SUMANAWATHIE
v
BANDIYA AND OTHERS

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA, J.
C.A. 500/94(F)
D.C. ANURADHAPURA 160 P
AUGUST 1, 2003
SEPTEMBER 11, 2003

Partition Law, No. 21 of 1977– Section 12(1) – Lis Pendens Registration with no reference to prior Registration – Is it defective? Non Registration of lis pendens – Could the Judgment be attacked on this issue? Possession of a co-owner – Adverse possession – Ouster – Primary facts – findings – not lightly to be disturbed

Plaintiff-respondent instituted action to partition the land in question. The main contention was whether the original owner was "N" as averred by the plaintiff or "B" as pleaded by the 2nd defendant-appellant. The learned District Judge held with the plaintiff-respondent.

It was contended that, registration of the *lis pendens* is defective and the failure to comply with section 12(1) is fatal.

Held :

(i) No issue has been settled on defective *lis pendens* registration or failure to comply with section 12(1). No questions have been put to the plaintiff-respondent on these two issues.

(ii) There is no provision in the Partition Law for the dismissal of an action merely on the ground that the *lis pendens* has not been registered in the correct folio.

(iii) The 2nd defendant-appellant is a party to the action, and no prejudice has been caused to her by the *lis pendens* registration being defective or non compliance with section 12(1).

(iv) On the question of fact, as to who is the original owner and who is in possession -

Per Somawansa, J.

"In deciding these questions of fact the learned District Judge was in a better position than me and had the advantage of seeing, hearing and observing the demeanour of the witnesses who were called to testify to the matters in issue".

(v) The possession by a co-owner enures to the benefit of the co-heirs. It is not possible for him to put an end to that possession by any secret intention in his mind.

APPEAL from the Judgment of the District Court of Anuradhapura.

Cases referred to:

1. *Don Sadiris* v *Heenhamy* – 68 NLR 17
2. *Seneviratne* v *Kanakaratne* (1937) – 39 NLR 272
3. *Victor Perera* v *Don Jinadasa* – 45 NLR 45
4. *Rasiah* v *Thambipillai* – 69 CLW 57
5. CA 287/82(F) – D.C.Gampaha No.22610/L – CAM 5.12.1988
6. *Sideris* v *Simon* – 46 NLR 273
7. *Maria Perera* v *Albert Perera* – 1983 2 Sri LR 339
8. *Corea* v *Iseris Appuhamy* –-15 NLR 65(PC)
9. *Fradd* v *Brown & Co.Ltd,* 20 NLR 282
10. *Alwis* v *Piyasena Fernando* –-1993 1 Sri LR 320

Mahinda Ralapanawa for 2A defendant-appellant
Rohan Sahabandu for plaintiff-respondent.

Cur.adv.vult

March 19, 2004

SOMAWANSA, J.

The plaintiff-respondent instituted the instant partition action in the District Court of Anuradhapura to partition the land called and known as "Pahala Elapatha" morefully described in the schedule to the plaint.

The position taken by the plaintiff-respondent was that Wannihamy Wawlekam and his predecessors in title had possessed the land sought to be partitioned for well over 150 years and on his death his four children Mudiyanse, Kapuru Banda, Mutu Menika and Neelamma possessed the same. On their death their children inherited the said land and majority of them by deed No.4543 dated 05.05.1970 marked P1 conveyed 11/12 shares of the land to the plaintiff-respondent and the 1st defendant-respondent thus each being entitled to 11/24 shares and the 2nd defendant-appellant to the balance 2/24 shares.

The contesting 2nd defendant-appellant's position was that the original owner of the land to be partitioned was one Appuralage Banda and on his death his rights devolved on his three children Wannihamy Wewlekam, Herath Hamy and Tikirihamy each being entitled to 1/3 share. The 2nd defendant-appellant accepted the devolution of title of Wannihamy Wewlekam's share as shown in the plaintiff-respondent's pedigree. As for Herath Hamy's share the position of the 2nd defendant-appellant was that his rights devolved on his children Mutu Menike and Tikiri Banda who became entitled to 1/6 share each and Tikirihamy's share devolved on his 5 children each becoming entitled to 1/18 share.

The 2nd defendant-appellant averred that his mother Neelamma acquired prescriptive rights to the entire land sought to be partitioned and on her death the said land was possessed by Somawathi, Tikiri Banda and the 2nd defendant-appellant and as Somawathi, and Tikiri Banda left the village he alone possessed and occupied the whole land thereby acquiring prescriptive title to the whole land. In the premiss, he prayed for the dismissal of the plaintiff-respondent's action and that he be declared entitled to the land in suit.

Parties went to trial on 30 points of contest. The main contest was whether the original owner was Wannihamy Wewlekam as averred by the plaintiff-respondent or Appuralalage Banda whose rights devolved on his 3 children as pleaded by the 2nd defendant-appellant.

