IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.04.2022

Pronounced on : 27.05.2022

CORAM : JUSTICE N.SESHASAYEE

C.R.P.(NPD) No.1 of 2022
and CMP. No.23 of 2022

Abdul Rashid Sahib .... Petitioner / 2nd Defendant

Vs

1.Ramachandran .... 1st Respondent / Plaintiff
2.Karunanidhi .... 2nd Respondent / 1st Defendant

Prayer : Civil Revision Petition filed under Article 227 of the Constitution of India, praying to set aside the impugned judgment and decree dated 02.06.2015 passed by the Sub Court, Gudiyatham in O.S.No.81 of 2011.

For Petitioner : Mr.Sharath Chandran

For Respondent : Mr.G.Vinodh Kumar

ORDER

The revision petitioner is the second defendant in O.S.No.81 of 2011 on the file of Sub-Court, Gudiyattam, Vellore District. He has moved this Court under Article 227 of the Constitution challenging what passes for a decree dated 02-06-2015, passed with the consent of the defendants declaring the title of the plaintiff to the suit property.

2. The facts that provide the backdrop for the present revision may be bullet-pointed:

- The plaintiff/the first respondent herein had laid a suit in O.S.81/2012 for declaration of title allegedly on the strength of an unregistered sale deed. The second respondent herein was arrayed as the sole defendant to the suit. He is stated to be a close relative of the plaintiff.
- Claiming that he is the owner of the suit property along with another, the revision petitioner herein had filed I.A.17/2012 to implead himself.
- On 24.08.2012, I.A.17 of 2012 was allowed. On the procedural front, this necessitated an amendment to the cause-title of the plaint. However, the

plaintiff/first respondent failed to carry out the same, with the result that the suit was dismissed for default on 27-11-2012.

- Long after the dismissal of the suit, 767 days to be precise, the plaintiff filed I.A.31/2015 for restoration of the suit along with another application for condoning the delay of 767 days. While it is not exactly clear as to what happened to the application for condonation of delay, the fact remains that posting of I.A.31/2015 came to be advanced and was eventually allowed. Then, the suit itself was restored to file vide order dated 27.04.2015.
- At the time when the suit was restored, there was still only one defendant: the second respondent herein. The plaintiff carried out amendment to the cause title of the plaint, and the revision petitioner came to be arrayed as the second defendant.
- Subsequently, on 29-04-2015 a Memo is alleged to have been filed by the counsel for the revision petitioner informing the Court that the second defendant/revision petitioner '*submits to the decree',* recording which on 02-06-2015, the Court decreed the suit.
- After obtaining the said decree, the plaintiff/decree holder applied for transfer of patta, and for which purpose, he filed W.P.No.6934 of 2021. This was allowed by this Court on 18.03.2021 (Order by N. Seshasayee J), and in its

order, it directed the revenue officials to issue notice to all the parties who are likely to be affected by the intended action. The Tahsildar accordingly issued a notice to the present revision petitioner, and it is upon receiving this notice did the revision petitioner learn about the passing of the decree.

Challenging that the decree dated 02-06-2015 is vitiated by fraud, the second-defendant has laid this revision.

3. Mr. Sharath Chandran, the learned counsel for the revision petitioner contended that the trial Court ought to have realised that the Memo was allegedly signed only by the counsel, and that it should not have skipped or short circuited the procedure contemplated under Order XXIII Rule 3 CPC, and should have satisfied itself that there was a conscious relinquishment on the part of the second defendant before proceeding to pass a decree. Even if this is complied with, still the decree declaring the title to the property would have to be passed based on an unregistered sale deed. This would mean that the court was called upon to pass a decree, based on a certain Memo of the defendants, which it could not pass legally, and the trial Court was unwittingly sucked into the trap well laid by the plaintiff to pass the decree. He added that as per his instructions, the counsel for the revision petitioner before the trial court has already filed an affidavit before this Court disowning the said

document. Inasmuch as the decree is vitiated by a calculated fraud on the judicial process, there is no legitimacy attached to it. He relied on the ratio in ***Devaki and Others Vs. Manickam*** [2019 SCC Online Mad 35754 : (2020) 1 Mad LJ 567]; ***Himalayan Coop. Group Housing Society Vs. Balwan Singh and Others*** [(2015) 7 SCC 373]; ***Annapoorni Vs. Janaki*** [2013 (2) MWN (Civil) 847]; ***Karuppathal Vs. Palanisamy & Others*** [2011 (3) MWN (Civil) 469]; ***J.Sivasubramanian and another Vs. N.Govindarajan and another*** [1998-1-L.W.372]; ***Renuka Devi Vs. D.Manoharan*** [1997 (III) CTC 567].

4. Per contra, Mr.G.Vinodh Kumar, the learned counsel appearing for the respondents 1 and 2 submitted that:

- If at all the revision petitioner is aggrieved, he ought to have moved the very Court that passed the decree to have the decree recalled and the same cannot be challenged under Article 227 of the Constitution.
- It is not that the trial Court has granted a decree based on the unregistered sale deed but on the basis of a Memo filed by the counsel for the 2nd defendant. Therefore, it cannot be said that the trial Court has passed a decree based on the unregistered sale deed.

He relied on the authorities in ***Garment Craft Vs Prakash Chand Goel*** [(2022) 4 SCC 181] ***Y.Sleebachen Etc., Vs. Superintending Engineer WRO/PWD & Another*** [(2015) 5 SCC 747 : (2015) 3 SCC (Civ) 35] and ***P.Chinnaraj @ P.Rajan Vs. C.Ramasamy and others*** [2014 SCC Online Mad 11875; (2015) 1 MWN (Civil) 759].

5. The allegation on which this revision is pivoted is that the judicial process has been deftly and nefariously manoeuvred by the plaintiff to obtain a decree which substantive law and procedure does not accommodate. The resistance to it from the first respondent/plaintiff is directed to the jurisdiction of this Court under Art.227 of the Constitution to embark on an enquiry into a disputed question of fact viz., whether the counsel for the revision petitioner/2nd defendant before the trial court had filed a memo on 29-04-2015? This exercise would be beyond the ambit of powers of superintendence under Article 227 of the Constitution, argued the counsel.

6. This Court perused the records, and a reference to what it discloses will be made later. The issue here is not confined to whether or not Mr.Theerthagiri, the counsel of the revision petitioner before the trial court, had filed a Memo dated 29-04-2015

that led to the Court passing the decree. It goes beyond.

7. The facts may be reiterated for a convenient opening, for doing which this court considers it appropriate to refer to the records of the trial court. They disclose:

Sl.No.	***Date***	***Events***
1	19.09.2011	Suit filed by the first respondent against the second respondent
2	11.03.2011	Summons to defendant served. Defendant called absent and set exparte
3	22.11.2011	Exparte evidence taken. Exhibits A1 to A7 marked. Posted for arguments on 08.12.2011.
4	08.12.2011	Post to 20.12.2011.
5	20.12.2011	For adducing better evidence, posted to 24.01.2012.
6	24.01.2012	For adducing better evidence, posted to 10.02.2012.
7	10.02.2012	I.A.No.17/2012 filed by the revision petitioner for impleading – Under Order I Rule 10(2) CPC
8	24.08.2012	I.A.No.17/2012 allowed. Posted for steps to amend the plaint on 17.09.2012.
9	17.09.2012	Posted to 19.11.2012, and then to 27.11.2012.
10	27.11.2012	Steps not taken. Counsel for the plaintiff represented. Party may be called. Suit dismissed for default.
11	02.02.2015	I.A.31/2015 filed by the plaintiff for condonation of delay of 767 days for filing I.A., for restoration of suit, filed along with application for Order IX Rule 9 CPC. Notice was ordered. Notice was served only on second respondent (No notice taken on revision petitioner). I.A.No.31/2015 – Posted to 27.04.2015
12	31.03.2015	I.A.No.56/2015 filed by the plaintiff to advance hearing of I.A.No.31/2015 from 27.04.2015. Petition allowed. Case advanced to 31.03.2015
13	----	Application under Order IX Rule 9 for restoration of

Sl.No.	*Date*	*Events*
		the suit numbered as I.A.No.57/2015. Posted for notice of hearing and counter by 17.04.2015
14	17.04.2015	Learned Judge was on leave. But endorsement made by the some counsel that 'No counter, petition may be allowed'. Case posted to 22.04.2015.
15	22.04.2015	Notice of hearing filed on 16.04.2015. Memo filed by the 1st defendant on 21.04.2015. Memo filed by the second defendant on 21.04.2015. Judge on OD. Reposted to 27.04.2015.
16	29.04.2015	Memo filed by the second defendant – *"Submitting to decree and the above suit may be decreed without costs and his memo may kindly be recorded."*

8. Couple of facts disclosed above require a certain degree of emphasis as it seemingly sets up the stage for the passing of the decree:

- First the suit was laid for declaration of title on the strength of an unregistered sale deed against a sole defendant, the second respondent herein. He, is stated to be a close relative of the plaintiff, and he chose to remain exparte. Should it be presumed as an expected line of the game plan?

- On 24-11-2011, the trial Court proceeds to record the exparte evidence of the plaintiff, and marks the documents produced by him as Exts.A-1 to A-7. But it did not proceed to pass an exparte decree. It appears to have entertained the doubts on the sustainability of the plaintiff's right to relief (as it is

founded on an unregistered sale). It therefore, posted the case for arguments to 08-12-2011, and then specifically posted the case for ***adducing better evidence*** to 20-12-2011, 24-01-2012 and to 10-02-2012. It is now evident that the Court is less inclined to grant a decree for declaring the title of the plaintiff on the strength of an unregistered sale deed in an uncontested suit.

- On 10-02-2012, the date on which the case was posted for the plaintiff to adduce better evidence, the revision petitioner makes his entry when he came up with his application in I.A.17/2012 for impleading himself in the suit as the second defendant. Paragraph 3 of his affidavit filed in aid of this application discloses why the revision petitioner seeks his impleadment and also his just apprehension as to how his right to the suit-property might be imperilled if he is not heard. It reads:

> *"3. I state that I am* ***one of the absolute owner of the suit property and myself and T.Aslam Basha were purchased the said property under a registered Sale Deed dated 01/03/1991 executed by Ganesan for himself and on behalf of his minor children in Document No.889/1991 of SRO, Guidyatham.*** *We were in joint possession and enjoyment of the said property. Myself and T.Aslam Basha were the partners of the company in the name and style of "M/s.Eastern Leather Company". The abovesaid company was started by us with plant and*

machinery. The TNEB service connection stands in the name of T.Aslam Basha. And all the revenue records stand in the name of us."

