

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

K. A. Jayasekera of  
Maharachimulla, Alawwa.

**PLAINTIFF**

C. A No. 250/1997 (F)  
D.C. Kurunegala No. 3376/P

Vs.

1. K. A. Gunasekera Appuhamy of  
Meewewa, Kongahakotuwa,  
Kalugamuwa.
2. K. A. Nandasena of  
Maharachimulla, Alawwa.

**DEFENDANTS**

And

K. A. Jayasekera of  
Maharachimulla, Alawwa.

**PLAINTIFF-APPELLANT**

Vs.

1. K. A. Gunasekera Appuhamy of  
Meewewa, Kongahakotuwa,  
Kalugamuwa.
2. K. A. Nandasena of  
Maharachimulla, Alawwa.

**DEFENDANTS-RESPONDENTS**

K. A. Jayasekera of  
Maharachimulla, Alawwa.  
**(deceased)**

**PLAINTIFF-APPELLANT**

1. W. M. F. Princess Fernando
2. K. A. S. R. Jayasekara
3. K. A. A. W. Jayasekara
4. K. A. S. N. Jayasekara

All of Maharachchimulla, Alawwa.

**Parties sought to be substituted as  
1A, 1B, 1C, 1D PLAINTIFF-  
APPELLANT-PETITIONERS**

Vs.

1. K. A. Gunasekera Appuhamy of Meewewa, Kongahakotuwa, Kalugamuwa.
2. K. A. Nandasena of Maharachchimulla, Alawwa.

**DEFENDANTS-RESPONDENTS**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** Jacob Joseph with Sandamali Somarathne  
and S. Senanayake for the  
1A, 1B, 1C & 1D Plaintiff- Appellants

N.M. Reyaz for the 2<sup>nd</sup> Defendant-Respondent

**WRITTEN SUBMISSIONS**

**FILED ON:** 23.09.2011 - Defendant-Respondent  
30.09.2011 – 1A, 1B, 1C & 1D Substituted-Plaintiff-Appellants

**ARGUED ON:** 25.08.2011

**DECIDED ON:** 14.10.2011

**GOONERATNE J.**

This was a partition suit filed in the District Court of Kurunegala. The subject matter or the corpus was admitted and 7 points of contests were raised. The proceedings of 24.2.1997 indicates that there was no contest between the parties and both parties agreed to lead only the evidence of Plaintiff and signed the record accepting the decree of court. Land in question is called Medawattehena. According to the plaint and evidence led suggest that the original owner was one Peiris Appuhamy. The said Peiris Appuhamy as in paragraph 3 of the plaint by deed No 383 of 12.7.1927 transferred and sold the land to K.A.Gunasekera Appuhamy. Evidence was led on this fact but it is recorded that Plaintiff could not trace the deed No. 383. (එම ඔප්පුව මට සොයා ගැනීමට නොහැකි වුනා). By deed P2 of 27.10.1966 said Gunasekera Appuhamy transferred the land to the Plaintiff, which rights he acquired from above deed No. 383. Plaintiff's father is Gunasekera Appuhamy. His father had by deed P2 transferred 1 acre to Plaintiff.

In his evidence Plaintiff states his father has by deed No. 383 acquired 1/4 share from the land in question and however the father transferred 1 acre to Plaintiff. In evidence Plaintiff admits that his father could only have transferred what he had acquired from deed No. 383. Two

other deeds 2V1 & 2V2 had been marked at the trial through the Plaintiff. By 2V1 of 24.9.1960 Peiris Appuhamy transferred the balance  $\frac{1}{2}$  share to Gunapala. Both Gunapala and Peiris Appuhamy together by 2V2 transferred to the 2<sup>nd</sup> Defendant the  $\frac{1}{2}$  share. (ගුණපාල සහ පීරිස් අප්පුහාමි දෙදෙනාම එකතුව ගුණපාලට පීරිස් අප්පුහාමිගෙන් අයිති වූ  $\frac{1}{2}$  ක පංගුව සමග 1960.12.17 දිනැති අංක 10365 දරණ 2 ව 2 දරණ ඔප්පුවෙන් 2 වත්තිකරු නන්දසේනට පවරා දුන්නා).

Plaintiff in his evidence suggest the following share allocation.

Plaintiff  $\frac{1}{4}$  unalotted  $\frac{1}{4}$  2<sup>nd</sup> Defendant 1/2.

In the petition of appeal and in the submission to this court the learned counsel for Appellant stressed the following:

(a) The plaintiff begs to produce marked x1 the deed bearing No. 383 aforesaid, deed 833 marked x2 and deed 2311 marked x3 and deed No. 10190 as x4 and moves Court to admit and receive the said deeds marked x1, x2 and x3 in evidence under Section 773 of the Civil Procedure Code and Article 139(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

(b) The plaintiff states that he obtained the relevant title deeds bearing Nos. 383 dated 12.7.1927 attested by E.E.G. Daniels, N.P and 833 dated 12.3.1947 attested by D.A.A Seneviratne, N.P only on 28.2.1977 after the trial in the above case. The plaintiff also obtained a certified copy of the deed bearing No. 2311 attested by D.T.S. Goonatilleka, N.P on 5.6.1946 only on 27.3.1997.

(c) According to the deed bearing No. 383 K.A Punchirala the grand father of the plaintiff has transferred title to the said land to K.A. Gunasekera Appuhamy the 1<sup>st</sup> defendant, the father of the plaintiff.

(d) By the deed bearing No. 383 the 1st defendant has received about  $\frac{1}{4}$  share of the said land from the said K.L. Punchirala.

Under deed bearing No. 2311 K.L. Peiris Appuhamy and the said K.L.Appuhamy have received from Mudiyansele Ukkhamy undivided  $\frac{1}{2}$  share of the land in suit.

The 1<sup>st</sup> defendant also received under deed bearing No. 833 dated 12.3.47 from the aforesaid K.L.Appuhamy another ( $\frac{1}{4}$ ) one quarter share of the said land.

The said K.L.Peiris Appuhamy has transferred his  $\frac{1}{4}$  share of the said land to K.L.Gunapala by deed No. 10190 marked 2D1.

The said K.L.Peiris Appuhamy and K.L.Gunapala have transferred an undivided  $\frac{1}{2}$  share of the said land to the 2<sup>nd</sup> defendant by deed bearing No. 10365 dated 27.10.1960 marked 2D2.

Learned counsel for Respondent objected to the submissions set out above by learned Counsel for Appellant and drew the attention of this court to the settlement between parties entered in the District Court on 24.2.1997 and submitted that there is finality in view of the said settlement. Learned counsel vehemently objected to a fresh trial and cited the case of Beatrice Dep vs Lalani Meemaduma 1997(3) S.L.R 379 and stressed that the requirements in the above case are not satisfied. In the said case it was held:

- (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
- (2) Evidence must be such that if given it would probably have an important influence on the result of the case, although it need not be decisive.
- (3) The evidence must be such as is presumable to be believed or in other words it must be apparently credible although it need not be incontrovertible.  
(Ratwatte vs. Bandara 70 N.L.R 231 & Ladd Vs. Marshall followed)

Learned counsel for Respondent also submitted that even if the deeds referred to above are permitted to be led in evidence his share if at all would be 5/12<sup>th</sup> share of the land in dispute.

I have taken note of the following which have been highlighted in the written submissions of 2<sup>nd</sup> Defendant-Respondent.

- (a) Record does not show that Plaintiff-Appellant applied for certified copies of deeds or that he made an application to the District Court and was refused.
- (b) The District Judge proceeded to trial an agreement reached by parties. Both parties represented by counsel.
- (c) Already contested issues should not be re-highlighted. There has to be finality.
- (d) Trial Judge has investigated title. Duty to investigate title does not precede the parties objection to prove their title. In this regard the following authorities are cited.

Faleel vs. Argeen 2004 (1) SLR 48 per Weerasuriya J. P/CA stated at page 51 ....

Therefore, the principle laid down in Kumarihamy v Weeragama (supra) which was a full bench decision, has to be reiterated, namely that after investigation of title and having being satisfied that the parties before it alone have interests in the land to be partitioned there is nothing to prevent the court allowing parties to compromise their dispute.

Thilagaratnam v. Athpunathan 1996 (2) SLR 66 Anandacoomaraswamy J. at pg. 68 ....

We are not unmindful of these authorities and the proposition that it is the duty of the Court to investigate title in a partition action, but the Court 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.

- (e) Re-trial would cause grave prejudice to 2<sup>nd</sup> Defendant-Respondent and will not bring finality to parties decree.
- (f) The conditions laid down in the case of Beatrice Dep vs. Meemaduma not satisfied. All 3 limbs of the case above mentioned has to be fulfilled.

The substituted 1A, 1B, 1C & 1D Plaintiff-Appellant submit in their Written submissions that trial proceeded on the available deeds and as at the date of trial all the deeds relating to title was not available. The deceased Plaintiff pleaded in the petition of appeal (paragraph 16) to produce deed x(1) to x(4) referred to therein, and invite this court to exercise the powers vested in this court under Section 773 of the Civil Procedure Code and Article 139(2) of the Constitution. No doubt when one read and understand the above provisions it is clear that the Court of Appeal has wide powers and discretionary powers, to deal with appeals and even admit fresh evidence having in mind that justice should prevail at all times and the Court of

Appeal is legally bound to give effect to the above legal provisions to ensure rights and interests of parties, legally. However these powers need to be exercised very cautiously.

The judgment of the learned trial Judge however cannot be faulted. Parties agreed to settle and evidence was led accordingly and judgment was entered on material placed before the trial court by the Plaintiff. Therefore there is finality reached between the litigants in the trial court, though in a partition suit there is a duty cast on the District Judge to investigate title. In this regard parties could compromise their dispute as in the case in hand, supported by the case of Kaleel vs. Argeen, and within the limits stated in the case of Thilagaratnam vs. Athpunathan. Looking at the entire case in hand what really strike me is the absence of material to show that the Plaintiff failed to obtain the necessary deeds with reasonable diligence for use at the trial. On the other hand I cannot deny the possibility that if fresh evidence by permitting the aforesaid deeds to be produce in evidence, would have an important influence in the result of the case. Nor can I conclude that such production of deeds as evidence would not be apparently credible.



It is important to fathom from the above mentioned decided cases re-Beatrice Dep's Case, Ratwatte vs. Bandara & Ladd Vs. Marshall that in order to justify the reception of fresh evidence all three conditions laid down in the above cases should be fulfilled. The dicta in the above cases had been followed and adopted for quite a long period of time. It is regrettable that Plaintiff had failed to demonstrate and prove that he could not obtain the deeds relied by him as at the date of trial to be used at the trial, with reasonable diligence. This aspect of the case had not been established according to the available material. Mere statement that he could not obtain the deeds, would not suffice.

In all the above circumstances I am reluctantly compelled to dismiss this appeal without costs.

JUDGE OF THE COURT OF APPEAL