

1944 Present: Moseley S.P.J. and Wijeyewardene J.

WEERAPPA CHETTIAR, Appellant, and RAMBUKPOTHA
KUMARIHAMY, Respondent.

154—D. C. Kandy, 405.

*Partition action—Framing of issues—Points of dispute with regard to title—
Practice, useful and necessary.*

In a partition action the duty is cast upon the Judge to satisfy himself that the property to be partitioned does not belong to persons who are not parties to the action. With regard to the decision on this question the Court would consider the evidence without regard to the issues.

Apart from this question, the Court has to decide the disputes that arise between the parties as to the devolution of title. Regarding them it is a useful practice to frame issues so that the Court may control the proceedings and the parties may know precisely the points on which they have to lead evidence.

A PPEAL from a judgment of the District Judge of Kandy.

M. T. de S. Ameresekere, K.C. (with him *A. S. Ponnambalam*), for second defendant, appellant.

N. E. Weerasooria, K.C. (with him *Cyril E. S. Perera*), for first defendant, respondent.

A. Gnanaprakasam, for plaintiff, respondent.

Cur. adv. vult.

June 9, 1944. WIJEYWARDENE J.—

This is an action for partition, and the only questions that have to be considered are the rights of Rambukpotha Loku Kumarihamy and Leelawathie Kumarihamy to claim shares of the estate of their father, Mampitiya Tikiri Banda.

It is not disputed that Mampitiya Tikiri Banda, the original owner of the lands sought to be partitioned, died intestate leaving a son, Mampitiya Dissawa, and three daughters, Rambukpotha Loku Kumarihamy (first defendant), Anula (called Wegodapola Kumarihamy) and Leelawathie and that all the three daughters were given in marriage by their brother, Mampitiya Dissawa, and their mother after the death of their father.

Anula, who was married to A. B. Wegodapola (see recitals in P 2) purported to mortgage an undivided half share of the estate with M. M. Fernando by P 2 of 1926. She appears to have executed this bond on the footing that her two sisters, the first defendant and Leelawathie, were married in diga and thereby forfeited their rights to the estate. That bond was put in suit, and the mortgaged property was sold when the plaintiff purchased it and obtained a Fiscal's transfer, P 6 of 1938. Though the plaintiff claimed an undivided half share in the plaint, he restricted his claim at the trial to an undivided one-third share on the ground that the first defendant had re-acquired binna rights and therefore, Anula, his predecessor in title, could not have mortgaged more than an undivided one-third share by P 2.

The first defendant filed answer claiming one-third share by inheritance and one-third share by the deed of gift, 1 D 1 of 1937 executed in her favour by her brother, Mampitiya Dissawa, who is now dead.

The 4th defendant, S. Wegodapola, intervened in the action claiming a one-third share. He stated that Mampitiya Tikiri Banda's estate devolved on Mampitiya Dissawa, Anula and Leelawathie alone and not on the first defendant, as she had contracted a diga marriage and did not re-acquire binna rights. Leelawathie married Iriyagama Loku Banda in February, 1901 (see 2 D 1) and died a few months afterwards (see 2 D 3) leaving a child Seelawathie (see 2 D 2) who died in December, 1901 (see 2 D 4). Iriyagama, who thus became entitled to an undivided one-third share, married Seedeви Kiri Amma in February, 1902, and died in 1914 leaving him surviving his widow, Seedeви, and four children who by 2 D 6 of 1940 conveyed their one-third share to the fourth defendant.

At the commencement of the trial the main points that arose for determination between the parties were formulated as follows:—

- (a) Did the first defendant marry out in diga and forfeit her rights?
- (b) Did she re-acquire binna rights?
- (c) Did Leelawathie Kumarihamy re-acquire binna rights?

The District Judge held that the plaintiff was entitled to one-third and the first defendant to two-thirds and rejected the claim of the fourth defendant holding that his predecessor in title, Leelawathie, had married in diga and failed to re-acquire binna rights. The fourth defendant seeks to canvass that finding on this appeal.

I shall deal first with the rights of Rambukpotha Loku Kumarihamy (first defendant). She gave evidence and stated that, though she married out in diga, she returned after her husband's death about forty years ago to her Mulgedera and was "accepted" by her brother, Mampitiya Dissawa. I see no reason for holding that the learned Judge, who is a gentleman of wide experience, has erred in accepting the evidence of this lady. Her oral evidence is supported very strongly by the documentary evidence in the case. About 1925 there was an action No. 6803 in the District Court of Kegalla for the partition of some other lands belonging to the estate of Mampitiya Tikiri Banda. That action was filed by Anula (Wegodapola Kumarihamy) against Mampitiya Dissawa and Rambukpotha Loku Kumarihamy. In that case Mampitiya Dissawa took up the position that Rambukpotha Loku Kumarihamy was entitled to an undivided one-third share by inheritance and final decree was entered accordingly (see 1 D 2). Further the deed 1 D 1, is a gift by Mampitiya Dissawa to his sister, Rambukpotha Kumarihamy, "in consideration of the devoted services and attention rendered and performed to me by my sister". I would, therefore uphold the finding of the District Judge that the first defendant had re-acquired binna rights and become entitled to a share of her father's estate.

The fourth defendant called two witnesses—Abeyratne Banda and Jimmy Iriyagama—to establish his claim. That evidence is contradicted by the oral evidence of Rambukpotha Loku Kumarihamy. In assessing the evidence with regard to the forfeiture of Leelawathie's claims to the paternal estate, the District Judge has referred to the fact that, while the fourth defendant pleaded in his answer that Leelawathie "never left the Mulgedera" after her marriage the issue framed by the fourth defendant suggested a different plea. The issue as framed on February 3, 1941, reads, "Did the intervenient re-acquire binna rights?" That issue was adopted with an amendment on February 22, 1943, and the amended issue reads "Did Leelawathie re-acquire binna rights?" It would thus be seen that the issue adopted by the fourth defendant after consideration and on which he went to trial was that, though Leelawathie had forfeited her rights by severance from the Mulgedera, she had re-acquired these rights later. I think, therefore, there is a great deal of force in the submission of the Counsel for the plaintiff and the first defendant that they led only such evidence as they thought was sufficient to meet the fourth defendant's case on that issue. The Counsel for the appellants contended that the case should be decided on the pleadings and not on the issues, as, he said, it was a well-known rule of practice not to frame issues in a partition case, though issues have been framed in this action. The appellant's Counsel has stated this practice in too general terms. In a partition action the duty is cast on the Judge to satisfy himself that the properties to be partitioned do not belong to some persons who are not parties to the action. It is with regard to the decision on this question that the Court would consider the evidence without regard to any issues. But apart from this question, the Court has to decide on the various disputes that arise between the parties as to the devolution of title. There is nothing improper in a Court framing issues with regard to those points and I think it a very useful

practice to have issues regarding these matters, so that the Court may be able to control the proceedings and the parties may know precisely the points on which they have to lead evidence.

Now the only relevant evidence led for the fourth defendant on the question of Leelawathie's claim to a share of the estate being not affected by her marriage depends on the statement of Abeyratne Banda that after her marriage she remained in the "Mulgedera". This evidence does not prove the question raised in the issue, and the fourth defendant cannot complain if his claim is rejected on that ground. I do not think, however, that the learned Judge has proceeded to decide the case in that manner. Further, I propose to examine the evidence independently of the issue and ascertain if the evidence supports the plea in the fourth defendant's answer.

Abeyratne Banda's evidence that Leelawathie remained in the Mulgedera after her marriage is contradicted by Rambukpotha Loku Kumarihamy who says that Leelawathie was taken to her husband's house after her marriage and she came to the Mulgedera for her confinement. Abeyratne Banda is a stranger to the Mampitiya family and I should have no hesitation in acting on the opinion of the District Judge that the evidence of Rambukpotha Loku Kumarihamy should be accepted in preference to that of Abeyratne Banda. Abeyratne Banda's evidence can be tested in other ways.

If Rambukpotha Loku Kumarihamy had a right to a share of her father's estate—and I hold it had been established in this case—then, if Leelawathie too had not lost her rights to the estate, the paternal estate would have devolved in equal shares on Mampitiya Dissawa and the three sisters. We find, however, that Mampitiya Dissawa, against whose *bona fides* no allegation has been made, has dealt with an undivided one-third share by 1 D 1 on the footing that the estate devolved on him and only two of his sisters. It cannot be said seriously that the sister whom he considered as excluded from the inheritance was Rambukpotha Loku Kumarihamy and not Leelawathie, as that would be directly opposed to the position taken by him in D. C. Kegalla, 6,803 (1 D 2). The attitude taken by Mampitiya Dissawa in this matter is of the utmost importance as Leelawathie could not have re-acquired binna rights without the consent of her brother, Mampitiya Dissawa. Moreover, the failure of Seedeivi Kiri Amma and her children—the vendors to the fourth defendant—to establish a claim to a share of the lands in D. C. Kegalla, 6,803, shows that in 1925 they acquiesced in the position that Leelawathie lost her right to a share of her father's estate.

The evidence given by Jimmy Iriyagama with regard to the possession of Leelawathie's heirs is entirely unconvincing. If his evidence is to be accepted, he and the other step children of Leelawathie got a share of the paddy crop even after the sale to the plaintiff in 1940. He himself admits that, though there were tea and rubber on some of the lands, neither he nor the other vendors to the plaintiff got any coupons. It is not likely that, if they had possession, they would have failed to avail themselves of this valuable source of income. If the members of the

Iriyagama family did not possess any share of the lands, then that is a fact which militates strongly against the contention that Leelawathie did not forfeit her share.

Jimmy Iriyagama admitted at first that his father's estate was administered and then, when he was asked whether any share of Mampitiya Tikiri Banda's estate was inventoried in that case, he said at first that he was unaware of that fact and then said that he did not even know that his father's estate was administered. If Iriyagama Loku Banda owned even an undivided one-fourth share of the valuable Mampitiya lands, then his own estate should have been administered, considering that at the time of his death all estates over Rs. 1,000 required administration.

On a consideration of all these facts I hold that Leelawathie was conducted from the Mulgedera and that she failed to regain her binna rights during the short period of her married life.

I would dismiss the appeal with costs.

MOSELEY S.P.J.—I agree.

Appeal dismissed.

