

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.07.2018
PRONOUNCED ON : 01.08.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.2106 of 2004

and

C.M.P.No.15830 of 2000

1.G.Krishnan

2.G.Thimmaraya Naidu

3.G.Govindan

4.G.Rajigan

5.G.Kanmani

6.G.Manickam

7.G.Kamalesan

8.T.Devan

9.K.Murthy

10.C.Chandra

Appellants/Defendants

Vs.

Samalpatti Villagers
Rep. By Beethappa Naidu,
S/o, Chinnappa Naidu
Samalpatti Village,
Thogarapalli post,
Krishnagiri Taluk

Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree made in A.S.No.79 of 1997 on the file of 2nd Additional District Judge and Chief Judicial Magistrate, Krishnagiri dated 30.11.1999 reversing the well considered judgment and decree made in O.S.No.399 of 1990 dated 16.08.1995 on the file of District Munsif Court, Krishnagiri.

For Appellants : Mr.K.A.Ravindran

For Respondents: No appearance
Set exparte

Vide order of Court dated 06.07.2018

J U D G M E N T

Challenge in this Second Appeal is made to the judgment and decree dated 30.11.1999 passed in A.S.No.79 of 1997 on the file of II Additional District and Sessions Judge/Chief Judicial Magistrate's Court, Krishnagiri reversing the judgment and decree dated 16.08.1995 passed in O.S.No.399 of 1990 on the file of District Munsif Court, Krishnagiri.

2. The second appeal has been admitted on the following substantial questions of law.

(i) Whether the decree passed by the Lower Appellate Court is sustainable on the face of mandatory provisions as adumbrated in Order 23 Rule 3 of C.P.C is not complied with?

(ii) Whether the decree passed by the Lower Appellate Court is sustainable since the same has been made without complying with the mandatory provisions of Order 23 Rule 3B of C.P.C?

3. Considering the scope of issue involved in this Second Appeal lying in a narrow compass, it is not necessary to dwell into facts of the case in detail. The suit has come to be laid by the plaintiff for declaration, permanent injunction and mandatory injunction. The said suit laid by the plaintiff has been resisted by the defendants on various grounds. Based on the materials projected by the respective parties, it is found that the suit has come to be dismissed by the trial court. Aggrieved over the same, it is found that the plaintiff has preferred the first appeal. It appears that in the first appellate court, a memo of compromise had been filed on behalf of the plaintiff and the defendants and based on the abovesaid memo of compromise, the first appellate court had disposed of the first appeal in terms thereof. Aggrieved over the same, the present second appeal has been preferred.

4. The main contention projected by the appellants' counsel is that the judgment and decree of the first appellate court based on the memo of compromise is not in consonance with the provisions contained in Order 23 Rule 3 and Rule 3B of the Code of Civil Procedure and therefore the judgment and decree of the

first appellate court are liable to be set aside.

Order 23 Rule 3 of the Code of Civil Procedure reads as follows:

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].

[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.]

Order 23 Rule 3B of the Code of Civil Procedure reads as follows:

No agreement or compromise to be entered in a representative suit without leave of Court: (1) No agreement or compromise in a representative suit shall be entered into without the leave of the Court expressly recorded in the proceedings: and any such agreement or compromise entered into without the leave of the Court so recorded shall be void.

(2) Before granting such leave, the Court shall give notice in such manner as it may think fit to such persons as may appear to it to be interested in the suit.

Explanation: In this Rule, "representative suit" means,

(a) a suit under section 91 or section 92

(b) a suit under rule 8 of Order I,

(c) a suit in which the manager of an undivided Hindu family sues or is sued as representing the other members of the family,

(d) any other suit in which the decree passed may, by virtue of the provisions of this Code or of any other law for the time being in force, bind any person who is not named as party to the suit.

5. On a perusal of the memo of compromise filed in the appellate court based on which the appellate court had disposed of the appeal, it is seen that the said memo had neither been signed by the plaintiff nor by the defendants. On the other hand, it is found that the said memo of compromise had been signed only by the counsel for the plaintiff and counsel for the defendants. Such being the position, as rightly put forth by the defendants' counsel, when the memo of compromise had not been signed by the parties to the litigation and when Rule 3 of Order 23 mandates that the memo of compromise or the agreement entered into between the parties should be in writing and signed by the parties and when admittedly, the memo of compromise filed before the first appellate court had not been signed by the parties and signed only by the counsel appearing for the parties, it is found that based on the abovesaid memo, the first appellate court should not have endeavored to dispose of the first appeal in terms thereof. Thus, it is found that the first appellate court's judgment and decree based on the abovesaid memo of compromise signed only by the counsel cannot be sustained in the eyes of law and liable to be set aside.

6. In the decision reported in 2010 (1) CTC 799 [Kokila Kaliamoorthy Vs. K.Mani and others] it has been held that when a compromise memo had not been signed by both the parties who are concerned with the issues arisen in the lis, the said memo of compromise is only a trash and cannot be acted upon by the Courts below and the above position of law has been explained as follows:

Compromise Memo : Validity of - Validity of Compromise not signed by parties to lis - Held compromise memo is only a trash which cannot be acted upon by Court of law.

Coming to the Compromise Memo now sought to be introduced as additional evidence before this Court, it is found that it was only the first respondent, who had mooted a compromise and having signed the Compromise Memo, circulated the same to the

plaintiff. It is to be noted that the said Compromise Memo was not signed by the other respondents who were parties to the Suit. It is also seen that the said Compromise Memo was not signed by the plaintiff. When a Compromise Memo was not signed both the parties who are concerned with the issues arisen in the lis, the said Compromise Memo is only a trash which cannot be acted upon by the Court of law.

Similarly, in the decision reported in 2013 (2) CTC Page 13 [K.M.Ramanathan and others Vs. Rengasamy and others] it has been held that the compromise arrived at between the parties must be signed by the parties and if the compromise has not been signed by any/some of the parties, the dispute between the parties would remain as it is and the position of law has been explained by the Division Bench in the abovesaid decision as follows:

Code of Civil Procedure, 1908 (5 of 1908), Order 23, Rule 3 - Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) - Effect of - Compromise decree passed without association of all parties in LPA - Validity of - Provision post Amendment mandates that compromise arrived at between parties must be signed by all the parties - Dispute between parties would remain as it is, when compromise has not been signed by any/some parties - In instant case, Petitioners though party to LPA, original Compromise Memo not containing signatures of Petitioners or their Counsel - Although Petitioners remained absent in LPA and Court disbelieved sale in their favour, held, same would not confer jurisdiction on Court to pass compromise decree without their association - Compromise decree passed by Division Bench set aside - Review allowed.

Facts: The core issue to be considered in instant Application is the validity of a compromise decree passed by Division Bench of High Court wherein all the parties to the LPA were not included.

Held: Order 23, Rule 3 of C.P.C permits the parties to the lis to compromise the Suit. The provision regarding compromise of the Suit has undergone a sea change on account of the amendment made to the Code of Civil Procedure by Act 104/1976. Order 23, Rule 3 of CPC, after the amendment provides that compromise can be recognised by the Court only in case it was made out in writing and signed by all the parties to the suit. The amendment was made with a laudable object. The provision after amendment makes it clear that the compromise arrived at by the parties to the Suit must contain the signature of all such parties. The association of all the parties to the Suit, therefore, is a mandatory requirement, for passing a decree of compromise under Order 23, Rule 3 of C.P.C.

The Parliament, therefore, by making amendment to the Code of Civil Procedure, wanted all the parties to sign the Memo of Compromise so as to make a binding decree under Order 23, Rule 3 of CPC. In case some of the parties have not signed the compromise, the dispute between the parties would remain as it is, notwithstanding the partial compromise.

The fact that the First Appellate Court disbelieved the sale in favour of the Petitioner would not give jurisdiction to the Court to pass a compromise decree without their association notwithstanding their presence in the Letters Patent Appeal.

