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

In the matter of an Appeal under Section 754 of the Civil Procedure Code

Korallage Edward Ranasinghe of
Morawatta, Ruwanwella.

CA 289/99(F)

D.C. Avissawella Case No. 154/P

Plaintiff – Appellant

Vs.

1. Ranasinghe Arachchige Dingiri Mahatmaya
2. Korallage Ariyawathie Ranasinghe
3. Korallage Shirani Ranasinghe
4. Korallage Doreen Chandra Ranasinghe
5. Korallage Margaret Sheila Ranasinghe
6. Korallage Anulawathie Ranasinghe
   All of Morawatta, Ruwanwella
7. Mahinda Meedeniya of Mudugamuwa, Ruwanwella.

Defendants – Respondents

BEFORE: M.M.A. GAFFOOR J

S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL: **Vidura Gunaratne with P.D.R.J.U. de Almeida for the Plaintiff – Appellant**
Athula Perera with Chaturani de Silva for the 7th Defendant – Respondent

ARGUED ON: **27.03.2017**

WRITTEN SUBMISSIONS – **Plaintiff – Appellant – 02.02.2012 & 31.08.2016**

7th Defendant – Respondent – 04.04.2013

DECIDED ON: **10.08.2017**

S. DEVIKA DE LIVERA TENNEKOON J

The Plaintiff – Appellant (hereinafter referred to as the Appellant) instituted action in the District Court of Avissawella to have the land described in the schedule partitioned between the Appellant and the 1st – 7th Defendant – Respondents (hereinafter referred to as the Respondents) as per the shares mentioned in the Plaint dated 04.11.1986.

The 7th Respondent in his statement of claim dated 26.01.1990 took up the position that the land sought to be partitioned called "Attikkagahaowita" is a portion of a land called "Hamunawele Owitawatta" which belonged to the 7th Respondent and as such the Appellant and the 1st – 6th Respondents have no right over the corpus.

Trial commenced in this case on 03.05.1994 and issues 1 – 6 were recorded on behalf of the Appellant and issues 7 – 14 were recorded on behalf of the Respondents and no admissions were recorded. Issues 12 – 14 were raised on behalf of the 7th Respondent. Upon the conclusion of the trail the learned District Judge pronounced judgment on 29.01.1999 dismissing the Plaint of the Appellant.

Being aggrieved by the said judgment the Appellant preferred the instant appeal on two main grounds;

a) A period of more than 3 years has elapsed between the conclusion of the case and the pronouncement of the impugned judgment,
b) The Commissioner who prepared the preliminary plan marked as '**X**' bearing No. 1553 has not adequately complied with the Section 18(1) (a) iii of the Partition Act and therefore not identified the corpus.

Before considering the merits of the instant Appeal I must first consider whether the delay caused in delivering the impugned judgment should result in the judgment been set aside. It must be noted however, that the Petition of Appeal of the Appellants does not contain a prayer for *trial de novo* and only prays to set aside the said judgment.

On an examination of the journal entries at trial it seems that that judgment was first fixed for 24.11.1995 and was only delivered on 29.01.1999 and as correctly submitted by the learned Counsel for the Appellant the pronouncement of the judgment was delayed for not less than three years.

The learned Counsel for the Appellant relies on the case of **Tikiri Menika Vs. Dionis 7 NLR 337** in which it was held by Grenier, A. J that;

> 'This case must go back for a new trial. In the first place, I find that Mr. Carbery was *functus officio* at the time he delivered judgment in this case. Had the judgment been written by him during his tenure of office, it would

have been competent for his successor to have delivered it; but he seems to have written out his judgment after he had ceased to be Commissioner, and I do not think the consent of the parties served to make the judgment valid.

On another ground also, I think it advisable, although I much regret it, that there should be a new trial. Even if I consider Mr. Carbery's judgment a valid one, he has not dealt with the points in issue between the parties, and has pronounced no finding of a definite character. All he says is that the evidence as to possession on both sides is confusing and contradictory, and that on the paper title plaintiff has made out a good case. This is not a judicial pronouncement upon the issues framed by him. The judgment appears to have been written in a hurry, and nearly two months after the case on both sides had been closed.'

The learned Counsel for the Appellant also relies on the case of **Kulatunga Vs. Samaranayake 1990 (1) SLR 244** where judgment was delivered two years and four months after the written submissions were tendered to Court. It was held *inter alia* that;

'I am of the view that the appellate court cannot place the same reliance on findings of fact made after such a long delay. The learned judge was bound to have lost the advantage of the impressions created by the witnesses whom he saw and heard and his recollection of the fine points in the case would have faded from his memory by the time he comes to write the judgment.'

Upon examining the impugned judgment it is clear that the said judgment was delivered in a hurry nearly three years after the parties filed written submissions. This Court, however, must also be mindful of the additional delay which would be caused to the parties if the instant case is directed for a re – trial and therefore would only consider such remedy if it can be seen that grave injustice has been caused to the Appellant by the delay in pronouncing the impugned judgment.

The Counsel for the Appellant contends that the Commissioner who prepared the preliminary plan marked as 'X' bearing No. 1553 has not adequately complied with the Section 18(1) (a) iii of the Partition Act.

The Commissioner who prepared the said preliminary plan was called to give evidence on 14.09.1994 and it seems that the inadequacy complained of by the Appellant was brought to the notice of the said Commissioner in re – examination (vide pages 76 & 77 of the Appeal Brief). When re – examined on this the Commissioner says he cannot indicate with certainty whether what is depicted in the said plan is the corpus.

Section 18 of the Partition Act reads;

> "(1) The surveyor shall duly execute the commission issued to him and, in doing so shall, where any boundary of the land surveyed by him is undefined, demarcate that boundary on the ground by means of such boundary marks as are not easily removed or destroyed and shall, on or before the date fixed for the purpose, make due return thereto and shall transmit to the court-

(a) a report, in duplicate, substantially in the form set out in the Second Schedule to this Law, verified by affidavit stating-

(i) the dates on which notice of survey was issued to the parties;

(ii) the nature of the land surveyed and of any buildings, walls, wells, trees, plantations, fences and other improvements thereon;

(iii) whether or not the land surveyed by him is in his opinion **substantially** the same as the land sought to be partitioned as described in the schedule to the plaint;

Attention is drawn to the wording of the Section relied upon by the Appellants which states that the commissioner shall state is opinion as to whether the land surveyed by him is the same land which ought to be partitioned. The Commissioner has answered the above provision as clause 5 of his report which states;

According to the Plaint it is the land described in the Schedule
According to the 7th Defendant it is Hamunawele Owitawatta (A portion of)

This Court takes the view that the above description which has been reaffirmed by oral evidence is sufficient compliance of Section 18(1) (a) iii of the Partition Act as it is seen as an expression of opinion and not a finding of fact.

Further, it seems that the Appellant had complained of this alleged inadequacy at the trial stage but had failed to take steps to rectify this omission under the provisions of the Partition Act.

Section 18 (3) of the Partition Act reads;

> (a) Notwithstanding anything in subsection (2) of this section, the court, either of its own motion or on the application of a party to the action, may, before using the copy of the surveyor's field notes and the plan, cause them to be verified and to be certified as correct or, **where such field notes and plan are incorrect, cause fresh field notes and a fresh plan to be made by the Surveyor-General** or by any officer of his department authorized by him in that behalf, and may for that purpose issue a commission to the Surveyor-General.

In the absence of the proper steps by the Appellant to rectify the alleged omission by Commissioner this Court cannot agree with the contention of the Appellant that the Commissioner who prepared the preliminary plan marked as 'X' bearing No. 1553 has not adequately complied with the Section 18(1) (a) iii of the Partition Act.

It is apparent that this is the only finding of fact contended by the Appellant the other contention being raised concerning the delay of pronouncing the judgment.

This Court is of the view that cases such as this, where the impugned judgment has been delayed, are the exception and not the rule, therefore, when considering whether grave injustice has been caused to the Appellant by the delay in pronouncing the impugned judgment warranting a *trial de novo* one must deliberate on a case by case basis.

The impugned judgment was pronounced on 29.01.1999 the instant judgment is pronounced on 10.08.2017 which is over 18 years since the date of pronouncement of the said judgment. It is true that there is an unexplained delay not less than three years in pronouncing the impugned judgement. Having taken into account all relevant factors this Court is not inclined to allow the instant Appeal as a grave injustice has not been caused to the Appellant as aforementioned.

In the circumstances as morefully described above I see no reason to allow the instant Appeal.

Appeal Dismissed.

Judge of the Court of Appeal

M.M.A. GAFFOOR J

I Agree.

Judge of the Court of Appeal