

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

Piyasena Loku Vithana
"Sumeeda", Welikala,
Pokunawita.

Plaintiff-Appellant

C.A. NO.556/96(F)
D.C.HORANA CASE NO.1728P

Vs

1A.Manage Somaratne
Welikala
Pokunawita.

And others

Defendant-Respondents

BEFORE : **K. T. CHITRASIRI, J**

COUNSEL : Saliya Peiris, Attorney-at-Law for the Plaintiff-Appellant
Sanath Jayatillake, Attorney-at-Law for the 10th & 11th Substituted Defendant-Respondents.

ARGUED ON : **29.04.2013**

WRITTEN SUBMISSIONS FILED ON : 06th June 2013 by the 10th & 11th Substituted Defendant-Respondents.

DECIDED ON : **27. 06. 2013**

CHITRASIRI, J.

This is an appeal seeking to set aside the judgment dated 31.11.1996 of the learned District Judge of Horana. In the petition of appeal, the appellant has also sought for an order to have a *trial de novo* or to enter judgment in favour of the plaintiff. In the said judgment, learned District Judge has decided to accept the 11th defendant's claim having rejected the position taken up by the plaintiff-appellant. (hereinafter sometimes referred to as the plaintiff) Reason to rely upon the position of the 11th defendant-respondent has been the contradictory nature as to the number of children of the plaintiff's father. Indeed paragraph 6 of the petition of appeal has been drafted to challenge the said decision of the learned District Judge as to the number of children of the plaintiff's father.

Even though the petition of appeal has been filed on those lines, when the appeal was taken up for argument on 29.04.2013, the learned Counsel for the appellant had informed Court that he would be restricting this appeal as to the title referred to in the deed bearing No.1185 marked as P11 in evidence. According to him, the rights emanated from the deed 1185 have not been considered at all by the learned District Judge. In view of the above decision to restrict this appeal as to the rights derived from the deed 1185, the matters raised in the petition of appeal dated 25.03.1966 stand not pursued and therefore, it is not necessary for this Court to look at the matters referred to therein.

As mentioned hereinbefore, learned Counsel for the plaintiff is of the view that the learned trial Judge has not looked at the deed 1185 at all. Accordingly, he moved this Court to allot the shares that had been kept un-allotted to the plaintiff on the basis of the title derived from the deed No.1185 marked as P11 in evidence.

Admittedly, the learned District Judge in his judgment has not referred to the said deed marked P11 at any stage. Therefore, I will now consider whether it is possible and/or is correct for this Court to allot the shares which was kept un-allotted, to the plaintiff on the strength of the deed 1185 marked P11.

The said deed bearing No.1185 marked P11, is a deed of transfer in which the transferor is L.B.Emis Singho who is the father of the plaintiff. He, by that deed had transferred to the plaintiff an undivided $\frac{5}{28} + \frac{1}{25}$ shares plus another undivided $\frac{1}{4} + \frac{2}{10}$ shares of the land, becoming it to exactly two acres in extent. Hence, it is seen that a specific extent containing 2 acres had devolved on to the plaintiff as a result of the execution of the said deed.

Admittedly, the land sought to be partitioned has only 2 acres 1 rood and 2.7 perches on the ground. [Vide Plan No.74 marked X] Then it would result in, to remain less than 43 perches of land to be distributed amongst all other co-owners in the event the entitlement under the said deed 1185 is accepted. Such a position will lead either to disregard the title of the deeds of the other parties or they could only have very much lesser land than their entitlement. At this stage, it must be noted that the decision to

accept those deeds of the other parties have not been challenged and therefore the title referred to in those deeds cannot be disturbed in order to accommodate the title derived from deed 1185. Therefore, it is clear that the title deed 1185 of the plaintiff cannot be regarded as far as the extent of the land sought to be partitioned is concerned particularly when the share allocation of the other parties are to remain intact. Hence, it is illogical and even wrong to accept the title referred to in the deed No.1185 as far as the corpus of this action is concerned though the application of the learned Counsel for the appellant is to that effect.

I will now look at the reasons assigned by the learned District Judge for keeping 1/56 shares of the land un-allotted. In the first paragraph found at page 11 of the judgment, [page 246 of the appeal brief] the learned District Judge has stated that it is because of the inability of the plaintiff to establish the particulars of one son of Coronelis that it was kept un-allotted. Therefore, it is clear that the entitlement to the share that was un-allotted should devolve on to the aforesaid son of Coronelis who was not disclosed for the purpose of this action and not for any other reason. It is more so when there is no appeal, challenging the decision as to the non-disclosure of the name of a son of Coronelis. Accordingly, the share that was kept un-allotted has to be devolved on either to the said son of Coronelis whose name was not disclosed or to his heirs. Therefore, merely because there is a share that had been kept un-allotted in the impugned judgment, it cannot be allotted to the plaintiff merely looking at the deed 1185.

Accordingly, I am not inclined to allow the application of the learned Counsel for the plaintiff-appellant in order to have the un-allotted shares, allotted to the plaintiff. For the aforesaid reasons, I do not wish to interfere with the impugned judgment. Hence, the judgment dated 31.11.96 would prevail intact. Accordingly, this appeal is dismissed with costs.

Appeal dismissed

JUDGE OF THE COURT OF APPEAL