

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

H.G. Premadasa,

Mahagoda, Hegoda,

Boossa.

Plaintiff

C.A. Case No. 844 / 1995 F

D.C. Galle Case No.7694/P

-Vs-

1. B.M. Edwin,

Mahagoda, Hegoda, Boossa.

2. H.G. Weerasekara (deceased),

Hegoda, Boossa.

2A. Mohottige Allen,

Katukurunda.

3. Muthipala Hegoda Gamage,

Mahagoda, Hegoda, Boossa.

4. Sumanadasa Hegoda Gamage,

Basthiyange Watte, Hegoda, Boossa.

5. Hegoda Vajira Thero,

Buddhist Centre, 2nd Maradana.

6. H.G. Chandralatha,

Meddawatta, Hegoda, Boossa.

7. H.G. Gnanawathie,

Mahagoda, Hegoda, Boossa.

8. H.G. Piyasena,

Mahagoda, Hegoda, Boossa.

9. H.G. Karunasena,

Mahagoda, Hegoda, Boossa.

10.H.G. Amarasena,

Mahagoda, Hegoda, Boossa.

11.H.G. Jinadasa,

Mahagoda, Hegoda, Boossa.

12.H.G. Pealis (deceased),

Mahagoda, Hegoda, Boossa.

12A. H.G. Munipala,

Hegoda, Boossa.

13.G.H.G. Somasiri Gunawardena,

"Sevana", Hegoda, Boossa.

14.G.H.G. Premalatha Gunawardena,

"Sevana", Hegoda, Boossa.

15.G.H.G. Alisnona Gunawardena,

"Sevana", Hegoda, Boossa.

16.G.H.G. Hemapala Gunawardena,

"Sevana", Hegoda, Boossa.

17.G.H.G. Gurnel Gunawardena (deceased),

"Sevana", Hegoda, Boossa.

17A. G.H.G. Somasiri Gunawardena.

18.B.M.A. Hendrick,

"Sevana", Hegoda, Boossa.

19.H.G. Karanelis Alias Andiris,

Galle Gedara, Madakada,

Hegoda, Boossa.

20.M.H.G. Mendis Appu,

Madakada, Hegoda, Boossa.

21.M.H.G. Nandiyas Appu,

Madakada, Hegoda, Boossa.

22.Hegoda Devarakkitha Thero,

West Somaramaya,

Welipitimodara, Ginthota.

23.B.M.A. Pieris Appu,

Temple Road,

Mahagoda, Hegoda, Boossa.

24.H.G. Sugathadasa,

Rex Theater, Borella,

Colombo 10.

Defendants

And Now Between

13.G.H.G. Somasiri Gunawardena,

“Sevana”, Hegoda, Boossa.

14.G.H.G. Premalatha Gunawardena,

“Sevana”, Hegoda, Boossa.

15.G.H.G. Alisnona Gunawardena,

“Sevana”, Hegoda, Boossa.

16.G.H.G. Hemapala Gunawardena,

“Sevana”, Hegoda, Boossa.

17.G.H.G. Gurnel Gunawardena (deceased),

“Sevana”, Hegoda, Boossa.

17A. G.H.G. Somasiri Gunawardena.

18.B.M.A. Hendrick,

“Sevana”, Hegoda, Boossa.

Defendant - Appellants

-Vs-

H.G. Premadasa,

Mahagoda, Hegoda, Boossa.

Plaintiff - Respondent

1. B.M. Edwin,

Mahagoda, Hegoda, Boossa.

2. H.G. Weerasekara (deceased),

Hegoda, Boossa.

2A. Mohottige Allen, Katukurunda.

1. Muthipala Hegoda Gamage,

Mahagoda, Hegoda, Boossa.

2. Sumanadasa Hegoda Gamage,

Basthiyange Watte, Hegoda, Boossa.

3. Hegoda Vajira Thero,

Buddhist Centre, 2nd Maradana.

4. H.G. Chandralatha,

Meddawatta, Hegoda, Boossa.

5. H.G. Gnanawathie,

Mahagoda, Hegoda, Boossa.

6. H.G. Piyasena,

Mahagoda, Hegoda, Boossa.

7. H.G. Karunasena,

Mahagoda, Hegoda, Boossa.

8. H.G. Amarasena,

Mahagoda, Hegoda, Boossa.

9. H.G. Jinadasa,

Mahagoda, Hegoda, Boossa.

10.H.G. Pealis (deceased),

Mahagoda, Hegoda, Boossa.

12A. H.G. Munipala,

Hegoda, Boossa.

19.H.G. Karanelis Alias Andiris,

Galle Gedara, Madakada,

Hegoda, Boossa.

20.M.H.G. Mendis Appu,

Madakada, Hegoda, Boossa.

21.M.H.G. Nandiyas Appu,

Madakada, Hegoda, Boossa.

22.Hegoda Devarakkitha Thero,

West Somaramaya,

Welipitimodara, Ginthota.

23.B.M.A. Pieris Appu,

Temple Road,

Mahagoda, Hegoda, Boossa.

24.H.G. Sugathadasa,

Rex Theater, Borella,

Colombo 10.

Defendant - Respondents

BEFORE : **A.H.M.D. Nawaz, J.**

COUNSEL : Defendant-Appellants absent and
unrepresented.

Kuvera De Soyza P.C. with Thusitha
Nanayakkara for the Plaintiff-Respondent.

Argued on : **31.03.2015**

Decided on : **13.11.2015**

A.H.M.D. NAWAZ, J,

The Plaintiff-Respondent (hereinafter sometimes referred to as “the Plaintiff”) filed this action on 27th June 1979 to partition a land called “**PEHEBIYAGAHA WATTA**”, among the parties specified in the pedigree annexed with the plaint. A commission

was issued to W.A.Garvin Silva, Licensed Surveyor, whose Plan bearing No.2462 dated 27th and 28th September, 1981 and his report were filed of record marked X and X1 respectively. The corpus to be partitioned is depicted as Lots A to D containing in extent 2 acres and 28.5 perches. The surveyor has identified the land depicted in his plan as the corpus to be partitioned among the parties.

The 10th and 11th Defendants filed their statement of claim disputing the pedigree of the plaintiff and sought a partition of the corpus in terms of the pedigree submitted by them. The 19th, 20th and 21st added-defendants also filed their statement of claim and claimed a partition of the corpus according the pedigree of the 10th and 11th Defendants.

When this case was taken up for trial on 13th January 1984, the parties agreed without any contest that Lots A to D as shown in Plan No.2462 dated 27th September 1981 constituted the corpus. Thereafter, issues Nos.1 to 7 were raised on behalf of the Plaintiff, issues Nos.8 to 14 on behalf of the 10th and 11th Defendants and issues No.15 on behalf of 23rd Defendant respectively. As the adduction of evidence proceeded, some more issues were raised with regard to plantations and improvements in the corpus. On behalf of the 1st Defendant only one issue was raised as to the plantations. However, 13th to 18th Defendants-Appellants had not raised any issue, either regarding the corpus or plantations, but stated that they relied on the issues raised by the 10th and 11th Defendants.

Previous Trial

Upon a perusal of the appeal brief, it appears that there was a previous trial that had been conducted before. In that trial the Plaintiff gave evidence in the first instance and produced documents marked 'P1' to 'P13'. He explained how the property devolved on the parties from the original owners. After the conclusion of the

Plaintiff's evidence the Court entered judgment on 27th April 1984. On 31st May 1984, the Counsel for the 23rd Defendant moved Court to set aside the judgment entered in the case and the application was considered by Court subject to costs in favor of other parties. On 17th February 1988, Court had allowed the application to set aside the judgment and with the consent of all the parties, the judgment was set aside by the then learned District Judge and the case was re-fixed for fresh trial.

