

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

Appeal No.625/95(F)-625A/95(F)

D.C.Kalutara No.5155/P

Loku Kankanamge Margaret Peiris,
Behind Market,
Galle Road,
Aluthgama.

4th Defendant-Appellant

Vs.

Weerakanda Aratchige Piyasena Silva,
No.46/4, Welipenna Road,
Aluthgama.

Plaintiff-Respondent

1. Sarath Liyanage,
Pitawella, Boosa.
2. Rochana Rajapske(Minor)
3. Rajapkse Udagelara,
Mithrasena (for himself and as guardian
of 2nd Defendant
Both of No.71, Galle Road,
Aluthgama.
5. Warnapurage Gamini Fernando
of Ganegama, Aluthgama.
6. Kirakankanamge Laura Nona.
7. Cyril Ananda Silva,
Both of No.41, Galle Road,
Aluthgama.

Defendant-Respondents

Counsel: N.R.M. Daluwatte P.C. with Gayahtri De Silva for the
6th and 7th Defendants/Appellants.

L.C. Kumarasinghe for the 4th Defendant/Appellant.

C.Laduwahetti for the Plaintiff/Respondent.

S.N. Vijithsingh for the 2nd and 3rd Defendants/Respondents.

Arguments: 19-5-2011

Written Submissions: 31-5-2011(6th Defendants/Appellants)

21-2-2011(4th Defendant/Appellant)

Before: Rohini Marasinghe J

Judgment: 20-6-2011.

The plaintiff-respondent instituted a partition action to partition the land called "Santhakurusiyawatte alias Rendawatte" described in the schedule to the plaint. After trial the learned trial judge entered judgment in favour the plaintiff. The 4th defendant the 6th defendant and 7th defendant have appealed against the said judgment.

The case of the plaintiff as pleaded was briefly as follows;

The land in suit was depicted in plan bearing No 118 made in 1903.(P1) According to that plan the land was described as lot "A" and lot "B" comprising of two distinct lands . Each lot had an equal extent of 8.8 perches of land. This land was originally owned by one Amaris Silva and Endoris Silva. The said land was surveyed by a commission issued by court. The commission plan prepared by Licensed Surveyor Ambepitiya bearing No 2059 was marked as 'X'. In that plan the land in suit was depicted as lots "A" and "B". The contention of the plaintiff was that though the land was shown as two distinct lands in plan 118 and as having two owners, the land was an undivided land owned in common by the said owners. On this basis the plaintiff pleaded his pedigree. The plaintiff claimed from the undivided 1/2 share of said Endoris.

And, according to the plaintiff the share of Amaris devolved on the 2nd and the 3rd defendants. The plaintiff contended that said Endoris had died leaving as his heirs 7 children. Two of the said children named Henry and Charlotte had died unmarried. Consequently, their share devolved on their siblings. And another sibling named Isaac had died leaving as his heirs Nicholas and Ramani. All of them other than one named Maggie together by deed no 10766 had transferred their share to Sirisena. And said Sirisena By deed No 1047 had transferred his share to the plaintiff. The aforementioned Maggie had transferred her share to the 1st defendant by deed No 6477. That was a separate transfer.

The case of the 4th defendant-appellant was briefly as follows;

The 4th defendant is one Margret Peiris. She claimed that Endoris was the sole owner of the land in suit. And she claimed her title to the land in suit through her predecessors in title. According to the evidence of the 4th defendant Endoris was married to one Charlotte. And they had 7 children who became the sole heirs of the land in suit, after the death of their parents. And she further averred that the said children other than Maggie by deed no 10766 (P2) transferred their shares to one Sirisena Cooray. In the deed 10766 the

executants were the heirs of the said Endoris. The land is described in the schedule to the deed as "Santhakursiya watte alias Renda watte bounded on the north by the land of Basthian Appu, on the East by road South by the boutique of L.Nicholas Peirs, on the West by the Mahawatte having an extent of 16.16 perches. In the preliminary plan the land in suit is described as lots "A" and "B". And the 4th defendant stated that said Sirisena by deed No 1048 had sold a portion of his share to her the 4th defendant. According to the deed 1047 said Sirisena appears to have transferred an extent of 8.8 shares from lot "A" of plan No 118 to the 4th defendant on 29-4-1983.

The case of the 6th and the 7th defendant-appellants was briefly as follows;

The 6th defendant is the mother of the 7th defendant. They had claimed the building bearing the assessment No 65 and the land adjacent to the building bearing assessment No 71 on the basis that they have prescribed to said lots.

The 7th defendant had given evidence at the trial. In his evidence he had stated that the one Balahamy Dias and one Lanty Silva and Haramanis Fernando were the original owners. According to him said Balahamy owned half share and the balance were owned in equal shares by Lanty and Haramanis. The 7th defendant had marked several deeds to prove the devolution of his title. But the foundation to his claim was the identity of the corpus. The 6th defendant

had taken a commission to establish his claim. The Licensed Surveyor by the name of one Gunawardena had surveyed the land shown by the 6th defendant. And he had superimposed that plan on the surveyor General's plan No 60. In the Surveyor Generals Plan No 60 the land depicted as lots 493 and 494 was superimposed on plan No 327. And in the plan 827 the land in suit is depicted as lots 1 and 2. But the surveyor had failed to superimpose the plan 827 on the plan 2059 as directed by the commission. The surveyor was unable to identify the land from any of the plans already before court. The 6th defendant claimed that the said portion of the land should be excluded from the corpus. And they further pleaded that in the event the court holds that the portions of land claimed by them formed part and parcel of the land in suit, then, they request the court to allot the said portions of land to them on the basis of prescription. The learned trial judge dismissed the claim of the 6th defendant in relation to the identity of the corpus and held that the corpus had been sufficiently identified by the respondent. Consequently, he held that the said portion was part and parcel of the corpus. But the trial Judge held that the 6th defendant had only established his prescriptive title to the building bearing No 65 and nothing more. The deeds tendered by the 6th and 7th defendants had not helped them to establish their claim to the land in suit. I have read the

reasons of the trial Judge for that determination in the impugned judgment. I see no reason to interfere with that decision.

The land in suit appears to have been a distinct portion of a larger land. The entire land was called "Santhakurusiya watte". Consequently, to the North and the South West were portions of the land in suit. The land to be partitioned is clearly shown in the preliminary Plan 2059(X) as lots "A" and "B". The land outside the lots A and B are therefore, outside the corpus.

The next issue was with regard to the devolution of title.

The plaintiff submitted that there were two original owners to the land in suit. They were one Amaris Silva and Endoris Silva. The plaintiff claimed the share by making his claim from the original owner Endoris. Additionally, the plaintiff pleaded that the share of Amaris devolved on the 2nd and the 3rd defendants. The Court had held that the plan 118 had shown these two lands depicting as two distinct lands, though they were possessed as one undivided land. The learned trial judge held that the 4th defendant had admitted that the said Amaris was living on this land. The 4th defendant came to own this land only in 1984. The attention was drawn to his evidence dated 28-6-1993. According to the trial judge the 4th defendant had admitted that the children of Amaris had

possessed this land. I have examined that evidence. That evidence was not sufficient to prove that Amaris possessed this land as the original owner. A mere statement that the sons of Amaris mortgaged this property to one John and left the country cannot be construed as proof of ownership. There should be evidence to support this proposition. The trial judge should not allot shares except upon good proof. It is settled law that in partition suits it is the paramount duty of the judge to fully investigate into the title to the land and shares. I am of the view that the evidence in the case had not been led sufficiently to prove the title of Amaris. The 4th defendant had in his evidence affirmed that the 3rd defendant was in possession of the land bearing No 73 and 75 depicted in the preliminary plan "X". The learned trial judge had not dealt with the deed 1048 marked by the 4th defendant. Both plaintiff and the 4th defendant claimed title through the same source. The 4th defendant and the plaintiff purchased the land in 1984 from one Sirisena Cooray.

The case of the plaintiff disclosed by the evidence was as follows;

In the cross examination the plaintiff admitted that the said Sirisena Cooray became the owner by virtue of the deed executed by the heirs of the said Endoris. Consequently, as admitted by the plaintiff the said Sirisena at one

time owned the entire property in suit. Out of which one half was transferred to the plaintiff and the balance was transferred to the 4th defendant (Vide proceedings dated 8-2-1983 at page 28)

I have examined the deed 10766. In that deed No 10766 the heirs of Endoris have transferred 16.16 perches of land. The said deed contains no reference to any plan. But the deeds by which said Sirisena had transferred to the plaintiff and the 4th defendant refer to the plan 118(P1). Consequently, the two deeds clearly mention that lot B in plan 118, having an extent of 8.8, had been transferred to the plaintiff. The lot A having an extent of 8.8 perches in plan No: 118 has been transferred to the 4th defendants. Admitted by both the plaintiff and the 4th defendant, the assessment No 73 and 75 depicted in the preliminary plan had been in the possession of the 2nd and the 3rd defendants. In the plan, some portions of the said lands are to be found within the land in suit. The parties could claim only the land that is within the corpus. The plaintiff had stated that the original owner Amaris Silva owned part of the land in suit. In addition to that statement there was no evidence supporting the ownership of Amaris. Therefore, I am of the view that Amaris may have had the legal title to the property in suit at one time. But Endoris had possessed the land in suit as the sole heir. Consequently, the heirs of Endoris had alienated the entire land in suit on the deed 10766. Therefore, based on this

finding I vary the judgment and the decree and direct that the judgment and the decree should include as follows;

The 6th defendant is entitled to the building bearing No 65 in plan "X". The 2nd and the 3rd defendants are entitled to the lands described as 73 and 75 in the plan "X". The plaintiff and the 4th defendant are entitled to the balance share of the land in equal shares. But all entitlements should remain within the lots described in the preliminary plan.

The issues are answered in the following manner.

Issue No 1. Yes.

Issue No 2. No

Issue No 3. Yes.

Issue No4. See above.

Issue No 5. Not proved.

Issue No 6. No. The entitlement is due on prescription.

Issue No7. The lots bearing No's 73 and 75, but the extents that are outside the preliminary plan are excluded.

Issue No 8. Yes.

Issue No9. Not proved.

Issue No 10. Not proved.

Issue No 11. The lots A and B are part and parcel of the corpus.

Issue No12. Yes.

Issue No 13 No.

Issue No 14-18 No.

Issue No 19 No

Issue No 20 - The building No 65 – only the area which is within the corpus described in the preliminary plan marked as "X"

Issue No 21 -Only building No 65 as mentioned above.

Issue No 22- No

Issue No 23- No

Issue 25 Yes. At one time it was possessed as one land.

Issue No 26 Not proved.

Issue No 27 No.

Issue No 28 No.

The issues dated 28-2-1993 as follows;

(1) Yes.

(2) No.

The Judgment is varied. The appeal of the 4th defendant is allowed. The appeal of the 6th and the 7th defendants is dismissed.

Rohini Marasinghe J

Judge of the Court of Appeal.