At the conclusion of the trial, the learned District Judge by his judgment dated 12.01.1994 held with the plaintiff-respondent. It is from the said judgment that the 2(a) defendant-appellant has lodged this appeal.

At the hearing of this appeal, it was contended by the counsel for the 2(a) defendant-appellant that the *lis pendens* has been registered in a new folio with no reference to the folios on which the transfer deed has been registered and that the lis pendens application has been submitted with no prior registration reference and in fact even in the schedule of the said application there are no prior registration details. In the circumstances, he submits that as the *lis pendens* has been registered with no reference to any prior registration details the *lis pendens* registration is defective. Furthermore, the plaintiff-respondent has failed to file the report of the Attorney with regard to the *lis pendens* registration in terms of Section 12(1) of the Partition Law which is also a mandatory requirement. Therefore he submits that in view of the defective *lis pendens* registration and failure to comply with the mandatory requirement of section 12(1) of the Partition Law the judgment cannot stand. To substantiate the said argument counsel has cited two decisions. However I am unable to agree with the above submission for defective *lis pendens* registration or the failure to comply with the requirement of section 12(1) of the Partition Law is not a ground to set aside the judgment in appeal.

On an examination of the proceedings, I find that no issue has been settled on these two points, viz. defective *lis pendens* registration and the failure to comply with the requirement of section 12(1) of the Partition Law. No questions have been put to the plaintiff-respondent on these two issues. Though the counsel for the 2(a) defendant-appellant tried to make out that attention of Court was invited to the said non-compliance in the oral submissions of the counsel for the 2(a) defendant-appellant and that the learned District Judge has failed to consider this matter in his judgment. All

what the counsel has stated in his oral argument is as follows:

"බෙදුම් ආඥා පනත අනුව මෙම නඩුව ඉදිරිපත් කර තිබෙනවා. බෙදුම් ආඥා පනත අනුව නඩුවක් ඉදිරිපත් කිරීමට ප්‍රථම පෙලපත ඉදිරිපත් කළ යුතු වෙනවා. ඒ වශයෙන් නිතියෙන් දක්වා ඇති පරිදි ප්‍රතිපාදන අනුව එකි ඉඩමට අදාල ලිස්පෙන්ඩනයක් ඉඩම් ලියා පදිංචි කිරීමේදි ලියාපදිංචි කළයුතු වෙනවා. මෙම කරුණු දෙක බෙදුම් නඩුවක නිවැරදි කරුණු දෙකක් වශයෙන් පදහන් වෙනවා. පැමිණිල්ලක් සමහ ඉදිරිපත් කර ඇති පෙලපත අසම්පූර්ණ පෙලපතක් නිසා මෙම නඩුවේදි නිතිමය අවශ්‍යතාවයක් ඇතුලත් කර නැති බව මා මුලිත්ම ගෞරවයෙන් පදහන් කර සිටිනවා'" 80

The reference to due registration of *lis pendens* by the counsel appear to be only a passing reference to provisions that should be complied with in the Partition Law. However there is no allegation or reference at all by the counsel that in the instant action registration of his *lis pendens* is defective or that provision in section 12(1) has not been complied with. The first decision cited by counsel for the 2(a) defendant-appellant is the decision in *Don Sadiris* v *Heenhamy*[1] the facts were as follows:

"In the course of the trial counsel for some of the contesting defendants raised two further points, i.e, whether the lis pendens had been duly registered, and, if not, whether the plaintiff could maintain this action. The learned District Judge held that the *lis pendens* was not duly registered and for this reason dismissed the plaintiff's action. The plaintiff has appealed". 90

Per Sirimane, J. at p. 19:

"In my view, an action should not be dismissed merely because the *lis pendens* has been registered in the wrong folio. When it is found in the course of a trial that the *lis pendens* has been incorrectly registered, the proper procedure is to take the case off the trial roll and offer the plaintiff an opportunity of correcting his mistake; and after a declaration is filed by his Proctor under section 25(1) of the Partition Act, and any new party which it may be necessary to add has been given notice, the Court will proceed on with the action". 100

It is to be noted that the decision in that case has no application to the facts in the present case, for in that case the contesting

defendants did raise two issues as to whether the *lis pendens* had been duly registered and if not whether the plaintiff could maintain this action, and the learned District Judge held that the *lis pendens* was not duly registered and for this reason dismissed the plaintiff's appeal. In the circumstances, the order of the learned District Judge was set aside and the case was sent back to the District Court so as to give the plaintiff an opportunity of registering his *lis pendens* in the correct folio and thereafter to take such steps as necessary to bring the case to trial. However in the instant action no such issue raised viz. that lis *pendens* registration is defective or that requirement in section 12(1) of the Partition Law has not been complied with. In fact no question was put to the plaintiff-respondent or any objection taken on this issue and no evidence led. The learned District Judge was not called upon to decide this issue. At this point It would be appropriate to quote what Sirimane, J. stated in that case at p. 18:

> "What would be the result if it is found during the course of a trial that the registration of the lis *pendens* is not in the correct folio? In practice there are several cases where the large majority of deeds are registered in a particular folio, but a very diligent search of the Land Registry may reveal that the oldest deed is registered in another folio. Should then the action be dismissed? I think not. The purpose in registering a *lis pendens* is two-fold: firstly, that all parties who have registered documents may have notice of the action; and secondly, that intending purchasers of undivided shares may be made aware of the partition action that is pending. There is no provision in the Partition Act itself for the dismissal of an action merely on the ground that the *lis pendens* has not been registered in the correct folio. It may be noted here that even in a case where the *lis pendens* has been incorrectly registered in an action under the old Ordinance, it was decided in the case of *Seneviratne* v *Kanakaratne*(2) that there is no provision in the Registration of Documents Ordinance for dismissing an action on the ground that *lis pendens* has not been duly registered".

The other decision cited by counsel for the 2(a) defendant-appellant is *Victor Perera* v *Don Jinadasa*(3) the facts were as follows:

> "The question of the due registration of the *lis pendens* was

raised as a specific issue on behalf of the appellant and evidence was led thereon; this issue was treated by counsel for all parties who participated at the trial as being the crucial issue, but the learned District Judge nevertheless declined to answer it, observing that the question of the due registration of the *lis pendens* "cannot be canvassed afresh in these proceedings". In taking that course the learned judge appears to have assumed what had indeed to be established viz. that the appellant himself was bound by the decree in the partition action.

The appellant, it must be emphasized, does not claim any right, title or interest as being derived directly or even remotely from the decree in the partition action, On the other hand, not having been a party to that action, he claims adversely to that decree. In these circumstances it seems to me that the trial judge was obliged to address his mind at the trial to the question of the due registration of the partition action as a *lis pendens*. It is neither satisfactory nor possible for us to essay an answer to that question (issue 7 at the trial) in this Court. The question is essentially one for a trial court".

Accordingly the decree dismissing the plaintiff's action was set aside and case remitted to the District Court. Again the decision in that case has no application to the facts in the instant case.

In this respect, counsel for the plaintiff-respondent has brought to our attention the decision of *Rasiah* v *Thambipillai*[4]. However what was considered in that appeal is the effect on an interlocutory decree entered in a partition action of the failure to register the action duly as a *lis pendens* under the Registration of Documents Ordinance. The appellant in that case petitioned the District Court to quash all proceedings. On this ground the learned District Judge held that once interlocutory decree had been entered no such relief would be given to them and dismissed the application. The Supreme Court by a majority decision held that the learned District Judge had come to a correct finding.

Counsel for the plaintiff-respondent also cited CA No. 287/82(F)[5] wherein Palakidnar, J. observed:

"The partition law section 48(5) enacts that the party to the

action is bound by the decree and it is final and conclusive in all respects. A third party may attack the judgment and decree on stipulated grounds but a party to the action is precluded from doing so. Under the earlier Partition Act judgment and decree could be challenged on the ground that there was non registration of *lis pendens* but in the present law such a provision has been omitted and a party to the action cannot challenge it on that footing."

I might also say that the 2(a) defendant-appellant is a party to this action and no prejudice has been caused to her by the *lis pendens* registration being defective or non-compliance of requirement in section 12(1) of the Partition Law.

It is also contended by the counsel for the 2(a) defendant-appellant that the plaintiff-respondent's claim was on the assumption that entirety of the land belongs to Winnihamy Wawlekam. However no evidence was led or any material placed to show who were the predecessors of Wannihamy Wawlekam. Whereas the 2nd defendant had stated from whom he inherited namely from Appuralalage Banda his grand father. Thus the onus was on plaintiff-respondent and 1st defendant-respondent to prove otherwise and support this pedigree which they have failed to do. In view of lack of any evidence as to the predecessor in title of Wannihamy Wawlekam the only conclusion the learned District Judge could have arrived was to accept the pedigree of 2(a) defendant-appellant and 3rd to 10th defendants-respondents which show the predecessors in title to Wannihamy Wawlekam. Therefore he submits that without proper reasoning the learned District Judge has answered issues 16 to 18, 24, 25, 29 and 30 in favour of the plaintiff-respondent.

While conceding that there is no proof as to how Wannihamy Wawlekam became the original owner it is also true that there is no proof as to how Appuralalage Banda the 2nd defendant's grand father became the original owner of the land to be partitioned. There is also no proof that Appuralalage Banda is the father of Wannihamy Wawlekam. In any event, the plaintiff-respondent's position was that Wannihamy Wawlekam had been in possession of the land to be partitioned for a long time. Under cross examination it was put to the plaintiff-respondent that Appuralalage Banda

the original owner as claimed by the 2nd defendant had 3 children to which she answered that she does not know. Although this position was put to her no proof was adduced that the said Appuralalage Banda in fact had 3 children. The learned District Judge himself adverts to this omission.

The only evidence led by the 2(a) defendant-appellant to establish that Appuralalage Banda was the original owner was that of her own evidence. The only other witness called by her was Herath Banda who claimed to be a son of Tikiri Hamy who was said to be a brother of Wannihamy the original owner in the plaintiff-respondent's pedigree does not say in his evidence that Appuralalage Banda is the original owner but goes on to say that the original owners of the land were Wannihamy Wawalekam, Herath Hamy and Tikirihamy. Other than the *ipsi dixit* of the 2(a) defendant-appellant no other evidence either oral or documentary evidence *viz.* birth or death certificate etc, was produced to establish the position taken by the 2(a) defendant-appellant. Surprisingly the 2nd defendant himself admits that he also gets title deriving from Wannihamy Wawalekam thereby accepting that Wannihamy Wawalekam was an owner.

On an examination of the evidence led in this case it appears that the learned District Judge has come to a correct finding in accepting the pedigree of the plaintiff-respondent. Counsel for the 2(a) defendant-appellant submits that the learned trial Judge in his analysis noted the incompleteness of the pedigree of the plaintiff-respondent in his judgment at page 223 of the brief. However on an examination of the judgment it is to be seen that p. 223 of the brief contains only a recital of evidence and not any observation or finding by the learned District Judge.

As for occupation of the land and prescriptive claim of the 2nd defendant the position taken by him is that the other co-owners to the land in suit gave him their rights and told him to possess the land and accordingly he was in possession of the land from 1957. However 2(a) defendant-appellant admits in her evidence that there are a number of others who have rights to this land. The two documents produced by the 2(a) defendant-appellant to prove his possession was the acreage levy receipt for the year 73/74 in respect of Pahala Elapatha marked V2 which is dated after the

institution of this action. On the other hand, evidence revealed that on the death of Wannihamy Wawalekam his rights devolved on his heirs and they in turn owned and possessed the land in common. In fact as stated earlier the 2nd defendant himself was a co-owner and there is no evidence of any ouster of the other co-owners by the 2nd defendant.

The case of *Sideris* v *Simon*(6) was an action between co-owners where the question arose as to whether a presumption of ouster may be made from long continued undisturbed and uninterrupted possession. Howard, C.J. in considering a series of judgments on the subject decided that such a fact would depend on the circumstances of each case. It was held that without any proof of any act which amounts to an ouster a secret intention in the mind of a person who claims prescriptive title cannot put an end to the co-owner's co possession.

In *Maria Perera* v *Albert Perera*(7) G.P.S. de Silva, J. held:

"That the possession of a co-owner would not become adverse to the rights of the other co-owners until there is an act of ouster or something equivalent to ouster".

Again, in often cited Privy Council decision in *Corea* v *Iseris Appuhamy*(8) it was observed:

> "That the possession by a co-heir enures to the benefit of his co-heirs. A co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing sort of ouster or something equivalent to ouster could bring about that result. The whole law of limitation is now contained in Ordinance No. 22 of 1871".

On an examination of the evidence led in this case and the judgment entered, it appears to me that the learned District Judge having analysed and evaluated the evidence placed before him had on a balance of probability come to a correct finding. The judgment is well supported by evidence and is not perverse. It is also to be seen that the matter that the learned District Judge was called upon to decide were purely questions of fact. In deciding these questions of fact the learned District Judge was in a better position

than me and had the advantage of seeing, hearing and observing the demeanour of the witnesses who were called to testify to the matters in issue.

In the case of *Fradd* v *Brown & Co. Ltd*(9) the head note reads:

"Where the controversy is about veracity of witnesses, immense importance attaches not only to the demeanour of the witnesses but also to the course of the trial, and the general impression left on the mind of the Judge of first instance, who saw and noted everything that took place in regard to what was said by one or other witness. It is rare that a decision of a Judge of first instance upon a point of fact is overruled by a Court of Appeal".

In *Alwis* v *Piyasena Fernando*(10) *Per* G.P.S. de Silva, C.J.

"It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed in appeal".

In the circumstances, I see no reason to interfere with the judgment of the learned District Judge. Accordingly the appeal will stand dismissed with costs fixed at Rs. 5000/-.

DISSANAYAKE, J. – I agree.

Appeal dismissed