

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

1. Hettiarachchige Weerarathna,
2. Wickramage Dona
Kusumawathie,
Both of Sandagiri Hotel,
Minnanana,
Getahetta.
Defendant-Petitioners

CASE NO: CA/RI/436/2015

DC AVISSAWELLA NO: L/25399/09

Vs.

Alawattage Don Iresh Dayan,
Arapangama,
Kosgama.
Plaintiff-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Mahinda Nanayakkara for the Defendant-
Petitioners.

(No written submissions have been filed on
behalf of the Petitioners.)

Dr. Sunil Cooray for the Plaintiff-Respondent.

Decided on: 02.05.2019

Samayawardhena, J.

The plaintiff filed this action in the District Court against the two defendants 10 years ago seeking ejectment of them from the premises in suit as overholding lessees, and damages. The defendants whilst admitting in paragraph 3 of the answer that the plaintiffs are the owners of the premises, sought dismissal of the action. When the trial was in progress, parties arrived at a settlement and written terms of settlement signed by the parties dated 17.03.2015 were tendered to Court¹, and also parties signed the case record signifying the settlement.² This was followed by entering the decree.³

According to the settlement, the plaintiff has agreed to sell and the defendants have agreed to purchase by way of a deed of transfer to be executed on or before 30.06.2015 whatever interests would be allotted to the plaintiff in the pending partition action (No.20404/P) before the same Court for a sum of Rs.3.5 million. Admittedly the premises in question falls within the corpus of the said partition action. The parties have *inter alia* further agreed that, in the event the defendants fail to pay the said money on or before 30.06.2015, the plaintiffs are entitled to take out a writ, after 07.07.2015, to evict the defendants from the premises without notice and also to recover damages, costs of the action and expenses for execution of the writ.

The defendants have defaulted payment on or before the due date, i.e. 07.07.2015. Thereafter, they, through their Attorney,

¹ Vide pages 106-108 of the brief marked A.

² Vide pages 88-89 of the brief.

³ Vide pages 102-105 of the brief.

by way of petition and affidavit dated 07.07.2015, whilst reaffirming the said settlement, have moved time till 17.08.2015 to make the payment purely on sympathetic grounds.⁴

2. ඉහත කී නඩුවේ විත්තිකාර පෙත්සම්කාර අප අංක 20404/බදුම් දරණ මෙම අධිකරණයේ පැවති නඩුවෙන් පැමිණිලිකරුට ලැබෙන අයිතිය නැතහොත් පැමිණිල්ලේ උපලේඛනයේ සඳහන් ඉඩම මිලට ගැනීමට එකඟ වූනෙමු. එම ඉහත කී දේපළ ලංකාවේ වලංගු මුදලින් රුපියල් ලක්ෂ 35,00000/- කට මිලට ගැනීමට විත්තිකාර අප එකඟ වූනෙමු.

8. මෙම නිසා විත්තිකාර අප වෙත අනුකම්පා කර මෙම මුදල් ගෙවීමට 2015.08.17 දක්වා කල් ලබා දෙන ලෙස ද ඉල්ලා සිටිමු.⁵

This application has been supported on 09.07.2015 and the plaintiff has objected to it and the Court has refused the application.⁶

To my amazement, thereafter, the same Attorney for the defendants has made an application by way of petition and affidavit dated 14.08.2015 seeking to set aside the said settlement on the basis that, as the Final Decree had not been entered in the partition action, the plaintiffs did not have a legal right to enter into the said settlement!⁷ In that application, the Attorney has sought to stay the proceedings until the determination of that application. This application has been supported on 28.08.2015 and the learned District Judge has very correctly refused to stay the proceedings by giving copious reasons and issued only notice.⁸

⁴ Vide pages 36-41 of the brief.

⁵ Vide paragraphs 2 and 8 of the affidavit of the defendants at pages 40 and 41 of the brief.

⁶ Vide pages 90-92 of the brief.

⁷ Vide pages 42-52 of the brief.

⁸ Vide pages 93-101 of the brief.

It is thereafter, whilst the said application is pending determination before the District Court, the defendants have come before this Court by way of revision and/or *restitutio in integrum* seeking to set aside the settlement in the District Court on the same basis. Because of this application, upon an undertaking given, proceedings of the District Court case have been stayed from 2015 up to now!

I must mention without mincing words, this is absolutely abuse of the process of Court in the highest degree, which shall be condemned in the strongest possible terms.

It is my considered view that, if the defendants wanted to set aside the settlement entered before the District Court, they cannot bypass the District Court and come before this Court to achieve that objective. They must first make the application before the District Court (as they have already done), and appeal against that order if the order is unfavourable to them. They cannot maintain parallel proceedings in two Courts in order to achieve their ulterior motives.

As I have mentioned before, the complaint of the Attorney of the defendants is that, as the Final Decree had not been entered in the partition action, the plaintiffs did not have a legal right to enter into the said settlement. If that is correct, the same Attorney is responsible for misleading his clients and the Court to enter into an illegal settlement. However this argument is devoid of any merit and makes obviously for collateral purposes.

A party in a partition action can sell, pending partition, whatever the interests he might ultimately be allotted in the final decree of partition. Sale of contingent rights pending partition is

absolutely permitted in law. (*Rajapakse v. Dassanayake* (1928) 29 NLR 509, *Salee v. Natchia* (1936) 39 NLR 259)

In *Manchanayake v. Perera* (1945) 46 NLR 457 it was held:

A conveyance executed after the institution of a partition action, and before the entering of the final decree, purporting to “sell, assign, transfer, and set over” to the vendee “the interest to which the said vendor may be declared entitled to in the final decree to be entered into in the said case from and out of all that land” (i.e., the subject of the partition suit) is valid and not obnoxious to section 17 of the Partition Ordinance. It passes an immediate interest in the property and is not merely an agreement to convey in the future.

In *Wijesinghe v. Sonnadara* (1951) 53 NLR 241 it was held:

The sale by a co-owner in land of whatever interests might ultimately be allotted to him under the decree in a pending partition action may be construed as a conventio rei speratae. In such a case, if some benefit, even to a far smaller extent than the parties had originally hoped for, accrued to the seller under the partition decree, the purchaser is not entitled to claim a cancellation of the sale on the ground of failure of consideration.

In that eventuality, the transferee need not be added as a party to the partition action. (*Abeyratne v. Rosalin* [2001] 3 Sri LR 308) Nor is there any necessity to execute another deed after entering the Final Decree as the Lot will automatically pass to the transferee without any further conveyance. (*Sillie Fernando v. Silman Fernando* 64 NLR 404, *Karunaratne v. Perera* 67 NLR 529)

The settlement entered into in the District Court is not illegal. I unhesitatingly dismiss the application of the defendant-petitioners. The defendant-petitioners shall pay a sum of Rs.200,000/= as costs of this application to the plaintiff-respondent.

Judge of the Court of Appeal