IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C.A. Case No.813/2000 (F)

DC Colombo 15015/L

Milford Exports (Ceylon) Limited,
No.833, Sirimavo Bandaranayake Mawatha,
Colombo 14.
PLAINTIFF

-Vs-

1. Colombage Gunadasa Wijesinghe,
   No.841, Sirimavo Bandaranayake Mawatha,
   Colombo 14.
2. Porage Rasika Saman Kumari Perera
   No.841, Sirimavo Bandaranayake Mawatha,
   Colombo 14.
   DEFENDANTS

AND NOW BETWEEN

Milford Exports (Ceylon) Limited,
No.833, Sirimavo Bandaranayake Mawatha,
Colombo 14.
PLAINTIFF-APPELLANT

-Vs-

1. Colombage Gunadasa Wijesinghe,
   No.841, Sirimavo Bandaranayake Mawatha,
   Colombo 14.

2. Porage Rasika Saman Kumari Perera
No.841, Sirimavo Bandaranayake Mawatha,
Colombo 14.
DEFENDANT-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : N.R. Sivendran with Ms. Dushyanthi Jayasuriya for Plaintiff-Appellant
Athula Perera for the Defendant-Respondents

Decided on : 30.07.2019

A.H.M.D. Nawaz, J.

This is a *rei vindicatio* action filed by the Plaintiff-Appellant (hereinafter sometimes referred to as "the Plaintiff") on 8th June, 1990, against the Defendant-Respondents (hereinafter sometimes referred to as "the Defendants"), in the District Court of Colombo, claiming title to Lot 1D in extent 1.5 perches as a roadway described in the 3rd schedule and Lot 1C in extent 5.5 perches described in the 4th schedule in the plaint, which are depicted in Plan No.590, and ordering the Defendants to remove the obstruction caused to the right of way and for ejectment of the Defendants therefrom, and peaceful possession of the same and for damages and costs. On the application of the Plaintiff the court issued an enjoining order till an interim injunction was issued. The Defendants filed answer on 31st October, 1990 claiming right to Lot 1B in Plan No.590 and denying the rights of the Plaintiff to the Lots prayed for and for the dismissal of the Plaintiff's action.

After trial, the learned District Judge entered judgment on 29.09.2000 dismissing the Plaintiff's action with costs. Being aggrieved by this judgment, on 20th November, 2000, the Plaintiff preferred this appeal to this Court. After several dates the matter was taken for argument on 21.11.2014 on which date the Counsel for the parties informed Court that

this matter can be settled by way of a survey and that the Counsel for the Defendant-Respondents needed time to consider the settlement and for this purpose he needed to consult his clients. On this ground this Court re-fixed this matter to be resumed on 4th December, 2014.

The Journal Entry as recorded on 4th December 2014 reads as follows:-

> *"The learned Counsel for the Defendants-Respondents informed Court that he is prepared to accept plan bearing No. 1512 dated 13.01.1994 prepared by G.G. Kammankada, Commissioner of Surveyor which has been produced marked 'P13' at the trial which is at page 419 (of the Appeal Brief) and that the Defendants undertake to remove all obstructions in Lot 1C and Lot 1D in the said Plan and they will not enter the said lots 1C and 1D. The Defendant-Respondents claim that they are entitled to lot 'X' depicted in plan No. 1512 and according to this plan in extent of 0.45 perches.*
>
> *The Counsel for Defendants-Respondents informs Court that on the stated above, the Defendants-Respondents are agreed to settle the matter on the said basis and that the judgment in this case can be pro-forma set aside.*
>
> *The Counsel for the Plaintiff-Appellant makes an application to consider this suggestion made by the Counsel for the Respondents. To be mentioned on 19.01.2015."*

On 19.01.2015, it is recorded that *"mention for settlement on 29.01.2015."* This entry gives the idea that since the Counsel for the Plaintiff-Appellant had moved for time to consider the settlement proposed on the last date, his response was due and the case was to be mentioned on 29.01.2015.

From 29.01.2015 onwards, the case had been postponed for several dates for the purpose of constituting a Bench to hear the case and finally, when the case was taken up on 04.03.2015, it was recorded as follows:

> *"Counsel for the Appellant informs Court that the settlement has been recorded on 04.12.14 as the P/Appellant prepared to accept the suggestions. Counsel for the Respondents informs Court that the suggestions has not recorded correctly." (sic).*

Both Counsel move for time to file written submissions and to make an order on written submissions. Written submissions to be filed on or before 02.04.2015. Order reserved by Hon. P.W.D.C. Jayatilleke, J. on 25.05.2015. Mention on 02.04.15."

On 02.04.2015, when the matter came up before me for the first time, it was agreed to have the matter mentioned for written submission on 27.05.2015 before Jayatilleke, J. As there was a date that had already been given for delivering the order in this matter, it was recorded that the date could be varied having regard to the written submissions that had to be filed in Court. On 27.05.2015, the case was postponed for 12.07.2015 for written submissions as Counsel moved for further time.

The written submission that both Counsel wanted to file was on the question whether a settlement had been arrived at having regard to the terms of settlement proposed by the Counsel for the Defendants-Respondents as recorded on 04.12.2014 and the acceptance thereof by the Plaintiff-Appellant on 04.03.2015. After the acceptance of the terms of settlement by the Plaintiff's Counsel was recorded, the learned Counsel for the Defendant-Respondents informed Court that the suggestion had not been recorded correctly. But he did not go further to say what the correct suggestion was. Without clarifying this doubt, both parties moved to file written submissions to ascertain whether what was recorded and accepted is a settlement or not.

It must be noted that whilst the case was pending for written submissions, the Journal Entry of 30.03.2016, states; *Counsel for the P/Appellant states that the matter can be reached for a settlement. In the circumstances, both Counsel state that this matter could be put off. Matter is to be resumed on 28.04.2016.* The written submissions have since been filed.

The crux of the matter in dispute in this appeal is whether the there was a settlement or not. Whilst the Plaintiff-Appellant was agreeable to the settlement recorded on 04.12.2014, the Defendants-Respondents stated that it was not properly recorded. This was the argument that was put forward before this Court. I cannot help but disagree with this contention.

It has to be noted that the entire terms of the settlement recorded on 04.12.2014 were suggested by the Counsel for the Defendant-Respondents. The Counsel for the Plaintiff-Appellant was present but he did not object to the terms of settlement suggested by the Counsel for the Defendant-Respondents but he moved for a date to consider the same. Subsequently, on 04.03.2015 the Plaintiff-Appellant, through his Counsel, indicated his consent to the said settlement. This there was consensus *ad idem* on 04.03.2015.

When a party to a case suggests a settlement which is accepted by the other party, that becomes a settlement between the parties. Only when the other party does not agree to the settlement suggested by the first party, it becomes a non-settlement. Section 408 of the Civil Procedure Code is very clear on this point. Section 408 states 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 of 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 there with, 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."*

A motion is necessary to inform the Court of the settlement arrived at by the parties only when the settlement was made outside the Court, but if it is made in the well of the court and in the present of the judges, a motion is redundant. Furthermore, in this case the settlement suggested by the Counsel for the Defendant-Respondents had been recorded by the Court in the presence of two Judges of this Court and the Counsel for the Plaintiff-Appellant and the Defendant-Respondents and the settlement constitutes a part and parcel of the record. It is the practice of our Courts that whenever a case is settled in open Court, the parties may request the presiding judge to record the terms of settlement and to make an order or judgment in terms of the settlement. That is why in this appeal too an order on the question of settlement by Hon. Jayatilleke, J. was reserved for 02.04.2015 but this order was never delivered as the parties wanted to file written submissions.

Considering the terms of settlement proposed by the Counsel for the Defendant-Respondents on 04.12.2014 and the acceptance of those terms by the Plaintiff-Appellant on 04.03.2015, as recorded, it is my considered view that there is a settlement that has been entered into between the parties. Though the Defendant-Respondents have taken a different view or changed their mind on the said settlement, the record cannot be contradicted or controverted.

On a perusal of the Journal Entries in this case, it is recorded on 21.11.2014, in the presence of two Judges of this Court : *"Learned Counsel for the Appellant is on his feet. Both Counsel inform court that this matter can be settled by way of a survey. Counsel for the Respondent makes an application to consider the said settlement and he needs to consult his client. To be resumed on 04.12.2014."*

This entry also clearly indicates an agreement between the parties for a settlement of the dispute and this settlement was notified to Court by the Counsel for the Defendant-Respondents on 04.12.2014, and recorded.

It appears that on 21.11.2014, the Counsel for the Defendant-Respondents after informing of the settlement to Court, had moved for time to consult his clients and on this application the case was postponed for 04.12.2014. On that day it was the Counsel for the Defendant-Respondents who informed Court that they would accept the plan No.1512 and so forth. All the details of the settlement were given by him for the Court to record. It goes without saying that a counsel acts on the instructions of his client and there is nothing to gainsay that representations made to Court by Counsel for the Defendant-Respondents were with the authority of his clients. After 04.12.2014 the case was postponed for 19.01.2015 and 29.01.2015 and on both these two dates neither the Defendant-Respondents nor their Counsel informed Court about the wrong recording. Subsequently, the Defendants-Respondents had revoked their proxy and retained a new Counsel, who on 04.03.2015 informed Court that the recording was wrong. It was thereafter that the matter went down for written submissions.

The question arises whether a party who agreed to a settlement can resile from the settlement and challenge the entries in the record. This cannot be done. The Court may

presume that judicial and official acts have been regularly performed. (Vide Illustration (c) to Section 114 of the Evidence Ordinance).

