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

4A. Herbert Ranjith Kulasooriya
No.10, "Mihira",
Main Road,
Passara.
4th Defendant-Petitioner

CA CASE NO: CA/LA/399/2006
DC BADULLA CASE NO: 10576/P

Vs.

Chandra Kulasooriya,
No.10, "Mihira",
Main Road,
Passara.
Substituted Plaintiff-Respondent

1. Oboda Arachchige Baby Nona,
2A. Kamalawathie Fernando,
Bulugahakumburewatta,
Kanahena,
Pallegama,
Passara.
3A. S.A. Rupawathie Senanayake,
Hapuroda Road,
Passara.
Defendant-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Faisz Musthapha, P.C., with Swadesh Randika De Silva and Keerthi Tillekaratne for the 4A Defendant-Appellant.

Chatura Dilhan for the 2A Defendant-Respondent.

Decided on: 09.11.2018

Samayawardhena, J.

This is a partition action. Upon the death of the 4th defendant, his son has been substituted as the 4A defendant. The 4A defendant has given evidence at the trial. During the course of his evidence, when he moved to mark the Deed No.6959 dated 22.06.1943, the learned counsel for the 2A defendant has objected to it on the basis that it is an unlisted document. However, the learned District Judge of Badulla by order dated 19.09.2006, has refused permission to mark that Deed in evidence on the premise that the said Deed is irrelevant to the issues raised at the trial. It is against this order, the 4A defendant has filed this appeal with leave obtained.

Let me first consider whether this Deed can be refused to be marked in evidence on the ground that it is an unlisted document.

According to section 23(1) of the Partition Law, No. 21 of 1977, as amended, the List of Documents shall be filed thirty days before the date of the trial. That section reads as follows:

"*Every party to a partition action shall, not less than thirty days before the date of the trial of the action, file or cause to be filed in court a list of documents on which he relies to prove his right, share or interest to, of or in the land together with an abstract of the contents of such documents. No party shall, except with the leave of the court which may be granted on such terms as the court may determine, be at liberty to put any document in evidence on his behalf in the action if that document is not specified in a list filed as aforesaid. Nothing in this subsection shall apply to documents produced for cross-examination or handed to a witness merely to refresh his memory*."

The thirty-day period from the date of the trial, mentioned in this section was interpreted liberally as opposed to restrictively by the Supreme Court in *Pushpa v. Leelawathie [2004] 3 Sri LR 162* to include not only the first date of trial but also any date to which the trial is postponed. Chief Justice S.N. Silva at page 163 stated: "*When this provision is considered in the light of section 25(1) it is clear that the date of trial is not necessarily the first date on which the case is fixed for trial but would also include any date to which the trial is postponed*."

Section 25(1) of the Partition Law reads as follows:

"*On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made*."

This section mandates the District Judge trying a partition action to examine the title claimed by each party in relation to the land to be partitioned, quite independently of what the parties may or may not tell the Judge. That is because partition actions are not actions in *personam*, where only the parties to the action are bound by the Judgment, but actions in *rem*, where not only the parties to the action, but also those who are not parties to the action are also bound by the Judgment. Therefore, a District Judge trying a partition action cannot be found fault with for being too cautious, circumspectous and jealous in investigating title to the land and looking beyond what has been presented before the Court by way of pleadings or otherwise to be absolutely satisfied *inter alia* that all the necessary parties are before Court and there is no collusion among the parties. He has every right even to call for evidence after the parties have closed their cases. (*Cynthia de Alwis v. Majorie D'Alwis [1997] 3 Sri LR 113 at 115*) This paramount duty of thorough investigation of title, independently of what parties may or may not say, cast upon the District Judge in partition actions has been repeatedly and overwhelmingly stressed by the Superior Courts from time immemorial.

In *Peris v. Perera* decided more than 122 years ago, and reported in (1896) 1 NLR 362, the Full Bench of the Supreme Court led by Chief Justice Bonser held that: "*The Court should not regard a partition suit as one to be decided merely on issues raised by and between the parties, and it ought not to make a decree, unless it is perfectly satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned*." This has consistently been followed up to now. (*Vide for instance: Juliana Hamine v. Don Thomas (1957) 59 NLR 546,*

Gnanapandithen v. Balanayagam [1998] 1 Sri LR 391, Sumanawathie v. Andreas [2003] 3 Sri LR 324, Basnayake v. Peter [2005] 3 Sri LR 197, Karunaratne Banda v. Dassanayake [2006] 2 Sri LR 87, Silva v. Dayaratne [2008] BALR 284, Abeysinghe v. Kumarasinghe [2008] BALR 300, Sopinona v. Pitipanaarachchi [2010] 1 Sri LR 87)

There is no blanket prohibition for unlisted documents to be marked in evidence in partition trials. Such unlisted documents can, in terms of section 23(1) of the Partition Law, be marked with the leave of the Court.

What is the purpose of listing documents before the trial? That is to prevent an element of surprise and thereby causing prejudice to the other party, and nothing else. The paramount consideration in that regard is nothing but the ascertainment of truth and not to place the objecting party at a distinct advantageous position or the defaulting party at a distinct disadvantageous position by reason of technicality. (*Silva v. Silva [2006] 2 Sri LR 80, Farose Ahmed v. Mohomed [2006] 2 Sri LR 66, Arpico Finance Co Ltd v. Perera [2007] 1 Sri LR 208, Mashreq Bank PSC v. Arunaselam [2007] BLR 20*)

In the instant action, the 4th defendant has filed a statement of claim on 08.11.1985 wherein, at paragraph 5, he has specifically pleaded this Deed (which was disallowed to be marked) together with three more Deeds. The 4A defendant moved to mark that Deed on 06.06.2006, which means, more than twenty long years after it was expressly pleaded in the statement of claim. Under those circumstances, can the 2A defendant, who objected it being marked in evidence on the basis that it was not listed thirty days before the date of the trial, rightfully claim that he

was taken by surprise when the Deed was produced in evidence? I would unreservedly answer it in the negative.

If a document is pleaded in the pleadings, such as the plaint, answer, replication, statement of claim, statement of objections, of which the opposing party had notice, the Court need not, as the Supreme Court in *Walker & Sons Co Ltd v. Masood [2004] 3 Sri LR 195* stated, reject the document to be received in evidence on the ground that it is not listed. In such circumstances, the Court shall exercise discretion to allow it to be marked in evidence despite it being formally listed strictly in terms of the law.

Hence, I take the view that there is no rational basis to reject the Deed being marked on the basis that it is unlisted.

This leads me to consider the basis upon which the learned District Judge, *ex mero motu*, decided to reject the Deed. The learned District Judge has disallowed that Deed to be marked because, according to the learned District Judge, no issue has been raised by the 4A defendant at the trial.

When admissions were recorded and issues were raised, the 4A defendant had been absent and unrepresented notwithstanding a statement of claim had been tendered by the deceased 4th defendant seeking exclusion of Lot 6 of the Preliminary Plan on the basis of the four Deeds (including the one rejected) and long possession. The learned District Judge states that as no issue has been raised on that basis, it is irrelevant to allow that Deed to be marked.

It is significant to note that, in the Partition Law, there is no provision to raise issues. Section 25(1) of the Partition Law, which deals with the stage of the commencement of the trial, does not speak of raising issues prior to the trial as in a regular action (as stated in section 146 of the Civil Procedure Code), but speaks of straightaway recording evidence to examine title to the land to which the action relates. Nevertheless, in partition actions, not issues, but points of contest are recorded, as a matter of practise, for convenience and to control the proceedings.

There is no mandatory rule that such points of contest shall necessarily be raised only at the commencement of the trial. Such points of contest, can, depending on the facts and circumstances of the case, be raised at any time during the course of the trial, and, if I may add, even after the conclusion of the trial, if the circumstances warrant such a course of action to be followed.

Section 149 of the Civil Procedure Code, which is applicable to a regular action, reads as follows: "*The court may, at any time before passing a decree, amend the issues or frame additional issues on such terms as it thinks fit.*" Section 79 of the Partition Law allows the procedure laid down in the Civil Procedure Code to be adopted in case of *casus omissus*.

In *Hameed v. Cassim [1996] 2 Sri LR at 33* Justice Ranaraja held that: "*The provisions of section 149……certainly do not preclude a District Judge from framing a new issue after the parties have closed their respective cases and before the judgment is read out in open Court. It is not necessary that the new issue should arise on the pleadings. A new issue could be framed on the evidence*

led by the parties orally or in the form of documents. The only restriction is that the Judge in framing a new issue should act in the interests of justice, which is primarily to ensure the correct decision is given in the case."

It is the duty of the presiding Judge, and not that of the parties or lawyers, to identify and record issues or points of contest on which the right decision of the case appears to the Court to depend.

Even though the learned District Judge on his own has stated that no issue has been raised by the 4A defendant seeking exclusion of Lot 6 and therefore marking Deeds which are pleaded in the statement of claim of the 4th defendant is irrelevant, when I go through the evidence of the plaintiff's daughter, who gave evidence on behalf of the plaintiff mother, it is seen that, she has, in her evidence, stated that Lot 6 shall be excluded from the corpus. I am mindful of the fact that the deceased 4th defendant was her father and the husband of the plaintiff and 4A defendant is her brother. Then what, the contesting 2A defendant also in her evidence has stated that, not only Lot 6, but also the other Lots except Lot 4 shall be excluded from the land to be partitioned. (vide page 136 of the Brief marked X) That may be the reason why the learned counsel for the 2A defendant did not object to that Deed on that basis (although the learned District Judge thought it fit to do so).

According to the plaint, the 2nd defendant is entitled to an undivided ¼ share of the land known as "*Bulugaha Kumburewatta*" in extent of about five acres; and according to the statement of claim of the 2nd defendant, the 2nd defendant is entitled to an undivided ¼ share of the different land known as

"*Manikige Hena*" in extent of 1 Acre, 1 Rood and 4 Perches (not five acres). It appears that the Preliminary Plan depicts the land described in the schedule to the plaint. However, at the beginning of the trial, when recoding admissions between the plaintiff and the 2nd defendant, it has been recorded that the land to be partitioned is depicted in the Preliminary Plan. In my view, there are more serious, but fundamental matters, to be looked into in this case by the learned District Judge.

That is why, the Full Bench of the Supreme Court headed by Chief Justice Layard in the case of *Mather v. Tamotharam Pillai (1908) 6 NLR 246*—decided more than 110 years ago—held: "*A partition suit is not a mere proceeding inter partes to be settled of consent, or by the opinion of the Court upon such points as they choose to submit to it in the shape of issues. It is a matter in which the Court must satisfy itself that the plaintiff has made out his title, and unless he makes out his title his suit for partition must be dismissed. In partition proceedings the paramount duty is cast by the Ordinance upon the District Judge himself to ascertain who are the actual owners of the land. As collusion between the parties is always possible, and as they get their title from the decree of the Court, which is made good and conclusive as against the world, no loopholes should be allowed for avoiding the performance of the duty so cast upon the Judge*."

On the other hand, if Lot 6 cannot be excluded and shall form part of the corpus, the 4A defendant shall be allowed to claim undivided rights from the land on those Deeds. The learned District Judge cannot, in law, prevent the 4A defendant from producing those Deeds at least for that purpose.

I unhesitatingly set aside the impugned order of the learned District Judge and allow the appeal with costs.

Judge of the Court of Appeal