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

Domingo Hewage Gunapala
of Goyambokke, Tangalle.

Plaintiff.

Court of Appeal No. CA 877/98(F)
D.C. Tangalle Case No. P/2218.

Vs.

1. Kankanamge Don Titus Dharmaratne
   Kottegooda, Nugegoda.

2. Upali Gunasekera,
   of M/s. Palm Paradise Cabanas,
   of Goyambokke, Tangalle and
   Presently of No. 19/2, Sunandarama Road,
   Kalubowila, Dehiwala.

3. Punyasiri Wickramasinghe of
   Goyambokke, Tangalle.

4. Pallakkara Gamage Martyn of
   Goyambokke, Tangalle.

Defendants.

AND BETWEEN

(deceased) Domingo Hewage Gunapala
Of Goyambokke, Tangalle.

Plaintiff-Appeallant.

Domingo Hewage Premachandra
Of Goyambokke, Tangalle.

Substituted – Plaintiff-Appellant.

Vs.

1.Kankanamge Don Titus Dharmaratne
Kottegooda, Nugegoda.

2. Upali Gunasekera,
of M/s. Palm Paradise Cabanas,
of Goyambokke, Tangalle and
Presently of No. 19/2, Sunandarama Road,
Kalubowila, Dehiwala.

3. Punyasiri Wickramasinghe of
Goyambokke, Tangalle.

4. Pallakkara Gamage Martyn of
Goyambokke, Tangalle.

1st to 4th Defendant-Respondent.

Before : E.A.G.R. Amarasekara, J

Counsel : Rohan Sahabandu P.C. for the substituted -Defendant-Appeallant

Gamini Marapanna for the 1st Defendant-Respondent.

Manohara de Silva P.C with Boopathi Kahathudwa for the 2nd Defendant –Respondent.

Decided : 04.12.2018.

E.A.G.R. Amarasekara, J

By the Judgment dated 27.10.1998 of the D.C. Tangalle partition case No. 2218/P, the learned District Judge of Tangalle has allocated 15/16 of the corpus to the

1st Defendant-Respondent (hereinafter sometimes referred to as the 1st Defendant). Even though the 1st Defendant Respondent and the 2nd Defendant-Respondent (hereinafter sometimes referred to as the 2nd Defendant) claimed rights to the entire corpus in their statements of claims, during the trial they have conceded that the 1st Defendant gets only a 15/16 share of the corpus through deeds marked as P1 to P5 (vide cross examination of the Plaintiff's evidence by the 1st Defendant at page 132 of the brief; 2nd Defendant's representative's evidence at page 166 of the brief; oral submissions made by the 1st Defendant's counsel at pages 102 and 103. Furthermore, the 1st Defendant –Respondent has not challenged the 15/16 share given by the Plaintiff in his evidence by calling any other witnesses to show any contrary position.)However, the 1/16th share claimed by the Plaintiff-Appellant (hereinafter sometimes referred to as the Plaintiff) was kept unallotted by the aforesaid Judgment. It appears that it was unallotted due to the following purported reasons.

1. The Plaintiff failed to prove the deed marked P6 which was marked subject proof.
2. The Plaintiff failed to prove that the Suddirikku Hennadige Podi Singho, one-time co-owner to a 1/2 share of the corpus as per the admissions made, had another child named Dayani other than the three children Gunadasa, Gunawathie and Karunawathie who were admitted as children of said Podi Singho by the parties at the commencement of the trial.

The Plaintiff, in his plaint, has claimed title to a 1/16 share referring to the deed No. 42585(P6)- (Vide Para 7 of the Plaint), but no Defendant has challenged the due execution of that deed in their statements of claims or amended statements of claims. In the aforesaid circumstances, marking of P6 subject to proof and

rejection of P6 on the objections raised during the trial by the Defendants that it has to be further proved, contravenes section 68 of the Partition Law. Of course, as per the provisions of the said section, the learned District Judge on his own could have required the Plaintiff to prove P6, but he should have elucidated by giving reasons why he used his discretion to order that P6 has to be further proved. I do not find any such reasons given by the learned District Judge. In **Wimalawathie Vs Hemawathie** and others (2009) 1 SLR 95, it was held that the finding in relation to the want of proof of the documents produced by the Plaintiff and the 10th Defendant contravenes Section 69 of the partition law, which provides that it shall not be necessary in any proceedings under the 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 the aforesaid circumstances, the rejection of P6 by the learned District Judge at the trial is unwarranted.

The challenge to the Plaintiff's title is based on the assertion that the aforesaid Podi Singho did not have a child named 'Dayani' who was the vendor of P6.

It is clearly stated in P6 that Suddirikku Hennadige Dayani alias Dayani Jayawickrama is a child of Suddirikku Hennadige Podi Singho. Furthermore, the Plaintiff has attempted to mark the birth certificate of said Suddirikku Hennadige Dayani alias Dayani Jayawickrama alias MiissiNona as P7, but it was rejected due to the objections raised by the Defendants on the ground that it was not properly

listed as required by Section 23 of the partition Law. It was held in **Pushpa V. Leelawathie** and others (2004) 3 SLR 167 that;

1. *"In terms of Section 23(1) ofPartition Law list of documents has to be filed not less than 30 days before the date of trial.*
2. *When Section 23(1) is considered with 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.*
3. *As the additional list is filed on 18.12.1998, well before the next date of trial, i.e.5.3.99, the documents could have accepted."*

The aforesaid birth certificate of Missi Nona was listed in a list dated 13.05.1997. When the said birth certificate was rejected for the 2nd time 27.06.1997, it is clear that 30 days from the date of filing of the list has lapsed. On the other hand, it was the duty of the learned District Judge to investigate the title of the parties involved. In this regard it is his duty to ascertain the truth with regard to the stances taken by the parties. When P6 indicates that Dayani is a child of Sudirikku Hennedige Podi Singho, the learned District Judge should have considered whether it was desirable to grant leave to mark the birth certificate in evidence. He should have noticed that P7 (the impugned birth certificate) was a certified copy issued by the District Registrar's office. As per Section 79 of the Evidence Ordinance the Court shall presume the genuineness of such document if it is substantially in the form and purports to be executed in the manner directed by law in that behalf.

Hence, it is my considered view that the learned District Judge should have granted leave to mark the said birth certificate in the first instance. However,

it appears that the learned District Judge in his Judgment has considered the said birth Certificate. He has stated that in the 2nd cage of the form, the name is mentioned as Missi Nona and the name 'Dayani Matilda Jayawickrama' has been inserted on a later occasion. The learned District Judge has further stated that if there is a name change, it has to be mentioned in cage 12, but the cage 12 of P7 is left blank. It is brought to the notice of this court that the over leaf of P7 contains the necessary details with regard to the name change even with reference to the number of the District Court case which ordered the name change of Missi Nona. It is obvious that such details cannot be inserted in the small space provided in cage 12. The relevant clerk who attended to the insertion of the amendment to P7 has not made a cross reference in cage 12, but it is not a fault of the Plaintiff for him to be penalized. It is my considered view that P7 is substantially in the form and purports to be executed in the manner directed by law in that behalf.The learned District Judge should have presumed the truth of P7 in favour of the Plaintiff. Furthermore, the Plaintiff himself had stated while giving evidence that he knew aforesaid Missi nona alias Dayani Jayawickrama as the daughter of said Sudirikku Hannadige Podi Singho (vide page 136 and 137 of the brief). The 1st Defendant has not given any evidence to refute this contention of the Plaintiff. It is clear from the evidence of the representative of the 2nd Defendant that he knew nothing with regard to the pedigree other than accepting the deeds that gave title to the 1st Defendant.

For the foregoing reasons, it is my considered view that the learned District Judge should not have kept the 1/16 share unallotted but should have allocated it to the Plaintiff. In fact, during the argument the 1st Defendant

conceded that the Plaintiff should be given the 1/16 share which is unallotted in the impugned Judgment. (Please see paragraph 6 of the written submissions of the 1st Defendant dated 12.03.2012 and paragraph 22 of the written submissions of the 1st Defendant dated 98.02.2017.)

