IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

3. W.A.Swarna
Deceased 3rd Defendant-Appellant

C.A.No.563/98 (F
D.C.GALLE CASE NO.9805/P

3a D.S.Ranasinghe
3b A.W.Ranasinghe
Both of No.149, Wakwella Road, Galle.
3a & 3b Substituted-Defendant-Appellants

5a E.H.Adlin
Deceased 5a Substituted-Defendant-Appellant

5b W.A.Sisira
5c W.A.S.P.Kumara.
Wakwella Road,
Minuwangoda,Galle.
5b & 5c Substituted-Defendant-Appellants

Vs

G.M.S.P.De.S.Suriyawansa
No.120,Wakwella Road,
Minuwangoda, Galle.
Plaintiff-Respondent
And others

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

COUNSEL : Mahinda Nanayakkara with Aruna Jayathilake for the Substituted 5B & 5C Defendant-Appellants
G.Wijemanne for the Sub.3a Defendant-Appellant
G.Samaranayake with Wimalasena de Silva for the Plaintiff-Respondent

ARGUED ON	:	11.11.2013
WRITTEN SUBMISSIONS FILED ON	:	10th December 2013 by the Plaintiff- Respondent 11th December 2013 by the Substituted 5B & 5C Defendant-Appellants
DECIDED ON	:	**18.02.2014**

CHITRASIRI, J.

This is an appeal, jointly filed by the 3rd and the substituted 5A defendants seeking to set aside the judgment dated 13.03.1998 of the learned District Judge of Galle. In the petition of appeal, the defendant-appellants also sought for a decision, declaring that the 3rd defendant-appellant (hereinafter referred to as the 3rd defendant) is entitled to lots bearing Nos.5A & 6A depicted in plan 2615 [including the premises bearing No.149] and that the 5A defendant-appellant (hereinafter referred to as the 5A defendant) is entitled to the premises bearing No.147 found thereon.

Having referred to the reliefs prayed for in the petition of appeal, I will now refer to the claim, the appellants have made in their statements of claim filed in the lower court, in order to have a clearer understanding of the background to this appeal. Statement of claim of the 3rd defendant had been filed jointly with the 2nd, 4th and 6th defendants. In that statement of claim they have claimed prescriptive title to the premises bearing assessment Nos. 147,149 and 149/1 along with a shed and the toilet appurtenant thereto whilst

showing a pedigree, completely different to the pedigree of the plaintiff-respondent. (hereinafter referred to as the plaintiff)

At this stage, it is also pertinent to note that the 2nd, 4th and the 6th defendants have not filed an appeal challenging the judgment though their claim is similar to the claim of the 3rd defendant. However, when this appeal was taken up for hearing, even the 3rd defendant was prepared to accept a settlement suggested by the plaintiff. Accordingly, the plaintiff-respondent on sympathetic grounds agreed to allocate the premises bearing the assessment No.149 to the 3rd defendant.

The aforesaid settlement was not materialized since the Substituted 5B and 5C defendant-appellants were not prepared to accept the settlement suggested by the plaintiff-respondent to them. The said settlement suggested by the plaintiff–respondent to the 5B and 5C defendant-appellants was to give the house shown as assessment No.147 to the 5A defendant, like in the case of the 3rd defendant. As a result, the matter was taken up for argument before this Court and then all the Counsel were heard in support of their respective cases.

Learned District Judge having carefully looked at the evidence, made order to partition the land allocating equal ½ shares to the plaintiff and to the 1st defendant having rejected the prescriptive claims of the two appellants. Refusal of the prescriptive claim advanced by the defendants was on the basis that they came into possession of the land sought to be partitioned, as

licensees of the plaintiff or his predecessors-in-title. His findings in this regard are as follows:

"03 විත්තිකාරිය වෙනුවෙන් ඇයගේ ස්වාමිපුරුෂයා සාක්ෂි දෙමින් කියා සිටියේ, තමා 1960 වර්ෂයේ සිට මෙම ස්ථානයේ පදිංචිව සිටින බවය, ඔහුද පැමිණිලිකරුවන්ට අයත් ඉඩමක් මෙම ස්ථානයේ ඇති බව පිලිගෙන ඇත. විපේපාල එනම් 02 වන විත්තිකරු විසින් ගෙවල් කුලි මණ්ඩලයට ඉදිරිපත් කරන ලද ඉල්ලුම්පත්‍රය පිලිබඳ ප්‍රශ්න කරන අවස්ථාවේ, ඔහු කියා සිටියේ මෙය, ව්‍යාජ ඉල්ලුම්පත්‍රයක් බවත්ය. කෙසේ නමුත් මෙම නඩුවේ 02, 03, 04, 06 විත්තිකරුවන්, එනම් එකී විපේපාලද ඇතුලුව සාමුහික වශයෙන් එක්ව සිටිනමි ප්‍රකාශයක් අධිකරණයට ඉදිරිපත් කර ඇත. 03 වන විත්තිකරු විසින් ඉදිරිපත් කරන ලද "වයි" සහ "වයි 2" දරණ ලේඛන වලට අනුවත්, එම "3වි3" දරණ ලේඛන වලට අනුවත්, ඔවුන් සහ ඔවුන්ගේ පූර්වයුක්තීන් මෙම ස්ථානයේ පදිංචිව සිටි බවට පිලිගත හැක. එසේම "3වි1" එල්/9908 දරණ නඩුවේ ඉල්ලීමක් පිලිබඳවත් "3වි2" දරණ ලේඛනය, එකී ඉල්ලීමට අදාල නියෝගයට අනුවත් පෙනී යන්නේ 04 වන වත්තිකාර සුමනදාසට එරෙහිව ඇස්කියි නිකුත් කොට " 6ඒ" සහ "6බී" දරන ඉඩම් කැබලි දෙක, එම නඩුවේ පැමිණිලිකාර, මෙම නඩුවේ පැමිණිලිකරුට ලබා දී ඇති බවය. සෙසේ වුවත් "3වි2" දරණ ලියවිල්ලට අනුව අධිකරණය විසින් ප්‍රතික්ෂේප කර ඇත්තේ දෙවැනි වරටත් එබදු ඇස්කිසියක් ක්‍රියාත්මක කිරීම ප්‍රතික්ෂේප කිරීම පමණකි.

ඒ අනුව මෙම නඩුවට ඉදිරිපත් වූ සාක්ෂිත්, ලේඛනවලටත් අනුව පෙනී යන්නේ පැමිණිලිකරු විසින් මැන බෙදා වෙන් කර ගැනීමට අදහස් කරන දේපල සම්බන්ධයෙන් කිසිදු ආරවුලක් නොමැති බවත්, එම දේපල "එකස්" දරණ පිඹුරේ කැබලි අක්ෂර 5ඒ, 5බී,, 6ඒ සහ 6බී වශයෙන් නිරූපනය වන බව තීරණය කල

නැත. එසේම මෙම දේපල, පැ1 සිට පැ8 දක්වා වූ ලියකියවිලිවලට අනුව, පැමිණිලිකරුවන්, 01 වන විත්තිකරුවන් සාරෝපණය වී ඇති බව පිලිගත නැත. විත්තිකරුවන් ඉදිරිපත් කරන ආකාරයට, ඔවුන් එම දේපලේ පිහිටි ඇතැම් ගොඩනැගිලිවලට කාලාවරෝධී සිටිනම් ලබා ඇති බව, ඉදිරිපත් වූ සාක්ෂි අනුව පිලිගැනීමට හැකියාවක් නොමැත. ඔවුන් එම දේපල වල පදිංචිව සිට ඇති බවට පිලිගත හැකි නමුත්, එසේ පදිංචිව ඇත්තේ අන් අයගේ අයිතිවාසිකම්වලට පටහැනි ලෙස බවට පිලිගත නොහැක. විශේෂයෙන් 02 වන විත්තිකරුගේ ක්‍රියාකලාපයන්, 04 සහ 03 වන වත්තිකරු විසින් දෙන ලද සාක්ෂි වලටත් අනුව පෙනී යන්නේ ඔවුන් නුදෙක් එම දේපලේ පැමිණිලිකරු හෝ ඔවුන්ගේ පූර්වයුක්තීන්ගේ අනුදැනුම ඇතිව මෙම දේපලේ පිදිංචිව සිට ඇති බව පමණි."

(Vide at pages 182,183 and 184 in the appeal brief)

Significantly, the findings of the learned District Judge including the matters referred to above was not a matter that was subjected to when the hearing of this appeal was taken up before this Court. Therefore, it is clear that the defendant-appellants have completely abandoned even the grounds of appeal cited in their petition of appeal filed, in order to impugn the judgment. The grounds of appeal referred to in the petition of appeal are directed towards the non-consideration of the claims made in the statements of claim of the defendants; basically it is their prescriptive claim.

The appellants, particularly the Counsel for the 5B and 5C defendant-appellants not having pursued the matters raised in the

petition of appeal, took up a different line of argument. His argument was that the plaintiff has failed to establish his title in the court below. He further argued that even the learned District Judge has failed to investigate the title of the parties though it is his duty to do so when it comes to a partition action.

Having advanced the aforesaid argument, learned Counsel for the 5B and 5C defendant-appellants submitted that it is wrong to have decided that the plaintiff is entitled to the rights of Peter Richard Rodrigo since the partition decree upon which the plaintiff depends to establish his rights, does not refer to such a person by the name of Peter Richard Rodrigo. Accordingly, his submission was that the learned District Judge should have decided that the plaintiff is not entitled to have the rights derived from Peter Richard Rodrigo referred to above. Having submitted so, he accordingly moved to have the impugned judgment set aside.

At this stage, it must be noted that the question raised as to the title of the plaintiff was not at all an issue when the trial was held before the learned District Judge. Not even a single question was asked on that line. Not only at that stage but even when the petition of appeal was filed such an issue was not been raised by the substituted parties of the 5th defendant. Basically, this issue had never been a point of contest before the learned District Judge. The defendants were always concentrating on their prescriptive claims. Those may have been the reasons for the

failure to consider this question as to the name of the predecessor in title of the plaintiff by the learned District Judge.

However, this Court cannot disregard the issue as to the burden that casts upon a trial judge to have the title of the parties investigated in a partition case. It is correct to state that it is the duty of the trial judge to investigate title of the parties in terms of Section 25 of the Partition Act. **[Galagoda V Mohideen 40 N L R 92, Gunatilleka V Murieal Silva 79 (1) N L R 481, Kularatne V Ariyasena 2001 B L R 06, Richard and Another V Seibel Nona 2001 (2) S L R 01, Abeysinghe V Kumarasinghe 2008 B L R 300]**

As mentioned hereinbefore in this judgment, it is seen that this issue as to the ownership of Peter Richard Rodrigo to lots 6A and 6B was never been an issue before the learned District Judge. It may have been the reason, not to have looked at this issue by him. Therefore, I will now consider whether it is possible for this Court to determine the correctness of the pedigree of the plaintiff having looked at the available material without the case being remitted back for a *trial de novo* which would certainly cause delay and expenses to the parties concern. It must also be remembered that this is an action filed in the year 1986.

Pedigree of the plaintiff commences through the final decree entered in the Partition Action bearing No.13990/P. The decree in that case was marked P1 in evidence. [vide at page 227 in the appeal brief] In

terms of the said final decree, the 1st defendant and the 3rd defendant in that case namely, Richard Henry Rodrigo and Peter David Rodrigo became entitled to Lots 5A & 5B and 6A & 6B respectively. The land sought to be partitioned in this case is the aforesaid lots 5A & 5B and 6A & 6B in the earlier partition case and in this case those lots are shown in the plan marked X in evidence. (vide at page 78 in the appeal brief) There is no dispute as to the devolution of title of Richard Henry Rodrigo who became entitled to lots 5A & 5B. Contesting defendants have not challenged the aforesaid devolution of title of Richard Henry Rodrigo.

However, in terms of the final decree entered in 13990/P, lots 6A & 6B had been allotted to Peter David Rodrigo who was the 3rd defendant in that action. In the pedigree of the plaintiff in this case, lots 6A & 6B had been owned, not by the said Peter David Rodrigo but by one Peter Richard Rodrigo. Learned Counsel for the 5B & 5C defendant-respondents, therefore argued that Peter Richard Rodrigo whose name appears as the predecessor-in-title to those lots 6A & 6B did not become entitled Lots 6A & 6B. Accordingly, he submitted that it is wrong to have decided the case accepting the title of a person by the name of Peter Richard Rodrigo who did not become entitled to lots 6A and 6B.

I will now turn to consider the submissions of the learned Counsel for the plaintiff-respondent in this connection. In the written submissions, he has disclosed the reason as to why such a matter was

not an issue at the trial stage. Explaining the issue, he has further stated that the full name of Peter David Rodrigo is **Peter David Richard Rodrigo** and he was sometimes called and identified in both the names and those been **Peter Richard Rodrigo** and **Peter David Rodrigo**. Accordingly, his submission is that Peter David Rodrigo and Peter Richard Rodrigo is one and the same person who had the full name of Peter David Richard Rodrigo. Such an explanation cannot be disregarded and is acceptable too. I believe it is a common occurrence in the villages in our country particularly during the time this partition action was filed. In the circumstances, I am inclined to accept the said explanation given on behalf of the plaintiff as to the name of the original owner of the lots 6A and 6B referred to in the partition action bearing No.13990/P.

Moreover, the learned Counsel for the Plaintiff-respondent in his submissions also has stated the reasons as to the discrepancies of the name of the person who had his full name as Peter David Richard Rodrigo. In that submission he, referring to the earlier partition case bearing No.13990/P, has submitted thus:

- *In P -1 (Final Decree of Partition Case No.13990/P the name of this person is given as "**Peter David Rodrigo**".*
- *In the Plaint filed in this case he is mentioned as "**Peter Richard Rodrigo**", by Attorney-at-Law – Mr.S.L.D.S.Uragoda who drafted the plaint.*

- *But the same Attorney-at-Law Mr.S.L.D.S.Uragoda, has mentioned the name of this person as "**Peter David Rodrigo**" who filed the plaint in Case No.9908/L, in District Court, Galle, on behalf of the same plaintiff-G.M.S.P.Suriyawansa, against W.A. Sumanadasa the defendant in that case.*

- *When leading the evidence of the plaintiff – Suriyawansa, in case No.9908/L, against the defendant W.A.Sumanadasa, the learned Counsel has referred to the name of this person as **"Peter David"**, omitting the portion **"Richard Rodrigo".***

(ii) This seems to be a common and usual practice, to refer to a person by his full name, at the beginning and, by a part of the name subsequently.

Before looking at the matters referred to above in the submissions of the plaintiff-respondent, I need to refer to a few authorities to show the manner in which the courts have acted when issues such as this have come up in the legal proceedings for consideration.

G.P.S.de.Silva C.J. in N.M.Serajudeen and others v. A.S.M.Seyed Abbas and another B.A.L.J. 1995 Vol.VI Part I P.18**,has quoted with approval the following statement expressed by **Bown L.J. in Copper v . Smith 1884 (26) Ch.D.700.

> *" ..... Now, I think, it is a well established principle that the object of Court is to decide the rights of the parties and **not to punish them for the mistakes they make**, in the conduct of their cases by deciding otherwise, than in accordance with their rights.*

*In **W.M.Mendis and Co. v. Excise Commissioner (1999) 1 SLR 351 (C.A.) De Silva, J.** held that,*

"In considering the correctness of the decision one has to be alive to the often quoted maxims ***false description does not harm if there be sufficient certainty as to the subject matter or the person,*** *and* ***any inaccuracy in description is to be overlooked if the subject matter or person is well know.***

"The object of the rules of procedure is to decide the rights of parties and not to punish them for their mistakes or shortcomings. A party cannot be refused just relief merely because of some mistake, negligence or inadvertence...."

In ***Jayasinghe v. Gnanawathie Manike 1997 (G) SLR 410****. It was held that:*

(falsa demonstratio non nocet cum de corpore vel persona constat) *a false description does not harm, if there be* ***sufficient certainty as to the object, corpus*** *or* ***person.***

It is now necessary to ascertain whether the above reasons given by the plaintiff-respondent as to the discrepancy in the name would suffice to act in accordance with those authorities referred to above. I must mention that the explanations given by the appellant in respect of the issue as to the name of the predecessor in title of the plaintiff are with cogent reasons and cannot be disregarded too. Those will show the circumstances under which such a discrepancy in the name has taken place. Therefore, it is my considered view that those reasons are sufficient enough to decide that the false description will not harm the certainty of the name Peter Richard Rodrigo. Accordingly, it is clear that the issue as to the name of the predecessor in title of the plaintiff is

only an omission on the part of the plaintiff and therefore it can easily be overlooked.

At this stage, it is also pertinent to note that due to various reasons parties do not disclose some matters to Court. Moreover, parties to an action also come to various terms outside Court and they do not disclose such terms due to the reasons best known to them. In such a situation, Court will not have the opportunity of looking at those matters. If the learned trial judge in this instance had the opportunity to consider the reasons and the explanations given in the written submissions that are now being disclosed by the plaintiff, he would have decided the issue accordingly. As stated above, it was not at all an issue before him.

In the circumstances, I am inclined to accept the explanations given on behalf of the plaintiff as to the name appearing in the pedigree shown by the plaintiff who became entitled to lots 6A & 6B in the case bearing No.13990/P. Now that I have accepted the reasons as to the discrepancy in the name of the predecessor in title of the plaintiff, the error in the name of the owner of the lots 6A and 6B should not stand in the way to establish the title of the plaintiff. Accordingly, I decide that the name appearing as Peter Richard Rodrigo is the same person who became entitled to lots 6A and 6B in the partition case 13990/P and his name appears as Peter David Rodrigo in that action.

In the light of the above, I am not inclined to agree with the contention of the learned Counsel for the 5B & 5C defendant- appellants. Accordingly, it is my considered view that the plaintiff has clearly established the pedigree he has shown in the plaint filed by him.

For the aforesaid reasons, this appeal is dismissed. Substituted 5B & 5C defendant-appellants are to pay Rupees One Hundred Thousand (Rs.100,000/-) as costs of this appeal to the plaintiff. Substituted 3a and 3b defendant-appellants need not pay costs since they did not intend to pursue this appeal from the very inception of the hearing of the appeal even though both the defendants have filed a joint petition of appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL