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

Case No: 499/1998 (F) & 499A/1998 (F)

DC Horana Case No: 231/Partition

14. Wanigatungage Jane Nona
(deceased),
Kumbuka,
Gonapala.

14A. Walpolage Piyaseeli,
No. 311A,
Sri Saranatissa Mawatha,
Gonapola.

15. Wanigatungage Wijeratne,
(deceased),

15A. Wanigatungage Chulananda
Kumara,
"Weda Nivasa",
Uturu Uduwa,
Maha Uduwa.

17. Kaluarachchige Kusumawathie,
(deceased),

17A. Jagath Kumara Wimalarathna,
No. 6/23,
Dhammarathana Mawatha,
Horana.

24. Walpitage alias Wanigathungage
Dayawansa,

Kuda Uduwa,
Maha Uduwa.
Defendant-Appellants

Vs.

Handunge Don Chalo Singho,
Maha Uduwa,
Kuda Uduwa.
Substituted Plaintiff-Respondent
Wanigatungage Nonohamy,
Kuda Uduwa,
Maha Uduwa.
And 25 Others.
Defendant-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Dr. Sunil Cooray for the 15A Defendant-Appellant.

Widura Ranawake for the 24th Defendant-Respondent.

Arjuna Udawatta for the Plaintiff-Respondent.

Decided on: 12.02.2019

Samayawardhena, J.

The plaintiff filed this action in the District Court seeking to partition the land known as Delgahawatta. There was a corpus

dispute as well as a pedigree dispute. The pedigree dispute was contested intensely whereby several groups of defendants came out with different pedigrees. After trial the learned District Judge in his Judgment accepted the plaintiff's version in relation to both the disputes. The 14th, 15th and 17th defendants; and 24th defendant have appealed against the Judgment.

Only the 15A defendant-appellant, 24th defendant-appellant and substituted plaintiff-respondent participated in the argument. When this matter came before me for the first time, learned counsel for the said parties invited the Court to dispose of the argument by way of written submissions.

It is the submission of the learned counsel for the 15A defendant-appellant, Dr. Cooray, that "*the case must be sent back to the District Court to enter a legally correct judgment on the oral and documentary evidence led at the trial in this case*" as the Judgment entered by the learned District Judge is *ex facie* erroneous. I totally agree. This Court cannot rewrite the District Court Judgment. I express my gratitude to Dr. Cooray for not insisting on a retrial. The case had been filed in 1976 in the District Court and the Judgment has been entered 21 years later in 1997. Now we are in 2019. Between then and now 43 years have passed by, and it will be a crime to send the case for retrial as there will not be anyone in the present generation who can speak about the pedigree.

At the trial the substituted plaintiff, Chalo Singho, who was the son of the original plaintiff, has given evidence. According to the pedigree of the plaintiff as set out in the plaint, Sinnappu was the original owner of the land. His rights have devolved on only son Abeynis, who had five children, Haramanis, Davith,

Thelenis, Karlinahamy and a person unknown to the plaintiff. Thelenis and unknown person have died issueless and thereby Haramanis, Davith and Karlinahamy have each become entitled to 1/3 of the corpus.

The plaintiff in his evidence is emphatic that he was asking only Haramanis' rights.[1] He has in the plaint stated that 1/3 each share of Davith and Karlinahamy shall be left unalloted as he was unaware of the devolution of title of both of them.

He has further stated in the plaint that Davith out of his 1/3 share transferred 1/10 to Karamanis by Deed No. 2810 executed in 1870, which was marked by the plaintiff P9, and Karamanis married to Davith's only daughter Karlinahamy.

There is a confusion here because the plaintiff in the plaint talks about two Karlinahamys: one who had 1/3 share, and another who is the daughter of Davith. However, in evidence, the plaintiff has stated that he does not know whether Karamanis got married or not.[2] Further he has stated that he is not certain whether Karlinahamy was Abeynis' daughter or Davith's daughter.[3]

If I may stop at that, as the learned counsel for the 15A defendant-appellant submits, the learned District Judge has got himself confused the whole thing from the very beginning. There cannot be any dispute that the learned District Judge accepted the plaintiff's pedigree as opposed to those unfolded by different other parties.

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[1] Vide page 454 of the Brief.
[2] Vide 5th and 6th lines from bottom of page 418 of the Brief.
[3] Vide pages 429-430, 451-452 of the Brief.

However, the learned District Judge in the Judgment states that as the plaintiff has agreed to apportion 1/10 to Davith by producing Deed No. 2810 as P9, he decides that there were two original owners to the corpus, i.e. Davith who owned 1/10 share and Sinno Appu who owned 9/10 share. This is an entirely incorrect conclusion. The position of the plaintiff was that, if I may repeat, Davith was a son of Abeynis who was the son of Sinno Appu, the original owner. The plaintiff produced Deed P9 to say that Davith who had 1/3 share transferred 1/10 out of 1/3 to Karamanis.

It is the submission of the learned counsel for the plaintiff-respondent, this being a partition action, the learned District Judge is entitled to come to independent conclusions irrespective of what parties may or may not say. I agree with that submission on principle but wish to state that in this instance the District Judge came to that conclusion not on any rational basis but on utter confusion on facts. I will further illustrate it in the next few paragraphs.

The District Judge does not say that he disagrees with the pedigree of the plaintiff on that point but states he does so because the plaintiff agreed to give 1/10 from the whole land to Davith. This is what the District Judge states in that regard. "කෙසේ වෙතත්, ආදේශිත පැමිණිලිකරු ඉහත කී ඔප්පු අංක 2810 මත දාවිත් යන අයට 1/10 ක් දීමට එකඟ වී ඇති බැවින්, මෙම බෙදීමට යෝජිත ඉඩමෙන් ඉහත කී එගොඩගේ සිංඤෝ අප්පුට 9/10 ක කොටසක්ද, ඉහත කී ගොඩගේ දාවිත් යන අයට 1/10 කොටසක්ද හිමි වූ බවට තීන්දු කරමි."[4] This is an erroneous finding.

[4] Vide 3rd paragraph from top of page 3 of the Judgment at page 601 of the Brief.

By coming to that finding, the District Judge has completely forgotten the plaintiff's position that there were three original owners, i.e. Haramanis 1/3, Davith 1/3 and Karalinahamy 1/3; and the plaintiff is claiming only through Haramanis' 1/3.

Having stated in the manner which I quoted in Sinhala above, immediately thereafter, the District Judge says that Haramanis, Davith and Karalinahamy gets 1/3 each from the entire corpus! This is how the District Judge states it. "ඉහත කී එගොඩගේ සිංඤෝ අප්පු විවාහ වී ඇත්තේ නාච්චිරෙහාමි නැමැති අය සමඟ ය. ඒ අයට දරුවෙක් වශයෙන් සිට ඇත්තේ අබේනිස් නැමැති අය පමණි. එකී අබේනිස් කලංචිහාමි සමඟ විවාහ වී ඔවුන් හට දරුවන් පස් දෙනෙක් වන හරමානිස්, දාවිත්, කෙලේනිස්, කර්ලිනාහාමි සහ නම නොදන්නා දරුවෙක් සිටියදී මිය ගොස් ඇත. ඉහත කෙලේනිස් සහ නම නොදන්න තැනැත්තා අවිවාහකව දරුවන් හෝ උරුමකරුවන් නොතබා මිය ගියෙන්, ඉහත කී හරමානිස්, දාවිත් සහ කර්ලිනාහාමිට 1/3 පංගුව බැගින් හිමි විය."[5]

Thereafter the District Judge says that Davith's 1/10 share out of his 1/3 share was transferred by Deed P9 to Haramanis (and not Karamanis as stated in the plaint and the Deed); and Davith's daughter Karalinahamy became entitled to the balance share of Davith, i.e. 9/30; and Karlinahamy got married to Haramanis! This is how the District Judge states it in the Judgment. "ඉහත කී දාවිත් ඔහුගේ අයිතිවාසිකම් වලින් 1/10 පංගුවක් වර්ෂ 1870 මාර්තු 18 වන දින ඔප්පු අංක 2810 වන පැ9 න් තම අයිතිවාසිකම් වනිගතුංගගේ හරමානිස්ට විකුණා හිමිකර දී ඇත. ඉහත කී දාවිත්ගේ එකම දරුවා වන කරලිනාහාමි ඔහුගේ 9/30 පංගුව හිමිවිය. ඉහත කී කර්ලිනාහාමි හරමානිස් සමඟ විවාහ වූ බැවින් කර්ලිනාහාමිට 9/30 පංගුවද, හරමානිස්ට 1/10 පංගුවක්ද හිමිවිය."[6]

Thereafter the District Judge has stated how Karalinahamy's rights devolved on her husband and seven children. "ඉහත කී

[5] Vide last paragraph of page 3 of the Judgment at page 601 of the Brief.
[6] Vide 2nd paragraph from bottom of page 5 of the Judgment at page 603 of the Brief.

කර්ලිනාහාමි තම උරුමයට පුරුෂයා වූ හරමානිස් සහ දරුවන් 7 දෙනා වන බ්‍රම්සි, ජොරෝනිස් අප්පු, ඕදිරිස්, කොරනේලිස්, සෙලෝහාමි, ලවාරිස්, ජෙන්තනෝනා නොහොත්, පොඩිනෝනා සිටියදී මිය යන ලදී. ඒ අනුව ඉහත කී කර්ලිනාහාමිගේ අයිතිවාසිකම් වලින් 9/60 පංගුවක් හරමානිස්ටද, ඉතිරි 9/60 පංගුවක් ඉහත කී දරුවන් හත් දෙනාටද හිමිවිය."[7]

Thereafter the District Judge has stated Karalinahamy is Abeynis' daughter and as the devolution of Davith's 1/10 share and Karalinahamy's 9/30 share (on the basis that Karalinahamy is one of the three owners who owned 1/3 each) are not stated, those shares shall be left unallotted! "ඉහත කී දාවිත්ගේ 1/10 පංගුවද, අබේනිස්ගේ දරුවා වන කරලිනාහාමිට හිමි 9/30 පංගුව පැවරෙන ආකාරය සඳහන් වී නොමැති බැවින්, එම අයිතිවාසිකම් අහිමි කර තැබීමටද තීන්දු කරමි."[8]

These findings are completely contradictory *inter se* and *per se*. This is not all but I pointed them out to highlight that the Judgment of the District Judge cannot be allowed to stand even for a moment.

Soon after the plaintiff's case was closed, the 15th defendant (now 15A defendant-appellant) has given evidence. The 8A, 14th, 15th, 16th defendants are said to be siblings. They seem to be in possession of Lot 11 of the Preliminary Plan, which is the largest Lot in the Plan. The 15th defendant has produced very old Deeds such as Deed No. 10495 executed in 1913 marked 8V3, Deed No. 17518 executed in 1902 marked 8V4, Deed No. 10806 executed in 1913 marked 8V5, Deed No. 14325 executed in 1899 marked 8V6, Deed No. 9300 executed in 1912 marked 8V7 and also Deed No. 2810 executed in 1870 marked 8V8.[9] The

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[7] Vide last paragraph of page 5 of the Judgment at page 603 of the Brief.
[8] Vide last three lines of paragraph 1 of page 9 of the Judgment at page 607 of the Brief.
[9] Vide pages 151-181 of the Brief for these Deeds.

District Judge has rejected all these very old Deeds solely on the basis that there is no proof how the grantors of those Deeds got title to the corpus.[10] However it is interesting to note that when the abovementioned last Deed No. 2810 (8V8) was produced by the plaintiff as P9, the District Judge readily accepted it without a murmur. The District Judge's said rejection of those Deeds is totally unacceptable.

The District Judge has not considered at all the old Deeds produced by the 24th defendant-appellant marked 20V2-20V8.[11]

The District Judge has not considered the pedigrees of the other defendants. He has manifestly misdirected himself on evaluation of evidence.

I unhesitatingly set aside the Judgment of the learned District Judge and direct the incumbent District Judge to deliver the Judgment afresh having regard to the evidence led and documents produced at the trial.

As the plaintiff is not responsible for this misfortune, let the parties bear their own costs of appeal.

Appeal allowed.

Judge of the Court of Appeal

[10] Vide 2nd paragraph of page 9 of the Judgment at page 607 of the Brief.
[11] Vide pages 562-566 of the Brief.