

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

C.A.No. 518/97(F)

A.M. Heenbanda

D.C.Kandy No. 7908/P

Sirimalwatta, Gunnepana

Plaintiff

Vs

1. A. Piyaratne
 2. H.M.Dingiri Banda (Decd)
 3. R.V.George Singho
 4. M.D.T.K.L.R.Mudiyanse
 5. (A) W.M. Weerakoon (Legal
Representative of the deceased 04, 05
Defendants
 6. Mendhinona
6(a) W.M.Jennona (Legal Representative
of 06th Defendant)
 7. H.M. Kiribanda
 8. A. Balaappuhamy – all of Sirimalwatta,
Gunnepana
- Defendants

AND

W.M. Jennona

W.M.Mudiyanse

H.M.Heenmenike – all of Karathamada,
Sirimalwatta, Gunnepana

6A,5A & 2nd Added Defendant Appellants

Vs

H.M.Henbanda, Sirimallwatta
Gunnepana

Plaintiff-Respondent

A. Piyarathna and 6 others
Defendant-Respondents

AND NOW BETWEEN

01.S. Appuhamy

02.I. Abeykoon

03.Kalu Banda

04.H.M. Banda

05.H.M.Ran Banda

06. H.M. Balaya Banda

06A.H.M.Lakshmi Kumari

Added-Defendant-Respondents

Vs

Kalupahanage Karunawathi

Added 5(a) Substituted Defendant
Respondent

BEFORE: Deepali Wijesundera J and

M.M.A. Gaffoor

COUNSEL: G.P.Janaka Silva for the 6B Substituted Defendant Appellant

Bimal Rajapakse with S.A. Kulasuriya for the 5(A) Defendant
Appellant

J.C.Boange for the Plaintiff Respondent

Daya Guruge for the 04th Defendant Respondent

ARGUED ON: 12.02.2015

DECIDED ON: 06.07.2015

M.A. Gaffoor J.,

This an appeal from the judgment of the learned District Judge of Kandy dated 12.12.1996. The Plaintiff-Respondent filed this action for the partition of the land described in the schedule to the plaint. Substituted 4th and 6th Defendants and the added 2nd to 6th Defendants contested the devolution of title pleaded by the Plaintiff. Substituted 6th Defendant and 2nd to 6th added Defendants contended that title Deed No. 4657 upon which the 4th Defendant claimed title to an undivided share of this land, was not an act and deed of its grantor. They in fact moved for a commission on the Examiner on Questioned Documents to compare the signature of the grantor in the said deed with his signature found on certain other documents. The learned trial Judge refused the application on the ground that the application for a commission was belated.

The learned trial Judge ordered the partition of the land granting also a share on a deed executed long after the action was registered as a lispendence.

The appellants in this appeal challenged the propriety of the judgment of the learned District Judge on the following grounds :

- i) The trial Judge erred in allotting a share to the 4A Defendant since the due execution of the deed upon which he claimed title to a share (4657 (4V3)) of the corpus had not been established and the said deed had been executed long after the case was registered as a lispendence; and

- ii) The trial Judge erred in allowing the witness whose name did not appear in the list of witnesses tendered before the date of the trial to testify;

Section 25 of the Partition Law No. 21 of 1977 as amended, requires the Court to investigate the title of each co-owner before proceeding to partition the land. He must investigate the title irrespective of what the parties may or may not do. However, it is to be borne in mind that the Judges are not expected to go on a voyage of discovery in finding evidence for the parties.

It is correct for the Court to say that an application for the commission under Section 428 of the Civil Procedure Code may be dismissed for its belatedness but that is not a rule of law. This section confers discretion on the Court to issue a commission even at the later stage of the trial but before the judgment if it is required for the proper adjudication of the dispute between the parties. This being a partition action the learned trial Judge should have allowed the motion to issue a commission on the Examiner on Questioned Documents which would have assisted the Court to a very great extent in investigating the title of the parties.

Section 68 of the Evidence Ordinance requires that if a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. But in partition proceedings these documents can be admitted in evidence without further proof. However, when fraud is alleged the

burden of proving the due execution of a particular deed is on the party who relies on that document. The Plaintiff Respondent called one of the attesting witnesses to testify at the trial. Section 68 does not require that both witnesses to be called but when fraud is alleged. In my view, mere calling only one witness is not sufficient however much the learned trial Judge believes his or her evidence. The learned trial Judge in the case analyzed his evidence but merely says that he believes his evidence. I am therefore of the view that the learned trial Judge should have allowed the motion of the Appellants to issue a commission on the Examiner on Questioned Documents to examine the signature of the grantor in Deed "4V3".

This case has been registered as a lis pendence on 05th October 1970, and Deed "4V3" has been executed on 01st November 1989, more than nineteen years later, pending this action.

Section 66 of the Partition Law No. 21 of 1977, as amended provides thus :

- i) After a partition action is duly registered as a lis pendence under the Registration of Documents Ordinance no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates shall be made or effected until the final determination of the action by dismissal thereof, or by the entry of a decree of partition under Section 36 or by the entry of a certificate of sale;

- ii) Any voluntary alienation, lease or hypothecation made or effected in contravention of the provisions of sub-section (1) of this Section shall be void;
- iii) Any assignment, after the institution of a partition action, of a lease or hypothecation effected prior to the registration of such partition action as a lis pendence shall not be affected by the provisions of sub-section (1) and (2) of this action;

In view of the above provisions the Deed "4V3" does not confer title on the 4th Defendant and the learned trial Judge has erred in allotting a share to the 4th Defendant and the learned trial Judge has erred in allotting a share to the 4th Defendant.

It is also important to note that when a party dies during the pendency of a partition action, his rights do not devolve on the party substituted in his place. Even where a party dies any share of the corpus should be allotted to the deceased party and not to the substituted party. A person is substituted in the room of a deceased party only for the purpose of prosecuting the action. The rights of the heirs of the party deceased cannot be adjudicated upon the same action. .

For the reasons set out above I am of the view that the learned trial Judge has failed to discharge his duty to investigate the title of the parties as required by the Partition Law No. 21 of 1977, as amended.

Section 23 of the Partition Law only requires the parties to file their respective lists of documents 30 days before the trial, it does not require the parties to file lists of witnesses.

Most of the allegations in the petition of appeal are that certain shares transferred after the action was registered as a lis pendence have not been allotted to such parties. This allegation is without merit for the reasons set out above.

In my view, although the parties are inconvenienced, this case has to be sent back for a trial de novo.

The appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Wijesundera J.,

I agree.

JUDGE OF THE COURT OF APPEAL.