[IN REVISION]

1935 *Present :* **Akbar S.P.J. and Koch A.J.**

SABAPATHY *v.* DUNLOP *et al.*

D. C. Avissawella, 1,636 and 1,637.

Restitutio in integrum—*Judgment entered by compromise—Application to set aside decree—Fear and surprise—Powers of Supreme Court—Civil Procedure Code, s.. 408 and 752—Courts Ordinance, s. 40.*

Where an action has been adjusted by agreement or compromise under section 408 of the Civil Procedure Code, the Supreme Court has power to set aside, by way of restitution or revision, a judgment entered in terms of the section, on the ground of fear or mistake.

A threat from a Judge to dismiss a plaintiff's case unless he agreed to the terms of settlement would amount to fear.

THIS was an application to set aside by way of revision or restitution the orders in two cases entered of consent between the plaintiff and the respective defendants in the actions.

The settlement was entered into in Court in the presence of the District Judge and was signed by the plaintiff, the defendants, and the District Judge.

The facts are fully stated in the judgment of Akbar S.P.J.

N. Nadarajah (with him *P. Navaratnarajah*), for plaintiff, petitioner.—This is an application by way of revision or in the alternative by way of *restitutio in integrum* to have an order of the District Judge of Avissawella set aside. The settlement which is recorded was brought about by pressure and surprise, and an order in pursuance of such a settlement can be set aside. (*Swinfen v. Swinfen*[1]; *Neale v. Gordon Lennox*[2]; *Fernando v. Singhoris*[3].) A trial Judge ought not to take part in effecting a settlement between parties—section 408 of the Civil Procedure Code. He has judicial functions to perform with regard to the terms of compromise.

There is ample authority for the proposition, that where a Judge misconducts himself, the position can be rectified and order set aside by a Judge of the Appellate of Superior Tribunal. (*2 White and Tudor's Leading Cases in Equity 708; Reg. v. Justices of Cumberland*[4], *Reg. v. Millage et al.*[5]; *Queen v. Farrant*[6]; *Zemindar of Tuni v. Binnaya*[7]; *1837, Morgan's Digest 143.*)

This can be done either by *restitutio in integrum* (*Vander Linden, bk. I, tit. 12, s. 1; Voet, bk. IV., tit. 2; 2 Van Leeuwen 338, Censura Forensis, bk. IV., clause 11, section 10; Digest, bk. IV., tit. 2—title 6 Monro's Trans.*) or by way of Revision—*see* section 753 of Civil Procedure Code, section 357 of Criminal Procedure Code, sections 21 and 40 of Courts Ordinance. Counsel also cited *Appuhamy v. Weeratunga*[8]; *Cassi Lebbe v. Dias*[9].

[1] *2 D. G. & J. Chancery Reports 386; 1 Revised Reports 490.*
[2] *(1902) A. C. 469.*
[3] *26 N. L. R. 469.*
[4] *58 L. T. N. S. 491.*
[5] *40 L. T. N. S. 748.*
[6] *20 Q. B. D. 58.*
[7] *22 Mad. 155.*
[8] *23 N. L. R. 467.*
[9] *2 N. L R. 319.*

H. V. Perera (with him *E. F. N. Gratiaen*), for defendant, respondent.—The plaintiff's version of the incidents which took place on the trial date is false, and in any event he would not be entitled to relief inasmuch as he admits that he agreed to settle this case in the hope of pleasing the trial Judge and thereby obtaining an undue and improper advantage in the connected case.

Assuming that the plaintiff's version is accepted, the Court has no jurisdiction to interfere by way of revision under section 753 of the Civil Procedure Code. The decree entered by the trial Judge in pursuance of the compromise effected between the parties under section 408 was neither "illegal" nor "improper", and cannot therefore be set aside. It was in fact the duty of the Court to pass decree giving effect to the compromise, provided that the terms of such compromise were legal, as they undoubtedly are.

The trial Judge was competent to enter decree in terms of the compromise; he was not "personally interested" in the action within the meaning of section 90 of the Courts Ordinance, even if the plaintiff's version be true, which we deny.

The plaintiff is not entitled to relief by way of *restitutio in integrum*. No allegation of fraud or improper conduct is alleged against the respondent personally, and it would be contrary to public policy to entertain allegations of this nature against the Judges who heard the suit. Whatever relief may be open to the plaintiff in a separate action against the Judge by way of damages, the regularity of the Proceedings in the present action as against the respondent cannot be challenged.

Relief by way of "*restitutio in integrum*" is open to a party on the ground of fear only in cases where he can show that the "fear" alleged is caused by present or future danger of a substantial evil which would exclude all notion of consent. (*Voet, bk. IV., 1, 26* and *IV., 1, 11-14.*) Fear of an adverse result in a connected litigation would not be sufficient.

Cur. adv. vult.

May 21, 1935. AKBAR S.P.J.—

This is an application by the plaintiff in D. C. Avissawella, Nos. 1,636 and 1,637, by way of revision or in the alternative by way of *restitutio in integrum* to set aside two orders in the two cases above mentioned which had been entered into of consent between the plaintiff and the respective defendants settling these two cases on August 14, 1934. On December 21, 1933, the plaintiff who was the Government District Medical Officer of Karawanella in charge of the Government hospital there, an officer of the first grade in the Department of Medical and Sanitary Services with 22 years of service in that department, filed four cases, viz., 1,634, 1,635, 1,636, and 1,637 in the District Court of Avissawella claiming Rs. 50,000 as damages from each defendant in the respective cases for alleged defamation. In case 1,635 the defendant, Mr. G. Huntley, was the Superintendent of Vincit estate at the time material to the case and he and his wife were injured in a motor car accident on January 27, 1933, and were treated by the plaintiff at the Government hospital.

Mr. Huntley was dissatisfied with the treatment of the plaintiff and on February 13, 1933, he wrote the following letter to the Director of Medical and Sanitary Services :—

"February 13th, 1933
Colombo.

The Director of Medical and Sanitary Services, Colombo.

DEAR SIR,—I HAVE to make a very strong complaint against the negligence and incompetence of the District Medical Officer at Karawanella. On Friday, the 27th ultimo, after a very severe car smash on Panawatte estate, my wife and I and the driver were conveyed by Mr. Urquhart of Panawatte estate in his car to Karawanella Hospital, neither of us being able to move. We arrived at the hospital at 8 P.M., and the D. M. O. after a very perfunctory examination pronounced definitely that no bones were broken, and without any suggestion of an X'ray examination in Colombo put us in charge of the Acting Matron, in the paying ward, and actually intimated that we might leave on the following morning. We stayed two nights as my wife was too unwell to travel, the D. M. O. making no examination of any sort during that period. On the 7th instant, being able to walk slowly, I took my wife, who complained of severe pains in the shoulder, to Colombo and saw Dr. A. M. de Silva. He at once ordered an X'ray photograph, which not only disclosed a fractured arm but a fracture of the pelvis, as well as in my own case a fracture below the shoulder. Dr. A. M. de Silva will, I know, be pleased to furnish full particulars. Mr. Urquhart of Panawatte estate can also corroborate any statement *re* the D. M. O's treatment at Karawanella Hospital. I cannot too strongly condemn the attitude of the D M. O. whose one examination at night occupied only two or three minutes and thereafter took no interest in us whatever, merely prescribing Lead Lotion and the usual liniments and leaving everything to the Acting Matron. My driver was not even given an antitetanus injection, though I insisted on it for ourselves. Both my wife and I are amazed at such behaviour, and I hope you will take strong action in the matter.

(Sgd.) G. HUNTLEY."

It is this letter which is the subject-matter of case No. 1,635. A copy of this letter was sent to Mr. B. M. Selwyn, the defendant in case No. 1,634 in his capacity as Chairman of the Kelani Valley Planters' Association of which Mr. Huntley, Mr. Dunlop (defendant in case No. 1,636) and Mr. Bentley-Buckle (defendant in case No. 1,637) are members. Mr. Huntley's letter was discussed at a meeting of the Kelani Valley Planters' Association on February 23, 1933, when a resolution was proposed by Mr. Dunlop and seconded by Mr. Bentley-Buckle. The cause of action alleged against Mr. Selwyn was the publication of Mr. Huntley's letter to the Director and the cause of action against Mr. Dunlop and Mr. Bentley-Buckle was not only the publication of this letter but also the use of certain words and expressions by them in their addresses.

All the four defendants filed answers pleading truth as regards the facts and fair comment as regards opinion and privilege. All the four cases were fixed for trial for the same day but case No. 1,635 was tried first, the other cases being postponed for the adjourned dates. On August 10, 1934, the defendants in cases Nos. 1,636 and 1,637 applied to withdraw their pleas of truth and fair comment, thus restricting their defence only to privilege, which motion was allowed on August 14, 1934.

When case No. 1,636 was taken up for trial the Judge refused the application of plaintiff's counsel for the costs incurred by the plaintiff in getting ready for trial on the pleas of truth and fair comment. Case No. 1,635 against Mr. Huntley was not over on August 14, 1934, for which date after all the evidence had been recorded the case was standing over for Counsel's address. On August 10, plaintiff put in a motion for the postponement to a later date than August 14, as his senior counsel was engaged in another case, which application was refused. The journal entry on August 14, 1934, in case No. 1,635 reads as follows:— "It is agreed that the addresses in this case should be heard after the evidence in cases Nos. 1,634, 1,636, and 1,637 ".

Case No. 1,634, *i.e.*, against Mr. Selwyn was however setttled, the terms being as follows :—

"In the District Court of Avissawella.

Dr. C. Sabapathi of Karawanella Hospital .... Plaintiff.
No. 1,634. Vs.

B. M. Selwyn, Justice of the Peace and Unofficial Police Magistrate, Udapolla, Dehiowita .... Defendant.

The parties hereto move to file of record the following terms of settlement :—

The defendant expresses regret at the publication by the Press of the discussion which took place at the Meeting of the Kelani Valley Planters' Association held on the 23rd day of February, 1933, at Taldua, on Mr. Huntley's letter dated the 13th day of February, 1933, to the Director of Medical and Sanitary Services. In view of the fact that the defendant's connection with this matter has always been in his official capacity and not in his personal capacity, the defendant agrees to withdraw the allegations of fact in his answer as filed. The defendant further agrees to pay to the plaintiff Rs. 250 by way of costs, and in view of the premises the plaintiff agrees to withdraw his claim for damages made against the defendant.

Dated this 14th day of August, 1934.

Witness to the signature and identity of Dr. C. Sabapathi, the plaintiff above named.
(Sgd.) ———.

(Sgd.) C. SABAPATHI,
Plaintiff.

Witness to the signature and identity of B. M. Selwyn, the defendant above named.
(Sgd.) ———.
Proctor, S C., Colombo.

(Sgd.) B. M. SELWYN,
Defendant.
(Sgd.) ———.
Proctor, S. C."

