SOMARATNE AND ANOTHER
v.
PADMINI DE SILVA

SUPREME COURT
RANASINGHE C. J., TAMBIAH J. AND BANDARANAIKE J.
S. C. NO. 61/86; C. A. NO. 350/82;
D. C. KALUTARA NO. 2552/L
SEPTEMBER 15, 1988

Rei vindicatory suit — Encroachment — Settlement — Mistake.

Where a settlement was entered whereby it was recorded that it was agreed that if no foundation was found on the corpus by the Interpreter-Mudaliyar the action would be dismissed when what the plaintiff meant was only the remnants of an old house it was wrong to apply the test of the presence of a foundation to dispose of the action.

Case referred to:

(1) *Thangarajasingham v. Iyampillai* 64 NLR 569

APPEAL from judgment of the Court of Appeal

P. Somatillekam with *Miss Nevanka Goonewardene* for petitioner
Hermon J. C. Perera for respondent.

Cur. adv. vult.

October 19, 1988
RANASINGHE, C. J.,

The Plaintiff-Respondent-Respondent (hereinafter referred to as Respondent) has instituted this action against the Defendants-Petitioners-Appellants (hereinafter referred to as Appellants) for a declaration of title to a portion of an allotment of land, called Gorakagahawatte and more fully described in the schedule to the plaint, and for ejectment of the Appellants therefrom.

The Respondents claim title upon the basis of two deeds bearing Nos: 6515, dated 8.3.72, and 8203, dated 21.5.77.

Upon a commission taken out by the Respondent the land claimed by him was depicted as lots A and B in Plan No. 1243, which is marked 'B'. The portion, which the Respondent claims has been encroached upon by the Appellants, is said to be Lot 'B' in the said plan, and the extent of such portion is given as 3.4 perches.

The Appellants, who disputed the Respondent's claim too have had the land, which they stated is theirs, surveyed and depicted in Plan No. 2650, which was marked 'D'. They claim not only lots 1 and 2 in the said plan, but also a strip of land, 1 perch in extent, along the northern boundary of lot 3, which they state constitutes the Respondent's land.

The portion, which was in dispute between the parties and which the Respondent claims has been encroached upon by the Appellants, is depicted in Plan 'B' as Lot 'B', and in Plan 'D' as Lot 2.

In Plan 'D' was also depicted as "item B" what the surveyor describes as the "foundation" of an old house, and which is said to be claimed by the Appellants. The area covered by such "item B", according to the said surveyor, falls within lots 1 and 2 of the said plan.

When the case was taken up for trial on 17.12.81, a settlement was arrived at between the parties. The terms of the said settlement were: that the interpreter-mudliyar of the court should inspect the land depicted in the plan 'D' referred to above: that if he were to find a "foundation" (අත්තිවාරම) at the site marked 'B' in Plan 'D'. The Respondent's action was to be dismissed with costs: that, on the other hand, if no such "foundation" was found to exist at the said site 'B', then judgment was to be entered for the Respondent.

The interpreter-mudliyar had proceeded to the said land on the same day and had inspected the portion in dispute in the presence of the two surveyors who had prepared the aforementioned plans 'B' and 'D' respectively.

The Interpreter-mudliyar gave evidence before the learned District Judge on 18. 12. 81, as to the results of his inspection; and, on the basis of the interpreter-mudliyar's evidence, the learned District Judge entered judgment for the Respondent, on the footing that there was no "foundation" at the site marked 'B' in the said plan 'D'. Decree was entered accordingly by the learned District Judge.

The Appellants then filed an application in the Court of Appeal for revision of the said decree and/or restitutio-in-integrum. It was contended; that a mistake had been made in entering the terms of settlement before the District Court by the use of the word "foundation"; that what the Appellants had meant was only the remnants of an old house; that, therefore, the Appellants should be given relief on the basis of a mistake made by them in agreeing to the said settlement.

The Court of Appeal took the view that the Appellants had made no mistake in agreeing to the said terms of settlement recorded in the District Court. The Court of Appeal, having

expressed the view that the term "foundation" is usually used to express 'the base or basis of a building', proceeded to hold that what was described by the Interpreter-mudliyar as having been found by him at the said site could not have supported "any building standing on it."

Learned Counsel appearing for the Appellants before this court has only contended that the Orders, of both the District Court and the Court of Appeal, be set aside and that the case be sent back for a continuation of the trial on the basis of the pleadings filed.

The contention, that a mistake was made by the Appellants in entering into the said settlement, seems to me to be untenable; and, having regard to the view expressed by the Court of Appeal on this point, I see no reason to interfere with that part of the Order of the Court of Appeal refusing relief by way of restitutio-in-integrum.

A consideration of the evidence given by the interpreter-mudliyar, of the results of his inspection of the scene; in court on 18. 12. 81, makes it clear that he has set out three features he found at the site:

(i) that the said site, depicted as 'B', is, in comparison to the rest of the land, slightly elevated;

(ii) that there were, here and there, layers of cement mixed with clay, although he did not find any bricks;

(iii) that, when the mammoty was used, the layers of cement seemed to come off in pieces.

It was upon this evidence that the learned trial Judge concluded that there was no "foundation" as contemplated by the parties.

Having regard to the view taken by the Court of Appeal in regard to the nature and the purpose of a "foundation", I find it difficult to accept the conclusion arrived at by the Court of

Appeal that the existence of such a 'base or basis of a building' is not borne out by what the interpreter-mudliyar testified to as having been found by him at the site.

It has, however, been contended by learned Counsel appearing for the Respondent that this court should not give relief to the Appellants by way of revision for the reasons; that no application had been made to the learned District Judge to lead evidence to contradict the evidence given by the interpreter-mudliyar; that there has been delay in making the application for relief to the court of Appeal: that, although there was a right of appeal from the order of the District Judge, the Appellants failed to exercise that right.

Having regard to the terms of the said settlement I do not think that any application to lead evidence to contradict that of the interpreter-mudliyar's could have been entertained by the learned District Judge. In any event, having regard to the view I have formed of the evidence so given by the interpreter-mudliyar himself, the failure to move to lead evidence to the contrary should not, in the circumstances of this case, be counted against the Appellants.

The period, between the date of the Order made by the District Court and the making of the application to the Court of Appeal, the parties agreed, was only three months. This period of time is not such as should, in the circumstances of this case, be considered to amount to inordinate delay in moving the Court of Appeal for the exercise of the discretionary powers vested in it.

Having regard to the nature and the scope of the settlement that was arrived at between the parties on 17.12.81 and communicated to the learned District Judge, and the order made entering judgment for the Respondent by the learned District Judge in terms of the said settlement, it seems to be clear, upon the authority of the decision in the case of *V. Thangarajasingham & wife vs. M. Iyampillai & wife,* (1) (and the several authorities referred to in the said judgment) that the Appellants would have had no right of appeal from the said decree of the District Court.

The appeal of the Appellants is allowed; and the judgment of the Court of Appeal is set aside. The decree of the District Court is also set aside, and the District Court is directed to settle the issues, and proceed to hear the trial upon the said issues.

The Respondent is also directed to pay the Appellants a sum of Rs. 2100/- as costs of the proceedings before the Court of Appeal and of the appeal to this Court.

TAMBIAH, J. — I agree.

BANDARANAYAKE, J. — I agree.

Appeal allowed