

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

W. Marie Helan Patricia Fernando  
Vaikkala

**Plaintiff**

Vs.

CA 1142/99 (F)

D.C. Marawila Case No. 311/L

W. Mary Miulin Philamine Fernando  
Vaikkala

**Defendant**

**AND NOW BETWEEN**

W. Marie Helan Patricia Fernando  
Vaikkala

**Plaintiff – Appellant**

Vs.

W. Mary Miulin Philamine Fernando  
Vaikkala

**Defendant – Respondent**

**BEFORE: M.M.A. GAFFOOR J**

**S. DEVIKA DE LIVERA TENNEKOON J**

**COUNSEL:** Pubudu Alwis with Deepa Karasinghe for the  
Plaintiff -Appellant  
L.P.A.Chitranganie for the Defendant  
Respondent

**ARGUED ON:** 25.01.2017

**WRITTEN SUBMISSIONS –** Filed by both parties

**DECIDED ON:** 08.09.2017

**S. DEVIKA DE LIVERA TENNEKOON J**

The Plaintiff – Appellant (hereinafter referred to as the Plaintiff) instituted action in the District Court of Marawila dated 21.01.1989 against the Defendant – Respondent (hereinafter referred to as the Defendant) for *inter alia*;

- a) A declaration that the Plaintiff is the owner of the land described in the 2<sup>nd</sup> Schedule to the Plaint,
- b) To eject the Defendant and all others holding under her from the said land.

The Defendant filed Answer dated 30.05.1989 denying the averments contained in the Plaint and prayed for a dismissal of the action and further prayed for *inter alia*;

- a) An order invalidating deed bearing No. 8764 prepared by H. P . Perera Notary Public,

- b) Damages of Rs. 25, 000/- caused by the preparation of the said deed,
- c) An order declaring that the Defendant is the owner of the land described in the schedule to the Answer.

Thereafter on 25.07.1989 the Plaintiff filed Replication denying the averments contained in the Answer of the Defendant and sought the reliefs as prayed for in the Plaint.

On 17.05.1999 trial commenced and no admissions were recorded by the parties. Issues No. 1 – 4 were raised on behalf of the Plaintiff and issues No. 5 – 14 were raised on behalf of the Defendant.

On behalf of the Plaintiff, the Plaintiff, a coconut plucker by the name of W. Anthony Joseph Fernando and a licensed surveyor named M. Godfrey Shelton Samarathunga gave evidence and the Plaintiff's case was closed with documents P1 – P7 been marked in evidence.

The Defendant gave evidence on her behalf and closed the case marking documents V1 – V4.

Consequent to written submissions been filed by both parties the learned District Judge delivered judgment dated 25.11.1999 in favour of the Defendant and granted the relief as prayed for by the Defendant, except the award of Rs. 25,000/- as damages.

Being aggrieved by the said judgment the instant appeal was preferred by the Plaintiff by Petition of Appeal dated 18.01.2000.

In summary the contention of the parties are as follows;

The Plaintiff contends that her father W. Benedict Fernando was the lawful owner of the land described in the 1<sup>st</sup> Schedule to the Plaint. The said title derives from Deed bearing No. 1222 dated 20.01.1937 prepared by M.L/ de S/ Karunathilaka Notary Public. The Father of the Plaintiff has then gifted a divided portion of the land, as depicted in the 2<sup>nd</sup> Schedule to the Plaint, to the Plaintiff by virtue of Deed bearing No. 8764 dated 29.02.1988 prepared by H. P. Perera Notary Public. Further the Appellant pleads prescription over the corpus.

The Defendant contends that the land described in the 2<sup>nd</sup> Schedule to the Plaint was not a part of the land which is described in the 1<sup>st</sup> Schedule to the Plaint and further that the land described in the 1<sup>st</sup> Schedule to the Plaint formed a part of the land described in the 1<sup>st</sup> Schedule to the Answer.

