

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

C. A. 937/97 (F)

D. C. Galle, No. 8811/P

S. P. Gunawardane,
Pinnaketiya Watta,
Addara Kubura, Wanchawala,
Galle.

PLAINTIFF

VS

1. M. N. K. Alexander
- 2A. Hewamanage Orlina
3. Hewamanage Orlina
4. M. K. B. G. Nanayakkara
5. M. K. B. Peter Nanayakkara
6. M. K. L. Premasiri
Nanayakkara
7. M. K. H. Mabel
Nanayakkara
8. M. A. Azilin Gunawathi
9. De Silva Amarapala
Udugampola
10. Idamawattage Pabilis
All of Panagamuwa,
Wanchawala.

DEFENDANTS

AND BETWEEN

- 2A. Hewamanage Orlina
3. Hewamanage Orlina
10. Idamawattage Pabilis

DEFENDANT-APPELLANTS

VS

S. P. Gunawardane,
Pinnaketiya Watta,
Addara Kubura, Wanchawala,
Galle.

PLAINTIFF-RESPONDENT

1. M. N. K. Alexander
4. M. K. B. G. Nanayakkara
5. M. K. B. Peter
Nanayakkara
6. M. K. L. Premasiri
Nanayakkara
7. M. K. H. Mabel
Nanayakkara
8. M. A. Azilin Gunawathi

All of Panagamuwa,
Wanchawala.

- 9A. Champaka Udugampala
No. 484/17, De Silva
Place, Pannipitita

DEFENDANT-RESPONDENTS

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

COUNSEL : P. L. Gunawardana with K. C. Perera for the
2A, 3rd & 10th Defendant-Appellants

Chithral Fernando for the Substituted Plaintiff-
Respondent

R. Wimalaratna for the 9A Defendant-
Respondent

WRITTEN SUBMISSIONS

TENDERED ON : 23.07.2018 (by the 2A, 3rd & 10th Defendant-
Appellants and the Substituted Plaintiff-
Respondent)

09.08.2018 by the 9A defendant-Respondent

DECIDED ON : **14.12.2018**

M. M. A. GAFFOOR, J.

The Plaintiff-Respondent initially instituted this partition action by Plaint dated 28.04.1983 in the District Court of Galle against the 1st to 10th Defendants to partition the land called Addarakumbura situated at Kalahe in Talpe pattu in the District of Galle. The Preliminary Plan No. 375 dated 12.01.1984 and the relevant report prepared by the Court Commissioner G. H. C. L. de Silva (at pages 239-242).

After conclusion of the trial, the learned District Judge had entered judgment on 27.06.1997 allotting shares to the Plaintiff and 1st and 2nd Defendants in the following manner (*vide page 181 Of the appeal brief*):

- Plaintiff 62/150
- 1st defendant 75/150
- 2nd Defendant 13/150

Bing aggrieved by this judgment the 2A, 3 and 10th Defendant-Appellants (hereinafter referred to as the Appellants) preferred this instant appeal seeking to set aside the judgment.

In this appeal, Appellants and 9th A Defendant-Respondent have made their respective submissions.

The position taken by the Appellants was that the learned trial judge had failed to observe the consistency of the pedigree set out by the Appellants together with the 9th Defendant-Respondent. They further stated that the learned trial judge had failed to evaluate the evidence of the 9th Defendant-Respondent with regard to the interest of the Appellants; the deeds marked as 2V2, 3V2, 3V3 and 10V1 have not been considered by the learned trial judge and as a result the said Defendants have not been allotted any shares in the judgment thus causing a severe prejudice to the said Defendants.

The main contentions of the 9A Defendant-Respondent are:

1. That the Trial Judge had based his judgment on the original Plaintiff and had ignored to proceed on the amended Plaintiff
2. The Plaintiff had failed to establish properly the devolution of title of the corpus.

In this case, it is to be noted that all parties have admitted the corpus as per Plan No. 375 dated 12.01.1984 and the relevant report prepared by the Court Commissioner G. H. C. L. de Silva.

When the trial was commenced in the District Court, the learned District Judge had noted that the property of the 2nd Defendant-Appellant had been transferred to 3rd Defendant after institution of the action. But this transfer had not been done subject to the prevailing partition action (*page 189 of the appeal brief*).

The learned District had further observed that, taking into consideration the cumulative effect of the oral and documentary evidence, the Plaintiff-Respondent had proved his pedigree and title (*vide page 189*).

The learned District Judge in his judgment further observed the fact that the Plaintiff-Respondent or the 9th Defendant had failed to elicit evidence as regards to Aranolis pertaining to P1 and 1V1, the Court was not inclined to accept these documents are forged ones (*vide page 187 of the appeal brief*).

It is also to be noted that when considering the entire judgment this Court observes that the learned District Judge had considered the material in the amended Plaint, although he had not specifically mentioned so.

In this regard, it is to be stressed that the observation of the Hon. G. P. S. De Silva, C. J. in *Alwis vs. Piyasena Fernando* (1993) 1 SLR 119 when he emphasized that:

"..it is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal."

In *Ariyadasa vs. Attorney General* (2012) 1 SLR 84 the Court observed as follows:

"Court of Appeal will not lightly disturb a finding of a Judge with regard to the acceptance or rejection of a testimony of a witness , unless It is manifestly wrong, when the trial Judge has taken such a decision after observing the demeanor and the deportment of a witness..."

In *Kumara de Silva and two others vs. Attorney General* (2010) 2 SLR 169, Sarath de Abrew, J. had held that:

"Credibility is a question of fact, not of law. The acceptance or rejection of evidence of witnesses is therefore a question of fact for the trial Judge."

In the circumstances enumerated above, this Court sees no valid reason to interfere in the above judgment of the learned District Judge of Galle.

Therefore, I dismiss this appeal without Costs.

JUDGE OF THE COURT OF APPEAL