IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for Restitutio-in-Integrum and Revision under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No:
CA/RII/01/2021

D.C. (Kandy) Case No :
1482/2012/L

1. Ranatunga Arachchilage Sunil Harshadewa
No. 660/06/B,
Sirimavo Bandaranayaka Mawatha,
Mulgampola,
Kandy.

Defendant - Petitioner

-Vs-

1. Kotte Hewa SwarnamaliThilinikaDeshabandu
No.50, Madigelhala, Manikhinna.

2. Kotte Hewa BaladewaDeshabandu (Deceased)

Plaintiff - Respondents

Before: Hon. D.N. Samarakoon[1], J.

[1] On 24.01.2024 learned counsel appeared for parties consented for the judgment being given by me as Single Judge because the argument was heard by myself and Justice Iddawala

Counsel: Ashan Randika with Amindika Rathnayake for the Defendant-Petitioner.

Dr. Sunil Coorey with Sudharshini Cooreyfor the 01st and 02ndPlaintiff-Respondents.

Argued on: 05.09.2023

Written submission tendered on: 20.10.2023 by the Defendant- Petitioner.

01.10.2023 by the Plaintiff- Respondents.

Decided on: 29.02.2024

D. N. Samarakoon J.,

J U D G E M E N T

The defendant petitioner says, that,

"INTRODUCTION

1. The Plaintiff Respondents have instituted an action at District Court of Kandy fordeclaration for the title of the subject matter and to eject the defendant-Petitioner(hereinafter sometimes and referred as "Petitioner") from the subject matter.
2. Subsequently the parties [have] entered into a settlement. But however to Petitioner's utterdismay and surprise he was informed that the terms entered was not terms agreedbetween parties.
3. The Petitioner has made an application to revise or set aside the said settlement dated23.02.2016 before the District Court of Kandy."

The Defendant- Petitioner says that

(i) he was invited to reside at the property of subject matter in viewof the invaluable service rendered by the Petitioner.

(ii) the Second Plaintiff - Respondent authorized the Petitioner to develop, repair and make improvements tothe subject matter valued at Rupees One Million.

(iii) the Second Respondent has promised to transfer the property to the Petitioner upon thepayment of the value of the subject matter.

(iv) the Petitioner has spent more than Rs. 500,000/- to improve the subject matter in viewof the Second Respondent's aforesaid promise abandoning his idea of purchasing a plotof land in Gannoruwa.

(v) the First Plaintiff Respondent is the daughter of the Second Respondent.

(vi) Later on 17.12.2012, the Respondents instituted an action praying for a declaration oftitle to the subject matter and ejectment of the Petitioner from the subject matterthereof.

(vii) the Petitioner has filed his answer on 31.07.2014, which contained a claim in reconvention and the Petitioner demands Rupees One Million from the Respondents.

(viii) the trial has commenced on 12thOctober 2015 on which date Courtrecorded 2 admissions and 22 issues as agreed by the parties.

(ix) the Attorney-at-Law for the Respondents in the presence ofhis [not clear whose, may be the petitioner's] registered Attorney-at-Law proposed to the Petitioner that he would be paid Rs.500,000/- [which he] spent on improvements made to the subject matter as claimed if he were tovacate the premises within a reasonable time for which the Petitioner agreed inprinciple.

(x) the Court was informed by the parties that there was a settlement when this matter came up for trial on 23rdFebruary 2016. The terms of the settlement werethereafter entered and parties placed their respective signatures as directed by the Court.

(xi) later the Petitioner inquired from his registered Attorney-at-Law as to whenhe would receive the Rs. 500,000/- as agreed between parties as there was no sign ofthe Petitioner receiving the same.

(xii) to the Petitioner's utter dismay and surprise, he wasinformed by his Attorney-at-Law that there had been no such term included in the termsof settlement so entered and the Petitioner immediately informed court that he wouldrevoke the proxy filed on the Petitioner's behalf by Petitioner's letter dated 25.04.2016.

(xiii) upon the perusal of the case record, the Petitioner came to know that there was in factno term which indicates the payment of Rs. 500,000/- to Petitioner recordedon 23.02.2016.

(xiv) therefore an application under and in terms of Section 189 of the Civil Procedure Codewas filed in the District Court seeking to set aside the terms of settlement erroneouslyentered on or about 23.02.2016. **The Petitioner alleged that the purported settlementwas entered by his Attorney-at-Law mistakenly and/or negligently contrary to theinstruction given by the Petitioner**.

(xv) the Learned District Judge delivered the order on or about 07.06.2017 dismissing thePetitioner's aforesaid application.

(xvi) being aggrieve by the aforesaid order, the Petitioner has lodged an appeal in the HighCourt of Central Province (Exercising Civil Jurisdiction) holden in Kandy.

(xvii) the Respondents raised a preliminary objection regarding the maintainability of theappeal on the basis that the proper

application that Petitioner should have filed was aleave to appeal application instead of final appeal.

(xviii) the Judges of High Court of Central Province (Exercising CivilJurisdiction) delivered the order dated 11.12.2010 allowing the aforesaid preliminaryobjection and dismissed the Petitioner's appeal.

(xix) the Judges of High Court of Central Province (Exercising CivilJurisdiction) holden in Kandy stated that the proper remedy available to the Petitionerwas to seek a restoration from an appropriate forum.

(xx) thereafter the Petitioner filed this application for Revision and/or Restitution inIntegrum before this Court.

(xxi) the terms of settlement entered are hardly favourable to the Petitioner as thereis no clause benefiting the Petitioner.

(xxii) a doubt may arise as to whether the Petitioner in fact would agree to such terms in the premise that the Petitioner clearly claimed by his claim in reconvention a sum of RupeesOne Million.

(xxiii) it has been also mentioned that the Petitioner would be allowed to remain in the subject matter until 31.12.2016.

The purported compromise having not being entered in terms of sections 408 and 91:

The petitioner reiterates, that, the Attorney at Law of the respondents, in the presence of his [presumably petitioner's – because the petitioner revoked his proxy the moment he came to know about the absence of a clause that makes him entitled to a payment of Rs. 500,000/-] registered Attorney at Law proposed to him to give him Rs. 500,000/- in return for him vacating the premises.

The position of the respondents is condensed in the following paragraphs of their written submissions,

"4.It is respectfully submitted that, on the 1st day of trial, namely on 2015.10.13 (pg 56rounded number) admissions and issues were raised by both parties and both parties werepresent on that day. On the next day of [the] trial, it seems parties agreed to settle the matter byentering the terms of settlement, namely on [23.02.2016]. It is most respectfully submittedthat there is no error, defect or irregularity, which has not prejudiced the substantialrightsof the parties or occasioned a failure of justice. **Your Lordships kind attention is drawn tothe fact that section 408 of Civil Procedure Code allows parties to enter into a settlement**". (paragraph 04)

"7.Your Lordships attention is drawn to the Journal Entry No. 15 at page 22, where theDefendant Petitioner has clearly signed after agreeing to the terms ofsettlement. As per the proceedings on [23.02.2016] the terms had been read out in openCourt by the learned Additional District Judge. In Malani Vs. Somapala 2000 (2) SLR196, it was decided that, "when settlements or compromises are made as a precaution theof the settlement or compromise or adjustment should be explained to the partiesand their signatures or thumb impressions should be obtained",

> "In Lameer vs. Senarathne 1995 (2) SLR 13, it was held that, "Where an Attorney atLaw is given a general authority to settle or compromise a case, [a] client cannot seek to setaside a settlement to entered, more so when the client himself had signedthe record.Court cannot grant relief by way of restitution to a party who has agreed in court tosell property at a lesser price with the full knowledge of [its] true value". (paragraph 07)

"11.It is respectfully submitted that, the Defendant Petitioner knew that he was a leave andlicense/ lessee of the Plaintiff Respondents, he could not prove to Court a better title thanthat of the Plaintiff Respondents with respect to the subject matter of this action; which isthe reason why

> the Defendant Petitioner agreed to vacate the premises by 31.12.2016without any damages. However the Defendant Petitioner after occupying the subject matterof this action for [the] last 5 to 6 years is now claiming money to vacate premises, which isentirely unreasonable and unjust. It is respectfully submitted that to set aside the terms ofsettlement is purely an after thought of the Defendant Petitioner, since the terms entered [are] not a "profitable set of terms". (paragraph 11)

In this Court as well as in the District Court, the respondents have cited the case of Lameer vs. Senarathne decided in 1995 in the Court of Appeal by Ranaraja J., (S. N. Silva P/C.A. – later Chief Justice) concurring, in which it was said, that,

> "1. When an Attorney-at-Law is given a general Authority to settle or compromise a case, client cannot seek to set aside a settlement so entered, more so, when the clienthimself had signed the record.
>
> 2 There is no affidavit from the Attorney-at-Law affirming petitioner was forced into accepting the terms of settlement. Pleadings indicate that the settlement was first suggested on 21.6.1991 and entered only on 13.7.1991."

Hence, that was a case in which the petitioner was allegedly forced into accepting a settlement.

Furthermore, there is nothing to suggest in this case, that, the Attorney at Law was given a general authority to settle. The petitioner alleges that he agreed to vacate the premises on his belief that he will be paid Rs. 500,000/- in consideration of the same, which he later found our to be a mistaken belief.

Hence the ratio, if there is any, in Lameer's case cannot be employed in this case in toto. Furthermore I do not, with respect, agree what is in 1 above, that, once general authority is given to an Attorney at Law that amounts to the crossing of the Rubicon (cannot return to original position). That is, with

respect, a decision for convenience of policy but not for the dispensation of principled justice.

Such unalloyed justice and common sense were recognized by His Lordship Justice **N. E.** Weerasooriya[2] Judge of the Supreme Court of Ceylon in UKKU AMMA, Appellant, and PARAMANATHAN et al,RespondentsS. C. 34-G. R. Matale, 13077 decided on 27.11.1959 as Single Judge. (63 NLR 306)

It was decided that

> "Compromise of action-Procedure-Civil Procedure Code, ss. 91, 408.
>
> Where, in a purported settlement of a case, not only were the provisions of sections 408 and 91 of the Civil Procedure Code as to notification to Court by motion not complied with, but there was nothing on the record to show at whose instance the settlement was arrived at-
>
> Held, that the decree entered in terms of the settlement should be vacated."

Section 408 says,

> "408. If an action be adjusted wholly or part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the action, **such agreement, compromise, or satisfaction shall be notified to the court by motion made in presence of, or on notice to, all the parties concerned**, and the court shall pass a decree in accordance therewith, so far as it relates to the action, and such decree shall be final, so far as relates to so much of the subject-matter of the action as is dealt with by the agreement, compromise, or satisfaction".

This shows, that, as per the law enacted by the parliament, which is the supreme law of the land next to the very Constitution, which the courts cannot

[2] Whose brilliance as a lawyer was on unsurpassable excellence.

deny to apply, settlements and compromises cannot be entered without following the pre requisites laid out by written law. If a compromise is entered without following those pre requisites, it will be valid, as long as one of the parties to it complains within a reasonable time.

In addition, Justice Weerasooriya said that the record must show, that, at whose instance the settlement was arrived at.

Section 91 says,

> "91. **Every application made to the court in the course of an action, incidental thereto, and not a step in the regular procedure, shall be made by motion by the applicant in person or his counsel or registered attorney**, and a memorandum in writing of such motion shall be at the same time delivered to the court".

Section 408 is not a step in the regular procedure of plaint, answer, replication, issues, evidence, judgment and decree.

Hence the requirement of adhering to the provisions of section 91 as well.

Justice Weerasoorya said in the conclusion, that,

> "Section 408 of the Civil Procedure Code provides that an agreement or compromise shall be notified to Court by motion. Under section 91, where the motion is by the advocate or proctor for a party, a memorandum in writing of such motion is required to be at the same time delivered to Court. Not only have these provisions not been complied with, but there is nothing in the record to show at whose instance the settlement was arrived at.
>
> In these circumstances I would allow the appeal of the plaintiff with costs. The decree entered in terms of the settlement is vacated and the case will be sent back for the trial to be proceeded with according to law. All costs so far incurred in the Court below will be costs in the cause.

This order will not, however, preclude the parties from arriving at any lawful adjustment or compromise of the action, if they so desire, and notifying the same to Court in terms of section 408 of the Civil Procedure Code".

Then I find, that, in **W.R. PERERAVSSPECIAL EDUCATIONAL SOCIETYC.A. (restitutio in integrum) Application No. CA/Rl[I]/01/2019DC (Tangalle) [Tangalla] Case No. SPL 251/18, which was decided on 04.03.2021** by my esteemed colleague and brother Justice C. P. Kirthisinghe (in which I concurred), the complaint of the plaintiff petitioner was, that, he agreed for the 1st condition, but not to the 2nd. True, that, in addition the petitioner was blind. But the decision of this Court was not based on that, or at least on that alone. "Blind" I think means cannot see. When the judge is having the record, usually a stenographer is recording and even if the lawyers of parties may be having a motion in writing (there is nothing to show that such a motion was there in this case – a requirement under sections 408 and 91) can the party see, even if there is no problem with his eye sight? In fact, as this Court sees it, that is the basis for the requirement in section 408 that there must be a written motion and a memorandum, or at least one of the reasons for that requirement.

As I see there is no such motion and or memorandum in the copy of the case record attached to the petition. The learned district judge in proceedings dated 23.02.2016 just says, that,

"Parties inform that there is a settlement. The terms of settlement are recorded as follows."

There is no reference to a motion and or a memorandum.

In the failed appeal to the Civil Appellate High Court paragraph 08 of the petition of the petitioner dated 02.08.2017 clearly stated, what he states now too, that, prior to 23.02.2016 it was discussed and agreed at the discussion held before the Attorneys at Law of both the parties to pay him Rs. 500,000/-.

No evidence of a motion and or memorandum made reducing the verbal agreement to writing, which is a must under the law.

In the case decided by Justice Kirthisinghe he said as follows, **[Beginning of the Quotation]**

> "The Petitioner states that the Respondents were aware that the Attorney - at - Law for the Petitioner was making a mistake as that additional condition was not a part of the agreement reached by the parties.
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> In the case of Cornelius Perera vs. Leo Perera 62 NLR 413, Basnayake CJ held that on the ground of mistake, a consent order and the judgement based on it can be set aside. Sansoni J held that the proper remedy is by way of an application for restitutio in integrum. In the case of Halib AbdulCader Ameer vs. Danny Perera 1998 (2) SLR 321, G.P.S. De Silva CJ held that …. restitutio in integrum can be claimed on the ground of "Justus error" which constitutes reasonable or excusable error…..
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> The Petitioner has taken up the position that the settlement pertaining to the additional condition recorded is not in compliance with the provisions of the section 408 of the civil procedure code.
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> Section 408 of the civil procedure code reads as follows;
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> > 408. If an action be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the action, such agreement, compromise, or satisfaction shall be notified to the court by motion made in presence of, or on notice to, all the parties concerned, and the court shall pass a decree in accordance therewith, sofar as it relates to the action, and such decree shall be final, so far as relates to so much of the subject matter of the action as is dealt with by the agreement, compromise, or satisfaction.
>
> Section 91 of the civil procedure code reads as follows;

> 91. Every application made to the court in the course of an action, incidental thereto, and not a step in the regular procedure, shall be made by motion by the applicant in person or his advocate or proctor, and a memorandum in writing of such motion shall be at the same time delivered to the court.

Section 408 of the civil procedure code requires the parties to notify the agreement, or compromise to court by motion and section 91 of the code requires that a memorandum in writing of every motion should be delivered to court at the time it is made. The procedure adopted in this case in the District Court at the time the settlement was recorded does not satisfy the requirements of section 408....

That shows that the written terms of settlement were not before court at the time the settlement was recorded and the parties had not tendered to court a memorandum in writing containing the terms of settlement. Therefore even if the consent given by the counsel for the Plaintiff Petitioner to include the disputed additional condition into the terms of settlement had not been vitiated by a mistake of fact the consent decree entered in terms of that arrangement will not attract the finality given to the decree passed under section 408 of the code. As stated by Basnayake CJ in Cornelius Perera vs Leo Perera 62 NLR 413 "Where a statute provides special machinery which if resorted to renders a decree final, the finality prescribed in the Act does not attach to a decree unless there is a clear manifestation of a conscious intension of the parties to resort to that machinery with a knowledge of the consequences it involves and there has been a strict compliance with the requirements of the statute." **Parties to this case had not complied with the imperative requirements of section 408 of the civil procedure code and therefore the consent decree entered in the District Court will not attract the finality given to decrees passed under the section 408 of the civil procedure code. Therefore this settlement can be set aside <u>on that ground alone</u>**.

The Roman Dutch Law enables a person to avoid an agreement or settlement for mistake on his part when the mistake is an essential and reasonable one. In the case of Cornelius Perera vs Leo Perera cited above Sansoni J states thus "it must be essential in the sense that there was a mistake as to the person with whom he was dealing (error in persona) or as to the nature or subject matter of the transaction (error in neqotio, error in corpore). A mistake is regard to incidental matters is not enough. The test of reasonableness is satisfied if the person shows either (1) that the error was induced by the fraudulent or innocent misrepresentation of the other party, or (2) that the other party knew, or a reasonable person should have known, that a mistake was being made, or (3) that the mistake was, in all the circumstances, excusable (Justus et probabilis error) even where there was absence of misrepresentation or knowledge on the part of the other party. An agreement entered into in the course of an action, like any other agreement, may be set aside on these grounds".

In this case the mistake committed is an essential one as it relates to the nature or subject matter of the settlement. Before coming to the test of reasonableness it is appropriate to take into consideration the following opinion expressed by Burnside CJ in the case of Phillippu vs Ferdinands(1892 (1) Matara cases 207). "And I should hold that any admission which might be made for the defendants attempting to bind them to their manifest prejudice in the very essence of the defence on their pleadings and contrary to their contention on their evidence would not bind them without shewing that they had expressly authorized their counsel to make it and with a full knowledge of its effect".**[End of Quotation]**

Hence what His Lordship Justice Kirthisinghe said; and which I quoted above, was in perfect accord with the decision of Justice N. E. Weerasooriya in 1959, although His Lordship himself in W.R. PERERA VS SPECIAL EDUCATIONAL SOCIETY did not refer to the same. I now even more agree with my former brother Kirthisinghe, on what I have quoted above from His Lordship's judgment, having read the opinion of Justice Weerasooriya.

The above is the first ground to set aside the purported settlement.

The other ground due to which the purported settlement cannot stand:

The second is as follows,

Adam Smith had said that,

> "Man is an animal that makes bargains; no other animal does this – no dog exchanges bones with another."

Frederick Bastiat, the French economist and a prominent member of French Liberal School said, that, the need "to consult and compare" is a basic facet of human intellect[3] and justice. He denounced, in his 1850 work "The Law", the law which is a negative force (the accumulated force of the collective self defense) becoming a positive force, attempting to organize justice, in the process destroying it. The ability of the human mind to compare two or more things while gauging the quantity or quality of one thing, against another, which is the basis of the concept of equality, which faculty, the animals does not seem to have in them, at least to the extent humans have it, is the basis of equality and justice.

The petitioner has claimed in his answer dated 31.07.2014 Rs. 500,000/-.

The petitioner has stated at paragraph 08 of the answer, that,

(i) he is a driver of a funeral hearse
(ii) he helped to provide to the plaintiff and his wife who are in their old age things that become essential for them
(iii) on a certain day the plaintiff was even carried by the petitioner over the difficult route to reach the main road, which according to physicians saved his life, for delay in taking the plaintiff to the hospital could have been fatal,
(iv) petitioner even donated blood
(v) the plaintiff's daughter, who is also a plaintiff was grateful to him

[3]Frederick Bastiat, "The Law" (Dean Russel Translation, The Foundation for Economic Education, Inc., 1950)

(vi) the petitioner was planning to buy a land from Gannoruwa at that time

(vii) the plaintiffs invited the petitioner to come into the occupation of the subject matter and to pay in instalments the consideration for the transfer

(viii) an informal document dated 29.12.2010 was written

(ix) the petitioner paid Rs. 50,000/- to the plaintiffs

No doubt that the informal writing conveys no right title or interest as per section 02 of the Prevention of Frauds Ordinance of 1840. But it can be taken into account in considering the claim in reconvention together with what the petitioner now says, that, he expected the payment of Rs. 500,000/- to him as a condition in the purported settlement. It should have been taken into account, before the petitioner's grievance was summarily dealt with and rejected by all the courts below on technical or non technical grounds.

There was no reason for the petitioner to agree to a settlement or a compromise without a clause that enables him to receive the above sum.

HenceI must say what Justice Weerasooriya said in the above case with slight modification.

I would allow the appeal of the [defendant petitioner] with costs. The decree entered in terms of the [purported] settlement is vacated and the case [is] sent back for the trial to be proceeded with according to law. [The petitioner is entitled to] [a]ll costs so far incurred in [this Court and the Courts] below. This order will not, however, preclude the parties from arriving at any **lawful** adjustment or compromise of the action, if they so desire, and notifying the same to Court in terms of section 408 [and section 91] of the Civil Procedure Code. [The modifications are within square brackets]

Hence the application for restitutio in integrum is allowed with costs.

Judge of the Court of Appeal