

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

Chandradasa Ranasinghe,
Aranwela,
Beliatta.
2A Defendant-Appellant

CASE NO: CA/92-93/2000/F

DC TANGALLE CASE NO: 2116/P

Vs.

Danny Wijesinghe Wakista,
Aranwela,
Beliatta.
Plaintiff-Respondent
And Several Other Defendant-
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Saman Galappaththi for the 2A Defendant-
Appellant.

Other parties are absent and unrepresented.

Decided on: 24.06.2019

Mahinda Samayawardhena, J.

The plaintiff instituted this action to partition the land described in the schedule to the plaint. Several parties have intervened pending action. After trial the learned District Judge delivered the Judgment partitioning the land among the plaintiff, the 1st and 2nd defendants and some others who are not parties to the action. Being dissatisfied with the Judgment, the 2A defendant and 3rd defendant have preferred appeals. The 3rd defendant did not pursue the appeal, and there remains to consider the appeal of the 2A defendant.

The 2nd defendant did not give evidence at the trial. The pivotal argument of the learned counsel for the 2A defendant is that the land to be partitioned was already amicably partitioned by Plan marked 1D5 prepared in 1963 and Deed of Partition marked 1D6 executed in 1964, and accordingly, the 2nd defendant became entitled to Lot 1, the plaintiff to Lot 2, and the 1st defendant to Lot 3 in the said Plan, and those Lots were thereafter registered at the Land Registry as separate Lots, and therefore, the partition action should have been dismissed or Lot 1 should have been excluded from the corpus.

This argument is unacceptable on two grounds. One is, all the co-owners had not been parties to the amicable partition, and the other is, after the amicable partition, admittedly, the 2nd defendant has executed Deeds alienating undivided rights from the land to several others including the plaintiff and the 4th defendant. The 2nd defendant, by raising issue Nos. 30 and 31, whilst accepting execution of two Deeds in favour of the plaintiff and the 4th defendant, has taken up the position that, at the time of execution, he did not have title to the said land! Execution of Deeds

alienating undivided rights after the alleged amicable partition cuts across the said argument.

There is no doubt that the amicable Partition Plan and the amicable Deed of Partition executed thereon have not been acted upon, and the principal argument of the 2A defendant-appellant is therefore not entitled to succeed. Lot 1 shall form part of the corpus.

Learned counsel for the 2A defendant in the written submission has stated that the learned District Judge has miscalculated some shares. How it happens is not very clear. Calculation of shares is referable to the pedigree. The 2A defendant has not raised a pedigree dispute at the trial and therefore he cannot raise a pedigree dispute for the first time in appeal. In any event, the 2A defendant has not stated how such miscalculation, if at all there is one, has affected him.

Learned counsel for the 2A defendant further says that although the learned District Judge has given shares to Sendiris and Andrayas, there was no evidence, at least, to establish they were among the living. The learned District Judge has in the Judgment given some shares to three persons who are not parties to the action. That is not necessary. Either they should have been made parties to the case or those shares should have been left unallotted. Hence the shares given to those three persons who are not parties to the case shall be left unallotted.

Subject to that variation, the Judgment of the District Court is affirmed and the appeal is dismissed but without costs.

Judge of the Court of Appeal