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

C.A. Case No.1289/2000 (F)

D.C. Galle Case No.11560/P

Pubudusena Senanayake,
of Vidyachandra Mawatha, Ahangama.
PLAINTIFF

-Vs-

1. Jane Senanayake,
   C/o. Mallika Kariyawasam,
   Anangoda, Galle.
1A. Mallika Kariyawasam,
   of Udugama Road, Anangoda,
   Akmeemana.
2. Kamala Senanayake,
   of "Sampath", Godawatta,
   Akmeemana.
3. Dayaratne Senanayake,
   of "Senani", Vidyachandra Mawatha,
   Ahangama.
4. Leelaratne Senanayake,
   of Kandamuduna, Dikkumbura.
5. Kusuma Lakshmi Senanayake,
   Kandamuduna, Dikkumbura.
   DEFENDANTS

AND BETWEEN

Dayaratne Senanayake,
of "Senani", Vidyachandra Mawatha,
Ahangama.
3rd DEFENDANT-APPELLANT

-Vs-

Pubudusena Senanayake,
of Vidyachandra Mawatha, Ahangama.
PLAINTIFF - RESPONDENT

1. Jane Senanayake,
   C/o. Mallika Kariyawasam,
   Anangoda, Galle.

1A. Mallika Kariyawasam,
   of Udugama Road, Anangoda,
   Akmeemana.

2. Kamala Senanayake,
   of "Sampath", Godawatta,
   Akmeemana.

4. Leelaratne Senanayake,
   of Kandamuduna, Dikkumbura.

4A. Sheela Kodagoda Delapalage

4B. Menik Sanjeewani Kodagoda Senanayake
   Both of Kandamuduna,
   Malalgodapitiya, Dikkumbura,
   Ahangama.

5. Kusuma Lakshmi Senanayake,
   Kandamuduna, Dikkumbura.
   DEFENDANT-RESPONDENTS

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

COUNSEL : W. Dayaratne, P.C. with R. Jayawardena and S. de Zoysa for the 3rd Defendant-Appellant.
Lasitha Chaminda for the Plaintiff-Respondent.

Decided on : 29.04.2019

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

The quintessential question that has arisen in this appeal of the 3rd Defendant-Appellant is whether premises No.8 that has been depicted in the preliminary plan of this case but which has been decreed to the allotted in common to all the parties in the case should be exclusively allotted to the 3rd Defendant-Appellant, in view of the axiomatic principle of law in partition law, namely a co-owner who has made improvements should be allotted the portion which contains the improvements, provided it does not cause substantial injustice to the other co-owners-*see* J.D. ***Liyanage v. L.H. Thegiris*** 56 N.L.R 546.

Let me indulge in a conspectus of facts so as to comprehend the issue engulfed in this appeal.

The Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") Pubudusena Senanayake instituted this partition action against the 3rd Defendant-Appellant (hereinafter sometimes referred to as "the 3rd Defendant") and 5 others to partition a land more fully described in the plaint dated 14th January 1992.

The parties admitted the identity of the corpus as depicted as Lots A, B, C and D in the preliminary plan and there is also no dispute as to how the property has devolved on the parties. According to paragraph 3 of the plaint, Philip de Silva Senanayake had been in possession of this property and by a deed of gift No.2204 dated 29th March 1949, he had transferred an undivided shares of 6/7 to his six children namely; Edwin, David, Martin, Peter, Gunaseeli and Jane-1st Defendant. In other words these six children of Philip de

Silva Senanayake got 1/7 each of this property. The father Philip de Silva Senanayake retained the balance portion of 1/7. In other words co-ownership was created among the six children and the donor (Philip de Silva) to the extent of 1/7 shares each.

The said son Edwin married Sandaseeli Dias Edirisinghe Kodithuwakku and on his death there were his intestate heirs namely his widow Sandaseeli, the Plaintiff Pubudusena and the 2nd Defendant-Kamala. This 1949 deed has been marked as **P5**. The schedule of the deed refers to 3 lots and it would appear that the subject matter is an amalgamation of these lots.

Since the main contest between the Plaintiff and 3rd Defendant-Appellant revolved around the main house in the subject-matter which is depicted as premises No.8 in the preliminary plan, the natural question to pose is whether the original owner Philip de Silva Senanayake ever referred to this house in his deed of transfer of 1949. There is no reference to a house built on this land but there are references to buildings. Therefore, when the Grandfather Philip de Silva donated 1/7 each to his six children and retained 1/7 for himself it would appear that this co-owned land didn't have a dwelling house. In fact if there had been a dwelling house, the deed would have been a reference to a house in the deed.

It would appear that it is through Peter Senanayake the father of 3rd Defendant-Appellant that the 3rd Defendant-Appellant inherited his shares in the corpus and it is not disputed that the 3rd Defendant's share became 1/14. Thereafter Gunaseeli who was an aunt of the 3rd Defendant also transferred her 1/7 share to the Defendant and the 3rd Defendant got 36/84 shares.

By devolution the Plaintiff admittedly got 20/84 shares in the corpus and the learned Additional District Judge of *Galle* did eventually allot the aforesaid proportionate shares to the parties respectively-*see* page 314 of the Appeal Brief for the final allotment of shares in the judgment dated 24.11.2000.

It has to be noted that none of the above transactions referred to above refers to the bone of contention in this appeal namely the house depicted as premises No.8 in the

preliminary plan. The contest between the 3rd Defendant-Appellant and the Plaintiff-Respondent is over the main house. Should it go to the soil in the proportionate shares of the parties as held by the learned Additional District Judge? Or should the soil rights of the 3rd Defendant-Appellant (36/84 shares) must include this as an improvement effected by his privies?

Reference to the house

A reference to the house is found only in Deed No.263-*see* page 391 of the brief. This transfer deed is marked as 3VI. By this deed dated 11th December 1988, the 3rd Defendant's mother and sister Eslin Senanayake along with Gunaseeli Senanayke (an aunt of transferred certain shares to the 3rd Defendant and the 2nd paragraph of the deed refers to the house-*see* the page 391 of the brief as a donation to the 3rd Defendant-Appellant. So there is documentary evidence that 3rd Defendant-Appellant became the donee of this main house. It is on the strength of this evidence and other items of evidence that the 3rd Defendant claimed the house as an entitlement to be engulfed in his 36/84th share.

I have already referred to the judgment of Sansoni, J. in ***Liyanage v. Thegiris*** *(supra)* which laid down the proposition that a co-owner could be allotted the portion which contains his improvements, though it is not an inflexible rule. Sansoni, J. went on to hold (with Alan Rose C.J agreeing) that the rule may not be followed if it involves substantial injustice to the other co-owners.

The same proposition was articulated thus by Lascelles C.J in ***Moldrich v. La Brooy*** (1911) 14 N.L.R 331:

> *"Where improvements have been effected 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; he should not be required to pay compensation to the other co-owner for these improvements. If the land on which the improvements are made is superior in point of fertility to the rest of the land, a different consideration arises".*

This principle is also mirrored in Section 33 of the Partition Law No.21 of 1977 and in the circumstances, it becomes relevant to pose the question as to who built the premises No.8 which is depicted in the preliminary plan bearing No.180. Was the house an improvement by the Plaintiff's privies?

The contesting parties namely the Plaintiff-Respondent and the 3rd Defendant-Appellant who are sons of two brothers put forward two rival positions at the trial. Whilst the Plaintiff-Respondent took the stance that it was their grandfather-Philip de Silva Senanayake (the original owner) who had put up the house, it was the consistent position of the 3rd Defendant-Appellant that it was his father along with her aunt Gunaseeli who had constructed the house.

So it is a question of fact as to who built this house that would be finally determinative of the claim to the house. The learned Additional District Judge of *Galle* by his judgment dated 24.11.2000 held that the house was common to all and it must devolve on all children and their heirs. The tenor of the judgment of the learned Additional District Judge is that the exclusive claim made by the 3rd Defendant-Appellant is fraudulent. Moreover, the learned Additional District Judge went on to hold that the original owner's widow (the grandmother of the contesting parties) had sufficient assets to put up this house but I hasten to point out that the record does not bear any evidence of her contribution towards the building of the house.

One has to collate the items of evidence in the case to ascertain the veracity of the different versions proffered by the respective parties.

The Plaintiff's argument was that the grandfather Philip de Siva Senanayake renovated the existing house or built another in 1952. The consistent position of the Plaintiff right throughout the trial from its inception was that the house that the grandfather-Philip de Silva Senanayake constructed had an extent of 21 cubic feet, but the surveyor who visited the corpus and surveyed the land in August 1992 stated that the extent of the house was 14 cubit feet. In other words, the position of the Plaintiff was contradicted by the surveyor in regard to the extent of the house. To put this in an evaluative context, there is an inconsistency *inter se* in the position of the Plaintiff at the trial. The surveyor

asserted at p 285 of the Appeal Brief that the house was of 14 cubit feet. This would indicate that the old house of 21 cubit feet, which the Plaintiff had alleged his grandfather had built, had ceased to exist and in its place the house which was in an extent of 14 cubit feet had come into existence. This important item of evidence that emerged from the surveyor shows that the house which was alleged to have been renovated or built by the grandfather was no longer on the ground and this would cast the finding of the learned Additional District Judge into doubt, because it was his holding that the house was constructed by the original owner-Philip de Silva Senanayake and therefore the house must go to the soil for all to co-own and share. This finding is contrary to the evidence that emerged at the trial.

The version that the house was built by the original owner namely the grandfather of the both the Plaintiff and the 3rd Defendant-Appellant does not ring probable for several other reasons.

One of the witnesses for the Plaintiff one *Handy* stated that it was him who supplied timber for the construction of the house and it was Gunaseeli (the Aunt of the 3rd Defendant-Appellant) who paid the money for the timber. It was Gunaseeli who had managed and supervised the construction. This testimony given on behalf of the Plaintiff proves the case of the 3rd Defendant that it was his father-Peter Senenayake and Gunaseeli who had constructed the house.

A strong item of evidence in support of this testimony of the 3rd Defendant is that Gunaseeli along with others in fact gifted this house to the 3rd Defendant by way of a deed of gift bearing No.263 and dated 11th December 1988.

As I have said before, it is only this deed that refers to a house and the recital in the deed refers to the construction of the house and the house in the following terms:-

> *"The 3rd and 4th named vendor (Eslin Senanayake alias Eslin Amaradasa and Gunaseeli Senanayake) under and by virtue of inheritance from our deceased brother (David Senanayake) the said David Senanayake and by me the fourth named vendor also* ***by right of construction*** *and under and by virtue of Deed No.2204 dated 29.03.1949..."*

Even the 1st schedule is specific in its reference to the house... "*....about 14 cubic house standing thereon built by Peter Senanayake and the Fourth Donor named hereof Gunaseeli Senanayake....*" *(sic)*.

This gift was made to the 3rd Defendant-Appellant on 11th December 1988 and the evidence is that the 3rd Defendant has been in possession of the house.

This deed marked as 3V1 is indeed *ante litem motam*. As I said in ***Jayasinghage Abesysuriya and two others v. Jayasinghage Premarathna Jayasinghe and others*** (CA 1005/1997(F)-decided on 30.07.2018), the expression "*ante litem motam*" would mean "before an action has been raised". *i.e.*, at a time when the declarant had no motive to lie. This phrase is generally used in reference to the evidentiary requirement that the acts upon which an action is based occur before the action is brought-*see* Black's Law Dictionary (10th Edition, p 112).

The fact that the house was constructed by Gunaseeli appears as such in the deed. This cannot be a lie because this assertion is corroborated by one *Handy* who despite having been summoned to give evidence for the Plaintiff asserted that the expenses for the construction of the house were borne by Gunaseeli. The money had apparently been dispatched by the 3rd Defendant's father-Peter Senanayake and this fact is referred to in the deed **3V1** bearing No.263.

All these items of evidence show that the probabilities tilt more in favour of Gunaseeli (the Aunt of the 3rd Defendant and donor of the house) having constructed the house, with the financial disbursement given by her brother-Peter Senanayake-the father of the 3rd Defendant-Appellant. The deed which was *ante litem motam* is supported by evidence aliunde and the learned Additional District Judge of *Galle* was in error, when he concluded that the deed was fraudulent. The deed quite categorically describes that the improvement in the form of the house was made by Gunaseeli who later made a gift of that improvement to the 3rd Defendant-Appellant. It is also to be noted that when this deed was marked, no objection was raised by the Plaintiff and Section 68 of Partition Law No.44 of 1973 provides that it shall not be necessary in any proceedings under the law to adduce formal proof of the execution of any deed which, on the face of it, purports

to have been duly executed, unless the genuineness of that deed is impeached by a party claiming adversely to the party producing the deed, or unless the Court requires such proof. The Plaintiff did not seek to impeach 3V2 nor did the Court require proof thereof.

There is not sufficient evidence to support the version of the Plaintiff that the house had been constructed by the old paterfamilias-Philip de Silva Senanayake.

Special means of knowledge spoken to by the executants in the deed and the fact that these statements were made *ante litem motam* render the recitals relevant and admissible and they are indeed corroborated by evidence-*see* ***Cooray v. Wijesooriya*** (1958) 62 N.L.R 158 wherein Sinnetamby, J. used statements in the recitals to infer a pedigree.

From the foregoing it is quite manifest that the Plaintiff failed to establish that the house that had been allegedly built by the grandfather remained intact. The evidence is that the improvement was made by Gunaseeli-one of the co-owners who was funded by the father of the 3rd Defendant-Appellant. This improvement was donated in the end to the 3rd Defendant-Appellant. Therefore it was preposterous for the learned Additional District Judge to have allotted this house in common. As the learned District Judge found, the 3rd Defendant-Appellant was allotted 36/84 of the corpus-the largest share among the parties and it is consistent with case law and Section 33 of Partition Law to have held that the soil rights of the 3rd Defendant-Appellant would include the house-the premises No.8 as depicted in the preliminary plan.

The learned Additional District Judge misdirected himself on an important question of fact, that amounts to a non-direction as well. As a result, I proceed to set aside the judgment of the learned Additional District Judge dated 24th November 2000 and allow the appeal of the 3rd Defendant-Appellant. The learned District Judge of *Galle* is directed to enter judgment and decree by allotting premises No.8 to be included in the 30/84th share that the 3rd Defendant-Appellant has been awarded. All other allotment will remain so awarded as in the judgment.

JUDGE OF THE COURT OF APPEAL