The 2nd Defendant had not preferred any appeal against the Judgment but almost after 10 years from the date of the petition of appeal tendered by the Plaintiff, the lawyer for the 2nd Defendant has given a notice under Section 772(1) of the Civil Procedure Code on the following grounds,

1). The learned District Judge has misdirected himself in not answering issues No. 7 to 9, 11 to 19, 22 and 26 to 29.

2). The learned District Judge erred in answering issues No. 10, 20, 21, 23, 24, 25, 30, 31 and 32 against the 2nd Defendant.

3). The learned District judge erred in the allocation of shares in the manner as set out in the Judgment.

I have already dealt above in this Judgment with regard to the allocation of shares to the Plaintiff which may have some connection to the item 3 and issue No. 23 referred to in item 2 of the aforesaid notice given under Section 772(1). If there was any dissatisfaction with regard to the allocation of shares to the 1st Defendant or with regard to the parts of the Judgment that relates to the disputes between 1st Defendant and the 2nd Defendant, the 2nd Defendant should have filed a direct appeal against the Judgment. As per the decision in **Doloswala Rubber & Tea Estate Co. V. Swaris Appu** 31 NLR 60, Section 772 of the Civil Procedure Code is not available to a Respondent, who desires to question the decree in favour of another Respondent. It has also been stated that an exception may be allowed in cases where there is an identity of interest between the Appellant and the

Respondent against whom the statement of objection is directed. The Plaintiff Appellant has preferred this appeal to get the unallotted portion allotted in his favour. Even the lawyers for the 1st Defendant and 2nd Defendant had not asked that 1/16th share to be allotted to their clients in their oral submissions at the end of trial in the lower Court. Both the lawyers have moved to leave that 1/16th share unallotted. Under such circumstances, I do not think that this application under aforesaid notice fall within the exceptions contemplated in the aforesaid decision of Doloswala Rubber & Tea Estate Co. Vs. Swaris Appu. In that backdrop, it is my view that the 2nd Defendant cannot challenge the parts of the Judgment of the learned District Judge which are in favour of the 1st Defendant by giving the section 772(1) notice dated 31.07.2008. Furthermore, the brief indicates that;

1. The document which was not allowed to be marked as 2වි1, which appears to be the deed No. 5 dated 19.04.1984, has not been submittedd to the lower Court or this Court. (without the relevemt document being submitted for perusal, this court cannot consider the argument presented on the validity of the said pending partition deed.)
2. As per the evidence of the representative of the 2nd Defendant, he has joined the 2nd Defendant company, which was established after the institution of the Partition Action, only in august 1997. Therefore, he cannot have any personal knowledge with regard to a trust created by an agreement between the 1st Respondent and any of the promoters who took steps to establish the 2nd Defendant company. Therefore, without any documentary proof, the witness of the 2nd Defendant was not capable of establishing a trust that took place prior to his appointment to the 2nd Defendant Company.

3. The witness of the 2nd Defendant has stated that 1st Defendant and the 2nd Defendant entered in to an oral agreement after the commencement of the District Court Partition Action to transfer the rights of the 1stDefendant that he was to get from the said action to the 2nd Defendant for 2 million Rupees. He further has stated Rs 1100000.00 has been already paid and Rs. 900000.00 has to be paid on or before 15.01.1999. Furthermore, if the balance Rs. 900000.00 is not paid, the 1st Defendant has to return Rs.1000000.00, forfeiting Rs.100000/- from the Rs.11,00000.00 already paid. (vide page 157 of the brief). This piece of evidence shows that there was no existing constructive trust with regard to the corpus, since the full consideration was not paid even at the time of giving evidence. As per the said oral agreement the date to pay the balance has fallen on a date that came after the date of the Judgment and a considerable part of the consideration has to be returned if the balance is not paid.

By moving to send this case back for re trial, the 2nd Defendant is trying to have a second bite of the same cherry to cover up his failures in proving his case in the lower Court.

Hence, I dismiss the application made by tendering Section 772(1) notice by the 2nd Defendant with costs.

I allow the appeal by allocating the unallotted 1/16th share to the Plaintiff. Subject to the amendment caused by the aforesaid allocation of 1/16th share to the Plaintiff, the Judgment of the learned District Judge prevails.

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E.A.G.R. Amarasekara

Judge of the Court of Appeal