PETITIONER:
BYRAM PESTONJI GARIWALA

Vs.

RESPONDENT:
UNION BANK OF INDIA AND ORS.

DATE OF JUDGMENT20/09/1991

BENCH:
THOMMEN, T.K. (J)
BENCH:
THOMMEN, T.K. (J)
SAHAI, R.M. (J)

CITATION:
1991 AIR 2234 1991 SCR Supl. (1) 187
1992 SCC (1) 31 JT 1991 (4) 15
1991 SCALE (2)625

ACT:
Code of Civil Procedure, 1908--Order XXIII Rule 3 -Compromise --Counsel's role--Pre and Post 1976 CPC Amendment--Object of amendment-Legislative intention indicated.
Code of Civil Procedure, 1908--Order XXIII read with Order XXI, Rule 22--Compromise entered into by the Counsel of defendant in High Court-Compromise decree on 18.6.1984 Execution--Notice under Order XXI, Rule 22 to defendant made absolute on 23.1.1990--Questioning the compromise after six years by chamber summon-- Effect of.

HEADNOTE:
Before this Court, the appellant-defendant challenged the judgment of the High Court which held that the decree made against the defendant 'in terms of a compromise in writing and signed by the counsel representing the parties was valid and binding on the parties, and that in the absence of any challenge against the order made under Order XXI, rule 23, Civil Procedure Code, allowing execution of the decree, the defendant was no longer entitled to resist execution by recourse to Chamber Summons.
The appellant contended that the High Court was wrong in holding that, notwithstanding the amendment of 1976 inserting the words 'in writing and signed by the parties', it was still sufficient if the terms of compromise were reduced to writing and signed by counsel representing the parties, and not necessarily by the parties in person, and that a decree based on a compromise not signed by the parties in person was a nullity and was incapable of execution.
The respondents submitted that it was always understood that the expression 'party' included his pleader in matters relating to appearance in court, and his counsel in the cause, therefore, had express or implied authority, unless specifically withdrawn or limited by the party, to represent him in court and do whatever was necessary in connection with the conduct of his suit including adjustment of the suit by agreement or compromises.
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Dismissing the appeal, this Court,
HELD:. 1. Counsel's role in entering into a compromise has been traditionally understood to be confined to matters

within the scope of the suit. However, a compromise decree may incorporate not only matters failing within the subject matter of the suit, but also other matters which are collateral to it. The position before the amendment in 1976 was that, in respect of the former, the decree was executable, but in respect of the latter, it was not executable, though admissible as judicial evidence of its contents. [199 C-D]

2. After the amendment of 1976, a consent decree, is executable in terms thereof, even if it comprehends matters failing outside the subject-matter of the suit, but concerning the parties. [201 E]

3. The object of the amendment of Order XXIII, Rule 3, C.P.C. was to provide an appropriate remedy to expedite proceedings in Court. That object must be borne in mind by adopting a purposive construction of the amended provisions. The legislative intention being the speedy disposal of cases with a view to relieving the litigants and the Courts alike of the burden of mounting arrears, the word 'parties' must be so construed as to yield a beneficent result, so as to eliminate the mischief the legislature had in mind. [202 D-E]

4. 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 recognised 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 recognised and universally acclaimed common law tradition of an ever alert, independent and active Bar with freedom to manoeuvre with force and drive for quick action in a battle of wits typical of the adversarial system of oral heating which is in sharp contrast to the inquisitorial traditions of the 'civil law'of France and other European and Latin American countries where written submissions have the pride of place and oral arguments are
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considered relatively insignificant. [202 E-H]

5. Considering the traditionally recognised 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 authorised agents. Any such presumption would be inconsistent with the legislative object of attaining quick reduction of arrears in Court by elimination of uncertainties and enlargement of the scope of compromise. [205 F-H]

6. A judgment by consent is intended to stop litigation between the parties just as much as a judgment resulting from a decision of the court at the end of a long drawn out fight. A compromise decree creates an estoppel by judgment. [207 B]

7. In the present case, the notice issued under Order XXI rule 22 was personally served on the defendant, but he

did not appear or show cause why the decree should not be executed. The notice was accordingly made absolute by order dated 23.1.1990 and leave was granted to the plaintiff to execute the decree. The decree passed by the High Court on 18.6.1984 in terms of the compromise was a valid decree and it constituted res judicata. [206 F-G]

8. The consent decree made on 18.6.1984 remained unchallenged. None questioned it. The appellant never raised any doubt as to its validity or genuineness. He had no case that the decree was vitiated by fraud or misrepresentation or his counsel lacked authority to enter into a compromise on his behalf. Nevertheless, after six years he questioned its validity by means of chamber summons. This was an unsuccessful challenge by reason of delay, estoppel or res judicata. [207 E-F]

Halsbury's. Laws of England, 4th Ed. Vol.3, Paras 1181 & 1183; Francis Bennion's Statutory Interpretation, Butterworths, 1984, para 133; Crawford's Statutory., Construction, Para 254; Rene David, English Law and French Law--Tagore Law Lectures, 1980; Spencer-Bower to Turner in Res
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Judicata, Second Edition, Page 37; The Common Law in India 1960-The Hamlyn Lectures, Twelfth Series. pp 1-4, referred to.

Patience Swinfen v. Lord Chelmsford, [1860]5 H & N 890 at 912; S.C.(Ex.) 382; Mathews v. Munster, [1887] 20 Q.B. 141 at 144; Rondel v. Worsley, [1965] 1 Q.B. 443,502; (Babu) Sheonandan Prasad Singh &Ors. v. Hakim Abdul Fateh Mohammed Reza & Anr., AIR 1935 P.C. 119,121; Sourendera Nath Mitra & Ors. v. Tarubala Dasi, AIR 1930 P.C. 158; Hemanta Kumari Debi v. Midnapur Zamindari Co., AIR 1919 PC 79; Jamilabai Abdul Kadar v. Shankerlal Gulabchand & Ors., [1975] Supp. SCR 336; Monoharbahal Colliery, Calcutta v. K.N. Mishra & Ors., AIR 1975 SC 1632; National Assistance Board v. Wilkinson, [1952] 2 Q.B. 648; Sailendra Narayan Bhania Deo v. The State of Orissa, AIR 1956 SC 346; Mohanlal Goenka v. Benoy Kishna Mukherjee & Ors., AIR 1953 SC 65, Shankor Sitaram Sontakke & Anr. v. Balkrishna Sitaram Sontakke & Ors. AIR 1954 SC 352, referred to.

Ram Juwan v. Devendra Nath Gupta, AIR 1960 M P. 280; Vishnu Sitaram Auchat v. Ramchandra Govind Joshi, AIR 1932 Bombay 466; Jasimuddin Biswas v. Bhuban Jelini, ILR 34 Calcutta 456; Ganganand Singh & Ors. v. Rameshwar Singh Bahadur & Anr, AIR 1927 Patna 271; Chengan Soun, Nayakam v. A.N. Menon, AIR 1968 Kerala 213; Jiwibai v. Ramkumar Shriniwas Murarka Agarwala, AIR 1947 Nagpur 17; Govindamreal v. Marimuthu Maistry & Ors., AIR 1959 Mad 7; Laxmidas Ranchhoddas & Ors. v. Savitabai Hargovindas Shah, AIR 1956 Bombay 54; Mohan Bat v. Jai Kishan, AIR 1983 Rajasthan 240; Smt. Mohan Bat v. Smt. Jai kishan & Ors., AIR 1988 RaJasthan 22, Nadirsha Hirji Bana & Ors. v Niranjanlkumar alias Nireshkumar Dharamchand Shah & Ors., 1983 (1) G.L.R. 774, approved.

Kesarla Raghuram v. Dr. Narsipalle Vasundara, A.I.R. 1983 A .P. disapproved.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3698 of 1991.

From the Judgment and Order dated 1.11.1990 of the Bombay High Court in Chamber Summons No. 838 of 1990 in Execution Application No. 242 of 1989 in Suit No. 309 of 1972.

Arun Jaitley, R.F. Nariman, R. Karanjawala, Mrs. M.

Karanjawala, Ms. Nandini Gore and Ms. Aditi Choudhary for the appellant.
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V.A. Bobde, U.A. Rao and B.R. Agarwala for the respondents.
The Judgment of the Court was delivered by
THOMMEN, J. Leave granted.

The appellant who is the defendant in Suit No. 309 of 1972 challenges the judgment of the Bombay High Court in Chamber Summons No. 838 of 1990 in Execution Application No. 242 of 1989 whereby the High Court held that the decree made against the defendant in terms of a compromise in writing and signed by counsel representing the parties, but not signed by the parties in person, was valid and binding on the parties, and in the absence of any challenge against the order made under Order XXI rule 23, Civil Procedure Code allowing execution of the decree, the defendant was no longer entitled to resist execution by recourse to Chamber Summons. The High Court found that the decree was valid and in accordance with the provisions of Order XXIII rule 3, as amended by the C.P.C. (Amendment) Act, 1976.

The only question which arises for consideration is as regards the construction of Order XXIII rule 3, C.P.C. We shall read this provision, as amended by the C.P.C. (Amendment Act, 19%, bracketing the newly added words:

23., 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 satisfied 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 had 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, shall not be
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deemed to be lawful within the meaning of this rule.

Mr. Arun Jaitley, appearing for the appellant, says that the High Court was wrong in holding that, notwithstanding the amendment of 1976 inserting the words 'in writing and signed by the parties', it was still sufficient if the terms of compromise were reduced to writing and signed by counsel representing the parties, and not necessarily by the parties in person. Any such construction would do violence to the provision as amended in 1976. He says that the object of the amendment was to provide that no agreement or compromise adjusting wholly or in part a pending suit was valid unless such compromise was evidenced in writing and signed by the parties in person. The expression 'parties', he contends, means only parties and none else. To read 'counsel' into that expression, as done by the High Court, is to presume that the legislature failed to say what it intended to say and to attempt to supply the omission by correcting the deficiency. This cannot be done. The legislature, on the other hand, made its intention explicit by providing that an agreement or compromise would form the basis of a decree only if the consensus was reduced to writing and signed by

the parties. Neither an agent nor a pleader could act as a substitute for a party to sign the agreement or compromise. A decree based on a compromise not signed by the parties in person is a nullity and is incapable of execution.

Mr. Jaitley submits that if the legislature had intended to authorise counsel independently to sign the memorandum containing the terms of settlement, and allow a decree to be passed in terms thereof, the legislature would have said so by further adding the words 'or their counsel'. In the absence of any such expression, it cannot be presumed that the legislature intended more than what it said and that 'party' included counsel. This argument, Mr. Jaitley says, is fortified by the fact that for the first time the legislature has allowed a decree to be passed on the basis of compromise relating to matters concerning the parties, but extending beyond the subject matter of the suit. Such a wide power to compromise was most unlikely to be left in the hands of counsel, and it is, therefore, necessary to read the provision narrowly so as to read it as it now stands by adopting a strictly literal construction.

Mr. V.A. Bobde appearing for the respondents, on the other hand, submits that it was always understood that the expression 'party' included his pleader in matters relating to appearance in court, and his counsel in the cause, therefore, has express or implied authority, unless specifically withdrawn or limited by the party, to represent him in court and do
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whatever is necessary in connection with the conduct of his suit including adjustment of the suit by agreement or compromise. In the absence of any such limitation or restriction of his authority, counsel appearing for a party is fully competent to put his signature to the terms of any compromise upon which a decree can be passed in proper compliance with the provisions of Order XXIII rule 3 as it now stands. Any such decree, he says, is perfectly valid.

Mr. Bobde submits that in the absence of express words to the contrary, 'party', in the context of proceedings in court, must necessarily include his recognised agent or pleader. This construction is warranted by the provisions of Order III, C.P.C. That this has been the consistent view adopted by courts in the construction of the expression 'party' in the context of proceedings in court is clear from the decisions of courts, and it is most unlikely that the legislature would have, by the amendment of 1976, limited the scope of 'party' so as to exclude the traditional role of the recognised agent or counsel. The legislative draftsmen are presumed to know the law of the land as it stood then, and, if they had intended to deviate therefrom, they would have explicitly stated so rather than leave it to future judicial construction. The Statement of Objects and Reasons for the amendment, he says, does not support the view canvassed by the appellant.

Sub-clause (iii) of clause 77 of the Statement of Objects and Reasons concerning the C.P.C. (Amendment) Act, 1976 states:-

> is provided that an agreement or compromise under rule 3 should be in writing and signed by the parties. This is with a view to avoiding the setting up of oral agreements or compromises to delay the progress of the suit.
>
> .....
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> In view of the words 'so far as it relates to the suit' in rule 3, a question

arises whether a decree which refers to the terms of a compromise in respect of matters beyond the scope of the suit is executable or whether the, terms of the decree relating to the matters outside the suit can be enforced only by a separate suit. The amendment seeks to clarify the position."

The Statement of Objects and Reasons indicates that the amendment is intended to clarify that a compromise has to be in writing signed by the parties to avoid delay which might arise from the uncertainties of oral agreements. The amendment has also clarified that the terms of compromise are permitted to include all matters relating to the parties to the

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suit even if such matters fall outside the subject matter of the suit. The legislature has thus sought to attain certainty and clarity and widen the scope of compromise. The fundamental question is, in the absence of any contrary indication in the Statement of Objects and Reasons, can it be stated that the legislature has intended to exclude a pleader or a recognised agent from the expression 'party' when it has always been understood, as explicitly stated in Order 1II rule 1, that appearance of a party in court may be in person or by his recognised agent or pleader. In the absence of any provision to the contrary, can it be stated that the legislature, when using the expression 'parties' in rule 3 of Order XXIII, limited it to parties in person and excluded their duly recognised agents or counsel ?

