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

S.C. Appeal No. 49/2003
S.C. (Spl.) L.A. No. 1/2003
C.A. No. 631/98(F)
D.C. Homagama No. 247/P

Horagalage Sopinona,
No. 400, Porikiyahena,
Pitipana South,
Homagama.

Substituted Plaintiff-Respondent-Appellant

Vs.

3. Pitipana Arachchige Cornelis,
No. 364, Pitipana South,
Homagama.

Defendant-Appellant-Respondent (deceased)

3a. Kumara Ratnakeerthi Pitipanaarachchi,
No. 364, Pitipana South,
Homagama.

3b. Ramya Chandrakumari Pitipanaarachchi
No. 364, Pitipana South,
Homagama.

Substituted Defendants-Appellants-Respondents

41. Matarage Menchinona,
No. 363, Porikiyahena,
Pitipana South,
Homagama.

Defendant-Appellant-Respondent

BEFORE **:** Dr. Shirani A. Bandaranayake, J.
Saleem Marsoof, J. &
Jagath Balapatabendi, J.

COUNSEL : Nihal Jayamanne, PC., with Dilhan de Silva
for Substituted-Plaintiff-Respondent-Appellant

Rohan Sahabandu for Defendants-Appellants-Respondents

ARGUED ON : 13.01.2009

WRITTEN SUBMISSIONS
TENDERED ON : 10.02.2009

DECIDED ON : 03.02.2010

Dr. Shirani A. Bandaranayake, J.

I have had the advantage of reading in draft, the judgment of my brother Marsoof, J. Although I am in agreement with the findings of Marsoof, J., that the three (3) questions of law on which special leave to appeal was granted by this Court on 01.07.2003, must be answered in the negative, I

am not in agreement with his conclusion that the judgment of the Court of Appeal dated 22.11.2002 be set aside.

I do not intend to make reference to the facts of this appeal since that had been dealt in detail by Marsoof, J. I would also not dwell on the three questions of law on which special leave to appeal was granted, as I am of the view that, considering the facts and circumstances, and more importantly the legality of the questions raised, they must be answered in the negative.

In the light of the above, I would only consider the question as to whether it would be correct to conclude that the judgment of the Court of Appeal dated 22.11.2002, which decided to set aside the judgment of the learned District Judge and to hold a trial *de novo* should be set aside.

The main issue before the Court of Appeal was on the basis that the learned District Judge had answered only one issue, which was raised by the plaintiff-respondent-appellant (hereinafter referred to as the appellant). The contention of the learned President's Counsel for the appellant was that since the main issue raised by the appellant was answered by the learned District Judge, there was no necessity to answer the other issues framed by the defendants-appellants-respondents (hereinafter referred to as the respondents). Considering the submissions made by both learned Counsel before the Court of Appeal, Somawansa, J., had taken the view that the learned District Judge had failed to consider and analyse the totality of the evidence led before the District Court and more importantly that she had decided on the allocation of shares in accordance with the pedigree given in the plaint without examining the devolution of title. In arriving at this conclusion, learned Judge of the Court of Appeal had referred to several instances, where the learned District Judge had erred. Referring to such instances, Somawansa, J., in his judgment had stated thus:

"The fact that she has not given her mind to analyse the evidence is borne out by her misstatements that the 3rd defendant-appellant is a son of Jeeris when in fact he was a grandson and again that Carolis is a son of Haramanis's brother when in fact he was the son of Odiris, who is the son of Haramanis.

It is apparent that the learned District Judge has failed to consider and analyse the totality of the evidence led and more importantly has failed to examine the title of parties. With a sweeping statement she has directed that allocation of shares should be in accordance with the pedigree as shown in the plaint when in fact it was incumbent on her to examine the devolution of title. It is also to be noted that the learned District Judge has failed to consider and answer 13 issues on the basis that in view of answer to issue No. 01 it was not necessary to answer the other issues. Here again, I am of the view that she has erred in not answering the balance 13 issues. For issue No. 01 is based not only on devolution of title, but also on prescription. Therefore it becomes necessary to consider and analyse the evidence to ascertain whether parties disclosed in the plaint had prescribed which the learned District Judge has failed to do."

Learned Judge of the Court of Appeal had referred to several decisions (**Victor v Cyril de Silva** [1998] 1 Sri L.R. 41, **Warnakula v Ramani Jayawarden**a [1990] 1 Sri L.R. 206, **Wijesundera v Herath Appuhamy and others** 67 C.L.W. 63, **Dharmadasa v Meraya** (1948) 50 N.L.R. 197, **Peiris v Perera** (1896) 1 N.L.R. 362 and **Mather v Thamotheram Pillai** (1903) 6 N.L.R. 246).

By this the learned Judge of the Court of Appeal had emphasized the need to evaluate both oral and documentary evidence in a partition action in order to ascertain the actual owners of the land in question before entering the decree, which is good and conclusive against the whole world.

The action in question was initially instituted in the District Court of Homagama seeking to partition a land, which was known as Porikiyahena in extent 3R. 11P., morefully described in the schedule to the plaint and depicted as lots A and B in the preliminary plan No. 255 prepared by A.P.S. Gunawardena, Licensed Surveyor dated 06.07.1970.

Since a partition action is instituted to determine questions of title, it is necessary to conduct a thorough investigation and the duty of such investigation undoubtedly devolves on the Court. Bertram A.C.J., in **Neelakutty v Alvar** ((1918) 20 N.L.R. 372) had considered the reason underlying the need for a careful investigation by Court and had clearly stated that it is due to the effect of a partition decree, which is much the same as that of a judgment in rem. Browne A.J. in **Batagama Appuhamy v Dingiri Menika** ((1897) 3 N.L.R. 129) emphasized the fact that in order to obtain a decree of partition, which is binding against the whole world, the Court should require the parties to prove their title. This position was again considered by Bonser, C.J., in **Peiris v Perera** (supra), where it was clearly stated that,

> "It is obvious that the Court ought not to make a (partition) decree, unless it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property. The Court should not, as it seems to me, regard these actions as merely to be decided on issues raised by and between the parties. The first thing the Court has to do is to satisfy itself that the plaintiff has made out his title, for unless he makes out his title, his action cannot be maintained; and he must prove his title strictly , as has been frequently pointed out by this Court."

The need for a careful investigation of all titles has been emphatically reiterated by our Courts in many decisions (**Mather v Tamotheram Pillai** (supra), **Ferreira v Haniffa** (1912) 15 N.L.R. 445, **Fernando v Mohamadu Saibo** (1899) 3 N.L.R. 321, **Fernando v Perera** 1 Thambyah Reports 71, **Manchohamy v Andiris** 9 S.C.C. 64, **Gooneratne v Bishop of Colombo** (1931) 32 N.L.R. 337, **Nagamuttu v Ponampalam** 4 Thambayah 29, **Caronchi Appuhamy v Manikhamy** 4 Thambayah 120, **Cooke v Bandulhamy** 4 Thambyah 63) and there is no doubt regarding the necessity for a thorough investigation of title in partition actions.

It is not disputed that the learned District Judge had not carefully examined and analysed the totality of the evidence placed before her and had not taken steps to investigate the title of parties before the District Court. It is also not disputed that the learned District Judge had answered only issue No. 1 and had not answered the 13 issues raised by the respondents.

An important feature in our Civil Procedure Code is the requirement that specific issues be framed (Civil Procedure in Ceylon, K.D.P.

Wickramanayake, 1st edition, 1971, pg. 177). In partition actions they are commonly known as points of contest and not as issues. In **John Singho v Pediris Hamy** ((1947) 48 N.L.R. 345) reference was made to such points of contest in a partition action.

Considering all the aforementioned circumstances, I would now turn to consider the question, that was raised at the outset, as to whether it would be correct to conclude that the judgment of the Court of Appeal dated 22.11.2002, which decided to set aside the judgment of the District Court and to hold a trial *de novo,* should be set aside.

Section 187 of the Civil Procedure Code deals with the requisites of a judgment of a trial Court and reads as follows:

> "The judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively."

Considering the provisions contained in Section 187 of the Civil Procedure Code, in **Warnakula v Ramani Jayawardena** (supra), the Court of Appeal observed that the learned District Judge had failed to consider the totality of the evidence led on behalf of the plaintiff-appellant and had held that,

> "Bare answers to issues without reasons are not in compliance with the requirements of S. 187 of the Civil Procedure Code. The evidence germane to each issue must be reviewed or examined. The judge must

> evaluate and consider the totality of the evidence."

In **Tikiri Menika v Deonis** ((1903) 7 N.L.R. 337) it was held that a judgment which does not deal with the points in issue and does not pronounce a finding definitely on them is not a judicial pronouncement and as stated in **Dona Lucihamy et al. v Ciciliyanahamy et al.** ((1957) 59 N.L.R. 214) bare answers in a judgment to issues are insufficient, unless all matters, which arise for decision under each head have been examined. Moreover, examining the provisions contained in Section 187 of the Civil Procedure Code, Sirimane, J. in **Meera Mohideen v Pathumma** (76 C.L.W. 107) had clearly stated that,

> "A trial Judge should assess the oral evidence and bring his mind to bear on the facts relevant to the dispute and give reasons for his decision of the dispute as required by Section 187 of the Code."

Considering the facts and circumstances of this appeal, it is evident that by only answering the point of contest raised as the only issue by the appellant in the District Court and not giving any consideration to the points of contest raised by the respondents, justice was denied to them for no fault of the respondents. The respondents' allegation before the Court of Appeal was that there deeds were not at all considered, which leads not only to the conclusion that there had been a denial of justice, but also considering the rights of the respondents that there had in fact been a miscarriage of justice. In **Cooray v Wijesuriya** ((1958) 62 N.L.R. 158, Sinnetamby, J. referred to the importance of Court being cautious of its investigations regarding the entitlement of parties in a partition action. According to Sinnetamby, J.,

> "It is unnecessary to add that the Court, before entering a decree, should hold a careful investigation and act only on clear proof of the title of all the parties."

It is to be borne in mind that a partition suit could be said to be a proceeding taken for the prevention or redress of a wrong within the ambit of section 3 of the Court's Ordinance (**De Silva v De Silva** (3 C.W.R. 318). Accordingly in a partition action, it would be the prime duty of the Trial Judge to carefully examine and investigate the actual rights and titles to the land, sought to be partitioned. In that process it would essential for the Trial Judge to consider the evidence led on points of contest and answer all of them, stating as to why they are accepted or rejected.

It is not disputed that this action has been pending since 1969 for a period of over 4 decades. It is unfortunate to note that even after such a long time span, to this date the points of contest taken up in the form of issues at the District Court, have remained unanswered. Whilst the inordinate delay from the very commencement of this case cannot be condoned, in order to mete out justice in a fair and a rational manner, it would be necessary for the District Court to take up this matter *de novo* to carefully examine the devolution of title on the basis of oral and documentary evidence on the allocation of shares and to take steps to answer all the points of contest raised as issues, as otherwise there could be a miscarriage of justice.

Accordingly, for the reasons aforesaid the question is answered in the negative and the judgment of the Court of Appeal dated 22.11.2002, which set aside the judgment of the District Court, Homagama and directed the case to be sent back for a trial *de novo,* is affirmed.

The Registrar is directed to send the case record to the District Court, Homagama forthwith and the learned District Judge is directed to hear and conclude the case as expeditiously as possible.

I make no order as to costs.

Judge of the Supreme Court

Jagath Balapatabendi, J.

I agree.

Judge of the Supreme Court