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

In the matter of a Leave to Appeal application filed in terms of the section 5(2) of the Provincial High Court (Special Provisions) Act No. 10 of 1996.

Avenra Gardens (Private) Limited,
No. 22/5, Muhahunaupitiya,
Negambo.

S.C. Appeal No. 157/2019 **Plaintiff**
SC/HC/LA No. 63/2019
HC/Civil No. 253/17 MR

Vs.

1. Global Project Funding AG
   Samstagernstrasse,
   CH- 8832,
   Wollerau,
   Switzerland.

2. My Star Spain S L
   C/Padre Thomas Montana,
   36-2-46023,
   Valencia,
   Spain.

3. CAIXA Bank SA,
   Main Brach,
   Barcelona ES,
   Spain.

4. Seylan Bank PLC,
   Head Office,
   Seylan Tower,
   No. 90, Galle Road,
   Colombo 03.

Defendants

AND NOW BETWEEN

4. Seylan Bank PLC,
   Head Office,
   Seylan Tower,
   No. 90, Galle Road,
   Colombo 03.

Defendant-Petitioner

Vs.

1. Global Project Funding AG
   Samstagernstrasse,
   CH- 8832, Wollerau,
   Switzerland.

2. My Star Spain S L
   C/Padre Thomas Montana,
   36-2-46023, Valencia,
   Spain.

3. CAIXA Bank SA,
   Main Brach, Barcelona ES,
   Spain.

Defendant-Respondents

Avenra Gardens (Private) Limited,
No. 22/5, Muhahunaupitiya,
Negambo.

Plaintiff-Respondent

Before: L.T.B. Dehideniya, J.

A.L. Shiran Gooneratne, J.

Janak De Silva, J.

Counsel:

Kuvera De Zoysa, P.C. with Senaka De Seram for the 4th Defendant-Appellant

Ruwantha Cooray for the Plaintiff-Respondent

Written Submissions tendered on:

4th Defendant-Appellant on 14.11.2019

Plaintiff-Respondent on 22.07.2020

Argued on: 01.03.2021

Decided on: 23.02.2022

Janak De Silva, J.

This is an appeal against the order of the learned judge of the Commercial High Court dated August 26, 2019.

Leave to appeal was granted in respect of the following questions of law:

(1) The learned Commercial High Court Judge failed to consider the order of dated 31st October 2017 entering the terms of settlement was only between the Plaintiff and the 1st and 2nd Defendants and not between the other Defendants

(2) The learned Commercial High Court Judge failed to consider that in terms of the order entered by the learned Commercial High Court Judge on the 31st October 2017 with regard to the entering of the decree, there was no decree entered by as per said settlement against the Petitioner

The issues to be determined are related to the terms of the settlement entered on October 31, 2017. Therefore, I will not make any reference to the factual matrix of the action except to the extent that it may impinge on the terms of the settlement.

The Court called for the original record of the Commercial High Court and, after examining the case record, the proceedings of October 31, 2017 read as follows:

1 වන විත්තිකරු පෙරකලාසි ගොනු කර සිටී.

පැමිණිලිකාර ආයතනයේ නියෝජිත සිටි.

පැමිණිලිකරු වෙනුවෙන් නීතිඥ ලංකා ධර්මසිරි මහත්මියගේ උපදෙස් මත නීතිඥ චමිත් ෆර්නෑන්ඩු මහතා සහ නීතිඥ රුවන්ත කුරේ යන මහත්වරුන් සමග ජනාධිපති නීතිඥ අලි සබ්රි මහතා පෙනි සිටි.

1,2 විත්තිකරුවන් වෙනුවෙන් 1 වන විත්තිකරුගේ නියෝජිත සහ 2 වන විත්තිකරුගේ ඇටෝනි බලකරු ගරු අධිකරණයේ සිටි.

1 වන විත්තිකරුවන් වෙනුවෙන් ජී. ඩබ්. ආර්. ධම්මික මහතාගේ උපදෙස් මත නීතිඥ ශිහාන් විජේගුණවර්ධන මහතා පෙනී සිටි.

2 වන විත්තිකරු වෙනුවෙන් සාලගලගේ කුමාර ප්‍රසාද් සිල්වා මහතා පෙනී සිටි.

4 වන විත්තිකාර වෙනුවෙන් වයෝමා පරණගම මහත්මියගේ උපදෙස් මත නීතිඥ උදයන්ති මදනායක මහත්මිය පෙනී සිටි.

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මෙම නඩුව සම්බන්ධයෙන් දෙපාර්ශවය වෙනුවෙන් පෙනී සිටින නීතිඥවරුන් ප්‍රකාශ කර සිටින්නේ මෙම නඩුවට අදාල විෂය වස්තුව වනුයේ පැමිණිල්ලට ඒ8 වශයෙන් අමුණා ඉදිරිපත් කර ඇති ණයවර ලිපිය ප්‍රකාරව 1,2 විත්තිකරුවන්ට අදාල ණයවර ලිපියේ සඳහන් මුදල අය කර ගත හැකිද, නොඑසේ නම් එම මුදල යලි පැමිණිලිකරු වෙත මුදා හැරිය යුතුද යන්නය.

එකී ණයවර ලිපිය ආරම්භ කොට ඇත්තේ 2 වන විත්තිකරු විසින් 1 වන විත්තිකරුගේ නියෝජිතයා ලෙස පැමිණිලිකරුට එකී ණයවර ලිපියට අදාල භාණ්ඩ ලංකාවට ආනයනය කිරීම සම්බන්ධයෙන් ගෙවිය යුතු ඇමරිකානු ඩොලර් 1,368,750/- ක මුදලක් ගෙවීම සම්බන්ධයෙන් වූ අවලංගු කළ නොහැකි ණයවර බිල් පත්‍රයක් සම්බන්ධයෙනි.

කෙසේ වෙතත් අදාල ණයවර ලිපිය ප්‍රකාරව 2 වන විත්තිකරු විසින් පැමිණිලිකරු වෙත එවිය යුතු වූ භාණ්ඩ එවීම ප්‍රතික්ෂේප කිරීම හේතුකොට ගෙන සහ/හෝ එවැනි භාණ්ඩයක් ඇත්ත වශයෙන්ම නැව් ගත කොට නොතිබීම හේතුකොට ගෙන එකී ණයවර ලිපිය මත 1,2 විත්තිකරුවන්ට මුදල් ලබා ගැනීමට නොහැකි යන පදනම මත පැමිණිලිකරු ගරු අධිකරණයෙට පැමිණ සිටිනවා ස්වාමීනි.

ඒ පිළිබඳව සැහිමකට පත් වීමෙන් පසුව මුල් අවස්ථාවේදී අධිකරණය විසින් එකී ණයවර ලිපිය අනුව මුදල් නිශ්කාෂනය කිරීම වළක්වාලමින් 4 වන විත්තිකාර බැංකුවට විරුද්ධව වාරණ නියෝගයක් නිකුත් කල අතර ඊට විරෝධතා ඉදිරිපත් නොකිරීම මත දැනට අතුරු ඉන්ජන්ෂන් තහනම් ආඥාවක් නිකුත් කොට ඇත.

ඉන් පසුව මැතිතුමනි 1,2 වන විත්තිකරුවන්ට විරුද්ධවද වාරණ නියෝගයන් ඇති අතර එය තවදුරටත් ක්‍රියාත්මක වෙමින් පවතී. නමුත් මෙම නඩුවේ සමථයක් ඇති කර ගැනීම සඳහා පාර්ශවකරුවන් එකඟ වී ඇති අතර ඒ අනුව පහත සමථ කොන්දේසි වලට අනුව මෙම නඩුව සමථයට පත් කරවා ගැනීමට දෙපාර්ශවය එකඟ වේ.

01. ඒ8 දරන ණයවර ගිවිසුමට ප්‍රකාරව එම ණයවර ගිවිසුමට අදාල වූ භාණ්ඩ 1,2 වන විත්තිකරුවන් විසින් පැමිණිලිකරුට නැව්ගත කොට නොමැති බවට 1,2 විත්තිකරුවන් පිළිගනී.

02. ඒ අනුව එකී ණයවර ලිපියට අදාල මුදල පැමිණිලිකරු වෙත යලි මුදා හැරීමට 1,2 විත්තිකරුවන් එකඟ වේ.

03. ඒ අනුව එකී ණයවර ලිපියට අදාල ඇමරිකානු ඩොලර් 1,368,750/- යන ප්‍රමාණය අද දින සිට සති 2 ක කාලයක් තුල එනම්, 2017.11.14 වන දින හෝ ඊට පෙර බැංකු අණකරයක් මගින් හෝ පැමිණිලිකරුගේ වාසියට 4 වන විත්තිකාර තීරු ගිණුමක පැමිණිලිකරුගේ වාසියට තැන්පත් කිරීමට 1,2 විත්තිකරුවන් එකඟ වේ.

04. ඒ අනුව එලෙස 2017.11.14 වන දින හෝ ඊට පෙර එකී ඇමරිකානු ඩොලර් 1,368,750/- ක මුදල පැමිණිලිකරුට බැංකු අණකරයකින් ගෙවනු ලැබුවහොත් සහ/හෝ තීරු ගිණුමක පැමිණිලිකරුගේ වාසියට 4 වන විත්තිකාර බැංකුවෙහි තැන්පත් කොට එකී බැංකුව එකී මුදල් ලැබුණු බවට සහතික කරනු ලැබුවහොත් ඒ8 ණයවර ලිපිය මත 1,2 විත්තිකරුවන්ට

ලැබිය යුතු මුදල 4 වන විත්තිකාර බැංකුව විසින් මුදා හැරිය යුතු බවට දෙපාර්ශවය එකඟ වේ.

05. එලෙස 2017.11.14 වන දින හෝ ඊට පෙර එකී මුදල පැමිණිලිකරුට ගෙවීමට හෝ පැමිණිලිකරුගේ වාසියට 4 වන විත්තිකාර බැංකුවෙහි තීරු ගිණුමක තැන්පත් කිරීමට 1,2 විත්තිකරුවන්ට පැහැර හැරියහොත් හෝ ප්‍රතික්ෂේප කරනු ලැබුවහොත් පැමිණිල්ලේ ආයචනයේ ''අ, ආ, ඇ, ඈ සහ ඔ'' ඡේදයේ ඉල්ලා ඇති සහන අයකර ගැනීම සඳහා පැමිණිලිකරුට අයිතිවාසිකම් ඇති බවට 1,2 විත්තිකරුවන් එකඟ වේ.

ඒ අනුව එකී එකඟතාවය මත එදිනෙන් පසුව 4 වන විත්තිකාර බැංකුවෙහි ඒ8 ණයවර ලිපිය ප්‍රකාරව අදාල ණයවර ලිපිය නිකුත් කිරීම සඳහා තැන්පත් කර ඇති පැමිණිලිකරුගේ මුදල් අදාල ණයවර ලිපිය අවලංගු කොට එදින සිට සතියක් ඇතුලත යලි පැමිණිලිකරු වෙත මුදා හැරීමට 4 වන විත්තිකාර බැංකුව එකඟ වේ. ඒ අනුව එකී කොන්දේසි මත පැමිණිලිකරු සහ 1,2 සහ 4 විත්තිකරුවන්ට අතර සමථ නඩු තීන්දුවක් ඇතුලත් කරන ලෙන සියලු පාර්ශවයන් ඉල්ලා සිටි. 3 වන විත්තිකරුට විරුද්ධව පියවර ගැනීම සම්බන්ධයෙන් මෙම සමථය අනුව කටයුතු කොට තීරණයක් ඉදිරිපත් කිරීම සඳහා ඊළඟ දිනට කැදවන මෙන් ඉල්ලා සිටි.

<u>අධිකරණයෙන්;</u>

එකඟ වී ඇති කොන්දේසි වලට අනුව පැමිණිලිකරුට සහ 1,2 විත්තිකරුවන් අතර තීන්දු ප්‍රකාශයක් ඇතුලත් කරන්න. පැමිණිල්ලේ නියෝජිත සහ 1,2 විත්තිකරුවන්ගේ නියෝජිත නඩු පොත් අත්සන් කිරීමට නියම කරමි.

The basic question to be decided is whether the 4th Defendant-Appellant (hereinafter referred to as "Appellant") is a party to the terms of the settlement entered on October 31, 2017.

Section 408 of the Code of Civil Procedure provides for the adjustment of actions and reads as follows:

> *"If an action be adjusted wholly or 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* ***<u>by motion made in presence of, or on notice to, all the parties concerned</u>, and the court shall <u>pass a decree in accordance therewith</u>****, 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." (Emphasis added)

The foundation of a consent decree is the *consensus ad idem* of the parties. For this reason, section 408 of the Civil Procedure Code directs that the Court should pass a decree in accordance with the terms of the settlement. Case law emphasizes the need to comply with this and other relevant provisions to ensure that any settlement entered is based on the mutual consent of the parties.

Any settlement or compromise must conform strictly to the provisions of sections 91 and 408 of the Civil Procedure Code. If the compromise was lacking in precision and did not strictly conform to sections 91 and 408 of the Civil Procedure Code and it leads to confusion and uncertainty, any decree entered on it could be attacked on the ground of want of mutuality [*Faleel v. Argeen and Others* (2004) 1 Sri.L.R. 48]. Thus, in *Dassanaike v. Dassanaike* (30 N.L.R. 385 at 387), Fisher, C. J. observed:

> *"It is fundamentally necessary before section 408 can be applied that it should be clearly established that what is put forward as an agreement or compromise of an action by the parties was intended by them to be such."*

No doubt settlement of an action between the parties is welcome. In fact, settlement between parties should be encouraged by the Court to the extent possible in law provided that applications to pursue a settlement are not made with a view to delay the proceedings or to merely obtain a date. However, before any such settlement is entered and decree entered accordingly, the procedural steps mandated by law must scrupulously be observed to ensure that the terms of the settlement are based on the consent of all the parties whose rights are affected by it.

That appears to be the reason for section 408 of the Civil Procedure Code to require any settlement to be notified to the Court by way of motion made in the presence of, or on notice to, all the parties concerned. It directs that "*such agreement, compromise, or satisfaction shall be notified to the court by motion…"*. In my view, these words require the terms of the settlement to be incorporated into a motion signed by the registered attorney for all parties to the settlement. There can be no room for any dispute once terms are recorded in a motion and the parties concerned have indicated their consent

by the registered attorney-at-law signing the motion containing the terms of the settlement.

This Court has added safeguards to be followed in concluding settlement arrangements to ensure that they reflect the intention of the parties. Thus Soertsz, J. observed in *Punchibanda v. Punchibanda et al* (42 N.L.R. 382):

> "*This Court has often pointed out that when settlements, adjustments, admissions, &c., are reached or made, their nature should be explained clearly to the parties, and their signatures of thumb impressions should be obtained. The consequence of this obvious precaution not being taken is that this Court has its work unduly increased by wasteful appeals and by applications being made to it for revision or restitutio in integrum. One almost receives the impression that once a settlement is adumbrated, those concerned, in their eagerness to accomplish it, refrain from probing the matter thoroughly lest the settlement fall through."*

Regrettably, I note that the terms of settlement in this case have not been incorporated into a motion as required by law. Instead, the terms were recorded in open court on October 31, 2017. After the terms of settlement were entered, the learned judge of the Commercial High Court, directed that the decree be entered between the Plaintiff and the 1st and 2nd Defendants only. This order was made despite an application to enter a consent decree between the Plaintiff and the 1st , 2nd and Appellant.

Moreover, journal entry no. 17 pertaining to this date, part of which appears to have been written in English by the learned judge of the Commercial High Court, reads:

> "…Terms of Settlement were recorded between the Plaintiff and the 1st and 2nd Defendants….Enter Decree accordingly…Representatives of the parties are directed to sign the record."

The record reflects that only the representatives of the Plaintiff and the 1st and 2nd Defendants have signed the record. There is no signature of any representative of the Appellant.

To my mind, the learned judge of the Commercial High Court did not have any doubt when the settlement was recorded on 31st October, 2017 that only the Plaintiff and the 1st and 2nd Defendants were parties to the terms of the settlement. That appears to be the reason for the journal entry written by the learned judge to state that the terms of settlement were entered into between the Plaintiff and the 1st and 2nd Defendants. This is complimented by the order he made on that date, directing that the decree be entered between the Plaintiff and 1st and 2nd Defendants according to the terms of the settlement. The matter is put beyond doubt by the fact that only the representatives of the Plaintiff and the 1st and 2nd Defendants have signed the record.

However, the learned counsel for the Plaintiff-Respondent drew the attention of the Court to the proceedings of October 31, 2017 and submitted that the Appellant was represented by Ms. Udayani Madanayake, Attorney-at-Law and as such the terms of settlement are binding on the Appellant. Indeed, her name appears in the proxy filed on behalf of the Appellant in the Commercial High Court.

It is trite law that the Attorney-at-Law on record has the authority to enter into a settlement on behalf of a party [*Fernando v. Sinnoris Appu* (20 N.L.R. 460), *Punchibanda v. Punchibanda et al* (42 N.L.R. 382), *Sinna Veloo v. Messrs. Lipton Limited* (66 N.L.R. 214)]. Nevertheless, it must be clear from the record that registered attorney on record accepted the terms of the settlement on behalf of the party he represents. Such an agreement will be clearly reflected if the provisions of section 408 of the Civil Procedure Code are scrupulously followed by submitting a consent motion to the court. Regrettably it has not been done in this case.

It is customary for appearances by all parties to be recorded on each date when there is a public hearing. In my view, the mere fact that the appearance of Ms. Udayani Madanayake, Attorney-at-Law is recorded on October 31, 2017 for the Appellant does not amount to any consent on the part of the Appellant to the terms of the settlement.

This Court observes that in this case five (5) terms are recorded as part of the settlement. The tenor in the five terms refers to admission by two parties (දෙපාර්ශවය) or by 1st and 2nd Defendants (1,2 විත්තිකරුවන්). This negates any claim that the Appellant agreed to the terms of the settlement. However, the learned counsel for the Plaintiff-Respondent drew

the Court's attention to the paragraph immediately below subsection (5) and argued that it was indicative of the appellant's agreement.

Nonetheless the learned judge directed that a decree be entered only between the Plaintiff and 1st and 2nd Defendants. In my view, this indicates that the Commercial High Court was of the opinion that the parties to the settlement arrangements were the Plaintiff and the 1st and 2nd Defendants.

I hold that the facts and circumstances of this case do not unequivocally establish the Appellant's consent to the terms of the settlement.

This conclusion is supported by consideration of the proceedings of December 14, 2017. On this day the learned counsel appearing on behalf of the Appellant had informed the Commercial High Court of its inability to revoke the letter of credit issued at the request of the Plaintiff in view of the applicable rules. After hearing the parties, the learned judge of the Commercial High Court declined to change the terms of the regulation.

His order reads:

> "On 31st October 2017, settlement was recorded between the Plaintiff and the 1st and 2nd Defendants. The 4th Defendant who was present has also agreed to release the money deposited against the letter of credit and signed the case record. Accordingly, the court has already entered the decree. Accordingly, the court holds that the terms of the settlement already entered in the case cannot be altered at this stage."

It is significant that the learned judge asserts that the agreement was recorded between the Plaintiff and the 1st and 2nd Defendants. This is consistent with the journal entry and order he made on October 31, 2017.

It appears he has taken the view that although not a party to the terms of the settlement, the Appellant had agreed to release the money deposited against the letter of credit by signing the case record. He was clearly mistaken because no representative of the Appellant had signed the case record.

The learned counsel for the Plaintiff-Respondent further submitted that the order made by the learned judge was not challenged by the Appellant and as such it cannot be done in the present appeal.

However, it is the clear right of every litigant to invite the Appellate Court to consider on a final appeal any interlocutory order even if he did not directly challenge it at the time when it was made [*Abubakker v. Ismall Lebbe* (11 N.L.R. 309 at 313), *Perera v. Battaglia* (58 N.L.R. 447 at 449), *Cornel & Company Limited v. Mitsui & Company Limited and Others* (2000) 1 Sri.L.R. 57 at 76].

The Plaintiff-Respondent sought to execute the decree entered in this case against the Appellant by motion dated 21st February 2018 which was supported in open court on 5th April 2018. The Appellant objected to this application. Following an inquiry, the learned judge of the Commercial High Court, by order of August 26, 2019, allowed the application for execution of the writ against the Appellant. The Appellant preferred this application against the said order as he is entitled in law.

The learned judge of the Commercial High Court concluded that the Appellant did not have the right to object to the execution of the writ inter alia, as no appeal was preferred against the order made on 14th December 2017. However, I find that the Appellant has the right to challenge the request to enforce the writ against it, taking into account the above authorities.

The learned judge of the Commercial High Court also rejected the objections of the Appellant to the execution of the decree on the basis that the settlement was entered into between the Plaintiff, 1st and 2nd Defendants and Appellant. He was clearly mistaken as the Appellant was not a party to the terms of the settlement as explained above.

For all the foregoing reasons, I answer the two questions of law in the affirmative and set aside the order of the learned judge of the Commercial High Court dated August 26, 2019. In terms of section 408 of the Civil Procedure Code, the decree must be passed in accordance with *such agreement, compromise, or satisfaction as notified* to court. In this case the decree sought to be executed against the Appellant has been entered contrary to the terms of the settlement and the order made by the learned judge of the Commercial High Court on October 31, 2017.

Accordingly, I dismiss the application of the Respondent dated 21st February 2018 and filed on 6th March 2018 in the Commercial High Court marked as P11 to execute a writ against the Appellant.

For the avoidance of doubt, I hold that the Appellant is not a party to the terms of the settlement entered on 31st October, 2017.

The Appeal is allowed.

I make no order as to costs.

The Registrar is directed to take further action accordingly.

JUDGE OF THE SUPREME COURT

L.T.B. Dehideniya, J.

I agree.

JUDGE OF THE SUPREME COURT

A.L. Shiran Gooneratne, J.

I agree.

JUDGE OF THE SUPREME COURT