

**KARUNARATNE BANDA
VS.
DASANAYAKE**

COURT OF APPEAL.
BALAPATABENDI, J.
BASNAYAKE. J.
CA 760/2002(F).
DC KANDY 12461/P.
MARCH 28, 2005.
JUNE 15, 17, 2005.
FEBRUARY 8, 2006.
MARCH 15, 2006.

Partition Law 21 of 1977-Section 25 - Investigation of Title-Court has to safeguard the interests of others who are not parties? - Paramount duty cast on Court?

The plaintiff - respondent instituted action to partition a land in extent 2 acres, but depicted in the Preliminary Plan as containing an extent of 6 acres. The plaintiff - respondent claimed 1/3 share of the land in extent 6 acres, making use of title deeds, though the share of the land he is entitled to was described as 1/3 share of 2 acres. There was no contest regarding the pedigree. The trial Judge granted the shares as claimed by the plaintiff - respondent. The 6th defendant appealed.

HELD:

1. The trial judge had completely failed to examine the title and satisfy himself that the plaintiff - respondent has made out a title to the share of the land he claimed from the land sought to be partitioned.
2. A partition suit is not a mere proceeding inter - parties to be settled of consent or by the opinion of the Court upon such points as they choose to submit to it in the shape of issues.
3. The Court has to safeguard the interests of others who are not parties to the suit, who will be bound by the decree.
4. The Court should be satisfied that the plaintiff has made out his title to the share claimed by him.
5. In the instant case, the plaintiff - respondent has failed to prove his title to the land to be partitioned whether he is entitled to a share of 1/3 of 6 Acres or 1/3 of 2 Acres.

APPEAL from the District Court of Kandy.

Cases referred to :

1. *Mather vs. Thamothearam Pillai* - 6 NLR 246
2. *Peiris vs Perera* - 1 NLR 362
3. *Gnanapandithen and Another vs. Balanayagam and Another* - 1998 1 Sri LR 391

Manoj Sanjeewa with *Roshan Dayaratne* for 6th defendant - appellant.

A. A. de Silva PC with *Iresha Samaraweera* for plaintiff - respondent.

May 4, 2006.

JAGATH BALAPATABENDI, J.

The Plaintiff - Respondent instituted this action to partition the land called "Dambagahawelahena" of 3 amunas in extent, morefully described in the schedule to the Plaint, and depicted in the Preliminary Plan No. 5075 dated 02.10.1990 made by the Licensed Surveyor R. W. M. Weerakoon (marked as x) consisting of Lots 1, 2, 3, and 4 ; total extent of 6 Acres 1 rood and 4.6 perches.

The 6th Defendant - Appellant being the only contesting defendant had filed his original statement of claim stating that the said Lot 4 in the Preliminary Plan No. 5075 is shown as Lots 2 and 3 of the Plan No. 223 dated 23.08.1970 made by Licensed Surveyor A. B. Kiridena and moved Court to get the said Lot 4 of the Plan 5075 superimposed on Lots 2 and 3 of the Plan No.223, as the said Lot 4 of the Plan No.5075 is not a part of the corpus and it should be excluded from the corpus.

The licensed surveyor Mawalagedera had superimposed the said Plan and it was revealed that the Lot 4 of the Plan No. 5075 does not fall within the Lots 2 and 3 of the Plan 223 as shown in the Plan No.992(6V1) and in the Report marked (6V1a). Thereafter the 6th Defendant - Appellant had filed an amended statement of claim on 20.05.1997 stating that he had been in possession of the said Lot 4 for more than 10 years and had acquired prescriptive title to the said Lot 4, thus prayed for an exclusion of the said Lot 4 from the corpus.

After trial the learned trial judge held with the Plaintiff - Respondent and rejected the claim made by the 6th Defendant - Appellant.

At the hearing of the appeal the main ground urged (among other grounds) by the 6th Defendant - Appellant in his written submissions was that the learned District Judge had totally failed to investigate the title set-up by the Plaintiff - Respondent as regards the corpus described in the title deeds marked and produced at the trial.

It was alleged by the 6th Defendant - Appellant that though the Plaint described the corpus as a land in extent of 3 ammunam, all the title deeds marked and produced (P1 to P7) by the Plaintiff - Respondent at the trial

to establish the title to the corpus, described the corpus as a land in extent of only one ammunam. Hence the Plaintiff - Respondent having produced title deeds (P1 to P 7) relating to a land in extent of one ammunam/ (2 acres) had sought to partition a land in extent of 3 ammunam(6 acres). Further, the Plaintiff - Respondent had claimed a 1/3 share of the land in extent of 3 ammunam paddy sowing, making use of title deeds (P 1 to P7) where the share of the land he is entitled to is described as 1/3 share of one ammunam of paddy sowing. Thus, the Plaintiff - Respondent cannot claim much more than he is entitled to as described in the schedules of the title deeds (P1 to P7).

The 6th Defendant - Appellant further alleged that the land described in the title deeds P1 to P7 is a separate and defined land, separately registered in the Land Registry, as revealed in the title deeds marked and produced as P 1 to P 7. The prior registration and the present registration mentioned in the said deeds are completely different from the folios where the Lispendence has been registered viz : B 218/298 or B 89/249. (A detailed statement of registration, with the folios of the said deeds (P 1 and P7) is given at page 4 of the written submissions filed by the Counsel of the 6th Defendant- Appellant). Therefore, the Counsel of the 6th Defendant - Appellant submitted that the learned District Judge had totally failed to investigate the title, merely because there was no contest regarding the pedigree by the parties at the trial.

It is also alleged that the existence of two different registrations in respect of a land in extent of 3 ammunam/(6 acres) as shown in the schedule to the Plaintiff and a land in extent of one ammunam (2 acres) as shown in the schedules of the title deeds (P 1 to P 7) have not been explained by the Plaintiff-Respondent in his evidence at the trial or in his written submissions filed.

The contention of the Counsel for the Plaintiff - Respondent was that since Northern, Eastern and Southern boundaries of the corpus tally with the title deeds marked and produced as P1 to P7 the corpus has been properly identified. Hence the findings of the learned District Judge was correct.

In reply to the above mentioned contention of the Counsel for the Plaintiff - Respondent, the Counsel for the 6th Defendant - Appellant submitted that mere appearance to tally the three boundaries of the corpus cannot be considered as proper identification of the corpus for the following reasons :

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- (a) The extent of the corpus mentioned in the schedule to the Plaintiff is different to that of the extent of the land mentioned in the title deeds P1 to P7.
 - (b) There is a considerable difference in extents between the land sought to be partitioned viz. 3 ammunam (6 acres) and the land described in title deeds P1 to P7 viz. 1 ammunam (2 acres).
 - (c) The Lispendens of the partition action has been registered in a different folio to that of the title deeds P 1 to P 7. (it is not a case where the Lispendens had been registered in a wrong folio).
 - (d) In view of the above reasons the title deeds marked and produced as P1 to P7 do not establish title to the land depicted in the Preliminary Plan, or the land described in the Schedule to the Plaintiff.

Now I would like to deal with the law relevant to the above mentioned issue.

Section 25 of the Partition Law No.21 of 1977 imposes on the Court the necessity and the obligation to "examine the title of each party" and "shall hear and receive evidence in support thereof."

In the case of *Mather vs. Thamocharam Pillai* it was held that "a partition suit is not a mere proceeding inter-parties, to be settled of consent, or by the opinion of the Court upon such points as they choose to submit to it in the shape of issues. It is a matter in which Court must satisfy itself that the Plaintiff has made out his title, and unless he makes out his title his suit for partition must be dismissed."

In the case of *Peiris vs. Perera* ⁽²⁾ the Supreme Court held that "the Court should not regard a partition suit as one to be decided merely on issues raised by and between the parties, and it ought not to make a decree, unless it is perfectly satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned. **After the Court is satisfied that the Plaintiff has made out his title to the share claimed by him**"

In the case of *Gnanapandithen and Another vs. Balanayagam and Another*⁽³⁾ G. P. S. de Silva C. J. observed that "It seems to me that this is not a case where the investigation of title by the trial judge was merely inadequate. In my opinion there was **total want** of investigation of title. Mr. Samarasekera cited several decisions which have, over the years, emphasized the paramount duty cast on the court by the statute itself to investigate title. It is unnecessary to repeat those decisions here. For the present purpose it would be sufficient to refer to the case of *Mather v. Thamothearam Pillai (supra)* decided as far back as 1903, where Layard, C.J. stated the principle in the following terms :- "Now, the question to be decided in a partition suit is not merely matters between parties which may be decided in a civil action, :.. The court has not only to decide the matters in which the parties are in dispute but to safeguard the interest of others who are not parties to the suit, who will be bound by a decree for partition "Layard, C.J. stressed the importance of the duty cast on the Court to satisfy itself "that the plaintiff has made out a title to the land sought to be partitioned, and that the parties before the court are those solely entitled to such land." (emphasis added.) This the trial judge in the case before us completely failed to do. On a consideration of all the matters set out above I am satisfied that a **miscarriage of justice** has actually occurred in the present case. The Court of Appeal has not addressed itself to these relevant matters which vitiate the judgment and the interlocutory decree based thereon."

In the instant case the Plaintiff - Respondent has failed to prove his title to the land sought to be partitioned whether he is entitled to a share of 1/3 of 3 ammunam/(6 acres) as depicted in the Preliminary Plan or a share of 1/3 of one ammunam (2 acres) as asserted by the Plaintiff-Respondent on the title deeds P1 to P7.

For the reasons mentioned above I agree with the contention of the Counsel for the 6th Defendant-Appellant that **the Learned District Judge had completely failed to "examine the title" and satisfy himself that the Plaintiff - Respondent has made out a title to the share of the land he claimed from the land sought to be partitioned.**

In the above mentioned circumstances I set aside the judgment, the interlocutory decree entered and dismiss the action of the Plaintiff-Respondent with costs of Rs.5000.

BASNAYAKE, J. - *I agree.*

Appeal allowed.