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/05/2023

D.C. Colombo Case No :
DLM/00128/19

1. Athavuda Arachchige Premalatha
   Pigera Jayawardena
   27/18B, Ranasinghe Road,
   Pirivena Patumaga,
   Kolonnawa.

Substituted
Defendant-Petitioner

-Vs-

1. C.B. Anil Upananda
   No.81, Meethotamulla Road,
   Wellampitiya.

Plaintiff-Respondent

Before: Hon. D.N. Samarakoon, J.

Counsel: Dr. Sunil Cooray for the Substituted Defendant-Petitioner.
Chandrasiri De Silva with Ms. Ishara Gunarathna for the Plaintiff-Respondent instructed by Ms. Dilani Jayanetti.

Argued on: 30.01.2024[1]

Written submission tendered on: 07.03.2024 by the Substituted Defendant-Petitioner
07.03.2024 by the Plaintiff-Respondent.

Decided on: 29.04.2024

D. N. Samarakoon J.,

J U D G M E N T

The substituted defendant petitioner seeks the following reliefs,

"(b) that the record in D.C. Colombo Case No. DLM/12 called for;

(c) that the proceedings held on 02/03/2022 and the terms of settlement recorded on that day be set aside, together with the judgment and decree (if any) entered in terms of the said terms of settlement;

(d) that the District Court of Colombo be directed to proceed with the trial of this action, and thereafter to judgment, according to law;

(e) for interim relief by way or an order staying all further proceedings in D.C. Colombo Case No. DLM/1 28/2019 until the final determination of this application before Your Lordships' Court;

() for costs of this application; and

(g) for such other and further relief which to Your Lordships' Court shall seem meet."

[1] But further time was granted as learned counsel indicated, that, there is a possibility of a settlement, which was informed on 15.02.2024 will not be materialized.

The substituted defendant petitioner says in her written submissions from paragraph 12 onwards as follows,

> "12. Prior to 27/08/2020. which was the date fixed for the pre-trial, the Defendant died on 13/08/2020 [157,159]. Until then and also thereafter the Substituted Defendant was not made aware of the disputes in this action and her instructions to her attorney at law was to ensure that the buildings (boutique and living unit) which were being occupied by her and her daughter will not be affected by the decision in this action and that they be entitled to use the boutique and the living unit as they had been doing until then. On the death of the Defendant his rights and title devolved on his wife the Substituted Defendant and their only child, Lihinika Sayuri, a 27 year old unmarried girl.
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> 13. Prior to his death the Defendant had nominated his wife, to be substituted in his room in the event of his death pending the action [164]. Accordingly, on 10/08/2021 order was made substituting the Defendant's wife as the Substituted Defendant, who is named above as the Substituted Defendant in the caption of this action. Accordingly, amended caption dated 10/12/2021 [21] was filed by the Plaintiff.
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> 14. The Substituted Defendant does not appear to have appointed by a proxy Ms. Uthpala Adhikari, Attorney at law to appear for her (although the Substituted Defendant has subsequently purported to revoke [168]a proxy assumed to have been granted by her to Ms. Uthpala Adhikari, Attorney at law). Therefore, it appears that when the terms of settlement were recorded in court (as averred below) there was no attorney at law on record for the Substituted Defendant.
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> 15. Thereafter the pre-trial proceeding was held and concluded on 12/10/2021 [63] at which the admissions and issues which had been suggested by the Plaintiff and by the defendant were accepted by the court The trial was accordingly fixed tor 29.11.2021.

16. On 29/11/2021 when the case was taken up for trial, no proceedings had been recorded. The journal entry of the said date [13] is difficult to decipher, except that it appears that on the basis of a possibility of a settlement of this action the Court refixed the trial for 02.03.2022. No indication of the basis or of terms of settlement were disclosed or recorded.

