

"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

&

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

FRIDAY, THE 20TH DAY OF JANUARY 2023 / 30TH POUSHA, 1944

MAT.APPEAL NO. 810 OF 2022

AGAINST THE ORDER DATED 03.11.2022 IN I.A.NO.5 OF 2020 IN

O.P.NO.780 OF 2021 ON THE FILES OF THE FAMILY COURT,

THIRUVANANTHAPURAM

APPELLANTS:

- 1 DR. DRISYA D.T.,
AGED 37 YEARS, D/O. THANKAMANY, RESIDING AT A4,
TC. NO. 4/1870(4), A4 (4) DEEPAM, PANDITS
COLONY, KOWDIAR P.O., THIRUVANANTHAPURAM,
PIN - 695003.
- 2 DEEPSHIKA D.K.
AGED 8 YEARS, D/O. DR.KIRAN, REP. BY THE 1ST
APPELLANT DR. DRISYA, WHO IS THE MOTHER AND
GUARDIAN, PIN - 695003.
- 3 DEEBJITH D.K.
AGED 5 YEARS, S/O. DR. KIRAN, REP. BY THE 1ST
APPELLANT DR. DRISYA, WHO IS THE MOTHER AND
GUARDIAN, PIN - 695003.

BY ADVS.

M.R.DHANIL

SENITTA P. JOJO

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RESPONDENTS :

- 1 DR. KIRAN
AGED 40 YEARS, S/O. DR. THANKAPPAN, RESIDING AT
SAMUAL GARDEN, ARCHANA NAGAR, E34, NEW RAYS (TC
6/2331), PONGUMOODU, ULLOOR VILLAGE, MEDICAL
COLLEGE P.O., THIRUVANANTHAPURAM, PIN - 695011.
- 2 DR. K.R. THANKAPPAN,
AGED 73 YEARS, S/O. SAKKAI, RESIDING AT SAMUAL
GARDEN, ARCHANA NAGAR, E34, NEW RAYS (TC
6/2331), PONGUMOODU, ULLOOR VILLAGE, MEDICAL
COLLEGE P.O., THIRUVANANTHAPURAM, PIN - 695011.
- 3 VALSA P.T.,
AGED 71 YEARS, W/O. DR. THANKAPPAN, SAMUAL
GARDEN, ARCHANA NAGAR, E34, NEW RAYS (TC
6/2331), PONGUMOODU, ULLOOR VILLAGE, MEDICAL
COLLEGE P.O., THIRUVANANTHAPURAM, PIN - 695011.

BY ADVS.
S. MAJIDA S
AJIKHAN.M
MUHAMMED SUHAIL K.H.

THIS MATRIMONIAL APPEAL HAVING COME UP FOR FINAL
HEARING ON 03.01.2023, THE COURT ON 20.01.2023 DELIVERED
THE FOLLOWING:

"C.R."**JUDGMENT**P.G.Ajithkumar, J.

The order dated 03.11.2022 of the Family Court, Thiruvananthapuram in I.A.No.5 of 2020 in O.P.No.780 of 2021 is under challenge in this appeal filed under Section 19(1) of the Family Courts Act, 1984.

2. I.A.No.5 of 2022 was filed by the appellants, who are the wife and children of the 1st respondent, seeking review of the judgment dated 01.07.2022 in O.P.No.780 of 2021. As per the said judgment, O.P.No.780 of 2021 was allowed in terms of the compromise entered into between the parties. The Family Court, after hearing both sides, dismissed I.A.No.5 of 2022.

3. This appeal was admitted on 21.11.2022. The respondents entered appearance through their learned counsel.

4. Heard the learned counsel appearing for the appellants and the learned counsel appearing for the respondents.

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5. O.P.No.780 of 2021 was filed by the appellants seeking a decree setting aside gift deed No.914 of 2019 of Sub Registry Office, Pattom. Apart from the said case, several other litigations between the parties are pending. The 1st respondent filed O.P.No.223 of 2018 for a decree of dissolution of marriage. He also filed O.P.No.224 of 2018 for declaring him the guardian of the children and to get their permanent custody. The appellants fled M.C.No.160 of 2018 claiming maintenance. Two more cases, namely, O.P.No.753 of 2021 and O.P.No.3004 of 2021 between them are also pending consideration of the Family Court. It was in such circumstances, a compromise, Ext.P1 was entered into and signed by the 1st appellant and the respondents, which was filed before the Family Court. The Family Court as per the judgment dated 01.07.2022 recorded that compromise and allowed O.P.No.780 of 2021. The judgment reads:-

"Petition for setting aside the gift deed No.914 of 2019 and for temporary injunction.

Advanced. Both parties and their counsels are present. Matter along with all other connected matters

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are settled in the counselling. Compromise filed. OP allowed in terms of compromise. The compromise shall form part of the decree. The attachment is lifted. Communicate the order.”

6. The appellants have filed I.A.No.5 of 2022 in O.P.No.780 of 2021 seeking to review the said judgment dated 01.07.2022. The contentions of the appellants were that the 1st appellant was made to believe that by such a compromise, O.P.No.780 of 2021 would alone be disposed of; whereas in the said judgment rendered on recording the settlement agreement, it was stated that all litigations between appellants and the respondents pending before the Family Court Thiruvananthapuram and also this Court have been settled. Although the Family Court was apprised of the error thereby occurred, the review petition was dismissed.

7. The learned Counsel appearing for the appellants would contend that a reading of Annexure A1, the settlement agreement itself it is evident that the purport of the same was to settle the subject matter of O.P.No.780 of 2021 and

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no other case. Now, the respondents would interpret the compromise and also the judgment in O.P.No.780 of 2021 to mean that all cases pending between the parties are settled as per the terms of Annexure A1. The learned Counsel appearing for the appellants would further submit that Annexure A1 as well as Annexure A2 judgment dated 01.07.2022 are vitiated by fraud, and therefore the same could be challenged by filing an interlocutory application. According to the learned counsel, a separate suit for challenging Annexure A2 judgment is barred under the provisions of Order XXIII, Rule 3A of the Code of Civil Procedure, 1908 and the remedy is to approach the same court by filing an application. In this regard the learned counsel placed reliance on the decisions in **Ajanta LPP v. Casio Keisanki Kabushiki Kaisha d/b/a Casio Computer Co. Ltd. & another [(2002) 5 SCC 449]** and **R.Janakiammal v. S.K.Kumaraswamy (deceased) (through LRs. and others [(2021) 9 SCC 114]**.

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8. The learned counsel appearing for the respondents, on the other hand, would submit that the 1st appellant, who is a Doctor by profession holding a Post Graduate Degree in Medicine, after understanding all the clauses in Annexure A1 has signed it. Her counsel also had signed Annexure A1. Various clauses in Annexure A1 are stated with clarity and after understanding the same only, the 1st appellant has signed the compromise. After that, she cannot be allowed to retract and assail Annexure A2 judgment.

9. The learned counsel for the respondent invited our attention to **Sindhu P.K. v. Sreekumar P.A. and another [(2015) 3 KLT 869]** and **Thriloki Nath Singh v. Anirudh Singh (D) through LRs. and others [(2020) 6 SCC 629]** in order to fortify her contention that once the compromise was found to be lawful, the court was obliged to record the same and no challenge to the same by way of appeal or review can be entertained. In Apex Court in **Thriloki Nath Singh** (supra) and this Court in **Sindhu P.K.** (supra) took the view that when a compromise is filed before the court and the

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court is satisfied that it is lawful and entered into between the parties knowing the contents of the agreement, the court is obliged as per the provisions of Order XXIII, Rule 3 of the Code to record the compromise and pass a decree in terms of the same. There cannot be any dispute with respect to the said proposition of law. Similarly, the law is settled that when a compromise decree is a product of fraud played upon the court, the aggrieved can approach the same court by filing an interlocutory application to recall the decree. The proviso to Order XXIII Rule 3 of the Code obligates the court to decide the question of lawfulness of the compromise, if one of the parties alleges that the settlement agreement is not lawful. But that is possible at a stage before recording the compromise and passing the decree.

