IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

B.M.Walter Jinadara
Godawela, Marawila
3rd Defendant-Appellant

Vs

C.A.No.510/98 (F)

D.C.MARAWILA CASE NO.53/L

H.M.A.Parakrama Herath
Galamuna, Kudawewa
And others

Plaintiff-Respondents

A.A.Gnanawathie
Wiharahena, Kudawewa
(Deceased-Defendant-Respondent

B.M.Hemakeerthi
Wiharahena,
Kudawewa
And others
Substituted-Defendant-Respondents

BEFORE	:	**K.T.CHITRASIRI, J**
COUNSEL	:	A.Dharmaratne with Indika Jayaweera for the 3rd Defendant-Appellant J.M.Wijebandara with M.Abeyratne for the 1st to 3rd Plaintiff-Respondents
ARGUED ON	:	10.09.2013
WRITTEN SUBMISSIONS FILED ON	:	10th October 2013 by the Plaintiff-Respondents 11th November 2013 by the 3rd Defendant-Appellant
DECIDED ON	:	**12.12.2013**

CHITRASIRI, J.

This is an appeal seeking to set aside the judgment dated 18th June 1998 of the learned District Judge of Marawila. By that judgment, Learned District Judge made order to partition the land as decided in his judgment having rejected the defendants' claim of prescription made to the land sought to be partitioned. This appeal of the 3rd defendant-appellant is to set aside the said judgment dated 18th June 1998 and to have the prescriptive claim of all the six defendants accepted and also to have the plaintiffs' action dismissed.

However, learned Counsel for the 3rd defendant-appellant (hereinafter referred to as the appellant) at the commencement of the argument in this Court, submitted that he is not pursuing the prescriptive claim of the defendants. Even in the written submissions filed subsequent to the oral submissions made on behalf of the appellant, it is clearly mentioned that the appellant is not pursuing the appeal filed in respect of the decision made on the prescriptive claim of the defendants. Accordingly, the appeal filed to canvas the decision in respect of the prescriptive claim of the defendants is dismissed. Hence, the decision of the learned District Judge on the claim of prescription raised by the defendants would prevail.

Then the issue is to determine whether the plaintiff-respondents (hereinafter referred to as the respondents) have established the title of the respective parties as claimed by them. Upon perusal of the judgment, it is clear

that the learned District Judge has basically relied on the admission recorded at the commencement of the trial on 16th June 1994 in determining the allocation of shares to the parties. This position is clearly seen by the following observations made by the learned District Judge in his judgment dated 18th June 1988.

"මෙම නඩුවේ විභාගය ආරම්භ වුනු අවස්ථාවේදී දෙපාර්ශවය පිළිගත් කරුණක් වුයේ පැමිණිල්ලේ 2වන උපලේඛනයේ විස්තර කර ඇති දේපල අවුරුදු 40 කට වැඩි කාලයක් බමුනු මුදියන්සේලාගේ චාර්ලිස් අප්පුහාමි බුක්ති විඳ දීර්ඝ කාලීන බුක්තිය පිට හිමි වී ඇති බව."

[vide proceedings at page 238 in the appeal brief]

The admission referred to by the learned District Judge that was recorded on 16th June 1994 is being worded in the following manner.

"<u>පිලිගැනීම් :-</u>

(1) පැමිණිල්ලේ 2 වෙනි උපලේඛනයේ විස්තර කරන දේපල අවුරුදු 40 කට වැඩි කාලයක්, බමුනු මුදියන්සේලාගේ චාර්ලිස් අප්පුහාමි විසින් බුක්ති විඳ, දීර්ඝ කාලීන බුක්තිය පිට හිමි වී ඇති බවට පිලිගනී."

[vide proceedings at page 135 in the appeal brief]

It is on the basis of the aforesaid admission that the learned District Judge has decided the devolution of title to the land sought to be partitioned. One cannot find fault with the Judge to have taken such a stand since it had been recorded as an admitted fact between the parties. In fact, the submissions of the

learned Counsel for the respondents also seem to have made on that basis in the Court below.

However, it is important to note at this stage that the issues, particularly the issues bearing Nos. 5,6,7,9 and 11 of the contesting defendants including the 3rd defendant-appellant had been framed questioning the pedigree submitted by the respondents despite the recording of the above admission. Under those circumstances, the learned District Judge should not have allowed the aforesaid admission to stand in the way it is recorded.

