Carrison Vs. Rodrigues and ors.

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Court : Kolkata

Decided On : Apr-21-1886

Reported in : (1886)ILR13Cal115

Judge : Trevelyan, J.

Appellant : Carrison

Respondent : Rodrigues and ors.

Judgement :

Trevelyan, J.

1. This is an application to set aside the decree made by consent on 30th March 1886. The facts on which I must act are contained in an affidavit made by the plaintiff and also by Mrs. Westcott, her daughter. I am bound to say at the outset that it is somewhat extraordinary, considering the terms of the affidavit, that the attorney on the record, who was perfectly cognizant of the facts alleged, did not support it. But I do not think that this circumstance-although one would have expected the attorney to come to the assistance of the Court-would justify me in refusing to act. The case came oil for hearing for the second time on the 30th March 1886. On a previous occasion I had decided a particular issue, and held that the plaintiff under her husband's will was entitled to the property for life.

2. When the case was called on, counsel for the defendant, seeing that a continuance of the litigation would involve the disappearance of the property in suit, suggested that I might assist in a compromise. I felt that it was clearly a case which the parties ought to settle. But there was nothing to compel a settlement, and the parties were entitled to a decision if they desired it.

3. Counsel on both sides then came to my room and we discussed the terms of settlement, which were to a great extent suggested by me, and which appeared to me to be extremely reasonable. So far as 1 recollect, when we had discussed the terms, counsel for the plaintiff left the room to get his client's consent, and I impressed on him the necessity of his getting her consent. Counsel came back, having explained the matter to his client, and having, as I thought, obtained her consent. Terms were put in and signed by counsel on both sides.

4. The next day the plaintiff's attorney wrote and repudiated the settlement. (The Court here read Mr. Lewis's letter of the 31st March to the Registrar of the Court.) As I understand it, it is not disputed that this dissent was communicated the same day to the defendants. At any rate on the 5th April 1886, six days after the consent decree, express notice of this application was given to the defendants and their attorney, and at that time no decree had been drawn up. Had the decree been drawn up and sealed, it would have been impossible to deal with the case. A long affidavit has been put in; in it Mrs. Carrison says that she declined a settlement throughout, and there can be no doubt that this statement is correct. (Here followed portions of that affidavit.)

5. Several cases have been cited to me, and I think that I must decide in favour of the plaintiff. It may be very hard on the defendants that, when a settlement was formally drawn up by both sides, the matter should be reopened; but, on the other hand, it would be hard to insist upon the plaintiff being bound in a compromise to which she was not an assenting party.

6. I will cite in passing the remarks of Vice-Chancellor Malins, in Holt v. Jesse L.R. 3 Ch. D. 177 (182) a case in which Jesse was actually in Court at the time of settlement.

Now I can only say that this is an order which, if Mr. Jesse did not consent to, he ought to have consented to most cheerfully and thankfully; but I am satisfied that he did consent to it. He was present in Court and thoroughly understood it, and he is not, in my opinion, at liberty to withdraw the consent then given.' (The plaintiff in the case before me swore that she never at any time consented to any settlement).

7. But as much has been said in the course of the argument, and authorities have been cited about the general principles of the Court in withdrawing consent given to orders, I beg to express my opinion, which I believe is in conformity with all the cases that have' been cited, that, if it shall turn out that by fcbe inadvertence of counsel, by the careless consent of the plaintiff or defendant himself, not fully knowing or considering what he is about, an order given by consent has prejudiced him in a manner which neither he nor his advisers could have anticipated at the time, such as in the case of Swinfenv Swinfen 2 De. 6. and J., 381 : 26 L.J.C.P. 97, where counsel was instructed to do one thing and consented to a totally different thing; that is, for instance, being instructed to make a claim to an estate in fee simple, he consented that the claimant should have a life estate only, or a tenancy for life; that is entirely beyond his authority, and nothing could be more reasonable than that his client should not be bound by such a consent inadvertently given.

8. The case of Strauss v. Francis L.R. 1 Q.B.D. 379 cited by Mr. Pugh and much relied on, is cited by Malins, V.C. in Holt v. Jesse. If the proposition of 'Vice-Chancellor Malins is correct, a fortiori the suitor is not bound here. Here there is no consent at all, but a careful dissent. It is difficult to say how it came about that counsel consented.

9. The case of Strauss v. Francis L.R. 1 Q.B.D. 379 the principle is laid down by Blackburn, J.: 'We are all agreed that there clearly ought to be no rule. The plaintiff by no means makes out that there was any express dissent on his part to withdrawing a juror; there is nothing on the affidavits to show that the client absolutely withdrew all authority, nor is there anything to show that counsel had done so unprofessional a thing as to undertake the conduct of a cause giving up

all discretion as to how he should conduct it; still less is there anything to show that there was the slightest knowledge on the part of the other side that the apparent general authority of counsel had been in fact limited.'

10. It is true that in this case the defendants had not, at the exact moment of the decree being made, any knowledge that the authority of the plaintiff's counsel had been limited by the plaintiff, but they obtained this knowledge almost immediately, and before the decree was drawn up; for the plaintiff took steps the next day and wrote to the Registrar not to draw up the decree.

11. So far as I can see the plaintiff has repudiated the consent within the time she was entitled to do so. I, therefore, think that I cannot exclude her from going on with her case.

12. I, must allow this case to be re-tried.