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

In the matter of an Appeal under section 754 of the Civil Procedure Code.

Palliage Darmadasa,
Gamsabha Gedara,
Radaniara,
Kirama.

C.A. No. 240/99(F)
D.C. Walasmulla No. P/410

Plaintiff

Vs.

1. Palliage Sugathapala
   No.175, Saranapalahimi Mawatha,
   Wanathamulla, Borella.
2. Geedanage Francis de Silva
   Radaniara,Kirama.
3. Geedanage Kinsly de Silva
   Radaniara, Kirama.
4. Geedanage Kusuma de Silva,
   Radaniara, Kirama.
5. Cyril de Silva,
   Radaniara,
   Kirama.
6. Wekatiyage Darmadasa,
   Beerawatta, Radaniara,
   Kirama.
7. Rathnagoda Barnaduge Goonawardena,
   Beerawatta, Radaniara,
   Kirama.
8. Nawurunnage Wimaladasa Wadumaduwa,
   Radaniara,
   Kirama
9. Weketiyage Nandiyasappu,
   Beerawatta,
   Radaniara, Kirama,
10. Weketiyage Nandiyasappu,
    Beerawatta,Radaniara,
    Kirama

11. Weketiyage Kirinerisappu Alias Jayasinghe Jinadasa
"Darupela" Kandegoda,
Hakmana.

Defendants

AND NOW

Palliage Darmadasa (deceased),
Gamsabha Gedara,
Radaniara, Kirama.

Plaintiff-Appellant

1. Palliyage Sriyalatha

2. Waththe Arachchige Siriyawathie
Both of No 46/1 Beerawatta,
Radaniara, Kirama,

Substituted-Plaintiff-Appellants

Vs

1. Palliage Sugathapala
No.175, Saranapalahimi Mawatha,
Wanathamulla, Borella.

2. Geedanage Francis de Silva
Radaniara, Kirama.

3. Geedanage Kinsly de Silva (deceased)
Radaniara, Kirama.

3A. Jinadasa Abeynayake, Dukhena, Higawatta Junction
Beralapathanahara.

04. Geedanage Kusuma de Silva, (deceased)
Radaniara, Kirama.

4A. Dulani Madushika Kalugahahena
Karaputugala.

05. Cyril de Silva,
Radaniara, Kirama.

06. Wekatiyage Darmadasa, Beerawatta,
Radaniara, Kirama.

07. Rathnagoda Barnaduge Goonawardena,
Beerawatta, Radaniara, Kirama.

08. Na wurunnage Wimaladasa (deceased), Wadumaduwa, Hadaniara, Kirama.

8A. Nawurunnage Chandradasa,

8B. Nawurunnage Chandrawathi,

8C. Nawurunnage Jayadasa,

8D. NaWtifUnnage Rosanona,

8E. Nawurunnage Padmim,

All are of "Darupela", Kandegoda, Hakmana.

09. Weketiyage Nandiyasappu, Beerawatta, Radaniara, Kirama.

10. Weketiyage Nandiyasappu, Beerawatta, Radaniara, Kirama.

11. Weketiyage Kirinerisappu Alias Jayasinghe Jinadasa, (deceased) "Darupela" Kandegoda,Hakmana.

11A. Renuka Pushpakanthi Jayasinghe,

11B. Renuka Pushpakanthi Jayasinghe,

11C. Ramya Jayasinghe,

11D. Gamini Jayasinghe,

11E. Malani Jayasinghe,

11F. Shantha Priyalal Jayasinghe,
All are of "Darupela",
Kandegoda,
Hakmana.

Defendant-Respondents

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Nimal Rajapaksha with Hemathilaka Madukanda for the substituted-plaintiff-appellants.

S.A. Kulasuriya for the 08th and 10th substituted-defendant-respondents.

Written Submissions: By the substituted-plaintiff-appellants on 04.09.2020, 11.10.2018 and 11.06.2013

By the substituted-defendant-respondents not filed

Argued on: 30.09.2020 and 22-03-2021

Judgment on: **26-10-2021**

N. Bandula Karunarathna J.

This is an appeal preferred by the plaintiff-appellant (hereinafter referred to as the plaintiff) against the judgement dated 23.12.1998 by the learned District Judge of Walasmulla.

The plaintiff instituted this partition action on 02.05.1983, against the defendant-respondents (hereinafter called and referred to as the defendants) under the provisions of Partition Act No.21 of 1977 seeking to enter a partition decree dividing the subject matter as per the pedigree set out in paragraph 8 of his plaint in favour of the plaintiff and the 1st to 6th defendants.

The plaintiff took up the position in his plaint, inter-alia that, the subject matter is called as "බදුවත්තේ මහරුප්ප" and it was originally owned by 6 persons as mentioned in paragraph 3 of the plaint. The subject matter more fully described in paragraph 2 of the plaint which is in extent 3 kurrakkan kurnis. The plaintiff claimed that he is entitled to 2 / 3rd share of the said subject matter by way of title and by possession over 30 years.

The 6th, 8t , 9th and 11th defendants filed their statement of claims and denied the name of the subject matter and the 2 / 3rd share of the title of the plaintiff to the subject matter as described in the plaint. The defendant also denied other allegations and sought for a dismissal of the action.

The defendants by their statement of claims took up the positions inter-alia that, the subject matter, which is called "බිරවත්ත", more fully described in paragraph 4 of the statement of claims, is 3 acres in extent.

According to the said statement of claims, the subject matter is originally owned by the persons mentioned in paragraph 4 of their statement of claims.

The matter was taken up for trial on 19.07.1988 and parties recorded their issues. Issues number 1 to 10A were raised on behalf of the plaintiff; issues number 11 to 19 on behalf of the 8th defendant and issues number 20 to 29 on behalf of the 9th defendant were recorded. The original plaintiff himself and Ekanayake Archchige Hinni Appuhamy gave evidence on behalf of the plaintiff and produced documents marked "පැ 1" to "පැ 12" and Preliminary Plan and report No. 328 dated 15.05.1984 marked as "X" and "X1" at the trial without any objections from the defendants.

No evidence was called on behalf of the 6th defendant, but the 8th defendant Nawurunnage Wimaladasa, Hewa Hinni Pelage Dingiris, the 9th defendant Weketiyage Nandiyasappu and the 11th defendant Weketiyage Kirinerisappu alias Jayasinghe Jinadasa gave evidence at the trial. The aforesaid defendants produced documents marked as "8වි1" to "8වි4" and "9වි1". The trial

was concluded on 09.10.1997 and the learned District Judge directed both parties to file their respective written submissions. The judgment was delivered on 23.12.1998 by dismissing the plaintiff's action and by granting relief as prayed for by the defendants.

Being aggrieved by the said judgment the appellant appealed to this Court against the said judgment on the following grounds;

(a) the said judgment is contrary to law and is against the weight of evidence led in this case.

(b) the learned District Judge erred in law in deciding that the appellant had failed to establish the title of the Palliage Heenhamy even though the document marked "පැ1" which was produced without any objection clearly shows that the said Heenhamy at least owned an undivided 2/9 share of the corpus.

(c) the learned District Judge also erred in law when he came to the conclusion that an undivided 2/3 share of the corpus was devolved on the 8th, 9th and 11th respondents as claimed by them and in accepting the pedigree of the said respondents although they have failed to prove that their purported predecessor in title Wekatiyage Siyadoris had any right to the corpus.

(d) the learned District Judge has failed to take into consideration that on the documentary evidence placed before the court it is established that the said Heenhamy was a co-owner of the subject matter whereas there was no documentary evidence placed to establish that the said Siyadoris was a co-owner.

(e) the learned District Judge also failed to consider that the appellant's father had mortgaged an undivided 2/3 share of the corpus as far back as in 1955 by "පැ12" which is usufructuary mortgage.

(f) the learned District Judge thus gravely misdirected himself in the approach to the case, and thereby has failed to duly consider the basic matter in issue to the serious prejudice of the appellant.

(g) the learned District Judge also failed to consider that the name of corpus is "Baduwatte Maharoopa" and not "Beerawatte".

In proof of the plaintiff's title, he marked and produced the title deeds "පැ 2" to "පැ 12" at the trial without any objection thereby rendering them as unchallenged evidence.

The main contention among the parties were whether the undivided 2/3rd share was originally owned by Palliyage Heenhami as alleged by the plaintiff or by Siyadoris Appu as alleged by the defendants. As per the deed marked පැ 2 dated 10.07.1914, one Jayasinghe transferred his paternal share (1/9th) of the subject matter to the grandfather of the plaintiff namely Palliyage Simon Appu and then he became owner to an undivided 1/9th share of the subject matter as more fully described in the second schedule thereto.

From the land registry extracts relevant to the subject matter marked as "පැ1", it is evident that Palliyage Heenhami became owner of an undivided 1/9th share of the subject matter by deed of transfer bearing No. 2830 dated 15.11.1911. Also, another undivided 1/9th share by deed of

transfer bearing No. 504 dated 17.03.1909 and thus she became owner of 2/9th share of the subject matter.

The said Palliyage Simon Appu died intestate and the aforesaid Palliyage Heenhami the widow and Sirineris Appu the son (plaintiff's father) became the owners to the said 1/9th share of the said deceased Palliyage Simon Appu of the said subject matter thereafter. As per the deed marked පැ3 dated 25.11.1961 the aforesaid Sirineris Appu gifted 2/3rd share as stated in the said deed to the original plaintiff. The two mortgage deeds marked and produced as "පැ 11" and "පැ 12" also proved the fact that Sirineris Appu had title over 2/3rd share of the subject matter. The plaintiff, throughout his evidence maintained this position of his entitlement to the subject matter without any hesitation.

