

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

C.A. 628/98 (F)
C.A. 628A/98 (F)

D.C. Kalutara Case No: 5152/P

Mohomed Hashim Mohomed Jifser
No: 35,
Snapulla Road,
Gardhanagar.

Complainant

- Vs-

Mohomed Naseem Mohomed Nawari
No:29,
Snapulla Road,
Gardhanagar.

And Others

Respondents

C.A. 628/98 (F)

D.C. Kalutara Case No: 5152/P

C.A. 628A/98 (F)

Before : K.T. Chitrasiri,J.

Counsel ; Sabry Nilandeen for the 11th and 14th defendant-Appellants in C.A. 628/98 and for the 11th and 14th Defendant-Respondents in C.A. 628/98A

H. Withanachchi for the 2nd and 3A Defendant-Appellants in C.A. 628/98A and for the 2nd and 3A defendant-Respondents in C.A. 628/98(F)

M.U.M.Ali Sabry,P.C. with Sanjeewa Dasanayake for the Plaintiff-Respondent in both C.A. 628/98 and C.A. 628/98A

Argued &

Decided on : 12.02.2014

K.T. Chitrasiri,J.

Heard all three Counsel in support of their respective cases.

These two appeals have been filed seeking to set aside the judgment delivered on 14.08.1998 of the learned District Judge of Kalutara. By that judgment, an order had been made allotting 1/8 share to the plaintiff and the balance 7/8 shares to the 1st Defendant-Respondent of the land sought to be partitioned having accepted virtually the pedigree of the

plaintiff-respondent. Being aggrieved by the said decision of the learned District Judge, these two appeals have been filed seeking to set aside the impugned judgment in addition to the other reliefs prayed for in the two petitions of appeal.

At this stage it is necessary to note that nothing has been looked at by the learned District Judge as to the matters raised in the statements of claim filed by the defendants including that of the appellants. Learned Judge has merely stated that the issues of the defendants will not arise despite the fact that some of those have come up with completely a different pedigree. Accordingly, no shares were given to any of the defendants in the judgment not having addressed to their claims.

At this stage, it is brought to the notice of Court that the learned District Judge has not looked at the evidence adduced on behalf of the 9th to 16th Defendants though they have raised issues bearing Nos. 18 to 31 relying upon a pedigree [as shown in their statements of claim] completely different to the pedigree of the plaintiff. Learned District Judge has not even answered those issues. Instead she has merely stated that those will not arise. Learned District Judge, being the person who is given the task of investigating title of each and every party to a partition action in terms of Section 25 of the Partition Act, should not have answered those issues of the 9th to 16th defendants in that manner particularly when they have produced even the deeds alleged to have

executed in connection with the land sought to be partitioned to establish their rights. Learned Counsel for the 11th to 14th defendant-appellants submits that the deeds marked 13V1 to 13V5 refers to a land in extent of three acres in which the name of the land referred to in the deeds produced by the 9th-16th defendant-respondents as well as the plaintiff also appears. Nothing is found in the judgment as to the consideration of those matters submitted by the learned Counsel for the appellants.

Therefore on the face of the record, learned District Judge seems to have misdirected herself; particularly when it comes to the claim of the 9th-16th Defendants. In the circumstances, Counsel for the 11th to 14th defendant-appellants submits that the learned District Judge has not evaluated the evidence led, along with the matters contained in the deeds produced particularly on behalf of the 9th to 16th defendants.

Having considered the above matters all three Counsel appearing for the two sets of appellants as well as the respondent agree to have this matter remitted back to the District Court for a *trial de novo*.

It is difficult for this Court too, to consider such an issue without hearing the evidence of the respective parties since it involves a large amount of facts of the case. Accordingly, this case is to be remitted back to the District Court of Kalutara for re-trial enabling the trial judge to act in terms of Section 25 of the Partition Act and accordingly to investigate title of all the parties to the action.

For the aforesaid reasons, the judgment delivered on 14.08.1998 of the learned District Judge of Kalutara is set aside. This case is to be sent back to the District Court of Kalutara for re-trial. Both appeals are allowed. No costs.

Appeals allowed.

JUDGE OF THE COURT OF APPEAL

Jmr/-