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

Ranketheththe Gedara Piyasena,
Halloluwa,
Dulwela,
Kandy.
Plaintiff-Appellant

CASE NO: CA/DCF/720/2000

Vs.

Kande Vidanelage Ruban Ananda Karunaratne,
No.132/8,
Pahala Dulwela,
Dulwela,
Kandy.
10A Defendant-Respondent
And several other Defendant-Respondents.

Before: Mahinda Samayawardhena, J.

Counsel: Sandamal Rajapaksha for the Plaintiff-Appellant.
David Weeraratne for the 10A Defendant-Respondent.

Argued on: 27.07.2020

Decided on: 10.09.2020

Mahinda Samayawardhena, J.

The Plaintiff filed this action in the District Court of Kandy seeking to partition the land known as Bathalakotuwewatta, containing in extent two *pelas* of paddy sowing area, among the Plaintiff and 1st-7th Defendants. The 10th Defendant is the contesting party. The 10th Defendant filed several statements of claim and the last one appears to be the one dated 03.11.1988. According to this statement of claim, the 10th Defendant is not claiming undivided rights in Bathalakotuwewatta, the land for the partition of which the case was filed. The 10th Defendant claims title to a land known as Illukkatiyewatta.

At the trial, on 23.04.1992, the Plaintiff raised the following issues.

1. Was the original owner of the land known as Bathalakotuwewaththa, as described in the schedule to the plaint, Rankoth Gedara Havadiya Duraya?
2. Have the rights of the said Havadiya Duraya passed to the Plaintiff and 1st-7th Defendants in the manner described in paragraphs 3-11 of the plaint?
3. Have the Plaintiff and his predecessors in title acquired prescriptive rights to the land in suit by having been in possession for over 10 years?
4. Is the land sought to be partitioned described as Lots 1, 2 and 3 in Plan No.1910 dated 14.01.1981 prepared by licensed surveyor A.B. Weerasekera?

5. If the above issues are answered in favour of the Plaintiff, is the Plaintiff entitled to a partition decree as sought in the prayer to the plaint?

On the same day, the 10th Defendant raised five issues, but withdrew those issues on 09.06.1992 and raised the following new issues.

8. Is the land inclusive of the waterspout thereon depicted in Plan No.1910 dated 14.01.1981 prepared by surveyor Weerasekera, the land known as Illukkatiyawatta as described in the first schedule to the amended answer of the 10th Defendant?

9. Is the said land depicted as Lots 1, 2, and 3 in Plan No.2604 dated 16.08.1986 prepared by surveyor G.R.G.M. Weerakoon?

10. Is the 10th Defendant entitled to the said land known as Illukkatiyawatta comprising 5 *lahas* of paddy sowing area as described in the second schedule to the amended answer in the manner averred in his answer?

11. Is the said land described as Lot 3 in Plan No.2704 prepared by surveyor Weerakoon?

12. Has the 10th Defendant enjoyed continuous, uninterrupted and undisturbed possession of the said Lot 3 for over 10 years and thereby acquired prescriptive rights to the land?

13. If the above issue Nos. 8-12 are answered in favour of the 10th Defendant, can the Plaintiff maintain this action?

14. Was the commission to correct Preliminary Plan No.1910 issued to surveyor Weerasekera with the permission of the Court?

15. In any event, did the Plaintiff act in accordance with section 19(2) of the Partition Law when the second commission was issued?

16. If the above two issues, Nos. 14 and 15, are answered against the Plaintiff, can the Plaintiff maintain this action?

By the said issues, the 10th Defendant takes up the following positions:

1. What is depicted in Lot 1 of Plan No.1910 dated 14.01.1981 prepared by surveyor A.B. Weerasekera marked X is not Bathalakotuwewatta but Illukkatiyewatta.

2. This land is shown as Lots 1-3 in Plan No.2704 dated 16.08.1986 prepared by surveyor G.R.W.M. Weerakoon marked A. (Nevertheless, a larger extent comprising 5 lots is shown in Plan No.2704).

3. The 10th Defendant acquired prescriptive title to Lot 3 in Plan No.2704. (However, the 10th Defendant does not say he claims Lots 1 and 2 of the same Plan thereby

giving the impression that he has no claim to those two lots, which is contrary to the position taken by him in (1) above).

4. The second commission was issued to surveyor Weerasekera not through the Court (and is therefore invalid).

At the trial, the Plaintiff and surveyor Weerasekera, who was the Court Commissioner, gave evidence on behalf of the Plaintiff. Then the 1st Defendant gave evidence accepting the Plaintiff's pedigree. The 10th Defendant, surveyor Weerakoon and an officer from the Harispattuwa Divisional Secretariat gave evidence on behalf of the 10th Defendant.

After the trial, the learned District Judge dismissed the Plaintiff's action. Hence this appeal by the Plaintiff.

It is relevant to note that the trial was concluded on 20.10.1995 and the Judgment was delivered on 22.09.2000, i.e. five years after the conclusion of the trial. This is entirely unsatisfactory and cannot be condoned by any stretch of the imagination.

In *Kulatunga v. Samarasinghe*,[1] this Court held:

> *A [partition] judgment delivered two years and four months after the tender of written submissions cannot stand. The case depended on the oral testimonies of witnesses. The impression created by the witnesses on the judge is bound to have faded away after such a long delay. The learned*

[1] [1990] 1 Sri LR 244.

> *judge was bound to have lost the advantage of the impressions created by the witnesses whom he saw and heard and his recollections of the fine points in the case would have faded from his memory by the time he comes to write the judgment.*

Be that as it may, let me now consider on what grounds the learned District Judge dismissed the Plaintiff's action.

The learned District Judge dismissed the Plaintiff's action on the basis that "*in view of the issues raised by the 10th Defendant*", the Plaintiff failed to depict the land to be partitioned in the Preliminary Plan.

According to the plaint, the extent of land to be partitioned is two *pelas* of paddy sowing area, which is equivalent to 1 acre. The Court Commissioner, Weerasekera, first prepared Plan No.1910 dated 14.01.1981, depicting a land in extent of ½ acre and 22 perches. Thereafter, as seen from journal entry No.35, the Attorney-at-Law for the Plaintiff, with notice to the Attorney-at-Law for the 10th Defendant, moved Court to reissue the commission to Weerasekera to show the entire land of 1 acre as stated in the commission. This application was allowed and, as seen from journal entry No.55, the commission was reissued to Weerasekera. Upon receipt of the commission, the Court Commissioner asked for Plan No.1910, which had already been sent to the Court, in order for him to show the larger land thereon, and the learned District Judge, as seen from journal entry No.57, ordered the said Plan to be sent to the Court

Commissioner. The amended Plan No.1910 was sent to the Court thereafter – *vide* journal entry No.61.

Following the (misleading) written submission of the 10th Defendant filed after the conclusion of the trial, the learned District Judge in the Judgment says that the removal of the first Plan (depicting ½ acre and 22 perches) from the case record without the authority of the Court, and the introduction of a second Plan (depicting 1 acre 1 rood and 22 perches) instead is wrongful. This is completely incorrect. The first Plan was removed and the second (amended) Plan was prepared by Order of the Court. There is no truth to the statement that the first Plan was illegally removed and a new Plan was introduced. The amendment was done on the first Plan itself.

The learned District Judge says a portion of a different land (probably referring to Illukkatiyewatta claimed by the 10th Defendant) is shown in the second Plan, and, according to the learned District Judge, this is not correct.

If the learned District Judge thinks that portions of different lands have been included in the Preliminary Plan, what he should do is not dismiss the partition action *in toto*, but exclude the portions of other lands and partition the land in respect of which the action was filed among the rightful owners in terms of the law.

In the Judgment, the learned District Judge does not analyse the evidence led at the trial at all. Nor does he answer any of the issues. Instead, he refers to the schedules of the Deeds marked P1 and P2 to say that Bathalakotuwewatta comprises 1 *pela* of

paddy sowing area. He further says, it is for the first time in the Deed marked P3 that the land is described as having 2 *pelas* in extent. This analysis is not correct. The Deed P1 was executed in 1974 and P2 in 1943. But P3 was executed in 1938, prior to both P1 and P2. Thereafter, in all subsequent Deeds, Bathalakotuwewatta is described as a land of 2 *pelas*.

On the other hand, even if the learned District Judge thought Bathalakotuwewatta comprises 1 *pela* and not 2 *pelas*, he could have confined the land to Lot 1 of the Preliminary Plan and partitioned the same among the co-owners, subject to the claim of the 10th Respondent.

The 10th Respondent had on his own caused Plan No.2704 to be prepared and marked it as A at the trial. The learned District Judge has referred to this Plan in the Judgment and appears to have taken the view that a portion of Illukkatiyewatta is included in Preliminary Plan No.1910. This is unacceptable.

According to section 18(3) of the Partition Law, if the Court or a party is not satisfied with the Preliminary Plan, steps can be taken to issue a commission to the Surveyor-General to prepare a fresh Plan; but there is no provision in the Partition Law to issue a commission to another surveyor to prepare an alternative Preliminary Plan. (*Fernando v. Perera*,[2] *Tudor v. Lalitha*[3]) However, in the instant case, no commission was issued by the Court for the preparation of an alternative Plan.

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[2] CALA 187/95, Minutes of the CA dated 02.10.1995.
[3] SC (Appeal) 134/2016, Minutes of the SC dated 19.02.2018.

The Court can, upon the application of the Plaintiff or *ex mero motu*, give the Court Commissioner further instructions to submit to the Court a complete Plan depicting the land to be partitioned. These instructions can be given with the commission, during the course of the execution of the commission, or after the Plan is sent to the Court upon execution of the commission. (*Uberis v. Jayawardene*,[4] *Brampy Appuhamy v. Menis Appuhamy*[5])

If the 10th Defendant was dissatisfied with Preliminary Plan No.1910, what he should have done was cause another commission to be issued to the same Court Commissioner to show the encroachment by the Plaintiff or any other Defendant on his land, namely Illukkatiyewatta, and seek the exclusion of those parts from the Preliminary Plan or the land to be partitioned. This was not done.

Any other Plan shall be superimposed on the Preliminary Plan and not *vice versa*. In any event, the Preliminary Plan has not been superimposed on Plan No.2704 tendered by the 10th Defendant either.

The learned District Judge could not have relied on Plan No.2704 to dismiss the Plaintiff's action.

The learned District Judge further says in the impugned Judgment that *lis pendens* had not been registered when the larger land was shown in the amended Preliminary Plan. This is also an erroneous finding. As seen from page 438 of the Appeal

[4] (1959) 62 NLR 217.
[5] (1958) 60 NLR 337.

Brief, *lis pendens* was registered for the land of about 2 *pelas* in extent as described in the schedule to the plaint.

The learned District Judge dismissed the Plaintiff's action on an erroneous basis without analysing the evidence five years after the trial was concluded, as he may have thought this was the most convenient way to dispose of the action.

This Court sitting on appeal cannot play the role of the trial Judge and analyse the evidence as the learned District Judge ought to have done and deliver the Judgment on the merits. However, it would be unconscionable to order trial *de novo* as the case was filed in the District Court more than 42 years ago – to be exact on 04.01.1980.

I set aside the Judgment of the District Court and direct the incumbent learned District Judge of Kandy to deliver the Judgment afresh on the evidence led at the trial according to law.

The appeal of the Plaintiff is allowed. No costs.

Judge of the Court of Appeal