

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

In the matter of an
Application for Leave
To Appeal

Court of Appeal No: CALA 330/2006

District Court of Matugama No: 4487/P

K.D. Karunaratne

13th Defendant-Petitioner

Vs.

S.D. Dodanduwa

Plaintiff-Respondent

Before: Eric Basnayake J

Counsel: Sanath Jayatileke for the 13th Defendant-Petitioner

Shantha Jayawardene for the Plaintiff-Respondent

Written Submissions tendered on: 26.7.2011

Decided on: 13.7.2012

Eric Basnayake J

1. The 13th defendant petitioner (13th defendant) filed this leave to appeal application (an amended petition was filed on 4.9.2006) inter alia to have the order dated 2.8.2006 of the learned Additional District Judge of

Matugama set aside. Counsel agreed to have this leave to appeal inquiry resolved on the written submissions.

2. The plaintiff respondent filed this action in the District Court of Matugama on 3.4.2006 to partition the land called "Malwatte" 3 acres in extent. The plaintiff had allotted to himself 41784/144480 share. The 13th defendant had been allotted 624/144480 share. Some shares have been left un-allotted. The plaintiff states that the 13th defendant, while residing in a land about 15 perches in extent, is also in possession of a about another 12 perches with a road frontage, a business premises.
3. The plaintiff states that the 13th defendant is in the process of constructing another building adjacent to the present shop. The plaintiff states that the 13th defendant had already taken from the road frontage a distance of about 15 to 20 feet. The plaintiff expressed fear that at the partition the parties will be prevented from obtaining road frontage proportionate to their share.
4. The plaintiff also complained that the 13th defendant is cutting down trees and sought an interim injunction and an enjoining order restraining the 13th defendant from constructing and cutting down trees. The court issued an enjoining order and notice of injunction to which the 13th defendant filed objections. In the objections filed the 13th defendant admitted the co-ownership. The 13th defendant also did not specifically deny the share given to the plaintiff and the 13th defendant. However

the 13th defendant claimed that his wife too was entitled to a share and moved to intervene.

5. The 13th defendant stated that his wife had purchased two out of four boutiques 30 years ago and having removed the walls constructed one boutique and has been running a textile business for the last 30 years. The adjacent land is with a road frontage of 18 feet. The 13th defendant states that he has been in possession of this land for the last 30 years and had begun to construct on the existing foundation. The 13th defendant denied to having constructed on a new foundation. The 13th defendant states that the other two boutiques are also with a road frontage of 30 feet.

6. The learned Judge decided to issue an interim injunction as the defendant did not dispute the plaintiff's share. The plaintiff's complaint is that the parties may not get a road frontage in proportion to their share if the 13th defendant is allowed to construct another building. The learned Judge allowed the interim injunction considering the fact that the 13th defendant may be using an area disproportionate to his share. The 13th defendant himself does not state what his share is. He does not specifically deny the share allocated to him by the plaintiff in the plaint. The plaintiff is given 41874 while the 13th defendant is given only 624.

Submission of the counsel for the 13th defendant

7. The learned counsel submitted that the deeds tendered by the 13th defendant contained the undivided rights together with the two boutiques. The learned counsel relied on the judgment of *Epinona vs. Punchisingho* 52 NLR 115 to the effect "that every co-owner has the right to enjoy his share in the common land reasonably and to an extent which is proportionate to his share, provided that he does not infringe the rights of his co-owners (*Gratian J* at pg. 117), also *Sumanawathie vs. Mahinda* (1998) 3 Sri L.R. 4. The learned counsel does not mention the extent of land that he would get from the partition case.

Submission of the counsel for the plaintiff

8. The learned counsel submitted that there is no dispute that the land to be partitioned is co-owned. He also submitted that the 13th defendant never disputed the share allocation. The extent of the land is 480 perches. The 13th defendant is already enjoying 12 perches and 15 perches with a road frontage.

9. The learned counsel also submitted that the 13th defendant is constructing a new building. The 13th defendant states that the two boutiques were bought 30 years ago. It was then in a dilapidated condition. The wife of the 13th defendant had demolished the walls of both the boutiques and reconstructed one boutique where they have a textile business. The foundation of the other boutique was allowed to be exposed. 30 years ago the building was in a dilapidated condition. Then the walls were demolished. After the demolition of the walls the

foundation remained. It remained like that for 30 years exposed to natural elements. An already dilapidated foundation was left exposed for another 30 years causing further deterioration. Considering its condition one will find it difficult to believe that the same foundation would be used to construct walls and a roof above.

10. The plaintiff states that the 13th defendant is constructing a new building. The 13th defendant had furnished some photographs. However these photographs were not tendered in the District Court and should not be considered as evidence. The learned counsel for the plaintiff submitted that if the 13th defendant could wait for 30 years without building, why not wait until the conclusion of the partition case.

11. Considering the fact that:-

- The 13th defendant is entitled to a minute share;
- Waited to build for 30 years;
- No convincing evidence of building on an existing foundation which was exposed for 30 years;
- No convincing evidence that the 13th defendant is building within the extent proportionate to his share;

I am of the view that the interim injunction was correctly issued. Therefore this application is without merit. Hence notice is refused with costs.

Judge of the Court of Appeal