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

In the matter an application for Special Leave to Appeal in terms of Article 128(2) of the Constitution Constitution of Sri Lanka.

Subramaniam Asokan
15, 4th Cross Street, Colombo 11
But residing at
No. 44, 36th Lane, Colombo 06.

Appellant

SC Appeal 185/14
Court of Appeal No. CA 53 A&B/99/F
DC Colombo No. 16029/L

Vs.

Alawala Dewage Premalal Siriwardana of
No. 496/5, Ihala-Karagahamune
Kaduwela.

Respondent

Before	:	Hon. Jayantha Jayasuriya, PC, CJ Hon. L.T.B. Dehideniya, J Hon. S. Thurairaja, PC, J.
Counsel	:	Hijas Hisbulla for the Petitioner. H. Withanachchi for the Respondent.
Argued on	:	31.10.2019
Decided on	:	04.03.2020

Jayantha Jayasuriya, PC, CJ

The Plaintiff-Appellant-Respondent (hereinafter called the Plaintiff) sued the Defendant-Respondent-Appellant (hereinafter called the Defendent) in the District Court of Colombo for declaration of title to the premises, which is the subject matter of the action and for the ejectment of the Defendent from the said premises. The property in question as described in the schedule is a land of one perch and thirty eight decimal in extent situated at 4th Cross Street of Pettah and the building bearing assessment number 15 situated thereon. The Defendent resisted the action and preferred a claim in reconvention.

Both parties admitted that the Plaintiff's father who was the owner of the premises in question rented out the said premises to the father of the Defendent, E Subramaniyam in 1954. Thereafter the Defendent came in to occupy the said premises, after the demise of his father.

The Plaintiff claimed, that his father died intestate in 1985, leaving his mother and three siblings along with him, as heirs. Thereafter in 1988, three siblings and the mother alienated their undivided rights from and out of the property in question to him and, the plaintiff became the sole owner of the premises in question as from the year 1988. Three years thereafter, in 1991 the plaintiff requested the Defendant to attorn and pay the rent. However the Defendant did not attorn as per the said request. In 1992 the Plaintiff instituted action under consideration in the District Court.

Before the District Court, the Defendant refused to admit the ownership of the Plaintiff. Therefore one of the issues the Plaintiff raised, – issue no 4 – is whether the plaintiff is the owner of the property as pleaded in the plaint.

The Defendent *interalia* pleaded that the Plaintiff had no status or cause of action to institute the action and that the Plaintiff's action was debarred by section 547 of the Civil Procedure Code. One of the issues raised by the Defendent - issue number 14 – was whether the plaintiff could maintain the proceedings without the estate of the deceased A.D.P. Siriwardane, being properly administered.

At the conclusion of the evidence presented by both parties, the Learned District Judge answered issue number 4 as 'not proved' and issue no 14 in the negative.

The Learned District Judge by her judgment dated 23 November 1998 dismissed the plaint subject to costs and denied the claim in reconvention of the Defendent. The Learned Judge held that no order can be made declaring the Plaintiff as the owner of this property as the father of the plaintiff had died without a last will and no testamentary proceedings had been instituted in relation to this property.

Both parties appealed against the Judgment of the District Court. The Court of Appeal by its judgment dated 26 August 2014 allowed the appeal of the Plaintiff and directed the learned District Judge to enter decree accordingly. In their Judgment the Learned Judges of the Court of Appeal held that the Learned District Court judge's finding, that no title has passed onto the plaintiff by reason of the fact that the estate

of his deceased father had not been administered is a misstatement of law and amounts to a misdirection.

The Defendant, being dissatisfied with the Judgment of the Court of Appeal sought leave of the Court of Appeal to appeal to the Supreme Court and the Court of Appeal by its Order dated 03 September 2014, allowed the leave to appeal application of the Defendant.

The substantial question on which the Court of Appeal granted leave, reads as follows. "Where the action is to recover immovable property on the basis of non-attornment and the defendant has put in issue and challenged the plaintiff's right to recover the property in view of the bar contained in section 547 of the civil Procedure Code, can judgment be entered in favour of the plaintiff without taking into consideration, particularly the pleas of the defendant that the property is of the value of Rs 3,000,000/- but pleaded that the father of the plaintiff died and did not leave and estate of administrable value".

The Defendan's main position before this court is that the plaintiff has no legal status to sue the Defendant as there is a failure to obtain administration of the property in question and therefore fail to satisfy the pre condition imposed by section 547 of the Civil Procedure Code.

The Plaintiff submitted that the plaintiff's action cannot be treated as either a *'rei vindicatio'* or an action for declaration of title. It is his position that he had to institute action treating the Defendant as a trespasser even though initially the

defendant was treated a tenant by attornment. It is his position, that the learned trial judge erred when these proceedings were equated to a typical declaration of title case.

The Plaintiff further claims that the property rights of a deceased person would pass to the heirs by the operation of common law, in the absence of a testamentary disposition such as last will. He relies on the judgment in **Silva v Silva,** 10 NLR 234. He also submits that heirs of the deceased landlord become vested with the contractual rights and obligations in respect of the premises with the demise of the landlord. It is his submission that this legal proposition can be deduced from the judgment of this court in **Mohamed v Public Trustee**, 1978-1979-80 I SLR 01. It is his contention that the provisions of Section 547 of the Civil Procedure Code would not debar the proceedings in question as this is not an action for a declaration of title or a *rei vindicatio* action.

Two main aspects will be considered in deciding this matter. Firstly the scope of Section 547 of the Civil Procedure Code and secondly the nature of the proceedings that were before the District Court. For convenience, section 547 of the Civil Procedure Code as it was in force in the year 1992, is reproduced below.

"No action shall be maintainable for the recovery of any property, movable or immovable, in Sri Lanka belonging to or included in the estate or effects of any person dying testate or intestate in or out of Sri Lanka within twenty years prior to the date of institution of the action, where such estate or effects amount to or exceed in value the sum of twenty thousand rupees unless grant of probate or letters of administration shall first have been issued.

In the event of any such property being transferred in any manner other than under the provisions of subsection (1) of section 539B of this Ordinance or under section

28 of the Estate Duty Ordinance or section 22 of the Estate Duty Act, as the case may be, without such probate or administration being so first taken out, every transferor or transferee of such property shall be guilty of an offence, and in addition to any penalty imposed under this Ordinance, it shall be lawful for the State to recover from such transferor and transferee or either of them, such sum as would have been payable to defray estate duty. The amounts so recoverable shall be a first charge on the estate or effects of such testator or intestate in Sri Lanka or any part of such estate or effects, and may be recovered by action accordingly."

It is pertinent to observe that one of the issues framed before the trial court was "whether the plaintiff is the owner of the property as pleaded in the plaint". The learned District Judge answered this issue as 'not proved'. The learned District Judge held that no determination can be made declaring the plaintiff as the owner of the property. The reason being that no proper inheritance can take place from a transfer without having testamentary proceedings in place, in a situation where the initial owner of the property had deceased intestate.

It is settled law that succession of the property of a deceased person does not depend on the institution of testamentary proceedings. Succession and inheritance of the property of a deceased person will have to be determined in accordance with the legal principles governing the same. It had been held that "On the death of a person his estate, in the absence of a will, passes at once by operation of law to his heirs, and the *dominium* vests in them. Once it so vests they cannot be divested of it except by the several well-known modes recognised by law" (Grenier A.J in **Silva v Silva *at el*** (Full Bench) 10 NLR 234 at 242.). It was further observed that "An administrator in Ceylon deals with immovable property and applying the English Law it seems clear that no conveyance from an administrator is necessary to pass title to the heirs, for that has already passed by operation of law" (**Silva v Silva *at el***, 10 NLR 234 at 244).

Section 547 of the Civil Procedure Code does not deal with either inheritance or succession of the property of a deceased person. Therefore, this section has no impact on a title derived through succession or inheritance. However it is important to note that the plaintiff in this case claims title in two different lines.

It is admitted that the plaintiff was not the sole heir of the deceased. He was a joint heir with the other heirs namely the mother and three siblings. Therefore with the death of the father, the plaintiff derived co-ownership of the property along with the other four heirs. Section 547 has no application or impact on this aspect of succession.

Three years thereafter the other co-owners transferred their rights to the plaintiff. It is admitted that the aforesaid transfer between the co-owners had taken place without a grant of probate or letters of administration first have been issued. The plaintiff did not reject the suggestion that the value of the property concerned at the time the co-heirs gifted to him, is approximately two million rupees even though the Deed of Gift dated 1.6.1988 which was produced marked P3 has given the value as sixty five thousand rupees.

Section 547 of the Civil Procedure Code is in two parts. The first part deals with regard to the maintainability of certain types of actions. The scope of this part of the section will be dealt with later in this decision. The second part deals with situations of the transfer of property belonging to the estate of a person dying testate or intestate, where such transfers had taken place without a grant of probate or letters

of administration first have been issued where the value of such property exceeds twenty thousand rupees. According to this provision, both the transferor and the transferee are guilty of an offence unless the transfer had taken place within the limited instances recognised by the provision it self.

An examination of the facts of this case reveal that both the plaintiff and the co-heirs have breached this provision and therefore are guilty of an offence. However, it is necessary to consider whether section 547 invalidates any transfer that had taken place in breach of that provision?

In **Hassen Hadjiar v Levane Marikar** (15 NLR 275 at 279) Wood Renten J held "Section 547 of the Code does not prohibit the transfer of property which ought to have been, but has not been, administered. It penalizes such a transfer, but the language in which the penalty is imposed as well as that of the section as a whole point, in my opinion, to the conclusion that the Legislature did not intend to do anything more than this".

I see no reason to deviate from this view. Therefore I hold that the Plaintiff has derived title to the property in question lawfully.

However the remaining issue to be resolved is whether there is any bar imposed on the Plaintiff in the context of these proceedings by operation of Section 547. Limitation imposed in the first part of section 547 relates to property of a deceased person, which is twenty thousand rupees, or more in value. It's applicability in scope is in relation to the *'actions for the recovery of (such) property'* (emphasis

added). The said provision deals with the *'maintainability'* (emphasis added) of such actions. Restriction imposed on the maintainability of such action is that the need to have the grant of probate or letters of administration have been issued first, or a period of twenty years have lapsed since the death of the initial owner.

The issue that arises therefore is whether the plaintiff, even he is the rightful owner, could he have maintained these proceedings?

It is held that "..section 547 in unmistakable language rendered an action not maintainable without due administration for the recovery of any property included in an intestate estate. In interpreting that section this court laid down that it formed a statutory bar which could not be got over by the mere acquiescence, or even by the express agreement of the parties to any particular litigation" - Wendt J in **Gunaratne v Perera Hamine** 6 NLR 373 at 376.

Plaintiff's position in this regard is that the action in the District Court is not an action 'for the recovery of property'. It is his position that the Plaintiff's case cannot be treated in law as either a *'rei vindicatio'* or an action for declaration of title and therefore the limitation in Section 547 is not applicable. I am not inclined to decide in favour of this assertion of the plaintiff. Examination of the prayers in the plaint and the issues raised by the plaintiff, clearly reflect that the action concerned is to recover the property from the defendant. Infact in **Ponnamma v Arumugam** (8 NLR 223) the Privy Council held that the limitation in Section 547 of the Code of Civil Procedure is applicable to a partition action. In **Kandiah v Karthigesu** 31 NLR 172 even an action to declare that the signature of the deceased in two deeds are

forgeries was considered as ‘action to recover property’ coming within the purview of Section 547. Therefore the proceedings relating to this matter is an action for the recovery of property as coming within the purview of Section 547 of the Civil Procedure Code.

