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

In the matter of an application for leave to appeal under and in terms of the article 128 of the Constitution of the Democratic Socialistic Republic of Sri Lanka read with Section 5 C of the High Court of the Provinces (special Provisions) act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC Appeal No. 110/2016

SC Appeal No. 111/2016

SC Appeal No. 112/2016

SC Appeal No. 113/20160

HCCA Trincomalee Revision App.
16/2016
DC Trincomalee Case No.
763/97
764/97
765/97
766/97

Shamali Arunika de Zoysa,
No.532/20 A, Siebel Place,
Kandy

Plaintiff

Vs.

1.Lilani Oosha Ramanaden,
No. 532/20 A, Siebel Place,
Kandy.

2.Ranjithan Justin,
Tambimuttu Casinader,
38, Denbigh Road,
Armadale 3143,
Victoria,
Australia
Appearing by his Attorney
the 1st Defendant.

3.Victorine Sounderam Rogers,
(dead)
C/O Mrs. Y Nadaraja,
13, Ebenezer Avenue,
Dehiwala.

3A. Daphne Seevaratnam,
146/8, Poorwarama Road,
Colombo 05.

Defendents

1. K. Sarojinidevi,
28/5, Central Road,
Orr's Hill,
Trincomalee.

2. A. Sellathangam,
28/4, Central Road,
Orr's Hill,
Trincomalee.

3. Chndramugam Mahendran,
(dead)
28/3, Central Road,
Orr's Hill,
Trincomalee.

3A.Mahenthiran Saraswathy,
28/3, Central Road,
Orr's Hill,
Trincomalee.

4. J. Vartharajah,
24, Konespuram, Orr's Hill,
Trincomalee.

5. S. E Chandrabose,
   26D5, Central Road,
   Orr's Hill,
   Trincomalee.
6. N. Sritharan,
   26F, Central Road,
   Orr's Hill,
   Trincomalee.
7. A. Vallliamma,
   26E, Central Road,
   Orr's Hill,
   Trincomalee.
8. G. Parashakthi (dead)
   26 D 1, Central Road,
   Orr's Hill,
   Trincomalee.

8A.T. Gopalasingham
   26 D 1, Central Road,
   Orr's Hill,
   Trincomalee.
9. K. Indrani
   26 G, Central Road,
   Orr's Hill,
   Trincomalee.

Added Defendants

AND

Shamali Arunika de Zoysa,
No.532/20 A, Siebel Place,
Kandy

Plaintiff-Petitioner

1.Lilani Oosha Ramanaden,
No. 532/20 A, Siebel Place,
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Defendant-Respondents

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Added Defendant-Respondent-Respondents

AND NOW

Shamali Arunika de Zoysa,
No.532/20 A, Siebel Place,
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Plaintiff-Petitioner-Petitioner-Petitioner

Vs.

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   26 G, Central Road,
   Orr's Hill,
   Trincomalee.

Added Defendant-Respondent-Respondent-Respondents

Before: Jayantha Jayasuriya, PC, CJ.
L.T.B Dehideniya, J.
S.Thurairaja PC, J.

Counsels: Faisz Musthapha, PC, with Gamini Hettiarachchi instructed by Sanath Wijewardena for the Plaintiff-Petitioner-Petitioner-Appellant.

Uditha Egalahewa, PC, with Ranga Dayananda for the 1st and 2nd Defendant-Respondent-Respondent-Respondents

K.V.S Ganesharajan with S. Ragul and K. Nasikethan for the 9th added Defndant-Respondent-Respondent

Argued on: 08.09.2020
Decided on: 07.06.2022

L.T.B Dehideniya, J.

Plaintiff-Petitioner-Petitioner-Petitioner (hereinafter sometimes referred to as the Petitioner) instituted a partition action in the District Court of Trincomalee to Partition the lot 2 of the land called "Orr's Hill", described in the schedule to the Plaint amongst the Plaintiff and the 1st to 3rd Defendants-Respondents-Respondents-Respondents (hereinafter sometimes referred to as the Respondents). Subsequently, the 1st to 9th added Defendants-Respondents-Respondents-Respondents (hereinafter sometime referred to as the 1st to 9th added Defendants) were added as parties at their request and they filed their statements of claims. At the trial, a settlement was proposed by the added Defendants to buy the portion of land they were in possession of, for the price of Rupees 200,000/- per perch. The Petitioner led evidence and concluded the trial marking documents P1 to P34. The other Defendants have not led any evidence. The learned District Judge delivered the judgement accepting the Petitioner's evidence and giving shares as prayed for in the Plaint. The learned District Judge has considered the proposed settlement

and stated in his judgement that the parties have reached a settlement and the added Defendants are willing to buy the said portion. Thereafter, the said conditions were entered in the interlocutory decree.

The Petitioner made an application to the District Court in terms of Section 839 of the Civil Procedure Code to set aside and/or cancel the relevant part of the judgement in relation to the settlement, on the basis that the parties have not entered into a proper settlement. The learned District Court judge disposed the inquiry by way of written submissions and delivered his order dated 31.05.2010 refusing the application holding that the parties had entered into a valid settlement.

Being aggrieved by the said order, the Petitioner filed a revision and *restitutio in integrum* application to the High Court of Civil Appellate in Trincomalee. After hearing the application the learned High Court Judge dismissed the revision application by the judgement dated 14.10.2013. It is from the aforesaid judgement that this appeal is preferred.

This Court granted Leave to Appeal on the following questions of law;

1) Is the judgement of their Lordships' the judges of the Civil Appellate High Court contrary to law and the materials placed before the Court?
2) Have their Lordships' the judges erred in law by failing to consider that the purported settlement is vague, uncertain and therefore cannot be implemented?
3) Have their Lordships' the judges erred in law by failing to consider that the express consent of the Plaintiff and the 1st to 3rd Defendants for the purported settlement were not obtained?
4) Have their Lordships' the judges erred in law by failing to consider that the parties have not expressly agreed on specific terms and conditions necessarily required for a consent decree?

5) Have their Lordships' the judges erred in law by failing to consider that the nature of the settlement was not explained to the parties before entering of the purported settlement?
6) Have their Lordships' the judges erred in law by failing to consider that the purported settlement was made violating Section 408 of the Civil Procedure Code?
7) Have their Lordships' the judges erred in law by failing to consider that the purported settlement was against the intention of the Plaintiff and the 1st to 3rd Defendants?
8) Have their Lordships' the judges erred in law by failing to consider that the said order of the learned District Judge is tantamount to gross miscarriage of justice?

The Petitioner's Appeal is based on the ground that the judgement of the High Court of Civil Appeal in Trincomalee, is contrary to law and against weight of the evidence led before the Court leading to a gross miscarriage of justice.

The land in question became an effected property within the definition of the terms under the Rehabilitation of Persons and Property and Industry Authorities Act No.29 of 1987 and vested with the state from 1987 to 1989. On 20th December 1989, the said allotment of the land was divested under the provisions of the said Act, free of encumbrances to the Petitioner and the 1st to 3rd Respondents. The Petitioner and the 1st to 3rd Respondents instituted the instant partition action in 1997. Therefore, according to the provisions of the Rehabilitation of Persons and Properties And Industries Authority Act No.29 of 1987 it is evident that the added Defendants cannot claim prescriptive rights to the subject matter.

It is a settled law that parties to a partition action could compromise their disputes and enter into a settlement with the mutual consent of all the parties to the partition action.

In the cases of ***Caroline Perera and Another v. Martin Perera and Another*** [2002] 2 Sri L.R 1 and ***Faleel v. Argeen and Others*** [2004] 1 Sri L.R 48 it was held that;

"It is possible for the parties to a partition action to compromise their disputes provided that the Court has investigated the title of each party and satisfied itself as to their respective rights."

A similar view was expressed in the case of ***Kumarihamy v. Weeragama et al.***(1942) 43 NLR 265, where Justice de Kretser held that, an agreement which is entered into in a partition action affecting only the rights of the parties inter se and which is expressly made subject to the Court being satisfied that all parties entitled to interests in the land are before it and are solely entitled to it, is binding on the parties and is not obnoxious to the Partition Ordinance.

A question with great importance before this court is whether the terms of settlement referred to in the District Court established a valid partition settlement under the existing legal context.

According to the proceedings dated 09.09.2008, the proposed terms of settlement are as follows;

"පැමිණිලිකාරිය සිටී

ඇය වෙනුවෙන් නීතිඥ ඕ.එල්.එම් ස්මයිල් මහතාගේ උපදෙස් මත නීතිඥ අසේල රැකව මහතා පෙනී සිටී.

විත්තිකරුවන් සිටී

01, 02 සහ 03 විත්තිකරුවන් වෙනුවෙන් නීතිඥ ඇන්ටනි මහතාගෙ උපදෙස් මත නීතිඥ මාධව රූපසිංහ මහතා පෙනී සිටී. 05 සහ 08 විත්තිකරුවන් වෙනුවෙන් නීතිඥ ඒ. පේගසෝදි මහතා පෙනී සිටියි.10 සහ 12 විත්තිකරුවන් වෙනුවෙන් නීතිඥ තිරුකුමාරනාදන් මහතා පෙනී සිටින අතර අද දින ඒ මහතා පෙනී නොසිටී.

අද දින මෙම නඩුවට රාමනාදන් යන විත්තිකරු සහ කාසිනාදන් යන විත්තිකාරිය පෙනී සිටියි. ඔවුන් දෙදෙනා මෙම නඩුවට අදාළ ඉඩමේ නොමැති බව කියා සිටියි. රෝයස් යන විත්තිකරු මිය ගොස් ඇත. ඩී. ඩී සිලරත්නම් යන විත්තිකරු අද දින අදිකරණයට නොපැමිණි අතර ඔහු

එම ඉඩමේ පදිංචි වී නොසිටින බව අධිකරණයට පවසා සිටී. සරෝජිනී යන විත්තිකාරිය අද දින අධිකරණයට පමිණ නැත. සෙල්ලතම්බි යන විත්තිකාරිය අද දින අධිකරණයේ පෙනී සිටී. මහේන්ද්‍රන් යන විත්තිකරු මිය ගොස් ඇත. සරස්වතී විත්තිකාරිය අද දින අධිකරණයේ පෙනී සිටී. වරධරාජා, චන්ද්‍රබොස්, ඉන්ද්‍රානි, ගෝපාලසිංහම් යන විත්තිකරුවන් අද දින අධිකරණයේ පෙනී සිටී. පරාශක්ති යන විත්තිකාරිය මිය ගොස් ඇති හෙයින් ඇයගේ ඇටෝර්නි බලකරු වශයෙන් ඇයගේ ස්වාමි පුරුෂයා වන පද්මනාදන් යන අය අධිකරණයේ පෙනී සිටී.

අද දින අධිකරණයේ පෙනී සිටින ලද සියලුම විත්තිකරුවන් තම තමන් භුක්ති විඳින ඉඩම් කොටස් සඳහා රු.200,000/- (ලක්ෂ දෙක) බැගින් ගෙවා මිලට ගැනීමට එකඟ වේ. ඉහත කී යෝජනාවට එකී පමිණිලිකාරිය කැමත්ත පළ කර සිටී. සියලුම විත්තිකරුවන් අධිකරණයට පැමිණීමෙන් පසු පමිණිලිකාරියගේ අයිතිවාසිකම් අධිකරණය මගින් පරීක්ෂා කිරීමෙන් අනතුරුව මෙම නඩුව සමථයට පත් කිරීමට අධිකරණයට ඉඩ දීමට කැමැත්ත පළ කර සිටී.

එම නිසා මෙම නඩුව සමථයට පත් කිරීමට කැමත්ත පළ කිරීම නිසා සමථයට නඩුව කල් තබනු ලැබේ..”

Proceedings dated 18.11.2008;

‘‘පැමිණිලිකරු සිටී.

පැමිණිලිකරු වෙනුවෙන් නීතිඥ ඕ.එල්.එම් ස්මයිල් මහතාගෙ උපදෙස් මත නීතිඥ අසේල රැකව මහතා පෙනී සිටී.

01 වන විත්තිකාරිය සිටී.

02 වන විත්තිකාරියගෙ ඇටෝර්නි බලකරු සිටී.

01 සහ 02 විත්තිකරුවන් වෙනුවෙන් නීතිඥ ඇන්ටනි මහතාගෙ උපදෙස් මත මාධව රූපසිංහ මහතා පෙනී සිටී.

02, 05, 06, 07, 08, 11 වන විත්තිකරුවන් සිටී.

04 වන විත්තිකරු නැත.

...

..මෙම නඩුව මීට පෙර සටහන් කර ඇති පරිදි ආරවුලට අදාළ දේපලේ එක් එක්කෙනා භුක්ති විඳින කොටස් වලට පර්චස් 01 ක් රු.200,000/- බැගින් ගෙවා මිලදී ගැනීමට කැමැත්ත පළ කර ඇත. එම කරුණු මත මෙම නඩුව තවදුරටත් විභාගයට ගෙනයාමේ අවශ්‍යතාවයක් නොමැති බව පාර්ශවකරුවන්ගේ නීතිඥ මහත්වරුන් කියා සිටී..''

The terms of settlement as referred in the judgement of the District Court dated 09.01.2009 are in the following manner; (p.4)

"..What the settlement is that added Defendants indicated their consent to purchase from the Plaintiff and the 1st Defendant the Lots that they are now in possession at the rate of Rs.200,000/- per perch. To this, the Plaintiff and the 1st Defendant showed their consent to the Court."

Even though the law permits the parties to a partition action to compromise their disputes, the Court has to thoroughly investigate the terms of the settlement and title of each party, before allowing such partition settlement. According to **Section 25 (1)** of the Partition Law (No. 21 of 1977), learned trial Judge has a duty to examine the title of each party to the action and to hear and receive evidence in support in order to determine all questions of law. The above legal context has been discussed and accepted in a long line of case law. In the case of ***Richard and Another v. Seibel Nona and Others*** [2001] 2 Sri L.R 1 it was held that it is the duty of the Judge to fully investigate into the title to the land and shares. A similar view was expressed in the case of ***Sopinona vs. Pitipanaarachchi And two others*** [2010] 1 Sri L.R 87 Saleem Marsoof J. held that basic principle in all the enactments on Partition Law is that where there has been no investigation of title, any resulting partition decree necessarily has to be set aside. Similarly, in the case of ***Gangoda Mudiyanselage Wijewathi Podimenike of Mahawelegedara***

v. Pathirennehelage Leelawathie of Mahawelgedera (SC Appeal No. 178 /2013, SC minutes dated 14.12.2016) per Eva Wanasundera PC J., in the course of investigation of title to the land sought to be partitioned by parties before Court, prior to deciding what share should go to which party is more the duty of the judge than the contesting parties.

In the present application, according to the judgement dated 09.01.2009 and the order dated 31.05.2010, the Learned District Judge had investigated the title of the Petitioner and the 1st – 3rd Defendants considering the evidence led by the said parties. However, the District Judge has not investigated the title of the Added Defendants. When the case was taken up for trial, Added Defendants did not lead evidence and further decided not to contest the title. Consequently, the Added Defendants entered into the purported partition settlement. Therefore, it is evident that the Learned District Judge had no opportunity to investigate the title of the Added Defendants for the reason that they had not led evidence.

Moreover, it is a well-established legal concept that several legal aspects need to be fulfilled in order for a settlement to be valid before the law.

In the case of ***Gunawardena v. Ran Menike and Others*** [2002] 3 Sri L.R 243, Weerasuriya J. (P/CA) held with approval of the case ***People's Bank v. Gilbert Weerasinghe*** (1986) 2 CALR,

> At p.244-245
>
> *..an agreement must be expressed in clear an unambiguous terms to have a binding effect on the parties to give it the effect of amounting to an implied waiver of the right to appeal.*
>
> *Therefore, it is vital that the first instance to ascertain whether there was a settlement by all parties who have a right to this land on clear and unambiguous terms to have a binding effect on the parties."* [emphasis added]

In the present application, the subject matter is co-owned by four co-owners (Petitioner and the 1st to 3rd Respondents) and nine added Defendants were claiming prescriptive title to several portions of it. There has been a failure to mention the terms of the compromise, namely in what manner and to what extent the rights of the parties are affected. Therefore, it is uncertain which co-owner is entitled to which allotment and which co-owner is entitled to receive the payments from which added Defendant. Further, there is no express term regarding an exact time period to fulfil the purported settlement and no indication of consequences if one or more parties to the settlement failed to act in accordance with the settlement.

It appears that certainty and precision, which are considered as basic attributes of a partition settlement, cannot be found in the aforesaid settlement. Further, the learned District Court Judge has failed to investigate the reliability of the terms of settlement, which affects the rights of the parties. Thereupon, this settlement cannot be enforced by law and cannot be considered as binding upon the parties.

Except for the precision of the terms of settlement, it is noteworthy that where there has been a settlement or compromise, it must be in strict compliance with the **Section 91 and 408** of the Civil Procedure Code. Section 91 of the Civil Procedure Code provides that;

> **Section 91**
>
> *"Every application made to the court in the course of an action, incidental thereto, and not a step in the regular procedure, shall be made by motion by the applicant in person or his counsel or registered attorney, and a memorandum in writing of such motion shall be at the same time delivered to the court."* [emphasis added]

Section 408 of the Civil Procedure Code provides for the adjustment of actions and reads as follows;

Section 408

> *"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 accordance therewith, so far as it relates to the action, and such decree shall be final, so far as relates to so much of the subject-matter of the action as is dealt with by the agreement, compromise, or satisfaction."* [emphasis added]

A basic question of law to be decided is whether the purported settlement was made violating Section 408 of the Civil Procedure Code. Section 408 of the Civil Procedure Code require any settlement to be notified to the Court by way of Motion made in the presence of or on notice to all the parties to the settlement. The above legal context has been discussed and accepted in a range of case law.

In the case of ***Ukku Amma v. Paramanathan*** (1959) 63 NLR 306 Weerasooriya J. held that, Section 408 provides that an agreement or compromise shall be notified to Court by motion. It was further held that the decree entered in terms of the settlement should be vacated, where in a purported settlement of a case was not complied with Section 408 and 91 of the Civil Procedure Code.

In the case of ***Gunawardena v. Ran Menike and Others*** [2002] 3 Sri L.R 243 it was held that where there has been a settlement or compromise it must be in strict compliance with the provisions of Section 91 and Section 408 of the Civil Procedure Code.

Further, in the case of ***Caroline Perera and Another v. Martin Perera and Another*** [2002] 2 Sri L.R 1 per Justice Weerasuriya;

At p.4

*"In **Babyhamine v. Jamis** (46 CLW 5) at the trial where the points in dispute were settled among the parties before the evidence was led and the interlocutory decree entered so as to give effect to the settlement but the compromise was lacking in precision and did not strictly conform to section 91 and 408 of the Civil Procedure Code it was held that in the interest of justice , the purported settlement and the judgement should be set aside and the trail should proceed de novo upon the issues framed."*

A similar view was expressed in the case of ***Avenra Gardens (Private) Limited v. Global Project Funding AG*** (S.C. Appeal No. 157/2019 decided on 23.02.2022), Per Justice Janak De Silva.

At p. 7

*" The foundation of a consent decree is the consensus ad idem of the parties. For this reason, section 408 of the Civil Procedure Code directs that the Court should pass a decree in accordance with the terms of the settlement. Case law emphasizes the need to comply with this and other relevant provisions to ensure that any settlement entered is based on the mutual consent of the parties. Any settlement or compromise must conform strictly to the provisions of sections 91 and 408 of the Civil Procedure Code. If the compromise was lacking in precision and did not strictly conform to sections 91 and 408 of the Civil Procedure Code and it leads to confusion and uncertainty, any decree entered on it could be attacked on the ground of want of mutuality **[Faleel v. Argeen and Others** (2004) 1 Sri.L.R. 48]. Thus, in **Dassanaike v. Dassanaike** (30 N.L.R. 385 at 387), Fisher, C. J. observed: "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." [emphasis added]

At p. 7-8

"..It directs that "such agreement, compromise, or satisfaction shall be notified to the court by motion…". In my view, these words require the terms of the settlement to be incorporated into a motion signed by the registered attorney for all parties to the settlement. There can be no room for any dispute once terms are recorded in a motion and the parties concerned have indicated their consent by the registered attorney-at-law signing the motion containing the terms of the settlement." [emphasis added]

Nevertheless, when carefully considering the present Application, it appears that the terms of settlement have not been produced by way of a motion as required by law. Instead, the terms were recorded in open court on 09.09.2008. Further, according to the proceedings of the District Court dated 09.09.2008 and 18.11.2008, some of the added Defendants were absent and some of them were deceased at the time when the terms of settlement were recorded in the open court. Therefore, it is evident that the learned District Judge has failed to consider the following legal factors, when entering the Partition Decree:

i. Terms of settlement was not incorporated into a motion as required by law.
ii. Terms of settlement was recorded in the open court without the mutual consent of all the parties to the case.
iii. Terms of Settlement was lacking in precision and did not strictly conform to sections 91 and 408 of the Civil Procedure Code and it leads to confusion and uncertainty.

It is a trite law that, settlement of a partition action between the parties is welcome. The settlement between parties should be allowed by the Court to the extent possible in the law. On that account, in my view, pursuant to evidence and case law discussed, there is a significant absence of precision and certainty in the terms of settlement in this case. Moreover, it is apparent that the purported settlement was made violating Sections 91 and 408 of the Civil Procedure Code. Therefore, in the eyes of law, the purported terms of settlement in the present application is invalid and cannot be enforced before law.

I answer the questions of law as follows;

1) Yes
2) Yes
3) Yes
4) Yes
5) Yes
6) Yes
7) Yes
8) Yes

Under these circumstances, the settlement is invalid and should be set aside.

The Petitioner has also prayed for the cancellation of the settlement, contesting that the said settlement has been commissioned violating the provisions of law. When looking at the proceedings of the District Court, it appears that the added Defendants did not lead evidence, relying on the proposed settlement.

Therefore, I set aside the District Court judgement dated 09.01.2009 and the interlocutory decree entered upon the said judgement and direct the learned District Court judge of the

District Court of Trincomalee to proceed with the trial from the point where the Petitioner closed the case after leading evidence. I allow the Appeal, set aside the order dated 31.05.2010 of the District Court of Trincomalee, set aside the interlocutory decree, set aside the judgment dated 14.10.2013 of the Civil Appellate High Court of Trincomalee, and set aside the settlement.

Judge of the Supreme Court

Jayantha Jayasuriya, PC, CJ.
I agree

Chief Justice

S. Thurairaja, PC, J.
I agree

Judge of the Supreme Court