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

S.C. Appeal 59/2014
SC/HCCA/LA No. 301/2011
NCP/HCCA/ARP No. 689/2009(F)
D.C. Polonnaruwa Case No. 10/P/2007

Liyanage Indrani Manel Charlotte
Watawala nee Perera

Of No. 462/12, Main Street, Negombo.

PLAINTIFF-RESPONDENT-PETITIONER

Vs.

Ratnayake Mudiyanselage Jayatilleke
Bandara of No. 135, Thopawewa,
Polonnaruwa.

DEFENDANT-APPELLANT-RESPONDENT

Liyanage Anoma Kanthi Juliyana
Bamunuwatte nee Perera
Of No. 42/17, Dias Place, Panadura.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: Priyasath Dep P.C., J.
Anil Gooneratne J. &
Prasanna S. Jayawardena P.C., J

COUNSEL: Dr. Sunil Cooray for the Plaintiff-Respondent-Petitioner

Vijaya Niranjan Perera with Ms. Jeevani Perera
For the Defendant-Appellant-Respondent

ARGUED ON: 30.09.2016

DECIDED ON: 09.02.2017

GOONERATNE J.

This was a partition action filed in the District Court of Polonnaruwa on or about 18.07.1997. Plaintiff filed plaint against the 1st Defendant (Plaintiff's sister) 2nd and 3rd Defendants to partition a land described in the 3rd schedule to the plaint. Plaintiff-Respondent-Petitioners aver that the 3rd schedule refer to a divided portion of land from and out of the larger land called Dingirbanda–Hitapu-Watta which divided portion was said to be 5 Acres in extent within the boundaries given in the 3rd schedule. The larger land is described in the 1st schedule to the plaint in extent of 27 Acres and 15 Perches was owned on a crown grant.

The position of the Plaintiff-Respondent-Appellant was that the Plaintiff and 1st Defendant are sisters and they got title to the corpus to the land from their father Bonnie Perera on two separate deeds. It is urged that only the

two of them were the co-owners of the larger land and that the 2nd Defendant (son of 3rd Defendant) has no title whatsoever to the land in dispute but lived on the land in dispute. The 3rd Defendant was the wife or mistress of Wilson Singho who was the original lessee under Bonnie Perera. The learned District Judge held with the Plaintiff-Respondent-Petitioner on the points of contest raised in the action by the Plaintiff and the Defendant. As such the District Court Ordered the partition of the land in dispute between the Plaintiff and the 1st Defendant. Learned District Judge held against the 2nd and 3rd Defendants on their plea of prescriptive title. The 2nd and 3rd Defendants being aggrieved by the Judgment of the District Court appealed to the High Court. The High Court set aside the Judgment of the learned District Judge and ordered trial De Novo.

The Defendant-Appellant-Respondent support the Judgment of the learned High Court Judge. These Respondents reject the argument of the Petitioner that 5 Acres in extent of the land in schedule 3 of the plaint remained divided. It is an undivided portion of a larger land. Further they argue that mere separation of a portion and long continued possession thereof would not confer the possessor the benefit of prescriptive possession. It is further explained by reference to paragraph 5 of the plaint that there were other intestate heirs and co-owners. Those details not made known by the Petitioner. Defendant-Appellant-Respondent refer to the testamentary case (T/18) of late Gabriel

Wijesinghe Jayawardena where 11 children were made parties. Plaintiff admits this fact in evidence.

This court on 14.03.2014 granted Leave to Appeal on the following substantial question of law.

(1) Did the High Court err by holding that the identity of the corpus has not been proved for the reason that the extent of land sought to be partitioned is only 5 Acres but the land depicted in the preliminary plan is 6 Acres 2 Roods and 35 Perches?

(2) In any event did the High Court err in setting aside the Judgement of the District Court with respect to the question of the respective rights of parties?

Learned counsel for the Plaintiff-Respondent-Petitioner in his oral and written submissions argued that the High Court failed to consider whether the corpus for partition has been sufficiently identified by means of boundaries of the land, in terms of the decisions reported in 1989 (1) SLR 361 which followed the decision reported in 43 CLW 82.

I would like to consider the case of *Gabriel Perera Vs. Agnes Perera 43 CLW 82 held ..* in a deed the partition of land conveyed is clearly described and can precisely ascertained, a mere inconsistency as to the extent thereof should be treated as a mere falsa demonstratio not affecting that which is already sufficiently conveyed. This case is more on the question of interpretation

of the deed. In the appeal it was argued that the person who claims under the deed, the deed marked P2, describes the boundaries of the land correctly. Corpus confined to lot A & C. Party concerned who claim under deed P2 the entire extent of lot A which is 1 Rood and 2 Perches or only 1 Rood and 5 Perches. Lot A was 1 Rood and 22 Perches and not 1 Rood and 5 Perches as described in the deed P2. Rule envisaged was that a subsequent statement inconsistent in extent should be treated as mere falsa demonstratio not affecting that which is already sufficiently conveyed.

The above decision in 43 CLW. 82 was followed in *Yapa Vs. Dissanayake Sedera 1999 (1) SLR 361.* It is a case where in a deed the partition of land conveyed is clearly described and clearly ascertained a mere inconsistency as to extent should be treated as a mere falsa a demonstratio not affecting that which is sufficiently conveyed.

I do not think the above cases relied upon by the Plaintiff-Respondent-Petitioner could be equated to the case in hand, and the decision in the cases reported in 60 NLR 337, 61 NLR 352 and 1989 (2) SLR 105 could be read subject to, and in harmony with the principle accepted in the decisions reported in the above decided cases relied by the Petitioner.

The case in hand cannot be described in its extent as <u>a mere discrepancy</u> <u>in extent</u>. Learned High Court Judge very correctly observes (Pg.9)

that the extent of land referred to in the preliminary plan and the land sought to be partitioned in the schedule to the plaint differ in an extent of about 1 Acre 2 Roods and 35 Perches. Further the High Court Judge observes that the boundaries in plan 'X' shows certain differences and the Plaintiff party did not lead evidence to connect and explain such differences. I also wish to state that the two decided cases relied upon by the Plaintiff party do not refer to any provisions in the Partition Law. However the case reported in 1989 (2) SLR 105 Sopaya Silva and another Vs. Magilin Silva discuss in detail Sections 18(1) (a) (iii), 18(2), 19(2) of the Partition Law inclusive of discrepancy in extent of corpus with the corpus described in plaint and commission. Further the above Magilin's case consider the duty of commissioner – lis pendens natural justice so on and so forth. The case of *Sopaya Silva and another Vs. Magilin Silva* is a persuasive Judgment which is very relevant to the case in hand and follows the decided case of *Brumpy Appuhamy Vs. Morias Appuhamy 60 NLR 337.*

In this regard my views and that of the High Court which I concur with, are fortified by the Judgment of *Sansoni CJ. in Jayasuriya Vs. Ubaid 61 NLR 352* Held -

> In a partition action there is a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it is always open to him to call for further evidence (in a regular manner) in order to make a proper investigation.

I also note and I am inclined to adopt the dicta in *Sopaya Silva and Another Vs. Magilin Silva S.N. Silva J.*

Held –

(1) It was not open to the District Judge to dismiss the case on the point of wrong registration of the lis pendens – a point on which there was no contest and no argument was heard. It is a violation of natural justice.

(2) The lis pendens being registered in the folios where the deeds of the land described in the plaint were registered was correctly registered.

(3) On receipt of the surveyor's return which disclosed that a substantially larger land was surveyed the District Judge should have decided on one of the following courses after hearing the parties:

(i) To reissue the Commission with instructions to survey the land as described in the plaint. The surveyor could have been examined as provided in section 18(2) of the Partition Law to consider the feasibility of this course of action.

(ii) To permit the Plaintiffs to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment of the plaint and the taking of consequential steps including the registration of a fresh lis pendens.

(iii) To permit any of the Defendants to seek a partition of the larger land as depicted in the preliminary survey. This course of action involves an amendment of the statement of claim of that defendant and the taking of such other steps as may be necessary in terms of section 19(2) of the Partition Law.

(4) The surveyor under section 18(1) (a)(iii) of the Partition Law must in his report state whether or not the land surveyed by him is substantially the same as the land sought to be partitioned as described in the schedule to the plaint. Considering the finality

and conclusiveness that attach in terms of s 48(1) of the Partition Law to the decree in a partition action, the Court should insist upon due compliance with this requirement by the surveyor.

There is another matter that should be considered. In the manner pleaded and submitted to this court the 1st schedule in the plaint is in extent of 27 Acres and 15 perches, was owned on a Crown Grant in favour of Gabriel Wijesinghe Jayawardena in the year 1905. (P1) He died intestate in 1909 and his heirs were widow Elsie Wijesinghe Jayawardena and children. One of whom was Leopold Victor Stanley Jayawardena. Written submissions of Plaintiff-Respondent-Appellant does not disclose the names of the other children and the number of children. It is pleaded that the said Victor Stanley Jayawardena thereafter separated from and out of the said larger land called "Dingiriband – Hitapu-Watta" an extent of 13 Acres 2 Roods and 7 ½ perches which he possessed and became owner of land and described in plan No. 278 of 1944. The said extent is 13 Acres 2 Roods and 7 ½ perches is described in 2nd schedule. Plaint avers that the said Stanley sold and transferred an extent of 5 Acres to Liyanage Bonnie Perera. This is the way Plaintiff presents the case.

In the manner observed above there is something the original court should seriously consider. 2nd and 3rd Defendant-Appellant-Respondent takes up the position that the original owner Gabriel Wijesignhe Jayawardene had several

other children and the said Jayawardena's intestate estate was administered in D.C. Anuradhapura Case T/181 where all 11 children were named as Respondents in the testamentary case. The document P3 (letters of administration) was admitted by Plaintiff but as argued on behalf of 2nd and 3rd Defendant-Appellant-Plaintiff has deliberately refrained from making all the children parties. Original court should consider this position and decide its necessity and relevancy.

In the above facts and circumstances, I have no hesitation to affirm the Judgment of the learned High court Judge. The two questions of law are answered as 'No' in the negative.

Identity of the corpus is always an important and a relevant matter in a land case and more particularly in a partition suit. I also note the following from the Judgment of the learned High Court Judge which I concur.

"..... මෙම නඩුවේ මුලික පිඹුර සම්බන්ධයෙන් මිනින්දෝරුවරයා ද සාකිෂිකරුවකු වශයෙන් කැඳවා නැවත මෙම නඩුව මුල සිට විභාග කර තීන්දුවක් ලබා දීමට නියෝග ඕරීම වඩාත් සාධාරණ හා යුක්ති සහගත බවයි. ඒ අනුව මෙම නඩුව නැවත මුල සිට විභාග කිරීමට පොලොන්නරුව දිසා අධිකරණය වෙත යොමු කිරීමට තීරණය කරමු. මෙම නඩුව පැරණි නඩුවක් බැවින් නඩුව විභාග කර අවසන් කිරීමට පුර්වනාවයක් ලබාදිට යඅතු බවද කීරණය කරමු ....."

It is always safe to follow the statutory provisions contemplated by law. What is relevant and important had been suggested and the procedure to

be adopted are discussed in the case of *Sopaya Silva Vs. Magilin Silva.* Judgment of the learned High Court Judge is affirmed. This appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., J.

I agree

JUDGE OF THE SUPREME COURT

Prasanna S. Jayawardena P.C., J.

I agree.

JUDGE OF THE SUPREME COURT