It was signed by the plaintiff and defendant and the two proctors. Case No. 1,636 now before me was then taken up and plaintiff's counsel read the evidence of certain witnesses already recorded in 1,635 as part of his case consent to prove the publication and closed his case. Mr. Dunlop gave evidence in defence and the case was adjourned for lunch. After lunch the case was settled and the following is the memorandum of settlement:—

"In the District Court of Avissawella.

D. C. 1, 636. August 14, 1934

Memorandum of Settlement.

In the final decision in case No. 1,635, D. C. Avissawella, if judgment is entered for this plaintiff against Mr. G. Huntley it is agreed that the defendant in this case should pay plaintiff Rupees Five hundred (Rs. 500) as damages and Rupees Two hundred (Rs. 200) as costs.

2. That the defendant should withdraw by written motion the statements he made at the meeting of the Kelani Valley Planters' Association on 23rd February, 1933, and referred to in paragraph 7 of the plaint.

3. It is further agreed that if the defendant does not so withdraw the said statements he should pay an additional sum of Rupees one thousand as damages. It is further agreed that if in the final decision the plaintiffs action No. 1,635, D C. Avissawella, is dismissed—this action should be dismissed with costs fixed at Rupees Two hundred (Rs. 200) payable to the defendant.

Call case after the final decision in case No. 1,635, D. C. Avissawella, for decree to be entered in terms of the above settlement.

(The plaintiff desires it to be entered of record that he agreed to this settlement as he brought this action not with a view to make money but to vindicate his honour and reputation as a Government Medical Officer and Medical Practitioner.)

(Sgd.) C. SABAPATHY, Plaintiff.

(Sgd.) J. D. DUNLOP, Defendant.

(Sgd.) P. VYTILINGAM,
Additional District Judge.

It was signed by the plaintiff and Mr. Dunlop and also the District Judge. Case No. 1,637 was also settled on similar terms, the memorandum being signed by the plaintiff, Mr. Bentley-Buckle, and the District Judge. It should be noted that these settlements were entered into in Court in the presence of the District Judge and the Proctors and Advocates, of the respective parties and in both the memoranda there is this note above the signatures of the parties.

" The plaintiff desires it to be entered of record that he agrees to this settlement as he brought this action not with a view to make money but to vindicate his honour and reputation as a Government Medical Officer and Medical Practitioner."

Counsel then began to address the Court in case No. 1,635 on August 15 and 16, and the case was adjourned for September 1, 1934, for judgment, on which day judgment was given in favour of the plaintiff against Mr. Huntley for Rs. 10,000 damages and costs. On the same day plaintiffs proctor moved for issue of writ to recover the amount which was allowed. The defendant offered security and the writ was stayed on September 8, 1934, on which day the defendant filed his petition of appeal and the appeal to this Court is pending. On November 9, 1934, the plaintiff filed a motion with affidavits asking that the settlement orders made in cases Nos. 1,636 and 1,637 should be set aside by way of revision or *restitutio in integrum* on the ground of surprise and fear or pressure and that the cases should be sent back for trial in due course. The plaintiff's affidavit sets forth his own version of the events after the luncheon interval which led to the signing of the terms of settlement. There are counter affidavits from the two defendants traversing plaintiff's version. At this stage I shall assume the correctness of plaintiff's affidavit as regards the incidents which led to the settlement of the two cases. The plaintiff is, as I have already stated, a Government Medical Officer of the first grade with over 22 years' service in the Government Department. He was in charge of the district hospital, and is a Bachelor of Medicine and Master of Surgery of the Madras University; he is also

a Licentiate of the Royal College of Physicians, London, and a Member of the Royal College of Surgeons, England. So that it will be seen that the plaintiff is not an illiterate person, but a person of culture and education. He is also a member of a learned profession, trained to meet emergencies and also trained to appear in Court to give evidence in criminal cases in his capacity as Judicial Medical Officer as the Government expert. He was also the head of the local hospital. The settlement was signed by him in Court in the presence of his own advocate and proctor, both of whom belong to the same nationality as his. He had already settled the case against Mr. Selwyn by withdrawing his large claim for Rs. 50,000 damages on Mr. Selwyn expressing regret for the publication and withdrawing the allegations of fact in the answer and on payment of Rs. 250 by way of costs; thus emphasizing the end he had in view which was afterwards specially incorporated in the last paragraph of the memoranda of settlement in cases Nos. 1,636 and 1,637 at his request, namely, that he brought the actions not to make money but to vindicate his honour and reputation. According to the terms of settlement he was to get Rs. 500 as damages and Rs. 200 as costs and the defendants were to withdraw the statements made by them at the meeting of the Kelani Valley Planters' Association meeting on February 23, 1933, on pain of a penalty of a further sum of Rs. 1,000 each as damages if these statements were not withdrawn. These payments were to depend on the final decision of case No. 1,635, *i.e.*, if judgment was finally entered for plaintiff against Mr. Huntley, the terms above mentioned were to bind Messrs. Dunlop and Bentley-Buckle; but if plaintiff's action against Mr. Huntley was dismissed decree was to be entered dismissing plaintiff's actions Nos. 1,636 and 1,367 with Rs. 200 as costs.

There seems to be nothing unreasonable on the face of these settlements, in view of the fact that the plaintiff had already settled his case against Mr. Selwyn, under which settlement he withdrew his whole claim for damages and got nothing in respect of it, on Mr. Selwyn expressing regret and withdrawing his plea of truth in his answer and he was content with the sum of Rs. 250 as costs. Both Mr. Dunlop and Mr. Bentley-Buckle had withdrawn their pleas of truth and fair comment and had confined themselves to the one defence of privilege. They were to withdraw their statements made at the meeting on pain of paying a further penalty of Rs. 1,000 each. These terms were in keeping with the avowed intention of plaintiff that he was out not to make money but to vindicate his honour. There is nothing unreasonable in these terms being conditional on the result of 1,635; for if Mr. Huntley won his case it would mean that Mr. Huntley was justified on the facts in writing the letter complained of to the Director. Such a finding would have a serious effect on the result of cases Nos. 1,636 and 1,637.

I have considered the grounds put forward by the plaintiff in his affidavit to prove that he was taken by surprise and was put into fear by the action of the District Judge in drawing up the terms of the settlements in the circumstances set forth in his affidavit and I have no doubt in my mind that on these facts the plaintiff has not made out a

case of surprise or fear or pressure or all three combined which will justify me in setting aside the orders and sending the two cases Nos. 1,636 and 1,637 for trial.

According to the plaintiff's affidavit after the luncheon interval case 1,634 having been already settled the trial Judge inquired whether case 1,636 could not be settled and counsel for the defendant said that his clients in 1,636 and 1,637 were each prepared to pay Rs. 500 as damages and Rs. 100 as costs. The plaintiff was unwilling to accept this compromise owing to the inadequacy of the terms; upon which the Judge is said to have remarked: "Suppose I give Rs. 5 damages and costs in that class, what will you get". This could only mean that the Judge was referring to the uncertainty of litigation and that it was possible that the plaintiff might not get Rs. 500 as damages and might even get Rs. 5. The Judge was clearly referring to case No. 1,636 then before him and he could not have referred to case No. 1,635, which case had been put off for counsel's address at the time. But in the affidavit filed by the plaintiff he says he understood the Judge to refer to case No. 1,635 and that he regarded this as a threat of what the Judge intended to do in case No. 1,635 upon the result of which the terms of settlement in 1,636 and 1,637 were made to defend and that through fear of incurring the Judge's displeasure he reluctantly and unwillingly put his signature to the terms of settlement. This shows that far from there being any surprise in the matter of the settlement plaintiff deliberately put his signature to the terms of settlement in cases Nos. 1,636 and 1,637 in the hope that his willingness to settle these cases would put him in a favourable position in the estimation of the Judge when he came to deal with plaintiff's main claim against Mr. Huntley in case No. 1,635. As I have said the learned trial Judge could not have meant his remark about the Rs. 5 to be taken as a veiled threat regarding the fate of 1,635. He was only referring to the uncertainty of the result of a trial, when plaintiff's counsel commented on the inadequacy of the terms of settlement offered in 1,636 and 1,637. Plaintiff's affidavit shows that there was a discussion in Court between the counsel and the Judge and that it was the Judge who increased the costs from Rs. 100 to Rs. 200. The plaintiff remarked on the words "final decision" in the terms of the settlement and the Judge assured him that "final decision is final decision". The last note added to the terms of the settlement referred to by me, and apparently inserted at the request of the plaintiff also shows that there was a discussion of the terms. The plaintiff signed the terms in the presence of his lawyers and after consulting them. Ordinarily a Judge does not take part in the discussion of the terms of a settlement and the turn that these cases have taken shows the inadvisability of any such participation. But the immediate question I have to decide is whether these orders should be set aside on the two grounds alleged when they have been signed by the plaintiff on the advice of his lawyers on August 14, 1934, and when he allowed an interval of three months to elapse between August 14, 1934, and November 9, 1934, the date of his motion now before us, long after he had heard the result of case No. 1,635. It is true that he has filed supplementary affidavits after this matter came up before us, stating that he had asked his counsel to advise him

on the settlement orders, as he had been made to sign them by the pressure of the District Judge; but there is no affidavit from either Mr. R. L. Pereira, his senior counsel, or from Mr. Gnanaprakasam, his second advocate. It may be as stated by him that he consulted another advocate regarding the steps that should be taken to vacate the compromises, but the fact remains that he allowed an interval of nearly three months to elapse before these papers were filed. The long interval between the settlement orders and the filing of these papers affects seriously the position of the defendants in 1,636 and 1,637. If the plaintiff with his counsel near him was really in the position of being surprised and being forced to agree to a settlement which he would never have accepted, I cannot understand why a refusal to take part in the proposed settlement was not peremptorily conveyed to the Judge at the very beginning. But instead of doing this he showed unwillingness as the terms were inadequate and gradually further terms were added to those offered at the beginning. The real reason why he signed the orders was what I have indicated above, and his whole conduct was guided at the time by a consideration of the possible result of the compromise on case No. 1,635, which the Judge could never have had in mind. His own affidavit shows the mentality of the plaintiff and negatives the theory of surprise and pressure now put forward. The disingenuousness of his affidavit is shown by his entire omission to refer to the settlement of case No. 1,634.

I have not taken into consideration the affidavits put in by the defendants which give quite a different version of the incidents and in this view it is not necessary for me to inquire as to the truth or falsity of either version. It is also really not necessary for me to discuss the further questions of law argued before us as regards the jurisdiction of this Court to entertain this application, but as the point has been argued before us by counsel on both sides I think I should indicate briefly my own views on this question.

The application to set aside the order of settlement has been made in the alternative either by way of the revisionary powers of this Court or by way of *restitutio in integrum*. In my opinion this Court has the power to set aside the order either by way of restitution or revision, if good grounds are shown for the interference of this Court.