However, the learned Additional District Judge erroneously considered only one statement made by the plaintiff at the cross-examination and arrived at the conclusion that the plaintiff had accepted the defendants' pedigree and therefore not entitled to any title over the said subject matter. The learned trial Judge's conclusion, regarding the fact that, the plaintiff admitting the 1/6th share of the 8th defendant's title and the 8th defendant denying the plaintiff's title tantamount to acceptance of the entire pedigree of the defendants, is totally misconceived in law.

The learned trial Judge had failed to evaluate the documentary evidences adduced before him at the trial on behalf of the plaintiff in which the learned trial Judge once in his judgment accepted the fact that the plaintiff had proved his pedigree. The learned trial Judge also failed to acknowledge the fact that none of the documentary evidence placed by the defendants does not reveal the fact that the said Siyadoris Appu was the original owner of the undivided 2/3rd share of the subject matter.

Section 25(1) of the Partition Law No. 21 of 1977 reads thus;

> "On the date fixed for trial of a partition action or on any other date to which the trial may be postponed or adjourned, the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and facts arising in that action in regard to the right, share or interest of each party to, of, or in the land to which the action relates, and shall Consider and decide the which of the orders mentioned in section 26 should be made."

In the case of Pathirennehelage Swarnasiri Nimal vs. Pathirennehelage Leelawathie and Others SC Appeal No. 178/2013 decided on 14.12.2016 it was held that; it is trite law that the duty imposed on the judge in a partition case is a sacred one. The burden of seeking and getting evidence before Court, in the course of investigation of title to the land sought to be partitioned by parties before Court, prior to deciding what share should go to which party is more the duty of the judge than the contesting parties. The authorities proclaim that it is the duty of the trial judge in a partition action to investigate title of the parties before he decides what share should be allocated to which party of the case before him.

In Cynthia De Alwis Vs. Marjorie De Alwis and two others, 1997, 3 SLR 113, it was held that; "A District Judge trying a partition action is under a sacred duty to investigate into title on all material that is forthcoming at the commencement of the trial. In the exercise of this sacred duty to investigate title, a trial judge cannot be found fault with or being too careful in his

investigation. He has every right even to call for evidence after the parties have closed their cases."

It was held in Faleel Vs. Argeen and Others 2004, 1 SLR 48 that; "It is possible for the parties to a partition action to compromise their disputes provided that the Court has investigated the title of each party and satisfied itself as to their respective rights."

In Sopinona Vs. Cornelis and Others 2010 BLR 109, it was decided that, "It is necessary to conduct a thorough investigation in a partition action as it is instituted to determine the questions of title and investigation devolves on the Court. In a partition suit which is considered to be proceeding taken for prevention or redress of a wrong, it would be the prime duty of the judge to carefully examine and investigate the actual rights to the land sought to be partitioned."

In Batagama Appuhami Vs. Dingirimanike 3 NLR 129, the Supreme Court held that, to obtain a decree of partition which is binding against the whole world, the Court should require parties to prove their title. That is the criteria which had been followed throughout by our Courts in relation to the burden of proof cast upon the parties seeking rights under a partition decree.

It was decided in John Singho Vs. Pediris Hami 48 NLR 345; even if there is no dispute between the parties, it is the duty of the court to carefully ascertain whether E the burden had been duly discharged which requires the proof of title without any ambiguity.

In Mather Vs. Tamotharam Pillai 6 N.L.R. 246 it was held that, in partition proceedings the paramount duty is cast by the Ordinance upon the District Judge himself to ascertain who are the actual owners of the land. As collusion between the parties is always possible, and as they get their title from the decree of the Court, which is made good and conclusive as against the world, no loopholes should be allowed for avoiding the performance of the duty so cast upon the Judge.

Therefore, the findings of the learned District Judge in his judgment are ex-facie erroneous and the learned Trial Judge has failed to evaluate the evidence properly. In the light of the above-mentioned judgments, observations of the learned District Judge in the present case cannot stand in Law and therefore are bad in Law.

The 9th defendant and the 11th defendant admitted that the plaintiff is in possession over the northern part of the subject matter. The learned trial Judge acknowledged the said fact and accepted that the plaintiff is in possession. The surveyor in his report marked as "X 1" also stated that the plaintiff is in possession over lot A and claims ownership to the two buildings thereon. This fact too is admitted by, the defendants and the learned trial Judge. It was proved that the plaintiff was in exclusive possession of the subject matter well over a period of 30 years and thereby has acquired prescriptive title thereto.

The plaintiff proved his possession to the subject matter and therefore acquired prescriptive title to the same. However, despite all these evidence and findings the learned trial Judge had erroneously decided that, since no paper title is vested or proved on behalf of the plaintiff and therefore, he is, not entitled to any possessory rights over the said Lot A and only entitled to the crops and damages for the two buildings thereon. It is my view that the said finding is totally misconceived in law.

It is important to note Section 33 of the Partition Act, which reads as follows;

> "The Surveyor shall so partition the land that each party entitled to compensation in respect of improvements effected thereto or by of building erected thereon will, if that party is entitled to a share of the soil, be allotted, so far as is practicable, that portion of the land which has been so improved or build upon, as the case may be."

It is clear according to Partition Law, as well as all accepted legal principles that, the above lots of the subject matter should be allocated to the parties considering their previous possession.

In Moldrich Vs. La Brooy 14 NLR 331 Lascelles C.J. held that where improvements have been affected with the assent of the co-owner, that portion of the land on which the improvements stand should, if possible, be allotted, on a partition of the land, under Ordinance no. 10 of 1863, to the co-owner who has made the improvements.

The appellant has submitted පැ1 to පැ12 to prove his title and pedigree, without any objection from the respondents. According to පැ1, Palliyage Heenhamy is entitled to 2/9th share of the subject matter and her only son by පැ3, has gifted the above title to the appellant and hence he is entitled to 2/9th share of the corpus without any dispute. It is clear that nobody claims rights to block A of the corpus which is 1 Rood and 8 Perches in extent and therefore the appellant has exclusive prescriptive title to the same. In his testimony the appellant has stated that after the death of his father the plaintiff is in possession of the land and no respondents have challenged that stance and therefore the appellant has exclusive prescriptive title to block A of the corpus. The 8th and 9th defendants have relied on 8 වි 3 and 9 වි 1 to prove their title; but, North and West boundaries of the 8 වි 3 and 9 වි 1 are totally different from the boundaries set out in පැ1 to පැ12 except in පැ9 and පැ10. By deed bearing No. 2807 (පැ9) Hewage Heenhamy and her husband Wekatiyage Saravis Appu transferred their title to Wekatiyage Dharmadasa.

The said Heenhamy and Savaris Appu got title from the deed bearing No. 9592 (පැ8) and the said Saravis Appu got title from the, deed bearing No. 21052 (පැ4), deed bearing No. 3388 (පැ7), deed bearing No. 466(පැ5) and deed bearing No. 745 (පැ.6) according to the deed bearing No. 9592 (පැ8). The boundaries of the පැ4, පැ7, පැ5, පැ6 are compatible with the boundaries of පැ1, පැ2, පැ3; but in පැ9, above-said Heenhamy and Saravis Appu had changed the boundaries as well as the extent of the corpus incorrectly.

The boundaries and the extent of the 8වි3 and 9වි1 are not compatible with the corpus according to the X and X1. The deed marked 8වි3 as well as 9වි1 are first registrations of the deeds and North and West boundaries of the same are not compatible with the same of the Preliminary Plan X. According to X Preliminary Plan, west boundary of the corpus is කොස් කොරටුව නොහොත් මැදමණ්ඩිය but in 9වි1 the West boundary of the 8වි3 and 9වි1 are described as කජුගහ කොරටුව and කැටකැලගහ කොරටුව respectively. Therefore, boundaries are different in 8වි3 and 9වි1. When compared with plan X, the findings of the learned trial Judge are incorrect and therefore the judgment is bad in law.

Thus, it reflects that the learned Judge had not carefully examined and analyzed the evidence and had not investigated the title of parties under section 25 of the Partition Act. The need for a careful investigation of all titles has been emphatically reiterated by our Courts in many decisions as mentioned above.

In the above-said circumstances, we set aside the judgment dated 23.12.1998 and re-calculate the shares of the land in accordance with the pedigree of the plaintiff-appellant.

The new shares are as follows:

For the Plaintiff	16/72
For 1st Defendant	4/72
For 2nd Defendant	1/72
For 3rd Defendant	1/72
For 4rd Defendant	1/72
For 5rd Defendant	1/72
For 6rd Defendant	10/72 (Subject to ₰ 10 mortgage)
For 8rd Defendant	12/72
For 9rd Defendant	12/72
For 11rd Defendant	12/72
Unallotted	2/72

Appeal allowed. Plantation and improvements in lot A should be given to the plaintiff as they possessed for more than 75 years. Rest of the plantation and improvements in lot B, C & D in X Plan should be given and divided according to the survey report marked as X1.

Interlocutory Decree be entered accordingly.

The plaintiff is entitled for cost in the District Court as well as in this Court.

Registrar is directed to send the original case record along with a copy of this judgement to Walasmulla District Court.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal