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

Matharage Dona Hemalatha,
No.135/1, Samanabedda,
Thiththapaththara.
Substituted 3rd Defendant-Appellant

CASE NO: CA/1027/2000/F
DC PUGODA CASE NO: 194/P

Vs.
Kulatungage Kusumawathi,
1st Lane, Bogahawatta,
Pannipitiya.
1A Plaintiff-Respondent
And Several Other Respondents

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Pubudu Alwis for the Substituted 3rd Defendant-Appellant.
Nizam Kariappar, P.C., for the Plaintiff-Respondents.
Ravindra Sumathipala for the 8th Defendant-Respondent.
Malaka Herath for the 10A Defendant-Respondent.

Argued on: 17.05.2019

Decided on: 29.05.2019

Mahinda Samayawardhena, J.

The 3rd defendant-appellant filed this appeal against the Judgment of the Additional District Judge of Pugoda dated 04.09.2000 pronounced in Partition Case No. 194/P.

The learned counsel for the 3rd defendant during the course of argument sought to set aside the said Judgment mainly on three grounds. They are (a) failure to identify the corpus (b) failure to consider the pedigree unfolded by the 3rd defendant and (c) exclusion of Lot 3 of the Preliminary Plan in favour of the 10th defendant.

The learned President's Counsel appearing for the plaintiffs, supported by the learned counsel for the 8th defendant and the learned counsel for the 10th defendant, did not make serious submissions at the argument, on the basis that no document tendered at the trial were marked subject to proof and the Judgment was entered as a consent Judgment and therefore this is a frivolous appeal. I am unable to agree.

By going through the Appeal Brief it is clear that the impugned Judgment was not at all a consent Judgment. The defendants have filed statements of claim, 24 issues have been raised at the trial, evidence has been led and the Judgment has supposedly been delivered on the evidence led.

Although the learned counsel for the 3rd defendant now says that the corpus has not been properly identified, and therefore action cannot be maintained, the 3rd defendant at the trial has not raised a specific issue on that important question, if he was

serious on that matter.[1] Nor has he at least moved to mark the Preliminary Plan subject to proof notwithstanding the Court Commissioner in his Report has stated that what he depicted in the Preliminary Plan is the land to be partitioned.[2] From this Report it is further established that the 3rd defendant was also present at the preliminary survey and assisted the Court Commissioner to identify the land. [3] In addition, whilst answering the questions put during the cross-examination by the Attorney-at-Law for the plaintiff, the 3rd defendant has accepted that what is depicted in the Preliminary Plan is the land to be partitioned.[4] Hence it is too late in the day for the 3rd defendant to raise a corpus dispute for the first time in appeal.

The second and third arguments of the learned counsel for the 3rd defendant are, in my view, valid.

When I read the Judgment with the evidence led at the trial, it is clear to me that the learned Judge has palpably misdirected herself on several fundamental matters.

The learned Judge has repeated evidence in the Judgment without proper analysis and thereafter reproduced the schedule of shares tendered by the Attorney-at-Law for the plaintiff at the end of the trial[5] without explaining how the share calculation was done.

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[1] Vide the 3rd defendant's issues at pages 95-96 of the Brief.
[2] Vide page 74 of the Brief.
[3] Vide paragraphs (v), (vi) and (vii) of the Report at page 74 of the Brief.
[4] Vide page 117 of the Brief.
[5] Vide page 140 of the Brief.

This is a bad practice not permitted by law. How can the Judge ask the plaintiff's Attorney-at-Law to prepare the schedule of shares [6] in a contested trial for the Judge to mechanically incorporate it in the Judgment? In a partition case, generally, the whole Judgment rests on the calculation of shares upon the deeds produced at the trial. Calculation of shares is a judicial function, which cannot be delegated by the Judge to a lawyer. Lawyers can with their written submissions tender proposed schedule of shares to Court, but it is up to the Judge to ultimately come to an independent conclusion on that vital matter. This has not happened in this case.

In the instant case, the 3rd defendant has apparently tendered a pedigree different from the one unfolded by the plaintiff, and raised issues No.7-12 and 14 at the trial. There is no issue No. 13 although the learned Judge in the Judgment without quoting the issues has answered issue No.13 in the affirmative! The learned Judge has not answered the 7-11 (pedigree) issues stating that as the plaintiff's issues were answered in the affirmative, there is no necessity to answer them. However in the Judgment the learned Judge has not stated why she cannot accept the pedigree of the 3rd defendant and how it differs or tallies with that of the plaintiffs! That is a fundamental error in the Judgment.

Although those issues have not been answered in favour of the 3rd defendant, the learned Judge has answered issue Nos.12 and 14 raised by the 3rd defendant in the affirmative. Interestingly, the issue No.14 is: "*If the aforesaid issues (Nos.7-12) are*

[6] Vide JE Nos.56-58 appearing at pages 38-40 of the Brief.

answered in the affirmative, is the 3rd defendant entitled to the reliefs as prayed for?" The affirmative answer to issue No.14 in my view is contradictory to the earlier position taken by the Judge!

By going through the evidence of the 3rd defendant it is seen that he has produced two Deeds marked as 3D1 and 3D2.[7] However only Deed marked 3D1 has been tendered to Court after the conclusion of the trial.[8] Deed marked 3D2 has neither been tendered nor has the Judge referred to it in the Judgment. It is the peremptory duty of the trial Judge trying a partition action to investigate title to the land quite independently of what the parties may or may not tell the Judge. The aforesaid incident itself proves that the Judge has shirked that responsibility.

On the date the Judgment was due to be pronounced, all of a sudden, the 10A defendant has been called to give evidence.[9] He has produced 4 Deeds marked 10D1-10D4. I carefully read the evidence of the 10A defendant to learn that he in his evidence has not specifically stated that Lot 3 of the Preliminary Plan shall be excluded from the corpus on the basis that he has acquired that portion by prescriptive possession notwithstanding such an issue has been raised. No cogent evidence to that effect was led at the trial. The learned Judge at page 10 of the Judgment has expressed that there is no positive evidence to conclude that the entirety of Lot 3 shall go to the 3rd defendant, but later decided to exclude the entirety of Lot 3 in favour of the 10th defendant stating that it is the most

[7] Vide page 116 of the Brief.
[8] Vide JE No.54 at page 38 and page 174 of the Brief.
[9] Vide JE No. 57 at page 39 and pages 120-125 of the Brief.

convenient solution to the problem![10] In a partition action, portions of the corpus cannot be so excluded in favour of one co-owner for convenience of Court unless there is cogent evidence and compelling reasons to do so. It appears to me that the learned Judge has found that convenient method as the plaintiffs' Attorney-at-Law has not given any share to the 10th defendant in his schedule of shares tendered to Court!

The learned Judge at page 11 of the Judgment has stated that the 8th defendant is entitled to Lot 2 of the Preliminary Plan![11] This has not even been asked by the 8th defendant! The 8th defendant has produced only one Deed marked 8D1. Although that Deed speaks of undivided rights and later a land in extent of 2 roods and 23 perches has been identified, the Court shall satisfy that the vendor of that Deed had rights to convey such rights to the 8th defendant. Whilst first stating that the 8th defendant is entitled to Lot 2 of the Preliminary Plan, at the end of the Judgment, by reproducing the schedule of shares of the plaintiffs' Attorney-at-Law, the learned Judge has again stated that the 8th defendant is entitled to 12/48 shares of the corpus! This is irreconcilable.

According to the Preliminary Plan, the land has been divided into only 4 Lots. Out of these 4 Lots, Lot 4 is a road. Out of the remaining 3 Lots, Lots 2 and 3 have been excluded! The remaining Lot is only Lot 1, which, according to the Judgment, to be divided among the 3 plaintiffs, and the 3rd-7th defendants!

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[10] Vide page 135 of the Brief.
[11] Vide last sentence of the first paragraph at page 136 of the Brief.

Due to the above glaring shortcomings, it is my considered view that the Judgment cannot be allowed to stand. Hence I set aside the Judgment directing the incumbent Judge to deliver the Judgment afresh on the evidence already led after allowing the parties to tender written submissions with all the documents marked at the trial. In that written submission, to assist Court, if necessary, they can incorporate schedule of shares for consideration of the Court.

Judgment of the District Court is set aside and the appeal is allowed.

Let the parties bear their own costs of appeal.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Court of Appeal