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

C A 1354/99 (F)

D.C Galle, Case No. 13246/L

G. G. Ananda Samarasekara of "Samaragiri", Pilana, Wanchawala.

PLAINTIFF

VS

1. Pilana Gamage Hinnihami,
2. Mawella Vithanage Yasawathie both of Pilana, Wanchawala.
3. Mawella Vithnage Ariyapala of Thalahitiyawa, Pilana, Wanchawala

DEFENDANTS

AND BETWEEN

1. Pilana Gamage Hinnihami,
2. Mawella Vithanage Yasawathie both of Pilana, Wanchawala.

1ST AND 2ND DEFENDANT-PETITIONER-APPELLANTS

VS

G. G. Ananda Samarasekara, "Samaragiri" Pilana, Wanchawala

PLAINTIFF-RESPONDENT

3. Mawella Withanage Ariyapala
of Thalahitiyawa, Pilana,
Wanchawala

3RD DEFENDANT-RESPONDENT

AND NOW BETWEEN

1. Pilana Gamage Hinnihamy
(Deceased)

1a. Mawalla Withanage
Chandrawathei of No. 22,
Rukmale, Pannipitiya

1b. Mawalle Withanage
Adarawathie of Thalahitiyawa,
Pilana, Wanchawala.

1d. Mawalle Withanage Ajapala of
Thalahitiyawa, Pilana,
Wanchawala

2. Mawalla Withanage
Yasawathei both of Pilana,
Wanchawala.

1ST AND 2ND DEFENDANT-PETITIONER-APPELLANTS

VS

G. G. Ananda Samarasekara

1a. Pillana Godakandage
Dhanesha Samarasekara

1b. Pillana Godakandage Sujeewa
Dammika Samarasekara.

1c. Pillana Godakandage
Sucharitha Thilakarathna

PLAINTIFF-RESPONDENT-RESPONDENTS

3. Mawella Withanage Ariyapala of
Thalahitiyawa, Pilana,
Wanchawala

3RD DEFENDANT-RESPONDENT-RESPONDENTS

BEFORE	:	**M. M. A. GAFFOOR, J.**
COUNSEL	:	Buddhika Gamage for the Defendant-Appellant S.A.D.S. Suraweera for the Plaintiff-Respondent
WRITTEN SUBMISSION FILED ON	:	01.06.2018 (by the Plaintiff-Respondent) 19.07.2018 (by the Defendant-Appellants)
DECIDED ON	:	**30.11.2018**

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M. M. A GAFFOOR, J

The Plaintiff-Respondent (hereinafter referred to as the "Respondent") instituted this action against the 1st to 3rd Defendants above named seeking for a declaration of title to the property more fully described in the amended plaint dated 11.02.1997.

In the District Court, the Respondent in his plaint pleaded inter alia that the land in suit depicted in Plan bearing No. 1489 dated 18.06.1996 prepared by A. Samararathne, License Surveyor and set out his chain of title thereto emanating from one Halgoda Endirige Karlina who had acquired title to the land in suit by a final decree of a partition action (instituted in the District Court of Galle, bearing No. 11782) which is also depicted as Lot 1 and Lot 2 in the final Partition Plan bearing No. 304A dated 27.01.1914 and 02.07.1914 which is now superimposed by the above mentioned plan and the Defendants had come to the possession of Lot C depicted in the said superimposed Plan forcibly on or about 10.04.1995.

The Defendants had filed their joint answer denying all and singular the several averments contained in the amended plaint (*page 35 of the appeal brief*) and stated inter alia that one P. K Karolis and P. G. Sendiris Appuhami were the original owners of Lot 4 and 5 depicted in Plan 304A who had acquired title to the said allotments by the final decree of the said partition action and over the course of time their title to the said lots were conveyed to the Defendants through series of deeds and inheritance and is now depicted as one land in the Plan bearing No. 543 dated 24.08.1997 prepared by L. S. Dahanayake, Licensed Surveyor. The Defendants also stated that the Respondent had narrowed 8 feet cart road to 2 feet road the situated along the Eastern and Western boundaries of the lands of the Defendants and Respondent, which they used as a common road to their land for a long period of time and prayed for a dismissal of the Respondent's action, a declaration of title to the allotments of the land depicted Plan No. 543.

With all the above mentioned averments the case was fixed for trial by the learned Trial Judge and the case proceeded to trial on several issues raised on behalf of the contesting parties.

When this case was taken up for trial on 04.05.1999, the Respondent and the 3rd Defendant, who were present in the Court, moved the Court to settle the matter and said terms of settlement were recorded in open Court as agreed upon by the parties and the learned Trial Judge fixed the case for site inspection (*vide page 61 & 62 of the appeal brief – said agreement and the terms of the settlement*).

Subsequently the 1st and 2nd Defendants made an application to the Court seeking to set aside the said settlement entered into between the Respondent and the 3rd Defendant in the absence of the 1st and 2nd Defendants and hence the said settlement is not a valid settlement according to the law.

Attorney-at-Law for the Respondent making submissions stated that:

මෙම නඩුවේ 1, 2, 3 විත්තිකරුවන් නීත්‍යඥ පී.කේ.එල්. බණ්ඩාර මහතා මඟින් පෙරකලා සීයක් ඉදිරිපත් කරලා, ඔවුන් 3න් දෙනා වෙනුවෙන් උත්තර ප්‍රකාශයක් ඉදිරිපත් කරලා ඇත. මෙම නඩුව විභාගයට ගත් අවස්ථාවේදී මෙම අධිකරණයේ ජ්‍යෙෂ්ඨ නීතීඥවරයෙක් වන බණ්ඩාර මහතා ඔවුන් නියෝජනය කර ඇත. එම අවස්ථාවේදී 2, 3 විත්තිකරුවන් නඩු වාර්තාව අනුව අධිකරණයේ පෙනී සිට ඇත. 1 වන විභාග දින පෙනී සිට ඇත. 2 වන විභාග දින 3 වන විත්තිකරු පමණක් අධිකරණයේ පෙනී සිට ඇත. එම අවස්ථාවේදී ඇති වූ සම්මුතිය ගරු අධිකරණය විසින් සටහන් කොට ඒ අනුව ක්‍රියා කිරීමට වධිවිධාන යොදා ඇත. ශ්‍රේෂ්ඨාධිකරණය මඟින් ප්‍රකාශයට පත් කොට ඇති, වාර්තාගත නඩු වාර්තා අනුව සෑම පාර්ශව කරුවෙකුටම සමථයකට ඇතුළත් වන අවස්ථාවේදී අධිකරයේ පෙනී සිටීමට අවශ්‍යතාවයක් නොමැත. (Page 68 of the appeal breif)

At the inquiry, the 1st and 2nd Defendants stated that they were not present in Court on that fateful day due to illness of the 2nd Defendant and that they did not take part in the settlement. They further stated that both Defendants never instructed their Attorney-at-Law to come to a settlement of the above mentioned nature.

After hearing the submissions of both the parties, the learned District Judge made an order (dated 30.07.1999) refusing the application of the 1st and 2nd Defendants on the basis that the District Court has no power to set aside a settlement entered into between parties who were appropriately represented by their respective Attorneys in Court and fixed a date again for the site inspection (*page 70 of the brief*). Accordingly the said site inspection was

carried out by the learned District Judge on 29.10.1999 and after the inspection the learned Judge fixed the case for order.

The said order was delivered on 26.11.1999 granting a 4 feet broad access road to the Defendants along the Northern and Western boundaries of the Respondent's land as agreed by the parties to the settlement and affirmed the terms of settlement entered into between the Respondent and the Defendants.

Being aggrieved by the said order dated 26.11.1999, the 1st and 2nd Defendant-Petitioner-Appellants (hereinafter referred to as the "Appellants") have preferred this appeal to seeking set aside the said order and this appeal had been objected by the Respondent in the District Court on the basis that the Appellants have no right of appeal against an order made affirming a settlement. Even though, the learned District Judge overruled the objection of the Respondent and ordered the case record to send to this Court.

Accordingly, when the instant appeal was taken up for hearing, the Respondent raised a preliminary objection as to the maintainability of this appeal on the basis that there is no right of appeal to the Appellants as they have appealed against an order made affirming the settlement entered into between the parties in the District Court (*vide journal entry dated 29.03.2016 (CA)*)

In this appeal, the Appellants' main averment was that they were not present on Court on that fateful day due to an unavoidable circumstance as the 2nd Defendant was ill; and they are further stated that they never instructed their Registered Attorney to come to settlement (as *mentioned in page 61 & 62 of the appeal brief*), which is highly prejudicial to their right, 3rd Defendant who entered in to the settlement between the Respondent is not a party highly prejudicial to his right.

In contrast, the Respondent's submission was that the 1st to 3rd Defendants were represented by the same Registered Attorney in the District Court from very inception until the settlement and that they have filed a joint answer and therefore it is clearly evident that the Defendants were acting in cooperation with each other and their interest were the same and that they had granted the authority to their Registered Attorney to take all the necessary steps in the Court on behalf of them by the proxy (*para 15 of the Respondent's written submission dated 01.06.2018*).

Therefore, Counsel for the Respondent rely on the decisions of SINNA VELOO vs. MESSERS LIPTON LTD. [(1963) 66 NLR 214] and CHARLES PERERA vs. SHANTHA GUNASEKARA [CA 2044/2001] and submitted that the views set out by these case law in respect of the settlement entered by an Attorney-at-Law in the absence of his client is that such settlement cannot be assailed on the ground of the absence of such party as the Registered Attorney as regarded as acting under the authority of such party granted by a proxy.

In this segment, it is important to note that the pronouncement of GARGIAL et al. vs. SOMASUNDARAM CHETTY, [09 NLR 26], in this case the Defendant was absent at the trial stage. The proctor moved for a postponement since the Defendant was abroad. The judge refused a date. The court heard evidence of the Plaintiff and entered judgment. The question arose in appeal with the trial, whether it was *ex parte* or *inter-partes*. The Supreme Court (C. P. Layard, C. J, and Wood Renton, J) held that it was *inter-partes* on the basis that the Proctor for the Defendant must be taken to have appeared for the Defendant at the trial. Therefore there was no default of appearance on the part of the Defendant.

In the case of DE MEL vs. GUNASEKERA [(1939) 41 NLR 33], it was held that if an advocate appeared and moved for a postponement, then

proceedings should be considered as *inter-partes*. In PERUMAL CHETTY vs. GOONETILLEKE, [(1908) BAL. 02] the Supreme Court observed that there is no requirement for the Defendant to appear personally and it is sufficient if he is represented by counsel. This same approach followed by Wimalachandra, J. in KANDASAMY vs. KANDASAMY, [(2006 2 SLR 260].

Thus, I am of the view that all the Defendants had been represented by their Registered Attorney and he has entered in to the said settlement on behalf of the all the Defendants.

Further, it is seen from the submissions made by Counsel for the Respondent that, according to Section 754 (1) of the Civil Procedure Code, a party to prefer an appeal should be dissatisfied with the judgment of the original Court any error in fact or in law and it is clear that said provisions are not applicable to an order entered in accordance with a settlement as there is no possibility of being dissatisfied by an order made in accordance with terms of settlements agreed upon by the parties.

Also, counsel for the Respondent correctly pointed out the above position with the decision in the case SURIYAPPERUMA vs. SENANAYAKE [(1989) 1 SLR 325], this Court held that,

"Where parties agree to abide by the Court's decision after an inspection, there is implied in it a waiver of all defences taken in the answer and a total acceptance of the outcome of the Court's decision after the agreed inspection."

"The judgment and decree then are of consent of the parties and there is no right of appeal."

In the circumstances, this court in a view that the Appellants have no merits to precede the appeal against the impugned order as it is clear that they have represented and given their consent through their respective attorneys to the terms of settlement on which the said order had been made by the learned District Judge after carrying out a site inspection.

Therefore, I see no reason to interfere with the decision of the learned District Judge. Accordingly I dismiss this appeal without Costs

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL