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

S.Pupawathie Rathnasiri

Case No. C.A.1293/99(F)

Gammaddegoda,Rathgama.

D. C. Galle No. P/9562

Substituted-Plaintiff

Vs.

01. Manimeldura Amalawathie,
    Gammeddegoda,Rathgama.
02. Mallika Somawathie De silva
03. Deva Harischandra Stanley De Silva
04. Deva Gotham Stanley De Silva
05. Deva Regina De Silva
06. Deva Hersin Stanley De Silva
07. Deva Kanthi De Silva
08. Deva Chandra Stanley
09. Deva Martin Stanley De Silva
10. Deva Harsha De Silva
11. Deva Dulip Stanley De Silva
12. Deva Thamara De Silva
    All of Gammeddegoda,Rathgama.
13. Deva Amithalndrani De Silva
    Bogahapitiya,Ahungalla.

Defendants

And now between

Thotagamuvage Ruwan Chaminda

Gombedda,Rathgama.

Substituted 1(a) Defendant-Appellant

Vs.

1A. Wasantha Kumar

1B. Sriyani Hemamali

1C.Ramani Anoma

1D. Kamanie Umanga Jinadari.

All of Gammeddagoda,Rathgama.

Substituted-Plaintiff-Respondents.

01. Manimeldura Amalawathie,
    Gammeddegoda,Rathgama.
02. Deva Harischandra Stanley De Silva
03. Deva Gotham Stanley De Silva
04. Deva Regina De Silva
05. Deva Hersin Stanley De Silva
06. Deva Kanthi De Silva
07. Deva Chandra Stanley
08. Deva Martin Stanley De Silva
09. Deva Harsha De Silva
10. Deva Dulip Stanley De Silva
11. Deva Thamara De Silva
    All of Gammeddegoda,Rathgama.
12. Deva Amithalndrani De Silva
    Bogahapitiya,Ahungalla.

Defendants-Respondents

Before: M.M.A. Gaffoor J.

Janak De Silva J.

Counsel: Gamini Hettiarachchi for Substituted 1(a) Defendant-Appellant

Saliya Pieris P.C. with Susil Wanigapura for Substituted Plaintiff-Respondents

Written Submissions tendered on:

Substituted 1(a) Defendant-Appellant on 02.04.2018

Substituted Plaintiff-Respondents on 19.03.2018

Argued on: 24.01.2018

Decided on: 16.11.2018

Janak De Silva J.

This is an appeal against the judgment of the learned Additional District Judge of Galle dated 14.09.1999.

The Original Plaintiff filed action in the District Court of Galle on 12.07.1985 seeking to partition a land called 'Rathurala Padinchiwasiti Waththa' situated at Rathgama Gammadegoda in the District of Galle A.1 R.0 P.0 in extent. The Original Plaintiff passed away during the pendency of the action and the wife of the Original Plaintiff was substituted as Substituted-Plaintiff (Substituted Plaintiff – Respondent). The Substituted Plaintiff – Respondent took up the position that the said corpus is depicted as Lot A and B in Plan No 1373 dated 13.06.1996 made by G.H.G.A De Silva Licensed Surveyor upon a commission issued by the District Court of Galle in the partition action.

In the plaint filed before the District Court, it has been accepted that the 1st Defendant Appellant (Appellant) is entitled to an undivided 2/3 share of the said corpus. (Vide page 54 of the Appeal Brief) This has also been recorded as an admission. (Vide page 115 of the Appeal Brief)

The Substituted Plaintiff – Respondent only claims title to the remaining 1/3 undivided share of the corpus. It is the Substituted Plaintiff – Respondent's position that the Original Plaintiff and the 2nd – 12th Defendant-Respondents were entitled to 1/3 undivided share of the corpus on the basis of the pedigree and deeds mentioned in the plaint. According to the plaint, the respective claims of the parties to the corpus called 'Rathurala Padinchiwasiti Waththa' were as follows:

- The Original Plaintiff 3/12
- The Appellant 8/12 (2/3)
- The 2nd to the 12th Respondents (collectively) 1/12

The Appellant filed answer and contended that the corpus was depicted as Lot A, B and C in Plan No 755 dated 1992.07.22 made by Anton Samararatne Licensed Surveyor. The Appellant also disputed the Substituted Plaintiff – Respondent's contention that the undivided 1/3 of the corpus ought to be divided between the Original Plaintiff and the 2nd to the 12th Respondents. The Appellant relies on a separate pedigree to claim title to the 1/3 undivided share of the corpus. In sum, the Appellant claims title to the entirety of the corpus.

During the course of proceedings before the District Court, the 13th Defendant- Respondent (13th Respondent) sought to intervene in the action and be added as a party that has a claim to the undivided 1/3 share of the corpus. After being granted permission, the 13th Respondent claimed title to the undivided 1/3 share of the corpus on a different pedigree. (Vide page 75 of the Appeal Brief). Notably, the 13th Respondent's pedigree did not in any way dispute the claim of the Original Plaintiff to the 1/3 undivided share of the corpus. The 13th Respondent claimed that she was a sibling of the 2nd to the 12th Respondents (Vide page 77 of the Appeal Brief) and thus entitled to whatever undivided share of the corpus the 2nd to the 12th Respondent would collectively receive. The 13th Respondent's pedigree goes further back in time and in fact corroborates the original Plaintiff's pedigree in certain respects. During the course of the trial, the Substituted Plaintiff – Respondent accepted the pedigree of the 13th Respondent. (Vide pages

131 – 136 of the Appeal Brief) The learned Additional District Court judge having considered all three pedigrees and the deeds supporting them came to the conclusion that the 13th Respondent's pedigree was the most reliable one and accepted the devolution of title under it viz. that the original Plaintiff and the 2nd to the 13th Respondent had title to the undivided 1/3 share.

Being aggrieved by the said judgment, the Appellant sought to impugn it on the following grounds (Vide pages 8 – 11 of the Appeal Brief):

1. The learned District Court judge has failed to identify the corpus correctly
2. The deeds produced by the 13th Respondent do not relate to the corpus
3. The learned District Court judge misdirected himself in accepting the pedigree, deeds and evidence of the Plaintiff and the 13th Respondent
4. The learned District Court judge has failed to appreciate the fact that the Appellant and her predecessor in title have been in long possession of the entirety of the corpus

The points of appeal raised by the Appellant will be considered hereinafter.

Failure to identify the corpus sought to be partitioned

It is trite law in partition actions that the trial judge is under a "supervening duty to satisfy itself as to the identity of the corpus" [*Wickremaretne v. Albenis Perera* [1986] 1 Sri LR 190 at 199]. This is because "clarity in regard to the identity of the corpus is fundamental to the investigation of title in a partition case." [*Sopinona v. Pitipanaarachchi and two others* (2010) 1 Sri.L.R. 87 at 105]

In the matter before us, the Appellant contends that the learned trial judge has taken contrary positions in his judgment regarding the identity of the corpus and has thus failed to fulfill a prerequisite in a partition matter. The Appellant contends that the corpus is identified as Lots A, B and C of Plan No 755 at page 14 of the judgment but that it is later identified as Lots B and C of Plan No 755 in answering the first issue (at page 13) and Lots A and C of Plan No 755 at page 7 of the judgment.

This contention can be easily disposed of upon an *ex facie* consideration of the judgment of the learned trial judge. It is abundantly clear that the learned trial judge has identified the corpus as Lot A, B and C in Plan No 755 (Marked Y) at all points of the judgment. Plan No 755 was in fact produced and marked by the Appellant. The learned trial judge has answered the fourth issue raised by the Appellant in her favour by holding that the corpus is identifiable as Lot A, B and C in Plan No 755. I am of the view that there is sufficient clarity in the judgment regarding the identity of the corpus.

The deeds produced by the 13th Respondent do not relate to the corpus

The Appellant has also contended that the deeds underlying the pedigree of the 13th Respondent do not relate to the corpus in this matter and therefore should not have formed the basis for the learned trial judge's decision. The 13th Respondent has presented four ancient deeds (marked 13වි1 - 13 වි4 to show that it was the Substituted Plaintiff – Respondent's and the 2nd to the 13th Respondent's predecessor in title that had the earliest recorded title to the 1/3 undivided portion of the corpus in dispute.

The 13th Respondent contends that one Odiris Silva obtained title to the 1/3 undivided share of the corpus by virtue of Deed No. 908 dated 1861.06.11 (13වි2), Deed No. 3755 dated 1868.09.07 (13වි3) and Deed No 13714 dated 1868.01.07 (13වි4). Despite considerable difficulty in reading the said deeds, the documentation is sufficiently comprehensible to establish that they relate to the same corpus described in the Substituted Plaintiff – Respondent's plaint and the 13th Respondent's statement of claim.

The Substituted Plaintiff – Respondent's plaint describes the corpus in the following manner with reference to its boundaries:

දකුණු පළාතේ ගාලු දිස්ත්‍රික්කයේ වැලිමඩ පත්තුවේ රත්ගම ගම්මදෙගොඩ පිහිටි රතුරලා පදිංචිව සිටි වත්තට මායිම්: උතුරට කුඩා ගොම්බද්දෙගොඩ කුඹුරද නැගෙනහිරට ගොම්බද්දේ වත්තද දකුණට බෝපුමකන්කනම වැවු වත්තද බස්නාහිරට බවිගේවත්තද යන මායිම් තුල පිහිටි අක්කර එකක් පමණැති ඉඩම

13වි2 refers to a land called රතුගේවත්ත with boundaries which largely correspond to the boundaries of the corpus identified in the plaint. The Northern, Eastern and Western boundaries in this ancient deed is identical to the boundaries in the corpus in the plaint. (Vide page 324 of the Appeal Brief) Only the southern boundary in this deed has a slight variation in terminology *vis a vis* the boundaries in the plaint. However, the overall wording is sufficiently clear to show that this ancient deed relates to the corpus which is the subject matter of this action. A perusal of 13වි3 (Vide page 325 of the Appeal Brief) shows that it relates to a land called රතුරාලපදිංචිවළුන් ගොන්බද්දෙවත්ත. The boundaries of that land are identical to the boundaries of the corpus in the plaint. 13වි4 deals with a land called ගොන්බෙද්දෙගොඩ රතුරලා පදිංචි වත්ත and that land too has boundaries identical to the boundaries of the corpus found in the plaint. In addition, the Appellant has in cross examination stated that ගොන්බෙද්දෙගොඩ රතුරලා පදිංචි වත්ත is another name associated with the corpus in the present matter (Vide page 202 of the Appeal Brief). Therefore, it is abundantly clear that the three deeds produced by the 13th Respondent relate to the corpus in dispute. The other deed produced by the 13th Respondent is No 3459 dated 1927.08.28 (marked 13වි1) and it also deals with a land called ගොන්බෙද්දෙගොඩ රතුරලා පදිංචි වත්ත and that land too has boundaries identical those found in the plaint.

Therefore, I have no hesitation in concluding that all four deeds produced and marked by the 13th Respondent are deeds which directly relate to the corpus in dispute.

The learned District Court judge misdirected himself in accepting the pedigree, deeds and evidence of the Plaintiff and the 13th Respondent

As already adverted to above, the primary question that has arisen in this matter is the party that can claim title to the undivided 1/3 of the corpus. The learned trial judge concluded that the 13th Respondent's pedigree – which supported the title of the Substituted Plaintiff - Respondent and the 2nd -13th Respondent's – was the more reliable one.

On appeal, this court is required to assess whether the trial judge came to his conclusion on a 'thorough investigation of all titles' claimed by the parties. [*Sopinona v. Pitipanaarachchi and two others* (2010) 1 Sri.L.R.87, 94 - 95] Such thorough investigation of titles is necessary since a partition decree is binding against the entire world i.e. a decree in rem.

In *Karunaratne v Sirimalie* [53 NLR 444 at 445] the court made the following observation about the standard of proof required in respect of title for a partition action:

> *"Subject however to this important qualification, the* ***fact remains that a partition action is a civil proceeding, and I do not understand the authorities to suggest that, where all possible claimants to the property are manifestly before the Court, any higher-standard of proof should be called for in determining the question of title than in any other civil suit"*** (emphasis added)

The question therefore is whether the trial judge adhered to these legal standards in accepting the pedigree of the 13th Respondent over and above the other pedigrees available.

The learned trial judge seems to have not accepted the pedigree of the original Plaintiff as it contained a key flaw. According to the original Plaintiff's pedigree, one Deva Leuneris Silva had obtained title over the 1/3 undivided share of the corpus by way of Fiscal Conveyance No 10367 dated 1905.03.21. However, a perusal of the said Fiscal Conveyance and the corresponding Order Confirming Sale dated 1905.01.05 (Vide pages 298 – 300 of the Appeal Brief) only reveals that an undivided 2/3 part of the land described was sold to one Daballage Carolishamy. The Fiscal Conveyance does not at any point show that the remaining 1/3 undivided share was sold to Deva Leunaris Silva or as to who had title to that share. Therefore, since the pedigree of the original Plaintiff had a defect at its earliest point of time, the learned trial judge has very correctly refused to accept that pedigree.