In view of these findings taken together with the admitted facts in the case I hold that the action initiated by the Plaintiff in the District Court comes within the purview of Section 547 of the Civil Procedure Code.

Therefore the substantial question of law upon which leave was granted to this Court should be answered in the negative.

However, in deciding the remedy that can be granted, this court has to consider another issue namely the effect of Section 547 on the proceedings before the District Court.

The Learned trial judge having come to the conclusion that no order can be made declaring the plaintiff as the owner of the property due to non-satisfaction of Section 547 proceeded to dismiss the plaint. It is pertinent to note that the trial judge’s decision to dismiss the plaint is not in accordance with the jurisprudence on this matter.

In **Alagakawandi v Muttumal** 22 NLR 111, recognised “that the words ‘no action shall be maintainable’ did not amount to the same thing as ‘no action shall be instituted’. In **Ponnamma v Arumogam (PC)** it is observed that “whenever it

appears in the course of a case which a Court is trying, that administration is necessary, it becomes the duty of that Court to see that the provisions of Section 547 are complied with before the litigation proceeds any further" (8 NLR 223 at 225). In **Hassen Hadjiar v Levane Marikar** Court acknowledged that the jurisprudence recognised "while section 547 of the Code is imperative it was open to the Court to give the party suing an opportunity of taking out the necessary administration." The court further held that "The primary object of Section 547 is to protect the revenue. That object is obviously secured by the refusal of the Courts to allow an action for the recovery of property liable to administration, but not administered, to proceed until a grant of administration has been obtained. We ought not to place upon section 547 an interpretation which its language does not compel us to adopt, and which, as in the present case, can only serve to support purely technical objections" (15 NLR 275 at 280). In **Jayawickrama v David Silva**, Supreme Court cited with approval the following finding of the trial Court in relation to Section 547 of the Civil Procedure Code - "this section does not say that action cannot be instituted. The action cannot be maintained without obtaining letters of administration. The decree can be entered after such letters of administration have been obtained" (76 NLR 427 at 430).

In relation to the proceedings under consideration, the father of the plaintiff died intestate in the year 1985 and the co-heirs transferred their rights to the plaintiff in the year 1988. Action to recover the property in question was instituted in 1992. Therefore the proper course of action that should have been adopted by the trial judge was to have given an opportunity for the Plaintiff to satisfy the requirements of Section 547.

The learned trial judge in entering the judgment mainly focused only on this issue. The judgment does not reflect any evaluation of the evidence and decisions relating to other issues. It is also pertinent to note that the time limitation recognised under Section 547 namely twenty years had elapsed now. Therefore the limitation under Section 547 is no longer in operation relating to the property in question.

The main issue that had been addressed both by the trial court as well as the appeal court is whether the plaintiff could have maintained these proceedings. However, the Court of Appeal has come to the conclusion that the Plaintiff should have succeeded in the District Court and answered the issues raised by the plaintiff in his favour. Thereafter made order directing the learned District Judge to enter judgement for the Plaintiff as prayed for. However the judgement of the Court of Appeal does not reflect a proper analysis of the evidence relating to other issues. It is also pertinent to note that no submissions were made before this Court on other issues, as the sole issue on which leave was granted had been the applicability of Section 547.

Under these circumstances this court is not in a position to make a determination on the other issues raised before the trial court. We are mindful of the fact that this is a matter where proceedings had been instituted in the District Court in the year 1992. Yet, I am of the view that the only way, justice can be served to both parties is by ordering a re-trial in this matter.

Taking into account all the factors that are enumerated hereinbefore both judgments, namely the Judgment of the Court of Appeal dated 26.08.2014 and the

judgment of the District Court dated 02.10.1998 are set aside and a re-trial is ordered. The District Court is directed to give priority to this matter and conclude proceedings without delay.

Chief Justice

L.T.B. Dehideniya, J
I agree.

Judge of the Supreme Court

S. Thurairaja, PC, J.
I agree.

Judge of the Supreme Court