

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

Sinhala Pedige Shelten Marasinghe
Of Kelapitimulla, Wegowwa,
Minuwangoda.

1st Defendant – Appellant

CA 1049/97(F)

D.C. Negombo – 2427/P

Vs.

1. Edirisinghe Pedige Seelawathie
Ketaakelagahawatta,
Kelapitimulla,
Wegowwa.

Plaintiff – Respondent

2. Karuna Pedige Edirisinghe
Kelapitimulla,
Wegowwa.
(Deceased)

2(a). Wettasinghe Pedige Malani
Kelapitimulla,
Wegowwa.

3. Karuna Pedige Pedrick Dickman
No. 83A, Wegowwa,
Minuwangoda.

4. Karuna Pedige Chandralatha Jayalath

No. 83A, Wegowwa,
Minuwangoda.

5. Karunapedige Cristoper
Kumarasinghe
Minuwangoda.

Defendant – Respondent

BEFORE: M.M.A. GAFFOOR J

S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL: Daya Guruge for the 1st Defendant Appellant
Tharanth Palliyaguruge with Dulmini Indika for the
Plaintiff – Respondent

ARGUED ON: 07.12.2016

WRITTEN SUBMISSIONS – Plaintiff – Respondent - 23.02.2017
Defendant – Appellant – 23.02.2017

DECIDED ON: 24.05.2017

S. DEVIKA DE LIVERA TENNEKOON J

The Plaintiff – Respondent (hereinafter referred to as the Plaintiff) instituted action in the District Court of Negombo by plaint dated 22.02.1990 to partition the land described in the schedule to the Plaint depicted in Plan No. 849 dated 1992.02.27 prepared by K.G. Fernando Licensed Surveyor.

According to the Plaintiff the 1st Defendant – Appellant (hereinafter referred to as the 1st Defendant) was entitled to an undivided share of the corpus by Deed No. 5146 dated 16.06.1998. The Identity of the corpus is not in dispute between the parties.

The 1st Defendant by his 1st statement of objections dated 27.11.1992 admitted to the title claimed by the Plaintiff and acknowledged that the 1st Defendant was entitled to an undivided $\frac{1}{2}$ share of the corpus. However, by his amended statement of claim dated 29.07.1993 the 1st Defendant reverses his position and denies the title of the Plaintiff and prays for a dismissal of the action whilst claiming title to the entire land.

Trial commenced on 18.09.1995 with 3 issues been raised for the Plaintiff and 2 issues been raised for the 1st Defendant. Documents marked P1 – P5 were marked on behalf of the Plaintiff and the Plaintiff, one Ananda Jayasinghe and one Thiyunugalpedige Sutin gave evidence on behalf of the Plaintiff. The 1st Defendant, one Sinhalapedige Simon and one Sinhalapedige Siyadoris gave evidence on behalf of the 1st Defendant and marked document 1V1 and closed the case for the 1st Defendant. The 2nd – 5th Defendant – Respondents (hereinafter referred to as the 2nd – 5th Defendants) are the lawful issues of the Plaintiff.

The point of contention between the parties concerns the flow of title from one Leelawathie i.e. whether title devolves on Leelawathie's only son (Plaintiff's husband) as contended by the Plaintiff or whether Leelawathie died unmarried and issueless in which event her entitlement devolves on her brother Seditis through whom the 1st Defendant claims title.

The 1st Defendant contends that the Plaintiff's husband, one Premasinghe, is not the son of Leelawathie aforementioned and as such when Leelawathie died issueless, her entitlement i.e. undivided ½ share devolved on her brother Seditis, who thereby became entitled to the whole corpus as the ownership of the other undivided ½ share was with him. The contention is that the said Seditis transferred the entirety of the corpus to the 1st Defendant via deed marked as 1V1 dated 16.06.1988 bearing No. 5146.

Although the best evidence in support of the Plaintiff's position that the Plaintiff's husband was the only son of the said Leelawathie, would be to produce a birth certificate to that effect, the Plaintiff produced document marked P4, a result of search of registers of Births, stating that the relevant information was not available since the relevant documentation has eroded. The Plaintiff led the evidence of one Ananda Jayasinghe a retired Grama Sevaka of that area, in in this regard, and in his evidence-in-chief the said witness confirms the fact that Leelawathi's only son was the Plaintiff's husband, the said Premasinghe. The evidence of the said Ananda Jayasinghe has not been vitiated by the 1st Defendant at cross-examination and it seems that both Sinhalapedige Simon and Sinhalapedige Siyadoris who gave evidence on behalf of the 1st Defendant who were from the same village did not state that the said Premasinghe was not a son of Leelawathie.

In circumstances where the maternity is in question, in the absence of documentary evidence to establish such maternity it is the testimony of witnesses that Court must rely on. The learned District Court Judge by impugned judgment dated 23.10.1997 has carefully evaluated the evidence placed before Court at trial and has correctly held that the Plaintiff's contention that, the said Premasighe was the only son of Leelawathie has been proved and

the 1st Defendant has failed to adduce sufficient evidence to refute this contention.

The question of whether the 1st Defendant is entitled to the corpus by way of prescription does not arise since the 1st Defendant has failed to prove that he was in continued, undisturbed adverse possession of the corpus.

In these circumstances, this Court sees no basis on which to set aside / alter the findings of the learned District Court Judge dated 23.10. 1997 and as such the instant appeal is dismissed without costs.

Appeal dismissed.

Judge of the Court of Appeal

M.M.A. GAFFOOR J

I Agree.

Judge of the Court of Appeal