SUMANAWATHIE AND ANOTHER
V
ANDREAS AND OTHERS

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA, J.
CA 528/96(F)
D.C. GALLE 9171/P
SEPTEMBER 9, 2003

Partition Law No. 21 of 1977 – Sections 25 and 27 – Framing of Issues – Is it imperative? Examination of title – Investigation defective – Can the Judgment stand? Civil Procedure Code – Section 187 – Requisites of a Judgment – Evaluation of evidence – Partition Ordinance No. 10 of 1863 – Section 9.

HELD:

(i) There is a failure on the part of Court to evaluate the evidence in terms of S. 187, C.P.C. and Sections 25/27 – Partition Law.

(ii) Partition Decree cannot be the subject of a private agreement between parties on matters of title which the Court is bound by law to examine.

(iii) 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 Galle

Cases referred to:

1. *John Singho* v *Pedris Hamy* – 48 NLR 345
2. *Juliana Hamine* v *Don Thomas* – 59 NLR at 549
3. *Sirimalee* v *D.J.Pinchi Ukku* – 60 NLR 448 at 451.
4. *P.M.Cooray* v *Wijesuriya* – 62 NLR 158 at 160/161.
5. *Mohamadaly Adamjee* v *Hadederd Sadeen* – 58 NLR 271 at 236

Nehru Gunatilake P.C. with *Dhammika Pathirana* for plaintiff-appellants

D.Akurugoda with *K.Nanayakkara* for the 16,19,20 defendants-respondents.

Cur. adv. vult

November 7, 2003

SOMAWANSA, J.

The plaintiffs-appellants instituted this partition action in the District Court of Galle seeking to partition the land called and known as 'Poddiwela Kebella' morefully described in the schedule to the plaint.

There was no contest with regard to the land to be partitioned or the improvements. The only contest was in respect of the devolution of title to the land.

At the trial five admissions were recorded and parties went to trial on 25 points of contest and at the conclusion of the trial the learned District Judge by his judgment dated 28.06.1996 dismissed the action of the plaintiffs-appellants. It is from the said judgment that the plaintiffs-appellants have lodged this appeal.

It is contended by the counsel for the plaintiffs-appellants that the learned District Judge has failed to evaluate the evidence adduced in respect of the 3rd original owner Mapalagama Liyanage Don Philip de Silva and has thereby seriously misdirected himself. On an examination of the judgment of the learned District Judge it is to be seen that the contention of the counsel for the plaintiffs-appellants is correct.

At the trial the 2nd plaintiff-appellant had given evidence and had spoken to the devolution of title of the 3rd original owner the said Don Philip de Silva. It is to be seen that the 19th defendant-respondent also under cross examination has admitted the title of the 3rd original owner. However the learned District Judge has not considered or dealt with the rights, title and interest of the said 3rd original owner Don Philip de Silva.

The learned District Judge in his judgment has observed that there was a contest between the plaintiffs-appellants and the 16th, 19th, 20th, 21th, and 37th defendants-respondents and goes on to state that what he has to decide is according to whose pedigrees should the corpus be partitioned. Thereafter the learned District Judge goes on to examine the various pedigrees put forward by the parties, but does not embark on an examination of title of parties. According to the plaintiffs-appellants' pedigree one of the original

owners Weliwatta Liyanage Solomon Appuhamy had only two children. However the learned District Judge has come to a finding that he could not accept this position as the 21st and 37th defendants-respondents' pedigree showed that the said Solomon Appuhamy had 4 children. He also has come to a finding that the pedigree of the plaintiff-appellant cannot be accepted as the 21st and 37th defendants-respondents in their statement of claim aver that there are other original owners. It is also to be noted that when the contesting 19th defendant-respondent sought to mark a deed on which the 19th defendant-respondent derived title he was prevented from marking the said deed as it was not referred to in the statement of claim filed by him.

As for possession it appears that the learned District Judge has come to a finding that the plaintiff-appellant has failed to prove his possession, for the reason that the 2nd plaintiff-appellant did not possess a farmer's identity card nor was his name included in the Agricultural Land Registry when there was other evidence available. It is also to be seen that the learned District Judge had decided not to accept the pedigree of the plaintiff-appellant as well as the defendants-respondents for the reason that shares set out in the deeds marked do no not tally with some of the shares claimed in their pedigree. However this should not be the basis on which a pedigree should be rejected.

Counsel for the 19th defendant-respondent contends that the learned District Judge has answered the issues having being fully acquainted with the facts and the law pertaining to the partition and particularly the facts of this case and that he has not left a single issue unanswered. Further, he submits that it is not imperative to frame issues in a partition case and it is also not imperative to answer all the issues raised in a case. For the proposition of this law he has cited *John Singho* v *Pedris Hamy*[1] wherein the head note reads:

> 'Where in a partition action all parties agree on the points in dispute and state them to Court the Judge should not consider without giving due notice to the parties any other matters that may appear to him to arise between the parties in the course of the proceedings. The position will however be different where the points in dispute are not set down in the form of issues".

The dispute in that case was whether Andiris Naide owned the land or whether Aberan, his son owned the land. The learned District Judge found on a balance of evidence that Andiris Naide and not Aberan was the original owner. However without proceeding to enter decree declaring the successor in title from Andiris Naide was entitled to the undivided shares of the land as ascertained by him he took upon himself to decide whether some of the successors in title of Aberan had not acquired by prescriptive possession against all the other parties. It is to be seen that the decision in that case has no application to the instant case, for 26 points of contest have been raised in the instant case and all of them have been answered by the learned District Judge of which 19 of them have been answered as 'not proved'. What has to be looked into is whether the learned District Judge has evaluated the evidence in terms of section 187 of the Civil Procedure Code and also complied with the provisions of section 25 of the Partition Law.

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 sections 25 and 27 of the Partition Law, No.21of 1972 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 the 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 the 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* (2) 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".

In the case of *Sirimalie* v *D.J.Pinchi Ukku*(3) 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*(4) at 160/161 *per Sinnatamby, J.*

> "It is a common concurrence 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 *Mohamadaly Adamjee* v *Hadad Sadeen*(5) 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 more so the title of the plaintiffs-appellants. In the circumstances, the judgment of the learned District Judge cannot stand. I am mindful of the fact that the action has been filed in 1984. As the learned District Judge has dismissed the action of the plaintiffs-appellants to embark on an investigation of title of parties at this stage would be to take upon myself the function of the trial Judge, hence 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 plaintiffs-appellants and set aside the judgment of the learned 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 19th defendant-respondent will pay Rs.5000/ as costs of this appeal.

DISSANAYAKE, J. - I agree.

Appeal allowed.