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GUNAWARDENA
v.
RAN MENIKE AND OTHERS

COURT OF APPEAL
WEERASURIYA, J. (P/CA) AND
DISSANAYAKE, J.
CA NO. 808/93 (F)
DC RATNAPURA NO. 2822/P
MAY 18,
JUNE 22, AND
JULY 19, 2001

Partition Action – Judgment based on a compromise – Validity – Civil Procedure Code; sections 91 and 408 – Strict compliance necessary.

Held:

- (1) 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.
- (2) It is possible for parties to a partition action to compromise their disputes provided the court has investigated the title of each party and satisfied itself as to the respective rights and allotment of shares upon the compromise reached by parties.

APPEAL from the judgment of the District Court of Ratnapura.

Cases referred to:

1. *People's Bank v. Gilbert Weerasinghe* – (1986) 2 CALR 260.
2. *Kumarihamy v. Weragama* – 43 NLR 265.
3. *Rosalin v. Maryhamy* – (1994) SLR 262.
4. *Punchibanda v. Punchibanda* – 42 NLR 382.

W. Dayaratne with *Lasitha Karuwanarachchi* for plaintiff-appellant.

R. Dabare for 7th defendant-respondent.

Ranjan Mendis for 1st, 3rd, 4th and 5th defendant-respondents.

Daya Guruge with *Senarath Weerakoon* for 2nd and 10th defendant-respondents.

Raja Peiris for 21st, 22nd, 24th, 28th, 31st and 32nd defendant-respondents.

Cur. adv. vult.

October 05, 2001

WEERASURIYA, J. (P/CA)

This is an appeal arising from the judgment dated 14. 12. 1993, ⁰¹ ordering an interlocutory decree to partition the contiguous lands called Maha Kumbura, Polwatte Kumbura, Dobagahakumbura, Muhandiramlagewatte, Pahalawatte and Weliwatte morefully described in the schedule to the plaint and depicted in preliminary plan No. 379, dated 18. 05. 1980, made by licensed Surveyor M. S. Diyagama.

At the hearing of this appeal, learned Counsel for 1st, 3rd, 4th and 5th defendant-respondents raised a preliminary objection that since this judgment was based on a compromise arrived at by the parties, there is no direct right of appeal. It is necessary to deal with ¹⁰ this matter at the outset.

In the case of *The People's Bank v. Gilbert Weerasinghe*⁽¹⁾ it was held that an agreement must be expressed in clear and unambiguous terms to have a binding effect on the parties to give it the effect of amounting to an implied waiver of the right of appeal.

Therefore, it is vital in the first instance to ascertain whether there was a settlement by all the parties who have a right to this land on clear and unambiguous terms to have a binding effect on the parties.

This case was taken up for trial on 11. 12. 1991 and at the conclusion of the evidence of Don Piyadasa Rupasinghe, a date was nominated for tendering of the documents and the schedule of shares. It would appear that in the absence of any points of contest and any cross-examination of the evidence of Rupasinghe, that the parties who were present on this day had entered into a compromise to settle all their disputes. Therefore, it would be legitimate for one to assert initially that the judgment against which this appeal has been preferred, in fact was a consent judgment. But, however, the following material would counter such a proposition:

- (1) The 3rd, 6th, 8th, 10th, 11th, 12th, 15th, 16th, 17th, 18th, 19th, 20th, 23rd, 25th, 26th, 27th, 29th and 30th defendant-respondents were absent and unrepresented.

However, out of these defendant-respondents only the 3rd, 8th, 10th, 11th, 12th, 15th, 16th, 19th, 20th and 27th defendant-respondents had filed their statements of claim.

It is necessary to state that even the parties who were in default within the meaning of section 25 (2) of the Partition Law are entitled to claim their rights disclosed in the plaint and produce the title deeds in proof of that. Therefore, there was a serious lapse on the part of the District Judge to permit a compromise without participation of all the parties.

- (2) The person who gave evidence was Don Piyadasa Rupasinghe the husband of the plaintiff-appellant. The question may arise whether he had the express authority of the

plaintiff-appellant to effect a compromise on her rights in the absence of proof that she was present in Court and agreed to diminution of her rights on that day. Her entitlement of 1/3 undivided rights on deed P9 had been reduced to 11/60.

- (3) There has been a failure to mention the terms of the compromise, namely in what manner and to what extent the rights were reduced to bring about a resolution of the disputes. The plaintiff-appellant is entitled to complain that without her participation her rights had been bargained without reaching a consensus with all the parties who are entitled to rights on this land. 50
- (4) The case of the 7th defendant-appellant stands on a different footing, namely that there was no indication of the consent of the attorney-at-law in respect of a diminution of his (7th defendant-appellant's) entitlement.
- (5) The plaint disclosed 11/18 undivided rights to 1st to 9th defendant-respondents, but at the purported settlement, 7th defendant-appellant's rights were completely disregarded. One fails to understand the rationale of foregoing the entire rights of a party in a compromise, when there was no mention of any arrangement to that effect between the 7th defendant-appellant and others. 60

It would be significant to note that several parties had appeared subsequently and made their claim without a reference to a compromise having been effected.

The lapse of this magnitude on the part of the trial Judge amounts to an illegality, as opposed to a more irregularity. In the circumstances, 70

this settlement did not have the binding effect on the parties to give it the effect of amounting to an implied waiver of the right of appeal. It is possible for parties to a partition action to compromise their disputes provided the Court has investigated the title of each party and satisfied itself as to their respective rights and allot shares upon the compromise reached by the parties.

In *Kumarihamy v. Weragama*⁽²⁾ it was held that there is nothing to prevent the Court allowing parties to compromise their disputes provided the Court has investigated the title and has been satisfied 80 that the parties before it alone have interests in the land to be partitioned and that once such a compromise is allowed the parties are bound by its terms.

It is noteworthy that where there has been a settlement or compromise it must be in strict compliance with the provisions of sections 91 and 408 of the Civil Procedure Code.

In *Rosalin v. Maryhamy*⁽³⁾ it was held that when an agreement is entered into the Court has to be satisfied only as to whether the agreement is between all the parties having interests in the land sought to be partitioned. In the event of such agreement the respective share 80 or interest to be given to each party is based upon the compromise that is reached and not on an examination of title.

The unsatisfactory manner in which settlements are effected in cases was the subject of comment by Soertsz, J. in *Punchibanda v. Punchibanda*⁽⁴⁾ in the following manner :

"This court has often pointed out that when settlements, adjustments, admissions, &c. are reached or made, their nature should be explained clearly to the parties and their signatures or thumb impressions should be obtained. The consequence of this

obvious precaution not being taken is that this court has its work ¹⁰⁰ unduly increased by wasteful appeals and by applications being made to it for revision or *restitutio in integrum*."

The manner in which the trial Judge has proceeded to effect a settlement of the disputes in this partition action is far from satisfactory. There has been failure to adhere to basic fundamentals in effecting a settlement and the adjustment of claims.

For the foregoing reasons, I set aside the judgment of the learned District Judge dated 14. 12. 1993 and order a fresh trial. The parties must bear their costs in this appeal. This case is remitted to the District Court for a trial *de novo*.

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This appeal is allowed subject to the above conditions.

DISSANAYAKE, J. – I agree.

Appeal allowed.