

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

1. Maligaspe Koralalage Arwin Peter
Nanayakkara, (Deceased)
- 1A. Kariyawasam Hegoda Gamage
Uma,
Both of
Panagamuwa,
Wanchawala.
Plaintiff

SC APPEAL NO: SC/APPEAL/2/2019

SC LA NO: SC/SPL/LA/193/2017

CA NO: CA/1391/99 (F)

DC GALLE NO: 9556/P

Vs.

1. Epage Dayananda,
2. Epage Jeedrick, (Deceased)
- 2A. Mandalawattage Alisnona,
3. Dolamulla Kankanamge
Selenchihamy, (Deceased)
- 3A. Maligaspe Koralage Bartin
Nanayakkara,
4. M.K. Bartin Nanayakkara,
Pinnaketiyawatta, Panagamuwa,
Wanchawala.

5. Thomas Udugampala,
Panagamuwa,
Wanchawala.
6. S.P. Gunawardena,
Panagamuwa, Kalahe,
Wanchawala.
7. M.K.A. Nanayakkara,
Pinnaketiyawatta,
Panagamuwa, Wanchawala.
8. D.L. Karunawathie,
Panagamuwa,
Wanchawala.
Presently at,
No. 39/3, Morris Road,
Milidduwa, Galle.
Defendants

AND BETWEEN

4. M.K. Bartin Nanayakkara,
(Deceased)
Pinnaketiyawatta, Panagamuwa,
Wanchawala.
- 4A. Maligaspe Koralage Leelani
Priyanthi,
Kalahe, Wanchawala.
5. Thomas Udugampala,
Panagamuwa,
Wanchawala.

7. M.K.A. Nanayakkara,
Pinnaketiyawatta, Panagamuwa,
Wanchawala.
4th, 5th and 7th Defendant-
Appellants

Vs.

1A. Kariyawasam Hegoda Gamage
Uma,
Panagamuwa, Wanchawala.
Plaintiff-Respondent

1. Epage Dayananda,
2A. Mandalawattage Alisnona,
(Deceased)
2B. Epage Premadasa,
Panagamuwa, Kalahe,
Wanchawala.
3A. Maligaspe Koralage Bartin
Nanayakkara,
6. S.P. Gunawardena, (Deceased)
Panagamuwa, Kalahe,
Wanchawala.
6A. Indika Panditha Gunawardena,
6B. Anushka Kumari Panditha
Gunawardena,
Panagamuwa, Kalahe,
Wanchawala.

8. D.L. Karunawathie,
Panagamuwa,
Wanchawala.
Presently at,
No. 39/3, Morris Road,
Milidduwa, Galle.
Defendant-Respondents

AND NOW BETWEEN

4A. Maligaspe Koralage Leelani
Priyanthi,
Kalahe,
Wanchawala.
Defendant-Appellant-Appellant

Vs.

1A. Kariyawasam Hegoda Gamage
Uma,
Panagamuwa,
Wanchawala.
Plaintiff- Respondent-Respondent

1. Epage Dayananda,
2B. Epage Premadasa,
Panagamuwa, Kalahe,
Wanchawala.

3A. Maligaspe Koralage Bartin

Nanayakkara,

6A. Indika Panditha Gunawardena,

6B. Anushka Kumari Panditha

Gunawardena,

Panagamuwa,

Wanchawala.

8. D.L. Karunawathie,

Panagamuwa,

Wanchawala.

Presently at,

No. 39/3, Morris Road,

Milidduwa, Galle.

Defendant-Respondent-

Respondents

5. Thomas Udugampala,

Panagamuwa, Wanchawala.

7. M.K.A. Nanayakkara,

Pinnaketiyawatta,

Panagamuwa,

Wanchawala.

5th and 7th Defendant-Appellant-

Respondents

Before: S. Thurairaja, P.C., J.

Achala Wengappuli, J.

Mahinda Samayawardhena, J.

Counsel: Mahinda Nanayakkara with Aruna Jayathilaka for the 4A Defendant-Appellant-Appellant.
Priyantha Alagiyawanna with Isuru Weerasooriya for the Plaintiff-Respondent-Respondent.
Dilip Obeysekera for the 5th Defendant-Appellant-Respondent.

Argued on : 20.07.2021

Written submissions:

by the 4A Defendant-Appellant-Petitioner on 29.01.2019.

by the Plaintiff-Respondent-Respondent on 23.09.2019.

Decided on: 15.10.2021

Mahinda Samayawardhena, J.

The plaintiff filed this action in the District Court of Galle seeking to partition two contiguous allotments of land known as *Pinnaketiyawatta* and *Godaihalawatta* as one unit. The 4th, 5th and 7th defendants sought the dismissal of the partition action. After trial, the District Court entered judgment as prayed for by the plaintiff. The appeal filed by the 4th, 5th and 7th defendants against the judgment of the District Court was dismissed by the Court of Appeal. This appeal by the 4th defendant-appellant is from the judgment of the Court of Appeal.

This Court granted leave to appeal to the 4th defendant on the following question of law:

Has the Court of Appeal erred in law by not coming to a finding that the District Court of Galle has failed to investigate the title in terms of Partition Law No. 21 of 1977 in particular not considering the deeds marked 4V1 to 4V10?

As stated above, the 4th defendant does not seek to partition the land. He seeks the dismissal of the action. Hence his position before this Court that the District Court did not take into consideration his deeds marked 4VI to 4V10 in investigating the title is irreconcilable with the relief sought.

The position of the 4th defendant before the District Court as crystallised in the issues was not clear at all. His position before this Court is no better.

The Preliminary Plan depicted five lots marked A to E as the corpus. By way of issues 6 to 9, the 4th defendant took up the position that lots A to C in the Preliminary Plan is the land known as *Pinkatiyawatte Dakunukebella* alias *Pinketi yawatte Kosgahakebella*, lot D is *Godaihalawatta*, and lot E is part of *Welikandewatte*. It was not the position of the 4th defendant before the District Court that lots A to D comprise the land to be partitioned. Nor did the 4th defendant state that lots A to D are parts of different lands unrelated to the land to be partitioned. The 4th defendant did not take up a clear position in respect of these lots.

By way of issue 10, the 4th defendant first states that lots A to C are part of the corpus in another partition action No. P/9211 pending before the same District Court and therefore these lots

cannot be part of the corpus in the instant action. Thereafter, in the same breath, by way of issues 11 to 19, he unfolds a pedigree different from the plaintiff's in respect of lots A to C. These are contradictory positions.

By way of issues 20 to 23, the 4th defendant reveals another pedigree different from the plaintiff's for lot D.

Other issues raised pertain to lot E to which the 4th defendant has no claim.

By the last two issues 27 and 28, the 4th defendant seeks dismissal of the action in the event the aforesaid issues of the 4th defendant are answered in his favour.

Despite the 4th defendant seeking dismissal of the action, let me now consider whether the 4th defendant proved his pedigree in respect of lots A to D.

As seen from the proceedings dated 10.06.1997, it is correct that at the trial the 4th defendant commenced his evidence in chief and purported to mark the deeds 4V1 to 4V3 for the purpose of record although these deeds were not before Court. The trial was postponed in order for the 4th defendant to bring the deeds and continue with his evidence in chief. However the 4th defendant did not resume evidence on the next date and the 5th defendant gave evidence instead. It is through the 5th defendant that the deeds 4V1 to 4V10 were marked. In cross examination, the 5th defendant categorically stated that he has no right to lots A to D and his only claim is to lot E which is a minute portion of about one perch. The 4th defendant's purpose in marking the

deeds 4V1 to 4V10 through the 5th defendant is unclear as the 4th defendant did not specifically seek undivided rights to the land. The 5th defendant concluded his evidence in chief seeking dismissal of the plaintiff's action.

In the aforementioned circumstances, the learned District Judge cannot be found fault with when he stated in the judgment that the 4th defendant did not establish his rights to the land to be partitioned.

During the course of the argument before this Court, learned counsel for the 4th defendant was asked whether deeds 4V1 to 4V10 are relevant to the land to be partitioned but he did not give a straightforward answer. When asked what share of the land the 4th defendant claims on these deeds if they are relevant, there was no answer at all.

Learned counsel attempted to make submissions on the failure to identify the corpus on the strength of these deeds, stating that the plaintiff filed this action to partition several lands in violation of the partition law. However, as learned counsel for the plaintiff rightly pointed out, the Supreme Court did not grant leave to appeal on this question of law.

The only submission of learned counsel for the 4th defendant is that the plaintiff's action shall be dismissed as there was no proper investigation of title by the District Judge. He cites a series of authorities to emphasise that it is the bounden duty of the District Judge to independently investigate the title of each party irrespective of what the parties or their attorneys submit to Court.

It is true that under section 25(1) of the Partition Law, No. 21 of 1977, a special duty is cast upon the District Judge to investigate the title of each party to the land to be partitioned. But this does not mean that the District Judge shall go after the parties pleading with them for help in investigating their title to the land, more so when the parties are represented by attorneys.

An attorney is duty-bound to conduct the case so as to serve the best interests of his client. When he conducts a trial, he has a strategy in place, and rightly so. He raises points of contest, marshals evidence, cross examines witnesses etc. according to his plan. It is not proper for the Judge to sabotage this plan and forcibly take control of the trial in the guise of investigating the title to the land. Such conduct on the part of the Judge would violate the most rudimentary norms of justice. The role of a Judge hearing a partition case is no exception to this fundamental norm.

In *Thilagaratnam v. Athpuna* [1996] 2 Sri LR 66 at 68 Anandacoomaraswamy J. stated:

The Learned Counsel for the Appellant cited several authorities Goonaratne v. Bishop of Colombo 32 NLR 337, Peris v. Perera 1 NLR 362, Neelakutty v. Alvar 20 NLR 372, Cooray v. Wijesuriya 62 NLR 158, Juliana Hamine v. Don Thomas 59 NLR 546 at 549 and Sheefa v. Colombo Municipal Council 36 NLR 38 and stated that it is the duty of the Court to examine and investigate title in a partition action, because the judgement is a judgement in rem. We are not unmindful of these authorities and the proposition

that it is the duty of the Court to investigate title in a partition action, but the Court can do so only within the limits of pleadings, admissions, points of contest, evidence both documentary and oral. Court cannot go on a voyage of discovery tracing the title and finding the shares in the corpus for them, otherwise parties will tender their pleadings and expect the Court to do their work and their Attorneys-at-Law's work for them to get title to those shares in the corpus.

A judgment entered in a partition action after following a long-drawn-out cumbersome procedure shall not be set aside with a stroke of the pen and retrial ordered causing enormous difficulties, under the popular banner “failure to investigate title”, unless there is good cause for doing so.

In *Francis Wanigasekera v. Pathirana* [1997] 3 Sri LR 231 at 234-235, Weerasekera J. impressed upon the undesirability of the literal application of section 25(1) of the Partition Law:

Learned Counsel also urged that the learned District Judge failed to act in terms of section 25 of the Partition Act which requires Court to examine and hear and receive evidence of the title of each party as decided in the case of Sirmalie v. Punchi Ukku 60 NLR 448.

I do agree that section 25 of the Partition Act requires the Court to examine and hear and receive evidence of the title and interest of each party. But it must be remembered that the literal application of the provisions of this section would

lead to the most disturbing, hilarious and absurd result and no partition case could ever be finally concluded.

John Singho v. Pedris Hamy (1947) 48 NLR 345 is a partition case where the dispute presented to the District Judge was whether Andiris Naide owned the land or whether Aberan owned the land. The District Judge found on a balance of evidence that Andiris Naide was the original owner. Having come to that finding next he took upon himself to decide whether some of the successors in title of Aberan had not acquired title by prescriptive possession against all the other parties. Despite this being a partition action, the Supreme Court decided that the District Judge overstepped his boundaries. Wijeyewardene J. held at 346:

This appears to have been a self-imposed task, considering that the parties had told him that the dispute between them was whether Andiris Naide or Aberan was the original owner. It cannot be said that the plaintiff has not been prejudiced by the action of the District Judge in deciding the question of prescriptive possession in these circumstances. A Judge may find it frequently very convenient to state, in the form of issues, the matters in dispute between the parties in a partition action. After satisfying himself that no person other than the parties to the action has interests in the property, he will in such a case decide the issues framed by him and enter a decree for partition or sale according to his finding on those issues. He should not in such circumstances consider, without giving due notice to the parties, any matters in dispute that may appear to him

to arise between them in the course of the proceedings. The position, of course, will be different where the Judge does not set down, in the form of issues, the matters in dispute in a partition action. In such a case the parties will be presumed to have asked the Court to adjudicate on all the matters in dispute as disclosed by the pleadings.

I do not say that a partition trial shall be conducted in the same manner as any other *inter partes* civil trial. Notwithstanding the system of justice which prevails in our country is adversarial as opposed to inquisitorial, the role of the Judge in a partition case is different and unique. The responsibility of the Judge in a partition case is much greater than in an ordinary civil trial, particularly because collusive actions deprive the rights of the true owners simply because partition actions are actions *in rem*. Collusion can take place not only when right parties are not before Court but also when they are before Court. The case of *Sirimalie v. Punchi Ukku* (1958) 60 NLR 448 cited before Weerasekera J. in *Francis Wanigasekera's case* (*supra*) provides a typical example.

In *Sirimalie's* case, the plaintiff in her plaint set apart shares of the land to be partitioned to the 8th, 9th and 10th defendant-petitioners. The trial was taken up when the plaintiff and the 7th and 9th defendants were present. The only parties represented by attorneys at the trial or at any previous stage were the plaintiff and the 1st, 2nd and 3rd defendants. At the commencement of the trial, the Court was informed that there was no contest. When the evidence of the plaintiff's husband was led, he deviated from what had been pleaded in the plaint

and took up a new position which deprived the 8th, 9th and 10th defendant-petitioners of any share in the land.

The Supreme Court disapproved of the unsatisfactory manner in which the trial was conducted and, having stressed the duty of the District Judge in hearing a partition case, set aside the judgment and directed that the trial be commenced afresh. At page 450, Sansoni J. (later C.J.) stated:

I think the more serious objection to the manner in which this trial was conducted is the fact that the 9th defendant, who was present in Court, seems to have been totally ignored. She appeared even before summons was served on her. It is true that she filed no statement, but her presence at the trial surely indicated that she had come to watch her interests. She does not seem to have been asked whether she accepted the new position taken up by parties who had pleaded differently, nor whether she wished to give evidence, or even to cross-examine the plaintiff's husband whose evidence was directly against her interests.

Obviously, the facts of *Sirmalie's* case cried aloud for the intervention of the Supreme Court to prevent what would otherwise have been a miscarriage of justice.

Conversely, the facts of the instant action are totally different. The 4th defendant was fully represented by an attorney throughout the trial and the District Court answered the issues with the available evidence.

If the 4th defendant later thinks his deeds marked 4V1 to 4V10 are relevant to the land to be partitioned, he can make an application before the District Court to secure his undivided rights from the share left unallotted by the District Judge in the judgment.

I answer the question of law in the negative and dismiss the appeal of the 4th defendant but without costs.

Judge of the Supreme Court

S. Thurairaja, P.C., J.

I agree.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court