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

In the matter of an application for leave to Appeal against the Judgment of the Provincial High Court of Western Province dated 18/03/2014 in Case No. WP/HCCA/GPH 162/2009(F) D.C. Gampaha Case No.37362/P.

In the District Court of Gampaha

Hewayalage Margaret,
Thalgasmote,
Veyangoda. **(Deceased)**

Plaintiff

Weerakkody Samaradivakarage
Hemachandra Manel Indika
No.6/58, Court Road,
Gampaha.

Substituted – Plaintiff

S.C. Appeal No.115/2015
SC Application No.SC/HCCA/LA No. .200/2014
WP/HCCA/Gampaha Case No. WP/HCCA/GPH/162/2009F
D.C. Gampaha Case No. 37362/P.

Vs.

1. Manikpura Dewage Soma,
"Claristan",
Helen Mawatha,
Wennappuwa.

2. Manikpura Dewage Sapin,
Thalgasmote,
Veyangoda. **(Deceased)**

2A. Manikpura Dewage Soma,
"Claristan",
Helen Mawatha,
Wennappuwa.

3. Manikpura Dewage Cyril
Piyaratne,
No.255,
Thalgasmote,
Veyangoda.

Defendants

And Between in the Provincial High Court of Western Province

Manikpura Dewage Cyril
Piyaratne,
No.255,
Thalgasmote,
Veyangoda.
3rd Defendant-Appellant

Vs.

Weerakkody
Samaradivakarage
Hemachandra Manel Indika
No.6/58, Court Road,
Gampaha.
Substituted – Plaintiff-Respondent

1. Manikpura Dewage Soma,
"Claristan",
Helen Mawatha,

Wennappuwa.,
Presently at 'Shrinath',
Sandalankawa,
Sandalankawa.

2A. Manikpura Dewage Soma,
"Claristan",
Helen Mawatha,
Wennappuwa;
Presently at 'Shrinath',
Sandalankawa,
Sandalankawa.

1st and 2A Defendant-Respondents

And Now Between in the Supreme Court

Manikpura Dewage Cyril Piyaratne,
No.255,
Thalgasmote,
Veyangoda.

3rd Defendant-Appellant-Petitioner

Vs.

Weerakkody Samaradivakarage Hemachandra Manel Indika
No.6/58, Court Road,
Gampaha.

Substituted – Plaintiff-Respondent-Respondent

1. Manikpura Dewage Soma,
"Claristan",
Helen Mawatha,
Wennappuwa.
Presently at 'Shrinath',
Sandalankawa,
Sandalankawa,

2A. Manikpura Dewage Soma,
"Claristan",
Helen Mawatha,
Wennappuwa.
Presently at 'Shrinath',
Sandalankawa,
Sandalankawa,
1st and 2A Defendant-Respondent- Respondents

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BEFORE : L.T.B. DEHIDENIYA, J.
P. PADMAN SURASENA, J.
ACHALA WENGAPPULI, J.

COUNSEL : Ms. Sudarshani Coorey for the 3rd Defendant- Appellant-Appellant
M.C.Jayaratne with H.A. Nishani H. Hettiarachchi instructed by M.D.J. Bandara for the 1st and 2A Defendant-Respondent-Respondents.

ARGUED ON : 03rd May, 2021

DECIDED ON : 05th November, 2021

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ACHALA WENGAPPULI, J.

The Plaintiff-Respondent-Respondent (later referred to as the Substituted Plaintiff- Respondent-Respondent and hereinafter referred to as the Plaintiff) instituted the instant action, under Section 2(1) of the Partition Law No. 21 of 1977, before the District Court of Gampaha on 11.05.1994, primarily seeking to partition a commonly held land called *Batadenikele* alias *Baddehikele*, which is in an extent of two Roods and 8.53

Perches and morefully described in the schedule to her plaint, according to the pedigree set out therein. Having claimed a ½ share entitlement of the corpus on a deed of gift, the Plaintiff had also conceded to the entitlement of the 1st Defendant-Respondent-Respondent (hereinafter referred to as the 1st Defendant), to the remaining ½ share of the corpus. Both the Plaintiff and the 1st Defendant relied on two deeds of gift, in proof of their respective entitlement. These two deeds of gift, Nos. 9854 of 18.09.92 and 7194 of 25.01.1993 were executed by the 2nd Defendant-Respondent-Respondent (later substituted by 2A Defendant-Respondent-Respondent and hereinafter referred to as the "2nd Defendant") and attested by Notary Public *Pathiratne*. The 3rd Defendant Appellant-Appellant (hereinafter referred to as the "3rd Defendant") was added to the said partition action on 29.11.1995, as a disclosed party, upon him making a claim before the surveyor as to the improvements effected to the dwelling house, during the preliminary survey of the corpus.

It is admitted by the parties that the 2nd Defendant is the original owner of the corpus, who had received his title upon a final decree of the partition case No. 18122/P, dated 12.05.1981. The 2nd Defendant had gifted a ½ share of the corpus to his 2nd wife, the Plaintiff and the balance ½ share to his eldest daughter, the 1st Defendant. The 3rd Defendant, who was in possession of the house standing on the corpus, is the only son of the 2nd Defendant.

In his statement of claim, the 3rd Defendant sought dismissal of partition action or, in the alternative, sought compensation for *bona fide* improvements made to the land as well as to the house, quantified at Rs. 950,000.00 and a declaration of Court to his entitlement to *Jus Retentionis*.

The District Court, having accepted that the 3rd Defendant is only entitled to compensation for improvements made to his paternal house by making additions to the existing building, further held that since he failed to prove the stated amount of compensation and owing to their very reason had desisted itself in awarding any compensation. The Court also held that he is not entitled to *Jus Retentionis* as well. The trial Court had thereupon decreed that the corpus be partitioned, with each of the half share, allocated to Plaintiff and the 1st Defendant.

Being aggrieved by the said judgment of the trial Court for its failure to award any compensation, the 3rd Defendant preferred an appeal to the High Court of Civil Appeal, which had allowed his appeal and awarded him Rs. 300,000.00 for *bona fide* improvements, instead of Rs. 850,000.00 which he sought. He then preferred the instant appeal to this Court, challenging the judgment of the High Court of Civil Appeal, on the basis that it had awarded a lesser sum as compensation for the *bona fide* improvements than the amount and thereupon seeking an enhancement of the amount of compensation awarded to him by the said appellate Court.

This Court, having afforded a hearing to the contesting parties on 30.06.2015, thought it fit to grant leave to the following questions of law, that had been formulated by the 3rd Defendant in sub paragraphs I, II and III of the paragraph 14 of his Petition, dated 28.04.2015.

I. Did the learned High Court err when deciding that in the District Court a full trial was conducted, whereas on the 1st date of evidence of the 3rd Defendant-Appellant-Petitioner, a further date had been refused?

II. Did the learned High Court err in failing to assess the evidence adduced by the parties, where all parties admitted that the 3rd Defendant-Appellant-Petitioner was a *bona fide* improver?

III. Did the learned High Court err in failing to assess the evidence adduced by the parties, whereas the actual amount of compensation should be at least Rs. 800,000/- for the fully completed house?

Learned Counsel for the 3rd Defendant, in her submissions before this Court in support of the appeal, contended that since it was absolutely essential for him to establish the value of the improvements and developments he has carried out to the house, at the conclusion of his evidence before the trial Court, made an application seeking an adjournment to call another witness, in order to discharge that burden. Calling of this witness was necessitated due to an objection raised by the Plaintiff, that the documents relied on by the 3rd Defendant, are only to be admitted in evidence 'subject to proof'.

The said application for adjournment was refused by the trial Court and the 3rd Defendant therefore contends before this Court that, in view of the provisions of Section 25(1) and Section 76(1) to (3) of the Partition Law, although a wide discretion was conferred on the trial Court to allow such an application for an adjournment, it did not exercise its discretion reasonably in this particular instance, resulting in an adverse impact on his claim.

Learned Counsel for the 1st and 2A Defendants, in seeking to counter the submissions of the 3rd Defendant that the final decree of the

partition action, on which the original owner (2nd Defendant) was allocated a share, was pronounced only on 10.03.1981 and therefore, the 3rd Defendant cannot claim any compensation for improvements that claims to have been effected prior to 1981. They further contend that, although the 3rd Defendant claimed "*at least Rs. 800,000.00 for the fully completed house*" in his petition seeking leave from this Court, his amended statement of claim to the trial Court, he limited the amount only to Rs. 350,000.00.

Thus, the issue of whether the trial Court's order of refusal to grant the 3rd Defendant an adjournment, depriving him an opportunity to call witness/witnesses on his behalf, was made erroneously, will have to be considered at the outset, in view of the scope of the 1st question of law.

In refusing the application of the 3rd Defendant for an adjournment, the trial Court noted that the instant action being a partition action, its trial had taken over 8 years to reach that stage of the proceedings. It also noted that the 3rd Defendant, in presenting his case, had failed to take any steps at all to call his witnesses, and not even made an attempt at least by moving for summons on them, in spite of having had the full knowledge of the requirement to prove the documents that he himself had tendered to Court during his evidence, as they were marked 'subject to proof'.

The legal question presented before this Court therefore revolves around the question whether the refusal to grant an adjournment is an erroneously made order or not. In support of his contention that it is an order erroneously made, the 3rd Defendant relied on the provisions

contained in Section 76 of the Partition Law, which deals with adjournments.

Provisions of subsection 76(3) deals with trials as it states that "*the Court may, for sufficient cause, either on the application of the parties or of its own motion, advance or postpone the trial to any other day, upon such terms as to costs or otherwise as to it shall seem proper.*" Once a partition action had been fixed for trial, there must be a 'sufficient cause' for the trial Court, for it to make an order to advance or to postpone an already fixed trial date.

The proceedings relating to the application of the 3rd Respondent, in seeking an adjournment for further trial, indicate that he made an application seeking permission of the trial Court to call the witnesses, who have already been listed by him, in relation to the documents marked V13, V14 and V15. He had thus made an application for adjournment to Court.

Perusal of the appeal brief reveals that the instant partition action had been instituted on 11.05.1994 and the trial Commenced on 28.02.2001 with the acceptance of the points of contest, by the trial Court. The Plaintiff had closed her case on 01.06.2007 and the Defendant's case commenced on 01.08.2007 with the 1st Defendant giving evidence. She called a witness on her behalf. That witness concluded his evidence on 08.12.2008. The trial adjourned to 11.05.2009 for further trial of Defendant's case and the 3rd Defendant had commenced his evidence. He was cross examined and re-examined on the same day and then only the application for adjournment was made. With the refusal of the application for an adjournment, the 3rd Defendant had decided to close his case with the available evidence. At that stage, the Plaintiff again

moved trial Court to reject the documents, relied on and marked by the 3rd Defendant as V1, V2, V13, V14, V15 and V16, on the basis they were not proved.

The documents V1, V2, V13, V14, V15 and V16, included the two documents issued by the relevant bank branches, indicating that the 3rd Defendant had obtained loans to carry out repair work on a dwelling house. The remaining documents concern purchases of hardware items. It is also evident that the 3rd Defendant had, despite the objection, tendered these documents along with his written submissions and the trial Court too had considered the contents of those documents, in holding that he did in fact carry out renovation work to his father's house. Thus, his interests were not prejudiced at all, merely because the trial Court had not allowed an adjournment to call a witness.

In the list of witnesses filed by the 3rd Defendant he had cited 14 witnesses including himself. The 1st Defendant, who presented her evidence before Court had cited only four witnesses and called only one of them. When the trial was adjourned to 11.05.2009, the 1st Defendant and her witness had already concluded their evidence and it was for the 3rd Defendant to place his evidence on that day. When the 3rd Defendant sought to mark documents through the witness for the 1st Defendant, it was objected to and marked subject to proof. On 11.05.2009, the 3rd Defendant gave evidence and concluded his evidence. Clearly, he had not taken any steps to secure attendance of any of his witnesses on that date, although he knew very well that it was for him to prove the documents, that were marked subject to proof, by calling relevant witnesses on that day, to which step he had more than sufficient time to take.

The trial Court, after rejecting the 3rd Defendant's application to permit to call witnesses, had decided to proceed with the case. The 3rd Defendant thereafter closed his case on that day.

The judgment of the High Court of Civil Appeal clearly indicates the several grounds of appeal that had been urged before it by the 3rd Defendant at the hearing of his appeal. The ground of appeal under "F", contained in the impugned judgment of the High Court of Civil Appeal, had been raised only on the premise that the trial Court had erred, in its failure to award compensation for *bona fide* improvements to the house. The appellate Court had referred to the submissions of the 3rd Defendant, in which he submitted that if afforded an opportunity he could have proved these documents. None of these factors indicate that the 3rd Defendant ever did challenge the said refusal of an adjournment.

In these circumstances, I am not convinced that the order of the trial Court had been made erroneously since there was no sufficient cause for it to exercise its discretion conferred on it by section 76(3) of the Partition Law, in favour of the 3rd Defendant in granting the adjournment. No interlocutory appeal was taken by the 3rd Defendant against the said refusal to grant an adjournment and strangely, in prosecuting the final appeal preferred against the judgement of the trial Court to the High Court of Civil Appeal, the 3rd Defendant had failed to raise a ground of appeal on this particular order.

I propose to deal with the remaining questions of law formulated by learned Counsel in relation to the award made by the High Court of Civil Appeal on the entitlement of the 3rd Defendant on the question of compensation for *bona fide* improvements at this stage.

The question of law whether the High Court of Civil Appeal "err in failing to assess the evidence adduced by the parties where all parties admitted that the 3rd Defendant-Appellant-Petitioner was a *bona fide* improver", had been formulated, apparently on the presumption of fact that the status of the 3rd Defendant as a *bona fide* improver had not been disputed by the parties and therefore admitted by the parties. The question then proceeds to the remaining segment where it raises the issue whether the appellate Court had fallen into error in assessing the evidence led by the parties on his entitlement, when he in fact a *bona fide* improver.

There is no such admission that was marked before the trial Court at the commencement of the trial nor was there any admission by the Plaintiff or by the 1st Defendant that the 3rd Defendant is a *bona fide* improver. On the contrary none of the opposing parties even accept that he made any improvement to the house built by their father, the 2nd Defendant. When they were cross examined by the 3rd Defendant, it was suggested to them that he did carry out renovations to the house. But the Plaintiff, the 1st Defendant and her witness have strenuously denied any contribution by the 3rd Defendant in that respect. The parties, although disputed as to who made the improvements, only agree that there were certain renovations carried out to their father's house, in and around 1984.

During the trial, the 3rd Defendant conceded to the share entitlement of both the Plaintiff and the 1st Defendant and proceeded only with his claim for compensation. It was his evidence that he was promised ownership of the family house by his late father, the 2nd Defendant and therefore in that belief he had made improvements to it periodically by renovating the old paternal house and by planting many

trees by spending Rs. 850,000.00, commencing from about 1974. He described the extent of the improvements he had effected by stating that he made the existing wattle and daub house, belonged to his father, a brick walled one with walls plastered in cement. He also had added on a verandah, a kitchen and a toilet. He had relied on documentary proof in support of loans obtained to carry out these improvements and receipts issued by a hardware store.

The trial Court had correctly arrived at the conclusion in favour of the 3rd Defendant that he had in fact made certain improvements to his father's house and therefore is entitled to compensation on that account. This conclusion was reached on the basis that the house 'D' as shown in the preliminary plan 'X' had been altered by adding new constructions to it and the trial Court noted that the 3rd Defendant's entitlement to compensation limits to those new additions. In appeal, the High Court of Civil Appeal too has held in favour of the 3rd Defendant by holding that the evidence clearly points to the fact that it was he who made the new constructions. However, the High Court of Civil Appeal, in determining the quantum of compensation that should be awarded to the 3rd Defendant, stated that the evidence does not support his claim that Rs. 850,000.00 was spent on those additions to the house and therefore limited its award to Rs. 300,000.00.

The High Court of Civil Appeal, in determining the amount to be awarded as compensation for improvements to the 3rd Defendant, considered the contents of the documents marked V15 and V16, that had been issued by the respective banks, in confirmation of the loans taken by him in relation to construction work on home improvement. The appellate Court, having accepted the two documents on the footing there was no challenge mounted by opposing parties as to its

genuineness, had considered them in favour of the 3rd Defendant. Thereafter, the Court had proceeded to award Rs. 300,000.00 as compensation to the 3rd Defendant, based on the "*evidence and circumstances*" that were available before it, despite of his demand of Rs. 850,000.00. The answer given by the trial Court to issue No. 10 was accordingly amended by the High Court of Civil Appeal to reflect its reasoning in favour of the 3rd Defendant and conclusion it had reached on the point.

It was submitted by the learned Counsel at the hearing that the main point of argument is the quantum of compensation awarded by the High Court of Civil Appeal, to which he seeks enhancement.

In a partition action, a party claiming compensation for *bona fide* improvements, the applicable principle of law has stated by Pereira J, in ***Perera v Pelmadulla Rubber & Tea Company et al*** (1913) 16 NLR 306 as follows:

> *"In the case of a bona fide possessor, what he is entitled to receive as the value of improvements effected by him is the amount by which the value of the whole property on which the improvements have been effected has been enhanced by reason of the improvements, or the actual expenditure incurred in effecting the improvements, whichever is less."*

When the surveyor visited the corpus, in making the preliminary plan, the 3rd Defendant claimed that he had lived in the house since his birth and made improvement to it commencing from 1970 until 1991 with his own funding but did not quantify it. The assertion of the 3rd Defendant that he made improvements since 1970 was effectively

refuted by his opponents when he admitted the fact that he was employed only in 1975. This resultant situation leaves with weak evidence as to the value of the improvements that are attributed to the 3rd Defendant who thereby left the Courts with insufficient evidence to decide on the quantum of his claim.

The documents that the 3rd Defendant referred to in his submissions as the items of evidence he was 'deprived' of an opportunity to 'prove' (V1, V2, V13, V14, V15 and V 16) would only add up to Rs.43,019.15, which the High Court of Civil Appeal in fact did consider in his favour in determining the amount at Rs. 300,000.00. As the learned Counsel for the 1st Defendant contends, these were the only documents that the 3rd Defendant relied on to prove his claim of compensation, in order to establish the varying amounts, which he cited from time to time. In the amended statement of claim the compensation was quantified by the 3rd Defendant at Rs. 850,000.00 but did not put that position to the Plaintiff. During cross examination of the 1st Defendant, it was suggested to her that he spent Rs. 500,000.00 to construct the 'new' house, which she denied. He then suggested he made improvements to the value of 350,000.00 to that house. That suggestion too was denied by the 1st Defendant. In cross examining the witness called by the 1st Plaintiff, it was suggested that he had spent Rs. 350,000.00 to add a room, a storeroom and a kitchen to the house. Strangely, the 3rd Defendant did not mention any specific amount as compensation for improvements and offered an explanation to his inability to produce any documentary proof of expenditure on the improvements and renovations that were made to the house on the basis that he had accepted his father's oral promise that he would have the ownership of the house and, having acted on that verbal assurance, he

did not keep a record of the expenditure made on improvements. In advancing yet another position before this Court, the 3rd Defendant relied on the third question of law based on his perceived entitlement to Rs. 800,000.00 as compensation for the 'fully completed' house.

I have carefully considered the quantum of compensation awarded by the High Court of Civil Appeal, in the light of the available evidence that had been placed before the trial Court by the parties to the instant partition action, and find that there is no error on the part of the appellate Court made either on evidence or on the law, in determining the quantum of entitlement.

The District Court as well as the High Court of Civil Appeal had considered the available evidence on the entitlement of compensation for *bona fide* improvements to the 3rd Defendant. The High Court of Civil Appeal had corrected the judgment of the original Court, when it had quantified the entitlement of the 3rd Defendant to compensation for improvements at Rs. 300,000.00. It is clear from the evidence that the 3rd Defendant had opted for the mode in which he is expected to prove "*the actual expenditure incurred effecting the improvements*" rather than proving "*the amount by which the value of the whole property on which the improvements have been effected has been enhanced by reason of the improvements*." The 3rd Defendant had however failed to establish his proclaimed entitlement to compensation of Rs. 800,000.00, since "*the actual expenditure incurred effecting the improvements*" only points to the sum awarded by the High Court of Civil Appeal and therefore his entitlement is limited to Rs. 300,000.00.

In view of the forgoing, I proceed to answer all three questions of law against the 3rd Defendant and in the negative. Since all questions

were answered in the negative, I accordingly affirm the judgment of the High Court of Civil Appeal and dismiss the appeal of the 3rd Defendant with costs.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, J.

I agree.

JUDGE OF THE SUPREME COURT