IN THE SUPREME COURT OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal from a judgment of the Civil Appellate High Court of Kegalle.

PathirennehelageSwarnasiriNimal,
Of Batuwatta, Helamada.(Deceased)

Plaintiff

GangodaMudiyanselageWijewathi
Podimenike of Mahawelegedara,
Batuwatta, Helamada.

Substituted Plaintiff

SC APPEAL No. 178/2013
SC/HCCA/LA 31/ 2013
SP/HCCA/Kegalle/ 856/2011
D. C. Kegalle No. 26682/P

Vs

1. PathirennehelageLeelawathie,
   Of Mahawelegedara,
   Batuwatta, Helamada.
2. VidanarallageGunarathMenike,
   Of Mahawelegedara,
   Batuwatta, Helamada.

Defendants

AND BETWEEN

GangodaMudiyanselageWijewathi
Podimenike of Mahawelegedara,
Batuwatta, Helamada.

SubstitutedPlaintiff Appellant

Vs

1. PathirennehelageLeelawathie,
   Of Mahawelegedara,
   Batuwatta, Helamada.
2. VidanarallageGunarathMenike,
   Of Mahawelegedara,
   Batuwatta, Helamada.

Defendants Respondents

AND NOW BETWEEN

GangodaMudiyanselageWijewathi
Podimenike of Mahawelegedara,
Batuwatta, Helamada.

Substituted Plaintiff Appellant Appellant

Vs

PathirennehelageLeelawathie
Of Mahawelgedera, Batuwatta,
Helamada.

Defendant Respondent Respondent

BEFORE : S. EVA WANASUNDERA PCJ.
UPALY ABEYRATHNE J. &
PRASANNA S. JAYAWARDENA PCJ.

COUNSEL: B. O. P. Jayawardena instructed by Gaithri de Silva for
The Substituted Plaintiff Appellant Appellant.
Dr. Sunil Coorey with A.W.D.S. Rodrigo for the Defendant
Respondent Respondent.

ARGUED ON: 17. 11. 2016.

DECIDED ON: 14. 12. 2016.

S. EVA WANASUNDERA PCJ.

In this Appeal, the questions of law to be decided are as follows:-

1.Have the learned High Court Judges erred in law when they affirmed the Judgment of the learned District Judge dated 19.05.2011?

2.Have the learned High Court Judges erred in law when they failed to give due consideration to the admissions recorded in this case, particularly taking into consideration of the fact that the said admissions were recorded between the only two parties to the case?

3.Have the learned High Court Judges erred in law when they failed to consider that the Respondent while being present at the trial fully endorsed and accepted the Appellant's evidence?

4.Have the learned High Court Judges erred in law when they failed to evaluate the evidence adduced by the Appellant properly, regarding the earlier cases decided on the same pedigree as in the present case?

5.Have the learned High Court Judges erred in law when they came to the conclusion that the Appellant had failed to establish title to the lands in this case?

The facts pertinent to the case are as follows:
P. SwarnasiriNimal was the original Plaintiff. He filed this action seeking to partition the lands described in five schedules to his plaint dated 16.07.1996. He sought to partition the said allotments of land between himself and the 1st Defendant . The 2nd Defendant was holding the life interest of the portions which belonged to the 1st Defendant. The 1st Defendant was the daughter of the 2nd Defendant. The Plaintiff and the 1st and 2nd Defendants were close relations. The pedigree set up by the Plaintiff was common to all the allotments of land in the five schedules. **The claim of the Plaintiff was ½ share of all the lands and he submitted in his Plaint that the other ½ share was to be given to the 1st Defendant.**

The Plaintiff had passed away and the Substituted Plaintiff Appellant (hereinafter referred to as the Plaintiff Appellant) continued with the case to get an order of partition as prayed for in the Plaint. During the proceedings in

the District Court , the **2nd Defendant** also had passed away and no substitution had taken place because she **had only the life interest**. The land sought to be partitioned was to be divided between only the **Plaintiff and the 1stDefendant**

A commission to survey was taken out as a matter of procedure. The said five allotments of land in the schedules to the Plaint were surveyed separately and the Surveyor, A.C.P. Gunasena made five new plans and submitted the same to court with a report common to all the plans. The Plans were bearing numbers as 1007P, 1008P, 1009P, 1010P and 1011P. In the joint Statement of Claim filed by the 1st and 2nd Defendants, it was averred that the land described in the Second Schedule had not been properly depicted in the said Plan number 1011 P and only a portion of the land called " NikathenneKumbura" had been depicted in the said plan.Then, the 1st and 2nd Defendants, at that time had caused the said land to be surveyed and the plan bearing number 720 made by S.S.P. Kulatunga licensed surveyor had been tendered to the District Court.

Thereafter **several persons** who made claims to the said land called NikathenneKumbura described in the 2nd Schedule to the Plaint(which was depicted in the aforementioned Plan No. 1011P), **were added as 3rd to the 25th Defendants.** The said Defendants had **filed different statements of claim with different pedegrees.**

At this juncture, **the Plaintiff Appellant, made an application to withdraw the case in respect of the land called NikathenneKumbura** described in the Second Schedule. Then, the District Court made order allowing the application and accordingly **excluded the said land and permitted the Plaintiff Appellant to proceed with the case against only the 1st Defendant Respondent Respondent** (hereinafter referred to as the **Defendant Respondent**) to partition the land in the 1st , 3rd, 4th and 5th Schedules to the Plaint. As a result of the said withdrawal, all the other Defendants who intervened and filed statements of claim to the land **called NikethenneKumbura were released from the case.**

Thereafter on **09.07.2009**, the Plaintiff Appellant and the Defendant Respondent had informed court that they were **negotiating a settlement** and sought a further date for the same. On the next date of the case, i.e. **on 09.03.2010 again**, the Defendant Respondent had requested for a further date for settlement. The Plaintiff Appellant had agreed for the same and the case got postponed **to 31.05.2010**. The learned District Judge on record on both the

said dates was Hon. Mr. Sapuvida. By the next date the former District Judge had gone on transfer and the matter came up before the next District Judge, Hon. Mr. Morawaka. Finally, on **31.05.2010 both parties agreed to settle the case and on the same day six admissions were recorded.**

Then on the same day, as usual, right after recording the admissions, in the same run, the **Plaintiff Appellant** gave evidence. **Her testimony was uncontested.**She was **not cross examined**. The evidence led through the Plaintiff Appellant on that day was marked and produced as P12. The **admissions** are recorded as follows:

1.Parties agree that the lands proposed to be partitioned are five in number.

2.Parties agree that the said lands are contained in the five Schedules to the Plaint.

3.The said lands are surveyed and shown in Plans Nos. 1007P to 1011P

4.The Parties agree that the land depicted in Plan 1011P was excluded from the corpus to be partitioned.

5.Accordingly**, the pedigree** pertaining to the property as well as the manner in which it should be apportioned is **accepted**.

6.Both parties agree that the **Plaintiff should be granted an undivided ½ share and the Defendant should be granted the other undivided ½ share** thus being given equal shares of the property to be partitioned.

It is mentioned that with permission of court, evidence of the Plaintiff Appellant is being led in the case. The next line in the proceedings state that " Accordingly, **in pursuance of the settlement** ,depending on the evidence of the Plaintiff**, if necessary, the evidence of the Defendant can be called. Firstly, the evidence of the Plaintiff is taken**."

It is obvious that due to the fact that this is a case to partition the property, the evidence of the Plaintiff was led, to impress upon the trial court of the contents of the Plaint and the pedigree and the other factors relevant to **implement the settlement as agreed. It is clear that evidence was called to place facts before court.**

No issues had been raised. No cross examination was done. It seems to me that **the Judge did not want to hear any evidence from the Defendant** and the evidence had not been necessary because it is Court which has recorded that if the evidence of the Plaintiff does not bring forth enough evidence that the Defendant's evidence will be called, according to what was recorded right before the Plaintiff gave evidence.

The case was closed on that day praying that the lands which were the subject matter be divided in equal shares between the Plaintiff and the Defendant.Documents marked were ten in number and marked as Pe1 to Pe 10. Out of these documents, Pe4 ,Pe 8, Pe 10 and Pe 6 were respectively, a decree in DC Case No. 27331P , judgment in DC Case No. 26768P, judgment in DC Case No. 27328P and proceedings in DC Case No. 27328P. **The said cases had been other partition cases between the same two parties with regard to other lands.** Some cases out of those had been filed by the Defendant in this case in hand and others had been filed by the Plaintiff in this case, against each other**. They had been settled accepting the same pedigree as in this case.**

The case in hand, had come up next, in open court on 30.08.2010 before yet another District Judge, Hon. Sahabdeen. The lawyers had informed that the **judgment was due by the former District Judge, Hon. Morawaka** and that the documents also had been already sent to the said Judge. Finally on 19.05.2011, judgment by Hon. Morawaka had been delivered **dismissing the Plaint**. The Judgment is marked as P 21 and produced before this Court.

The said Judgment has analysed the evidence to reach a **conclusion** that the evidence of the Plaintiff Appellant **does not prove the pedigree well enough** and **the Defendant Respondent's entitlement is not proven** by the Plaintiff's evidence set down by the documents and the oral evidence before Court. The **District Court dismissed the Plaint** on that account thus not making any order for partitioning the land in the Schedules to the Plaint.

The Plaintiff Appellant appealed from that Judgment to the Civil Appellate High Court. On 13.12.2012 , the High Court affirmed the judgement of the District Court. The Plaintiff Appellant has now appealed from the High Court Judgement to this Court.