10. Annexure A1 settlement agreement was presented before the Family Court and acting upon it Annexure A2 judgment was passed. In terms of Annexure A2, O.P.No.780 of 2021 was allowed. In Annexure A1, it has been stated that the following cases between the same parties are pending

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consideration,-

A. Before the High Court

- 1) Mat.Appeal No.169 of 2022
- 2) Mat.Appeal No.668 of 2021
- 3) O.P.(FC) No.13 of 2022
- 4) R.P.(FC) No.264 of 2021

B. Before the Family Court, Thiruvananthapuram

- 1) O.P. No.3004 of 2021
- 2) O.P.No.753 of 201
- 3) O.P.No.780 of 2021

11. Clause No.(5) in Annexure A1 reads,-

“5. ഇതുകക്ഷികളും തമ്മിൽ കേരളത്തിലെ കോടതികളിൽ (ബഹു: ഹൈക്കോടതി, കുടുംബകോടതി തിരുവനന്തപുരം) നിലനിൽക്കുന്ന എല്ലാ കേസുകളും ഒത്തുതീർക്കേണ്ടതാണ്.”

It is the said clause that is now interpreted that both parties settled all the cases between them.

12. When a suit/petition is settled, the same can be disposed of either under Rule 1 of Order XXIII as withdrawn or a compromise decree can be passed under Rule 3 of Order XXIII of the Code. Clause (5) in Annexure A1 only says that other cases between the parties would have to be settled. In what way those cases should be settled has not been

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mentioned. On the basis of such a clause, either Rule 1 or Rule 3 of Order XXIII of the Code can be invoked. If there is a compromise and a decree based on the same has to be passed, the compromise agreement shall ordinarily be an executed one and not merely an executory one.

13. As per the definition of the decree in Section 2(2) of the Code a decree shall be the adjudication of the matters in controversy in the suit. It can either be preliminary or final. On the basis of an agreement by which the parties agreed to settle a suit, without saying how is the suit to be decided and what are the terms of compromise, no decree can be passed. If the suit is to be withdrawn also, there shall be a stipulation to that effect. Clause (5) or any other clause in Annexure A1 does not enable this Court or the Family Court, Thiruvananthapuram to dispose of any of the cases mentioned above except, O.P.No.780 of 2021. Therefore, the apprehension of the appellant that Annexures A1 and A2 would be interpreted to mean that all the aforesaid pending cases have been settled is genuine. In view of that Annexure A2 judgment is wrong.

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14. The 2nd and 3rd appellants are minors. When a compromise decree is passed in a suit to which minor is a party, it is the mandate of Order XXXII Rule 7 of the Code to obtain leave of the court before the disposal of the suit. O.P.No.780 of 2021 was allowed in terms of Annexure A1 compromise without obtaining such a leave from the court. Leave of the court is a mandatory pre-requirement when the suit is compromised by the next friend or guardian. In that view of the matter, Annexure A2 judgment by which the compromise was recorded is an apparent error. In such circumstances, the Family Court ought to have allowed the review petition, I.A.No.5 of 2022 in O.P.No.780 of 2021.

The order of the Family Court dated 03.11.2022 is therefore set aside by allowing this appeal. I.A.No.5 of 2022 stands allowed. The Family Court will proceed with O.P.No.780 of 2021 in accordance with law.

Sd/-

ANIL K. NARENDRAN, JUDGE

Sd/-

P.G. AJITHKUMAR, JUDGE

dkr

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APPENDIX OF MAT.APPEAL 810/2022

PETITIONER ANNEXURES

- ANNEXURE A1 CERTIFIED COPY OF THE AGREEMENT DATED 01/07/2022 .
- ANNEXURE A2 CERTIFIED COPY OF THE JUDGMENT DATED 01/07/2022 IN OP NO. 780/2021 OF THE FAMILY COURT, THIRUVANANTHAPURAM.
- ANNEXURE A3 TRUE COPY OF THE DRAFT MEMORANDUM OF AGREEMENT DATED 05/07/2022 RELATED TO MAT. APPEAL NO.668 OF 2021.
- ANNEXURE A4 TRUE COPY OF THE DRAFT MEMORANDUM OF AGREEMENT DATED 06/07/2022 RELATED TO RP(FC) NO.264 OF 2021.
- ANNEXURE A5 TRUE COPY OF THE REVIEW PETITION NUMBERED AS IA NO. 5/2022 IN OP NO. 780/2021 OF THE FAMILY COURT, THIRUVANANTHAPURAM, DATED 29/08/2022.
- ANNEXURE A6 TRUE COPY OF THE OBJECTION, DATED 10/10/2022 FILED BY THE RESPONDENTS IN THE REVIEW PETITION NUMBERED AS IA NO. 5/2022 IN OP NO. 780/2021 OF THE FAMILY COURT, THIRUVANANTHAPURAM.