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

S.C. Appeal No. 111/2014
SC/HCCA/LA/150/2014
SP/HCCA/TAN/LA/06/2013
D.C. Tangalle Case No. 2687/L

Lutz Paproth
Seenimodara
Tangalle.

PLAINTIFF

Vs.

1. Otto Geissler
Seenimodara
Nakulugamuwa.

2. Dirk Bryant Flamer – Caldera
No. 47/17, Ward place,
Colombo 7.

DEFENDANTS

AND BETWEEN

Dirk Bryant Flamer – Caldera
No. 47/17, Ward place,
Colombo 7.

2ND DEFENDANT-PETITIONER

Vs.

Lutz Paproth
Seenimodara
Tangalle.

PLAINTIFF-RESPONDENT

Vs.

1. Otto Geissler
Seenimodara
Nakulugamuwa.

1ST DEFENDANT-RESPONDENT

AND NOW BETWEEN

Dirk Bryant Flamer – Caldera
No. 47/17, Ward place,
Colombo 7.

2ND DEFENDANT-PETITIONER-APPELLANT

Vs.

Lutz Paproth
Seenimodara
Tangalle.

PLAINTIFF-RESPONDENT-RESPONDENT

Otto Geissler
Seenimodara
Nakulugamuwa.

1ST DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: Chandra Ekanayake J.
P. B. Aluwihare P.C., J. &
Anil Gooneratne J.

COUNSEL: S.A. Parathalingam P.C. with Razik Zarook P.C. and
S. Cooray for the 2nd Defendant-Petitioner-Appellant

Krishantha Nissanka instructed by Anoma Munasinghe
For the 1st Defendant-Respondent-Respondent

Panni Subasinghe with Ajith Liyanage instructed by Simon & Associates
For the Plaintiff-Respondent-Respondent

ARGUED ON: 11.05.2015

DECIDED ON: 04.08.2015

GOONERATNE J.

This is a land case and I am very conscious of the fact that a decision favourable to either party necessarily involves some measure of hardship to the other. At the outset I am inclined to observe as above since the action bearing No. 2687/L involves a declaration of title and for a right of way over the land of the 1st Defendant-Respondent-Respondent and 2nd Defendant-Petitioner-Appellant. Whilst the said suit was pending a 3rd party, one L.Y. Priyanthi filed a partition action on or about 02.12.2010 against the 2nd Defendant-Petitioner-Appellant and 1st Defendant-Respondent-Respondent to partition a land called 'Indihena' in extent of 3 Acres: 2 Roods and 23 Perches. Plaintiff-Respondent-Respondent intervened in the above partition action to preserve his right of way which he claimed in the other case (2687/L) may be in anticipation of his right of way getting wiped out after final decree in the partition case.

It would be necessary to ascertain the position in the land case (2687/L) by perusing the pleadings and plans, prior to examining the order made by the learned District Judge and the learned High Court Judge, where both courts

held against the 2nd Defendant-Petitioner-Appellant on the question to lay-by the case (2687/L) until finality is reached in the above mentioned partition case (P4071). The plaint (para 2) in case 2687/L describes the land in dispute as 'Amuhena' in extent of about 3 Acres. It is also inter alia pleaded that (para 4) a road which is 12 feet wide and 300 feet in length, provides a right of way to the land called 'Amuhena' across the lands belonging to the 1st Defendant-Respondent-Respondent which land is called 'Sooriyagahawatte' and that of the 2nd Defendant-Petitioner-Appellant described as 'Indihena'. In para 4 of the plaint it is pleaded that the Plaintiff-Respondent-Respondent had purchased the above right of way by deed No. 151 of 11.03.1981 as shown in plan No. 2599 of 18.02.1981 although Plaintiff-Respondent-Respondent claims to have prescribed to same , as stated in para 5 of the plaint. It is also the case of the Plaintiff-Respondent-Respondent that the two defendants in the case had obstructed his access and caused loss and damage to him, as stated in para 9 of the plaint. Plaintiff-Respondent-Respondent has also sought a commission from court to show his access and the alleged obstruction.

The survey plans supportive of the Plaintiff-Respondent-Respondent are plan Nos 2599 and 1244 of Surveyor Dharmapala and Kodippilli, respectively.

Both plans show the road access from land called 'Amuhena' up to land described as 'Sooriyagahawatta'. Plan No. 1244 seems to show a better picture of the situation of the above lands. The said plan depicts the main road and the right of way as lots A, B, C & D. Lot 'D' is the stretch that runs through land called 'Indihena' which is also described according to the two plans as 'Thalagodalle' which land is occupied by Abanchi Appu. Lot 'C' also runs through 'Indihena' up to the main road. Lot 'B' runs across the main road and enters lot 'A' which is within a land called 'Ihiniyagalawatte'.

The two answers filed in case No. 2687/L on behalf of the two Defendants (1st Defendant-Respondent & 2nd Defendant-Petitioner-Appellant) are identical. Both of them reject the claim by the Plaintiff-Respondent-Respondent for a right of way, and plead that the deeds relied upon by Plaintiff-Respondent-Respondent are forged deeds and move for dismissal of Plaintiff-Respondent-Respondent's action. At the trial 17 issues had been recorded and parties have concentrated and suggested issues to incorporate the gist from each parties' pleadings.

It may not be necessary to re-consider the question of intervention by the Plaintiff-Respondent-Respondent in the partition action and which was

allowed by the learned District Judge to be added as a party Defendant. However learned President's Counsel for the 2nd Defendant-Petitioner-Appellant submitted to this court in his oral and written submissions the very nature of the application to intervene by the Plaintiff-Respondent-Respondent, based on 3 points, emanating from paras 2, 3 & 4 of the Plaintiff-Respondent-Respondents, Petition and affidavit filed in the partition action to intervene as a party Defendant. I note the following:

(1) a right of way has been sought over the corpus of the partition case (Indihena) against the Defendant-Respondent in the partition case.
(2) Plaintiff-Respondent-Respondent is a necessary party to be added as per Section 18 of the Civil Procedure Code.
(3) If Plaintiff-Respondent is not made a party to enable him to preserve the alleged right of way, there is a likelihood of it being wiped out on entering the final decree in the partition case.

Learned President's Counsel for the Appellant drew the attention of this court to certain oral submissions of learned Counsel for Plaintiff-Respondent-Respondent in the application for intervention in the partition case. However the issue that concerns this court where leave to proceed was granted is the question whether the Plaintiff-Respondent-Respondent's case bearing No. 2687/L should be laid by, pending the determination of the partition case. Even though the

learned District Judge before whom both cases were heard i.e the right of way case and the partition case, was not agreeable to lay by case No. 2687/L and that decision being affirmed by the High Court, the following two questions of law need to be considered. This court granted leave to Appeal on 09.07.2014, on the question of law set out in paragraph 16(e) and 16(f) of petition dated 24.03.2014 which reads thus:

16(e) that the Plaintiff-Respondent-Respondent will in the circumstances has to take part in the partition action and prove his claim to alleged right of way over the corpus and that the Plaintiff-Respondent-Respondent's claim for such a right of way will be accepted or rejected only at the conclusion of the said partition action by the entering of the partition decree.

16(f) that in the conclusion of this action pending the partition action will be futile and will not benefit the Plaintiff-Respondent-Respondent as he will have to await the decision in the partition action to establish his claim for a right of way over the Petitioner's and 1st Defendant-Respondent-Respondent's lands which are included in the land sought to be partitioned in the partition action.

What is relevant to note is the position taken up by both, the Plaintiff-Respondent-Respondent and the 1st Defendant-Respondent who opposed the application of the 2nd Defendant-Appellant to lay by the case

pertaining to Plaintiff-Respondent-Respondent's 'right of way', in the lower court, the High Court and before us in the Supreme Court, notwithstanding the fact that Plaintiff-Respondent-Respondent sought to intervene in the partition case and whose application was allowed, for the reason that Plaintiff-Respondent-Respondent need to preserve his position regarding a 'right of way'. Further both defendants inclusive of the Appellant and the 1st Defendant-Respondent, challenged the Plaintiff's right of way case, and even go to the extent of disputing a deed relied upon by the Plaintiff-Respondent-Respondent to be a forgery. We have noted the contents of the written submissions filed before this court and submissions of all learned counsel, who addressed court on the date of hearing.

Learned counsel who opposed the application to lay by the case in question emphasized that there is no provision in the Civil Procedure Code to lay by cases and invited us to consider certain decided cases where courts disapproved the practice to lay-by cases and held that such a practice should ordinarily be avoided vide *Bonser C.J. in Fernando Vs. Curera (1896) 2 NLR 29; Samsudeen V. Eagle Star Insurance Co. Ltd., 64 NLR 372.* I do agree with the submissions of learned counsel for 1st Defendant-Respondent-Respondent and Plaintiff-Respondent-Respondent on this aspect and state that an application to lay by a case should be allowed only in very limited circumstances and court need

to be extra cautious of such an application. However the case in hand is different and need to be distinguished from very many other cases, reported earlier.

The main issue for determination would have to be decided according to the Partition Decree. The alleged road-way extends from the land called 'Amuhena' owned by the Plaintiff-Respondent-Respondent across the land sought to be partitioned (Indihena) and land described as 'Sooriyagahawatte'. Necessarily Plaintiff-Respondent-Respondent has to prove his right of way over the corpus of the land sought to be partitioned. Unless Plaintiff establish the right of way as described above the case filed by the Plaintiff-Respondent-Respondent (2687/L) would not bring good results for the Plaintiff-Respondent-Respondent as a Partition Decree would be final and conclusive.

I would at this stage wish to make certain observations on the two orders pronounced by the learned District Judge and that of the learned High Court Judge as regards the application to lay by the 'right of way' case. (2687/L) I do appreciate that both courts identify the need to ensure early disposal of the 'right of way' case. Learned District Judge accepts and appreciates the finality of the partition decree, but gives way to the question of prejudice being caused to the Plaintiff in the event of dismissal of the partition case. However the legality of the partition decree and its finality has not been considered in detail by the

learned District Judge. If orders are to be made in anticipation, perhaps more prejudice would be caused to all parties in the absence of a valid order by a court of law, being challenged at the correct point of time. Both Judges are correct in observing that the partition case will take a long time to reach finality, but courts should not surmise the outcome of a case and pronounce orders. Plaintiff-Respondent-Respondent no doubt filed case No. 2687/L to fortify his position as regard his right of way. He also made the correct decision to intervene in the partition case as the alleged 'right of way' as shown in the survey plans relied upon by Plaintiff-Respondent-Respondent and submitted to court as indicated that the 'right of way' takes the route or goes over the corpus of the land sought to be partitioned (Indihena). In these circumstances finality of the partition decree takes precedence over and above any other case where a 'right of way' is in issue. Plaintiff-Respondent-Respondent is an added party in the partition case. As such all parties are represented in the partition case.

In Selvadurai Vs. Raja 41 NLR 423 held: "A court has inherent power to lay by a case pending the decision of an action in another court between the same parties in which the matters in dispute are identical. The learned High Court Judge emphasis the prejudice that would be caused to the Plaintiff-Respondent-Respondent in the event the case is laid by. It is also stated that the Plaintiff-

Respondent-Respondent came to court first and the case (2687/L) is at the concluding stages. It is further stated by the learned High Court Judge that no harm could be caused to the Plaintiff in the partition case. It may be so, but more harm and prejudice would be caused to Plaintiff-Respondent-Respondent if he failed to intervene in the partition case to preserve his 'right of way'. Learned High Court Judge further observes that there is no reason to lay by a case merely because a partition case has been filed. Learned High Court Judge no doubt in his order compare and contrast both the 'right of way' case and the partition case, and support the Plaintiff-Respondent and others opposing to lay by the case, the said order does not consider the legality of a partition decree, at least to the bare extent of the District Judge's observations on same. Therefore I will proceed to set aside the orders of the learned district Judge and the order affirming the District Judge's order by the learned High Court Judge.

I will at this stage of the judgment consider the legal position that would be the foremost position in the context and circumstances of the case in hand.

Plaintiff-Respondent-Respondent was not a party to the partition case, but he intervened and the trial Judge added the Plaintiff-Respondent-

Respondent as a party in the partition case. In *Girigoris Vs. Mammadu Meedin 1 Bal. Report 177.*

Pg. 97 of K. D. P. Wickremesinghe – The Law of Partition in Ceylon

> In Girigoris Vs. Mammadu Meedin, Perera J. said that although a person having a right of way cannot be regarded as a co-owner, still he is entitled to claim to be made a party to a partition suit. It was held in this case that a person claiming a right of way over a land is not entitled to institute action to partition the land, but he is entitled to be made a party to the action to establish his servitude over the land.

There is also a reported case which recognized the right to go over the common property to reach the adjoining land. In *Chellan V. Ponnan* *56 NLR 95*……

> Where in the partition of a land owned in common a portion of it is reserved as common property for use as a lane, a co-owner is entitled to use the lane in order to reach an adjoining land which belongs solely to him if by doing so he does not interfere with the substantial rights of the other co-owner.

On the question of an express grant or reservations in *Rodrigo V. Narayanasamy* *56 NLR 402* ……

> When land which is owned in common has been amicably partitioned, a former co-owner is not, as a general rule, entitled to claim a right of way over a portion allotted to another co-owner unless it has been expressly granted or reserved in the cross-conveyances executed by the co-owners, even though a well-defined footpath had existed prior to the severance of the common property.

I have also in process examined the law on the subject i.e via Vicinalis and via publics which necessarily has to be considered and the Plaintiff-Respondent-Respondent need to be mindful of same. In *Amarasinghe Vs. Wanigasuriya 1994(2) SLR at pg. 207/208…* In the book titled 'Servitudes' by *Hall & Kellaway 2nd Ed pg. 43.*

> "The courts have repeatedly laid down that there are two kinds of public roads, via publica and via vicinalis …. A via publica is a road which has been proclaimed as a public road by an authority empowered by statute to do so, while a via vicinalis is a right of way which the public becomes entitled to use through immemorial user … Two other methods of creating public rights of way exist viz. by reserving them in Crown grants of land and through the owner of the land dedicating a road which crosses his property to public use".

The authors have further explained the acquisition of via vicinalis as follows

> "These roads were originally roads used by a number of neighbours jointly and known in Holland as 'buyrwegen' (Grotius, 2.35.10; van Leeuwen 2.21.9; Voet, 43.7.1). In Peacock v. Hodges, de Villiers, C.J. said that they are either roads in a village or roads leading to a town or village, but close connection with an urban area does not seem to have been

> required in earlier times. Use from the time immemorial without interference from the owner of the land over which they run is an essential factor… Upon proof of user for thirty years and upwards the court is justified in holding that a state of things had existed from time immemorial if no evidence is adduced to show when it originated."

In the above case (Amarasinghe Vs. Wanigasuriya), although it is a Judgment of the Court of Appeal, the law remains unaltered and stands firm since it relates to the scheme of partition which was confirmed by the District Judge but the Appellate Court held it was a fundamental error which considered a matter in dispute which related to a road, as depicted along the North Western boundary of the corpus in the final plan. Petitioners were not parties to the above action as they had no interest in the corpus, but the Petitioner claimed the road to be a private 'road' serving the Petitioners who own the land to the west of the corpus to be exclusion of the co-owners of the corpus.

They submitted that their rights are affected by the scheme of partition as contained in the final plan wherein the Surveyor has partitioned the corpus using the said 'private road' as the only means of access to the lots 2, 3, 4 and 5 of the corpus.

> The order confirming the scheme of partition and the final decree that has been entered, have the effect of creating a servitude of way in favour of the parties to the partition action over the 'private road' which is outside the corpus, without the

petitioners being heard on this matter. On this basis, they moved that the final decree be set aside and suitable direction given by this Court to the District Court to safeguard the interests of the petitioners in relation to the 'private road' to which they are exclusively entitled.

