

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

**Court of Appeal case no. C.A. 208/98**

**D.C. Kaluthara case no. 4931/P**

Mohamed Muhseen Abdul Gaffar,

**5<sup>th</sup> Defendant-Appellant**

**Vs.**

1. Mohamed Abdul Cader,
2. Abdul Careem Sithy Saleela,
3. Abdul Careem Mohamed Naseer

**Plaintiff-Respondents**

1. Abdul Careem Mohamed Hyder
2. A.L.M. Rahumath Umma  
Both of them No. 3 Sheik Fassy  
Mawatha, Dharga Town.
3. Y.L.M. alias M.Y.M. Suhair  
Mosque Lane, Dharga Town,
4. M.M. Mohamed Anver  
Molliyamale, Beruwala,
6. M.M.Aluhar
7. M.M.Ashar
8. M.M.Haseen
9. M.M.Safari
10. M.M.Jasool

11. M.M.Irfan
12. M.M.Suhari
13. M.M.Raheema
14. M.M.Noor Kareema  
All of New Road Dharga Town
15. Ummul Nary
16. Abdul Hameed Ibrahim
17. Abdul Hameed Safaya
18. Abdul Hameed Sitty Nissa
19. Abdul Hameed Fatima Rilaya  
All of No. 1, Sheik Fessy Mawatha,  
Dharga Town
20. Hameedu Mohamed Mashoona  
Pelanda, Agalawatta
21. Sheik Hassan Abdul Hady  
Kotte Road, Dharga Town

**Defendant - Respondent.**

**Before** : P.R.Walgama J.

: L.T.B. Dehideniya J.

**Counsel** : C.J. Ladduwahetti for the 5<sup>th</sup> Defendant Appellant.

: Rohitha Wimalaweera for the 3A Defendant Respondent

Daya Gamage for the Plaintiff Respondent

**Argued on** : 04.03.2016

**Written submissions filed on** : 18.03.2016

**Decided on** : 28.02.2017

**L.T.B. Dehideniya J.**

This is an appeal from the District Court of Kaluthara.

The Plaintiff Respondent instituted this action to partition the land called Kongahawatta alias Mattan Thottam. The Plaintiff Respondent presented the pedigree and the list of shares and moved Court to partition the land. The preliminary survey was done and the plan and report (marked as X1 and X2) submitted to Court depicting the land as lots A, B, C, D. The parties admitted that lot D is a road and agreed to exclude it from the corpus.

The 3<sup>rd</sup> Defendant Respondent and the 5<sup>th</sup> defendant appellant (4 to 14 defendants as a group) claimed that lot A of plan X1 is a separate land and moved to exclude it from the corpus. Further they submitted different pedigrees and claimed deferent shares.

Half of the house marked as No. 3 in the plan X1 was claimed by the 3<sup>rd</sup> Defendant Appellant on the basis that it was constructed by the predecessor, the father of the 3<sup>rd</sup> Defendant Respondent and the grandfather of the 4 to 14 Defendant Appellants. The 3<sup>rd</sup> defendant Suhai and the father of the 4 to 14 defendants Musheen were brothers and their father was Mahallam Usubu Suleiman Lebbe. The 3<sup>rd</sup> defendant's contention is that the house was constructed by the said Mahallam Usubu Suleiman Lebbe. The 4 to 14 defendants submit that it was build by their father Musheen and they claimed the entire house for them.

The learned District Judge after trial decided to partition the land as per the list of shares pronounced in the judgment and held that the house No 3 shall be divided in equal shares among 3<sup>rd</sup> Defendant and 4 to 14 Defendants as a group. Being aggrieved by the said judgment the 5<sup>th</sup> Defendant appealed against.

At the argument the appellant restricted the appeal to the issue of the ownership of the house. Therefore it is not necessary to consider the points raised on the pedigree and the corpus in the petition of appeal.

The 5<sup>th</sup> Defendant Appellant's argument is that the 3<sup>rd</sup> Defendant Respondent's father has not claimed the house No. 3 at the preliminary survey because he knew that it was constructed by the father of the 4 to 14 Defendants. He argues that it is only the 3<sup>rd</sup> Defendant Respondent's word against the 5<sup>th</sup> Defendant Appellant and therefore the survey report is crucial evidence relating to the house. The 3<sup>rd</sup> Defendant Respondent's argument is that by deed No. 11682 marked 3D1 the land including the house was transferred by Mahallam Usubu Suleiman Lebbe to his children, the 3<sup>rd</sup> Defendant, Musin the father of the 4<sup>th</sup> to 14<sup>th</sup> Defendants and one Jameel who died issueless. His contention is that this deed proves that the house was in existences even before transferring the land to the father of the 3<sup>rd</sup> and 5<sup>th</sup> Defendants. Since Jameel died issueless, the other two children became entitle in equal shares.

The 3A Defendant while giving evidence stated that he is claiming  $\frac{1}{2}$  of the house marked No. 3 on the basis that it was constructed by Mahallam Usubu Suleiman Lebbe. He admitted that his father, the deceased 3<sup>rd</sup> Defendant, was present at the preliminary survey but has not claimed the house before the surveyor. In cross examination it was put to him that the house was constructed by the farther of the 4<sup>th</sup> to 14<sup>th</sup> Respondents and that is the reason for not claiming the house by the 3<sup>rd</sup> Defendant before the surveyor, but has denied. In answering to re-examination, he said that the deceased 3<sup>rd</sup> Defendant in his statement of claim has claimed the house.

The 5<sup>th</sup> Defendant gave evidence on behalf of the 4<sup>th</sup> to 14<sup>th</sup> Defendants. His contention is that the house No.3 was constructed by the

father of them, but has failed to tender any evidence other than his oral testimony to establish that fact.

The oral testimony of the 5<sup>th</sup> Defendant is not reliable. At one stage he said that there was no house on the land when it was transferred by Mahallam Usubu Suleiman Lebbe and the house shown in the plan was constructed by his father, but on questioning further he changed his stand and said that there was a cadjan house. He has contradicted his own evidence. Further in his statement of claim he has not pleaded the deed marked 3D1. In his evidence he claimed the entirety of Mahallam Usubu Suleiman Lebbe. Under these circumstances the Court cannot act solely on his evidence and come to the conclusion that the house was constructed by the father of the 5<sup>th</sup> Defendant. As per the deed marked 3D1, the land has been transferred with the existing house.

The learned District Judge has considered the evidence and come to the correct finding that the house marked No. 3 should devolve on 3<sup>rd</sup> Defendant and 4<sup>th</sup> to 14<sup>th</sup> Defendants (as a group) in equal shares. I see no reason to interfere with the finding of the learned District Judge.

Accordingly I dismiss the appeal subject to costs fixed at Rs. 10,000/-

Judge of the Court of Appeal

**P.R.Walgama J.**

I agree.

Judge of the Court of Appeal