1963 *Present :* T. S. Fernando, J., and Tambiah, J.

D. A. SENANAYAKA and another, Appellants, *and* H. GAMAGE and another, Respondents

S. C. 6/1962 (Inty.)—D. C. Colombo, 43850/M

Compromise of action—Terms duly recorded by Court—Memorandum in writing not necessary—Meaning of word "motion"—Civil Procedure Code ss., 91, 408.

A settlement and compromise entered into by the parties, notified to Court and recorded by the Judge in the course of a trial is not invalid merely because a memorandum in writing, embodying the terms of the settlement, is not filed when the terms of the settlement are recorded by the Judge. There is no requirement that section 91 of the Civil Procedure Code should be complied with when parties enter into a settlement under section 408.

APPEAL from an order of the District Court, Colombo.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the 2nd and 3rd defendants-appellants.

C. Ranganathan, for the plaintiff-respondent.

Cur. adv. vult.

February 6, 1963. TAMBIAH, J.—

The short point for decision in this appeal is whether a settlement and compromise, solemnly entered into by the parties, notified to Court and recorded by the judge, in the course of a trial, should be ignored merely because a memorandum in writing of the motion, embodying the terms of settlement, has not been filed after the terms of the settlement have been recorded.

The plaintiff brought this action on an Indenture of Lease No. 7762, dated 27.7.1947., and prayed for the ejectment of the defendants from the premises described in the schedule to the plaint. The defendants, while admitting the signing of the Indenture of the Lease, averred that the plaintiff failed to deliver possession of the land and prayed for the

refund of the sum of Rs. 420 which, he alleged, was paid at the execution of the deed of lease. Under the Indenture of Lease, the defendants were entitled to put up certain buildings and possess the same for a particular period. At the trial, after the plaintiff and one of the witnesses had given evidence, the parties arrived at a settlement which was notified to Court on 19.9.1960, and was duly recorded by the learned District Judge.

The terms of the settlement stated, inter alia, that the second and third defendants consented to ejectment without costs being entered in favour of the plaintiff in respect of the land depicted in Plan No. 656 dated 24.2.1960. Writ was not to issue till 31.3.1961. If the second and third defendants handed over vacant possession of the premises to plaintiff on or before 31.3.1961, the plaintiff undertook to pay the second and third defendants compensation for the building standing on the premises, depicted in the said plan, on an amount assessed by an independent valuer nominated by Court. The parties undertook to accept such valuation as final and conclusive. The plaintiff also undertook to pay the amount of such valuation within a period of three years from the date of it being notified by the valuer. The parties further agreed that the valuation should be done by one Mr. P. H. Wijesinghe.

Mr. Wijesinghe filed his valuation report, dated 7.2.1961, and the plaintiff, who was dissatisfied with the said valuation, filed objections, dated 28.3.1961, in which he averred, inter alia, that Mr. Wijesinghe's valuation was grossly inflated and that he had not acted fairly and justly. It is not suggested that there was lack of consent by the parties to the terms and conditions of the settlement or that such terms were vague. At the inquiry, plaintiff's counsel led no evidence to show that the valuation was unfair, but he raised the objection that since no memorandum in writing, as required by section 91 of the Civil Procedure Code, had been filed along with the settlement, the settlement should be ignored and no decree should be entered on it. The learned District Judge, after hearing parties, accepted the contention of the plaintiff's counsel and held that he would ignore the settlement entered into by the parties and re-fixed the matter for trial. The second and third defendants have appealed to this Court from the said order.

Section 408 of the Civil Procedure Code (Cap. 101) enacts :

> " 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 accordnace therewith, so far as it relates to so much of the subject matter of the action as is dealt with by the agreement, compromise, or satisfaction. "

The appellant's counsel submitted that there has been sufficient compliance of the provisions of section 408 of the Civil Procedure Code when the terms of settlement were duly recorded by the Court. He

urged that the learned District Judge erred in ignoring the terms and conditions of the settlement, which were finally agreed upon by the parties. He further contended that there is no provision in section 408 of the Civil Procedure Code for the filing of a written motion when the terms of a settlement are recorded by the judge.

The respondent's counsel, on the other hand, urged that the word "motion" in section 408 of the Civil Procedure Code must necessarily mean *written* motion; that the only provision governing filing of motions is contained in section 91 of the Civil Procedure Code and as no such motion was filed, the settlement was null and void. Alternatively, he urged that even if the word "motion" should be construed as an oral motion, nevertheless, section 408 must be read along with section 91 of the Civil Procedure Code and a written memorandum of the motion should have been filed before the settlement could be given any efficacy and a decree entered. In support of his arguments, the respondent's counsel cited the ruling of this Court in *Wijewardena v. Lenora*[1] ,*Cornelius Perera v. Leo Perera*[2] and *Ukku Amma v. Paramanathan*[3].

The word "motion", in section 408 of the Civil Procedure Code, is not defined in the Code. In legal phraseology, it means "an application made to a court or judge *viva voce* in open court. Its object is to obtain an order or rule, directing some act to be done in favour of the applicant" (vide Stephen's Commentaries, cited in Mozley and Whiteley Law Dictionary (5th Edition) by F. G. Neave p. 210). Having regard to its most natural meaning in the context, we are of the opinion that the meaning of the word "motion", in section 408 of the Civil Procedure Code, cannot be whittled down to mean a *written* motion.

Further, when parties finally settle their disputes and notify the terms of their compromise to Court, the Court is bound to enter the terms of their settlement and then pass a decree (vide section 408 of the Civil Procedure Code). This is a step in the course of *regular* procedure specifically provided for by the Civil Procedure Code and is *not* a step incidental to the proceedings. Consequently, there is no requirement that section 91 should be complied with when parties enter into a settlement under section 408 of the Civil Procedure Code. Section 91 of the Civil Procedure Code becomes relevant only in applications made to the court in the course of an action, incidental thereto, and not a step in the regular procedure. A Court is bound to take certain steps in a regular procedure, such as filing of plaints, answers, replications, summoning of witnesses and proceeding with the trial. A step required to be taken by a court by the provisions of the Civil Procedure Code is not an incidental step in the course of the proceedings. (vide observations of Bonser C. J. in *Peria Carpen Chetty v. Kiri Banda Arachchi and Dingiri Banda*[4].) Even the filing of a list of witnesses is a regular step in an action. The practice of filing motions or memoranda in matters which are steps in regular procedure has been deprecated by this Court (*Ibid* at p. 66).

[1] *(1958) 60 N. L. R. 457.*
[2] *(1960) 62 N. L. R. 413.*
[3] *(1959) 63 N. L. R. 306.*
[4] *(1902) 3 Browne Reports 61 at 66.*

The word " motion ", even as used in section 91 of the Civil Procedure Code, cannot, in the light of its context, be read to mean *written* motion, for, if in the same section the words " written motion " are substituted for the word " motion ", then the provisions contained in the said section become redundant and meaningless. All that the section requires is that " a memorandum in writing of such motion shall be at the same time delivered to the Court ". A distinction must, therefore, be drawn between a " motion ", which is an oral application made to court, and a " memorandum in writing " of such motion in section 91 of the Civil Procedure Code. The contention of the respondent's counsel that the word " motion ", as used section 91 of the Civil Procedure Code, means written motion, also fails.

Section 408 of the Civil Procedure Code does not require that a memorandum in writing of the agreement or compromise should be filed. It merely enacts that the agreement or compromise " *should be notified* to the Court by motion made in the presence of, or on notice to, all parties concerned ".

Where the terms of the settlement or compromise are ambiguous or vague, the parties are not without remedy. In such cases our courts have proceeded with the trial. The cases cited by the respondent's counsel establish this salutary principle, but are distinguishable from the facts of the instant case. In *Punchibanda v. Punchibanda*[1] a settlement entered in Court was set aside on the ground that it was vaguely worded. In the course of his judgment, Soertsz J. remarked (vide at p. 383) that section 408 of the Civil Procedure Code, read with section 91, requires a certain formality to be observed in arriving at a settlement. The Court, in that case, had no occasion to analyse section 408, and, consequently, the views expressed by Soertsz J., were merely obiter.

Even if section 408 of the Civil Procedure Code should be read along with section 91 of the Civil Procedure Code, the better view seems to be that the provisions of section 91 are only directory and not mandatory. In *Wijewardene v. Lenora* (supra) Basnayake C.J., took the view that the said provisions are mandatory while Sinnetamby J., said that they are merely directory. Sinnatamby J., in the course of his judgment said (at p 467) : " In regard to the scope of sections 80 and 91 of the Civil Procedure Code, I agree that where there is both the opportunity and the time available an application for the postponement of the hearing should always be made by motion but there are occasions when this cannot be done in such cases the *cursus curiae*, if I may speak from personal experience, has been to permit an application to be made *ore tenus*. " The case was decided on other grounds and, consequently, the opinions expressed by them on this matter are obiter.

In *Cornelius Perera v. Leo Perera*[2] a Bench of three judges held that a compromise or agreement, which was made on the ground of mistake, where one party knew of the mistake and the other did not, should be set aside. Basnayake C.J., said (at p. 419) : " There was not even an

[1] *(1941) 42 N. L. R. 382.* [2] *(1960) 62 N. L. R. 413.*

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 evey part of what has been recorded by the trial judge ..... " The learned Chief Justice, however, had no occasion to analyse section 408 of the Civil Procedure Code. Sansoni J. reserved his opinion on the interpretation of section 408. He said (vide at p. 422) : " 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 ". The decision, in this case, rested on the principle that where there has been a mistake in entering into terms of settlement, then such a settlement should not be enforced by a court of law.

In *Ukku Umma v. Paramanathan*[1] Weerasooriya J., vacated a settlement entered into, in the course of a trial, where there was nothing on the record to show at whose instance the settlement was arrived at. He stated (at page 308) : " Section 408 of the Civil Procedure Code provides that an agreement or compromise shall be notified 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 that settlement was arrived at."

Section 408 of the Civil Procedure Code requires that both parties should agree to the terms of settlement and that such an agreement should be notified to Court. (vide *Eastern Hardware Stores v. Fernando*[2] ; *Meis Singho v. Josie Perera*[3].) In the instant case, the parties have unambiguously notified to Court their terms of settlement, and, consequently, it could be distinguished from *Cornelius Perera v. Leo Perera* (supra) and *Ukku Umma v. Paramanathan* (supra).

It is unnecessary for us to add fetter to the freedom of parties to compromise their action by further requiring them to file a written motion, the terms of which have already been solemnly stated to Court and duly recorded.

For these reasons, we set aside the order of the learned District Judge, dated 30.11.61., and direct that decree be entered in terms of settlement arrived at between parties on 19.9.1960. The appellant is entitled to costs of appeal and costs of inquiry held on 16.11.1961.

T. S. FERNANDO, J.—I agree.

Order set aside.

[1] *(1959) 63 N. L. R. 306.* [2] *(1956) 58 N. L. R. p. 568 at 570*

[3] *(1929) 31 N. L. R. 168.*