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

C.A : 819/96 F
D.C Kalutara: 6217P

Mahabaduge Clera Fernando, Galle Road, Polkotuwa, Beruwala

3rd Defendant Appellant

Vs

1. Weerawarnakula sooriya Boosa Baduge Daisy Matilda Fernando, 8, Polkotuwa, Beruwala

2. Weerawarnakula sooriya Boosa Baduge Reeni Prasida Fernando, 8, Polkotuwa, Beruwala

Plaintiff-Resplendents

1. Jusecoora Mohotti Fernanado, Galle Road, Polkotuwa, Beruwala

Mahabaduge Francis Fernando, Galle Road, Polkotuwa, Beruwala

Defendant Respondents

Before: A W A Salam J

Counsel: Collin A Amarasingha for substituted 3rd defendant-appellant and Rohan Sahabandu for plaintiff respondent.

Argued on: 11.06.2010 and 03.08.2010.

Written Submissions Filed on: 30.09.2010.

Decided on: 17.01.2011

A W Abdus Salam, J.

This is an appeal by the 3rd defendant allowing the Partition of the land consisting of Lots C1 and D of "Polkotuwewatta Pawula Owita". The two plaintiffs are sisters. They claimed that the action is for the partition of the corpus shown in plan No 1608 dated 19 February 1970 made by H Wijesundera, Licensed Surveyor, filed of record in DC Kalutara P 3228. It is common ground that the corpus in the present action was excluded in that action. For purpose of this action the corpus consisting of lots C1 and D of Polkotuwewatta Pawula Owita is depicted in the preliminary plan No 288 dated 23 August 1993 made by K D L Wijenayaka, Licensed Surveyor and Court Commissioner as C1 and D.

According to the plaintiffs the original owner of the corpus was one Mariyanu Fernando who died leaving behind four children, each child inheriting ¼ share. The last child named Andiris Fernando having

inherited ¼ share from his mother had by deed No 10038 dated 2 February 1910 transferred his rights to Gardenia Fernando who died leaving the 2nd and 3rd defendants who thus became entitled to an undivided 1/8 share each.

The undivided rights of the other three children of Marianu Fernando devolved on the plaintiffs and the 1st defendant. Accordingly, in terms of the plaint the devolution of title of the original owner was set out to be as follows...

1st plaintiff	-	8/24
2nd plaintiff	-	8/24
1st defendant	-	2/24
2nd defendant	-	3/24
3rd defendant	-	3/24

It was only the 3rd defendant who filed a statement of claim in opposition to the plaint. However in her statement of claim the 3rd defendant did not contest the identity of the corpus set out in the plaint and depicted in the preliminary plan. She specifically pleaded in her statement of claim that the devolution of title shown by the plaintiff does not relate to the land in question and that she alone was in exclusive possession of the corpus and had acquired a valid prescriptive title. The 3rd defendant therefore sought a dismissal of the partition action on that ground. At the trial the plaintiff gave evidence

and closed his case reading in evidence documents marked X, XI and PI to P8. None of the defendants gave evidence at the trial nor did they call any witnesses to testify on their behalf. They did not produce any documents either.

The learned district judge after considering both oral and documentary evidence adduced at the trial came to the conclusion that the allotments of land sought to be partitioned by the plaintiffs are lots C1 and D of "Polkotuwewatta Pawula Owita" as depicted in plan No 288 made by K D L Wijenayaka, Licensed Surveyor and Court Commissioner. He rejected the contention of the 3rd defendant that she had acquired a prescriptive title to the corpus. Accordingly, the learned district judge entered interlocutory decree and allotted undivided shares to the parties as set out in the plaint and directed that the land be partitioned among them accordingly.

As far as this appeal is concerned, one area of contention was the alleged improper identity of the corpus. The learned counsel of the 3rd defendant contended that the corpus had no fences or other physical boundaries on the ground to identify its limits. He has further submitted that part of the permanent buildings marked d2 and a2 on the corpus where the rest of the said buildings are found in the adjoining land to the West and claimed by the 3rd defendant are suggestive of the corpus being part of a larger land possessed by the appellant. In other words the learned counsel has made the persistent

attempt to show that there has been no proper investigation by the learned district judge as to the proper identity of the subject matter which he says is only a part of a larger land. In this context he has highlighted the discrepancies with regard to certain boundaries arising as between the schedule to the plaint and some of the deeds produced by the plaintiffs. His position is that the North, South and West of the land and the boundaries given in the schedule to the plaint are different from some of the documents produced at the trial.

Arising on this contention it must be observed that from the very inception the 3rd defendant has represented matters that the corpus identified by the plaintiff in the plaint and also in reference to the preliminary plan is faultless. She does not dispute the assertion of the plaintiff that the corpus in this case had been excluded in the earlier partition action. Furthermore, she claims that it was at her instance the exclusion was made in the earlier partition action. She has not elected to point out to the surveyor at the preliminary survey that the subject matter is a part of a larger land or not an independent entity or different from what has been described in the schedule to the plaint. Above all she had categorically admitted that the land sought to be partitioned has been correctly depicted in the preliminary plan. She did not raise any points of contest touching upon the identity of the corpus either. No commission has been taken out by the 3rd defendant to substantiate a different position with regard to the identity of the corpus proposed by the plaintiffs. She neither called

witnesses to establish a different position as regards the identity of the corpus nor did she elect to testify herself on that matter. In the circumstances, it is hardly possible to accept her contention that the land sought to be partitioned is in fact is not the same as what the plaintiffs represented it to be in the plaint and the document marked as X.

In this respect, I think what has been pointed out by the plaintiff in relation to the investigation of title which need to be limited to pleadings, admissions, points of contest, and evidence both oral and documentary should be equally made applicable to the question of identification of the corpus as well, unless very strong grounds are urged to step outside the case presented by both parties. As has been pointed out by the plaintiff the court cannot go on a voyage of discovery tracing the title and find the shares in the corpus for the parties. In the same manner it is practically impossible for the court to engage on a wild goose chase in the ascertainment of the identity of the subject matter, when the parties have provided nothing to the contrary. Quite surprisingly the pleadings, evidence and the preliminary plan point to the accuracy of the subject matter in respect of which 3rd defendant has sought a declaration of title in her favour based on long and uninterrupted prescriptive possession. For the foregoing reasons, I am not inclined to endorse the view voiced on behalf of the 3rd defendant regarding the alleged lack of proof of the subject matter.

As stated above, it was only the 1st plaintiff who gave evidence at the trial. The case of the plaintiff was closed reading in evidence documents marked X, X 1 and P1 to P8. There was no other evidence available to adjudicate on the matter as none of the defendant chose to adduce any proof to the contrary. The learned district judge was therefore left with the evidence of the 1st plaintiff and her documents. In the circumstances, I cannot find any basis to interfere with the judgment of the learned district judge with regard to the devolution of title.

One of the important matters that loomed large in the presentation of the case for the 3rd defendant was the claim of prescriptive title. The relevant point of contest reads as " by reason of the long and prescriptive possession whether the 3rd defendant had acquired a prescriptive title to lots C1 and D depicted in plan No 288?". In terms of the document marked as P5 (the interlocutory decree entered in partition action No P 3228) the subject matter of this action has been excluded on 31 March 1977. This partition action has been filed on 27 April 1993. The deed of transfer 10038 dated 2nd December 1910 by which Gardian Fernando has derived title refers to an undivided 1/4 share of the corpus. The 2nd and 3rd defendants are children of the said Gardian Fernando and thus by paternal inheritance became entitled to 1/8 share each.

The uncontroverted testimony of the 1st plaintiff which has been accepted by the learned district judge points to the subject matter as being co-owned by the plaintiffs and the three defendants. The surveyor's report shows that the improvements other than buildings A2, B, C and D2 have been claimed and counter claimed by the plaintiffs and the defendants. No points of contests have been suggested with regard to the improvements. The learned district judge has ruled that the improvements should be shared by the parties as per surveyor's report. The fact that the subject matter has been excluded in the partition action by itself does not give rise to any inference that the party sought the exclusion has acquired a prescriptive title to it.

As a matter of fact the 3rd defendant in the earlier partition action has sought the exclusion of the subject matter of the present action on the basis that the original owner of it was Marianu Fernando. Further the 3rd defendant in that action has clearly set out the manner of devolution of the said original owner.

Undoubtedly an order for exclusion of a portion of a land from a partition action does not operate as Res Judicata and such exclusions are always made on the application of a party or ex mero motu but it does not create a title in favour of anybody. It is nothing but a mere exclusion from the proposed corpus, even though title is pleaded for purpose of seeking exclusion.

As regards the question of prescription claim by the 3rd defendant, the learned district judge has investigated that claim on the basis that the 3rd defendant was a co-owner. Very strangely the 3rd defendant did not give evidence or produce any documents. As has been correctly pointed out by the learned district judge the 3rd defendant had failed to prove ouster by any overt act. In short there has been no evidence led on behalf of the 3rd defendant as to any manner of possession. In the circumstances, the investigation carried out by the learned district judge in the light of the respective cases presented by the parties appears to be quite satisfactory and warrants no intervention of this court. As has been submitted on behalf of the plaintiff the judgment of the learned district judge and the reasons adopted by him are not at all perverse to be overturned as cogent reasons have been adduced for his conclusion.

As such, I see no merits in this appeal. Appeal dismissed subject to costs.

Judge of the Court of Appeal

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