IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRILANKA

C.A. Case No. CA/369/95 (F)

District Court of Matale
Case No. 1525/P

Neketh Geadra Sahandhu
Wilemulla
Millawana

Plaintiff

Vs.

1. Nekath Gedara Jayathu
2. Nekath Gedara Ukkuwa
3. Nekath Gedara John
4. Nekath Gedara William
5. Nekath Gedara Liesa
6. Nekath Gedara Dingiri
7. Nekath Gedara
   Somawathie
   All of Wilemulla
   Millawana

8. Nekath Gedara Baalaya
   Kambuwatta
   Madipola

Defendants

AND

Nekath Gedera Jayathu
Wilemulla
Millawana

1st Defendant – Appellant (Deceased)

Galagama Gedara Sirisena
Wilemulla
Millawana

1A Defendant-Appellant

Galagama Gedara Somapala
Ihalagama
Akuramboda

Subtituted-1B Defendant-Appellant

Vs.

1. Galagama Gedera Sunil
2. Galagama Gedera Sugathapala
3. Galagama Gedera Dhanapala
4. Galagama Gedera Gunapala
5. Galagama Gedera Siripala
6. Galagama Gedera Nimalawathie
7. Galagama Gedera Gunapala
8. Galagama Gedera Dharmadasa
9. Galagama Gedera Saraneris

Substituted-Respondents

1. Nekath Gedara Sahandu
   Wilamulla
   Millawana

Plaintiff- Respondent

2. Nekath Gedara Ukkuwa
   Wilemulla
   Millawana

2nd Defendant Respondent

3. Nekath Gedara Balaya
   Wilamulla
   Millawana

8th defendant-Respondent

BEFORE : **M.M.A GAFOOR J**

COUNSEL : Saliya Peiris P.C. with Susil Wanigapura for the 1B Defendant-Appellant.

Respondents - absent and unrepresented.

WRITTEN SUBMISSIONS TENDERED ON : 23.04.2018 (by the 1 B Defendant-Appellant)

DECIDED ON : **28.08.2018**

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M.M.A GAFOOR, J.

This is an appeal stemming from the judgement of the learned District Judge of Matale in respect of a Partition Action Case No. 1525/P.

The Plaintiff – Respondent (hereinafter referred to as the 'Plaintiff') instituted this action seeking *inter alia* to partition of the land called 'Gonnagahamula' more fully described in the schedule to the Plaint.

According to the Plaintiff's pedigree, L.M. Mudiyanse, L.M.Tikiri Banda and Appuhamy were the original owners of the land described in the schedule to the plaint. As per the pedigree set out in the plaint, L.M. Mudiyanse and L.M. Tikiri Banda transferred their each 1/3 shares to Tikiri Dureya by way of deed No. 1686 dated 07.01.1932 and No. 1171 dated 06.02.1932 respectively. (Marked as P1 and P2)

In addition to another person called Appuhamy who owned undivided 1/3 share of the same land above described, transferred his 1/6 share to Dingiri Banda. Later Dingiri Banda transferred his 1/6 share to Tikiri Dureya and Bandiya as 1/6 for each of them. After this transfer (by the deed No. 9149 dated 18.02.1908) Tikiri Dureya has got 9/12 shares of the land. After demise of Tikiri Dureya, the two sons of him Baalaya and Ukkuwa (2nd and 8th Defendants) inherited the share each of 9/24th of the land.

Later Baalaya transferred his undivided 4/24 shares to the Plaintiff by deed No. 1540 dated 25.01.1965.

Bandiya who got a 1/12 shares from Tikiri Banda transferred his shares to Esadu and to the Plaintiff a 1/24th for each of them.

After demise of Esadu his five children (3rd, 4th, 5th, 6th and 7th Defendants in this case) inherited the said 1/12 of the land.

Apart from above transactions, Appuhamy an original owner of the land transferred a 1/6 shares of the same land to Mudiyanse by the deed No 6207 in 1940. Mudiyanse transferred that 1/6 shares to Sarangi and Sarangi transferred to N. G Jayathu who is the 1st Defendant (deceased) in this Case.

According to the plaint and the pedigree plaintiff initially claimed for his 50/120 shares of the undivided portion. And After adding as a party to the case, the 8th Defendant-Respondent filed his statement of claim on 14.05.1991 and claimed an undivided 25/120th shares of the land sought to be partitioned whereas the 2nd to 7th Defendants did not file statement of claim on their behalf.

In the trail the plaintiff averred that the shares should be divided as follows:

Party	**Share**
Plaintiff	Initially he claimed for 50/120 but after adding 8thDefendant **25/20**
1st Defendant	20/120
2nd Defendant	45/120
3rd Defendant	1/120
4th Defendant	1/120
5th Defendant	1/120
6th Defendant	1/120
7th Defendant	1/120
8th Defendant	25/120

But in the District Court the 1st Defendant – Appellant (hereinafter referred to as the 'Appellant') claimed that she is a grand-daughter of Tikiri Dureya, as her mother Sobani is a daughter of Tikiri Dureya.

Thereafter, the Appellant filed her statement of claim stating *inter alia* that the ½ of shares of the land sought to be partitioned be allotted to her, since she has inherited the said ½ share out from the corpus as described in the statement of claim. **Thereby she claimed for an additional share from Tikiri Dureya's property.**

The Appellant further claimed that the buildings marked as 'ඛ', 'ඝ', 'ඞ', and 'ඊ' of the Preliminary Plan and the Plantation in the Lot No. 3, 4 and 5 depicted in the Preliminary Plan marked as 'X'. The Appellant further sought an order from the Court directing the Respondent to furnish a Plan by which the land sought to partitioned is correctly depicted. But the Plaintiff's position (according to his plaint) was that entitlement of Tikiri Dureya was inherited to Ukkuwa and Baalaya **as they were the only children of Tikiri Dureya**.

In the District Court trail, the Plaintiff gave evidence and produced the documents marked as X, Y, Z and ඉැ - 1 to ඉැ - 4 while the 1st Defendant-Appellant gave evidence on behalf of the Defendants and produced the documents marked ඊ - **1** to ඊ - **4**.

After conclusion of the trail, the learned District Judge of Matale delivered the judgment on 03rd February 1995 rejecting the position of the Appellant and holding the corpus of the land called 'Gonnagahamula' in favour of the Plaintiff.

Being aggrieved with judgment dated 03rd February 1995, the Appellant has preferred this appeal to this Court, seeking a reversal of the judgment and grant of other prayed for in the petition of appeal. And further submitted before this Court that the plaintiff has failed to identify the corpus because the Plaintiff has sought to partition the land in extent of **2 Acres 2 Roods and 38 Perches** as described in the schedule to the plaint.

However, in the Preliminary Plan bearing No. 3265 prepared by K.S. Samarasinghe Licensed Surveyor, the extent of land which was surveyed is a land of **2 Acres 2 Roods and 19 Perches.**

When this matter was mentioned in this Court, the Respondents were not present, though the Court issued notices on them several occasions. Even after the notices have been served, the Respondents were failed to present before this Court. For that reason this Court decided to take up the matter ex-parte.

In this case, the Appellant claims for two different shares. She states that, Tikiri Dureya had two children namely, Ukkuwa and Baalaya from a Marriage. And Tikkiri Dureya had a daughter namely, Sobani in addition to said sons and she is a daughter of Sobani, therefore the Appellant claims that she should entitle the shares by way of inheritance from Sobani in addition to the portion of land which received from the deed No. 22436.

The Appellant gave evidence and demonstrated her position as follows:

> "....ටිකිරි දුරයාට පවුල් දෙකක් සිට තිබෙනවා. එයා ටිකිරි දුරයාගේ 1 වැනි පවුලට සිටී දුව සොබනි. සොබනි මගේ අම්මා. දෙවැනි පවුලගේ දරුවන් උක්කුවා සහ බාලයා.." ***(Page at 77)***

In this court, the learned Counsel for the Appellant earlier submitted that, the only issue to be determined of this case is whether Tikiri Dureya had three children by the names of 'Baalaya', 'Ukkuwa' and 'Sobani' or whether he had only two children namely, 'Baalaya' and 'Ukkuwa'. The 1st Defendant-Appellant claims title from M.P.Sarangi by way of a deed marked 1D3 and she also claims that she was a daughter of 'Sobani'.

For this argument the Appellant did not provide any further evidence to lead her claim. But she is in a position that in the cross-examination the plaintiff has given evidence corroborating the fact that Tikiri Dureya had two families and Sobani is daughter of him.

"...ටිකිරි දුරයා මැරෙනකොට මට වයස **20** ක් විතර ඇති. එතකොට කසාද මම බැඳලා. සරගි දන්නවා. අගේ සගෝදරිය තමයි විත්තිකාර ජයතු. මව සොබනි. ඇයත් දන්නවා. ටිකක් දන්නවා. සොබනි ටිකිරි දුරයාගේ දුව. ටිකිරි දුරයාට පවුල් 2 ක් ඉඳලා තියනවා, සොබනි කියන්නේ 1 වැනි පවුලගේ දුව. 2 වැනි පවුලගේ දරුවෝ තමයි බාලයා සහ උක්කුවා ..." ***(page at 74)***

Even though, the learned District judge was not satisfied on Appellant's claim that there was a lawful inheritance-relationship with Tikiri Dureya. Therefore, he concluded that there is **no evidence to prove that Sobani is a lawful daughter of Tikiri Dureya.**

As has been stated by this Court and the Supreme Court in several precedents before, the duty of the Court in a partition action is primarily to investigate the title of the parties to the case to its satisfaction.

In ***Peris vs Perera*** (1896) 1 N.L.R 362 Bonser C.J. held as follows;

"It is obvious that the court ought not to make a decree, except it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property. The court should not, as it seems to me, regard these actions as merely to be decided on issues raised by and between the parties.

The first thing the Court has to do is to satisfy itself that the plaintiff has made out his title, for, unless he makes out his title, his action cannot be maintained; and he must prove his title strictly, as has been frequently pointed out by this Court." (Page at 367)

Comparable dicta are found in many decisions such as ***Fernando vs. Mohammedu Saibo*** *(1899) 3 N.L.R 32,* ***Mather vs. Thamotheram Pillai*** *(1903) 6 N.L.R 246* and ***Neelakutty vs Alvar*** *(1918) 20 N.L.R 372.*

It is most relevant to record the guidelines of ***Chettiar vs. Kumarihamy*** (1944) 45 N.L.R 332, Wijewardena J. held that

"In a partition action the duty is cast upon the Judge to satisfy himself that the property to be partitioned does not belong to persons, who are not parties to the action.

With regard to the decision on this question the court would consider the evidence without regard to the issue."

I observe that in the instance case, there was a duty cast on the trail judge to satisfy himself as to identify the interested parties of the land, and for this purpose it was always open to him to find out the evidence from the entire fact and call for further evidence or witness in order to make a proper investigation.

In ***Thayalanayagam vs. Kathiresapillai*** (1910) 5 Balasingam L.R 10, Hutchinson, C.J said:

"In a partition action such as this is, I think that the judge has power, and that in some cases it may be his duty, even after the parties have closed their case, to call for further evidence. (But if he does, he must do it in a regular manner)..."

In the case of ***Karunaratne vs. Sirimalie*** (1951) 53 N.L.R 444, the Supreme Court held that,

"Where, in a partition action, all possible claimants to the property are manifestly before the court, no higher standard of proof should be called for in determining the question of title than in any other civil suit"

And further it is pertinent to recall the finding of Fernando J in ***Golagoda vs. Mohideen*** (1937) 40 N.L.R 92, he said that a trail judge **'perfectly satisfy'** himself whether the claimants who are parties to the proceedings or property in question actual parties or not.

I agree with the above rationales. And in the present case, the only outstanding question for determination was therefore whether the Appellant had satisfactorily established on a balance of probability that she has a valid title to claim a different shares from said land as she is a grand-daughter of Tikiri Dureya and whether she has an inherited additional - rights on the land.

In this point, I am of the view that in the District Court, the Appellant failed to establish her claim that she is a lawful heir of Tikiri Dureya. Therefore, the

learned District Judge answered this question in negative, he find in difficult to fathom the validity of the marriage of Sobani.

In my opinion, the learned District Judge correctly evaluate the above issue, firstly he evaluated the evidence to find a legal relationship between Tikiri Dureya and the Appellant. Secondly, he evaluated the pedigree of the plaintiff and found that the Appellant get the shares from Appuhamy who was an original owner of the land not from Tikiri Dureya. Therefore, the pedigree clearly shows the Appellant's position that she cannot inherited any shares from Tikiri Dureya.

In ***Upageeris vs. Odanis*** (1964) 67 N.L.R 521, a partition action dismissed on the ground that the marriage of a person from whom the plaintiff derived this rights had not been registered. But in the appeal the Appellate Court allowed re-submitting the marriage certificate. At the same time the Judges of the Supreme Court directed the District Judge to investigate whether the appellant was a legitimate child of that marriage.

Further, I think it is vital to have a note on the case of ***Appuhamy vs. Perera*** 56 C.L.W 32 and ***Cooray vs. Wijesuriya*** 62 N.L.R 158. In ***Appuhamy vs. Perera***, Basnayake C.J held that, a trail judge need to observe the provisions of Evidence Ordinance even in a partition case and His Lordship further held that 'it is important that even in partition action evidence that is not relevant according to the provisions of the Evidence Ordinance should not be admitted.'

Basnayake C.J. in ***Cooray vs. Wijesuriya*** emphasised that,

> *Section 25 of the Partition Act imposes on the Court the obligation to examine carefully the title of each party to the action. Apart from proof by the production of birth, death and marriage certificates, the relevant provisions of the Evidence Ordinance in regard to proof of a pedigree are to found in sections 32 (5), 32 (6) and 50 (2)*

And the following phrases of the Basnayake C.J. are noteworthy:

" The relevant provisions of the Evidence Ordinance in regard to proof of a pedigree are to be found in section 32 (5), section 32 (6) and section 50 (2)—I am omitting for the moment proof by the production of birth, death and marriage certificates. It almost always happens that birth and death certificates of persons who have died very long ago are not available: in such cases the only way of establishing relationship is by hearsay evidence. Section 32 (5) of the Evidence Ordinance renders a statement made by a deceased person admissible:-

> ***"When the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage, .or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised."***

It is under this provision of law that oral evidence of pedigree is generally sought to be led. What practitioners and the Court sometimes lose sight of is the fact that before such evidence can be led there must be proof that the hearsay evidence sought to be given is in respect of a statement made by a person having special means of knowledge : furthermore, it must have been made ante litem motam . Where the statement is made by a member of the family such knowledge may be inferred or even presumed, but where it is a statement made by an outsider proof of special means of knowledge must first be established.

Therefore, these findings seem to me that, in partition action a party can build their own evidence through in perfectly satisfied way with the Evidence Ordinance too.

Therefore, the Appellant had a good chance to establish her position with appropriate evidence. However, I observe that the Appellant failed on her position at this juncture. It is quite manifest that the plaintiff has failed to establish her claim (additional shares) by legally admissible evidence.

Appellant's another submission before this Court was that the plaintiff has failed to identify the corpus because the Plaintiff has sought to partition the land in extent of **2 Acres 2 Roods and 38 Perches** as described in the schedule to the plaint. However, in the Preliminary Plan bearing No. 3265 prepared by K.S. Samarasinghe Licensed Surveyor, extent of the land which was surveyed is a land of **2 Acres 2 Roods and 19 Perches.** Therefore, the Appellant further submitted that the plaintiff has failed to identify of the corpus and learned District Judge has not considered these discrepancy of the extent of the corpus and variety of the boundaries.

After the evaluation of the deeds submitted by both parties, it is seem to me that the Preliminary Plan bearing No. 3265 only indicate the extent of the land as **2 Acres 2 Roods 19** Perches but there is no a single discrepancy on the boundaries.

Deeds marked by the Plaintiff, Appellant to the land called 'Gonnagahamula' are indicating a same extent as 2 Acres 2 Roods and 38 Perches. The same descriptions has probably been copied from an earlier original deed and conveyed by all parties. The subsequent misdescription cannot alter the effect of that conveyance. Further the trail of this action proceeded after certain matters in dispute between the parties were recorded, but no specific issue was framed regarding the actual corpus to be partitioned.

I am in a view that this is a case of ***"falsa demonstratio non nocet"*** *(වැරදි විස්තරයකින් හානියක් සිදු නොවේ - page at 181, Glossary of Technical Terms, Department of Official Languages).* It is a legal maxim that means a false description doesn't void a document if the intent is clear.

The maxim *falsa demonstratio*, defined in Oxford Dictionary of Law, 8th ed. by Jonathan Law (Oxford University Press; 2015, page at 254) as follows:

> *"A rule applied where a description of something in a legal document (e.g. a will) is made up of more than one part, and one part is true, but the other false: if the*

part that is true describes the subject with sufficient legal certainty, then the untrue part will not vitiate the document."

To proceed further, I respectfully recall the vital findings of their Lordships Basnayake and Gratian JJ in the case of ***Gabriel Perera vs. Agnes Perera and Others*** 43 C.L.W 82. It is settled and well known rule of interpretation of deeds that, where the portion conveyed is perfectly described, and can be precisely ascertained, and no difficulty arises except from a subsequent inconsistent statement as to its extent, the inconsistency as to extent should be treated as mere *falsa demonstratio* not affecting that which is already sufficiently conveyed. Their Lordships were emphasised their views with a land marked decision of ***Llewellyn vs. Earl of Jersey (1843) L. J. Ex 243.***

The same approach followed by Akbar J. in the case of ***De Silva vs. Abeytileke*** (33 NLR 154) in this case, following finding of Akbar J. is noteworthy;

*"...[I]n the case of **Eastwood v. Ashton** (1915) A. C. 900, Lord Sumner quoted with approval certain English decisions as follows:—" My Lords, the principle on which this case was decided in the Court of Appeal was thus stated by Parke B. in Llewellyn v. Earl of Jersey. As soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it."*

Moreover, it is further note that in the case of ***Eastwood v. Ashton*** held that, if there any discrepancy in a description of a good (rem), the *vonder* is not entitled to take over the good (rem). The furthest they can go is to make a claim for compensation, vide ***Fernando v. Sumangala*** (1920) 22 N. L. R. 23 and ***De Silva vs. Abeytileke*** (33 NLR 154).

In the light of above decisions and authorities, I observe that there are no obstacles in front of me to ratify the deeds which have been submitted by the plaintiff in the District Court.

The description on deeds – (2 Acres 2 Roods and 19 Perches) has probably been copied from an earlier original deed and conveyed by all parties.

Therefore, I do not interfere with the judgment of the learned District Judge. For the forgoing reasons, I dismiss the claims made by the Appellant. And I affirm the judgment dated 03.02.1995.

I dismiss the appeal. However, I order no costs.

JUDGE OF THE COURT OF APPEAL