

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

Lokuge Gunawathi De Silva (Deceased)
Kaikawala,
Matale.

Plaintiff-Appellant

1. Obada Mudalige Gamini Sarathchandra of
Bandarawatta.Ambaghatenna,Raththota
2. Obada Mudalige Nihal Kamalasiri of
Ambaghatenna,Raththota

Substituted Plaintiffs-Appellants

CA Case No.635/97(F)

DC Matale No.2095/P

Vs.

Lokuge Sisiliya De Silva, (Deceased)
Kaikawala,
Pallesiyapattuwa,
Matale.

Defendant-Respondent

- 1a.Waduge Benette De Silva of No.37,
Kaikawala,Raththota,Matale
- b.Appuwa Waduge Kamalasiri Hemantha
De silva of No.46, Kaikawala,
Raththota,Matale

Substituted Defendants-Respondents

1. (bb) Disanayake Mudiyanse Lage Mala Disanayake
No.46.Kaikawala,Raththota,Matale

Substituted 1(bb) Defendant-Respondent

Before: M.M.A. Gaffoor J.

Janak De Silva J.

Counsel: Samantha Vithana with Nishanthi Mendis for Substituted Plaintiffs-Appellants

Erosha Kalidasa for 1a Substituted Defendant-Respondent

D.B. Bulathgama for Substituted 1bb Defendant-Respondent

Written Submissions tendered on:

Substituted Plaintiffs-Appellants on 19th February 2018

Argued on: 16th January 2018

Decided on: 5th April 2018

Janak De Silva J.

The Plaintiff-Appellant (Plaintiff) filed action in the District Court of Matale seeking to partition the land called Diyabubulewatta Hena described more fully in the schedule to the plaint situated at Pallegama in the district of Matale. The land was said to be A.0 R.3 P.11 in extent. The corpus depicted in plan No. 4904 dated 16.08.1995 made by K.S. Samarasinghe, Licensed Surveyor (පැ.3). The Plaintiff claimed that she was entitled to an undivided 7/8 share of the corpus while the Defendant-Respondent (Defendant) was entitled to an undivided 1/8 share of the corpus.

This is a rare partition case where there was no contest between the parties, the trial was concluded in one day and the judgement delivered on the same day. No points of contest were raised between parties. The evidence of the Plaintiff was lead after which the case for the Plaintiff was closed. On the same day the learned District Judge of Matale gave judgement and held that the Plaintiff is entitled to an undivided 2/3 share of the corpus while the Defendant is entitled an undivided 1/3 share of the corpus. The Plaintiff has appealed against the said judgement.

It is useful to examine the pedigree pleaded by the Plaintiff before addressing the arguments made by the learned counsel for the Plaintiff. It is the claim of the Plaintiff that the original owners of the corpus were Lokuge Allis De Silva and Lokuge Punchi Nona. Allis De Silva sold his undivided $\frac{1}{2}$ share of the corpus to Odiris De Silva by deed no. 10370 dated 1931.11.10 attested by J.S. Jayawardena, notary public. Upon the death of the said Odiris De Silva, his rights devolved on Gunawathie De Silva, Sisilia De Silva, David De Silva, Wilson De Silva, Peter De Silva, Alfred De Silva, Silva Nona and Edward De Silva. The said Wilson De Silva, Peter De Silva, Alfred De Silva, Silva Nona and Edward De Silva sold their rights to the Plaintiff Gunawathie De Silva by deed no. 28065 dated 1972.09.20 attested by H.H.S. Seneviratne Notary Public who thereby became the owner of an undivided $\frac{6}{8}$ share of the corpus. Furthermore, David De Silva sold his undivided $\frac{1}{8}$ share of the corpus to the Plaintiff Gunawathie De Silva by deed no. 3947 dated 1990.02.23 attested by L.B. Warnapala notary public who thereby became the owner of an undivided $\frac{7}{8}$ share of the corpus.

According to this pedigree pleaded by the Plaintiff she claimed an undivided $\frac{7}{8}$ share of the corpus while the Defendant Sisilia De Silva was said to be entitled to an undivided $\frac{1}{8}$ share of the corpus.

According to the pedigree pleaded by the Plaintiff the other $\frac{1}{2}$ share of Diyabubulewatta Hena held by Lokuge Punchi Nona devolved upon other parties as pleaded in the plaint and was the subject matter of D.C. Matale case no. 1524/P.

During the evidence of the Plaintiff the final decree of the said D.C. Matale case No. 1524/P was marked as ௮.2. According to this final decree the Plaintiff, Defendant and David De Silva each obtained an undivided $\frac{1}{3}$ share of Lot 1 in plan no. 3496 prepared K.S. Samarasinghe, licensed surveyor in the said case. It is this Lot 1 which is A.0 R.3 P. 11 in extent that is the corpus in this case and depicted in plan No. 4904 dated 16.08.1995 made by K.S. Samarasinghe, licensed surveyor (௮.3). By deed no. 3947 dated 1990.02.23 attested by L.H. Warnapala notary public (௮.4) David De Silva sold his share to the Plaintiff. It is on this evidence that the learned District Judge of Matale held that the Plaintiff is entitled to an undivided $\frac{2}{3}$ share of the corpus while the Defendant is entitled an undivided $\frac{1}{3}$ share of the corpus.

The main ground upon which the Substituted Plaintiffs-Appellants (Appellants) sought to assail the judgment of the learned District judge is that he has failed to properly investigate title as required by law. Section 25(1) of the Partition Law requires the court to examine the title of each party and hear and receive evidence in support thereof. It has been consistently held 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*. In *Gnanapandithen and another v. Balanayagam and another*¹ G.P.S. De Silva C.J. explained this duty as follows:

“Mr. Samarasekera cited several decisions which have, over the years, emphasized the paramount duty cast on the court by the statute itself to investigate title. It is unnecessary to repeat those decisions here. For present purposes it would be sufficient to refer to the case of *Mather v. Thamoatham Pillai*⁽²⁾ decided as far back as 1903, where Layard, C.J. stated the principle in the following term: - "Now, the question to be decided in a partition suit is not **merely matters between parties which may be decided in a civil action**; . . . The court has not only to decide the matters in which the parties are in dispute, **but to safeguard the interests of others who are not parties to the suit**, who will be bound by a decree for partition . . . "Layard, C.J. stressed the importance of the duty cast on the court to satisfy itself "that the plaintiff has made out a title to the land sought to be partitioned, **and that the parties before the court are those solely entitled to such land.**" (emphasis added). “²

The complaint of the Appellants is that although the Plaintiff is entitled to an undivided 7/8 share of the corpus while the Defendant is entitled to an undivided 1/8 share of the corpus, the learned District Judge failed to properly investigate the title by not awarding the parties the said shares. However, this allocation of the shares as pleaded by the Plaintiff in the plaint was without any reference to the final decree in D.C. Matale case No. 1524/P. But clearly the final decree in D.C. Matale case No. 1524/P gave the Plaintiff, Defendant and David De Silva each an undivided 1/3 share of Lot 1 in plan no. 3496 prepared K.S. Samarasinghe, licensed surveyor in the said case which is the corpus in this case. By deed no. 3947 dated 1990.02.23 attested by

¹ (1998) 1 Sri.L.R. 391

² Ibid. page 395

L.H. Warnapala notary public (පැ.4) David De Silva sold his share to the Plaintiff. Hence the learned District Judge of Matale was correct in deciding that the Plaintiff is entitled to an undivided 2/3 share of the corpus while the Defendant is entitled an undivided 1/3 share of the corpus.

But the Appellants complains that the share allocation between the aforesaid parties were not mentioned in the said final decree and that the learned District Judge should have considered the judgement and interlocutory decree in the said D.C. Matale case No. 1524/P to ascertain the share allocation between the parties to this case. However, the judgement and interlocutory decree in the said D.C. Matale case No. 1524/P was not tendered in evidence during the trial. While it is true that the court has a duty to investigate the title in a partition case, it 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.³The Plaintiff should have marked in evidence all the documents which according to her were necessary for court to properly investigate title. She must bear the consequences of her failure to do so.

Instead, the Appellants now seeks to argue that except පැ.3 and පැ.3අ, none of the other documents marked පැ.1, පැ.2 and පැ.4 during the trial were tendered to court at the conclusion of the trial and that this merits a trial de novo. The learned Counsel for the Appellants relies on section 114 (2) of the Civil Procedure Code and the decisions in *Chandrasena v. Piyasena and others*⁴and *Podiralahamy v. Ran Banda*⁵ which state that it is the duty of the trial judge to direct parties after trial to tender all documents to court with a list attached before writing the judgement. However, the two documents referred to by the Appellants as being important for the investigation of title, namely the judgement and interlocutory decree in the said D.C.

³ Anandacoomaraswamy J. in *Thilagaratnam v. Athpunathan and Others* [(1996) 2 Sri.L.R. 66 at 68]

⁴ (1999) 3 Sri.L.R.201

⁵ (1993) 2 Sri.L.R. 20

Matale case No. 1524/P was not marked in evidence. Hence no difference is made even if all the marked documents were tendered to court.

In any event, it appears that in terms of an order made by this court on 18th February 2016, the Substituted 1st Defendant Respondent has submitted the missing marked documents to this court. None of these documents persuades me to conclude that the judgement of the learned District Judge of Matale is wrong.

For the foregoing reasons, I see no reason to interfere with the judgement of the learned District Judge of Matale made on 25th February 1997.

The appeal is dismissed with costs.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I agree.

Judge of the Court of Appeal