

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

Kamala Wijeweera  
Maliyagoda, Kataluwa,  
Ahangama

**3<sup>rd</sup> Defendant-Respondent-Petitioner**

**C.A. NO.1187/98(F)**  
**DC.GALLE**  
**CASE NO.9224/P**

**VS**

Udumalagala Gamage Pemasiri  
Kataluwegedera, Tellambara,  
Nakiyadeniya

**Plaintiff-Respondent-Respondent**

Baranige Gnanawathie  
Maliyagoda,  
Ahangama

**1<sup>st</sup> Defendant-Appellant-Respondent**

Hewawasam Tuduwawattage Dhanapala  
Maliyagoda,  
Ahanagama

**2<sup>nd</sup> Defendant-Respondent-Respondent**

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

**COUNSEL** : Athula Perera with Chaturani de Silva  
for the 1<sup>st</sup> Defendant-Appellant -Respondent

D.M.Siriwardene with Palitha Bandaranayake and  
Dilani Jayaneththi for the 3<sup>rd</sup> Defendant-  
Respondent-Petitioner

**ARGUED ON** : **02.10.2015**

**WRITTEN SUBMISSIONS** : 20<sup>th</sup> January 2015 by the 3<sup>rd</sup> Defendant-Respondent- Petitioner

**FILED ON** : 13<sup>th</sup> July 2015 by the 1<sup>st</sup> Defendant-Appellant Respondent

**DECIDED ON** : **04.11.2015**

**CHITRASIRI, J.**

Plaintiff-respondent-respondent filed this action in the District of Galle seeking to have the land called Ambagahakoratuwewatta alias Ambagahawatta, partitioned. Initially there were only two defendants to the action. At the time of the preliminary survey of the land subjected to in this case, 3<sup>rd</sup> defendant-respondent-petitioner claimed a part of the land before the Commissioner. Accordingly, she made an application to intervene and then she was added as the 3<sup>rd</sup> defendant to the action. At the conclusion of the trial, learned Additional District Judge of Galle made order to partition the land as shown in his judgment dated 16.10.1998.

Being aggrieved by the said decision of the learned Additional District Judge, the 1<sup>st</sup> defendant filed this appeal seeking to set aside the judgment and to have an order to partition the corpus as prayed for in the plaint.

When the appeal was taken up in this Court on 05.08.2013, neither the plaintiff-respondent nor the 2<sup>nd</sup> defendant-respondent was present in

this Court even though notices have been sent by the Registrar under registered cover directing them to be present in this Court on that date. Accordingly, the appeal was taken up for argument in the absence of the plaintiff-respondent and the 2<sup>nd</sup> defendant-respondent. The Attorneys-at-Law who appeared for the appellant and the 3<sup>rd</sup> defendant-respondent moved to file submissions in writing and invited Court to write the judgment without oral submissions being made.

When this matter was mentioned on the next date to ascertain whether the parties have filed their submissions, different Counsel appeared for the 3<sup>rd</sup> defendant-respondent. He alleged that there had been a fraud committed by the plaintiff in this connection and made an application to have another date to support his application. Thereafter, 3<sup>rd</sup> defendant-respondent-petitioner, by the petition dated 19.03.2014 sought permission of this Court to receive and admit new evidence in terms of Section 773 of the Civil Procedure Code, in addition to the evidence already recorded in the Court of the first instance. Appellant filed objections to this application. Thereafter, both parties made their submissions in writing as well on the issue of receiving fresh evidence.

Section 773 of the Civil Procedure Code reads thus:

*“Upon hearing the appeal, it shall be competent to the Court of Appeal to affirm, reverse, correct or modify any judgment,*

*decree, or order, according to law, or to pass such judgment, decree, or order therein between and as regards the parties, or to give such direction to the court below, or to order a new trial or a further hearing upon such terms as the Court of Appeal shall think fit, or, if need be, to receive and admit new evidence additional to, or supplementary of, the evidence already taken in the court of first instance, touching the matters at issue in any original cause, suit or action, as justice may require or to order a new or further trial on the ground of discovery of fresh evidence subsequent to the trial."*

In the case of **Beatrice Dep v. Lalani Meemaduma**, [1997 (3) SLR 379] this issue of admitting new evidence had been discussed. In that decision, several other decisions including that of **Hettiarachchi v. Mary Motha** [C.A.1329/82 CALA 141/82 C A Minutes dated 5.11.1986] **Carolis v. Piyadasa** [CALA 182/90 C A Minutes dated 16.7.1993] **Jandiris v. Deva Renta** [33 NLR 200] **Piyaratne Unnanse v. Nandina** [37 NLR 109] **Endiris de Silva v. Aronolis** [33 CLW 39] **Ramasamy v. Fonseka** [62 NLR 90] **Ratwatte v. Bandara** [70 NLR 231] also had been discussed. In the aforesaid judgment namely, **Beatrice Dep v. Lalani Meemaduma**, (supra) decision in **Lada v. Marshall** [1954 (3) AII ER 745 at 748] also is cited and in that **Denning, L. J** had held thus:

*"in order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the*

*trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive,: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.”*

I have no hesitation to agree with the guide lines enumerated in those decisions when the question of receiving fresh evidence to be decided at the appeal stage. In the circumstances, I will now turn to consider whether the matters referred to by the 3<sup>rd</sup> defendant-respondent-petitioner would permit this Court to make an order allowing her application made under Section 773 of the Civil Procedure Code.

Matters referred to in her petition dated 19.03.2014 are basically on the question of devolution of title of the parties to the land subjected to in this partition action. Since, it is on the title of the parties, I would like to refer first to Section 25 of the Partition Act. The said Section 25 of the Partition Act imposes a duty on the trial judge to investigate title of the parties when it comes to proceedings in a partition action. Such a duty is akin to inquisitorial system prevails over civil law jurisdictions. **[Galagoda V. Mohideen 40 N L R 92. Gunatilleka V Murieal Silva 79 (1) N L R 481, Kularatne V Ariyasena 2001 B L R 06, Richard and Another V**

**Seibel Nona 2001 (2) S L R 01, Abeysinghe V Kumarasinghe 2008 B  
L R 300]**

Matters alleged by the 3<sup>rd</sup> defendant-respondent-petitioner in order to act under Section 773 of the Civil Procedure Code are basically in relation to the devolution of title of the parties to the corpus subjected to in this case. As mentioned earlier, aforesaid Section 25 of the Partition Act imposes a duty on the trial judge to consider those matters even if the parties have failed to refer to those matters at the trial. Now that such an issue has come up before this Court, 3<sup>rd</sup> defendant has every right to bring it to the notice of this Court and move for a re-trial even at this appeal stage enabling the trial judge to act in accordance with Section 25 of the Partition Act. Merely because her claim was to have an exclusion of a particular portion of the corpus, she is not prevented from taking up the matters pertaining to the devolution of title of the parties to the action even at this appeal stage.

Therefore, it is my view that the 3<sup>rd</sup> defendant-respondent-petitioner is entitled to make submissions even at this appeal stage as to the title of the other parties to the action despite the fact that her claim is only for exclusion. Accordingly, it is not necessary for this Court to make an order in respect of the application dated 19.03.2004 of the 3<sup>rd</sup> defendant-respondent-petitioner made under Section 773 of the Civil Procedure Code. In the circumstances, I make an order to have the appeal fixed for argument afresh

for another date enabling the 3<sup>rd</sup> defendant-respondent to make submissions as to the devolution of title of the parties to the action.

For the aforesaid reasons, this application dated 19.03.2014 is refused. This matter is to be mentioned on another date to fix the appeal for argument.

*Application dismissed.*

JUDGE OF THE COURT OF APPEAL