1960 *Present :* **Basnayake, C.J., K. D. de Silva, J., and Sansoni, J.**

CORNELIUS PERERA and others, Appellants, *and* LEO PERERA, Respondent

S. C. 103, with Application 346—D. C. Panadura, 2808

*Compromise of action—Consent order—Agreement caused by mistake of fact—"Mistake" —Appeal—*Restitutio in integrum*—Civil Procedure Code, ss. 91, 408.*

In an action for a right of cartway across the defendants' lands, one of the contesting defendants (the 6th defendant) stated that a right of way to the plaintiff's land traversed across one D's land (lot 162). In cross-examination he denied that lot 162 was fully built on and persisted in asserting that it was a vacant land. After challenge and counter challenge were thrown out by the respective Counsel as to the correctness of the statement, it was agreed between the parties that if, on inspection by Court, the 6th defendant could not satisfy Court *inter alia* that lot 162 was a vacant land, judgment should be entered in favour of the plaintiff. On the next day, when the District Judge inspected the land, Counsel for the 6th defendant stated that the 6th defendant had made a mistake of fact in stating that lot 162 was a vacant land. The fact that the 6th defendant was mistaken was beyond question. He therefore sought to resile from the terms of agreement entered into on the previous day. The Court refused the application and entered judgment in terms of the consent order.

Held, that, on the ground of mistake, the consent order and the judgment based on it should be set aside.

Quaere, whether, in such a case, the remedy of the aggrieved party is by way of appeal or by way of an application for *restitutio in integrum ?*

APPEAL, with application for *restitutio in integrum*, from a judgment of the District Court, Panadura.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke, L. C. Seneviratne* and *H. E. P. Cooray*, for 6th, 7th and 8th Defendants-Appellants in the Appeal and for 6th, 7th and 8th Defendants-Petitioners in the Application.

N. K. Choksy, Q.C., with *D. C. W. Wickremasekera*, for Plaintiff-Respondent in both the Appeal and the Application.

D. R. P. Goonetilleke, for 1st and 2nd Defendants-Respondents in both the Appeal and the Application.

C. D. S. Siriwardene, with *A. A. de Silva*, for 4th and 5th Defendants-Respondents in both the Appeal and the Application.

Cecil de S. Wijeratne, with *J. V. M. Fernando* and *A. A. de Silva*, for 9th Defendant-Respondent in both the Appeal and the Application.

Cur. adv. vult.

December 19, 1960. BASNAYAKE, C.J.—

This is an action for a right of cartway. The plaintiff sued the eight defendants for a declaration that he was entitled to a cartway over the lands described in paragraphs 4 to 9 and 9*a* of the amended plaint filed on 20th April 1956, for damages, and for ejectment. He also prayed a right of cart way of necessity in the event of the Court holding that he was not entitled to a cartway by right of user. Although there were eight defendants the action was fought by the plaintiff on the one hand and the 6th and 8th defendants on the other.

In the course of his evidence the 6th defendant said—

"... I say that there is no right of way over my land to the pltff's land. The land between the pltff's land and the duplication road belongs to Mrs. P. C. H. Dias. That land is not built upon. It is possible conveniently to have a roadway along the northern or southern boundaries of Mrs. P. C. H. Dias's land to lead to the pltff's land. I know Mr. Karunaratne's land. Mr. Karunaratne's land is to the south and abuts the plaintiff's land. There is a house built on this land. I have been to the pltff's land through Mr. Karunaratne's land. There was a roadway leading to Mr. Karunaratne's house."

In the course of his cross-examination plaintiff's counsel showed him town plan 1D4 and in answer to his questions the 6th defendant said—

". . . . This is a town Plan. Lot 164 in this plan is pltff's land. It is lots 162 and 163 in this plan that belong to Mrs. P. C. H. Dias. I cannot say whose land lot 161 is. That lot is immediately to the north of lots 162 and 163. I deny that lot 162 belongs to Mr. Dunstan Cooray. I state that it belongs to Mrs. P. C. H. Dias.

Q : I put it to you that lot 162 is fully built on ?

A : No. It is vacant land.

If one goes there even today he can see this land. I know Dr. Cooray's house. Dr. Cooray's house is at the junction of the duplication road and the 5th Cross Street. That is what is shown as 116 in 1D4. "

In answer to the Judge the 6th defendant said—

". . . . I still say that the two blocks of land which adjoins the pltff's land on its east is vacant land. That is the two blocks between the duplication road and the pltff's land. My mother was living in Colombo at the time the case was filed against her by Mr. C. E. A. Perera. She has been living in Colombo since 1914. I say that a 10 foot road can be given from the duplication road over the two vacant blocks of land I spoke of to the pltff's land. "

At this stage the counsel for the plaintiff challenged the 6th defendant to point out a 10 foot roadway which can run over the two vacant blocks on the land immediately to the east of the plaintiff's land and between the plaintiff's land and the duplication road. He stated that he was willing to have his action dismissed if such a road is pointed out. Counsel for the 6th and 8th defendants stated that he was unable to accept the challenge as only one of his clients was present in Court. This incident occurred before the luncheon adjournment. When the Court resumed after lunch counsel for the 6th and 8th defendants stated that he had consulted his clients and that he was willing to accept the challenge of the plaintiff made by his counsel. Then plaintiff's counsel stated that his challenge was in respect of lots 162 and 163 and if the defendant can point out a 8-10 foot cart road over those lots he was willing to stand by his challenge. He added however that the road to be pointed out must be reasonably straight and it must not run through buildings or parapet walls.

Counsel for the 6th and 8th defendants stated that he was willing to accept even that challenge. He stated that he would point out a 8-10 foot road running over lots 162 and 163 to the plaintiff's land which is reasonably straight. Thereupon the District Judge made the following record :—

" It is agreed between the parties that the 6th deft. will point out a 8-10 foot road from the duplication road to the pltff's land on lots 162 and 163 in plan 1D4.

It is agreed that the Court should decide whether the said road is reasonably straight. It is also agreed that the road to be pointed out must not run through parapet walls or buildings.

It is further agreed that if the 6th defendant points out such a road and the Court considers that it is reasonably straight, then the pltff's action is to be dismissed with costs.

If, however, the 6th defendant is unable to point out such a road or point out a road which does not entirely fall on lots 162 and 163 or which is not in the opinion of the Court reasonably straight, then judgment should be entered for the pltff declaring him entitled to a roadway 8 feet wide along Z L M C B A N O in plan marked P1 without payment of any compensation and with costs to the pltff against 1, 2 and 6-8 defendants.

It is also agreed that the Court should inspect the 8-10 foot road that will be pointed out by the 6th defendant. If the Court is unable to decide whether the said road way falls within lots 162 and 163 it is further agreed that this Court should avail itself of the assistance of Mr. J. M. R. Fernando, Surveyor, in arriving at a decision on that point.

.. ..

The 6th and 9th defendants are present. The terms are explained to the parties and they agree to the terms.

Inspection tomorrow at 9.30 a.m. "

On the following day when the District Judge inspected the land counsel for the plaintiff and counsel for the 1st, 2nd, 6th, 7th, 8th and 9th defendants were present instructed by their respective Proctors. The plaintiff and the 1st and 6th defendants were present. The following record was made by the District Judge :—

" Mr. Adv. Goonetilleke wants it noted that the 7th and 8th defts were contacted by Mr. D. R. de Silva his Proctor during the luncheon interval yesterday afternoon after the first challenge by the pltff was recorded. He states that the 7th and 8th defts had no notice of the challenge made in the afternoon after the challenge of the morning was accepted, after the luncheon interval.

Mr. Adv. Goonetilleke states that the 6th deft accepted the challenge by a mistake of fact, the mistake of fact being that the vacant land between the duplication road and the pltff's land was comprised of lots 162 and 163 and that he now suspects that the vacant land between the duplication road and the pltff's land is not lots 162 and 163 although he was led to believe that it was so by the pltff.

Mr. Adv. Goonetilleke therefore states that his clients want to resile from the terms of agreement entered into yesterday."

Upon this the learned Judge made the following order :—

" I am not at all satisfied with the explanation given by learned Counsel for resiling from the agreement. The terms of settlement were explained to the parties in detail by Court and they understood very accurately the nature of the terms.

The 7th and 8th defendants were represented by their Proctor Mr. D. R. de Silva who was instructing Counsel Mr. Adv. T. P. P. Goonetilleke who appeared for them.

Agreement was entered into by Mr. Adv. T. P. P. Goonetilleke on behalf of the defts he represented. I therefore hold that all the defts whom Mr. Adv. Goonetilleke represented are bound by the agreement entered into yesterday.

I call upon the 6th deft to point out the 8-10 foot roadway on lots 162 and 163 running to the pltff's land from the duplication road as agreed by him yesterday. He states that he is not taking part in the inspection in view of the statement made by his counsel earlier. He does not point out any roadway to me.

Mr. Adv. Perera states that the defts are not entitled to resile from the agreement entered into yesterday, and they have failed to point out the road. He moves that judgment be entered according to the consent order of yesterday.

Documents to be filed by all parties before the 13th. Judgment on 14.3.57. "

On that day the District Judge pronounced judgment declaring the plaintiff entitled to a right of cartway 8 feet wide along the track Z L M C B A N O in plan No. 688 marked P1 over the defendants' land without payment of any compensation. He also directed the 1st, 2nd, and 6th-8th defendants to pay the plaintiff the costs of the action.

That the 6th defendant was mistaken when he said he could point out a roadway 8-10 feet wide from the duplication road to the plaintiff's land over lots 162 and 163 in plan 1D4 is beyond question. Must he suffer for that mistake ? I think not.

It is contended that he is bound by his mistake and cannot resile from it even after it became evident that he consented to have his action dismissed on a mistaken impression that lot 162 was a land without

buildings. I am unable to assent to so unreasonable a proposition. Although it is generally recognised that in litigation there is an element of chance I cannot bring myself to think that it is so much a matter of chance as to come within the realm of betting or wagering, for what happened in this case savours of it. Challenge and counter challenge was thrown out by the respective counsel each confident of the correctness of his assertion of a factual situation which was easily verifiable and was in fact verified when the Judge inspected the allotment over which the 6th defendant asserted and the plaintiff's counsel denied that a cartway could be demarcated.

A Court of law is the forum for the determination of disputes by a Judge upon evidence and not upon challenge and counter challenge. The Civil Procedure Code makes no provision for what happened in this case. Decision of a cause in the way in which this action was decided is utterly foreign to our Code and I know of no system of Civil Procedure in which such a procedure finds acceptance.

The expression " mistake " is too well known to need a definition but I think it would be useful to indicate its scope in law and I think the best way of doing it would be to quote Story's definition of it which has stood the test of time. It runs thus :

> " This (mistake) is sometimes the result of accident, in its large sense ; but, as contradistinguished from it, it is some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence. "

Mistakes are for the purpose of deciding their legal consequences divided into two classes—mistakes of law and mistakes of fact. The former class of mistakes need not be referred to here as the question for decision relates to a mistake of fact. It is accepted on all hands that a Court in the exercise of its equitable Jurisdiction will, where a mistake of fact calls for it, grant relief. To my mind the instant case falls into that category of cases in which a Court would grant relief especially when the relief is sought by way of appeal.

An appeal is not barred in the instant case because in my view the decree is not one passed under section 408 of the Civil Procedure Code which provides that a decree passed thereunder is final. That section provides :

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

The procedure adopted here as already observed does not satisfy the requirements of section 408 and even if the consent given by counsel for the 6th and 8th defendants had not been vitiated by a mistake of fact the decree entered in terms of an arrangement such as we have here will not attract the finality given to decrees passed under section 408. Where a statute provides special machinery which if resorted to renders a decree final, the finality prescribed in the Act does not attach to a decree unless there is a clear manifestation of a conscious intention of the parties to resort to that machinery with a knowledge of the consequences it involves and there has been a strict compliance with the requirements of the statute. Here there was not even an attempt to comply with the requirements of section 408. The Code (s. 91) requires that a memorandum in writing of every motion should be delivered to the Court at the time it is made by pleader or counsel. No such writing has been tendered by counsel, nor is it clear from the record that the parties gave their mind to every part of what has been recorded by the trial Judge especially the words—

> " If, however, the 6th defendant is unable to point out such a road or point out a road which does not entirely fall on lots 162 and 163 or which is not in the opinion of the Court reasonably straight, then judgment should be entered for the pltff declaring him entitled to a roadway 8 feet wide along Z L M C B A N O in plan marked P1 without payment of any compensation and with costs to the pltff against 1, 2 and 6-8 defendants. "

In this connexion the following opinion expressed by Burnside C.J. in *Phillippu v. Ferdinands*[1] is relevant :—

> " And I should hold that any admission which might be made for the defendants attempting to bind them to their manifest prejudice in the very essence of the defence on their pleadings and contrary to their contention on their evidence would not bind them without shewing that they had expressly authorized their counsel to make it and with a full knowledge of its effect. "

It is not necessary to discuss the cases cited by learned counsel as no case which directly affects the question involved on this appeal has been referred to, nor is it necessary to discuss the submissions made by learned counsel on the subject of an advocate's authority to effect a compromise in the course of an action.

Decisions on mistake in the law of contract are of little assistance in the decision of a question such as we have before us.

For the reasons stated above I set aside the judgment and decree and direct that a trial *de novo* be held.

The appellants are entitled to costs both here and below.

K. D. DE SILVA, J.—I agree.

[1] *(1892) 1 Matara Cases 207 at 210.*

SANSONI, J.—

There is an appeal by the 6th to 8th defendants and there is also an application for *restitutio in integrum* filed by them. Both were heard together. Since the judgment entered by the District Judge followed upon an agreement entered into between Counsel appearing for the respective parties, I would hold that no appeal lies either from that judgment or from the order refusing to allow the appellants to resile from their agreement. Their proper remedy is an application for *restitutio in integrum*.

The plaintiff filed an answering affidavit in the application for *restitutio*, in paragraphs 3 and 4 of which he refers to the 6th defendant's evidence given at the trial; the 6th defendant described the two lots between the plaintiff's land and High Street, as shown in the Town Survey Plan 1D4, as vacant lots and said that the plaintiff could easily get a right of way over those two lots. There is no doubt, and I do not think Mr. Choksy contested that position, that the plaintiff all along knew that of those two lots, lot 163 was vacant land, but lot 162 was entirely built upon; the plaintiff therefore knew that it was not possible to have a roadway over lot 162. This position, as the plaintiff says in his affidavit, was specifically put to the 6th defendant in cross-examination, but the 6th defendant persisted in stating that lot 162 was vacant land.

Thus it is abundantly clear that the agreement into which the parties entered through their counsel was the result, so far as the 6th to 8th defendants are concerned, of a mistake made by the 6th defendant in thinking that lot 162 was vacant land. His counsel, no doubt on the 6th defendant's instructions, and acting on behalf of the 7th and 8th defendants also, was influenced by the same mistake. The main question that arises for decision is whether the 6th to 8th defendants are entitled to have the agreement set aside because of that mistake.

Now the Roman Dutch Law enables a person to avoid an agreement for mistake on his part when the mistake is an essential and reasonable one. It must be essential in the sense that there was a mistake as to the person with whom he was dealing (*error in persona*) or as to the nature or subject matter of the transaction (*error in negotio, error in corpore*). A mistake in regard to incidental matters is not enough. The test of reasonableness is satisfied if the person shows either (1) that the error was induced by the fraudulent or innocent misrepresentation of the other party, or (2) that the other party knew, or a reasonable person should have known, that a mistake was being made, or (3) that the mistake was, in all the circumstances, excusable (*Justus et probabilis error*) even where there was absence of misrepresentation or knowledge on the part of the other party. An agreement entered into in the course of an action, like any other agreement, may be set aside on these grounds.

In the present case the mistake made by the 6th defendant and counsel appearing for the 6th to 8th defendants is with regard to an essential matter. They were mistaken in regard to the location of the particular

lots over which the road was to run, and as to whether those lots were vacant or built upon. Has the test of reasonableness also been satisfied ? I think it has, and I think the case falls within the second of the three categories of reasonableness which I have just set out. This is a case where the plaintiff knew that the 6th defendant and his counsel were labouring under a mistake as to the true situation and the nature of the land over which the proposed road was to run. Mr. Choksy urged that the 6th defendant persisted in his mistake after his attention was repeatedly drawn to the correct position. That would have been a sufficient answer if the 6th defendant's plea had been that his mistake was excusable, or in other words fell within the third category of reasonableness. In such a case negligence or persistent disregard of the means of knowledge disqualifies the party from pleading *justus error*, but it is different where one party is mistaken and the other party knows that he is mistaken. Such knowledge is decisive and makes all the difference, because in a case like that the party who knows the true state of facts knows also that his intention is different from that of the mistaken party, and no agreement of minds is possible in such a situation.

The law therefore allows the mistaken party to claim that the contract is void *ab initio* because there was no *consensus* on the terms of the contract. In such a case there is a radical variance between the offer and the acceptance. The reason is set out in the following passage from the judgment of Hannen, J. in *Smith v. Hughes*[1] : " The promisor is not bound to fulfil a promise in a sense in which the promisee knew at the time the promisor did not intend it . . . . if by any means he knows that there was no real agreement between him and the promisor, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promisor did not assent. " This case is cited by Wessels in his Law of Contract in South Africa (2nd Edition) Vol. I, Section 911. A South African case frequently cited in this connection is *Logan v. Beit* [2], the headnote of which reads : " Where the terms of a contract are unambiguous, one of the contracting parties is not entitled to restitution on the ground that he misapprehended its meaning, in the absence of proof that the other contracting party knew, or had reason to know, at the time of the contract that he was so misapprehending it. " Lee and Honore in *The South African Law of Obligations*, section 40, having referred to this case, make the comment that if there was or should have been such knowledge on the part of the other contracting party, the absence of *justus error*, that is, a mistake that is reasonable and justifiable, makes no difference. Another case where a Court granted relief, imputing to the offeree knowledge of the mistake made by the offeror, is *Webster v. Cecil* [3]. There Cecil, who had already refused to sell his land to Webster for £2,000, wrote a letter offering it to him for £1,250. Webster accepted by return of post and Cecil immediately gave him notice that he had mistakenly written £1,250 for £2,250. The Court

[1] *(1871) 6 Q.B. 597.* [2] *(1890) 7 S C. 197.*

[3] *(1861) 30 Beav. 62.*

set aside the contract. Wessels cites this case in section 975 for the proposition: "If the mistake was known to the other party or if a reasonable man would have detected the mistake, it would be *dolus* to insist upon the contract being carried out with the error."

There is, in fact, no difference between English Law and Roman Dutch Law on this matter. Cheshire and Fifoot in the Law of Contract (4th Edition, page 173) call this particular type of mistake 'unilateral', where one only of the parties is mistaken and the other party knows or must be taken to know that the first party is mistaken. In such a case the judicial approach to the problem is subjective, in that the innocent party is allowed to prove the effect upon his mind of the error in order to avoid its consequences. The distinguishing feature of a case of unilateral mistake is that only one party is mistaken and the mistake of that party is known, or ought to be known, to the other. The party which knows of the mistake in such a case knows also that there is a complete lack of agreement and, therefore, cannot maintain that there is a contract such as there would have been if the objective test had been applied. The knowledge of the error is decisive and makes it impossible to apply the objective test of intention, which is the test applied where the parties misunderstand each other and both are mistaken without either being aware of any mistake. That type of mistake is termed "mutual".

The next question that arises is whether the agreement of the 6th to 8th defendants' counsel to the terms of the settlement, binds the 6th to 8th defendants. For the reasons I have already given I would hold that this is not a case where the 6th to 8th defendants should be bound by the agreement made by their counsel. The mistake of the 6th defendant being known to the plaintiff, the settlement entered into by their respective counsel derives no validity from the mere fact that their counsel agreed to the terms. This Court has ample powers to give relief by setting aside a judgment which has been entered upon an agreement based on mistake. No Court will lend its authority to compel observance of an agreement so arrived at. I see nothing irregular or objectionable in the agreement itself. It is a common and well-established method of solving a dispute such as arose in this case. The District Judge, however, had no power to set aside the agreement entered into, and the appeal filed against his judgment entered in terms of the agreement was misconceived. It is unnecessary, in the view I have formed of the situation arising from the mistake made by 6th to 8th defendants' counsel, to consider the arguments addressed to us on section 408 of the Code. I reserve my opinion on the interpretation of that section. I would only add that I am not prepared to whittle down the powers of counsel to enter into settlements. It has often been held by this Court that counsel has, by reason of his retainer, complete authority over the action and the mode of conducting it, including an abandonment of it. He can compromise in all matters connected with the action and not merely collateral to it, even contrary to the instructions of his client, unless the opposite side had knowledge that he was acting contrary to authority. In my view, he does not require his client's authority to make an admission.

I agree that the judgment and decree should be set aside and a trial *de novo* held. But with regard to costs, I would not award the appellants any costs of the appeal since they mistook their remedy in appealing. I would award them the costs of the application for *restitutio in integrum*, in which I hold that they have succeeded. And I would order the parties to bear their own costs of the abortive trial since they are equally to blame for the inconclusive agreement.

Judgment set aside.