C.A.280/99(F)

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

Withanage Werainghe Arachchige
Irene Weerasinghe
Moranna, Yakkala.

Plaintiff

C.A.Case No:-280/99(F)

D.C.Gampaha Case No:-28265/P

V.

(1)Arachchi Appuhamilage Julis Singho
(Deceased)
Moranna, Yakkala.

(2)Arachchi Appuhamilage Herbert
Jayainghe ,
"Sepalika" Kalagedihena.

(3)Senanayaka Amerasinghe Mohotti
Appuhamilage Sadiris (deceased)
No.310, Kirillawala, Weboda.

(4)Edirisuriya Mudalige Wilbert
Sooriyaratne Siriwardena,
Moranna, Yakkala.

Defendants

AND NOW

Edirisuriya Mudalige Wilbert

Sooriyartne Siriwardena,

Moranna, Yakkala.

4th Defendant-Appellant

V.

Withana Weerasinghe Arachchige

Irene Weerasinghe,

Moranna, Yakkala.

Plaintiff-Respondent

(2)Arachchi Appuhamilage Herbert

"Sepalika" Kalagedihena.

(3)Senanayaka Amerasinghe Mohotti

Appuhamilage Sadiris (deceased)

3A.Vithana Archchige Edduwan Singho

No.310, Weboda, Kirillawala.

Defendant-Respondents

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

Counsel:-Anuruddha Dhamawardene for the 4th Defendant-Appellant

C.Ladduwahetty for the Plaintiff-Respondent

Argued On:-23.06.2014

Written Submissions:-15.07.2014/24.11.2014

Decided On:-09.12.2015

H.N.J.Perera, J.

The plaintiff-respondent instituted this partition action to partition a land called Lot B2 of Kahatagahawatta morefully described in the schedule to the plaint. The land described in the schedule to the plaint is lots 1 & 2 depicted in Plan No.1337 dated 26.04.1986 made by Surveyor D.S.Hettige.

According to the pedigree set out in the plaint the land in suit, was originally owned by Arachchi Appuhmilage Siyadoris. The said Siyadoris died unmarried and issueless and his rights to the land devolved ¼ shares each on his brothers Peter, Julis Singho 1st defendant and his two sisters Manchohamy and Nonohamy.

The 4th defendant-appellant has taken up the position that the said Julis Singho has acquired prescriptive title to the land sought to be partitioned and he by Deed No. 168 dated 09.02.1974 attested by G.S.Ranatunge, Notary Public conveyed the said land to the 4th defendant-appellant. Accordingly the 4th defendant-appellant prayed that he be declared the owner of the land sought to be partitioned and for a dismissal of the plaintiff's action.

After trial the learned trial Judge delivered judgment on 25.02.1999 and held that the plaintiff-respondent is entitled to 10/16 share of the land, 1st defendant to 4/16 share, 2nd and the 3rd defendants to 1/16th share each to the land to be partitioned. The learned trial Judge rejected the 4th defendant-appellants position taken up at the trial that Julis Singho has acquired prescriptive title to the property and declared that the land should be partitioned according to the shares given in the judgment.

Being aggrieved by the said judgment of the learned trial Judge the 4th defendant-appellant had preferred this appeal to this court.

At the trial the contesting 4th defendant-appellant has given evidence and admitted the fact that that Manchohamy, Peter, Nonohamy and Julis the 1st defendant got 1/4th each from Siyadoris. The 4th defendant-appellant also admitted that Julis was a co-owner, that he possessed this land as a co-owner and that the 4th defendant-appellant has got rights upon deed marked 4V1 from Julis. On perusal of the deed marked 4V1 it is important to note that Julis has transferred his rights by deed No 168 marked 4V1, the rights he had inherited as a brother of Siyadoris to the 4th defendant-appellant.

When this matter was taken up for appeal the Counsel for the defendant-appellant abandoned the claim of prescription made by the 4th defendant-appellant at the trial and confined his argument to two grounds of appeal.

It was contended on behalf of the 4th defendant-appellant that the learned trial Judge has erred in law in allocating shares to the 1st defendant. The evidence led in this case establish that the 1st defendant had transferred his rights to the 4th defendant-appellant by Deed No.168 dated 09.02.1974 marked 4V1 at the trial. This action had been filed by the plaintiff-respondent on 03.10.1985 and the said deed marked 4V1 has been executed on 09.02.1974 well before the institution of the partition action. Therefore it is very clear that as contended by the Counsel for the 4th defendant-appellant that the 1st defendant Julis Singho had no rights as at the date of filing of this partition action and all his rights in the corpus has been conveyed to the 4th defendant-appellant.

It is also to be seen that the learned trial Judge in answering issue No.6 has answered correctly that Julis Singho has conveyed his rights in the

corpus to the 4th defendant by Deed No.168 marked 4V1. However the learned trial Judge in allocating shares has not allocated the said 1/4th share to the 4th defendant but has erroneously allocated the said 1/4th share to the 1st defendant. The Counsel for the plaintiff-respondent too concede this position.

It is very clear that the 1/4th share allocated to the 1st defendant should go to the 4th defendant-appellant. Therefore this court is of the view that the Interlocutory decree entered in this case should be amended and the 4th defendant-appellant should be allocated the said 1/4th share allocated to the 1st defendant in the schedule of shares given in the said judgment of the learned trial Judge.

The 4th defendant-appellant is now claiming a right of way across the corpus for the first time in appeal. The 4th defendant-appellant had never claimed for such road in his statement of claim. There was no dispute among the parties about the right of way in this case. The 4th defendant-appellant in his evidence too has not mentioned this claim for a road at the trial. The learned Counsel for the 4th defendant-appellant too concede this fact.

The purpose to raise issues and admissions in terms of the Civil Procedure Code is in one respect to identify each party's case before court. Issues are generally raised from the pleadings. It is also permissible to raise issues when evidence transpire in court and based on the evidence issues could be suggested.

In the case of The Tasmania (1890) 15 App.Cases 223, Lord Herschell said:-

"It appears to me that under these circumstances, a court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it is satisfied beyond doubt, first, that it has

before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and, next, that no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box."

In Appuhamy V. Nona 15 N.L.R 311 it was held by Pereira, J. that:-

"Under our procedure all the contentious matter between the parties to a civil suit is, so to say, focused in the issues it to be taken as admitted by one party or the other, and under our procedure it is not open to a party to put forward a ground for the first time in appeal unless it might have been put forward in the court below under some. One or other of the issues framed, and when such a ground that is to say, a round that might have been put forward in appeal for the first time, the cautions indicated in the Tasmania may well be observed."

The learned trial Judge had entered judgment based on the evidence recorded at the trial. Accordingly evidence had been led to prove the pedigree put forward by the plaintiff-respondent in this case. In this case it was a matter of which the 4th defendant-appellant was perfectly cognizant when the action was tried in the court below. It is to be seen that the position taken up by the 4th defendant-appellant in appeal for the first time as ground 2 is not in accordance with the case presented by him in the District court.

In Setha V. Weerakoon 49 N.L.R 226 it was held that:-

"A new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the court of appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more."

I am therefore of the opinion that this is not a matter which can be raised for the first time in appeal.

Further a perusal of the said preliminary Plan marked X, clearly shows that the said roadway, namely lot 2 has been clichéd to the rest of the land on both sides of the said land. The said Plan X and the report X1 clearly establishes the fact that the said road is a part of the corpus. The said issue raised by the 4th defendant-appellant is not a pure question of law but primarily a question of fact and this court does not have all the material to decide the said issue before court and therefore cannot be entertained for the first time in appeal.

Accordingly for the reasons stated above I declare that the parties are entitled to shares in the following manner.

Plaintiff- 10/16

2nd Defendant- 01/16

3rd Defendant- 01/16

4th Defendant- 04/16

The interlocutory decree is to be amended accordingly. I make no order for costs.

Interlocutory decree- varied.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL