

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

C.A.No.554/98 (F)

D.C.Mt Lavinia No.1902/L

A.Wilbert Fernando

Dewapurage Seelat Fernando

No:27,
Sri Bodhirukkarama Road,
Wellawatte.

Appellants

Vs.

Piyadasa Hettiarachchi
No: 28/B,
Prathibimbarama Road,
Kalubowila,
Dehiwala.

Respondents

C.A.No.554/98 (F)

D.C.Mt Lavinia No.1902/L

Before : **K.T.Chitrasiri,J.**

Counsel : Hemasiri Withanachchi for the Substituted-
Defendant-Appellants.

Rohan Sahabandu P.C. with Samithre Kumarawadu
for Plaintiff - Respondent.

Argued &
Decided on : 10.05.2013.

K.T.Chitrasiri,J.

This is an appeal seeking to set aside the judgment dated 22.05.1998 of the learned District Judge of Mt.Lavinia. In that judgment learned District Judge decided the case in favour of the plaintiff-respondent (hereinafter referred to as the plaintiff) as prayed for in the plaint dated 15.03.1998, having rejected the prescriptive claim made by the defendant-appellants (hereinafter referred to as the defendants).

In that plaint, the plaintiff had prayed inter alia that he be declared entitled to the lands referred to in the two Schedules thereto, and also to have a

declaration preventing the defendants from entering the above mentioned two lands referred to in those two Schedules. At this stage, it must be noted that there is no prayer in the plaint to eject the defendants from the two lands claimed by the plaintiff. Relying upon the pleadings, the plaintiff has suggested five issues whilst the defendants have raised four issues. Basically, the plaintiff's issues are directed to establish the title of the disputed two lands. The defendants issues are on the basis of prescription to the land referred in the Second Schedule. Significantly, the defendants have not raised any issue claiming rights to the land described in the First Schedule to the plaint.

Learned Counsel for the appellant submits that the plaintiff has failed to establish title to the land referred to in the Second Schedule. It is the land shown as Lot 1 in the Plan DCML 3/92 marked as P2 in evidence and it is also shown as part of Lot 305 in Plan No.498 marked as P1.

Having perused the impugned judgment Court is unable to see the reasons assigned by the learned District Judge as to why he decided that the plaintiff is entitled to the land referred to in the Second Schedule.

Learned Counsel for the defendants further submits that no evidence whatsoever is found to establish the title of the plaintiff to the land referred to in the Second Schedule to the plaint. Learned President's Counsel for the plaintiff

concedes that there is no evidence that had been led to prove title of the plaintiff to the land described in the Second Schedule.

Therefore, it is clear that the plaintiff has failed to establish title to the land referred to in the Second Schedule to the plaint and hence, it is clear that the learned District Judge misdirected himself when he declared that the plaintiff is entitled to the land described in the Second Schedule to the plaint.

Accordingly, the appeal in respect of the decision as to the land referred to in the Second Schedule to the plaint is allowed.

The other issue is in respect of the declaration sought in respect of the land referred to in the First Schedule to the plaint. The learned District Judge has decided that the plaintiff is entitled to the land referred to in the First Schedule on the basis of a partition decree filed in case bearing No.737/P decided in the District Court of Mt.Lavinia.

The defendants have not claimed any right to this land referred to in the First Schedule to the plaint in their pleadings. Neither have they raised any issue claiming rights to the said land. Therefore, it is correct to decide that the plaintiff is entitled to the land referred to in the First Schedule to the plaint on the basis of the partition decree in the aforesaid decision in case No.737/P.

Accordingly, the appeal in respect of the land referred to in the First Schedule to the plaint is dismissed. Parties are to bear their own expenses in this appeal.

Appeal is partly allowed. No costs.

Appeal is partly allowed.

JUDGE OF THE COURT OF APPEAL

KLP/-