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

C.A. Case No.710, 711, **712/1999 (F)**

D.C. Gampaha Case No. 19077/P

1. Henarath Mohottige **Noris Perera** (Deceased)
   of Henahatta, Biyagama,
   Malwana.
2. Kumarapeli Arachchige **Luwisanona**
   of Henahatta, Biyagama,
   Malwana.

   PLAINTIFFS

1A. Henarath Mohottige **Magilin Nona**
1B. Henarath Mohottige **Juliet Perera**
1C. Henarath Mohottige **Albert Perera**
1D. Henarath Mohottige **Albert Perera**
All of Biayagama, Malwana.

SUBSTITUTED PLAINTIFFS

-Vs-

1. Kariyawasam Gamage **Piyasena**
2. Kumarapeli Arachchige **Emis**
   and 22 others

   DEFENDANTS

AND

1. Kariyawasam Gamage **Piyasena**

21. Panapitiyage Dona Baby Nona

1st and 21st DEFENDANT-APPELLANTS

-Vs-

1. Henarath Mohottige Noris Perera (Deceased)
2. Kumarapeli Arachchige Luwisanona (Deceased)

1A. Henarath Mohottige Magilin Nona

1B. Henarath Mohottige Juliet Perera

1C. Henarath Mohottige Albert Perera

1D. Henarath Mohottige Albert Perera

All of Biayagama, Malwana.

DEFENDANT-RESPONDENTS

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

COUNSEL : Ranjan Suwandaratne for 5A and 18th Defendant-Appellant.

Bimal Rajapakse with Amrit Rajapakse and Muditha Perera for the Appellant in C.A.711/1999 and for the Respondent in C.A. 710/99.

M.U.M. Ali Sabry, P.C. with Shehani Alwis and Nuwan S. Bopage for the 10th and 13th Defendant-Appellants.

Gamini Prematilake with Ranjith Henrey for the 3rd and 4A Defendant-Respondents.

B. Manawadu for the 2A and 2E Defendant Respondents.

Decided on : 16.11.2018

ORDER ON THE PRELIMINARY QUESTION

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

The quintessential question that demands an initial consideration in this case is whether the non-registration of a *lis pendens* in respect of a larger land brought in by the 3rd and 4th Defendant-Respondents in this case would invalidate the judgment rendered by the learned Additional District Judge of *Gampaha* on 13.08.1999. The argument of Counsel before me mainly focused on the question of failure to register the *lis pendens* and Counsel for Appellants in CA 711/99 and Respondents in CA 710/99 and CA 712/99 argued quite strenuously that it is a "fundamental vice" (an expression used by Justice Soza in ***Somawathie v. Madawela*** (1983) 2 Sri.LR 15) if *lis pendens* has not been registered.

In order to understand the rival arguments of Counsel whether the non-registration of the larger land brought up by the 3rd and 4th Defendants would vitiate the judgment dated 13.08.1999 and set it at naught, let me give a conspectus of the facts in the case.

The original Plaintiffs sought to partition a land called and known as *"Millagahawatte"*, which was in an extent of 12 bushels paddy sowing-*see* the plaint dated 07.12.1976 and its schedule at pages 109 and 113 of the appeal brief.

The three Petitions of Appeal that have been filed by different parties in this case call in question the corpus that should be partitioned and divided among the parties. The contest among the Appellants is the identification of the corpus. What is the land that is the subject matter of the action?

The Plaintiff-Appellant (hereinafter sometimes referred to as "the Plaintiff") instituted this action to partition a land called *"Millagahawatte"* in extent 12 bushels paddy sowing area, which is more fully described in the schedule to the plaint, among the parties in terms of the devolution as set out in the plaint. After the action was filed, a commission was issued to one D.A.F. Yapa, Licensed Surveyor, whose Preliminary Plan No.546 dated

12.06.1977 and the Report have been filed of record marked **'X'** and **'XI'** respectively. According to this plan, the actual extent of the corpus is 5 Acres 1 Rood and 6 Perches, which is almost equal to 12 bushels paddy sowing area.

