

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA

**In the matter of an Appeal
from a Judgment of the
Civil Appellate High Court.**

Don Padmasiri Abeysingha,
Anguruwatota Road,
Horana.

Plaintiff

SC APPEAL No. 113/13

SC/HC/(CA) LA/428/11

WP/HCCA/Kal/58/2004/F

Vs

D C Horana Case No. 652/P

1. Abdul S. Mohamed Anver,
No. 43, Anguruwatota Road,
Horana. (Deceased)
2. Gamage Don Sisiliyawathi,
Anguruwatota Road,
Horana. (Deceased)
- 2A. Gamage Don W. Gunawardena,
No. 110, Sri Somananda Mawath,
Horana.
3. Y.W. Costa, Anguruwatota Road,
Horana.
4. Induruwage P. Thisera,
No. 69, Anguruwatota Road,
Horana.
5. Gamage Don W. Gunawardena,
Anguruwatota Road,
Horana.
6. Thalagalage David Gunatilake,
Anguruwatota Road, Horana.

- 6A. Karunaratna Banda Wijesekera
Mediwaka, No. 47, Anguruwatota
Road, Horana.
- 6B. Weerasekera Wasala Mudiyansele
Mediwaka Walawwe Buddika Apsara
Mediwaka, No. 47, Anguruwatota
Road, Horana.
7. Induruwage Rosalin Thisera,
Anguruwatota Road, Horana.

Defendants

AND

Abdul Salam Mohamed Anver,
No. 43, Anguruwatota Road,
Horana.

1st Defendant Appellant

Vs

Don Padmasiri Abeysingha'
Anguruwatota Road,
Horana.

Plaintiff Respondent

Don Muditha Abeysingha,
No. 30, Ariyawilasa Road,
Horana.

Substituted Plaintiff Respondent

- 2A. Gamage Don W. Gunawardena,
No. 110, Sri Somananda Mawath,
Horana.

3.Y.W.Costa, Anguruwatota Road,
Horana.

4. Induruwage P. Thisera,
No. 69, Anguruwatota Road,
Horana.

5. Gamage Don W. Gunawardena,
Anguruwatota Road,
Horana.

6. Thalagalage David Gunatilake,
Anguruwatota Road, Horana.

6A. Karunarathna Banda Wijesekera
Mediwaka, No. 47, Anguruwatota
Road, Horana.

6B. Weerasekera Wasala Mudiyansele
Mediwaka Walawwe Buddika Apsara
Mediwaka, No. 47, Anguruwatota
Road, Horana.

7. Induruwage Rosalin Thisera,
Anguruwatota Road, Horana.

7A. Weerasekera Wasala Mudiyansele
Mediwaka Walavve Buddika Apsara
Mediwaka, No. 47, Anguruwatota
Road, Horana.

Defendants Respondents

AND THEN

Weerasekera Wasala Mudiyansele
Mediwaka Walavve Buddika Apsara
Mediwaka, No. 47, Anguruwatota
Road, Horana.

**6B & 7A Substituted Defendant
Respondent Petitioner**

Vs

Abdul Salam Mohamed Anver,
No. 43, Anguruwatota Road,
Horana.

**1st Defendant Appellant Respondent
(now deceased)**

AND NOW BETWEEN

Weerasekera Wasala Mudiyanseelage
Mediwaka Walavve Buddika Apsara
Mediwaka, No. 47, Anguruwatota
Road, Horana.

**6B & 7A Substituted Defendant
Respondent Appellant Petitioner**

Vs

1A. Abdul Samadu Marikkar Ummu Ala,
No. 432, Galle Road, Horetuduwa,
Moratuwa.

1B. Mohamed Anver Ahmed Jausakky,
No. 137/4, Hill Street, Dehiwela.

1C. Mohamed Anver Ahamed Hassan,
No. 38, De Vos Lane,
Grandpass, Colombo 14.

1D. Mohamed Anver Pattumma
Husseniya, No. 432, Galle Road,
Horetuduwa, Moratuwa.

1E. Mohamed Anver Ummul Nihara,
No. 432, Galle Road,
Horetuduwa, Moratuwa.

**Substituted 1st Defendant
Respondent Respondents**

**BEFORE : S. EVA WANASUNDERA PCJ.
PRIYANTHA JAYAWARDENA PCJ &
VIJITH K. MALALGODA PCJ.**

**COUNSEL : M.U.M. Ali Sabry PC with Lasitha Kanuwanaarachchi
and Nalin Alwis for the 6B / 7A Substituted Defendant
Respondent Appellant.
H. Withanachchi for the 1A to 1E Defendant Appellant
Respondents.**

ARGUED ON : 10.07.2017.

DECIDED ON : 02.08 .2017.

S. EVA WANASUNDERA PCJ.

On 06.09.2013, this Court has granted leave to appeal in this matter on the questions of law set out in paragraph 22(d), (e), (f), (k) and (m) of the Petition dated 28.10.2011. One more question of law was raised by the counsel for the 1st Defendant Appellant. They read as follows:

1. Have the learned High Court Judges failed to analyze the true and real nature of the documents marked 1V2 (Q8) and the rights flow based on the said document?

2. Have the learned High Court Judges failed to appreciate the fact that according to the terms of settlement contained in 1V3 (Q9) the Respondents cannot claim any right whatsoever to the land mentioned in 1V2 (Q8)?
3. Have the learned High Court Judges misdirected in both law and facts in coming to a conclusion that the default on the part of the vendor in 1V2 (Q8) conveyed the title to the 1st Respondent to a portion of the corpus?
4. Have the learned High Court Judges erred in law in granting reliefs not prayed for by the 1st Respondent and more specifically permitting the 1st Respondent to obtain title after the payment of Rs. 12000/- even after the purported agreement to sell 1V2 (Q8) had been clearly prescribed?
5. Have the learned High Court Judges erred in law in failing to appreciate that in any event, the 1st Respondent is not entitled in law to claim 9 Perches of land based on 1V2 (Q8) wherein the original 6th Defendant only had ½ share of the land?

6. The terms of the settlement contained in 1V3 (Q9) would supersede the terms in the document marked as 1V2 (Q8) to confer title on the 1st Defendant without any further documentation.

It is understood by the aforementioned questions of law that in this Appeal, Court has to specifically consider the documents **1V2 (Q8)** and **1V3 (Q9)** which has given rise to the questions of law.

1V2 is an Agreement to Sell on the face of it. However it is titled as Deed No. 713 – **Deed of Agreement**. The contents state that the vendee has paid Rs. 28000/- to the vendor and the balance of Rs. 12000/- should be paid to the vendor within 5 years from the date this agreement was entered into , i.e. from 06.12.1964, when a deed of Conveyance would be executed at the cost of the vendee. At the same time, there is no clause providing for the failure of paying the balance money by the vendee but there is a clause providing for the vendor to pay to the vendee Rs. 28000/- in one payment, in the event the vendor is ‘ not willing and ready to sell the land and premises ’ to the vendee within the said 5 years and thereafter the vendor is free to cancel the deed of agreement entered into between the parties. From the other clauses in the deed, it was agreed that the vendee could occupy the house without any rent for the period of 5 years and the vendor to pay rates and taxes.

The vendor was Thalagalage David Gunatilake and vendee was Abdul Salam Mohamed Anver, in the aforementioned deed of agreement No. 713 attested by Bafic, Notary Public. The Schedule to the deed describes the land and building thereon bearing No. 43, Horana Town and the extent of the land is stated **as about 9 Perches.**

This Appeal has arisen out of a **Partition action** in the District Court of Horana. The other parties were represented at the initial stages of this case and they got themselves discharged from these proceedings by orders requested from this Court and granted by this Court, due to the fact that **the contention** has been right along, between **the 1st Defendant** Abdul Salam Mohamed **Anver and the 6th Defendant** Thalagalage Don **David Gunatilake.**

In the Partition Action, among other lands to be partitioned was the portion of land in question in the case in hand. The title to the property which is the subject matter in question, contained in the Deed of Agreement 713 dated 26.12.1964 was claimed by the 1st Defendant Anver but **the District Judge by his judgment dated 14.06.2004 held that the 1st Defendant Anver had no entitlement whatsoever** to the land sought to be partitioned in the Partition Action. An Appeal was filed in the Civil Appellate High Court by the 1st Defendant Anver against the judgment of the District Judge. **The High Court delivered its judgment on 20.09.2011 in favor of the 1st Defendant, Anver.**

One of the heirs of the 6th Defendant David Gunatilake who is also an heir to the inheritance of the 7th Defendant Rosalin Thisera , namely, W.W.M.M.W. B.A. Mediwaka has come before this Court by way of an Appeal as the 6B/7A Substituted Defendant Respondent Appellant against the judgment of the High Court Judges of the Civil Appellate High Court dated 20.09.2011. At present the parties to this Appeal are heirs of David Gunatilake and Anver.

The title of Thalagalage Don David Gunatilake was not contested by any other party to the Partition action except by Anver on the said Deed of Agreement No. 713 attested by Bafiq Notary Public which is dated 26.12.1964. It is interesting to note that in the body of the said deed, it is mentioned that “ the vendor (meaning David Gunatilake) is seized and possessed of the land in the Schedule heretoby virtue of Deed No. 3071 dated 30.12.1955 attested by D.R.de

Silva, Notary Public. “ Even though, it is mentioned that way, the real position was that David Gunatilake and Rosalin Thisera were the owners of the land in question by that Deed 3071 which was then transferred to Hariet Perera Wickremasinghe by Deed 3072 dated 30.12.1955 but Hariet Perera Wickremasinghe had transferred the land back to David Gunatilake and Rosalin Thisera by Deed No. 712 attested by Bafiq Notary Public on 26.12.1964. So, in fact David Gunatilake owned only half of the land at the time the Deed of Agreement 713 was signed and the clause which stated that he was ‘seized and possessed of the land by virtue of Deed No. 3071’ was incorrect. However, it can be concluded that the vendor in the Deed of Agreement David owned only ½ of the land.

The next specific document to be looked into is **1V3 (Q9)**. This document is a **Settlement at the Debt Conciliation** Board dated 12.10.1970. The person who had gone before the Debt Conciliation Board making an application to intervene and settle the matter was David Gunatilake stating that he had borrowed Rs. 28000/- from Anver who was David’s tenant at No. 43, Horana Town, and that he has not been able to pay it back within 5 years as promised by the Deed of Agreement. As agreed Anver had enjoyed the premise No. 43 without paying any rent for the said five years and continued holding the premises without any rent. The Debt Conciliation Board had heard them at the inquiry and placed on record that in their opinion , the transaction contained in **Deed 713 was seemingly a conditional transfer but in fact it is a mortgage of the said land by David to Anver.**

The matter was settled with the agreement of both parties, on 12.10.1970 with the condition that David should pay Anver Rs.28000/- within two years from 12.10.1970. It was further stated that “after the money is paid in full” Anver will again continue to be the statutory tenant of David. The Board went on to state that when the money is fully paid the Deed of Agreement will become invalid and if it is not fully paid, the application of David will be dismissed and then Anver will get **his rights under the said Deed No.713**. Thereafter there is another order of the Debt Conciliation Board dated 25.11.1972 when David, not having been able to pay the Rs.28000/- had gone before the Board with his grievance. Anver was present at that time with his lawyer, Bafiq and objected to the **application for reconsideration** made by the debtor David, giving the reason for the objection by the creditor Anver as the application for reconsideration had been

made two months after the two years for the repayment of the loan by David to Anver, had lapsed. The Board had therefore not given a rehearing.

To my mind, David the co-owner of the land and premises in question had tried to get some more time to repay the actual loan of Rs. 28000/- which he borrowed from his tenant Anver. According to the proceedings before the Debt Reconciliation Board, **it was revealed that the transaction did no amount to an agreement to sell the land to Anver** by David but that agreement was security for the loan and the intention of David was never to part with his land to Anver at any time even in the future but only to get the loan, repay the loan and keep his land to himself as the owner.

When David failed to pay the money within two years, Anver could have anyway returned **to his rights in the Deed 713**. That was the right to get the land conveyed to him as agreed in the Deed of Agreement by David by paying him another Rs. 12000/-. **He has not pursued his rights under the deed**. He had not filed action to get the land conveyed to him. He had only been occupying the premises which was run as a shop by him as a tenant without paying any rent to David even after 1970.

David had passed away in the year 1982. No action was taken by Anver at all until the year 1989 when he filed action to get the land and premises transferred to him by the heirs of David. That was instituted under **L 3938** in the District Court of Horana and in the Plaint filed on 08.06.1989 by the Plaintiff Anver he has based the said action taking Deed 713 as an Agreement to Sell and states that David did not come to the lawyer's office even though Rs. 12000/- was deposited with the lawyer and he had invited David to come and sign the deed of conveyance as agreed. The prayer was for court to declare that Anver is the owner and to get David's heirs who are named as defendants in that case to transfer the land in his name. **The District Judge had dismissed the Plaint but it is in appeal .**

In seeking justice from different forums such as the Debt Conciliation Board, the District Court , the Civil Appellate High Court and the Supreme Court, **one litigant cannot take up different positions and pray for different reliefs**. In the case in hand the 1st Defendant Appellant Respondent, Anver has placed Deed 713 before the Debt Conciliation Board as **a loan**, in the Partition action he claims that he is **the owner by prescription** and in the District Court in a separate action he claims

that Deed 713 is **an Agreement to Sell**. Therefore I hold that in this Appeal regarding the Partition Action , the 1st Defendant Appellant Respondent, Anver is estopped from claiming prescription at all.

From the documentary evidence before court , in reality, Anver had given a loan of Rs. 28000/- to David, who was the land lord owning the shop building in which Anver was doing business as David's tenant. The land and premises was taken by Anver as security for the loan granted on the document called Deed of Agreement.

Taking Deed 713 as an Agreement to Sell the land and premises, when the 1st Defendant Anver could not pay the balance of Rs. 12000/- to David or if David refused to accept the money and execute the conveyance as promised within the five years as agreed, **at the end of the five years, Anver had a cause of action to institute action against David on the written agreement of Deed 173 within the next 6 years, according to the provisions of the Prescriptions Ordinance.** Anver did not do so. He had filed action only in 1989, which is 20 years past the six year prescription period. The Patition Action was not filed by David. It was filed by Abeysingha in 1969 and David was the 6th Defendant and Anver was the 1st Defendant. David tried to settle the loan by going to the Debt Conciliation Board.

The Counsel for the 1st Defendant Appellant Respondent, Anver submitted to court that the nature of the rights in terms of Deed 713 which would pass to the 1st Defendant had been superseded and/or merged with, the terms in 1V3 which is the terms of settlement by the Debt Conciliation Board, thus giving the resultant position that " David's right to redemption was at an end and Anver would be entitled to the property as in the case of a conditional transfer after the expiry of the period stipulated for redemption".

In law pertaining to land and property, there is no such way that a settlement could supersede a notarialy executed agreement which specifically states that the title has not yet passed and a deed of conveyance will be effected in the future, on conditions provided in the said agreement being satisfied. It cannot be compared with a conditional transfer because it is not a transfer. **It was only an**

agreement to transfer. The heading on Deed 713 read as 'Deed of Agreement'. The intention of the parties were admittedly quite different from what was taken later as an agreement to sell. Even then, the 1st Defendant has not acted on his rights contained in the document deed 713.

The Civil Appellate High Court Judges has decided that the 1st Defendant is entitled to 9 Perches of the land and the buildings thereon. The High Court had not even realized that David Gunatilake was not the sole owner of the said 9 Perches which was described in Deed 713 . The owners, even according to the title deed 3071 incorrectly mentioned as the title deed of David Gunatilake in the said Deed of Agreement 713 as well as according to the correct Deed No. 712 both of which were attested by the same Notary Public, Bafiq on one and the same day, were David Gunatilake and Rosalin Thisera. Then David owned only ½ of the 9 perches , i.e. only 4 ½ Perches. The High Court had **hardly realized** the nature of the suit the judgment was written about , as that of a **Partition case.**

In the High Court Judgment, the judges go on to state that “ the 1st Defendant Appellant has very clearly established the land in dispute has been very clearly depicted in the Preliminary Plan marked as Lot 1, 1A and 2B was agreed to be sold to the vendee on payment of Rs. 40000/- to the Vendor.Therefore the vendee has to hand over the said amount of Rs.12000/- with legal interest calculated from the date of 26.12.1969 to the vendor and to get the said property conveyed to him. ” It looks like that the Juges of the High Court have forgotten that the Plaintiff, one Abeysingha had filed a partition case and that it was not a land case filed by the contesting parties to the Appeal to get the ownership of a land which was partly paid for and which is under a sale agreement. In a **Partition** Action, the High Court was not expected to decide on who has to pay, how much, to whom and/or whether it was a motgage or a loan transaction. In law, the Appellate Court Judges cannot decide on specific performance of a sale agreement **within a Partition Action.**

In the case of **Pathmawathie Vs Jayasekera 1977 , 1 SLR 248** the Court of Appeal had made this observation. “ It must always be remembered by judges that the system of civil law that prevails in this country is confrontational and therefore the jurisdiction of the judge is circumscribed and limited to the dispute presented

to him for adjudication by our Civil Law does not in any way permit the adjudicator or judge the freedom of the wild ass to go on a voyage of discovery and make a finding as he pleases may be or what he thinks right or wrong. The adjudicator or

judge is duty bound to determine the dispute presented to him and this jurisdiction is circumscribed by that dispute and no more". As such, I hold that the High Court has seriously misdirected itself by awarding relief to the 1st Defendant which has **not been prayed for or which was never in issue at the trial.**

The 1st Defendant Respondent Respondent had not prayed for any of the reliefs that the Civil Appellate High Court had granted. In the Partition case, Anver had taken a different position that he was the owner of that particular land of 9 perches. **He had not prayed for specific performance of the agreement. The Deed of Agreement was not an issue in this Partition case. No court can grant what the parties had not prayed for at all.**

The argument put forward by the 1st Defendant Respondent Respondent, Anver was that the document marked as 1V3(Q9), the settlement by the Debt Conciliation Board, had given him rights to the corpus. The settlement before the Debt Conciliation Board was in terms of Sec. 30 of Ordinance No. 39 of 1941. In the said settlement it was admitted in Clause 1 that **1V2 (Q8) was not a transfer but a document relating to a loan transaction.** Then the Creditor, the 1st Defendant would not get any title to the property, but has only a right to recover the credit amount secured by the Mortgage. According to the clauses in the settlement, in case of default, the creditor get could get the rights in terms of 1V2 (Q8) which is an agreement to sell. 1V3(Q9) does not give any title or ownership to the property to Anver.

In any event **in case of default of a settlement, the creditor should go before the District Court according to Sec. 43(1) of the Debt Conciliation Board Act to claim his rights under the settlement.** It is clear that the terms of a settlement alone does not have any enforceable power and therefore, Anver did not get any

enforceable right by the said settlement as it was not presented to the District Court.

I hold that the learned judges of the High Court have erred in law in having granted a right to specific performance of an agreement to sell within this Partition Action. Even in an action for specific performance in the District Court, the relief cannot be granted due to the fact that it is long prescribed.

I set aside the judgment of the Civil Appellate High Court by answering the questions of law raised in favor of the 6B/7A Defendant Respondent Appellants and against the 1 A to 1 E Defendant Appellant Respondents. I affirm the judgment of the District Court.

Appeal is allowed. However I order no costs.

Judge of the Supreme Court

Priyantha Jayawardena PCJ.

I agree.

Judge of the Supreme Court

Vijith K. Malalgoda PCJ.

I agree.

Judge of the Supreme Court

