

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

1. Godayalage Sirisena of Higgoda,
Undugoda. (deceased)
- 1(b) Hewayalage Chandralatha
9. Gamage Nimal Chandraratne of
Higgoda, Undugoda.
15. Godayalage Podinona of Higgoda,
Undugoda.

1st, 9th and 15th Defendant-
Appellants

6. Kinigamayalage Marthelis,
7. Widanadewayalage Anula
Hathurusinghe of Higgoda,
Undugoda.

6th and 7th Defendant-Appellants

11. Godayalage Andirisa of Higgoda,
Undugoda. (deceased)
- 11(a) Godayalage Upali Wijesinghe of
Higgoda, Undugoda.

11(a) Defendant-Appellant

CASE NO: CA/1123-1125/2000/F

DC KEGALLE CASE NO: 23150/P

Vs.

Godayalage Somaliya of Higgoda,
Undugoda.

(Deceased 1st Plaintiff-
Respondent)
Godayalage Rathnapala of
Higgoda, Undugoda.
1(a) Plaintiff-Respondent
And Several Other Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Upul Kumarapperuma for the 1st, 9th and 15th
Defendant-Appellants.

U. de Z. Gunawardena for the 6th and 7th
Defendant-Appellants.

C. Sooriyaarachchi for the 11th Defendant-
Appellant.

Sudharshani Cooray for the Plaintiff-
Respondents.

Decided on: 01.02.2019

Samayawardhena, J.

The five plaintiffs filed this action seeking partition of the land depicted in the Preliminary Plan marked X among the plaintiffs and the 1st-7th defendants. The other defendants have later intervened. After trial the learned District Judge has decided to partition the land as set out in the plaint. Being dissatisfied with the said Judgment (a) the 6th defendant, (b) the 11th defendant and (c) 1st, 9th and 15th defendants have preferred appeals.

Let me first consider the 6th defendant's appeal.

The 6th and 7th defendants are husband and wife respectively. They have filed a joint statement of claim. But the Petition of Appeal has been filed only by the 6th defendant. The learned District Judge has given 30/1800 shares each to the 6th and 7th defendants.

At the trial they have sought exclusion of Lot 6 of the Preliminary Plan on prescription.

The plaintiff sought to partition the land known as Hitinawatta alias Paranawatta. The court commissioner has confirmed it in the Preliminary Plan and its Report marked X and X1 respectively.

The 6th defendant states that Hitinawatta and Paranawatta are two different lands and Lot 6 is Paranawatta and therefore cannot be subject to partition in one action. This position is unacceptable.

Even in the old Plans (vide for example P16/11V3 prepared in 1956) and the old Deeds (vide for example P10 executed in 1921, P17 executed in 1923, P18 executed in 1934, 11V1 executed in 1964, 4V2 executed in 1972, 11V2 executed in 1978, 5V1 executed in 1974) this land has been identified as Hitinawatta alias Paranawatta, or Hitinawatta and Paranawatta.

It is the position of the 6th defendant that 6th and 7th defendants have prescribed to Lot 6 of the Preliminary Plan. This position is also unacceptable.

The 6th and 7th defendants at the trial produced three Deeds. By Deed No. 14266 dated 24.06.1958 marked 6V1, Kiribiyah,

Hetuwa and Jothiya have transferred undivided 11/25 shares out of 8 lahas of paddy sowing area out of the larger land of 1 pela of paddy sowing area to Allis. Allis has transferred the same undivided share by Deed No. 3666 dated 15.02.1980 marked 6V2 to Pushpa Kumari. Pushpa Kumari again with Allis has transferred undivided 34/75 shares out of 8 lahas of paddy sowing area out of the larger land of 1 pela of paddy sowing area by Deed No.1670 dated 05.05.1981 marked 6V3 to the 6th and 7th defendants.

It is noteworthy that the 6th and 7th defendants purchased “undivided rights” from the land (not a divided and defined portion) nearly one month before the institution of this action (in that their title Deed 6V3 is dated 05.05.1981 and registered at the Land Registry on 11.05.1981 and the action was filed on 24.06.1981).

In the written submissions tendered before the District Judge after trial, this is what the Attorney-at-Law for the 6th and 7th defendants has prayed for: “*Therefore 6th and 7th defendants pray that they be given 11/25 shares of Lots 1-6 (of the Preliminary Plan) or Lot 6 in lieu of their shares.*”¹

It is abundantly clear that the claim of the 6th and 7th defendants for exclusion of Lot 6 of the Preliminary Plan on prescription or otherwise is manifestly not entitled to succeed.

I am unable to accept the argument of the learned counsel for the 6th defendant-appellant that “*the parties are bound by the language of the deed*”. As correctly held in *Cooray v. Wijesuriya (1958) 62 NLR 158* “*Before a Court can accept as correct a share*

¹ Vide page 345 of the Brief.

which is stated in a deed to belong to the vendor there must be clear and unequivocal proof of how the vendor became entitled to that share.”

I dismiss the appeal of the 6th defendant-appellant but without costs.

I will now consider the 11th defendant’s appeal.

The 11th defendant has not been given any shares by the Judgment.

According to the 11th defendant, Dingiriya was entitled to 3/10th share of 2 pelas of paddy sowing area of the larger land of 5 pelas of paddy sowing area of land, and Dingiriya has transferred that right to Kiribindu by Deed No.19732 dated 14.07.1964 marked 11V1, and Kiribindu has transferred that right to the 11th defendant by Deed No. 12352 dated 09.11.1978 marked 11V2. These Deeds were marked through the evidence of the 1st plaintiff without any objection.² It is the position of the 11th defendant that he is in possession of Lot 7 of the Preliminary Plan and therefore he has acquired prescriptive rights to that Lot.

According to paragraph 13 of the plaint and the evidence of the 1st plaintiff³, Dingiriya has got undivided rights to the land from Balaya by Deed No. 31 dated 31.06.1921 marked P10. It is the position of the 1st plaintiff that Dingiriya transferred that right to Kiribindu (not the same Kiribindu referred to earlier) by Deed No. 38023 dated 08.01.1926 marked P11, and thereafter that right devolved on the 1st and 2nd plaintiffs. This is not correct.

² Vide page 186 of the Brief.

³ Vide page 171 of the Brief.

Dingiriya in Deed P11 traces his title (or declares as the source of his title) to Deed No.20834 attested by Fernando NP and not to Deed No. 31 attested by Wickremaarachchi NP marked P10.

Conversely, in Deed marked 11V1 relied upon by the 11th defendant, Dingiriya traces his title (or declares as the source of his title) to Deed No. 31 attested by Wickremaarachchi NP marked P10.

Then it is clear that the finding of the learned District Judge that Dingiriya disclosed by the 11th defendant does not figure in the pedigree of the plaintiff⁴ is erroneous.

The 11th defendant's claim for undivided 3/10th share out of 2/5th share (i.e. 6/50 share) is entitled to succeed.

His claim to prescriptive rights to Lot 7 of the Preliminary Plan is not entitled to succeed.

At the final scheme of partition his rights shall as far as possible be given from Lot 7 of the Preliminary Plan.

The appeal of the 11th defendant is partly allowed.

This leads me to consider the appeal of the 1st, 9th and 15th defendant-appellants.

The 1st, 2nd, 4th, 5th, 8th, 9th and 10th defendants have filed a joint statement of claim. The 15th defendant does not seem to have filed a statement of claim. The said defendants have predominantly sought to exclude Lot 3 of the Preliminary Plan on prescription. This claim is not entitled to succeed.

⁴ Vide 3rd paragraph of page 252 of the Brief.

The learned District Judge in the Judgment has given 100/1800 shares to the 1st defendant and no shares have been allotted to the 9th and 15th defendants.

The learned counsel for the said defendants in the written submission makes two points in relation to devolution of title. I will now consider them.

Tikira who owned 1/4th share of the corpus transferred his share by Deed P17 dated 16.07.1923 to Punchihatana. Punchihatana by Deed P18 dated 06.12.1934 has transferred 1/5th of the corpus to Hetuwa and Jothiya. Hetuwa and Jothiya by Deed 4V2 dated 05.02.1972 transferred 5/6th from 1/5th of the corpus to the 1st defendant Sirisena. The 1st defendant Sirisena has by Deed 5V1 dated 02.09.1974 transferred 1/6th from 1/5th to the 4th defendant Suwaris and the 8th defendant Siriwardena.

The Deed 5V1 has been produced during the cross examination of the 1st plaintiff-respondent. This has been acknowledged by the learned counsel for the 1st plaintiff-respondent in the written submission. The learned District Judge was wrong not to have given any share to the 8th defendant Siriwardena. By Deed 5V1 dated 02.09.1974, the 8th defendant Siriwardena becomes entitled to 1/2 from 1/6th from 1/5th (i.e. 1/60) of the corpus.

It appears that the learned District Judge has thought that the 1st defendant Sirisena by Deed 5V1 has transferred the entirety of what he got from Deed 4V2 (i.e. 5/6 from 1/5) to the 4th defendant Suwaris and the 8th defendant Siriwardena. But it is not so. He transferred only 1/6th from 1/5th to the 4th defendant Suwaris and the 8th defendant Siriwardena. The 1st defendant

Sirisena is entitled to the balance $4/6^{\text{th}}$ from $1/5^{\text{th}}$ (i.e. $4/30$) from the corpus. This shall be in addition to what has already been given to him by the Judgment (i.e. $100/1800$).

The learned counsel for the said defendants also states that by Deed No. 14265 marked as P4, Kiribiyah and Allis transferred $9/25^{\text{th}}$ from the corpus to Hethuwa and Jothiya, and those rights, upon their deaths, shall devolve upon their children—the 1st defendant Sirisena, the 8th defendant Siriwardena, the 2nd defendant Piyadasa, the 9th defendant Nimal Chandraratne, the 15th defendant Podinona and the 4th defendant Suwaris.

This contention is unacceptable as Hethuwa and Jothiya, particularly what they got from Deed P4 transferred to the 4th defendant Suwaris and the 8th defendant Siriwardena by Deed No. 66275 marked 4V1.

The learned counsel further states that by Deed No. 63561 marked 4V2, Hethuwa and Jothiya transferred to the 1st defendant Sirisena, only $5/6^{\text{th}}$ from $1/5^{\text{th}}$ and therefore the balance $1/6^{\text{th}}$ from $1/5^{\text{th}}$ of Hethuwa and Jothiya shall upon their deaths also devolve on their children. This is not acceptable.

The learned counsel for the plaintiff-respondents in the written submission by drawing attention to Deed No. 66276 marked 5V2 has stated that Hethuwa and Jothiya have by the said Deed transferred $77/100$ shares to the 5th defendant Gunadasa, the 9th defendant Nimal Chandraratne and the 15th defendant Podinona. The learned counsel for the plaintiff-respondents states that this Deed produced during the cross examination of the 1st plaintiff has escaped the attention of the District Judge.

Hence the 5th defendant Gunadasa, the 9th defendant Nimal Chandraratne and the 15th defendant Podinona shall in equal shares be entitled to the said 77/100 share (i.e. each 77/300).

Appeal of the 1st, 9th and 15th defendants party allowed.

This case has been instituted in the District Court in 1981. Appeals have been filed in 2000. We are in 2018. It would have been very easy for me to set aside the Judgment of the District Court stating that the District Judge has not made a full investigation of title. I tried my best to address specific points raised by the learned counsel of the appellants. It is not my duty to rewrite the District Court Judgment. Let the District Judge prepare the new List of Shares.

Parties will bear their own costs of appeal.

Judge of the Court of Appeal