

JOHN KEELS LTD.,  
V.  
KURUPPU

COURT OF APPEAL.  
DR. GUNAWARDENA, J (P/CA)  
DE SILVA, J.  
CA 126/95  
DC COLOMBO 95596/M  
October 16, 1996

*Civil Procedure – S.408, S.430 – S.436. Compromise – Commission to verify the statement of accounts – Is it a settlement?*

The Plaintiff Petitioner instituted action against the Defendant Respondent claiming a certain sum. The Defendant-Respondent took up the position that he is not liable to pay the said sum, and the Plaintiff cannot maintain the said action. On 7.6.1989 Court suggested that a Commission be issued as a practical step to verify the statement of accounts; and as both parties agreed to this suggestion a Commission was issued in terms of S.430 of the Civil Procedure Code. After the return of the Report, after several dates of postponement of the trial, on 9.5.94 the Plaintiff invited Court to enter judgement in favour of the Plaintiff, as the Report showed a large sum of money due from the Defendant. The Defendant denied that the parties have entered into a settlement. The learned District Judge refused the application of the Plaintiff-Petitioner.

**Held:**

(1) S.408 of the Civil Procedure Code is intended to provide an easy and inexpensive means of giving effect to agreements of parties instead of driving them to separate actions for specific performance. Therefore there must be a definite agreement by the parties in respect of the matter in-

volved. On a perusal of the document it is clear that (1) the joint Commission was issued in terms of a suggestion made by Court as a practical step and not in terms of - a settlement, (2) No settlement had been recorded (3) the Parties did not agree to settle the case. Thus there is no specific settlement arrived at by the parties.

"It is fundamentally necessary before S.408 can be applied that it should be clearly established that what is put forward as an agreement or compromise of an action by the parties was intended by them to be so."

The petitioner further sought a direction from the Court of Appeal to the District Court to accept the Commission report without any further documents in support thereof,

(2) S.432 (2) makes it clear that the report is to be used as evidence in the case and that either party may examine the Commissioner personally in open Court. The report therefore is of evidential value only and the findings of the Commissioner are not judicial findings, Law on this question is quite clear, issuing directions to the District Judge to admit the report does not arise.

**APPLICATION** in revision from an order of the District Court of Colombo.

*Romesh de Silva* P.C. for Plaintiff-Petitioner.

*Ajantha Cooray* for Defendant - Respondent.

*Cur. adv. vult.*

May 27, 1996.

**J.A.N. DE SILVA, J.**

This is an application to revise the order of the learned District Judge dated 15.07.1994 wherein he had disallowed the plaintiff-petitioner's (hereinafter referred to as the plaintiff) application to enter judgement and decree in accordance with a Commission Report marked as E2. By this application the petitioner has also sought an order from this Court directing the learned District Judge to accept the said Commission Report as evidence without any proof of the contents thereof.

Petitioner and the Defendant-Respondent (hereinafter referred to as the Defendant) filed written submissions on the 18th of October 1995. Thereafter this application had been listed for argument on several

occasions. However due to lack of time it had not been taken up for argument and on 02.04.1996 parties agreed to dispose of the application on the written submissions.

This matter arose in the following manner.

The Plaintiff instituted action on 18.09.85 against the Defendant, claiming a sum of Rs. 4,147,115./09 with interest. The Petitioner's case was based on a statement of accounts which was annexed to the plaint and was marked as 'A'.

The Defendant filed an amended answer on 15.11.88 denying the averments in the plaint and took up the position that he is not liable to pay the said sum and Plaintiff cannot maintain this action.

When the case came up for trial on the 7th of June 1989 it was suggested by Court that a Commission be issued as a practical step to verify the statement of accounts. Both parties agreed to this suggestion and accordingly a Commission was issued in terms of Section 430 of the Civil Procedure Code.

After the Commissioner submitted the report the Court fixed the case for trial and thereafter the trial had been postponed several times for various reasons. On the 9th of May 1994 when the case was taken up for trial counsel for the Plaintiff has stated to Court that according to the Commissions report there was a large sum of money due from the Defendant to the Plaintiff and as there was a compromise reached between the parties on 07.06.89 in terms of Section 408 of the Civil Procedure Code, the Court should enter judgement and decree in favour of the Plaintiff.

Counsel for the Defendant denied that the parties have entered into a settlement and moved that the trial be proceeded with.

After hearing oral submissions of both parties the Court ordered parties to file written submissions. Thereafter the learned District Judge by his order dated 15.07.1994 refused the application of the Plaintiff - Petitioner.

The present application is to set aside the said order of the learned District Judge.

The main submission of the counsel for the Petitioner is that the compromise reached was in terms of Section 408 of the Civil Procedure Code and decree should be entered in terms of that Section.

Section 408 of the Civil Procedure Code reads as follows:

"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".

This provision is intended to provide an easy and inexpensive means of giving effect to agreements of parties instead of driving them to separate actions for specific performance. Therefore there must be a definite agreement by the parties in respect of the matter involved in the action.

In the instant case to ascertain whether there was an agreement one has to look into the proceeding of 7th June 1989 which was marked and produced as 'C'. On a perusal of the document it is clear that (1) the joint Commission was issued in terms of a suggestion made by Court "as a practical step" and not in terms of any settlement (2). No settlement had been recorded on the 7th. (3) Parties did not agree to settle the case. Thus there is no specific settlement arrived at by the parties.

It is fundamentally necessary before Section 408 can be applied that it should be clearly established that what is put forward as an agreement or compromise of an action by the parties was intended by them to be so. This is not so in this case. In my opinion therefore the Plaintiff has failed to establish that there was infact a settlement. In the circumstances, I hold that Section 408 of the Civil Procedure Code is inapplicable to this case.

The Petitioner is also seeking a direction from this Court to District Court to accept the Commission report without any further documents in support thereof.

The provisions of law relating to the issue of Commission to examine accounts are set out in Sections 430 to 436 of the Civil Procedure Code. The plain language of the Section makes it very clear that these provisions are intended to be used by Court whenever it requires the assistance by way of a report on accounts. The words in Section 432(2) make it clear that the report is to be used as evidence in the case and that either party may examine the Commissioner personally in open Court. The report therefore is of evidential value only and the findings of the Commissioner are not judicial findings. Since the law on this question is quite clear, it is my view that issuing directions to the learned District Judge to admit the report does not arise. In the circumstances we see no reason to interfere with the order of the learned District Judge. We dismiss this application with costs fixed at Rs. 2500/-.

The Petitioner has filed a leave to appeal application bearing No: CA/LA No: 181/94 on the same matter. The decision in this application will be applicable to the said leave to appeal application too. The said leave to appeal application is hereby dismissed without costs.

**DR. GUNAWARDANA, J. (P/CA)** – I agree.

*Application dismissed.*