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

SC. Appeal No. 169/2010

SC.(HC) CA/LA No. 198/2010
NCP/HCCA/Anuradhapura No. 298/2007
D.C. Anuradhapura No. 290/Partition

Adhikaram Mudiyanselage Punchi Amma Adhikaram
No. 641, Eriyawetiya Road,
Kiribathgoda,
Kelaniya.

.

Plaintiff

Vs.

Sirima Shanthi Mendis
"Vanasevana",
Mahawela,
Vijithapura.

Presently
No. 66/31, Old Road, Nawinna.

Defendant

Between

Sirima Shanthi Mendis
"Vanasevana",
Mahawela,
Vijithapura.

Presently
No. 66/31, Old Road, Nawinna.

Defendant-Appellant

Vs.

Adhikaram Mudiyanselage Punchi Amma Adhikaram
No. 641, Eriyawetiya Road,
Kiribathgoda,
Kelaniya.

Plaintiff-Respondent

And Now Between

SC. Appeal No. 169/2010

Adhikaram Mudiyanselage Punchi Amma Adhikaram
No. 641, Eriyawetiya Road,
Kiribathgoda,
Kelaniya.

.

Plaintiff-Respondent-Appellant

Vs.

Sirima Shanthi Mendis
"Vanasevana",
Mahawela,
Vijithapura.

Presently
No. 66/31, Old Road, Nawinna.

Defendant-Appellant-Respondent

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BEFORE : Hon. Dr. Bandaranayake, CJ
Hon. Amaratunga, J. &
Hon. P.A. Ratnayake, PC.J.

COUNSEL : Gamini Marapana PC. with Navin Marapana for the Plaintiff-Respondent-Appellant.

Saliya Peiris with Thanuka Nandasiri for the Defendant-Appellant-Respondent.

ARGUED ON: 19-09-2011

WRITTEN SUBMISSIONS OF THE PETITIONER TENDERED ON: 14 -01-2011

WRITTEN SUBMISSIONS OF THE RESPONDENT TENDERED ON: 13-10-2011

DECIDED ON : **23-02-2012**

P.A. Ratnayake, J.

The Plaintiff-Respondent-Appellant hereinafter referred to as the Petitioner filed the above styled action in the District Court Anuradhapura, seeking to partition a land which had two allotments. Both allotments of land are referred to as 'Helamahagaha kumbura' and described in schedules 'A' and 'B' of the amended plaint. Both allotments of land were paddy lands. The District Court gave judgment to partition the land as prayed for by the Petitioner in the amended plaint.

The Defendant-Appellant-Respondent hereinafter referred to as the Respondent appealed to the High Court of Civil Appeal of the North Central Province which set aside the judgment of the Learned District Judge and ordered a retrial. The Petitioner was given Leave to Appeal against the said judgment of the High Court by this Court on the questions of law given in paragraphs 25(i) to 25(iv) of the Petition of Appeal which states as follows:-

(i) Have their Lordships of the High Court erred in law in having failed to consider the explanations given by the commissioner in his own testimony with regard to the statements in his report 'X1'?

(ii) Have their Lordships of the High Court erred in law in having determined that the Petitioner had failed to identify the corpus sought to be partitioned?

(iii) Have their Lordships of the High Court misapplied the ratio in the decision of the Court of Appeal in the case of Richard Vs. Sieble Nona (2001 2 SLR 01) ?

(iv) In the absence of any application by the Respondent and given the fact that the Commissioner himself had correctly identified and depicted in the Preliminary Plan three of the boundaries stated in the schedule to the Plaint, have their Lordships of the High Court

erred in holding that the Learned District Judge should have issued a commission to the Surveyor General in terms of Section 18(3) of the Partition law?

The Respondent did not dispute the allotment of shares including the entitlement of herself and the Plaintiff as pleaded in the plaint. The main dispute is on the identification of the corpus.

Respondent in her Statement of Claim admitted the corpus as described in the schedules to the amended plaint but nevertheless went on to say, inter alia that certain portions of another land possessed by the Respondent have been included in the Preliminary Plan and accordingly she has objected to the land described in the Preliminary plan being considered as the corpus of the case. The Respondent also prayed for a dismissal of the action and for an order that a fresh survey be done for the purpose of properly identifying the corpus and excluding the disputed portion of the land possessed by the Respondent. In the amended plaint there are two schedules described as "Schedule A" and "Schedule B". Thereafter there is a further description of an amalgamated corpus describing it as "the amalgamated corpus as stated in the preliminary plan No. 2001/72 dated 2001-08-11 of licensed Surveyor K.M.G. Samaratunga" in the following manner;.

,මෙම නඩුවේ නිකුත් කරන ලද කොමිෂන් බලපත්‍රයක් අනුව ඉහත සඳහන් ඉඩම් දෙක ඒකාබද්ධ කොට ඒකාබද්ධ ඉඩමක් වශයෙන් මිනිනු ලැබ බලයලත් මානක කේ.එම්.පී. සමරතුංග මහතා විසින් සාදා ඇති අංක 2001/72 හා 2001-08-11 දිනැති පිඹුර අනුව එකී ඒකාබද්ධ ඉඩම පහත සඳ හන් පරිදි විස්තර වේ.

උතුරු මැද පලාතේ, අනුරාධපුර දිස්ත්‍රික්කයේ, උතුරු තලාගම් පලාත, තලංගම් කෝරලේ, යෝධඇල තුලාගේ, අමනන්තවිවුව නමැති ගමේ පිහිටි උතුරට: ජල මාර්ගයද, නැගෙනහිරට: විකිරි බණ්ඩාගේ පුංචි බණ්ඩාගේ ඉඩමද, දකුණට: ජල මාර්ගයද, බස්නාහිරට: ඒ.එම්. රම්මැණිකාගේ කුඹුරද යන මායිම් තුල පිහිටි අක්කර දෙකයි රූඩ් එකයි පර්චස් දහතුනයි දශම හයයි දෙකක් (අ.2 රූ.1 පර්.13.62) හෙවත් හෙක්ටාර් බින්දුවයි දශම නවයයි හතරයි පහයි බින්දුවක් (හෙක්. 0.9450) විශාලැනි අංක 1 වහයෙන් සලකුණු කර ඇති ඉඩම් කොටස වේ.,

An admission has been recorded in respect of the corpus as described in schedules 'A' and 'B' of the amended plaint. Accordingly there has not been any dispute in respect of the land described in the amended plaint of the schedules 'A' and 'B'. But the dispute has been in respect of the land described in the amended plaint after the schedules 'A' and 'B', which is the land described in the preliminary plan of the licensed surveyor. The following issues framed by the parties including the Petitioner herself will demonstrate this position. (a) whether the licensed surveyor has properly demarcated in his preliminary plan the lands described in schedules 'A' and 'B' of the amended plaint? (Issue No. 1 framed by the Petitioner herself.) (b) Whether, the Commissioner has properly identified the boundaries of the said land, for the purposes of his survey? and (c) Whether the person called Jinadasa, who was not a party to this case was entitled to point out the boundaries on behalf of the Appellant at the time of the survey? In the circumstances the identification of the corpus as described in the preliminary plan has ended up being an issue to be decided by Court.

According to the Plaintiff the corpus comprises of the allotments of land separately described in schedules 'A' and 'B' of the amended plaint. The extent was given in the schedules as 1 Pela of 6 seers/lahas in respect of each allotment. This was the extent contained in the original plaint dated 6th February 2001. But after the licensed Surveyor's plan No. 2001/72 dated 11.08.2001 amalgamated both lands and described the extent of the corpus as A2 R1 P13.62 the amended plaint dated 19th November 2001 was filed. In the amended plaint boundaries of the two allotments were shown as in the original plaint but reference was also made to the boundaries and the extent of the amalgamated land as shown by the Surveyor in the preliminary plan. The Surveyor who did the survey in his report marked 'X1' has stated that the extent of the land as described in the schedule to the plaint defer from the extent surveyed, as the schedule gave an extent of 2 Acres whilst the surveyed extent was 2 Acres 1 Rood and 13.62 perches. In fact the Surveyor sought directions from Court due to this and other factors he has observed in his report.

The Surveyor in his evidence at page 11 of the proceedings of 12-08-2002 makes an effort to explain the difference in the following manner.

,ප්‍ර: වී ලාස් 6 පෑලෙන් අක්කර 1ක් මෙය විවින් විට වෙනස් වෙනවා නේද?

උ: ඒක මම කියන්න දන්නේ නැහැ. අනුරාධපුර දිස්ත්‍රික්කය අනුව කියන්නේ.

ප්‍ර: ඒ සම්බන්ධයෙන් චක්‍රලේඛණයක් තිබෙනවාද?

උ: ලාස් 6 පෑලෙන් අක්කර 1ක් කියලා අරගත්තේ එයට නිත්‍යානුකූල චක ්‍රලේඛණයක් නැහැ. සම්ප්‍රදායක් තිබෙනවා.

ප්‍ර: වී ලාස් 6 පෑලෙන් අක්කර 1ක් කියලා අරගත්තේ, ඒ පාරම්පරිකව කෙරෙන මැනුම් කටයුතු අනුව. ,

Where the extent of the corpus were 2 Acres and based on the survey if an extent of 1 Rood 13.65 Perches are to be added, there is a substantial variation to the corpus. Therefore this explanation will not assist to reconcile the difference.

The Respondent has alleged that there is an inconsistency in the boundaries given in the two schedules (Schedule A and B) of the amended plaint and the amalgamated land given in the preliminary plan. The Northern boundary of the land described in the Schedule A is "Yoda-Ela Reservation" and Southern boundary was given as "the fence separating the land of Vannihamyge Welvidane". The Northern boundary of the land in Schedule B is "Wekada Reservation". But according to the Preliminary Plan of the Licensed Surveyor he has considered the Southern boundary of Lot A and the Northern Boundary of Lot B to be the same. If both lands are to be shown contiguously as done in the preliminary plan the Southern boundary of lot A and the Northern boundary of lot B have to be the same. But the aforesaid boundaries are not so in the amended plaint. In the preliminary plan the two lands are shown contiguously but the Surveyor has not given any reason as to how it could be so in the context mentioned above. It was the duty of the surveyor to have explained as to how this has happened. Parties including the Respondent have also failed in their duty by not questioning the surveyor on this important aspect. But such failures on the part of the surveyor and the parties will not absolve the duty of the Court

to consider this matter. This is a serious lapse that has occurred in the District Court proceedings and overlooked in the judgment. Further this also establish that the argument advanced on behalf of the Petitioner that the Commissioner had correctly identified and depicted in the partition plan 3 out of the 4 boundaries given in the schedule to the plaint, is not acceptable.

In respect of the allegation of the Respondent to the effect that the corpus is not properly identified on the ground, a further reason advanced is the conflicting views expressed in respect of the Northern boundary of the Preliminary Plan. The identification of the corpus on behalf of the Petitioner was done by Jinadasa who was a Power of Attorney holder of the Petitioner. He specifically states in his evidence that the Northern boundary of the corpus was not cultivated up to the bank of the lake and that there was a reservation of the 'Yoda Ela'. But the Surveyor says that he could not find a reservation of the 'Yoda Ela' in the Northern boundary. According to the Surveyor's report, the Northern boundary is a paddy field. Witness D.M. Karunatillake who gave evidence on behalf of the Petitioner speaks of a reservation of the Yoda Ela at pages 64 and 67 of his evidence. Even the daughter of the Petitioner Tharangani Kulasena called by the Petitioner in her evidence at pages 71, 75 and 77 of the proceedings clearly and unambiguously state that there was a reservation of the Yoda Ela which was the northern boundary of the corpus.

