

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

In the matter of an application under and in terms of Article 140 of the Constitution for a Mandate in the nature of a Writ of Certiorari and Mandamus.

Theruviam Senarathrajah
Ihala Hattiniya,
Marawila.

Petitioner

CA (Writ)
Application No. 313/2016

- Vs -

1. Indika Anurudda Piyadasa
Divisional Secretary,
Upper Division,
Gampola
2. L.K.G Gunawardena
Commissioner General of Excise,
Department of Excise,
No. 34, W.A.D Ramanayake Mawatha,
Colombo 02
3. Muniyandi Prabakaran
No. 2, Wahugapitiya,
Gampola

And

No.97R, Upper Division,
Dumbaragiriya,
Hatton

4. Hon. Attorney General
Attorney General's Department,
Colombo 12

Respondents

Before: C.P. Kirtisinghe – J
Mayadunne Corea – J

Counsel: Eraj De Silva, D. Wijeratne instructed by M/S Paul Ratnayake
Associates for the Petitioner
S. Wimalasena, SSC for the 1st, 2nd and 4th Respondents
M.T.N. Ahamed for the 3rd Respondent

Argued on: 25.11.2021

Decided on: 04.08.2022

C.P. Kirtisinghe – J

Petitioner had filed this writ application seeking for a mandate in the nature of a Writ of Certiorari quashing the decision of the 1st Respondent – The Divisional Secretary, Upper Division, Gampola not to release the deposit of Rs.2,860,000.00 to the Petitioner, for a mandate in the nature of a Writ of Mandamus directing the 1st Respondent to release the aforesaid deposit to the Petitioner and for the interim relief prayed for in the Petition.

On 21.09.2017 there had been a settlement entered between the Petitioner and the 3rd Respondent. A memorandum dated 18.09.2017 containing the contents of the settlement had been tendered to Court. According to the contents of that memorandum and according to the terms of settlement recorded by Court on 21.09.2017 it has been recorded that the 3rd Respondent has no objection in releasing the deposit of Rs. 2,860,000.00 held by the 1st Respondent with interest accrued to the Petitioner by the 1st Respondent. The 3rd Respondent had agreed to withdraw the appeal bearing no. FA/115/16 filed in the Civil Appellate High Court of Kandy against the order made in case no. SPL/58/2011 in DC Gampola and the Petitioner had agreed not to execute the Writ against the 3rd Respondent in DC Gampola case no. SPL/58/2011. On 26.03.2019 the 3rd

Respondent has tendered an affidavit stating that he had never given instructions to his Registered Attorney – at – Law to settle the case in any manner whatsoever before this Court. He says that his Registered Attorney- at – Law had requested for the signature of the 3rd Respondent to a document a few minutes prior to the calling of the case in Court on that day. The 3rd Respondent says that his knowledge in English is limited to placing his signature in English and the 3rd Respondent had signed the document on the understanding that it was a document that has to be submitted on his behalf for the purpose of objecting to the Petitioner’s application. He further states that the contents of the said document were not read over and explained to him. The 3rd Respondent states that he is not agreeable to the aforesaid terms of settlement. After about one month’s time he became aware of the terms of settlement and requested his Registered Attorney – at – Law to bring to the notice of Court of his disagreement but the Registered Attorney had not acted accordingly. On 05.09.2018, the 3rd Respondent had tendered an Affidavit to Court and informed Court that he is objecting to the aforesaid terms of settlement being accepted and requested for an order accordingly. In this Affidavit, the 3rd Respondent says that he is not inclined to proceed with the settlement and he will be withdrawing from the aforesaid terms of settlement.

The Petitioner had filed a statement of objections to the application of the 3rd Respondent and states that at all material times, the 3rd Respondent knew and understood the contents of the said motion and in fact the 3rd Respondent acted on the contents of the motion. Prior to this motion, the parties signed a document containing the identical terms of settlement at the office of the Lawyers of the 3rd Respondent (Document marked B).

The Petitioner states that the conduct of the 3rd Respondent amounts to a contempt of court. Therefore, the Petitioner had prayed for a dismissal of the application of the 3rd Respondent and prays that this Court should hold that the 3rd Respondent had committed an act of contempt of court and punish the 3rd Respondent accordingly.

It is the case of the 3rd Respondent that he signed the aforesaid memorandum with the mistaken belief that he was signing a document for the purpose of objecting to the Petitioner’s writ application and he never knew that he was consenting to the aforementioned settlement. So, he says that he had signed it by ‘mistake’.

Chitaley and Rao in “**Commentary on the Code of Civil Procedure**” 1908, 7th Edition - Volume III (1963) at pages 3509-3510 state thus:-

“A compromise decree is but a contract with the command of a Judge superadded to it...It can, therefore, be set aside on any of the grounds, such as fraud, mistake, misrepresentation, etc., on which a contract may be set aside”.

This view was followed by Soza J in the case of **Ceylon Carriers LTD v Peiris (1981) 2 SLR 119**. In that case, Soza J regarded a settlement of this nature upon which a decree is entered under Section 408 of the Civil Procedure Code to be in substance a contract to which is superadded the command of the Judge. This view was followed also in the case of **Gunasekara v Leelawathie (Sri Kantha Law Reports Vol V - Page 139)**.

In the case of **Dassanayake v Dassanayake 30 NLR 385** it was held that when an application is made to have an adjustment or compromise of an action entered under Section 408 of the Civil Procedure Code, it must be clearly established that both parties have agreed to the compromise and that effect could be given to it by a decree of Court. In the case of **Cornelius Perera v Leo Perera 62 NLR 413**, it was held that on the ground of mistake, the consent order and the judgment based on it can be set aside.

The memorandum submitted to Court marked ‘A’ has been signed by the Petitioner and the 3rd Respondent. The 3rd Respondent has also signed a similar document marked ‘B’. Both those documents contain the same terms of settlement. However, the Petitioner had not signed the document ‘B’. Instead, an agent of the Petitioner had signed the document. The Petitioner in his affidavit states that the memorandum tendered to Court was signed by the parties at the office of the 3rd Respondent’s Attorney-at-Law which means the 3rd Respondent had signed it inside his Lawyer’s office. But the 3rd Respondent says that he signed the memorandum outside the courthouse just before the case was taken up indicating that he signed it hurriedly.

When you compare document ‘A’ with document ‘B’, both documents contain the signature of the 3rd Respondent. Only ‘A’ contains the signature of the Petitioner and ‘B’ had been signed by the agent of the Petitioner. Therefore, it is clear that the two documents had been signed on two different occasions and the Petitioner was not there when ‘B’ was signed. But the 3rd Respondent had been present on both those occasions. Therefore, the Petitioner’s version to the effect that the memorandum tendered to Court was signed at the office of the

3rd Respondent's Attorney-at-Law is more probable and one cannot accept the version of the 3rd Respondent that it was signed outside the courthouse just before the case was taken up. As the 3rd Respondent had signed 2 documents containing the same terms of settlement on two occasions, the 3rd Respondent had the ample opportunity of perusing the terms of settlement twice without any hurry. Further, the 3rd Respondent had signed those documents in English and his handwriting is mature. Therefore, one cannot accept that he had no sufficient knowledge of English to understand the terms of settlement. Therefore, one cannot accept the version of the 3rd Respondent that he signed the memorandum by mistake.

The Petitioner says that the 3rd Respondent withdrew the Appeal he had lodged in the High Court (Civil) Kandy acting in terms of the settlement but there is no evidence before us to that effect. The 3rd Respondent states that he became aware of the terms of settlement one month after signing it. But he had not made any attempt to bring this matter to the notice of this Court until the expiration of a period of nearly one year from that date. The 3rd Respondent says that he instructed his Attorney-at-Law to do so but his Registered Attorney had not acted according to his instructions. If it was the case, the 3rd Respondent should have revoked the proxy and retained the services of a new Registered Attorney-at-Law. But the 3rd Respondent has failed to act in that manner. That shows that the 3rd Respondent did not make any attempt to resile from the settlement until the expiration of nearly one year from the date of the settlement which means that the 3rd Respondent not only accepted the said terms of settlement, but he was also acting in terms of the settlement. Therefore, one cannot accept the fact that the 3rd Respondent signed the aforesaid memorandum by mistake.

In the case of **Sinna Veloo v Messrs Lipton LTD 66 NLR 214**, Herath J held that 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. It was further held that 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. Therefore, a Registered Attorney-at-Law can enter into a settlement on behalf of his client in the absence of the client.

In the case of **Mohideen Ali v Hassim 62 NLR 457**, it was argued in Appeal that the authority of the Proctor of a party to a suit was limited by the terms of the

instrument of appointment and that as Section 24 of the Civil Procedure Code provided that an Advocate instructed by a Proctor represents the Proctor in Court, the Advocate's authority could never be greater than that given to the Proctor. It was held that despite the restricted terms of the proxy, the Plaintiff was entitled to judgment in his favor in terms of the consent given by the Defendant's Counsel. An extension of the written authority contained in the proxy could be given orally or be inferred from the client's conduct.

In the case of **Ummu Vareela Majumdeen v Keerthi (C.A.L.A 119/2002, DC Kandy 16327/L, C.A. Minutes dated 18.06.2004)**, the Plaintiff instituted the action to eject both the 1st and 2nd Defendants from the premises in suit. Case was settled in between the Plaintiff and the 1st Defendant in the absence of the 2nd Defendant. But the Attorney-at-Law who appeared for the 1st Defendant held a common proxy given by both Defendants. The 2nd Defendant later made an Application through another Attorney-at-Law to have a declaration that he was not bound by the consent decree for the reason that he was not informed about the settlement. The District Judge held that the 2nd Defendant was not bound by the settlement.

Gamini Amaratunga J held thus:-

“The compromise entered into without any objection from the Attorney-at-Law was equally binding on the 2nd Defendant on the basis of the general authority conferred by the proxy”.

The 3rd Defendant does not deny the fact that his signature is contained in the memorandum. His case is that he signed it on a mistaken belief. Therefore, the signature is admitted.

In the English case of **L'Estrange v F. Graucob LTD [1934] 2 KB 394**, Scrutton LJ (with Maugham LJ agreeing) held that as a buyer had signed the written contract and had not been induced to do so by any misrepresentation, she was bound by the terms of the contract, and it was wholly immaterial that she had not read it and did not know its contents.

As the 3rd Respondent had signed this memorandum containing the terms of settlement, it is immaterial that he had not read and did not know its contents. The 3rd Respondent is bound by the contents of the memorandum.

For the reasons I have stated earlier, in the circumstances of this case one can come to the conclusion that the 3rd Respondent had the opportunity of reading

it before signing and had the opportunity of understanding the contents. At the time the memorandum was tendered to Court and the settlement was entered, the 3rd Respondent had the assistance of a Counsel and his Registered Attorney-at-Law and he was represented by a President's Counsel. Therefore, the 3rd Respondent cannot complain that he had no knowledge of the contents of the memorandum. Therefore, I hold that the 3rd Respondent is bound by the terms and conditions contained in the aforesaid memorandum and the 3rd Respondent cannot resile from that settlement.

For the aforesaid reasons, I dismiss the application of the 3rd Respondent.

Judge of the Court of Appeal

Mayadunne Corea – J

I agree

Judge of the Court of Appeal