1922.

Present : Bertram C.J. and De Sampayo J.

ORR *et al. v.* GUNATILLEKE *et al.*

D. C. Ratnapura, 3,229.

Restitutio in integrum—*Settlement—Proctor acting contrary to instructions—Relief given by Supreme Court directed without sending case to District Judge for investigation into allegations in application.*

Where a proctor, acting contrary to the instructions of his client, consented to certain terms of settlement, the Supreme Court granted relief by way of *restitutio in integrum*.

The Supreme Court being satisfied that the proctor acted contrary to instructions gave direct relief without directing the District Judge to investigate the question.

THE facts appear from the judgment.

R. L. Pereira, in support.

E. W. Jayawardene (with him *Wijemanne*), for the respondents.

January 20, 1922. BERTRAM C.J.—

This is an application to this Court for *restitutio in integrum* based upon the principles laid down in the case of *Sinnatamby v. Nallatamby*.[1] The action was for a breach of agreement of a lease, and the breach complained of was that the defendants, who were lessees of a tea garden, had not weeded, pruned, and otherwise maintained the tea on the estate in accordance with the agreement. Rs. 2,000 damages were claimed, and further Rs. 500 per mensem until the agreement was complied with. A settlement of the action was arrived at in pursuance of a letter written by Miss Orr, one of the defendants. Miss Orr's intention was this : That the action should be laid aside, that is to say, suspended, and that she should undertake to give up the estate duty weeded and cleaned on the expiration of the lease. Unfortunately, through a mistake of the proctor who was advising her at Kalutara, where she resided, the date on which the estate was to be delivered up was fixed at April 11, 1920; whereas the lease did not expire until April 11, 1921. This letter was addressed to her proctor at Ratnapura, and he proceeded to effect a settlement on the basis of that letter. Had he carefully scrutinized the letter, he would have seen from the other expressions which she used that the date was a mistaken date. But he did not realize that fact, and proceeded to a settlement on the basis of the date given. But he went further. Miss Orr had spoken of the action

[1] *(1903) 7 N. L. R. 139.*

being laid aside. He proceeded to agree that if the estate were not delivered up on April 11, 1920, his client was willing to pay the damages claimed on the plaint. These damages were penal. They involve the payment of Rs. 500 per month. Miss Orr never contemplated anything of the kind, and I find it difficult to believe that if she had contemplated it, she would have consented to it. It is quite true that the point on which she mainly insists has been the mistake of date. But it was not so much the mistake of date which impelled her to appeal to this Court, as the fact that she had been placed under an obligation to pay those very heavy damages. A mistake in procedure was made, inasmuch as she instituted an appeal in the action instead of applying to this Court for *restitutio in integrum*. I need not go into the question of those proceedings. What we have to decide here is whether she is entitled to any remedy in the proceedings that are now before us. The law as to the circumstances under which a Court will set aside a consent judgment entered up by a mistake, where the mistake is unilateral, is discussed in the case of *Wilding v. Sanderson* [1] and other authorities that may be found in the additional notes to the *Annual Practice, 1921, pages 1910-11*. I need not, however, discuss the question whether when a settlement is entered into by a proctor in pursuance of express instructions in writing by his client, and it is afterwards discovered that the client in drawing up those instructions has made a mistake, a consent judgment so entered can be set aside. It is the other point in the case which seems to me to be more important.

It is conceded that, if a consent judgment is entered up contrary to the express instructions of the client, that judgment can be set aside. Now, in this case, Miss Orr had clearly defined her instructions. In consenting to the penal damages claimed in the plaint, her proctor, it seems to me, was going contrary to those express instructions, and this, I think, is a sufficient ground for giving her the relief prayed for.

Mr. E. W. Jayawardene assures that, if the matter is fully investigated, the damages which have been spoken of as penal would prove to be much less than those which he would be entitled to claim. That may or may not be the case. All I think that is necessary to decide in this case is that the settlement was contrary to the instructions of his client. I do not think that in this case it would be necessary to remit the matter for inquiry to the District Judge. If it had been seriously contended that both parties contracted on the supposition that the lease expired on April 11, 1920, that might be a matter for inquiry by the District Judge. But, from the evidence before us, it would hardly seem worth while to investigate that question. Nor would it be necessary to investigate the question whether Miss Orr did make a mistake about the date. The learned Judge has already found that as a fact, and, moreover, we

[1] *(1897) 2 Chan. 534.*

1922.

BERTRAM C.J.

Orr v. Gunatilleke

are not deciding the case on that ground. Nor need we direct the learned Judge to investigate the question whether, in consenting to the damages prayed for, the proctor was acting contrary to the instructions of his client, because we have formed the opinion here that this was in fact the case. I think, therefore, that we should give direct relief, and should set aside the judgment entered up in this case, and direct the case to proceed in the ordinary course from the point at which the supposed settlement was arrived at. The application in this Court should, in my opinion, be allowed without costs.

DE SAMPAYO J.—I agree.

Set aside.