

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

CA 412/93(F)

D.C. Galle Case No. 7279/P

Eyani DeSilva

Substituted Plaintiff Appellant

Vs.

W. Samson De Silva

And 04 others

Defendants - Respondents

CA 412/93(F)

D.C. Galle Case No. 7279/P

Before : **K.T. CHITRASIRI, J.**

Counsel : Daya Guruge for the Substituted-Plaintiff-Appellant.
H.Withanachchi for the 3rd and
4th Defendant-Respondents
2nd Defendant-Respondent is absent and
unrepresented

Argued &

Decided on : 16.01.2014

K.T. CHITRASIRI, J.

This is an appeal seeking to set-aside the Judgment dated 01.12.1992. By that Judgment Learned District Judge dismissed the action that was filed to partition the land referred to in the schedule to the Plaint. Both Counsel agree that the basis for the dismissal of the action has been that it was filed for the purpose of determining the question of constructive trust and the applicability of the Fidecommissa to the property in suit, in the guise of a partition action. In other words,

learned District Judge was of the view that a partition action cannot be instituted to have such issues determined. The decision of the learned District Judge as to his view on this point is as follows:

“අදාළ ඉඩමේ නොබෙදූ අයිතිවාසිකම් වලින් 1/108 පංගුවක් සිටි යයි කියා සිටිනු ලබන පලමුවන විත්තිකරු හා සමග කිසිදු හඬයක් නොමැතිව සහ නඩු විභාගය අතරමගදී හඬ කිරීම අත්හරිනු ලැබූ 2 වන විත්තිකරු හා පැමිණිලිකරු අතරද විශ්වසනීය භාරයක් කියා සිටිමින්ද, පැමිණිලිකරු විසින් මෙම බෙදුම් නඩුව පැමිණිලි කරනු ලැබ ඇත්තේ නුදෙක් ඉඩම බෙදා වෙන් කර ගැනීමේ අදහසින් නොව, ඉහත සඳහන් පරිදි පැමිණිලිකරු හා සෙසු පාර්ශවකරුවන් අතර අවුල් ජාලයක් බවට පත් කර ගනු ලැබ ඇති සියලු ප්‍රශ්න නිරාකරණය කර ගැනීම සඳහා බැව් පෙනේ. මෙහිදී මෙබඳු වූ පෙලපතකින් පැවතෙන අයිතියක් මා ලබා ඇතැයි කියමින් ඊට පටහැනි වූ කවර අයිතිවාසිකම් හෝ වෙන්නම් ඔප්පු කර ගන්නා ලෙස සෙසු පාර්ශවකරුවන් වෙත පවරමින් නිතඬ විමෙන් ඉතා පහසුවෙන් පැමිණිලිකරුට මෙම කරුණු නිරාකරණයකර ගැනීමට බෙදුම් නීතියේ පිළිසරණ ලබා ගත හැකි බවට මෙම අධිකරණය තීරණය නොකරයි.”

The above reasoning shows that the learned District Judge has declined to consider the merits of this partition action due to the inclusion of issues such as Constructive Trust and Fidecommissa. It is a clear misdirection on the part of the learned District Judge to have this partition action dismissed stating that it involves determining issues such as those referred to above. Both Counsel too agree that it is wrong to have declined to consider those issues merely because those

have been raised in this same partition action. For the aforesaid reasons, I set aside the judgment dated 01.12.1992 of the learned District Judge.

Against such a background, it is necessary to consider the possibility of answering those issues by this Court upon looking at the evidence already been recorded. I am of the view that such an exercise is not advisable since it may prejudice the rights of the parties particularly because the determination of the issues such as constructive trust, fidecommissa and prescription involve facts and circumstances of the case. Also, it is necessary to note that the best person to decide those matters is the trial Judge who hears and sees the witnesses.

Moreover, it must be mentioned that in the event this court decides to conclude the case upon perusing the evidence already been recorded, then it will have to be made without hearing the submissions of the 2nd defendant-respondent as he is absent and not even being represented before this Court. Such an exercise may lead to prejudice the rights of the 2nd defendant-respondent in particular. At this stage, learned Counsel for the appellant informs Court that he has no objection to remit this case back to the District Court for re-trial.

Considering all these matters, this Court makes an order to have a re-trial allowing the trial judge to decide all the issues raised in this

partition case. Accordingly, learned District Judge of Galle is directed to hold a trial de-novo. In doing so, he is free, either to adopt the proceedings already recorded with the consent of the parties or if necessary to allow the parties to call for additional evidence. For the aforesaid reasons this appeal is allowed without cost.

Appeal allowed

JUDGE OF THE COURT OF APPEAL

Mm/-.