IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

Appeal No.C.A.1180/99 (F)
D.C.Bandarawela Case No.195/P

(Deceased) 2. W.B.M. Hemapala
Dimbulewatta, Obadaella,
Bandarawela.

2nd Defendant- Appellant

2a. Yapa Mudiyanselage Heenmanika
2b. Wijekoon Bandara Mudiyanselage Udeni Malkanthi
2c. Wijekoon Bandara Mudiyanselage Nirmala Swarnakanthi
2d. Wijekoon Bandara Mudiyanselage Damayanthi Swarnalatha
All of Dimbulewatta, Obadaella,
Bandarawela.

Substituted 2nd Defendant- Appellants

(Deceased) 3. S.A.Somapala
Pahala,Ulugedara,Obadaella, Bandarawela.

3rd Defendant- Appellant

3a. Sooriyasinghe Arachchilage Pushpakumara
3b. Wijesuriya Mudiyanselage Leelawathie
3c. Sooriyasinghe Arachchilage Priyangika Samanmalee
3d. Sooriyasinghe Arachchilage Neela Samanthika
All of Pahala Ulugedara,Obadaella,
Bandarawela.

Substituted 3rd Defendant-Appellants

VS.

(Deceased) A.M.Kumarihamy Attanayake
'Wijesiri', Pitahawatta,Obadaella,
Bandarawela.

Plaintiff-Respondent

1. Hemasiri Bandara Wijesundara
'Wijesiri', Pitahawatta,Obadaella, Bandarawela.
2. Nalani Kumarihamy Wijesundara
Karagahapathana,Mirahapathana, Nawela.
3. Vineetha Kumarihamy Wijesundara Uda
Asadduma,Hiloya.
4. Nandasiri Bandara Wijesundara
'Nandasiri',Pitahawatta,Obadaella,
Bandarawela.

Substituted Plaintiff-Respondents

(Deceased) K.A.Gunasekara
Alawatta,Obadaella,Bandarawela.

1st Defendant-Respondent

1. Nawaratne Mudiyanselage Kumarihami
2. Mangalika Karunaarachchi
3. Mallika Karunaarachchi
4. Karuna Arachchilage Seneviratne
5. Karuna Arachchilage Chandrawathi
6. Karuna Arachchilage Gunawathi, all of
Alawatta,Obdaella,Bandarawela.

Substituted 1st Defendant- Respondents

Before: **Janak De Silva J.**

&

N. Bandula Karunarathna J.

Counsel: Thusitha Wijekoon for the Plaintiff –Respondent

H. Withanachchi with S. Karunadhara for the 2A-2D and 3A-3D for the Substituted Defendant-Appellant

Written Submissions: Of the 2nd and 3rd Substituted-Defendant-Appellants on 02.07.2019.

Of the Plaintiff-Respondent - not filed

Of the 1st Defendant-Respondent - not filed

Argued on: 13/05/2019

Judgment on: **22/06/2020**

N. Bandula Karunarathna J.

This is an Appeal preferred by the 2nd and 3rd Defendant Appellants (hereinafter referred to as the Appellants) against the Judgement dated 16/12/1999 by the Learned Additional District Judge of Bandarawela.

The Plaintiff Respondent (hereinafter referred to as the Respondent) instituted this Partition Case on 29.11.1979 seeking to partition an allotment of land called "අස්වැද්දුමපතනේ කුඹුර" of 7 Pelas in extent with the following meters and bounds;

North - Kandura

East - Kandura

South - Paddy Lands cultivated by Ambagahawatte Banda and Punchirala and paddy land of Karunaratne

West - Kandura

The Plaintiff states that the Original Owner of the land was H.M.Sudukumarihamy. Her estate was administered in D.C. Badulla Case No.1705/T and her heirs were George Collin Nikapatha (husband) and the daughters, H.M. Wimalawathi and H.M.Kumarihamy. Further, the Plaintiff states that subsequent to a settlement entered in the said Testamentary Case No.1705/T, H.M.Wimalawathi, became the owner of "අස්වැද්දුමපතනේ කුඹුර" and she had conveyed a half share of the said land to the Plaintiff by Deed No.1917 dated 10.04.1975. Thereafter, Wimalawathi had transferred the balance half share to the 1st Defendant.

The 2nd and 3rd Defendants had been made parties as they were claiming rights unlawfully being in possession. The 2nd and 3rd Defendants more fully base their arguments on the following;

i) that the land more fully described in the statement of claim, called "හේවායින්ගේ වෙල" belonged to one T.M. Kalumenika who transferred the same to E.M. Kiribanda Gamarala by Deed No.3152 dated 06.11.1911.

ii) that said Kiribanda by Deed No.341 dated 10.01.1935 gifted the said property to Hitihamy Mudiyanselage Sudukuma who in turn gifted the said land to Herath Mudiyanselage Kumarihamy.

iii) that the 2nd and 3rd Defendants had acquired title to the said land by Deed No.1311 dated 04.11.1973, executed by said Kumarihamy.

iv) that the said Defendants intended taking a Commission to depict the land belonging to them and to show that such land was not a part of the land sought to be partitioned.

On a Commission issued by the Court, P.Wickremasinghe, L.S. prepared the Preliminary Plan No.1140 dated 01/04/1983, which was filed of record marked as P8 with the Report. At the trial, the predecessor-in-title of the Plaintiff namely, H.M. Wimalawathie, the 1st Defendant and the Surveyor, Wickremasinghe gave evidence.

On behalf of the 2nd and 3rd Defendants, their predecessor, H.M.Kumarihamy, Surveyor Nandasena, the 2nd Defendant- Hemapala, W.M.Bandaramenika, the 3rd Defendant-Somapala and a Clerk from the Agrarian Centre of Bandarawela gave evidence.

The 2nd and 3rd Defendant Appellants state that the title to the "අස්වැද්දුම පතනේ කුඹුර" was claimed by the Plaintiff from the Deed No.1917 executed by Wimalawathi on the basis of maternal inheritance from her Mother, H.M. Sudukumarihamy and on the Decree in D.C.Badulla Case No.1705/T. The Inventory filed in the Testamentary Case No. 1705/T in respect of the Estate of H.M. Sudukumarihamy, contained 7 lands of which item (9), "අස්වැද්දුම් පතනේ කුඹුර" was described as containing 7 Pelas in extent.

The said Case No.1705/T had been instituted by the husband of Wimalawathie namely, R.M.Punchirala citing, the husband of Sudukumarihamy, George Collin Nikapotha as the 1st Respondent and the said Wimalawathi, as the Defendant.

The 2nd and 3rd Defendants state that an Application for Intervention dated 01.12.1968 was made on behalf of the other daughter, H.M.Kumarihamy who was a Minor at that time, by the putative father, H.M.Ukkubanda and it was brought to the notice of Court that Item Nos. (b), (c), (d), (e) and (f) described in the Inventory, had already been disposed of by Sudukumarihamy on Deed No.6687 dated 07.04.1968 in favor of the 2nd daughter, H.M.Kumarihamy.

According to a settlement reached on 06.02.1973 among the parties on the following terms, the Case No. 1705/T was withdrawn.

a) that the 5 lands (items: b, c, d, e, and f) in the Inventory were to be excluded as belonging to H.M.Kumarihamy.

b) that the 2 lands in Items (a) and (g) should be the property of Wimalawathie.

c) The position taken up by Wimalawathie in her testimony in the present Case was that on the occasion of the marriage of Sudukumarihamy to Collin Nikapotha, in 1935, Sudukumarhamy's father, namely E.M.Kiribanda Gamarala had gifted this land by a Deed to the said Sudukumarihamy.

d) When the said Wimalawathie was confronted with the Deed No.341 dated 10.01.1935 by which 3 lands had been gifted by Kiribanda Gamarala to Sudukumarihamy, she had initially said that there was another deed for a '7 Pela' land and later she took up the position that from the Testamentary Case only, she got the title.

The 2nd and 3rd Defendants had already raised Issue No. 3 in their Statement of Claim on the question whether the Lot No.2 in Plan No. 2942 of Fuard Ismail, L.S., depicted the land described in their Statement of Claim, namely "හේවායින්ගේ වෙල" and as submitted earlier the only evidence relating to a paddy land called "අස්වැද්දුම පතනේ කුඹුර" devolving on common predecessor, Sudukumarihamy from Kiribanda Gamarala, was the "අස්වැද්දුම කුඹුර" described in Deeds No. 1159 and No.341.

The Appellants took out 3 different plans (No.2942, No.312 and No.1205) but the extent was confirmed from all 3 and it was almost the same. Section 18(3) (a) of the Partition Act is very clear and it says that, if a party disputes any contents of a Preliminary Plan then he has to make an Application to Court, to refer that matter to the Surveyor General to decide which land is the correct land, in dispute.

It was not done and if it was referred to the Surveyor General, he would have been reported whether lot 2 is "අස්වැද්දුම පතනේ කුඹුර" or "හේවායින්ගේ වෙල", without any doubt. It is my view that except P8 plan, all the other plans prepared by the Appellants must be rejected because they were not complied with section 18 (3) (a) of the Partition Act.

The 2nd and 3rd Defendants claim was that they are entitled to raise the said Issues No. 1 to No.16 which are directly on the identity of the subject matter of the action and in that exercise there was no attempt to present a different case from, what had been placed before the Trial Court.

At the conclusion of the trial on 19.12.1997, Counsel for the 2nd and 3rd Defendants had raised the issues a fresh, numbering 1 to 16 and the Learned Trial Judge had rejected the said issues apparently on the ground that they were founded on evidence elicited at the trial. There is no doubt that refusal of the Learned Trial Judge to record and to answer the Issues No.1 to No.16 at the conclusion of the trial was correct.

Section 149 of the Civil Procedure Code provides: "The Court may, at any time before passing a decree, amend the issues or frame additional issues on such terms as it thinks fit".

It was held in Silva Vs. Obeysekara 24 NLR 97; The provisions of section 149 considered along with the observation of Bertram C.J. certainly do not preclude a District Judge from framing a new issue after the parties have closed their respective cases and before the Judgment is read out in Open Court. It is not necessary that the new issue should arise on the pleadings. A new issue could be framed on the evidence led by the parties orally or in the form of documents. The only restriction is that the Judge in framing a new issue should act in the interests of justice, which is primarily to ensure the correct decision is given in the case. It also means that the Judge must ensure that when it is considered necessary to hear parties to arrive at the right decision on the new issue, that they be permitted to lead fresh evidence or if it is purely a question of law, that they be afforded an opportunity to make submissions thereon.

This decision was adopted in Hameed Vs. Cassim (1996)2 SLR 30.

But that has no effect for the final result of this case as the Appellants claim is based on another corpus.

The land described in their Statement of Claims, namely "හේවායින්ගේ වෙල" which claimed by the 2nd and 3rd Defendants, is completely different from the land which is the subject matter of this Partition action.

The meters and bounds of the "හේවායින්ගේ වෙල" is as follows;

North - oya

East - Appuge Kumbure ima niyara

South - Dingirige Kumbure ima niyara and Badala

West - Kiribanda Gamaralage Kumbure ima niyara

The land called "අස්වැද්දුම්පතනේ කුඹුර" of 7 Pelas in extent, which is the subject matter of this Partition case and its meters and bounds are as follows;

North - Kandura

East - Kandura

South - Paddy Lands cultivated by Ambagahawatte Banda and Punchirala and paddy land of Karunaratne

West - Kandura

According to the evidence of the 1st Defendant, "හේවායින්ගේ වෙල" is situated in somewhere else.

In consideration of the law and the precedent cases dealing with partition, it could be seen that the provisions of the Section 25 (1) of the Partition Law requires that "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 and facts arising in that action in regard to the rights, shares or interests of each party to, or in the land to which the action relates." The provisions of Section 149 of the Civil Procedure Code empower "The Court may, at any time before passing a decree, amend the issues or frame additional issues on such terms as it thinks fit"

In the Case of Jayasuriya Vs. Ubaid (61 N.L.R 352). His Lordship, Sansoni, J. observed that "There is no question that there was a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it was always open to him to call for further evidence in order to make a proper investigation...."

The 2nd and 3rd Defendants state that in the present Case, it appears that the District Court was under the impression that no fresh issues can be allowed on the basis of the evidence led at the trial, which is a gross misdirection in law. In the case of Jayawickreme V. Amarasuriya (20N.L.R.289), the Privy Council has held that "If at the Trial the District Judge, who had full control over record, had amended the issue so as to suit the facts proved, he should have given a decree in favor of the Plaintiffs for the sum sued for..."

They further stated that the power of the Trial Court in this regard may be exercised any time before the Judgment, at its discretion and in the Case of Silva V. Obeysekara (24 N.L.R. 97) it was held that the Court should do so when such a course appears to be in the interests of Justice; and it is not a valid objection to such a course being taken that they do not arise on the pleadings. Further, it is well settled law that the framing of issues is the responsibility of the Court and it was held in Pathmawathie V. Jayasekare (1997(1) SLR. 248) that "Though in practice Counsel appearing for the Plaintiff or Defendant do suggest the issues, it is the prime responsibility of the Judge to frame issues, it is more so because it is ultimately the Judge who should make a finding and without clear understanding of the dispute and the issues that he has to determine, it would be a most dangerous exercise to embark upon".

The 2nd and 3rd Defendants state that the Learned District Court Judge has failed to identify the corpus of the case and that the land sought to be partitioned in the Plaint, did not have an existence as a separate and divided entity with an extent of 7 Pelas other than the Inventory in the Testamentary Case No. 1705/T. It is common knowledge that by the inclusion of a property in testamentary proceedings and description given thereof, cannot form and confer a source of title or conclusiveness on the extent of the land. It is significant that the Plan No.159081 and Plan No.159079 (2D1) both authenticated by the Surveyor-General on 21.10.1892, depicted two adjacent blocks of land called "අස්වැද්දුම පතනේ කුඹුර" of 4 Acres 34 Perches and 3 Acres 3 Roods 37 Perches respectively. Although the Plaintiff had produced the Plan No.159081, no attempt had been made to depict the allegedly divided 7 Pelas extent within the said larger land of 4 Acres and 34 Perches and there is no evidence at all to establish an extent of 7 Pelas coming into existence from and out of that larger extent. Since a part of a larger land cannot be partitioned and there is total failure to identify a distinct and divided land of 7 Pelas by the Plaintiff, and the Appellants argument is that the partition action should have been dismissed by the Trial Judge.

Moreover, they state that the District Court was in error for the failure to answer the Original Issues raised at the beginning of the trial on 29.08.1988. If the District Court was of the view that no issues could be permitted at that stage of the Case, the duty cast on the Court to answer the original issues raised by the 2nd and 3rd Defendants, cannot be dispensed with. (Vide:Warnakula V. Ramani Jayawardene -1990 – 1 SLR 206 and Abdul Latheef V. Mohamed Mansoor – 2010- 2 SLR 333).

It is my opinion that while the Plaintiff and the 1st Defendant took up the position that the entire land shown in Preliminary Plan No.1140 was "අස්වැද්දුමේ පතනේ කුඹුරේ" which devolved on Leelawathi alias Wimalawathi in terms of the settlement reached in D.C. Badulla Case No. 1705/T, the position of the 2nd and 3rd Defendants was that Lot No.2 in Plan 'P2', is a separate land called "හේවායින්ගේ වෙල" which they got on a chain of title commencing from 1911. When the Surveyors Fuard Ismail and Ananda W.de Silva prepared the Plans No.2942 and No.312 at the instance of the 2nd and 3rd Defendants, they had not indicated that Lot No. 2 in those Plans was the same land call "හේවායින්ගේ වෙල".

Although the said Defendants had claimed Lot 2 in Plan No.1205 before Surveyor, Nandasena as "හේවායින්ගේ වෙල", the said Surveyor had not used his experience to find out whether the said Lot No.2 was "හේවායින්ගේ වෙල" and all lands surrounding Lot No.2, were called "අස්වැද්දුමේ පතන කුඹුරේ".

The contention of the 2nd and 3rd Defendants that on Deed '2D1' the said Leelawathi alias Wimalawathi could have got the land "අස්වැද්දුම" of 2 Pelas, while in the Testamentary Case, the extent had been increased to 7 Pelas, such position was untenable as all plans described the land as "අස්වැද්දුමේ පතනේ කුඹුර"

The possession of Lot No.2 by the 2nd and 3rd Defendants could be related to the permission given by Ambewela Bass, who managed the properties of Sudukumarihamy and after having purchased "හේවායින්ගේ වෙල" in 1973, they could not have acquired a prescriptive title. It is evident that Ambanwela Bass, the step father of Seelawathi who looked after this land as Seelawathi was residing elsewhere. Also, it was him who had retained the 2nd and 3rd Defendants to cultivate this land on share basis. Then he has advised his daughter Sudukumarihamy to give the deed 1311 to the Appellants in 1973, stating that the said land is called "හේවායින්ගේ වෙල".

If Appellants are claiming Prescriptive title against the Plaintiff, it should be started on 04/11/1973, that is after the said deed 1311 was executed. The present case has been filed on 12/12/1979. It is very clear that, the 10-year period has not lapsed. Thus, the Appellants claim has no merit.

The Plans No.159081 and No.159079 of the Surveyor-General, relating to "අස්වැද්දුමේ පතනේ කුඹුර" corresponded to the Northern part of the land surveyed for the Case which clearly established that the said land was not "අස්වැද්දුම කුඹුර" but it is call "අස්වැද්දුමේ පතනේ කුඹුර".

While the Extracts of Agricultural Land Register (P13, P14 and P15) referred to the land as "අස්වැද්දුමේ පතනේ කුඹුර", the Extract '2D9' described a paddy land "හේවායින්ගේ වෙල අස්වැද්දුම පතන" which did not support the existence of the land "හේවායින්ගේ වෙල".

Thus, I believe that there is no controversy that the Lot No.1 belonged to the 1st Defendant and hence the balance 1/2 Share represented by Lot No.2 should go to the Plaintiff. The Appellants have failed to prove their Prescriptive title for Lot 2 and therefore the relief they claimed in the Appeal cannot be granted.

The Judgment of the learned District Judge dated 16/12/1999 is affirmed and this appeal is Dismissed with cost.

Judge of the Court of Appeal

Janak De Silva , J

I agree.

Judge of the Court of Appeal