DIAS

VS

YASATILAKA AND OTHERS

COURT OF APPEAL.

SOMAWANSA, J. (P/CA).

EKANAYAKE, J.

CA 897/92 (F).

DC GALLE 9396/P.

MARCH 4, 2005.

Partition Law, No. 21 of 1977 - Partition Act, section 23(1) - Lis pendens *registered in respect of a larger land?–Corpus not properly identified - Should the judgment be allowed to stand?*

The *lis pendens* has been registered in respect of a larger land which is inclusive of an extent acquired by the State. The Court allowed the partitioning of the larger land.

HELD:

1. The *lis pendens* has been registered in respect of a larger land and not in respect of the *corpus.* The trial judge has not properly identified the *corpus.*

2. The impugned judgment cannot be allowed to stand - the plaintiff's action has to be dismissed.

APPEAL from the judgment of the District Court of Galle.

Cases referred to :

Grampy Appuhamy vs. Monis Appuhamy 60 NLR 337.

Dr. Jayantha Almeida Gunaratne, PC for 3rd defendant-appellant.

Manohara R. de Silva for plaintiff-respondent.

Athula Perera for 1st defendant-respondent..

Cur. adv. vult.

March 04, 2005.

CHANDRA EKANAYAKE, J.

This is an appeal preferred by the 3rd Defendant–Appellant (hereinafter sometimes referred to as the 3rd Defendant), to set aside the judgment of the learned Additional District Judge of Galle dated 5.11.1992 and the interlocutory decree entered in the case, to declare that the 3rd Defendant is entitled to the *corpus* and to have the action of the Plaintiff dismissed.

The Plaintiff - Respondent (hereinafter sometimes referred to as the Plaintiff) instituted this action in the District Court of Galle to partition the land called Pambaketiye godawatte *alias* contiguous lots 3, 4, 5 (after a re-survey of contiguous lots 3 and 4) of Pambaketiyegodawatte which is morefully described in paragraph 2 of the plaint dated 03.01.1995 in extent 4 Acres 3 roods 12.5 Perches (4A., 3R., 12.5P) which being the extent after excluding an extent of 5 Acres 4.9 Perches (5A., 0R., 4.9P) which

was said to have been acquired by the State from the larger land of 9 Acres 3 Roods 17 Perches (9A., 3R., 17P). According to the pedigree pleaded in paragraphs 3 to 9 and on acquistion of prescriptive rights as averred in paragraph 10 of the plaint, the Plaintiff had prayed for an order to partition the above mentioned *corpus.* It has to be observed that by paragraph 9 of the plaint, Plaintiff has claimed that he and the 1st Defendant were entitled to an undivided 1/2 share each from the *corpus.*

The 3rd Defendant and the 2nd Defendant being father and son having claimed rights before the Court Commissioner, Sisira Amendra (L. S.) when carrying out the preliminary survey, were made 3rd and 2nd Defendants in the case subsequently. The 1st Defendant by his statement of claim dated 21.05.1987 whilst admitting the pedigree and the share shown to him in the Plaint prayed for an order making him entitled to the aforesaid share from the corpus together with what was claimed by him at the preliminary survey.

The 2nd and 3rd Defendants by their joint statement of claim dated 11.09.1997 whilst denying the averments in the plaint and the statements of claim of the other Defendants which are inconsistent with the averments in their statement and the contents of the preliminary plan bearing No. 62 and the report annexed had prayed for a dismissal of the Plaintiff's action and for a declaration that the 3rd Defendant is entitled to the land proposed to be partitioned. It was further contended by the 2nd and 3rd Defendants *inter -alia* that, neither the Plaintiff nor the 1st Defendant has possessed the land proposed to be partitioned and that the 3rd Defendant had acquired

prescriptive title having independent and uninterrupted possession against the Plaintiff and the 1st Defendant for well over 18 years.

Case had proceeded to trial on points of contest 1 and 2 raised on behalf of the Plaintiff; and 3 and 4 raised on behalf of the 2nd and 3rd Defendants. An admission had been recorded at the commencement of the trial to the effect that the corpus was the land depicted in plan No. 62 of S. Amendra (L. S.) However the 2nd and 3rd Defendants at the conclusion of the examination-in-chief of the Plaintiff had resiled from the said agreement (at page 150 of the brief). It has to be observed that no point of contest had been raised with regard to what the corpus was. However the learned Judge in his judgment has arrived at the finding that the *corpus* is the land depicted as lot 1 in the preliminary plan No. 62 (X).

Plaintiff's case had been concluded with the evidence of the Plaintiff, one Malini Sirimathie (an officer from the Land Acquisition Department of the Galle Kachcheri), one M de Silva (an Officer of the National Housing Department), one Marthenis De Silva and Sisira Amendra (Court Commissioner). On behalf of the 2nd and 3rd Defendants, Samarapala Simon, Nandasiri, Diyonis and one Somadasa had testified. After filing of written submissions by the parties who contested the case the learned Judge had pronounced the impugned judgment and ordered to partition the land according to the shares given therein *viz* - undivided 1/2 share each to the Plaintiff and the 1st Defendant and the improvements and plantation also to go according to the judgment. This is the judgment now appealed against.

