

**(1975) 12 MAD CK 0033**  
**In the Madras High Court**

Kodiketti Nadar

APPELLANT

Vs

Maria Luis Martin Fernando and Others

RESPONDENT

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**Date of Decision :** 09-12-1975

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 2, 100

**Citation :** (1977) 1 MLJ 141

**Hon'ble Judges :** Ramaprasada Rao, J

**Bench :** Single Bench

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**Judgement**

Ramaprasada Rao, J.—These Letters Patent Appeals arise out of a common judgment rendered by Natarajan, J. in A.A.Os.Nos. 75, 114, 115 and 118 of 1972. These Letters Patent Appeals are inter-connected. We shall state a few facts to appreciate the real dispute between the parties.

2. In a previous litigation, to wit, a mortgage suit filed by the respondents in O.S. No. 8 of 1962 on the file of the Subordinate Judge of Nagercoil, the respondents obtained a preliminary decree on 28th October, 1962. In course of time, a final decree was passed on 10th February, 1964. On the judgment-debtor's failure to respect the final decree in accordance with its tenor, the hypotheca was brought to sale, In the public auction held on 17th February 1966 it is claimed, the plaintiffs' counsel on behalf of the plaintiffs, purchased some of the properties which were the subject-matter of such a public sale. The appellant filed an application to set aside that sale but was unsuccessful till the disposal of the Letters Patent Appeal by this Court in L.P.A. No. 1 of 1970 in which the Court found that there was no irregularity in the sale; nor was there any fraud which would necessitate the public sale being set aside. The appellant, having thus failed in setting aside the public sale as above, entered into a dialogue with the respondents and it is said that between January and February, 1970 there were negotiations for a compromise. The material terms of the discussions revolved on the appellant paying a substantial sum to the respondents as the decree-holder by a sale of his properties to the Vivekananda Rock Memorial Committee as also

by a sale of his wife's properties. Apparently, after such discussion, an agreement dated 27th February, 1970 was drawn up as between the appellant and the respondents which arrangement is the subject-matter of the proceedings before us. The learned Judge has extracted in his order the compromise memo, and it is needless for us to re-extract the same. The appellant's case is that as per the terms of the arrangement so recorded on 27th February, 1970, he Pled the same in Court the next day and has partly performed his part of the obligations under it, though not contemporaneously along with the writing of the memo, of compromise, but some time later by paying a sum of Rs. 9,685 to the respondents' power-of-attorney who was the person behind the entire show and that factually, he has paid the other sums payable under the memo of compromise and that therefore, the joint memo, so filed by him along with the respondents into Court on 28th February, 1970 projects a case wherein the decree-holder/respondent in seeking for a certification of the payments already made under a decree of Court and, therefore, the Court ought to have recorded the memo, of compromise and the adjustment reflected therein. His grievance is that notwithstanding such an adjustment outside the Court and notwithstanding the fact that the respondents' power-of-attorney was a party to the filing of the joint memo, for the certification of the payments and for the recording of the adjustments, the respondents, pursuant to the decision of this Court in L.P.A. No. 1 of 1970, which upheld the public-sale of some items of the hypotheca in their favour, sought for delivery of those properties by filing an independent application and obtained such delivery of possession of the properties purchased, by them in the Court-auction on 16th March, 1970. The appellant's case is that he having performed his part of the obligation under the memo, of compromise, the Court was bound to record the same and give him the usual certificate of payment and consequently one of discharge towards the decree debt. He also sought for redelivery of the property.

3. The case of the respondents is that even though the memo was brought into Court at their instance through their power-of-attorney and it was so filed into Court by both the judgment-debtor the appellant as well as by them through their power-of-attorney, yet, as the appellant did not conform to the recitals in the said memo, and in particular, as the appellant did not pay the amount due and payable by him to the respondents, the filing of the memo. as if the appellant has done his part of the obligation is a fraud sought to be perpetrated on the Court and that the Court ought not to record the compromise and certify the payment by barely accepting the memo of compromise without a further probe into it. The respondents, through their power-of-attorney, even denied that they received a sum of Rs. 9,685 and thus prompted the Court to enquire into the joint memo, of compromise to find out whether a case for automatic certification of payment and recording of a compromise resulting in the adjustment of the dues ought to be made or not. The trial Court, in the circumstances stated above, thought fit to enquire into it, examined P.Ws. 1 to 3. and after hearing the appellant, who examined himself as R.W.1, came to the

conclusion that the appellant has failed to make out a case which could reasonably prompt the Court to certify the payment and record the event as one of adjustment of differences between the parties. As against the judgment of the Court below, which rendered a common judgment, the appellant came to this Court. Incidentally we may refer to three other proceeding's which are intricately connected with the application for recording the compromise. When the appellant came to Court for recording the compromise, the respondents filed an independent application requesting the Court not to accept the compromise for the reasons already stated. The appellant also filed another application before the Executing Court seeking for re-delivery of the property delivered to the respondents who obtained such delivery on the foot of their public sale having been held by this Court in L.P.A. No. 1 of 1970 as being valid and without suffering from any taint. Another application was also taken out by the appellant in the above proceedings for the return of a sum of Rs. 4,000 which was in Court deposit in the course of the hearing and conclusion of the mortgage suit already referred to. As already stated, in a common judgment, the Court below gave total relief to the respondents and refused the same to the appellant-judgment-debtor. Four appeals were filed against the orders of the Court below in the four matters referred to above. Natarajan, J., also heard the appeals together and in a common judgment of his, dismissed all the four appeals. L.P.A. No. 25 of 1973 is against the order of the trial Court which was accepted by Natarajan, J., who refused to re-deliver possession which the respondents obtained in the Executing Court pursuant to their success in L.P.A. No. 1 of 1970. L.P.A. No. 26 of 1973, is against the judgment of the trial Court which accepted the respondents' contention that the so-called joint memo, of compromise cannot be acted upon and the payment certified. L.P.A. No. 27 of 1973, is against the order of the Court below which was again accepted by Natarajan, J., which negated the relief to the appellant in the matter of the recording of the compromise under the joint memo. L.P.A. No. 28 off 1973, is against the orders of the first Court as well as the appellate Court which refused to interfere in the matter of return, of the deposit of Rs. 4,000 made by the appellant in the course of the mortgage decree proceedings.

4. Natarajan, J., in an elaborate judgment, considered the merits of the case and found every issue as against the appellant and dismissed the four appeals. It is against this, the above Letters Patent Appeals have been filed. Before we consider the merits, it is necessary for us to state a few propositions which cannot be disputed. The main action which is the basis of all the proceeding before us is an application, made by the appellant as the judgment-debtor along with the decree-holder for a certification of certain payments made outside the Court by the judgment-debtor to the decree-holder and which payments according to the appellant as judgment debtor, are contained in the said memo of compromise.

5. Under Order 21 Rule 2 of the Civil Procedure Code, if money payable under a decree is paid out of Court or the decree is otherwise adjusted in whole or in.

part to the satisfaction of the decree-holder the decree-holder shall certify such payment or adjustment to the Court whose duty is to execute the decree, and the Court shall record the same accordingly Sub-Rule (2) of Order 21, Rule 2, need not be quoted as it is not relevant Under sub-Rule (3) of Order 21, Rule 2 a payment or adjustment which has not been certified or recorded as aforesaid shall not be recognised by any Court" executing the decree. Certification of payment, therefore, is possible under two different heads. It can spring from an actual payment of money by the judgment-debtor to the decree-holder or secondly by an adjustment of the said decree to the satisfaction of the decree holder either in part or in whole. In either case, however, the dominus litis to bring such matter to the Court's view is the decree-holder himself since it is his responsibility to certify such payment or other adjustment and bring it to the notice; of the appropriate Court who shall act accordingly. But, in our view, Order 21, Rule 2, does not pose an empty formality. If a case of certification or adjustment comes up before an Executing Court and if the judgment-debtor or may be the decree-holder himself, is able to satisfy the conscience of the Court that the recitals in the memo, of compromise ought not to be automatically acted upon because he or she has a legitimate grievance against the certification of such payment or the recording of an adjustment, then the power of Court is available so as to make a judicious probe into the legality, regularity or truthfulness; of such payment or adjustment. It is in this background that this case has to be looked into.

6. One other legal aspect which arises for consideration is, whether in a Letters Patent appeal, the Division Bench can interfere with the findings of fact made by a learned Judge sitting singly in exercise of his appellate powers. Pragmatically a Letters Patent appeal is a Second; Appeal. But, in the absence of any inhibitions as provided for u/s 100 of the Civil Procedure Code, prima facie, the jurisdiction exercisable by Court under Clause 15 of the Letters Patent appears to be vast and might include sometimes the re-appraisal of facts and merits. But, on that score, in our view, under the guise of re-appraisal, the Court exercising jurisdiction under the Letters Patent would not be justified in interfering with the concurrent findings of fact rendered by the learned single Judge who, after considering the evidence and the records came to certain conclusions in which he agreed with the trial Court itself. Thus in matters where a Judge of this Court, in exercise of his appellate powers after re-appraisal of the evidence and the records, agrees with the findings of fact rendered by the trial Court or the first appellate Court, it would be difficult for the Court exercising jurisdiction under the Letters Patent to brush aside such concurrent findings of fact and once again for a third time, consider the evidence and the record to find otherwise.

7. With the above background, the findings of the learned Judge in the instant case have to be considered. Before we do so, we are afraid that the appellant has no case, Mr. Chellaswamy, wants us to interpret the joint memo, and find a case on a prima facie reading of it that the decree has been satisfied or otherwise adjusted. Our first impression is not that at all. Clause 2 says that the appellant

has agreed to pay a sum of Rs. 37,500 to the plaintiffs or to their power-of-attorney. It again says that the plaintiffs have agreed to give up the balance, if any, under the main decree. To crown all these, Clause 5 makes the intention of the parties clear. Clause 5 runs as follows:

5. Plaintiffs' power-of-attorney-holder, Susia Fernando has received today a (sic) of Rupees thirty seven thousand and five hundred and passed a receipt to that effect.

It, therefore, follows that, whilst under Clause 2 something in future has to be done, under Clause 5, it was obligatory on the part of the appellant to obtain a receipt if he pays the sum of Rs. 37,500. Clause 2 of the compromise memo, certainly cannot help the appellant. The question is whether Clause 5 can. Clause 5 projects a mandate. It obligates the appellant to obtain a receipt if he makes the payment. It is common ground that no such receipt has been obtained. It is, therefore, clear to us that the appellant cannot base his case on the memo, of compromise at all. Be that as it may, as the trial Court and Natarajan, J., went still further and examined the oral evidence and the record to find whether the appellant's case is true, we shall briefly refer to it. The joint memo. is signed by counsel. No explanation is given as to why the appellant did not examine his counsel to prove his case. The memo provides for payment by several other persons and no one mentioned in the memo, of compromise had been examined. The respondents let in oral evidence too. The learned trial Judge as well as Natarajan, J., believed P.Ws. 1 and 2. P.W.1 is characterised by our learned brother as a respectable and independent witness who says that no amount of Rs. 37,500 was paid under the compromise decree. Even so, P.W.3 swears in the witness box that no money was paid to the power-of-attorney holder under the joint memo, of compromise. Mr. Chellaswamy, made a point on the conduct of P.W.3. No doubt, P.W.3, when he came to Court, said that he did not receive the sum of Rs. 9,685 but he had to admit in the course of trial that he did receive the said amount from the appellant. On the basis of this contradiction, Mr. Chellaswamy, says that the entire case of the respondents ought to be disbelieved. In the instant case, the onus is upon the appellant as the person seeking relief under the so called memo, of compromise and under which he is compulsorily seeking a certification of payment as if such payment was made by him either intrinsically under the recitals of the memo, of compromise or by examining others that a large sum of Rs. 37,500 was paid by him to the respondents. He has not proved as to how he obtained the amount and as to why he did not act strictly according to its terms by obtaining a receipt from the Power-of-Attorney. We agree with Natarajan, J., when he said that what the parties contemplated was that the terms of compromise were to be arrived at in the first instance and the payment of the money was to be postponed to a future date and that the joint memo, was never intended to be a complete and full document which could be taken for granted as evidence of payment of the money due by one to the other. It was in these circumstances that Natarajan, J., refused to interfere.

8. As we said, our jurisdiction, in the circumstances stated above in a Letters Patent Appeal, is rather limited. No data is placed before us to lightly interfere with the concurrent findings of fact rendered by the trial Court as well as the appellate Court. In fact, even on a re-appraisal of such evidence, we are unable to agree with the learned Counsel for the appellant that there could have been a payment of such a large sum by the appellant to the respondents as pleaded by him and that the appellant was entitled, on the basis of the joint memo, to a certification of such payment under Order 21, Rule 2 or the alleged adjustment of the same as pleaded by him.

9. As regards the sum of Rs. 9,135 and two other sums of Rs. 225 and Rs. 550 Natarajan, J., has rightly stated as follows:

This agreement is outside the scope of the appeals. We are not now on the questions as to whether the compromise petition is fully supported by consideration and if it is not so, as to what is the amount due and payable to the respondents. It is a matter which the parties have to agitate and work out in separate proceedings which are more appropriate to these contentions than these appeals.

We agree with this observation and it is for the appellant to work out, such remedy as is available to him, to obtain relief in other appropriate proceedings. He cannot seek for relief regarding the refund of the said amount in these proceedings. These Letters Patent Appeals, therefore, fail and they are dismissed. There will be no order as to costs.