IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Piyasena Loku Withana of
"Sumeeda Welikala, Pokunuwita.

PLAINTIFF-APPELLANT

C.A 556/1996(F)
D.C Horana 1728/P

Vs.

Manage Somaratne of
Welikala Pokunuwita and others

DEFENDANT-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: Saliya Peiris for the Plaintiff-Appellant

Sanath Jayatilleke for the Defendant-Respondent

ARGUED ON: 03.03.2011

DECIDED ON: 28.04.2011

GOONERATNE J.

When this appeal was taken up for hearing on 03,.03.2011, two basic points were discussed and this court invited learned Counsel for the Appellant Mr. Saliya Peiris and Mr. Sanath Jayatilleke for Respondent to tender written submissions on the following.

(a) Several material documents which should be annexed to the brief are not included in the brief i.e amended plaint, statement of claim of 10th & 11th Defendant-Respondents, and documents marked X, X1, 10V1 to 10V5 and 11V2/11V3. Learned Counsel for Appellant moved this court to direct the Registrar of this court to supply the omissions and have a proper brief prepared prior to argument. The learned Counsel for Respondent Mr. Sanath Jayatilleke objected to the above course of action and moved for rejection of the appeal as it was in breach of the Supreme Court Rules and submitted that it is the responsibility of the Appellant to furnish and identify proper documents and failure to do so amounts to rejection of the appeal.

(b) Failure on the part of the Trial Judge to answer the several points of contest in the Judgment is fatal and as such a re-trial should be ordered.

I will proceed to consider (a) above initially since the failure to include all relevant and necessary documents in the brief will no doubt be disadvantages to all parties and to court, notwithstanding the provisions contained in the Supreme Court Rules. Much emphasis is placed by learned

Counsel for Respondent in his written submissions that the above Rules have no connection with the duty cast on the Appellant to make available the briefs for argument of the appeal (rules of 1978). The question is not only as to who should be blamed for the above lapse of having an incomplete brief but as to whether such lapse result in rejection of the appeal or else whether such an omission can be cured even at a later stage, in the interest of justice, though one could argue that delay would prejudice ones vested rights.

I would incorporate S.C Rules (Court of Appeal – Appellate – Procedure copies of records – rules) 1978, which are relevant to the objection raised.

2(1) In every Civil appeal preferred after the date of the Commencement of these rules, the appellant shall provide, in the manner hereinafter prescribed, for the use of the Judges who shall sit on the hearing of the appeal, a copy typewritten or photocopies of so much of the record of the case as may be necessary for the decision of the appeal.

(2) For the purposes of sub-rule (1) an appeal shall be deemed to be preferred on the date of the presentation of the petition of appeal in the Court of first instance.

3. Within one week of the presentation of the Petition of appeal the Court of first instance shall transmit the record to the Court of Appeal

4. Within two weeks of the presentation of the Petition of Appeal the appellant shall apply in writing to the Registrar of the Court of Appeal for the number of copies of the record stating in such application whether copies of the whole portions only, and if so of what portions of the record as necessary for the decision of appeal. Such application shall state the number of copies required by him. The appellant shall within three days of his so filing his application serve a copy of the same on the respondent who shall within seven days of receipt of the said copy file in the said court a memorandum of any further

portions of the record which he considers necessary together with an application specifying the number of copies required by him.

5. On receipt of such applications and payment in terms of these rules, the Registrar shall furnish the parties as soon as possible, with copies applied for.

6. The Registrar shall cause to be made for the use of the Court.

The Appellant in his written submissions state and refer to journal entry (83) of the Original Court record. Though the minute of 26.2.1996 in the Original Court record is not so legible I could gather with much difficulty that when Notice of Appeal was filed in the Original Court an application was made for copies of brief. However as at 26.2.1996 there could not have been a Petition of Appeal filed. Journal Entry (84) of 01.04.1994 confirm presenting of Petition of Appeal and in the same minute to forward brief to the Court of Appeal. This would also bring to light the fact that as at 26.02.1996 Plaintiff had applied for a certified copy of the record, but it is not an application in terms of the Supreme Court Rules, as the application was made to the Original Court.

When I peruse the entirety of the docket it is apparent that there had never been any application by the Appellant in terms of Rule 4 of the above stated Supreme Court Rules. Further my inquiries from the Registrar of this court revealed that the Registry does not insist on compliance with above Rule 4. Instead what happens in practice is that, when the Original

Court forward the record with Petition of Appeal and Notice of Appeal, the Registrar as directed by Court call for brief fees. The Appellant in compliance with Registrar's directive deposit brief fees. In other words deposit of brief fees would mean Appellant requests the entirety of the record, and not in parts. Although in the case in hand there is no strict compliance with the above mentioned Rule 4, Appellant by depositing brief fees request for the entirety of the record, and as such the Appellant cannot be faulted for any lapse in the preparation of the appeal brief. In my view any defect arising from failure to include necessary documentation in the brief is no fault of the Appellant. As such the Appellant could and would be entitled to request the Registrar of the Court of Appeal to supply the omission.

The sequence of events are as follows: (recording with few discrepancies)

(a) Rule 13(b) notice dated 07.01.1997 despatched to Appellant to deposit brief fees before 28.02.1997.

(b) Non compliance to above notice resulted in appeal being rejected on 15.05.1997.

(c) Motion tendered by Appellant dated 02.12.2002 to re-list.

(d) Registrar's minute of 24.03.2003 – dismissed due to lapse of Registry.

(e) List case to mention on 09.05.2003

(f) On 05.05.2003 – parties absent and unrepresented. Court directs Registrar to issue notice.

(g) On 02.06.2003 – Sanath Jayatilleke for 15A Defendant. Registrar directed to issue notice on Plaintiff-Appellant to deposit brief fees before 30.6.2003 mention on 04.07.2003.

(h) Motion of Appellant 25.06.2003

(i) Respondent deposit brief fees 19.01.2004

(j) 06.12.2010 Respondent obtained brief from Registry

(k) Appellant obtains brief on 08.12.2010.

It is observed that although there is non compliance with the above mentioned Rule 4, the party concerned had applied for the brief and obtained same (though defaulted and late). Appellant has requested for the entire record and not parts of brief. As observed above in spite of the time lapse this court cannot fault the Appellant. Therefore I refuse the application to reject this appeal and hold that objection raised in this regard by Respondent cannot be accepted in the circumstances of this case. Accordingly objection of Respondent overruled.

The other important matter is the failure of the learned District Judge to answer the points of contest (b). Learned Counsel for Respondent inter alia refer to the Constitutional Provisions contained in Article 138 proviso. The said article reads thus:

> The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal,

revision and restitutio in integrum, of all causes, suits, actions, prosecutions matters and things of which such Court of First Instance tribunal or other institution may have taken cognizance.

Provided that no judgment, decree or order of any court, shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

The proviso to the above article of the Constitution contemplates of error etc.

(a) which does not prejudice substantial rights and

(b) which does not result in a failure of justice.

Constitutional provisions would override any other law being basic law of the land. However (a) & (b) above need to be established or proved to rely in Article 138 proviso.

In Victor and Another v. Cyril de Silva 1998(1) SLR of pg. 42. Per Weerasuriya J.

"The learned District Judge was in obvious error when she failed to evaluate the evidence, in terms of S. 187, Civil Procedure Code, the failure to comply with the imperative provisions of S. 187, has not substantially prejudiced the rights of the defendant-appellants or has not occasioned a failure of justice to the defendants-appellants, as it is evident on a close examination of the totality of the evidence that the learned District Judge is correct in pronouncing judgment in favour of the plaintiff-respondent".

Justice Weerasuriya had also expressed a similar view in Gunasena Vs. Kandage & Others 1997(3) judgment. SLR 393 at 400..

> It is clear on a close examination of the totality of the evidence that the learned District Judge is correct in entering judgment for the plaintiffs-respondents as prayed for in the plaint. However, she was in error for failing to adduce reasons for her findings. Nevertheless, the question that has to be examined is whether or not such failure on her part had prejudiced the substantial rights of defendant-appellant or has occasioned a failure of justice. Having considered the totality of the evidence, it seems to me that no prejudice has been caused to the substantial rights of the defendant-appellant or has occasioned a failure of justice by this error, defect or irregularity of the judgment.

Annexture A & B are submitted along with the written submissions of the Respondents (being 5 admissions & 27 issues at (Folios 94-110. J E of 23.7.1990) learned counsel must be relying on same to prove his point but the proceedings of 3.7.1991 (Folio III) state that parties agreed among themselves to cancel the admissions and issues above (A & B) and proceeded to record them afresh. 5 admissions were recorded and 13 points of contest were suggested according to the proceedings of 3.7.1991.

Admissions

Corpus with reference to plan and 4 lots were admitted. 11th Defendant's position as in his statement of claim regarding original owner and chain of title were admitted (No. 2). It is admitted as in paragraphs 4 & 9 of plaint and as described therein stating Julis died with 5 children. Briefly 5/14 share of land to be partitioned went to the persons named in admission No. 5. (which flow from admission No. 4).

The points of contest are suggested by the Plaintiffs, 10th & 11th Defendants & 20th & 21st Defendants with regard to their rights, entitlement, improvements and plantation.

It was the contention of the learned counsel for Respondent that the learned District Judge has in his judgment considered and made findings on all the above points of contest though answers are not provided in a chronological order in the usual manner of answering issues in a judgment.

Annexture B of the written submissions refer to certain extracts from the judgment. No doubt the trial Judge gives his reasonings may be based on the points of contest.

The Plaintiff-Appellant has not mentioned about Article 138(1) proviso. As such the question of Plaintiff-Appellant being subject to any kind of prejudice to his substantial rights or that Judge's failure to answer the points of contest would result in a failure of justice has not been urged or demonstrated in his submissions. As such this court cannot in the absence of material placed by the Appellant regarding above come to a conclusion that the trial Court Judge's failure to answer issues would prejudice his case. No doubt there is an imperative requirement under section 187 of the Civil Procedure Code to answer the issues. Insistence with Section 187 of the Code is a requirement that should never be ignored. Nor should Original

Courts take Section 187 of the Code lightly. Even though in the case in hand article 138(1) proviso is made to apply, it should not be the rule in all other cases. Each case needs to be viewed separately as facts and circumstances may differ.

Partition cases are very common and popular in our country. Unlike any other case the trial Judge is burdened in partition suits with a responsibility and duty. If the trial Judge has performed his duty correctly the Appellant Court need not interfere, on a mere question of failure to answer points of contest, if his finding supports the suggested points of contest. I would refer to the following case law to fortify the view expressed by the learned Counsel for the Respondent.

Layard CJ in Mather v. Tamotheram Pillai 6 NLR 246 summarized the duties of the judge in a partition action, which appears to have stood the test of time and relevant in respect of even the provisions of the present law. It was stated that "the paramount duty is cast by the Ordinance upon the Judge himself in partition proceedings to ascertain who the actual co-owners of the land sought to be partitioned are. As collusion between parties to a partition action is always possible, and as in such a suit the parties get their title from the decree of the court awarding them a definite piece of land, and as a decree for partition under Section 9 of the Ordinance, is good and conclusive against all persons whosoever, whatever their rights may be may be, whether they are parties to the suit or not, it appears to me that no loophole should be allowed to a Judge by which he can avoid performing the duty cast expressly upon him by the Ordinance.

In Kumarihamy v. Weragama 43 NLR 256 a full bench held, that there was nothing to prevent a court allowing parties to a partition suit to compromise their disputes, provided the court has investigated the title and has been satisfied that the parties before it alone has interests in the land to be partitioned and once such a compromise is allowed the parties are bound by its terms.

In Aranolis de Silva v M.N. Babeni 1 NLR 362 it was held that the court should not regard a partition suit as one to be decided merely on issues raised by and between the parties and it ought not make a decree, unless it is perfectly satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned.

It was held in Juliana Hamine v Don Thomas 59 NLR 546 that it is essential for parties to a partition action to state to court the points of consent inter se and to obtain a determination on them, and that the court has to discharge its obligation under Section 25 of the Act irrespective of what the parties may or may not do.

Irrespective of the points of contest raised in a partition case, it remains the cardinal duty of court to investigate title of each party to the suit.

In all the above circumstances I would summarize my order as follows:

(a) Application to reject the appeal and the objection raised as alleged by Respondent on the question of non-compliance with the rules of court is rejected and refused. Accordingly objection overruled. Registrar is directed to supply the omission and make available to all parties the documents not included in the brief.

(b) This appeal would proceed for argument for the reasons stated in this order. The learned Respondents Counsel's contention in this regard is upheld for the above reasons.

JUDGE OF THE COURT OF APPEAL