36/93

SUPREME COURT OF VICTORIA

HANNAN v BINNS

Gobbo J

15 November 1993

CIVIL PROCEEDINGS – REHEARING – ACTION COMPROMISED – TERMS OF SETTLEMENT AGREED TO – DEFAULT – ORDER MADE *EX PARTE* – APPLICATION TO SET ASIDE – WHETHER CONTRACT OF COMPROMISE DETERMINED RIGHTS OF PARTIES – WHETHER A FINAL ORDER – WHETHER APPELLABLE – WHETHER CONTRACT OF COMPROMISE COULD BE IMPUGNED BY REHEARING APPLICATION OR FRESH ACTION: *MAGISTRATES' COURT ACT* 1989, S110.

At the hearing of a civil proceeding, the plaintiff and defendant's counsel entered into terms of settlement. Default having occurred, the plaintiff obtained an order *ex parte* for the amount agreed on plus interest. Subsequently, upon an application by the defendant to set aside, a magistrate granted the application and set aside both the terms of settlement and the order *ex parte*. Upon appeal by the plaintiff—

HELD: Appeal allowed in respect of the order setting aside the terms of settlement.
1. The order made in relation to the terms of settlement represented a contract of compromise which replaced and removed the parties previous rights. When the order was made setting aside the terms of settlement, this had the effect of finally depriving the parties of rights conferred by the contract of compromise and accordingly, was a final order within the meaning of s110(1) of the *Magistrates' Court Act* 1989. On the other hand, the order made *ex parte* in default of the terms of settlement was an interlocutory order which did not finally determine the rights of the parties and accordingly, was not a final order within s109 of the Act and not appellable to the Supreme Court.

2. *Obiter*. The contract of compromise should be impugned only by a fresh action. Accordingly, the magistrate was in error in setting aside the terms of settlement on an application to set aside and rehear.

GOBBO J: [1] This is an appeal from the decision of a Magistrate at Sandringham, setting aside a judgment entered in default and also setting aside certain terms of settlement. The matter arose in this way. The plaintiff claimed a sum of $22,309.45 and interest from the defendant. When the matter came on for hearing on 14 April 1992, the defendant appeared through his counsel; the defendant himself did not appear. His counsel and the representatives of the plaintiff entered into terms of settlement whereby the defendant was to pay $22,000, inclusive of interest and costs, in satisfaction of the plaintiff's claim. The settlement sum was payable by monthly payments of $2,000. The terms provided that in default of any instalment that the plaintiff could, upon 14 days notice, enter judgment for the balance of the sum of $22,000 outstanding at the time of the default and also could enter judgment for costs. The formal order of the Court on 14 April was that the matter be struck out with the right of reinstatement. It would seem to be common ground before me that that was done in the context of a settlement of the matter being announced. Default having occurred, the plaintiff's solicitors, by application dated 5 June 1992, applied to the Magistrates' Court at Sandringham for an order for $22,000 and interest and costs. It does not appear that notice was given to the defendant. It also does not appear that there was any application to reinstate the action.

On 17 June 1992, the Magistrate made an order for payment of $22,000 and interest of $1519.63 as costs. In March 1993, the defendant applied for an order to set **[2]** aside the judgment of 17 June 1992. This came on for hearing after an adjournment and the learned Magistrate made an order on 10 June 1993 that the judgment of 17 June 1992 be set aside and also that the terms of settlement of 14 April 1992 be set aside. It is this order which is the subject of this appeal.

There was conflicting material before the Magistrate at the June 1993 hearing on the question of the circumstances as to how the action had come to have been struck out. In substance, the defendant deposed that he had not authorised any settlement, whilst his counsel and solicitors both provided affidavit material to the contrary.

The first issue raised is one of jurisdiction. Mr Appudurai of counsel appeared for the defendant and submitted that there was no appeal open under s109 of the *Magistrates' Court Act* 1989, as that only permits an appeal on a question of law from a final order of the Court. It was said that an order made under s110, setting aside a judgment and for this purpose also setting aside the terms of settlement, was not a final order. It is convenient to set out here s110(1) of the *Magistrates' Court Act* 1989:

> "If a final order is made by the Court in a civil proceeding against a person who did not appear in the proceeding, that person may, subject to and in accordance with the Rules, apply to the Court for an order that the order be set aside and that the proceeding be reheard."

Reliance was placed upon the decision of the High Court in *Carr v Finance Co of Australia Ltd No. 1* [1981] HCA 20; (1981) 147 CLR 246; 34 ALR 449; 55 ALJR 397, where the test put forward as to what was a final **[3]** order was whether the order finally disposed of the rights of the parties. The test was described in slightly different terms by Windeyer J in *Hall v Nominal Defendant* [1966] HCA 36; (1966) 117 CLR 423 at page 443; [1966] ALR 705; (1966) 40 ALJR 102:

> "In most cases, the test that seems to be most satisfactory, and the one that accords most nearly with what has been said on the subject in this Court, is it seems to me to look at the consequences of the order itself and to ask does it finally determine the rights of the parties in a principal cause pending between them. It is never enough to ask simply does the order finally determine the actual application or matter out of which it arises; because, subject to the possibility of an appeal, every order does that, unless it be an order that is expressly declared to be subject to variation."

His Honour drew a distinction between orders setting aside a verdict and those ordering a new trial, which His Honour described as being clearly interlocutory whilst an order refusing a new trial was final. There is some force in the arguments put on this matter on behalf of the defendant in this Court. The critical question is what was the effect of the entry into the terms of settlement. In my view, the terms of settlement represented a contract of compromise which replaced and removed the plaintiff's previous rights. Put briefly, the plaintiff gave up the right to recover the full amount and interest in exchange for the new contract represented by the terms of settlement. The defendant similarly gave up his right to contend the various defences open to him on the claim.

When the order was made setting aside the terms of settlement, this had the effect of finally depriving the plaintiff, and indeed the defendant, of the rights **[4]** conferred by that contract into which the prior rights, or if one chooses to use the term choses in action, had merged. An order dissolving a contract of that kind was, in my view, one which finally disposed of the rights of the parties in that contract.

The preliminary objection as to jurisdiction, namely as to whether there was a final order, therefore fails, so far as the setting aside of the terms of settlement is concerned. As to the order setting aside the judgment of 17 June, that was an interlocutory order, for it did not finally determine the rights of the parties, that is the rights arising under the terms of settlement. Had the order only set aside the judgment without setting aside the terms of settlement, it would clearly not have been a final order in respect of the rights of the parties as they then stood. It follows that that part of the Magistrate's order stands, subject to one matter.

It was submitted on behalf of the plaintiff appellant, for whom Mr Dennis appeared, that the learned Magistrate had no power to grant a rehearing as there had been an appearance entered in the proceeding. He referred in particular to the decision of this Court in *Kotrlik v Eisner* [1958] VicRp 11; [1958] VR 55; [1958] ALR 317 where counsel for the defendant, as a result of an arrangement made with counsel for the complainant, announced his appearance for the defendant whilst took no further part in the proceedings and an order in favour of the complainant was made. Subsequently, upon the defendant's application the Court of Petty Sessions set aside the order made and directed that the complaint be reheard. It was held on review by Herring CJ that the section was designed to enable the **[5]** court to redirect a re-hearing in cases where an *ex parte* order had been made and, as the appearance of counsel for the defendant was an appearance of the defendant, the order setting aside the order made and directing the re-hearing should not have been made.

It was said that in this case the defendant had similarly appeared here, because his counsel

had appeared at the original hearing. In my view, the hearing, where the matter was struck out after terms of settlement had been entered into, was distinct from the matter before the Court when the judgment was entered on 17 June 1992. The latter was founded, not on the original proceeding, whilst on the terms of settlement.

It is true that it was still made in the original action whilst that was not, in my view, one which for the purposes of appearance was the same proceeding as is the proceeding referred to in s110. It would be an odd result if it were otherwise, for it would mean, for example, that where a matter was adjourned on a number of occasions whilst the defendant appeared at the first hearing only, he would be deemed, for all purposes, to have appeared at every subsequent hearing. Although a subsequent hearing would not ordinarily require proof of service to sustain the validity of any orders made in those subsequent hearings, it is quite another thing to say the defendant is to be regarded as appearing in person at a second hearing, simply because he appeared in an earlier hearing. In any event, there was here much more than a mere adjournment. There was here a termination of the first matter.

The next question is whether there was any error of **[6]** law on the part of the learned Magistrate in setting aside the terms of settlement. There were effectively three grounds of appeal, namely that there was no jurisdiction to set aside the terms of settlement on an application to set aside judgment entered in default. Secondly, that the order setting aside was made in breach of natural justice. Thirdly, that the order here was one that could not be supported on the evidence. As to jurisdiction, the argument was a twofold one, namely that s110 did not permit an order which set aside both the judgment and, in effect, the cause of action upon which it was based. Secondly, that it was necessary to take separate proceedings in order to impugn the terms of settlement.

For the defendant, it was contended that the application to set aside terms of settlement was not founded on s110 and was, in substance, an application under order 20 of the *Magistrates' Courts Rules*. In any event, it was said, a separate action was not necessary. S110 does not, in my view, contemplate both the setting aside of the judgment and a final determination of the proceeding in the one order. Indeed, s110 refers to the rehearing of the proceeding. I understand that in most cases this would have been the rehearing of the original dispute. It would not mean a rehearing of the compromise, for that is not, in itself, ordinarily a proceeding. Section 110 should not be given an operation which, in the absence of clear words or clear intention, leads to an alteration of accrued rights of the kind represented by a contract. Section 110 can do its work quite effectively, without having to interfere with the clear contractual rights of the parties.

[7] There are two contrasting views in the present case. The first, espoused by the defendant, is that the terms of settlement are set aside and the original claim is to be heard. The opposite view is that s110 operates to set aside the judgment and enables the rehearing of the proceeding, namely the application for judgment in default. The second view does not do any violence to the section and is, in my view, to be preferred. It follows in this case that an application under s110 was ineffective to set aside the terms of settlement.

I am reinforced in my conclusion by the trend of the authorities, which point to the need to turn to separate action, rather than by motion in an action where it is sought to enforce the compromise, at any rate, where the judgment has not been made and entered. It was argued with admirable clarity and persistence on behalf of the defendant that the statements of principle recognised that there could be motions to enforce a compromise in an action and that a party did not have to proceed by way of separate action and that accordingly by analogy, one could similarly proceed in an action to set aside the compromise. The basic principle, certainly as to enforcement, has been recognised in a number of cases. I need refer only to *Robert v Gippsland Agricultural and Earth Moving Contracting Company* [1956] VicLawRp 86; [1956] VLR 555 at 557; [1957] ALR 71, where Lowe and O'Bryan JJ adopt the following statement of principle in *Daniell's Chancery Practice* (8th ed.), vol. 1 at p646:

> "Where an action is compromised by agreement out of Court, it was formerly necessary to institute an action for specific performance of the agreement in the event of any party refusing to **[8]** carry it out. But since the *Judicature Act* such a compromise may be converted into an order of the Court upon a motion by any party interested and enforced like a judgment. But a consent order, embodying a new agreement between the parties beyond the scope of the action, can only be enforced in a fresh suit, which is also the proper method of determining the validity of the compromise, if disputed."

Their Honours said at p557:

> "When the matter came before Dean J, the case was in just that simple form. There has been no order staying the action, it had not been struck out, discontinued or otherwise interrupted."

In the present case, however, it is common ground that the action had been struck out. Considerable reference was made in argument to the High Court's decision in *Harvey v Phillips* [1956] HCA 27; (1956) 95 CLR 235; 30 ALJR 140. At CLR page 242 the Court said as follows:

> "The learned judge authorised the entry of judgment in accordance with the terms of settlement drawn up. Judgment has not in fact been signed or entered, so we were informed. Had judgment been signed, it may be doubted whether it was open to the plaintiff to attack it by making an application to the Full Court in the action to set aside the judgment and compromise. No objection was made on this score."

Then later, the Court went on to say:

> "It is not a case where the assistance of the court is sought or invoked to carry a compromise into effect which otherwise could not be enforced by the party relying upon it. In such a case, the assistance may be refused on grounds not necessarily sufficient to invalidate a simple contract. It is not a case where a compromise has been agreed upon by counsel acting only in pursuance of his apparent or implied authority from his client but, owing to a mistake or misapprehension, in opposition to his client's instructions or in excess of some limitation that **[9]** has been expressly placed on this authority. In such a case, at all events until the judgment or order embodying the compromise has been perfected, an authority exists in the court to refuse to give effect to or act upon the compromise and perhaps to set it aside.

At page 243 and 244 the Court says:

> "The question of whether the compromise is to be set aside depends upon the existence of a ground which would suffice to render a simple contract void or voidable or to entitle the party to equitable relief against it, grounds for example such as illegality, misrepresentation, non-disclosure of a material fact where disclosure is required, duress, mistake, undue influence, abuse of confidence or the like."

It needs to be pointed out that none of the authorities are illustrations of cases of setting aside a contract of compromise where, in effect, the determination of the proceeding had been perfected by the order of the Court. It was sought to proceed, as I have indicated, by analogy to the recognition in certain cases described in *Robert's case* as simple cases, that there could be motions to enforce compromises within the action without having to take fresh proceedings. It is, on the view I have formed of the operation of s110, unnecessary to express a final view on this matter. But the tenor of the authorities indicates, both as a matter of principle and as a matter of convenience, that a contract of compromise should be impugned only by a fresh action. The notion of convenience is understandable for it is one thing to canvass a limited matter upon a motion in the action itself, especially if what is being canvassed is not a complete settlement of the whole proceedings, **[10]** whilst a step taken in the proceeding. Where, however, there is likely to be a substantial conflict, and I would put into that category direct conflict of testimony as to whether or not there was actual authority to enter into the final compromise which occurred, then, it seems to me, that there is a considerable argument of convenience for that being dealt with in a separate proceeding. In any event, as I have indicated, it is not necessary for me to reach a final decision on that matter.

It was nonetheless argued on behalf of the defendant that it was not necessary to rely on s110 to set aside the terms of settlement and that the learned Magistrate's order could be justified, as if it had been made as an order under order 20 of the *Magistrates' Court Rules*. The short answer to this argument, in my view, is that there was no application under order 20 at all. It would be exceptional retrospectively, as it were, to treat an application under s110 as also being accompanied by another application which was never made at the time. This is more than a matter of mere form and is not simply directed to the question as to whether an inappropriate document was used and the proper form of document was not adopted in respect of which a court, in the control of its own proceedings, could always make provision. This was a case where it could reasonably be said that s110 was an entire application and that the material that was before the learned Magistrate was all explicable as supporting the matters that the applicant had to show, namely to account for his non-appearance and secondly, to show that he had a good defence on

the merits. The latter necessarily involved him in having to **[11]** explain, not merely why he had not been in attendance when the matter was struck out, whilst the order was made without his authority. It may be true to say that had there been an application made under order 20, there would not have been much in the way of additional material, whilst the fact is that there was no such application made nor could it be said that at any stage, the representative of the defendant agreed to waive any rights to have such a separate application made. On the contrary, arguments were put as to why the terms of settlement should not be impugned at the hearing that was then taking place before the learned Magistrate.

In all of those circumstances, it was, in my view, not open to the learned Magistrate to make the order that he did. It was not sustainable as a exercise under s110 and there was no other proceeding before him that enabled him to make the order that he did, which was a final order setting aside the terms of settlement. This conclusion makes it unnecessary for me to refer to the other main ground of attack, namely a complaint that there had been breach of natural justice, or a want of procedural fairness, in relation to the conduct of the hearing. It follows that if I find that the Magistrate's order setting aside the default judgment is to stand and that the order setting aside the terms of settlement cannot stand, that the appeal must succeed to the extent that it seeks a setting aside of the Magistrate's order. The appropriate order will therefore be that the learned Magistrate's order is set aside to the extent that it is sets aside the terms of settlement.

As I have already indicated, I take the view that **[12]** the order of reinstatement is not an order reinstating the whole action and that the limited matter that was before the Magistrate was an order to seek the setting aside of the judgment, which would then mean that the matter returns to the court with the action remaining struck out and the terms of settlement remaining in place.

APPEARANCES: For the appellant Hannan: Mr BM Dennis, counsel. Hardy, solicitors. For the respondent Binns: Mr R Appurudai, counsel. MacPherson & Kelley, solicitors.