The Courts have to do justice to the parties. Technicalities should not come in the way of rendering justice. If it is made out that the Petitioners were not parties to the Compromise Memo and the compromise decree was not passed in terms of Order 23, Rule 3, C.P.C., necessarily, such decree should be set aside.

7. In the light of the above position of law, when the judgment and decree of the first appellate court had been based upon the memo of compromise not signed either by the plaintiff or the defendants and appears to be signed only by the counsel appearing for the parties, the first appellate court should not have endeavoured to act upon the said memo of compromise in the light of the mandatory stipulation contained in Order 23 Rule 3 of the Code of Civil Procedure and in such view of the matter, on the abovesaid ground, the judgment and decree of the first appellate court are liable to be set aside.

8. It is further seen, on a reading of the judgment and decree of the first appellate court, that the compromise had been mooted by the court at the first instance and following the same, it appears that the counsel had filed the memo of compromise and though the judgment would read as if the memo had been presented by the respective counsel, after getting the consent of the parties concerned, however, when the said memo had not been signed by the parties and when the law stipulates that the memo of compromise should be signed by all the parties to the lis as abovenoted, the judgment and decree of the first appellate court based on the same would be a nullity and the dispute between the parties would remain as it is notwithstanding the compromise memo filed by the counsel appearing for the parties. As above seen, the first appellate court should have ascertain that the said memo of compromise filed in the Court had been prepared with the association of all the parties to the lis, a mandatory requirement and the same having not been ascertained and followed by the first appellate court, it is seen that the judgment and decree of the first appellate court cannot be allowed to stay further.

9. In addition to that, in so far as this case is concerned, it is found that the suit had been laid by the plaintiff in a representative capacity. Such being the position, as mandated under Rule 3B of Order 23 without the leave of the court, the lis should not have been disposed of on the basis of the compromise and before acting upon the memo of compromise filed, the court should give notice in such a manner to all the parties to the lis as provided under Rule 3B and only after issuing the notice to the parties concerned and ascertaining whether the memo of compromise had been filed based upon their consent and association and only after obtaining the leave of the court, expressively recorded in the proceedings, the court should endeavor to proceed further in the matter. However in so far as this case is concerned, there is no material placed as to whether any requisition had been made to the court for seeking the leave to enter into a compromise and there is no material placed to show that while seeking such leave, the court had issued notice to all the parties concerned and the court had acted upon the compromise after ascertaining their consent and interest vis-a-vis the memo of compromise and the terms contained therein. The abovesaid safeguards having been provided as regards the suit filed in the representative capacity, the said mandatory requirements not having been complied with the first appellate court, on that score also, it is found that the judgment and decree of the first appellate court based upon the memo of compromise signed only by the advocates appearing for the parties are found to be not in consonance with Rule 3B of Order 23 of Code of Civil Procedure, and on the said ground also, the same are liable to be set aside as the compromise entered into without the leave of the court and recorded by the court shall be void sans the adherence to the mandatory requirements as provided under Rule 3B of Order 23.

10. In the light of the above discussions, the substantial questions of law formulated in the second appeal are accordingly answered in favour of the defendants/appellants and against the plaintiff.

11. For the reasons aforesaid, the judgment and decree dated 30.11.1999 passed in A.S.No.79 of 1997 on the file of II Additional District and Sessions Judge/Chief Judicial Magistrate's Court, Krishnagiri are set aside. The matter is remitted back to the first appellate court with a direction to the first appellate court to take up the first appeal on file and after issuing notice to both the parties is directed to dispose of the Appeal in accordance with law.

12. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The 2nd Additional District Judge and Chief Judicial Magistrate,
Krishnagiri.

2.The District Munsif,
District Munsif Court,
Krishnagiri.

Copy to

The Section Officer,
VR Section,
High Court,
Chennai. (2 copies)

+1cc to Mr.K.A.RAVINDRAN, Advocate, S.R.No. 52250

Judgment made in
S.A.No.2106 of 2004

EV(CO)
TR(30/08/2018)

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