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

In the matter of an Application for restitutio in integrum under and in terms of Article 138 of the Constitution of Republic of Sri Lanka.

C.A. (restitutio in integrum)
Application No. CA/RI/01/2019
DC (Tangalle) Case No. SPL 251/18

W.R. Perera,
No.7/1/A, 1st Lane,
Samuel Road,
Tangalle.

PLAINTIFF

vs

1. Special Educational Society,
   Polommaruwa,
   Tangalle.

2. P.M. Sirisena,
   '*Sachintha*', Udukubulwela,
   Ella.

3. M.M.S. Franklin,
   '*Duresha*', Kiwula,
   Lunama,
   Ambalantota.

4. K.V. Aariyasena,
   No.5/125, States Road,
   Colombo 14.

DEFENDANTS

And now between

W.R. Perera,
No.7/1/A, 1st Lane,
Samuel Road,
Tangalle.

PLAINTIFF - PETITIONER

vs

1. Special Educational Society,
   Polommaruwa,
   Tangalle.

2. P.M. Sirisena,
   '*Sachintha*' Udukubulwela,
   Ella.

3. M.M.S. Franklin,
   '*Duresha*', Kiwula,
   Lunama,
   Ambalantota.

4. K.V. Aariyasena,
   No.5/125, States Road,
   Colombo 14.

DEFENDANT - RESPONDENTS

Argued on :12.02.2021

Decided on :04.03.2021

Counsel :Sanjeewa Ranaweera with Malaka Palliyaguruge for Plaintiff - Petitioner

:Isuru Somadasa with Aruna Chithrananda De Silva for 01st and 03rd Defendants Respondents

Kirtisinghe – J

The Plaintiff Petitioner has filed this application for Restitutio – in – Integrum to set aside/ Vacate the settlement recorded on 13.03.2018 in the District Court of Tangalle and restore the parties to the *status quo ante* or in the alternative to set aside/ vacate the settlement pertaining to the additional condition recorded on that day.

The Petitioner was the Manager of the two schools managed by the 1st Respondent society and 2,3 and 4 Defendant Respondents were the President, Secretary, and Vice President of the 1st Respondent society. It is the case of the Petitioner that the Respondents had made an attempt to hold the Annual General Meeting of the society with the participation of a group of people who had been granted the membership of the society unlawfully in the previous year. Thereafter, the Petitioner had sought for an interim injunction from the District Court of Tangalle preventing same. Earlier the Petitioner had instituted action No. SPL 417 in the District Court of Bandarawela for a similar purpose. The District Court of Tangalle had issued an enjoining order in the first instance and issued notice of interim injunction on the Respondents. Thereafter the Petitioner and the Respondents were negotiating with the view of reaching a settlement with regard to the holding of the Annual General Meeting of the 1st Respondent society and these negotiations had led the Petitioner and the Respondents to the conclusion that the two cases pending in the District Court of Tangalle and the District Court of Bandarawela were an obstacle to making progress in their effort to resolve the dispute amicably. Therefore, the Petitioner and the Respondents had agreed not to proceed with the two cases. When this case had come up in the District Court of Tangalle on 13.03.2018 the agreement reached by the parties was placed before Court and the Petitioner had moved to withdraw the case on the condition that the Respondents undertake to withdraw their claim in reconvention in the Bandarawela case.

The proceedings on 13.03.2018 reads as follows;

මෙම නඩුව ඉල්ලා අස්කර ගැනීම සම්බන්දයෙන් විත්තිකරු සහ පැමිණිලිකරු අතර එකගත්වයක් ඇති බැවින් මෙම නඩුව ඉල්ලා

අස්කර ගැනීමට අවසර ලබා දෙන ලෙස ඉල්ලා සිටී. දැනට ගොනු කර ඇති වාරන නියෝගය විසුරුවා හරින ලෙසත් ගෞරවයෙන් ඉල්ලා සිටී.

මෙම නඩුව ඉල්ලා අස් කර ගැනීම සම්බන්ධයෙන් සමථ කොන්දේසි පහත පරිදි වේ.

01. දැනටමත් බණ්ඩාරවෙල දිසා අධිකරණයේ පවරා ඇති එස්.පී.එල්. 417 දරණ නඩුවේ විත්තිකරුවන් විසින් පවත්වාගෙන යනු ලබන හරස් ඉල්ලීමද ඉල්ලා අස් කර ගැනීමේ කොන්දේසිය මතය.

The Petitioner states that he came to know later that at the time of the aforesaid settlement was recorded the Attorney – at- Law for the Respondents had introduced an additional condition to which the Attorney – at – Law for the Petitioner had expressed his agreement by mistake.

That additional condition and the proceedings thereafter read as follows;

ඊට අමතරව තවත් කොන්දේසියක් විත්තිය වෙනුවෙන් ඉදිරිපත් කරනු ලබනවා.

විත්තිය වෙනුවෙන් නීතිඥ ලලිත් අන්ද්‍රාහැන්නදි මහතා මෙසේ ප්‍රකාශ කර සිටී.

01. විත්තිය වෙනුවෙන් කියා සිටින්නේ ඔබතුමාගේ ගරු අධිකරණයේ නඩුවට පදනම් වී ඇත්තේ බණ්ඩාරවෙල අධිකරණයේ එස්.පී.එල්. 417/17 දරන නඩුවේ අතුරු නියෝගය අනුව 2016 නිළධාරීන් විසින් 2018 වරෂය සඳහා තංගල්ල විශේෂ අධ්‍යාපන සේවා සමිතියේ නිලවරණය පැවැත්වීමට අදාලවයි. එම 2018 මහා සභා රැස්වීම එකී සමිතියේ 2016 වරෂයේ සාමාජිකයින් සහ 2017 වරෂය සඳහා බදවාගෙන ඇති සාමාජිකයන් සියල්ලම සහභාගි කරවාගෙන 2018 මහා සභා රැස්වීම පැවැත්වීමට කටයුතු යොදා තිබෙනවා. එම මහා සභා රැස්වීමේ කටයුතු පැවැත්වීමෙන් අනතුරුව තෝරා ගන්නා නව නිළධාරී මණ්ඩලය ව්‍යවස්ථාවට අනුකූලව තෝරා ගන්නා නව නිළධාරී මණ්ඩලය පිළිගැනීමට පැමිණිලිකරු එකඟ වෙලා තියෙනවා. ඒ අනුව ඉන් අනතුරුව බණ්ඩාරවෙල අධිකරණයේ නඩුව ඉල්ලා අස් කර ගන්නා බව ප්‍රකාශ කර සිටිනවා. බණ්ඩාරවෙල දිසා අධිකරණයේ එස්.පී.එල්. 417/17 දරණ නඩුව ජූනි මස 22 වන දිනට විභාගයට නියමිතව ඇති බැවින්, එදිනට මෙම කොන්දේසිය මත ක්‍රියා කරන්නේ නම් එදිනට මෙම නඩුව ඉල්ලා අස් කර ගැනීමට එකඟ වේ.

මෙම කොන්දේසි වලට එකඟ බව පැමිණිල්ල දන්වා සිටී.

The Petitioner states that the aforementioned additional condition was not a part of the agreement arrived at between the parties and the Attorney – at – Law for the Petitioner had expressed his consent to that condition purely by mistake. The Petitioner did not, at any stage, instructed his Attorney – at – Law to consent to that additional condition. The Petitioner says that although he signed the case record after recording the settlement, he was unaware and was

unable to comprehend that such an additional condition had been included in the settlement as he was blind. The Petitioner states that the Respondents were aware that the Attorney – at – Law for the Petitioner was making a mistake as that additional condition was not a part of the agreement reached by the parties.

In the case of **Cornelius Perera vs. Leo Perera** 62 NLR 413, Basnayake CJ held that on the ground of mistake, a consent order and the judgement based on it can be set aside. Sansoni J held that the proper remedy is by way of an application for restitutio in integrum. In the case of **Halib Abdul Cader Ameer vs. Danny Perera** 1998 (2) SLR 321, G.P.S. De Silva CJ held that the District Court has no jurisdiction to set aside a decree entered by consent of parties on the basis of "Justus error" committed by a party in consenting to the terms of the settlements. However, restitutio in integrum can be claimed on the ground of "Justus error" which constitutes reasonable or excusable error. It was also held that the remedy by way of restitutio in integrum is an extra ordinary remedy and is given only under very exceptional circumstances.

The Petitioner has taken up the position that the settlement pertaining to the additional condition recorded is not in compliance with the provisions of the section 408 of the civil procedure code.

Section 408 of the civil procedure code reads as follows;

408. 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.

Section 91 of the civil procedure code reads as follows;

91. Every application made to the court in the course of an action, incidental thereto, and not a step in the regular procedure, shall be made by motion by the applicant in person or his advocate or proctor, and **a memorandum in writing of such motion** shall be at the same time delivered to the court.

Section 408 of the civil procedure code requires the parties to notify the agreement, or compromise to court by motion and section 91 of the code requires that a memorandum in writing of every motion should be delivered to court at the time it is made. The procedure adopted in this case in the District Court at the time the settlement was recorded does not satisfy the requirements of section 408. In his order the learned District Judge has stated as follows;

"සමථ කොන්දේසි ඇතුළත් සමථ නීන්දු ප්‍රකාශයක් මෝසමකින් ගොනු කළ යුතුයි."

