

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

C. A. 648/98 (F)

D. C. Kalutara Case

No. 5857/P

Ahamed Abdulla Marikkar
Mesthiriyar Mohamed Ismail,
Aluthgama Street,
Darga Town. *(Deceased)*

Plaintiff

Mohamed Ismail Mohamed
Najeeb,
Aluthagama Street,
Draga Town.

Substituted Plaintiff

Vs

1. Sammon Hadjar
Mohamed Fawzy,

36/2, Aluthgama Street,
Darga Town.
2. Mausan Marikkar
Mesthriyar Mohamed
Riskan
3. Abdul Majeed Mohamed
Zahir
4. Asana Lebbe Marikkar
Mohamed Ismail
5. Mohamed Ismail
Mohamed Innam
6. Mohamed Ismail
Mohamed Imran
7. Mohamed Zahir
Mohamed Shirazi

8. Mohamed Zahir Sithy
Faroosa
9. Mohamed Zahir Sithy
Faiza
10. Mohamed Zahir
Mohamed Faizer
11. Mohamed Mousoon
Mohamed Jisry
12. Mohamed Mousoon
Mohamed Ismail
13. Mohamed Mousoon
Mohamed Sithynoori
14. Mohamed Mousoon
Mohamed Fathima Rizla
15. Mohamed Mousoon
Mohamed Kairul Nisa
16. Mohamed Haniffa
Marikkar Samsun Nisa

All are Main Street, Darga
Town

Defendants

AND NOW BETWEEN

Mohamed Ismail Mohamed
Najeeb,
Aluthgama Street,
Darga Town

Substituted-Plaintiff-Appellant

Vs

1. Samoon Hadjiyar Mohamed
Fawzy, 36/2, Aluthgama
Street, Darga Town
(Deceased)

1st Defendant-Appellant

1 A. Mohamed fawzy
 Mohamed Fazly.
 179/2, main Street,
 Darga Town

**Substituted 1st Defendant-
 Appellant**

2. Mausan Marikkar
 Mesthriyar Mohamed
 Riskan
 34, Main Street, Darga
 Town

3. Abdul Majeed Mohamed
 Zahir, Main Street,
 Darga Town (*Deceased*)

3 A. Mohamed Shirazi

3 B. Sithy Firusa

3 D. Mohamed Faizer

All of Main Street, Darga
 Town.

**Substituted in place of the
 Deceased 3rd defendant**

4. Asana Lebbe MArikkar
 Mohamed Ismail

4 A. Mohamed Ismail
 Mohamed Imran
 Main Street, Darga Town

**Substituted in place of the
 deceased 4th Defendant**

5. Mohamed Ismail Mohamed
 Innam

6. Mohamed Ismail Mohamed
 Imran

7. Mohamed Zahir Mohamed
 Shirazi

8. Mohamed Zahir Sithy
Faroosa
9. Mohamed Zahir Sithy Faiza
10. Mohamed Zahir Mohamed
Faizer
11. Mohamed Mousoon
Mohamed Jisry
12. Mohamed Mousoon
Mohamed Ismail
13. Mohamed Mousoon
Mohamed Sithynoori
14. Mohamed Mousoon
Mohamed Fathima Rizla
15. Mohamed Mousoon
Mohamed Kairul Nisa
16. Mohamed Haniffa
Marikkarm Samsun Nisa

All are Main Street, Darga
Town

Defendants-Respondents

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

COUNSEL : Ifthikar Hassan with Ashiq Hassim for
the Substituted Plaintiff-Appellant and
the Substituted 1st Defendant-Appellant

Bimal Rajapakshe with Muditha Perera
for the 2nd Defendant-Respondent

Sanjeeva Dassanayake with Dammika
Jiminige for the 6th Defendant-
Respondent

ARGUED ON : 21.03.2018

**WRITTEN SUBMISSIONS
TENDERED ON** : 18.09.2018 (by the Substituted Plaintiff-
Appellant and Substituted 1st Defendant-
Appellant)

23.05.2018 (by the 2nd Defendant-
Respondent)

15.09.2017 (by the 6th Defendant-
Respondent)

DECIDED ON : **01.10.2018**

M. M. A. GAFFOOR, J.

This is an appeal from the judgment of the learned District Judge of the Kalutra in respect of a Partition action bearing case Number 5857/P. The Original Plaintiff instituted this action seeking to partition the land called 'Nynapulle Thottam' also known as 'Nynapulli Padi' depicted in Plan Number 761 dated 18.02.1992 prepared by A. G. C. Sirisoma, Licensed Surveyor marked as 'X' produced and filed of record.

The Plaintiff claimed that he was entitled to an undivided 1/2 share in the said land and the 1st and 2nd Defendants were each entitled to an undivided 1/4 share in the said corpus in his amended petition dated 18.11.1992.

The 3rd to 10th Defendants have averted that they were entitled exclusively to the plantations and improvements in the corpus sought to be partitioned in this action as depicted in Plan No. 256 dated 07.04.1993 and the report annexed to the said Plan made by K. D. L. Wijeyanayaka. Therefore, the 3rd to 10th Defendants filed their answers on 27.05.1993.

At the end of trial, the learned District Judge delivered his judgment dated 15.09.1998 in favour of the 3rd to 10th Defendants accepting their pedigree.

Being aggrieved by the said judgment and decree the Substituted Plaintiff-Appellant filed this appeal and praying that:

- to set aside the judgment dated 15.09.1998
- that judgment and decree be entered as prayed for in the amended plaint or order a re-trial.

In this appeal, this court concentrates the plaint carefully; when I peruse the plaint, the Substituted Plaintiff-Appellant had amended the original Plaint dated 14.11.1994. In the original plaint, the Plaintiff claimed that the original owners of the land in questioned as follows:-

1. Mohamed Marikkar - 1/4
2. Mousoon Marikkar - 1/4
3. Ahamed Abdullah - 1/4
4. M. L. M. Faleela Umma, A. R. M. Thoufic and A. R. M. Ahamed Ismail – 1/4 (*Vide page 87 in the appeal brief*).

But the Substituted Plaintiff-Appellant mainly amended the plaint stating that the Deed No. 4592 of 1988 (P8) in favour of the 2nd Defendant was a wrong deed and this deed applied to the adjoining land.

According to the amended plaint, the Substituted Plaintiff-Appellant claimed that he is entitled to an undivided 1/2 share in the said corpus and M. I. L. A. Rahuman Lebbe Marikkar and M. L. M. S. Mohamed Lebbe Marikkar were each entitled to an undivided 1/4 share in the said corpus (*vide page 89 in the appeal brief*).

Further, it is important to note that, after evaluation of all testimonies in this case, I am of the view that, the Substituted Plaintiff-Appellant was not aware of the facts of the case because he admitted at the trial that **his deceased father (Original Plaintiff) was well aware about this partition action better than himself and after his father's death he had to amend the plaint.** But, he has failed to give a reasonable answer in the cross examination (*vide page 292 in the appeal brief*).

It is well known legal norm that, who desires any court to give a judgment as to any legal right or liability dependent on the existences of facts and reasons which he asserts; he must prove that those facts and reasons are exist (*vide section 110 of the Evidence Ordinance*). Even, in this case the Appellant failed to do so.

In ***Deeman Silva vs. Silva and Others*** (1997) 2 S. L. R. 382, Weerasekara and Wickneswaran JJ held that:

"No plaintiff should be allowed to come into Court and ask the Court to unveil the defendants case unless the law recognises such a right. It is a burden cast upon the plaintiff under our law to prove his assertions in such cases...."

It is trite law that, the burden of seeking and getting evidence before court, in the course of investigation of title to the land sought to be partitioned by parties before Court, prior to deciding what share should go to which party is more the duty of the judge than the contesting parties. The authorities proclaim that it is the duty of the trial judge in a partition action to investigate title of the parties before he decides what share should be allocated to which party of the case before him.

In **Sopinona vs Cornelis and Others** 2010 B.L.R. 109, it was held that:

"It is necessary to conduct a thorough investigation in a partition action as it is instituted to determine the questions of title and investigation devolves on the Court. In a partition suit which is considered to be proceeding taken for prevention or redress of a wrong, it would be the prime duty of the judge to carefully examine and investigate the actual rights to the land sought to be partitioned."

In the case of **Cynthia De Alwis vs. Marjorie De Alwis and two others**, (1997), 3 S.L.R. 113, it was held that:

"A District Judge trying a partition action is under a sacred duty to investigate into title on all material that is forthcoming at the commencement of the trial. In the exercise of this sacred duty to investigate title, a trial judge cannot be found fault with for being too careful in his investigation. He has every right even to call for evidence after the parties have closed their cases."

In **Faleel vs. Argeen and Others** 2004, 1 S.L.R. 48, it was held that;

"It is possible for the parties to a partition action to compromise their disputes provided that the Court has investigated the title of each party and satisfied itself as to their respective rights."

In the instant case, the Substituted plaintiff-Appellant was not fully aware on the fact and issues; he had failed to give a reasonable answer in the cross examination. Therefore, enigmas are seemed to me that the Substituted Plaintiff-Appellant failed to prove his case.

Furthermore, considering the whole evidence of the Substituted Plaintiff-Appellant and after perusing the oral and written submissions, I am of the opinion that he failed to raise a single legal argument to support his position. But he only had given prudence to the factual discrepancies which had no solid ground to interfere with the District Court Judgment.

Therefore, for the forgoing legit reasons, I dismiss the appeal with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL