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

1A. Wijayasinghalage Lilee

1B. Sisira Thilak Ananda Fernando

1C. Sandya Sriyani

All of Nelundeniya, Morawaka.

Case No: 400/97(F)

DC Kegalle No: 23421/P

Vs.

1A.Wijesinghayalage Leelawathie

2A. Wijesinghayalage Thilakaratne

Substituted-Defendants-Respondents

3. Wijesinghayalage Gunapala
4. Hettiarachchige Podiralahamy

Defendants-Respondents

5A. W.Ranasinghe

Substituted-Defendant-Respondent

6. W.Premadasa
7. W.Ranasinghe

Defendants-Respondents

8A. Wijesinghayalage Gunapala

9A. Wijesinghayalage Ariyadasa

Substituted-Defendants-Respondents

10. Wijesinghayalage Siripala

All of Morawaka, Nelundemiya.

Defendant-Respondent

Before: M.M.A. Gaffoor J.

Janak De Silva J.

Counsel: W.D. Weeraratne for Substituted 1A, 1B and 1C Plaintiffs-Appellants

Lasith Chaminda for 2nd to 10th Defendants-Respondents

Written Submissions tendered on:

Plaintiff-Appellant and 2nd to 10th Defendants-Respondents on 16th November 2017

Argued on: 12th October 2017

Decided on: 1st February 2018

Janak De Silva J.

The original Plaintiff (hereinafter referred to as "Plaintiff") filed the above action in the District Court of Kegalle seeking to partition the land called Hitinawatta 15 lahas paddy sowing in extent situated at Morawaka in the District of Kegalle.

The Plaintiff claimed that one Rankira was the original owner of the corpus. Upon his death his rights devolved on his child Andirisa whose rights devolved on his child Podiya, the 1st Defendant in this case (hereinafter referred to as "1st Defendant"). Podiya sold ½ of his share to Somapala the Plaintiff by deed no. 856 dated 20.10.1981 (එ7.1). That was the pedigree pleaded by the Plaintiff in terms of which the Plaintiff and the 1st Defendant gets an undivided ½ share each of the corpus.

The 2nd and 3rd defendants (hereinafter referred to as "2nd and 3rd Defendants") while admitting the corpus denied that Rankira was the sole owner and took up the position that Rankira and Lapaya both owned an undivided ½ share each of the corpus and pleaded a different pedigree to that of the Plaintiff.

The 4th and 5th defendants (hereinafter referred to as "4th and 5th Defendants") claimed that the corpus was known as Hitinawatta alias Udaha Hena and admitted the claim of the Plaintiff that it was at one time owned by Rankira. However, they contested the position of the Plaintiff that Andirisa was the only child of Rankira and took up the position that Rankira had four children namely Andirisa, Pinsethuwa, Kira and Singho.

The 5th, 6th and 7th defendants (hereinafter referred to as "5th, 6th and 7th Defendants") claimed that the corpus was known as Hitinawatta alias Udahawatta of 12 lahas paddy sowing in extent. They admitted the claim of the Plaintiff that it was at one time owned by Rankira. However, they contested the position of the Plaintiff that Andirisa was the only child of Rankira and took up the position that Rankira had four children namely Andirisa, Pinsethuwa, Kira and Singho.

The learned District Judge of Kegalle held that the Plaintiff failed to establish his title to the corpus and held that Rankira and Lapaya both owned an undivided ½ share each of the corpus. It was further held that the parties were entitled to the following shares of the corpus:

2nd Defendant	undivided 55/120
3rd Defendant	undivided 49/120
6th Defendant	undivided 2/120
7th defendant	undivided 8/120
9th defendant	undivided 4/120
10th defendant	undivided 2/120

The Plaintiff has filed this appeal against the said judgment of the learned District Judge of Kegalle and moves that the said judgment be set aside and judgment be entered as prayed for in the plaint.

Section 25(1) of the Partition Law requires the court to examine the title of each party and hear and receive evidence in support thereof. It has been consistently held that it is the duty of the Court to examine and investigate title in a partition action, because the judgement is a judgement *in rem.* In *Gnanapandithen and another v. Balanayagam and another*[1] G.P.S. De Silva C.J. explained this duty as follows:

> "Mr. Samarasekera cited several decisions which have, over the years, emphasized the paramount duty cast on the court by the statute itself to investigate title. It is unnecessary to repeat those decisions here. For present purposes it would be sufficient to refer to the case of *Mather v. Thamotharam Pillai* (2) decided as far back as 1903, where Layard, CJ. stated the principle in the following term: - "Now, the question to be decided in a partition suit is not **merely matters between parties which may be decided in a civil action**; . . . The court has not only to decide the matters in which the parties are in dispute, **but to safeguard the interests of others who are not parties to the suit**, who will be bound by a decree for partition . . . "Layard, CJ. stressed the importance of the duty cast on the court to satisfy itself "that **the plaintiff has made out a title to the land sought to be partitioned, and that the parties before the court are those solely entitled to such land.**" (emphasis added). "[2]

The alleged rights of the Plaintiff and 1st Defendant to the corpus flows from Andirisa. Hence the burden was on the Plaintiff to establish that Andirisa was the only child of Rankira. That was the case he pleaded. However, during his evidence, he contradicted himself on this issue. Initially he admitted that Rankira had two children namely Andirisa and Kira (Appeal Brief page 97). Later he claimed that Rankira had two children namely Kirisanda and Jothia (Appeal Brief page 98). Thereafter he stated that Rankira had four children (Appeal Brief page 113). He did not reveal

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[1] (1998) 1 Sri.L.R. 391
[2] Ibid. page 395

this in his pedigree although he admitted under cross-examination that he was aware of these facts. He also stated that he had submitted the birth certificate of Andirisa to court when in fact it was not done. It was also admitted by the Plaintiff that the 2nd, 3rd and 8th Defendants possessed ½ share of the corpus for over 40 years which runs contrary to his stated position. His evidence is contradictory on material points and the learned District Judge was correct in concluding that the Plaintiff had failed to prove his pedigree in the light of the 2nd and 3rd Defendants strenuously contending that Rankira did not have a child named Andirisa.

On the other hand, the learned District Judge held that the evidence establishes that the rights of Rankira had devolved on Pinsethuwa, Kira and Singho and proceeds to allocate shares of the corpus more or less in accordance with the pedigree pleaded by the 2nd and 3rd Defendants. Plaintiff himself admitted that Rankira had a child named Kira (Appeal Brief page 97). Several deeds 2Ə.1 to 2Ə.4 and 3Ə.1 to 3Ə.5 were marked in evidence in support of the pedigree pleaded by the 2nd and 3rd Defendants. Some of these deeds were executed as early as 1911, 1924, 1929, 1945 and 1969 whereas the only deed marked in evidence by the Plaintiff was executed in 1981. The learned District Judge has correctly investigated the title in the light of these deeds and oral evidence.

The Plaintiff sought to raise a question before this court on the non-acceptance of deed of gift marked 3Ə.3. This is a deed of gift by which Kira gifted his share to the 2nd and 8th Defendants. The learned counsel for the Plaintiff submitted that it is trite law that for a deed of gift to be valid it must be accepted by the donee. It was submitted that there been no acceptance it cannot pass title to the 2nd and 8th Defendants. However as correctly submitted by the learned counsel for 2nd to 10th Defendants, this is raised for the first time in appeal. No issue on this matter was raised at the trial. In *Somawathie v. Wilmon and others*[3] the question of non-acceptance of a deed of gift was raised for the first time in appeal before the High Court of Civil Appeal of the North Western Province which took cognizance of this issue. In appeal the Supreme Court held that the High Court was wrong in law in considering the question of non-acceptance of the deed of gift since there was a failure to raise an issue on that ground in the District Court and to lead any

[3] (2010) 1 Sri.L.R.128

evidence to that effect. Accordingly, the question of non-acceptance of deed of gift 3Ð.3 is not an issue that can be raised in this appeal.

The learned counsel for the Plaintiff submitted that if the Plaintiff has failed to establish his title to the corpus, the learned District Judge should have stopped by dismissing the action as the defendants have not specifically prayed for the partitioning of the land. In *Weerakoon et al v. Waas et al*[4] it was held that when an action for partition of a land is dismissed on the ground that the plaintiff has no title to the land, the Court has no jurisdiction to proceed to allot shares among the defendants if the defendants do not agree to ask for partition. Basnayake C.J. explained the rationale as follows:

> "It would appear from section 2 of the Partition Act, No. 16 of 1951, that an action for partition can be instituted only by a person to whom a land belongs in common with two or more persons. The Act creates a special jurisdiction and provides for a special procedure. Where after trial it appears that the basis on which the action can be brought is non-existent, the Court cannot make any order other than the dismissal of the action and any other order which is ancillary to such order. This Court has decided that in an action under the repealed Partition Ordinance each party to a partition action had the double capacity of plaintiff and defendant and that he who first brought the action was taken to be the plaintiff. It has also been held by this Court that in an action under the same Ordinance where the plaintiff failed to prove his title there was no objection to a partition among the defendants who had established their title if they so desired it, because defendants in a partition action are for some purposes in the position of plaintiffs. The new Act is not different from the old Ordinance in respect of the provisions under which those decisions have been given and decisions under the repealed Ordinance can properly be regarded as applicable to the new Act. But in the instant case the defendant did not agree to ask for a partition."[5]

[4] 57 N.L.R. 25
[5] Ibid. page 26

I am of the view that this rationale is applicable to the Partition Law No. 21 of 1977 as well.

However, in this case the 4th and 5th Defendants have in their statement of claim prayed for an undivided 1/32 and 1/80 shares respectively of the corpus. The 6th and 7th Defendants have also prayed for an undivided 1/20 and 1/40 shares respectively of the corpus. In the circumstances the learned District Judge was correct in ordering partitioning of the corpus even though the Plaintiff failed to establish his title to it.

The learned Counsel for the Plaintiff submitted that no evidence was led to establish that Pinsethuwa was a child of Rankira. However, the death certificate of Pinsethuwa was marked as 7D1 which shows that Morawaka Wijayasinghalge Rankira was the father of the deceased. The Plaintiff admitted that the said Rankira was the original owner of the corpus (Appeal Brief page 112).

The learned Counsel for the Plaintiff submitted that the learned District Judge failed to give reasons for her judgment as required by section 187 of the Civil Procedure Code. I am unable to agree. The judgment contains the reasons for the conclusions set out therein. In any event, the proviso to Article 138(1) of the Constitution states that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice. Therefore, even where there is a failure to comply with Section 187 of the Civil Procedure Code, if it is evident on a close examination of the totality of the evidence that the learned District Judge is correct in pronouncing judgment, there is no prejudice to the substantial rights of the parties or occasioned a failure of justice and the judgment of the learned District Judge should not be disturbed.[6] The evidence in this case supports the judgment of the learned District Judge.

[6] *Victor and Another v. Cyril De Silva* (1998) 1 Sri.L.R. 41

For the foregoing reasons, I see no reasons to interfere with the judgment of the learned District Judge of Kegalle.

Accordingly, the appeal is dismissed with costs.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I agree.

Judge of the Court of Appeal