

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

SC/APPEAL/20/11

SC/HCCA/LA/102/2009

WP/HCCA/COL/49/2008/LA

D.C. Colombo No. 4147/ZL

R. V. Bandaratilake,
No. 448, Nawala Road,
Rajagiriya.

PLAINTIFF

-VS-

K. H. Gamage,
DEFENDANT (deceased)

1.K. L. P. Gamage,

2.U. K. Gamage,

Both of No. 480, Nawala Road,
Rajagiriya.

SUBSTITUTED

DEFENDANTS

AND

2.U. K. Gamage,
No. 480, Nawala Road,
Rajagiriya.

SUBSTITUTED

DEFENDANT- PETITIONER

-VS-

R. V. Bandaratilake,
No. 448, Nawala Road,
Rajagiriya.

PLAINTIFF- RESPONDENT

1.K. L. P. Gamage,
No. 480, Nawala Road,
Rajagiriya.

SUBSTITUTED

DEFENDANT-RESPONDENT

AND NOW BETWEEN

2.U. K. Gamage,
No. 480, Nawala Road,
Rajagiriya.

SUBSTITUTED

DEFENDANT-PETITIONER-

PETITIONER

-VS-

R. V. Bandaratilake,
No. 448, Nawala Road,
Rajagiriya.

PLAINTIFF-

RESPONDENT-RESPONDENT

1.K.L.P. Gamage,
No.480, Nawala Road,
Rajagiriya.

SUBSTITUTED

DEFENDANT-

RESPONDENT-

RESPONDENT

Before: Hon. Vijith K. Malalgoda, PC, J.
Hon. E.A.G.R. Amarasekara, J.
Hon. Yasantha Kodagoda, PC, J.

Counsel: Manohara de Silva with V. Guneratne instructed by Manori Pathirana for the
Substituted Defendant- Appellant- Appellant
Rasika Dissanayake with Shabbeer Huzeir instructed by Sarath Wijewardene
for the Plaintiff-Respondent-Respondent

Argued on: 03.03.2022

Decided on: 08.08.2024

E. A.G. R. Amarasekara, J.

This is an appeal made by the Substituted Defendant Petitioner (hereinafter sometimes referred to as the Petitioner) against the order dated 22.04.2009, made by the Provincial High Court of Civil Appeals of the Western Province in appeal no. WP/HCCA/COL/49/2008/LA. The said order was made over an appeal made against the order dated 17.03.2008 made by the District Court in case No.4147/ZL. The learned High Court Judges dismissed the said appeal confirming the order made by the learned District Judge. Thus, in his petition dated 14.05.2009, the Petitioner has *inter alia* prayed to set aside the aforesaid orders made by the Learned High Court Judges as well as by the learned District Court Judge and to direct the learned District Judge to accept and/or approve the draft deed that had been tendered. In the alternative, the Petitioner has

prayed that if the Respondent refuses to sign the deed directed(sic) the Registrar of the District Court to sign the same on behalf of the Respondent. However, it appears that no prayer is made to direct the Respondent to sign the deed. As per the contents of the Petition and circumstances of the matter at hand, the term "Respondent" referred to in the above prayer seems to mean the Plaintiff Respondent Respondent (hereinafter sometimes referred to as the Plaintiff or the Plaintiff Respondent). The learned District Judge in his order dated 17.03.2008, refused to approve a draft deed tendered by the Petitioner along with the other substituted Defendant and get it signed by the Plaintiff Respondent as it was not tendered within the time limit mentioned in the relevant Supreme Court order which will be referred to later in this Judgment. The relevant motion, draft deed and order of the District Court have been tendered as A12, A13 and A14 respectively along with the Petition- vide paragraph 17(iii) (b) of the Petition dated 28th May 2009. As few decisions made prior to the impugned orders are relevant to understand the matter before this Court, it is necessary to narrate the facts relating to this matter briefly.

Case No. 2280/RE

The said case No.2280/RE was filed by one C.O.L.B. Bandaratilake, the father of the Plaintiff Respondent of this case, as the landlord against Mr. K.H. Gamage, who is also the original Defendant of this case, to eject the Original Defendant by plaint dated 23.03.1973. However, the mother of the Plaintiff, Mrs. N.M. Bandaratilake, was the owner of the property involved.

The Father of the Plaintiff having represented to Court that he had due authority to enter into a settlement on behalf of his wife (the owner of the premises), entered into a settlement on 15.08.1975 on the following manner:

(i) Parties agreed to enter judgment in favour of the Plaintiff Respondent's father but the Plaintiff Respondent's father as the Plaintiff in that case agreed to sell the property to the said original Defendant for Rs.70,000 and the original Defendant agreed to buy it before 31.12.1977 and Rs. 7500/- of that was to be paid as an advance. Further, the original Defendant was to pay the rental arrears and damages as agreed.

(ii) The original Defendant was to leave the premises if he was in breach of the agreement and the Plaintiff Respondent's father who was the Plaintiff of that case was entitled to a writ of execution without notice in case if the original Defendant stayed in breach of the agreement.

(iii) If the owner (the mother of the Plaintiff Respondent) failed to sign the deed of transfer, the original Defendant was entitled to remain in possession until the Deed of Transfer was executed in his favour by the owner of the property.

The original Defendant continued to occupy the said premises after duly making the requisite payments but the Plaintiff Respondent's mother did not execute a deed of transfer in his favour.

Case No. 3004/RE

Notwithstanding the said settlement, the aforementioned C. O. L. B. Bandaratilake, father of the Plaintiff Respondent on or about 01.09.1978 instituted another action bearing No. 3004/RE to

eject the Original Defendant. The Learned District Judge dismissed the said action on the premise that the parties were bound by the settlement dated 15.08.1975.

The Current Case- DC Case No. 4147/ZL

Notwithstanding the aforesaid settlement, N.M. Bandaratilake, the mother of the Plaintiff Respondent, transferred the said premises to the Plaintiff by Deed No. 931 dated 25.06.1981. Both N.M. Bandaratilake and C.O.L.B. Bandaratilake (Father and Mother of the Plaintiff Respondent), thereafter called upon the original Defendant to attorn to and pay him the rent for the premises by letter dated 23.11.1981. The original Defendant did not comply with the said demands and was consequently served with notice to quit on 22.03.1982. The Plaintiff Respondent subsequently instituted a fresh action against the original Defendant by plaint dated 09.05.1982 which was given the case No. 4147/ZL. Answer was filed on 02.02.1983, the Plaintiff Respondent's replication was filed on 16.03.1983 and the matter proceeded to trial thereafter. Learned District Judge entered the Judgment dated 27.04.1989 in favour of the Plaintiff Respondent and granted the reliefs prayed for. Subsequently, it was appealed to the Court of Appeal (CA Case No. 269/89F) by the original Defendant. The Court of Appeal observed that the learned District Judge was in error in failing to consider the binding nature of the settlement in DC case No. 2280/RE and the consequences that flowed from the dismissal of DC case No. 3004/RE. The Court of Appeal further stated in its judgment that in terms of the aforesaid settlement and the decree entered in case No.2280/RE, the Original Defendant had the right to continue to be in occupation of the premises till the Plaintiff Respondent's mother conveys the property to the Original Defendant. Moreover, it was said in the said Judgment that the Plaintiff Respondent's mother had not only failed to carry out the pledge given on her behalf by her husband to Court but also fraudulently transferred the property to her son, the Plaintiff Respondent, in defiance of the undertaking and Court would not countenance such conduct or grant relief to those who claim rights through such miscreants as doing so would only encourage the abuse of the process of Court. Thus, the Court of Appeal reversed the judgment of the District Court by its judgment dated 20.12.1996. The Plaintiff Respondent appealed to this Court and this Court upheld the Court of Appeal judgment by its judgment dated 21.10.2003 in SC Appeal No. 83/97. While dismissing the appeal, this Court in the final paragraph of the said judgment stated as follows;

*“We award the substituted defendants-respondents costs in a sum of Rs.30,000/- in all three courts payable on or before 1.3.2004. However, if the substituted defendants-respondents tender a deed of transfer at their expense **on or before 31.12.2003** reciting as consideration the sum of Rs. 70,000/- already deposited- the draft deed to be approved by Court if disputed by the plaintiff-appellant- and if the plaintiff appellant executes the transfer on or before 28.02.2004, no cost would be payable.”* (highlighted by me)

The Petitioner along with the other substituted Defendant Respondent by the motion dated 04.03.2008 marked A12 tendered a draft deed and moved Court to approve the draft deed and get it signed by the Plaintiff Respondent. As mentioned before, since it was not tendered within the time limit which was quoted above, the District Judge refused the said application and as said

before the learned High Court Judges affirmed the said order. This Court granted leave against the said decision of the learned High Court Judges on the questions of law mentioned below:

1. Whether the said impugned order is contrary to law and is against the judgment of the Supreme Court;
2. Whether the provincial High Court /District Court erred in holding that the Petitioner was not entitled to a Deed of Transfer for the reason that the same had not been presented within the time stipulated;
3. Whether the Judges of the provincial High Court of Civil Appeals Western Province and the District Court erred by misinterpreting the reference to the stipulated time period in the judgment of the Supreme Court as being a reference to the period within which the deed had to be executed whereas the time period is only relevant to the payment or nonpayment of costs;

In deciding this appeal, it is relevant to see whether the Original Defendant was entitled to get a deed of transfer executed in his name as of a right and if so, the time limit mentioned in the said Supreme Court judgment as quoted above is applicable only for the payment or non-payment of costs.

In this regard, it is pertinent to peruse the following passages from the Supreme Court judgment which interpret the nature of the settlement entered in the Case No.2280/RE.

*“The Court of Appeal has held that the District Court was in error in holding that the father of the plaintiff-appellant acted without the knowledge of his wife, who was the title holder, in entering into a settlement in regard to the property in the previous case No. 2280/RE. **It affirmed the right of the deceased defendant-respondent to continue to be in occupation of the premises without making any payment until the plaintiff-appellant's mother executed a deed of transfer in his favour.***

*The deceased defendant-respondent was admittedly the lawful tenant when the father of the plaintiff-appellant instituted action No.2280/RE as the landlord of the premises for ejection and arrears of rent. He had agreed to sell and the tenant had agreed to purchase the premises for a sum of Rs. 70,000/- payable before 31.12.77 and, admittedly, the consideration has been deposited in Court on 09.06.77. The tenant has also paid arrears of rent and in terms of the settlement, **he had the right to be in occupation without making any further payment until a deed of sale was executed in his favour.***

Although the father of the plaintiff-appellant had represented to Court that he had the authority of his wife, the title holder, to enter into the said terms of settlement, a distinction must be drawn between possession and title when considering the terms of settlement. While

the authority of the plaintiff-appellant's father extended to dealing with the possession of the property, it did not extend to disposing of the title thereto.

Where a settlement deals with a subject matter different to or more extensive than the subject matter of the suit and affects the rights of a third party, it is desirable that the Court should obtain an unequivocal manifestation of that third party's consent if the parties are to be bound by the settlement.

Although the plaintiff-appellant's father was not the agent of his mother in relation to the alienation of the property, he was nevertheless her agent in relation to the possession of the property. Thus, the settlement was binding on the father and the mother, as the principal, in relation to the payment of the arrears of rent and damages and the right to remain in possession. Having complied with the terms of settlement in regard to the deposit of the money, the defendant-respondent and his successors in title became entitled to remain in possession of the premises indefinitely and he was no longer a tenant. His refusal to attorn to the plaintiff-appellant is therefore irrelevant. Further, the plaintiff-appellant's mother had the paper title to the property subject to the right of the defendant-respondent to remain in occupation indefinitely without making any further payment. The gift of the property to the plaintiff-appellant from his mother did not give him greater rights than that which his mother had.

We, therefore, affirm the judgment of the Court of Appeal and hold that the father of the plaintiff-appellant acted as the agent of his mother to the limited extent as explained above in relation to the possession of the property.” (highlighted by me)

Thus, in relation to the settlement entered, the Supreme Court recognized the father of the Plaintiff Respondent as the agent of the Plaintiff Respondent's mother to deal with the possession of the property but not with regard to the title. In fact, by giving the property on rent to the original Defendant as the landlord on behalf of the mother of the Plaintiff Respondent, it is clear that the father of the Plaintiff Respondent had ostensible authority to act as the agent of the mother of the Plaintiff Respondent in relation to the possession of the property. However, as recognized by the Supreme Court, the father of the Plaintiff Respondent did not have authority to enter into an agreement with regard to the title of the property but as far as the possession is concerned there is a valid agreement between the parties that empowers the original Defendant and his successors to remain in property indefinitely as he has fulfilled the terms of settlement as agreed. Therefore, the Plaintiff Respondent's mother had only paper title and anyone who gets title through her cannot have better title than her. Thus, no right to get back the possession. Hence, the Supreme Court has observed this anomalous situation created by the settlement between the predecessors of the Plaintiff Respondent and the original Defendant. It is in that background one should understand the final paragraph of the Supreme Court judgment which was quoted previously in this Judgment.

Thus, the losing party, the Plaintiff Respondent was ordered to pay Rs.30,000/- as costs of all three Courts. This was almost a half of the consideration that the Plaintiff Respondent's predecessors got in view of the terms of settlement. It appears that to iron out the anomalous situation created by the settlement of parties, the Supreme Court in the aforesaid judgment has

given an opportunity for the Plaintiff Respondent to retain the costs ordered without paying as ordered if he transferred the property on or before 28.02.2004. As the father of the Plaintiff had no authority with regard to title, this executing a transfer deed is apparently an option given by the Supreme Court to the Plaintiff Respondent to retain costs without paying it, but it cannot be interpreted as a direction given to enforce through a decree as such enforcement would contradict the reasoning found in the said judgment. It must be noted that neither in the settlement in the original court nor in the aforesaid judgment of the Supreme Court, it is mentioned that the Defendant or its successors are entitled to get the transfer deed executed through a decree in terms of sections 331 and 332 of the Civil procedure Code in case the Plaintiff failed or refused to execute the deed. In fact, such a direction could not have been given as per the reasons adumbrated by the afore quoted paragraphs of the Supreme Court Judgment. As per the last paragraph of the Supreme Court Judgment, it is seen that the Plaintiff Respondent had three situations to execute a transfer deed before 28.02.2004 which is set out below;

1. The Substituted Defendants to draft the deed at their expense on or before 31.12.2003 reciting as consideration the sum of Rs 70,000/-already deposited - (The Plaintiff Respondent, if he had no objection to the draft could have opted to execute a transfer deed according to the draft even without any involvement by the Court).
2. If there was any objection to the draft deed mentioned above (if the draft is disputed by the Plaintiff Respondent), the Court has to approve the draft- (In such a situation, the Plaintiff Respondent could have opted to execute a transfer deed as approved by the Court)
3. The Plaintiff Respondent himself could have prepared the transfer deed in accordance with the settlement and the Supreme Court judgment and transfer the title before the given date- (There was no bar in the Supreme Court judgment for the Plaintiff Respondent to transfer the property as agreed in the settlement and in terms of the Supreme Court judgement.)

Whatever it is, as per the Supreme Court Judgment the execution of the deed should have taken place prior to 28.02.2004, otherwise the Substituted Defendants (Petitioner and the Other Substituted Defendant Respondent) were entitled to the costs ordered. I agree with the submission made on behalf of the Petitioner that the time limit that was imposed by the Supreme Court relates to the payment or non-payment of the costs. It does not affect the rights of the parties in terms of the settlement as interpreted by the Supreme Court Judgment. However, there is no direction by the Supreme Court that a deed must be executed or it could be executed through the Registrar of the District Court in terms of section 331 and 332 of the Civil Procedure code. One may argue that the substituted Defendants (including the Petitioner) are entitled to get a deed of transfer executed by the Registrar of the District Court as the Supreme Court affirmed the Court of Appeal judgment, and the Court of Appeal had allowed the appeal which had prayers among other things to set aside the District Court Judgment as well as to enter judgment in favour of the Defendant Appellant as prayed for in the answer filed in the Original Court wherein among other things, it had been prayed to execute a deed of transfer by the Registrar of

the District Court in case the Plaintiff Respondent failed to execute the deed- vide documents marked A1, the Supreme Court Judgment, A4, the Court of Appeal Judgment, A3 the Petition of Appeal to the Court of Appeal and A7, Answer in DC 4147/ZL. This cannot be acceded as the Court of Appeal in allowing the appeal only had set aside the District Court Judgment and had not mentioned that the Defendant were also entitled to the other prayers in the Petition of Appeal. On the other hand, It cannot be interpreted that the Court of Appeal granted all the reliefs prayed for in the Answer (A7) as the answer contained reliefs that cannot be given simultaneously; for example, while praying for a judgment directing to execute a deed of transfer by the Plaintiff and failing such to execute it by the Registrar of the District Court, there was also a prayer to stay the proceedings of the case until case No.4222/2 is concluded- vide A7, answer in the District Court. Thus, allowing the appeal by the Court of Appeal by its decision dated 20.12.1996 cannot be interpreted as a judgment giving all the reliefs prayed in the said answer. As stated above, while allowing the appeal it granted the relief of setting aside the judgment of the District Court.

In the above circumstances, the Plaintiff Respondent and his successors have the paper title based on the deed executed in favour of the Plaintiff Respondent but not entitled to obtain the possession based on that title as they are bound by the settlement entered by his predecessors and the said Supreme Court judgment. After the aforesaid settlement, the original Defendant was not in possession as a tenant, but on the strength of the settlement entered between him and the predecessors of the Plaintiff Respondent [as the father of the Plaintiff Respondent entered into the settlement representing his mother (the owner) as the agent who was authorized to deal with regard to the possession of the property]. As such, there is no possibility to force the Plaintiff Respondent to execute a deed of transfer which conveys the title. If the draft deed was tendered in time the Plaintiff Respondent could have considered it and opted to execute the transfer deed accordingly within time stated in the supreme Court judgment. As per the decision of the Supreme Court the settlement was valid with regard to the possession. Thus, the transfer of the title instead of paying costs ordered appears to be an option. By the time the Petitioner tendered the draft, the time given by the Supreme Court to use such option has lapsed resulting that the Plaintiff Respondent is now bound to pay costs ordered by the Supreme Court in its judgment dated 21.10.2003. Hence, considering the draft after the time given by the Supreme Court and approving it would not change the situation and make the execution of deed enforceable by using Court's authority. Thus, allowing this appeal and directing the District Court to consider and approve the draft will not affect the substantial rights of the parties.

Therefore, the questions of law allowed by this Court and quoted above are answered as follows;

1. Answered in the negative.
2. The reason given for the non-entitlement is not correct as the Supreme Court Judgment has not given any entitlement to get a deed or transfer executed as of a right giving clear indication that the settlement is valid only with regard to the possession. Hence, the execution of the deed was an option that could be used by the Plaintiff Respondent in lieu of paying the cost ordered.

3. Yes, however, since the execution of the deed is interrelated with the payment of costs within time, once the time lapse execution of the deed does not arise as the substituted Defendants (including the Petitioner) has not been conferred a relief to get a deed of transfer executed as of a right neither by the settlement nor by the Supreme court Judgment.

Hence, this appeal is dismissed. No costs are ordered. However, this Judgment should not be an obstacle for the successors of the original Defendant and the Plaintiff Respondent or his successors to negotiate and execute a deed of transfer. Anyhow, as at now, the Plaintiff Respondent has the mere paper title and does not have a right to get the possession back. He is also bound to pay the costs ordered by the Supreme Court in its judgment dated 21.10.2003. The successors of original Defendants are entitled to enjoy the possession of property based on the settlement and the Supreme Court Judgment.

Appeal Dismissed. No costs.

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Judge of the Supreme Court.

Hon. Vijith. K. Malalgoda, PC, J.

I agree.

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Judge of the Supreme Court.

Hon. Yasantha Kodagoda, PC, J.

I agree.

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Judge of the Supreme Court.