- I.A.17/2012 was allowed, and the revision petitioner was impleaded. The next stage is a procedural step which requires formally amending the cause-title of the plaint for disclosing the name of the revision-petitioner as the second defendant in the suit. The trial Court granted two postings for the same, and as it was not done, consequent to which it dismissed the suit for default on 27.11.2012. It is doubtful if this procedure is entirely correct, but this is not very germane for the current purposes. Uptil this point there is hardly any significant procedural default. Indeed the trial Court deserves appreciation when it did not rush to pass an exparte decree as it chose to wait for better evidence for considering the plaintiff's claim of title to the suit property.

- The problem comes thereafter. Some 767 days later, the plaintiff comes up with applications under Order IX Rule 9 CPC for restoring the suit, and another for condonation of delay in filing the former application under Sec.5 of the Limitation Act.

- On 02.02.2015, the application under Sec.5 of the Limitation Act was taken on record as I.A.31/2015. Justly the Court ordered notice on it. And, the notice appears to have been taken only on the second respondent, who had chosen to remain exparte, but not on the revision petitioner, who by now had been impleaded as the second defendant.

- The case was posted to 27.04.2015. But it was hurriedly advanced when the plaintiff filed I.A.No.56/2015 for the purpose, with the counsel for the defendant, whom only God knows who, endorsing no objection, advanced to 31-03-2015, and I.A.31/2015 was allowed. A delay of 767 days was condoned in no time, but was the revision petitioner heard?

- Now, the case travels to the next stage. And it assumes a '*Solomon Grundy*' pattern. The application filed by the plaintiff under Order IX Rule 9 CPC was promptly taken on record in I.A.57/2015. Application also was filed to carry out amendment to the plaint for including the name of the revision petitioner in the party array. The suit was restored on 20.04.2015, and the plaint was amended. On 21.04.2015, the counsel for the first defendant filed

his Memo submitting to the decree. But the first defendant has been set exparte on the first hearing of the suit, and there is nothing on record to show when this order was set aside, and since when the first defendant was allowed to participate in the suit. The case stood adjourned to 02-06-2015, immediately after a four week summer recess. In between, on 29-04-2015, the counsel for the revision-petitioner/second defendant, Mr.Theerthagiri had filed a similar memo. This reads:

> *"It is humbly prayed that the 2nd Defendant is submitting to Decree and the above suit may be decreed without costs and this Memo may kindly be recorded."*

- On 02-06-2015, the trial court acted on the Memo and decreed the suit. Interestingly enough the trial court has referred to the evidence on record before acting on the Memo of the counsel.

9. The counsel for the revision petitioner claims on instructions that Mr.Theerthagiri had not filed any such Memo, and that he had filed an affidavit to the effect. The counsel for the first respondent/plaintiff would contend that the issue, whether or not Mr.Theerthagiri had filed the Memo is a disputed question of

fact, and the jurisdiction of this Court under Article 227 of the Constitution does not authorise the Court to travel into the domain of disputed facts. As indicated in paragraph 6 above earlier, the issue involved goes far beyond the Memo, both alleged and denied to have been filed by the counsel for the revision petitioner before the trial court.

On the Supervisory power under Article 227

10.1 The power of superintendence of the High Court which the Constitution speaks of is more an aspect of duty than an idea of authority. Courts may have been a creation of the Constitution and the statutes, but the force that sustains their vitality and institutional relevance is defined not by the authority which are vested in them by the sources of their creation, but by the public trust in them. If rights are wronged, then the Courts, as an impartial arbiter, assure the aggrieved that the wrong would be set right. It is a promise they hold for justifying their establishment, and is the consideration they pay the public for investing its trust in them. In a republic under a normative constitution, this process is open and transparent as they guarantee greater clarity to the litigants that justice is both done and is also seen to be done – both substantive and procedural. '*Justice must be seen*

to be done' is not an ordinary statement on the optics of justice dispensation but is an inalienable aspect of judicial accountability that reassures the public of the commitment of the Court to sustain the faith reposed in it. The power of superintendence, nay the duty to supervise which the Constitution has enjoined this Court with under Article 227 of the Constitution, in essence, is intended to secure and sustain the public faith in the judicial system. It may be understood as a duty to drone-cam the functioning of the courts subordinate to it to ensure that the quality of its functioning is effective and is worthy of sustaining the trust of the litigant public.

10.2 Contextually the phrase *'seen to be done'* is an aspect of procedure. Procedure is the path, travelling through which substantive justice in a cause is attained. When a procedure is mishandled or manipulated to derive an unmerited advantage by one of the parties to the litigation, it, in effect, corrodes the public faith in the judiciary. It will sound a knell that this Court cannot afford to ignore. Power of superintendence, therefore, is not ornamental, but are facets of serious Constitutional responsibility. It is an internal check to assure the litigants that their faith in the judiciary is rewarding.

10.3 The power of superintendence is not a free-roaming authority since the Courts subordinate to the High Court are independent within their spheres of power, function and authority. It is not an invisible string for this Court to pull from behind or above as if in a puppet-show. Hence, power of superintendence may not be construed as authorising the High Court to shadow-participate in every judicial proceeding of the courts subordinate to it, nor interfere with that, for doing which those courts have been vested with the authority to do. In the realm of their authority, the courts subordinate to the High Court are supreme, and duty of supervision does not permit needling with that supremacy. It is similar (though not the same) as a referee making a line-call. Only where the Courts subordinate to this Court breach the rule of procedural and processual fairness of the kind already indicated, this Court will contemplate assuming its constitutional responsibility to step in and restore fairness in procedure and substance.

10.4 When Article 227 is invoked, this Court scans the judicial process applied in a litigation to ascertain the quality of processual justice and evaluates the consequences produced. Not all the mishandled procedure affects the substantive right to litigate or defend or produce unfair results, as many may fall within the

domain of the discretionary space made available to the courts subordinate to this Court. Where the procedure is mishandled, or manipulated (commonly understood as abuse of judicial process or fraud on court) to produce an unfair result adverse to one of the litigants with the potential to impair the litigant's faith in the Court, it will be a clarion call for this Court to step in. This Court's claim that it is a *sentinel on the qui vive* in protecting the rights of the citizens will then go hollow and weather beaten, if it compromises its Constitutional conscience, and forsakes its duty to correct a wrong in exercise of its powers under Article 227 of the Constitution. This is the soul of its supervisory power: of identifying a wrong which holds the potential to imperil the public faith in the judiciary or challenges its own purity and effectiveness of its functioning, and then following it with curial measures. To complete the narrative, it is necessary to point out that allegations of fraud is not rain seeding power of courts to come down and wash away all procedural and substantive aspects in a suit. Fraud on court empowers the same court as well as this Court to interfere in appropriate cases under Article 227 of the Constitution of India. However, fraud on a party is a voidable act and it has be investigated and dealt with by way of an appropriate application or a separate suit.

11. When can this Court engage in a process of identifying a wrong to contemplate

a correction? Here, it needs to be emphasised that the legitimacy of judicial process may not be evaluated solely by its validation in an apparent or ostensible procedural compliance, but by its proximity to fairness needed for its compliance. A procedure represents the body of rules navigating through which justice could be obtained. It is the means to an end and not an end in itself. Any understanding of the procedural law as a mere statute providing a check-list for mandatory compliance is an oversimplification of what it signifies. The soul of procedure is its fairness, which the expressions embodying it may not adequately highlight. Indeed, procedural law is written with fairest of inks on the parchment of fairness, and if fairness is separated from the procedural law - its application and handling, the judicial process will be at the risk of losing its vitality and relevance. An unfair procedure is per se oppressive and is anathema to substantive justice. Accordingly, if unfairness is seen manifest in an apparent procedural compliance which is shown to have produced unfair consequences, and thereby threatens the faith the litigant has in judicial system, then notwithstanding what may pass for procedural compliance, this Court may find a moment to exercise its powers under Article 227 of the Constitution.

12.1 Now, the quintessential facts are re-visited for testing them on the plane of

principles herein above stated. It will be convenient to commence the narrative from what happened in the suit on 10.02.2012. On that date, the revision petitioner approached the Court with I.A.No.17/2012 for impleading himself. On 24.08.2012, the trial Court did find reasons to implead him when it allowed the application. Here it is necessary to refer to paragraph No.3 of his affidavit, extracted in one of the earlier paragraphs. Subsequently, on 27.11.2012, the suit came to be dismissed essentially, because the plaintiff has not taken steps to carry out the amendment in the plaint to include the name of the revision petitioner as the second defendant. Then, there was a lull for close to three years, when on 02.02.2015, the plaintiff filed I.A.No.31/2015 for condoning a delay of 767 days in filing his application for restoration of the suit. No notice is seen to have been served on the revision petitioner.

12.2 Here there is a possible technical plea available to the plaintiff in that, since plaint was not amended consequent to the order allowing the impleadment of the revision petitioner, notice might not be necessary. But amending the plaint consequent to an order allowing impleadment of a defendant under Order I Rule 10 (4) though is mandatory, yet a breach does not imply that the newly impleaded defendant can be unfairly treated. In that sense Order I Rule 10(4) compliance is

cosmetic viz-a viz the right of the newly impleaded defendant - both substantive and procedural. After all, when the trial court chose to allow I.A.17/2012, it has taken a conscious call to hear him whose effect, a mere failure to carry out an amendment to the plaint cannot efface. Even if it is presumed that the Court was on the right track procedurally, yet *quo vadis* fairness? Hence, an ostensible procedural compliance may not be adequate unless it is validated in the rule of fairness. Alternatively, if Mr.Theerthagiri, the counsel for the revision petitioner had adopted the line of least resistance to let I.A.31/15 to be advanced and also offered no objection for condonation of delay, then how this is to be appreciated in the face of the facts alleged in paragraph 3 of the affidavit filed in support of I.A.17/2012?

13. When I.A.No.31/2015 was filed, the suit became a pheonix, suddenly came alive from the ashes, and soon it was into a flying mode. I.A.No.31/2015 was initially posted to 27.04.2015, then it was advanced to 31.03.2015, and was allowed on the same date, and almost immediately the application filed under Order IX Rule 9 CPC was numbered, and the counsel for defendants 1 and 2 filed a memo one after another and submitted to the decree. The Court apparently was closed for summer vacation, and immediately on re-opening on 02.06.2015, the suit came be decreed. Procedurally, a couple of aspects are baffling. But before that, the role

which the counsel of the revision petitioner before the trial court was alleged to have played in filing the said Memo may require a reference.

14. There are allegations and counter-allegations as to whether the counsel for the revision petitioner had filed a Memo dated 29-04-2012 before the trial Court. The determination of this issue, as the counsel for the plaintiff/first respondent has argued, may not be undertaken by this Court. Now, if he had not filed the Memo before the Court, it is a plain fraud on the Court. If, however, he had filed that Memo, he is more likely to have tread the path of ethical infidelity. Here it needs to be remembered:

- It is not for nothing that the revision petitioner got himself impleaded, but for resisting the suit for declaration of title on the basis of an unregistered sale deed with a claim of title in himself and another, and has averred it in paragraph No.3 of the affidavit in I.A.No.17/2012. No sensible person given to ordinary prudence will ever concede to surrender his title when he has disclosed to the Court, his need to implead himself in the suit. And, if only he had wanted to concede and surrender his assertion of title to the one who claims title on the basis of an unregistered sale deed (read, the plaintiff/the first respondent herein), he need not have rushed to the Court seeking his

impleadment. Unless there is proof of any change of mind of the revision petitioner, the Memo alleged to have been filed by his counsel should only kindle a *prima facie* suspicion about how things have happened.

- Secondly, when the revision petitioner became aware of the decree dated 02-06-2015, pursuant to the notice issued by the Tahsildar for mutating the patta in the name of the plaintiff in terms of the order of this Court in W.P.6394 of 2021, he did not keep quiet, but rushed to this Court. If only he had instructed his counsel to file a Memo dated 29-04-2015, his conduct thereafter is inconsistent. Unless an owner of a property is in a state of renunciation or is excessively charitable, he is not going to concede his title over a piece of immovable property to one who claims title based on an unregistered sale deed. Does not his *ex-post* conduct feed *ex-ante* suspicion?

15. If a counsel of a litigant breaches the rules of professional fidelity which he/she at all times is under a duty to observe, and owes it to his/her client and prompts the court to pass a decree adverse to the interest of such client, then it cannot be simply rejected as a matter between an Advocate and his client. When judicial process is set in motion to adopt a certain course which the Court would not have adopted but

for believing in the statements borne of professional infidelity of the counsel, and goes on to produce results consistent with such statements, then the Court also has to take responsibility. After all, what is exposed to risk is the public trust in the Court. The Court cannot blame it on the counsel, and show the litigant an alternate path and seek an escape route from the situation which is partly its own doing.

Should this Court intervene?

16. The stage is now set for this Court to intervene under Article 227 of the Constitution. The focus, however, is not on the counsel for the revision petitioner before the trial court – whether he filed a Memo or not, but how the trial court has approached the Case. The baffling aspects are: (a) Why the trial Court did not ensure the presence of the second defendant before it? And (b) Why did it choose to act on a memo allegedly filed by the counsel for the second defendant/revision petitioner?

Advisability of the Court Acting on a Counsel's Memo:

17.1 Is it wrong for a Court to act on a memo of the counsel of a litigant for passing an order? **In *Syed Yousuf Ali v Mohd Yousuf*** [(2016) 3 ALD 235] a learned Single Judge of the Andhra Pradesh High Court has taken an extreme view and has held as

under:

> "*The first and foremost contention of the learned counsel for the respondents is that no judicial order be passed based on memo. Filing of memo is not contemplated either under Code of Civil Procedure or under Civil Rules of Practice. The purpose of receiving memos by the Courts is only to receive certain intimation pertaining to the lis pending before it. Since filing of memo is not contemplated under Code of Civil Procedure or Civil Rules of Practice, no judicial order can be passed on memo. But the trial Court passed a judicial order based on memo which is contrary to the established practice. Therefore, the order passed by the trail Court basing on memo ..... filed before the trial Court is erroneous and it is an illegal exercise of jurisdiction which is conferred on it.*"

This Court, however, marginally differs from the aforesaid view of the Andhra Pradesh High Court, and is of the view that Court's practice may accommodate a Court acting on a memo of the counsel of a party, but its permissibility depends on the situations in which the Court intends to act. For greater clarity on the topic, it is necessary to delve deep into the fundamentals which, though might be familiar to all those who are connected to the legal system, still may provide a convenient opening for the narrative.

18.1 A judicial process encounters two categories of rights – substantive and

procedural. The substantive rights are those on which the plaintiff rests the cause of action for a suit, and those based on which the defendant resists the suit. On the contrary, the procedural rights are those which are associated with the mode of accessing the court in instituting a suit and the various stages through which a suit passes through before it is disposed of by a court.

18.2 If procedural rights as embodied in the CPC are broadly analysed, they fall into two categories: (a) That aspect of the procedure which affects the right of action or right to sue, and the right of defence. Both these rights will have the effect of affecting the substantial right of a litigant either to access the court for a remedy, or to resist the grant of a remedy, as the case may be, in relation to the subject matter of the suit; and (b) those which aid the Court, or the litigant in the various stages of suit, or in the effective participation of a litigant in the judicial process.

18.3(a) If Order XLIII Rule 1 CPC is probed, the Code has provided for an appeal against all categories of procedural orders which either directly affect the right to sue, or right of defence, or right over the subject matter of the suit. All other categories of orders not falling under the Order XLIII Rule 1 class of orders are purely procedural in nature, which may be of assistance either to the Court, or the

litigant but may not immediately or directly impact the substantive right of the parties viz-a-viz the subject matter of the suit, or their right of action or defence. To this may be added four other classes of orders which the Code treats as decrees, though they are essentially procedural orders. They are: (a) an Order under Sec.144 CPC concerning restitution of a property; (b) an Order rejecting a plaint under Order VII Rule 11 CPC; (c) an Order passed under Order XXI Rule 58, in an application filed by a third party challenging an order of attachment of a property in execution of a money-decree; and (d) Order passed under Order XXI Rule 98 or 100 of the Code. Of them, except the order rejecting the plaint, rest of the orders directly affect the right of a party over the subject matter in lis. And, so far as an order rejecting the plaint is concerned, it has the potential to deny access to the plaintiff to remedy his cause. When it is a decree, it becomes appealable under the CPC. Another reason for differentiating rejection of plaint from other categories is where a suit is rejected, the code permits the plaintiff, to resort to Order VII Rule 13 and present a fresh suit on the same cause of action, if permissible. In other cases, the order could operate as *res judicata*.

18.3(b) In all cases of non-appealable procedural orders (to repeat that which do not affect the substantive rights of the parties), a party aggrieved may only challenge

the same only if the Court below has committed, what is conveniently and compendiously referred to as, a jurisdictional error. Prior to the CPC Amendment Act, 1999 (Act 46/1999) amending the Code, these categories of orders had to fall within the meaning of the expression '*case decided*' for a revision to lie under Section 115 of the Code. Post amendment, a revision against these type of orders would lie under Section 115 CPC only if those orders also have the effect of finally disposing any suit or other proceedings. Any orders that do not fall under the category of revisable orders under Sec.115 CPC, can still be challenged under Article 227 of the Constitution, where the criterion, though may include errors of jurisdiction, need not have the effect of finally disposing of the suit or proceedings. They may include cases where the Courts' procedure prejudices a substantive or a procedural right of the litigant or is inconsistent with the rules of procedure and practice (which necessarily would include rules of fairness) or impairs the purity and effectiveness of the judicial machinery.

19. The moot question here is, when can a Court act on a Memo of a counsel of a party to a suit? Finding an answer to it lies in understanding the distinction between a substantive and a procedural right *vis-a-vis* the category of orders that may be procedurally passed by the court etc. Here, this Court cannot ignore the basic

premise in our processual jurisprudence: That a counsel, as an agent of a party, has a right to make a statement of fact on behalf of his client, which includes his right to concede on a fact relating to the dispute. If this basic premise is considered alongside the preludial statements made in paragraph 18.1 and 18.3 above, the following situations would arise:

a) As per the scheme of the Code, the Court has the authority to pass a decree without a trial under Order X Rule 1, Order XII Rule 6, Order XV Rule 1, and Order XXIII Rule 3. Under Order X Rule 1 the Court, upon an examination of the parties, ascertains directly from the defendant whether they concede or oppose the claim of the plaintiff, whereas in all the remaining three situations Court requires definite materials to act. To elaborate, for passing a decree under Order XII Rule 6 CPC, the Court must satisfy itself that the defendant indeed had made an admission. Similarly, to pass a decree without a trial under Order XV Rule 1, the Court should satisfy itself that the materials available before it are adequate to pass a decree without a trial. Turning to Order XXIII Rule 3, the Courts passes a decree based on a compromise which operates as an independent contract between the parties. But the Courts are under an obligation to satisfy themselves that such contracts are lawful. To repeat and re-emphasize, these are situations

where the Court is required to decide on anything that has the potential to affect the substantive right of the parties on which parties rest either their cause of action or defence – more specifically their right, title or interest in the subject matter of the suit, or their right to institute a suit or defence. A scrutiny of the scheme of the CPC informs that these are the situations where the Courts are required to adjudicate on the rights of the parties over the subject matter of the suit *based on evidence*, and where the Courts do not enjoy any discretion of its own in the procedure. They literally decide the fate of a litigant vis-a- vis the suit.

b) The Second category of cases are those where the Court has considerable discretionary space within the realm of procedure, where it may act on its perception guided by its sense of justice and fairness. Instances such as whether the Court should order fresh summons to the defendant or to direct service by substituted summons, whether it needs to allow amendment of pleadings, whether it should allow additional pleadings in a particular case, whether it should summon a witness or allow production of documents, or appoint a commission, and so on. Here the Court has greater discretion, and not one of them may immediately affect the right of the parties viz-a-viz the

subject matter of the suit, or their right to sue or defend. In these categories of cases, the Court may act on the Memo of a counsel of the parties to pass a judicial order. For an illustration, See ***Mangayakarasi v Suseela*** [AIR 2000 Mad 266].

