MALANI

v.

SOMAPALA AND ANOTHER

COURT OF APPEAL.
WEERASURIYA, J.
KULATILAKA, J.
CA 893/97.
DC MT. LAVANIA 375/95/L.
06TH MAY, 1999.

Rei Vindicatio action - Claim of Trust - Settlement challenged on the basis of bias and change of scope of action - Proper remedy and procedure - Restitution in integrum - Civil Procedure Code Ss.408, 753 - Contradicting the record.

When the case was taken up for trial parties had come to a settlement and accordingly the settlement was recorded and decree entered.

The Plaintiff Petitioner sought to revise the said settlement.

Held :

(i) Parties aggrieved by any order made in terms of S.408 CPC, could come before the Court of Appeal either by way of Revision (S.753) or the common law remedy of *restitution-in-integrum.*

(ii) If a party wishes to contradict the record he ought to file the necessary papers before the Court/Tribunal of first instance, institute an inquiry before such Court/Tribunal and thereafter if aggrieved by that order canvass the matter before the Court of Appeal.

(iii) It is not open to a Petitioner to tender convenient and self serving affidavits sworn to by him for the first time before the Court of Appeal.

"There must appear to be a real likelihood of bias, Surmise or conjecture is not enough, there must be circumstances from which a reasonable man would think it likely or probable that the justice . . . would or did favour one side unfairly at the expense of the other."

"When settlements or compromises are made as a precaution the nature of the settlement or compromise or adjustment should be explained to the parties and their signatures or thumb impressions should be obtained."

Cases referred to :

1. *Andradie vs Jayasekera Perera* [1985] 2 Sri L.R. 206 at 209
2. *A.K.W. Perera vs Don Simon* 62 NLR 118
3. *Punchi Banda vs Punchi Banda* 42 NLR 382
4. *Shell Gas Company vs All Ceylon Commercial & Industrial Workers Union* [1998] 1 Sri L.R. 118 at 120
5. *K vs Jayawardena* 48 NLR 497 at 503
6. *Jamal vs Aponso* 2 Times Law Reports 215
7. *Metropolitan Properties Company vs Lannon & Others* (1968) 3 All ER 304 at 310
8. *Fernando vs Singoris* 26 NLR 469
9. *Sinna Veloo vs Messrs Lipton Ltd.*, 66 NLR 214 at 215

APPLICATION in Revision from the Order of the District Court of Mt. Lavinia.

D.P. Mendis with *B. Wellala* for Plaintiff-Petitioner.

S. Mahenthiran for Defendant-Respondent-Respondent.

Cur. adv. vult.

June 29, 1999.

KULATILAKA, J.

The original plaintiff-petitioner to this application Dhampahalage Gunapala died while the case was pending before this Court. Thereupon his widow Ukwattage Sumana Malani has been substituted in his place as the petitioner.

The plaintiff-petitioner instituted action in the District Court of Mt. Lavinia against the defendant-respondent-respondent seeking *inter alia*:

A declaration of title to the premises in suit described in the schedule to the Plaint, and ejectment of the defendant-respondent-respondent therefrom. The defendant-respondent-respondent in his answer claimed a trust and sought a dismissal of the plaintiff's action. According to Journal entry (7) of 12. 01. 96 the case had been fixed for trial on 22. 08. 96.

Journal entry of 22. 08. 96 shows that as the defendant had failed to appear on that date Court had made order to hear the case *exparte*, in spite of the fact that a lawyer had appeared on behalf of the defendant and moved for a postponement on the ground that he could not obtain instructions from his instructing Attorney as he had gone abroad.

According to journal entry 11 of 17. 09. 96 after an *exparte* trial Court had entered judgment in favour of the plaintiff and entered decree accordingly. Thereupon the defendant with notice to the plaintiff had preferred an application to purge his default. Having considered the oral and written submissions made on behalf of the parties by order dated 03. 03. 97 Court set aside the *exparte* order and permitted the defendant to proceed with the defence and refixed the case for trial on 08. 09. 97. (vide P7)

According to the proceedings of 08. 09. 97 when the case was taken up for trial, parties had come to a settlement and accordingly the learned judge has recorded the settlement and thereafter entered the decree. By this application the petitioner is seeking to set aside the purported settlement recorded by the learned Additional District Judge.

In view of the contentions raised by the learned counsel for the petitioner it is appropriate to refer to the proceedings of 08. 09. 97 which include the impugned settlement as well. It reads as follows:

"Plaintiff is present. Attorney-at-law Collin Mendis instructed by Attorney-at-Law H.W. Jayatissa appears for the plaintiff.

Defendant is present. Attorney-at-Law Sahabandu instructed by Attorney-at-Law Derek Fernando appears for the defendant.

