1951 *Present:* **Gratiaen J. and Gunasekara J.**

NEWTON *et al.*, Appellants, *and* SINNADURAI, Respondent

S. C. 250—D. C. Point Pedro, 4,733

Contract—Consent decree—Terms of settlement—Mistake—Power of Court to rectify it.

Where the terms of settlement in a compromise arrived at between the parties to an action were carelessly drawn up in such a manner that they were incapable of enforcement—

Held, that the consent decree could be rectified so as to give effect to the real intention of the parties. If necessary, the Court could substitute fresh terms which would be more in accordance with the substantial result which the parties had intended to achieve.

APPEAL from a judgment of the District Court, Point Pedro.

This was an action on a promissory note. The parties arrived at a settlement according to which plaintiff agreed to transfer to a Company certain shares which had been allotted to him; and the defendants agreed to pay to the plaintiff the amount of the promissory note. A consent decree was accordingly drawn up. The defendants, however, discovered at a later date that the Company was precluded by its Articles of Association from having the shares transferred to it. Thereupon, they applied to the District Court for a declaration that the purported settlement was inoperative and null and void. The plaintiff, on the other hand, claimed that he had fulfilled his part of the bargain and was therefore entitled to the benefit of his decree for the sum payable on the promissory note sued on. The learned District Judge upheld the latter contention. The defendants thereupon appealed.

N. E. Weerasooria, K.C., with *T. W. Rajaratnam*, for the defendants appellants.

S. J. V. Chelvanayakam, K.C., with *V. S. A. Pullenayagam*, for the plaintiff respondent.

Cur. adv. vult.

July 25, 1951. GRATIAEN J.—

The difficulties presented by the questions arising for consideration in this appeal can all be traced to the carelessness with which the terms of compromises in pending litigations are so often drafted for submission to the Court of trial. Indeed, I venture to suggest that some responsibility attaches in such cases to the trial Judge himself, whose duty it is to enter a decree in accordance with the terms of settlement; that responsibility involves a duty to ensure that the decree so passed is embodied in language which, while giving full effect to the intentions of the litigants, is at the same time capable of enforcement should the necessity arise.

This action relates to certain transactions which were allegedly connected with the incorporation of a private Company with limited liability known as "Newton's Ltd.". The plaintiff sued the defendants

jointly and severally for the recovery of a sum of Rs. 2,500 and interest due to him in terms of their promissory note dated September 26, 1947. The defendants admitted the execution of the note, but pleaded by way of defence that they had discharged the debt by their fulfilment of a contemporaneous promise to secure the allotment to the plaintiff of 25 shares in the Company of the aggregate par value of Rs. 2,500. These shares, they said, had been duly registered in the plaintiff's name. The plaintiff, however, strenuously asserted that no such allotment of shares had been authorised by him.

After some preliminary evidence had been led, the parties arrived at a settlement of this dispute. The basis of the compromise was that the plaintiff, who presumably had less confidence in Newtons Ltd. than the defendants had, was prepared to place at their disposal the shares which had at their instance been registered in his name, and the defendants in that event were willing to pay back to him the amount of the promissory note which was alleged to represent the value of the shares in question. A consent decree was accordingly drawn up on 25th February, 1949, in the following terms :—

> " It is ordered and decreed of consent that on the plaintiff disclaiming all right, title and interest in the 25 shares allotted to him by the Company called Newtons Ltd. and further stating that he will in future have no further claim on the Company and that he will give a writing to be considered by the Board of Directors of the said Company wherein he will ask the Company to buy over all his rights to the said shares, and on this undertaking the defendant stating that when the necessary papers referred to are executed and sent over to the company he will become liable in the amount claimed in the pro note to the plaintiff and the plaintiff do execute this writing referred to and forward the same to the Company before 7.2.49.
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> It is further ordered and decreed that if this writing is executed and sent before 7.2.49 that the defendant should be given six weeks time from 7.2.49 to pay and settle the amount claimed on the pro note. It is agreed that on payment of the sum claimed in this case the plaintiff will return the title deeds, insurance policy and other documents which have been handed over by the defendant to the plaintiff.
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> It is ordered and decreed that if the writing is not so given by the plaintiff the action will stand dismissed with costs. If he gives the writing the agreement will be given effect to as recorded.
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> And it is further ordered and decreed that if the writing is given but the defendant fails to pay the claim on the pro note within six weeks from 7.2.49 then the defendant will be liable to pay costs. If the defendant pays the amount claimed within six weeks as agreed upon the costs will be divided ".

That the parties had at this stage settled their disputes and genuinely desired to give effect to the terms of this compromise is clear enough. In fact, the plaintiff furnished the stipulated disclaimer within the prescribed time, and expressed his willingness to make over the shares to the Company in terms of the decree. Unfortunately, however,

defendants discovered at a later date what any reasonable man engaged in a business transaction of this kind would have been concerned to ascertain before the terms of the final settlement was drawn up—namely, that "Newtons Ltd." was precluded by its Articles of Association from holding shares in its own business, and that the plaintiff's disclaimer in favour of the Company was valueless.

In these circumstances the defendants applied to the Court for a declaration that the purported settlement of 25th January, 1949, was inoperative and therefore null and void. The plaintiff on the other hand claimed that, on an application of the strict terms of the compromise, he had fulfilled his part of the bargain and was accordingly entitled to the benefit of his decree for the sum payable on the promissory note sued on. The learned District Judge upheld the latter contention, and the effect of his order is that the plaintiff would not only succeed in recovering the money advanced to the defendants but would also retain the shares for which he had admittedly not paid. I refuse to think that the law can countenance a situation so violently opposed to the spirit of the settlement which had been carelessly but honourably arrived at in January, 1949.

It is necessary in the first instance to examine the terms of the recorded settlement in the background in which the negotiations had taken place. I shall then proceed to consider whether it was not legitimate for the learned Judge to find some means of giving effect to the real intention of the parties to the compromise by adding to the terms of the agreement, and, if necessary, substituting fresh terms which would be more in accordance with the substantial result which the parties had intended to achieve.

On the first question I find no difficulty whatsoever. The plaintiff did not wish to be burdened with the shares which the defendants had purchased in his name. He demanded instead the return of his money which he had advanced to them. Obviously he could not reasonably retain the shares as well as demand the money. The defendants on their part agreed to repay the money on condition that the shares were transferred by the plaintiff to some person nominated by them and from whom they could claim the consideration which they had provided for their purchase. Who that person should be, was a matter in which the plaintiff had no concern. It was only of subsidiary importance, not vital to the main purpose of the transaction. If the compromise be looked at in this light, it is abundantly clear that *the substantial agreement between the parties was that the plaintiff should have a decree for the payment of the money advanced on the promissory note provided that he agreed to take the necessary steps to transfer the shares to a person nominated and selected by the defendants.*

In their attempt to give effect to this agreement, the terms of the settlement were carelessly conceived and carelessly drawn up. The transferee nominated to receive the shares standing in the plaintiff's name was not qualified in law to receive them. Is the Court then so powerless that it must sanction a result which the parties themselves did not intend and would not, if they had addressed their minds to the question at the proper time, have contemplated ?

One answer to the problem lies, I think, in the power of the Court to rectify on equitable grounds a written agreement which, owing to a common mistake, does not substantially represent the real intention of the parties, and even to order specific performance of the agreement as rectified. *United States of America v. Motor Trucks Ltd.* [1]. " The essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement *into harmony with that prior agreement* . . . . It presupposes that by common mistake the final completed instrument fails to give proper effect to the prior contract ". *Lovell and Christmas Ltd. v. Wall* [2]. The real scope of the equitable jurisdiction vested in a Court of equity is *not to rectify the contract itself but to rectify the instrument* in which the terms of the contract have been inaccurately represented. *Mackenzie v. Coulson* [3]. That such jurisdiction is vested in our Courts has long been recognized. *Fernando v. Fernando* [4] and *Meerasaibo v. Theivanayagam Pillai* [5].

In the present case it is also permissible, in my opinion, to read into the recorded settlement of January, 1949, certain implied terms in order to repair an intrinsic failure of expression. This power exists whenever " the document which the parties have prepared may leave no doubt as to the general ambit of their obligations ; but they may have omitted, through inadvertence or faulty draftsmanship, to cover an incidental contingency, and this omission, unless remedied, may frustrate their design. In such a case the Judge may himself supply a further term which will implement their presumed intention and, in a hallowed phrase, give *business efficacy* to the contract. In doing this, he does not impose a term *ab extra*, but merely does what the parties would themselves have done had they thought of the matter ". *Cheshire and Fifoot's Law of Contracts* [6].

The leading English authority on this point which has frequently been followed in our Courts is *The Moorcock* [7]. " The question ", said Bowan L.J., " is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they saw nothing about the burden of an unseen peril, leaving the law to raise such inferences as are reasonable from the very nature of the transaction ". I would refer to one further decision in which Mackinnon L.J. makes an observation which seems very aptly to meet the problem with which we are confronted in the present case :—

> " *Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying ; so that, if while the parties are making their bargain an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common ' Oh, of course ' ". *Shirlaw v. Southern Foundaries Ltd.* [8]

[1] *(1924) A. C. 196.*
[2] *104 L. T. 85.*
[3] *L. R. 8 Eq. 375.*
[4] *(1921) 23 N. L. R. 266.*
[5] *(1922) 24 N. L. R. 453.*
[6] *1st edition page 102.*
[7] *(1889) 14 P. D. 64.*
[8] *(1939) 2 K. B. 206.*

Let us assume that when the terms of settlement between the parties were communicated to the Court in their present form, the learned Judge himself, and not merely some " officious bystander ", had posed the very pertinent question, " What would be the position if it is discovered that a transfer of the 25 shares by the plaintiff to Newtons Ltd. cannot be lawfully effected ?". Can it reasonably be suggested that the answer would have been, as the plaintiff's counsel in effect suggested in the lower Court, " Of course, in that event the plaintiff is entitled to retain the shares and have his money as well ?" *or* that the defendant would have replied that the whole basis of the settlement must then fall through ? On the contrary, I do not doubt that *both* parties would have informed the Judge that if Newtons Limited, in whom the defendants had a controlling interest, could not lawfully obtain a transfer of the shares, it would be equally satisfactory that the plaintiff should make the shares available *to any other person nominated by the defendants*.

For these reasons I think that the Court is entitled, and indeed in duty bound, to give effect to the intention of the parties *either* by rectifying the terms of the recorded settlement *or* by reading into those terms an implied agreement to the effect that the plaintiff should, in the eventuality which has occurred, implement the true purpose of the agreement by transferring the shares to any person nominated by the defendent. I would therefore amend the decree passed in the lower Court on 25th January, 1949, and substitute for it a decree in the following terms :—

" (1) that the defendants should jointly pay to the plaintiff a sum of Rs. 2,500 with interest thereon calculated at the rate of 12 per cent. per annum from 26th September, 1947, until 25th January, 1949, and thereafter with legal interest on the aggregate amount of the decree until payment in full.

(2) that the plaintiff should sign and execute, on demand, such transfer forms or documents as may be tendered to him by the defendants for the purpose of transferring the 25 shares in Newtons Limited standing in his name to any person or persons nominated by the defendants, and that, in the event of his failure to sign and execute such forms or documents within one week of demand, the Secretary of the District Court of Jaffna be authorised to sign and execute the same on the plaintiff's behalf ".

In all the circumstances of the case I would make no order as to the costs of this appeal or of the action or the incidental proceedings in the Court below.

GUNASEKARA J.—I agree.

Decree amended.