20. Now, in which of the aforestated two situations can a Court act on the Memo of the counsel of a party to conclude the suit or proceedings? The nearest procedural aspect which this Court may refer to as an analogy is the authority of the counsel of a party to compromise the suit without his client signing the written compromise. In a compromise, parties settle their conflicting claims over the subject matter of the suit through a lawful contract, which in terms of the discussion above, will fall under the class of procedure affecting the substantive right of the litigants. Contextually A memo of a counsel of the defendant conceding the claim of the plaintiff, if acted upon by the court, will leave an identical consequence.

21. Order XXIII Rule 3 of the Code has both a legislative and interpretational history which must be briefly noticed. Order XXIII Rule 3, as originally enacted, was as follows:

"*Where it is proved to the satisfaction of the Court that a suit has been*

adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the while 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 suit."

This rule does not provide how a compromise must be presented before the Court. This was introduced, vide Section 74 of the CPC (Amendment) Act, 1976, (w.e.f 01.12.1976), whereinafter Rule 3 reads (the entire provision is extracted as it has some relevance in the later part of this order) as under:

"*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 to 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 .....

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.***"

22.1 Now, notwithstanding the letter of Order XXIII Rule 3 requiring a written

contract signed by the parties, Courts are nevertheless required to decide the question as to whether it is lawful for the court to act on a contract of compromise signed only by the counsel of a party. The import of the expression "*in writing and signed by the parties*" came up for consideration before the Supreme Court in ***Gurpreet Singh v Chatur Bhuj Goel*** [(1988) 1 SCC 270], where a two judge bench of the Hon'ble Supreme Court has held as under:

> "*Under Rule 3 as it now stands, when a claim in suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them. To constitute an adjustment, the agreement or compromise must itself be capable of being embodied in a decree. When the parties enter into a compromise during the hearing of a suit or appeal, there is no reason why the requirement that the compromise should be reduced in writing in the form of an instrument signed by the parties should be dispensed with. The court must therefore insist upon the parties to reduce the terms into writing.*"

However, in ***Byram Pestonji Gariwala v Union Bank of India*** [(1992) 1 SCC 31] another two judge bench (T.K Thommen and R.M Sahai, JJ) had held that the counsel "*possessed of the requisite authorisation by vakalatnama*" can act on behalf of his client to enter into a compromise without there being any agreement in writing between the parties. The Court held that the scope of the expression "*in*

writing and signed by the parties" must be read in conjunction with the power conferred on counsel under Order III Rule 1 of the Code. It is seen from the judgment that the earlier decision of the coordinate bench in ***Gurpreet Singh v Chatur Bhuj Goel*** [(1988) 1 SCC 270], was not brought to the notice of the Court.

22.2 The subsequent authorities of two various two judge Bench of the Hon'ble Supreme Court ***Banwari Lal v Chando Devi*** [(1993 1 SCC 581)], ***Arjan Singh v Punit Alhuwalia*** [(2008) 8 SCC 348], ***Jigneshwardas v Jagrani,*** [(2003) 11 SCC 372], ***Pushpa Devi Bhagat v Rajinder Singh*** [(2006) 5 SCC 566] and ***Y.Sleebachen v State of Tamil Nadu***, [(2015) 5 SCC 747] followed one of the two views, but the predominant view was that advocates can act for their clients in signing the compromise if requisite authority was granted to them in their vakalat.

23. It now boils down to the question of ascertaining if an Advocate has the authority for compromising a suit on behalf of his client: Where he has, he can, and where he has not, he cannot. The legal position is seen to have been settled by this Court in ***Ramappayya v Subbamma*** [(1947) 2 MLJ 580], where a Division Bench of this Court (Fredrick Gentle, CJ and Tyagarajan, J) had held:

"*6. Before referring to the decided cases I desire to make two*

observations. ***It is difficult to see how an express and explicit direction or power to conduct and defend a suit, which must mean to contest it, includes a direction or power to compromise, it. The vakalatnama confers, in detail, six separate and distinct powers and the absence of a power or direction to compromise is not without significance***.

11. Whether it is called a power of attorney or a vakalatnama the authority of the advocate in the present instance, is derived from the written document. In principle, there is no difference whether the client is a pardanashin lady or a lady who does not observe gosha or anybody else. The fourth defendant empowered the advocate to appear for her and to conduct and defend the suit; did not empower him to settle it on her behalf. He had no express authority to effect a compromise, but solely to contest the suit. In those circumstances no implied authority arises or can be deemed to have been conferred upon him to make a compromise which was binding upon his client."

In ***Himalayan Coop. Group Housing Society v. Balwan Singh,*** [(2015) 7 SCC 373], a three-judge bench of the Supreme Court speaking through H.L Dattu, CJ arrived at a conclusion similar to that of the Division Bench of this Court in ***Ramappayya v Subbamma*** [(1947) 2 MLJ 580]. The Supreme Court has observed thus:

"*The law is now well settled that a lawyer must be specifically authorised to settle and compromise a claim, that merely on the basis of his*

employment he has no implied or ostensible authority to bind his client to a compromise/settlement. To put it alternatively that a lawyer by virtue of retention, has the authority to choose the means for achieving the client's legal goal, while the client has the right to decide on what the goal will be.

A lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or statement is clearly a proper step in accomplishing the purpose for which the lawyer was employed. "

In this regard it may be mentioned that in ***Y.Sleebachen & Others Vs Superintendent Engineer WRO/PWD & another*** [2015(2) CTC 452 : 2015-1-LW 713], a two judges bench of the Hon'ble Supreme Court has held that a Govt. pleader has an implied authority to compromise on behalf of the Govt. It however, may have to be stated that this Court is bound by the ratio in ***Himalayan Coop. Group Housing Society*** as it was delivered by a larger bench, which now settles the position that an Advocate has no implied authority to concede the substantive rights of his client in a litigation. Also see: ***Govindammal Vs. Marimuthu Maistry*** [AIR 1959 Mad 7].

Effect of the Memo in question

24. In terms of the authority in ***Himalayan Coop. Group Housing Society case,*** the counsel for the revision petitioner does not have the authority to file a Memo (if at all he had filed), conceding the right of the revision petitioner/ the second defendant. This apart, even if the vakalat he had filed is scrutinised, he was not given any authority to enter into a compromise on behalf of the revision petitioner, nor any authority to concede his client's interest. Whichever way the issue is viewed, it is evident that the Memo dated 29-04-2015 stated to have been filed by the counsel of the revision petitioner is beyond his authority to file and is plainly incompetent. The trial Court has egregiously erred in acting on it without ascertaining if it could act upon it.

25.There is yet another aspect to it. This is more in line with the Explanation to Order XXIII Rule 3 CPC. In every case it is imperative for the court to satisfy itself that the decree that it intends to pass must not fall foul of the provisions of law irrespective of whether it is passed on a compromise or under any other provisions like Order X Rule 1 CPC, Order XII Rule 6 CPC, or Order XV Rule 1 CPC. No court can be dragged or hoodwinked by a party or a litigant to pass a decree or an order which it either does not have an authority in law to pass, or cannot be

sustained in substantive law. And if it is found to be passed, then the decree or order so passed will be invalid, and is vitiated for abuse of the judicial process.

26. Turning to the facts of the case, the trial Court has passed a decree declaring the right of the plaintiff/first defendant based on unregistered sale deed, which on the face of it, goes against Sec.17 of the Registration Act, read with Sec.54 of the Transfer of Property Act. Therefore, irrespective of whether the Memo alleged to have been filed by the counsel for the revision petitioner in the trial court can be acted upon by the court or not, in terms of the result produced by the decree passed by the trial court, the same cannot be sustained in law. If only the trial court had read its earlier jottings of its notes-paper where it had impliedly indicated its doubt over the right of the plaintiff to sustain his claim of declaration of title over the suit property on the basis of an unregistered sale deed, it might not have ventured to pass a decree. The trial court appears to have ignored caution from its line of consideration, trusted and acted on the Memo when it ought to have suspected it. The consequence is that the revision petitioner has suffered a decree without him knowing about it.

27. The revision petitioner has been plainly wronged in procedure and has lost his

right to defend the suit and establish the better title he claims over the subject matter of the suit. This Court now steps in to exercise its power of superintendence under Article 227 of the Constitution to set right the wrong that judicial process has inflicted on the revision petitioner, both for its illegality and for abuse of its process.

28. This case leaves certain strong messages for a Court in yielding to the temptation of acting on the Memo of an advocate. This is now set forth as a set of directions to the Courts subordinate to this Court.

(a) Unless a court decides to proceed exparte, no Court should act solely on a Memo of the counsel of the party conceding the substantive right of the party viz-a-viz the subject matter of the suit, or right of defence, for passing any ***non-adjudicatory decree or appealable orders.*** Before passing any such decree, the Court should apply its mind and satisfy itself in a manner that it considers appropriate and adequate that the defendant in the suit has conceded to the plaintiff's claim. In cases of appealable orders of similar nature, before passing it, Court should ensure that the respondent in the application has filed at least an affidavit conceding to the interim prayer sought. This will also save the Advocate concerned from a possible embarrassment.

(b) In other category of procedural orders not affecting the substantive rights of the parties, Court may act on a Memo of the counsel of the party, but it is not bound to act so.

(c) It is advisable that in every case where the Court chooses to act on any Memo of the counsel, it is required to evaluate the consequences of acting on such Memo. After all in a functional audit of its performance only the Courts become accountable to the litigant in particular, and public general, and its imprudence in mindlessly acting on the Memo of the counsel, it may invite embarrassment upon itself.

(d) In no case the Court can pass a decree or an order which it is not competent to pass, or which violates any of the mandatory provisions of law.

29. Time to conclude, and the conclusion is a literal writing on the wall. This revision is allowed, the decree passed by Subordinate Court, Gudiyatham in O.S.81/2011, dated 02-06-2015 is set aside, and the suit is directed to be resumed from the date of carrying out the amendment in the plaint after the restoration of

suit in 2015. No costs. Consequently, connected miscellaneous petition is closed.

Registry is directed to communicate a copy of this order to all Courts subordinate to this High Court, after obtaining necessary orders from Hon'ble The Chief Justice.

27.05.2022

Index : Yes / No
Speaking order / Non-speaking order

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To:
The Judge
Sub Court
Gudiyatham.

N.SESHASAYEE.J.,

ds

Pre-delivery order in
CRP(NPD) No.1 of 2022

27.05.2022