

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

C.A 199/1998 (F)
D.C Galle 11145

W. Vithanage Gnanawathie of
Epitagederawatta, Kodagoda,
Imaduwa.

PLAINTIFF

Vs.

10 Hawpe Liyanage Chandrasekera of
Epitagedarawatta, Kodagoda,
Imaduwa.

And Others

DEFENDANTS

NOW BETWEEN

Hawpe Liyanage Chandrasekera of
Epitagedarawatta, Kodagoda,
Imaduwa.

10TH DEFENDANT-APPELLANT

Vs.

W. Vithanage Gnanawathie of
Epitagederawatta, Kodagoda,
Imaduwa.

PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Sirimal D. Vithanage for the 10th Defendant-Appellant

Ashoka Fernando with A.R.R. Siriwardena
for the Plaintiff-Respondent

ARGUED ON: 26.9.2012

DECIDED ON: 31.01.2013

GOONERATNE J.

This is an appeal from a partition case from the Galle District Court. Parties proceeded to trial on 7 points of contest and 4 admissions. Corpus was admitted and parties admitted that the land is depicted as lot 'A' is, 1 Rood 38.12 perches and 0.1849 Hectares. It was admitted that the original owners of $\frac{1}{4}$ of the corpus were Hawpe Liyanage Don Jamis, Hawpe Liyanage Sarnolis and Ahangama Vithanage Jamis. There is no dispute as to how the rights of original owners Ahangama Liyanage Caroline and Vithanage Saineris devolved. The admissions recorded has in a way helped the Plaintiff-Respondent.

I do appreciate the submissions of the learned counsel for the Plaintiff-Respondent who urge that the Petition of Appeal had been filed out

of time. The Petition of Appeal does not give a clear date except the seal of the District Court bears the date 26.1.1998. Journal Entry No. 40 gives the date as 24.3.1998, the date on which the Petition of Appeal tendered. If that be so the Petition of Appeal need to be rejected, since judgment was entered in November 1977. However I find the unsigned journal of the Court of Appeal referring to the date of Petition of Appeal as 26.1.1998. On one hand the original court had failed to maintain proper journals/records. The Court of Appeal Registry has also, on the other hand has not given due notice to the listing judge on the above lapses. If found to be incorrect the Petition of Appeal should have been rejected, at the earliest opportunity. The Appellant in his submissions has not explained the above position. As such on this ground alone this appeal has to be rejected.

Nevertheless I have considered the merits of this case. The Appellant inter alia urge the following:

1. The Appellant intervened the partition action as claimant before the Surveyor and was added to the caption of the action as the 10th Defendant.
Thereafter the 1st, 4th and 7th to 10th defendants filed their statements of claim dated 24th October, 1995.
2. In terms of the above-mentioned statement of claim 1st defendant and the 4th defendant had no contest with the plaintiff. The 7th, 8th, 9th and 10th defendants have challenged the Plaintiff's pedigree.

3. As per the statement of claim of the 7th to the 10th defendants, an undivided $\frac{1}{4}$ share was owned originally by Yapa Abeywardena Dona Gimhara who died leaving Udukawe Yapagai Gimara.

The Petition of Appeal refer to certain grounds of appeal and it is somewhat a different case to the case presented in the District Court. Such a position cannot be maintained 1997 (2) SLR 109. It is evident that Plaintiff produced deeds P1 – P14 and by that Plaintiff establish the basis of deriving title (13/24). The said deed as urged by the Plaintiff-Respondent is ex-facie part of the pedigree. Therefore I would reject the Appellant's contention that Plaintiff has not established legal rights to $\frac{2}{4}$ of the corpus. I agree with the submissions of the Plaintiff-Respondent that the pleadings of 1st, 4th, 7th & 10th Defendants does not seek to exclude any portion of the corpus. In this regard the admissions recorded at the trial need to be considered and kept in mind (corpus/lot A admitted). There is no points of contest raised on the exclusion of land. All the admissions recorded in this case would contradict the position of the Appellant in his attempt to find grounds of appeal.

Though the Appellant was able only to produce a photo-copy of deed 10 V1 (rejected) the trial judge in his judgment has considered the deed in his judgment.

There is no merit in this appeal. The trial judge has considered the evidence led at the trial very carefully and entered judgment accordingly. This court will not unnecessarily disturb question of fact. Primary facts unless unacceptable need not be disturbed. Sumanawathie Vs. Bandiya 2003(3) SLR 278.

In all the above circumstances of this appeal I see no basis to interfere with the judgment of the District Court. I affirm the judgment of the District court.

Appeal dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL