

THILAGARATNAM
V.
ATHPUNATHAN AND OTHERS

COURT OF APPEAL

ANANDACOOMARASWAMY J., (P/CA)

EDUSSURIYA, J.,

C.A. 264/89 (F)

D. C. COLOMBO 13978/F

Jun 21, 1995, June 28, 1995, October 2, 1995, December 14, 1995

July 07, 1995

September 22, 1995.

Partition - Investigation of Title - Duty of Trial Judge - Trust property - seizure.

One S was the owner of the property and he left behind a Lastwill which was admitted to Probate. D and P (1, 2 Defendant- Respondents) were appointed Trustees of the Estate of the said S. According to the Law of Thesavalamai 1/2 share vested in S's wife and on her death 1/8 share each devolved on her daughters 4-7th Defendants-Respondents.

The 8th Defendant-Appellant claimed title from the Fiscal Conveyance of the Right Title and interest of the Trustee P (2nd Defendant-Respondent) to one J who sold his rights to her father T who gifted same to her in 1977.

The 8th Defendant-Appellant was not given any shares, and hence the Appeal.

It was contended on her behalf that Court has not investigated Title, and that the bona fide purchaser for value got title on a Fiscal Conveyance despite an existing trust.

Held:

(1) Although there is a duty cast on court to investigate title in a Partition action, the court can do so only within the limits of pleadings, admissions, points of contest, evidence both documentary and oral.

Per Anandacoomaraswamy, J.

"Court cannot go on a voyage of discovery tracing the title and finding the shares in the corpus for them; otherwise parties will tender their

pleadings and expect the court to do their work and their Attorneys-at-Law's work for them to get title to those shares in the corpus."

- (2) Trust property cannot be seized and sold in execution proceedings. Hence the 8th Defendant-Appellant gets no shares.
- (3) What was transmitted to J is the alleged Right Title and Interest of P in the corpus. There was no evidence led at the trial that P had vested in himself with any such right to the corpus.

What was purported to be transmitted was neither defined dominium nor recognised share but a mere vacuum, no tangible Title was passed onto J.

AN APPEAL from the Judgment of the District Court of Colombo.

Cases referred to:

1. *Gooneratne v. Bishop of Colombo* 32 NLR 337
2. *Peries v. Perera* - 1 NLR 362
3. *Neela Kutty v. Alvar* 20 NLR 372
4. *Cooray v. Wijesuriya*, 62 NLR 158
5. *Juliana Hamine v. Don Thomas* 59 NLR 546 at 549
6. *Sheefa v. Colombo Municipal Council*, 36 NLR 38
7. *Mohamed Faux v. Salha Omma* - 58 Ceylon Law Weekly 46
8. *Davoodbhoy v. Farook*, 63 NLR 97, 58 CLW 57
9. *Charles Hamy v. Jane Nona* 15 NLR 481

N. S. A. Goonetilake P.C., with *M. B. Peramuna* for 8th Defendant-Appellant.
Ikram Mohamed for Plaintiff Respondent and 9th Defendant-Respondent.
S. Sivarasa, P.C., with *S. Mahenthiran* for 3rd Respondent.

Cur. adv. vult.

February 14, 1996.

ANANDACOOMARASWAMY, J. (P/CA)

This is an appeal from the judgement of the Learned District Judge of Colombo in a partition action, where the Learned District Judge held that the 8th Defendant - Appellant was not entitled to any share in the corpus to be partitioned.

One V. Sunderam was the owner of the property and he left behind a Last Will No. 1070 dated 12.12.1937 which was admitted to probate

in District Court of Colombo No. 9061/T. S. Dharmaratnam and S. Pathmanathan were appointed Trustees of the Estate of the said Sunderam with specific directions. According to the Law of Thesawalamai half share vested in Sunderam's wife Nithiya Lakshmi and on her death 1/8 share each devolved on her daughters the 4th to the 7th Defendants - Respondents. The Trustees are the 1st and 2nd Defendants-Respondents who transferred 1/8 share to each of them namely Jaganathan the 3rd Defendant - Respondent and Athputhanathan the Plaintiff - Respondent. The 8th Defendant - Appellant was made a party on the basis of deeds in her favour but was not given any shares. The 9th Defendant - Respondent was added as a son of the person who purchased from the original owner.

It is the case for the 8th Defendant - Appellant that her title was from Fiscal conveyance Marked "8D1" and ultimately devolved on her on 8D4 and on 8D5.

The Learned Counsel for the Appellant cited several authorities *Goonaratne v. Bishop of Colombo*,⁽¹⁾ *Peries v Perera*,⁽²⁾ *Neela Kutty v Alvar*,⁽³⁾ *Cooray v. Wijesuriya*,⁽⁴⁾ *Juliana Hamine v Don Thomas*⁽⁵⁾ & *Sheefa v Colombo Municipal Council*,⁽⁶⁾ and stated that it is the duty of the Court to examine and investigate title in a partition action, because the judgement is a judgement *in rem*.

We are not unmindful of these authorities and the proposition that it is the duty of the Court to investigate title in a partition action, but the Court can do so only within the limits of pleadings, admissions, points of contest, evidence both documentary and oral. Court cannot go on a voyage of discovery tracing the title and finding the shares in the corpus for them, otherwise parties will tender their pleadings and expect the Court to do their work and their Attorney-at-Law's work for them to get title to those shares in the corpus.

The Learned Counsel for the Appellant submitted that neither the Last Will nor the probate was produced and therefore no title passes based on those two documents *Mohamed Fauz v Salha Umma*,⁽⁷⁾ *Davoodbhoy v Farook*⁽⁸⁾ and *Charles Hamy v Jane Nona*.⁽⁹⁾

In the instant case there was an admission about the Last Will and Probate and there was no point of contest as regards these two documents.

The 8th Defendant-Appellant claims title from the Fiscal conveyance of the right title and interest of the Trustee Pathmanathan the 2nd Defendant - Respondent to Jabanesan who sold his rights to her father E. Thilagaratnam on 8D4 in April 1977 and her father gifted it to her on 8D5 in June 1977. What was transmitted to Jabanesan on 8D1 is the alleged "right title and interest" of Pathmanathan in the corpus. There was no evidence led at the trial that Pathmanathan had vested in himself with any such right to the corpus. As this was the undisputed position, what was purported to be transmitted on 8D1 was neither defined dominium nor recognised share, but a mere vacuum. No tangible title was passed unto Jabanesan.

It is the contention of the Counsel for the Appellant that the *bona fide* purchaser for value gets title on a Fiscal conveyance despite an existing trust. Trust property cannot be seized and sold in execution proceedings. Hence the 8th Defendant-Appellant gets no share on this count.

The learned Counsel for the Appellant also relied on the fact that the Plaintiff-Respondent is not entitled to any share because the deed conveying a share to him was not produced at the trial although it was produced in the trial earlier. However in view of the admissions and because the deed in question forms part of the record we have taken into consideration the said deed.

Further we wish to add that the chain of title recite the earlier title and this confirms the admissions recorded at the commencement of the trial.

On a perusal of the oral and documentary evidence together with the admissions we have no hesitation in coming to the conclusion that the learned District Judge came to the correct conclusion as regards the shares allotted to each party.

For these reasons we affirm the judgment of the learned District Judge and dismiss the appeal with costs fixed at Rs. 5,250/-.

EDUSSURIYA, J. - I agree.

Appeal dismissed.