GUNASENA
v.
KANDAGE AND OTHERS

COURT OF APPEAL.
ISMAIL, J.
WEERASURIYA, J.
C.A. 653/91 (F).
D.C. PANADURA 231/L
AUGUST 25, SEPTEMBER 15, 1997.

Civil Procedure Code – Sections 40, 187 – Pedigree not pleaded – Is the Plaint defective? section 92 – Evidence Ordinance – Section 2 – Prevention of Frauds Ordinance – Could oral evidence be led to vary the terms of the duplicate of a Deed – Judgment Perfunctory as there is no evaluation of evidence? – Constitution Article 138(1) – Partition Act – Divided share of a larger land – Exclusive Possession.

Held:

(1) The cause of action in a *rei vindicatio* arises out of the fact that the plaintiff is the owner of the property in suit and therefore entitled to the possession thereof, that is to an order for ejectment of the defendant. Upon a close perusal of the plaint it is clear that the plaintiff-respondents have pleaded the title in a manner which is sufficient to give notice of their ownership to the defendant-appellant. Infact the deed on which the 1st and 2nd plaintiffs-respondents base their title has been executed by the defendant-appellant himself.

(2) It would appear that; parol evidence pertaining to any of the grounds of relief set out in the proviso to Section 92 can be led only in cases where the validity of the document itself is challenged or where on Order or Decree is sought relating to the document itself. The Proviso does not apply if the effect of the Deed or written contract receives consideration only incidentally. Oral evidence could be led to establish the occurrence of a *bona fide* mistake in regard to the shares in the duplicate deed.

(3) A lot separated off and intended as a permanent mode of possession cease with the lapse of time and exclusive possession to be common with the rest of the land.

***Per* Weerasuriya, J.**

"The learned District Judge 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 the 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."

APPEAL from the judgment of the District Court of Panadura.

Cases referred to:

1. *Kānapadian v. Pieters* – 9 SCC Vol. ix No. 47-185.
2. *Kiri Menika v. Duraya* – 17 NLR 11.
3. *Dingiri Appu v. Mohottihamy* – 68 NLR 40 at 43.
4. *Girigoris Perera v. Rosalin Perera* – 53 NLR 536.
5. *Fernando v. Fernando* – 23 NLR 266.
6. *Nadaraja v. Ramalingam* – 21 NLR 38.
7. *Belgaswatte v. Ukkubanda* – 43 NLR 281 at 283.
8. *Velan Alvan v. Ponny* – 41 NLR 106.
9. *Obeysekera v. Endoris* – 66 NLR 457.

J. W. Subasinghe P.C., with *D. J. C. Nilanduwa* for defendant-appellant.

Rohan Sahabandu for plaintiff-respondents.

Cur. adv. vult.

November 21, 1997.
WEERASURIYA, J.

The plaintiffs-respondents instituted action by plaint dated 24.03.1988 in the District Court of Panadura against the defendant-appellant seeking a declaration that they are entitled to 3/4 share of the land called Kahatagahawatta more fully described in the schedule to the plaint, ejectment of the defendant-appellant and damages. The defendant-appellant in his answer while admitting execution of the deed referred to in the plaint, averred that the house standing on this land was built by Kandage Luwis and was never gifted to 1st and 2nd plaintiffs. The case proceeded to trial on 14 issues. The learned District Judge entered judgment on 14.10.1994 in favour of the plaintiffs-respondents. It is from the aforesaid judgment that this appeal has been lodged.

The case of the defendant-appellant has been presented in this appeal basically on the following contentions –

(a) that the plaint is defective as no pedigree has been pleaded in terms of section 40 of the Civil Procedure Code;

(b) that the plaintiffs-respondents are not entitled to lead oral evidence to vary the terms of duplicate of the deed marked 'D1' in terms of section 92 of the Evidence Ordinance read with section 2 of the Prevention of Frauds Ordinance;

(c) that the plaintiffs-respondents cannot seek a declaration of title to a divided portion of the land called Kahatagahawatta in the absence of a valid partition in respect of the larger land; and

(d) that in any event the judgment is perfunctory in that there has been no evaluation of evidence.

I propose to consider these contentions in that order.

Section 40(d) of the Civil Procedure Code stipulates that the plaint should consist of a plain and concise statement of the circumstances constituting each cause of action and where and when it arose. Learned president's Counsel for the defendant-appellant cited *Kanapadian v. Pieters*[1] where it was held that a defendant sued on the strength of a plaintiff's title to land, is entitled to have that title disclosed so that he may know what case he has to meet. It is to be observed that in that case, plaintiff sued the defendant to recover possession of an undivided share of land and the defendant denied the plaintiff's title and possession and set up a specific title in himself (defendant). Further, that plaint averred that the plaintiff had title in May 1989 but did not disclose how that title arose. In the circumstances, it was observed by Clarence J. that where title to land is a circumstance upon which the plaintiff bases his claim to relief, the intention of the Code is that title should be disclosed in the plaint so that the defendant may have notice of the case which he has to meet.

In the insant case, the plaint contains as averment that the original owner of this land was Kandage Pabilis who by deed 'P1' executed a conditional transfer in favour of Caroline in 1962 and by deed 'P2' the said Caroline and Pabilis transferred the property to Kandage Piyasena (the defendant-appellant) who by deed 'P3' gifted the same to 1st and 2nd plaintiffs-respondents reserving the life interest in the 3rd plaintiff-respondent.

The cause of action in a *rei vendicatio* arises out of the fact that the plaintiff is the owner of the property in suit and therefore entitled to the possession thereof, that is, to an order for ejectment of the defendant. Upon a close perusal of the plaint, it is clear that the plaintiffs-respondents have pleaded the title in a manner which is sufficient to give notice of their ownership to the defendant-appellant. It is to be noted that deed 'P3' on which 1st and 2nd plaintiffs-

respondents base their title has been executed by the defendant-appellant himself.

It would be seen that encumbrance sheets 'P9 and P10' could provide more details, prior to Pabilis Kandage acquiring ownership of the land in suit in 1962 by deed 'P8'. Nevertheless the title pleaded in the plaint is sufficient for the defendant-appellant to take notice of the case he has to meet as he himself acquired rights by deed 'P2' from Pabilis and Caroline.

Malini Weerasinghe, the Notary Public who attested the deed 'P3' by which 1st and 2nd plaintiffs got title testified that a mistake has occurred in the duplicate of the deed 'D1' in regard to the share that was purported to be conveyed by the defendant-appellant. Her position was that deed 'P3' which is the original and deed 'P6' the protocol shows correctly the share as 3/4 but due to an inadvertence duplicate 'D1' shows the share conveyed as 1/4.

Learned President's Counsel drew our attention to *Kiri Menika v. Duraya*[2] where it was held that a duplicate cannot be treated as a copy of the original deed. However, it is significant to note that in *Dingiri Appu v. Mohottihamy*[3] Basnayake C.J. at 43 observed that there may be cases in which the correctness or genuineness of the duplicate is called in question and cases have come before Courts where there have been discrepancies between the original and duplicate of the same deed and that in such cases the court is free to refuse to treat the duplicate as a replica of the original and as standing in the same place as the original deed.

However, Learned Counsel contended that in terms of the provisions of section 92 of the Evidence Ordinance, plaintiffs-respondents are barred in law to lead oral evidence to vary the terms of the (duplicate deed 'D1'). It is to be noted that proviso 1 of section 92 of the Evidence Ordinance provides that "any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration or mistake in fact or law". Illustration II thereof refers to a situation wherein a mistake in a provision of a contract could be

proved by parol evidence. On the analogy of the Illustration II in *Girigoris Perera v. Rosalin Perera*[4] it was held that –

"Where deeds dealing with shares in an allotment of land purport to convey undivided shares of a larger land of which the allotment had at one time formed a part, a Court administering equity has power in a partition action relating to the allotment to rectify the mutual mistake of the parties in the description of the property even though no plea of mistake and no claim of rectification is set up in the suit".

A similar principle was adopted in *Fernando v. Fernando*[5]. However, relief under the proviso is not restricted to cases in which the mistake is admitted by both parties.

In regard to the grounds of relief spelt out by the 1st proviso to section 92 Bertain C.J. in *Nadaraja v. Ramalingam*[6] observed that —

"The circumstances referred to are defences of an equitable nature. Fraud, intimidation, mistake of fact or law are all defences of this nature. The words such as are an indication that the enumeration is not exhaustive".

It would appear that parol evidence pertaining to any of the grounds of relief set out in the proviso can be led only in cases where the validity of the document itself is challenged or where an order or decree is sought relating to the document itself. The proviso does not apply if the effect of the deed or written contract receives consideration only incidentally. In *Belgaswatte v. Ukkubanda*[7] Howard C.J. at 283 in distinguishing the decision in *Velan Alvan v. Ponny*[8] observed as follows:

"In *Velan Alvan v. Ponny*, Keuneman J, in his judgment held that oral evidence is not allowed where the effect of the deed comes up for consideration incidentally. He states that the action in that case made no attempt to invalidate the document nor would the fact to be proved entitle any person to any decree or order relating thereto. There was no claim relating to the document, I think the present case can be distinguished from *Velan Alvan v. Ponny* on

the ground that decree or order is sought in relation to P4. There is a claim relating to P4 the effect of which does not come up merely incidentally in connection with the proof of the plaintiff's title."

In the present case, the claim of the plaintiffs-respondents is based on the deed P3. In the circumstances, they are entitled to lead oral evidence to establish the occurrence of a *bona fide* mistake in regard to the shares in the duplicate 'P2' which was transmitted to the land registry.

