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

CA Appeal No. 816/2000 (F)

DC Matale Case No. L/4792

M.A.D. Francis
of Ambagastenna, Rattota,
Matale.
PLAINTIFF

Dona Indrasena Rupananda Makewita
of Ambagastenna, Rattota,
Matale.
Substituted-PLAINTIFF

-Vs-

Yatiwalane Gedera Leelawathie
of Maduranwala, Kaikawala,
Matale.
DEFENDANT

AND NOW BETWEEN

Yatiwalane Gedera Leelawathie
of Madurawala, Kaikawala,
Matale.
DEFENDANT-APPELLANT

1A. Jayasing Gedera Jayasinghe
of Madurawala, Kaikawala,
Matale.

1B. Jayasing Gedera Chandrawathie
Track 19,
No. 66, Somiel,
Bakamuna.
Substituted-DEFENDANT-APPELLANTS

-Vs-

Dona Indrasena Rupananda Makewita
of Ambagastenna, Rattota,
Matale.
Substituted-PLAINTIFF-RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Shantha Jayawardena with Dinesh de Silva and Duleeka Imbuldeniya for Substituted-Defendant-Appellants Upendra Walgampaya for Substituted-Plaintiff
Decided on	:	12.07.2019

A.H.M.D. Nawaz, J.

This is a case where the Plaintiff alleged that soon after he was placed in possession, consequent to a partition suit, of a portion known as 5B of a larger land called *Dematagahamula Watte*, he was dispossessed by the original Defendant-Leelawathie. So he instituted this *Rei Vindicatio* action which restored him back to possession and the appeal arises out of the judgment delivered in the *Rei Vindicatio* action. The previous partition suit bearing No.1645/P wherein both the Plaintiff and the Defendant had been allotted

their respective lots figures prominently in this appeal along with the final partition plan bearing No.1333A.

In the schedule to the plaint filed in the *Rei Vindicatio* action, the original Plaintiff Francis described Lot 5B to which he wanted restoration as *Dematagahamula Watte* and the corpus had in fact been described as such in the final partition decree. When the writ was executed in consequence of the partition decree and possession of lot 5B in the final partition plan No.1333A was given to the Plaintiff on the 29th of September 1993, the Defendant-Leelawathie had objected but after the fiscal explained, she relented.

But the Plaintiff avers in his plaint filed in the *Rei Vindicatio* action that no sooner had the fiscal gone away after having placed him in possession on the 29th September 1993 than the Defendant entered Lot 5B around 6.30 pm on the same day and dispossessed him. This gave rise to the *Rei Vindicatio* action.

Prior to the institution of the civil action, the breach of the peace ended up in Magistrate's Court, *Rattotta*, wherein parties were directed to seek their civil remedy. It is in these circumstances that the Plaintiff averred that he instituted this *Rei Vindicatio* action and sought a declaration of title to Lot 5B and ejectment of the Defendant, her servants and all those who claimed rights under her.

In the answer, the Defendant-Appellant (hereinafter sometimes referred to as "the Defendant") sought a cross claim that Lot 5B was *Dematagahamula Hena* and therefore the plaint must be dismissed. The Defendant also averred in her answer that she had objected to possession being handed over to the Plaintiff in the presence of the fiscal and that the Plaintiff had not had any possession of the land.

The trial in the *Rei Vindicatio* action

It would appear that the Plaintiff's action had at one stage been dismissed on account of his default on the 4th of June 1988-*vide* Journal Entry No.20. The case was however restored back to trial and the trial began afresh-*see* page 74 of the appeal brief.

Issues No. 1-6 were formulated by the Plaintiff, whilst Issues No. 7-15 were framed by the Defendant. On behalf the Plaintiff's case, the substituted Plaintiff, S.A.A. Majid (the Registrar of the District Court of *Matale*), S.P.M. Sunitha Menike (a clerk of the Primary Court) and a licensed surveyor gave evidence, whilst documentary evidence **P2-P6** was also adduced in evidence. On behalf of the Defendant, the Defendant and a Gramaseva Niladhari of *Rattotta-Madurawala* testified, marking in evidence documents marked **D1-D9**, excluding the document marked **D3.**

On the 20th of October 2000, the learned District Judge of *Matale* pronounced judgment in favour of the substituted Plaintiff-Respondent and granted the relief prayed for in the plaint namely a declaration of title and ejectment of the Defendant-Appellant.

The learned District Judge of *Matale* concluded that the Defendant was estopped from denying that the corpus in Case No. P/1645 is the land called "*Dematagahamulawatte*" and the Defendant cannot challenge the final partition decree in the said case as it was a decree *in rem* and also because the Defendant was a party in the said Case No. P/1645. It is against this judgment that the Defendant-Appellant has preferred this appeal in order to have the said judgment set aside.

Some of the salient arguments that were taken on behalf of the substituted Defendant-Appellant in order to challenge the judgment of the learned District Judge can now be itemized.

1. Rejection on the part of the learned District Judge of *Matale* to issue a commission.
2. Refusal to permit calling a witness.
3. Failure to identify the corpus.

I would now focus on these three principal grounds of appeal that were urged before me.

1. <u>Rejection on the part of the learned District Judge of *Matale* to issue a commission.</u>

It was submitted on behalf of the substituted Defendant-Appellants that the learned District Judge erred in law by refusing the Defendant's application for a commission to survey the subject matter.

When the trial began afresh before the District Judge of *Matale* on the 29th of February 2000, the learned Counsel for the original Defendant moved for a commission to have the disputed lot (**5B**) surveyed. This application was objected to by the Counsel for the Plaintiff and the learned District Judge in his order adverted to the long delay in making this application and rejected this application on the ground that this application was never made in the answer nor was it made on any of the subsequent dates until this was made for the first time when the first trial began on 29th February 2000. I must state that the learned District Judge was indeed wide off the mark in his decision to refuse the application.

The learned Counsel for the substituted Defendant-Appellants Mr. Shantha Jayawardene quite correctly submitted that as per Section 428 of the Civil Procedure Code, there is no specific stage for an application for a commission to be made-*see* ***Canapathipillai v. Adannappa Chetty*** 21 N.L.R 217 wherein the Supreme Court held that a Court has the jurisdiction to issue a commission even after the conclusion of the trial. So there was no requirement that an application for a commission must be made at an anterior stage of a trial as the learned District Judge has concluded in his order.

Be that as it may, the attempt of the original Defendant to prove that the disputed lot is *Dematagahamula Hena* cannot succeed as the final decree in the Partition Case No. P/1645 quite clearly shows that it was only *Dematagahamula Watta* that was partitioned. Even the final Partition Plan bearing No.1333A makes this crystal clear. The Plaintiff in this *Rei Vindicatio* action had been allotted Lots 5A and 5B of the final Partition Plan No.1333A in the partition suit. The Defendant who had been the 5th Defendant in the Partition suit was allotted Lot No.6 of Plan No.1333A by the final partition decree.

All these lots were carved out of a land called *Dematagahamula Watta.* In other words, the lots allotted to the Plaintiff and the Defendant all came out of *Dematagahamula Watta.* Having accepted a Lot in *Dematagahamula Watta,* it would be preposterous for the Defendant now to argue that Lot 5B is not part of *Dematagahamula Watta.* He cannot blow hot and cold and seek to argue that Lot 5B is *Dematagahamula Hena.*

The Defendant accepted a lot in the very plan, which described the land as *Dematagahamula Watta* and not *Dematagahamula Hena.* Having accepted Lot No.6 in the land that is described as *Dematagahamula Watta,* could the Defendant now argue that Lot 5B is *Dematagahamula Hena*? It would be an abuse of process to ask for a commission to survey Lot 5B.

This case is chock-full of inconsistent and contradictory stances on the part of the Defendant. The statement of claim filed by the Defendant displays another example of such an inconsistency *per se.*

The statement of claim filed by the Defendant in the partition case was marked in evidence as **P4** in the subsequent *Rei Vindicatio* action which has given rise to this appeal. In this statement of claim, the Defendant admitted the devolution of title as set out in the relevant paragraphs to the plaint and claimed to be entitled to an undivided 1/21 share in the land called *Dematagahamula Watta* as depicted in preliminary Plan No.1113. In her statement of claim that was filed in the partition suit, the Defendant-Leelawathie did not claim Lot 5B as *Dematagahamula Hena.* In other words, she was not saying the same thing in the Partition action as she did in the *Rei Vindicatio* action.

Therefore, she cannot seek to prove in the *Rei Vindicatio* action that Lot 5B is *Dematagahamula Hena.* Even in regard to her statement of claim in the Partition suit vis-à-vis her subsequent answer in the *Rei Vindicatio* action, it could be said that she was blowing hot and cold.

This conduct on the part of the original Defendant harks back to the principle that, "She/He who alleges contradictory things is not to be believed"-*Allegans contraria non est audiendus.*

In the circumstances, since the Defendant has accepted this corpus as *Dematagahamula Watta,*she is estopped from asserting that it is *Dematagahamula Hena.* There is also another factor that would militate against permitting this Defendant to establish the land as *Dematagahamula Hena* for the reason that the Defendant never sought to cross-examine the

Plaintiff in the Partition Case bearing No. P/1645. In other words, though the Plaintiff in his evidence described the land as *Dematagahamula Watta*, the Defendant never dared to challenge the Plaintiff on this position in the partition trial.

Failure to cross-examine the Plaintiff on a material point

There is thus a failure to cross examine the Plaintiff on a material point and as Peter Murphy on his *Murphy on Evidence* (8th Edition, 2003), page 597-598 observes, there are 2 distinct consequences of a failure to cross-examine a witness. One is purely evidential in that, "*failure to cross-examine a witness who has given relevant evidence for the other side is held technically to an acceptance of the witness's evidence-in-chief.*" The other is a technical one, but no less important for that, "*where a party's case has not been put to witnesses called for the other side, who might reasonably have been expected to be able to deal with it, that party himself will probably be asked in cross examination why he is giving evidence about matters which were never put in cross examination on his behalf.*"

Both these two direct consequences of failure to cross-examine a witness on a material point, as expounded by Professor Peter Murphy, ensue in this case and they cast a pall of gloom on the testimonial trustworthiness of the original Defendant. Because the Defendant had not cross-examined the Plaintiff in the previous partition case on the assertion of the Plaintiff that the land sought to be partitioned was *Dematagahamula Watta*, that failure to cross-examine entails the consequence that the Defendant has admitted that Lot 5B is in *Dematagahamula Watta.*

Since the Defendant had not put to the Plaintiff in the partition suit his position that the land is *Dematagahamula Hena*, the 2nd consequence as identified by Professor Peter Murphy follows namely he is precluded from asserting in the *Rei Vindicatio* action that the subject-matter of contention is *Dematagahamula Hena.*

The wisdom encapsulated in Professor Peter Murphy's adumbration on failure to cross-examine a witness was long recognized by Lord Herschell, L.C in the celebrated House of Lords decision of ***Browne v. Dunn*** (1893) 6 R.67 and the requirement to challenge the

evidence by putting the contradictory matter to a witness is sometimes called the rule in ***Browne v. Dunn.***

The essence of the rule in ***Browne v. Dunn*** is a general duty on a party to put a matter directly to a witness if he is going to later adduce evidence to impeach the witness' credibility or offer contradictory evidence. The purpose of the rule is well-grounded; witnesses should be given an opportunity to respond to competing versions of claims or events. If this has not happened, in assessing the weight to be given to the uncontradicted evidence, judges may properly take into account the fact that the opposing witness was not questioned about it.

This is exactly what H.N.G. Fernando C.J couched in a different formula in the election petition case from *Balapitiya-**Edrick de Silva v. Chandradasa de Silva*** 70 N.L.R 169 at p 174.

> *"If the Petitioner leads evidence and the Respondent does not contradict it, this is an additional "matter before the Court," which the definition in section 3 of the Evidence Ordinance requires the Court to take into account."*

So be it. In the partition suit nary a question was put to the Plaintiff on *Dematagahamula Hena.* When the partition decree materialized, it became *res judicata* against the whole world signifying the fact that what was partitioned was *Dematagahamula Watta* and not *Dematagahamula Hena.*

It can thus be said that the Defendant, Leelawathie had accepted that Lot 5B is a part of *Dematagahamula Watta* and she cannot go behind this admission. In the circumstances, the Defendant-Appellant cannot complain of any prejudice in the refusal of her application for a commissioned survey. The attempt to show via the new survey that the land is *Dematagahamula Hena* is repudiated by her admissions emanating from her failure to cross-examine the Plaintiff and the doctrine of *res judicata* in the form of a judgment *in rem.*

2. Refusal to permit summoning of witnesses

This is another complaint that was made on behalf the Defendant-Appellant. It was submitted that the learned District Judge of *Matale* refused the application of the Defendant-Appellant to call another witness and as a result the Defendant-Appellant was compelled to close her case on the 29th of June 2000. When one examines the order of rejection made by the learned District Judge of *Matale* on the 29th of June 2000, it is clear that he has rejected the application to summon another witness on the basis that the said action had been instituted in 1994 and therefore, there was an urgency to dispose of this action. In addition, the learned District Judge stated that between the dates 29th of February 2000, the previous date of proceedings and 29th June 2000, the date on which the application was made to summon a new witness, there was a period of 4 months which was quite sufficient for the defense to have had that witness ready and since the witness was not ready to give evidence despite the availability of sufficient time, the District Judge stated that he was not inclined to allow the application.

It is not clear from the proceedings dated 29th June 2000 that the witness sought to be called was on the list of witnesses. The Counsel for the Defendant just intimated to Court that he wished to call another witness and the witness sought to be called was not indicated with certainty. So this Court cannot ascertain with precision that the refusal of the learned District Judge pertained to a witness on the list of witnesses.

Even if this witness was not on the list of witnesses, the first proviso to Section 175(1) of the Civil Procedure Code (CPC) vests the discretion in the Trial Judge to permit witnesses to be called *"if special circumstances appear to it to render such a course advisable in the interest of justice"*.

There must be material placed on record for this Court to ascertain the relevance and admissibility of the evidence sought to be led through the new witness. In other words, the Counsel must urge "special circumstances" as postulated in the proviso to Section 175(1) of the CPC. Therefore if the witness sought to be called was vital to the case of the Defendant, there must be material on the record to indicate the nature, content and

relevance of the evidence sought to be led. In the absence of such a clarification as to these requirements in the submissions made by counsel as reflected in the record, this Court is hard put to assess the strength of the evidence sought to be led. Therefore, there is no merit in the complaint made by the learned Counsel for the Defendant-Appellant as to the prejudice caused to the Defendant in the conduct of his trial.

Further, it was also submitted that when the Defendant gave evidence, a witness named Samarawikrama Wasala Mudiyanselage Victor Wickremasinghe who gave evidence after the Defendant had been inside the Court. Upon noticing the presence of this witness in Court while the Defendant was giving evidence, the learned District Judge proceeded to record that the said witness had been inside the courthouse while the Defendant was giving evidence-*see* page 144 of the appeal brief.

Though the Defendant summoned this witness to the stand, the record shows that the defence suspended the examination in chief of this witness in midstream. It is thereafter that the Defendant-Appellant made the application to call another witness and it is this application that was rejected. The complaint that the learned District Judge deprived the defence of leading a new witness seems to be groundless having regard to the facts and circumstances of the case.

I have already commented on the absence of sufficient material as to the relevance and admissibility of this witness's evidence. In any event no new evidence could have challenged the Partition decree which was a judgment *in rem*. It is as plain as a pikestaff that a partition decree binds not only the parties to the case, but also outsiders subject of course to the challenges given under Section 48 of the Partition Law. If these challenges are not made, the final partition decree is *Res Judicata* against the whole world and the effect of *Res Judicata* is to shut the jurisdiction of another Court to needlessly to adjudicate upon the same issues in a subsequent trial.

Improper rejection of testimony-Section 167 of the Evidence Ordinance

In regard to this ground of appeal I would also draw in aid Section 167 of The Evidence Ordinance which spells out the following:-

"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decisions in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received, it ought not to have varied the decision."

Section 167 is applicable to civil as well as criminal cases. This section deals with two important aspects of the admission and rejection of evidence in proceedings, namely, (1) evidence that should not be admitted if it is improperly admitted, and (2) evidence that is to be admitted is improperly rejected. The object of the section is that the Court of Appeal, in appeal or in revision, should not disturb a decision of a lower court on the ground of improper admission or rejection of evidence, if in spite of such evidence, there is sufficient material in the case to justify the decision. In other words, technical objections will not be allowed to prevail, where substantial justice appears to have been done. The appellant in such a case must, therefore, show not only that there has been an improper admission or rejection of evidence, but also that it has been resulted in a miscarriage of justice-***Mohur Singh v. Ghuriba*** (1870) 6 Beng. L.R. 495 at 499 (P.C.).

As I said before, rights of the parties as to their respective Lots in *Dematagahamula Watta* had been determined in the Partition suit and notwithstanding the estoppel effect of this judgment *in rem*, the Defendant-Appellant was attempting to challenge it by seeking to call another witness. In my view, this witness could not have advanced the case of the Defendant and assuming that the rejected evidence ought to have been received, it would not have varied the decision of the District Court.

Therefore the refusal of the learned District Judge of *Matale* to deny the right to call a witness has not resulted in a miscarriage of justice.

3. <u>Failure to identify the corpus</u>

This argument of the Defendant-Appellant is also slated to fail as the corpus had been correctly identified as *Dematagahamula Watta* and the complaint is that the licensed surveyor Sugathadasa Ranchagoda who had prepared the final Partition Plan bearing

No.1333A had been called to give evidence by the Plaintiff but the Plaintiff stopped questioning this witness after having posed a few questions. The Counsel for the Plaintiff informed Court that he did not wish to call this witness to give evidence anymore-*see* page 105 of the Appeal brief. The Counsel for the Defendant-Appellant argued that by giving up the idea to call the said licensed Surveyor as a witness even after bringing him to the witness box, an inference could be drawn that if the said licensed surveyor had given evidence, his evidence would have been adverse to the Plaintiff's case. In other words, the submission of Mr. Shantha Jayawardena, the learned Counsel for the Defendant-Appellant is that the failure to carry on with the evidence of the said Licensed Surveyor would lead to the presumption being drawn in terms of Section 114(f) of the Evidence Ordinance.

The illustration (f) to Section 114 of the Evidence Ordinance states the following: "*that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it.*"

I am afraid I cannot help but disagree with the submission that an adverse inference under Section 114 (f) of the Evidence Ordinance should be drawn against the Plaintiff. This witness-the Surveyor who prepared the final plan in the Partition suit was already there in Court and if he was being sent away by the Plaintiff after having been posed a few questions, the Defendant could have objected to this course being adopted. He could have asked Court for an opportunity to cross-examine this witness. When the Defendant himself had an opportunity of cross-examining this witness and eliciting relevant evidence, one cannot draw an adverse inference against the Plaintiff by virtue of Section 114(f) of the Evidence Ordinance. There is no withholding of this witness, when it lies in the power of the Defendant to lead the evidence of the witness. For the presumption under Section 114(f) of the Evidence Ordinance to arise, the evidence must not be available or is withheld by the opposite party. The presumption will not arise if it is available within the control of the party who wishes to lead that evidence. In other words no inference can be drawn where the witness in question is equally available to both, particularly when he is actually in Court.

The Plaintiff in this case is not at par with a party who wrongfully withholds evidence in his possession. An adverse inference can be drawn only in cases of refusal to bring forth the best evidence in Court and merely because the Defendant failed to grab the opportunity to cross-examine a witness brought to the witness box by the Plaintiff, that omission cannot be palmed off to the Plaintiff. It is equally possible for the Plaintiff to argue that the Defendant failed to cross-examine this witness because he was not likely to support the case of the Defendant. It is moot whether in such circumstances an adverse inference can be drawn against the Defendant because there is a culpable failure to establish through the surveyor the veracity or otherwise of the story pertaining to *Dematagahamula Hena*, be it fanciful or otherwise.

In the circumstances, there is no misdirection on the part of the learned District Judge and there is no prejudice caused to the Defendant-Appellant who was only trying to take two bites at the old cherry by posing a challenge to the partition decree that had already been entered in D.C. Matale Case No. P/1645.

The judgment of the learned District Judge of *Matale* dated 20th October 2000 has to be necessarily affirmed and whilst affirming it, I would dismiss the appeal of the Defendant-Appellant with costs.

JUDGE OF THE COURT OF APPEAL