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

C.A 165/1997
D.C. Panadura 74/L

1. K. Don Sirisena
   Jaliyagoda, Piliyandala.

2. N. Bertrum Perera
   No. 265, Bokundara, Piliyanda.

3. K. Don Wimalawathie
   Jaliyagoda, Piliyandala.

4. K. Don Gunawathie,
   Jaliyagoda, Piliyandala.

PLAINTIFFS

Vs.

1. Porage Dona Lisahami
1A. K. Dona Premawathie
1B. K. Dona Jayawathie
1C K. Dona Chandrawathie
1D K. Dona Sumanawathie
1E K. Dona Siriyawathie
1F/2 K. Dona Dayarathne
1G/3 K. Don Karunadasa

All of No. 4,
Jaliyagoda, Piliyandala.

DEFENDNATS

AND NOW BETWEEN

1F/2 Kolambage Don Dayarathne
No. 4, Jaliyagoda, Piliyandala.

1F/2 DEFENDNAT-APPELLANT

Vs.

1. K. Don Sirisena
   Jaliyagoda, Piliyandala.

1A. K. Dom Vipul Manopushpa
   Sirisena
   No. 336, Colombo Road,
   Jaliyagoda, Piliyandala.

SUBSTITUTED 1ST PLAINTIFF-RESPONDNET

2. N. Bertrum Perera
   No. 265, Bokundara, Piliyanda.

2A. N. Seneha Dineshi Perera
   No. 265, Kurundueatte Raod,
   Bokundara, Piliyanda.

SUBSTITUTED 2ND PLAINTIFF-RESPONDENTS

3. K. Don Wimalawathie
   Jaliyagoda, Piliyandala.

3A. K. Dom Vipul Manopushpa
   Sirisena
   No. 336, Colombo Road,
   Jaliyagoda, Piliyandala.

SUBSTITUTED 3RD PLAINTIFF-RESPONDENTS

4. K. Don Gunawathie,
   Jaliyagoda, Piliyandala.

.4A K. Dom Vipul Manopushpa
   Sirisena
   No. 336, Colombo Road,
   Jaliyagoda, Piliyandala.

SUBSTITUTED 4TH PLAINTIFF-RESPONDENTS

1. Porage Dona Lisahami
1A. K. Dona Premawathie
1B. K. Dona Jayawathie
1C K. Dona Chandrawathie

All of No. 4, Jaliyagoda, Piliyandala.

1D. K. Dona Sumanawathie
W. N. Iranthie Jayasinghe
No. 41/1, Colombo Road,
Jaliyagoda, Piliyandala.

SUBSTITUTED 1D DEFENDANT-RESPONDENTS

1E. K. Dona Siriyawathie
1G/3. K. Don Karunadasa

Don C. Ishara Colombage
No. 5, Colombo Road,
Jaliyagoda, Piliyandala.

SUBSTITUTED 1D DEFENDANT-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: Hitler Peiris for the 1F2 Defendant-Appellant
Dr. Jayatissa de Costa P.C., with L. N. Silva

For the Substituted-Plaintiff-Respondents

ARGUED ON: 27.07.2012

DECIDED ON: 02.11.2012

GOONERATNE J.

Plaintiff filed action for a declaration of title and to eject the Defendants from the land described in the 3rd schedule to the plaint. Plaintiff-Respondent contends that one Hendrick and Johanahami are the original owners of the land described in the 1st schedule to the plaint. The said two persons amicably partitioned the said land (vide plan P3 No. 323). As such Hendrick went into possession of lot Nos. A1, B1, C1 & D1 and Johanahami to lots A2, B2, C2 & D2 of plan P3. Plaintiff also contend that lots C1 & C2 of plan P3 was possessed by the heirs of Johanahami and Hendrick (original owners). It is the position of both parties to this appeal that lots C1 & C2 in plan P3 which were commonly possessed was partitioned in partition case No. 14490/P in the District Court of Panadura. The point that is relevant for this appeal is that by the judgment of 13.9.1976 in the said partition case lot (3) in plan 3283 (V1) was excluded from the corpus. The said lot '3' so excluded, as above, is the land in dispute pertaining to the case in hand, for which the Plaintiff claim to have title and filed a case for a declaration of title. Does case No. 14490/P operate as res judicata?

Parties to this case proceeded to trial on 11 issues. As stated above and at the hearing of this appeal, issue No. 9 would be the most important question relating to the principle of res judicata. The said issue reads thus:

09. අංක 14490 දරණ බෙදුම් නඩුවේ තීන්දුව මෙම නඩුවේ පාර්ශවකරුවන් අතර විනිශ්චිත කරුණක් වී ඇත්ද?

If the judgment in the previous case 14490 operates as res judicata, the trial judge's decision is wrong and need to be set aside? As such Plaintiff's action should have been dismissed. In an action for a declaration of title the Plaintiff should prove and establish title. There is no burden cast on the Defendant, until Plaintiff's proving his title. If Plaintiff succeed in proving title, it is for the Defendant to establish the title/right or interest upon which Defendant claims to be in possession or establish his legal possession on title. If plaintiff cannot establish title plaintiff's case should be dismissed. The trial judge in this judgment narrates the evidence led at the trial and good part of the judgment is on that, and his conclusions and reasoning is dealt within about one and a half pages. Trial Judge merely answers issue No. 9 as 'not relevant', and does not give a clue as to whether the principle of res judicata is applicable or not or that he has considered?

When I consider and peruse the judgment of the trial judge the following had been stated as regards the previous case P/14490

(1) That the entire corpus in case No. 14490 is shown in plan 3283 in extent of 3 Roods 17.4 Perches. (The trial judge failed to check the extent in plaint and the Licensed Surveyor's plan).

(2) Parties have agreed that the corpus be confined to only lots 1 & 2 in the above plan in extent of 3 Roods 17.4 Perches and lot (3) to be excluded.

This court observe that the trial judge does not seem to have correctly perused and understood the previous judgment. There was no agreement between parties to exclude lot (3), but the trial judge in the previous case having examined the material decided to exclude lot (3) and also ruled that Plaintiff has no right or interest to same.

(3) The excluded lot does not have another name, but according to evidence it was transferred (පැවරූ බවට) to Hendrick and Johanahami.

(4) After the final decree in case No. 14490 the Defendant forcibly entered the land in dispute on 23.5.1986. P2 confirm same.

As such I cannot find any specific ruling of the learned District Judge as regards the application of the principle of 're judicata'. Apart from above, issue No. 9 is merely answered as 'does not arise'. This would not suffice in the context of the case in hand.

Prior to dealing with the relevant points in case No. 14490 and the trial judge's findings as to why lot (3) was excluded based on material, I prefer to, at the out set, refer to the following authorities which explain the principle of res judicata in it's correct perspective.

Res judicata

The principle of estoppel by res judicata is not concerned with the operative effects of judgments. That principle does not mean that parties to a judgment are bound by its operative effect but that they are barred by the determination of the Court on all actual or implied issues of fact or law and may not raise them again. 26 N.L.R at 392 . All that the law requires for the purpose of constituting res judicata or estoppel by judgment is that the issue in question should have been distinctly raised between the same parties appearing respectively in the same capacity and should have been directly and necessarily determined by the former proceedings. 5 C.W.R at 24. See 21 N.L.R at 203; 26 N.L.R at 229 . The doctrine only applies to matters which the parties had an opportunity of bringing before the Court. 1 C.L.W. 239, and the plea must be restricted to the cause of action for which the action is brought. 5 A.C.R. 13; 14 Law Rec. 91 A plea of res judicata can be successfully raised only against parties and their privies. 7 Times 68.

Judgment P/14490

Having understood the above it is important at this point to refer to the judgment in case No. P/14490, as to why lot No. 3 was excluded. The following may be noted in the said judgment since every word of same is important and relevant to decide issue No. 9.

(a) without raising points of contest, Plaintiff gave evidence. Defendants absent. 5th Defendant filed a statement of claim but did not take part at the trial nor was he represented. All Defendants were aware of the case.

(b) Having fixed the case for judgment (4.9.1981) the 5th & 6th Defendnat counsel sought permission to file written submissions. Permission granted. By the written submissions these Defendants moved to exclude lot (3).

(c) Can such an issue be decided? (as in 'b').. In the absence if oral evidence, by documentary evidence alone it could be decided.

(d) 5th & 6th Defendants states (in verbetim)

පැමිණිල්ලේ එකම සාක්ෂි බංඩයක් මත ඔවුන්ට හිමිකම් කිමට නොහැකි බිම් කොටසක් විත්තිකැවන්ගේ 'පෙනිමට' තිබෙන අයිතිවාසිකම් මත ප්‍රතික්ෂෙප කල නොහැකි බවය. දැන් පැමිණිල්ලේ එකම සාක්ෂිය මෙයය.' මෙම නඩුවේ බෙදා වෙන් කර ගැනිමට මා ඉල්ලා සිටින්නේ 'තිරිගහවත්ත' කියන ඉමයි. එය මේ නඩුවේ අමුනා තිබෙන අංක 3293 දරණ පිබුරේ 1,2,3 කට්ට වශයෙන් දක්වා තිබෙනවා...

(e) The above evidence (as in 'd') tendered without any objection, under normal circumstances when exparte evidence led, case to be decided on a balance of probability. However if there is reason to reject such evidence, court is not bound to act on such evidence. Refer to Rasheed Ali Vs. Mohamed Alli 1981 (2) SLR 38 – 39.

(f) The schedule to plaint describes the land in question as 'Kirigahawatte' in extent of 3Roods 8.50 Perches.

Plan 3282 gives the extent of 3R. 17.5 P. The licensed Surveyor gives the extent of lot (3) to be excluded as 13 perches. It is called 'එය ඔවිටකි'.

(g) Plaintiff has told the licensed Surveyor that the corpus consist of lots1 & 2. But the 1st & 2nd Defendants had stated to the licensed Surveyor that lot (3) was possessed by John Perera (father of 1D & 2D).

None of them gave evidence. Plaintiff showed the boundaries to license Surveyor. By the above facts and the extent of the corpus which differ court comes to the conclusion that the said lot (3) had been given up by Plaintiff.

(h) Trial Judge holds, apart from above evidence Plaintiff has not been able to prove by deeds or by possession that Plaintiff has rights or title to lot 3).

(i) Deed submitted by Plaintiff refer to Surveyor Rodrigo's plan of 7.7.1921. On preparation of Petitioner's plan the Surveyor had looked at surveyor Rodrigo'es plan to mark north/south boundaries. As such corpus consists only lots 1 & 2.

Court also observes that if Plaintiff wish to plead prescriptive rights mere possession would not suffice. Possession need to be explained and exemplified 59 NLR 546.

(j) Survey had without a basis included lot 3 'owitta' (ආවාටිගේ ඔවිට). Extent in plaint and plan differ. If that be so Surveyor has to take precautions. Surveyor cannot change the extent from that of the extent in plaint. 62 NLR 217.

(k) Lot (3) to be excluded and Plaintiff's evidence on same rejected by court. පැමිණිල්ලේ චාච්ක සාක්ෂියක් නඩුවේ මානක තැනගේ රපෝර්තුවක්, ඔප්පුවක්, සලකාබලන කල අංක 3 පිළිබඳව පැමිණිල්ල සාක්ෂි ප්‍රතික්ෂේප කල යුතුය.

(l) Case reported in 64 NLR 208 Bilinda Vs. Sediris Singho is similar to the facts of this case.

Having considered (a) to (k) above it is very clear that the trial judge whilst excluding lot (3) from the corpus for cogent reasons rule that Plaintiff has no right/title or interest to lot (3). As such case 14490 is a regular action which was framed to afford a ground for a final decision upon the subjects in dispute and to prevent further litigation. (Section 33 of the Civil Procedure Code). Our law of res judicata is contained in Sections 34, 207 & 406 of the Civil Procedure Code. The relief claimed in the previous partition action and the case in hand may differ. There is no harm in that as long as parties, cause of action, final judgment are all ingredients found and established, what is necessary to prove res judicata. Proof contained in (a) to (l) above amply

support same. I note the following. Civil Procedure in Ceylon – E.B. Wickremanayake

pg. 24.. It is the matter in issue, not the subject matter of the action that forms the essential test of res judicata (x) a party who has failed in one action cannot afterwards set up the same claim in another action between the same parties and support it on grounds which might have been put forward in the first action. Section 207 of the Civil Procedure Code makes a juidgment convulsive not only as to matters actually pleaded, put in issue tried and decided, but also as to matters which might and, according to the rules of the Code, ought to have been pleaded, tried and decided (y) and as to all consequential remedies even though some of them were not prayed for.

Pg. 21..

The test of the identity of causes of action does not depend on the relief for which the plaintiff prays. It depends rather upon the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. Upon every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the court (b). "a great criterion of the identity of causes of action" said Lascelles C.J. "is that the same evidence will maintain both actions. (c).

Plaintiff-Respondent relies in the case of A. Dionis Vs. William Singho. I observe that part of the dictum in the above case has no application to the case in hand. My views are fortified by the following factual and legal aspects referred to by the Appellant.

No doubt a well known rule is contained in the above mentioned Dionis Vs. William Singho's case. In the previous partition case the learned District Judge has not made any order in favour of the 5th Defendant-Respondent who moved the District Court to exclude lot (3).

Dionis' case, the dictum shows that an order was made as regards rights/interest/title of the party who moved for exclusion. It is not the case as that of /Duionis' case, in case P/14404, no order was made in favour of 5th Defendant. Court merely excluded and gave cogent reasons to exclude and in the process rejected Plaintiff right/title and interest to the excluded lot. As such Dionis' case is no comparison to the present partition case P/14490. I note the following.

In partition case 14490 what was partitioned was not any 'Kirigahawatte' but the particular 'Kirigahawatte' depicted in plan P6, of 7.7.1921 (schedule to plaint V2 indicates). This had been identified as lots 1 & 2 in preliminary plan V-1 and final plan V-3. The western boundary of 'Kirigahawatte' in P6 consists of 2 lands Achariya Owita to the north and Duwage Owita to the south. There is no 'Kirigahawatte' to the west. Lot (3) in preliminary plan V-1 is Duwage Owita as in P6. The Defendant-Appellant and his father claimed this as a partition of Duwage Owita. No basis to claim it as 'Kirigahawatte'. The final plan in case No. 14490/P – V3 shows clearly that the corpus consists of lots 1 & 2 (now depicted as lots 1, 2A, 2B & 2C) ends at the western extreme of lot 1 and as the superimposition in V1 shwos, is the land in plan P6 it's present extent being 3 Roods and 4.4 Perches. It is

to this land that P5 applies. It cannot be said that this deed applies to a land outside this land.

I agree with the Appellant's submissions that party cannot having rights in one land on a deed or set of deeds to make use of same to obtain rights in another. P5 deed cannot be used to claim rights twice over. Law cannot permit to canvass the previous judgment (14490) on the basis of same being wrongly decided, in the absence of preferring a proper appeal. Such a judgment cannot be impeached collaterally for errors of law or irregularities of procedure.

Garuhamy Vs. Nelson Gunatilleke 1986 2 CALR 225

Held:

After a detailed survey of the judicial authority related to jurisdictional errors and the effects of decisions arrive at the consequence therein the Court of Appeal dismissing the appeal and distinguishing between a want of jurisdiction and a wrong exercise of jurisdiction held that when a Court has jurisdiction over the subject matter and the parties, its judgment cannot be impeached collaterally for errors of law or irregularities in procedure.

In all the above circumstances I am inclined to accept the views and submissions of the Appellant. As such, I set aside the judgment of the learned District Judge dated 13.2.1997. The principle of 'Res Judicata'

should have been considered by the learned District Judge in detail. Plaintiff's action is dismissed. Appeal allowed. No costs.

Appeal allowed.

JUDGE OF THE COURT OF APEPAOL