

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

CA 479/98 (F)
DC Kandy Case No. 13204/P

1. Mangalagama Wattegedara Jayasekera
2. Mangalagama Wattegedara Kirimenike
Both of Mangalagama, Muruthalawa.

Plaintiffs

Vs.

1. Mangalagama Wattegedara Siyadoris
2. Mangalagama Wattegedara Muhandiram
3. Mangalagama Wattegedara Kiriamma
4. Mangalagama Wattegedara Ran Menike
5. Mangalagama Wattegedara Dinoris
6. Mangalagama Wattegedara Sugathihamy
7. Viharadhipathi, Kukuladagoda,
Mangalagama, Muruthalawa.
All of Mangalagama, Muruthalawa.

Defendants

And

Mangalagama Wattegedara Dinoris
(Deceased)

5th Defendant-Appellant

1. R.M. Ukku Menike
No. 203A, Mangalagama, Wattegedara,
Muruthalawa
2. Mangalagama Wattegedara Wijewardena
No.203A, Mangalagama, Wattegedara,
Muruthalawa.

3. Mangalagama Wattegedara Seneviratne
No.203A, Mangalagama, Wattegedara,
Muruthalawa.
4. Manamendaragedara Abetratna
Thalawatta, Peradeniya.

**Substituted 5th Defendant-
Appellants**

Vs.

1. Mangalagama Wattegedara Jayasekera
2. Mangalagama Wattegedara Kirimenike
Both of Mangalagama, Muruthalawa.

Plaintiffs-Respondents

3. Mangalagama Wattegedara Siyadoris

1st Defendant-Respondent

4. Mangalagama Wattegedara Muhandiram

2nd Defendant-Respondent

5. Mangalagama Wattegedara Kiriamma

3rd Defendant-Respondent

6. Mangalagama Wattegedara Ran Menike

4th Defendant-Respondent

7. Mangalagama Wattegedara Sugathihamy

6th Defendant-Respondent

8. Viharadhipathi, Kukuladagoda,
Mangalagama, Muruthalawa.

7th Defendant-Respondent

9. Mangalagama Wattegedara Ranasinghe

Substituted 5th Defendant
-Respondent

All of Mangalagama, Wattegedara
Muruthalawa.

Before : H.C.J. Madawala , J
&
L.T.B. Dehideniya, J

Counsel : Upul Ranjan Hewage for the Appellant
Nizam kariapper for the 1st and 2nd Respondents

Argued On : 15 /06 /2016

Written Submissions on : 23 /09 /2016

Decided On : 14 /02 /2017

H. C. J. Madawala , J

The 5th Defendant Appellant has preferred this appeal to set aside the judgment dated 04/06/1998 and for further relief as prayed for in the prayer of the Petition dated 22/07/1998. This matter was fixed for argument on 15/06/2016 and argument was concluded and Counsels to moved for date to file written submissions. Both parties have file their written submissions and judgment was reserved for 23/09/2016 and thereafter postpone for 13/02/2017.

The Plaintiff Respondent instituted this action to partition the land called “Kukuladagoda watte” or “Mahaaramba Watte” in extent of 8 lahas. The Plaintiff possession was that in his pedigree the original owner of Parakatawelle Diddeniyegedera Muhandiram and that the said Muhandiram had two children. Namely,

- 1- Wattegedara Ran Ethana and
- 2- Wattegedara Appu Naide

The Plaintiffs claimed the said Ran Ethana had conveyed her share to the 1st Plaintiff who then became entitled to an undivided half share of the corpus. The Appellant possession was that the said Muhandiram had more than two children, and took up the position that the said Muhandiram’s had seven children. Namely,

- 1) Appu Naide , 2) Ran Naide, 3) Ran Ethana, 4) Menikhamy,
- 5) Ukku Ethana, 6) Abaran Appu, 7) Kiri Appu with an undivided 1/7 share devolving on each of them. The Appellant also stated that the Plaintiffs was seeking to partition 8 lahas out of a much larger land. The Appellant had purchased the shares of Manikhamy and Abaran Appu. Furthermore, he was entitled to another 1/14 share in the corpus as one of the 7 children of Appu Naide. Thus, the Appellant claimed 5/14 shares in the corpus. When the case was taken up for trial two admissions were recorded.

- 1) The Kandyan Law was applicable to the parties,

2) That the said Muhandiram was the original owner of the corpus.

The Learned District Judge delivered his judgment on 4/6/1998 accepting the contention of the Plaintiffs both with regard to the corpus and the pedigree. Being aggrieved by the said judgment dated 4/6/1998 the 5th Defendant-Appellant appeal against the said judgment of the following grounds of appeal,

- a) the said judgment is contrary to law and the weight of evidence led,
- b) the Learned Trial Judge has failed to consider the deeds produced by the Appellant in deciding whether the entire land had been surveyed,
- c) the Learned Trial Judge has failed to consider the devolution of title as set out in the earlier judgment in case No 5688/P,
- d) the Learned Trial Judge has failed to consider the evidence of Manikhamy who was one of Muhandiram's daughters.

When this matter came up for argument on 15/6/2016 the 1st and 2nd Plaintiff-Respondent make argument that the original owner of Muhandiram had 7 children and not two, as pleaded by the Plaintiff an issue No 10. The burden of proof lies on the 5th Defendant Vide **Gunasekara Vs. Latheef 1991 Vol 1 pg.365** it was held,

“While S.101 Evidence Ordinance is concerned with the duty to prove a case as a whole, viz the overall burden of proof S. 103 regulates the burden of proof as to a particular facts, however the devolution of the overall burden is governed by S. 102 which declares that the burden of proof lies on that person who would fail if no such evidence at all were given on either side. When the legal title to the premises is admitted or proved to be in the plaintiff the burden of proof is on the defendant to show he is in lawful possession- defendant must begin the case”.

It was contended that the 5th Defendant-Appellant did not raises any issues in respect of whether parties are governed by Kandyan Law. Therefore the 5th Defendant-Appellant cannot now claim rights under the Kandyan Law. Vide **Piyadasa and another Vs. Babanis and another 2006 Vol 2 pg 17** it was held,

“On a question of fact the appellants cannot abdicate for the first time in appeal without first having contested the matter in the Original Court”.

It was contended that the Learned District Judge has very clearly come to the following findings at page 5 and 6 of his judgment.

“ පෙලපත සම්බන්ධයෙන් 5වන විත්තිකරු කියා සිටියේ ඉබමේ මුල් අයිතිකරු වශයෙන් පැමිණිලිකරු විසින් පෙන්වා ඇති මුහන්දිරම් නැමැත්තාට පැමිණිල්ලේ සඳහන් දරුවන් දෙදෙනාට අමතරව තවත්

දරුවන් 05 දෙනෙකු සිටි බවයි. මේ සම්බන්ධයෙන් දෙපාර්ශවයෙන් ඉදිරිපත් කළ වාචික සාක්ෂි වලට වඩා වැදගත් ලෙස සැලකිය හැකි ලේඛණගත සාක්ෂි ඉදිරිපත් වී ඇත. 11232/ඊ නඩුව ඉදිරිපත් කිරීමේදී (පැ 2) 05 වනද විත්තිකරු කියන 5 දෙනාද මුහන්දිරම්ගේ දරුවන් වශයෙන් පෙන්වා ඇත. නමුත් එම නඩුවේදී 5වන විත්තිකරු (තවත් අය සමග එකතු වී) හිමිකම් ප්‍රකාශය අමුණා එම තත්වය පැහැදිලිව ප්‍රතික්ෂේප කර ඇත. එහිදී 5 වන විත්තිකරු කියා ඇත්තේ (පැ 6) මුහන්දිරම් නමැත්තා බුදුල් කිරීමට තරම් දේපලක් නොතබා දරුවන් වන පුංචි අප්පු සහ රන් එතනා යන අය තබා මිය ගිය බවත් 1985 දී මෙම නඩුවේ විෂය වස්තුව සම්බන්ධයෙන්ම පවරන ලද නඩුවේදී 5වන විත්තිකරු විසින් ප්‍රකාශ කර ඇති එම කරුණු දැනට ගෙන ඇති ස්ථාවරයට සම්පූර්ණයෙන්ම වෙනස් ය. එකම කරුණ සම්බන්ධයෙන් අවස්ථා දෙකකදී 5 වන විත්තිකරු එකිනෙකට පටහැනි ප්‍රකාශයක් කර තිබෙන නිසා ඒ මත විශ්වාසයක් තැබිය නොහැක. කෙසේ වෙතත් කලින් අවස්ථාවේදී මුහන්දිරම්ට දරුවන් දෙදෙනෙකු සිටි බව 5වන විත්තිකරු විසින් පිළිගෙන තිබීම පැමිණිල්ල විසින් කරන ප්‍රකාශය සනාථ කිරීමක් ලෙස පිළිගත හැකිය.”

It was contended the 5th Defendant is estopped from taken up the position that, Muhandiram had 7 children and as he had denied the same in his previous action. Therefore the Learned Trial Judge has correctly answered issue No 10 not proved. Accordingly the question of illegitimate children succeeding under the Kandyan Law does not arise.

The 5th Defendant in his answer dated 17/05/1995 para 3 has stated that legal heirs of Muhandiram are his 07 children namely,

Parakadawelle Dikdeniya Gedara Appu Naide , Ran Naide, Ran Ethana, Menikhamy, Ukku Ethana, Abaran Appu, And Kiri Appu. Further he has stated the two daughters were married in “Deega” under the Kandyan Law. However the 5th Defendant had not indicate that the said property of Muhandiram is acquired property.

Under Section 15 of the Kandyan Law declaration and Amendment Ordinance its states as follows,

15. When a man shall die intestate after the commencement of this ordinance leaving an illegitimate child or illegitimate children-
 - (a) such child or children shall have no right of inheritance in respect of the paraveni property of the deceased;
 - (b) such child or children shall, subject to the interests of the surviving spouse, if any , be entitled to succeed to the acquired property of the deceased in the event of there being no legitimate child or the descendant of a legitimate child of the deceased;
 - (c) any such child shall, subject to the interests of the surviving spouse, if any, be entitled to succeed to the acquired property of the deceased equally with a legitimate child or the legitimate children, as the case may be-

- (i) if the deceased intestate had registered himself as the father of that child when registering the birth of that child. In the devolution of the estate of any person who shall die intestate after the commencement of this Ordinance, (a) whenever the estate or any part thereof shall devolve upon heirs other than a child or the descendant of a child, and such heirs are in relation to one another brothers or sisters, or brothers and sisters, or the descendants of any deceased brother or sister, such heirs shall inherit inter se the like
- (ii) if the deceased intestate had in his lifetime been adjudged by any competent court to be the father of that child.

The Learned District Judge of Kandy have not considered that under that Kandyan Law whether a child is legitimate or illegitimate even an illegitimate child can inherit like legitimate child inherit their fathers property if it is acquired property. Further, when there are legitimate children and illegitimate child or children can inherit the father's property, if the fathers name is registered in the Birth Certificate of illegitimate children as the father.

The Learned District Judge in answering issue No 10 (a) and (b) has stated that the said issue has not been proved. On a perusal of the record I find that

Muhandiram died leaving both legitimate and illegitimate children. The Plaintiff has failed to plead in his Plaint that the property to partition owned by Muhandiram was paraveni property. The Learned District Judge has failed to peruse P5 regarding the devolution of title from Muhandiram.

In the case No DC/ 5688 parties have admitted that the 6th Defendant Ran Ethana and 7th Defendant Punchi Hamy were married out in "deega" his illegitimate children were the deceased Plaintiff Ran Naide and 1st to the 4th Defendants.

The Learned District Judge in his judgment had stated that issue No 10 has not been proved due to the fact that only the birth certificate of Ran Naide has been submitted for his perusal. As such since the 5th Defendant has failed to tender the relevant documents namely the birth certificate. The Learned District Judge has answered the issue No 10 in the negative. On a perusal of the judgment in case No DC 5688 it has been determined that Muhandiram has 5 illegitimate children. It was contended by the 1st and 2nd Plaintiff-Respondent that the Appellants cannot abdicate for the 1st time in appeal without 1st having contested the matter in the original court. We find that the Plaintiff had not complied with section 4(d) of the Partition Law of 1997. In that the Plaintiff has failed to indicate whether the property to be partitioned is paraveni or acquired property.

The Plaintiff has failed to comply with section 4(c) or 4, 5 of the Partition Law in that the Plaintiff should have named the illegitimate children of the original owner which the Plaintiff has failed to do. Further the Learned District Judge has failed to comply with Section 20 (1) (b) of the Partition Law. Section 20 (1) (b) of the Partition Law stated that the court shall order notice of the partition action to be sent by registered post to every person disclosed under paragraph “c” of sub section “1” of section 19 by the Defendant in the action.

The Substituted 5th Defendant Appellant also submitted that a daughter under the Kandyan Law inherits the father’s property, only in certain circumstances.

They are, (1) if the daughter is married in binna or

(2) if the daughter is married after the father’s death.

The 1st Plaintiffs mother Ran Ethana was married in binna or married after the death of Muhandiram should have been averred by the Plaintiff to claim any rights from his mother on that ground of she were to inherit her father’s property.

It was submitted that there is not an iota of evidence produced on behalf of the Plaintiff that Ran Ethana was married in binna or Ran Ethana was married after the death of Muhandiram. The Learned District Judge has held that the evidence

is insufficient to establish that those sisters of the 5th Defendant were married in deega.

It was submitted that the trial judge has failed to come to a conclusion how the Plaintiffs the mother became entitle to any share of a property in question in answering issue No 10 A the Learned District Judge should have considered not only P 5 tendered by the Plaintiffs and 5 V 4 tendered by the 5th Defendant. He should have considered the evidence given by one of the 7 children of the said original owner Muhandiram, that is Manikhamy. Manikhamy gave evidence at the trial and was subjected to cross-examination by the Plaintiff. This evidence has never been considered by the Learned District Judge. Manik Hamy gave evidence and stated that her father is Muhandiram and Muhandiram had 3 children from Loku Amma. Namely, Punchi Hamy, Appu Naide and Ran Ethana and that her mother had 5 children. Namely,

Ran Naide, Manik Hamy, Ukku Ethana, Mohandiram and Kiri Appu.

She also stated that Muhandiram had 2 wives. She also stated in her evidence that her father has given his name in certain birth certificates. It was submitted that the Learned District Judge had failed to consider the document marked 5V9 which is a birth certificate of one of the 7 children. It was submitted that

Muhandiram has signed as the informant. Accordingly it was submitted that the Learned District Judge has failed to investigate the title in light of this evidence.

We hold that the duty cast on the trial judge under section 25 of the Partition Law has not been discharged. Since she has failed to find or come to a conclusion how the Plaintiff's mother became entitled to any share to the property in question.

The Plaintiff and the 5th Defendant Respondent has admitted that Muhandiram is the original owner of the property to be partition. However the Plaintiff in his written submissions had stated that the property was owned by Plaintiff's father one Ran Naide. The Plaintiff has not disclosed these fact in his plaint. He also has not disclosed the names of the illegitimate children in his plaint and had failed to give notice under section 20(1) of the Partition Law. Accordingly, I hold that the plaint of the Plaintiff is defective in that the Plaintiff has to indicate the correct pedigree and whether the land is paraveni property or acquired property in the plaint.

I am of the view that the Plaintiff has failed to narrate the nature of the property and to mention whether Ran Ethana was married in deega or binna and whether Muhandiram had other children who had claims to the land to be partitioned.

I hold that the Learned District Judge has failed and that there has been no proper investigation of title on the part of that Learned District Judge. As such I am of the view that the Learned District Judge has come to an incorrect conclusion when he has answered issue No 10 as not proved as he has not considered document marked P5 in regard to the devolution of title.

The Learned Counsel for the 5th Defendant Appellant in his petition has prayed for a dismissed of the action. However in the interest of justice I am of the view that this case has to tried in de novo.

Hence we allow this appeal and to set aside the judgement dated 04/06/1998 with cost of Rs.25,000/- and order of the Learned District Judge to commence the trial in de novo with notice the all parties.

Judge of the Court of Appeal

L.T.B.Dehideniya, J

I agree.

Judge of the Court of Appeal