SARANELIS AND ANOTHER

v.

AGNES NONA

COURT OF APPEAL.
BANDARANAYAKE, J. AND DHEERARATNE, J.
L.A. 2/77.
D.C. KANDY 100384 L.
JANUARY 23 AND 27, 1987.

Civil Procedure Code–Agreement by deed to provide right of way for use by neighbours, with Municipality–Suit for obstruction of right of way–Settlement in Court–Variation/cancellation of settlement–Court misled–Inherent powers–S. 408 and s. 839 of Civil Procedure Code.

The defendants agreed by deed with the Municipal Council to provide a 5 feet right of way for use by the neighbours. The plaintiff who was a user of the road sued the defendants for obstruction of the roadway The case was settled whereby after the construction of the road at joint expense in accordance with the deed with the Municipality, decree was to be entered. There was no reference to any plan depicting the roadway in the settlement. This settlement was entered into without reference to the fact that the 1st defendant had already agreed with the Municipality to vary the roadway he undertook to provide on the original deed of agreement.

Held–

The general principle that should be followed is that a settlement entered into by the parties and notified to Court in terms of s. 408 of the Civil Procedure Code should not be lightly interfered with whether a decree has been entered by Court in pursuance thereof or not. But in this case the Court had been misled into recording the settlement

in regard to a roadway without a plan or even a sketch so that there would be no uncertainty about the course of the right of way. Besides the settlement involved the rights of the Municipal Council who was not a party. In these circumstances as the Court was misled setting aside the settlement using the inherent powers of Court under s.839 of the Civil Procedure Code was warranted in the interests of justice.

Cases referred to:

(1) *Shirekulidima 'Pa' Hedga v. Maha Blya–(1886) 10 Bombay 435.*

(2) *Perera v. Perera–(1948) 50 NLR 83.*

(3) *Sinna Veloo v. Messrs. Lipton Ltd.–(1963) 66 NLR 214.*

APPEAL from order of the District Court of Kandy.

Dr. H. W. Jayewardene, Q.C. with *G. Candappa, P.C.* and *Miss T. Keenawinna* for defendant-appellants.

Nimal Senanayake, P.C. with *Saliya Mathew* and *Miss S. Theresa* for plaintiff-respondents.

Cur. adv. vult.

March 20, 1987.

DHEERARATNE, J.

The plaintiff-respondent filed this action on 24.07.1973 seeking a declaration for a right of way to her land. It was alleged–

- that on 15.02.1955, the defendant-appellants without permission from the Municipal Council, Kandy, had built a house encroaching upon the road reservation leading to the plaintiff-respondent's land;

- that the Municipal Council, precedent to the approval of that building, stipulated that the defendant-appellants should provide a right of way at least 5 feet wide to the users of the neighbouring lands;

- that in pursuance of the said requirement by the Municipal Council the defendant-appellants entered into agreement No.4084 of 31.05.1956 attested by N. Coomaraswamy, Notary Public, whereby they bound themselves to provide a right of way not less than 5 feet wide for the use of others;

- that since the aforesaid agreement the plaintiff and others used a right of way depicted in plan No. 3987 dated 15.03.1970 made by R. C. O. De La Motte, licensed surveyor, which is also depicted in plan No. 1584 dated 14.06.1972 made by L. W. Ariyasena, Licensed Surveyor; and

- that on 13.07.1973 the defendant-appellants unlawfully obstructed the said right of way depicted in the said two plans.

The defendant-appellants who are husband and wife, by their answer, while denying most of the averments in the plaint, stated that the roadway they were prepared to provide to the Municipal Council and what the Municipal Council was prepared to accept, was a roadway along the north-western and north-eastern boundaries of the land belonging to the defendants, which land is depicted in plan No. 1087 of 13.11.1949 made by B. S. A. Kroon, licensed surveyor. In fact, according to the agreement No. 4084, that is what the defendants had agreed to grant the Municipal Council.

On 04.05.1976, when the case came up for trial, a settlement was reached by the parties, a translation of which would read as follows:

".....agreement No. 4084 dated 31.08.1956 entered into between the defendants and the Municipal Council, Kandy in respect of the roadway *claimed in the plaint* is produced by the Municipal Council today for perusal of court. The parties to the agreement are the Municipal Commissioner, Kandy and the (first) defendant. The roadway agreed to be given by the defendant *is mentioned in the schedule to the deed.* The defendant agrees to provide the roadway mentioned in that deed without any obstruction. It is ordered that the roadway will be provided under the supervision of P. H. T. De Silva, the land officer of the Municipal Council. Counsel for the defendants agrees that for the purpose of providing this roadway, the plan which is in the custody of the defendant, will be made available to the land officer, if so required. The first defendant agrees to give the roadway as mentioned above. He also consents on behalf of his wife. It is agreed that the plaintiff and the defendant will bear equally the expenses incurred in constructing the roadway, according to the estimate which will be presented by the buildings engineer of the Municipality. After the said sum of money is deposited with the Municipal Council, the

Municipal Council should construct the road. After the road is provided, decree will be entered. Call case on 8th June for the estimates of the Municipal Council. Parties must deposit money with the Municipality within one month of the date on which the estimate is submitted. After these conditions were explained, the plaintiff and the 1st defendant signed the record."

On 25.05.1976, the plaintiff-respondent filed petition and affidavit seeking to set aside or to vary the settlement entered into in court. The gravamen of the complaint of the plaintiff-respondent, was that since no reference was made in the settlement to any plan depicting the roadway claimed, particularly to plan No.3987 of De La Motte, it is uncertain as to whether the defendant had agreed to give the road claimed in the plaint or any other road as there is some doubt about the road mentioned in agreement No.4087. In these circumstances the plaintiff-respondent prayed that either the settlement entered into be set aside or varied making mention that the road agreed upon is depicted in plan No.3987. The defendant-appellants resisted this application.

On 13.09.1976, when the matter came up for inquiry, attorney-at-law for the plaintiff-respondent moved for an adjournment of the inquiry to enable him to summon the Municipal authorities to show that after the agreement No.4084 was entered into, the 1st defendant having submitted a fresh building application, had agreed with the Municipality to vary the proposed roadway he undertook to provide by the agreement No.4087. The attorney-at-law who appeared for the defendant-appellants denied that there was any alteration whatsoever to the roadway, agreed upon originally.

On 25.10.1976, when the matter came up for inquiry, the learned Additional District Judge called up P. H. T. De Silva, the land officer of the Municipality, to give evidence. This officer stated to court that subsequent to the agreement No.4084, the defendant agreed to alter the course of the roadway as shown in plan produced marked XI, making provisions for a roadway "20 feet away from the rear of the proposed building" of the 1st defendant. On this evidence which the learned trial judge accepted, he came to the finding that the defendant-appellant had failed to bring this alteration to the notice of court before the parties reached the settlement and on that ground he proceeded to set aside the settlement entered on 04.05.1976. This appeal has been preferred from that order with leave having being obtained.

Mr. Nimal Senanayake, P.C. for the plaintiff-respondent took up a preliminary objection to this appeal being heard. He contended that the application to obtain leave must be rejected as it has been filed out of time. The application to leave for appeal has been filed on 05.01.1977. It would appear that this application for leave to appeal had been filed at a time when the Administration of Justice Law was in operation, and that in terms of section 326(1) of that law, no time limit had been prescribed within which such an application should be filed, unlike in the case of a notice of appeal, for which a time limit of 14 days was provided for, in terms of section 320(1) of that law. I find no merit in this preliminary objection and it therefore fails.

Dr. Jayewardene, Q.C. for the defendant-appellents contends that the trial court had no inherent power to set aside the settlement entered in terms of section 408 of the Civil Procedure Code. Section 408 reads:

> "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 it relates to the action, and such decree shall be final, so far as it relates to so much of the subject matter of the action as is dealt with by the agreement, compromise or satisfaction."

It appears to me that the general principle which should be followed, is not to interfere lightly with a settlement entered into by the parties and notified to court, whether a decree has been entered by court in pursuance thereof or not. The reason underlying this principle has been so eloquently expressed by West, J. in the case of *Balprasad v. Dharmidhar Sakhram* printed as a footnote to the case of *Shirekulidinia 'Pa' Hedga v. Maha Blya* (1) quoted with approval by Nagalingam, J. in *Perera v. Perera* (2) at page 83:

> "The admission of a power to vary the requirements of a decree once passed would introduce uncertainty and confusion. No one's rights would at any stage be so established that they could be depended on and the courts would be overwhelmed with applications for the modification on equitable principles of orders made on full consideration of the cases which they are meant to terminate. It is obvious that such state of things would not be far removed from a state of judicial chaos."

Dr. Jayewardene also relied on the case of *Sinna Veloo v. Messrs Lipton Ltd.* (3) where Herath, J. held that once the terms of settlement entered upon are presented to court and notified thereto and recorded by court, a party cannot resile from the settlement even though the decree has not yet been entered. In that case the defendant-appellant, having revoked the proxy given to one proctor and having filed a fresh proxy through another, sought to resile from the settlement tendered to court on the grounds *inter alia* that the settlement had been entered without his consent and notified to court in his absence. Interpreting section 408, Herath, J. observed that the presence of parties does not mean the presence of parties personally, for, the code provided that the parties are represented by their proctors, unless the code expressly requires personal appearances.

According to the facts of this case, it appears to me that it was doubtful as to what right of way the parties agreed at the settlement, and this situation had been brought about by the 1st defendant in not apprising court or the plantiff of his subsequent variation of the course of the right of way on a plan submitted to the Municipal Council. It is right to say that the court has been misled into recording the settlement and it appears to me to be very unlikely that the court would have given its sanction to the settlement and recorded it, if the court was aware that subsequent to agreement No. 4084, the 1st defendant had agreed with the Municipal Council for an alteration of the right of way. This situation would have no doubt been avoided had the settlement been recorded with reference to a plan or even a sketch depicting the proposed right of way. From the proceedings it is quite apparent that there was no plan or sketch before court depicting the right of way agreed upon, so that there could have been no uncertainty about the course of the right of way. Besides, this was a settlement which involved not only the rights of the parties before court, but also those of a third party, namely the Municipal Council of Kandy.

In my view, circumstances of this case amply warranted the court from setting aside the settlement entered in terms of the inherent power vested by section 839 of the Civil Procedure Code, necessary to secure the ends of justice, for in this case the settlement would not have been sanctioned by court had it not been misled, which is different from the position of a party having being misled.

The appeal is therefore dismissed and in the circumstances of this case the parties will bear their own costs of this appeal. Registrar to send the record of this case back to the District Court of Kandy as early as possible for the trial to be proceeded with on the pleadings already filed or on such amended pleadings parties may wish to file. In view of the fact that the plaint in this case has been filed in 1973, we direct the District Court to take steps to conclude the trial expeditiously.

BANDARANAYAKE, J. –I agree.

Appeal dismissed.
Case sent back.