The law on Partition is contained in the Partition Law which was enacted in 1977 by Law No. 21 of 1977. The said Law commenced with effect from 15.12.1977 and thereafter four amendments to the said Law was enacted. The

four Amendments are Acts Nos. 5 of 1981, 6 of 1987, 32 of 1987 and 17 of 1997. The Partition Law provides for the partition and sale **of land held in common.** Whoever who comes before court as the Plaintiff should plead that the land which is held in common be partitioned. Section 2 provides that where any land belongs in common **to two or moreowners**, any one or more of them, may institute an action for partition.

Section 25(1) which deals with the trial of a Partition action reads as follows:

"On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the court **shall examine the title of each party** and shall hear and receive evidence in support thereof and shall try and determine all questions of law an fact arising in that action in regard to the right, share or interest of each party to, of or in the land to which the action relates, and shall consider and decide which of the orders mentioned in Sec. 26 should be made."

According **to Sec. 26 (2)(a) and (g) ,** court can order for a partition of the land and can order any share be unallotted if title and pedegree is not proved . In other words, if the land cannot be partitioned due to the reason that the title has not been proved to a particular portion with evidence to the satisfaction of court, any portion can be left unallotted.

It is trite law that the duty imposed on the judge in a partition case is a sacred one.The burden of seeking and getting evidence before court, in the course of investigation of title to the land sought to be partitioned by parties before Court, prior to deciding what share should go to which party is **more the duty of the judge than the contesting parties**. The authorities proclaim that it is the duty of the trial judge in a partition action to investigate title of the parties before he decides what share should be allocated to which party of the case before him.

In the case of **Cynthia De Alwis Vs. Marjorie De Alwis and two others, 1997, 3 SLR 113**, it was held that, " A District Judge trying a partition action is under a sacred duty to investigate into title on all material that is forthcoming at the commencement of the trial. In the exercise of this sacred duty to investigate title, a trial judge cannot be found fault with for being too careful in his investigation. He has every right even to call for evidence after the parties have closed their cases."

In**Faleel Vs. Argeen and Others 2004 , 1 SLR 48**, it was held that " It is possible for the parties to a partition action to compromise their disputes provided that the Court has investigated the title of each party and satisfied itself as to their respective rights."

In **Sopinona Vs Cornelis and Others 2010 BLR 109,** it was held that " It is necessary to conduct a thorough investigation in a partition action as it is instituted to determine the questions of title and investigation devolves on the Court. In a partition suit which is considered to be proceeding taken for prevention or redress of a wrong, it would be the prime duty of the judge to carefully examine and investigate the actual rights to the land sought to be partitioned."

In the case in hand, there were two parties, namely the Plaintiff Appellant and the Defendant Respondent**. All the provisions with regard to the matter before reaching the trial stage had been complied with**. Parties had accepted and admitted the title to either party for ½ share of each parcel of land in the Schedules to the Plaint. There had not been any other party who came before court to contest the Plaintiff's case, claiming any portion of the lands which are the subject matter of this action. The High Court Judge and the District Court Judge had tried to examine the title of the Plaintiff and the Defendant since it is the onus of the judge to examine the title.

The pedigree of the Plaintiff is drawn out in page 104 of the brief before this Court. It commences with Deed No. 7160 dated 05.09.1990 granted in favour of the original Plaintiff, Swarnasiri Nimal. In the said deed, which is marked as Pe 1 at the trial and also marked for convenience of this Court by the Plaintiff Appellant as P20 in this brief, in the very first sentence in the Schedule to the deed**, it is mentioned that the Vendor had got titlein the year 1939 by Deed No. 5825 dated 18.05.1939 attested by A.I.De S. Abeywickrema, Notary Public.PathirennehelagePunchibanda had got title** to all **the twelve parcels of land** of different names by this Deed and it is also added that he had been possessed of the said land without any interference from others from 1939 up to the date of transfer as mentioned in the Deed No. 7160. By this Deed, the ownership of the Plaintiff to the lands in the Schedules to the Plaint **stands proved.**

The pedigree and the averments in the Plaint dated 16.07.1996 however submit that the lands mentioned in the five Schedules to the Plaint were owned by PathirennehelagePunchi Banda and PathirennehelagePunchiNilame

at one time and an undivided ½ share owned by Punchi Banda was transferred to the Plaintiff SwarnasiriNimal by Deed 7160. Even though the Plaint does not specifically explain as to how the Defendant Respondent (= the 1st Defendant in the District Court) is entitled to the other ½ share, the pedigree shows the 1st Defendant as the owner of ½ share. **The title Deed No. 5825 referred to in Deed 7160 had not been produced** in the evidence before the District Court in this trial but in the judgements of other cases produced in evidence by the Plaintiff in cases Nos. 27331/P, 27338/P, 26768/P and 27369/P which were the **cases between the same parties** and which cases were settled in Court ,**the title Deed No. 5825 had been taken as good evidence as the base of title of ½ share for either party of the cases.**

In all the said judgments the said Deed No. 5825 has been mentioned as the title deed of the Plaintiff Appellant's predecessor in title and the Defendant Respondent's predecessor in title. When analysed, I can see that the Deed No. 5825 had been the source of title of Puchi Banda and PunchiNilame. Even though the said deed is not before us today, it had been taken into account by the Judges who accepted the settlements between the same parties and allowed the partitioning of the other lands in the Schedule to Deed No. 7160 **which are seven more in number. Only five lands** out of the twelve lands described in the Schedule to the said Deed 7160 make up the subject matter of this case in hand before this court.

I understand that the reasoning behind the evidence produced before the District Court by way of judgments in the other cases, is the fact that the **devolution of title contained in Deed No. 5825** proves the ownership of the Plaintiff Appellant and the Defendant Respondent. They both get title from one source. **Punchirala who granted title to Punchi Banda and PunchiNilame , to receive ½ share of all the lands had been done by Deed No. 5825**.

Therefore I am of the opinion that the decision of the parties to this action at the trial to divide the four lands amicably by way of a settlement with ½ sharefor either party should be finalised by allowing the partition as prayed for in that way by the Plaintiff.

Both Courts which has dismissed the Plaint have **failed to understand** the evidence before them. The High Court Judge specifically states in the penultimate paragraph of his judgment as follows: " I have carefully considered the judgments marked Pe 8, Pe 10 and Pe 6. It has clearly convinced my mind that the **Appellant failed to explain** how these judgments are related to the

present action. The facts stated above clearly demonstrate that there is no sufficient evidence to prove how Punchirala's rights devolved on PodiNilame and Punchi Banda. Therefore I am of the view that the learned District Judge has correctly arrived at the conclusion that the mode of devolution of title from Punchirala to Punchi Banda and PunchiNilame is not explained."

I hold that the reasoning given in the High Court judgement is wrong. It is the duty of the trial Judge to examine the title according to Partition Law which both Judges have failed to do. They have failed to understand that by Deed No. 5825 dated 18.05.1939, Punchirala had given 12 parcels of land in equal shares to his sons, PunchiNilame and Punchi Banda. This Deed had been produced in the other partition cases and those cases were settled. The learned District Judges had acted upon the said Deed and allowed partition of seven parcels of land contained in the said Deed in four other cases between the same parties. That deed had been recognized as the source of title of the Plaintiff Appellant and the Defendant Respondent in those cases. The five out of twelve parcels of land remaining unpartitioned were the subject matter of this case. Even though the said Deed 5825 was not produced to Court in this particular case to partition the remaining five parcels of land, Court has to take judicial notice of the judgments passed by the same court which were not appealed from by either party. The Deed before Court in the present case is Deed 7160 which specifically mentions that the Vendor got title by Deed 5825. No Court can ignore the material placed by the Plaintiff with regard to other judgments between the same parties which were before the same Court prior to this case.

The learned High Court Judges erred when they affirmed the judgment of the District Court which failed to call for the evidence of the Defendant, if it was of the opinion that the evidence of the Plaintiff was not sufficient to prove the entitlement of the Defendant, specially so, because right before the evidence of the Plaintiff commenced, the Court had recorded that depending on the Plaintiff's evidence, it will decide whether it should make order for the Defendant to give evidence. After stating so in the record, how could the same judge dismiss the Plaint on the basis that the Plaintiff has failed to prove the share to be given to the Defendant? Both the High Court and the District Court had failed to evaluate the evidence adduced by the Plaintiff properly regarding the earlier cases which were between the same parties on the same pedigree as in the present case. The basis of entitlements was decided on one Deed 5825 by which Punchirala had given the lands to his two sons PunchiNilame and Punchi Banda in equal undivided shares. The Judges have failed to identify this fact which was proven and accepted by both parties.

I answer all the questions of law set down at the beginning of this judgment in the affirmative in favour of the Plaintiff Appellant .

I hold that the High Court Judges have erred in law. I answer the questions of law in the affirmative in favour of the Plaintiff Appellant. I set aside the Judgment of the Civil Appellate High Court dated 13.12.2012 and the Judgment of the District Court dated 19.05.2011. I make order allowing the partitioning of the lands described in the Schedules 1,3,4 and 5 of the Plaint in accordance with the provisions of the Partition Law , on the basis of an undivided half share each to the Appellant and the Respondent from each of the said lands.

Appeal is allowed with costs.

Judge of the Supreme Court

UpalyAbeyrathne J.
I agree.

Judge of the Supreme Court

Prasanna S. Jayawardane PCJ
I agree.

Judge of the Supreme Court.