

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

Rankothpedige Nandasena,  
Arandara, Atale.

1<sup>st</sup> Defendant-Appellant

Illandarage Wijeratne,  
Arandara, Atale.

12<sup>th</sup> Defendant-Appellant

**CASE NOS: CA/9/2000/F**

**CA/10/2000/F**

**DC KEGALLE CASE NO: 23180/P**

Vs.

1. Rankothpedige Sandara  
(deceased),
2. Rankothpedige Appuwa  
(deceased),
3. Rankothpedige Sedara (deceased),
- 3A. Rankothpedige Gamini  
Jayasinghe,  
Arandara, Atale.

Plaintiff-Respondents

Rankothpedige Sarath  
Samarasinghe,  
G188, Dammulla,  
Arandara, Atale.

Substituted Plaintiff-Respondents

And Several Other Defendant-  
Respondents

Before: Mahinda Samayawardhena, J.  
Counsel: Ajith Munasinghe for the 1<sup>st</sup> and 12<sup>th</sup>  
Defendant-Appellants.  
Pubudu de Silva with Mihiri Abeyratne for the  
Plaintiff-Respondents.  
Decided on: 08.05.2019

Samayawardhena, J.

The plaintiff filed this action in the District Court to partition the land described in the schedule to the plaint among the plaintiff and the 1<sup>st</sup>-10<sup>th</sup> defendants. After trial the learned District Judge entered Judgment as prayed for by the plaintiff. Being dissatisfied with that Judgment, the 1<sup>st</sup> defendant and the 12<sup>th</sup> defendant have filed separate appeals.

Let me first consider the 12<sup>th</sup> defendant's appeal. His complaint is that the 6<sup>th</sup> defendant's rights shall devolve on him.

According to the pedigree of the plaintiffs, Hatana, the 6<sup>th</sup> defendant, is entitled to 1/6 share of the land. Despite summons being served, the 6<sup>th</sup> defendant did not come to Court at any stage of the case.

When the 13<sup>th</sup> defendant was giving evidence, the counsel for the 12<sup>th</sup> defendant has informed Court that the 6<sup>th</sup> defendant's said rights have devolved on the 12<sup>th</sup> defendant by way of deeds and there is no contest over that matter.<sup>1</sup> This assertion made in open Court has not been disputed by the others. Thereafter, the counsel for the plaintiffs has marked those deeds as 12D1-

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<sup>1</sup> Vide page 192 of the brief.

12D3 through the evidence of the 13<sup>th</sup> defendant without any objection.<sup>2</sup> The 1<sup>st</sup> defendant in paragraph 5 of his statement of claim has clearly mentioned those deeds and stated that the 12<sup>th</sup> defendant shall be made a party to the case.<sup>3</sup> This evidence has escaped the attention of the learned District Judge when writing the Judgment. Hence what has been allotted to the 6<sup>th</sup> defendant in the Judgment shall go to the 12<sup>th</sup> defendant. The Interlocutory Decree to be amended accordingly.

Let me now consider the 1<sup>st</sup> defendant's appeal.

The 1<sup>st</sup> defendant did not file written submissions. Hence this Court will be guided by the contents of the Petition of Appeal to understand the 1<sup>st</sup> defendant's appeal.

The 1<sup>st</sup> defendant makes two points in the Petition of Appeal.

The first one is that the plaintiffs claimed title on deed P1 from Sasira, but the 1<sup>st</sup> defendant produced deeds 1D1 and 1D2 executed in 1918 to show that Sasira had earlier transferred his rights to "some other persons". The 1<sup>st</sup> defendant in paragraph 6 of his statement of claim has named the said "some other persons" as Silva and Peiris, but has not asked the said Silva and Peiris or his successors if any to be added as parties.<sup>4</sup> Even in evidence the 1<sup>st</sup> defendant has stated that he was unaware to whom the rights of Silva and Peiris go.<sup>5</sup> Deed P1 has been executed in 1939, and there is no clear evidence as to what has happened between 1918-1939. Hence the learned District Judge cannot be found fault with, when a contest has not been

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<sup>2</sup> Vide page 199 of the brief.

<sup>3</sup> Vide page 106 of the brief.

<sup>4</sup> Vide pages 106-107 of the brief.

<sup>5</sup> Vide page 153 of the brief.

raised by the successors of Silva and Peiris, for accepting deed P1 in favour of the plaintiffs.

The second point raised by the 1<sup>st</sup> defendant in the Petition of Appeal is that the 13<sup>th</sup> defendant in the course of the trial produced Plan 13D1 made in 1934, and according to that Plan, the plaintiffs cannot maintain this action as there is no common ownership of the land because parties possessed the land as separate lots.

The 1<sup>st</sup> defendant has never taken up such a clear position in his statement claim or in issues raised at the commencement of the trial.<sup>6</sup> However after the closure of the case for the plaintiff and at the re-examination of the 1<sup>st</sup> defendant the counsel for the 1<sup>st</sup> defendant for the first time has raised an issue (No.26) to say that as the corpus has been possessed by the parties as divided portions for well over 50 years the plaintiffs cannot maintain this action.<sup>7</sup> This has been rightly objected to by the counsel for the plaintiff, but the learned District Judge has accepted that issue.<sup>8</sup>

In my view, the learned District Judge should not have allowed that issue to be raised at that stage of the case as, on the one hand, it causes prejudice to the case of the plaintiffs, and, on the other, it changes the character of the 1<sup>st</sup> defendant's case presented to Court by way of his statement of claim.

If the corpus has been possessed by the parties as divided lots for well over 50 years, the 1<sup>st</sup> defendant should have taken it in the forefront of his statement of claim and sought dismissal of

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<sup>6</sup> Vide pages 132-133 of the brief.

<sup>7</sup> Vide page 176 of the appeal brief.

<sup>8</sup> Vide pages 179-180 of the appeal brief.

the action on that ground alone. He cannot suddenly realize that important matter after the closure of the case for the plaintiffs, and at the tail end of his evidence, and raise it as an issue to spring a surprise to others.

Whether a case is a partition case or otherwise, a party cannot change the character of his case as he goes along to suit the occasion. He must present his case at the trial the way he pleaded in his pleadings and issues raised and his opponent is prepared to meet. (*Candappa nee Bastian v. Ponnambalampillai* [1993] 1 Sri LR 184, *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 any event, as there was no evidence that parties possessed separate lots as different entities and all the deeds have been executed in relation to undivided rights, the learned District Judge has answered that issue No.26 in the negative.

I see no reason to interfere with that finding.

The 12<sup>th</sup> defendant's appeal is allowed.

The 1<sup>st</sup> defendant's appeal is dismissed.

No costs.

Judge of the Court of Appeal