Thereafter the 3rd and 4th Defendant-Respondents (hereinafter sometimes referred to as "3rd and 4th Defendants") filed their amended statement of claim and moved for a commission upon which a plan bearing No.1089 and dated 25.09.1979 and its corresponding report prepared by one K.G. Hubert Perera, Licensed Surveyor have been filed. According to this plan (3V2), the land is divided into 8 Lots and the full extent is 10 Acres 2 Roods and 35.4 Perches. This plan contains an extent of a land with an addition of about 5 acres.

The 3rd and 4th Defendants claimed that the extent of the corpus which should be partitioned must be Lots 1 to 8 as depicted in Plan No.1089. The 3rd and 4th Defendants are the only parties who wanted the larger land to be the corpus. On a mere comparison of both these plans and the Plan of the Survey-General bearing No. Gam/misc./83/10, it is markedly clear that only Lots 1 and 2 in Plan 1089 corresponds to Lots 1 and 2 in Plan No. 546.

The 18th Defendant-Appellant (hereinafter sometimes referred to as "the 18th Defendant") and the 19th Defendant-Respondent (hereinafter sometimes referred to as "the 19th Defendant") in their statement of claim state that Lot 4 in Plan No.1089 is a part of the land called "*Delgahawatta* Lots A, B and C" and they claim that it devolved on the parties as set out in the statement of claim of the deceased 5th Defendant. The deceased 5th Defendant claimed that Lot 4 in Plan No.1089 should be excluded. This position is agreed to by 5(a) and 18th Defendants.

Having regard to the issues raised by all the parties, it would appear that the main contest between the parties is centered around the extent and identification of the corpus. As stated above the main contest is whether the corpus is the land depicted in Plan No.546 or it is the land depicted in Plan No.1089, as claimed by the 3rd and 4th Defendants. Both Mr. Ranjan Suwandaratne for the 5a and 18th Defendant-Appellant and

Bimal Rajapakse with Amrit Rajapakse and Muditha Perera for the Appellant in C.A. 711/1999 and for the Respondent in C.A. 710/99 argued that the judgment dated 13.08.1999 must be set aside for non-registration of *lis pendens*. Mr. Nuwan Bopage for the 10th and 13th Defendant-Appellant contended to the same effect.

Contrary arguments on this issue were made by Mr. Gamini Prematilleke, Mr. Manawadu and Mr. David Weeraratne. No argument on the merits took place.

This order is made on that preliminary question. On the question of failure to register *lis pendens*, it is undeniable that the subsequent plan 3V2 bearing No.1089 shows an increase in extent-namely about 10 acres but it has to be pointed out that the boundaries in the 2nd plan tally with the boundaries given in the plaint, whereas the boundaries given in the preliminary plan do not tally at all with the boundaries given in the plaint. If all the boundaries in the later plan 3V2 are the same as in the plaint, it must be taken that the land described in the plaint has been surveyed correctly in the later plan. Ms. Shehani Alwis who appeared for the 10th and 13th Defendant-Appellants quite strenuously argued that though the 3rd and 4th Defendant-Respondents brought in the larger land, they had not caused a registration of a *lis pendens* for the larger land and on that score the failure to register that instrument must necessarily result in a setting aside of the interlocutory decree. The Counsel cited ***Kanagasabai v. Velupillai*** 54 N.L.R 241 ; ***Uberis v. M.W. Jayawardena*** 62 N.L.R 217; and ***Soyza v. Silva*** (2000) 2 Sri.LR 235.

Needless to say, Section 19(2)(a) of the Partition Law No.21 of 1977 also provides for the following:-

a) Where a defendant seeks to have a larger land than that sought to be partitioned by the plaintiff made the subject-matter of the action in order to obtain a decree for the partition or sale of such larger land under the provisions of this Law, his statement of claim shall include a statement of the particulars required by section 4 in respect of such larger land; and he shall comply with the requirements of section 5, as if his statement of claim were a plaint under this Law in respect of such larger land.

b) Where any defendant seeks to have a larger land made the subject-matter of the action as provided in paragraph *(a)* of this subsection, the court shall specify the party to the action by whom and the date on or before which an application for the registration of the action as a *lis pendens* affecting such larger land shall be filed in court, and the estimated costs of survey of such larger land as determined by court shall be deposited in court.

c) Where the party specified under paragraph *(b)* of this subsection fails to comply with the requirements of that paragraph, the court shall make order rejecting the claim to make the larger land the subject-matter of the action, unless any other party, in whose statement of claim a similar claim shall have been set up, shall comply therewith on or before the date specified in paragraph *(b)* or within such extended period of time that the court may, on the application of any such party, fix for the purpose.

The object of registration of *lis pendens* cannot be overstated. It gives notice to intend ting/prospective purchasers and those who would be dealing with the land and it is crystal clear that up to the filing of the appeal in this matter no such person has come forward complaining of injury or injustice that has been caused to him/her owing to non-registration of *lis pendens*. I am cognizant of the long line of cases that have emphasized the need to register *lis pendens*. The case of ***Kanagasabai v. Velupillai*** *(supra) though* brings out the fact that a defendant who was not a party to the partition action contended in that case that the decree for partition was not "good and conclusive" against him. Thus it was a non-party who complained of non-registration of *lis pendens*.

Who is complaining of the non-registration of *lis pendens* in this case? It is the Plaintiff who brought in the smaller land but his surveyor could not survey the land with the same boundaries as in the plaint. It is with the subsequent plan that the plaint accorded in term of boundaries.

In addition, the 10th and 13th Defendant-Appellants too have complained against the non-registration of *lis pendens*.

Getting back to the case of the 10th and 13th Defendant-Appellants, it has to be remembered that they contended in their a statement of claim that lots 5, 6 and 7 in the later plan must be excluded from the corpus. But the learned Additional District Judge proceeded to include these lots and ordered the partition of the entire land. Whilst Ms. Shehani Alwis for the 10th and 13th Defendant-Appellants was contending along with Mr. Bimal Rajapakse was that the interlocutory decree must be set aside. In the course of the impressive submissions that this Counsel made, this Court posed the question-"what is the prejudice that the 10th and 13th Defendants have suffered by the non-registration of *lis pendens*? Is it not open to the 10th and 13th Defendants now to argue in appeal that the learned Additional District Judge got it wrong when he proceeded to include lots 5, 6 and 7?

There is no likelihood of prejudice in their case notwithstanding the non-registration of *lis pendens* and it is open to the 10th and 13th Defendants to effectively contend in appeal for an exclusion of lots 5 to 7, provided sufficient evidence has been led at the trial to that effect. In fact, Mr. Bimal Rajapakse quite poignantly pointed out that if the 10th and 13th Defendant-Appellants are successful in their bid to exclude lots 5, 6 and 7, then the corpus would fall within the preliminary plan, for which there is already a registered *lis pendens*. This submission clinches the issue. The parties who are complaining against the non-registration of *lis pendens* for the larger land were parties to the case who had acquiesced in the proceedings by a full participation at the trial. There is no possibility of an injustice if this matter is argued on the merits and all these contentious issues could be disposed of in appeal. It enough evidence for exclusion of lots 5 to 7 has been led, the merit of the decision of the learned Additional District Judge is open to impugnment. The learned Additional District judge heard evidence on exclusion but has decided otherwise. The propriety or otherwise of this decision would be gone into in the main appeal.

In fact, Ms. Shehani Alwis conceded that in the petition of appeal dated 14.10.1999, it is exactly this relief- namely the exclusion of lots 5, 6 and 7 that have been prayed for by the 10th and 13th Defendant-Appellants. In the circumstances this Court would be acting in vain to set aside the judgment of the learned Additional District Judge of *Gampaha* dated 13.08.1999, merely on the ground of the non-registration of *lis pendens* of a larger land, which process has not caused prejudice at all to the participating and contesting parties to the case. That being so, it would be preposterous to remit this case back to District Court for a trial *de novo-see* Marsoof, J's disinclination to remand a case of partition to the original court after long years of litigation in ***Sopinona v. Pitipanaarachchi*** (2010) 1 Sri.LR 67.

I am reminded of the maxim, *non potest probari quod probatum non relevant*-law requires nothing to be done that is to no purpose. Law does nothing in vain; and commands nothing in vain. I recall that this principle was not considered in those cases that remanded partition cases to the original court for want/non-registration of *lis pendens*.

In the circumstances, I disallow the argument that the judgment must be set aside on the ground of non-registration of *lis pendens* and make order that this main matter be fixed for argument.

JUDGE OF THE COURT OF APPEAL