

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

K. L. Udenis Perera of
Weedagama, Bandaragama.

PLAINTIFF

C.A 246/1998 (F)
D.C. Horana 4100/P

Vs.

1. M.K. Don Wildon Fonseka Abeykoon of Lokapila,, Weedagama, Bandaragama.
2. M. K. Don Joseph Fonseka Abeykoon of Talawinna, Katugastota.
3. H. Ceciliyana Peiris of Lokapila,, Weedagama, Bandaragama.
4. M. K. S. Fonseka Wijewardena Abeykoone of Maitree Road, Weedagama, Bandaragama.

DEFENDNATS

K. L. Udenis Perera of
Weedagama, Bandaragama.

PLAINTIFF-APPELLANT

Vs.

1. M.K. Don Wildon Fonseka Abeykoon of Lokapila,, Weedagama, Bandaragama.

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4. M. K. S. Fonseka Wijewardena Abeykoone of Maitree Road, Weedagama, Bandaragama.

DEFENDANTS-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: J. A. J. Udawatta with Ruwan Geekiyanage
for the Plaintiff-Appellant

R. Dissanayake with R. Hathurusinghe
For the Defendnat-Respondents

ARGUED ON: 05.09.2012

DECIDED ON: 18.01.2013

GOONERATNE J.

This was a partition suit and the land sought to be partitioned according to Plaintiff comprises of 3 allotments of land called and known as

lots 6 and 7 and the remaining portion of lot 8 of a land called 'Kurugahawatta'. It is averred by Plaintiff that the said land is depicted in plan No. 3234 marked 'X' and described in schedule 5 of the plaint in extent of 19.04 perches. This appeal is against the dismissal of Plaintiff action in the District Court. Parties proceeded to trial on 17 points of contest.

The position of the Plaintiff-Appellant is that the land sought to be partitioned is one entity secured within defined boundaries, and not separate parcels of land. Plaintiff contends that by final decree in Kalutara D.C partition case No. 7849/P one M. Don Abraham Fonseka Abeykoon became entitled to lot 9 in plan 4277 and the 4th to 13th Defendants in that action jointly entitled to lot 7 with a person called Kusthan and Peter, entitled to lots 6 & 8. Plaintiff argue that all the above lots were adjacent to each other and from 1923 Alperis Fonseka possessed the entirety for over 50 years and prescribed to same lots.

The main question to be decided is whether the corpus comprises of one entity or it is comprised in different parcels of land as claimed and held by the learned District Judge with the Respondents. The appellant urge the following:

- (a) Decree in case No. 21/L (P8). It was a case between the predecessors of the Appellant and the original 1st Defendant in this case. It confirms according to appellant that the land is one entity.

- (b) Plan P11 (1074) no mention of the word 'amalgamated'. There is a boundary between lots 7 & 7 (line fence)
- (c) Lot 8 in the plan P11 divided as lots 8A & 8b in plan 615 of July 1975 (folio 165 of brief).

The learned trial Judge has made special mention to the case No. 21/L Which case was appealed to the Court of Appeal and Supreme Court. In appeal, the Court of Appeal held that according to documents P8 and 4V1 Plaintiff Appellant's predecessors in title M.K. Don Alperis Fonseka became entitled to lot Nos. 6, 7, 8 & 9 as one entity and thereby prescribed to those lots. This fact has been confirmed by the Supreme Courts. As such the trial Judge has correctly arrived at that conclusion based on above. At this stage this court would not disturb the findings of the trial judge as stated above.

I have also noted the reasons to reject Plaintiff's contention by the trial Judge. It is perfectly in order. District Judge states that it is not been established and proved that lot 8b as demonstrated by Plaintiff to be part of Lots 7 and lot 9 were possessed and owned as separate lots. The following extract from the original court Judgment clarify the position.

කෙසේ නමුත් මෙහිදී පෙනෙන කරුණක් නම් පැමිණිලිකරු ඉදිරිපත් කරන පැමිණිල්ල සහ සාක්ෂි අනුව මෙම අංක 8 දරණ බිම් කොටසක් කොටසක් වනම් 8. බී. සහ අංක 9 දරණ බිම් කොටස වෙනම කොටසක් ලෙසට වෙන්ව බුක්ති විඳීමට ඒවා මිලදී ගන්නා කියන අය පටන් ගත් ආකාරය හෝ එසේ කිරීමට

හේතුවූ කරුණු ගැන පැහැදිලි කිරීමක් සනට් කර නැත. පැ. 8 දරණ ලේඛණයට යාකොට ඇති අංක 615 දරණ පිඹුර 1975 ජූලි 12 වෙනි දින මැන සාදා ඇති අතර එම පිඹුර පැ. 11 වගයෙන් ලකුණු කර ඇත. පෙර කී පැ. 8 දරණ නඩුව සඳහා අධිකරණයේ කොමිෂමක් මත පිහිටියල කරන ලද පැ 11 දරණ පිඹුරේ අංක 8 දරණ කැබැල්ලෙන් වෙන්වූ කැබැල්ලක් ලෙසට බෙදා වෙන්කර ඇති බවට හෝ පාවිච්චි කර ඇති බවට වෙනම සඳහන් නැති අතර, එහි අංක 6, 7, 8, 9 දරණ බම් කැබලි 4 ම ඒකාබද්ධ ඉඩමක් ලෙසට දක්වා ඇත.

It is more or less settled that by the above appeal, (by P8, decision) Alperis Fonseka has prescribed to lots 6, 7, 8 & 9. Therefore lots 8 & 9 as shown in plan 615 in 1975 cannot be accepted as a separate land. These are all primary facts which I have no basis to disturb and review. The Appellate Court would not overrule a decision based on primary facts unless factually unacceptable which is based on facts that led to a perverse decision. 1993 (1) SLR 119; 20 NLR 332; 20 NLR 282.

I have noted the following case law on land possessed in different lots by co-owners and maintainability of actions

Girigoris Appuhamy vs. Maria Nona 60 NLR 330...

Where a land is possessed in different portions by different co-owner for convenience of possession, a partition action cannot be maintained in respect of one portion only; the entire land should be brought into the action.

Abeyasinghe Vs. Abeyasinghe 47 NLR 509...

Action cannot be brought to partition a corpus which in itself is an undivided portion of a larger common land.

When a co-owner who has erected a new building on the common land remains in possession of that building such possession does not necessarily mature into a prescriptive title to the building and the soil on which it stands as against the remaining co-owners.

The mere fact of execution, by co-owners, of deeds dealing with specific or divided portions of a common land does not per se establish that there was an arrangement arrived at by the co-owners to divide the land in such a manner that title was to be affected.

In all the above circumstances this court affirm the judgment of the District Court. Respondent's title has been proved by deeds and documents 4V2, 4V3 & 4V4 & 4V5. Decree 4V1 support the case of the Respondent. Therefore I dismiss this appeal without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL