

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

Rajapaksha Arachchilage
Dharmawathi Menike,
Batuwita,
Ruwanwella.
9th Defendant-Appellant

CASE NO: CA/430/2000/F

DC AVISSAWELLA CASE NO: 73/P

Vs.

Kariyawasam Wickrama
Arachchillage Rapiyel Singho,
(Deceased Plaintiff-Respondent)
Kariyawasam Wickrama
Arachchillage Upali Gunaratne,
Amitirigala.
1A Plaintiff-Respondent
And Several Other Defendant-
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Luxman Perera, P.C., with Anjali Amarasinghe for
the 9th Defendant-Appellant.

Thushari Hirimuthugodage for the Substituted
Plaintiff-Respondent.

Decided on: 14.02.2019

Samayawardhena, J.

This is an appeal filed by the 9th defendant-appellant (appellant) against the Judgment of the District Court dated 17.07.2000.

This is a partition action. Whilst the case was in progress, the appellant intervened. She was made the 9th defendant and proxy filed.¹ However she never filed a statement of claim. In the statement of claim of the 3rd and 6A defendants (with whom the appellant is sailing together) and filed by the same registered Attorney of the appellant², it is stated in paragraph 9 that “*Jamis Singho referred to in paragraphs 4 and 6 of the plaint, transferred the rights which he got from the Judgment in case No.4702 to Rajapaksha Arachchilage Dharmawathie Manike (the appellant) by Deed No. 1650 dated 11.01.1984.*” Based on this averment, the registered Attorney for the appellant raised issue No. 23 at the trial.³ However, the appellant never produced the said Deed No. 1650 either before the District Court or before this Court as fresh evidence in appeal. Even in the written submissions filed before the District Court, the Attorney for the appellant never relied on Deed No. 1650. He made no submissions on that Deed to the District Judge.⁴ Therefore, the learned District Judge rightly answered issue No. 23 in the negative.

The appellant raised no more issues in the District Court and therefore, in my view, the matter shall end there.

¹ Vide JE No. 53 at page 32 of the Brief.

² Vide page 55 of the Brief.

³ Vide page 71 of the Brief.

⁴ Vide the written submissions of the appellant at pages 125-126 of the Brief.

However, the learned President's Counsel for the appellant before this Court seeks to set aside the Judgment of the District Court on the premise that the learned District Judge has failed to investigate title to the land properly. I totally disagree with that line of argument. Without producing the Deed, in my view, that argument is meaningless. If that argument is accepted, any third party who has no interest whatsoever in the land, can attack the partition Judgment on that basis.

It is also noteworthy that the registered Attorney for the appellant, by paragraph 3 of the aforesaid statement of claim and by issue No. 22, took up the strong position that the Judgment in case No.4702 operates as *res judicata*. However, the appellant before this Court takes up the completely opposite position and states that it does not operate as *res judicata* may be having now realized that the position taken up before the District Court on that point is unfavourable to her. The appellant cannot do it.

It is settled law that no party can be allowed to make at the trial a case materially different from what he has placed on record. (*vide Hildon v. Munaweera [1997] 3 Sri LR 220, YMBA v. Abdul Azeez 1997 BALJ 7, Ranasinghe v. Somawathie [2004] 2 Sri LR 154*)

Explanation 2 to section 150 of the Civil Procedure Code reads thus:

The case enunciated must reasonably accord with the party's pleading, i.e., plaint or answer, as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on

record, and which his opponent is prepared to meet. And the facts proposed to be established must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings.

In parity of reasoning, Chief Justice G.P.S. de Silva in *Candappa nee Bastian v. Ponnambalampillai* [1993] 1 Sri LR 184 stated that the above principle can safely be applied in appeals too, if a party tries to present a case materially different from the case presented before the Trial Court.

Thus it is seen that the position taken up in appeal for the first time was not in accord with the case as presented by the defendant in the District Court. It is well to bear in mind the provisions of explanation 2 to section 150 of the Civil Procedure Code. It reads thus: "The case enunciated must reasonably accord with the party's pleading, i.e. plaint or answer, as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet" A fortiori, a party cannot be permitted to present in appeal a case different from the case presented before the trial Court except in accordance with the principles laid down by the House of Lords in *The Tasmania* (1890) 15 App. Cases 233 and followed by *Dias, J. in Seta v. Weerakoon* 49 NLR 225, 228, 229.

In *Janashakthi Insurance Co. Ltd v. Umbichy Ltd* [2007] 2 Sri LR 39 the Supreme Court reiterated the above position.

The defendant-appellant is prohibited from setting up a different case from that set up at the trial, he cannot take up a case in appeal which differs from that of the trial.

The submission of learned President's Counsel for the appellant centers around on two Deeds: the Deed No. 18672 marked P2 by the plaintiff in evidence whereby the plaintiff got rights to the land to be partitioned from James Singho; and the appellant's Deed No. 1650, which was never produced. His submission is that the District Judge was wrong and by "*Deed No.18672 James Singho can only give 1/3 share.*"⁵ However, by Deed No. 1650, James Singho has transferred to the plaintiff only $\frac{1}{4}$ share⁶ and therefore there is nothing wrong in that transfer.

This appeal is absolutely devoid of merit. Appeal is dismissed. The appellant shall pay a sum of Rs.50,000/= as costs of this appeal to the substituted plaintiff.

Judge of the Court of Appeal

⁵ Vide paragraph 9 of the written submissions of the Appellant tendered to this Court dated 13.11.2018.

⁶ Vide the Deed at pages 136-139 and the evidence of the plaintiff at page 74 of the Brief.