

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

P.H. Dayananda,
No.40, Nandimithra Place,
Pamankada.
Defendant-Appellant

CASE NO: CA/1010/2000/F

DC MT. LAVINIA CASE NO: 366/95/L

Vs.

1. K. Dona Nimalawathie,
2. H. Dona Nilusha Pasandika,
3. H. Dona Nilanka Naduni
Shyamanika,
All of No.64,
De Silva Road,
Kalubowila,
Dehiwala.
Plaintiff-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Manohara De Silva, P.C., for the Defendant-
Appellant.
D.P. Mendis, P.C., for the Plaintiff-
Respondents.

Decided on: 20.06.2019

Mahinda Samayawardhena, J.

The plaintiffs filed this action in the District Court against the defendant seeking declaration of title to the land described in the schedule to the plaint and ejectment of the defendant therefrom. The defendant in the answer whilst seeking dismissal of the plaintiff's action, sought a declaration by way of a cross-claim that he is the owner of a part of the said land which is morefully described as Lot A3B in Plan No.1049 dated 19.02.1980 (D4). After trial the learned District Judge entered Judgment for the plaintiffs. Hence this appeal by the defendant.

By admission No.2, the defendant admitted that Dharmadasa (the late husband of the 1st plaintiff and the father of the 2nd and 3rd plaintiffs) was the owner of the land by virtue of the deed marked with the plaint P1.

It is the position of the defendant that the said Dharmadasa by deed No. 9305 dated 13.01.1972 (D13) sold undivided 15 perches to his brother Karunadasa, and Karunadasa in turn by deed No.3132 dated 03.09.1980 (D2) sold a divided 15 perches described as Lot A3B in Plan D4 to him.

The learned District Judge held against the defendant predominantly on the basis that his title deeds marked D2 and D13 have not been proved despite them being marked subject to proof.

The learned President's Counsel for the defendant strenuously contends that although those two deeds were marked subject to proof, when the defendant's case was closed reading in evidence documents marked D1-D15, the counsel for the plaintiffs, as seen from the proceedings dated 20.04.2000, informed Court

that only documents marked D3-D5, D8 and D10 have not been proved.

It is well settled law that, in a civil case, if an objection has not been taken at the closure of the case of the opposite party that the documents marked subject to proof were not proved and therefore be rejected, they become evidence for all intents and purposes without the requirement of further proof despite the subject to proof objection taken at the time of marking the said documents. Vide the Judgments of the Supreme Court in *Sri Lanka Ports Authority v. Jugolinija Boat East* [1981] 1 Sri LR 18, *Balapitiya Gunananda Thero v. Talalle Methananda Thero* [1997] 2 Sri LR 101, *Stassen Exports Limited v. Brooke Bond Group Ltd* [2010] 2 Sri LR 36, *Jamaldeen Abdul Latheef v. Abdul Majeed Mohamed Mansoor* [2010] 2 Sri LR 333. This includes deeds marked subject to proof. Vide the Supreme Court Judgment in *Samarakoon v. Gunasekera* [2011] 1 Sri LR 149.

The contention of the learned President's Counsel for the plaintiffs that the proceedings dated 20.04.2000 have been wrongly recorded is unacceptable because after the said date, case has been called in open Court as much as seven times before the Judgment was delivered. Even in the plaintiffs' written submissions tendered to the District Court dated 29.09.2000, although it has been stated that the said two deeds have not been proved, it has not been stated that the proceedings dated 20.04.2000 have been wrongly recorded. In any event, the recording of the proceedings of the lower Court cannot for the first time be challenged in the Appellate Court.

The learned District Judge has not taken this vital matter into consideration when pronouncing the Judgment, and therefore the said Judgment cannot be allowed to stand.

Let the District Judge enter Judgment for the plaintiffs as prayed for in paragraph (a) of the prayer to the plaint subject to the grant of the relief to the defendant as prayed for in paragraph (b) of the prayer to the answer.

Appeal is allowed without costs.

Judge of the Court of Appeal