That shows that the written terms of settlement were not before court at the time the settlement was recorded and the parties had not tendered to court a memorandum in writing containing the terms of settlement. Therefore, even if the consent given by the counsel for the Plaintiff Petitioner to include the disputed additional condition into the terms of settlement had not been vitiated by a mistake of fact the consent decree entered in terms of that arrangement will not attract the finality given to the decree passed under section 408 of the code. As stated by Basnayake CJ in **Cornelius Perera vs Leo Perera** 62 NLR 413 "Where a statute provides special machinery which if resorted to renders a decree final, the finality prescribed in the Act does not attach to a decree unless there is a clear manifestation of a conscious intension of the parties to resort to that machinery with a knowledge of the consequences it involves and there has been a strict compliance with the requirements of the statute." Parties to this case had not complied with the imperative requirements of section 408 of the civil procedure code and therefore the consent decree entered in the District Court will not attract the finality given to decrees passed under the section 408 of the civil procedure code. Therefore, this settlement can be set aside on that ground alone.

The Roman Dutch Law enables a person to avoid an agreement or settlement for mistake on his part when the mistake is an essential and reasonable one. In the case of **Cornelius Perera vs Leo Perera** cited above **Sansoni J** states thus "it must be essential in the sense that there was a mistake as to the person with whom he was dealing (*error in persona*) or as to the nature or subject matter of the transaction (*error in negotio, error in corpore*). A mistake is regard to incidental matters is not enough. The test of reasonableness is satisfied if the person shows either (1) that the error was induced by the fraudulent or innocent misrepresentation of the other party, or (2) that the other party knew, or a reasonable person should have known, that a mistake was being made, or (3) that the mistake was, in all the circumstances, excusable (*Justus et probabilis*

error) even where there was absence of misrepresentation or knowledge on the part of the other party. An agreement entered into in the course of an action, like any other agreement, may be set aside on these grounds".

In this case the mistake committed is an essential one as it relates to the nature or subject matter of the settlement. Before coming to the test of reasonableness it is appropriate to take into consideration the following opinion expressed by **Burnside CJ** in the case of **Phillippu vs Ferdinands (1892 (1) Matara cases 207)**. "And I should hold that any admission which might be made for the defendants attempting to bind them to their manifest prejudice in the very essence of the defence on their pleadings and contrary to their contention on their evidence would not bind them without shewing that they had expressly authorized their counsel to make it and with a full knowledge of its effect".

According to the contents of the additional condition submitted on behalf of the defendants and incorporated into the settlement the Plaintiff Petitioner had agreed to accept the new office bearers that will be elected at the Annual General Meeting with the participation of all the members who had become members of the society in 2017. That agreement completely cuts across the Plaintiff's case. The plaintiff had come to court to prevent the Respondents from holding the Annual General Meeting with the participation of the members who had been granted membership unlawfully in 2017. While the case was pending the Plaintiff Petitioner and the Defendant Respondents were negotiating to arrive at an amicable settlement and those negotiations are still continuing. The Plaintiff Petitioner had decided to withdraw the action pending in the District Court because both the Plaintiff and the Defendants had thought that this case was an obstacle to making progress in their effort to resolve the dispute amicably. Therefore, it is highly improbable that the Plaintiff Petitioner would have agreed to accept the additional condition incorporated into the settlement. Therefore, on a balance of probability of the evidence one can accept the version of the Plaintiff Petitioner that the Attorney – at – Law who represented him had acted contrarily to authority as the additional condition was not a part of the agreement entered into between the parties and that the Attorney – at – Law for the Plaintiff Petitioner had consented to this additional condition purely by mistake. When one examines the content of the proceedings on 13.03.2018 it is apparent that the additional condition had been incorporated into the settlement subsequently. It was not a part of the original settlement. After the terms of the original settlement were recorded the Attorney – at – Law for the Defendants has made an attempt to incorporate these additional terms

into the settlements as an additional condition. That clearly shows that it was not a part of the original settlement. The learned counsel for the Defendant Respondents has conceded in this court that the disputed additional condition was not in the original agreement. Therefore, one can come to the conclusion on a balance of probabilities that the Defendants Respondents new, or a reasonable person should have known, that a mistake was being made. That mistake was excusable even where there was absence of knowledge on the part of the Respondents. Therefore, the disputed additional condition incorporated into the settlement can be set aside on these grounds.

For the aforesaid reasons we set aside the settlement/ Compromise pertaining to the disputed additional condition and direct the learned District Judge to amend the consent decree accordingly.

The application of the Plaintiff Petitioner is allowed. In the circumstances of this case, we make no order for costs.

Judge of the Court of Appeal

D.N. Samarakoon – J
I agree

Judge of the Court of Appeal