

CYNTHIA DE ALWIS
v.
MARJORIE D'ALWIS AND TWO OTHERS

COURT OF APPEAL.
YAPA, J.,
JAYASURIYA, J.,
C.A. 618/97.
D.C. MT. LAVINIA 5494/P.
AUGUST 7, 1997.

Partition Act – Undivided shares vested in the Commissioner of National Housing – Ceiling on Housing Property Law No. 1 of 1973 – Statement of claim not filed by Commissioner of National Housing though added as a Party – Can an issue be raised as to the title and interest vested in the Commissioner?

The District Court held that the Commissioner of National Housing, though added as a party had failed to file a Statement of Claim and in the circumstances there was no justification and provision in the Partition Act to permit an issue to be raised as to title and interests vested in the Commissioner.

Held:

1. A District Judge trying a partition action is under a sacred duty to investigate into title on all material that is forthcoming at the commencement of the trial. In the exercise of this sacred duty to investigate title a trial Judge cannot be found fault with for being too careful in his investigation. He has every right even to call for evidence after the parties have closed their cases.
2. Though the Commissioner did not file a statement of claim the first and second defendants have filed Statement of Claim pleading that certain undivided interests in the corpus vested in the Commissioner. In the circumstances, the learned trial Judge was under a duty to adopt the points of contest raised.
3. Even in a *Rei vindicatio* action issues are not limited to pleadings. Our Civil Procedure Code requires the Defendant to file an answer but it does not allow the Court to try the case on the parties pleadings by requiring specific issues to be framed by the provisions of S.146 of the Civil Procedure Code, after parties are agreed the issues may be stated by them, if not agreed then the Court must frame them.

There is no necessity under our law to restrict the issues to the pleadings.

APPLICATION in Revision from the Order of the District Court of Mt. Lavinia.

Cases referred to:

1. *Kumarihamy v. Weeragama* – 43 NLR 265
2. *Mather v. Thamotheram Pillai* – 6 NLR 246
3. *Thayalnayagam v. Kathiresa Pillai* – 8 CWR 152
4. *Attorney-General v. Smith* – 8 NLR 229 at 241
5. *Bank of Ceylon v. Chelliah Pillai* – 64 NLR 25(P.C.)
6. *Pieris v. Municipal Council, Galle* – 65 NLR 555 at 556
7. *Jayawickrema v. Amarasuriya* – 20 NLR 293 at 297

Ms Maureen Seneviratne P.C. with Tilak Gunawardena and P. N. R. Fernando, for 1st defendant-petitioner.

Mihindu Kulasooriya for plaintiff-respondents.

Cur. adv. vult.

August 7, 1997

F. N. D. JAYASURIYA, J.

We have heard learned counsel for the petitioner and learned counsel appearing for the respondent. The veracity of facts set out in the petition and affidavit of the petitioner are conceded and admitted by learned counsel who appeared for the plaintiffs-respondents.

The first and second defendants-respondents, in their statement of claim, pleaded that substantial undivided shares in the property which was the subject-matter of the partition action had vested in the Commissioner of National Housing under the provisions of the Ceiling on Housing Property Law. The said Commissioner, after notice, was added as a party but he has failed to file a statement of claim. At the trial, the following point of contest were raised before the Court: No. 3 – "Did substantial interests in the subject-matter of this partition action which were previously owned by Olivia Constance de Alwis vest in the Commissioner of National Housing under the provisions of the Ceiling on Housing property Law during the life time of Olivia Constance de Alwis? No. 4 – If Issue 3 is answered in the affirmative, did undivided one-fourth shares in the corpus vest in the Commissioner of National Housing?" The learned District Judge refused to accept and adopt the aforesaid points of contest suggested by Counsel for the first and second defendants-respondents on the ground that the Commissioner of National Housing, though added as a party, had failed to file a statement of

claim and in the circumstances there was no justification and provision in the Partition Act to permit an issue to be raised as to the title and interests vested in the Commissioner.

We hold that this is a manifestly erroneous order in law. A District judge trying a partition action is under a sacred duty to investigate into title on all material that is forthcoming at the commencement of the trial. Vide the express provisions to that effect in the Partition Act and the dicta in the decision in *Kumarihamy v. Weeragama*⁽¹⁾ (Divisional Bench). Justice de Kretser in this decision observed "A number of decisions of this court have emphasized the duty of the court **to investigate title fully** and not to treat a partition action as an action inter partes. The emphasis is always on the necessity and duty to investigate title. In *Mather v. Thamotheeram Pillai*⁽²⁾ Chief Justice Layard observed that the "trial Judge must satisfy himself by personal inquiry that the Plaintiff has made out a title to the land sought to be partitioned and that the parties before Court are solely entitled to the land." In the exercise of this sacred duty to investigate title a trial judge cannot be found fault with for being too careful in his investigation. He has every right even to call for evidence after the parties have closed their cases. Vide *Thayalnayagam v. Kathiresa Pillai*⁽³⁾.

Though the Commissioner of National Housing did not file a statement of claim the first and second defendants have filed statements of claim pleading that certain undivided interest in this corpus vested in the Commissioner of National Housing. In the circumstances the learned trial judge was under a duty to adopt the point of contest raised. This is an imperative and mandatory function of the District Judge in matter of investigation of title.

Even in a *rei vindicatio* action in Sri Lanka, issues are not limited to the pleadings. The judge is entitled to frame an issue on the material before him which would result in a right decision of the case and a complete and effectual determination of all the matters arising between the parties and for that purpose he can use the documents enumerated in the lists, the submissions and opening of counsel and every material placed before him at the trial prior to the framing of issues. See the decision in *Attorney-General v. Smith*⁽⁴⁾ at 241. In this decision Chief Justice Layard referred to the differences in Indian

Civil Procedure and the English Procedure. He observed that in England parties frame their own pleadings and the **case is tried on issues raised in the pleadings** and if an issue is objected to the judge has to decide on the sufficiency or insufficiency of pleadings and if the pleadings are insufficient, leave is given to amend ... But under the Indian system, which is akin to the provisions of the Sri Lankan Civil Procedure Code, the court does **not as in England try the case on the pleadings**; it can use the plaint the defendants' statements, if any, to ascertain what are the issues to be adjudicated on. They are supplemented by the examination of the parties, documents produced by them and also by the statements of the respective pleaders. It is the duty of the court in India **from such material** to frame the issues to be tried and disposed of in the case. Our Civil Procedure Code follows the Indian counterpart in this matter except that it requires the defendant to file an answer unlike the Indian Code. However, it does **not** allow the court to try the case on the **parties' pleadings** but requires specific issues to be framed. By the provisions of section 146 of the Civil Procedure Code, if the parties are agreed, the issues may be stated by them. If not agreed, then the court must frame them. **There is no necessity** under our law **to restrict the issues to the pleadings** as was done in this case and in fact it appears to me to be contrary to our law."

Likewise, in *Bank of Ceylon v. Chelliah Pillai*⁽⁵⁾ (Privy Council) the principle was laid down that "A case must be tried upon the issues on which the right decision of the case appears to the court to depend and it is **well settled** that the framing of such issues is not restricted by the pleadings. In *Peiris v. Municipal Council, Galle*⁽⁶⁾ at 556. Justice Tambiah remarked that even where the plaintiff fails to raise a relevant issue, it is the duty of the judge to raise the necessary issues for a just decision of the case. Vide also the judgment of the Privy Council in *Jayawickrema v. Amarasuriya*⁽⁷⁾ at 297.

Therefore, we hold that the learned District Judge has erred grievously in rejecting the said points of contest 3 and 4 which were suggested by learned counsel. We direct the District Judge to accept and adopt points of contest 3 and 4 and proceed to trial after framing all other issues that are required for arriving at a right decision in this case.

The Order dated 1.7.97 is set aside. The Revision Application is allowed without costs. Issue parties with certified copies of this Judgment expeditiously on payment of the usual charges.

H. S. YAPA, J. – I agree.

Application allowed.
