

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

C.A. No. 943/96 (F)  
D.C. Kurunegala No. 1736/P

Gamaralalage Tikiri Banda Jayaratne of  
Gonawa,  
Kalugamuwa.  
Plaintiff

Vs.

01. Gamaralalage Kirimanika of  
Badigamuwa,  
Narammala.
02. Gamaralalage Janenona of  
Panthanigoda,  
Narammala,
03. Gamaralalage Ukkuamma of  
Gonawa,  
Kalugamuwa
04. Gamaralalage Mudiyanse of  
Gonawa,  
Kalugamuwa.
05. Gamaralalage Dingiribanda of  
Gonawa,  
Kalugamuwa.
06. Gamaralalage Rammanika of  
Gonawa,  
Kalugamuwa.
07. Kasturimudiyanselage Ukkubanda  
of Gonawa,  
Kalugamuwa.

08. Ekanayake Mudiyansele  
Punchibanda of  
Gonawa,  
Kalugamuwa.

09. Land Reform Commission  
Colombo 07.

10. Kaluwa Handige Lilonna of  
Gonawa,  
Kalugamuwa.

3A. Gamaralalage Chamath Rohana  
Saman Bandara of  
Gonawa,  
Kalugamuwa

Defendants

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Gamaralalage Tikiri Banda Jayaratne of  
Gonawa,  
Kalugamuwa.  
Plaintiff-Appellant

Vs.

09. Land Reform Commission  
Colombo 07.

9<sup>th</sup> Defendant-Respondent and others

Before : A.W.A.Salam, J.

Counsel : Sapumal Bandara for the plaintiff-appellant and  
S. Sahabandu P.C. for 9<sup>th</sup> defendant- respondent

Argued on : 26.07.2010 and 27.08.2010

Written Submissions tendered on : 06.12.2010

Decided on: 17.01.2011.

A W Abdus Salam,J.

The plaintiff instituted action to partition three contiguous lands, namely Ratmalgahakumbura, Rukkgahamulawatta and Buluwagawahena of which the first land being a paddy field and the rest high lands. The said lands have been shown in the preliminary plan No 875 dated 4 January 1985 as lots 1, 2, 3 and 4. There was no contest as to the identity of the corpus.

In terms of the plaint the co-owners of the subject matter of the action are the plaintiff and 1 to 8 defendants. None of the defendants except the 9<sup>th</sup> and 10<sup>th</sup> filed statements of claim. The Land Reform Commission has been made the 9<sup>th</sup> defendant in the case as it was in possession of the subject matter.

The 9<sup>th</sup> defendant in its statement of claim inter alia took up the position that by virtue of deeds bearing no's 1526 dated 23 January 1929 and 226 dated 17 October 1933 the original owner of the subject matter was one Mrs E M M Fernando and the properties belonging to her no doubt vested in the Land Reform Commission in terms of the provisions of the Land Reform Commission Law. By reason of the said vesting the Land Reform Commission was in possession of the subject matter and had acquired a prescriptive title as well.

The trial proceeded on 10 points of contest of which 1 to 4 were suggested by the plaintiff and 5 to 10 by the 9<sup>th</sup> defendant. At the trial

the plaintiff gave evidence and closed his case reading in evidence documents marked X, X1, P1 and P2. 1st to 8<sup>th</sup> and the 10<sup>th</sup> defendants did not give evidence, summon witnesses or produce documents. Quite significantly, the 9<sup>th</sup> defendant also led no evidence or produce any documents. The learned district judge after trial held inter alia that the action for the partition of the land in question cannot be maintained as the original owner of the subject matter was one E M M Fernando and that it had got vested in the Land Reform Commission by reason of the operation of the provisions of the Land Reform Law.

As was pointed out previously the only evidence led at the trial was that of the plaintiff and all the documents produced at the trial were through him. Quite surprisingly the 9<sup>th</sup> defendant has chosen not to lead any evidence. As a result of the failure on the part of the 9<sup>th</sup> defendant to adduce any proof as to whether the immovable properties owned by E M M Fernando was affected by the ceiling fixed by the Land Reform Law, the court was actually kept in dark as to the applicability of the provisions of the Land Reform Law to the properties owned by E M M Fernando.

Even though it is admitted that the 9<sup>th</sup> defendant had taken possession of the subject matter and fenced the same no specific date has been mentioned by the plaintiff or the 9<sup>th</sup> defendant regarding the commencement of such possession. The 9<sup>th</sup> defendant has not led any evidence to establish that the subject matter was owned by E M M

Fernando by virtue of the two deeds referred to in the point of contest No 5. In the absence of such proof I am unable to ascertain as to how the learned district judge had answered point of contest No 5 in the affirmative.

No doubt the Land Reform Law came into force on 28 August 1972. If the land in question had been taken in to the possession of the 9<sup>th</sup> defendant on 28 August 1972, the 10 year period of prescription would have come to an end on 27 August 1982. This partition action has been instituted on 6 September 1982. In other words barely 10 days after the completion of the prescriptive period, had the 9<sup>th</sup> defendant taken over possession of the subject matter on the very day of the commencement of the operation of the Land Reform Law.

The finding of the learned district judge as regards the possession of the 9<sup>th</sup> defendant cannot in any way support the prescriptive title of the Land Reform Commission. At page 8 of the impugned judgment, the trial judge has come to the conclusion that the Land Reform Commission has been in possession of the subject matter from 1973 although he has not given the exact month and the date of the commencement of such possession. Assuming that the Land Reform Commission commenced its possession as from 1 January 1973, it could not have had uninterrupted possession of 10 years immediately preceding the date of the action as the partition action has been instituted on 6 September 1982. In other words the possession of the

Land Reform Commission has fallen short of 3 months and 24 days so as to be precise to complete the 10 year Prescriptive period.

The point of contest No 8 has been framed to ascertain whether the 9th defendant had acquired a valid prescriptive title to the subject matter. Without any scrap of evidence as to the commencement of the alleged possession, the learned district judge could not have in any event answered the said point of contest in the affirmative. As regards the question of prescriptive title it is settled law that content evidence is necessary to come to any favourable conclusion to defeat the paper title. In this case no evidence has been led with regard to the commencement of the possession. As such the finding of the learned district judge on the question of prescriptive title of the Land Reform Commission appears to have ended up in a miscarriage of Justice and perversity.

The plaintiff has taken up the position that the land called "Maguwalapitiya" owned by E M M Fernando is situated to the West of the subject matter. It is quite evident from the preliminary plan that the said Maguwalapitiya is shown to the West of lot 4 in the preliminary plan. The 9th defendant has not produced any statutory determination or a plan prepared under the Land Reform Law. For reasons best known to it, the 9th defendant has not availed of the opportunity to take out different survey and/or to superimpose the same on the preliminary plan, so as to impress upon court that the

subject matter of the partition action is in fact affected by the provision of the Land Reform Law.

According to the report X1 annexed to the preliminary plan, Commissioner has categorically stated that the land surveyed by him is the subject matter referred to in the schedule to the plaint. The 9th defendant has not controverted this position. The learned district judge appears to have lost sight of the evidential value of the preliminary plan and the report unless the contrary is proved. In terms of section 18 (2) of the Partition Act, the report of the commissioner on the preliminary survey stating inter alia that the land surveyed by him is substantially the same as the land sought to be partitioned as described in the schedule to the plaint without further proof be used as evidence of the facts stated therein at any stage of the partition action. The 9<sup>th</sup> defendant has not shown any reasons to reject the report of the commissioner as to the identity of the land.

It was well within the power of the 9<sup>th</sup> defendant to have made an application to summon the surveyor to be examined orally on any point or matter arising on, or in connection with any document submitted by the surveyor in response to the commission issued to him. The learned district judge has not given any reason as to why the evidential weight attributed to the return of the surveyor who carried out the preliminary survey should be disregarded.

In the circumstances, it is my considered view that the learned district judge has manifestly misdirected himself with regard to the findings; he has arrived in favour of the 9th defendant. For the aforesaid reasons I am compelled to set aside the judgment and interlocutory decree dismissing the plaintiff's action as it had undoubtedly ended up in a miscarriage of Justice. The case is sent back for retrial.

I make no order as to costs

Judge of the Court of Appeal

Kwk/-