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

Galapitagedara Shelton Seelarathne,

Dankanda, Dambagolla.

Plaintiff

C.A Appeal No: 1256/99(F)

D,C,Matale Case No: 2087/P **Vs**

1. Galapita Gedara Dingiri Banda,
   Dankanda, Dambagolla.
   And 3 Others

Defendants

And now between

Damagolle Gedara Gnanawathi,

Dankanda, Dambagolla.

3A Defendant-Appellant

Vs

Galapita Gedara Shelton

Seelarathna,

Dankanda, Dambagolla.

Plaintiff-Respondent

1. Galapita Gedara Dingiri Banda,
   Dankanda, Dambagolla.
   And 2 others

Defendants-Respondents

Before: H.N.J.Perera, J

Counsel: Widura Ranawake with A.D.H.Gunawardena for the

3A Defendant-Appellant

Argued On: 20.09.2013

Written Submissions: 23.09.2013

Decided On: 22.11.2013

H.N.J.Perera,J.

The Plaintiff instituted this action for the partition of a land called Nagahamulahena described in the schedule to the plaint. According to the plaint the parties are entitled to undivided shares of the corpus as described in paragraph 13 of the plaint as per the pedigree set out in the plaint.

At the commencement of the trial before the District Court of Matale on 03.04.1997, the parties admitted that the land described in the schedule to the plaint and to be partitioned is depicted in the preliminary plan No. 3537 dated 06.03.1996 and certified by S.Ranchagoda, Licenced Surveyor, and also the jurisdiction of the court.

Issue number 1 and 2 were raised by the plaintiff and the 4th defendant raised issues bearing number 3 and 4. The 4th defendant stated in her statement of claim that she received an undivided share of the corpus by deed bearing No 30460 dated 03.08.1957. However she did not give evidence at the trial nor produce this deed in evidence. By issue no 3 and 4, the 4th defendant claimed prescriptive title to the entire land sought to be partitioned in this action.

The plaintiff gave evidence and produced documents marked P1 to P 10 in support of his claim. Although the 4th defendant had claimed prescriptive title to the entire land she did not give evidence or produce any evidence to establish that she has prescribed to the land sought to be partitioned. She had also stated in her statement of claim that she is a co-owner of the said land. The 3A defendant-Appellant gave evidence on her behalf. The learned District Judge after trial delivered judgment on 23.04.1999 and held that lot No 4 of the preliminary plan to be allotted to the 4th defendant since she had prescribed the aforesaid portion and the balance portion of the corpus to be divided amongst the plaintiff and the 1st to 3rd defendant's per shares given in the judgment.

It was contended by the Counsel for the 3rd defendant-Appellant that the learned District Judge had erred in law by deciding deed P4 as a valid revocation of gift and accepting same as evidence to prove the pedigree of the plaintiff. The plaintiff in his plaint as well as in giving evidence had stated that a person called Waduge Themis was the original owner of the land sought to be partitioned and the said Themis had transferred the land to Waduge Balahamy deed of transfer bearing No 1925 dated 27.12.1924, marked P2. The plaintiff further stated that the said Balahamy gifted the land to her children Agnus (3rd defendant), Wimalarathna, Lilawathie (2nd defendant) Jemis Appuhamy, Dingiri Banda (1st defendant), Kusumawathie and

Jayasinghe deed of gift bearing No 17495 dated 01.02.1955 marked P3.It is the position of the 3rd defendant that she had accepted the aforesaid gift on her behalf as well as the other donees who were minors at the time of the execution of deed P3.

The plaintiff stated that the deed of gift marked P3 had been revoked by the donor by deed of revocation of gift bearing No 18144 dated 05.12.1955 marked P4.It was the position of the plaintiff that the said Balahamy after the said revocation transferred her rights by deeds marked P5, P8 and P9.

It is the contention of the Counsel for the 3rd Defendant-Appellant that Waduge Balahamy had executed deed of cancellation of gift marked P4 unilaterally, without the consent of the donees in P3 and that the donor Balahamy had not reserved her right to revoke the gift at the time of execution of the deed of gift marked P3, and therefore the donation made by P3 was an absolute gift which is under Roman Dutch Law irrevocable. It is further submitted that the deed of gift P3 could not have been revoked by the donor by execution of the deed of revocation of gift P4 and therefore P4 has no force in law and therefore no title had passed to the vendees in P5, P8, and P9 since the vendor in all three deeds had no title to the corpus at the time of execution of those deeds.

The purpose to raise issues and admissions in terms of the Civil Procedure Code is in one respect to identify each party's case before court. Issues are generally raised from the pleadings. It is also permissible to raise issues when evidence transpire in court and based on the evidence issues could be suggested.

In the case of The Tasmania (1890) 15 App. Cases 223 Lord Herschell said " It appears to me that under these circumstances, a court of Appeal ought only to decide in favour of an appellant on a ground

there put forward for the first time, if it is satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and, next, that no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box.

In Appuhamy Vs Nona 15 NLR 311 it was held by Pereira, J that:-

"Under our procedure all the contentious matter between the parties to a civil suit is, so to say, focussed in the issues of law and fact framed. Whatever is not involved in the issues is to be taken as admitted by one party or the other, and under our procedure it is not open to a party to put forward a ground for the first time in appeal unless it might have been put forward in the court below under some, one or other of the issues framed, and when such a ground that is to say, a ground that might have been put forward in appeal for the first time, the cautions indicated in the Tesmania may well be observed."

The learned district judge had entered judgment in favour of the plaintiff-respondent based on admissions and evidence recorded at the trial. The plaintiff in his evidence has stated that the said Balahamy gifted the land to her children by a deed of gift bearing No 17495 marked P3, and that the said deed marked P3 was revoked by the donor by a deed of revocation No 18144 marked P4. The plaintiff had stated further that the said Balahamy executed deeds P5, P8 and P9 on the strength of the title acquired by her by the aforesaid deed of revocation of gift. All these matters had been pleaded by the plaintiff in the plaint and accordingly evidence had been led to prove the pedigree put forward by the plaintiff in this case. The plaintiff

had marked deeds P1 to P10 in giving evidence without any objections from any other party to this case.

In Wijewardene Vs Ellawala 1991 (2) SLR 14 it was held that the failure to object to the deed being received in evidence would amount to a waiver of the objections.

In Cinemas Limited Vs Sounderajan 1998 (2) Sri L.R. 17 it was held that in a civil case when a document is tendered the opposing party should immediately object to the document. Where the opposing party fails to object, the trial judge has to admit the document unless the document is forbidden by law to be received and no objection can be taken in appeal

In Muttaiya Chetty Vs Harmanis Appu 4 N.L.R. where a promissory note not duly cancelled having been tendered in evidence, without objection taken, and judgment given for plaintiff, it was held that it was too late in appeal to take that objection, and that the proper course was to have made that question an issue in the case.

In Silva Vs Kindersley 18 NLR 85 it was held that in a civil suit, when a document tendered in evidence by one party is not objected to by the other, the document is to be deemed to constitute legally admissible evidence as against the party who is sought to be affected by it. It was further held in this case that it would be manifestly unfair to a party who tenders a document in evidence if, after he has been lulled into security by lack of objection by his opponent, he is suddenly required to meet for the first time in appellate Court objections to the receipt of the document in evidence.

In this case it was a matter of which the 3rd defendant- appellant was perfectly cognizant when the action was tried in the court below,

and when she was called upon to meet the plaintiff's case she should have asked the Judge to make that question an issue.

In Cinemas Limited Vs Sounderanjan Jayasuriya, J further stated that:-

"Thus in civil proceedings, it is of paramount importance for the opponent to object to a document of it is inadmissible having regard to the provisions of the Evidence Ordinance. Where he fails to do so, the objections to admissibility cannot be raised for the first time in appeal. The principle and rationale behind this rule is easily understood. Had objection been taken, the party proposing to to adduce the document would have tendered to the court evidence aliunde and by the failure to take the objection the opposing party has waived the objection."

The 3^{A} defendant- Appellant has filed her statement of claim and was represented by a Counsel at the trial. No issue has been raised on her behalf at the trial and the evidence given by the plaintiff has not been challenged by the 3A defendant-appellant with regard to deed marked P3 and P4. In fact the plaintiff had marked the deed P8 without any objection from the 3A defendant and proved some rights to her. In fact the plaintiff has tendered the deed No 30467 marked P8 and had stated that the 3rd defendant, the mother of the 3A defendant is entitled to a 1/5 of 7/8 share of the corpus to be partitioned. By P8, the mother of the 3A defendant had purchase shares from Balahamy, after she (Balahamy) had revoked the original deed of gift marked P3 by P4. It could be said that the 3rd defendant had conceded the fact that Balahamy became the owner of the said property after she had revoked the said deed of gift P3 by the said deed P4.

It is to be seen that the position taken up by the 3A defendant-Appellant in appeal for the first time is not in accord with the case presented by her in the District Court.

In Candappa Nee Bastian Vs Ponnambalampillai (1993) 1 Sri L.R 185 that a party cannot be permitted to present a case different from that presented in the trial court where matters of fact are involved which were not in issue at the trial such case not being one which raises a pure question of law.

In Setha Vs Weerakoon 49 NLR 226 it was held that:-

'A new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the court of appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more."

In Thilagaratnam Vs Athpunathan and others [1996] 2 Sri L.R. 66 it was held:-

(1)Although there is a duty cast on Court to investigate title in a partition action, the court can do so only within the limits of pleadings, admissions, points of contest, evidence both documentary and oral.

Per Anandacoomaraswamy, J

"court cannot go on a voyage of discovery tracing the title and finding the shares in the corpus for them; otherwise parties will tender their pleadings and expect the court to do their work and their Attorneys-at-Law's work for them to get title to those shares in the corpus."

I am, therefore of opinion that this is not a matter which can be raised for the first time in appeal.

It was also contended by the Counsel for the 3A defendant-Appellant that the learned District Judge erred in law by deciding that Karunawathie had inherited the entirety of Jayasinghe's share by way of matrimonial inheritance.

The plaintiff whilst giving evidence had stated that Jayasinghe received an undivided 7/8 x4/5 x1/3 by deed marked P9 was married to Karunawathie and died without having children. The widow of Jayasinghe by deed marked P10 had transferred the entire rights of the deceased Jayasinghe to plaintiff. The plaintiff also claimed the entire rights of Jayasinghe by the said deed P10.It is the contention of the 3A defendant-Appellant that the entirety of Jayasingh's share could not have devolved on karunawathie in view of the provisions in section 25 and 26 of the Matrimonial Rights and Inheritance Ordinance and Karunawathie inherits only one half share of Jayasinghe's rights. Brothers and sisters of deceased Jayasinghe inherit the balance half share in view of the said provisions in the Matrimonial Rights and Inheritance Ordinance. This position had been put to the plaintiff even at the trial by the Counsel for the 3A defendant-Appellant. The learned District Judge had erred by deciding that the entire rights of Jayainghe passed on to the plaintiff in terms of deed P10.Therefore half share of the rights of deceased Jayasinghe that is half of 7/8 x 4/5 x 1/3 share should devolve on his sisters and brothers. Therefore that part of the Judgment awarding entire rights of Jayasinghe to the plaintiff must be set aside. Those shares awarded by the judgment and interlocutory decree to the plaintiff must be kept unallotted. The sisters and brothers of the

deceased Jayasinghe are entitled to make an application to the District court and to obtain the shares they are entitled to from the share that is kept unallotted in this case.

Finally it is the contention of the Counsel for the 3A Defendant-Appellant that the learned District Judge had erred in law deciding that the 4th defendant had prescribed lot 4 of the preliminary Plan marked P1.

The 4th defendant filed a statement of claim and claimed that she received an undivided share of the corpus by deed No 30460 dated 03.08.1957. However she did not give evidence or produce the said deed at the trial. Issue No 3 and 4 was raised by the 4th defendant and she claimed prescriptive title to the entire land sought to be partitioned in this case.

The learned District Judge had held that the 4th defendant had prescribed to lot 4 in preliminary Plan marked P1. It is contended on behalf of the 3A defendant that the 4th defendant could not prescribe to the entire land since the plaintiff and 2nd and 3rd defendants were also in possession and residing upon the land sought to be partitioned. It is further submitted that the 4th defendant did not give evidence and call or produce any evidence to establish that she prescribed the land scught to be partitioned and or any portion thereof.

It is to be noted that plaintiff in cross examination had denied this position taken up by the 4th defendant. The 3A defendant whilst giving evidence had merely admitted that the 4th defendant was in possession of a portion of the land over a period of time. It is submitted that the learned District Judge had based his finding solely on the answers given by the 3A defendant during cross examination.

The burden is cast on the 4th defendant to prove that by virtue of adverse possession she had obtained a title adverse and independent of the paper title of plaintiff and the other co-owners.

In Sirajudeen and others Vs Abbas [1994] 2 Sri L.R. 365 it was held that:-

"Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights.

As regard the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by court.

One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be such character as is incompatible with the title of the owner.

In Hassan Vs Romanishamy 66 C.L.W 112, it was held 'That mere statements of a witness, "I possessed the land" or "We possessed the land" and "I planted plantain bushes and also vegetables", are not sufficient to entitle him to a decree under section 3 of the Prescription Ordinance, nor is the fact of payment of rates by itself proof of possession for the purposes of this section.'

The burden was cast on the 4th defendant to prove that by virtue of as adverse possession she had obtained a title adverse to and independent of the paper title of the plaintiff and other owners. According to section 3 of the Prescription Ordinance such a possession must be undisturbed, uninterrupted, adverse to or independent of that of the former possessor and should have lasted for at least ten years before she could transform such possession into prescriptive title. Here in the instant case the 4th defendant had not given evidence. The mere statement of the 3A defendant that she (the 4th) possessed this land is not sufficient to prove prescriptive title. One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the plaintiff and other owners. There must be proof that the 4th defendant's occupation of the premises was such character as is incompatible with the title of others. It seems to me that the trial Judge has not properly addressed his mind to the important fact that the burden is definitely on the 4th defendant to establish her plea of prescriptive title. In my view in the present case there is a significant absence of clear and specific evidence on such acts of possession as would entitle the 4th defendant to a decree in favour in terms of section 3 of the Prescription Ordinance. For reasons stated above I am of the opinion that the learned District Judge had erred in law in deciding that the 4th defendant had prescribed to lot 4 of the preliminary plan marked P1.

Accordingly I answer the issues in the following manner.

(1) Yes. Subject to what is stated in my judgment.

(2) Yes. Lots 1, 2, 3 and 4 of the Preliminary Plan marked P1.

(3) No.

(4) No.

Parties are entitled to shares in the following manner.

(1)Plaintiff:- 42/120
(2)1st Defendant :- 28/120
(3) 2nd Defendant:- 15/120
(4) 3rd Defendant:- 21/120
(5)Unallotted:- 14/120

The parties are entitle to improvements as stated in the judgment of the District judge dated 23.04.1999.

The interlocutory decree is to be amended accordingly. I make no order for costs.

Interlocutory decree –varied

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL