

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

CA 1161-1162/96 (F)

DC Kegalle Case No. 23341/P

Malawi Atchchilage Herath Banda,
Asmadala, Galathara.

Plaintiff-Appellant.

Vs.

1. Malawi Atchchilage Jayathilleka
Banda, Wattededara, Asmadala,
Galathara.

And 15 others.

Defendant-
Respondents.

BEFORE : A.W.A. Salam, J.

COUNSEL : Mokshini Jayamanna for the 3rd Defendant-
Appellant. D.S. Saman de Silva for the 9th Defendant-Respondent.

ARGUED ON : 21.02.2012

WRITTEN SUBMISSIONS TENDERED ON: 17.07.2012

DECIDED ON : 30.04.2013

A W A Salam, J

The instant appeals have been preferred by the plaintiff-appellant and 3rd defendant-appellant whom I propose referred to in the rest of this judgement as "plaintiff" and "3rd defendant" respectively against the findings, judgement and interlocutory decree entered by the learned district judge.

The plaintiff filed partition action to partition the land called Hitinawatta which was depicted for the purpose of the partition action as lots 1, 2, 3, 4, and 5 in extent of 5 acres and 21.50 perches in plan No K 1775 dated 23.11.1983 prepared by M.B. Ranatunga, L.S..

The parties were in agreement that the land sought to be partitioned consists of the five lots depicted in the said land No K 1775. Hence, no contest arose at the trial as regards the identity of the corpus and no argument was advanced in the appeal either.

According to the plaintiff the original owner of the corpus was one Malavi Arachchilage Mudalihamy. The defendants who contested certain specific aspect of the devolution of title set out by the plaintiff, offered no contest with regard to the original ownership attributed to the said Mudalihamy. Thus, it is common ground that Malavi Arachchilage Mudalihamy was the undisputed original owner of the corpus.

Upon a perusal of the evidence led and the document marked and produced at the trial, it is quite evident that no

one had contested the position of the plaintiff that the said original owner by deed No 42648 dated 10.4.1905 gifted all his rights from and out of the corpus to his 4 children and wife Unaspitiya Kirielle Vidanalage Ranmenika.

One of the main points of contest that came up for determination at the trial was whether the said Unaspitiya Kirielle Vidanalage Ranmenika had transferred her rights in the land by deed No 2842 (P2) to one M. Appuhamy whose rights ultimately devolved on the plaintiff and the 1st defendant. It was also contended by the plaintiff in the original Court that M. Dingiri Appuhamy who derived title on the deed of gift No 42648 transferred his rights to Ukkumenika whose rights ultimately came down to the plaintiff and the 1st defendant.

The learned district judge in her judgement inter alia held that the vendor in deed No 2848 namely Malavi Achchilage Ranmenika is not the wife of the original owner. He observed that the wife of the original owner who derived title on deed No 42648 is one Unaspitiya Kirielle Vidanalage Ranmenika. Further, the learned district judge held that the land dealt in deed No 2848 is not the subject matter of the partition action. In the circumstances, the learned district judge held that the rights of U R W Ranmanika and M Dingiriappuhamy do not devolve on the plaintiff and the 1st defendant.

The plaintiff amongst other matters urged that the said finding of the learned district judge is contrary to the

evidence led at the trial. Having perused the evidence led at the trial on this aspect of the case and examined the approach of the learned district judge to resolve the dispute, I find it difficult to endorse the argument that the rights of U R W Ranmanika had not passed on deed No 2848 and that the rights of M Dingiriappuhamy had not passed on deed No 10204. Consequently, I find no merits in the appeal preferred by the plaintiff.

The 3rd defendant in his appeal has urged that the learned district judge was wrong in not allotting 1/4 share to him despite the fact that it had been established on a clear chain of title that he had acquired the rights of M Punchi Appuhamy (one of the children of the original owner) who had derived title on P1.

As far as the 3rd defendant is concerned, his position was that the rights of M Punchi Appuhamy (1/4th share) were transferred on deed No 17247 to M Mudianse who died leaving as the sole heir of M Sethuhamy who by deed No 26437 transferred the same to Y G Appuhamy who in turn by deed No 38102 transferred it to M.A. Sethuhamy who by deed No 50798 transferred it to the 3rd defendant. However, the learned district judge gave no rights in the land to the 3rd defendant on the basis that the deeds relied upon by him are inapplicable to the corpus.

The contest raised by the 10th defendants on one side and the 3rd defendant on the other side was whether the rights of M. Appuhamy who became entitled to 1/4th share from

the original owner Mudalihamy, died without executing any deed affecting the land in question or whether he executed a transfer in favour of M Mudianse. The 10th and 11th defendant's position was that Appuhamy died leaving as his heirs Ukkumenika and Dingirimenika and his rights devolved on the 10th and 11th defendants. They claimed that Dingirimenika transferred her share in the land on deed No: 2948 dated 24th November 1973 (11 D 1) to the 11th defendant and Ukkumenika transferred her share on deed No 24494 dated 15th August 1949 (10 D 4) to the 10th defendant.

Nevertheless, under cross examination the 10th defendant admitted that Appuhamy transferred his rights to Mudianse by deed 3 D 1. The only argument the 10th defendant advanced was that the 3rd defendant does not in fact have any legal title to 1/4 share as he had never possessed the corpus. Quite remarkably the 10th defendant neither takes up the position that he (10th defendant) was ever in possession of the subject matter. Under cross examination the 10th defendant conceded that he was not in possession of any part of the subject matter. Thus, it would be seen that the 10th defendant specifically admits the transfer made by Appuhamy of his 1/4 share in favour of Mudianse by deed 3-D 1. The contention of the 10th defendant therefore narrows down to the ground that the 3rd defendant's title is defective by reason of his not having any possession of the subject matter.

A careful scrutiny of the alleged grounds urged by the parties who contested the position of the 3rd defendant's title reveals that none of them have substantiated the argument with sufficient evidence. The learned district judge has however failed to appreciate or take cognizance of this fact.

Besides, the learned judge has dealt with deed marked as 3-D 1, 3D 2, 3D3 and 3D4 by simply making an overall observation to the effect that the deeds in question are not applicable to the corpus. In making such observation, the trial judge has failed to analyse the contents of the deeds or set out the other grounds which influenced her decision. For this reason alone the judgement is totally defective, as obviously there has been a failure of justice for want of reasons for the findings of the trial judge affecting the claim of the 3rd defendant.

Further the learned district judge has failed to consider the boundaries set out in the preliminary plan or match them with those in 3-D 1. The 3rd defendant's contention that 3-D 1 is applicable to the corpus is supported by the fact that all parties have sought to partition HITINAWATTA which is in extent 6 palas of paddy.

Furthermore the Commissioner M B Ranatunga in his preliminary report annexed to the preliminary plan No 1775 has remarked that the 3rd defendant was present at the time of survey and claimed several plantations on lots 1 and 4 without any counter claims being made by any party.

The 10th defendant has countered the report of the survey claiming that the 3rd defendant was not even present at the survey. The learned trial judge has not given due judicial mind to the fact that the 3rd defendant was present at the survey and preferred certain claims before the Commissioner.

In the circumstances, it would be seen that the learned district judge has failed to give sufficient reasons for his conclusion that the deeds of the 3rd defendant are not applicable to the corpus. Hence, it would be seen that there has been no proper investigation of title. As such I am compelled to set aside the impugned judgment and send the case back for a re-trial.

Judgment and ID set aside and case sent back for re-trial.

Judge of the Court of Appeal

NR/-