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

In the matter of an Application for Leave to Appeal against judgment dated 26.07.2011 delivered by the High Court of the Western Province exercising Civil Appellate jurisdiction at Gampaha in case No. WP/HCCA/GPH/02/2010 / Revision - D.C. Negombo Case No. 2425/P.

SC. Appeal 130/2012

SC.H.C.CA. LA. 344/2011
WP/HCCA/GPH/02/2010/Revision
D.C. Negombo No. 2425/P

1. Edirisinghe Pedige Jayasinge,
2. Edirisinghe Pedige Thilakarathne,

Both of Keraminiya, Horampella.

Plaintiffs

Vs.

1. Edirisinghe Pedige Mangalasena Edirisinghe,

1A. Heenmenike Jayasundara, No. 147/B, Keraminiya, Horampella.

2. Edirisinghe Pedige Somasiri,
3. Noiyya, more correctly Malhinnage Premawathie,
4. Edirisinghe Pedige Lal Premasiri, more correctly Lal Premasiri Edirisinghe, all of Keraminiya, Horampella.
5. Edirisinghe Pedige Sunithra Kanthi, Keraminiya, Bodhipihitiwela, Horampella.
6. Ramanayake Pedige Asilin, Keraminiya, Horampella.

Defendants

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1. Edirisinghe Pedige Jayasinge,
2. Edirisinghe Pedige Thilakarathne, (deceased), both of Keraminiya, Horampella.

2A. Edirisinghe Pathiranage Chamari Dushanthi Edirisinghe, all of Keraminiya, Horampella.

Plaintiff- Petitioners

Vs.

1. Edirisinghe Pedige Mangalasena Edirisinghe, (deceased)

1A. Heenmenike Jayasundara, No. 147/B, Keraminiya, Horampella.

2. Edirisinghe Pedige Somasiri,

3. Noiyya, more correctly Malhinnage Premawathie,

4. Edirisinghe Pedige Lal Premasiri, more correctly Lal Premasiri Edirisinghe, all of Keraminiya, Horampella.

5. Edirisinghe Pedige Sunithra Kanthi, Keraminiya, Bodhipihitiwela, Horampella.

6. Ramanayake Pedige Asilin, Keraminiya, Horampella.

Defendants-Respondents

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2. Edirisinghe Pedige Somasiri,

4. Edirisinghe Pedige Lal Premasiri, more correctly Lal Premasiri Edirisinghe, all of Keraminiya, Horampella

Defendants-Respondents-Appellants

Vs.

1. Edirisinghe Pedige Jayasinge,

2A. Edirisinghe Pathiranage Chamari Dushanthi Edirisinghe, all of Keraminiya, Horampella.

Plaintiff- Petitioner-Respondents

1. Edirisinghe Pedige Mangalasena Edirisinghe, (deceased)

1A. Heenmenike Jayasundara, No. 147/B, Keraminiya, Horampella.

3. Noiyya, more correctly Malhinnage Premawathie,

5. Edirisinghe Pedige Sunithra Kanthi, Keraminiya, Bodhipihitiwela, Horampella.

6. Ramanayake Pedige Asilin, Keraminiya, Horampella.

Defendants-Respondents-Respondents.

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BEFORE : **Eva Wanasundera, PC. J.**
Sisira J. de Abrew, J. &
Sarath de Abrew, J.

COUNSEL : Dr. Sunil Cooray with Ms. Sudarshani Cooray for the Defendant-Respondent-Appellants

Palitha Ranatunga instructed by Indika Kahatapitiya for the 1st and 2nd Plaintiff- Petitioner-Respondents.

ARGUED ON : **03.10.2014**

DECIDED ON : **29.10.2014**

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Eva Wanasundera, PC.J.

In this application on 25.07.2012 leave to appeal was granted against the judgment of the Civil Appellate High Court of Gampaha, on the questions of law contained in paragraphs 20 (a), (b), (c) and (d) of the petition dated 05.09.2011.

They are as follows:-

20(a) Did the High Court err by totally failing to consider whether the Plaintiff-Petitioners are guilty of misrepresenting material facts in paragraph 12 of their petition seeking 'Revision' regarding why no appeal was filed by them against the Judgment of the District Court?

(b) Did the High Court err by failing to consider or to make any reference to the documents marked 'Z' filed as an exhibit to the statement of objections of the 2nd and 4th Defendant-Respondents?

(c) Did the High Court err by holding that the Learned District Judge erred by failing to consider that the Defendant-Respondent-Petitioners had in their statement of claim prayed for the partition of Lots C and D in plan 'Y', when the uncontroverted evidence on the record is that Lots C and D had been alienated to outsiders and that position was never contested by the Plaintiff-Petitioners?

(d) Did the High Court err by failing to consider that the Plaintiff-Petitioners had not made out a case for trial de-novo in this partition action which had been instituted in 1990 when the Plaintiff-Petitioners, who did not themselves ask for partitioning of Lots C and D, could if they now so wish, get lots C and D partitioned by instituting a fresh partition action for that purpose?

In the District Court the Plaintiffs were 2 in number and the Defendants were 6 in number. The Plaintiffs wanted to get **one big land of 1A 1R 8.7P** partitioned, which was Lot A2 in Plan 137/5/P. The 1st to **4th Defendants** prayed that four more smaller blocks of land, in extent 34.6 Perches, 23.32 Perches, 7.5 Perches and 4.4 Perches be **added** to the corpus to be partitioned. Two Survey Commissions were issued by Court. Plan 903 and report were marked X and X1, Plan 2316 and report were marked Y and Y1. Plan 903, namely X, surveyed only the big land and marked it as 'A'. Plan 2316 namely Y, surveyed the other 4

lots as well and **marked the big land once again as Lot 'A',** the 34.6 Perche land as Lot E, 23.32 Perche land as Lot F, 4.4 Perche land as Lot B and divided the 7.5 Perch land into 2 blocks namely **Lot C and Lot D. Lot C was in extent 5.54 Perches and Lot D was in extent 2.17.**

The District Judge in his judgment has excluded Lots C and D from the corpus of partition on the evidence given by the 4th Defendant in open Court on 25.09.2008 at pg. 199 of the District Court brief, specifically stating thus: "I am not asking for Lots C and D in Plan No. 2316 marked Y to be partitioned. I am asking that only Lots A, B, E and F be partitioned. Lots C and D have got transferred to others by way of deeds. Therefore I am not claiming the said lots". Furthermore he says "I am not asking to partition the land in the 4th Schedule to my statement of claim". He concludes his evidence thus: "I am begging Court to grant 2/6th to the 1st Plaintiff, 1/6th to 2nd Plaintiff, 1/6th to the 1st Defendant, 1/6th to the 2nd Defendant, my uncle, 1/12th each to 4th and 5th Defendants who are my sisters, in a possible way that can be enjoyed according to the way we all are resident". This is exactly what is given by the District Judge in his judgment. It is the 4th Defendant who concluded his case in that manner. I observe that it is the 4th Defendant who wanted to get Lots C and D partitioned in his statement of claim and it is he himself who gave evidence before court and asked that the same lots be excluded from the corpus.

The only other person who gave evidence in this case was the 1st Plaintiff. The 1st Plaintiff's evidence is concluded with a suggestion from the Plaintiff's Lawyer, "Do you have any objections to the partition of other co-owned portions of land adjoining the land you have requested to be partitioned" to which he answers, "If my lawyer says, I consent to such partitioning." It is quite obvious that the Plaintiffs and the 4th Defendant giving evidence wanted the land which is co-owned, partitioned in a particular way with certainty in each one's shares and that is exactly what the judgment has granted.

In summary, the Plaintiff wanted Lot A partitioned. The 4th Defendant at first wanted Lots A, B, E, F, C and D partitioned. When giving evidence, he wanted Lots C and D, the total extent of which was only 7.71 Perches be excluded from the corpus. The Plaintiff did not object to this exclusion at that time. These parties were represented by lawyers at all times of the case. The Court Commissioner was directed by Court to partition the land in practically a possible manner, giving their shares around their residencies, leaving the roadway etc.

I further observe that the plaint in the partition action is dated 16.02.1990. The District Court Judgment is dated 10.07.2009. The Civil Appellate High Court has ordered **a trial de-novo** on 26.07.2011, i.e.21 years later that the inception of this partition action. The extent of land that the Plaintiff-Petitioners are trying to get included **in the corpus of an extent of approximately 1A 2R 31P** to be partitioned, **is only 7.71 perches** in the village of Horanpella, District of Gampaha. The facts are shocking and invites one to wonder whether the six parties to the case really want to partition this small extent of land. I wonder whether they would even know at what cost to each one of them, in money and in time, they would get a partition out of an additional 7.71 perches. At its best, each party would be getting one perch or so at the end of many more years. I cannot imagine of any party to a partition action wanting to get one perch per person stepping into a trial de- novo

The Plaintiffs did not appeal from the District Court judgment. After 7 months, on 23.02.2010, the Plaintiffs filed a Revision application in the Civil Appellate High Court praying to revise or set aside the District Court Judgment. The 4th Defendant objected to the Revision application on the grounds that the Revision application was based on a fabrication of so called facts which were utterly false and was on the breach of the duty of uberrima fides and prayed that the High Court should dismiss the Revision application. The 4th Defendant filed the document 'Z' with records of a court case to show the falsity of what was averred in the Revision application by way of exceptional grounds for such an application.

The High Court Judge allowed the Revision application, not taking into account the objections and not considering the contents of document 'Z' which contained facts proven by valid records. The High Court further ordered **a trial de novo**. The 2nd and 4th Defendant-Respondent-Appellants (hereinafter referred to as the 'Appellants') are now before this Court challenging the Judgment of the High Court.

I observe that the written submissions filed before the High Court by the 1st and 2(A) Plaintiff-Petitioners dated 22.7.2011 in paragraph 7 of the written submissions at pg. 265 of the District Court brief reads thus: **"Inordinate delay and failure to maintain uberimae fides are all accepted and admitted by the Petitioners** with greatest regret pleading for a judgment pronounced by Your Lordships Court that will rectify the error of excluding Lots C and D of Plan No. 2316 (Y) without any valid reason as above mentioned in the judgment of the Learned District Judge". The Petitioners in the High Court are the Plaintiff-Petitioner-Respondents in this appeal. In the teeth of this admission, no appeal Court Judge could allow a revision application. In this revision application itself no other exceptional grounds were averred except one of the Plaintiffs falling sick which is totally disproved by the document 'Z' , which the High Court had failed to consider at all.

Uncontestedly, Lots C and D were dropped out of the corpus by the 4th Defendant- Respondent who wanted those lots in, according to his statement of claim. The Plaintiffs' lawyer did not ask any questions in cross examination nor did their lawyer object to such dropping of the Lots C and D from the corpus. The Plaintiff got what he asked for in his prayer in the plaint. The Defendants joined a little more adjoining land and got the same shares which were due to them. The apportionment of the shares was the same. If the Plaintiffs still want Lots C and D partitioned they can still file another action and get their share. Lots C and D were not included in the corpus which the Plaintiffs sought to get partitioned by the partition action they filed before the District Court. Therefore

they cannot be heard to say that they now want Lots C and D included in the corpus to be partitioned.

The learned High Court Judge refers to submissions by the Plaintiffs to the effect that “no opportunity was given for cross examination” and “no opportunity was given for re examination” etc. There is no record of an application to cross examine or to re examine and the judge not having allowed the same. The lawyers were present in court and they did not cross examine and re-examine at different times. It is observed by me, that they did not do so due to reasons they would have thought were not beneficial to their clients. The learned High Court Judge has failed to see that, whatever each party alleges, has to be borne out by the court record and if it is not so recorded the appeal court judge cannot take connivance of just allegations in the air. The High Court has gone quite wrong in its decision to that effect.

For the reasons set out above, I answer the questions of law aforementioned in the affirmative in favour of the Appellants. I set aside the judgment of the Civil Appellate High Court of Gampaha dated 26.07.2011. I affirm the judgment of the Learned District Judge dated 10.07.2009. I allow the appeal. I order costs of rupees twenty five thousand (Rs. 25000/-) to be paid to the Appellants by the Respondents in this appeal.

Judge of the Supreme Court

Sisira J. de Abrew, J.

I agree.

Judge of the Supreme Court

Sarath de Abrew, J.

I agree.

Judge of the Supreme Court