FALEEL

v

ARGEEN AND OTHERS

COURT OF APPEAL
WEERASURIYA, J. (P/CA) AND
DISSANAYAKE, J.
C.A. 1021/93/F
JULY 11, 2001
AUGUST 13, AND
SEPTEMBER 13, 2001

Partition Law, No. 21 of 1997 – Settlement – Validity – Can the parties compromise their dispute? – Investigation of title – Consensus ad idem – Civil Procedure Code, sections 91 and 408 – Strict compliance.

Held:

(i) It is possible for the parties to a partition action to compromise their disputes provided that the court has investigated the title of each party and satisfied itself as to their respective rights.

(ii) Any settlement or compromise must be in strict compliance with sections 91 and 408 of the Civil Procedure Code.

(iii) It is the obligation of the trial Judge to investigate title first and having been satisfied that the parties before it alone have interests in the land and thereafter allow the parties to compromise their dispute.

(iv) It is necessary to observe that the respective shares or interests given to each party is based on the compromise reached and not on the examination of the title.

(v) If the compromise was lacking in precision and did not strictly conform to sections 91 and 408 of the Civil Procedure Code and it leads to confusion and uncertainty, any decree entered on it could be attacked on the ground of want of mutuality.

APPEAL from the judgment of the District Court of Kandy.

Cases referred to:

1. *Kurmarihamy* v *Weeragama* – 43 NLR 265
2. *Rosalin* v *Mary Hamy* – (1994) 2 Sri LR 262
3. *Babyhamine* v *Jamis* – 46 CLW 5

Dr. Jayantha Almeida de Gunaratne for plaintiff-appellant

Nizam Kariapper for 1st, 2nd and 4th defendant-respondents

Daya Guruge for 3rd defendant-respondent.

November 9, 2001

WEERASURIYA, J. (P/CA)

The plaintiff-appellant instituted this action to partition the land called Dummannagehena *alias* Watta morefully described in the schedule to the plaint and depicted in preliminary plan bearing No. 116, dated 01.06.1990, drawn by licensed surveyor W.H.E. Uduwawela produced at the trial marked X.

The defendant-respondents in their respective statements of claim disputed the claim of the plaintiff-appellant for 110/196 undivided rights to this land.

When the trial was taken up on 21.01.1992, parties arrived at a settlement and on that basis the evidence of the 1st defendant was led. Learned District Judge by his judgment dated 29.10.1992, alloted rights to the parties in the following manner:-

Plaintiff	-	Lot 3 and 5.6 perches from lot 1
1st and 2nd defendants	-	Lot 1 and lot 4 less 56 perches from lot 1
3rd defendant	-	Lot 6
3rd and 4th defendants	-	Lot 7 in common
6th defendant	-	Lot 2
4th defendant	-	Lot 5

The present appeal is against the aforesaid judgment.

At the hearing of this appeal, learned counsel for the plaintiff-appellant submitted that learned District Judge has misdirected himself in holding that no injustice would be caused to the parties by the purported settlement.

Learned counsel for the 3rd defendant-respondent submitted that the plaintiff-appellant is not entitled to recite from the settlement arrived at by the parties on 21.10.1992.

Learned counsel for the 1st, 2nd and 4th defendant-respondents submitted that the plaintiff-appellant is not entitled to challenge the validity of the judgment.

At the outset, it is necessary to state that on 21.10.1992, parties had indicated to court that the disputes relating to the share entitlement have been settled. The terms of the purported settlement appear to be as follows:-

(1) that the parties have resolved their disputes in regard to the shares *inter se*:

(2) that although it is later stated in the deed by agreement, the parties desire to have allotments as shown in preliminary plan 116;

(3) that in addition to lot 3 which the plaintiff-appellant is presently in possession, the 1st defendant-respondent would agree to give him 5.6 perches from lot 1;

(4) that accordingly parties agree to give plaintiff-appellant 5.6 perches from lot 1 in addition to lot 3.

Learned counsel appearing for the plaintiff-appellant contended that on the basis of this purported settlement, the 1st defendant-respondent has agreed to give 5.6. perches from lot 1 to the plaintiff-appellant to tag on to her lot 3 which she was already in possession. Therefore, learned counsel for the plaintiff-appellant contended that the plaintiff-appellant could have got from one point of the corpus 56 perches for her to continue in possession, instead of 50.4 perches in lot 3 which she was in possession. It was contended further, that the plaintiff-appellant has not agreed to the taking of 5.6 perches from lot 1, in addition to lot 3 which she was in possession, in lieu of her entitlement from deed bearing No. 589, dated 17.09.1986, attested by M.S.M. Hussain N.P. (marked P7).

Learned trial judge in his judgment, has stated that there is no reason for him not to accept the settlement reached and the evidence led. He stated further that no injustice would be caused to any party by the said settlement.

It is possible for the parties to a partition action to compromise their dispute provided that the court has investigated the title of each party and satisfied itself as to their respective rights. However, any settlement or compromise must be in strict compliance with the provisions of sections 91 and 408 of the Civil Procedure Code.

It was held in *Kumarihamy* v *Weeragama* [1] that –

"An agreement, which is entered into in a partition action, affecting only the rights of parties inter se, and which is expressly made subject to the court being satisfied that all parties entitled to interests in the land are before it and are solely entitled to it, is binding on the parties and is not obnoxious to the Partition Ordinance."

The following observations at page 269 are highly relevant on this question.

"*What we now decide is that, when the court is invited to investigate title and, having done so and having been satisfied that the parties before it alone have interests in the land to be partitioned, thereafter to allow the parties to compromise their dispute, there is nothing to prevent the court allowing this to be done, and once it is allowed the parties are bound by their agreement.*"

Therefore, it is obligatory on the District Judge to investigate title first and having being satisfied that the parties before it alone have interests in the land and thereafter allow the parties to compromise their dispute.

In *Rosalin* v *Mary Hamy*[2] it was held that when an agreement is entered into, the Court has to be satisfied only as to whether the agreement is between the parties having interests in the land sought to be partitioned.

In the event of such agreement, the respective shares or interests to be given to each party is based upon the compromise that is reached and not on an examination of title.

Therefore, the principle laid down in *Kumarihamy* v *Weeragama* (*supra*) which was a full bench decision, has to be reiterated, namely that after investigation of title and having being satisfied that the parties before it alone have interests in the land to be partitioned there is nothing to prevent the court allowing parties to compromise their dispute.

However, it is necessary to observe that the respective shares or interests given to each party is based on the compromise reached and not on the examination of the title.

In *Babyhamine* v *Jamis*[3] points in dispute in the partition action were settled among the parties before evidence was led and interlocutory decree was entered to give effect to the settlement but the compromise was lacking in precision and did not strictly conform to sections 91 and 408 of the Civil Procedure Code. The compromise was in fact calculated to lead to confusion and uncertainty and any decree entered on it could be attacked on the ground of want of mutuality.

It was held that the Supreme Court will not go into the question whether there was consensus *ad idem* between the parties to that settlement and if so what was in their minds. It was further held that in the interests of justice the purported settlement and the judgement entered upon on the basis of that settlement should be set aside.

In the present case, learned District Judge has not satisfied himself that all the parties who had interests in the case were before him. It is to be observed that in the plaint the 5th defendant-respondent has been allotted an extent of land 38 x 58 feet. However, evidence has not been led as to how his rights were to be allotted. The 6th defendant in respect of whom no share has been given, was declared entitled to lot 2.

In this settlement, the plaintiff-appellant has not agreed that in lieu of her undivided rights in terms of deed P7 she would consent to accept lot 3 and 5.6. perches from lot 1

The 1st defendant has agreed to give 5.6 perches from lot 3 he was in possession to the plaintiff-respondent.

Therefore, there was absence of precision in regard to the conditions and an element of uncertainty pervaded the purported compromise which affected the rights of the plaintiff-appellant.

For the above reasons, I would set aside the judgment of the District Judge dated 26.10.1992. However, I make no order as to costs.

This appeal is allowed.

DISSANAYAKE, J. - I agree.

Appeal allowed.