PIYASEELI
v
MENDIS AND OTHERS

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA, J.
C.A. 203/90 (F)
D.C.MATARA 10449/P
OCTOBER 4 AND 11, 2002
MAY 12, 2003

Partition Law No. 21 of 1977 – Sections 25 and 26 – Investigation of title – Main function – Failure – Civil Procedure Code- – Failure to comply with section 187 – Devoid of reasons – Can a partition decree be the subject of a private agreement between parties? Evidence Ordinance – Partition Act, No. 16 of 1951 – Section 25 – Partition Ordinance No. 10 of 1863 – Section 9 and 48.

Held:

(i) Main function of the trial Judge in a partition action is to investigate title, it is a necessary prerequisite to every partition action.

(ii) Partition decrees cannot be the subject of a private agreement between parties on matters of title which the Court is bound by law to examine. There is a greater need for the exercise of Judicial caution before a decree is entered. "On an appeal in a partition action if it appears to the Court of Appeal that the investigation has been defective it should set aside the decree and make an order for proper investigation."

APPEAL from the Judgment of the District Court of Matara.

Cases referred to:

1 *Juliana Hamine* v *Don Thomas* – 59 NLR 549
2 *Sirimalie* v *D.J.Pinchi Ukku* – 60 NLR 448 at 451
3 *P.M.Cooray* v *Wijesuriya* – 62 NLR 158 at 160-161
4 *Mohamedaly Adamjee* v *Hadad Sadeen* – 58 NLR 217 at 226

Rohan Sahabandu for defendant-appellant.

Hemasiri Withanachchi for plaintiffs-respondents.

Cur.adv.vult

November 14, 2003

SOMAWANSA, J.

The plaintiffs-respondents instituted this partition action seeking a partition of the land called and known as 'Gorakagahawatta' alias 'Bakmeegahawatta' in extent of 2 1/2 kurunis kurakkan sowing more-fully described in the schedule to the plaint. The position of the plaintiffs-respondents was that the original owner of the land sought to be partitioned was Sedohamy and his rights, title and interest devolved on the 1st and 2nd plaintiffs-respondents, 1st to 6th and 8th to 11th defendants-respondents and the 7th defendant-appellant.

The contesting 7th defendant-appellant while denying the pedigree of the plaintiff-respondent took up the position that the preliminary plan No.1845 dated 23.03.81 prepared by N.Wijeweera, Licensed Surveyor marked X depicts 3 lands and that the original owner of Lot 01 depicted in the said plan marked X was one Jasin Aratchchige Laishamy and the original owner of Lots 2 and 3 depicted in the said plan marked X was Jasin Aratchchige John Appu. On this basis the contesting 7th defendant-appellant disputed the corpus to be partitioned and also the pedigree of the plaintiffs-respondents and went on to plead that the 7th defendant-appellant is in possession and occupation of the land sought to be partitioned for well over 10 years and that the plaintiffs-respondents nor her predecessors in title ever had possession of the same.

The parties went to trial on 18 points of contest and at the conclusion of the trial the learned Additional District Judge by his judgment dated 22.01.90 held with the plaintiffs-respondents. It is from the said judgment that the contesting 7th defendant-appellant has preferred this appeal.

At the hearing of this appeal, it was contended by the counsel for the 7th defendant-appellant that the judgment of the learned Additional District Judge is devoid of reasons and an analysis of the evidence led, in that the learned District Judge has considered only the documents marked by the plaintiffs-respondents and no reference made either to the documents marked by the 7th defendant-appellant or to the documents marked and tendered by the other defendants-respondents. It appears to me that there is force in this argument.

On an examination of the judgment it could be seen that the learned Additional District Judge does refer to one document marked by the 7th defendant-appellant and that being 7V7. Except for this document the learned Additional District Judge does not refer to any other documents marked either by the 7th defendant-appellant or the other defendants-respondents, when in fact 9V1 to 9V7, 10V1 to 10V3, 14V1 and 7V1 to 7V8 were marked at the trial.

