

CA 73/99(F)

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

Lasitha Manathunga,
Wiyagama Junction, Thekkawatta'
Palatota, Kalutara.

5th Defendant-Appellant

C.A.Case No:-73/99(F)

D.C.Kalutara Case No:-6076/P

V.

Somawathie Jayasekera Senevirathne
Sudusinghe,
Halwatta, Walawwa, Bolossagama
Kalutara.

Plaintiff (deceased)

1A.Chamari Nadeeja Manathunga,
1B.Indika Nalin Manatunga, Both of
Halwatta, Elawita, Bolossagama
Kalutara.

Substituted Plaintiff Respondents

1.Indrani Kotalawala,
"Shanthi Nikethanaya", Pokunuwita,

Horana.

Defendant-Respondent (deceased)

1A.Moses Kotalawala

“Shanthi Nikethanaya”, Pokunuwita
Horana.

1A Substituted Defendant-Respondent

2.Upali Manathunga,

Wiyagama Junction, Thekkawatta,
Palatota, Kalutara. (deceased)

2A.Anagiyath Dehige Nimal Dhammika

Wiyagama Junction, Thekkawatta ‘
Palatota, Kalutara.

2A Substituted Defendant-Respondent

3.Chamal Nadeeja Manatunga,

4.Indika Nalin Manatunga Both of
Halwatta, Elawita, Bolossagama,
Kalutara.

6.Dayarathne Mohottige,

366, Thekkawatta, Palatota,
Kalutara.

Defendant-Respondents

Before :- H.N.J.Perera, J.

Counsel:-Faisz Musthapha P.C with A.Panditharathna for the 5th

Defendant-Appellant

Dr.Jayatissa De Costa P.C with Lahiru N.Silva for the Plaintiff-

Respondent

K.K.Farooq for the Substituted 2nd Defendant-Respondent

T.Jayakody for the 6th Defendant-Respondent

Argued On:-15.10.2013

Written Submissions:-15.11.2013/31.01.2014

Decided On:-27.11.2015

H.N.J.Perera, J.

The plaintiff-respondent (deceased) instituted this partition action in the District Court of Kalutara seeking to partition the land called Lot B of Millagahawatta alias "The Hermitage" otherwise known as "Teak Estate" morefully described in the schedule to the plaint.

At the trial there was no dispute between the parties with regard to the identity of the corpus. The land is depicted as Lot 1 & 2 in Preliminary Plan bearing No.6920 dated 22.01.1993 prepared by Licensed Surveyor W.Seneviratne.

The plaintiff's position was that the original owner of the entire land was oneThegis Manatunga.. However at the trial it was revealed that one Joseph Kevin Dodwell Domingo De Silva by virtue of the Administrator's conveyance No 91 had become the original owner of the said land. The said Domingo De Silva had transferred a $\frac{3}{4}$ share to the said Thegis Mannatunga by virtue of deed of transfer No. 763 dated 05.07.1954

attested by Leonard Suwaris , Notary Public while the balance $\frac{1}{4}$ share was transferred to one Melis Singho by virtue of deed of transfer No. 762 dated 05.07.1954 attested by the same Notary Public.

The 5th defendant-appellant's position was that the original owners of the land were Thegis Manatunga and Melis Singho. Thegis Mannatunga owning $\frac{3}{4}$ and Melis Singho the balance $\frac{1}{4}$.

At the trial this position was accepted by all parties and it was common ground that Melis Singho's rights had devolved on the 6th defendant-respondent and that the 6th defendant-respondent possessed Lot 1 in the said Preliminary Plan. Hence the contest which was between the plaintiff and her children 3rd and 4th defendant-respondents on one hand and the 2nd and 5th defendants on the other, was limited to the rights of $\frac{3}{4}$ of the land owned by Thegis Mannatunga. The plaintiff-respondent and the 3rd and 4th defendant-respondents took up the position that the interests of Thegis Manatunga devolved on all the intestate heirs of Thegis Manatunga as set out in the plaint.

The 2nd and 5th defendants took up the position that Thegis Mannatunga died intestate and that by the Administratrix' conveyance No. 602 dated 24.10.1989 executed in the Testamentary case No. 4238/T in which Thegis Manatunga's intestate estate was administered. The corpus of this partition action has been allotted to Mercy, the widow and Thillekawathie a sister of Thegis. The said Mercy Gunathilake and the said Thilakawathie gifted the $\frac{3}{4}$ share to the 2nd and 5th defendants under the deed of gift No. 4342 attested by H. Gangaboda, Notary Public. Thereafter the 2nd and the 5th defendants executed a deed of partition No.1016 dated 20.06.1991 within 14 days from the date on which they became entitled to the $\frac{3}{4}$ share under the said deed of Gift No 4342 and the 6th defendant to partition the land according to the plan No 264 prepared by D.H.Ameasinghe, Licensed Surveyor.

The plaintiff's position was that Thegis Manatunga being the owner of $\frac{3}{4}$ th share left as his heirs, his widow Mercy and 4 siblings , namely Thilakawathie, Nelis, Arlis, and Demis and Hamunona who predeceased leaving Moses and Indrani as her heirs. The said Thegis Maatunga's estate was administered in case No4238/T in the District Court of Kalutara. Accordingly the wife of late Thegis Manatunga became entitled to $\frac{1}{2}$ share of the $\frac{3}{4}$ share of the corpus. The other $\frac{1}{2}$ share devolved on the sister of Thegis Hamunona. Therefore the siblings of Thegis Manatunga Thilakawathie, Nelis, Arlis and Demis became entitled to $\frac{1}{10}$ share each and heirs of Mamunona Moses and Indrani to $\frac{1}{20}$ th each .

It was the position of the plaintiff that the $\frac{1}{10}$ out of $\frac{3}{4}$ share of the said Nelis was transferred to Somawathie, the plaintiff by virtue of deed of transfer No. 1441 dated 22.12.1987 (P3)attested by Harry Seneviratne , Notary Public. A $\frac{1}{20}$ out of $\frac{3}{4}$ share of the Moses was also transferred to the plaintiff under the deed of transfer No. 3803 dated 25.03. 1988 (P4) attested by H. Gangaboda , Notary Public.

The said Arlis who owned $\frac{1}{10}$ out of $\frac{3}{4}$ share died leaving his widow the plaintiff, the 3rd and 4th defendants as heirs and $\frac{1}{2}$ share of the said Arlis devolved on the plaintiff and $\frac{1}{4}$ out of $\frac{1}{10}$ share each devolved on the 3rd and 4th defendants. Therefore the plaintiff claimed $\frac{1}{10}$ share under the deed of transfer No.1441, $\frac{1}{20}$ share under the deed of transfer No.3803 and $\frac{1}{20}$ share on the inheritance under the said Arlis.

The sole issue that has to be dealt with this appeal is that whether the 2nd and 5th defendants are entitled to rely on the devolution of title under the said Administrator's conveyance No 602 marked 2V3 at the trial.

In the said Administrator's conveyance 2V3 the Administratrix, namely Mercy Gunthilake has transferred certain lands to the other heirs of the deceased Thegis Manatunga in lieu of their respective shares while

transferring ½ share of the corpus in the present case to herself and the other ½ to Thilakawathie, the mother of the 2nd and the 5th defendants. The fact that the said Mercy Gunathilake transferred ½ share of the corpus to herself and to Thilakawathie according to her own whims and fancies had been revealed from the evidence of the sole witness of the 2nd and 5th defendants Somawathie.

According to law relating to succession the title of the estate of a deceased person who died intestate passes at once to the heirs of the deceased person by the operation of law and such title vested in the heirs cannot be divested otherwise than by well-known modes of acquisition of title to the immovable properties. In *Silva V. Silva* 10 N.L.R, at page 234 Granier, J held that:-

“On the death of a person his estate, in the absence of a will, passes at once by operation of law to his heirs, and the dominium vests in them. Once it so vests they cannot be divested of it except by the several well-known modes recognized by law”

It was further held that:-

“Such being the position of heirs, the point which next arises for determination is, what relation an administrator bears to them when such a person is appointed by the court. It is clear that the title cannot be in both the administrator and the heirs at one and the same time. Indeed, this is rendered impossible by the title having passed already to the heirs on the death of the intestate. An administrator is invariably appointed sometime after the death of the intestate, and if by the mere fact of his appointment the title passes to him, then it means that the heirs have been divested of it in a manner which is not recognized or supported by any rule of positive laws relating to the transfer of immovable property. Besides, in strict law, it is impossible to conceive a state of things by which title to immovable property is temporarily

suspended. Or is vested in no one, for that is what will invariably result if the heirs do not become vested with the title of their intestate immediately on his death, and there is an interval of time, long or short, between that event and the appointment of an administrator. Clearly a grant of administration, viewed by itself, is not a conveyance or assignment by court to the administrator of the title of the intestate. The very terms of a grant negative such a contention.”

It was also held that:-

“It may be safely asserted that there is no legislative enactment in Ceylon which vests immovable property in an administrator in the sense that he is the absolute owner of it and is at liberty to deal with it in any way he pleases.”

Therefore if the title and the dominium to the estate of the deceased are vested in all the heirs at once by the operation of law and if title so vested cannot be divested except by the well known modes recognized by law i.e by deed or prescription, it is quite clear that the administratrix in this case did not have the power to transfer the rights of the property in this case to herself and Somawathie by the said Administrator’s conveyance marked 2V3.

Therefore it is abundantly clear that the 2nd and the 5th defendants are not entitled to rely on the said administrator’s conveyance 2V3 to claim title to the said land to be partitioned in this case.

According to the 2nd and the 5th defendants the only question that had to be decided in this case was whether the Administratrix conveyance 2V3 based on a family decision conveyed the title of Thegis Manatunga to his widow Mercy and Thilakawathie and whether their interests devolved on the 2nd and 5th defendants who are the sons of Thilakawathie and nephews of the deceased Thegis Manatunga and his widow Mercy.

The learned trial Judge has held that there was insufficient evidence to establish a family division.

It was contended on behalf of the substituted-plaintiff-respondent that the 2nd and the 5th defendants have not averred anything in respect of a family agreement in their statement of claim but solely based their title on the said administrator's conveyance. Further no issue has been raised at the trial by the 2nd and 5th defendants with regard to a family agreement and that the sole witness of the 2nd and the 5th defendants, the mother Somawathie has not at all been questioned with regard to any family agreement in her evidence. It was further contended by the learned Counsel for the plaintiff-respondent that in fact there is not an iota of evidence before court as to when and where such agreement was entered in to, about the parties to the agreement, as to why such an agreement was entered into or as to the real nature of the agreement entered into. The position with regard to a family agreement has not been taken up at the trial and it has for the first time taken up in the written submissions tendered to court by the 2nd and 5th defendant-appellants.

On perusal of the judgment of the learned trial Judge it is clear that the learned trial judge had in fact has come to a clear conclusion that there was no evidence to support such a family agreement.

The plaintiff-respondent in this case had instituted this action to partition the entire land described in the schedule to the plaint. There is no dispute by the parties that at one time Thegis Manatunga became entitled to 3/4th of the land to be partitioned and the other ¼ to one Melis Singho. Melis Singho rights in this case is claimed by the 6th defendant by deeds marked 6V1 to 6V6. Therefore it was not disputed that Melis Singho was also a co-owner to the land to be partitioned and he or his heirs were not parties to the alleged family agreement.

Therefore it is very clear that the heirs of the said Melis Singho had continued to possess a part of the land as co-owners the Lot No.1 in the Preliminary plan marked ' X' for convenience. The 6th defendant had claimed the rights of Melis Singho and is entitled only to a share of ¼ of the corpus and not to lot 1 in the said Preliminary Plan. As the evidence has disclosed that the 6th defendant had possessed lot 1 of the Preliminary Plan marked ' X' the improvements in the said lot had been allocated to her by the learned trial Judge in his judgment. The sixth defendant is entitled to a ¼ share of the corpus and to all the improvements that are shown in lot 1 in the said Preliminary Plan marked 'X' at the trial.

Further there is no evidence to prove prescriptive title by the 2nd and the 5th defendant based on the said Administrative conveyance. As evident by the said Administrator's conveyance marked P3 , the said Thegis Manatunga died intestate on 21.08.1982 whereas this action has been instituted on 02.06.1992. Therefore it is clear that the action has been instituted within 10 years period from the death of the said Thegis Manatunga and therefore the 2nd and the 5th defendant-appellants cannot be heard to say that they have acquired prescriptive title based on the alleged family agreement.

The mere non possession of the plaintiff-respondent who is a co-owner would not deprive her title since the possession of one co-owner means and includes the possession of all co-owners.

In *Corea V. Appuhami* 15 N.L.R 65 it was held that:-

“A co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result.”

The learned trial Judge has correctly held that the evidence disclose possession by the 2nd and the 5th defendant-appellants but there is no sufficient evidence in this case to conclude that there was a family arrangement as claimed by the 2nd and the 5th respondents in this case.

It was the contention of the Learned Counsel for the 2nd and the 5th respondents that “Millagahawatta” which was the subject matter of this partition action had been allotted to Mercy, the widow and Thilakawathie a sister of Thegis in pursuance of a family settlement and title thereto devolved on the 2nd and the 5th defendants upon a gift executed in their favour by Mercy and Thilakawathie. But from the evidence led in this case it is clearly seen that the entire land of “Millagahawatta” sought to be partitioned is not possessed by the 2nd and the 5th respondents only but a part of the land to be partitioned is also possessed by the 6th defendant-respondent. In fact the 6th defendant-respondent too is a co-owner of the said land to be partitioned and there is no evidence to show that although she had possessed lot 1 in the Preliminary Plan that she too has separated and exclusively possessed the said portion of land exclusively. It is clear that she was not a party to the family arrangement of Mercy and Kamalawathie and the 6th defendant continued to possess a part of the corpus as a co-owner. The fact that Thegis Manatunga and Melis Appuhamy at one time became co-owners of the land to be partitioned is not disputed by any party to this case. That the 6th defendant became entitled to the rights of Melis Singho and continued to possess a part of the said corpus is also not disputed by parties to this case. There is no evidence to show that the heirs of Thegis Manatunga and Melis Singho had amicably partitioned the entire corpus and had continued to possess the same accordingly. Even if there had been an agreement between the heirs of the Thegis Manatunga there is no evidence to suggest that they were able to implement the said agreement among all the co-owners.

The learned trial Judge has after considering all the evidence that had been placed before court by the parties has come to a decision that $\frac{1}{4}$ of the land to be portioned was owned by Melis Singo and the said rights devolve on the 6th defendant-respondent as claimed by her, and the balance $\frac{3}{4}$ share owned by Thegis Manatunga devolved on the parties as claimed by the plaintiff-respondent in her pedigree.

In *Gunewardena V. Cabral and Others* (1980) 2 Sri.L.R 220, it was held that the Appellate Court will set aside inferences drawn by the trial Judge if they amount to findings of fact based on:-

- (a) inadmissible evidence; or
- (2) after rejecting admissible and relevant evidence; or
- (3) if the inferences are unsupported by evidence; or
- (4) if the inferences or conclusions are not rationally possible or Perverse.

In the case before me I do not see that the findings of the learned trial Judge and the inferences drawn by him are vitiated by any of these considerations. In my view there is no justification for interfering with the conclusions reached by the learned trial Judge which I perceive are warranted by the evidence that was before him.

For the above reasons I see no reason to disturb the judgment of the learned trial Judge. Accordingly the appeal of the 2nd and the 5th defendant-appellants is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL