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

In the matter of an application for a Leave to Appeal in terms of Article 127, 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5(C) of the High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006.

Christhombu Wasangalwadu Lakshman Jayasiri Wijeratne,
No. 126/2A, Galwala Road,
Dehiwala.

Plaintiff

SC Appeal No: 03/2020
SC/HCCA/LA/ 377/2018
WP/HCCA/MT/ 33/2016 (F)
DC Mount Lavinia Case No. 207/97/P

Vs.

1. Colombage Nandawathie De Silva Wijeratne,
   No. 126/2A, Galwala Road,
   Dehiwala.

1a. Christhombu Tasan Galwaduge Ishara Deepthi Kanchana Wijeratne,
No. 126/2A, Galwala Road,
Dehiwala.

2. Mohammad Haneefaa Ahamad Jamaldeen,
   No. 58, Marikkar Place,
   Colombo 10.

3. Christhombu Galwadu Saranadasa De Silva Wijeratne,
   No. 126/2A, Galwala Road,
   Dehiwala.

4. Nimala Theressa Atapattu alias Nimala Theressa Chandrapala,
   No. 126/2A, Galwala Road,
   Dehiwala.

Defendants

And

Christhombu Wasangalwadu Lakshman Jayasiri Wijeratne,
No. 126/2A, Galwala Road,
Dehiwala.

Plaintiff-Appellant

Vs.

1. Colombage Nandawathie De Silva Wijeratne,
   No. 126/2A, Galwala Road,
   Dehiwala.

1a. Christhombu Tasan Galwaduge Ishara Deepthi Kanchana Wijeratne,
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   No. 58, Marikkar Place,
   Colombo 10.

3. Christhombu Galwadu Saranadasa De Silva Wijeratne,
   No. 126/2A, Galwala Road,
   Dehiwala.

4. Nimala Theressa Atapattu alias Nimala Theressa Chandrapala,
   No. 126/2A, Galwala Road,
   Dehiwala.

Defendant-Respondents

And Now Between

Christhombu Wasangalwadu Lakshman Jayasiri Wijeratne,
No. 126/2A, Galwala Road,
Dehiwala.

Plaintiff-Appellant-Petitioner-Appellant

Vs.

1. Colombage Nandawathie De Silva Wijeratne,
   No. 126/2A, Galwala Road,
   Dehiwala.

1a. Christhombu Tasan Galwaduge Ishara Deepthi Kanchana Wijeratne,
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No. 126/2A, Galwala Road,
Dehiwala.

4. Nimala Theressa Atapattu alias Nimala Theressa Chandrapala,
No. 126/2A, Galwala Road,
Dehiwala.

4a. Anuraj Narendra Palliyaguruge,
No. 73, Sri Gnanegra Road,
Ratmalana.

Defendant-Respondent-Respondent-Respondents

Before: **Chief Justice Jayantha Jayasuriya, PC**

Justice L.T.B. Dehideniya

Justice A.L. Shiran Gooneratne

Counsel: Rohan Sahabandu, PC with Nathasha Fernando and Chathurika Elvitigala for the **Plaintiff-Appellant-Petitioner-Appellant.**

Jagath Wickramanayake, PC with Pujanee de Alwis instructed by Renuka Edirisinghe for the substituted **4a Defendant-Respondent-Respondent-Respondents**.

Argued on: 07/09/2022

Decided on: **28/11/2022**

A.L. Shiran Gooneratne J.

The Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Appellant) instituted the instant action in the District Court of Mount Lavinia against the 1- 4 Defendant-Respondent-Respondents to partition the land called "Kongahawatte" in extent of 14.76 perches, morefully described in the 2nd Schedule to the Plaint. The 1-3 Respondents as co-owners, acquiesced to the said partition between the Plaintiff (undivided 5/15 share, subject to the life interest of 1st and 3rd Respondents), the 1st Defendant-Respondent (undivided 7/15 share) and the 2nd Respondent (undivided 3/15 share), on Deeds. The Appellant claimed that the 4th Defendant-Respondent (hereinafter referred to as the 4th Respondent) has no title to the land claimed in extent of 4.64 perches as shown in Plan No. 748, and building (Assessment No. 126/2C), morefully described in the 3rd Schedule to the Plaint and pleaded that the 4th Respondent is in illegal possession of the said premises.

The 4th Respondent in her statement of claim is seeking, *inter alia*, to exclude Lot No. 1 of the Preliminary Plan No. 2517 (Plan 'X'), including Premises No. 126/2C (the land shown as lot 1 in Plan 2517), the property described in the Deed of Disposition No. 15935 (marked 'X8'), and identified as Lot 1 in title Plan No. 748 (marked '4V2'), in extent of 4.64 perches, which is shown as part of the corpus to be partitioned in extent of 14.76 perches as described in the 2nd Schedule.

At the conclusion of the trial the learned District Judge by Judgment dated 08/01/2016, dismissed the Appellant's action stating that the Appellant has not established the rights of the co-owners, including himself, but permitted the 4th Respondent's claim to exclude the land depicted in the said lot 1 of Preliminary Plan No. 2517.

Aggrieved by the said Judgment, the Appellant by Case No. WP/HCCA/MT/33/2016 (F) preferred an appeal to the Civil Appellate High Court of Mount Lavinia. The appellate court by its Judgment dated 03/10/2018, held that the Appellant has failed to establish his rights to the land and that of the co-owners and therefore, is not entitled to a Judgment in terms of Section 26(2) of the Partition Act and accordingly dismissed the action. However, the Court was of the view that the 4th Respondent was successful in establishing her entitlement to exclude the said Lot 1 of the said corpus as decided by the trial judge.

The Appellant is before this Court challenging the said Judgement dated 03/10/2018.

This Court by Order dated 13/01/2020, granted Leave to Appeal on the question of law stated in sub paragraph (3) in paragraph 22 of the Petition of Appeal dated 12/11/2018, which states as follows;

"Did the learned High Court Judges err in law and fact in not considering the strict burden of proof is on the 4th Defendant who claim for an exclusion of the portion of the Lot 1 in his title Plan No. 748."

At this stage it is pertinent to place on record that the Plaintiff's action was dismissed by the learned District Court Judge by Judgment dated 19/11/2014, prior to the impugned Judgment dated 08/01/2016. Being aggrieved by the said Judgment dated 19/11/2014, the Plaintiff preferred an Appeal Bearing No. WP/HCCA/MT/62/11 (F) to the Civil Appeal High Court. Having considered submissions of both Counsel, the appellate court by Judgment dated 19/11/2014, sent the case for *trial de novo* for the limited purpose of re-considering Plan No. 1015, and if necessary to record further evidence. When the matter was taken up before the District Court both parties agreed to accept the evidence and without any further evidence led, invited the learned Trial

Judge to enter Judgement. Thereafter, the learned Trial Judge entered the impugned Judgment dated 08/01/2016, which is now sought to be challenged before this Court.

The Appellant raised two consequential issues before the trial court against the 4th Respondent challenging the validity of the transfer and the rightful ownership of the corpus by the 4th Defendant by Deed of Transfer No.15935 by the Commissioner of National Housing. The premises bearing Assessment No. 126/2C, in lot 1 depicted in Plan Bearing No. 748 was vested with the Commissioner of National Housing under and in terms of the Ceiling on Hosing Property Law No. 1 of 1973.

The Appellant denies that the 4th Respondent is entitled to any share in the land in suit. The learned Presidents Counsel for the Appellant argues that even if the 4th Respondents title by Deed of Disposition No. 15935, dated 13/05/1995 (marked '4V6'), by the Commissioner of National Housing making the 4th Defendant the absolute owner of premises bearing Assessment No. 126/2C, in lot 1 in Plan No. 748 (marked '4V2'), or Lot 1 in Preliminary Plan No. 2517 is admitted, it only proves the ownership of the land but the location of the land remains unidentified. The Appellant's position simply is that having a deed or a plan will only prove title but not where the land is located. In this premiss it is contended that Plan No. 748 does not refer to Plan 2517 marked 'X1' and in the absence of a superimposition of the 4th Respondent's title Plan No. 748 on the Preliminary Plan No. 2517, the location of the 4th Respondents land cannot be identified for the purpose of exclusion. It is also contended that there is not even a reference in Plan No. 748 to Plan No.1015, which is the Title Plan of No. 2517, where lot B, the land to be partitioned came into existence.

It was the position of the 4th Respondent that she claims only the exclusion of lot 1 in Plan 748 (4V2) described in the 3rd Schedule to the Plaint and in the schedule to the 4th

Respondent's statement of claim. It is contended that the said lot 1 according to the boundaries and extent is identical with the boundaries of lot 1 in the Preliminary Plan No. 2517 (Plan X).

It is revealed that after the demise of the original owner of the land in the 1st Schedule to the Plaint, the said land was subdivided into two lots A and B by his heirs as described in Plan No. 1015, dated 29/03/1953. Lot B, described in the 2nd Schedule to the Plaint was sold to the 1st Respondent. The husband of the 4th Respondent one Wilmet Chandrapala was a tenant of the house standing on a part of Lot B and had come into occupation by Deed of Disposition No. 15935 issued by the Department of National Housing. The said Wilmet Chandrapala gifted the said property to his wife the 4th Respondent by Deed No. 98, dated 07/09/1995 which is pleaded as part of the corpus that is sought to be partitioned, described in the 3rd Schedule to the Plaint.

In this context, the learned Presidents Counsel for the 4th Defendant has drawn attention of Court to the 2nd Schedule to the Plaint which describes the corpus in the following manner;

"....අංක 1015 දරණ පිඹුරේ කැබලි අංක බී දරණ ඉඩමට මායිම්...."

And the 3rd Schedule to the Plaint which describes the portion which the 4th Defendant is allegedly in wrongful possession as;

"....වරිපනම් අංක 25 (පෙරදී 126/2සී) දරන්නා වූ දේපලට ඒ.ඩී.එම්.ජේ. රූපසිංහ බලයලත් මිනින්දෝරු තැන විසින් වර්ෂ 1993 ක් වූ ජූලි මස 22 වන දින මැන සාදන ලද අංක 748 දරණ පිඹුරේ කැබලි අංක 1ට මායිම් උතුරට ඉහත කී සැලැස්මේ වරිපනම් අංක 126/1 ගල්වල පාර, නැගෙනහිරට කුසලඥාන මාවත, දකුණට ඉහත කී සැලැස්මේ වරිපනම් අංක 126/2ඒ, ගල්වල පාර සහ බස්නාහිරට වරිපනම් අංක 124, ගල්වල පාර යන මායිම් තුළ පිහිටි .... පර: 4.64 විශාල ඉඩම...."

The 4th Respondent claims that the portion of land to be excluded is well defined and identified in her Statement of Claim and therefore, contends that the said allotment was wrongfully included by the Plaintiff in the corpus to be partitioned.

As contended by the learned Counsel for the 4th Respondent, it is clearly seen that Lot 1 depicted in Plan No. 748 was a part of Lot B depicted in Plan No. 1015 as described in the 2nd Schedule to the Plaint. It is also seen that the boundaries of Lot 1 in Plan No. 748 and Lot 1 in Preliminary Plan No. 2517 are one and the same and therefore one cannot entertain a doubt regarding the location of Lot 1 in the Preliminary Plan No. 2517.

