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

Alagallegedara Lalitha Jayanthi Alagalla
Kotawella, Rambukkana.

Plaintiff- Appellant

C.A.Case No.762/99 (F)

D.C.Kegalle Case No: 22501/P

Vs.

01. Sextus Siriwaradane
Kotawella, Rambukkana

02. Peellagavagedara Dinaya (Dead)
Belgoyagedara Piyadasa,
Kotawella,Rambukkana.

02A. Nimal Gunaratne,
Kotawella,Rambukkana

03. James Doyle Siriwardana (Dead)
Kotawella,Rambukkana.

03A. Sextus Siriwaradane,
Kotawella, Rambukkana

04. Agampodi Dewayalage Thepanis,(Dead)
Kotawella, Rambukkana.

04A. Agampodi Dewayalage Sarath Jayalal
Ariyaratne

04B. S.G. Dingithi,

Kotawella, Rambukkana.

Defendants- Respondents

Before: M.M.A. Gaffoor J.

Janak De Silva J.

Counsel: Ikram Mohamed P.C. with G.D. Kulathilake for Plaintiff-Appellant

L.M.C.D. Bandara with M. Namali L. Perera for 1st Defendant Respondent

Written Submissions tendered on:

Plaintiff-Appellant on 23rd January 2018

1st Defendant-Respondent on 23rd February 2018

Argued on: 11th December 2017

Decided on: 27th March 2018

Janak De Silva J.

The Plaintiff-Appellant (Plaintiff) filed the above action in the District Court of Kegalle seeking to partition the land called Kalahugahamula more fully described in the schedule to the plaint situated at Kotawella in the district of Kegalle. According to the plaint the corpus consisted of eight (8) contiguous lots of land namely Serugahamula Hena, Bogahamula Hena, Kaduruwagawa Hena, Kalahugaha Hena, Kadurugahamula Hena, Bogahamula Watta, Delgahamula Watta and Rukattanagahamula Hena which were possessed for over 30 years as one land named Kalahugahamula.

The Plaintiff claimed that the corpus was owned by five persons namely Pillagawagedera Dinaya Bolgodayalalage Handuna alias Piyadasa, Gunaya, Rankiri, Gunawathie Jayawardena and Silindu. According to her they sold the corpus to Malini Fernando and Thilaka Hemalatha by deed no. 194 attested by V. Rajapakse notary public. Upon the death of Malini Fernando her rights devolved on the Plaintiff. Upon the death of Thilaka Hemalatha her rights devolved on the 1st Defendant-

Respondent (Defendant). That was the pedigree pleaded by the Plaintiff in terms of which the Plaintiff and Defendant were each entitled to an undivided ½ share of the corpus.

The learned Additional District Judge of Kegalle by her judgement dated 1st September 1999 dismissed the action of the Plaintiff stating that the entitlements of the parties cannot be decided upon the evidence adduced and that the lands sought to be partitioned were not clearly identified in the preliminary plan no. 421 marked "X". Hence this appeal by the Plaintiff.

The Plaintiff sought to assail the judgment by submitting that it is not in compliance with section 187 of the Civil Procedure Code (CPC). Reliance was placed on the decisions in *Piyaseeli v. Mendis*[1], *Sumanawathi v. Anderis*[2], *Abeykoon Pathiranage v. Suduhakuruge Methioros*[3] *and Dona Mary Nona v. Don Justin and others*[4]. These decisions reiterate the principle that section 187 of the CPC requires the judgement to contain an evaluation of the totality of the evidence, consideration of the points for determination, the decision thereon and the reasons for such decision. Bare answers to the issues or points of contest are insufficient.

I have examined the judgement of the learned Additional District Judge of Kegalle and find that there is a reference to the points of contest at page 2 of the judgement (Appeal Brief page 230) and the answers to them are set out at pages 12 and 13 of the judgement (Appeal Brief pages 240 and 241). Hence it cannot be said that the impugned judgement does not contain the points of contest and the decisions thereon.

The only question left is to examine whether there is an evaluation of the totality of the evidence. This must be considered in the context of the duties of a trial judge in a partition case, namely the requirement that firstly there must be the identification of the corpus and secondly an investigation of title.

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[1] (2003) 3 Sri.L.R. 273
[2] (2003) 3 Sri.L.R. 324
[3] CA 1364/2000(F); C.A. Minutes of 17.02.2014
[4] (2016) B.L.R. 130

There was no admission on the identity of the corpus. Issue no. 1 was whether the land described in the schedule to the plaint were depicted in plan no. 421 dated 1980.09.12 prepared by T.N. Cader licensed surveyor. The plan no. 421 prepared for this action is marked as "X" (Appeal Brief page 252). That plan contains 7 lots. The preliminary survey report (Appeal Brief pages 254 to 258) however identifies only two lots by name that is lot 1 as Kalahugaha Hena and lot 3 as Karawugaha Hena (as claimed by the Plaintiff) or Serugahamula Watta (as claimed by the Defendant). None of the other lots are identified by name. However, the schedule to deed marked පැ.3 refers to 8 lots by reference to names and metes and bounds of which Kalahugaha Hena is one. Hence the plan no. 421 marked "X" has failed to depict seven (7) lots of lands that have been described more fully in the schedule to the plaint by names and metes and bounds.

It is true that T.N. Cader licensed surveyor who conducted the preliminary survey has in his report marked "X1" stated that the land surveyed is the land sought to be partitioned and described in the schedule to the plaint. This is in conformity with the requirement set out in section 18(1)(a)(iii) of Partition Law No. 21 of 1977 which requires the surveyor to state in his report, supported by affidavit, 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. However as pointed out earlier the corpus in this case consists of eight (8) contiguous lots of land which are not separately identified in plan no. 421.

The learned Additional District Judge has come to the finding that some of the lots described in the preliminary plan no. 421 must be excluded from the corpus for different reasons. Although the preliminary survey report identifies lot 1 of plan no. 421 as Kalahugaha Hena the learned Additional District Judge has come to a finding that it is in fact Rukattanagahamula Hena (which is described in lot 8 of the schedule to the plaint) which was the subject matter in a partition action D.C. Kegalle case no. 14805 and as such it must be excluded from this partition action. The Plaintiff did not contest this finding in this appeal. The position of the Defendant with regard to lot 3 of plan no. 421 was that it is part of Serugahamula Watta and that the whole of the said land was not depicted in the said plan and that it must be excluded from the partition action. The learned Additional District Judge has upheld this position. Here again the Plaintiff did not contest this finding in this appeal. It has also been held by the learned Additional District Judge that lot 4

of plan no. 421 is Ritigahamula Hena which is not part of the corpus set out in the schedule to the plaint and that the 3rd defendant holds 2/3rd of it. Hence the finding is made that it must be excluded from this partition action. Again, the Plaintiff did not contest this finding in this appeal.

After excluding lots 1, 3 and 4 of plan no. 421, the largest portion of land containing in extent A.6 R.2 P.8 is contained in lot 2 of plan no. 421. The learned Additional District Judge has held that it was not established by the evidence that the land described more fully in the schedule to the plaint is contained in lot 2 of plan no. 421. The Court has also held that it is not possible to ascertain where in plan no. 421 that Serugahamula Watta is situated. The Plaintiff has failed to controvert this finding in appeal.

These are the reasons why the learned Additional District Judge in answering issue no. 1 held that the land described in the schedule to the plaint was not depicted in plan no. 421 dated 1980.09.12 prepared by T.N. Cader licensed surveyor. I am in agreement with this finding. In a partition action the court has a supervening duty to satisfy itself as to the identity of the corpus and also as to the title of each and every party who claims title to it.[5]

This raises the question of investigation of title as clarity in regard to the identity of the corpus is fundamental to the investigation of title in a partition case.[6] 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*[7] 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

[5] Jameel J. in *Kodituwakku v. Anver and others* [C.A. 13/81; C.A. Minutes of 10.12.1985]
[6] Marsoof J. in *Sopinona v. Pitipanaarachchi and two others* (2010) 1 Sri.L.R.87
[7] (1998) 1 Sri.L.R. 391

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). "[8]

The Plaintiff marked deed no. 194 (පැ7.3) whereby Pillagawagedera Dinaya Bolgodayalalage Handuna alias Piyadasa, Gunaya, Rankiri, Gunawathie Jayawardena and Silindu sold their rights in the eight (8) lots more fully described in the schedule to the plaint to Malini Fernando and Thilaka Hemalatha. However, the schedule to deed no. 194 (පැ7.3) shows that all the said eight (8) lots were not owned by the said vendors in common but owned in different portions on different pedigrees. For example, lot 1 in the schedule to the plaint namely Serugahamula Hena was allegedly owned by Handuna by virtue of deed no. 5399 while lot 2 therein namely Bogahamula was allegedly owned by Silindu by virtue of deed no. 950. Several such deeds are referred to in the said schedule but the Plaintiff failed to produce any of the said deeds in evidence. Furthermore, several plans depicting the land pertaining to said deeds were set out in the said schedule but the Plaintiff did not produce anyone of the said plans during evidence. The learned Additional District Judge has accordingly correctly held that it is difficult to determine the shares of the parties.

The Plaintiff submitted that although the learned Additional District Judge has held that the lands depicted in lots 1, 2, 3 and 4 in the schedule to the plaint are owned by the Plaintiff and Defendant she has failed to allocate it to them. That is claimed to be an error which merits a retrial. This submission overlooks the fact that the preliminary plan has failed to separately identify the 8 lots of land described in the schedule to the plaint. Therefore, the trial judge was not in a position to determine where the said lots 1, 2, 3 and 4 are contained in plan no. 421. Accordingly, she was

[8] Ibid. page 395

correct in concluding that the land sought to be partitioned is not clearly identified in the preliminary plan no. 421.

The Plaintiff submitted that the learned Additional District Judge erred in answering issues 15, 20 and 30. There is some merit in this submission. However, 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 if there is a failure to comply with Section 187 of the CPC, as it is evident on a close examination of the totality of the evidence that the learned Additional District Judge was correct in dismissing the action, there is no prejudice to the substantial rights of the parties or occasioned a failure of justice and the judgment of the learned Additional District Judge dated 1st September 1999 should not be disturbed.[9]

For the reasons set out above, I dismiss this appeal with costs.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I agree.

Judge of the Court of Appeal

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