Fresh Trial which gives rise to the Instant Appeal

Accordingly, on 17th February 1988, admissions and fresh issues were framed. As stated in the anterior part of this judgment, issues Nos. 1 - 7 were formulated by the Plaintiff, issues Nos. 8 - 14 by the 10th and 11th Defendants, and issue No. 15 was raised by 23rd Defendant respectively. No other party raised issues. Thereafter, when the trial resumed on 20th July 1988, the Plaintiff gave evidence. The Plaintiff was cross-examined only by the 1st, 10th, 11th and 19th Defendants. Under cross-examination by the Counsel for the 10th and 11th Defendants, the Plaintiff clearly delineated as to how the title devolved from the original owners, and thereafter on the persons mentioned in the pedigree filed by him. He concluded his evidence by stating that he was seeking to partition the corpus among the parties stated in the plaint vis-à-vis their respective shares and that the plantations must be divided according to the soil rights. His testimony of course lasted for several days.

Thereafter as the 17th Defendant who was called to give evidence crossed the great divide, the 13th Defendant was next called to testify. Upon the disclosure in the course of his evidence that there were new parties, the Court made an order to add them as parties to the case. Subsequently on 31st January 1995, the 13th Defendant's evidence began afresh. In his evidence the 13th Defendant admitted most of the matters pertaining to the devolution of title mentioned by the Plaintiff in his

pedigree. He admitted that the Plaintiff who was residing in the land had been in possession of the plantations since 1958. He also admitted that just like the Plaintiff, the other persons shown in Plaintiff's pedigree were also residing on the land.

It appears from the record that the case of the 10th Defendant brought forth documents 10V1 to 10V2. The 11th, 13th - 18th and 19th Defendants closed their case without producing any documents. The 23rd Defendant had moved for a date to give evidence but on the date of resumption of the trial it was stated that he would not give evidence- vide pages 221 and 222 of Appeal Brief. Thereafter, the parties filed their written submissions and the case was fixed for judgment which was delivered on 12th October 1995 by the learned District Judge. So much for the concatenation of chronology in the court *a quo*.

It is only the 13th to 18th Defendants who have preferred this appeal. One has to bear in mind that although there was no dispute over the corpus, the contest revolved around the pedigree submitted by the Plaintiff, which had been accepted by all other parties except the 10th, 11th and 13th to 18th Defendants. It must be borne in mind that the Appellants (13th to 18th Defendants) neither raised any points of contest nor did they cross-examine the Plaintiff at the trial. Although the 10th and 11th Defendants disputed the Plaintiff's pedigree, they did not prefer to give evidence to establish their pedigree and devolution of title. Such failure on their part does not advance their cause. When a party disputes the Plaintiff's pedigree and relies on a different pedigree for his title and ownership, it is his bounden duty to establish his pedigree and I must state that the 10th and 11th Defendants have failed to discharge this burden.

I am therefore of the view that the corpus should be partitioned according to the proven pedigree filed by the Plaintiff, and the plantations as allotted by the judgment.

It must be noted that on 16th March 1992 after the Plaintiff's evidence was concluded, the 17th Defendant was called to give evidence. But it is not clear whether the Plaintiff had closed his case. It is not recorded as to whether Plaintiff's case was closed. The 17th Defendant was called without following this procedure. After the Plaintiff's evidence, no other witnesses were called for the Plaintiff. The 10th and 11th Defendants who filed a contesting pedigree have not given evidence.

The record reveals that the 17th Defendant after his examination-in-chief had died. On 05th October 1993, parties agreed to recant the evidence already given by the deceased 17th Defendant and call the 13th Defendant to give evidence on behalf of the contesting defendants in order to prove the pedigree filed by the 10th and 11th Defendants. It must be noted that the 13th Defendant was called to give evidence not only for himself but also for 10th, 11th, 13th to 18th and 19th Defendants who were all supportive of the pedigree of 10th and 11th Defendants.

On a perusal of the evidence of the 13th Defendant, it is very clear that he does not know his family background and he further admitted that it was not him who gave instructions to his lawyer to prepare the pedigree. His evidence is perse contradictory. His evidence given on the first day was departed from on the second day. His evidence is nothing but admission of the devolution of title to the parties mentioned in the pedigree of the Plaintiff. He miserably failed to give a satisfactory evidence as to the devolution on their pedigree. The learned District Judge has commented on this evidence as "hopelessly bad". Surprisingly, the 13th Defendant virtually admitted the Plaintiff's pedigree and stated "the plaintiff and his

predecessors in title have had long years of possession for the plantations, and Premadasa (plaintiff) came to reside in 1958 and I admit that the persons mentioned in plaintiff's pedigree are residing on the land". (See pages 208, 217 and 220 of the Appeal brief). If that is the position, the 13th Defendant, who has given evidence on behalf of 10th and 11th Defendants and 13th to 18th Defendants-Appellants can be taken into account as a party who has accepted the Plaintiff's pedigree. It was in such a background that the learned District Judge has rejected the pedigree filed by the 10th and 11th Defendants.

The 13th to 18th Defendants who have now appealed against the judgment, filed their statements of claim and stated that they accepted the pedigree filed by the 10th and 11th Defendants. The 19th to 21st Defendants who were later added, also relied on the pedigree of the 10th and 11th Defendants. Hence, the real contest is between the pedigree the plaintiff and the pedigree asserted by the 10th and 11th Defendants. But the question is whether, as against the Plaintiff's pedigree, the pedigree of the 10th and 11th Defendant has been proved? The testimony of the 13th Defendant has failed to furnish satisfactory proof of the pedigree and therefore, as the learned District Judge commented, the second pedigree stands unproved. The 13th Defendant has, admittedly stated that the Plaintiff has allotted shares correctly to the respective Defendants, and thereby he has contradicted his own pedigree. He did not know how many daughters his predecessor "Velun" had and how many sisters and brothers his mother had.

In the written submissions of the 13th to 18th Defendants, it is stated that the reasons for the appeal are given in paragraph 10 of their Petition of Appeal, and they plead that on the grounds stated therein the judgment of the learned District Judge must

be set aside. What they have stated in paragraph 10 that is the pedigree which they have filed in the District Court and that is the one which remains unproved.

In these circumstances there is no evidence before the Appellate Court to establish the pedigree filled by the 10th and 11th Defendants although sufficient opportunity was available to establish it at the trial before the lower Court? Proof of pedigree should have been done by adducing sufficient evidence, by the parties who rely on that pedigree. The contesting pedigree was filed by the 10th and 11th Defendants, on which the 13th to the 18th Defendants-Appellants have relied. In the absence of such proof, the learned District Judge has correctly accepted the unchallenged pedigree of the Plaintiff, which is proved to the satisfaction of the Court, and entered judgment on that pedigree.

Considering the stand taken by the parties and the evidence led in the case, I am of the view that the Defendants have totally failed to lead any evidence against the evidence of the Plaintiff on the pedigree submitted by him. The 13th to the 18th Defendants have not raised any issue at the trial. They said that they would accept the pedigree filed by the 10th and 11th Defendants. If these two Defendants opted not to give any evidence, and the 13th Defendant gave unsatisfactory evidence, it is the duty of the other Defendants to produce sufficient evidence to prove the pedigree which they rely upon. I must state that no such obligation was ever undertaken by any of the Defendants. Certainly a Defendant in a partition suit stands in the shoes of a Plaintiff and this dual capacity imposes a burden on the Defendant to adduce proof of his title as the duty of a judge to investigate title cannot be effectively discharged without adduction of some evidence towards proof of *facta probanda*. In any event a District Court cannot embark on a wild goose chase or a voyage of discovery in the discharge of its task of fact finding if parties for bear to

adduce evidence of the case they have placed before court – see ***Bandi Naide v Appu Naide (1923) 5 CL Recorder 192*** for the proposition of double capacity of Plaintiff and Defendant.

The 10th and 11th Defendants further to the devolution on the pedigree, also depended on prescriptive title. But they failed to raise any issue as to prescription nor did they lead any evidence to prove prescription in their favour.

The learned District Judge has gone into the question of devolution of title and the persons who are entitled to the buildings and plantations. In this regard, the learned Judge has considered the oral evidence as well as the documents marked and produced

Therefore, I hold that the learned District Judge's finding to allot the respective shares to the parties in his judgment is correct. The learned District Judge has taken into consideration of the claims of the parties to the buildings, plantations and improvements and how they should be allotted to the parties concerned.

In the circumstances, this appeal is dismissed with costs and the record is sent back to the lower Court to proceed with further steps to partition the land and to allot the buildings and plantations in terms of the judgment entered in the case.

JUDGE OF THE COURT OF APPEAL