

FATHIMA
v.
MOHIDEEN AND ANOTHER

COURT OF APPEAL
DE SILVA, J.,
WEERASURIYA, J.,
C.A. NO. 576/92
D.C. COLOMBO NO. 8699/M
SEPTEMBER 21ST, 1998

Civil Procedure Code S. 188, S. 408 – Consent Decree – Settlement on matters extraneous to the action – subject-matter of another action. – Lack of jurisdiction – Patent or latent.

The plaintiff-respondent instituted action against the defendant respondent claiming damages, consequent upon the demolition of five premises. The matter was settled with the defendant-respondent agreeing to purchase the allotment of land which is the subject-matter in another case 14762/L, which had been instituted by the petitioner upon a valuation by a Valuer.

Once the deed is executed the plaintiff-respondent and the petitioner were to withdraw the 4 connected cases which were pending against the defendant respondent.

The petitioner who is the wife of the plaintiff-respondent moved court to set aside the settlement. The application was refused by the learned District Judge.

Held:

1. It is common ground that the settlement and the consent decree did not deal with the matters which were the subject-matter of the action. Such a decree is not one that the court had power to enter under s. 188 CPC. Nor is it one that the court had the power under sec. 408 CPC.
2. The subject-matter of the action has to be determined by having recourse to the pleadings of a particular case.
3. As the subject-matter of the two cases are distinct – and independent of each other a party is precluded from enlarging the subject-matter by way of a settlement by bringing the subject-matter of one action to the subject-matter of another action – there was a patent lack of jurisdiction.

APPLICATION in Revision from the Order of the District Court of Colombo.

Cases referred to:

1. *A. D. Appuhamy v. T. E. Perera Hamine* – 63 CLW 84.
2. *Perera v. Commissioner of National Housing* – 77 NLR 361 at 366.

Faiz Musthapa PC, with *H. Withanachchi* for petitioner-petitioner.

L. C. Seneviratne PC, with *Lakshman Perera* and *Arjuna Weerasinghe* for defendant-respondent.

Cur. adv. vult.

December 08, 1998.

WEERASURIYA, J.

By this application, petitioner-petitioner (hereinafter referred to as the petitioner) is seeking to set aside the order of the Additional District Judge of Colombo dated 22.06.92.

The facts pertaining to this application as set out by the petitioner are briefly as follows:

The plaintiff-respondent by plaint dated 15.12.90 instituted action against the defendant-respondent claiming damages in a sum of Rs.1,500,000 arising, consequent upon the demolition of premises bearing Nos. 15/22, 15/23, 15/24, 15/25 and 15/26, New Moor Street, Colombo 12.

On 24.05.91 when the case came up for trial parties agreed to settle the case *inter alia* on the following terms:

- (1) that the defendant-respondent has agreed to purchase the allotment of land described in the schedule to the plaint in DC Colombo case bearing No. 14762/L which had been instituted by the petitioner upon a valuation by a valuer selected by the defendant-respondent from a panel of valuers nominated by the plaintiff-respondent;
- (2) that upon the deposit of the purchase price by the defendant-respondent, the petitioner would execute a deed of transfer;

- (3) that on the execution of the said deed the plaintiff-respondent and the petitioner would withdraw cases bearing Nos. 5700 ZL, 5701/ZL, 5702/ZL, 5703/ZL and 14762/L which were pending against the defendant-respondent.
- (4) that in the event of failure on the part of the plaintiff-respondent to execute the deed within two weeks upon the deposit of money by the defendant-respondent, the Registrar of Court would execute a deed of transfer in favour of the defendant-respondent.

Carl Moses, Consultant Valuer, who was selected by the defendant-respondent, in accordance with the terms, submitted a valuation report dated 06.09.91 and the petitioner on 08.10.91 filed objections to the aforesaid settlement praying that it be set aside and that she be discharged from the obligation under the said settlement. The defendant-respondent filed a statement of objections to the application of the petitioner and the Additional District Judge having called upon the parties to tender written submissions, by his order dated 22.06.92 refused the application of the petitioner. It is from the aforesaid order of the Additional District Judge that this application for revision has been filed.

At the hearing of this application, learned President's Counsel for the petitioner submitted the following matters:

- (a) that the District Court had no jurisdiction to enter the said settlement;
- (b) that the Additional District Judge had erred by failing to consider the fundamental issue whether the plaintiff-respondent had the authority of the petitioner to bind her to obligations in a case to which she was not a party.

The contention of learned President's Counsel for the petitioner that the District Court had no jurisdiction to enter the said settlement was based on the following grounds:

- (a) that the settlement was not in respect of the subject-matter of the action;
- (b) that the District Judge had misconstrued section 408 of the Civil Procedure Code.

In the case of *A. D. Appuhamy v. T. E. Perera Hamine*⁽¹⁾ where a decree entered in terms of a settlement arrived at by the parties of an action did not deal with matters which were the subject-matter of that action but embodied matters extraneous to the action and dealt with the subject-matter of other actions between the parties, it was held that such a decree is not one that the court had power to enter under section 188 of the Civil Procedure Code; nor is it one that the court had power to pass under section 408 of the Code. It was common ground in that case, that the settlement and the consent decree did not deal with matters which were the subject-matter of the action.

It is to be noted that the petitioner who is the wife of the plaintiff-respondent had independently instituted case No. 14762/L in the District Court of Colombo against the defendant-respondent seeking, *inter alia*, a declaration that she was entitled to a right of way for certain land owned by her. Apart from the present case, plaintiff-respondent had instituted cases bearing Nos. 5700/ZL, 5701/ZL, 5702/ZL and 5703/ZL against the defendant-respondent seeking relief to prevent forcible ejection from such premises. The settlement entered upon on 24.05.91 between the plaintiff-respondent and the defendant-respondent, required the petitioner to sell the property which formed the subject-matter of the case bearing No. 14762/L, to the defendant for a purchase price to be determined by a valuer in accordance with the terms of settlement. The said settlement also provided for a withdrawal of case No. 14762/L instituted by the petitioner against the defendant-respondent. Thus, the settlement provided for a transfer of property owned by the petitioner to the defendant-respondent which formed the subject-matter of action bearing No. 14762/L instituted by the petitioner.

However, it is to be observed that the said settlement provided for the following consequential clauses namely:

- (a) that in the event the defendant-respondent makes default in depositing the money, being the consideration for the sale of land as stipulated in the settlement, judgment is to be entered in favour of the plaintiff-respondent as prayed for in the plaint;
- (b) that if the plaintiff-respondent failed to fulfil his part of the settlement in nominating the panel of valuers within the stipulated time, that the plaintiff-respondent's action will stand dismissed.

Learned President's Counsel for the defendant-respondent submitted that these two consequential clauses in the settlement were clearly connected to the action in respect of which the settlement was entered, and therefore the settlement was necessarily in respect of the subject-matter of the action.

Section 408 of the Civil Procedure Code provides that agreement or compromise once notified to court by motion made in presence of or notice to all the parties concerned, the court shall pass a decree in accordance therewith, so far as it relates to the action and that such decree shall be final so far as relates to so much of the subject-matter of the action as is dealt with by such agreement or compromise. It would be clear that the subject-matter of the action has to be determined by having recourse to the pleadings of a particular case. Therefore, one has to determine the subject-matter of DC Colombo case No. 8699/M by the material furnished in the plaint and the answer. The subject-matter in case No. 8699/M and 14762/L are quite distinct and independent of each other.

Learned President's Counsel for the defendant-respondent contended that terms and conditions of the settlement must be distinguished from the clauses in the settlement which contain

consequential clauses which would automatically follow the performance or non-performance of the terms of the settlement. It is pertinent to observe that section 408 of the Civil Procedure Code clearly contemplates a settlement by the parties pertaining to the subject-matter of the action and nothing else.

Learned President's Counsel for the petitioner submitted that there was a total lack of jurisdiction inasmuch as section 408 of the Civil Procedure Code permitted a compromise only in so far as it relate to the particular action and subject-matter of the action. However, learned President's Counsel for the defendant-respondent contended that even assuming that District Court lacked jurisdiction to allow the parties to enter into a settlement, the failure of the plaintiff-respondent to challenge the validity of the said settlement would nevertheless bind the parties to the said settlement, if it is not set aside. Thus learned President's Counsel's contention was that, in the circumstances this was an instance of a latent want of jurisdiction. On this basis he submitted the following matters namely:

- (a) that the failure on the part of the plaintiff-respondent to object to such jurisdiction would amount to acquiescence; and
- (b) that the petitioner had in fact accepted the settlement by filing a motion in case No. 14762/L.

The question that has to be discussed is whether or not the District Court had jurisdiction to permit a settlement outside the ambit of the provisions of section 408 of the Civil Procedure Code. The settlement effected did not bear any connection to the subject-matter of the case bearing No. 8699/M. The subject-matter of case bearing No. 14762/L is quite distinct and independent of the subject-matter of case bearing No. 8699/M. Thus, in view of the provisions of section 408 of the Civil Procedure Code, District Court had no jurisdiction to enter a decree in terms of the said settlement. As the subject matter of the two cases namely, 8699/M and 14762/L are distinct and independent of each other, a party is precluded from enlarging the

subject-matter by way of a settlement by bringing the subject-matter of one action to the subject-matter of the other action. Therefore, it would be seen that in the instant case there was a total lack of jurisdiction ie an instance of a patent lack of jurisdiction to effect a settlement in total disregard of the provisions of section 408 of the Civil Procedure Code.

In the case of *Perera v. Commissioner of National Housing*⁽²⁾ at 366 it was observed as follows:

" . . . In that class of case where the want of jurisdiction is patent no waiver of objection or acquiescence can cure the want of jurisdiction, the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature"

The contention of learned President's Counsel for the defendant-respondent that the petitioner's remedy in this instance ought to be by way of *restitutio in intergrum* is untenable for the reason that such relief could be invoked only by a party to a settlement.

In the circumstances, it seems to me that the District Court had no jurisdiction to effect the impugned settlement in terms of section 408 of the Civil Procedure Code. In the result, I proceed to set aside the settlement dated 24.05.91 and the order of the District Judge dated 22.06.92. This application is allowed with costs.

DE SILVA, J. – I agree.

Application allowed.