

**NANDAWATHIE
VS
JAYATILAKE AND OTHERS**

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CA 2174/2003.
DC GALLE 8977/T.
JULY 25, 2005.

Civil Procedure Code, sections 408 and 839 - Settlement - Application to set aside Settlement - an after thought? - Can a party resile from a settlement? - Circumstances.

All parties including the petitioner signed the terms of settlement tendered to Court. The registered attorney - at-law of the petitioner too signed the records. Acting on the terms of the settlement, the parties have paid the fees of the valuer and with the consent of all parties the administrator executed the administrative conveyances. Even the petitioner became entitled to certain lands. Two months later and after the execution of the transfer deeds, the petitioner made an application in terms of section 839 to set aside the settlement, on the grounds that it was arbitrary, illegal, unfair and biased, unjustifiable or fraudulently disproportionate. This application was rejected by the trial judge. The petitioner moved in revision.

HELD:

- (1) The signing of the terms of settlement by the petitioner and her registered attorney-at-law would negative all the allegations raised. The petitioner cannot be heard to say that she was unaware or did not understand the terms of settlement.
- (2) It appears that this in fact is an after thought. As a general rule, agreement by way of compromise should not be re-opened on the ground of after thought of a party.

Per Somawansa, J (P/CA) :

"It is to be noted that at all times relevant to this settlement the petitioner was represented by her registered attorney-at-law as well as her Counsel, none of them have come to her rescue at least by tendering a written statement corroborating the averments of the petitioner".

- (3) Once the terms of settlement as agreed 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.

Per Somawansa, J. (P/CA) :

"I am not impressed at all with the submission of counsel for the petitioner that she was totally unaware of the terms of settlement - when court accepted the terms and that she was taken by surprise and due to inadvertence, lack of understanding under pressure and misleading explanation she was compelled to sign."

APPLICATION in revision from an order of the District Court of Galle.

Cases referred to :

1. *Gunasekara vs. Leelawathie* - Sri Kantha Law Reports Vol 5 - page 139
2. *Newton vs. Sinnadurai* - 54 NLR 4
3. *Saranelis vs. Agnes Nona* 1987 2 Sri LR 109
4. *John Keels vs. Kuruppu* 1996 W Sri LR 6
5. *Dassanayake vs. Dassanayake* - 30 NLR 385
6. *Costa vs. Silva* - 22 NLR 478
7. *Sinna Velu vs. Lipton Ltd* - 66 NLR 214
8. *Dayawathie and Others vs. Fernando* 1988 2 Sri LR 314
9. *Lameer vs. Senaratne* 1995 Sri LR 13

J. Palihawadana for petitioner,

Ananda Kasturiarachchi with *K. Pathiraja* for 4th, 5th and 9th respondents.

Rohan Sahabandu with *Gamini Hettiarachchi* for respondent.

Cur. adv. vult.

October 21, 2005.

ANDREW SOMAWANSA, J. (P/CA)

This is an application in revision seeking to revise and set aside the settlement order of the learned District Judge of Galle dated 30.07.2003 and for an order for re-hearing of this action as from the date the proceedings

were stayed. When this application was taken up for argument parties agreed to resolve the matter by way of written submissions and both parties have tendered their written submissions.

The relevant facts are on 05.02.2003 the learned District Judge made further order that an inquiry is not necessary and that the parties prepare a scheme of allocating property by way of settlement and thereafter upon presenting a list of properties the Court made a further order dated 26.02.2003 marked B that -

- (a) all properties shall be subject to sale by public auction and the proceeds shall be distributed among heirs ;
- (b) prior to such auction a proper valuation report shall be presented on the next calling date which was 30.07.2003.

On 30.07.2003 parties including the 3A respondent - petitioner - petitioner informed Court that the parties have arrived at a settlement and the signed terms of settlement was tendered to Court signed by parties including the 3A respondent - petitioner -petitioner and her registered Attorney -at -Law. Thereafter it is to be seen that all parties including the 3A respondent - petitioner- petitioner signed the record as well, as evident by the journal entries marked 4D8. In terms of the aforesaid settlement it was agreed by parties to give up the final accounts pursued by them for nine years and to recall the commission for valuation of properties, to transfer the properties as per the settlement by way of administrative conveyances and to terminate the testamentary proceedings.

In terms of the settlement marked A the 3A respondent - petitioner-petitioner on behalf of the heirs of the deceased Herbert Jayatilake was to receive the land morefully described in the first schedule. It appears that parties acting on the terms of the aforesaid settlement have already paid a

sum of Rs. 191,000 as fees of the valuer as evident by 4R10 and 4R11 and with the consent of all parties executed the Administrator's Conveyances marked VR12 to 4R18 and the 3rd respondent - petitioner - petitioner and children who are the heirs of the deceased 3rd respondent Herbert Jayatilake are now the owners of the lands described in the aforesaid Administrative Conveyance marked 4R16.

On 01.10.2003 two months after and after the execution of the aforesaid deeds the 3rd respondent - petitioner - petitioner made an application in terms of section 839 of the Civil Procedure Code to set aside the aforesaid settlement. It was supported on 08.10.2003 and on the same day the learned District Judge refused the application of the 3rd respondent - petitioner - petitioner. The present application challenging the settlement entered on 30.07.2003 and the subsequent order dated 08.10.2003 is tendered to this Court on 12.12.2003. It is to be noted that there is no explanation or reason given for the undue delay in making this revision application.

Counsel for the 3rd respondent - petitioner - petitioner contends that the settlement is arbitrary and illegal, that the terms of settlement are unfair and or biased, unjustifiable and or fraudulently disproportionate, that necessary heirs have not been made parties, that the terms are misleading, unreasonable, causing unjust enrichment in respect of certain heirs, while omitting rights, title and entitlements of certain heirs and are illegal, unlawful and contrary to law and the alleged scheme of settlement does not reflect the intention of all parties.

In this respect counsel for the 3rd respondent - petitioner - petitioner has cited *Gunasekara vs. Leelawathie*⁽¹⁾ *Newton vs. Sinnadurai*⁽²⁾, *Saranelis vs. Agnes Nona*⁽³⁾ *John Keels vs. Kuruppu*⁽⁴⁾ and *Dassanayake vs. Dassanayake*⁽⁵⁾ However I do not think that the decisions of the aforesaid cases are applicable to the instant application.

In the settlement entered into between the parties and as accepted by court, the contesting 3rd respondent - petitioner- petitioner as well as her registered Attorney-at-Law has consented to the terms of settlement by signing the terms of settlement tendered to Court and thereafter by signing the record testifying to the acceptance of the terms of settlement. In the circumstances, I am not impressed at all with the submission of counsel for the 3rd respondent - petitioner - petitioner that she was totally unaware of the terms of settlement when Court accepted the terms and that she was taken by surprise and due to inadvertence, lack of understanding, under pressure and misleading explanation she was compelled to sign. It suffices to say that the signing of the terms of settlement by the 3rd respondent - petitioner - petitioner and her registered Attorney-at-Law and thereafter the 3rd respondent - respondent signing the record accepting the terms of settlement would negative all the allegations raised by counsel for the 3rd respondent - petitioner - petitioner. In the circumstances the 3rd respondent - petitioner - petitioner cannot be heard to say that she was unaware or did not understand the terms of settlement. It appears to me that this fact is an after thought. As it was held in *Costa vs. Silva*⁽⁶⁾ as a general rule agreement by way of compromise should not be reopened on the ground of after thought of a party. In any event, it is to be noted that at all times relevant to this settlement the 3rd respondent - petitioner - petitioner was represented by her registered Attorney -at -Law as well as her counsel. None of them have come to her rescue at least by tendering a written statement corroborating the averments of the 3rd respondent petitioner-petitioner. An affidavit by anyone of them would have been much better. Unfortunately none was forth coming.

It was held in *Sinna Veloo vs. Lipton Ltd.*⁽⁷⁾;

“When parties to an action enter into a settlement and are represented by their Proctors, they need not be personally present when the settlement is notified to the Court in terms of section 408 of the Civil Procedure Code.

Once the terms of settlement as agreed 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.”

Also in *Saranelis vs. Agnes Nona (supra)* :

“The general principle that should be followed is that a settlement entered into by the parties and notified to Court in terms of section 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 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 section 839 of the Civil Procedure Code was warranted in the interests of justice.”

In the case of *Dayawathie and Peiris vs. Fernando*⁽⁹⁾ it was held :

“Notwithstanding the judgment entered in a civil case it is permissible for the parties to enter into a compromise of their rights under the decree”.

I would also refer to the decision in *Lameer vs. Senaratne*⁽⁹⁾ where it was held :

- (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 client himself had signed the record.

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- (2) There is no affidavit from the Attorney-at-Law affirming that the petitioner was forced into accepting the terms of settlement. Pleadings indicate that the settlement was first suggested on 21.06.1991 and entered only on 13.07.1991.
 - (3) 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.
 - (4) There is no uncertainty as, in this instance the respondent has already deposited the full sum due."

For the foregoing reasons, I have no hesitation in dismissing the instant application for revision. Accordingly the application will stand dismissed with costs fixed at Rs.5000 to be paid by the 3rd respondent - petitioner - petitioner to each of the contesting 4th, 5th, 8th, and 9th respondents - respondents.

WIMALACHANDRA, J. – *I agree.*

Application dismissed.