In *Voet, bk. IV., tit. 6, cl. 17 (Sampson's Trans. p. 105)* there is the following passage :—

> "Further if a particular judgment has been consented to by the parties to the suit, as it will not then be improper for the judge to decide according to the wish of the parties, without further hearing, so if the judgment is given by a Court of not supreme jurisdiction, there is no reason why restitution should not be allowed against it, if grave prejudice is shown to have been incurred by it. For if restitution is applicable against mutual agreements because of *laesio enormis,* and the authority of a matter decided by a judge of not supreme jurisdiction is not so great as to put a stop to relief by restitution should a just cause of restitution appear, even in cases in which the

judgment has been given after the fullest consideration; it follows that, whether we regard the agreement of the parties or the authority of a judgment, it cannot be said that restitution would in that case be inequitable. And it supports this, that appeals from such a judgment are nowadays allowed."

Mr. Perera quoted *Voet, bk. IV., tit. 1, cl. 26,* and argued that the only just grounds for restitution were fear, fraud, minority, &c., enumerated in the clause and that fear meant fear caused by present or future danger of a substanial evil which would exclude all notion of consent and vitiate the agreement *ab. initio.* He argued that if the fear was of a conditional nature, *i.e.,* some threatened harm, this did not exclude all notion of consent and made the agreement only voidable. He further quoted *Voet, bk. IV., tit. 2, cl. 11-14,* to show that the fear to be adequate must be of the first kind. I cannot agree with him that unless the fear is of the first kind we have no jurisdiction to entertain the application. For one thing there is the passage I have quoted above from *bk. IV., tit. 6, cl. 17,* which states that if it can be shown that grave prejudice had been incurred by a consent judgment of a Court of not supreme jurisdiction, there is no reason why restitution should not be allowed (*see* also *2 Kotze, p. 341*). According to *Voet, bk. IV., tit. 2, cl. 10,* all that is required is that the fear should be caused by something done illegally, even by a Magistrate. Supposing in this case it was proved that the Judge directly threatened to dismiss plaintiff's claim in 1,635 unless he signed the terms of settlement. Mr. Perera, further urged that surprise was not a valid ground for an application by way of restitution. Here too I cannot agree, for according to the passage from *Voet, bk. IV., tit. 6, cl. 17,* if grave prejudice has been caused to the applicant through any cause whatever, there is no reason why restitution should not be allowed. This point is, as pointed out by my brother, covered by the *obiter dictum* of Bertram C.J. in *Fernando v. Singhoris Appu* [1], in which he mentions any equitable ground such as mistake or surprise as being sufficient. The only difference between that case and the one before us is that here the petitioner alleged the conduct and act of the trial Judge himself as constituting the surprise which would entitle him to a rescission of the agreement.

I also agree with my brother that we have jurisdiction to hear an application of this kind by way of revision. Section 753 of the Civil Procedure Code gives very wide powers to the Supreme Court. Mr. Perera had to admit that if a Judge had recorded as a fact that he had forced the parties to enter into a settlement in the middle of a trial then this Court had the power to interfere. But does it lose that power if the Judge omitted to insert the sentence, although there is the strongest possible evidence to prove that the settlement was forced on the parties by the Judge? In support of his contention Mr. Perera went so far as to urge that we had no power to set aside an order which was *ex facie* good even when it could be proved that the Judge was induced to make that order from corrupt motives.

[1] 26 N. L. R. 469.

Section 90 of the Courts Ordinance gives the right to a party to an action to have his case transferred for trial before another Judge when the Judge who will ordinarily try the case is personally interested in the subject-matter of the action. A bribe offered to a Judge would bring him within section 90, for he would then be personally interested in the subject-matter of the action. In my opinion section 90 of the Courts Ordinance would also cover a mere personal bias as in *Regina v. The Justices of Cumberland*[1]. Suppose this interest was discovered after the determination of the case and it can be proved to have so existed at the time of the trial, has this Court no power to interfere by way of revision under section 753 of the Civil Procedure Code, when the application is made in revision within a reasonable time of the discovery? In my opinion the Supreme Court has the power. The fact that there is a dearth of authorities is due to the reason given by Voet that it is practically impossible to prove that a judgment was fraudulent in this sense (*Voet, bk. V., tit. 1, cl. 58*).

I also agree with my brother's interpretation of section 408 of the Civil Procedure Code. The plaintiff having failed to convince me on his affidavits that he signed the orders of settlement in cases Nos. 1,636 and 1,637 either through surprise or pressure or fear his application in the two cases, 1,636 and 1,637 will be dismissed with costs.

KOCH A.J.—

The application preferred by the applicant, who is the plaintiff in D. C. Avissawella, Nos. 1,636 and 1,637, comes up before us by way of revision or in the alternative by way of *restitutio in integrum* with a view to obtaining orders respectively setting aside two decrees entered in the said two cases. The facts are very fully and clearly set out by my brother and it is needless for me to recapitulate them.

The first point that arises on objection by respondent's counsel is, assuming for the purpose of argument that there were present surprise and pressure, whether we have jurisdiction to entertain this application.

Mr. Nadarajah relied on section 408 of the Civil Procedure Code and argued that before the Court can pass a decree in accordance with the agreement or compromise that purports to be entered into between the parties, there must first be a notification of it to the Court by motion, and after this has been done the Court must next satisfy itself that the agreement or compromise was lawful. He argued that pressure or surprise or both invalidate the agreement or compromise, and that therefore the Court would be acting wrongly in passing a decree thereon if these facts were brought to its notice. In the present case he submitted the Judge was himself in possession of the facts, and that in entering the decree the Judge acted wrongly and in contravention of that section and his act could therefore be reviewed by this Court.

On the other hand, it is contended by opposing counsel that the word "lawful" which qualifies the agreement or compromise contemplated in the section is not entitled to the latitude of meaning that has been put on it by the applicant. Its application must be confined to what appears on the face of the compromise, that is to say, the compromise on the face

[1] *58 Law Times 491.*

of it must not contain an obligation *contra bonos mores* or one that is impossible of performance or one that is absurd or nonsensical, and that it is not open to the Court to travel behind the terms of the compromise and inquire as to whether the compromise was entered into as the result of circumstances that in law may render the agreement or compromise voidable. If fraud was actually present, he argued, the position would be different as fraud vitiates a contrast *ipso jure* and there would therefore be no agreement in existence which the Court can be called upon to pass a decree on. Anything short of fraud will, generally speaking, render the agreement or compromise merely voidable and accordingly such cannot justifiably lead the Court to an inquiry before the decree is entered up.

The case of *Fernando v. Singhoris Appu*[1] was cited to us on this point by Mr. Nadarajah. The decision was on an application for *restitutio in integrum*. The facts were that on the trial date a settlement was arrived at between the proctor for the plaintiff on the one hand and the defendant on the other, and that the plaintiff's proctor in doing so acted in pursuance of the general authority conveyed by the proxy in his favour. The objection was that the proctor acted contrary to the instructions of his client. Sir Anton Bertram C.J. was of opinion that the objection could not be sustained, as the proctor having apparent authority to compromise, his client will be bound by a compromise effected under that apparent authority. The learned Chief Justice in his judgment in dealing with the position before the decree had been passed expressed himself thus, " To this there is only one exception—if the order, *i.e.*, the decree, has not in fact been drawn up, and if the Court is satisfied there is some equitable ground such as *mistake or surprise*, then the Court will not direct the order to be drawn up but will take steps to correct the mistake and restore the case to the list. In the present case no doubt the order has been drawn up, and if it could be shown that there was some mistake or other equitable ground for relief, the Court would be free to give it. But I am unable to see in this case that there has been established any such ground of relief ".

A further point was argued in that case and the observations of the Chief Justice on it are helpful. It was contended that no settlement was in fact arrived at. The form of the learned District Judge's note said, " The following settlement is ordered ". It was sought to put on this note the construction that the settlement was imposed on the parties by the Court. The Chief Justice was of opinion that the District Judge's words could not justly be so interpreted and that what the Judge really meant thereby was that a settlement being arrived at between the parties, an order was made in accordance therewith. Having come to this decision, he dismissed the application. The learned Chief Justice had the opportunity of clinching the matter on the ground of want of jurisdiction if that was his opinion, but far from doing so, the tenor of his observations rather points to the conclusion that had the settlement been actually imposed by the Judge in the first instance on the parties and a decree thereafter passed, the Supreme Court would have been disposed to accord relief. The principles of law affecting consent decrees are

[1] 26 N. L. R. 469.

set out in *Sinnetamby v. Nallatamby*[1], *Ponniahpillai v. Muttutamby*[2], *Silva v. Fonseka*[3], *and Wilding v. Sanderson*[4], and *restitutio* has been considered to be an appropriate remedy.

Mr. H. V. Perera, however, in his able argument went to the extremity —and he was compelled to go that length—of contending that however strong the compulsion or pressure or undue influence exercised by a Judge on parties in forcing them to a settlement even to the degree of a scandal, so he argued, such settlement must stand if an order was once passed on it and cannot be reviewed by this Court. There was no precedent or law, he maintained, in favour of a third party's conduct—in this case the Judge's—being made the matter of investigation and relief granted. The remedy he emphasized was to be found elsewhere, that is, either by an action for damages against the Judge or by his being punished departmentally. The order the Judge entered must stand and cannot by any manner of means be disturbed. In short, this Court had no jurisdiction to entertain an application based on this ground.

I cannot for a moment subscribe to this. To agree with Mr. Perera is to fetter the plenary and wide powers invested in this Court by sections 39 and 40 of Ordinance No. 1 of 1889, which deals with the Supreme Court and its powers and jurisdiction, and section 753 of the Civil Procedure Code which defines the powers of this Court in revision.

I quite admit that the Court passing the decree on a compromise is restrained to a certain extent in satisfying itself as to the lawfulness of the compromise. For instance, it cannot go into the question of the fairness of the compromise (*10 Cal. 612*), or whether the terms are one-sided and extremely favourable to one party only (*22 Bom. 238*), the reason being that circumstances such as these have nothing to do with the legality of the agreement or compromise, but it would be another matter where the actual validity of such an agreement or compromise was questioned.

It is true that according to the law of England an agreement tainted with fraud (which involves surprise) or duress (which embraces pressure) or undue influence (which chiefly applies to cases where fiduciary relations exist) is rendered not *ipso jure* void but only voidable—*Chitty on Contracts, 18 ed. (1930), 797, 802, 809, &c.*; but according to Roman-Dutch law by which we are governed, if fraud occasioned the contract, the contract was *ipso jure void—Voet, bk IV., tit. 3, s. 3.* In the case of duress, *i.e.*, compulsion under fear (*laesio*) or violence (*vis*) a distinction seems to have been drawn by Voet. If by duress was meant the exercise of absolute force against a person clearly unwilling, all notion of consent is excluded and the so-called contract is no contract at all, but if the force was of a conditional nature, *e.g.*, threatened harm, the opinion held is that the person does consent as he elects the lesser of two evils and chooses to do the thing required of him, in which case consent is not wanting and the contract is not *ipso jure* void but voidable (*Voet, bk. IV., tit. 2, ss. 1 and 2*).

[1] *7 N. L. R. 139.*
[2] *1 Times L. R. 232.*
[3] *23 N. L. R. 447.*
[4] *(1897) 2 Ch. 534.*

Grotius does not seem to differentiate between fraud and fear, and in the "Select Theses" by Van der Keessel on *Grotius' Introduction to Dutch Jurisprudence* it is stated in Art. DCCCLXXVII at page 296 that transactions are null and void as have been contracted in fraud (*dolus*) or fear (*laesio*).

Vander Linden (*Henry's Trans.*) in chapter XIV., section 2, sets out that contracts are invalid and not binding when consent is extorted by undue influence or fear or by deceit.

Van Leeuwen in his *Commentaries* (*Kotze's Trans.*) on pages 6 and 7 in the note, speaking of agreements occasioned by fear or force, declares as follows :—

> "How can we say a person does a voluntary act where the *ratio sufficiens* has not been left to his judgment but to that of the person who has compelled him? He who by fear or violence obtains the consent of another cannot acquire any right through such wrong, therefore promises so made expire of themselves".

Maasdorp (1907) in *bk. III., chap. 4, p. 64,* sets forth that fraud forms the very cause and groundwork of a contract whenever one of the parties has by the employment of fraud been induced to enter into a contract and but for such fraud would not have done so. Such a contract is *ipso jure* null and void and does not even require *restitutio in integrum,* but in respect of contracts extorted through fear, force, or violence these are not actually *ipso jure* null and void but are invalidated for want of free consent and restitution will be granted to set them aside (at page 68).

It will thus be seen that the safer opinion is that if fear or violence does not actually render a contract *ipso jure* void as in the case of fraud, these elements very nearly do so, so much so that I feel that a Judge would be justified in giving a liberal interpretation to the word "lawful" in section 408 of the Civil Procedure Code and in refusing to record the settlement or compromise or agreement, if he was satisfied that the same had been the outcome of fear or violence.

The next point is whether it makes a difference that the fear or surprise complained of was occasioned by a third party and not by the other contracting party. There seems to be very little doubt on this point. In Halsbury's *Laws of England* (*1st ed.*), *vol. VII., s. 738,* he says that a contract may be avoided on the ground of undue influence exercised by a third person provided the other party was aware at the time when the contract was entered into that such undue influence was exercised. The principle is the same whether it be fear, pressure, or violence.

In the matter before us it is common ground that whatever transpired to occasion the pressure or surprise did happen in Court on one and the same occasion and in the presence of parties, so that if the circumstances did actuate fear or surprise in the applicant they were facts known to the respondent immediately before or at the time the compromise was signed by the parties thereto. The circumstance that a presiding Judge was the third party can make no difference. The principle remains, and that is that relief will be granted to the aggrieved party if the facts and circumstances on which that relief was claimed were known to the other party at the time material.

The words "shall be notified to the Court" in section 408 must be given some significance and this would appear to be that the discussion of terms should be a matter left entirely to the parties, and when agreement and finality have been reached, it is then only that the Court should be apprised of the compromise. The participation of the Court in the discussion of the terms would appear to be deprecated.

It was strenuously argued to us by Mr. Perera that conduct on the part of the Judge as is complained of in this case cannot be listened to by this Court and his order revised as such conduct cannot be construed as an error in fact or in law. Now, whatever the view may be as to what a Judge says or does outside the precincts of the Court regarding a cause that is listed and comes up before him, whether for instance at his club or at a place of recreation, I am firmly of opinion that the position is different when his words and his acts have been expressed and committed in his judicial capacity while functioning as a tribunal on a Bench, and when the action in respect of which he has so acted is in his charge and under his control.

I put it to respondent's counsel that had the Judge recorded his utterances and acts, what then? He immediately sought to draw a difference between what formed a part of the record and what did not. I regret that I am unable to appreciate the suggested distinction. To do so is to place a premium on the perverseness of a Judge, for he can do manifest injustice to a party in a case before him by not recording his acts, and thus prevent the Court from interfering and remedying a miscarriage of justice. This Court has, when occasion demanded it, been prepared to permit an aggrieved party to supplement a record on a material point by affidavit or other means of proof, in case the recording Judge had wrongly failed to note the facts.

I do not however wish it to be understood that I am in sympathy with the argument that a Judge can say and do what he pleases in regard to a case that comes up before him for adjudication so long as such acts are committed by him when he is not actually functioning. There are grounds on which a Judge may be recused—among them private and personal animosity between Judge and party, malice, corruption, bribery, a direct expression of an opinion adverse or hostile to one of the parties in regard to the action in which the plea of recusation is made, &c. This plea can be taken before *litis contestatio*, and, in some cases such as malice or corruption, may be brought in before a Court having jurisdiction to review (*Nathan, vol. IV., ss. 1993-1995*).

I am therefore of opinion that it is within our jurisdiction to take cognizance of and inquire into such complaints.

The next point is whether the applicant has chosen his rightful legal remedy. The application is set up by way of *restitutio in integrum* or in the alternative by revision.

Voet in *bk. IV., tit. 2, s. 1,* says that the first ground for *restitutio in integrum* is fear, and in title 3, section 3, in dealing with fraud lays down that if this was the occasion of the contract, the contract was *ipso jure* void so that restitution was not necessary, implying thereby that if fraud

merely rendered the contract voidable, *restitutio* would lie. This position is clarified by him in *Book IV., title 1, section 26,* where he says that just grounds for restitution are fear, fraud, error, &c.

