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

Lankahaluge Ruben Fernando
of "Nirmala", Mudukatuwa,
Marawila.
PLAINTIFF

C.A. Case No.1053/1999 (F)

D.C. Marawila Case No.12/P

-Vs-

1. Warnakulasuriya Ponnakuttige Aloysius Fernando
   of Mudukatuwa, Marawila.
2. Ponweera Aratchige Don David Appuhamy
   of Mudukatuwa, Marawila.
3. Warnakulasuriya Ponnakuttige Theresa
   of Lansigama, Katuneriya.
4. Liurukara Aratchige Mary Margret
   of Mudukatuwa, Marawila.
5. Udugampola Peter Canicius Fernando
   Aerated Water Agent,
   Wennappuwa.
   DEFENDANTS

AND NOW BETWEEN

2. Ponweera Aratchige Don David Appuhamy (Deceased)
   2nd DEFENDANT-APPELLANT

Ponweera Aratchige Don Sunimal Damian Appuhamy

of Mudukatuwa, Marawila.

Substituted 2nd DEFENDANT-APPELLANT

-Vs-

Lankahaluge Ruben Fernando

of "Nirmala", Mudukatuwa,

Marawila.

PLAINTIFF-RESPONDENT

1. Warnakulasuriya Ponnakuttige Aloysius Fernando

   of Mudukatuwa, Marawila.

3. Warnakulasuriya Ponnakuttige Theresa

   of Lansigama, Katuneriya.

4. Liurukara Aratchige Mary Margret

   of Mudukatuwa, Marawila.

5. Udugampola Peter Canicius Fernando

   Aerated Water Agent, Wennappuwa.

DEFENDANT-RESPONDENTS

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

COUNSEL : Dr. Sunil Coorey for the Substituted 2nd Defendant-Appellant

Jacob Joseph with Sajeed Ahamed for the Plaintiff-Respondent

Decided on : 02.08.2019

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

The Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") instituted this action initially against the 1st and 2nd Defendants seeking to partition a land called *Ambagahawatte* situated at *Mudukatuwa*, in extent 3 roods and 2 perches (122 perches), described in the 2nd schedule to the plaint. The corpus that was sought to be partitioned was Lot A in Plan bearing No.1612 and as could be observed from the Plan bearing No.1612, the said Lot A is a divided portion from and out of a larger land in extent 3 acres, described in the 1st schedule to the plaint. An admission was recorded at the trial to the effect that the land which the Plaintiff sought to partition is depicted as Lots A1 and A2 in the preliminary Plan bearing No.6169, which was marked "X" at the trial. The report of the surveyor was marked as "Y".

According to paragraph 6 of the plaint, the Plaintiff asserted that the co-owners of the corpus for partition were the Plaintiff and the 1st Defendant only, and that the Plaintiff was entitled to an undivided 95 perches and the 1st Defendant to an undivided 25 perches.

The plaint further stated that the 2nd Defendant-Appellant (hereinafter sometimes referred to as "the 2nd Defendant") was being made a party because he was in possession of the corpus for partition (out of the north-eastern side of the corpus) without any title to the corpus.

On the same lines as the plaint, oral testimony was given by the Plaintiff supported by documentary evidence to establish as to how the Plaintiff and the 1st Defendant derived their title to the corpus from one Laus Casileenu, who had himself obtained title to the corpus on a Deed bearing No.345 of 1930, which was produced at the trial marked **P1**.

Upon a perusal of the deed marked at the trial as P1, it is quite clear that Laus Casileenu did not derive any soil rights to the corpus. By the Deed bearing No.345 and marked as **P1**, Laus Casileenu was given only an undivided half share of the plantation and the *cadjan* thatched house upon the land described in the schedule to the said deed. In fact, the schedule to the said deed reads as follows:-

"An undivided half share of the plantation and the entire cadjan hatched house ***exclusive of*** *the soil of the land called Ambagahawatte situated at Mudukatuwa in the Meda Palatha, Pitigal Korale..."*

The aforesaid transfer makes it quite clear that the said Laus Casileenu did not get any soil rights in the corpus. The above fact was raised as an issue and the learned Additional District Judge answered that issue in the negative. Dr. Sunil Coorey the learned Counsel who appeared for the 2nd Defendant-Appellant impugned this answer to this issue as erroneous and argued that the learned trial Judge had fallen into an obvious and glaring error as to the construction of the deed in question. In fact Dr. Sunil Coorey contended that that the Plaintiff had no interest at all in the land upon the documentary evidence adduced and that the Plaintiff's action for partition should have been dismissed.

Mr. Jacob Joseph, the learned Counsel for the Plaintiff-Respondent contended in reply that the plantations and the entire *cadjan* thatched house were given with the exclusive right to the soil. He contended that the word "exclusive" is defined as absolute or limited to one person. Accordingly, Mr. Jacob Joseph, the learned Counsel for the Plaintiff-Respondent argued that the learned Additional District Judge has answered Issue No.4 correctly as Laus Casileenu had the absolute right to the soil.

Before I assess the merit of this argument which turns on the construction of the deed which uses the expression *exclusive of*, let me look at the statement of claim filed by the 2nd Defendant-Appellant wherein the 2nd Defendant-Appellant averred that Laus Casileenu had rights only in respect of the improvements (1/2 share of the plantations and the entire *cadjan* thatched house), and not in the land called *Ambagahawatte* (soil).

The corollary that follows is that the Plaintiff and the 1st Defendant did not get any title to the land from Laus Casileenu because Laus Casileenu was not the owner of any rights in the land/soil in *Ambagahawatte*. It is on the strength of this argument that the legal position was put forward that the Plaintiff's action should have been perforce dismissed.

The judgment of the learned Additional District Judge was also challenged on another ground. Whatever be the interests which Laus Casileenu acquired on Deed No.345 **(P1)**,

he had alienated such rights by deeds in the years 1941 and 1943, to Juliet Casileenu and to Regina Casileenu respectively, and that therefore the Plaintiff and the 1st Defendant could not have been the beneficiaries of any rights in the land/ soil in *Ambagahawatte*. The 2nd Defendant produced the two deeds of 1941 and 1943 at the trial as **2D1** and **2D2**, but the issues raised on these dispositions of 1941 and 1943 by Laus Casileenu and the impact flowing therefrom were answered against the 2nd Defendant and in favour of the Plaintiff.

Moreover, there was another issue suggesting that Juliet Casileenu had transferred her interests to the 2nd Defendant by Deed No.1709 of 20.08.1965. This issue too has been answered in the negative.

It was further argued on behalf of the 2nd Defendant that the Plaintiff was seeking to partition only a divided portion out of a larger land, the larger land being the one described in the 1st schedule to the plaint, in extent 3 acres.

The said larger land was shown on a survey plan prepared at the instance of the 2nd Defendant on a commission issued in this action, namely, Plan bearing No.2287, which was produced at the trial marked as **2D3**. The report of the surveyor was produced marked as **2D4.** Issue No.13 was also raised by the 2nd Defendant to that effect.

The said Plan marked **2D3** was prepared on a commission to survey the land described in the 1st schedule to the plaint. The difference in the extent of the land in the 1st schedule to the plaint and the land depicted as Lots 1 to 5 in the commissioned plan **2D3** is negligible, being only 1.5 perches. The surveyor has in his report stated that the land described in the 2nd schedule is part of the land described in the 1st schedule.

That being so, the land in the 2nd schedule to the plaint can be separately partitioned only on the basis that it forms a separate land, separated from the rest, and possessed separately, so that it has by prescriptive possession become a separate land. Therefore, it is pertinent to observe that the land sought to be partitioned is only a portion of the larger land. Unfortunately, the learned trial Judge has erred in this respect as well, by answering as "Not relevant", the Issue No.13 raised by the 2nd Defendant. Here again, the

learned trial Judge has treated as irrelevant some matter, which was most relevant and important for the correct decision of this partition action.

Since the land sought to be partitioned is only a divided portion out of a larger land of 3 acres, it is crystal clear the Plaintiff must prove by evidence that the land sought to be partitioned became a separate and distinct land by prescriptive possession. There was no evidence to this effect at the trial. However there is documentary evidence in the report marked as **Y** that Lot A2 in the preliminary plan **X**, is in the possession of the 2nd Defendant, who according to the Plaintiff has no rights to the land to be partitioned.

No fence separates Lot A2 from Lot B, as disclosed by the preliminary plan **X** and the report **Y**. It is quite clear that the 2nd Defendant had been in possession of Lot A2 along with Lot B as one land, and Lots A1 and A2 have never been separately possessed together by anyone at any time, so that, Lots A1 and A2, which together comprise Lot A, which is the corpus for partition, was never separately possessed by the Plaintiff and the 1st Defendant, who, according to the Plaintiff, are the co-owners of Lot A, which is the corpus for partition.

When one considers the recital in the schedule aforesaid, one could see that Laus Casileenu did not have any soil rights in the corpus to be partitioned. The words **"exclusive of"** must be given its dictionary meaning and it would mean 'not including of someone or something'. The Random House Dictionary defines "**exclusive of**" to mean excluding from consideration or account.

So when the schedule recites "exclusive of soil rights", it goes without saying that soil rights are not included in the transfer made to Laus Casileenu. Therefore the Plaintiff and the 1st Defendant could not have got soil rights. In the text book, *the Law of Partition in Ceylon*, K.D.P Wikramasinghe states at page 45 that a person who is the owner of trees on a land is not entitled to institute a partition action-*see* ***Wijesirinarayana v. Donchisahamy*** 1 C.W.R 77 where the owner of a land had granted by deed to 2 persons within the boundary of the land 15 coconut trees and the ground appertaining thereto. A purchaser of the interest of the donees under the deed instituted a partition action for

the purpose of getting his 15 coconut trees and the soil on which they stand defined. The action was dismissed in the District Court. The Plaintiff appealed against the judgment; but the appeal was dismissed by the Supreme Court.

Shaw, J. who delivered the judgment said, "the Partition Ordinance only relates when any landed property shall belong in common to 2 or more owners. The right under the deed referred to is not a right in common with the other owner or owners of the soil. Therefore, proceedings under the Partition Ordinance do not, in my opinion, lie".

Under Partition Law No.21 of 1977, a person having the ownership of a permanent plantation apart from the soil is entitled to receive compensation in respect of the plantation. This position is given effect to in Section 54(1) which reads as follows:-

> *"Where any person having ownership of a permanent plantation apart from the soil, on the land to which the Partition action relates is a party to the action, he shall be entitled only to receive compensation in respect of that plantation."*

In the circumstances, it is crystal clear that neither the Plaintiff nor the 1st Defendant possesses any right to the land (soil) of Lot A described in the 2nd schedule to the plaint, because their predecessor in title, Laus Casileenu himself had no rights to the land, but only to the plantations and thatched house.

In the circumstances, I would uphold the argument that that the action for partition ought to have been dismissed as the Plaintiff had no right in the land. In any event, the alienation of whatever rights Laus Casileenu had on his deed **P1** in the 1940s by **2D1** and **2D2,** to Juliet and Regina left him with no rights to give anything to the Plaintiff in 1967 and therefore the Plaintiff could not have got any rights in 1967 from Laus Casileenu.

In the circumstances, it all boils down to the fact that the Plaintiff did not have any rights at all when he instituted the partition action in 1983. Moreover, it would appear that the land brought for partition, Lot A in plan 1612, is not a separate land although it is shown as a sub-division of a larger land, and it has not been in the possession of any alleged co-owners who came to Court as the Plaintiff and the 1st Defendant. The evidence

has already transpired that the larger part of the whole land is in the possession of the 2nd Defendant who was possessing Lot A2 along with Lot B according to Plan No.1612.

If it is the law that the Court can give to parties land on their mere assertion that they between them are entitled to it, and if it be the case under Partition Law that the title so given is good against the whole world, it is obvious that grave injury will be caused to parties who have rights in the land.

In ***Golagoda v. Mohideen*** 40 N.L.R 92 it was held that the Court should not enter a decree in a partition action unless it is perfectly satisfied that the persons in whose favor it makes the decree are entitled to the property-*see* similar dicta in ***Karunaratne v. Sirimalee*** 53 N.L.R 444.

So in entering the judgment in favor of the Plaintiff and the 1st Defendant who had no rights in the corpus, the learned Additional District Judge of *Marawila* misdirected himself on the facts and law and the investigation of title is so defective that his judgment has to be set aside. Therefore I proceed to set aside the judgment dated 07.12.1999 and allow the appeal. The plaint of the Plaintiff would stand dismissed.

JUDGE OF THE COURT OF APPEAL