SOMASIRI
vs.
FALEELA AND OTHERS

COURT OF APPEAL
SOMAWANSA J(P/CA)
BASNAYAKE J.
C. A. No. 497/2004(REV.)
D. C. GALLE No. 13105/P
FEBRUARY 10, 14, 2002

Partition Law 21 of 1977 - Section 25(1), 48, 67 - Investigation of title imperative - Application in Revision - No appeal lodged - Could the application be entertained ? - Evidence Ordinance Section 44.

The 8th Defendant Petitioner sought to revise the Judgment of the Trial Court, on the basis that Court had not investigated title. Court over-ruled the preliminary objection and held that it has power to exercise revisionary jurisdiction having regard to the exceptional circumstances pleaded.

Held :

(i) The error had arisen owing to the failure of the Trial Judge to investigate title. The trial Judge had without examining the deeds personally followed the easy way by allotting the shares as prayed for in the Plaint, and had disregarded the amended statement of claim of the Petitioner.

(ii) The trial Judge must satisfy himself by personal Inquiry that the Plaintiff has made out a title to the land sought to be partitioned and that the parties before Court are solely entitled to the land.

(iii) While it is indeed essential for parties to a partition action to state to Court the points of contest inter-se and to obtain a determination on them the obligations of the courts are not discharged unless the provisions of Section 25 of the Partition Law are complied with quite independently of what parties may or may not do.

APPLICATION in Revision from the Judgement of the District Court of Galle.

Cases referred to :

1. *Cynthia de Alwis* vs. *Marjorie de Alwis and others*- 1997 3 Sri LR 113
2. *Kumarihamy* vs. *Weeragama* - 43 NLR 265

3. *Mather* vs. *Thamotharampillai* - 6 NLR 246
4. *Thayalnayagam* vs. *Kanthiresa Pillai* - 8 CWR 152
5. *Juliana Hamine* vs. *Don Thomas* - 59 NLR 546

W. Dayaratne for 8th Defendant Petitioner.

Bimal Rajapakse for Plaintiff Respondent.

cur. adv. vult.

March 14, 2005

ERIC BASNAYAKE J.

This is an application in revision by the 8th defendant petitioner (8th defendant) to revise the judgment of the learned District Judge of Galle dated 02.10.2003. By this judgment the court had ordered a partition as prayed for by the plaint. The plaintiff had given 19860/166200 shares to the 8th defendant in the plaint. In the judgment, the 8th defendant had been given the same share. The 8th defendant complains that he was deprived of 1.3 perches of land and the buildings No. 1,2 and 9 in the preliminary plan marked 'X'.

This court issued notice on the parties and after the objections and the counter objections were filed, a preliminary objection was taken by the plaintiff disputing the rights of the 8th defendant to invoke revisionary powers of the Court of Appeal without exercising the right of appeal in terms of section 67 of the Partition Act. The preliminary objection was overruled by this Court and held that it has power to exercise revisionary powers having regard to the exceptional circumstances of this application. The counsel thereafter agreed to dispose of this inquiry by way of written submissions. Those submissions have been tendered now.

The facts of this case are as follows. The plaintiff filed this case in the District Court of Galle on 29.03.1996 to have the land described in paragraph 2 to the plaint partitioned. In the plaint the plaintiff allotted 19860/166200 shares to the 8th defendant. The defendant obtained this share by deed 8 V 1. The defendant filed a statement of claim on 11.10. 1999. By this statement the 8th defendant claimed the rights he acquired through deed '8V1', the buildings No. 1 and 9 and the area covered by the building bearing the assessment No. 441 in plan 'X'. The building bearing the assessment No. 441 is identified as building No. 6 in the plan 'X'. At the preliminary survey , the 8th defendant claimed buildings ,1, 2 and 9, which is a well. The assessment number of building No. 1 is No. 449. There is no

separate assessment number for building No. 2. The buildings 1 and 2 are adjacent to each other. The plaintiff claimed buildings No. 1 and 2. There were no other claimants for building No. 9 before the surveyor , other than the 8th defendant.

At the commencement of the trial there was no dispute with regard to the corpus and the pedigree of the plaintiff. The dispute was with regard to the buildings 1, 2 and 9 over which issues 1 and 3 were raised. While the case was proceeding, the 8th defendant filed an amended statement of claim. In the amended statement the 8th defendant claimed 1.3 perches in addition to what he claimed through deed 8V1. This 1.3 perches was purchased from the 1st defendant prior to the institution of this action through deed No. 920 and marked '8V2'. The 8th defendant claims that he owned building bearing assessment No. 449 with an area of 1.3 perches, through this deed. The building bearing assessment No. 449 is shown in plan 'X' as building No. 1 which the 8th defendant had already claimed in the original statement. In evidence too the 8th defendant (through his witness) claimed 6.62 perches over which there is no dispute and 1.3 perches and building No. 1 in plan 'X' (assessment No. 449) through deed '8 V 2'. He also claimed the well which is No. 9 in plan X. The 8th defendant did not claim building bearing assessment No. 441 (No. 6 in plan 'X') either in the amended statement of claim or in oral evidence. It appears to me that 441 is a typing error as there is no basis to claim building No. 441. The correct No. appears to be No. 449 which is building No. 1 in the plan X.

The learned District Judge identified the main dispute in this case as involving buildings No. 1, 2, 6, 7 and 9. The learned Judge states that the 8th defendant failed to superimpose the plan (No. 2549) showing the lands that he had purchased on plan 'X'. Therefore he said that the lands referred to by deeds 8V 1 and 8 V 2 fall outside the corpus. Hence the learned Judge finds that the 8th defendant failed to prove the ownership to buildings No. 1 and 2. The learned counsel for the plaintiff too submits in the written submissions tendered to court that the burden was on the 8th defendant to prove that the lands purchased by the 8 th defendant on deeds '8V1' and '8V2' formed part of the corpus and the 8th defendant failed to discharge this burden. The learned counsel further submits that this is a frivolous application which should be dismissed with heavy costs.

The 8th defendant produced two deeds marked '8V1' and '8V2' to prove his case. By considering the deed 8V1, it may be construed that the plaintiff had given the 8th defendant 19860/166200 shares in the plaint. The learned District Judge too had given 19860/166200 shares to the 8th defendant in the judgment on the same basis. That is by regarding the 8th defendant as having obtained a share through this deed. Therefore, it becomes clear that the learned Judge erred in stating that the land referred to by deed 8V1 does not form part of this land.

The 8th defendant claimed 1.3 perches together with building No.1 through deed marked 8V2. The learned Judge states that the land referred to by this deed too does not form part of the corpus. By deed 8V2 the 8th defendant purchased 1.3 perches of land together with building No. 449 from the 1st defendant in 1995. This action was filed in 1996. The building 449 is shown in the preliminary plan marked X as building No. 1. The 8th defendant claimed buildings No. 1, 2 and 9 before the surveyor. The plaintiff too claimed buildings 1 and 2 before the surveyor. The plaintiff said in evidence that he had no possession. Although, the 8th defendant does not say anything about possession, one can assume that the 8th defendant had been in possession, considering the fact that the 8th defendant purchased this building from the 1st defendant. The learned counsel for the 8th defendant states in the written submissions filed that the 8th defendant's son constructed a building and has a barber salon in that premises. This fact had not been challenged by the plaintiff. It is against all these unchallenged evidence that the learned Judge states that the land referred to in deed 8V2 outside the corpus. I am of the view that the learned Judge erred in this respect too.

The error had arisen owing to the failure of the learned District Judge to investigate the title of the parties which he was required to do in terms of section 25(1) of the Partition Law No. 21 of 1977. The section provides that :-

> "On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, ***the court shall examine the title of each party*** and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made" (emphasis is mine).

Justice F.N.D. Jayasuriya observed in Cynthia de Alwis vs. Marjorie de Alwis and two others[1] as follows :

> **"A District Judge trying a partition action is under a sacred duty to investigate into title on all material that is forthcoming at the commencement of the trial.** His Lordship cited a dicta by Justice De Kretser in Kumarihamy vs. Weeragama [(2)] where His Lordship states thus "A number of decisions of this court have emphasized the duty of the court to investigate title fully and not to treat a partition action as an action inter partes. His Lordship also quoted Chief Justice Layard in Mather Vs. Thamotharam Pillai[3] that ***"the trial judge must satisfy himself by personal inquiry that the plaintiff has made out a title to the land sought to be partitioned and that the parties before court are solely entitled to the land".*** In the exercise of this sacred duty to investigate title a trial judge cannot be found fault with for being too careful in his investigation. He has every right even to call for evidence after the parties have closed their cases - Thayalnayagam vs. Kanthiresa Pillai. [(4)]

His Lordship L. W. De Silva A. J. held in Juliana Hamine vs. Don Thomas [(5)] that ***"a partition decree cannot be the subject of a private arrangement between parties on matters of title which the court is bound by law to examine. While it is indeed essential for parties to a partition action to state to the court the points of contest inter se and to obtain a determination on them, the obligations of the courts are not discharged unless the provisions of section 25 of the Act (same as section 25 of the Partition Law) are complied with quite independently of what parties may or may not do. The interlocutory decree which the court has to enter in accordance with its findings in terms of section 26 of the Act is final in character since no interventions are possible or permitted after such a decree. There is therefore the greater need for the exercise of judicial caution before a decree is entered. The court of trial should be mindful of the special provisions relating to decrees as laid down in section 48 of the Act. According to its terms, the interlocutory and final decrees shall be good and sufficient evidence of the title of any person as to the interests awarded therein and shall be final and conclusive for all purposes against all persons, whomsoever, notwithstanding any omission or defect of procedure or in the***

proof of title adduced before the court, and notwithstanding the provisions of section 44 of the Evidence Ordinance, and subject only to the two exceptions specified in sub-section 3 of section 48 of the Act".

It is unfortunate that the learned District Judge, without examining the deeds personally, followed the easy way by allotting the shares as prayed for in the plaint and fell into this grave error in concluding that the lands referred to in deeds 8V1 and 8V2 did not form part of the corpus. The plaintiff had given the due share to the 8th defendant on deed 8V1. The 8th defendant had acquired building No. 1 (assessment No. 449) by deed 8V2 and claimed same in the original statement filed on 11.10.1999. Although the 8th defendant was entitled to the soil as well (1.3 perches) by this deed, he had failed to claim the same in the original statement. This he has done in the amended statement of claim filed thereafter. The 8th defendant's amended statement of claim was allowed after an inquiry, subject to costs. The learned Judge by holding that the lands referred to by the deeds 8V1 and 8V2 do not form part of the corpus deprived the 8th defendant of what he acquired by deed 8V2; that is 1.3 perches of land and the building No. 1 which he is occupying. The 8th defendant is therefore entitled to the share allotted to him in the judgment namely 19860/166200 and 1.3 perches of the soil.

The 8th defendant acquired this 1.3 perches of land from the 1st defendant. Therefore, the 1st defendant's share should be less 1.3 perches. This 1.3 perches is the area that is covered by the building bearing the assessment No. 449 (building No.1 in plan X). Therefore, it is the 8th defendant who is entitled to this building. The 8th defendant was the only claimant before the surveyor of the well which is numbered as No. 9 in plan X. The plaintiff who was present before the surveyor and claimed buildings No. 1 and 2 did not claim the well. There is no evidence that it was the plaintiff who constructed it. There is no evidence of the plaintiff even using this well. The plaintiff had no possession in the land. Therefore, there is no basis to give the well to the plaintiff. On the material before court, it is the 8th defendant to whom this well should have been given. Therefore, I am of the view that it is the 8th defendant who is entitled to the well.

The building No. 2 appears to have had no separate assessment number. It appears that it is part of the building No. 449. The building No. 2 was claimed by the 8th defendant and the plaintiff. If the plaintiff had no possession in the land, it was the 8th defendant who occupied this building

and therefore buildings No. 1, 2 and 9 should have been given to the 8th defendant. In view of the foregoing reasons I allow this application by the 8th defendant in terms of prayer (C) to the petition with costs fixed at Rs. 5,000.

ANDREW SOMAWANSA J. (P/CA) — I agree

Application allowed.