

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On :22.12.2016

Pronounced On :02.01.2017

Coram

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.403 of 1998

Arokiya Marie Lemoan

.. Appellant/defendant

/vs/

1.Franclin Marie Louis(died)
2.Franclin Maxime (died)
3.Franclin Merius
(RR1 to 3 are represented by
their recognized power agent R2)
4.Mrs.Mahalakshmi
5.Mohan Franclin
6.Ravi
(Minor son rep.by his mother and
guardian 3rd petitioner rep.by power
agent Albert)
(Respondents 4 to 6 brought on record
as LR's of deceased 2nd respondent vide
order of Court dated 20.12.2000 in
C.M.P.Nos.12767 to 12769 of 1999)
(Cause title accepted vide order of Court
Dated 20.12.2000 in C.M.P.No.19791 of 2000)

7.Magimai(died)
8.Franclin Rajendran
(RR7 and 8 brought on record as
LR's of the deceased R1 and
R8 recorded as LR of the deceased R7
vide order of Court dated 21.02.2013
made in C.M.P.no.1787 to 1789 of 2008
in S.A.No.403 of 1998)

.. Respondents/plaintiffs

Prayer: Second Appeal filed under Section 100 of the Civil Procedure

Code against the judgment and decree dated 21.08.1997 made in A.S.No.60 of 1996 on the file of the Court of the Principal District Judge at Pondicherry, confirming the judgment and decree dated 30.09.1996 made in O.S.No.242 of 1990 on the file of the Court of the Principal District Munsif at Pondicherry.

For Appellant	:Mr.T.P.Manoharan Senior Counsel for Mr.G.M.Mani Associates
For Respondents	:Mr. Veena Suresh for Mr.T.R.Rajaraman for R3 to R6 and R8 R1,2,7 died.

J U D G M E N T

This Second Appeal with chequered history is a classic case to understand how the Courts below in their zealous to dispose of the case, are carried away by the compromise memos filed by the counsel, pass judgment without adhering to mandate of Order 23, Rule 3 of Civil Procedure Code and thereafter, to justify their action as well as the counsel's action whom they trust and act, refuse to undo the wrong, despite pointing out by the affected party.

2. The suit is for delivery of vacant possession after removing the superstructure put up by the defendant. According to the plaintiffs, the suit property was let out to the defendant by their mother

Santhanamary Franclin on 01.01.1977. After the demise of Santhanamary in the year 1979, the suit property devolved to plaintiffs. The defendant continue to be the tenancy by executing lease deed in favour of the plaintiffs. As per the lease deed dated 10.01.1984, the rent was enhanced to Rs.50/-. The defendant agreed to vacate the premises on six months notice or in case of default of rent continuously for six months. There was default in rent, hence, a lawyer notice dated 26.09.1989 was issued. Since the defendant failed to vacate and hand over the vacant possession, the original suit came to be filed.

3. The defendant resisted the suit denying landlord tenant relationship. Claiming that she is in possession of the property since 1957 uninterruptedly for more than 30 years, she claims to have prescribed title over the property. Further, challenged the suit as bad for want of pre-suit notice under Section 106 of Transfer of Property Act, 1882 and for improper description of the suit property.

4. The trial Court, after framing 6 issues, had examined 4 witnesses as P.W.1 to P.W.4 on behalf of the plaintiffs and marked 44

documents as Exs.A1 to A44. When the matter was adjourned for defendant's side evidence, a joint compromise memo has been presented before the trial Court on 08.07.1992. The trial Court has recorded the presence of both the parties and their respective counsels and decreed the suit on the same day in terms of the compromise memo.

5. As per the terms of the compromise memo, the defendant has to vacate the premises on or before 10.10.1992. The defendant did not vacate the suit property, hence, the plaintiffs have initiated execution proceedings. On receipt of the notice on Execution Petition, the defendant has preferred an appeal in A.S.No.8 of 1996 alleging that the compromise decree was obtained by fraud, the signatures obtained in the blank papers by her counsel for the case purpose had been misused to prepare the compromise memo, she never consented for compromise and there is no necessity for her to compromise without any consideration. The appellate Court found that there was lapse in recording the compromise decree. So, the matter was remanded back to the trial Court.

6. The remand order of the first appellate Court in

A.S.No.8 of 1996 dated 17.04.1996 reads as under:-

"14. It is the case of the defendant/appellant that her counsel has obtained her signatures on the blank papers and she came to know about the compromise decree only after the receipt of the notice in the E.P., proceedings. It is also stated by her that her counsel was sincerely in conducting her case. When she says that her counsel was sincerely in conducting her case there is no scope for her to throw blunt allegation against her counsel all of a sudden on the compromise memos filed in the Court. This is a case wherein the compromise memo were signed by both the counsels and the parties and filed in the open Court in the presence of all the persons concerned. While so, some sort of sanctity should be attached to this document signed by the learned counsels along with the parties and filed in the open Court otherwise litigants will take advantage of their so called innocence and illiteracy and exploit their situation by reopening the case as an after thought to challenge the compromise deed and the compromise decree passed by the Court. This is the exact purpose for which a new provision i.e., R.3A has been inserted to the Order 23 of the CPC in the year 1976. A perusal of the record of examination of the parties before the Court shows that there are some improved version on the side of both the parties and after ignoring the payment of consideration aspect of the case, it is felt that the defendant has not discharged the burden lies on her to prove that there was no consent and knowledge for the compromise filed in this case. As per Section 14 of the Indian Contract Act a free consent has been defined

when the consent is not caused by coercion and undue influence, fraud, misrepresentation, mistake of fact. Here, in the instant case the defendant has not proved as to how she was influence by the other party, as to what sort of fraud has been placed upon her and by whom and as to what sort of misrepresentation has been given to her in the matter of drafting compromise memos filed in the suit. This part of evidence relating to the payment of money to the defendant for entering into compromise cannot be considered and both the parties should not be allowed to take any advantage of this part of evidence because there is no mention about this payment either in the Compromise Memo or in the order of the Appellate Court. Hence, this part of evidence has to be ignored. Ignoring this place of evidence the presnt case has to be examined."

7. On remand, the trial Court has examined the second plaintiff as C.W.1, the defendant as C.W.2 and the then counsel for the defendant as C.W.3 and held that the compromise is genuine and the compromise memo was prepared at the instance of the defendant. The trial Court held that, the counsel have implied authority to enter into compromise on behalf of their client.

8. Aggrieved by the said finding, the defendant filed

appeal in A.S.No.60 of 1996. The first appellate Court dismissed the appeal confirming the judgement and decree of the trial Court.

9. At the time of admission of the second appeal, this court has formulated the following Substantial Questions of Law for consideration:

"1. Whether a decree can be passed in terms of the alleged memos of compromise filed in the present suit, when the respondents/plaintiffs have filed to appear before Court and to prove to the satisfaction of the Court that the said memos of compromise were made with the free consent and full knowledge of the appellant and the same are lawful as contemplated under Order 23, Rule 3 C.P.C., especially when they are acquiring absolute benefit under the same without giving anything in return to the aged, helpless and illiterate appellant?

2. Whether to arrive at a judicial satisfaction that the memos of compromise filed in the suit as contemplated in O.23 R.3 CPC, is it not just, proper and necessary to construe the

entire depositions of C.Ws.1,2 and 3 with reference to the totality of the facts and circumstances and the position of law and consequently, is the failure of the Court below to do the same, had not vitiated its judgment?

10. The learned counsel for the appellant pointed out that there are two compromise memos, one in English and another in Tamil. The Tamil Version and the English version are not identical and not executed on the same day. Both compromise memos were presented in the court on 8. 7.1992. The advocate clerk who assisted in preparing the memos was not examined. The ocular evidence of the second plaintiff examined as CW-1 and the ocular evidence of the defendant's counsel examined as CW-2 are contradictory to each other. They contradict vital facts like place of compromise arrived and signed, the date of compromise and payment of compensation.

11. The learned counsel for the respondents by referring the observation made by the trial court submitted that, the compromise decree duly passed should not be doubted. If such doubts are entertained by the Courts, the litigants will take advantage of their so called innocence and illiteracy and exploit the situation by reopening the case as an afterthought to challenge the compromise deed and the compromise decree passed by the court. The learned counsel for the

respondents further submitted that, minor discrepancies in the ocular evidence of CW-1 and CW-2 recorded after sufficient lapse of time, will not vitiate the compromise decree duly passed by a competent court.

12. The compromise memo was the subject matter for consideration before the courts below. Both the courts have not given adequate consideration to the facts such as, why compromise memo was prepared in bilingual(Tamil and English)? Why there are certain new terms found in the English version, which is conspicuously missing in the tamil version? Why the Tamil version of the compromise memo is dated 07.07.1992, whereas the English version of the compromise memo is dated 08.07.1992? Why the term in the English version which states that a seperate compromise application is made on 8.7.1992 not in the Tamil version and why that application was not filed?

13. C.W-1 in his evidence says that he paid Rs 1,15,000/- as quit pro quo to vacate and hand over the vacant possession. He also categorically states that he got receipt from the defendant for the payment of Rs 1,15,000/- in terms of the compromise and due to the mistake of the defendant counsel, the receipt for

Rs.1,15,000/- has not been filed along with the compromise memo. If there was really a payment of Rs.1,15,000/- to the defendant and the defendant has given a receipt, then that receipt should have been with the plaintiffs and not with the defendant's counsel. If the deposition of the plaintiffs that the defendant's counsel is in possession of the receipt is true then, C.W-2 ought to have explained why he retained the receipt and why he did not produce it into the Court when his client has squarely blamed and accused him for misusing her signatures made in blank papers. When there is a categorical denial made by the defendant that there was no compromise; she never received Rs.1,15,000/- in view of the compromise and she never executed receipt of Rs.1,15,000/-. The burden on the plaintiffs is discharged and the burden shifts to the defendant. The illustration (g) to Section 114 of the Indian Evidence Act, 1872 says that *the Court may presume, that evidence which could be and is not produced would, if produced, be unfavourable to the person, who withholds it.*

14. For the queries raised above, there is no explanation from the parties, who defend the compromise as true and genuine, but the Courts below have taken that task and had held that some sort of

sanctity must be attached to the compromise memo, because it has been signed by both the counsels along with the parties and filed in the open Court. No law prescribes sanctity should be attached to a document just because it is signed by an Advocate, that too when fraud and misrepresentation is alleged against the counsel, who has signed in the compromise memo.

15. For non-production of the receipt for Rs.1,15,000/- allegedly executed by the defendant, the trial Court has observed that both the parties should not be allowed to take any advantage of this part of evidence, because, there is no mention about this payment either in the compromise memo (or) in the order of the appellate Court (*Order of remand in A.S.No.8/1996:emphasis added*). If the compromise is not for money and it should be ignored, then the Courts below ought to have atleast sought for the compelling reason for the defendant to enter into a compromise, without compensation after the commencement of the trial and when the matter was posted for defendant evidence.

16. This court finds that the judgments of the Courts

below are not only based on surmises and conjunctures but also perverse. For the plea that the defendant being a illiterate, unlettered lady and she has been misled by her counsel, the trial court has observed that:

"...The version of the defendant cannot be accepted for the simple reason that it is very much against the conduct of an ordinary litigant public. This cannot be expected of a litigant lady who was very regular in attending the courts in this case. She is not a litigant from a remote village. She is resident of Pondicherry town for a very long time living with two of his sons and by attending the Courts regularly she must be knowing what would be the number of days normally for which the court adjourned her case on previous occasions."

17. For the point why two different compromise on two different dates, instant of finding the reasons through the evidence and documents, the first appellate Court has observed as under:-

"It has to be seen whether the said two compromise memos had been signed by the appellant on her own initiative and with her consent. For this I have to refer to the written

statement of the defendant, who averred para 3 that: "She had built the hut and started living in the suit property since 1957". I hold that the said pleading would mean that the defendant was not the owner of the suit property, namely the vacant site."

18. This Court is unable to comprehend how an averment in written statement, which is untested and unconnected to the point for determination and also filed much prior to the compromise memo, will give answer to the query, why there are two compromise memos bearing two different dates.

19. For the aforesaid reasons, this Court holds that the judgments of the trial Court and the first appellate Court bristle with perversity and liable to be set aside. Accordingly, the compromise decree passed by the trial Court, and confirmed by the first appellate Court is hereby set aside. As a result, this matter is remitted back to the trial Court to proceed further from the examination of defendant's side witnesses and complete the trial in the manner known to law.

20. In the result, ***the Second Appeal is allowed.***

Judgements and decrees of both the Courts below are set aside. The trial Court is directed to continue with the examination of witnesses and to dispose of the case on priority basis, preferable within 2 months from the date of receipt of the case records. No order as to costs.

02.01.2017

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Index:Yes/No

Internet:Yes/No

To

1.The Principal District Judge at Pondicherry.

2.The Principal District Munsif at Pondicherry.

Dr.G.Jayachandran, J.

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Judgement made in
S.A.No.403 of 1998

02.01.2017

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