

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

In the matter of an application to lead
fresh Evidence in Appeal.

Court of Appeal case No. CA 1086/96(F)
D.C. Negombo Case No. 2116/P

Marasinghe Pedige Dharmasena,
No. 52, Konraduwatta,
Horampella.

1st Defendant – Appellant- Petitioner.

-Vs –

Amarasinghe Arachchige Somawathie,
No. 52, Konraduwatta,
Horampella.

**Substituted – Plaintiff - Respondent-
Respondent.**

Kadawan Pedige Nandawathie,
No. L.B.2, Boralukanda,
Higuraggoda.

2nd Defendant – Appellant – Respondent.

Kadawan Pedige Wijesinghe,
No. L.B. 2, Boralukanda,
Higuraggoda.

3rd Defendant – Appellant – Respondent.

Kadawan Pedige Edirisinghe, (Deceased)

4th Defendant – Appellant.

4(a) Diyunugal Pedige Premawathie,
4(b) Kadawan Pedige Gunasinghe,
4(c) Kadawan Pedige Piyathunga,
All of Bolangama,
Horampella.

Substituted 4th Defendant – Appellant – Respondents.

Kadawan Pedige Ratnapall Amarawathie,
Of Horampella, Kudagoda.

5th Defendant – Respondent – Respondent.

Kadawan Pedige Aruna Shanthi Ariyasinghe,
of Horampella, Kudagoda.

6th Defendant – Respondent – Respondent.

Before : A.H.M.D Nawaz, J
E.A.G.R. Amarasekara, J

Counsel : Dinesh De Alwis AAL for the 1st Defendant-Appellant-Petitioner.
S.A.D.S. Suraweera AAL for the Substituted – Plaintiff-Respondent.
Decided On : 2018.11.09.

The 1st Defendant- Appellant- Petitioner, by his Petition dated 11.09.2012 has prayed this Court to allow deeds marked as 'X1' and 'X2' with the said Petition to be admitted and accepted as evidence in this case and in this appeal. In other words, this is an application to lead fresh evidence in appeal. The Plaintiff-Respondent-Respondent by his statement of objections dated 11.01.2016 has prayed that the aforesaid application of the 1st Defendant-Appellant- Petitioner be rejected and dismissed.

It was held in W.A. Ratwatte Vs A. Bandara 70 NLR 231 that the reception of fresh evidence in a case at the stage of appeal, may be justified if three conditions are fulfilled, namely;

1. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial,
2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not to be decisive,
3. The evidence must be such as is presumably, to be believed or in other words it must be apparently credible, although it need not be incontrovertible.

The 1st Defendant- Appellant- Petitioner does not state why he could not submit these two deeds, marked as X1, and X2 with the Petition, at the trial. The additional Registrar of the Land Registry, Negombo has certified the copies of these two deeds as true copies on 2010.07.20 and 2010.08.05 respectively when they were issued from the land registry. This shows that these deeds were available in the land registry and if the 1st Defendant-Appellant was diligent and had a real need to produce them during the trial, he could have done so by taking copies from the land registry.

On the other hand, the aforesaid certification by the Additional Land Registrar indicates that the 1st Defendant – Appellant took these certified copies only after a lapse of 3 years from the date of the Petition of Appeal. This application was made only in 2012. Had this court taken up this appeal for argument on the first date it was fixed for argument, namely 23.02.2011, this appeal would have been disposed of without this application being tendered. However, as said before the 1st Defendant - Appellant – Petitioner has not given any acceptable reason why he could not produce these deeds in the District court when they were available in the Land Registry.

Hence, as per the aforesaid decision in Ratwatte Vs Bandara this application has to be rejected.

On the other hand, the land sought to be partitioned in the District Court was a land named Lot B of Meegahawatta of 39.19 perches in extent which was depicted in Plan No. 170 dated 12.09.1925 made by C.R. Felsing, Licensed Surveyor. The

identity of the corpus was not challenged by the 1st Defendant- Appellant- Petitioner and, in fact, there was an admission recorded at the beginning of the trial stating that the said corpus is depicted in the preliminary Plan No. 4882 dated 25.02.1986 made by K.A.G. Samarasighe, Licensed surveyor. Even in his statement of claims, the corpus was admitted. The two deeds marked as X1 and X2 with the application were executed in 1944 and 1942 respectively and they were executed in respect of an undivided portion of a land named Meegahwatta of about 1 acre in extent. When the 1st Defendant- Appellant- Petitioner admits the existence of a land of 39 perches according to a Plan made in 1925, he cannot be allowed to present a case to show that in 1942 or 1944, it was an undivided land of about 1 acre. Furthermore, this Court observes that the 1st Defendant-Appellant-Petitioner had been a party to two deeds marked at the trial as P7 and 1V7, either as a vendee or vendor, which describes the land in accordance with the schedule to the Plaint, namely Lot B of Meegahwatta depicted in Plan No. 170 dated 12.12.1925 made by C.R. Felsing, Licensed Surveyor. Thus, the corpus, admitted and partitioned in the District Court case is a land of 39 Perches in extent which has a separate identity from 1925 as per the Plan made by C.R. Felsing, Licensed Surveyor. Perhaps the 1-acre land referred to in X1 and X2 relates to the main, larger land that existed before the survey done in 1925 to make the said plain of C.R. Felsing, Licensed Surveyor. Therefore, it is possible they might have been executed to convey the balance part of the larger land that existed prior to 1925.

The 1st Defendant- Appellant in his original statement of claim and the 1st amended statement of claim had admitted the devolution of title shown in the plaint. Therefore, the production of some deeds that relate to Meegahwatta of about 1

acre through the 1st Defendant- Appellant- Petitioner during the trial is not sufficient, which deeds were rejected by the learned District Judge in his Judgment, to prove that reference to an undivided portion of the aforesaid 1-acre land is to a portion of the corpus of the action. If the 1st Defendant Appellant Petitioner knew it, he could not have accepted the devolution of title in the plaint in his original statement of claim and the 1st amended statement of claim.

The application is limited to consider these two deeds as fresh evidence and nothing else. The mere production of these two deeds will not be sufficient, to prove that they relate to the undisputed, admitted corpus of 39 perches that was in existence from 1925.

Therefore, the application is dismissed with costs.

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E.A.G.R. Amarasekara, J
Judge of the Court of Appeal.

I agree,

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A.H.M.D. Nawaz, J
Judge of the Court of Appeal.