In the *Select Theses on Grotius,* at page 296 it is laid down that although fear or fraud vitiates a contract *ipso jure,* it is usual for greater security to apply for *restitutio in integrum,* a statement that is borne out to the letter by Voet in *bk. IV., tit. 1, s. 20,* where he says that *restitutio* is nowadays for the sake of extra caution sought against transaction which are *ipso jure* null and void.

Van Leeuwen in his *Commentaries in vol. II (2nd ed.), p. 338,* referring to obligations, says that where fraud, bad faith or impropriety exists, the debitor will have his remedy against it by restitution and will be restored, upon request to the supreme authority, to his former position.

The powers of this Court to act in revision are set out in section 40 of the Courts Ordinance, No. 1 of 1889, and section 753 of our Civil Procedure Code. Under section 40 of the Courts Ordinance this Court can " revise, correct, or modify any judgment or decree or order between and as regards the parties, or give directions to the Court below, or order a new trial or further hearing upon such terms as the Supreme Court shall think fit ". Under section 753 of the Civil Procedure Code the Supreme Court may call for and examine the record of any case, whether tried or pending trial, for the purpose of satisfying itself as to the *legality* or *propriety* of any judgment or order passed therein or as to the regularity of the proceedings of such Court, and may upon revision make any order which it may have made had the case been brought before it in due course of appeal. The appellate jurisdiction of this Court is extended by section 39 of the Courts Ordinance to the correction of all errors in fact or in law of the inferior Courts.

In *Ranasinghe and Henry*[1], Bonser C.J., being of opinion that no appeal lay from an order in a claim inquiry, dismissed the appeal, but finding that the order was wrong *ex facie,* he quashed the order in the exercise of revisionary power vested in the Supreme Court.

The same Judge during the hearing of an appeal in the matter of the *Insolvency of Kayman Thornhill*[2] discovered that the proceedings were conducted in a most perfunctory manner, and that there were a number of irregularities appearing in the record. He dismissed the appeal on the ground on which it was preferred and ordered that notice should be given to the parties that the case would be brought up in revision. In dealing with the matter when it was duly up before him he said, " There is no doubt whatever that this Court has the power of revising the proceedings of all inferior courts, and that it should have such a jurisdiction is most necessary. The object at which this Court aims in exercising its power of revision is the *due administration of justice* ". Withers J. entirely concurred.

Dalton J. in the case of *Kannangara v. Silva*[3], referring to the revisionary powers of this Court, said that " the power given by section 40 of the

[1] *1 N. L. R. 303.* [2] *2 N. L. R. 105.*

[3] *(1933) 13 Cey. Law Rec. 10 at p. 14.*

Courts Ordinance and by section 753 of the Civil Procedure Code is very wide, and there is no hard and fast rule governing the exercise of that power ".

Garvin J. in the very recent case of *Pieris v. Silva*[1], although he felt that it was *by no means clear* that the correct procedure was not to appeal to this Court, observed that it seemed to him that there were instances in which this Court had interfered with orders of the nature of that before them. He accordingly acting in revision set aside the order of the District Court.

Nathan in *vol. IV., s. 1997,* lays down that it is the duty of a Judge in deciding cases to act in accordance with the law. This must be obviously so, and if a Judge contravenes the law or acts improperly, there can be no doubt that this Court can exercise its powers by way of revision and grant relief to the party aggrieved in appropriate cases, and particularly so when the party concerned has no right of appeal as in this case.

I am of opinion therefore that it is the duty of the Court before passing a decree under section 408 of the Civil Procedure Code to satisfy itself as to the legality of the agreement contemplated in that section, where that legality is questioned on grounds such as fraud, fear, mistake, surprise, &c., and if not satisfied, should refuse to enter an order, but if the Judge wrongly does pass a decree, this Court has jurisdiction to entertain an application to have that decree set aside or altered or modified according to circumstances both by virtue of its power to grant restitution as well as to act by way of revision, and the fact that the equitable ground upon which relief is sought is directed against the Judge who passed the decree will not alter the position.

Finally, there remains the question whether the incidents of August 14, 1934, material to this application, and which preceded the signing of the settlement, are sufficient to warrant our holding that the compromise recorded was either void or avoided by the alleged conduct of the learned Judge, or that by reason of the said conduct the decree came to be improperly passed.

I entirely agree with my brother for the reasons stated by him that we are not satisfied that the applicant appended his signature to the memorandum of settlement as the result of coercion or pressure brought to bear on him by the presiding Judge, and that in doing so the applicant acted under fear. The affidavit of Mr. Dunlop traverses the more important allegations of the applicant on this point and is definite that no pressure whatsoever was exercised by the Judge, but apart from this it would appear from the averments of the applicant himself and those of his Proctor and others present that the applicant was represented by counsel, who after discussion as to the terms of the settlement was in favour of the final terms set out in the memorandum being accepted. He himself desired the insertion of a paragraph on the express wish of his client that the settlement was agreed to as his client did not bring the action with a view to enrich himself but to vindicate his honour and reputation, and advised his client that it would be best to agree to the

[1] (1934) 12 Ceylon Times Law Rep., p. 2.

compromise under the persuasion that " he should not displease the Judge ". I am satisfied that—though possibily with reluctance—the applicant did in law willingly sign the settlement in question actuated perhaps by considerations of tact and policy.

This case conspicuously manifests the danger of Judges participating in the discussion of terms of settlement and taking too active a part in seeking to bring about a compromise. The terms of settlement should be left entirely to the parties and their legal advisers who know best, or else there always will remain the possibility of remarks or observations coming from the Judge in the course of the discussion being misunderstood and wrong interpretations put thereon.

I think the application should be dismissed with costs.

Application refused.