BIMAL VIMLESH NARAYAN v REENA KUMARI BRAY (ABU0063 of 2011)

COURT OF APPEAL — CIVIL JURISDICTION

CALANCHINI AP, BASNAYAKE and BALAPATABENDI JJA

7, 28 September 2012

Practice and Procedure — settlement — term of settlement varied by Court — whether judge erred by amending consent judgment — fresh action.

The plaintiff appealed against an order of the High Court amending a consent decree. A settlement had been entered with the consent of the parties. One of the terms of the settlement was that $50,000 paid in Court by the defendant be released to the plaintiff. The High Court made an order varying this term and ordering that the $50,000 not be released to the plaintiff and, if it already had been, that the plaintiff return the money.

Held –

The jurisdiction of the Court once a settlement has been entered is clearly laid down by law. This is not a case involving an arithmetic error or where the judge says that that is not what he intended. In order to ascertain the intentions of the parties, evidence will have to be led, and therefore the defendant will have to file a fresh action. The High Court erred by amending the consent judgment.

Appeal allowed.

Cases referred to

Ainsworth v Wilding [1896] 1 Ch 673; *Emeris v Woodward* [1889] 43 Ch D 185; *Huddersfield Banking Co Ltd v Henry Lister & Sons* [1895] 2 Ch 273; *Re Affairs of Elstein* [1945] 1 All ER 272, considered.

S.C. Maharaj for the Appellant.

D. Naidu for the Respondent.

[1] Calanchini AP. I agree with the reasons and the judgment of Basnayake, JA.

[2] Basnayake JA. This is an appeal by the plaintiff appellant (plaintiff) to set aside the order dated 16th November, 2011 of the learned High Court Judge at Lautoka. By this order the learned Judge has amended the consent decree entered on 4th of October, 2011.

[3] The plaintiff filed this action in the High Court of Lautoka on 23.3.2006 seeking a declaration:

(a) That the agreement dated 11th October, 2005 has been duly rescinded, or alternatively rescission of the said agreement;
(b) That the deposit is forfeited as liquidated damages;
(c) Vacant possession of the property;
(d) Special damages for the loss of rental income from the property;
(e) General damages for loss of opportunity to sell the property to a third party;
(f) Costs on solicitor client indemnity basis;
(g) Any other order deemed just by this Honourable Court.

[4] The defendant-respondent (defendant) filed a statement of defence praying:

(a) That the plaintiff's claim be dismissed;

(b) That there be order for specific performance for the transfer of Crown Lease No 15354 to the defendant's name;

(c) Declaration that the plaintiff complete all works on the said dwelling house including permanent electrical connection prior to release of the balance purchase price of $50,000.00 (fifty thousand dollars) to the plaintiff;

(d) Damages;

(e) Costs on a Solicitor/client indemnity basis;

(f) Any other orders that this Honourable Court deems necessary and just.

[5] When this case was taken up for hearing on 4th of October, 2011, it was settled and the plaintiff and the defendant and the solicitors placed their signatures to a typed written settlement. The terms were as follows:

1. The defendant will pay the Plaintiff the sum of $167,200 (One Hundred Sixty Seven Thousand Two Hundred Dollars) in full and final settlement of the above matter.

2. *$50,000 (Fifty Thousand Dollars) paid in Court by the Defendant to be forthwith released to the Plaintiff;* (emphasis added).

3. The balance sum of $117,200 (One Hundred Seventeen Thousand Two hundred Dollars) to be paid within 45 days from the date hereof upon settlement of the transaction in Titles office.

4. The Plaintiff will return the tiles to the Defendant;

5. $50,000 is acknowledged to have been received by the Plaintiff prior to entering of the sale & purchase agreement dated 11.10.2005.

6. Each party to bear their own legal costs.

[6] A decree of court was entered by the Registrar of the Court which contained the identical terms. In the decree, an order of the learned Judge empowered the Court Registry to release a sum of $ 50,000 to the Plaintiff from the monies paid in Court by the Defendant. This sum appeared to have been released to the Plaintiff by Court in pursuance to the settlement.

[7] On 4th of November, 2011 a motion was filed for the defendant seeking the following orders, namely:-

1. Seeking clarification from this Honourable Court as per the interpreter or understanding of the consent orders pronounced on 4th of October, 2011 which only requires the 1st defendant to pay the Plaintiff a further sum of $67,000 upon taking into account the contents of paragraphs 2 and 5 of the said terms of settlement.

2. Stay of the Consent Orders dated 4th of October, 2011 until further Order of Court.

3. The costs of this application to be costs in the case.

[8] The Motion also contained an averment that the defendant intends to rely on an affidavit of Peter Bray filed in support herein.

[9] The learned High Court Judge after an inquiry made the impugned order dated 16.11.2011. In that order the learned Judge stated that:

• The payment out of monies deposited in Court is a matter that the Court has allowed subject to the terms of settlement being implemented then, the $ 50,000/- deposited in court should not be paid out and, the Plaintiff should not receive the said money unless the terms as agreed between parties are mutually implemented and is to be implemented.

• The Defendant on the 4th of October indicated that they had difficulty with regard to some of the terms after this Court entered the terms of settlement in to an Order of the Court. Therefore the Plaintiff ought to have been aware that there were some difficulties to be ironed out and should not have rushed into withdrawing the $ 50,000/- deposited in court by the Defendant. The Defendant too without delay should have moved Court to stay the payment out of the $ 50,000/- by a proper application.

[10] The learned Judge made order not to release the deposit of $ 50,000/- to the Plaintiff and thus varied the term entered in the settlement dated 4th of October, 2011. If this amount was already paid, the plaintiff was ordered to return the same.

[11] The learned counsel for the plaintiff submitted that the learned Judge has erred in law and in fact to entertain the motion dated 4.11.2011 when he had no jurisdiction in the matter to deal with any application whatsoever at all on the ground that he had become *functus* having made an order dated 4.10.2011 pursuant to terms of settlement filed in the Court with the consent of all the parties.

[12] Halsbury (Fourth Edition paragraph 562) states that a judgment given or an order made by consent may be set aside in a fresh action brought for the purpose, on any ground which would invalidate a compromise not contained in a judgment or order. North J held in *Emeris v Woodward* [1889] 43 Ch D 185 that to set aside a compromise, the proper course is to bring a new action. He cannot by means of summons set aside the agreement and reopen the controversy.

[13] *Ainsworth v Wilding* [1896] 1 Ch 673 at 676 Romer J states that *"the Court has no jurisdiction, after the judgment at the trial has been passed and entered, to rehear the case. The only cases in which the court can interfere after the passing and entering of the judgment are:*

> *(1) Where there has been an accidental slip in the judgment as drawn up.*
>
> *(2) When the Court itself finds that the judgment as drawn up does not correctly state what the Court actually decided and intended".*

[14] The Court held that the judgment as drawn up, simply expressed what the parties consented to, and contains the very words consented to, and it certainly carries out what the Court decided and intended to decide [*Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273. The ground of the application was that the judgment, which was based on the consent of the parties at the trial, was consented to under a mistake on the part of the applicant. Romer J said *"I think a fresh action must be brought and that I have no jurisdiction to hear the matter on motion, at any rate without the consent of the parties" Wilding v Sanderson* [1897] 2 Ch 534, 544, *RMKRM (firm) v MRMVL* (firm) [1926] AC 761, 771, *Kinch v Walcott* [1929] AC 482.

[15] In *Re Affairs of Elstein* [1945] 1 All ER 272 at 273 Lord Green MR said that *"if there is a right to have this judgment set aside and a different judgment entered, that right can only be enforced in an independent action and cannot be enforced by an application in the pending proceedings themselves".* The appellant applied to the County Court for a variation of the order on the ground that it understood the order to mean that the payment of 10s was to be in respect of rent only and that it would still be entitled to claim damages for disclaimer and dilapidations. The County Court refused to vary the order. The County Court Judge said that *"that is exactly what I intended".* Lord Green said *"the question of what meaning the Judge's words conveyed to the parties and their counsel again would have to be decided on evidence".* Lord Green said thus *"I cannot find that this is a case in which we can say that, according to the ordinary practice, the mistake if it be a mistake can be remedied by an application in the proceedings themselves once the order has been completed. The remedy must be by independent action on which evidence can be called, and the relevant facts ascertained"* (at 273).

[16] In the appeal under review, a settlement was entered with the consent of the parties on 4th of October, 2011. One of the terms was to release to the Plaintiff $50,000/- paid in Court by the Defendant forthwith. In consequence of this settlement this sum of $ 50,000/- was already paid to the Plaintiff. However the learned Judge by his order dated 16.11.2011 varied a term of settlement with regard to this payment of $ 50,000/-; that is, the learned Judge ordered to stop payment or if the payment was made for the Plaintiff to deposit that sum in Court to the credit of the case. The jurisdiction of the Court once a settlement is entered is clearly laid down by law. This is not a case involving an arithmetical error or where the Judge says that that is not what he intended. In order to ascertain the intentions of the parties evidence will have to be led. For this purpose the defendant will have to file a fresh action.

[17] I am of the view that the learned Judge has erred by amending the consent judgment and is therefore set aside. The appeal of the Plaintiff is thus allowed with costs fixed at $ 3000.00.

[18] **Balapatabendi JA.** I agree with the reasons and the judgment of Basnayake JA.

The orders of the Court are:

1. The appeal allowed.
2. The order dated 16.11.2011 set aside.
3. Costs $3000.00 to be paid to the appellant by the Respondent.

Appeal allowed.