

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

E. Gunaseeli Athulathmudali  
No. 83/7,  
4<sup>th</sup> Lane, Nawala Road,  
Rajagiriya.

**Plaintiff**

**CA No.841/2000(F)  
D.C.Panadura 87/L**

**Vs.**

Illangage Gunadasa Perera,  
No. 122, Moronthuduwa Road,  
Melagama, Wadduwa.

**Defendant**

**And**

Illangage Gunadasa Perera(Deceased),  
No. 122, Moronthuduwa Road,  
Melagama, Wadduwa.

**Defendant- Petitioner**

- 1A. M.R.Mulin Nona
- 1B. I. Chandani Perera
- 1C. I. Mervin Perera
- 1D. I. Chandrawathi Perera
- 1E. I. Wajira Pathmini Perera
- 1F. I. Jaynathi Kusumalatha Perera
- 1G. I. Sarath Perera

All of No. 23, Dias Road,  
Habaraghalanda,  
Melagama, Wadduwa.

**Substituted-Defendant- Petitioners**

**Vs.**

E. Gunaseeli Athulathmudali  
No. 83/7,  
4<sup>th</sup>Lane, Nawala Road,  
Rajagiriya.

**Plaintiff-Respondent**

**And now Between**

1A. M.R.Mulin Nona  
1B. I. Chandani Perera  
No. 23, Dias Road,  
Habaraghalanda, Melagama, Wadduwa.

**Substituted-Defendant- Petitioners**

**Vs.**

E. Gunaseeli Athulathmudali  
No. 83/7,  
4<sup>th</sup>Lane, Nawala Road,  
Rajagiriya.

**Plaintiff-Respondent-Respondent**

1C. I. Mervin Perera  
1D. I. Chandrawathi Perera  
1E. I. Wajira Pathmini Perera  
1F. I. Jaynthi Kusumalatha Perera

1G. I. Sarath Perera  
All of No. 23, Dias Road,  
Habaragahlanda,  
Melagama, Wadduwa.

**Substituted-Defendant-Petitioners- Respondents**

**Before :** A.H.M.D. Nawaz, J

**&**

**H.C.J. Madawala, J**

**Counsel: M.S.A. Wadood with Tharanga Edirisingha for the substituted-Defendant-Petitioner-Appellant**

**Argued on :** 12 / 02/2016

**Judgment Date :** 23 / 03 /2016

**H. C. J. Madawala J**

The substituted-defendant-petitioners-appellants filed this appeal to set aside the order dated 26-05-2000 by the Learned District Judge of Panadura in DC Case No. 87/ ෧෧෯ .The plaintiff Respondent respondent instituted the above styled action for a declaration of title to the land morefully described in the schedule to the plaint and for ejection of the original respondent therefrom and for damages at Rs.500/- per month and for costs. Summons was issued to the original defendant and however the said original defendant was unable to file his answer, and the case was fixed for ex parte trial. The Learned Trial Judge thereafter delivered his ex parte judgment granting the reliefs prayed for by the plaintiff. The decree was served on the original defendant and he filed his papers in time to purge his default and to vacate the ex parte judgment delivered against him. When this matter came up for

trial on 11-09-1987 both parties agreed to settle their dispute and both parties agreed that the ex parte judgment be vacated and on the same day entered the following terms of settlement.

- I. Both parties agreed that the subject matter of this action is shown as Lots B 1 and B 2 in Plan No. 1407 dated 28.1.1970 prepared by U.M. de Silva Licensed Surveyor.
- II. By the consent of both parties that the judgment to be entered as prayed for by the plaintiff.
- III. That the writ to be stayed till 31.1.1988 and on or before 31.1.1988 the defendant should hand over vacant possession of Lot No. B 2 depicted in the said Plan, to the plaintiff-respondent.
- IV. That the plaintiff on or before 12.10.1987 should take steps to demarcate 12 perches, out of Lot B1 and the boundaries be shown, on the soil, by U.M de Silva Licensed Surveyor or any other surveyor.
- V. That after the defendant handed over vacant possession of Lot B 2 as mentioned above on or before 31.1.1988, the plaintiff should execute a deed in respect of the said Lot No B 1 to the defendant at the defendant's expense.
- VI. In the event of the plaintiff failing to execute a deed in favour of the defendant, after he handed over vacant possession of Lot B 2 to the plaintiff, the defendant is entitled to execute a deed through the Registrar of the Court.
- VII. That the defendant is entitled to demolish the building standing on Lot B 2 and to remove the materials on or before 31.1.1988.
- VIII. That if the defendant is unable to remove the said building on or before 31.1.1988 or if the defendant is unable to hand over the possession of Lot B 2 on or before 31.1.1988 to the plaintiff, the plaintiff is entitled to obtain a Writ, without notice and to eject the defendant from the entire land and from the building.
- IX. That the plaintiff is entitled to remove 2 jak trees in Lot B1.
- X. That if the defendant handed over possession of Lot B2 on or before 31.1.1988 to the plaintiff should report to the Court that the defendant has complied with the decree.
- XI. That the defendant must not prevent the plaintiff or her agents from removing the two jak trees from Lot B 1. If the defendant handed over vacant possession of Lot B 2 as mentioned above, the plaintiff will waive damages ordered in the judgment.

Thereafter, according to the settlement the appellants took steps to remove the building which was on Lot B 2 in the said plan mentioned above and constructed a house on Lot B 1 and these appellants further state that they allowed the plaintiff to remove 2 jak trees from Lot B 1. These appellants stated that they complied with the said settlement and handed over vacant possession of Lot B 2 to the plaintiff. However in May 1988 these appellants were dispossessed from Lot B 1 by the plaintiff and subsequently they came to know that the plaintiff has obtained a writ without notice to eject them stating that the appellants has not complied with the settlement.

It was submitted that the original defendant filed a petition and affidavit seeking to set aside the said order to issue the writ and to recall the writ and to obtain possession back from the plaintiff in respect of Lot B 1 of the said plan mentioned above. However the original defendant died and steps have been taken to substitute these appellants in the room of the deceased defendant. The plaintiff – respondent filed his objections to the original defendant’s application stating that the original defendants as agreed under the settlement has not handed over vacant possession and has not demolished and removed the building which was standing on Lot B 2. Thereafter the matter was fixed for trial and evidence was led and both parties tendered their written submissions and the Learned District Judge on 26.5.2000 delivered his order dismissing these appellant’s application to restore them to the possession of the said Lot B 1. Being aggrieved by the said order the respondent’s appealed on the grounds set out in paragraph 17 of the petition of appeal.

- I. That the said judgment is contrary to law and against the weight of the evidence led.
- II. That the Learned District Judge has not analyzed and evaluated the evidence led in the correct perspective.
- III. That the Learned District Judge has not considered the evidence given by the Grama Seva Niladari of the area.
- IV. That the Learned District Judge erred in holding that these appellants have not complied with the said settlement.
- V. That the Learned District Judge has not considered the contradictory evidence given by the plaintiff- respondent.

- VI. These appellants respectfully submitted that Learned District Judge has failed to consider the totally of the evidence led by the parties.
- VII. Learned District Judge has failed to consider the fact that the plaintiff-respondent has obtained the writ by misleading Court and by suppressing material facts depriving the rights of these appellants.
- VIII. It is respectfully submitted that the said judgment is void and bad in law.

When this matter came up for argument on 12/02/2016 the substituted- defendant -appellant was present and was represented by Attorney-at- Law and plaintiff respondent was absent and unrepresented. The plaintiff- respondent has been given notice several times for a long period of time and finally this matter came up for argument and was concluded ex parte on 12-2-2016. It was urged by the counsel for the substituted defendant petitioner appellant that in accordance with the settlement that was arrived between the parties and recorded on 11-9-1987 and which terms and conditions were read over to the parties by the Learned District Judge and explained to the parties and both parties having understood the contents signed the case record. This settlement has been marked and produced as 01 by the plaintiff-respondent and produced at the inquiry. In the 01 settlement condition No. 8 was marked as 01 and was produced by the plaintiff respondent 01 condition No.8 states as follows,

“ If the defendant as aforesaid fails to remove the building, or fails to hand over possession of the portion of the land marked B2 to the plaintiff on or before 31-1-1988, the plaintiff is entitled to eject the defendant from the building and from the entire land without any notice to the defendant and to obtain the writ of ejectment.”

Lot B2 mentioned above is Lot B2 in plan No. 1407 dated 26-1-1970 made by U.L.M.De Silva surveyor and has been marked and produced as 02 by the plaintiff- respondent. The plaintiff- respondent case was that the defendant- petitioner- appellant did not give vacant possession of the portion of the land marked as B2 and therefore the plaintiff- appellant by petition and affidavit dated 19-5-1988 applied to court to issue writ of execution. On 27-5-1988 on the order of the Learned District Judge the fiscal

went to the land and executed the writ and ejected the defendant- petitioner from entire land and possession was given over to the plaintiff- respondent. It was plaintiff- respondent case that she complied with all the conditions and terms of the settlement, and the defendant- petitioner-appellant did not comply. According to the settlement she applied for writ of execution and on the orders of the Learned District Judge the fiscal went to the land on 27-5-1988 and ejected the petitioner appellant from the said land. However it was urged by the defendant petitioner appellant that a part of a new house put by the defendant- petitioner- appellant encroached on Lot B2 and therefore no vacant possession was handed over to the plaintiff- respondent.

It was urged by the defendant-petitioner-appellant that the Learned District Judge has not considered the evidence of Grama Sevaka who was called by the defendant- petitioner and who gave evidence stating that the entire land was sold by the plaintiff- respondent above 5 years ago. He has stated in his evidence that she did not question the plaintiff- respondent and that he has never met her earlier and that he cannot say whether the settlement made by the defendant- petitioner is true or false. However he said that when he visited the land it was one land and not two separate blocks above 5 years ago and that she has no interest in the land now. The entire land is now occupied by several persons who bought the blocks from her. She has stated that after the settlement she drew a plan by survey K.P. Wijeweera No. 161 dated 25-9-1987 marked Lot 1 of that plan which is to be given to the defendant- petitioner as a defendant- petitioner- appellant did not give vacant possession of Lot 2, because part of the old house belonging to the defendant- petitioner was there and that the new house built by the defendant- petitioner also encroached lot 1 and 2 and the small building used as a poultry shed was not removed and was still there in Lot 2. She said that she made a complaint to the Wadduwa Police and filed papers in the District Court to obtain vacant possession. Thereafter on the order of the Learned District Judge the fiscal went and ejected the defendantpetitioner from the entire land and possession on the entire land was given on to the plaintiff respondent. To prove her case the plaintiff respondent has tendered to Court 01, 02, 03, 04, 05, 06, 07 and 08 according to these document the plaintiff-respondent has proved that there was absolutely no fault on the part of the plaintiff- respondent. It was urged by the defendant petitioner appellant that notice of the ejection was not given to them.

On a perusal of the record I find that the Learned District Judge had stated that as defendant-petitioner did not comply with the terms and conditions of the settlement that the defendant-petitioner is not entitled to any writ to enter or possess Lot B1 and B2 in plan No. 407 as aforesaid.

The defendant- petitioner -appellant Mapataralalage Miulin Nona was called to give evidence and she stated that she is a widow of the deceased defendant Gunadasa Perera and the other petitioners are there children and she come to know that the plaintiff has filed action against her husband when she received the summons issued to Gunadasa Perera. According to the settlement arrived by both parties on 11-9-1987 the plaintiff has agreed to give 12 perches to defendant Gunadasa had agreed to give vacant possession on receiving same. Plaintiff who was entitled to a bigger Lot there was old house in the said premises built by father of Gunadasa Perera. She stated that the defendant Gunadasa and she demolished the building standing on block B2 and removed the material on or before 31-1-1988 and constructed a house in lot B1 and occupied and took possession of block B1 containing 12 perches and build a house on the said land. She stated that the plaintiff son erected concrete post and barbed wire fence on the land between the land dividing the plaintiff land and that of the witness. Further that on 27 May 1988 the fiscal together with a Police Officer came to the land and ejected them. Thereafter the plaintiff fenced the entire land including the 12 perches. The deceased Gunadasa Perera made a complaint with the Grama Sevaka on 2-2-1988 marked and produced as 001.

That the plaintiff informed him to take possession of the 12 perches. However, the plaintiff Piyasily Athulathmudali has not given him the respective deed to that premises. According to 002 which is a statement made by plaintiff- respondent to the Wadduwa Police he had threaten her son and has stated that he is not going to vacate the premises. He also have forcibly erected a kitchen and had planted some banana trees.

On a perusal of the evidence and the submissions before court we find that vacant possession of the land should be given by the defendant petitioner on or before 31<sup>st</sup> of January 1988. The partition of Lot B1 and Lot B2 has been done on 29-11-1987. It has to been done by the plaintiff before 12-10-



1987 under the terms and settlement in this case. It was the contention of the respondent- petitioner that the plaintiff has been extensively questioned about this during cross examination but has failed to give a proper answer for it. Therefore it was plaintiff who is the one who violated the terms of settlement first. However he has obtained a writ misleading court and by suppressing material facts depriving the rights of the appellants. It was submitted even if the plaintiff version of events is correct that if the defendant has failed to hand over the vacant possession of Lot B2 before 31-1-1988 it is unfair to deprive only the defendant the right he got under terms of settlement. It has been further submitted that the plaintiff on her own Police complaint admitted that she had violated terms of settlement it is unfair to allocate all the shares of the land to her depriving the defendants' rights because of some violation. It was further submitted that during cross examination the plaintiff made many contradictory comments that suggests that the defendant has complied with the terms of settlement entered in this case. It was a position of the substituted- defendant that the Learned District Judge has failed to evaluate those evidence correctly and decided the case solely based on the defendants failure to get executed a deed through the registrar of the court in his behalf. As such it was submitted that the Judgement of the Learned District Judge liable to be set aside. We are off the view that the Learned District Judge has not been misled as the plan drawn by the surveyor has been surveyed and partitioned on 21<sup>st</sup> of September 1987.

Therefore it is incorrect to say that plaintiff did not comply with the terms of settlement. The witness Gunasily has stated in the police statement that said 12 perches had been separated on 28<sup>th</sup> of November 1987. Where's the plan marked X shows that it has been surveyed and partitioned on 25<sup>th</sup> of September 1987. Accordingly we find that the contention of the substituted –defendant-petitioners is incorrect. Accordingly we reject the contention of the substituted- defendant –petitioner-respondent. We hold that plaintiff respondent has not violated the terms of conditions. Accordingly we hold that the substituted–defendant- petitioners has failed to give vacant possession by not removing the poultry shed in the said premises and giving vacant possession of Lot B2 to the plaintiff and as such is liable to ejected from the premises. Accordingly we hold that Learned District Judge has not been misled by the plaintiff-respondent- respondent. Accordingly in the present case we find that the respondent has already disposed of the said property to the 3<sup>rd</sup> parties and is no longer in

possession of the said premises. We hold that the application of the substituted- defendant - petitioner is futile. Accordingly we dismiss the appeal of the substituted–defendant-petitioner-respondents and affirm the order dated 26-5-2000 of the Learned District Judge of Colombo.

**JUDGE OF THE COURT OF APPEAL**

**A.H.M.D. Nawaz, J**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**