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

C.A. Case No.1059/2000 (F)

D.C. Kandy Case No.RE/2538

Upali Ranasinghe,
No.45, Main Street,
Thalathuoya.
DEFENDANT-APPELLANT

-Vs-

H.M. Kulatunga Banda,
No.47, Main Street,
Thalathuoya.
PLAINTIFF-RESPONDENT

BEFORE	:	**A.H.M.D. Nawaz, J.**
COUNSEL	:	K. Patabandige for the Defendant-Appellant Rohan Sahabandu, P.C with Diloka Perera for the Plaintiff-Respondent
Decided on	:	28.08.2018

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

The Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff"), the owner of premises bearing No.45, Main Street, Thalathuoya, instituted action in the District Court of *Kandy* on 08.10.1998 praying for the ejectment of the Defendant-Appellant (hereinafter sometimes referred to as "the Defendant") who was a tenant on

the basis that the Defendant was guilty of conduct which amounted to a nuisance to adjoining occupiers and had been using the premises for an immoral or illegal purpose and that the condition of the premises had deteriorated owing to acts committed by or the neglect or default of the Defendant. According to the Plaintiff, notwithstanding a quit notice dated 29.08.1998 sent to the Defendant, the Defendant failed to handover vacant possession.

Since the Defendant had made an application to the Rent Board seeking permission to effect repairs to the building, the Plaintiff prayed for interim relief preventing the Defendant from carrying out any repairs and the Court granted an enjoining order in favour of the Plaintiff.

The Plaintiff took out a commission to assess the extent of deterioration of the building and the Defendant also requested an inspection of the premises in suit by an officer appointed by court.

On 13.08.1999, the Defendant who was present in court and was represented by his Attorney-at-Law agreed to accept a sum of Rs.50,000/- from the Plaintiff as a full and final settlement which sum the Plaintiff had already deposited in the District Court, and further agreed to handover vacant possession to the Plaintiff on the given date. The settlement was recorded and the case record was signed by the parties.

Barely two weeks after the said settlement had been entered into and recorded, the Defendant filed a petition of appeal not signed by his Attorney-at-Law and subsequently filed another petition addressed to the District Court seeking to set aside the settlement entered on the basis that he was forced to enter into the settlement which vitiated his consensual agreement.

The learned District Judge by his order dated 29.08.2000 dismissed the application of the Defendant on the basis that the Defendant had already preferred an appeal to the Court of Appeal and notwithstanding such appeal made another application to the District Court to vacate the decree incorporating the said settlement. By way of this appeal he seeks an annulment of the compromise reached on 13th August 1999.

It was submitted by the learned President's Counsel that this settlement was reached before Court where the Defendant and his Attorney-at-Law were both present and the Defendant himself had signed the record. It is indeed the case that restitution does not lie in favor of a party who has voluntarily agreed in Court and in fact ***Lameer v. Senaratane*** (1995) 2 Sri L.R 13, held that:-

> *"The plaintiff-petitioner instituted action for Declaration of title, ejectment and damages. Defendant-respondent filed Answer stating that he was in lawful possession. After several dates of trial, a settlement was recorded on 21.6.1991 that the Petitioner should sell the premises to the respondents at Rs. 75,000 a perch. On 13.71991, the terms were recorded and signed by the parties. An application was made to set aside the settlement, on the grounds that (i) the Attorney-at-Law acted contrary to instructions; (2) he was compelled by Court to accept the terms. (3) Laesio Enormis;(4) Uncertainty of the settlement.*
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> *Held:*
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> 1. *When an Attorney-at-Law is given a general Authority to settle or compromise a case, the client cannot seek to set aside a settlement so entered, more so, when the client himself had signed the record.*
> 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 21.6.1991 and entered only on 13.7.1991.*
> 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."*

In the instance case, although the Defendant contends that his consent was obtained by duress, coercion and undue influence there is no evidence in support of this allegation. There is no affidavit by his Attorney-at-Law affirming that the petitioner was forced into accepting the terms of settlement. On the other hand, he himself signed the record and

subsequently filed this petition of appeal against the said settlement two weeks later. If the Defendant had any misgivings about the proposed settlement, he could have very well have refused to accept the terms recorded on 13.08.1999 which he has not done. In Such a situation estoppel operates and the Defendant would be estopped from falsely denying that he fully consented to the settlement that was entered into.

Moreover the Defendant has not been able to produce any proof documentary or otherwise to show that he was placed under duress so as to be out of his voluntary faculties not understand the proceedings that took place on 13.08.1999. The fact that he subscribed to it by placing his signature shows that he understood the terms of the settlement.

Section 114(d) of the Evidence Ordinance

Woodroffe, J. expressed a *dictum* in ***Navendra Lal Khan v. Jogi Hari,*** I.L.R. 32 Cal. 1107, that, "The meaning of section 114(d) of the Evidence Ordinance is that if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of which is essential to the plaintiff's case". Following this *dictum* of Woodroffe, J. in the above case, Keuneman, J. in ***Dharmatilake v. Brampy Singho*** (1938) 40 N.L.R 497 at p. 501 held that, "Section 114(d) of the Evidence Ordinance means that if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of which is essential to a case".

Under Illustration (d), the Court may presume that judicial and official acts have been regularly performed. The presumption applies to the regularity of the act and not to the doing of the act. ***Dharmatileke v. Barampy Singho*** (1938) 40 N.L.R 497; ***Hapuganoralage Menikhamy v. Podi menika*** (1978) 79 (II) N.L.R. 25 at 33. Proceedings and Process of courts are examples-*see* ***Seebert Silva v. Aronona Silva*** (1957) 60 N.L.R 272; ***Franciscu v. Perera*** (1934) 14 C.L.W. 71. Cf; ***Hapuganoralage Menikhamy v. Podi menika*** (*supra*); ***Dharmatileke v. Barampy Singho*** (*supra*).

The passage in the case of ***Seebert Silva v. Aronona Silva*** 60 N.L.R page 272 repays attention: *"the court is entitled to presume the genuineness in terms of section 114 of the Evidence Ordinance of the journal entries maintained under the Civil Procedure Code. The genuineness attached to the journal entries and the rebuttable presumption arising from the same ate part and parcel of our procedural law that had been followed for at least over a century."* For reference to journal entries to draw this presumption also see decisions of this Court in CA 477/2000(F) CA minutes of 12.09.2017; CA 765/2000 CA minutes of 30.05.2018.

In the instant case, Journal Entry No.17 clearly indicates that the settlement has been read over and explained to the parties and the parties having understood the same have placed their signatures on the record.

Therefore the Defendant is seeking to sustain in this Court an unsustainable assertion that he did not consent to the settlement in the District Court. There is not even a complaint made against the Attorney-at-Law who represented him for misleading him or acting against his instructions or forcing him to enter into a settlement and also when the Defendant does not dispute the settlement recorded or the journal entries which clearly indicate that both parties were present and signed the record voluntarily.

There is another impediment that would stand in the way of the Defendant namely No appeal would lie from a consent decree

As held in ***Marikkar v. Abdul Azeez*** 65 N.L.R 568, *"No appeal lies where parties have agreed to be bound by the order of the Judge sought to be appealed from.*

Accordingly, in an action for a right of way, no appeal lies from an order given by Court in accordance with an agreement recorded by the Court as follows:-"It is agreed that the parties will accept any order made by me after an inspection"."

Thus this Court would be hamstrung by want of jurisdiction to entertain this appeal.

There was also a submission made by the Defendant. The Defendant's position that he was intending to retain a President's Counsel is irrelevant to the case at hand as pivotal issue which has to be determined in the instant appeal is whether allegation made by the

Defendant that he did not consent to the settlement has been proved and if so whether it could vitiate the settlement?

In the case of ***Charles Perera v. Shantha Gunasekara*** CA 2011/2001, held that:-

> *"The main question that arose for determination in that case was whether a settlement entered in the presence of an attorney-at-law of a party who was absent in court can assail the settlement on the ground that he was not present in court at the time the attorney-at-law adjusted the matter. His Lordship Gamini Amaratunga, Judge of the Court of Appeal (as he was then) held that the attorney-at-law for the petitioners had acted within the authority granted to him by the proxy and therefore the settlement cannot be assailed merely on the ground of the party not being present in court at the time the compromise was recorded."*

In this particular instance Registered Attorney-at-Law was present in Court and that appearance constituted the appearance of the Defendant. Accordingly the Defendant's contention that he was expecting to retain a President's Counsel has no relevance and would be an irrelevant consideration if taken into account owning to the fact that the Petitioner was represented by an Attorney-at-Law on the date on which the settlement was entered.

It is manifest upon an examination of all these matters that the Defendant-Appellant voluntarily entered into a consensual compromise on 13.08.1999 and it is preposterous for him now to resile from this agreement. In the circumstances I proceed to dismiss this appeal.

JUDGE OF THE COURT OF APPEAL