

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

1. Hitihamilage Bandaramenika of Hindagolla. (deceased)
2. Hitihamilage Wijerathna Banda of Hindagolla. (deceased)

Plaintiffs.

- Vs. -

Application No: 738 / 95 (F)

1. Hitihamilage Bisomenika of Hindagolla.
2. Hitihamilage Kusumawathie Menike.

Defendants.

AND NOW IN THE MATTER OF A FINAL
APPEAL BETWEEN:

District Court Kurunegala
Case No: 3226/L

Hitihamilage Hemawathi Menike alias
Somawathie Menike.
Sub post office,
Hindagolla.

Substituted Defendant-Appellant

- Vs. -

1. Hitihamilage Bandaramenika of Hindagolla.
2. Hitihamilage Wijerathna Banda of

Plaintiff-Respondents

Counsel: S.N. Vijithsingh for the Defendants/ Appellants.

Kaushalya Tilakratne for the Plaintiffs/ Respondents

Written submissions: 27-4-2011 (Defendants/Appellants)

Before: Rohini Marasinghe J

Judgment 8-7-2011

CA 738-95

The Plaintiffs/Respondents (hereinafter referred to as plaintiffs) had instituted action seeking a declaration of title to the land described in the schedule to the plaint. The 1st plaintiff got title to the land in suit through a person named Nambirala. The defendants also claimed title thorough the same source. After trial the judgment was entered in favour of the plaintiffs. The defendants appealed.

The 1st plaintiff and the 1st defendants are two sisters. Their father was the said Nambirala. The 2nd defendant is the daughter of the 1st defendant. The original owner of this land was the said Nambirala. By virtue of a partition decree in case bearing No: 2496/P dated 22-7-1948 the said Nambirala was allotted the lot 6 depicted in the partition plan No: 3981 A.

The 1st plaintiff had given evidence at the trial. Her evidence disclosed the following;

By virtue of the partition decree which was marked as P1 the aforesaid Nambirala became the absolute owner of the lot 6 depicted in plan No: 3981 A. The said Nambirala had transferred that lot 6 to the 1st plaintiff and to one Punchmanike by deed 313. (P2). The said Punchmanike had died intestate. The heirs of said punchmanike by deed No: 24562 (P4) had transferred that share to Wijeratnes Banda who was one of their brothers. The said Wijeratna Banda is the 2nd plaintiff in this case. Consequently, the 1st and the 2nd plaintiffs became the owners of the land in suit. The plaintiffs' complain was that the defendant had encroached into a portion of their land in January 1988. The defendants as alleged by the plaintiff had constructed a house by filling the paddy land which belonged to the plaintiffs.

The Licensed Surveyor named Galagedera had given evidence on behalf of the plaintiffs. In his evidence he had stated that the land in issue was surveyed by him and the plan was superimposed on lot 6 of plan 3981 A. The superimposed plan No: 2999 was marked as "X". In the said plan "X" the land in issue is depicted as lots 1 and 2. In the said plan the encroached area by the defendants was shown in red. In the evidence the surveyor stated that the encroached area was in lot 2. The lot 1 is a high land and the lot 2 was a paddy land. The surveyor further stated that the paddy land had been filled and a house had been built recently on that paddy land depicted in the said plan as lot 2. These facts were observed by the surveyor when he went to survey the land in November 1988.

The defendants and a surveyor named Welagedera had given evidence for the defendants. The plan bearing No: 3370 dated 30-11-1987 (V6) was marked in evidence. The case of the defendants was briefly as follows:

The father of the 1st defendant namely aforesaid Nambirala by deed No: 11156 (V2) had gifted the land in suit to his children. This was a paddy land cultivated on *thatuu marru* basis. That is after one party had cultivated for one year another party cultivates that paddy land the next year. Consequently, the defendants' position was that they become entitled to cultivate the said land once in every 5 years.

The first question is whether the defendants could claim title to the land in suit from the deed marked as V2. The deed marked as V2 had been executed before the partition decree. The character of a partition decree is such that it wiped out all previous titles to the land in suit. . Consequently, the defendants' title had got wiped out after the Decree in the partition case.

The next issue was with regard to the prescriptive title claimed by the defendants. The principle is when the legal title and a title based on prescription are in issue, the court should first endeavor to ascertain in which party the legal title is vested. If neither party had been successful in establishing the legal title then the court should proceed to decide on the issue of prescription. It is common for every party in land actions relating to title to lands, to plead prescriptive title in addition to the title on deeds. The prescriptive title in short is a question of fact, where a party seeks without documentary title or deeds to establish long and continued exclusive possession which had become adverse for more than ten years before the

action is brought. In the written submissions the defendants had not addressed this point. The position of the defendants as mentioned in the written submissions was that, since there was an amicable plan bearing No: 3370 (V1) between the co-owners to the 5 lots depicted in the said plan, the earlier partition decree had no legal validity. I cannot agree with those submissions. Notwithstanding the fact the plaintiff was not a party to that plan, a partition decree cannot be vitiated by a subsequent plan to which all the co-owners had not consented. The surveyor who made this plan was one Sarath Chandra Bandara. His evidence is at pages 4 -6 of the proceedings dated 19-3-1993. The surveyor was asked as to who was present at the survey. The surveyor could not remember any person other than the defendant being present on the day of the survey. In my opinion this plan cannot be accepted a plan made with the consent of all the co-owners.

For these reasons the judgment of the District Court is affirmed. The appeal is dismissed.

Rohini Marasinghe J

Judge of the Court of Appeal.