WIMALAWATHIE
vs
HEMAWATHIE AND OTHERS

COURT OF APPEAL
ABDUL SALAM. J
CA 825A-825B/2001 (F)
DC COLOMBO 14522 P
SEPTEMBER 24, 2007

Partition Act No.16 of 1951 - Law No. 44 of 1973 - Partition Law No. 21 of 1977 - Section 68 - Proof of documents - Evidence Ordinance of 1895 Section 68 compared - Earlier law giving place to a later - law lex posterior derogate priori - lèges posteriors priores contrarias abrogant - non-est novum ut priores leges and posteriors.

In the partition action instituted by the plaintiff appellant to partition the corpus, the trial judge rejected the deeds of the plaintiff as the plaintiff could not prove the execution of the said deeds. The said deeds were marked subject to proof but not proved.

In appeal it was contended that calling for proof of documents produced by the plaintiff appellant contravenes Section 68 of the Partition Law.

Held:

(1) The finding in relation to the want of proof of the documents produced by the plaintiff and the 10th defendant blatantly contravenes Section 68 of the Partition Law, which provides that it shall not be necessary in any proceedings under that 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 that deed or unless the Court requires such proof.

(3) The execution of documents required by law to be attested should be proved by calling at least one subscribing witness - Section 68 Evidence Ordinance which was enacted in 1895. This precedes

the Partition Act 16 of 1951, Law 44 of 1973 and Partition Law, 21 of 1977, thus later laws repeal earlier laws in-consistent - there with and earlier act must give place to a later, if the two cannot be reconciled.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:-

1. *Sri Lanka Ports Authority vs. Jugolinga* - 1981 - 1 Sri LR 18
2. *Cooper vs. Wilson* - 1937 - 2 KOB 300

L. W. Wettasinghe with *Kapila Jayasekera* for plaintiff-appellant
Rohan Sahabandu for 10th defendant-respondent

cur.adv.vult

May 05, 2009

ABDUL SALAM, J.

The question that arises for determination in this appeal involves an important aspect of the law relating to the mode of proof of deeds, in a partition action. Understandably, there are no precedents on a similar legal question originating either from this Court or any other courts of superior jurisdiction. It is therefore necessary, to set out in detail the circumstances that had led up to the present appeal and the law that is applicable.

The plaintiff-appellant (Plaintiff) filed a partition suit against the 1st to 10th defendant-respondents (hereinafter collectively referred to as the "defendants" or individually as 1 to 10 defendants as the case may be) to partition a land alleged to be owned in common. Some of the defendants denied the devolution of title set out by the plaintiff, but put forward a chain of title, which materially deferred from that of the title pleaded by the plaintiff. The plaintiff and the 1st to 9th defendants are siblings and cousins and the 10th defendant is the mother of the 1st, 2nd, 6th ,7th, 8th and 9th defendants. The main question that arose for determination was whether the

subject matter of the action should be partitioned as per the pedigree set out in the plaint or in the statement of claim of the contesting defendants.

At the trial the plaintiff gave evidence in support of her case and produced 7 deeds marked as P1 to P7 in order to establish her title and led the evidence of the Notary Public who attested the documents marked as P3 and P6. Remarkably five of these deeds were originals and the rest were certified copies. P1 has been executed as far back as in 1913, P2 in 1943, P3 in 1971, P4 in 1952, P5 & P6 in 1971 and P7 in 1956. The partition action has been instituted on 3rd July 1986. The deeds produced by the plaintiff were 23 to 81 years old as at the time when they were produced in court in the year 1994.

None of the defendants chose to impeach the genuineness of the deeds produced at the trial marked as P1 to P7, even though they denied in their statement of claim, the devolution of title set out by the plaintiff. However, when P1 and P3 to P7 were sought to be produced in evidence, the 1st and 5th to 8th defendants insisted on the proof of the same. The learned district Judge thereupon allowed the documents to be produced **subject to proof.** As referred to above, the plaintiff called evidence only in proof of the execution of P3 and failed to call the notary or the subscribing witnesses to P1, P3 to P7. At the end of the plaintiff's case, the defendants who insisted on proof of the said deeds, pointed out to court that they have not been proved and the learned district Judge accordingly made a note to that effect. Thereafter based on the judgment in *Sri Lanka Ports Authority vs Jugolinija*[1] learned District Judge rejected the said deeds and held that the plaintiff's prescriptive possession should also fall as she could not prove the execution of the said deeds.

The learned counsel of the plaintiff has submitted that the error of law in rejecting the deeds of the plaintiff is contrary

to the provision of section 68 of the Partition Law and has completely dominated the learned district Judges thinking in arriving at his conclusion, as it stands repeated at seven places in the judgment, to wit; at pages 387, 392, 394,395,396 and 402 of the brief.

Furthermore the 10th defendant who was the mother of some of the parties who claimed life interest to house No 414 (her matrimonial home) on deed 10 D 1 (P5) that vested title on the plaintiff, had marked the said deed and 8 other documents. Even assuming that the burden cast formally to prove deeds in a partition action cannot be faulted, yet the learned district Judge had totally misdirected himself when he had not considered the evidence of the only surviving subscribing witness to the said deed Somadasa (page 258) whose uncontested testimony was with regard to the due execution of the said deed. This evidence was completely ignored by the learned District Judge who proceeded to arbitrarily dismiss the 10th defendants claim contrary to his own misinterpretation of the law. Moreover, the learned district Judge has failed to appreciate that none of the documents produced by the 10th defendant had been objected to by the contesting defendants.

The aforesaid finding of the learned judge in relation to the want of proof of the documents provided by the plaintiff and the 10th defendant, blatantly contravenes section 68 of the Partition Law which provides that it shall not be necessary in any proceedings under that 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 that deed, or unless the court requires such proof.

Noticeably the only deed that had been so challenged was P3. Even in respect of P3, evidence in rebuttal had been led

through the 10th defendant. This aspect of the case has also not been properly considered by the trial judge.

The execution of documents, required by law to be attested should be proved by calling at least one subscribing witness is contained in section 68 of the Evidence Ordinance that was enacted in 1895. This precedes the Partition Act No. 16 of 1951, Law No 44 of 1973 and Partition Law 21 of 1977. In this connection it is appropriate to refer briefly to the maxims *Lex Posterior derogat priori* and *Leges posteriors priores contrarias abrogant* which respectively mean that later laws repeal earlier laws inconsistent therewith and earlier Act must give place to a later, if the two cannot be reconciled. The maxim *non est novum ut priores leges and posterios* also would be applicable in this context. (see *Cooper Vs Wilson*)[2]

The learned counsel of the contesting defendants has contended that even if the genuineness of a deed had not been impeached in the statement of claim, yet the learned district Judge is entitled to insist on the proof of a deed as he is vested with the discretion to do so under section 68 of the Partition Act. Even though the contention of the learned counsel on this matter is not incorrect, a careful scrutiny of the entire proceedings clearly points to the fact that the learned District Judge had in reality not insisted on the proof of the deeds produced by the plaintiff on his own volition, in the exercise of the discretion vested in him under section 68, but merely as a matter of routine allowed the documents to be marked subject to proof, upon being insisted to that effect by the contesting defendants, without considering the applicable law.

As such it would be seen that the learned judge has manifestly failed in his fundamental duty to properly

investigate title which had resulted in a grave miscarriage of justice. Hence, the impugned judgment and interlocutory decree should necessarily be set aside on this ground alone and accordingly I set aside the same. The learned district Judge is directed to investigate title once again.

I make no order as to costs.

Appeal allowed

Trial de Novo Ordered