

NANAYAKKARA AND OTHERS
v
SIRISENA

COURT OF APPEAL
AMARATUNGA, J.
BALAPATABENDI, J.
CA REV. 1723/2001
D.C. GALLE 9773/L
FEBRUARY 10, 2003

Civil Procedure Code S. 5, S.187, S.188, S.337 – Settlement entered – In terms of settlement decree entered in 1994 – Application to execute decree allowed 6 years later – Settlement – Judgment – Decree – Computation of 10 year period in S.337.

Held :

1. The settlement was entered on 25.1.1990, the decree was entered only on 10.2.1994, the application to execute the decree was allowed on 18.10.2000.
2. When there is a settlement there is no adjudication and there is no judgment within the meaning of S.187, the terms of settlement cannot be elevated to the status of a decree, which has to be in Form No. 41. Thus it is clear that the terms of settlement were not the decree in the case.
3. The period of 10 years begins to run from 10.2.94 not from the date of settlement 25.1.90.

APPLICATION in Revision against the Order of the District Court of Galle.

Hemasiri Withanachchi for petitioners.

J.C. Weliamuna with *Shantha Jayawardena* for respondent.

Cur.adv.vult

April 1, 2003

GAMINI AMARATUNGA, J.

This is an application in revision to set aside the order made by the learned Additional District Judge of Galle dated 21.9.2001. That order relates to the execution of the writ of possession in favour of the plaintiff. The plaintiff by his plaint dated 30.7.1981 averred that he was the owner of lot No 8 depicted in final partition plan No. 780 prepared by Surveyor Garvin Silva in District Court, Galle case No P2421. The total extent of lot No. 8 was perches 28.62. Along the northern boundary of lot No.8 ran a roadway marked lot 12 in the said plan and this roadway was the access to the defendant's land marked Lot 9. The plaintiff alleged that the defendant encroached upon a portion of land from the northern boundary of lot No.8 and annexed it to lot No.12 which is the defendant's roadway to his lot. The plaintiff prayed for a commission to a Surveyor to demarcate the encroached portion and for an order declaring that he is the owner of that demarcated portion.

The Court has issued a commission to the same Surveyor Garvin Silva to prepare a plan showing the alleged encroachment. On 22.2.1983 the Surveyor has surveyed the land and prepared the plan which has been produced by the petitioners as P2 in these proceedings. In that plan the Surveyor has marked the encroachment 00.62 perches in extent - as lot 8 A.

On 25.1.1990 after one witness testified at the trial parties entered into a settlement. The defendant agreed that lot 8A in the said plan belonged to the plaintiff. The plaintiff agreed that the roadway marked lot 12 is the roadway to defendant's lot No 9. The defendant agreed to allow the plaintiff to build a stone wall along the northern boundary of lot 8A (that is along the southern boundary of lot 12 roadway). The defendant also agreed to the plaintiff getting the boundaries of the roadway demarcated by a Surveyor. The Judge ordered to enter decree in terms of this settlement.

The decree had been entered only on 10.2.1994. The delay for the entering of the decree is not relevant to this application. It appears that at some point of time the defendant has died but the exact date of his death has not been given by both parties. However in the documents annexed to the petition there is an appli-

cation made to Court dated 18.2.1994 seeking to substitute the present 2nd and 3rd petitioners in place of the deceased defendant and the Court on 17.11.1995 has issued notice on the proposed substituted defendants. (J.E. No 62) According to journal entry No 69 notices have been served on 1A defendant but there is no report indicating that notices have been served on 1B defendant. 40

Since it was necessary to demarcate the boundaries of lot No 12 (roadway) before the plaintiff could erect a stone wall along the southern boundary of the roadway (which is the northern boundary of lot 8A) the plaintiff again sought a commission to a Surveyor and this was issued on 17/8/1995 and the Surveyor's plan was submitted to Court on 6/1/1999. It appears from the record that the delay in submitting the plan was due to the illness of the Surveyor. Thereafter on the application of the plaintiff, the Court on 18/10/2000 made order directing the execution of the writ. 50 According to the Fiscal's report, on 25/11/2000 he went to the relevant land and after the Surveyor demarcated the boundaries he handed over possession of the relevant portion of the land to the plaintiff and the latter then and there built a boundary wall along the boundary of the roadway. According to the fiscal's report the 1st and 2nd petitioners have objected to the execution of the writ but he has asked them to make their objections to Court.

When one considers the Fiscal's report the purpose of the encroachment becomes apparent. According to the Fiscal's report after the plaintiff built the stone wall along the line shown by the Surveyor vehicles could not be taken along the roadway to lot No. 9. However the petitioners cannot now challenge the validity of the decree entered in terms of the settlement. They have in fact not challenged the validity of the decree. Instead they have challenged the execution on the basis that ten years have elapsed from the date of the settlement and that all heirs of the deceased defendant have not been substituted before the writ was issued. 60

It appears that the petitioners rely on section 337 of the Civil Procedure Code which enacts that "No application....to execute a decree....shall be granted after the expiration of ten years from- 70

(a) the date of the decree...."

In this case the application to execute the decree was allowed on 18/10/2000. The decree was never entered on the day the parties settled the case. On that day the Court merely ordered "enter decree accordingly". This is clear from the proceedings as well as from the journal entry No 50 of 25/01/1990. According to section 5 of the Civil Procedure Code 'decree' means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court....**Judgment** means the statement given by the Judge of the grounds of a decree or order. In other words judgment means the reasons upon which the adjudication is based. See section 187 of the Civil Procedure Code. In terms of section 188 of the Civil Procedure Code after the judgment a formal decree shall be drawn and signed by the judge. When there is a settlement there is no adjudication and there is no judgment within the meaning of section 187 of the Civil Procedure Code. The terms of settlement are terms agreed upon by the parties. Such terms cannot be elevated to the status of a decree, which according to section 188 of the Civil Procedure Code, has to be in the form of form No 41 in the first schedule or to the like effect. Thus it is clear that the terms of settlement were not the decree in the case. The journal entry of 10/2/94 (JE 59) clearly shows that the decree was entered – which means in terms of the provisions of section 188 of the Civil Procedure Code signed by the Judge – on 10/2/1994. Therefore the period of ten years begins to run from 10/2/94 and not from the date of settlement i.e. 25/1/1990. Accordingly the petitioners' contention that the writ has been issued ten years after the decree fails.

Their other contention is that four other heirs of the deceased defendant have not been added as substituted defendants. The learned Judge in his order of 21/09/2001 has directed to add them.

It appears that after the present petitioners filed their objections to the execution of the writ the learned judge has restored the status quo. In his order dated 21/9/2001 he has held that the plaintiff is entitled to get the writ executed. This order is a correct order. Accordingly this revision application is dismissed with costs fixed at Rs. 7500/-.

BALAPATABENDI, J. - I agree

Application dismissed