

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

7. Lokupetiyapege Samel,
No. 525,
Goonadeniya,
Wekendawala.
8. Lokuketiyapege Adline,
Gulugahawatte,
Bowala,
Walasmulla.
- Defendant-Appellants

CASE NO: CA/1041/2000/F

DC WALASMULLA CASE NO: 485/P

Vs.

Seethawaka Liyanage Don
Juwani,
Bowala,
Walasmulla.

Plaintiff-Respondent
And Several Other Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Samantha Vithana for the 7th and 8th
Defendant-Appellants.
Saman De Silva for the Plaintiff-Respondent.

Decided on: 29.03.2019

Samayawardhena, J.

The plaintiff instituted this action seeking to partition the contiguous allotments of lands known as Lenangaharuppa, Middeniyegedarawatta, Hamasgaharuppa, Paluraanagedarawatta, Medawatta and Katalagahawatta alias Mahagedarawatta in extent about 9 Acres. The Preliminary Plan marked X depicts a land in extent of 6 Acres 3 Roods and 15.5 Perches. After trial the learned District Judge in his Judgment has excluded Lot 5 and partitioned Lots 1-4 and 6, among the plaintiff and 1st-6th defendants, and left 51/144 shares unallotted. Being dissatisfied with the Judgment, only the 7th and 8th defendants have preferred this appeal.

The 7th and 8th defendants raised the following issues at the trial.¹

19. Shall the land known as Katalagahawatta depicted as Lot 6 in Plan No.1703 of Surveyor Kumarage be excluded from the corpus?
20. Did the 7th defendant purchase $\frac{1}{4}$ of that Lot?
21. Did the 7th defendant cultivate the Lots 2-4 of the said Plan?
22. Have the 7th and 8th defendants acquired prescriptive rights to those Lots on long possession?

There cannot be any dispute that Katalagahawatta is one of the lands sought to be partitioned, and Lot 6 of the Preliminary Plan is comprised of Katalagahawatta—vide the schedule to the plaint and the Preliminary Plan. Therefore there is no

¹ Vide page 55 of the Appeal Brief.

necessity to exclude Lot 6. It is the evidence of the 7th defendant that he purchased 1/4 of Katalagahawatta by Deed marked 7V1.² The learned District Judge in his Judgment has stated that the said Deed has not been tendered to Court for the Court to consider the said claim. Learned Counsel for the appellants did not produce that Deed at least to this Court. If what the 7th defendant has stated in evidence is correct, that is not a ground to exclude Lot 6 from the corpus. He might be able to produce that Deed and claim undivided rights from Lot 6. The learned District Judge has left some shares unallotted.

Regarding the issue on prescription, the position of the appellants is that the 7th defendant planted the coconut trees and the 8th defendant possessed them.³ Both of them are not living on the land.⁴ Even assuming they did so, by Mortgage Bonds marked 2V2 and 2V6, it is seen that the 7th defendant has started possession as a usufructuary mortgagee and there is no evidence about his change of character of possession and commencement of adverse possession against all the co-owners of the said Lots. The appellants have no other Deeds⁵, may be except 7V1, which was not produced. Even if the 7th defendant did not enter possession as a usufructuary mortgagee, mere long possession by the 8th defendant is not prescriptive possession. The 7th defendant is now not in possession.⁶

It is noteworthy that, the appellants, in their written submissions tendered to this Court, have not dealt with what they have put in issue at the trial. They do not say that those

² Vide page 107 of the Appeal Brief.

³ Vide inter alia page 149 of the Appeal Brief.

⁴ Vide inter alia pages 148, 149 of the Appeal Brief.

⁵ Vide page 143 of the Appeal Brief.

⁶ Vide page 149 of the Appeal Brief.

issues should have been answered in their favour. It appears that they now concede that they cannot succeed on those two grounds. Instead they say that the plaintiff has not proved the pedigree/the land to be partitioned has not been properly identified/Deeds are not relevant etc. They did not put any of those matters in issue at the trial Court. The appellants rejected the plaintiff's pedigree in toto in the trial Court but did not tender a separate pedigree. They, as I have already stated, sought exclusion of Lot 6 and claimed Lots 2-4 and 6 of the Preliminary Plan on prescription. In other words, they did not claim undivided rights from the land—they were outsiders. Having done so, the appellants cannot now seek dismissal of the action on extraneous grounds such as that the plaintiff did not prove the pedigree/corpus has not been properly identified/Deeds are not relevant etc. They are questions of fact which should have been raised in the District Court. The District Judge has satisfied with the evidence and entered Judgment accordingly. On the general principles that the plaintiff shall make out his title and it is the duty of the District Judge trying a partition action to investigate title fully etc., this Court cannot play the role of the District Judge nor dismiss the partition action summarily especially when those matters have not been put in issue in the District Court. There is no necessity to interfere with that Judgment so long as the issues raised by the appellants have been properly answered.

I dismiss the appeal with costs.

Judge of the Court of Appeal