According to the surveyor report marked 'X1', Lots 1, 2 and 3 in the Preliminary Plan No. 2517, is the corpus to be partitioned, as claimed by the Appellant and the 1-3 Respondents, described in the 2nd Schedule to the Plaint. The 4th Respondent is in possession of Lot 1 in extent of 4.64 perches and the attached building depicted as C, in the said Preliminary Plan. The return to the surveyor's commission states that the Appellant had initially identified Lot 2 and Lot 3 as depicted in the Preliminary Survey Plan No. 2517 as 5.82 perches and 3.58 perches respectively. Thereafter the 4th Respondent had identified the boundaries of the allotment in possession which is Lot 1 in the said plan in extent of 4.64 perches. Accordingly, the 4th Respondent's position in seeking an exclusion of the allotment Lot 1 in Plan No. 748 and Plan No. 2517 (Plan 'X') from the corpus is that it is a divided and a separate allotment and not a part of an undivided land and should not be included in the division of the land of the Appellant nor the co-owners.

The boundaries of Lot No. 1 given in the Deed of Disposition No. 15935, dated 13/05/1995 (marked '4V6') are as follows;

North by Assessment No. 126/1, Galwala Road, as depicted in Plan No. 748

East by Kusalagnana Mawatha

South by Assessment No. 126/ 2A, Galwala Road, as depicted in Plan No. 748

West by Assessment No. 124, Galwala Road

The afore-stated description is identical to the description given by the Appellant in the 3rd Schedule to the Plaint.

It was argued by the learned Counsel for the Appellant that to prove exclusion of the said Lot 1 from the corpus, a superimposition of Plan No. 748 on Plan No. 2517 is necessary to identify with accuracy the lot disposed.

The District Court trial concluded after the evidence of the Appellant and the 4th Respondent was recorded. On the question of possession, it was conceded by the Appellant that the 4th Respondent is in long possession of Lot 1. The said Deed No. 15935 pleaded by the 4th Respondent takes in the exact metes and bounds of the land in possession of the 4th Respondent as described in the 3rd Schedule to the Plaint. The Appellant nor his predecessors in title do not appear to have been in possession of the said Lot 1, once again establishing the 4th Respondent's title to the land and must be taken into consideration. Although the surveyor was not called to give evidence by the 4th Defendant on Plan No. 748, the trial court was possessed with oral evidence, Deeds, documentary evidence and other physical demarcations sufficient to identify the boundaries of the land in deciding on the legal rights of the 4th Respondent.

Assuming that the evidence in relation to the superimposition of Plan No. 748 on Plan 2517 (Plan 'X') was available to the trial court, still it would not have made any

deference to the Appellant's case or have availed the Appellant to dispossess the 4th Respondent from the allotment she claims.

The execution of Deed No. 15935 in respect of the allotment of land Lot 1 in Plan No. 748 is an acknowledgement of the existence of a divided and a defined allotment within the metes and bounds of the corpus to be partitioned, as described in the 2nd Schedule to the Plaint. According to the scheme of distribution set out in paragraph 12 of the Plaint, the Appellant sought to partition the land described in the 2nd Schedule and to eject the 4th Respondent from possession of the land described in the 3rd Schedule. In paragraph 13 of the Plaint, it is clearly stated that the partition of the said land is necessitated due to frequent boundary disputes with the 4th Respondent in possession of the land described in the 3rd Schedule. The issues against the 4th Respondent related only to the issue of legality of Deed bearing No. 15935. As observed earlier, the Appellant in the 3rd Schedule to the Plaint has clearly stated and acknowledged the precise boundaries claimed by the 4th Respondent by the said Deed No. 15935.

Rightfully so, the trial court did not enter interlocutory decree to exclude 'Lot 1' of Preliminary Plan No. 2517 (Lot 1 of Plan No. 748) from the corpus. The learned Trial Judge, answered Issue No. 15 in favour of the 4th Respondent, affirming the 4th Respondent's right to exclusion of Lot 1, dismissed the Plaint and ordered to enter a decree effecting dismissal of the action due to the Appellant's failure to establish the rights of the co-owners, and himself. Having considered the afore-stated circumstances, the trial court held in *obiter*, that the 4th Respondent was entitled to the exclusion of allotment 'Lot 1' from the corpus to be partitioned.

Accordingly, we hold that the 4th Respondent has discharged her burden of proof in establishing that a divided and defined separate allotment of land ('Lot 1' of Plan No.

748) was vested with her by the Commissioner of National Housing by operation of the law, which did not authorize the court to partition or make an order relating to right, title, or interest affecting the said land.

It was also the position of the Plaintiff that on perusal of Plan No. 748, there is a vacant area to the East of the house and the appurtenant land, which must be determined by the Commissioner in terms of the Ceiling on Housing Property Law No. 1 of 1993. It is observed that Deed No. 15935 clearly refers to the house and the land appurtenant thereto, at the time of vesting as described in the 3rd Schedule.

Accordingly, the only issue raised by the Appellant is answered in the negative.

When making submissions before this Court the learned Counsel for the Appellant also brought in a further question of law which reads as follows;

"when in a partition action, if the trial judge dismisses the Plaint and the action is dismissed, can he exclude a part after dismissing the action to partition the land."

The learned Counsel for the 4th Respondent did not object to the said issue been considered. The afore-stated issue was raised on the basis that when a court dismisses the action filed by the Plaintiff to partition a corpus, there is no corpus to be partitioned and an Interlocutory Decree does not follow and no share can be excluded.

The Appellant in his Plaint and in his evidence before the trial court has clearly acknowledged the existence of a divided and a defined allotment within the Preliminary Surveyor Plan 2517, as 'Lot 1' and the Assessment No. 126/2C within the metes and bounds of the corpus described in the 2nd Schedule to the Plaint.

The Plaintiff when testifying before the trial court stated as follows;

"ප්‍ර : කොයි කොටසේද ඔහු සිටින්නේ? (නඩු වාර්තාවේ ඇති පිඹුර පෙන්වා සිටී.)

උ : 126/2/සී කොටසේ.

ප්‍ර : 'X' දරණ සැලැස්ම ගරු අධිකරණයට පෙන්වා සිටී.

('X' පිඹුර පෙන්වා සිටී.)

ප්‍ර : *සාක්ෂිකරු පරීක්ෂා කර බලයි. පෙන්වා සිටීමට නොහැකි බව කියා සිටී.*

ප්‍ර : පේන විදියට කියන්න.

උ : (වෙන කොටසක් පෙන්වා සිටී.)

ප්‍ර : එහි විස්තර කරන්නේ කෙසේද?

උ : X දරණ කොටසේ කැබලි අංක 1 වශයෙන්.

ප්‍ර : තමන්ට එය නිශ්චිතව පැහැදිලිව තේරුම්ගන්න පුළුවන් X දරණ සැලැස්ම පරිදි?

උ : ඔව්.

ප්‍ර : එසේ බලා තේරුම්ගන්න හැකියාව තිබෙන්නේ කැබලි අංක 1හි නිශ්චිත මායිම් තිබෙන නිසා?

උ : මායිම් වෙන්කර නැහැ.

ප්‍ර : මායිම් වෙන්කර නැහැ කියා කෙසේද ගරු අධිකරණයට කියන්නේ?

උ : වෙන්කර තිබෙනවා.

ප්‍ර : දැන් කියන්න කොයි එකද හරි? වෙන්කර තිබෙනවාද කැබලි අංකයක්?

උ : ඔව්."

In the instant case the Court is not called upon to decide whether the 4th Respondent is entitled to a share or whether she has proved her entitlement to a share to the corpus to be partitioned. As observed above, the allotment of land 'Lot 1' in the Preliminary Plan

No. 2517 in Deed No. 15935 was acknowledged by the Appellant as a divided and a defined allotment in his Plaint as well as in the evidence given in the trial court.

