In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

CA 04/97F
DC Colombo 15256/P

2. W.A. Niluka Nilmini,
112/1, Kandy Road,
Kiribathgoda

4. W.A.Premaratna,
112/1, Kandy Road,
Kiribathgoda

2nd and 4th Defendant-Appellants

Vs

Arunawathie Dahanayaka,
114/1, Kandy Road,
Kiribathgoda
Plaintiff-Respondent.

1.R.B.T.Chandrasiri,
114/1, Kandy Road,
Kiribathgoda

2. R.B.T.Chandrasiri,
114/1, Kandy Road,
Kiribathgoda

1st and 3rd Defendant-Respondents

Before: AWA Salam J
Gamini Marapana PC with Navin Marapana, Tharanga Palliaguruge and Harshula Seneviratna for the 2nd and 4th defendant appellants and Rohan Sahabandu for the plaintiff-respondent..
Argued on: 23.06.2011
Written Submissions tendered on: 02.09.2011
Decided on : 21.03.2012

A.W A Salam, J

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This is an appeal preferred by the 2nd and 4th defendant-appellants (appellants) from the judgment and interlocutory decree entered by the learned district judge directing the division of the corpus, among the parties whom he declared entitled to undivided shares, in the following mannered.

Plaintiff-1 Rood-7.75 perches and undivided 7/8 share
1st defendant-27.4 perches
2nd defendant-23.2 perches
3rd defendant-1/8 share

The background to the appeal briefly is that the plaintiff-respondent (plaintiff) filed a partition action in respect of the land set out in the schedule to the plaint. For purposes of the partition action, the corpus was depicted in the preliminary plan No 38D dated 12.01.1992 made by the Commissioner H. Devasurendra, L.S. The extent of the corpus admittedly is 3 roods and 18 perches which is equivalent to 138 perches. The identity of the corpus was not disputed by the parties.

The original ownership attributed to Lokuliyanage Publis Cabral did not give rise to any disagreement either. Other facts admitted include the conveyance made by the original owner in favour of Simon Cabral transferring the entire land and the transfer of rights to Selina Violet Cabral (daughter) and Charles Victor Cabral (son in law) by Simon Cabral in the proportion of undivided ½ share each. Undisputedly, the

corpus being in extent of 138 perches Selina Violet Cabral and Charles Victor Cabral became entitled to an undivided 69 perches each.

As regards the devolution of title, I propose to deal with the rights of Selina Violet Cabral's 69 perches and Charles Victor Cabral's 69 perches separately. It is a matter of record that during a certain period of time Selina and Charles (Husband and wife) purported to convey divided lots of the subject matter, despite the corpus having continued to be in the common ownership, although under Registration of Documents Ordinance, the several lots dealt by them featured at the land registry as defined allotments.

Admittedly, the rights of Selina Violet Cabral on a series of conditional transfers have gone back and forth and finally on deed No 292 dated 24.01.1977 (P6) reverted to her. Initially therefore, it is convenient to examine the manner in which her undivided rights extending to an area of 69 perches from and out of the corpus had passed hands.

Selina Violet Cabral has by deed No 293 dated 24.1.1977 (1D1) conveyed two divided lots aggregating to 27.4 perches to the 1st defendant and thereafter on deed No 294 dated 11.2.1977 (2D1) to the 2nd defendant a divided extent of 23.2 perches rendering the total extent she parted with on 1D1 and 2D1 to 50.6 perches leaving her the balance entitlement from and out of the corpus to an area of 18.4 perches.

Subsequently, Selina Violet Cabral once again gave a

conditional transfer to one Jayasena on deed No 548 dated 29.05.1979 purporting to convey an undivided ½ share from the west and regained title by right of purchase upon deed No 945 dated 17.11.1980. Thereafter the said Selina on the same day, transferred on deed No 946 an undivided 1/2 share from the West of the corpus to the plaintiff. Quite rightly the plaintiff concedes[1] that on deed No 946 aforesaid she became entitled only to an undivided 18.4 perches from and out of the total entitlement of Selina.

It is undisputed that the plaintiff having become entitled to an undivided 18.4 perches as aforesaid had transferred 1/4th share of 1/2 of the rights dealt in deed No 946, i.e 1/4x1/2 of 18.4 perches = 2.3 perches to the 3rd defendant. By reason of the transactions referred to above their undivided ½ share of Salina would devolve on the parties as follows ...

Plaintiff	16.1 perches
1st defendant	27.4 perches
2nd defendant	23.2 perches
3rd defendant	02.3 perches
Total	69.00 perches

The need arises now to examine the manner in which the balance undivided half share (69 perches) owned by the husband of Salina, namely Charles Victor Cabral passed hand. In terms of paragraph 15 of the amended plaint Charles Victor Cabral had died intestate leaving as his heirs Selina Victor Cabral (widow) and Ranasirinal Cabral

[1] Vide paragrapf 14 of the amended plait

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(son) who became entitled to an undivided 34.5 perches from and out of the corpus.

Salina and Ranasirinal aforesaid byked deed No 1800 dated 17.01.1984 produced at the trial marked as 2D2 purported to convey a divided lot in extent of 20 perches to the appellants which in reality should be taken as a conveyance affecting an undivided 20 perches. Having thus alienated 20 perches Salina and Ranasirinal were left with 24.5 perches each, from and out of what they inherited from Charles Victor Cabral.

Thus Salina and Ranasirinal being entitled to 24.5 perches each (49 perches in aggregate) on deed 1188 dated 03.02.1986 (P10) conveyed an area in extent of 1 Rood and 7.75 perches which works out to 47.75 perches to the plaintiff.

The learned counsel of the plaintiff contended that had Charles Victor Cabral died prior to the execution of deed 548 (P7) or later and if *rei venditae et traditae* had been pleaded in respect of deed 946 (P9) it is possible to argue that at the time of execution of P7 or P9 as the case may be Selina Violet Cabral had not only an undivided extent of 18.4 perches coming to her on deed P2, but also a further 34.5 perches inherited from her husband Charles Victor Cabral. As has been quite correctly submitted by the learned President's Counsel, the fact that 2D2 has been executed by both Selina Violet Cabral and her husband, when Ransirinal Cabral had an entitlement of 34.5 perches,

the entire extent of 20 perches conveyed on deed 2-D 2 would go entirely out of the aforesaid entitlement of 34.5 perches of Ransirinal Cabral and hence 2D2 would in any event have to be fed.

The appellants submitted that that the northern boundary of the land given to the plaintiff on deed No 1188 has been mentioned as the allotment belonging to Premaratna who incidentally is the 4th defendant-appellant. This undoubtedly gives rise to a clear acknowledgment that an extent of the land in suit had earlier been conveyed to the 4th defendant. It is also contended on behalf of the appellants that 2D2 in favour of the appellants is dated 17.1.1984 whilst deed No 1188 (P10) originating from the same source is dated 2.3.1986 nearly two years later. In the circumstances, there cannot be any doubt as to which deed should be fed first. Hence, the trial judge has fallen into a palpable error in not granting the benefit of 2D2 to the appellants, on the premise that the recital of title in 2D2 is restricted to "prescriptive possession".

When the propriety of the judgment concerning 2D2 is scrutinized from a different perspective, it would appear that the refusal to confer the benefit of 2D2 to the appellants is meaninglessly inconsistent with the law applicable and the facts established. In my opinion the trial judge was unduly critical of 2D2 resulting in a serious misdirection of law with consequent detriment caused to the appellants and an undue advantage extended to the

plaintiff.

The deprivation of the benefit of 2D2 to the appellants was on the premise that there had been a failure to recite title in the deed, except the prescriptive title. This reasoning of the trial judge to reject 2D2, is baseless and untenable in law. It is quite clear that before the plaintiff's deed P10 could be fed, the deed of the appellants ought to have been favourably considered. Accordingly, it is my considered view that interests in the corpus from both sources which admittedly belonged to Selina Violet Cabral and Ransirinal Cabral at one point of time should devolve on the parties in a different manner than the scheme of distribution of rights suggested in the impugned judgment. In the result, the devolution to the entirety of the 138 perches should, therefore, be revised/corrected to read as it appears in the following table...

T A B L E

Extent in the table are in perches ▶

Party to whom shares allotted	From Salina's und ½ or 69P	Both from Salina's and Ransirinal's und ½ or 69P	Total
Plaintiff	16.1 +	47.75 +	63.85 +
1st defendant	27.4 +	00.00 +	27.4 +
2nd defendant	23.2 +	10.00 +	33.2 +
3rd defendant	02.3 +	00.00 +	02.3 +
4th defendant	00.0 +	10.00 +	10.00 +
unallotted	00.0 +	01.25 +	01.25 +
T O T A L	69.00 +	69.00 +	138.00

On a perusal of the impugned judgment, the finding of the learned district judge as regards 2D2 appears to be a clear misconception of the law. As has been mentioned earlier in

this judgement the document 2D2 is perfectly in order and flawlessly confers title on the vendees (appellants). Hence, the finding of the learned district judge as regards 2D2 is manifestly erroneous, considered particularly in the light of the sacred duty imposed by the statute to investigate title. The matter does not rest there. Taking into consideration the manifest error occasioned in the investigation of title, to send this case back for re-trial would mean further litigation, unnecessary expenses to both parties, and perhaps an additional right of appeal. Such a course, if adopted would no doubt prolong the agony. Therefore, it is unquestionably unfair by the parties and not conducive to the best interest of the parties.

As such, I feel that justice can be meted out by directing the learned district judge to amend the judgment and decree to fall in line with the schedule of distribution of undivided shares, as indicated in the T A B L E above.

Accordingly, the judgment and interlocutory decree of the learned district judge are affirmed subject to the variation directed to be made with regard to the schedule of shares. Judgment affirmed subject to variation.

There shall be no costs.

Judge of the Court of appeal

Kwk/-