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

Manage Sardajeewa
No.131, Danketiya, Tangalle.
PLAINTIFF

C.A. Case No. 722/1999 (F)

D.C. Tangalle Case No. P/3194

-Vs-

1. Manage Sumana Nandaseeli
   of Alwitigala, Colombo 8.
2. Emavasan Surananda
   No. 13, Sri Gnanawimala Road,
   Athurugiriya.
3. Emavasan Ariyasena
   of "Sampatha", Udasgama,
   Thissamaharamaya.
4. Manage Ayesha Samudrika
   of "Serendib Tailors", Thissa Road,
   Tangalle.
5. Kananke Acharige Mithrananda
   of Beliatta Road, Tangalle.
6. Jayawarna Arachchige Somawathi
   of Dahampalawatta, Tangalle.
7. Galle Annakkage Piyadasa
   of Beliatta Road, Tangalle.
8. John Ranathunga
   of Beliatta Road, Tangalle.

9. Sriyalatha Hewa Sahabandu
   of Kandurupokuna Road, Tangalle.
10. Sagara Kankanamge Piyasena
    of Kandurupokuna Road, Tangalle.

DEFENDANTS

AND NOW BETWEEN

Kananke Acharige Mithrananda
of Beliatta Road, Tangalle.

5th DEFENDANT-APPELLANT

-Vs-

Manage Sardajeewa
No.131, Danketiya, Tangalle.

PLAINTIFF-RESPONDENT

1. Manage Sumana Nandaseeli
   of Alwitigala, Colombo 8.
2. Emavasan Surananda
   No. 13, Sri Gnanawimala Road,
   Athurugiriya.
3. Emavasan Ariyasena
   of "Sampatha", Udasgama,
   Thissamaharamaya.
4. Manage Ayesha Samudrika
   of "Serendib Tailors", Thissa Road,
   Tangalle.

6. **Jayawarna Arachchige Somawathi**
   of Dahampalawatta, Tangalle.
7. **Galle Annakkage Piyadasa**
   of Beliatta Road, Tangalle.
8. **John Ranathunga**
   of Beliatta Road, Tangalle.
9. **Sriyalatha Hewa Sahabandu**
   of Kandurupokuna Road, Tangalle.
10. **Sagara Kankanamge Piyasena**
    of Kandurupokuna Road, Tangalle.

    DEFENDANT-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Rasika Dissanayake with Sandun Shashika for 5th Defendant-Appellant.

U. de Z. Gunawardana with Nimal Muthukumarana for 1st, 2nd, 3rd and 4th Defendant-Respondents.

Chathura Galhena with Manoja Gunawardena for 6th, 7th and 8th Defendant-Respondents.

Asthika Devendra for 9th and 10th Defendant-Respondents.

Hirosha Munasinghe for Plaintiff-Respondent.

Decided on : 06.05.2019

A.H.M.D. Nawaz, J.

The Plaintiff-Respondent instituted this action to partition a land known as "Kurubettipokkuna Watte" which was in an extent of 3 Kurakkan Kuruni. The plaint dated 8th June 1993 contained the following share allotments:-

Plaintiff - 2/80

1st Defendant	-	2/80
2nd Defendant	-	2/80
3rd Defendant	-	2/80
4th Defendant	-	2/80
5th Defendant	-	5/80
6th Defendant	-	20/80
7th Defendant	-	20/80
8th Defendant	-	20/80
9th and 10th Defendants	-	16.2 perches out of 20/80

It is the 5th Defendant who has preferred this appeal impugning the judgement dated 06th July 1999 of the learned Additional District Judge of *Tangalle*. In his statement of claim, the 5th Defendant-Appellant averred that Lot No. 2 in the Preliminary Plan bearing No. 3537 and dated 23rd June 1994 should be excluded from the subject-matter of the action. He also prayed that he be declared entitled to 5/80 share of the corpus.

When the trial was taken up on 8th February 1999, the parties recorded as admissions the pedigree filed by the Plaintiff-Respondent and the identity of the corpus. In other words, the parties admitted at the trial that the subject-matter of the action was constituted by Lots No. 1, 2, 3, 4, 5 and 6 as depicted in the Preliminary Plan bearing No.3537.

Thereafter, no points of contest were raised and the 3rd Defendant (brother of the Plaintiff) gave evidence supporting the Plaintiff's case. It has to be pinpointed that the 5th Defendant-Appellant who claimed 5/80 share of the corpus was represented by Counsel when the trial began with the recording of the admission and concluded with the adduction of the 3rd Defendant's testimony on 8th February 1999.

After having heard the evidence of the 3rd Defendant which was based on the agreement of the parties and the pedigree filed, the learned Additional District Judge of *Tangalle* pronounced Judgement on 6th February 1999 ordering the partitioning of the land according to the pedigree of the Plaintiff.

