

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

Sriya Warusevithana alias  
Sriyawathi Warusavithana (Deceased)  
of No 42/2 Amarasena Mawatha  
Hikkaduwa

**C.A. No:1292/99(F)**

**Defendant-Appellant**

**D.C. Galle Case No:11716/P**

1(a) Anthony Tiddy Karunasena De Silva  
alias Anthony Tiddy Karunasena  
No 42/2 Amarasena Mawatha  
Hikkaduwa

1(b) Anthony Udmini Niluka Sandani  
De Silva  
33 Galle Road  
Udugalpitiya  
Dodanduwa

1(c) Anthony Thilomini Deega Gayani  
De Silva  
31/3, 2<sup>nd</sup> Lane  
Rubberwatta Road  
Gangodawila  
Nugegoda

**Substituted Defendant-Appellants**

**Vs.**

Gunawathie Warusevithana of  
No 1587/1 Kottawa - Malabe Road  
Kottawa East  
Pannipitiya

**Plaintiff-Respondent**

BEFORE : M.M.A. GAFFOOR J AND  
S. DEVIKA DE L. TENNEKOON J

COUNSEL : W. Dayaratne PC with R. Jayawardena for the  
Substituted 1(a), 1(b) and 1(c) Defendant-Appellants  
  
D.K. Dhanapala with S.K.V. Jayanath for the  
Plaintiff-Respondent

ARGUED ON : 02.03.2017

WRITTEN SUBMISSIONS

TENDERED ON : 07.09.2017 (Substituted 1(a) to 1(c)  
Defendant-Appellants)

07.09.2017 (Plaintiff-Respondent)

DECIDED ON : 11.12.2017

-----

**M.M.A. GAFFOOR J**

The plaintiff-respondent (hereinafter referred to as plaintiff) filed the above action in the District Court of Galle seeking to partition the land called **“Pokunubadawaththa”** Lot A depicted in Plan No.3270 of 19.09.1993 and 03.10.1993. The said land is described as A1 to A3 by Licensed Surveyor, Ananda Wijesekera. The said Preliminary Plan is marked X and report marked X1.

At the inception of the trial both parties admitted that the land depicted in Plan marked ‘X’ is the corpus to be partitioned in the said case. Further, both parties have admitted that the original owner was one Appusingho Warusawithana. Therefore, there seems to be no contest as regards to the corpus nor the pedigree.

Case proceeded with 10 issues. 8 issues by the plaintiff and issue No. 9 to 10 by the defendant. The plaintiff has submitted documents P1 to P30 and the defendant, v1 to V4. It is to be observed that the defendant in her evidence, or tendered documents to show that she had been residing in the land to be partitioned or that she was ever been in occupation of the said land.

The defendant’s position was that the original owner Appu Singho derived title by Deed of Gift executed in 15.03.1906. The

defendant's Deed marked V4 executed in 15.03.1906 pertains to a mortgage pertaining to 32 coconut trees but it does not depict which part of the land the mortgage is referred to. The plaintiff had suggested that V2 and V3 are two Deeds that were not in operation. The defendants had not at any stage proved that the land depicted in V1 was occupied by them. Furthermore, no evidence had been led in respect of V2 and V3 to show that they were in occupation of the land depicted in those two deeds. By tendering P12 the defendant had admitted the pedigree tendered by the plaintiff. Accordingly she is estopped from contesting (P12) the pedigree.

The learned District Judge had observed that when the surveyor visited the land on commission, both plaintiff and the defendant had been present and the buildings marked No.1 and No. 2 have been claimed by the defendant and the plaintiff. According to their claims the defendant had claimed 9/10 and the defendant 1/10 of the said buildings. There had been no dispute as regard the plantations in the corpus. No issues have been raised in this regard too. Therefore, the learned District Judge had come to the conclusion that all parties have agreed on the pedigree tendered in the partition action (vide page 146 and 147 of the appeal brief).

It is to be noted that when the surveyor surveyed the land as both parties were present they cannot subsequently take any objections which had not been taken at the initial stage. In the case of

***Maddumaralalage Susil and another vs. Maddumaralalage Dona***

***Mary Nona and other*** SC 174/2010 SCM of 08.06.2016 H/L Eva

Wanasundera J had observed thus;

*“According to the Partition Law, a commission to survey the land is taken out at the initial stages and at that stage, the parties to the action resolve the matter about the identification of the land. Thereafter it should be taken as an admitted fact.”*

In the light of the above decision of the Supreme Court the parties cannot dispute the extent of the survey plan.

This Court notes that the defendant in the original Court had abstained from answering very important questions when she had been cross examined by the Counsel for the plaintiff. We note that on several important matters when the question was posed to the defendant she had kept silent and the proceedings bear testimony to what the Court had observed as “උත්තරයක් නැත”.

It is to be noted that the Judge of the original Court was the best person to have observed the demeanor of the witnesses in a trial before them. The evasion to answer the important questions posed to the witness infers that the witness was either evading the issues or does not want to come out with the truth.

This Court, further observes that the learned District Judge had very clearly analyzed the evidence led and taken into consideration the documents marked in this case. In such circumstances, Appellate

Courts are always slow to interfere with the decisions arrived at by the trial Judges as far as the facts of the case is concerned. This position had been accepted and upheld by the superior Courts in many occasions. In ***Alwis vs. Piyasena Fernando*** – 1993 (1) 1SLR at page 119, H/L G.P.S. de Silva J held thus;

*“It is well established that findings of primary facts by a trial judge who hears and sees the witnesses are not to be lightly disturbed on appeal.”*

This view is supported by the undernoted decisions

- ***De Silva and others v. Senevirathna and another – 1981 (2) SLR 8***
- ***Fradd v. Brown & Co. Ltd. – 20 NLR 282***
- ***D.S. Mahavithana v. Commissioner of Inland Revenue – 64 NLR 217***
- ***S.D.M. Farook v. L.B. Finance (CA 44/98, CA Minutes of 15.3.2013)***
- ***W.M. Gunathilake v. M.M.S. Pushpakumara (CA 151/98 CA Minutes of 09.05.2013)***

In the circumstances this Court is not inclined to reverse the judgment unless it is perverse.

Having examined the evidence pertaining to the facts of this case it is impossible for this Court to note that the judgment is perverse.

Accordingly, this Court does not see any error committed by the learned trial Judge.

The appeal stand dismissed with costs Rs.10,000/=.

JUDGE OF THE COURT OF APPEAL

**S. DEVIKA DE L. TENNEKOON J**

I agree.

JUDGE OF THE COURT OF APPEAL