At the hearing of this appeal all the parties had agreed to resolve the same by way of written submissions and same have been tendered by the Plaintiff - Respondent and 1st Defendant - Respondent. The 3rd Defendant - Appellant had agreed to abide by the written submissions initially filed in the case.

What needs consideration first is whether a *lis pendens* was correctly registered in respect of the land depicted in the preliminary plan. According to the judgment the learned Judge had concluded that the corpus to be partitioned was the land depicted as lot 1 in the preliminary plan X. But it has to be observed that the *lis pendens* in this case has been registered in respect of a larger land in extent 9A., 3R., 7 P which is inclusive of the extent of 5A., 0R., 4.9P which was the portion said to have been acquired by the State as seen by document marked P 11. Furthermore the plaint did not contain a schedule but the land sought to be partitioned was described in paragraph 2 of the plaint. That description was one giving the boundaries in respect of the said larger land, neither the boundaries of the portion which has to be partitioned nor the portion of the land said to have been acquired by the State was specified. When the learned Judge allowed the partitioning of the land depicted as lot 1 in plan X it was inclusive of the portion which was acquired by the State. This definitely is another aspect of the matter which needs consideration. In the light of the above it has become crystal clear that the *lis pendens* which was registered in the case was in respect of a larger land but not in respect of the correctly identified *corpus*.

It has to be observed that the learned Judge in his judgment has arrived upon the finding (at page 311) that the *corpus* is the land depicted as lot No. 1 in preliminary plan X. The Learned Judge has stated to the following effect at pages 310 and 311 of the brief :

..... නමුත්, පැමිණිල්ලෙන් කැඳවන ලද බලය ලත් මිනිත්දෝරු පිසිර අමේන්ද්‍ර මහතාගේ සාක්ෂිය සලකා බලන විටද, එම සාක්ෂිකරුගෙන් විත්තිය වෙනුවෙන් හරස් ප්‍රශ්න අසා නොමැති කරුණ සලකා බලන විට ද, එම සාක්ෂිකරුගේ සාක්ෂිය අනුවම පිඹුර පකස් කරන අවස්ථාවේදී මායිම් සම්බන්ධව කිසිම විරද්ධත්වයක් කවුරුන් විසින් හෝ ඉදිරිපත් නොකල බව, අනාවරණය වන කරුණ සලකා බලන විට ද, මෙම නඩුවට අදාල විෂය වස්තුව "x"දරන පිඹුරෙහි කැබලි අංක 1 වශයෙන් නිරූපනය කර ඇති බව මම තීරණය කරමි.

Just because *Mr. Amendra* (L. S) was not cross examined by the defence and that there had been no objection by anybody when carrying out the survey the learned Judge cannot conclude that the *corpus* was lot No. 1 in Plan X. In my view it is an erroneous conclusion. According to the plan marked X and report marked X1 both had been prepared without any reference being made to a survey plan and/or to the portion acquired by State. Therefore it is clear that there had been no material before the learned Judge to arrive at the finding as to what the *corpus* was. Accordingly in those circumstances I conclude that the learned Judge had erred when he decided that the *corpus* was the land depicted as lot 1 in plan X. In this context I have considered the principle of law offered in the case of *Brampy Appuhamy vs Monis Appuhamy*[1] In the above mentioned case the *corpus* sought to be partitioned was described in the plaint as a land about 6 acres in extent, and a commission was issued to a surveyor to survey a

land of that extent. The surveyor, however, surveyed a land of only 2 Acres and 3 Roods. Interlocutory decree was also entered in respect of a land 2 Acres and 3 Roods in extent without any question being raised by any of the parties as to the wide discrepancy between the extent given in the plaint and that shown in the plan made by the surveyor. None of the defendants had averred under section 23(1) of the Partition Act that only a portion of the land described in the plaint should be made the subject matter of the action. It was held *inter - alia* that the Court acted wrongly in proceeding to trial in respect of what appeared to be a portion only of the land described in the plaint". In the instant case too the learned Judge has proceeded to trial having determined the *corpus* as lot 1 in preliminary plan x which being a land less in extent to what was described as the land proposed to be partitioned in paragraph 2 of the plaint. This also becomes a cardinal error committed by the learned Judge in ordering a partition in respect of the land depicted in plan x.

For the above reasons my considered view is that the impugned judgment cannot be allowed to stand, and the same has to be set aside. Further I conclude that the above grounds are sufficient to dismiss Plaintiff's action. The need does not arise to consider the merits of the 3rd Defendant's prescriptive claim.

Accordingly, the appeal is allowed with costs fixed at Rs.10,000. The judgment of the learned Judge dated 05.11.1992 is hereby set aside and the Plaintiff's action is dismissed with costs. The Learned Additional District Judge is directed to enter decree accordingly.

The Registrar of this Court is directed to forward the record in Case No. 9396/P to the respective District Court forthwith.

ANDREW SOMAWANSA, J(P/CA) – *I agree.*

Appeal Allowed.

Plaintiffs action dismissed.