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

CA 1024/96 (F)

D.C. Mount Lavinia

Case No. 27/93/P

K. Piyadasa Fonseka,

No. 6B,

Sri Goonarathana Mawatha,

Mount Lavinia.

Plaintiff.

Vs.

K. Wilbert Fonseka,

No.7, Sri Goonarathana Mawatha,

Mount Lavinia.

Athuraliya Hathdura Patabandige Karunathilake,

No.3, Sri Goonarathana Mawatha,

Mount Lavinia.

Kebeliyapola Liyanage Karunawathie,

No.11, Sri Goonarathana Mawatha,

Mount Lavinia.

W.A.A. Patabandige Alfred Silva, No.414,
Galle Road,
Mount.Lavnia.

Pussewala Kankanamage Piyadasa
(deceased)
No. 1A, Sri Goonarathana Mawatha,
Mount Lavinia.
Defendants.

AND NOW BETWEEN
Dandunnage Dona Nandawathie of 6B,
Sri Goonarathana Mawatha, Mount
Lavinia.
Petitioner.
Vs.
Athuraliya Hathdura
Patabandige Karunathilake,
No.3, Sri Goonarathana Mawatha,
Mount Lavinia.
Plaintiff-Respondent-Respondent.

K. Wilbert Fonseka, No.7, Sri Goonarathana Mawatha,
Mount Lavinia.
Kebeliyapola Liyanage Karunawathie, No.11, Sri Goonarathana Mawatha,
Mount Lavinia.

W.A.A. Patabandige Alfred Silva,
No.414, Galle Road, Mount.Lavnia.
Defendant-Respondent-Respondents.

BEFORE : A.W.A. SALAM, J.

COUNSEL : Asoka Serasinghe for the 2nd Defendant-Appellant. Percy Wijesinghe for the Plaintiff-Respondent. Seevali Delgoda for the 4A Defendant-Respondent. Aravinda Athurupana for the 5A Defendant-Respondent.

ARGUED ON : 24.08.2011.

DECIDED ON : 10.07.2012.

A.W.A. Salam, J.

This appeal filed by the 2nd defendant-appellant raises the question as to whether the judgment and interlocutory decree entered to partition the corpus as prayed for in the plaint and unalloting certain portions of the land is consistent with the law and whether it could be justifiable in the circumstances peculiar to the facts of this case. The facts that led up to the appeal briefly are as follows:. The plaintiff filed action against first, 2nd and 3rd defendants to have the land described in the schedule to the plaint which was later depicted in the preliminary plan No 1019 dated 5th August 1994 divided and partitioned among the plaintiff, 1st, 2nd and 3rd defendants in the manner set out in paragraph 10 of the plaint. The 4th and the 5th defendants intervened in the action and were made parties. They did not dispute the identity of the corpus. The claim made by the 4th defendant was that he had acquired a valid prescriptive title to lot 1 in the preliminary plan. The 5th defendant took up the position that he too had acquired a valid prescriptive title to the building shown as "E and F" in the preliminary plan and the area of land covered by those two buildings. At the commencement of the trial a specific

admission was recorded as to the identity of the corpus. The 5 points of contest raised centered round as to whether the corpus should be divided as prayed for in the plaint or whether the 4th and 5th defendants should be declared entitled to as having prescribed to the land they have claimed to have prescribed and the rest should be partitioned according to the devolution of title shown by the plaintiff. The learned district judge after trial entered judgment and interlocutory decree allotting the area of land claimed by the 4th and 5th defendants and the respective buildings and directed that the rest of the land be partitioned among the plaintiff, 1st defendant and 2nd defendant as shown in the plaint. It is against that judgment the 2nd defendant-appellant (hereinafter referred to as the appellant) preferred this appeal.

At the trial the plaintiff gave evidence and produced documents marked as P1 to P5 and closed his case. Thereafter, the 4th defendant and then the 5th defendant gave evidence in succession and closed their cases producing for P1 to P6. As far as the contested facts are concerned, the plaintiff in his evidence took up the position that both the 4th defendant and the 5th defendants are his tenants of the respective buildings and therefore they are not entitled to maintain a claim of

prescription. As regards the alleged tenancy imputed to the 4th and 5th defendants by the plaintiff, the learned district judge has rightly observed a series of contradictions in the evidence of the plaintiff. At one stage, the plaintiff maintained that the rents in respect of the premises in question were collected by his sister and at another stage he attempted to impress upon court that the rents were directly paid to him. Even in a statement made to the police with regard to a dispute arising from the possession of the buildings in question the plaintiff has never stated that the 4th and/or 5th defendants are his tenants.

The learned district judge having examined the title to the subject matter has also made reference to a deed whereby one Nadarajah has purchased rights of the subject matter. It is under Nadarajah the 4th and 5th defendants have stated that were tenants at one point of time. Having not heard of Nadarajah for a long period of time, the 4th and 5th defendants claimed that they had commenced possessing the land adverse to him and acquired a prescriptive title. As regards the contradictions appearing from the evidence of the plaintiff the learned district judge has formed a very firm opinion that the version put forward by him alleging a verbal contract of tenancy

between himself on one part and the 4th and 5th defendants on the other part is palpably false and cannot be accepted.

In elaborating the reason for his decision the learned district judge has drawn an adverse inference against the plaintiff under section 114 F of the Evidence Ordinance. The inference thus drawn against the plaintiff has arisen by the failure of the plaintiff to call his sister whom he had alleged was the landlord at one point of time in respect of the buildings occupied by the 4th and 5th defendants. In the circumstances the learned district judge has disbelieved a part of the evidence of the plaintiff regarding the question of tenancy and entered the impugned judgment. Having analyzed the evidence of the 4th and 5th defendants who had been living on the land for a considerable length of time exceeding at least 3 to 4 decades, the learned district judge has come to the conclusion that they are not entitled to claim prescriptive rights as they are admittedly tenants of the premises. Having thus held that the 4th and 5th defendants had commenced their possession or entered into the land as tenants, the trial judge has rightly observed that the area of land together with the buildings claimed by the 4th and 5th defendants should be unallotted.

The learned counsel for the substituted defendant-respondent has submitted, paramount among the duties cast upon the trial judge in a partition action is the duty under section 25 of the Partition Law to investigate and give effect to the right, share and interest of all the parties concerned. In the case of Veerappa Chettiar vs. Rambukpotha Kumari Harmy 45 New Law Report 332, it was held that the court has a duty to ensure that the property sought to be partitioned does not belong to person who are not parties to the action. Applying this principle since Nadaraja was not a party to the case and the court could not have allotted any rights to him nor was it possible for the 4th and 5th defendants to have been given rights on prescription. It is for this reason and for the purpose of safeguarding the rights of those parties who are not before court, that the court is empowered under section 26 (2) (g) of the partition law, to make order in its interlocutory decree that any share in the corpus shall remain unallotted. This power of the Court to leave a share unalloted has been unequivocally confirmed in the decision of Cooray vs. Wijesooriya 62 New Law Report 158.

On a perusal of the evidence led at the trial and the judgment that had been entered, I am unable to find any fault I the

judgment for having disbelieved the plaintiff on the question of tenancy in respect of the buildings claimed by the contesting 4th and 5th defendants. The findings of the learned district judge on the facts and also the application of the law appear to me as quite correct and merit no variation of the judgment and the interlocutory decree entered. For the foregoing reasons, it is my considered view that this appeal should be dismissed. The contesting defendants are entitled to costs of this appeal.

Judge of the Court of Appeal.

Nr/