The role of counsel in Court in England is described in Halsbury's Laws of England, 4th Ed. Vol.3, paras 1181 & 1183, as follows:-

"1181. Counsel's authority. At the trial of an action, counsel's authority extends, when it is not expressly limited, to the action and all matters incidental to it and to the conduct of the trial, such as withdrawing the record, challenging a juror, calling or not calling witnesses, cross-examining or not cross-examining witnesses, consenting to a reference to arbitration, a compromise, or a verdict, undertaking to appear, or, on the hearing of a motion for a new trial, consenting to a reduction of damages.

The client's consent is not needed for a matter which is within the ordinary authority of counsel: thus if, in court, in the absence of the client, a compromise or settlement is entered into by counsel whose authority has not been expressly limited, the client is bound. If an action is settled in court in the presence of the client, his consent will be inferred, and he will not be heard to say that he did not understand what was going on .... "

The implied authority of counsel in England is, however, confined to matters failing within the subject matter of the suit. In the absence of express authority, counsel

cannot enter into compromise on collateral matters.

> "The authority of counsel to compromise is limited to the issues in the action: a compromise by counsel affecting collateral matters will not bind the client, unless he expressly assents; and it may be that a barrister has no authority to reach a binding settlement or compromise out of court. "(Halsbury ibid)

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A compromise is, however, not binding and is liable to be set aside in circumstances which would invalidate agreements between the parties.

> "A compromise by counsel will not bind the client, if counsel is not apprised of facts the knowledge of which is essential in reference to the question on which he has to exercise his discretion, for example that the terms accepted had already been rejected by the client. Where counsel enters into a compromise in intended pursuance of terms agreed upon between the clients, and, owing to a misunderstanding, the compromise fails to carry out the intentions of one side, the compromise does not bind the client, and the court will allow the consent to be withdrawn. Where, acting upon instructions to compromise, counsel consents under a misunderstanding to certain terms which do not carry into effect the intentions of counsel and the terms are thought by one party to the more extensive than the other party intends them to be, there is no agreement on the subject-matter of the compromise, and the court will set it aside. But a person who has consented to a compromise will not be allowed to withdraw his consent because he subsequently discovers that he has a good ground of defence? (Halsbury, ibid, para 1183).

Counsel's consent in certain circumstances such as duress or mistake may not bind the client.

> "If counsel's consent is given under duress, the client will not be bound, as when counsel, acting for a client alleged to be of unsound mind but believing him to be of sound mind, consented to certain terms for the withdrawal of Court of Protection proceedings against the client because of his fear of the inconvenience and iII-health likely to arise to the client from confinement.
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> A compromise or order made by consent by counsel for a minor or other person under disability is not binding on the client, unless it is sanctioned by the court as being for the benefit of the client. The court cannot, however, enforce a compromise on a minor against the opinion of his counsel." (Halsbury, ibid)

One of the early English authorities on this point is Patience Swinfen

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v. Lord Chelmsford [1860] 5 H & N 890 at 922; S.C. 29 L. J. (E.x) 382. Delivering the judgment of the Court, Pollock, C.B., stated:

> "....We are of opinion, that although a counsel has complete authority over the suit, the

> mode of conducting it, and all that is incident to it - such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as,. in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial - we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it ..... ".

In Matthews v. Munster, [1887] 20 Q.B. 141 at 144, Lord Esher M.R. stated:

.. The instances that are given shew that one of the things that counsel may do, so long as the request of the client to him to act as advocate is in force, is to assent to a verdict for a particular amount and upon certain conditions and terms; and the consent of the advocate to a verdict against his client and the withdrawing of imputations is a matter within the expression 'conduct of the cause and all that is incidental to it.' If the client is in Court and desires that the case should go on and counsel refuses, if after that he does not withdraw his authority to counsel to act for him, and acquaint the other side with this, he must be taken to have agreed to the course proposed. This case is a still stronger one, for the client was not present, and it is not pretended that he ever withdrew his authority to counsel, but he now comes forward and asks that because he does not like what has been done it should be set aside as between himself and his opponent. This the Court will not do, and this appeal must be dismissed."

See also Rondel v. Worsley, [1965] 1 Q. B. 443, 502, Per Lord Denning M.R.

If this is the position of counsel in England, Scotland and Ireland, is his position the same in India in the conduct of cases in Court ? That the answer is affirmative, there is high judicial authority.

In (Babu) Sheonandan Prasad Singh & Ors. v. Hakim Abdul Fateh Mohammad Reza & .Anr., AIR 1935 PC 119, 121, Lord Atkin, speaking for
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the Board, states:

> "..... As was laid down by this Board in 57 IA 133 (AIR 1930 PC 158) counsel in India have the same implied authority to compromise an action as have counsel in the English Courts. But if such authority is invoked to support an agreement of compromise the circumstances must be carefully examined. In the first instance the authority is an actual authority implied from the employment as counsel. It may however be withdrawn or limited by the client: in such a case the actual authority is destroyed or restricted; and the other party if in ignorance of the limitation could only rely upon ostensible authority. In this particular class of contract however the possibility of successfully alleging ostensible authority has been much restricted by the authorities such as (1902) AC 465 and (1919) 1 KB 474 which make it plain that if in fact counsel has had

his authority withdrawn or restricted the Courts will not feel bound to enforce a compromise made by him contrary to the restriction even though the lack of actual authority is not known to the other party."

Lord Atkin emphasises the need to rely on express authority, rather than implied authority, particularly because of easier and quicker communication with the client. He says:

"....In their Lordships' experience both in this country and in India it constantly happens, indeed it may be said that it more often happens, that counsel do not take upon themselves to compromise a case without receiving express authority from their clients for the particular terms; and that this position in each particular case is mutually known between the parties.

In such cases the parties are relying not on implied but on an express authority given adhoc by the client ....." (ibid, page 121)

However, collateral matters were understood to be beyond the scope of compromise. Lord Atkin says:

"If the facts are as their Lordships assume, the matter compromised was in their opinion collateral to the suit and not only would it not be binding on the parties, but it would in any case be a matter in respect of which the Court in pursuance of

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O. 23, R. 3, should not make a decree." (Page 122)

Referring to the role of counsel in India and comparing him with his counterpart in Britain, Lord Atkin in Sourendra Nath Mitra & Ors. v. Tarubala Dasi, AIR 1930 PC 158, says:

" ..... Their Lordships regard the power to compromise a suit as inherent in the position of an advocate in India. The considerations which have led to this implied power being established in the advocates of England, Scotland and Ireland, apply in equal measure to India. It is a power deemed to exist because its existence is necessary to effectuate the relations between advocate and client, to make possible the duties imposed upon the advocate by his acceptance of the cause of his client."

Counsel's power to compromise is vital to the defence of his party while engaged on his behalf in the thick of a legal battle in Court. Lord Atkin observes:

"The advocate is to conduct the cause of his client to the utmost of his skill and understanding. He must in the interests of his client be in the position, hour by hour, almost minute by minute, to advance this argument, to withdraw that; he must make the final decision whether evidence is to be given or not on any question of fact; skill in advocacy is largely the result of discrimination. These powers in themselves almost amount to powers of compromise: one point is given up that another may prevail. But in addition to these duties, there is from time to time thrown upon the advocate, the responsible task of deciding whether in the course of a case he

> shall accept an offer made to him, or on his part shall make an offer on his client's behalf to receive or pay something less than the full claim or the full possible liability. Often the decision must be made at once ..... "(ibid, page 161)

Emphasising the apparent authority of counsel, and the raison d'etre of such authority being the paramount interest of his client, and not an appandage of office, Lord Atkin states:

> "The apparent authority is derived from the known existence of the implied authority .....
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> First, the implied authority of counsel is not an appandage of office, a dignity added by the Courts to the status of barrister or advocate at law. It is implied in the interests of the client, to give the fullest beneficial effect to his employment of the advocate. Secondly, the implied authority can always be countermanded by the express directions of the client. No advocate has actual authority to settle a case against the express instructions of his client. If he considers such express instructions, contrary to the interests of his client, his remedy is to return his brief.
> Their Lordships are unable to see why the above considerations should not apply to an advocate in India, whose duties to his client in the conduct of a suit in no wise differ from those of advocates in England, Scotland and Ireland ..... ". (Page 161)

Counsel's role in entering into a compromise has been traditionally understood to be confined to matters within the scope of the suit. However, a compromise decree may incorporate not only matters failing within the subject matter of the suit, but also other matters which are collateral to it. The position before the amendment in 1976 was that, in respect of the former, the decree was executable, but in respect of the latter, it was not executable, though admissible as judicial evidence of its contents.

Referring to section 375 of the Code of Civil Procedure (Act XIV of 1882), (similar to Order XXIII rule 3 CPC as it stood prior to the amendment of 1976), Lord Buckmaster, in Hemanta Kumari Debi v. Midnapur Zamindari Co., AIR 1919 PC 79, states:

> " ..... In the first place, it is plain that the agreement or compromise, in whole and not in part, is to be recorded, and the decree is then to confine its operation to so much of the subject-matter of the suit as is dealt with by the agreement .....although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation the decree taken as a whole would include the agreement. This in fact is what the decree did in the present case. It may be that as a decree it was incapable of being executed outside the lands of the suit, but that does not prevent its being received in evidence of its contents". (Page 81)

In Ram Juwan v. Devendra Nath Gupta, AIR 1960 Madhya Pradesh

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280, the High Court states:

> "Where a consent decree contains terms that do not relate to the suit ..... such terms cannot be enforced in execution of the decree but they may be enforced as a contract by a separate suit". (Page 282)

See also Vishnu Sitaram Auchat v. Ramachandra Govind Joshi, AIR 1932 Bombay 466 and Jasimuddin Biswas v. Bhuban Jelini, ILR 34 Calcutta 456.

In Ganganand Singh & Ors. v. Rameshwar Singh Bahadur & Anr., AIR 1927 Patna 271, the High Court points out that a consent decree does not stand on a higher footing than a contract between the parties. The Court always has the jurisdiction to set aside a consent decree upon any ground which will invalidate an agreement between the parties. In the absence of any such ground, the consent decree is binding on the parties.

Courts in India have consistently recognised the traditional role of lawyers and the extent and nature of their implied authority to act on behalf of their clients. Speaking for a Full Bench of the Kerala High Court in Chengan Souri Nayakam v. A.N. Menon, AIR 1968 Kerala 213, K.K. Mathew, J. (as he then was) observed:

> "The construction of a document appointing an agent is different from the construction of a vakalat appointing counsel. In the case of an agent the document would be construed strictly and the agent would have only such powers as are conferred expressly or by necessary implication. In the case of counsel the rule is otherwise because there we are dealing with a profession where well-known rules have crystallised through usage. It is on a par with a trade where the usage becomes an additional term of the contract, if not contrary to the general law or excluded by express agreement." (p.215).

About the special position of the advocate, the learned Judge stated:

> Counsel has a tripartite relationship; one with the public, another with the court, and the third with his client. That is a unique feature. Other professions or callings may include one or two of these relationships but no other has the triple duty. Counsel's duty to the public is unique in that he has to accept all work from all clients in courts in which he holds himself out

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> as practicing, however, unattractive the case or the client." (p. 216)

See also Jiwibai v. Ramkumar Shriniwas Murarka Agarwala, AIR 1947 Nagpur 17; Govindammal v. Marimuthu Maistry & Ors., AIR 1959 Mad. 7 and Laxmidas Ranchhoddas & Ors. v. Savitabai Hargovindas Shah, AIR 1956 Born. 54.

These principles were affirmed by this Court in Jamilabai Abdul Kadar v. Shankerlal Gulabchand & Ors. [1975] Supp. SCR 336. Referring to a number of decisions on the point, V.R. Krishna Iyer, J. observes:

> " ..... Those who know how courts and counsel function will need no education on the jurisprudence of lawyer's position and powers. Of course, we hasten to enter a caveat. It is perfectly open to a party, tike any other principal, to mark out in the vakalat or by particular instructions forbidden areas or

> expressly withhold the right to act in sensitive matters, the choice being his, as the master. If the lawyer regards these fetters as inconsistent with his position, he may refuse or return the brief. But absent speaking instructions to the contrary, the power to act takes in its wings the right and duty to save a client by settling the suit if and only if he does so bona fide in the interests and for the advantage of his client ..... "(Page 346)

See also Monoharbahal Colliery Calcutta v. K.N. Mishra & Ors., AIR 1975 SC 1632.

After the amendment of 1976, a consent decree, as seen above, is executable in terms thereof even if it comprehends matters falling outside the subject-matter of the suit, but concerning the parties. The argument of the appellant's counsel is that the legislature has intended that the agreement or compromise should be signed by the parties in person, because the responsibility for compromising the suit, including matters falling outside its subject-matter, should be borne by none but the parties themselves. I1 this contention is valid, the question arises why the legislature has, presumably being well aware of the consistently followed practice of the British and Indian Courts, suddenly interfered with the time-honoured role of lawyers in the conduct of cases without specifically so stating, but by implication? Can the legislature be presumed to have fundamentally altered the position of counsel or a recognised agent, as traditionally understood in the system of law and practice followed in India and other 'common law countries' without expressly and directly so stating? There is,
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no indication in preparatory work such as the 54th Report of the Law Commission dated 6.2.1973 or in the Statement of Objects and Reasons or in the words employed by the legislature that the concept of 'agents and pleaders' of Order III, C.P.C. was in any manner altered. There is no warrant for any such presumption.

It is a rule of legal policy that law should be altered deliberately rather than casually. Legislature does not make radical changes in law by a sidewind, but only by measured and considered provisions'. (Francis Bennion's Statutory Interpretation, Butterworth, 1984, para 133). As stated by Lord Devlin in National Assistance Board v. Wilkinson, [1952] 2 Q.B. 648:--

> "It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion."

Statutes relating to remedies and procedure must receive a liberal construction 'especially so as to secure a more effective, a speedier, a simpler, and a less expensive administration of law'. See Crawford's Statutory Construction, para 254. The object of the amendment was to provide an appropriate remedy to expedite proceedings in Court. That object must be borne in mind by adopting a purposive construction of the amended provisions. The legislative intention being the speedy disposal of cases with a view to relieving the litigants and the Courts alike of the burden of mounting arrears, the word 'parties' must be so construed as to yield a beneficent result, so as to eliminate the mischief the legislature had in mind.

There is no reason to assume that the legislature in-

tended to curtail the implied authority of counsel, engaged in the thick of proceedings in court, to compromise 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 recognised 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 recognised and universally acclaimed common law tradition of an ever alert, independent and active. Bar with freedom to manoeuvre with force and drive for quick action in a battle of wits typical of the adversarial system of oral hearing which is in sharp contrast to the
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inquisitorial traditions of the 'civil law' of France and other European and Latin American countries where written submissions have the pride of place and oral arguments are considered relatively insignificant. (See Rene David, English Law and French Law - Tagore Law Lectures, 1980). 'The civil law' is indeed equally efficacious and even older, but it is the product of a different tradition, culture and language and there is no indication,. whatever, that Parliament was addressing itself to the task .of assimilating or incorporating the rules and practices of that system into our own system of judicial administration.

The Indian legal system is the product of history. It is rooted in our soil; nurtured and nourished by our culture, languages-and traditions; fostered and sharpened by our genius and quest for social justice; reinforced by history and heritage: it is not a mere copy of the English common law; though inspired and strengthened, guided and enriched by concepts and precepts of justice, enquiry and good conscience which arc indeed the hallmark of the common law. In the words of M.C. Setalvad:

> " ..... the common law of England with its statutory modifications and the doctrines of the English courts of equity has deeply coloured and influenced the laws and the system of judicial administration of a whole sub-continent inhabited by nearly four hundred million people. The law and jurisprudence of this vast community and its pattern of judicial administration are in many matters different from those of England in which they had their roots and from which they were nurtured. Yet they bear the unmistakable impress of their origin. The massive structure of Indian law and jurisprudence resembles the height, the symmetry and the grandeur of the common and statute law of England. In it one sees English law in the distant perspective of a new atmosphere and a strange clime."

Speaking of the common law in the wider sense, the learned author continues: -

> "....But the English brought into India not only the mass of legal rules strictly known as the common law but also their traditions, outlook and techniques in establishing, maintaining and developing the judicial system. When, therefore, I speak of the common law in India I have in view comprehensively all that is of English origin in our

> system of law. In that wide meaning
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> the expression will include not only what in England is known strictly as the common law but also its traditions, some of the principles underlying the English statute law, the equitable principles developed in England in order to mitigate the rigours of the common law and even the attitudes and methods pervading the British system of the administration of justice."
> The Common Law in India, 1960 - The Hamlyn Lectures, Twelth Series, pp.1-4.

After the attainment of independence and the adoption of the Constitution of India, judicial administration and the constitution of the law courts remained fundamentally unchanged, except in matters such as the abolition of appeals to the Privy Council, the constitution of the Supreme Court of India as the apex court, the conferment of writ jurisdiction on all the High Courts, etc. The concept, structure and organisation of Courts, the substantive and procedural laws, the adversarial system of trial and other proceedings and the function of judges and lawyers remained basically unaltered and rooted in the common law traditions in contra-distinction to those prevailing in the civil law or other systems of law.

In our own system of judicial administration, if strains have developed and cracks have appeared by the stresses and 2pressures of the time; if aberrations have become too obvious to be ignored or too deeprooted to be corrected by an internal mechanism; if the traditional role of the legal profession requires urgent legislative scrutiny with a view to remedying the defects and strengthening and safeguarding the system; it is a matter exclusively for Parliament to consider; but the amendment in question is not addressed to that purpose.

Aberrations there always have been in every system of administration; but whether they are merely peripheral or transient in character-mere ripples on a placid pool - or symptomatic of deeper malady requiring structural modification by prompt legislative intervention is a matter of grave significance for the jurists, sociologists and political scientists to ponder over.

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. On a matter of such vital importance, it is most unlikely that Parliament would have resorted
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to implied legislative alteration of counsel's capacity or status or effectiveness. In this respect, the words of Lord Atkin in Sourendra (supra) comparing the Indian advocate with the advocate in England, Scotland and Ireland, are significant:

> There are no local conditions which make it less desirable for the client to have the full benefit of an advocate's experience and judgment. One reason, indeed, for refusing to imply such a power would be a lack of confidence in the integrity or judgment of the Indian advocate. No such considerations have been or indeed could be advanced, and their

> Lordships mention them but to dismiss them ..... (Page 161)

Similar is the view expressed by the Rajasthan High Court in Mohan Bai v. Jai kishan, AIR 1983 Rajasthan 240; Smt. Mohan Bai v. Smtjai kishan & Ors., AIR 1988 Rajasthan 22 and by the Gujarat High Court in Nadirsha Hirji Baria & Ors. v. Niranjankumar alias Nireshkumar Dharamchand Shah & Ors., 1983 (1) G.L.R. 774. A contrary view has been expressed by the Andhra Pradesh High Court in Kesarla Raghuram. v. Dr. Narsipalle Vasundara, AIR 1983 Andhra Pradesh 32, and it does not commend itself to us.

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 or 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. This essential precaution will safeguard the personal reputation of counsel as well as uphold the prestige and dignity of the legal profession.

Considering the traditionally recognised 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 authorised agents. Any
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such presumption would be inconsistent with the legislative object of attaining quick reduction of arrears in Court by elimination of uncertainties and enlargement of the scope of compromise.

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-of-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.

Accordingly, we are of the view that the words 'in writing and signed by the parties', inserted by the C.P.C. (Amendment) Act, 1976, must necessarily mean, to borrow the language of Order II1 rule 1 C.P.C.:

> "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:
Provided that any such appearance shall, if the court so directs, be made by the party in person".
(emphasis supplied)

In the present case, the notice issued under Order XXI rule 22 was personally served on the defendant, but he did not appear or show cause why the decree should not be executed. The notice was accordingly made absolute by Order dated 23.1.1990 and leave was granted to the plaintiff to execute the decree. The decree passed by the High Court on 18.6.1984 in terms of the compromise was a valid decree and it constituted res judicata. As stated by this Court in Shankar Sitaram Sontakke & Anr. v. Balkrishna Sitaram Sontakke & Ors., AIR 1954 SC 352:-

"..... It is well settled that a consent decree is as binding upon the parties thereto as a decree passed by invitum. The com-
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promise having been found not to be vitiated by fraud, misrepresentation, misunderstanding or mistake, the decree passed thereon has the binding force of 'res judicata'." (Page 355)

S.R. Das, C.J., in Sailendra Narayan Bhanja Deo v. The State of Orissa, AIR 1956 SC 346, states:

".... a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the court exercises its mind on a contested case ..... ". (Page 351)

A judgment by consent is intended to stop litigation between the parties just as much as a judgment resulting from a decision of the court at the end of a long drawn out fight. A compromise decree creates an estoppel by judgment. As stated by Spencer-Bower & Turner in Res Judicata Second Edition, page 37:

"Any judgment or order which in other respects answers to the description of a res judicata is nonetheless so because it was made in pursuance of the consent and agreement of the parties .... Accordingly, judgments, orders, and awards by consent have always been held no less efficacious as estoppels than other judgments, orders or decisions, though doubts have been occasionally expressed whether, strictly, the foundation of the estoppel in such cases is not representation by conduct, rather than res judicata ..... ".

See also Mohanlal Goenka v. Benoy Kishna Mukherjee & Ors., AIR 1953 SC 65.

The consent decree made on 18.6.1984 remained unchallenged. None questioned it. The appellant never raised any doubt as to its validity or genuineness. He had no case that the decree was vitiated by fraud or misrepresentation or his counsel lacked authority to enter into a compromise on his behalf. Nevertheless, after six years he questioned its validity by means of chamber summons. This was an unsuccessful challenge by reason of delay, estoppel or res judicata, and was rightly so held by the High Court.

Accordingly, we see no merit in this appeal. It is dismissed. However, in the circumstances of the case, we do not make any order as to costs.

V.P.R. Appeal dismissed.

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