The second pedigree that was available before court was the one produced by the Appellant. As per this pedigree, the Appellant has laid claim to the undivided 1/3 share of the property by stating that one Sammu Ediris had title to the said share and that Sammu Ediris' title devolved upon his death to his son Sammu Andiris and that Sammu Andiris sold this share to the Appellant by Deed No 35 dated 08.06.1983. (Marked 1 වි5 at page 314 of the Appeal Brief) The learned trial judge has refused to accept this pedigree on the basis of there being insufficient evidence to show Sammu Ediris' title to the undivided 1/3 share of the corpus. The Appellant's position was that Sammu Ediris was the brother of one Eliyas Hami. Fiscal Conveyance No 10367 dated 1905.03.21 shows that Eliyas Hami's share of the corpus was sold to one Carolishamy. On this basis, the Appellant contends that Sammu Ediris also had a 1/3 undivided share to the corpus as Sammu Ediris was Eliyas Hami's brother. The learned trial judge has refused to accept this position as there was no evidence on record to show that;

a. The share of the corpus owned by Elias Hami (which was sold by the said Fiscal Conveyance No 10367 dated 1905.03.21) was a share that was obtained by Elias Hami through parental inheritance
b. Sammu Ediris was the brother of Eliyas Hami

(Vide page 236 of the Appeal Brief)

It is appropriate at this stage to consider the judgment of *P.M.Cooray v Wijesuriya* (62 NLR 158) which deals with the manner in which a party in a partition action must prove their pedigrees. The following observation made by Sinnetamby J is illuminating considering the facts of the present matter:

> *"Before a Court can accept as correct a share which is stated in a deed to, belong to the vendor* ***there must be clear and unequivocal proof of how the vendor became entitled to that share. Apart from proof by the production of birth, death and marriage certificates, the relevant provisions of the Evidence Ordinance in regard to proof of a pedigree are to be found in section 32 (5), 32 (6) and 50 (2).***" (Emphasis added)

Applying this reasoning to the present matter one must necessarily come to the conclusion that there is no 'clear or unequivocal proof' as to how the Appellant's purported predecessor in title (Sammu Ediris) came to have title to the undivided 1/3 portion of the corpus which is in dispute. The learned trial judge has correctly observed that no evidence had been adduced by the Appellant to prove that Sammu Ediris and Eliyas Hamy were brothers (Vide page 237 of the Appeal Brief). In terms of section 32(5) of the Evidence Ordinance apart from evidence such as birth certificates a relationship for the purpose of a pedigree can be proved by **statement relating to the existence of any relationship by blood**, marriage, or adoption between persons as to whose relationship by blood, marriage, or adoption **the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised**.

In the present matter one purported piece of evidence to show that Sammu Ediris and Eliyas Hamy were brothers is the evidence of the Appellant herself. (Vide page 223 of the Appeal Brief) During re-examination, the Appellant has also stated that she knew Sammu Ediris and Eliyas Hamy who were brothers based on information obtained by her deceased mother. (Vide page 228 of the Appeal Brief) In regard to the statement purported to have been made by the Appellant's mother, the following observation in *P.M.Cooray v Wijesuriya* (supra) made in relation to the ambit of section 32(5) of the Evidence Ordinance is pertinent.

> *"What practitioners and Courts sometimes lose sight of is the fact that before such evidence can be led there must be proof that the hearsay evidence sought to be given is in respect of a statement made by a person having special means of knowledge. furthermore, it must have been made ante litem motam. Where the statement is made by a member of the family such knowledge may be inferred or even presumed,* ***but where it is a statement made by an outsider proof of special means of knowledge must first be established.*** *In the present case the plaintiff himself knows nothing of the pedigree; but he, nevertheless, gave evidence of the pedigree and stated that Bastian Fonseka had six children.* ***Under cross-examination he admitted that, apart. from deeds, his evidence was based on information given to him by his vendor Charles Edward Perera. Charles***

Edward Perera is not a member of the family of Warnage Bastian Fonseka and there is no evidence that he had any other special means of knowledge." (Emphasis added)

The above passage indicates that an attempt was made by a party in that case to prove a family relationship in a pedigree by relying on a statement made by an outsider who had no special means of knowledge about the family. The party attempting to prove the pedigree had not attempted to show that the outsider who was being relied on had any special means of knowledge. I am of the view that the attempt by the Appellant in this matter to prove a family relationship by relying on a statement made by the Appellant's mother is a similar exercise. No evidence has been led to show that the Appellant's mother was related to either Sammu Ediris or Eliyas Hamy or that the Appellant's mother had any other special means of knowledge about that family. Accordingly, the learned trial judge was correct in concluding that there was no legally admissible evidence to show that Sammu Ediris and Eliyas Hamy were brothers. Absent this fact being established, the Appellant's pedigree fails as there's no evidence to show that the Appellant's earliest predecessor in title had title to the undivided 1/3 share of the corpus.

The final pedigree available to the trial judge was that of the 13th Respondent. It begins with the three ancient deeds (13වි2 - 13වි4) which give one Odiris Silva title to a portion of the present corpus. The next deed (13වි1) shows Odiris Silva's children and grandchildren selling their rights to the corpus to one Milton De Silva. Milton Silva died unmarried and issueless and his rights devolved to his four living siblings; Emiliya Nona, Dalrymple Stanley De Silva, Newlis De Silva and Godvin Stanley De Silva. The next deed in the pedigree No 2418 dated 1975.04.01 (ඉ7ැ2) shows the wife and children of Newlis Silva along with Godvin Stanley De Silva selling their rights to Emiliya Nona. Incidentally, this is the point at which the pedigrees of the Substituted Plaintiff – Respondent and the 13th Respondent converge and corroborate each other. The final deed in the pedigree which is No 4053 dated 1983.11.21 (marked ඉ7ැ1) shows Emiliya Nona selling her share in the corpus to the Original Plaintiff. The share which Dalrymple Stanley De Silva had in the corpus devolved onto his 12 children i.e. the 2nd to the 13th Respondent, after his death.

It is the above pedigree that the learned trial judge decided to accept after his investigation of title. The Appellant contends that this was incorrect as the pedigree was unsubstantiated and the evidence of the plaintiff and the 13th Respondent inconsistent. However, one is able to discern a valid deed supporting each link in the chain of this pedigree. The Appellant has not at any point sought to impeach the genuineness of any of the deeds. In those circumstances, the presumption in section 68 of the Partition Law[1] would come into play and the trial judge was entitled to accept the deeds without any formal proof of their due execution. [*Wimalawathie v Hemawathie and others* (2009) 1 S.L.R. 95] Therefore I am of the opinion that the learned trial judge was correct in relying on the 13th Respondent's pedigree to determine who had title over the corpus.

The learned District Court judge has failed to appreciate the fact that the Appellant and her predecessor in title have been in long possession of the entirety of the corpus

The Appellant's final contention is that she is able to claim title over the entirety of the corpus based on prescription. In *Dingiri Appu v Mohottihamy* (68 NLR 40) the court observed as follows:

> ***"Where a land is owned in common, there must be clear evidence of ouster of all the other co-owners by the co-owner who claims that he enjoyed the land exclusively*** *without recognizing the rights of others. He must also* ***establish that he commenced to do so from a certain date and that ten years have elapsed from that date.***"(Emphasis added)

In the present matter, the Appellant herself has conceded that she only functioned as a co-owner of the corpus **until 1983.06.08.** According to the Appellant's pedigree, 1/3 of the corpus was purportedly sold to her by one Andiris by Deed No 35 dated 1983.06.08. The present action was filed before the District Court on 1985.07.12. Therefore, the Appellant has failed to show that she enjoyed exclusive possession of the corpus for ten years before the commencement of the action. It is trite law that the rights of the parties have to be determined as at the date of the commencement of the action. [Silva v Fernando (15 NLR 499)]

[1] It shall not be necessary in any proceedings under this Law to adduce formal proof of the execution of any deed which, on the face of it, purports to have been duly executed, unless the genuineness of that deed is impeached by a party claiming adversely to the party producing that deed, or unless the court requires such proof.

In *Talagune v. De Livera* [1997 (1) SLR 253] the court observed as follows:

> *"the Plaint was filed on 18.03.85 and under our Code,* ***there is no provision which for a defendant to plead by way of defence, matter arising subsequent to the institution of action****, the judgment must determine the rights of the parties as on the date of the institution of the action. This was the position as held in 2 Times Report 192. It was also held in the case of Silva v. Fernando. The rights of the parties to an action have to be ascertained as at the commencement of the action. This is well settled law".* (Emphasis added)

Therefore, the Appellant's claim of title based on prescription must necessarily fail as she has failed to show exclusive possession of the 1/3 undivided share of the corpus for a period of 10 years prior to the commencement of the action.

For the foregoing reasons I see no reason to interfere with the judgment of the learned Additional District Court judge of Galle dated 14.09.1999.

Accordingly, I dismiss the appeal with costs.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I agree.

Judge of the Court of Appeal