

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

In the matter of an Application for Special Leave from the Judgment of the Provincial High Court of the Central Province in terms of Article 128 of the Constitution read with Section 5C (1) of the Act No.54 of 2006.

SC. Appeal No. 93/2009

SC. HC. CA. LA. 77/2008

Provincial High Court
(Civil Appellate)
of the No. CP/HCCA/KAN

Central Province 200/2002(F)

D.C. Kandy No. 13310/P

Noor Nazima alias

Noorul Naxima Hussain

of the No. 81/1, Katugastota Road,
Kandy.

Plaintiff-Respondent-Petitioner

-Vs.-

Shantha Wimalasuriya Tilakaratne,
Wevala, Harankahawa.

2nd Defendant-Appellant-Respondent

1. Noorul Parshana Hussain of No. 81/1,
Katugastota Road,
Kandy.

3. Sitti Sifaya Mohideen of No. 85,
Katugastota Road,
Kandy.

1st and 3rd Defendant-Respondents
Respondents

BEFORE : Tilakawardane, J.
Sripavan, J.
Dep, PC., J. &

COUNSEL : Faiz Musthapha, PC, with Hemasiri Withanachchi
for the Plaintiff-Respondent-Petitioner.

Wijeyadasa Rajapakshe, PC, with Nilantha
Kumarage for the 2nd Defendant-Appellant-
Respondent.

ARGUED ON : 15.05.2012

DECIDED ON : 07.12.2012

TILAKAWARDENA, J

An application was preferred to this Court , and leave was granted on the following question of Law;

“Whether the description of the land given in the deed No. 6257 dated 22.06.1983 attested to by A.H.M Jameel Notary Public, marked as P10, is conclusive with regard to the question that it is a defined and distinct

land?”

The Plaintiff-Respondent-Appellant (hereinafter referred to as the Appellant) preferred this Appeal against the judgment entered in case No. CP/HCCA/KAN Central Province 200/2002 (F) of the Provincial High Court of the Central Province Holden at Kandy (Civil Appellate) (hereinafter referred to as the High Court) dated 01.07.2008 made in favour of 2nd Defendant-Appellant-Respondent (hereinafter referred to as the Respondent).

The Appellant instituted an action seeking to partition an allotment of land depicted in Plan No. 7359 dated 07.04.1978, bearing Assessment No. 81/1, at Uda Mahaiyawa, Katugastota Road, Kandy. The Appellant filed civil proceedings against the Respondent in the District Court of Kandy (hereinafter referred to as the District Court) and judgment was given in favour of the Appellant on 23.10.2002 holding inter alia that the Respondent was not entitled to any rights in the corpus in view of the findings that the Appellant, as the admitted owner of the disputed land, had not signed the Deed bearing No.31540 dated 14.09.1987 attested to by H. Retigahapola Notary Public (marked IP 2). This was the Deed through which the Respondent claimed title. On appeal, by the Respondent, the High Court set aside the judgment of the District Court.

As stated above, the only question on which leave was granted pertained to whether the deed was conclusive with regard to defined and distinctive land. Section 4(b) Partition Law (No. 21 of 1977) states;

1. In addition to the particulars required to be stated in a plaint by the Civil Procedure Code, every plaint presented to a court for the purpose of instituting a partition action shall contain the following particulars : -

(b) a description of that land by reference to physical metes and bounds or by reference to a sketch, map or plan which shall be appended to the plaint;

The wording is the same as the repealed legislation concerning Partition, viz The Partition Ordinance. Under that legislation Section 2 required “reference to

physical metes and bounds or by reference to a sketch, map or plan which 'shall be' appended to the plaint". This section has been interpreted broadly in order to highlight the fact that these were not the only means by which identification of land could be satisfied. The case of **Ranbanda Vs. Yatagama et. al.** 3 A.C.R. 40 held, in addition to the material expressly stated in Section 2, it not being an exhaustive list, the judge was not precluded from using his or her discretion to ascertain whether the land had been identified on the facts and circumstances of the case like the survey plan, deeds etc which had been tendered with the plaint. Therefore despite this being the interpretation given to Section 2 of the Partition Ordinance, by analogy, the interpretation must be applied to Section 4(b) Partition Law (No 21 of 1977).

Relying on this interpretation it is the finding of this Court that the description of a land in a deed is conclusive as defined and distinctive land. Where a Court finds the deed to be lacking sufficient details to enable the identification of the land it will request a plan and other details.

A fundamental argument of the Respondent was that the land was not an undivided portion and therefore the Partition Law did not apply. However on consideration of the documents it is evident that the rights in the corpus when transferred to the Appellant by Deed of Transfer bearing No. 3466 dated 28.04.1978 attested to by Upatisa Ratnayake, Notary Public, from Siddik Moan Ahamod Shahed Hajir was an undivided allotment. Therefore as the original transfer to the Appellant was of undivided land and no plan was produced in evidence to indicate that a clear division was made at the time of transfer by deed P10 to the 1st Defendant it is the finding of this Court that it was an undivided transfer of land (despite P10 referring to a sub-divided portion marked Lot 1A in extent of 10 perches, by A.M. Navaratne Banda Licensed Surveyor of the portion marked Lot 1 in extent 14.50 perches effected on Plan No.1059 dated 28.08.1988 of A.S.M. Azward, Licensed Surveyor).It is however pertinent to note that none of the other owners who had any interest in the land, all relatives of the Appellant,

objected in any way to this action, nor did they seek to intervene.

Furthermore it is the opinion of this Court that the District Court was correct in its findings that the Gift of Transfer to the 1st Defendant was undivided land on the basis of there being no physical demarcation of the 10 perches conveyed. As submitted by the Appellant according to Gratien J. observed at p.p.61,

“ were it necessary to lay down any general principle for the purpose of deciding the effect of a deed whereby an owner of land purports to convey to someone a share in it, I would say where the words of description contained in the grant are sufficiently clear with reference to extent locality and other relevant matters to permit of an exact demarcation of **all the boundaries** of what has been conveyed, then the grant is of a defined allotment. If however, the **language is insufficient to permit such a demarcation, the grant must be interpreted as conveying only an undivided share in the larger land**”.

This Court agrees with this reasoning on the basis that Deed P10 failed to provide clear language indicating the boundaries of the gifted 10 perches. Further prejudice was caused to the Appellant as she was precluded from defending her position at first instance as the question in hand, whether the land was divided or undivided, was not in fact disputed at first instance. This Court wishes to draw attention to the case of **Jayawickrama Vs. Silva 76 NLR 427**, the Learned Judge stated that;

a pure question of law can be raised in appeal for the first time, but if it is a mixed question of fact and law it cannot be done.

The case of **Leechman Co Ltd. Vs. Rangalle Consolidated Ltd. (1981) (2) SLR. 373** espouses the same principle in inverse terms, with the Learned Judge stating;

a pure question of law which does not require the ascertainment of new facts can be raised for the first time in appeal.

The issue whether the corpus consisted of two distinct and divided portions of land making it amenable to a partition case, was not a matter on which the parties were at variance and hence the case presented to the District Court was confined to considering the land as undivided. It is the opinion of this Court that the District Judge rightly considered the land to be undivided.

In relation to Section 10 of the Prescription Ordinance which states as follows;

No action shall be maintainable in respect of any cause of action not hearing before expressly provided for or expressly exempted from the operation of this ordinance, unless the same shall be commences within 3 years from the time when such cause of action shall have accrued.

It is this Court's finding that the Appellant acted in time due to the fact that the Court interprets the 3 year period as commencing in 1994 and as the cause of action against the Respondent arose in 1994, only after the criminal investigation against Kaleel proved futile, time had not run out.

Therefore, it is the opinion of the Court that the Respondent is unable to rely on Section 10 of the Prescription Ordinance.

It was argued that the deed of transfer IP 2, under which the alleged transfer of land from the Appellant to Mohomad Kaleel is purported to have occurred, was a valid deed of transfer. The Respondent argues that the Appellant failed to prove the signatures on the deed to be hers, despite the Examiner of Questioned Documents (here in after referred to as EQD) report indicating the signature on the deed IP 2 (marked P2) not matching the specimen signatures (P3 & P5) of the Appellant . Further the EQD, C.D. Kalupahana, gave evidence on the signatures stating that P3 & P5 did not correspond with P2 and could not have been by the same person. Therefore it is the finding of this court that on the balance of probability that the signature on the Deed P2 was not of the Appellant and that purported the deed was void and could not therefore transfer any soil rights.

The 2nd Defendant bought the disputed property, from Kaleel who had no soil

rights to the property. The foundation of his action was rooted on the said Deed P2, and he therefore had no *locus standii*, or no right to bring an action or to be heard in an action under the Partition law, especially in view of section 2 of the Partition Act. Nothing in this dispute could either injuriously or adversely affect the said 2nd Defendant, and even the dismissal of the action would not benefit him as he had no soil rights whatsoever.

Indeed it is in the interest of the State to grant the owners of allotments of land their unfettered rights by Partition or any such actions which clear their title to the land and which would permit them to obtain the commercial benefit of the land.

This Court would like to highlight that the 2nd Defendant is a victim of the current registration system in Sri Lanka as the facts make it clear that he has taken all reasonable steps to ensure that he purchased land with a clear title. It is noted from evidence that the Notary in fact recommended that he purchase this land despite failing to make a thorough investigation into the identity of the seller; in fact it was stated that he did not know the seller. It is of course not mandatory that the Notary knows the seller before completing a deed of transfer or any other such transaction, however it is mandatory that the Notary acts with due diligence to protect the interest of his clients. The present title registration system in Sri Lanka does not facilitate such a process of due diligence and should be amended to avoid injustice caused to genuine purchasers of land. An identity search as proposed by the amendment of the Law along with the title search, should be adopted and effectively implemented and in this way, fraud as seen in this case can be avoided. The application of law should at all time facilitate the due process of justice and the current system creates loopholes for fraudsters to take advantage of the system and therefore cause injustice to citizens.

For the reasons set out above it is the finding of this Court that the Appellant's

SC. Appeal No. 93/2009

rights in the corpus has been established to have arisen as a result of a clean pedigree and therefore she is the rightful owner of the undivided land. For the reasons highlighted judgment of the High Court dated 01.07.2008 is set aside. The appeal is allowed and the Judgment of the District Court of 23.10.2002 is affirmed. No Costs.

JUDGE OF THE SUPREME COURT

Sripavan, J.

I agree.

JUDGE OF THE SUPREME COURT

Dep, PC, J.

I agree.

JUDGE OF THE SUPREME COURT