In ***Dionis vs. William Singho, 77 NLR 103,*** the Supreme Court held that; *"In partition action, once a certain land has been excluded from the corpus sought to be partitioned, the court has no authority under the Partition Act to determine the right, title and interest of any person who claims to be entitled to the land that has been excluded, or to the plantations, buildings or other improvements on it."*

The learned Presidents Counsel for the Appellant has drawn attention of Court to the orders that a court could make under Section 26 (2) of the Partition Act in order to demonstrate that an Interlocutory Decree cannot have an order to exclude an entitlement to a share. At this point it must be reiterated that in the findings of the Judgment delivered by the trial court, there was no Interlocutory Decree entered to exclude a share or portion of the land but only an order to dismiss the Plaint and to enter a decree effecting dismissal of the action.

In ***Udalagama and Others vs. Kempitiya (2002) 3 SLR 1*** (a Judgment of the Court of Appeal), the Presidents Counsel who appeared for the Appellant argued that the Partition Law did not authorize a court to partition or to make an order relating to right, title, or interest in a land that fell outside the corpus. The issue in contention was whether the Plaintiff-Respondent was entitled to a cartway which fell across the lands of the 2nd and 3rd Defendant-Appellants.

Dissanayake, J. with T.B. Weerasuriya, J. (P/CA) (as their lordships then were), agreeing, considered the old Partition Act, No. 16 of 1951 and the present Partition Law No. 21 of 1977, referred to the settled precedents and made the following observation;

"The rights of parties whose land fell outside the land to be partitioned and the scope of Section 2 of the old Partition Act No. 16 of 1951, and the orders that can be made by a District Court in an Interlocutory Decree under Section 26 of the old Partition Act which are on the same lines as Sections 2 and 26 of the present Partition Law No. 21 of 1977 has been dealt with in detail in the case of ***A.D. Dionis vs. A. William Singho (supra)*** *Pathirana, J. at page 105 quoting* ***Thambiah, J in Hewavitharana vs. Themis de Silva 63 NLR 68****, had stated thus;*

"There is no provision in the Partition Act that the Court is obliged to make any of the orders set out in Section 26 (2), in respect of the land that is described in the plaint. Nor is there any provision in the Act providing for the declaration of title to a land solely owned by a person, which has been wrongly included in the corpus sought to be partitioned. In such cases the practice hitherto has been to exclude the land which is outside the subject-matter of the partition action and which is proved to have been the property of a person who is not a party to the proceedings. It is not uncommon for a Plaintiff to include small portions of land in the corpus belonging to other persons. In all such cases if the Court has to adjudicate also on the title of the owners of those lands, then the Court will be obliged to investigate the title of lands which do not come within the purview and scope of Section 2 of the Partition Act. Further, if the Court has to examine the title of persons whose lands have been wrongly included in the corpus, great inconvenience and hardship may be caused to persons who may be quite content to possess such lands in common or if it happens to be the land of a single individual, to possess it by himself. In our view it is not the intention of the legislature in passing the Partition Act that the Court should partition any lands other than those that came within the ambit of Section 2 of the Act."

Accordingly, the trial court was correct in affirming the 4th Respondents right to exclusion of 'Lot 1', from the corpus to be partitioned and the order to enter a decree effecting dismissal of the action due to the Appellant's failure to establish the rights of the co-owners, and himself.

Therefore, we hold that 'Lot 1' in Plan No. 748 (4V2) described in the 3rd Schedule to the Plaint is a separate, clearly identifiable and a defined allotment of the corpus to be partitioned, which the 4th Respondent is entitled for exclusion. Accordingly, we see no reason to interfere with the Judgments delivered by the learned District Judge or the Judges of the Civil Appeal High Court.

Appeal dismissed. No costs ordered.

Judge of the Supreme Court

Jayantha Jayasuriya, PC. CJ.

I agree

Chief Justice

L.T.B. Dehideniya J.

I agree

Judge of the Supreme Court