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

Thiththalapitige Tilakaratne,
Rukgahawila, Walpola.
Plaintiff

SC APPEAL NO: SC/APPEAL/125/2016
SC LA NO: SC/HC/CALA/290/2015
HCCA GAMPAHA NO: WP/HCCA/GPH/69/2009/F
DC GAMPAHA NO: 39762/P

Vs.

1. Thiththalapitige Chandrawathi Perera, (Deceased)
2. Thiththalapitige Wilbert Perera,
3. Thiththalapitige Ruban Perera,

All of
Rukgahawila, Walpola.
Defendants

AND BETWEEN

1. Thiththalapitige Tilakaratne,
Rukgahawila, Walpola.
Plaintiff-Appellant

Vs.

1. Thiththalapitige Chandrawathi Perera, (Deceased)
2. Thiththalapitige Wilbert Perera,
3. Thiththalapitige Ruban Perera,

All of
Rukgahawila, Walpola.
Defendant-Respondents

AND NOW BETWEEN

3. Thiththalapitige Ruban Perera, (Deceased)

3A. Thiththalapitige Vipula Namal Priyadharshana Perera,
All of
Rukgahawila, Walpola.
3rd Defendant-Respondent-Appellant

Vs.

1. Thiththalapitige Tilakaratne,
Rukgahawila, Walpola.
Plaintiff-Appellant-Respondent
2. Thiththalapitige Wilbert Perera
Rukgahawila,
Walpola.
2nd Defendant-Respondent-Respondent

Before: Sisira J. De Abrew, J.
S. Thurairaja, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Amarasiri Panditharatne with Gaithri De Silva for the substituted 3rd Defendant-Respondent-Appellant.
Dr. Sunil F.A. Coorey with Sudarshani Coorey for the Plaintiff-Appellant-Respondent.

Argued on : 03.05.2021

Written submissions:

by the 3rd Defendant-Respondent-Appellant on 29.07.2016.

by the Plaintiff-Appellant-Respondent on 09.04.2021.

Decided on: 21.05.2021

Mahinda Samayawardhena, J.

The Plaintiff filed this action in the District Court of Gampaha naming three parties as Defendants seeking to partition the land described in the schedule to the plaint among the parties to the action. Only the 3rd Defendant contested the case. After trial the learned District Judge dismissed the Plaintiff's action without answering the issues on the basis that the land sought to be partitioned had not been properly identified. In addition, the learned District Judge also briefly stated that the Plaintiff had failed to present a comprehensive pedigree. On appeal, the High Court of Civil Appeal set aside the Judgment of the District

Court and entered Judgment as prayed for by the Plaintiff. It is from this Judgment of the High Court that the 3rd Defendant preferred this appeal.

This Court granted leave to appeal predominantly on three questions of law: (a) whether the corpus has been properly identified, (b) whether the Plaintiff proved his pedigree, and (c) whether the Court considered the 3rd Defendant's paper title and prescriptive title.

Let me first consider the question of identification of the corpus. It is the contention of the 3rd Defendant that notwithstanding the land to be partitioned as described in the schedule to the plaint is about three acres, the Preliminary Plan depicts only a land in extent of 1 acre, 3 roods and 3.46 perches and therefore the Plaintiff's action shall fail as the corpus has not been properly identified.

In a partition action, if the corpus cannot be identified, *ipso facto*, the action shall fail. There is no necessity to investigate title until the corpus is properly identified. The decision that the corpus has not been properly identified decides the fate of the action without further ado. This underscores the great care with which this decision shall be taken by Court. It shall not be used as a convenient method to summarily dispose of long-drawn-out and complicated partition actions without embarking on the arduous task of investigating the title of each party.

The decision of the learned District Judge in the instant case that the corpus has not been identified is erroneous. Let me explain.

The land described in the schedule to the plaint is as follows:

> *The land called Meegahawatta situated at Walpola in Udugaha Pattu of Siyane Korale of Colombo District in the Western Province and bounded on the North by the Live Fence of the Lands belonging to Biyanwilage Don Luwis and Tittalapitige Karanis Perera and others, East by the Paddy Field belonging to Karanis Perera and others, South by Live Fence of the Land belonging to Tittalapitige Yohanis and others, and West by the Land belonging to the Native Physician Gasin Achchige Karolis and others, and containing in extent about 3 Acres.*

All the title Deeds marked by the Plaintiff at the trial – P2 of 1987, P3 of 1987, P4 of 1960, P5 of 1959, P6 of 1962, P7 of 1976, P8 of 1984, P9 of 1984, and P10 of 1976 – describe the land in the same manner.

The 3rd Defendant marked two Deeds at the trial in claiming rights to the land to be partitioned. One is 3V1 of 1930 and the other is 3V2 of 1976. It is significant to note that in these two Deeds also the land is described in the same manner as it is described in the schedule to the plaint.

Simply put, the land described in the schedule to the plaint is a reproduction of the land described in the title Deeds of both the Plaintiff and the 3rd Defendant.

A commission to prepare the Preliminary Plan was issued to the Surveyor in terms of section 16 of the Partition Law, No. 21 of 1977, as amended. The Surveyor sent the Preliminary Plan and

Report to Court in accordance with section 18. In the Preliminary Plan, the land surveyed is described in the following manner:

> *The land called Meegahawatta situated at Walpola in Udugaha Pattu of Siyane Korale of Colombo District in the Western Province and bounded on the North by the Lands claimed by K. Sumanawathie, S.M. Somawathie, T. Somawathie, Shanthi Jaya Manike and T.P. Karunaratne, East by the Lands claimed by T.P. Karunaratne, S.A. Padmini, K. Piyadasa, the Road and the Canal, South by the Canal and the Land claimed by T. Victor Perera, and West by the Lands claimed by K. Sumanawathie and T. Victor Perera, and containing in extent 1 Acre, 3 Roods and 3.46 Perches.*

The Surveyor states in his Report that the Plaintiff and the 2nd and 3rd Defendants were present at the time of the survey and all three of them showed him the land to be surveyed. At the time of the survey, the 3rd Defendant had not told the surveyor that a larger land was to be surveyed. The 3rd Defendant does not dispute the content of this Report.

Section 16(2) of the Partition Law reads as follows:

> *The commission issued to a surveyor under subsection (1) of this section shall be substantially in the form set out in the Second Schedule to this Law and shall have attached thereto a copy of the plaint certified as a true copy by the registered attorney for the Plaintiff. The court may, on such terms as to costs of survey or otherwise, issue a*

commission at the instance of any party to the action, authorizing the surveyor to survey any larger or smaller land than that pointed out by the Plaintiff where such party claims that such survey is necessary for the adjudication of the action.

The Surveyor in his Report answers the question "*Whether or not the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint*" in the affirmative.

After the Preliminary Plan and Report were received by Court on 18.05.1998, the 3rd Defendant filed a statement of claim dated 02.11.1998. Thereafter, as seen from the proceedings dated 15.11.1999 and Journal Entry No. 17, on the second date of trial, with the 3rd Defendant fully represented by Counsel, uncontested evidence of the Plaintiff was led and the Court fixed the case for Judgment. As per Journal Entry No. 18, on the date of the Judgment, the 3rd Defendant (after apparently retaining another Counsel) made an application to refix the case for trial and also sought permission for a commission to be issued to prepare an alternative Plan. The Court allowed this application as there was no objection from the other parties. However, no steps were taken by the 3rd Defendant to issue a commission for an alternative plan. Thereafter, as per Journal Entry No. 19, the 3rd Defendant informed Court on the commission returnable date that he did not require an alternative Plan but only wanted to amend the statement of claim. This was allowed and the amended statement of claim dated 15.09.2000 was tendered. In this amended statement of

claim, the 3rd Defendant stresses that the Plaintiff cannot maintain the action as the entire land to be partitioned is not depicted in the Preliminary Plan. But the 3rd Defendant does not specify the portion of land not surveyed or even the approximate extent of that portion.

The conduct of the 3rd Defendant was contrary to section 19(2) of the Partition Law, which lays down the procedure to be followed by a Defendant who seeks to have a larger land partitioned. Section 19(2) reads as follows:

> *19(2)(a) Where a Defendant seeks to have a larger land than that sought to be partitioned by the Plaintiff made the subject-matter of the action in order to obtain a decree for the partition or, sale of such larger land under the provisions of this Law, his statement of claim shall include a statement of the particulars required by section 4 in respect of such larger land; and he shall comply with the requirements of section 5, as if his statement of claim were a plaint under this Law in respect of such larger land.*
>
> *(b) Where any defendant seeks to have a larger land made the subject-matter of the action as provided in paragraph (a) of this subsection, the court shall specify the party to the action by whom and the date on or before which an application for the registration of the action as a lis pendens affecting such larger land shall be filed in court, and the estimated costs of survey of such larger land as determined by court shall be deposited in court.*

(c) Where the party specified under paragraph (b) of this subsection fails to comply with the requirements of that paragraph, the court shall make order rejecting the claim to make the larger land the subject-matter of the action, unless any other party, in whose statement of claim a similar claim shall have been set up, shall comply therewith on or before the date specified in paragraph (b) or within such extended period of time that the court may, on the application of any such party, fix for the purpose.

(d) After the action is registered as a lis pendens affecting the larger land and the estimated costs of the survey of the larger land have been deposited in court, the court shall-

> *(i) add as parties to the action all persons disclosed in the statement of claim - of the party at whose instance the larger land is being made the subject-matter of the action as being persons who ought to be included as parties to an action in respect of such larger land under section 5; and*
>
> *(ii) proceed with the action as though it had been instituted in respect of such larger land; and for that purpose, fix a date on or before which the party specified under paragraph (b) of this subsection shall, or any other interested party may, comply with the requirements of section 12 in relation to the larger land as hereinafter modified.*

(e) Where the larger land is made the subject-matter of the action, the provisions of sections 12, 13, 14 and 15 shall,

mutatis mutandis, apply as if the statement of claim of the party seeking a partition or sale of the larger land were the plaint in the action; and-

> *(i) such party shall with his declaration under section 12, in lieu of an amended statement of claim, file an amended caption including therein as parties to the action all persons not mentioned in his statement of claim, but who should be made parties to an action for the larger land under section 5, and such amended caption shall be deemed for all purposes to be the caption to his statement of claim in the action;*
>
> *(ii) summons shall be issued on all persons added as parties under paragraph (d) of this subsection and all persons included as necessary parties under sub-paragraph (i) hereof;*
>
> *(iii) notice of the action in respect of the larger land shall be issued on all parties to the action in the original plaint together with a copy of the statement of claim referred to above;*
>
> *(iv) the provisions of section 20 shall apply to new claimants or parties disclosed thereafter.*

(f) If the party specified by the court under paragraph (b) of this subsection or any other interested party fails or neglects to comply with the provisions of section 12, as hereinbefore modified on or before the date specified in that

paragraph, the court may make order dismissing the action in respect of the larger land.

(g) Where the requirements of section 12 as hereinbefore modified are complied with, the court shall order summonses and notices of action as provided in paragraph (e) of this subsection to issue and shall also order the issue of a commission for the survey of the larger land, and the provisions of sections 16, 17 and 18 shall accordingly apply in relation to such survey.

The 3rd Defendant did not take any steps required by law to have a larger land than that sought to be partitioned by the Plaintiff made the subject matter of the action. If the 3rd Defendant wanted to enlarge the corpus, he ought to have taken steps to file an amended plaint *inter alia* naming new parties as Defendants, because according to the Preliminary Plan there are several claimants to the adjoining lands on all four boundaries. All those alleged owners are third parties.

At the trial, the 3rd Defendant raised the unspecific issue whether the land described in the schedule to the plaint is not depicted in the Preliminary Plan. He did so in an attempt to dismiss the action, as he is in possession of the entire land.

Soon after raising issues, the Plaintiff gave evidence. In his evidence, he marked the Preliminary Plan and the Report stating that the former depicts the land to be partitioned. Even at that point, the 3rd Defendant did not make an application to mark them subject to proof. Section 18(2) enacts *inter alia* that the Preliminary Plan and Report can be used as evidence without

further proof. However under the proviso to section 18(2), the 3rd Defendant could have called the Surveyor to give evidence. This was not done.

Section 18(2) of the Partition Law reads as follows:

> *The documents referred to in paragraphs (a), (b) and (c) of subsection (1) of this section may, without further proof, be used as evidence of the facts stated or appearing therein at any stage of the partition action:*
>
> *Provided that the court shall, on the application of any party to the action and on such terms as may be determined by the court, order that the surveyor shall be summoned and examined orally on any point or matter arising on, or in connection with, any such document or any statement of fact therein or any relevant fact which is alleged by any party to have been omitted therefrom.*

The 3rd Defendant states in his evidence that he has been in possession of the land depicted in the Preliminary Plan from the time he was born in 1942 and that his parents lived on the land before him. He further adds that he became entitled to the land by paternal inheritance and Deeds. The Deeds he refers to are 3V1 and 3V2. This means, although 3V1 and 3V2 describe a land in extent of about 3 acres (the same land which is described in the schedule to the plaint), in point of fact, the land on the ground has continuously been as depicted in the Preliminary Plan.

The Surveyor went to the land to prepare the Preliminary Plan in the year 1998, i.e. 68 years after the execution of the 3rd Defendant's Deed 3V1 of 1930. In 3V1, there is mention of another Deed executed in 1922. This means the Surveyor went to the land 76 years after the execution of the earliest known Deed. One cannot expect the boundaries of land in Gampaha to remain unchanged for 76 years.

The Nittambuwa-Urapola high road shown in the Preliminary Plan running along the northern boundary and the canal running along the southern boundary are of recent origin and did not exist in the 1920s.

It is relevant to note that in the old Deeds tendered by both parties, the boundaries are described by the names of the owners of the adjoining lands at that time. In the Preliminary Plan, the Surveyor records the existing boundaries. In doing so, he gives the names of the present owners. The Plaintiff in his evidence has also stated so.

Without analysing the evidence from the proper perspective, the learned District Judge made a superficial comparison of the boundaries and extent of the land described in the schedule to the plaint which is based on old Deeds with the existing boundaries and extent of the land as depicted in the Preliminary Plan to conveniently conclude that the land has not been properly identified. On this basis, without examining the evidence on the pedigrees of the parties and without answering the issues raised at the trial, the action was summarily dismissed. This is erroneous.

The land to be partitioned has been properly identified. I answer the questions of law on the identification of the corpus against the 3rd Defendant.

Let me now turn to the questions of law whereby the 3rd Defendant states that the Plaintiff failed to prove his title according to law, and that the Court failed to properly consider the 3rd Defendant's paper title and prescriptive title.

According to the evidence of the 3rd Defendant, he claims title to the land on paternal inheritance, Deeds, and prescription.

To prove paternal inheritance, the 3rd Defendant produces Deed No. 10216 marked 3V1. This Deed is referred to in paragraph 3 of the plaint. By virtue of this Deed, the 3rd Defendant's father Thiththalapitige Luwis Perera got an undivided 1/24 share of the land and upon his death, the 3rd Defendant, who is one of his three children (the other two being the 1st and 2nd Defendants), inherited an undivided 1/72 share.

The only other Deed the 3rd Defendant relies on to prove title is Deed No. 56 marked 3V2. This Deed is referred to in paragraph 8 of the plaint. By this Deed, a person by the name of Sibel Nona transferred an undivided (1/2 x 1/3) 12/72 share of the land to the 3rd Defendant.

The Plaintiff does not dispute Deeds 3V1 and 3V2. The 3rd Defendant is entitled to those undivided rights which amount in total to a 13/72 share of the land. The High Court has allotted this share to the 3rd Defendant.

There can be no dispute that the 3rd Defendant is a co-owner of the land. There is no evidence to say the 3rd Defendant acquired prescriptive title to the entire land against all the co-owners. There shall be cogent evidence to successfully claim prescriptive title against co-owners. Mere continuous long possession of the entire common property by one co-owner does not constitute prescriptive possession against all the co-owners. It is clear that the plea of prescriptive title by the 3rd Defendant was only an afterthought. Such a plea was not vigorously pursued at the trial or before this Court.

At the argument before this Court, learned Counsel for the 3rd Defendant submitted that although the Plaintiff states in paragraph 2 of the plaint that by Deed Nos. 1403 and 1433 marked P2 and P3 respectively, Luwis Perera transferred an undivided 3/24 share to the Plaintiff, the transferor is not Luwis Perera, but some others. These others are not strangers. The transferors of P2 and P3 are the 1st to 3rd Defendants who are the children of Luwis Perera. They transferred the said share by right of paternal inheritance. This is stated in the Deeds.

P2 and P3 as well as other Deeds marked by the Plaintiff were not marked subject to proof. A partition case is not a criminal case to secure a dismissal by creating doubts of the Plaintiff's pedigree in the mind of the District Judge. The Plaintiff need not prove his pedigree beyond reasonable doubt but on a balance of probabilities. P2 and P3 are not fraudulent Deeds.

In paragraph 4 of the plaint, the Plaintiff states that he became entitled to an undivided 8/24 share by Deed No. 10376 marked

P4 and Deed No. 9196 marked P5 from Tiththalapitige Singho Perera. These Deeds were executed in 1960 and 1959 respectively. The 3rd Defendant submits that there is no proof of how Singho Perera got his title. In P4 there is no mention of how Singho Perera got title but in P5 he refers to Deed No. 5554 of 1954 as the root of his title.

The same submission is made in respect of the Deeds mentioned in paragraphs 6 and 7 of the plaint.

In paragraph 6 of the plaint, the Plaintiff states that by Deed No. 11182 of 1962 marked P6 and Deed No. 75 of 1976 marked P7, Saranelis Perera transferred 12/24 share and 2/24 share respectively to the Plaintiff.

Deeds P6 and P7 provide Deed Nos. 9196 of 1959 and 10376 of 1960 as the source of title for Saranelis Perera.

In paragraph 7 of the plaint, the Plaintiff states that by Deed No. 863 of 1984 marked P8, Tiththalapitige Sanchi Nona transferred 2/24 share to Wilbert Perera and Wilbert Perera by Deed No. 6808 of 1984 marked P9 transferred the same to the Plaintiff.

Deed P8 refers to Deed No. 717 of 1928 and Deed P9 refers to Deed No. 863 of 1984 as the source of title for the transferors.

What about the 3rd Defendant's pedigree? Does he tender title Deeds from time immemorial?

By Deed No. 10216 of 1930 marked 3V1, although the 3rd Defendant claims 1/72 share by paternal inheritance (i.e. Thiththalapitige Luwis Perera's rights), there is no clear proof of

how the transferor of this Deed, i.e. Kakulawalage Lui Nona got title except to rely on what is recited in the Deed which states she got title from her mother Thiththalapitige Nikohamy. There is no further proof that Nikohamy was Lui Nona's mother.

By Deed No. 56 of 1976 marked 3V2 whereby the 3rd Defendant claims an undivided 12/72 share to the land, there is no clear proof of how the transferor, Thiththalapitige Sibel Nona, got title to such share except to rely on what is recited in the Deed whereby she states she got title by Deed No. 13300 of 1926 and Deed No. 718 of 1928.

It is true that in a partition action the Plaintiff shall unfold the full pedigree. However this does not mean that he shall unfold a perfect pedigree starting from the very first Deed ever executed on the land. It is not possible to trace the very first Deed or the very first original owner of the land. We must stop tracing back at a convenient point. What constitutes this convenient point shall be decided on a case by case basis and not by way of a rigid formula. This point was lucidly explained in the Court of Appeal case of *Magilin Perera v. Abraham Perera [1986] 2 Sri LR 208 at 210-211* by Gunawardene, J. with the agreement of G.P.S. De Silva, J. (later C.J.) in the following manner:

> *When a partition action is instituted the Plaintiff must perforce indicate an original owner or owners of the land. A Plaintiff having to commence at some point, such owner or owners need not necessarily be the very first owner or owners and even if it be so claimed such claim need not necessarily and in every instance be correct because when*

such an original owner is shown it could theoretically and actually be possible to go back to still an earlier owner. Such questions being rooted in antiquity it would be correct to say as a general statement that it could be well nigh impossible to trace back the very first owner of the land. The fact that there was or may have been an original owner or owners in the same chain of title, prior to the one shown by the Plaintiff if it be so established need not necessarily result in the case of the Plaintiff failing. In like manner if it be seen that the original owner is in point of fact someone lower down in the chain of title than the one shown by the Plaintiff that again by itself need not ordinarily defeat the plaintiff's action. Therefore, in actual practice it is the usual, and in my view sensible, attitude of the Courts that it would not be reasonable to expect proof within very high degrees of probability on questions such as those relating to the original ownership of land. Courts by and large countenance infirmities in this regard, if infirmities they be, in an approach which is realistic rather than legalistic, as to do otherwise would be to put the relief given by partition decrees outside the reach of very many persons seeking to end their co-ownership.

The Plaintiff has proved his title on the balance of probabilities. The 3rd Defendant's claim on inheritance and Deeds has been accepted while his claim on prescription has been rightly rejected. The questions of law raised on these points are answered against the 3rd Defendant.

I accept that the High Court did not give adequate reasons in overturning the Judgment of the District Court. There is no analysis of evidence or law in relation to the questions of identification of the corpus or devolution of title. However I agree with the conclusion arrived at by the High Court, subject to the variation that issue No. 3 raised by the Plaintiff in the District Court on prescription shall be answered in the negative.

Subject to the said variation, the Judgment of the High Court is affirmed and the appeal of the 3rd Defendant is dismissed with costs.

Judge of the Supreme Court

Sisira J. De Abrew, J.
I agree.

Judge of the Supreme Court

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court