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

Dona Elizebeth Attygala,
Awasa Junction,
Elpitiya,
Godakawela.

Plaintiff-Appellant

Vs

C.A.647/96 (F)

D.C.HORANA 4216/L

1. Dona Karunawathie Subasinghe
2. Dona Luwi Winson Attygala
3. Don Leslie Welinton Attygala
4. Don Lutas Nickolas Attygala
5. Dona Priya Subodhani Attygala
6. Dona Chintha Priyangani Attygala. (Deceased)

6A. Wijekoon Mudiyanselage Ravindra Wijekoon.

All of Atulugama Road, Kalamedriya, Bandaragama.

Defendant-Respondents

BEFORE : **SISIRA DE ABREW, J.**
K.T.CHITRASIRI, J.

COUNSEL : Naveen Marapane, Attorney-at-Law for the Plaintiff- Appellant
R.C.Goonaratne, Attorney-at-Law for the Defendant-Respondents

ARGUED ON ; 20TH JUNE 2011

DECIDED ON : 2nd AUGUST 2011

K.T.CHITRASIRI,J.

Plaintiff-Appellant namely Dona Elizebeth Attygala (hereinafter referred to as the plaintiff) instituted action against the defendant-respondents (hereinafter referred to as the defendants) in the District Court of Horana seeking *inter alia* for a declaration of title to the two allotments of land referred to in the Second Schedule to the plaint. In that plaint she has set out the way in which she claims title to the said land referring to the plan bearing No.2935 dated 14th July 1974 made by Licensed Surveyor R.W.Fernando.

The defendants having denied the legality of the aforesaid Plan No.2935 in their answer took up the position that the land claimed by the plaintiff forms part of a larger land and also had stated that they claim rights as co-owners over that property. Accordingly, the defendants whilst praying for a dismissal of the plaint had stated that it is necessary for the plaintiff to file a partition action if she needs to establish her rights.

Admittedly, it was a larger land until its original owner namely Don Iglasten Attygala transferred a portion of it to the 2nd, 3rd and 4th defendants by deed bearing No.18267 dated 13th September 1958, marked 1V1. The said portion of the larger land that was transferred fell on to the direction of south-west and it was separated clearly by a roadway. The balance land towards the north-east was transferred by the original owner Don Iglaston Attygala to Dona Lissi Margarret Jayasundera Hamine by the deed bearing No.18857 dated 28th January 1959 from whom the plaintiff obtained title.

The aforesaid two parts of the larger land transferred by deeds 18267 and 18857 had well defined boundaries as far back as in the year 1958. These two portions had been separated by a roadway coming from Wewita and leading towards Atulugama. This is clearly shown in the aforesaid plan No.2935 as well. In fact there is no dispute as to the identification of these two parts separately from the time that it was transferred to the predecessors in title of the plaintiff as well as the defendants. Hence, it is clear that there is no dispute as to the separation of the two parts of the larger land that was transferred by deeds 18267 and 18857 in the years 1958 and 1959 respectively. Therefore, there is no bar to obtain a declaration of title, of those two parts of the larger land by establishing proper title to the same even without filing a partition action. Indeed there was no contest placed by the parties as to this conclusion.

However, the issue arose due to Margarret Jayasundera Hamine from whom the plaintiff claims title, transferring a part, consisting of 20 perches in extent from her land situated on to the north-east of the road, to Richard Attygala and Lootus Nicholas Attygala (4th defendant) by deed bearing No.4229 dated 11th April 1987. Learned Counsel for the respondents relying upon the said deed of transfer, advanced an argument to state that such a transfer of title to the 4th defendant and to the predecessors in title of the other defendants, would not pave the way to terminate the co-ownership to the land. Accordingly, he submitted that the title devolved on the defendants by the said transfer of 20 perches of land by Jayasundera hamine would entitle them to claim co-ownership to the land claimed by the plaintiff.

In support of this contention, learned Counsel referred to the case of ***Dias v. Dias 61 NLR at 116.*** In that decision it was held thus:

"Where a co-owner conveys his interest by reference to a particular portion or korotuwa of which he has been in possession, the deed can be considered as effective in law to convey his undivided interest in the whole land. In such a case the transferee can maintain a partition action in respect of the whole land.

An amicable partition to be recognized in law must be a division which in law terminates the co-ownership of the property. A plan made at the instance of one or more co-owners purporting to cause a division of the common land of which the other co-owners apparently had no notice, does not form the basis of divided possession. Exclusive possession on the footing of such a plan does not terminate the co-ownership of the land."

In this case it was also held that:

"An amicable division to be recognized in law must be a division which in law terminates the co-ownership of the property".

In this connection, learned Counsel for the defendants referred to the case of ***Githohamy v. Karanagoda (1954) 56 N.L.R. at 250*** as well. Learned Counsel for the plaintiff also submitted that he too would be relying on those two decisions.

Hence, I will now examine the facts of this case having regard to the law cited by Mr. Gunaratne, learned Counsel for the defendants. The aforesaid deed bearing No.18857 by which Dona Lissi Margarret Jayasundera Hamine became the owner of the land had transferred 2/3rd share of that property to Don Wilson Attygala and to the plaintiff namely Dona Elizabeth Attygala by deeds bearing Nos.5939 and 5940 respectively. Subsequently, said Margarret Jayasundera Hamine had transferred

the balance 1/3rd share of the land by the deed bearing No.6767 to same Don Wilson Attygala and Elizabeth Attygala making the two of them sole owners to the land.

Thereafter, Dona Elizabeth Attygala and Don Wilson Attygala being the sole owners to the land had transferred back a part of the land containing 20 perches in extent to Margarret Jayasundera Hamine by deed 6768. Subsequently, she namely Jayasundera Hamine by deed No.4229 dated 11.4.1987 had transferred her 20 perch block to Lootus Nickolas Attygala (4th defendant) and to Richard Attygala, who is the husband of the 1st defendant and also the father of the 2nd to 6th defendants. This is the way in which the defendants claimed rights as co-owners to the land claimed by the plaintiff.

At the time the transfer by the plaintiff and Wilson Attygala to Jayasundera Hamine of the 20 perch block was effected by executing the deed 6768, they being the two transferors had drawn up a plan to show the land they own leaving out the said 20 perch block given to Jayasundera Hamine. This is the plan bearing No.2935 dated 20th July 1974 made by L/Surveyor R.W.Fernando. A reference had been made to this plan 2935, in the deed 6768 by which the 20 perch block was transferred to Jayasundera Hamine. The said plan is referred to in the subsequent deed as well, by which the plaintiff and Wilson Attygala became entitled to their allotments but minus the said 20 preach block.

The law referred to in the judgments cited hereinbefore clearly states that amicable division of a land with the view of terminating the co-ownership of the property could be done only in a manner recognized by the law. However, in both

those instances, discussed in the two judgments referred to earlier, some of the co-owners to the disputed lands in those two cases had not participated when the lands were divided even though a part of a larger land with defined boundaries had been alienated. Accordingly, the Court had held that in order to have a legally accepted division terminating the co-ownership, it is necessary to have the consent of all the parties who claim rights over a larger land.

In this instance, plaintiff and Wilson Attygala became the sole owners to the land pursuant to the execution of the aforesaid deeds 5939, 5940 and 6767. They being the only owners to the land had transferred a part of it, containing 20 perches in extent to Jayasundara Hamine. This is the right that is being claimed by the defendants through deed 4229. (P7) The said portion containing 20 perches was left out when the balance land claimed by the plaintiff was identified by the plan 2935. This plan is being referred to in the deeds relying upon by the plaintiff.

In the circumstances, it is clear that no co-owner was left out when transferring the land to Jayasundera Hamine and it was not like in the cases cited by the learned Counsel. Hence, the facts of this case should be differentiated from the facts in the cases cited by the learned Counsel for the defendants. Furthermore, it is seen that all the co-owners to the property had clearly separated a 20 perch block of land with defined boundaries when it was alienated to the predecessor in title of the defendants.

In the circumstances, it is my view that the plaintiff is entitled to obtain a declaration of title to the land that she had claimed in her plaint without resorting to a

partition action. Accordingly I set aside the judgment of the learned District Judge of Horana dismissing the plaint filed by the plaintiff.

At this stage, I must mention that when considering the evidence, both oral and documentary, particularly the deeds produced in this case, it is clearly seen that the plaintiff had proved that she is entitled to the land that she claims. In fact the opposing party had not controverted the said evidence. Basically the title to the land of the respective parties depended on the deeds that they have produced in evidence. Indeed, each other party has not challenged their respective deeds. All those deeds had also been referred to and discussed earlier in this judgment. In the circumstances, it is my considered view that the plaintiff by evidence has established her title to the land that she claims.

However, the plaintiff in her evidence as to the claim for damages has not described the manner in which she lost the income from the property though she has merely stated that she was prevented from possessing the land. To the contrary the 1st defendant in her evidence has stated thus:

ප්‍ර : මෙම ඉඩම දැන් කවුද බුක්ති විඳින්නේ?

උ : අපි පර්චස් 20 ඇතුලත තියන හරියට පමණයි අපි බුක්ති විඳින්නේ.

ඉතිරි කොටස් වල එක එක අය පොල් කඩා ගන්නවා. බෝල ගහන පිට්ටනියක් හදාගෙන බෝල ගහනවා. එහි ගස් වල ළමයි කුරුම්බා පවා කඩනවා. අනිත් කොටසේ කිසි දෙයක් තිබුනේ නැහැ . පොල් ගස් එහෙම තිබුනා. කොස් ගස් තිබුනේ නැහැ. ඒ ගොල්ලො තිබුන ගස් අටක් දහයක් පමණ කපා ගෙන ගියා.

ප්‍ර : මෙම ඉඩමේ ඒ ගොල්ලන්ගේ බුක්ති විඳින ඒ ගොල්ලන්ගේ කියන කොටස් වලට තමන්ලා කිසිම හානියක් කරලා නැහැ?

උ: නැහැ

ඒ අයට බුක්ති විඳින්න එන්න එපා කියා අපි කිසිම දවසක කියා නැහැ.

ප්‍ර: තමන්ලාගෙන් ඒ ගොල්ලො අලාභ ඉල්ලා තියෙනවා? තමන්ලා අලාභ ගෙවන්න වැඩක් කරලා තියෙනවාද?

උ: නැහැ.. ඒ ගොල්ලන්ට ඇවිත් ඒ ගොල්ලන්ගෙන් ගස් බුක්ති විඳින්න පුලුවන්.

(Vide proceedings dated 26.02.1996 at Page 115 of the brief)

When considering the aforesaid evidence of the plaintiff as well as the 1st defendant, it is not possible to conclude that the plaintiff has established her claim for damages that she has prayed for in the plaint.

For the aforesaid reasons, I direct the learned District Judge of Horana to enter judgment and decree in favour of the plaintiff only in terms of the prayers (1) and (2) of the plaint dismissing the claim for damages.

The plaintiff is entitled to the costs of this Court as well as the District Court.

Appeal allowed with costs.

JUDGE OF THE COURT OF APPEAL

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

Dona Elizebeth Attygala

Plaintiff-Appellant

Vs

CA Appeal No: 647/96 (F)
DC Horana No. 4216/L

1. Dona Karunawathi Subasinghe
2. Don Luwi Winson Attygala
3. Don Lesslie Welinton Attygala
4. Don Lutas Nickelas Attygala
5. Don Priya Subodhani Attygala
6. Dona Chintha Priyangani Attygala

6A. WMR Wijekoon.

Defendant-Respondents

Before : Sisira de Abrew J &
K.T Chitrasiri J

Counsel : Navin Marapana for Plaintiff-Appellant
Ranjan Gunarathne for the Defendant-Respondents

Argued on : 20.6.2011

Decided on : 2.8.2011

Sisira de Abrew J.

The Plaintiff appellant, by this appeal, seeks to set aside the judgment of the learned District Judge dated 29.8.96.

The plaintiff and Winson Attygala, by virtue of deeds marked P1, P3 and P4, became owners of one acre of the Northern portion of the land called Mahawatta (hereinafter referred to as the relevant land). Thereafter the plaintiff and Winson Attygala, by deed marked P5, transferred the house and 20 perches towards the southern boundary of the land to their mother Margret Jayasundara. Thereafter the plaintiff and Winson Jayawardene executed a partition deed marked P8. According to the said Partition deed plaintiff got lot Nos. 1 and 2 of the plan No.2935 marked P6 and Winson Attygala got lot No.3 of the said plan. Later Margret Jayasundara, by deed marked P7 transferred the house and 20 perches which she got from deed marked P5 to Richard Attygala and Nickalas Attygala. Upon Richard Attygala's death 1st to 6th respondents became the owners of the said property. Plaintiff appellant alleges that defendant-respondents, thereafter, entered lot Nos. 1 and 2 of plan marked P6 and disturbed the possession of the plaintiff-appellant. The plaintiff appellant filed an action in the District Court to get a declaration of title to said lot Nos. 1 and 2 and to eject the defendant respondents from the said lots. The learned District Judge, by his judgment dated 29.8.96, dismissed the plaintiff's action. This appeal is against the said judgment.

The contention of learned counsel for the defendant respondent is that since Nickalas Attygala and Richard Attygala became owners of the house and the twenty perch land which is a portion of the relevant land they too became co-owners of the relevant land. Learned counsel for the plaintiff appellant contended that the house and the twenty perch land described in deed marked P5 and P7 is a defined lot. I note that four boundaries of the twenty perch block with the house had been demarcated in deed marked P5.

The most important question that must be decided in this case is whether the plaintiff and Winson Attygala who were owners of the relevant land could sell a defined lot from the relevant land and when such a defined lot is sold, the buyers of the said lot become co-owners of the relevant land. I may present the question in another way. That is to say: can all co-owners of a land transfer a demarcated lot of the land and upon such transfer does the transferee become a co-owner of the land. The learned District Judge concluded that transferee becomes a co-owner of the property.

Learned Counsel for the defendant-respondents cited M. Githohamy Vs ER Karanagoda 56 NLR 250 Wherein Supreme Court held: "A plan made at the instance of a co-owner purporting to cause a division of the common land of which the other co-owners apparently had no notice does not form the basis of divided possession. Exclusive possession on the footing of such a Plan does not terminate the co-ownership of the land, and no presumption of an ouster can be inferred from such possession.

When a land is amicably partitioned among the co-owners it is usual to execute cross deeds among themselves or at least that all the co-owners should sign the Plan of partition."

This was followed in Dias Vs. Dias 61 NLR 116. In the above case division of the common land by way of a Plan was done by a co-owner without giving any notice to the other co-owner. But the question that is being considered is whether all co-owners can sell a defined lot. Therefore the above judicial decision is not an authority to decide the question that is being considered in this case. If the contention of learned counsel for the defendant respondent is to be accepted as correct, then all brothers and sisters of one family, after the death their parents, cannot sell a demarcated lot of the property of the family to an outsider. This is not the correct legal

position. Therefore if the contention of learned counsel for the defendant respondent is accepted as correct it will lead to an absurdity. In my view all co-owners of a co-owned property can transfer a demarcated lot of the co-owned property and upon such transfer, transferee does not become a co-owner of the property. He becomes an owner of only the demarcated lot.

For the above reasons, I hold that the learned District Judge's conclusion is wrong. I therefore set aside the judgment dated 29.8.96. I further hold that the plaintiff appellant is entitled to the relief prayed for in paragraph 1 and 2 of her plaint. The learned District Judge is directed to enter decree accordingly. The plaintiff appellant is entitled to the costs in both courts.

Appeal allowed.

Judge of the Court of appeal.