S. N. Silva J. held that:-

1. in the process of partitioning, proper rights of way should be provided from within the corpus as access to a public right of way.
2. the road claimed by the petitioners was not a *via vicinalis*. There was no proof of immemorial use of the disputed roadway or prescription.
3. there was fundamental error in confirming the scheme of partition without affording the petitioners an opportunity to object to it.
4. a glaring blemish which taints the proceedings in a partition action and results in a miscarriage of justice to a person not being a party to the action may appropriately be remedied by an application in revision."

The above would be an instance which the final decree was set aside for good reasons, and recognize the use of a right of way.

In the context of the case in hand I wish to refer to the following authorities which demonstrate finality aspect of a partition decree and instances where a court is not bound to accept a final decree in very limited circumstances.

Partition Decree does not bind the Crown where the Crown has not been a party to the action 2 N.L.R. 369; 3 Law Rec. 174; 1 Law Rec. 163; 23 N.L.R. 150. A partition decree creates a title which is good and conclusive for all purposes. It eliminates the title of a

previous and true owner who is not a party to the proceedings but allows him an action for damages against the person by whose tortuous act this was caused. 30 N.L.R at 18; 1 C.W.R. at 85. It is conclusive even as against a person owning an interest in the land partitioned whose title has by fraudulent contrivance been concealed from the Court. 8 Law Rec. at 141; 9 S.C.C. 198; 4 Law Rec. at 51. It binds even minors. 9 N.L.R 241 F.B. It extinguishes all easements not especially provided for in the decree whether such easements be claimed as between co-owners or by the owners of neighbouring lands over the land partitioned. 26 N.L.R 374; 6 Law Rec. 54; 2 Times 232. A partition decree entered without investigation into title but by mere consent of parties does not, however, have a conclusive effect as a decree under the Ordinance. 20 N.L.R 27. Where a decree under the Ordinance is pleaded as a basis of title it is open to the party against whom it is pleaded to show that it is not a decree "given as hereinbefore provided' and so has not the conclusive effect given to decree under section 9. 6 Law Rec. 87. A Court cannot vary a final decree even with the consent of parties, 2 C.L.W 252; 1 C.L.W 370, or where the procedure has been irregular. 2 C.L.W. 267. The proposition that a District Court does not have the right to set aside an order of dismissal made by it is not only good law but necessary for the proper working of partition actions. 34 N.L.R at 441. A partition decree does not of itself interrupt the running of prescription in favour of a person claiming title. 5 Law Rec, 191.

I have also noted the following case law as regards finality and good title in a partition decree.

In *Bernard Vs. Fernando (16 N.L.R. 438)* Supreme Court held that the partition decrees are conclusive by their own inherent virtue and do not depend for their final validity upon everything which the parties may or may not afterwards do. They are not like other decrees affecting land, merely declaratory

of the existing rights of the parties inter se: they create a new title in the parties absolutely good against all other persons whomsoever.

In the case of *Abdul Caffoor Vs. Pattumuttu (17 N.L.R. 173)* 'A' being allotted a certain portion of land in a decree in a partition suit, conveyed that portion to 'B' and the decree is subsequently varied and 'A' was allotted another portion in lieu of the portion conveyed by him. Thereafter the plaintiff brought this action to have the relevant deed rectified. The Supreme Court held that the plaintiff cannot maintain this action for rectification of the deed of conveyance.

Fernanod Vs. Marsal Appu (23 N.L.R. 370) was an action for declaration of title the defendants claimed under a partition decree. The plaintiff impeached it on the ground that it was obtained by fraud and collusion. In the Supreme Court Ennis J. held that, under section 9 of the Partition Ordinance the plaintiff was bound by the decree.

It was further held as follows:

"I have not considered it necessary to go into the question as to whether in exceptional circumstances, where the property is still in the sole possession of the parties whose fraud is set up the Court could not on proof of fraud take away the property from them."

In *Umma Sheefa Vs. Colombo Municipal Council (36 N.L.R. 38) Garvin J.* held that the conclusive character of a judgment entered in accordance with the provisions of the Partition Ordinance is sufficient to wipe out the effect of the

vesting order made under section 146 of the Municipal Councils Ordinance No. 6 of 1910.

The investigation into title which is an essential requirement compliance with which is one of the conditions upon which a decree in a partition case is accorded the effect of a judgment *in rem* is an investigation made by Court with the object of determining whether the title of the parties claiming to be owners of the land has been strictly proved.

Where in a partition case there were admissions and agreements in respect of the rights of parties *inter se* but no evidence that they or any of them were entitled to the premises or to any share thereof at the dates material the action. There was no proper investigation into title which would give the decree entered thereafter the conclusive effect given to it by section 9 of the Partition Ordinance.

In *Muthumenika Vs. Appuhamy (50 N.L.R. 162)* Supreme Court held that failure to notice a party disclosed in the surveyor's report does into destroy the conclusive effect of a final decree in a partition action.

It is the duty of the plaintiff to see that the necessary parties are before the court. Where therefore, the plaintiff knew that there was an intervenient disclosed in the Surveyor's report, his failure to make such intervenient a party amounts to such a breach of duty as would given rise to a claim for damages under section 9 of the Partition Ordinance.

In the case of *Dharmadasa Vs. Meraya (50 N.L.R. 197)* Supreme Court held that the partition action proceeds on oral as well as documentary evidence and the failure to notice the reservation of a life interest in a deed is an

accidental slip or omission which gives the Court jurisdiction to amend the decree under section 189 of the Civil Procedure Code. Where a decree is so amended with notice to the parties it is *res judicata* and cannot be attacked in a collateral action.

Hendrick Vs. Podinona (57 N.L.R. 494) was a partition action where the appellant, who was not mentioned as a defendant in the plaint, was ordered by Court to be made a party. His name thereafter appeared as one of the defendants and he took part in the proceedings between interlocutory decree and final decree. He admitted that the share allotted to him in the interlocutory decree was correct.

In *Mohamedaly Adamjee Vs. Hadad Sadeen (58 N.L.R. 217)* the Privy Council held that a decree entered under section 8 or section 9 of Partition Ordinance No. 10 of 1863 is conclusive against all persons whomsoever, and a person owning an interest in the land partitioned whose title even by fraudulent collusion between the parties had been concealed from the Court in the partition proceedings is not entitled on that ground to have the decree set aside, his only remedy being an action for damages (even though the property is still in the sole possession of the parties whose fraud is set up.)

Although a partition decree entered without any investigation of title does not have the conclusive effect provided by section 9 of the Partition Ordinance, a decree entered after a defective or inadequate investigation of title is conclusive,

as long as it has not been set aside on an appeal in the same action. Once it appears that the Court did hold an investigation into title, although the investigation was not sufficiently exhaustive to prevent the fraud which was perpetrated by the parties in regard to the title of a person who had not been made a party to the action, any defect in the method of investigation would not vitiate the decree. The person so defrauded is not entitled to seek by separate action to set aside the decree or in a separate action to challenge its conclusive effect. The fact that the lack of proper investigation of title may be sufficient for the Appeal Court acting in the same case to set aside a decree does not detract from the conclusive effect of section 9 of the Partition Ordinance when the decree is being considered in a separate case.

In the circumstances of this case it is observed that a partition decree cannot be the subject of any kind of private arrangement, between parties. Even if the partition case is time consuming finality and conclusiveness of the decree had been recognized by statute and case law. Plaintiff-Respondent-Respondent intervened in the partition suit for good reasons and more particularly to preserve his access through the land sought to be partitioned. In law and in cases filed before our courts parties keep options open to get the best deal for themselves. In the process delays may be inevitable, merely because a party filed a case first and others came in late would not be a ground to refuse applications, to lay-by cases, more particularly as a partition decree is conclusive and final. In these

circumstances and in the context of this case, this court is inclined to allow the application of 2nd Defendant-Respondent-Appellant. As such I answer the two questions of law in favour of the 2nd Defendant-Respondent-Appellant and in the affirmative, directing the trial Judge to lay-by case No. L/2687 until finality is reached in the partition case, as per sub para (d) of the prayer to the petition of the 2nd Defendant-Petitioner-Petitioner.

Appeal allowed. No costs.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake J.

I agree.

JUDGE OF THE SUPREME COURT

P.B. Aluwihare P.C., J.

I agree.

JUDGE OF THE SUPREME COURT