

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

Anthonidura Karunapala De
Silva,
(Deceased),
No. 321,
Sri Seelananda Road,
Kaluwamodera,
Aluthgama.

Plaintiff-Appellant

Anthonidura Muthulatha De
Silva,
No. 65/A/1,
Near the Railway,
Kaluwamodara,
Aluthgama.

Substituted Plaintiff-Appellant

CASE NO: CA/554/2000/F

DC KALUTARA CASE NO: 5903/P

Vs.

Anthonidura Somapala De Silva,
Kalavilawatta,
Moragalla.

1st Defendant-Respondent

And Several Other Defendants

Before: Mahinda Samayawardhena, J.
Counsel: S.A. Kulasooriya for the Plaintiff-Appellant.
Nalaka Samarakoon for the 22nd and 27th
Defendant-Respondents.
Sanjeewa Dasanayake for the 32nd, 35th and
47th-50th Defendant-Respondents.
Decided on: 05.03.2019

Samayawardhena, J.

This is a partition action having an extended pedigree. In the plaint 32 parties were made defendants and at last it shot up to 57.

After the exclusion of, at the beginning of the trial, Lots 6, 7 and 9 of the Preliminary Plan in favour of the Railway Department, and 38th, 39th, 44th and 45th defendants, there was no corpus dispute.

But there was a pedigree dispute. Several defendants, as individuals and groups, have filed several statements of claim. However, all the defendants, except the contesting 32nd, 34th, 35th, and 46th-50th defendants, have accepted the pedigree of the plaintiff. The said contesting defendants have come out with a different pedigree.

At the trial, the plaintiff on one hand, and the said contesting defendants on the other, raised issues.

On behalf of the plaintiff, the plaintiff himself has given extensive evidence, and tendered documents marked P1-P20. On behalf of the contesting defendants, 47A defendant has given evidence and tendered documents marked 32V1-32V10.

In the written submissions filed after the trial before the District Court, the learned counsel for the contesting defendants has candidly admitted that the pedigree of the contesting defendants was not proved.¹ Therefore the learned District Judge has not considered the contesting defendants' case in the Judgment.

Then the remaining question was to consider whether the plaintiff's pedigree could be accepted. The learned District Judge has not accepted the plaintiff's pedigree either, and dismissed the plaintiff's action. It is against this Judgment the plaintiff-appellant has filed this appeal.

As I have already mentioned, the pedigree unfolded by the plaintiff is a very lengthy and extended one. The evidence of the plaintiff runs into more than hundred pages.² He is a man born in 1929.³ He gave evidence from his own knowledge. It is not humanly possible to unfold a pedigree of this kind by memory without making mistakes and sometimes contradictions.

During the re-examination, the plaintiff has produced a copy of the plaint in another partition case No. 22387 filed in 1941 as P17, and a copy of the Final Decree as P18. The plaintiff was not a party to that partition action.⁴ It is not quite clear why he produced P17 and P18. At the beginning he has stated that the

¹ Vide page 441 of the Appeal brief.

² Vide pages 248-350 of the Brief.

³ Vide page 341 of the Brief.

⁴ Vide page 333 of the Brief.

pedigree set forth in that plaint P17 is correct⁵, but later has stated that he does not accept that pedigree⁶, and then at last has stated that he accepts some parts of that pedigree but rejects the other parts.⁷

According to the plaintiff, Annochchi Silva was entitled to 5/6 share of the land and it devolved on the parties as described in his evidence, and the balance 1/6 share shall devolve on the contesting defendants.

In the former partition case No. 22387 filed in respect of a different land, same Annochchi Silva has been mentioned as the original owner.

The learned District Judge has dismissed the plaintiff's action because the plaintiff's pedigree in the instant action is not identical to that stated in the plaint in the former partition case marked P17. Is that correct and permissible?

The main discrepancy between the two pedigrees as found by the learned District Judge is that, in the plaint of the former partition case, it has been stated that Annochchi Silva had 6 children including a child by the name of Maria, but in the pedigree of the instant case, it has been stated that Annochchi Silva had 5 children without mentioning the name of Maria. No devolution of Maria's rights has been shown by the plaintiff in the plaint. This is the main reason for the learned District Judge for the dismissal of the plaintiff's action.

⁵ Vide page 333 of the Brief.

⁶ Vide last question at page 344 and page 345 of the Brief.

⁷ Vide page 349 of the Brief.

With the greatest of respect to the learned District Judge, I am unable to accept that reasoning for the dismissal of a partition action. As the learned counsel for the 22nd and 27th respondents has correctly pointed out in his written submissions, whether Annochchi Silva had five children or six children is not a contradiction which justifies dismissal of the partition action. If the learned District Judge came to the conclusion that Annochchi Silva had six children (including Maria) and not five children as stated by the plaintiff, the learned Judge could have left those shares which should have gone to Maria unallotted. This is applicable not only to Maria's rights, but to any others' rights, the devolution of which, has not been satisfactorily explained. In a partition action of this nature it is not possible for the plaintiff to present one hundred percent complete pedigree.

The learned District Judge has found the pedigree of the plaintiff to be incorrect or incomplete in the light of the contents of the plaint in a former partition case marked P17. It is significant to note that P17 was produced not by the contesting defendants to contradict the plaintiff's pedigree, but by the plaintiff himself. If the plaintiff had any *mala fide* intention or conceal something to deprive somebody's due rights, he could have withheld it. In fact, P17 has been produced by the plaintiff in re-examination, and the learned counsel for the contesting defendants has objected it being produced in evidence but the learned District Judge has allowed it.⁸ That means, the contesting defendants do not admit the pedigree described in P17. Nor do they accept the pedigree stated by the plaintiff in the plaint in the instant

⁸ Vide page 330 of the Brief.

action. Their pedigree is totally different, which they themselves through their counsel later admitted not to have been proved.

Another important matter is, as I have already stated, the plaintiff was not a party to the former case, and he does not accept that pedigree as hundred percent correct either. He admits certain portions and rejects certain portions. The learned District Judge has gone on the basis that the pedigree stated in P17 is the correct pedigree as to devolution of title of Annochchi Silva's rights. With the greatest of respect, that is not correct. There is no proof that the Court accepted that pedigree in its entirety. Although the plaintiff has been produced, the Judgment has not been produced to know up to which extent that pedigree was accepted by the Court. The plaintiff is neither a party to that case nor claiming title through any of the parties in that case. That case is regarding a different land. But that Judgment, if produced, would have had a great persuasive value to decide the devolution of title of Annochchi Silva.

According to the Final Decree marked P18, it appears to me that the Court has not accepted the pedigree in P17 in its entirety. This is made clear by making a comparison the share allocation suggested by the plaintiff in paragraph 39 of the plaintiff⁹ with the Final Decree marked P18. In the plaintiff shares have been given to the plaintiff and 1st-14th defendants whereas in the Final Decree shares have been given to the plaintiff and 1st-5th, 9th-14th and 23rd defendants.¹⁰ That means, P17 pedigree has not been accepted as it is.

⁹ Vide page 551 of the Brief.

¹⁰ Vide page 555 of the Brief.

As I stated earlier, the main concern of the learned District Judge was the failure of the plaintiff in the instant action not to disclose the name of Maria as a child of Annochchi Silva and the devolution of title to that share. The devolution of title of Maria's share has been described in paragraphs 23-29 of the plaint P17.¹¹ According to those paragraphs, Maria's rights ultimately has gone to W. Appusingho, who appears to be the 15th defendant in that case.¹² Upon his death, it appears that 16th defendant has been substituted.¹³ However, it is interesting to note that, both in paragraph 39 of the plaint P17 and the Final Decree P18, 15th or 16th defendant has not been given any rights—whether Maria's or otherwise. That means Maria's alleged share has not been considered by some reason. If that is correct, the plaintiff in the instant action cannot be found fault with for non-disclosure of Maria's alleged share.

For the aforesaid reasons, I set aside the Judgment of the learned District Judge dated 29.08.2000.

The plaintiff has instituted this action in the District Court 28 years ago in 1991. It is not practically possible to order a retrial as the plaintiff if still alive will not be able to give evidence due to his old age. Same shall be true about the 47A defendant who gave evidence for the contesting defendants. The present generation has no knowledge of these old pedigrees.

In a partition case, in terms of section 25(1) of the Partition Law, it is the paramount duty of the District Judge to investigate title

¹¹ Vide pages 546-548.

¹² Vide page 540 of the Brief.

¹³ Vide page 541 of the Brief. I must state that this is only a guess without full proceedings not being available.

of “*each party*”¹⁴ “*quite independently of what parties may or may not do*”.¹⁵

This Court cannot rewrite the whole Judgment of the District Court. Taking everything into account, I direct the incumbent District Judge to deliver the Judgment afresh on the evidence already led at the trial. In that process, the learned Judge shall not consider what I have stated on P17 and P18 as concluded views of this Court. They were referred to in order to justify setting aside the Judgment of the District Court. The incumbent Judge is free to take his own views in respect of P17 and P18.

Appeal allowed. Let the parties bear their own costs of appeal.

Judge of the Court of Appeal

¹⁴ Vide section 25(1)

¹⁵ *Juliana Hamine v. Don Thomas* (1957) 59 NLR 546 at 549