

(2010) 09 KL CK 0255

High Court Of Kerala

Case No: Writ Petition (C) No. 21603 of 2010 (O)

Valsan Jerome

APPELLANT

Vs

Rockey and Others

RESPONDENT

Date of Decision: Sept. 13, 2010**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 3

Hon'ble Judges: Thomas P. Joseph, J**Bench:** Single Bench**Advocate:** Shoba Annamma Eapen, for the Appellant; K.S. Babu, for the Respondent**Final Decision:** Allowed

Judgement

Thomas P. Joseph, J.

This Writ Petition is in challenge of Ext.P3, order dismissing I.A. No. 4285 of 2009 in O.S. No. 528 of 2008 of the court of learned Sub Judge, Ernakulam. That is a suit for partition filed by petitioner. The suit was resisted by respondents/defendants. When the case came up for trial in the list on 19.02.2009, respondents were present but petitioner/plaintiff was not present. Counsel for both parties were present. Proof affidavit of petitioner was filed in court. At that time it is said, allegedly under instruction from petitioner his counsel made an endorsement on the plaint that the matter is settled and that decree could be passed in respect of item No. 2 of plaint schedule and excluding item No. 1. Accordingly, a decree was passed. Later petitioner filed I.A. No. 4285 of 2009 in the form of review challenging the compromise decree on the ground that there was no such compromise and the concession made by counsel was without getting instruction from petitioner. That application was opposed by the respondents. On I.A. No. 4285 of 2009 petitioner gave evidence as PW1. Learned Sub Judge was not impressed by the evidence of petitioner and dismissed I.A. No. 4285 of 2009. That order (Ext.P3) is under challenge. It is contended by learned Counsel for petitioner that Ext.P3, order cannot be sustained on the face of evidence given by petitioner as PW1. Learned

Counsel for respondents contend that there was infact a compromise entered between the parties and on the part of petitioner he conveyed the matter to his counsel over telephone based on which counsel for petitioner made endorsement on the plaint. Learned Counsel has placed reliance on the decisions of the Apex Court in [Jineshwardas \(D\) through L.Rs. and Others Vs. Smt. Jagrani and Another](#), and [Amteshwar Anand Vs. Virender Mohan Singh and Others](#), to support his contention that it is open to the counsel to make endorsement regarding settlement and that it is not absolutely necessary that the parties should joint the compromise.

2. The Supreme Court in [Som Dev and Others Vs. Rati Ram and Another](#), has held that after 01.02.1977 the compromise has to be signed by the parties in compliance of Rule 3 of Order XXIII of Code of Civil Procedure. But in a later decision See *Sneh Gupta v. Devi Sarup and Ors.* 2009 (2) Supreme 77 it was held that compromise signed by the counsel on both sides shall be accepted and that the compromise be signed by parties or by counsel or by both.

3. I am not at the question whether compromise could be signed by the counsel alone, for, in this case the question for decision is whether endorsement made on behalf of petitioner by his counsel was with due instruction. As PW1 petitioner has denied the suggestion that he had given instruction to his counsel to make such an endorsement. On the day counsel made the endorsement petitioner was not present in court. According to the respondents, petitioner had given instruction to his counsel over telephone. But that is not a matter within the knowledge of respondents. Nor has any of the respondents given evidence in that line. Learned Sub Judge found evidence of petitioner as PW1 not tallying with the averments in the affidavit in support of I.A. No. 4285 of 2009. But that is not on the crucial question whether petitioner had given instruction to his counsel to make a concession. The evidence given by petitioner as PW1 is that he had not given any instruction. I also stated that on the day counsel for petitioner (in the trial court) made the endorsement regarding settlement, petitioner was admittedly not present in the court. In that situation learned Sub Judge was not correct in rejecting the evidence of PW1 and dismissing I.A. No. 4285 of 2009.

Resultantly this Writ Petition is allowed. Ext.P3, order on I.A. No. 4285 of 2009 in O.S. No. 528 of 2008 of the court of learned Sub Judge, Ernakulam is set aside. That application is allowed and the compromise decree is set aside. It will be open to the parties to proceed with trial of the suit. Since the suit is of the year 2008 learned Sub Judge is directed to expedite further proceedings in the suit. Parties shall appear in the trial court on 30.09.2010.