The contention of learned president's Counsel that the plaintiffs-respondents cannot seek a declaration of title for a divided share of the land called Kahatagahawatta stems from the assumption that land described in the schedule to the plaint was an undivided portion of the larger land called Kahatagahawatta. It is significant to note that deeds 'P1' – 'P4' refer to the land in suit as a divided portion of Kahatagahawatta about two roods in extent. The encumbrance sheets marked 'P9' and 'P10' also reveal that land called Kahatagahawatta about two roods in extent has been registered in a separate folio indicating that it is being registered in a separate folio indicating that it is being treated as a distinct portion of land as from the year 1924.

It is no doubt correct as pointed out by learned President's Counsel that partition of a land could be brought about by a decree in a partition action or by way of an amicable partition followed by execution of deeds. It often happens that co-owners possess specific portions of land in lieu of their undivided interests in a larger corpus. However, this type of possession is sufficient to prove an ouster only in cases where the division is regarded as binding by all the co-owners and is not looked upon solely as an arrangement of convenience.

In *Obeysekera v. Endoris*[9] where the evidence indicated that an extent of about two roods possessed separately for over 20 years was not separated off for mere convenience of possession or temporary arrangement, but was intended as a permanent mode of possession, it was held, that lot so separated off ceased with the lapse of time and exclusive possession to be held in common with the rest of the land.

The documents 'P9' and 'P10' clearly demonstrate that as from the year 1924, an extent of two roods of the land called Kahatagahawatta

was registered in a different folio as a distinct portion of Kahatagahawatta. Kandage Pabilis by deed 'P8' in 1962 purchased this property from Mampa Vithanage Selohamy Perera. Therefore, the question that a declaration is sought for an undivided share of the larger land of Kahatagahawatta does not arise.

The main submission of learned Counsel was that the judgment of the learned District Judge was not in conformity with imperative provisions of section 187 of the Civil Procedure Code. He described the judgment as perfunctory. However, there is a brief indication of an attempt at evaluation of evidence in the form of a statement to the effect that 3rd plaintiff-respondent evidence is corroborated by Dayawathie. This would be a clear manifestation that the learned District Judge has considered the evidence of the 3rd plaintiff-respondent along with the evidence of Dayawathie. Nevertheless, on the whole the learned District Judge has failed in her legal duty to analyse the evidence before answering the issues. It is apparent that the judgment is in effect a summary of the evidence led at the trial.

The 3rd plaintiff-respondent testified in court that the house standing on the land in suit, was built by her deceased husband Pabilis and he permitted the defendant-appellant, who was his younger brother to stay in this house. It was her assertion that after the death of Pabilis, she left this house with the children with specific instructions to the defendant-appellant to hand over the possession whenever she requires the house. Witness Dayawathie who was the wife of deceased Arlin, a brother of defendant-appellant, corroborated the testimony of the 3rd plaintiff-respondent. Her testimony was that Kandage Luwis who was the father of deceased Pabilis and the defendant-appellant stayed in the ancestral house to the North of this land. It seems to me that the evidence of 3rd plaintiff-respondent and Dayawathie was sufficient for one to come to a definite finding that the house standing on this land was built by Pabilis and the defendant-appellant was permitted to reside in that house. The fact that deeds 'P2' and 'P3' make no reference to the house would not pose a difficulty. The deed 'D2' clearly demonstrate that Kandage Luwis had possessed the land described there which is about 1/4 acre in extent as a separate and distinct portion of Kahatagahawatta. Therefore, the position adverted to by the 3rd plaintiff-respondent that 'P3' conveyed 3/4 shares of the land

described in the schedule to the plaint has to be accepted. Thus, on the basis of the evidence placed before the District Judge one is justified in coming to a conclusion that the judgment in favour of the plaintiffs-respondents was inevitable.

Learned Counsel for the defendant-appellant drew our attention to the fact that learned District Judge has not answered issues 12-14. It is relevant to note that learned Counsel who appeared for the plaintiffs-respondents in the District Court has asked in his written submissions that issues Nos. 12-14 relating to the issue of a trust need not be considered as the evidence has established that the defendant-appellant has conveyed 3/4 shares of the land to the plaintiffs-respondents. In the circumstances, one could assert that the failure of the District Judge to answer issues Nos. 12-14, could have been due to this request by Counsel. Moreover, the defendant-appellant is not entitled to complain of any prejudice to him as the issues in question were raised on behalf of the plaintiffs-respondents, who alone could be prejudiced by such failure.

Article 138(1) of the Constitution which deals with the jurisdiction of the Court of Appeal states as follows:

138(1) —

"The Court of Appeal shall have and exercise subject to the provisions of the Constitution or 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 ... 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".

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.

For these reasons, I affirm the judgment of the learned District judge and dismiss this appeal with costs.

ISMAIL, J. – I agree.

Appeal dismissed.

Note by Editor: The Supreme Court in SCSP/LA No. 467/97 on 7.2.98 refused Special Leave to the Supreme Court.