

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

9. Mahalekamge Sumanasiri of
Wathukumbura, Muruthalawa.

9TH DEFENDANT-APPELLANT

Vs.

C.A 1102/1998 (F)
D.C Kandy 9063/P

1. M. I. Rajapakse
Vidanage Amarawansa Gunasekera

PLAINTIFF-RESPONDENT

2. M. I. R. P. Anulawathie Gunadasa of
Dodanwela Muruthalawa.
3. M.I.R.P. Karunawathie of
Dodanwela Muruthalawa.
4. M.I.R.P. Keerthiratne Gunasekera of
Dodanwela Muruthalawa.
5. B. M. Abeygunawardene
Dodanwela Muruthalawa.
6. B. M. Subhadra of
Dodanwela Muruthalawa.
7. B. M. Senaratne of
Dodanwela Muruthalawa.
8. B. M. Leelawathie of
Dodanwela Muruthalawa.
9. U. Karunadasa Bathgodapitiya
Menikdiwela

10. P.M.P. Gunadasa
Dodanwela, Muruthalawa.

DEFENDANTS-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: A.A. de Silva P.C., with Jayalath Hissella
for 9A Defendant-Appellant

Rohan Sahabandu with Athula Perera
for Plaintiff-Respondent

ARGUED ON: 20.9.2012

DECIDED ON: 24.01.2013

GOONERATNE J.

This is an appeal from a partition suit. The 9th Defendant-Appellant states that 6 lands as described in the plaint in its several schedules were subsequently, restricted to 4 lands as in the amended plaint and Plaintiff-Respondent claim ½ share. At the trial 5 admissions were recorded and parties proceeded to trial on 13 points of contest. Lands described in schedules 1 – 3 were admitted as depicted in the plans referred to therein in Surveyor A.B. Kiridena's plans No. 2309 & 2311 of 3.3.1981 and land in the 4th schedule as depicted in Surveyor Kalewalla's plan. It was

also admitted that one Somawathie who claimed to own the above lands was the mother of the Plaintiff and 1st – 3rd Defendants. The points of contests Nos. 1 to 5 relate to the devolution of title on the above named Somawathie.

At the outset this court wish to observe that trial Judge's views on succession relating to Kandyan Law has been correctly decided and this court does not wish to disturb those findings. Viz Plaintiff argued that under Kandyan Law the inheritance of the mother 'Somawathie' would not devolve on the 1st & 2nd Defendant's daughter if married in 'Deega' However the trial Judge rule that only father's inheritance will not devolve on the daughter married in 'Deega' and not that of the mother. According to Plaintiff and 1st – 3rd Defendant are entitled to the properties inherited from Somawathie the mother.

One of the main arguments advanced by the learned counsel for Appellant was that whether several lands can be partitioned? Are the lands held in common by the same co-owners in the same proportions and emphasize that there is no common ownership?

Section 26(4) of Partition Law No. 21 of 1977...

Where a partition action is in respect of two or more lands, the interlocutory decree may, in lieu of ordering the allotment of divided portions in all such lands to the persons entitled thereto, order that-

- (a) any divided portion or portions of one or of some of such lands, or
- (b) the entirety of one or of some of such lands whether with or without any divided portion or portions of any other such land or lands.

be allotted to any such person, whether with or without the award to him of owelty or of compensation for any improvements made by him to any such land. In any order under this subsection the court shall determine the amount of any owelty or of any compensation for improvements and the party by whom and the party to whom such owelty or compensation shall be paid.

There is no statutory bar to partition several lands held in Common. The deciding factor seems to be that common ownership need to prevail in respect of all lands. One of the earlier cases disapproved the partition of lands where the distinct portions did not belong to the same co-owners.

In Banda Vs. Weerasekera 23 NLR 157 ...

The added defendants, who alleged that a grant of land made by the Crown to two persons was not for them exclusively, but for them and the other members of their family, were permitted to intervene in a partition action merely with a view to secure the protection of their equitable rights.

The added defendants wished to include as part of the corpus in the partition action a piece of land which the plaintiff had not included.

Held, that as the added defendants were not co-owners, but persons admitted for the protection of their equitable interests, they were not entitled, in the circumstances of this case, to have the land included.

The Court has a discretion in the matter, and it requires a very strong case to induce the Court to permit such an inclusion.

The Court regards with strong disapproval any attempt to use the Partition Ordinance for the purpose of dealing in an action with distinct portions of land in which the shareholders and the interests are not the same.

I have also considered the views of the Plaintiff-Respondent who argued against the 9th Defendant-Appellant and the following decided cases seems to fortify the Plaintiff-Respondent's case.

Peiris Vs. Peiris 6 NLR 321..

When the plaintiffs and defendants had inherited numerous lands and shares of lands, and the plaintiffs prayed for a partition or sale of such lands, without making the co-owners of the deceased ancestor parties to the suit –

Held, that the Ordinance No. 10 of 1863 permits an action to be raised for the partition or sale of several lands held in common.

An undivided portion of a larger extent of land cannot be the subject of a partition suit unless the co-owners of the whole corpus be made parties to it.

If many entire lands are sought to be partitioned together with a land not held in common by all the plaintiffs and defendants, the proper course is to leave it to be dealt with in a separate suit.

Eliyatomby Vs. Veeragathie 35 NLR 211.....

It is not contemplated by the provisions of the Partition Ordinance that any more than one land will be partitioned in one proceeding.

An exception may be made in cases in which more than one allotment of land are held in common by the same set of co-owners in the same proportions.

The land No. 4 was excluded from the land sought to be partitioned. That was on the basis that it was not co-owned at the relevant time and same had been purchased by the 10th Defendant and or his successors. There is no contest on that portion being excluded. The land No. 4 is called 'Ketawalanahena'. However the 9th Defendant-Appellant maintain that devolution of title as regards the corpus are not the same, and the lands sought to be partitioned are different from each other. I do not think that the evidence led at the trial support the version of the 9th Defendant-Appellant. Nor did the 9th Defendant-Appellant raise a point of contest and prove his version. Appellant's contentions are not pure questions of laws and cannot be considered at the appeal stage. These positions are more or less mix questions of fact and law.

The co-ownership to lands described in schedule No 1 – 3 in the plaint differ from that of schedule No. 4. This court also observe that the 9th Defendant-Appellant has not proved that he has a claim to the land and building or plantation. The plans and reports of the Licenced Surveyor do not refer to such a position. Nor has the 9th Defendant-Appellant proved and established his rights or title to the property. As such lands described in schedules 1 – 3 are co-owned and as the trial Judge hold same has to be partitioned according to the provisions of the Partition Act.

In all the above circumstances there is no merit in this appeal. This court does not wish to disturb the findings of the trial Judge. As such I dismiss this appeal without cost. Judgment of the trial Judge affirmed.

Appeal dismissed.

A handwritten signature in black ink, appearing to read "Daniel Groulx". The signature is written in a cursive style with a large initial "D" and a long horizontal flourish at the end.

JUDGE OF THE COURT OF APPEAL