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

Dimungu Hewage Biatris
Nandawathie,
No.618/60E,
Buddhagaya Mawatha,
New Town,
Anuradhapura.
3rd Respondent-Petitioner-Appellant

CASE NO: CA/PHC/22/2015
HC KANDY CASE NO: 206/2012/Rev
DC/MC GAMPOLA CASE NO: 78200

Vs.

Vinitha Iranganee Hettiarachchi,
No. 350,
Naranwila,
Gampola.
5th Respondent-1st Respondent-1st Respondent
And 4 Other Respondents

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Asthika Devendra for the 3rd Party of the 1st Part-Appellant.

Jagath Wickremanayake, P.C., with Migara Doss for the 1st and 2nd Parties of the 1st Part-Respondents.
Dimuthu Senarath Bandara for the 1st and 2nd Parties of the 2nd Part-Respondents.

Argued on: 22.05.2019
Decided on: 03.06.2019

Mahinda Samayawardhena, J.

The police initiated these proceedings in the Magistrate's Court under section 66(1)(a) of the Primary Courts' Procedure Act, No.44 of 1979, regarding a dispute over a right of way between two parties. The first part consisted of 4 parties, and the second part 2 parties. Parties of each part are close relations. Each part was represented by an Attorney-at-Law in the Magistrate's Court and filed joint affidavits and counter affidavits.

Under section 66(6), once pleadings are complete, before the matter is fixed for inquiry, a duty is cast on the Magistrate to induce the parties to arrive at a settlement.

According to the journal entries dated 02.08.2012 and 24.08.2012 of the Magistrate's Court case record, in compliance with that provision, the learned Magistrate, in the presence of all the parties, has decided to go for an inspection of the disputed road on 27.09.2012.

According to the proceedings dated 27.09.2012, at the inspection, both parties have been represented by their

respective Attorneys-at-Law, and the dispute has been settled upon conditions until the matter is finally decided by a competent Court[1], which is the District Court. All the parties, except the 3rd party of the first part who was absent, have signed the case record in signifying the settlement.

More than 2 months after the said settlement, the 3rd party of the first part has gone before the High Court by way of revision seeking to revise "the orders dated 27.09.2012"[2] on the grounds that: (a) she was not a party to the settlement as she did not sign the case record in terms of section 66(6); (b) no order has been made on the settlement in terms of section 66(6); and (c) there is evidence that she has been using the disputed road for a long time.[3]

The learned High Court Judge has dismissed that application by Judgment dated 22.01.2015. The 3rd party of the first part (hereinafter "the appellant") has come before this Court against the said Judgment of the High Court.

Let me first consider the first ground. That is, the appellant was not a party to the settlement as she did not sign the case record as dictated in section 66(6). If the appellant thinks that she was not a party to the settlement as she did not sign the case record and therefore she is not bound by the settlement/order, she shall, in my view, first complain it to the Magistrate's Court. She cannot bypass the Magistrate's Court and go straight before the High Court to complain that an order has been made against

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[1] Vide last paragraph of page 1 of the said proceedings.
[2] Vide prayer to the petition tendered to the High Court.
[3] Vide paragraph 10 of the said petition.

her ex parte. The appellate Court has no wherewithal to initiate an inquiry into that allegation.

The second ground is, no order has been made on the settlement in terms of section 66(6). If the appellant is not a party to the settlement, whether or not an order has been made on the settlement is irrelevant to her. If she thinks that no order has been made, and therefore the agreement is unenforceable, she can remain silent. If no order has been made, it is difficult to understand why she went before the High Court seeking to set aside "*the orders dated 27.09.2012*".

The third ground relates to the merits of the application. When the matter is settled, there is no necessity to consider the merits and demerits of the substantive matter.

Without prejudice to the above, I must state that, the nature of section 66 proceedings is quasi civil. As the learned High Court Judge has correctly stated, there is no necessity for a party to be physically present before Court in an application under section 66. As the section 66(8)(a) provides, a party can enter appearance by an Attorney-at-Law. That is what the appellant has done in this case from the inspection. It is not her position that she was not represented, as per the proceedings at the inspection, by her Attorney-at-Law. Her complaint seems to be that, notwithstanding she was represented by an Attorney-at-Law, as she did not sign the case record, she is not bound by the settlement. Although section 66(6) requires the settlement to be signed by the parties, in my view, when parties are represented by Attorneys-at-Law, the settlement does not

become invalid, merely because one absent party who was represented by an Attorney-at-Law has failed to sign the case record. The other three parties of the first part were physically present and signed the case record despite two Attorneys-at-Law have appeared for all the four parties of the first part. As I stated at the outset, the four parties of the first part are closely connected and made one voice and filed pleadings jointly. Hence no prejudice whatsoever has been caused to the appellant for her being absent at the inspection.

The appellant must remember that what she filed before the High Court was not an appeal but a revision application. Unlike an appeal, which is exercised as of right, revision is a discretionary remedy, which the Court is loath to exercise unless there is a grave miscarriage of justice, which shocks the conscience of the Court.

In *Sinna Veloo v. Messrs Lipton Ltd*[4] it was held:

> *When parties to an action enter into a settlement and are represented by their Proctors, they need not be personally present when the settlement is notified to the Court in terms of section 408 of the Civil Procedure Code. Once the terms of settlement as agreed upon are presented to Court and notified thereto and recorded by Court, a party cannot resile from the settlement even though the decree has not yet been entered.*

In *Francis Wanigasekera v. Pathirana*[5], Weerasekera J. stated:

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[4] (1963) 66 NLR 214
[5] [1997] 3 Sri LR 231 at 234

> *There has been a very pernicious practice among litigants to resile from agreements merely because they have not subscribed their signature to the record. This pernicious practice in my view must be condemned and refuted with all the contempt it deserves.*

The words that "an order made in accordance with the terms as settled" found in section 66(6) shall not be taken to mean that the settlement will be ineffective unless a formal order is made after the recording of the settlement. What is the order the Magistrate is expected to make? In my view, a simple sentence such as "Parties shall comply with the above settlement", "The above settlement is to be considered as an order of Court".

When a case is settled there is no occasion for the Judge to deliver a judgment or order. In an ordinary civil case, after the settlement, decree is entered in terms of the settlement, and not in terms of the judgment or order as judgment or order is non-existent. Entering decree is a ministerial act and the responsibility of the Court. The failure to do that ministerial act does not make the settlement invalid. (*Pathirana v. Induruwage [2002] 2 Sri LR 63*) A party shall not be made to suffer for lapses on the part of the Court.

In *Distilleries Company Ltd v. Kariyawasam*[6] Nanayakkara J. rightly pointed out that "*construing or interpreting a provision of law cannot be solved merely by adopting the literal interpretation of a section or meaning given to a word in a dictionary as urged by learned counsel for the plaintiff-respondent. A provision of law*

[6] [2001] 3 Sri LR 119 at 124-125

has to be interpreted contextually, giving consideration to the spirit of the law."

Having considered the scheme and purpose, in my view, there is no place for hair-splitting arguments and high-flown technical objections in section 66 applications. The sole intention of introducing this special piece of legislation is nothing but to prevent breach of the peace arising out of land disputes and not to determine the rights of the parties. Until the parties go before a competent Court to have their substantive rights determined, the legislature expects the Court to make a provisional order.

The appellant says that the settlement is irrational and absurd. Even if it is correct, it shall not affect the validity of the settlement. That is not a permanent order. The appellant can go before the District Court to vindicate her rights. Until such time she is bound by the settlement.

Appeal is dismissed with costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Court of Appeal