17. On the day previous to 02/03/2022 the Substituted Defendant received a telephone call from Ms. Uthpala Adhikari, Attorney at law, who stated to the Substituted Defendant that her presence in court on 02/03/2022 was necessary as the case will be settled and that the terms of settlement will be favourable to the Substituted Defendant. The Substituted Defendant told the said Attorney at law that the settlement should be to the effect that by the settlement the residing building and boutique of the Substituted Defendant should remain for her and her daughter. The said Attorney at law assured the Substituted Defendant that by the settlement there would be no change to her residing property which will remain for her and her daughter.

18. When the Substituted Defendant went to court on 02/03/2022, the Plaintiff was also present. The Substituted Defendant was not made aware at any time of any terms of settlement. No written terms of settlement were made available at any stage to the Substituted Defendant for her to consider the same with her attorney at law and to receive an explanation thereof and to understand the implications thereof. She had no such opportunity. She was not given any document which contained any terms of settlement. She was not shown or given any survey plans. She was not aware of the contents of survey plans relevant to this action. She was not told by Ms. Uthpala Adhikari, Attorney at law, or any one else as to what the settlement of the case was, or how it would benefit the Substituted Defendant. When the case was taken up in court Ms. Uthpala Adhikari, Atorney at law, was present in Court and there were several other lawyers

also in the Court. A request was made to the Legal Aid Commission that an affidavit from Ms. Uthpala Adhikari be made available to the Petitioner in order to file the same in these proceedings in Your Lordships' Court in order to disclose to Your Lordships' Court the above facts of this case. The Petitioner has been unable to obtain such an affidavit.

19. In this case a lawyer on 02/03/2022 dictated in court terms of settlement which were heard by the Substituted Defendant for the first time. The Substituted Defendant did not understand the said terms and no one explained them to her. The Substituted Defendant could not and did not understand how the terms of settlement related to the land and building which she, her late husband, and their daughter had been occupying or how their residing building and boutique would remain for them. The Substituted Defendant heard the said lawyer referring to some survey plans, and what was dictated by the lawyer was recorded by the stenographer of the Court. but what was so dictated and recorded was not explained to or understood by, the Substituted Defendant. As certain plans were referred to in what was so dictated, the Substituted Defendant was unable to follow, or understand the implications of what was dictated and recorded. Thereafter as the Substituted Defendant was instructed by Ms. Uthpala Atapattu Attorney at law, to sign the record, she did so [14] after the Plaintiff also placed his signature on the record. The Substituted Defendant sighned the record because Ms. Uthpala Adhikari, Attorney at law, had assured her that her residing house and her boutique will remain unaffected to her and her daughter. After the Substituted Defendant had signed the record Ms. Uthpala Adhikari Attorney at law, informed the Substituted Defendant that the case was over and that the court had entered judgment in terms of the terms of settlement which were recorded.

20. Thereafter, after a few days the Substituted Defendant learnt from certain known persons who came to the boutique, including a brother of

the Plaintiff and of the deceased Defendant, that the Plaintiff had been telling others that he was happy with the settlement of the action because the Substituted Defendant had settled the action on terms favourable to the Plaintiff, and that Plaintiff had trapped the Substituted Defendant to a settlement which was in the Plaintiff's favour. The said known persons and the said brother have refused to give any affidavit saying that they wished to keep their good relations with both parties to this action.

21. Thereafter the Substituted Defendant attempted to verify from the Legal Aid Commission what exactly had been the settlement for which the Defendant Petitioner had on advice placed her signature on the record. However, she got no proper response, except that the Legal Aid Commission obtained from court and handed over to the Substituted Defendant a certified copy of the terms of settlement which had been recorded in court on 02/03/2022.

Thereafter the Substituted Defendant consulted another attorney at law, by the name of Mr. Chamara Nanayaklkarawasam, and his junior, to verify what had actually happened in the settlement. The said certified copy is filed herewith marked "E". The cash receipt for payment made by the Legal Aid Commission to court for the same is filed herewith marked “F". It was explained to the Substituted Defendant by the said attorneys at law that the terms of settlement which had been recorded in this case referred to several survey plans and provided for the conveyance by deed of certain blocks of land depicted in those plans, including the admission by the Substituted Defendant and by the Plaintiff regarding the ownership of certain blocks of land shown in the said survey plans, and that there was no term of settlement to the effect that the Substituted Defendant will continue to possess her residing premises and boutique of which she and her daughter were in fact in possession.

22. Thereafter the Substituted Defendant on legal advice changed her (said supposed) instructing attorney at law and made an application to the District Court in this action by way of a petition dated 10/06/2022 [38] and supporting affidavit [44], invoking the provisions of section 839 of the Civil Procedure Code, praying that the terms of settlement recorded on 02/03/2022 be vacated and set aside, for a direction that fresh terms of settlement be entered by which the Substituted Defendant as well as the Plaintiff will be entitled to continue to possess the respective premises of which they were already in actual possession of".

She then says that the district court had made order on 02.02.2022 dismissing her application with costs.

The following are some excerpts from the written submissions of the plaintiff respondent.

"15. The Petitioner in her Petition has taken up a position that the 2nd and 3rd terms of settlement referred to lands outside the scope of this action and which do not part of corpus of the action and the court acted without Jurisdiction and in violation of section 408 of the Civil procedure code but it is total misrepresentation of facts because the Plaintiff and the Defendant in their Plaint and answer very clearly claiming titles for the properties described in in the 1st, 2nd and 3rd averments of the settlement and those portion of Lands are well described in the 2nd and 3rd Schedules of the Both Plaint and the answer.

16. It is also respectfully submitted that Defendant has taken up that these was no Compliance with the section 408 of the Civil Procedure code.

17. It is respectfully submitted the section 408 is very clear "such Agreement compromise on satisfaction shall be notified to the court by motion made in presence of or on notice to all the parties concerned, and

court shall passed a decree in accordance there with so far as it relates to the action, and such decree will be final"

It his case the terms of settlement were read in open court before counsels and also the Plaintiff and the Defendant and were asked to sign it before the additional District Judge

18. The Order of the learned additional District Judge dated 02/02/2023 at page (69, 70, 71, 72) was not challenged up to now by the parties in the Civil High Court of Colombo by way of revision.

19. The Defendant Appellant by passing the available remedy of revision and or leave to Appeal to the Civil High Court of Colombo and had made this application, The Restitution in- intergrum and in the alternative for revision…."

[The language in the above excerpt is as one finds in that written submission. Civil High Court means the Commercial High Court. Since this case is not a one that is within the scope of that court, it could be presumed, that, the reference is to the Civil Appellate High Court (in colloquial terms) which in reality is the Provincial High Court that exercises civil appellate jurisdiction].

The question is whether to set aside the settlement or not.

The following is relevant,

In Malani Vs. Somapala 2000 (2) SLR 196, it was decided that, "when settlements or compromises are made as a precaution the of the settlement or compromise or adjustment should be explained to the parties and their signatures or thumb impressions should be obtained",

> "In Lameer vs. Senarathne 1995 (2) SLR 13, it was held that, "Where an Attorney at Law is given a general authority to settle or compromise a case, [a] client cannot seek to set aside a settlement

to entered, more so when the client himself had signed the record. Court cannot grant relief by way of restitution to a party who has agreed in court to sell property at a lesser price with the full knowledge of [its] true value". (paragraph 07)

There is nothing to suggest in this case, that, the Attorney at Law was given a general authority to settle.

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 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; and for the convenience of the ruler, not for the ruled, on whose sovereignty the former stands**.

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, Respondents S. 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."

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

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 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, <u>and not a step in the regular procedure</u>, 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.
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> 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. PERERA VS SPECIAL EDUCATIONAL SOCIETY C.A. (restitutio in integrum) Application No. CA/Rl[I]/01/2019 DC (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.

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, 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.
>
> 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.

There was no reason for the petitioner to agree to a settlement or a compromise without a clause that enables her with her daughter to remain in what she is in possession.

She has been misled by her purported registered attorney. It could be argued that this statement has been made without hearing her and hence not valid. But she has avoided the opportunity afforded her to explain by giving an affidavit.

Hence I 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

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

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