1959 *Present :* **Weerasooriya, J.**

UKKU AMMA, Appellant, *and* PARAMANATHAN *et al.*, Respondents

S. C. 34—C. R. Matale, 13077

Compromise of action—Procedure—Civil Procedure Code, ss. 91, 408.

Where, in a purported settlement of a case, not only were the provisions of sections 408 and 91 of the Civil Procedure Code as to notification to Court by motion not complied with, but there was nothing on the record to show at whose instance the settlement was arrived at—

Held, that the decree entered in terms of the settlement should be vacated.

APPEAL from an order of the Court of Requests, Matale.

Vernon Jonklaas, for the plaintiff-appellant.

T. B. Dissanayake, with *A. H. Moomin*, for defendants-respondents.

Cur. adv. vult.

November 27, 1959. WEERASOORIYA, J.—

The plaintiff-appellant is the present owner of all that northern portion depicted as Lot A in partition plan No. 23/1931, filed of record, and also of the eastern half of the house standing on the southern portion depicted as Lot B in the same plan. She has filed this action against the defendants-respondents for a definition of the boundary between lots A and B alleging that the defendants (of whom the 2nd defendant is admittedly entitled to lot B) had encroached on a portion of lot A and on the portion of the said house belonging to her.

After the issues had been framed the trial was adjourned for the 6th May, 1958. The proceedings on that date show an entry made by the Commissioner " case settled ", and below that appears in his handwriting

the terms of the purported settlement. The present appeal is from the order of the Commissioner dismissing the plaintiff's subsequent application to have the settlement set aside and the trial proceeded with.

The terms of settlement as recorded by the Commissioner are as follows :

"The boundary between the Plaintiff's and Defendant's land to be the existing live fence marked in Plan No. 384 filed of record, up to the enderu tree on that fence. From that enderu tree the boundary to go up to the eastern corner of the southern phase of the well. The southern phase (which is 6 feet 10 inches) (of the well) also will be a boundary. Then from the western corner of the southern phase of the well, a line 18 feet in length up to the existing live fence and providing an opening of 12 feet. Then along the live fence, and then the wire fence marked as the southern boundary of lot 3, on that side.

Then on the western side, the southern boundary of lot 2 and western boundary of lot F. (Lot F thus goes to Plaintiff.)

The Defendants to be entitled to erect a step to the southern phase of the well at their expense and to use the well in common.

Re building in the same plan.

A & B to the Plaintiff.

C. D & G to the Defendants.

The present temporary partition between B & C to be demolished and a wall in brick and lime to be erected by Defendants at his (sic) own expense.

A plan on these lines to be prepared by Mr. Samarasinghe at joint expense."

Plan No. 384 which is mentioned in the above terms of settlement was prepared on the 6th February, 1958, for the purpose of this action, and shows certain existing encroachments, not only on lot A, but also on lot B, in plan No. 23/1931. After the settlement was recorded, plan No. 384A dated the 2nd August, 1958, was prepared which purports to show the respective portions of lots A and B and of the house allotted to the plaintiff and the defendants under the settlement and, on the order of the Commissioner, decree was entered in terms of the settlement and plan No. 384A.

The plaintiff has stated in her petition of appeal that she did not consent to the settlement of the 6th May, 1958. According to the journal entry of that date the plaintiff was represented by a proctor and the defendants by counsel instructed by a proctor. There is nothing to indicate that the parties themselves were present.

Although it was held in *Fernando v. Singoris Appu* [1] that a proctor can under the general authority of his proxy enter into a compromise which is binding on his client, it would appear from the observations of Soertsz, J., in *Punchibanda v. Punchibanda et al.*[2] that this Court has more

[1] *(1924) 26 N. L. R. 469.* [2] *(1941) 42 N. L. R. 382.*

than once indicated the desirability of settlements, adjustments and admissions that are reached or made being explained clearly to the parties and their signatures or thumb impressions obtained. This procedure was not followed in the present case. Having regard to the involved nature of the terms in the first two paragraphs of the settlement, as recorded, I have grave doubts whether the plaintiff would have understood the settlement even if it had previously been put to her. The first paragraph refers to an enderu tree on a live fence marked in plan No. 384, but no such tree is shown in the live fence depicted in that plan. It is not clear even from the subsequent plan No. 384A whether there is such a tree.

Section 408 of the Civil Procedure Code provides that an agreement or compromise shall be notified to Court by motion. Under section 91, where the motion is by the advocate or proctor for a party, a memorandum in writing of such motion is required to be at the same time delivered to Court. Not only have these provisions not been complied with, but there is nothing in the record to show at whose instance the settlement was arrived at.

In these circumstances I would allow the appeal of the plaintiff with costs. The decree entered in terms of the settlement is vacated and the case will be sent back for the trial to be proceeded with according to law. All costs so far incurred in the Court below will be costs in the cause. This order will not, however, preclude the parties from arriving at any lawful adjustment or compromise of the action, if they so desire, and notifying the same to Court in terms of section 408 of the Civil Procedure Code.

Decree vacated.