GUNASINGHE
vs
PODIAMMA AND OTHERS

COURT OF APPEAL
ABDUL SALAM, J.
CA 1782/2002 (REV.)
DC KULIYAPITIYA 7466/P
AUGUST 25, 2008

Partition Law - Part of a larger land partitioned? - Discrepancy in the extent in the plaint and in the preliminary plan - Investigation of title - Duty of Court - Proof of original ownership - Degree of proof? - Lis pendens.

The petitioner seeks to revise the judgment on the ground that, the District Court had failed to take into consideration the fact that what was sought to be partitioned was a part of a larger land, and the discrepancy in the extent of the subject matter in the plaint and the preliminary plan is about ¾ of an acre and therefore it cannot be treated as marginal or negligible and that the registration of the lis pendens being in respect of an extent of 3½ Acres, the action could not have proceeded without any amendment of the plaint.

Held:

(1) A perusal of the preliminary plan clearly shows that the boundaries of the subject matter as described in the said plan are identical to that of the boundaries set out in the deeds produced by the plaintiff and the land set out in the plaint.

(2) The indefinite or undefined eastern boundary on the preliminary plan would not necessarily mean that the land surveyed for purpose of the action is only a portion of a larger land.

Per Abdul Salam, J

> "It is trite law that proof of original ownership of a land is not always placed at a very high degree and as such the plaintiff should have been shown some leniency relating to the proof of original ownership.

APPLICATION in Revision from an order of the District Court of Kuliyapitiya.

Cases referred to:-

1. *Brampy Appuhamy vs. Mendis Appuhamy* - 60 NLR 337
2. *W. Uberis vs. Jayawardane* - 62 NLR 217
3. *K. M. G. D. Dias vs. Kariyawasam Majuwana Gamage* - CA 897/92

Dr. Jayantha de Almeida Gunaratne PC with *Ayendra Wickremasekera* and *Lasith Chaminda* for petitioner.

M. C. Jayaratne with *N. Senaratne* for 1st and 2nd respondents.

Cur.adv.vult

February 10, 2009

ABDUL SALAM, J.

This is an application made in revision to have the judgment and interlocutory decree dated 2nd May 2002 set aside and/or revised or to have the plaintiffs action dismissed and/or for an order directing a retrial of the case.

The plaintiffs instituted the partition action in respect of a land called Mahawatta alias Innawatta alias Erumaliyadda which was depicted for the purpose of the partition action by preliminary plan No. 620 prepared by R. A. Navaratne, Licensed Surveyor.

Admittedly, the subject matter is depicted as lots 1 and 2 in plan No. 620 aforesaid. The learned district Judge having examined the deeds produced by the parties and the admissions made by them as regards the identity of the corpus, arrived at the conclusion that the subject matter of the partition action comprises of lots 1 and 2 depicted in plan No. 620.

Quite contrary to the admissions recorded at the instance of the parties, the petitioner now seeks to resile from

the agreement and argue that the learned District Judge has failed to take into consideration the fact that what was sought to be partitioned was a part of a larger land. Hence, the petitioner contends that the District Judge ought to have proceeded to take steps to have the correct subject matter depicted in reference to a different survey plan and not entered an interlocutory decree to partition the land.

The petitioner has urged that the discrepancy in the extent of the subject matter as given in the plaint and the preliminary plan is about ¾ of an acre and therefore cannot be treated as a marginal or negligible inconsistency. It is further submitted on behalf of the petitioner that the registration of the *lis pendens* being in respect of an extent of 3 ½ acres, the action could not have proceeded without any amendment of the plaint and a fresh *lis pendens*. The learned President's Counsel of the petitioner relies on the judgments of *Brampy Appuhamy vs Mendis Appuhamy*[1] *W. Uberis vs. Jayawardena*[2] and *K. M. G. D. Dias vs. Kariawasam Majuwana Gamage*[3] to drive home his point that the learned district judge should not have entered interlocutory decree to partition the subject matter.

In the case of *Brampy Appuhamy vs Mendis Appuhamy (Supra)* the corpus sought to be partitioned was described in the plaint as a land about 6 acres in extent and the communication issued to the surveyor was to survey a land of that extent. However the surveyor could survey a land of only 2 acres and 3 roods. Interlocutory decree was entered in respect of the land of 2 acres and 3 roods, without any question being raised by the parties as to the extensive inconsistency between the extent given in the plaint and that which was shown in the plan made by the surveyor. It was held that the court had acted wrongly in proceeding to trial in respect of what appeared to be a portion only of the land described in the plaint.

In the case of *W. Uberis vs. Jayawardena (supra)* the plaint in the partition action was amended so as to substitute a new corpus for the one described in the first plaint and it was held that a fresh lis pendens would be necessary to maintain the action.

In the case of *K. M. G. D. Dias vs Kariawasam Majuwana Gamage (Supra)* the plaintiff sought to partition a land in extent 4 acres 3 roods 12.1 perches being in extent after excluding 5 acres 4.9 perches which was acquired by the State from and out of a larger land in extent 9 acres 3 roods 17 perches. The *lis pendens* registered was in respect of a larger land in extent 9 acres 3 roods 17 perches, which was inclusive of the extent of 5 acres 4.9 perches that formed the portion said to have been acquired by the State. The description of the land even in the plaint was that of the larger land that existed prior to the acquisition. It was held that the District Judge had committed a cardinal error in ordering a partition in respect of the land which is a portion of the larger land.

The facts however in this case are quite different. The plaintiff in his plaint sought to partition a land in extent of about 3½ acres the boundaries of which are described to be on the North, East and West by the lands belonging to Mudalihamy Mahathmaya and others and on the South by lands owned by Sundara Bandara and others. At this stage it is of paramount importance to note the boundaries described in the preliminary plan No. 620. A perusal of the said plan clearly shows that the boundaries of the subject matter as described in the said plan are identical to that of the boundaries set out in the deeds produced by the plaintiff and the land set out in the schedule to the plaint.

Even the document marked P1 sets out the boundaries of the subject matter as the lands belonging to Mudalihamy

Mahathmaya and others on the North, East and West and by lands owned by Sundara Bandara and others on the South. Quite consistent with the boundaries given in P1, the documents marked as P2, P3, P4, P5 and P6 describe the boundaries of the subject matter in the same manner as has been described in P1 and also in the plaint. The lis pendens also contain the identical boundaries given in the plaint.

In the circumstances, the subject matter of the partition action cannot be said to be a portion of a larger land as has been contended by the petitioner. The indefinite or undefined eastern boundary on the preliminary plan would not necessarily mean that the land surveyed for purpose of the action is only a portion of a larger land, as the petitioner had attempted to make out. Consequently, the discrepancy cannot be considered as being so material, particularly in view of the unequivocal admissions made by the petitioner and other parties as to the identity of the corpus.

The learned trial Judge in his judgment has carefully considered the contents of the deeds produced on behalf of the petitioner prior to his concluding that the land dealt in the deeds produced by them are not applicable to the subject matter. Even as regards the original owner referred to by the petitioner the learned District Judge has given cogent reasons, before he rejected the version of the petitioner. According to the learned District Judge the land referred to in the deeds produced by the petitioner is different from the land sought to be partitioned by the plaintiff. Further the surname of Punchirala referred to by the petitioner is totally different from the surname of Punchirala referred to in the plaint as the original owner.

It is trite law that proof of original ownership of a land is not always placed at a very high degree and as such the plaintiff should have been shown some leniency relating

to the proof of original ownership. In any event 14th to 17th defendants have failed to establish the devolution of title to the corpus and also failed to prove prescription accompanied by an element of ouster by an overt act.

For the foregoing reasons it is my view that the revision application of the petitioner should fail. Hence I make order accordingly.

I make no order as to costs.

Application dismissed.