IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Jayapathma Herath Mudiyanselage
Herath Banda
In front of Kotawehera Police Station,
Kotawehera

4thDefendant-Appellant-Appellant

S.C.Appeal No.108/2014
SC/HC/CALA No.201/13
HCCA APPEAL
NO.P/KUR/146/2007[F]
D.C.MAHO CASE NO.5098/P

Vs

Herath Mudiyanselage Menuhami
Andarakatuwa, Mahakirinda, Mahagiriulla

Plaintiff-Respondent-Respondent

1. Jayapathma Herath Mudiyanselage Dingiri Menika, Halambe, Monnakulama
1A. RasnayakeMudiyanselageKapuru Bandara Rasnayake,
No.279/4, Meda Ela Para,
Nikaweratiya
2. KulatungaRanasingheHerath MudiyanselageHerathBandage Somawathie
3. Herath Mudiyanselage Herathhamige Dingiri Amma, Diganna Watta, Digannewa
4. Jayapathma Herath Mudiyanselage Tikiri Banda, Mole Kade, Ihala Agarauda, Monnekulama
5. Jayapathma Herath Mudiyanselage Bandaranayake,
In front of Kotawehera Police Station,
Kotawehera

Defendant-Respondent-Respondents

BEFORE	**:**	**S.E.WANASUNDERA, PC, J.** **PRIYANTHA JAYAWARDANE, PC, J.** **K.T.CHITRASIRI, J.**
COUNSEL	**:**	Amrith Rajapaksha for the 4th Defendant-Appellant-Appellant D.M.G.Dissanayake with L.M.C.D.Bandara for the Plaintiff- Respondent- Respondent and for the 1st & the 3rd Defendant-Respondent-Respondent
ARGUED ON	**:**	**16.05.2016**
WRITTEN	**:**	10.12.2015 by the 4th Defendant-Appellant-Appellant
SUBMISSIONS ON	**:**	20.05.2016 by the Plaintiff-Respondent-Respondent along with 1A Defendant-Respondent-Respondent and the 3rd Defendant-Respondent-Respondent
DECIDED ON	**:**	**26.07.2016**

CHITRASIRI, J.

This is an appeal seeking to set aside the judgment dated 04.04.2013 of the High Court of the North Western Province exercising its Civil Appellate Jurisdiction and also to have the judgment dated 29.10.2007 of the District Court of Maho set aside. In addition, 4th Defendant-Appellant-Appellant [hereinafter referred to as the 4th defendant] has sought for a dismissal of the action filed by the plaintiff-respondent-respondent. [hereinafter referred to as the plaintiff]

When this matter was taken up in this Court on 03.07.2014, it made order granting leave to proceed on the following questions of law.

(a) Have their Lordships of the Civil Appellate High Court failed to

adopt legal principles and procedural guidelines governing the investigation of title in a partition action?

(b) Have their Lordships of the Civil Appellate High Court failed to consider that the petitioner has sufficiently established prescriptive rights to Lot 1 in plan No.3316 dated 7.7.2004.

Briefly, the facts of this case are as follows. Plaintiff filed the action bearing No.5098/P in the District Court of Maho seeking to have a partition decree for the land called Karuwalagahamulayaya which is morefully described in the schedule to the plaint dated 15.11.1999. Only the 1A, 4th defendant and the added 6th defendant filed their respective statements of claim. The claim of the 4th defendant was over lot No.1 in plan No.3153 marked P2. It is the same lot that is being shown as lot No.1 in plan No.3316 [P3] as well. Learned District Judge having referred to the plans produced in evidence finally decided that the land sought to be partitioned comprises of lots 1, 2 and 3 of the plan bearing No.3316 dated 7.7.2000 which is marked as P3 in evidence. The said decision as to the corpus has not been challenged in this appeal.

Thereafter, learned District Judge having considered the evidence, made order to partition the land allotting 1/6th share to the plaintiff and another 1/6th share to the 3rd defendant. 1st defendant was given 2/6 share while the 2nd defendant was allotted the balance 2/6th share of the land. 4th defendant was not given any right over the land. Then the 4th defendant filed an appeal in the Civil Appellate High Court

canvassing the aforesaid decision of the trial Judge. Learned Judges in the High Court dismissed the appeal having affirmed the decision of the learned District Judge.

The claim of the 4th defendant that was pursued in the District Court was to lot No.1 in plan 3316. The said claim by the 4th defendant was on the basis of prescription to the said lot No.1 in that plan 3316. The aforesaid claim of the 4th defendant had been on a pedigree, different to the pedigree filed by the other parties. In his statement of claim, he has stated that neither the plaintiff nor the 1st defendant is entitled to the land subjected to in this case.

When the matter was taken up for hearing in this Court on 16.05.2016, learned Counsel for the 4th defendant-appellant submitted that he is not pursuing the prescriptive claim though it was one of the claims advanced during the trial in the District Court. He further submitted that the sole contention of the plaintiff is to move for a dismissal of the action filed in the District Court on the ground of the failure of the plaintiff to establish his pedigree.

Accordingly, it is not necessary to consider the 2nd question of law framed at the time of granting leave by this Court which is referred to hereinbefore in this judgment. Therefore, the remaining question is only to ascertain whether or not the learned District Judge has discharged the

duty cast upon him to investigate title of the parties to the action which is referred to in Section 25 (1) of the Partition Law No.21 of 1977 (as amended). The said Section 25 reads thus:

> *"on the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the Court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right share or interest of each party to, of, or in the land to which action relates, and shall consider and decide which of the orders mentioned in section 26 should be made."*

In a recent judgment delivered in the case of **Sarath Godampola and others Vs. W.K.Peter Fernando,** [S.C. Appeal No.98/07 Supreme Court minutes dated 10.06.2016] I have referred to many decisions that supports the above position of the law referred to in Section 25(1) of the Partition Law. Hence, I do not wish to repeat the same by which judgment the manner in which Section 25(1) of the Partition Law had been interpreted. The decisions referred to in that judgment include the following:

- **Peiris Vs. Perera 1 NLR 362**
- **Silva Vs. Paulu 4 NLR 177**
- **Golagoda Vs. Mohideen 40 NLR 92**
- **Juliana Hamine Vs. Don Thomas 55 NLR 546**
- **Cooray Vs. Wijesuriya 62 NLR 158**
- **Cynthia De Alwis Vs. Marjorie D'Alwis and Two others 1997(3) SLR 113**
- **Piyaseeli Vs. Mendis and Others 2003(3) SLR 273**
- **Faleel Vs. Argeen and others 2004 (1) SLR 48**

- **Somasiri Vs. Faleela and others 2005 (2) SLR 121**
- **Karunarathna Banda Vs. Dassanayake 2006 (2) SLR 87**
- **Sopinona Vs. Cornelis and others 2010 BLR 109**

In the circumstances, I shall now consider whether the learned District Judge has investigated the title of the parties to this action as referred to in Section 25(1) of the Partition Law when he allotted the shares in his judgment dated 29.10.2007. Learned Counsel for the appellant, at the outset submitted that he is not disputing the original ownership of the land which is mentioned in paragraph 3 of the plaint dated 15.11.1999. Therefore, it is admitted by all the parties that the original owner of the land sought to be partitioned was Herath Mudiyanselage Appuhamige Gamarala.

Having admitted the original ownership of the land, 4th defendant in his statement of claim has stated that the aforesaid Gamarala sold his entitlement to one Harold David Neil Auwardt. However, it is important to note that the 4th defendant has failed to produce the aforesaid deed by which Neil Auwardt alleged to have become the owner of the land claimed by the 4th defendant. Without producing the said deed by which Harold David Neil Auwardt became the owner, 4th defendant has produced the deed bearing No.1087 marked P4 by which Harold David Neil Auwardt had sold the land to Jayamaha Mudalige Don George Stephen Appuhamy. Argument of the 4th defendant was that the plaintiff and the first two defendants have no right or title to the land sought to be partitioned in

view of the execution of the said deed 1087 by which 4th defendant's predecessor became entitled to the land in question.

Plaintiff has not accepted the position that Gamarala sold his rights to Harold David Neil Auwardt. His position was that the original owner Gamarala died leaving three children. Accordingly, the plaintiff contented that the devolution of title of this land should take place through those 3 children of Gamarala.

Argument advanced by the learned Counsel for the 4th defendant-appellant was that the plaintiff has not established that there were three children to the original owner Gamarala and therefore the plaintiff has failed to prove his chain of title. Accordingly, the 4th defendant has stated that the plaintiff cannot rely on rights and entitlements of those 3 children shown in the pedigree of the plaintiff. Reason to advance such a contention was that there was no documentary evidence, produced in Court to prove that there were three children to the original owner Gamarala.

When looking at the impugned judgment, it is seen that all the issues as to the pedigrees put forward by the plaintiff and the 4th defendant had been dealt with carefully by the learned District Judge. His findings on that are as follows:

“මෙම බෙදුමට යටත් මෙම ඉඩම 4 විත්තිකරු කියා සිටින පරිදි නීල් අවුට්ට හෝ ස්ටිවන් අප්පුහාමිට හිමිව තිබී ඇති බව ඔප්පු නොවන අතර ගමරාලගේ හිමිකම පසුව දරුවනට ලැබී ඇති බව පිලිගැනීමට ඇති හැකියාව වැඩිය. ගමරාලගේ දරුවන් පිය උරුමයට මුදියන්සේ, උක්කුහාමි, ඩිංගරීමැනිකාට ලැබුන බව පැමිණිලිකරු කියා සිටී. 4 විත්තිකරු මෙය පිලිගෙන නැති අතර, ඔහුගේ සාක්ෂියෙන් හිතාමතාම පෙර උරුමකරුවන් සහ මවගේ සහෝදර සහෝදරියන් මවගේ මව සම්බන්ධව තොරතුරු වසන් කර ඇති බව පැහැදිලිය. එබැවින් ගමරාලගේ දරුවන් ලෙස මුදියන්සේ, උක්කුහාමි සහ ඩිංගිරීමැණිකා බවට උප්පැන්න සහතික ඉදිරිපත් කර නැතත්, පිලිගැනීමට ඇති හැකියාව වැඩිය. **මේනුහාමි මෙන්ම 1 වන විත්තිකාරිය වෙනුවෙන් රත්නායකද කියා සිටියේ ගමරාලගේ දරුවන් ඔවුන් බවයි. රත්නායක කියා සිටියේ ඩිංගිරිමැනිකා තමාගේ මව බවයි. ඇය මියගොස් බවත්, තමාට සහෝදරියින් 07 ක් සිටින බවත් කියා ඇත. හේරත් බන්ඩා ඔහුගේම අක්කාගේ පුතා බවද මොහු කියා ඇත. 6 විත්තිකරුගේ සාක්ෂියෙන් ගමරාලගේ අයිතිය පිලිගෙන සෝමාවති තමාගේ මව බවත්, ඇයට ඉඩම කිරීබන්ඩා පවරා ඇති අතර, ඔහුට මුදියන්සේ ලබාදී ඇති බවත්, පසුව සෝමාවතීට ලැබී තමාට එය විකුණූ බවයි.** ‘6වි1’ 1946 ලියා ඇති ඔප්පුවක් වන අතර, ගමරාලගේ පිය උරුමය මත තමාට ලැබුන නොබෙදූ 1/3 කිරීබන්ඩාට විකුණා පසුව 6වි2 (31863) මගින් 1978/5/7 වන දින සෝමාවතීට විකුණා ඇත. එබැවින් බෙදුමට යටත් ඉඩමෙන් නොබෙදූ 1/3 ක් සෝමාවතීට ලැබී ඇති බව පෙනේ.”

[emphasis added]

The above consideration by the learned District Judge shows that he was very much mindful of the pedigrees advanced by the respective parties. 4th defendant himself has stated that her mother Tikiri Menike is a sister of the 1A defendant. 1A defendant was substituted in place of the 1st defendant and that was also admitted by the 4th defendant in his evidence. Moreover, 4th defendant has admitted that Dingiri Menika is the correct name of the 1st defendant who is one of the children of Gamarala. (vide at pages 99 and 100 in the appeal brief).

Such evidence supports the fact that there were children to Gamarala. Accordingly, even though no documentary evidence had been produced to establish the heirs of Gamarala (original owner) there were enough evidence to prove that there had been three children to Gamarala. In the circumstances, I do not see any error when the learned District Judge came to the conclusion that there were 3 children to Gamarala despite the fact that there was no documentary evidence to establish the same. Therefore, it is clear that the learned District Judge had carefully considered the entirety of the evidence as to the devolution of title of the parties to the land sought to be partitioned as required under Section 25(1) of the Partition Law. His findings are neither irrational nor perverse.

At this stage, it is also necessary to mention that the appellate courts are always slow to interfere with the findings made by the original courts unless it is irrational or perverse when it comes to questions of facts. The question of law upon which the leave was granted and pursed in this case

relates only to the facts of the case. In the case of **Alwis vs Piyasena Fernando [1993 (1) S.L.R.at page 119] G.P.S. De Silva C J** held thus:

> *"it is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal. The findings in this case are based largely on credibility of witnesses. I am therefore of the view that there was no reasonable basis upon which the Court of Appeal could have reversed the findings of the trial Judge."*

Long line of authorities could be seen to support this position of the law. A few of those are;

Frad vs. Brown & Co [28 N.L.R. 282] Mahavithana vs. Commissioner of Inland Revenue [64 N.L.R.217] De Silva vs. Seneviratne [1981 (2) S.L.R. 8]

For the reasons set out above, I am not inclined to interfere with the judgment of the learned District Judge and the judgment of the learned Judges of the Civil Appellate High Court.

Accordingly, this appeal is dismissed. No costs.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PC, J.

I agree

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDANE, PC, J.

I agree

JUDGE OF THE SUPREME COURT