The Petitioner has taken up the position that if the Respondent did not agree with the preliminary plan of Surveyor Samarathunga, she should have moved for a commission to have the land resurveyed. Even the Learned District Judge in his judgment referred to the fact that there is no alternative plan submitted by the Respondent after surveyor Samarathunga has filed his survey plan and report in Court. In the Statement of Claim which was filed after surveyor Samarathunga's preliminary plan was filed in Court, at paragraph 10 it is pleaded by the Respondent that it would be necessary to have a survey done to demarcate the boundary of the corpus of the case in a manner that would exclude the land possessed by her. In prayer (B) of the statement of claim she has expressly prayed for such a survey. In the circumstances, it is not justifiable to attribute the entire blame to the Respondent in respect of a further survey not being done.

The Learned High Court Judges, at page 5 of their judgment, state that there was an opportunity for the Learned District Judge to issue a commission on the Surveyor General under Section 18(3) of the Partition Act to have the corpus properly identified but has not done so. It is very likely that the plans available with the Surveyor General which depict State land and State reservations would have assisted in identifying the 'Yoda Ela' Reservation.

The Learned High Court Judges have also discovered a further difficulty in the pleadings and proceedings of the District Court case. The lis pendens has been filed by the Petitioner based on the extent given in the original plaint which is an extent of 1 Pela of 6 Seers /Lahas in respect of each allotment. Surveyor Samaratunga in his evidence and also in his survey report equals this extent to 2 acres. According to his plan the extent of the subject matter of the case is 2 Acres 1 Rood and 13.62 Perches. There is definitely a substantial difference in the two extents ie. the extent given in the schedule of the original plaint and the extent given in the preliminary plan. Accordingly, steps should have been taken to file a fresh lis pendens to cover the additional extent of land. But this has not been done.

The importance of strictly observing the provisions of the Partition Act in a partition action has been emphasized by this Court and other Superior Courts in several judgments due to the finality in respect of a partition judgment in terms of Section 48(1) of the Partition Act.

In *Brampy Appuhamy Vs. Monis Appuhamy* 60 NLR 337 Basnayake CJ states as follows:

> " It is imperative that in an action such as a partition action which gives the decree under it (section 48(1) an effect which is "final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have to or in the land to which such decrees relate", the provisions of the Partition Act should be strictly observed."

The case of H. Sopi Nona vs. P.A. Cornelis and Others 2010 BALJ Vol. XVI 109 at 116 was a case where the judgment of the Supreme Court was not unanimous as there was a difference of opinion on the question whether the case should be sent back to the District Court for trial de novo as decided by the Court of Appeal or whether the judgment of the Court of Appeal be set aside and the District Court action should stand dismissed. Marsoof J. in his dissenting judgment expressed strong views with regard to the importance of having a fresh lispendens registered in respect of the larger extent of land which was accepted by the Court and which became the corpus of the case, in the following manner:

> "…… It appears from the original record maintained in the District Court which was called for by this Court that lis pendence was registered in terms of Section 6 of the Partition Act on 13th February 1969 in Folio G 384/48 at the Land Registry with respect to the land referred to in the schedule to the plaint in extent 3 roods and 1 perches. However, an examination of the journal entries in the original record maintained in the District Court in this case (from 18th April 1989, being the date of the reconstruction of the record after the original record was destroyed by fire) did not show any evidence that *lis pendence* was registered for the larger extent of land depicted in the Preliminary Plan No. 255 in extent 1 acre and 16.85 perches, and the fact that learned Counsel for Carolis Singho on 21st August 1997 sought to raise two additional issues in this regard suggests that in fact that there was no such registration.
>
> It has been expressly provided in Section 23(3) of the Partition Act of 1951 that where a survey made on a commission issued by Court in a partition case "discloses that the land described in the plaint is only a portion of a larger land which should have been made the subject matter of the action, the court shall specify the party to the action by whom, and the date on or before which, an application for the registration of the action as a *lis pendence* affecting that larger land shall be filed in court" to enable the filing of *lis pendence* showing the larger land and taking other mandatory steps under the Act, which are necessary to ensure that all interested parties are before court. The District Court has ordered the

partitioning of the said larger portion of land depicted in Preliminary Plan No. 255 consisting of 1 acre and 16.85 perches, which far exceeds the land described in the schedule to the plaint, and in the absence of material to show that Section 23 of the Partition Act was complied with, raises serious doubts as to the regularity and legality of the impugned decision of the District Court in this case."

In this context it is necessary to consider one of the questions of law on which this Court granted Leave to Appeal which states as follows:- "Have their Lordships of the High Court misapplied the ratio in the decision of the Court of Appeal in the case of Richard vs. Sieble Nona 2001 2 SLR 01?" In the High Court judgment of this case it is stated as follows:-

, රිචඩ් එරෙහිව සිබල් නෝනා 2001 (02) ශ්‍රී ලංකා නීති වාර්තා 01 වන පිටුවේ සඳහන් නඩුවේදී පෙන්වා දී ඇත්තේ, පැමිණිල්ලේ දක්වා නිබෙන ඉඩමට වඩා විශාල ඉඩමක් බෙදා වෙන් කර ගැනීම සඳහා බෙදුම් පනත යටතේ නීතිමය හැකියාවක් නොමැති බවයි.

බෙදුම් පනතේ ප්‍රතිපාදන උල්ලංඝණය කරමින් තීන්දුවක් ප්‍රකාශ කිරීම යුක්ති සහගත නොවන බවත්, වැඩිදුරටත් අවධාරණය කොට ඇත,

The case of Richard vs. Sieble Nona was also a case inter alia where parties filed action to partition a smaller extent of land but after the survey which disclosed a larger extent of land the parties sought to partition the larger extent of land without filing a fresh lis pendence in respect of the larger extent of land. Jayawickrema, J. in the said case states as follows:-

"In the instant case the lis pendence has been registered to a land of 3 acres and 3 roods in extent. This clearly proves the fact the lis pendence has not been registered in respect of the land shown in plan No.. 41/1990 which is of 4 acres 1 rood and 18.908 perches. …….. .

In the event of any party seeking to have a larger land to be made the subject matter of the action the Court shall specify the party to the action to file in Court an application for the registration of the action as a lis pendens affecting such larger land and the court shall proceed with the action as though it has been instituted in respect of such larger land after

taking necessary steps under sections 16, 17, 18 and 19 of the Partition Act. In the instant case this procedure has not been followed. When one takes into account the facts disclosed in this case it is abundantly clear that the learned District Judge has acted in violation of the imperative provisions of the Partition Law. Hence it will be a travesty of Justice to allow the judgment and the interlocutory decree to stand in this case."

Accordingly in Richard vs. Seible Nona one of the reasons considered by Court for the setting aside of the judgment of the District Judge has been the non registration of the lispendence in respect of the larger land which became the subject matter of the case and on which the District Court entered its judgment.

In the context of the facts quoted above, I do not see any misapplication of the ratio in the decision of Richard vs. Sieble Nona.

It is of extreme importance to have a fresh lis pendence filed if the land described in the preliminary survey is significantly larger than the land described in the plaint as the land sought to be partitioned and a decision is made to partition the larger land. But in this case where it was decided to partition the larger land a fresh lis pendence has not been filed. Accordingly this appears to be a major infirmity in the judgment of the District Court, in addition to the infirmities that were discussed earlier.

In all the circumstances mentioned above, I answer the questions of law in paragraphs 25(i) - 25(iv) in the Petition of Appeal in the negative. I do not see any basis to interfere with the Judgment of the High Court. Appeal of the Petitioner is dismissed. I make no order as to costs.

JUDGE OF THE SUPREME COURT

SC. Appeal No. 169/2010

Dr. Bandaranayake. CJ.

I agree.

CHIEF JUSTICE

Amaratunga, J.

I agree.

JUDGE OF THE SUPREME COURT