

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

In the matter of an application to substitute the deceased Plaintiff-Respondent.

**CA/730/97 (F)**

D.C. Matara, Case No. 14243/P

Elgoda Ranawakage Ganawathi *alias*  
Elgodage Ganawathi Ranawaka

**PLAINTIFF**

**Vs.**

1. Kekunawela Pathiranage Somawathi
2. Koralagodage Gamini Deepa Shamali  
Wickramasinghe

Both of Nelligahawatta, Marambe,  
Akuressa.

3. Perumpula Arachchige Pemawathi  
Kurupanagoda, Maramba, Akuressa.
4. Koralagoda Kornelis (Deceased)
- 4a. Koralagodage Amaratne,  
Meetiyagodawatta, Marmbe,  
Akuressa.
5. Thilakasiri Ranasinghe,  
Handugoda, Maramba, Akuressa.
6. Elgodage Saineris
- 6a. Elgoda Ranawakage Dinapala,  
Ranawake,  
Nelligahawatta, Marmbe, Akuressa.

7. Koralagodage Wijepala  
Wickramasinghe,  
Nelligahawatta, Mramba, Akuressa.
8. Thalpa Samanayakage Amaraseeli
9. Koralegodage Lakmini Rupawathi
10. Koralagodage Diana Lakshmi  
All of No. 23/5, Kalidasa Road,  
Matara.
11. Palitha Ranasinghe,  
Handugoda, Marambe, Akuressa.
12. Amaratathne Koralegoda,  
Witiyagoda, Marambe, Akuressa.
13. Koralegoda Saineris,  
Muttettugoda Minipagoda,  
Marambe, Akuressa.

**DEFENDANTS**

**AND NOW BETWEEN**

THilakasiri Ranasinghe,  
Handugoda, Marambe, Akuressa

**5<sup>TH</sup> DEFENDANT-APPELLANT**

**Vs.**

Elgoda Ranwakage Ganawathi alias  
Elgodage Ganawathi Ranawake

**PLAINTIFF-RESPONDENT**  
**(Now deceased)**

1. Thamala Surangani Halwahawatta  
Liyanarachchi,  
Asoka Place, Madawalamulla, Galle.
2. Bimba Kumudini Halgahawatta  
Liyanarchchi,  
Ganegoda, Akmeemana, Galle.
3. Gomeda Kalapathi Halgahawatta  
Liyanarchchi,  
Ashoka Place, Madawalamulla, Galle.
4. Sumedha Bhupathi Halgahawatta  
Liyanarchchi,  
Weliwatta, Marambe, Akuressa.
5. Mitta Madhumani Halgahawatta  
Liyanarchchi,  
Ashoka Place, Madawalamulla, Galle.
6. Vimodha Divipathi Halgahawatta  
Liyanarchchi,  
Ashoka Place, Madawalamulla, Galle.
7. Menaka Medhani Halgahawatta  
Liyanarchchi,  
Hatbodiya, Kalubowila, Dhehiwala.
8. Nirodha Sahampathi Halgahawatta  
Liyanarchchi,  
Ashoka Place, Madawalamulla, Galle.

**SUBSTITUTED PLAINTIFF-  
RESPONDENTS**

1. Kekunawela Pathiranage Somawathi
2. Koralagodage Gamini Deepa Shamali  
Wickramasinghe

Both of Nelligahawatta, Marambe,  
Akuressa.

3. Perumpula Arachchige Pemawathi  
Kurupanagoda, Maramba, Akuressa.
4. Koralagoda Kornelis (Deceased)
  - 4a. Koralagodage Amaratatne,  
Meetiyagodawatta, Marmbe,  
Akuressa.
5. Thilakasiri Ranasinghe,  
Handugoda, Maramba, Akuressa.
6. Elgodage Saineris
  - 6a. Elgoda Ranawakage Dinapala,  
Ranawake,  
Nelligahawatta, Marmbe, Akuressa.
7. Koralagodage Wijepala  
Wickramasinghe,  
Nelligahawatta, Mramba, Akuressa.
8. Thalpa Samanayakage Amaraseeli
9. Koralegodage Lakmini Rupawathi
10. Koralagodage Diana Lakshmi  
All of No. 23/5, Kalidasa Road,  
Matara.
11. Palitha Ranasinghe,  
Handugoda, Marambe, Akuressa.
12. Amaratathne Koralegoda,  
Witiyagoda, Marambe, Akuressa.
13. Koralegoda Saineris,  
Muttettugoda Minipagoda,  
Marambe, Akuressa.

**DEFENDANT-RESPONDENTS**

Before: **M. T. MOHAMMED LAFFAR, J. &  
K. K. A. V. SWARNADHIPATHI, J.**

Counsel: Taranatha Palliyaguruge for the 5<sup>th</sup> Defendant-Appellant  
Jegatheeswary Muthusamy for the 2<sup>nd</sup> Defendant-Respondent

Written Submissions on: 11.02.2020 (by the 5<sup>th</sup> Defendant-Appellant)  
12.02.2020 (by the 2<sup>nd</sup> Defendant-Respondent)

Decided on: **04.03.2021**

**K. K. A. V. SWARNADHIPATHI, J.**

In the District Court of Matara the plaintiff filed the original case under case No. P/14243 to partition of a paddy land more fully described in the schedule. In the original plaint, the plaintiff had introduced 10 defendants, and the latter two were added.

1<sup>st</sup> and 2<sup>nd</sup> defendants filed their statement of claim through one attorney, and 5<sup>th</sup> filed through another. All defendants had filed their proxy through various attorneys.

The original case was fixed for trial on the 5<sup>th</sup> November 1992, according to the 32<sup>nd</sup> journal entry. However, the case was not taken up on the date as it was a contesting case, and the judge is on transfer orders.

Perusing the case record, this case had gone down on many occasions and finally taken up for trial on the 22<sup>nd</sup> August 1995. According to the notes of the day, the learned District Judge had recorded that the 5<sup>th</sup> and 11<sup>th</sup> defendants were absent and unrepresented.

However, it is further recorded that parties have come into a settlement. Therefore, evidence will be recorded, and the husband of the plaintiff had been called to give evidence.

Witness giving evidence had stated that the original owner was one Koralagodage Don Diyonies. However, according to the plaint, one Walpitage allies Koralagodage Dines, was in the ownership of 1/4<sup>th</sup> of the paddy land.

However, this position had been contested by some of the defendants, including the 5<sup>th</sup> defendant. According to the statement of claim of the 5<sup>th</sup> defendant, the first

owners were Gunawardhena Hettirathnayaka Liyanage Don Bastian and Gunawardena Hettirathnayaka Liyanage Don Bastian Appuhamy.

Further in the statement of claim, the 5<sup>th</sup> and 11<sup>th</sup> defendants have categorically denied the schedule of shares and the pedigree of the plaintiff.

In the original plaint, two plaintiffs had given the 5<sup>th</sup> defendant 66/192 shares. However, in evidence, no shares were given to the 5<sup>th</sup> defendant even in the judgement, this had not been conceded. Thereby the 5<sup>th</sup> defendant had got no shares at all.

Facts of the case being thus it's time to consider the appeal lodged by the 5<sup>th</sup> defendant. The learned judge had taken the trial on the 22<sup>nd</sup> August 1995. At the outset, without cancelling the points of the contest already recorded. The learned judge had raised two new points of contests to add one admission. As there were privies points of contest accepted by court still exits, it is not clear what would happen to the points of the contest already raised.

On the same day of recording evidence, the learned judge had delivered the judgement denying any shares to the 5<sup>th</sup> defendant and ordered to enter the Interlocutory decrees, which was tendered to the court on the 20<sup>th</sup> November 1995. Papers had been then filled to survey the land.

At this point, the 5<sup>th</sup> defendant had filed papers to intervene and to set aside the judgement delivered on 22<sup>nd</sup> August 1995. This application was made on 19<sup>th</sup> April 1996. On 23<sup>rd</sup> April 1997, the inquiry was held. At the inquiry, the 5<sup>th</sup> defendant gave evidence and stated that he missed the court date due o his wedding preparations. Further, he had stated he was given a share in the plaint but not considered at the time of giving evidence by the husband of the plaintiff or in the judgement.

The learned judge who delivered the order to purge the defendant had considered sec 48 of the partition law to the strictest interpretation. The learned judge had further pointed out that the wedding is not an inevitable occasion. Therefore, the 5<sup>th</sup> defendant could have taken steps to change the date of the case, but the judge had failed to discuss the very important stand taken by the 5<sup>th</sup> defendant regarding not allocating shares to him, which the plaintiff had given in the plaint.

It is true that there are lapses in the hands of the 5<sup>th</sup> defendant, but those lapses are not such a grievance as the lapses in the entire case processing.

In the petition to set aside the judgement dated 22<sup>nd</sup> August 1995, the 5<sup>th</sup> defendant petitioner had brought to the notice of the court that apart from the fact of his wedding preparation, the court too had not considered the fact that shares were not

allocated to him irrespective of the fact that in the plaint he was awarded a certain share, without considering the 2<sup>nd</sup> factor the learned District judge after the inquiry has held against the 5<sup>th</sup> defendant petitioner purely on the fact that there are no reasonable grounds brought forward by the 5<sup>th</sup> defendant petitioner.

Aggrieved by the order dated 25<sup>th</sup> June 1997, the 5<sup>th</sup> defendant petitioner had moved the appellate jurisdiction of this court.

At the time of taking this matter up for argument, the parties had consented to dispenser the appeal by way of written submissions.

The 2<sup>nd</sup> defendant-respondent had filed written submissions. Citing the judgement in ***Siriya Vs. Amalee [(1957) 60 NLR 269]***, which carries the dictom unless the defendant showed the court that he was restrained from attending to the trial due to an unavoidable circumstance, the interlocutory decree should not be disturbed. However, the 2<sup>nd</sup> defendant-respondent has not touched on the other factor of appeal regarding the allocation of shares in the plaint and non-allocation of shares in the judgement.

The plaintiff-respondent at the outset of the case had taken an objection that the 5<sup>th</sup> defendant-appellant had no right of appeal.

When carefully studying the face of the case, there seem to be no grounds for a final appeal. However, in ***De Costa and Others Vs. De Costa and Others [(1998) 1 SLR 107]*** this position had been dealt with, and today the situation is Section 48 of the partition law decides the right of a party it can be interrupted as a judgement, and there is a right for a final appeal.

Further, when perusing Section 48 (4)(c), it reads as follows:

*“If upon inquiring into such application, after prior notice to the parties to the action deriving any interest under the interlocutory decree, the court is satisfied.*

- I. That the party affected had no notice whatsoever of the said parties action prior to the date of the interlocutory decree or having duly filed the statement of claim and register his address, failed to appear at the trial owing to an accident, misfortunate or other unavoidable causes and,*
- II. That such party had prima facie right, title or interest to or in the said land”.*

This second limb had not been considered by the learned district judge even though the 5<sup>th</sup> defendant had petitioned this fact at the inquiry.

Furthermore, the learned district judge had been in a hurry to dispense justice, forgetting the fact that “hurried *justice may cause to injustice*” as in this case.

Partition judgment being a judgement in ream a judge should be cautious and must carefully study the entire evidence and documents produced before him. It is the duty of the judge to study and analyse all deeds marked and be satisfied that evidence tallies with the documents even in an uncontested case. In fact, in ***Caroline Perera and another Vs. Martine Perera and another [(2002) 2 SLR 1]***, it is clearly stated that the court should satisfy the right of the parties, and any agreements by parties contrary to documentary evidence by some parties will not be conclusive proof of the title. In ***Falee Vs Argeen[2004 1 SLR 48]*** this position is further discussed in this judgment.

Even if all the parties agree on facts, it is the duty of the judge to evaluate evidence and carefully study the title before pronouncing the judgement. Considering all these above facts of the circumstances and the law, it is my view that the order dated 25<sup>th</sup> June 1997 should be set aside and allow the 5<sup>th</sup> defendant-appellant to contest the case.

I set aside the judgement entered on 22nd August 1995 and allow the appal with cost.

Considering the delay that this case had taken, we order the present district judge to take this matter up and expedite giving priority to the case and to hold a fresh trial.

In order to felicitate this, we set aside all orders regarding the interlocutory decree and the survey.

Further, we order the registrar of this court to take steps to send the judgement and the original case record to Matara District Court.

**Judge of the Court of Appeal**

**M. T. MOHAMMED LAFFAR, J.**

I agree.

**Judge of the Court of Appeal**