In the process of allotment of shares, the 5th Defendant-Appellant was allotted the shares that he had claimed in his statement of claim.

The 5th Defendant-Appellant impugns the judgment of the learned Additional District Judge, praying for the following remedy:-

i. Lot No. 2 as depicted in Preliminary Plan No.3537 should be excluded.

It was also argued that the acceptance of the corpus as depicted in Preliminary Plan bearing No. 3537 was illegal.

In other words the argument of the 5th Defendant-Appellant is that Lot No. 2 whose exclusion was sought by the Plaintiff-Appellant in his statement of claim must be ordered by this Court in appeal.

Having admitted at the trial that Lot No. 2 was a component part of the corpus, the 5th Defendant-Appellant sought the exclusion of that lot in appeal. Section 58 of the Evidence Ordinance states thus:-

> *"No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:*
>
> *Provided that the court may, in its discretion, requires the facts admitted to be proved otherwise that by such admissions."*

The pith and substance of Section 58 of the Evidence Ordinance is that facts admitted need not be proved. A District Judge cannot investigate matters or things which have been admitted. The 5th Defendant-Appellant who was present at the trial in the District Court was represented by an Attorney-at-Law. The proceeding at page 56 of the record and the 1st admission made at the commencement of the trial clearly show that lots 1 to 6 constitute the corpus. In effect the 5th Defendant-Appellant had acquiesced in the position that lot 2 was an integral portion of the corpus and the judgment of the District Court of *Tangalle* springs from the admission. Such an admission precludes the Court

from going into the question whether Lot No. 2 should be excluded or not. No party can thus make contradictory claims-*allegans contraria non est audiendus.* It is a principle of good faith that a person should not be allowed to blow hot and cold at different times. In fact a person who denies today what he affirmed yesterday is not to be heard or believed. This elementary rule of logic expresses the trite saying of Lord Kenyon that a man shall not be permitted to blow hot and cold with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to prompting of his private interests-vide-***Wood v. Dwarris,*** 1 Exch. 493; ***Andrews v. Elliott***, 5 E&B 502.

Presumably, what the 5th Defendant-Appellant argued before this Court was that he had possessed lot 2 and acquired prescriptive title thereto. But this position was abandoned at the trial. He cannot seek to resurrect a case which he has so clearly abandoned at the trial.

If the 5th Defendant-Appellant had sought an exclusion of lot 2, he should have put forward his claim to that lot by raising an appropriate point of contest. No such point of contest had been even suggested by the 5th Defendant.

After having raised a point of contest on prescription, the 5th Defendant-Appellant could have led relevant evidence on prescription in order to succeed in his claim for exclusion. There has been a grievous failure on the part of the 5th Defendant-Appellant to discharge that burden. In the circumstances the 5th Defendant-Appellant is debarred from raising before this Court the contention of a defective investigation of title on the part of the learned Additional District Judge of *Tangalle.* A man is not entitled to stand by and allow proceedings to go on against him to judgment, and then ask the Court to interfere on his behalf-***Churchill v. Churchill,*** LR 1P&D 486.

There is also another aspect of the matter that merits mention at this stage. When the 3rd Defendant who was the brother of the Plaintiff gave evidence on behalf of the Plaintiff, the testimony was on the basis that lots 1 to 6 constitute the corpus. This testimony remains unchallenged and uncontradicted. In other words, when the 3rd Defendant

stated in the course of his evidence that lots 1 to 6 constitute the corpus, the 5th Defendant-Appellant omitted or failed to cross-examine the 3rd Defendant. That failure would amount to an admission on the part of the 5th Defendant-Appellant a second time. In other words the failure to cross-examine the 3rd Defendant on the basis that Lot No. 2 was not part of the corpus is tantamount to an admission that Lot No. 2 is indeed a constituent portion of the corpus.

In his treatise, viz. **"A Practical Approach to Evidence"** at Page 444 Peter Murphy, Professor of Law South Texas College of Law having considered the effect of omission to cross-examine a witness on a material point had this to say:-

> *"Failure to cross-examine a witness who has given relevant evidence for the other side is held technically to amount to acceptance of the witness's evidence-in-chief. It is, therefore, not open to a party to impugn in a closing speech or otherwise, the unchallenged evidence of a witness called by his opponent or even to seek to explain to the tribunal of fact the reason for the failure to cross-examine..."*

So the 5th Defendant-Appellant cannot invoke the jurisdiction of this Court to assail the judgment that has declared that Lot No. 2 forms part of the corpus.

Accordingly I affirm the judgment of the learned District Judge of *Tangalle* dated 6th July 1999 and dismiss the appeal of the 5th Defendant-Appellant.

JUDGE OF THE COURT OF APPEAL