In fact even as regards the documents marked by the plaintiff-respondents, the learned Additional District Judge has had only a cursory look at them. It is to be seen that in the two page judgment of the learned Additional District Judge there is no proper investigation as to the identity of the corpus or as to the title of parties, when there was a contest among them as to the corpus as well as the pedigree. Learned Additional District Judge himself says that not only the 7th defendant-appellant but also the 1st to 6th, 9th, 15th and 17th defendants-respondents too have a contest with the plaintiff-appellant in respect of the pedigree. However it is to be noted that no reference is made to that contest in the judgment but having come to a finding as to who the original owner was the learned Additional District Judge had proceeded to accept the pedigree of the plaintiff-respondent. It is also interesting to note that as for possession of the land to be partitioned, the learned Additional District Judge has come to a finding that the fact that the plaintiff-respondent claimed the coconut husks that were on the land before the Surveyor was sufficient to establish that the plaintiff-respondent had rights to the corpus and was in possession of the same.

It is to be seen that the learned Additional District Judge has not dealt with or considered the right, title and interest of the parties and has failed to evaluate the evidence adduced on behalf of the 7th defendant-appellant as well as the other defendants-respondents and thereby seriously misdirected himself. It is well established that the main function of the trial Judge in a partition action is to investigate title. Our Courts have repeatedly pointed out that investigation of title by the Court of first instance is a necessary pre-requisite to every partition action and that inadequacy of the investigation of title by the trial Court as in the instant case is a ground on which Court of Appeal must necessarily set aside the decree and remit the case to the trial Court for a proper investigation of title.

On an examination of the evidence led and also the judgment of the learned District Judge, I would hold that the learned District Judge has failed to comply with the provisions of section 187 of the Civil Procedure Code as well as section 25 of the Partition Law, No.21 of 1977 and has failed to investigate title.

Section 187 of the Civil Procedure Code reads as follows:

"The judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision; and the opinions of the assessors (if any) shall be prefixed to judgment and signed by such assessors respectively".

Section 25 of the Partition Law reads as follows:

"..... 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 land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made."

In the case of *Juliana Hamine* v *Don Thomas* (1) at 549 per L.W. de Silva, A.J.

"We are of the opinion 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 Court are not discharged unless the provisions of section 25 of the Act 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."

In the case of *Sirimalie* v *D.J.Pinchi Ukku*(2) at 451 *per* Sansoni, J.

"It should be remembered that section 25 of the Partition Act,

No.16 of 1951, requires the Court to "examine the title of each party and hear and receive evidence in support thereof, and try and determine all questions of law and fact arising in regard to the right, share and interest of each party". In this case the trial judge has failed to perform these duties and it is not too late for us to require him to perform them at another trial."

In the case of *P.M.Cooray* v *Wijesuriya* (3) at 160/161 *per* Sinnatamby, J.

" It is a common occurrence for a deed to purport to convey either much more or much less than what a person is entitled to. Before a Court can accept as correct a share which is stated in a deed to belong to the vendor there must be clear and unequivocal proof of how the vendor became entitled to that share. How then is the proof to be established in a Court of Law? It only too frequently happens, especially in uncontested cases, that the Court is far from strict in ensuring that the provisions of the Evidence Ordinance are observed; and when this happens where there is a contest in regard to the pedigree, as in the present case, the inference is that the Court has failed totally to discharge the functions imposed upon it by section 25 of the Act. It cannot be impressed too strongly that the obligation to examine carefully the title of the parties becomes all the more imperative in view of the far reaching effects of section 48 of the new Act which seems to have been specially enacted to overcome the effect of the decisions of our Courts which tended to alleviate and mitigate the rigours of the conclusive effect of section 9 of the repealed Partition Ordinance No.10 of 1863."

In the case of *Mohamedaly Adamjee* v *Hadad Sadeen*(4) at 226 per Lord Cohen.

"On an appeal in a partition action if it appears to the court of appeal that the investigation has been defective it should set aside the decree and make an order for proper investigation."

In the instant case as stated above, the learned District Judge has failed to investigate the title of the parties to the action. In the circumstances, the judgment of the learned Additional District Judge cannot stand. I am mindful of the fact that the action has

been filed in 1980. However to embark on an investigation of title of the parties at this stage would be to take upon myself the function of the trial judge. Hence in the circumstances, I have no other option but to give directions for a re-trial.

In view of the above reasons, I would allow the appeal of the 7th defendant-appellant and set aside the judgment of the learned Additional District Judge and direct a trial *de novo*. The learned District Judge is directed to hear and conclude this action as expeditiously as possible. The plaintiffs-respondents will pay Rs 5000/- as costs of this appeal.

The Registrar is directed to send the case record to the appropriate District Court forthwith.

DISSANAYAKE, J. - I agree.

Appeal allowed.
Trial de novo ordered.