At this stage the case is settled on the following terms:

1. i. The defendant agrees to pay the plaintiff a sum of Rs. 10 lakhs (Rupees ten lakhs) in the following manner:

Within four months from the date hereof, on the date specified by the Court the defendant agrees to pay a sum of Rupees 5 lakhs in cash or by Bank draft in open Court. For that purpose call case on 08. 01. 98.

ii. In the event of a default in payment in the aforesaid manner the plaintiff has a right to ask for writ for the recovery of Rs. 10 lakhs.

iii. If so, costs of issue of writ could be recovered.

iv. If the sum of rupees 5 lakhs is paid in the aforesaid manner it is agreed that the balance sum of rupees 5 lakhs be paid monthly at the rate of Rs. 25,000/- commencing from February, 1998, on or before the last date of each and every month by bank draft made in favour of the plaintiff. It should be delivered by registered post to the address given in the plaint. The date of posting would be the date of payment.

v. In the event of two consecutive defaults the plaintiff is entitled to enter writ for the balance sum.

i. In that event, the plaintiff should notice the defendant.

vii. It is also agreed that the plaintiff is entitled to costs involved in the issue of writ.

2. It is agreed that after payment of the aforesaid Rupees 10 lakhs steps should be taken by the defendant to transfer the land at his expense and within two months after payment and as the last step the plaintiff should place his signature to the deed. If the plaintiff refuses to sign, the transfer could be executed by the Registrar of the Court by placing his signature to the deed.

3. It is also agreed that in the event of the death of any party the heirs are bound by these terms.

4. In such event if any question arises payment should be duly made by depositing the aforesaid monies in Court.

5. If the defendant pays the aforesaid sum of Rupees 10 lakhs in full before the aforesaid period within two months of such payment a right accrues to the defendant to obtain the deed in the aforesaid manner.

6. The aforesaid terms were read over and explained to the parties. Having understood the terms and having accepted them the parties sign the record.

7. Enter decree accordingly.

Signed, ADJ".

In his endeavour to impugn the aforesaid settlement the learned counsel for the petitioner urged the following grounds:

(1) that the purported settlement was foisted on the petitioner by the learned District Judge in the absence of the Attorney-at-Law for the petitioner and that this purported settlement is tainted with bias.

(2) that the tenor of the purported settlement is that it does not refer to the issues involved but takes the form of a money decree.

The learned counsel for the defendant-respondent-respondent raised a legal objection to the effect that in a case of this nature revision would not lie and that the proper remedy would be an application in restitution-in-integrum. Further he took up the position that no exceptional circumstances have been raised in the petition.

Before focussing our attention on the matters urged by learned counsel for the petitioner, it is pertinent to consider the legal objection raised by the learned counsel for the defendant-respondent-respondent. Parties aggrieved by any

order made in terms of section 408 of the Civil Procedure Code come before the Court of Appeal either by way of revision as provided for in section 753 of the Civil Procedure Code or the common law remedy of *restitutio-in-integrum*, the latter remedy being claimed on the ground of "*Justus Causa*". There appears to be no hard and fast rule that a particular remedy should be adhered to by an aggrieved party, both being extraordinary remedies.

Vide *Andradie vs Jayasekera Perera*[1] at 209, *A.K.W. Perera vs Don Simon*[2].

Cautioning how settlements should be recorded by the original Courts Soertsz, J in *Punchi Banda vs Punchi Banda*[3] made the following observation:

"The consequence of this obvious precaution not being taken is that this court has its work unduly increased by wasteful appeals and by applications being made to it for revision or restitutio-in-integrum".

Thus it appears that an aggrieved party can resort to either applications for revision or *restitutio-in-integrum*.

Furthermore, section 753 of the Civil Procedure Code as amended by Act No. 79 of 1988 has widened the scope of application of that section, thereby repelling any doubt as to the availability of revision applications to set aside orders made in terms of section 508 of the Civil Procedure Code.

Now we refer to the contentions advanced by the learned counsel for the petitioner. The petitioner has sworn to a self serving affidavit which is filed of record. He complains that on the 8th of September 1997 the case was taken up in the chambers of the Additional District Judge. The learned judge had said that "the case has to be settled and can be settled" and thereafter without permitting the petitioner to consult his lawyer "Pronounced various conditions" which were

simultaneously recorded. Thereupon the learned Additional. District Judge wanted the parties to sign the record and accordingly the petitioner had signed the record.

The effect of the above averments contained in paragraph 11 of the affidavit of the petitioner would be to totally contradict the record. It is clearly laid down in a number of decisions of the Appellate Courts in Sri Lanka that if a party wishes to contradict the record he ought to file the necessary papers before the court or Tribunal of first instance, institute an inquiry before such Court or Tribunal, obtain an order and thereafter if aggrieved by that order canvass the matter in the appropriate proceedings before the Court of Appeal. Vide the decision of Justice F. N. D. Jayasuriya in *Shell Gas Company vs All Ceylon Commercial and Industrial Workers' Union*[4] at 120; it was further held in the above case that it is not open to a petitioner to tender convenient and self serving affidavits, sworn to by him for the first time before the Court of appeal.

It is manifestly clear that in the instant case the petitioner has failed to comply with the proper procedure laid down in those decisions. Where no such procedure is adopted Justice Dias in *King vs Jayawardene*[5] at 503 laid down the rule that the Court of Appeal could not take into consideration self serving and convenient averments in an affidavit to contradict or vary the record, In this regard Jayawardena, J. did not have any reservations when he said " I do not think that the record can be contradicted or impeached by affidavits". *Vide Jamal vs Aponso*[6] In view of the above decisions, we are of the considered view that the petitioner in the instant case should not be allowed to contradict the settlement recorded by the learned Additional District Judge on 08. 09. 1997.

The learned counsel made submission imputing bias to the learned Additional District Judge who recorded the purported settlement. In his endeavour he referred to the order made by the learned Judge on 03. 03. 97 (P7) vacating the *exparte* order court made on 17. 09. 96. Counsel submitted

that the learned Judge in his order has stated that the defendant not coming to court would be reasonable because he knew that the case would necessarily be postponed because the defence counsel was not coming to Court on that date.

Learned Counsel contended that this reasoning would give the impression that the learned Judge was biased towards the defendant. A perusal of the order dated 03. 03. 97 clearly show that the defence counsel had been absent on 22. 08. 96 and that Collin Mendis the learned counsel for the petitioner had not objected to a postponement on that ground. (vide last paragraph of P7 and the journal entry of 22. 08. 96 marked as P4A). Further it must be remembered that it was the same Judge who had made an *exparte* order against the respondent (the defendant in the District Court action). Hence the submissions of learned counsel are nothing more than a mere surmise or conjecture and therefore should fail.

Lord Denning Master of the Rolls in his decision in *Metropolitan Properties Company vs Lannon & Others*[7] at 310 has dealt with the test to be applied on the issue of bias in the following terms:

> "There must appear to be a real likelihood of bias. Surmise or conjecture is not enough. . . . . there must be circumstances from which a reasonable man would think it likely or probable that the justice. . . . . would or did favour one side unfairly at the expense of the other".

We observe that all counsel if and when making an allegation of bias against a Judicial Officer should not only be cautious but also mindful of the test laid down by Lord Denning in such clear terms.

It is pertinent to scrutinize the phraseology used by the learned Additional District Judge in recording the settlement. The proceedings of 8. 9. 1997 show that the parties themselves and their counsel were present. Then the following phraseology has been used:

"මේ අවස්ථාවේදී මෙම නඩුව සමථයකට පත්වෙයි. පහත සඳහන් කොන්දේසි මත"

The English translation would be "at this stage the case is settled on the following terms". In *Fernando vs Singoris Appu*[8] in the original court, in recording a settlement it was stated - "The following settlement is ordered." It was contended that this phraseology indicated that the settlement was imposed on the parties by the Court.

Bertram, CJ (Schneider J agreeing) observed that he did not think that the learned Judge's words can justly be so interpreted and the learned Judge must have meant that the settlement being arrived at between the parties, an order was made in accordance with the settlement. He held that to rule otherwise would be to impute an arbitrary proceeding to the learned Judge for which there is nothing in his position or his judicial methods to justify the Appellate Court in imputing to him. Accordingly the application was refused.

In the instant case the phraseology used in recording the settlement can only be interpreted to mean that a settlement has been arrived at between the parties themselves on their own volition. Thus we hold that the submissions of learned counsel to the effect that the settlement was foisted on them by the learned Judge is bereft of any merit.

A settlement or compromise had to be determined as provided for in section 408 of the Civil Procedure Code. Our Courts have expressed the view that when section 408 speaks of the settlement being made in the presence of all the parties, since the Code provides that parties are represented by their Attorneys their (parties) personal appearance is not required. (*Vide Sinna Veloo vs Messes. Lipton Ltd.*[9] at 215). But our Courts have observed that when settlements or compromises are made, as a precaution the nature of the settlement or compromise or adjustment should be explained to the parties

and their signatures or thumb impressions should be obtained. Vide decision of Soertsz, J in *Punchi Banda vs Punchi Banda(supra).*

It is evident from the proceedings that in recording the settlement all precautionary measures Soertsz, J. referred to above have been observed. The sum agreed upon by the parties, the manner in which payment should be made to the plaintiff by the defendant have been clearly laid down in Clause 1(i). Provisions for the issue of writ in favour of the plaintiff in default of payment by the defendant have been included in clause 1(ii to vii) of the settlement and, Clauses 2 and 5 deal with the manner in which the transfer should be executed in favour of the defendant after payment of the agreed sum by the defendant to the plaintiff, Clauses 3 and 4 deal with as to how the settlement should be given effect to in the event of death of either party.

We do not see any deficiency or irregularity in the tenor of the settlement. Hence, the contention raised by the learned counsel for the petitioner regarding the tenor of the settlement should necessarily fail.

For these reasons we dismiss the application for revision with costs.

WEERASURIYA, J. - I agree.

Application dismissed.