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

The Petition of Appeal to vacate the Order dated 08.09.2017 for case No. 128/13 given by the Provincial High Court of the Central Provinces.

Case No: CA (PHC) 137/2017

High Court of Kandy Case No: REV 128/13

Magistrate's Court of Nawalapitiya Case No: 3/92

The Officer-in-Charge,
Police Station of Nawalapitiya,
Nawalapitiya.

Plaintiff

Vs.

1. A. A. Sithy Zulfiya,
   No. 288/A,
   Ilanganwatta,
   Gampola.

2. A. A. Mohommadhu Naseem,
   Hapukasthalawa,
   Nawalapitiya.

Respondents of the 1st Party

3. Abdul Rahman Lebbe Abdul Hakeem.

4. Abdul Rahman Ibrahim Lebbe,
   Both of No.C/112,
   Hapukasthalawa.

Respondents of the 2nd Party

AND

1. Abdul Rahman Lebbe Abdul Hakeem.

2. Abdul Rahman Ibrahim Lebbe,
   Both of No.C/112,
   Hapukasthalawa.

Respondent-Petitioners of the 2nd Party

Vs.

1. A. A. Sithy Zulfiya,
   No. 288/A,
   Ilanganwatta,
   Gampola.

2. A. A. Mohommadhu Naseem,
   Hapukasthalawa,
   Nawalapitiya. (Deceased)

Respondent-Respondents of the 1st Party

H. L. Ummu Jeseema,
No. B/180,
Mosque Road,
Hapukasthalawa.

Substituted Respondent

Officer-in-Charge,
Police Station of Nawalapitiya,
Nawalapitiya.

Plaintiff-Respondent

AND NOW BETWEEN

1. Abdul Rahman Lebbe Abdul Hakeem.

2. Abdul Rahman Ibrahim Lebbe,
   Both of No.C/112,
   Hapukasthalawa.

Respondent-Petitioner-Appellants of the 2nd Party

Vs.

1. A. A. Sithy Zulfiya,
   No. 288/A,
   Ilanganwatta,
   Gampola.

2. A. A. Mohommadhu Naseem,
   Hapukasthalawa,
   Nawalapitiya. (Deceased)

Respondent-Respondent-Respondents of the 1st Party

H. L. Ummu Jeseema,
No. B/180,
Mosque Road,
Hapukasthalawa.

Substituted Respondent-Respondent

Officer-in-Charge,
Police Station of Nawalapitiya,
Nawalapitiya.

Plaintiff-Respondent-Respondent

Before : Prasantha De Silva, J.
K.K.A.V. Swarnadhipathi, J.

Counsel : Lal Wijenayake with S. Jayaratne A.A.L for the Petitioner-Appellant.
N.M Shaheed A.A.L with Piyumi Seneviratne A.A.L for the 1st Respondent-Respondent-Respondent of the 1st Party and Substituted Respondent-Respondent.

Written Submissions tendered on : 25. 03. 2022 by the Appellant
07.03.2022 by the Respondent

Argued on : 11.03.2022

Decided on : 17.05.2022

Prasantha De Silva, J.

Judgment

The 2nd Party Respondent-Petitioner-Appellants (hereinafter sometimes referred to as the Appellants) had filed case bearing No. L/2255 in the District Court on 15.12.1992 within 3 months, as agreed in the said settlement. Five years after filing the said action and when it reached the stage of trial, it was revealed that the subject matter of the action is a co-owned land. Thereafter, the Appellants had withdrawn the case on 17.02.1997 reserving the right to file a fresh action.

Subsequent to the events above, 1st Party Respondent-Respondent-Respondents (hereinafter sometimes referred to as the Respondents) filed a motion dated 26.06.1997 stating that the 2nd Party Respondent-Petitioner-Appellants have withdrawn the case bearing No. L/2255 of District Court- Gampola, and hence to permit the Respondents to put up the boundary fence in terms of the settlement entered on 09.09.1992. Having considered the motion filed by the Respondents, the learned Primary Court Judge allowed the application of the Respondents to put up the boundary fence on 09.07.1997.

On or about 16.07.1997, the Appellants had filed a motion stating that a partition case bearing No. P/768 has been filed in respect of the land dispute and therefore to vacate the said Order dated 09.07.1997. Thereafter, on or about 15.09.1997, the Magistrate stayed the Order delivered on 09.07.1997, allowing the 1st Party Respondents to put up the boundary fence. On or about 28.05.2003, the 2nd Party Respondents moved to withdraw the said case No. P/768 with liberty to file a fresh action and the learned District Judge allowed the said application subject to costs.

Furthermore, on or about the 14.08.2013, Respondents filed a motion in the Primary Court of Nawalapitiya bearing case No. 3/92 and informed the learned Primary Court Judge that the 2nd Party Respondents have withdrawn the said partition action bearing No. P/768 and therefore to allow the Respondents to put up the boundary fence on the land in dispute as per the terms of settlement. Accordingly, the learned Primary Court Judge allowed the application of the 1st Party Respondents on 14.08.2013.

Being aggrieved by the said Order, on or about 05.11.2013, the 2nd Party Respondent-Petitioner-Appellants had filed an application for revision, bearing No. HC/REV/128/13 in the High Court of Kandy against the said Order dated 14.08.2013 allowing the Respondents to put up the boundary fence.

On or about 25.02.2015, the Respondents filed their statement of objections in the said case and specifically pleaded that the said revision application should fail since the 2nd Party Respondent-Petitioner-Appellants have failed to submit any exceptional or special circumstances warranting the invocation of the discretionary powers of the High Court. Thereafter, the learned High Court

Judge dismissed the said application on the basis that the Appellants have not disclosed any exceptional circumstances to invoke the revisionary jurisdiction of this Court. Being aggrieved by the said dismissal of the application, the 2nd Party Respondent-Petitioner-Appellants had preferred this appeal against the Order of the learned High Court Judge.

It was the contention of the Appellants that an application was made to the Primary Court Judge for execution of a writ. Apparently, the writ was issued by Court after 20 years from the settlement entered in the Primary Court case, without notice to the Appellants. As such, it was entered by the Appellants that in terms of Section 347 of the Civil Procedure Code, after a lapse of one year from the date of the Court order against the party, an application for execution of a writ must be made with notice to the other party. Since such a notice was not served on the Appellants, the application to issue a writ as well as the order to issue the writ is contrary to law and against natural justice.

In this instance, it is worthy to note the terms of settlement entered on 09.09.1992;

> "පලවන පාර්ශවකාර වගඋත්තරකරුවන්ගේ ආරවුල් ඉඩමේ සන්තකයට ඇති අයිතිවාසිකම් නිසි අධිකරණ බලය ඇති අධිකරණයක හෝ තීන්දු ප්‍රකාශයක් යටතේ මිස දෙවන පාර්ශවයේ වගඋත්තරකරුවන් ආරවුල් නොකල යුතු බවටත් නියෝග කරමි .
>
> තවදුරටත් දෙපාර්ශවයේ නීතිඥ මහතුන්ගේ ඉල්ලීම මත සිවිල් නඩුවක් දෙවන පාර්ශවයේ වගඋත්තර කරුවන් විසින් අද දින සිට මාස තුනක් ඇතුළත පැවරිය යුතු බවටත්, එසේ සිවිල් නඩුවක් නොපවරනු ලැබුවේ නම් මායිම් වැට ඉදිකර ගැනීමේ අයිතිවාසිකම පලවන පාර්ශ්වයේ වගඋත්තරකරුවන්ට හිමිවිය යුතු බවට තවදුරටත් නියෝග කරමි."

It is noteworthy that according to the terms of the settlement, it was agreed that the 1st Party is entitled to erect the boundary fence, in the event the Appellants fail to institute a civil action within three months from the date of the settlement. However, it has not been mentioned in the said terms of the settlement that the said condition of settlement has to be complied with notice to the Appellants. Hence, the Respondents need not to give notice of the execution of writ to the Appellants.

On the other hand, the Appellants were aware that the Respondents had executed the writ, after withdrawing the case bearing No. L/2255 without notice to the Appellants. Thus, it is a duty of the

Appellants to inform Primary Court regarding the withdrawal of the partition case bearing No. 768/P and seek permission of the Primary Court to adjust the terms of the settlement and staying the execution of writ until such time a fresh partition action has been instituted.

Court observes that the Appellants had withdrawn the said partition case bearing No. 768/P on 28.05.2003 with liberty to file a fresh action. The Appellants had not taken any interest in filing a fresh partition action until the Respondent moved Court to execute the writ, which was after 10 years from the date of withdrawal of the said partition case. Thus, it is imperative to note that the Appellants have not exercised their legal rights over the disputed property and had not acted upon with due diligence.

Thus, according to the maxim '*vigilantibus non dormientibus aequitas subvenit'*, the Appellants had slept over their rights. The law helps the vigilant and not those who sleep over their rights. In view of the aforementioned reasons, it is seen that the learned High Court Judge has correctly decided that no exceptional circumstances have been established by the Appellants to invoke the revisionary jurisdiction of the High Court. Since there is no miscarriage of justice caused to the Appellants, no exceptional circumstances exist for Court to exercise the discretionary remedy in favour of the Appellants.

Hence, we see no reason for us to interfere with the Order made by the learned High Court Judge. Thus, the appeal is dismissed with cost.

JUDGE OF THE COURT OF APPEAL

K.K.A.V. Swarnadhipathi, J.

I agree.

JUDGE OF THE COURT OF APPEAL