As contended by the Defendant her grandmother, Motherlena Fernando was the lawful owner of the land described in the 1<sup>st</sup> Schedule to the Answer which was in extent one acre. The said Motherlena Fernando had gifted 2/3 share to her son the aforementioned W. Benedict Fernando (the father of the Plaintiff) and the remaining 1/3 has been gifted to her daughter Victoria Fernando (the Defendant's mother ) by Deed bearing No. 1223 dated 20.01.1937. The said Victoria Fernando by deed bearing No. 1650 dated 23.06.1980 prepared by A. M. Fernando Notary

Public had gifted the said share to the Defendant. The Defendant further pleads prescription over the said share.

It is pertinent to note that the Defendant was received an order in her favour on a determination under Section 66 of the Primary Court Procedure Act and therefore was in possession of the corpus.

The co – owners of the entire land had prepared a plan bearing No. 2062 dated 01.09.1984 prepared by S. Samaratunga Licensed Surveyor. As the learned District Judge has correctly identified the main issue in the instant case is whether Lot 7 as depicted in the said plan is a divided portion of the 2/3 share claimed by the Plaintiff or whether it represents the 1/3 share claimed by the Defendant. Parties admit that Lot 7 is the subject of this action.

The aforesaid Deeds bearing Nos. 1222 and 1223 by which 2/3 share and 1/3 share devolved on to the father of the Plaintiff and the mother of the Defendant respectively are not contested by the parties. Further the parties agree that the 2/3 share of the Plaintiff and the 1/3 share of the Defendant are described in Deed Nos. 1222 and 1223 respectively.

As correctly evaluated by the learned District Judge the Eastern boundary of the land described in Deed No. 1223 refers to “2/3 share of this land” and the Western boundary of the land described in Deed No. 1222 refers to “1/3 share of this land”. Further, as per the description contained in Deed No. 1223 the Western Boundary of the 1/3 share of the Defendant which land is subject to this action is “dewata para”. It is clear therefore that the 1/3 share of the entire land, i. e. the corpus is

situated east of the “dewata para” and as such, the contention of the Plaintiff that the said land is situated west of the “dewata para” cannot hold. This was also the view taken by the learned District Court Judge.

The learned Counsel for the Defendant further submits that according to document marked P1 the Western Boundary of the Plaintiff's 2/3 share is not “dewata para” but as aforementioned it refers to “1/3 share of this land”, the learned District Judge has carefully evaluated this position and had held with the Defendant.

Therefore, the learned District Judge was correct to find that at the time Deed bearing No. 8764 dated 29.02.1988 prepared by H. P. Perera Notary Public was executed in respect of Lot. 7 mentioned above, the Plaintiff's father had no title to pass on to the Plaintiff since Lot. 7 aforementioned, now identified as the 1/3 share of the Defendant was gifted to the Defendant's mother by Deed bearing No. 1223 dated 20.01.1937 and in turn she gifted the said land to the Defendant by Deed bearing No. 1650 dated 23.06.1980 prepared by A. M. Fernando Notary Public.

The Counsel for the Appellant submits that Plan marked as P6 bearing No. 5804 dated 22.09.1959 prepared by Licensed Surveyor W. F. Warnakulasuriya, which was prepared in respect of District Court of Chilaw case bearing No. 4364 (P5), depicts a roadway between the land of the Mother of the Defendant and the Father of the Plaintiff. Learned Counsel submits that therefore 1/3 share of the land claimed by the Defendant is found at the Western side of this road way.

However the learned Counsel for the Defendant argues that the land at the Western side of this road way is a different land which belongs to the Defendant called

“ketakelagaha watte” to which her mother got title via the aforementioned Deed bearing No. 1223 and same has been described in the 1<sup>st</sup> Schedule therein. The Eastern Boundary of the said “ketakelagaha watte” is described in the said Deed as been “dewata para” and therefore is not the 1/3 share claimed by the Defendant.

In any event the said Plan marked as P6 bearing No. 5804 dated 22.09.1959 describes the land east of the roadway as belonging to both the Mother of the Defendant and the Father of the Plaintiff. In evidence when the Plaintiff was questioned whether both the Mother of the Defendant and the Father of the Plaintiff owned the said land she had no Answer.

The learned District Judge has considered all the evidence carefully relating to the identity and pedigree of the Corpus and has held in favour of the Defendant.

For the reasons morefully described above and in light of the meticulous reasoning presented by the learned District Judge this Court finds no reason to disturb the findings of the original Court. Therefore this 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