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Present : Fisher C.J. and Garvin J.

DASSANAIKE *v.* DASSANAIKE.

99—D. C. (Inty.) Ratnapura, 4,191.

Compromise—Application to have an adjustment entered of record—Proof of adjustment—Civil Procedure Code, s. 408.

Where an application is made to have an adjustment or compromise of an action entered under section 408 of the Civil Procedure Code, it must be clearly established that both parties have agreed to the compromise and that effect could be given to it by a decree of Court.

APPEAL from an order of the District Judge of Ratnapura. Plaintiff sued the defendant for a declaration of title to two lands. At the time of the institution of the action plaintiff was the wife of the defendant. She had instituted an action No. 3,884 for a divorce from him on the ground of malicious desertion. When the action came on for hearing, the parties came to a settlement, the terms of which were recorded. The agreement had reference to certain lands, including those which are the subject of the present action. After decree for divorce had been entered in case No. 3,884, the defendant moved to have the terms of agreement referred to embodied in the decree, but his application was disallowed. Thereupon the defendant amended his answer in the present action, and moved in accordance with section 408 of the Civil Procedure Code to have a decree entered in terms of the alleged settlement. The learned District Judge allowed the motion.

H. V. Perera (with *Weerasooria* and *Abeywardene*), for plaintiff, appellant.

De Zoysa, K.C. (with *Ameresekere* and *Navaratnam*), for defendant, respondent.

September 12, 1928. FISHER C.J.—

In this case the plaintiff claimed a declaration that two lands, Arcady and Maligatenne, are her property, and an order that the defendant may be ejected from them. She alleged in her plaint that the first-named property was bought by her with part of the proceeds of sale of certain lands which was subject to a *fidei commissum* in favour of her children. The second property she claims to have been transferred to her by deed No. 47 dated April 8, 1915.

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In his original answer the defendant set up that the first property was jointly owned by the plaintiff and himself subject to a *fidei commissum* in favour of their children. As regards the second property, he says that he purchased it in the plaintiff's name and that the plaintiff was a trustee for him and he claimed that the action should be dismissed with costs, that the plaintiff be declared to hold the whole of the second property in trust for him and be ordered to execute a deed of conveyance in his favour.

At the time this action was instituted the plaintiff was the wife of the defendant, but she had instituted an action No. 3,884 in the District Court of Ratnapura for a divorce from him on the ground of his malicious desertion. The defendant defended that action and made a claim in reconvention asking for a divorce. That claim was not persisted in, and on March 7, 1925, the action No. 3,888 came on for hearing in the presence of the parties and their Advocates, and the Judge made the following note :—" The parties are agreed as to the custody of the children and the disposal of property. Evidence is needed on the issue. Was there malicious desertion ? " Evidence on that issue was given by the plaintiff and she was not cross-examined. The Judge then made the following note :—" At this stage I am informed that the parties have arrived at the following agreement which they desire me to record. " He then set out the terms of the agreement which dealt with the custody and care of the children and access to them by the parents, and there were other terms relating to a number of claims against the plaintiff and defendant jointly and reference was made to an agreement by the plaintiff to make a settlement of certain lands, including those which are the subject-matter of the present action. The terms of the proposed settlement were set out and in one important respect they are contradictory, for in one paragraph reference is made to a reservation of a life interest in favour of the plaintiff and in another of a reservation of a life interest in favour of the defendant. No mention whatever is made of the present action or to any agreement to compromise or settle it. After the Judge had made this note the defendant's Advocate stated that he would not lead any evidence on the issue of malicious desertion " in view of the aforesaid agreement, " and the Judge made the following note : " I hold that there has been malicious desertion. Enter decree *nisi* returnable on June 9, 1925, " and ultimately the decree was made absolute accordingly. The defendant endeavoured to have the terms of the agreement referred to embodied in the decree. This was refused by the learned District Judge and the defendant appealed against that refusal. On November 5, 1925, this Court affirmed the decision of the learned District Judge. On March 23, 1926, the defendant moved to amend his answer in the present action by pleading " an alternative defence. " The

agreement is not pleaded as a compromise and it was not made the subject-matter of a counterclaim for a specific performance for the obvious reason that since it had not been notarially executed, it had no force or effect in law, it could not have been made the subject of a claim in reconvention. The proposed amendment contained the following paragraphs:—"(9) The interests of the plaintiff and defendant and the children *inter alia* in the property which was the subject-matter in this action were the subjects of settlement in the action for divorce already referred to," paragraph 10 referred to a copy of the terms of settlement, paragraph 11 alleged that the defendant had acted on the said settlement and was always ready and willing to perform the terms thereof and pleaded that "the plaintiff is estopped from acting contrary to the terms of the said settlement in maintaining the present action." The amendment was allowed. Replication was made by the plaintiff in which *inter alia* the agreement was denied and the defendant moved that in accordance with section 408 of the Civil Procedure Code a decree be entered in accordance with the settlement pleaded in the amended answer. The learned Judge gave judgment allowing the motion, and it is against that judgment that the present appeal is made.

In my opinion the judgment cannot be supported. It is fundamentally necessary before section 408 can be applied that it should be clearly established that what is put forward as an agreement or compromise of an action by the parties was intended by them to be such. This has not been shown to be so in this case. On the contrary it appears that having failed to establish the proposition that the parties had agreed to have the terms of the so-called agreement embodied in the decree for the divorce he now seeks to establish that they agreed to have them embodied in the decree in the present action. The course which the divorce proceedings took tend to indicate that the agreement was one involving a decree of dissolution of marriage by consent of parties. Such an agreement cannot be given effect to in a Court of law. But in giving judgment when that case was before this Court my brother Garvin said "There was no record that the parties invited the Court to pass a decree in conformity with the agreement in the event of a divorce being granted." Equally there is no record in the present case. It is clear that there was no mutual intention to settle the present action. The agreement itself, as I have mentioned, contained two irreconcilable terms. Paragraph 9 refers to a settlement by the plaintiff of *inter alia* the properties which were the subject-matter of this action on the children reserving to herself a life interest, and in the prayer of the amended answer the defendant ignores this provision and asks for the execution of a settlement in accordance with paragraph 9 of the agreement which provides for a life interest

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being given to himself. It cannot, therefore, be said that there was a clear intention expressed as to what the terms of settlement should be. In my opinion section 408 requires a notification to the Court acquiesced in by both parties before it that they have agreed to compromise, and the agreement must be one to which effect can be given by a decree of the Court. Clearly effect cannot be given to this agreement as it stands, for if effect is given to paragraph 6, paragraph 9 must be ignored, and *vice versâ*. To enter into an agreement after an action is brought which is inconsistent with the position taken up in the action and to enter into an agreement to compromise an action are not the same thing. The so-called agreement is based on the admission of the plaintiff's claim in the present action that the right to dispose of the property rests in her. No reference is made as to how the costs of the action are to be dealt with or indeed, as I have said before, to this action in any shape or form. To agree to do certain things is one thing and to agree that they be embodied in a decree in an action is another, and if the latter position is sought to be maintained the intention of the parties must be clearly established. In my opinion therefore the defendant has failed to establish what was necessary for him to establish in order to succeed, and the appeal must be allowed and the action must be remitted for trial. The respondent must pay the costs of and incidental to the hearing of the motion for judgment in the District Court in any event, and also the costs of this appeal.

GARVIN J.—I agree.

Appeal allowed.