In the case of ***Gunawardene v. Kelaart,*** 48 N.L.R. 522, a contention was advanced that there was a discrepancy in the evidence recorded by the Magistrate compared with what a witness is alleged to have said in the witness-box. To establish this contention Counsel proposed to read the statement contained in an affidavit sworn to by one of the junior Counsel who appeared at the trial. Rejecting this contention, Canekeratne, J. held that the Supreme Court would not admit affidavits which seek to contradict the record kept by the Magistrate. There is no place for self-serving affidavits.

The above decision is on all fours with the facts in the instant case. The said settlement was not forced upon the parties. It was the parties who informed Court on 21.11.2014 that the matter can be settled by way of a survey and Counsel for the Defendant-Respondents needed time to consult his clients, and the matter was re-fixed to be resumed on 04.12.2014, on which date the terms of settlement were supplied by the Counsel for the Defendant-Respondents for the Court to record. As the record speaks, the terms of settlement made on 04.12.2014 were accepted by the Plaintiff-Appellant on 04.03.2015 and the matter must be treated as having been concluded thereat. The matter became finito. Subsequently, the Defendant-Respondents by retaining a new Counsel cannot change their position and seek to contradict the record. In my view this appears to be an after-thought which cannot be allowed. As stated above, the settlement entered is proper and there is no irregularity or impropriety in its recording on 04.12.2014.

When a settlement is effected in Court, the parties are asked to sign the record as a precaution. But there is no hard and fast rule that parties must sign the record. This procedure is not a requirement under section 408 of the Civil Procedure Code. Even if the parties did not sign the record, the settlement would be valid and effectual and bind all parties to the settlement as it is consensual *ad idem.*

In an earlier case of ***Silva v. Hadjiar*** (1914) Bal. Notes of cases 7, parties had come to a settlement and the terms of settlement were drafted by the defendant's Counsel and

accepted by the plaintiff's Counsel. A paper containing this draft was read in open Court and assented to by the Counsel on both sides and the Judge made an order to the effect that, "Let order be entered in accordance with the terms of the joint motion when filed". The motion paper was not filed then and there. Subsequently, when the case was called, the defendant's Counsel stated that he could not sign the joint motion as the defendant has transferred his land to his son-in-law. The plaintiff then moved for judgment in his favour and judgment was accordingly entered. When the case went up in appeal, De Sampayo, J. held that the court was entitled to enter up decree in terms of settlement under section 408 of the Civil Procedure Code. His Lordship further said: "In my opinion section 408 of the Civil procedure Code was 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. When a definite agreement is arrived at by them in reference to the matters involved in the action, one of them is entitled to apply to Court to enforce the agreement even when the other objects to it. Unless this were so, the section would be deprived of its full scope and meaning."

The above judgment is a clear authority which can be followed in the instant case. The Defendant-Respondents who had agreed to settle the dispute on 04.12.2014 are estopped from reneging or resiling from their avowed position later. The Plaintiff-Appellant has a right to move this Court to give effect to the settlement entered on 04.12.2014 inspite of the objection of the Defendant-Respondents.

Finally, I wish to comment on the allegation that the Defendants-Respondents did not instruct their Counsel to make some of the terms of settlement as recorded on 04.12.2014. This allegation sounds contrary to reason. Having stated that the matter can be settled by way of a survey on 21.11.2014, their Counsel moved for time to consult his clients and on 04.12.2014 dictated the terms to be recorded. If he had not got the instructions from his client, how did he narrate the details of the terms of settlement accurately? The stenographer has no role to play in the terms of the settlement and therefore they cannot blame the stenographer for the recording as stated in their written submission dated 3rd September, 2015.

It is a recognized principle in court proceedings that when a party to a case gives a proxy to an Attorney-at-law, the Attorney has full authority to act and take all steps in the case on behalf of the party until the proxy is cancelled or the Attorney dies. Whatever acts and steps taken by the Attorney are deemed to be the acts and steps taken by the party. When a Counsel is retained, he too acts in the same manner on the instruction of the registered Attorney. In the instant case an Attorney appeared for the Defendants-Respondents and his communication to Court cannot be any less a communication than from the Defendant-Respondents. When the Court sees an Attorney with the terms of settlement, it may be the hand of Esau that holds it, but we hear the voice of Jacob through counsel, if I may paraphrase that popular phrase. Hence, the acts done by the Attorney on 04.12.2014 are deemed to be the acts done by him on behalf of the Defendant-Respondents.

For the reasons stated above, I hold that on 04.12.2014 a valid settlement had been entered into between the parties, which bind both of them and Defendant-Respondents have no legal right to go back on it. The judgment entered by the District Court of Colombo dated 29th September 2000 is varied. I remit the case back to the District Court to enter fresh judgment in terms of the settlement entered into before this Court on 04.12.2014.

The appeal is allowed.

JUDGE OF THE COURT OF APPEAL