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

Rev. Magalkande Dhammakitte
Viharadhipathi
Magal Kanda
Maggona

Plaintiff

CA 98/2001

D.C. Kalutara – L/4602

Vs.

1. Hewadewage Laris Nona
2. Ranasinghe Pearl Karunalata
3. Ranasinghe Trishan

All of Rockland Road,
Magal Kanda
Maggona

Defendants

AND NOW BETWEEN

1A. Ranasinghe Pearl Karunalata
1B. Ranasinghe Trishan

Both of Rockland Road,
Magal Kanda
Maggona

Substituted – Defendants – Appellants

2. Ranasinghe Pearl Karunalata
3. Ranasinghe Trishan

Both of Rockland Road,
Magal Kanda

Maggona
Defendant - Appellants

Vs.

Rev. Magalkande Dhammakitte
Viharadhipathi
Magal Kanda
Maggona

Plaintiff - Respondent

BEFORE: **M.M.A. Gaffoor J**

S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL: **Rohan Sahabandu PC for the 1st and 2nd Defendant – Appellants**
C.J. Ladduwahetti for the 3rd Defendant
N.R.M. Daluwatte PC for the Plaintiff – Respondent

ARGUED ON: **16.11.2016, 18.11.2016 and 25.11.2016**

WRITTEN SUBMISSIONS – **1B and 3rd Defendants – Filed**

Plaintiff – Respondent - Filed

DECIDED ON: **08.03.2017**

S. DEVIKA DE LIVERA TENNEKOON J

The Plaintiff - Respondent (hereinafter sometimes referred to as the Plaintiff) instituted action in the District Court of Kalutara in case bearing No. 4602/L by

Plaint dated 30.05.1997 praying for *inter alia* a declaration of title in respect of the land described in Schedule B to the Plaint, for an enjoining order, an interim injunction and a permanent injunction against the 1st – 3rd Defendants restraining them from cutting down and selling trees on the corpus and from blocking out and selling the said land, and for damages.

The 1st – 3rd Defendant – Appellants (hereinafter sometimes referred to as the Defendants) filed Answer dated 03.07.1997 with a claim in reconvention to *inter alia* dismiss the Plaint of the Plaintiff, for a decree declaring that the corpus was owned by the 1st – 3rd Defendants and damages. Trial commenced on 26.03.1998 and no admissions were recorded by either party and the Plaintiff raised 18 issues and the Defendants raised 11 issues an additional issue was reordered subsequently.

Upon conclusion of the trial the learned District Judge pronounced judgment dated 20.02.2001 in favour of the Plaintiff and granted the reliefs as prayed for in the Plaint. Being aggrieved by the said judgment the Defendants preferred an Appeal by Petition dated 12.03.2001 on the grounds *inter alia* that the impugned judgment is a perfunctory judgment which gives no reasons for arriving at a conclusion.

The case in brief for the Plaintiff is that the land described in Schedules A and B in the Plaint was by long and prescriptive possession the property of Paramachethiyaramaya Temple of Magalkanda, which the Plaintiff is purportedly the Viharadhipathi and also by virtue of certificate of quite possession No. 1902 dated 11.03.1870 issued by the Government Agent of the Western Province under clause 7 of Ordinance 12 of 1840.

The instant dispute arose when the Defendants had entered the land morefully described in Schedule B to the Plaint and tried to cut trees planted on the land and further when the Defendants sought to block out and sell the land.

In their answer the Defendants claimed that the land morefully described in Schedule B to the Plaint, called and named as "Kurunduwatte Kele" which is in extent 2A 3R 9P, was subject to a Partition action bearing No. 6138/P and lot Nos. 1 and 2 as depicted in Plan No. 1754 dated 5th October 1918 prepared by W. Seneviratne licensed surveyor were duly partitioned as per the final decree in the said case and consequent to instruments of conveyance marked as 1V16, 1V17, 1V18, 1V19, 1V20, 1V21, 1V22, 1V25, 1V26, 1V27, 1V28 and 1V29 the 1st and 2nd Defendants came to be owners of the said Lot1 and Lot2.

The Defendants further claimed that the said Lot Nos. 1 & 2 were subsequently mortgaged to Peoples Bank and that there exists a rubber plantation on the said Lots planted by the 1st and 2nd Defendants respectively. The Defendants contented that they were entitled to the land morefully described in Schedule B to the Plaint, called and named as "Kurunduwatte Kele" on the basis of the said Partition action bearing No. 6138/P and / or prescription and moved for a dismissal of the Plai4nt and countersued the Plaintiff for damages.

The Plaintiff accepted the claim that Partition action bearing No. 6138/P was instituted in respect of "Kurunduwatte Kele" by Plaint dated 08.01.1915 and stated that two trustees of the Paramachethiyaramaya temple of Magalkanda were added as Added Defendants in the said case after which the said two trustees filed a statement of claim dated 23.04.1915 wherein they claimed that they were the duly appointed Trustees of the Magalakanda Buddhist Temple and that the corpus was "sangeeka property" and therefore moved Court *inter alia* that the corpus be allotted to the Added Defendants.

The Plaintiff however states that the aforesaid Trustees of the Magalakanda Buddhist Temple acted in collusion with the parties in Partition action bearing No. 6138/P and had withdrawn their statement of claim and as such the learned Trial Judge had entered decree accordingly and partitioned the land called and named as "Kurunduwatte Kele" as Lots No. 1 & 2 aforementioned.

The Plaintiff contends that when the said action bearing No. 6138/P was filed in 1915 the Buddhist Temporalities Ordinance was in operation and that by virtue of Section 20 of the said Ordinance the corpus was vested in the trustees of the temple.

Section 20 of the Buddhist Temporalities Ordinance states;

> 'All property, movable and immovable, belonging or in anywise appertaining to or appropriated to the use of any temple, together with all the issues, rents, moneys, and profits of the same, and all offerings made for the use of such temple other than the pudgalika offerings which are offered for the exclusive personal use of any individual bhikkhu, shall vest in the trustee or the controlling viharadhipati for the time being of such temple, subject, however, to any leases and other tenancies, charges, and encumbrances already affecting any such immovable property.'

The Plaintiff argues that since the corpus is therefore a property subject to a Trust, more specifically, a charitable trust, the final decree in case No. 6138/P is invalid as per the provisions contained in Section 48(1) of the Partition Act which reads;

> (1) Save as provided in subsection (5) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 **shall**, subject to the decision on any appeal which may

be preferred therefrom, and in the case of an interlocutory decree, subject also to the provisions of subsection (4) of this section, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decree relates and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree. In this subsection "omission or defect of procedure ' shall include an omission or failure-

(a) to serve summons on any party; or

(b) to substitute the heirs or legal representatives of a party who dies pending the action or to appoint a person to represent the estate of the deceased party for the purposes of the action; or

(c) to appoint a guardian ad litem of a party who is a minor or a person of unsound mind.

In this subsection and in the next subsection " encumbrance" means any mortgage, lease, usufruct, servitude, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month.

The crux of the Plaintiffs contention, therefore, is that since the corpus in its entirety as described in Schedule A to the Plaint in the instant action, is

'sanghika property' which creates a Charitable Trust, such property cannot be partitioned.

Counsel for the 1B & 3rd Defendant cites T.B. Dissanayake and Colin de Soysa in their seminal work "Kandyan Law Buddhist Ecclesiastical Law" in which it states that;

> *"It is by a gift that a temple or any other property can become Sanghika, and the very conception of a gift requires that there should be an offering or dedication. Until a dedication takes place the temple remains gihi santaka (lay property). This dedication may take the form of a writing or may be verbal, but in either case it is a formal act, accompanied by a solemn ceremony in the presence of four or more Bhikkus who apparently represent Sarva Sangha or the entire Sangha. For a dedication there mist ne a donor, a donee and a gift. There must be an assembly of four or more Bhikkus. The property must be shown; the donor and the donee must appear before the assembly and recite three times the formula generally used in giving property to the Sangha with the necessary variation according as it is a gift to one or more. Water must be poured into the hands of the donee or his representative. In the case of a notarial gift it must be accepted by the Bhikku. The Sangha is entitled to possess the property from that time onwards. No property can become Sanghika without such a ceremony. Sometimes there is a stone inscription recording the grant or deed given. A dedication may be presumed in the case of a temple whose origin is lost in the dim past."*

To consider whether the corpus in the instant case is "sanghika property" it is pertinent to consider certificate No. 1902 dated 11.03.1870 issued by the Government Agent under clause 7 of Ordinance 12 of 1840 marked as P1. P1

dated 1840, refers to the corpus as "Magalkandepansalwatta" which translates to 'Mangalkanda Temple Land'. As such it is clear that as far back as 1870 the corpus has been referred to as temple property and under the provisions of Section 114 of the Evidence Ordinance this Court may presume that the preconditions of a dedication of property whereby such becomes "sanghika property" has been satisfied especially in a case "of a temple whose origin is lost in the dim past."

Therefore this Court finds that the corpus in its entirety as described in Schedule A to the Plaint in the instant action is 'sanghika property'.

The Added Defendants who were parties to the Partition action bearing No. 6138/P in their statement of claim dated 23.04.1915 also claimed that the corpus in the said case was "sanghika property" but subsequently retracted this claim.

The Plaintiff submits that this was due to collusive fraud by the duly appointed Trustees of the Magalakanda Buddhist Temple acting together with the parties in said Partition action. However, the Plaintiff has failed to adduce evidence of the alleged fraud and / or reasons for such collusion.

This Court is of the view that the provisions of Section 48(1) of the Partition Act mentioned above does not apply where the Trustees of a Charitable Trust who participated in the Partition proceedings expressly rescind their rights over the land to be partitioned. As the duly appointed trustees of the temple retracted their statement of claim as Added Defendants in the said case this Court finds that the final decree in Partition action bearing No. 6138/P is good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and is final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decree relates and notwithstanding any

omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.

One may note that the Plaintiff and his predecessors and even the many successors in title of the trustees of the temple had ample opportunity spanning a period of over half a century to rectify and / or address the alleged fraud committed by the Added Defendants in the said partition action who were Trustees duly appointed by the Temple, but failed to do so.

On the contrary the document marked as P10 attached to the Plaint, which is the Plaint dated 16.03.1960 in case bearing No. 108 in the District Court of Kalutara which was instituted by the then incumbent of the Paramachethiyaramaya Temple of Magalkanda to evict the tenants on the land called Magalkandepansalwatta (morefully described in Schedule A of the Plaint dated 30.05.1997 of the instant case) also accepted the Partition decree in case bearing No. 6138/P aforesaid by amending Schedule A, accordingly, to be "less an extent of Two acres, three roods and Nine perches (A2 – R3 – P9) towards the North of the said land which was the corpus of the Partition Action No. 6138/P District Court, Kalutara". (Vide page 19 of the Appeal brief Vol 2) This portion has been marked as V7 by the Defendants.

At this juncture it is prudent to note that in the case of Nono Hami vs. de Silva 2 SCC 114, relied by the learned Counsel for the Defendant, it was held that;

> "The partition decree is conclusive against the whole world and no ground whether fraud or otherwise can it be disturbed. The only remedy open to a party aggrieved by a partition decree is an action for damages."

The Latin maxim *Vigilantibus Et Non Dormientibus Jura Subveniunt* which means; the law assists those that are vigilant with their rights, and not those that sleep thereupon is apt to be noted in this instance.

The learned Counsel for the Plaintiff relies on the case of Marikkar Vs. Marikkar 22 NLR 137 in which De Sampayo J stated that;

> "a trust, express or constructive, will not be extinguished by a decree for partition, but will attach to the divided portion, which on the partition may be assigned to the trustee."

This case must be distinguished from the instant case on the facts since as per Bertram C.J;

> "The question for determination in this case relates to an alleged constructive trust attaching to an undivided share of a land which was the subject of a partition suit. The person beneficially interested under the alleged trust-though himself otherwise a party to the suit-did not assert a claim to his equitable right in the suit. Judgment was given, and a decree entered, without any reference to the trust. The question is therefore, whether, assuming the existence of the trust, it is extinguished by the decree, or whether it attaches to the share allotted in severalty."

It is clear that in Partition Action No. 6138/P the Trustees were parties to the said action but no property was allotted to the Trustees although there was a reference to a trust and as such this Court finds that the Plaintiff is bound by the said partition decree entered in favour of the predecessors in title of the present Defendants.

Further, it is observed that the learned District Court Judge has answered Issue No. 14 in the following manner;

Issue No.14 - 'Is the judgment in case 6138/P a void, ineffective judgment under Section 48(1) of the Act?'

Answer - 'does not arise'.

It is pertinent to note that the learned Trial Judge has misdirected himself in law when answering the said issue in the aforesaid manner since the contention of the Plaintiff is that by virtue of Section 48(1) of the Partition Act the Partition decree in case 6138/P was ineffective. Therefore, to hold that the said issue does not arise is contrary and inconsistent to the findings of the learned District Court Judge.

Issue 28 which reads;

'Has the Plaintiff any title or rights to this land?'

has been answered by the learned Trial judge as ' does not arise'. This Court is inclined to hold that the said issue could not have been answered in such a manner since it is contrary and inconsistent to the findings of the learned District Court Judge.

Similarly, it is also observed that the learned District Court Judge has failed to appreciate and identify the corpus by answering Issue No. 19 in the negative.

Issue No. 19 reads;

'Is the land in the second schedule a land called Kurunduwattekele?'

It is clear on a plain reading of Schedule B, which relates to the disputed land, included in the Plaint dated 30.05.1997 that Schedule B relates to a land named "Kurunduwattekele" and as such this Court finds that the learned Trial Judge has erred in answering the said issue, a reference to the corpus, in the negative.

The learned District Court Judge has failed to answer Issue No. 20 and has proceeded to answer Issue No. 21 as 'does not arise'. Similarly Issue No. 30 has not been answered by the learned Trial Judge. This Court is therefore of the view that the impugned judgment dated 20.02.2001 does not contain the requisites of a judgment as provided for in Section 187 of the Civil Procedure Code and as such is bad in law.

In the above circumstances and the reasons stated above this appeal is allowed. The judgment dated 20.02.2001 is hereby set aside. The action filed by the Plaintiff – Respondent is dismissed. Relief prayed for in prayer (b) of the Defendant's Answer is granted. The learned District Judge is directed to enter decree accordingly.

Appeal allowed.

Judge of the Court of Appeal

M.M.A. Gaffoor J

I Agree.

Judge of the Court of Appeal