Section 146(1) of the Civil Procedure Code allows the parties to an action to state the questions of facts or of law that are agreed by the parties. Accordingly, the parties suggest the issues of the case in order to present their respective cases before court. However, it is incumbent on the judge to make a decision as to the manner in which the admissions and the issues are to be recorded having considered those stated facts and law suggested by the parties, keeping in mind that he/she is to reach the right decision in the end, settling all the disputes presented before him in that action. **[Peiris V Peiris 10 NLR 41, Murugesu V Aruliah 17 NLR 91, Avudiappan V Indian Overseas Bank 1995 (2) SRI L R 131, Boyagane DC Mills Ltd. V Menikdivela 2002/2003 Nov-Feb BALR/Ca1221/2000]** Therefore, it is the duty of the trial Judge to determine and accept the admissions and the issues of the case though it is the practice of our civil courts to consider it as a right of the parties to suggest those admissions and issues probably taking the cover of stating the questions of facts or of law referred to in Section 146 (1) of the Civil Procedure Code.

In this instance, learned District Judge seems to have not addressed his mind to the aforesaid issues 5,6,7,9 and 11, whereby the defendants have clearly disputed the pedigree of the plaintiffs in view of the admission as to the original owner. Those issues seem to have been suggested in accordance with the pleadings as well. Had the trial judge addressed his mind to those issues with that of the suggested admission that was recorded, he could not have allowed the admission to stand in such a manner.

Learned Counsel for the appellant also made exhaustive submissions in support of the appellant's case referring to the manner in which the devolution of title to the land sought to be partitioned should be looked at. Apparently, the devolution of title of the defendants had not been considered by the learned District Judge probably in view of the admission recorded as to the original owner of the land sought to be partitioned.

In the circumstances, it is clear that the learned District Judge has evaluated the evidence on a wrong premise. Such exercise of the learned District Judge has prevented the defendants including the appellant, presenting their case as suggested in their issues. At this stage, it is also necessary to note that Section 25 of the Partition Act imposes a duty on the trial Judge to examine the title to a land subjected to in a partition action. This proposition in law has been upheld in numerous occasions including in the following decisions.

- **Galagoda vs. Mohideen, 40 N L R 92**
- **Gunatillake vs. Muriel Silva 79 (1) N.L.R.at 481**

- **Kularatne vs. Ariyasena (2001) B.L.R.6**
- **Rechard and Another vs. Seibel Nona (2001) (20 S.L.R. at 1**
- **Abeysinghe vs. Kumarasinghe (2008) B.L.R. at 300**
- **Brewery Company Ltd vs. Jax Fernando (2001(1) S.L.R.270**

Against such a backdrop, the learned District Judge should not have ignored the issues raised on behalf of the defendants as to the pedigree despite the admission recorded. The matters referred to above, show that the learned District Judge has failed to investigate title of the parties concerned, as referred to in Section 25 of the Partition Act. Therefore, it is my opinion that it is incorrect to allow the judgment dated 18.06.1998 to stand as it is. Hence, I set aside the said impugned judgment of the learned District Judge of Marawila in relation to the allocation of shares.

For the aforesaid reasons, I set aside the judgment dated 16.06.1998 allowing the appeal filed by the 3rd defendant appellant. Having considered the circumstances, I am of the view that the respective parties should bear their own expenses incurred in conducting this appeal.

At this stage, it must also be noted that it is difficult even for this Court to consider the evidence as to the pedigree put forward by the parties since the evidence had been recorded on the basis that there was no dispute as to the original owner. Therefore, I am of the opinion that it is necessary to hold a retrial

in this regard allowing the parties either to record admissions or to suggest issues on the question of devolution of title to the land sought to be partitioned. The learned District Judge of Marawila is directed to hold a re-trial and to determine the rights of the parties accordingly.

However, as referred to above, the appeal filed to challenge the decision made on the claim of prescription by the defendants has been dismissed by this Court due to non-pursuing the appeal on the issue of prescription claimed by the defendants. Hence, the defendants including the appellant cannot have a re-trial on their claim of prescription. Accordingly, the learned District Judge is directed to allow the parties to suggest issues only in respect of the pedigree referred to in the pleadings filed by the parties when the *trial de novo* is commenced.

Appeal allowed and the trial judge is directed to hold a re-trial.

JUDGE OF THE COURT OF APPEAL