court which was the subject matter of challenge in the Writ Appeal.

Stand of the appellants before the Division Bench of High Court was that they came to know about the disposal of the writ petition only in the month of 2002 when respondents 2(a) and 2(b) tried to get the Khata changed in their names on the basis of the purported compromise memo filed before learned Single Judge on the basis of which the writ petition was disposed of. It was their specific stand that compromise memo in question was never signed by them. The Division Bench held that the delay was not sufficiently explained.

In support of the appeal, learned counsel for the appellants submitted that disposal by the High Court was on entirely erroneous premises. The disposal was purportedly on the basis of a compromise memo and an affidavit stated to have been filed by the parties. On a bare perusal of the relevant documents it is clear that it was only the respondents who filed the memo and the affidavit and the appellants had not signed them. Therefore, the learned Single Judge should not have disposed of the matter in the manner done. There is no appearance on behalf of the respondents in spite of service of notice.

On a perusal of the so called compromise memo it is noticed that the same was signed by the respondents 2(a) and 2(b) before the Notary on 1.7.1998 and it contains the thumb impression of respondents 2(a) and 2(b), namely, Smt. Saraswathi and Girija @ Ananda. The memo itself shows that the respondents 2(a) and 2(b) have no objection for quashing the order dated 18.7.1979 passed by the Land Tribunal, Udupi in respect of certain lands. It is also mentioned therein that respondent 2(a) has filed a separate affidavit on her own behalf and on behalf of the respondent 2(b).

The affidavit is by Smt. Saraswathi respondent no.2(a) in the writ petition. The relevant portions of the memo and the affidavit read as follows:

> "Memo:-It is submitted that the Respondents 2(a) and 2(b) have no objection for quashing of the order dated 18.7.1979 passed by the Land Tribunal, Udupi in No.LRY-78-43-TRI-3425-79-80 in respect of the lands in S.No.143-1-0.50 acre and 142-1-1 acre of Herga village, Udupi Taluk and Dist.

> Affidavit:-I, therefore, pray that this Hon'ble Court may be pleased to modify the order of the Land Tribunal, Udupi dated 18.7.1979 in No.LRY-78-43-TRI-3425-79-80 by quashing the same to the extent of 50 cents in S.No.143-1 and 1 acre in S.No.142-1 of Herga village, Udupi Taluk and Dist., in the ends of justice and equity."

The High Court took note of the memo which according to it was filed by the parties and their counsel and was supported by an affidavit. The High Court thereafter quashed the grant of occupancy right in respect of two survey numbers and affirmed the order of the Tribunal in respect of the remaining survey numbers.

It is crystal clear that the High Court proceeded on entirely erroneous premises. If it wanted to dispose of a part of the dispute on the basis of a settlement purportedly arrived at between the parties, the memo and affidavit should have been filed by the parties concerned. Acting on the basis of memo or affidavit which was singed by the respondents only the dispute could not have been settled against the appellants without their consent.

At this juncture, it would be appropriate to take note of Order XXIII Rule 3 of the Code of Civil Procedure, 1908 (in short 'CPC') dealing with compromise of suit. Same reads as follows:

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit:

> Provided that where it is alleged by one party and 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."

The words "in writing and signed by the parties" were inserted by Act 104 of 1976 with effect from 1.2.1977.

The effect of the inserted portion as noted above is that the compromise if not signed by the parties cannot be recorded by the Court. In Byram Pestonji Gariwala v. Union Bank of India and Ors., AIR (1991) SC 2234 it was held that the compromise can be signed by the parties, their counsel or even their agents. The view was re-iterated in Jineshwardas (D) by Lrs. and Ors. v. Jagrani (Smt.) and Anr., [2003] 11 SCC 372.

Though in terms of Section 141 (Explanation) C.P.C., the expression 'proceedings' is not applicable to proceeding under Article 226 of the Constitution of India, 1950 (in short the 'Constitution'), the requirement under Order XXIII Rule 3 can be pressed into service even in writ proceedings.

Here even the signature of the counsel of petitioners is not there.

Above being the position, we find the order passed by the learned Single

Judge is unsustainable. When the writ petition was disposed of in an indefensible manner by learned Single Judge, the Division Bench should have condoned the delay even if it was substantial in view of the reasons indicated by the appellants. It did not even advert to the stand of the appellants that the learned Single Judge should not have disposed of the matter on the basis of the memo and affidavit which were only signed and filed by respondents 2(a) and 2(b) and not by the appellants.

The orders of the learned Single Judge and the Division Bench are set aside. The matter is remanded to the learned Single Judge for disposal on the merits of the case. We make it clear that we have not expressed any opinion on the merits of the case.

The appeal is disposed of accordingly with no order as to costs.