

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

Hubert Fernando of Horagolla, Marawila.

Plaintiff

Vs.

Application No.1265/2000(F)

Marawila No.441/P.

1. Kuranage Margret Monika Fernando of Marawila.
2. Kuranage Benadicta Jayaseeli Fernando of Mundalama.
3. Kuranage Antony Fernando of Mundalama.
4. Kuranage Agatha Irangani Fernando of Rajakaduluwa.
5. Kuranage Shelton Fernando of Marawila.
6. Kuranage Marshal Ranjith Fernando of Pallama.
7. Kuranage Annie Grace Fernando of Pallama.
8. Kuranage Marcus Fernando of Marawila.
9. Kuranage Mary Mabel Rita Fernando.
10. Wijeratne Arachchige Mary Lilihamy of Horagolla, Marawila.
11. Warnakulasuriya Ranjith Titus Fernando of Horagolla, Marawila.

Defendants

Warnakulsuriya Bibilet Miurine Fernando of
Horagolla.

Substituted 11A Defendant-Appellant

Vs.

Hubert Fernando of Horagolla, Marawila.

Plaintiff-Respondent

1. Kuranage Margret Monika Fernando of
Marawila. (Deceased)
 - 1A. Warnakuasuriya Anton Fernando.
 - 1B. Warnakuasuriya Jackson Saman Palitha
 - 1C. Warnakuasuriya Jessica Sudharmi Fernando
 - 1D. Warnakuasuriya Maha Mandige Nimal Jayalath
Nishantha Fernando
All of 2nd Fathima Road, Mudukatuwa, Marawila.
2. Kuranage Benadicta Jayaseeli Fernando of
Mundalama.
3. Kuranage Antony Fernando of Mundalama.
4. Kuranage Agatha Irangani Fernando of
Rajakaduluwa.
5. Kuranage Shelton Fernando of Marawila.
6. Kuranage Marshal Ranjith Fernando of Pallama.
7. Kuranage Annie Grace Fernando of Pallama
(Deceased)
- 7A. Agampodi Seethani Merian Jayalika Silva of
No.61, Sedawatta, Kurunegala Road, Chilaw.
8. Kuranage Marcus Fernando of Marawila
(Deceased)

- 8A. Pathirajage Don Rani Rathnayake of
“Wanigasekarawatta”, Horagolla, Marawila.
9. Kuranage Mary Mabel Rita Fernando.
10. Wijeratne Arachchige Mary Lilihamy of
Horagolla, Marawila (Deceased)
- 10A. Kuranage Hubert Fernando of Horagolla,
Marawila.

Defendant-Respondents

BEFORE : **PRASANTHA DE SILVA, J.**
K.K.A.V. SWARNADHIPATHI, J.

COUNSEL : Dr Sunil Coorey
For the 11th Defendant-Appellant.

W.D. Weerathna
For the 1st to 10th Defendant-Respondents.

Pubudu De Silva
For the Plaintiff-Respondent.

Argument: By way of written submissions

Date of Judgment: 18.11.2022

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

JUDGMENT

The Plaintiff-Respondent instituted a partition action under case No.441/P. at the District Court of Marawila to partition the land described in the schedule to the Plaint.

In the Plaintiff, he had named eleven Defendants 1st to 10th Defendants were his family members and the 11th Defendant was an outsider. When the matter was taken up to trial, only the 11th Defendant contested the pedigree of the Plaintiff. All parties to the action admitted the corpus.

Learned District Judge, in her judgment, held in favour of the Plaintiff. Aggrieved by judgment dated 5.12.2000 11th Defendant Appealed, praying to set aside the judgment of the District Court and to answer the points of contest raised on behalf of the 11th Defendant in the affirmative.

In this court, since the parties agreed to have the judgment on written submissions, dates were given for each party to file their respective submissions.

On 16.06.2022, on behalf of the Appellant, moved for additional time and time was given to file written submissions. Even though the Respondents filed their written submissions, the Appellant failed to file his submissions. Therefore, the court decided to study the entire District Court case and come to a conclusion.

The Plaintiff-Respondent had filed the partition case based on prescriptive rights. In such a case, he must prove uninterrupted possession for over ten years.

Kuranage Joseph Fernando, father of the Plaintiff-Respondent, came into the occupation of the land in 1944, and from that date, he had occupied with undisturbed and interrupted possession. By the time he died in 1988, he had gained independent title and had transferred the property by Deed No.1796, which was marked as "P1" to his wife, the 10th Defendant. This was duly registered in the Land Registry.

She had gifted the property by Deed No.496, marked as "P2". "P2" was attested in February 1995. From 1988 to 1995 it is about eight years. There is no mention of a civil case filed to cancel either of the Deeds by the 11th Defendant-Appellant. Even in this case, he had not prayed for a prayer to cancel those deeds. He had not led any evidence to prove that he had complained to any Police Station regarding illegal transfers to institute criminal action.

The two cases filed by the 11th Defendant-Appellant were filed in 1975 and 1978. Even though the 11th Defendant-Appellant had got judgment in his favour, he had not succeeded in exercising the judicial mechanism to oust the Plaintiff or 1st to 10th Defendant-Respondents.

If he was keen, he could have exercised his rights, prayed for relief from a court or filed contempt papers against the party who objected to carrying out the court orders. This clearly indicates that the 11th Defendant slept on his rights if he had any.

The present case was filed in 1995. The Appellant had not taken steps within one year and a day from the date of judgment in the cases mentioned above. Therefore, the judgment in those cases gets abated. As the Learned District Judge points out, from 1978 to 1995, there were nearly 20 years.

The Deeds marked as "11V (10)" and "11V (11)" were Deeds written in 1957 and 1971. Again, the question arises what had the 11th Defendant-Appellant done When he had deeds and judgments in his favour, he had been sleeping on his rights.

The 11th Defendant-Appellant, in his evidence, had admitted that Kuranage Joseph Fernando was in occupation of the land in the 1970s. He admitted that from the 1940s, said father of the Plaintiff and the 1st to 9th Defendants had lived in the premises.

A case filed in 1985 in the primary court of Wennapuwa, marked as "P16", was discussed by the learned District Judge, and in Appeal, it was marked as "11V (14)". In the primary court, the order was against the Appellant. His Appeal to the Court of Appeal failed due to a technical error resulting in the primary court order being affirmed. When the order is in favour, the prescription does not suffer.

The Appellant had not paid enough vigilance to his case at the District Court. He had not taken steps to safeguard his rights when the judgment of the case filed in the 1970s was in his favour.

Even in this court, the Appellant had not been vigilant after obtaining an extra three weeks to file his submissions. He had not filed his submissions.

In English law, such negligence was discussed as follows: -

"Equity does not relieve a person of the consequences of his or her carelessness". "Equity will not grant relief from a self-created hardship." These English principles have been adopted in many cases in Sri Lanka.

Even though the Appellant had judgments in his favour, negligence to obtain the land has made the prescription of the Defendant-Respondent gain their rights. It is settled law that the Appellate court must be careful in taking decisions where the learned District Judge had observed the demeanour of the witnesses.

The learned District Judge had carefully considered this case's aspects in delivering the judgment. The answers to the issues are clearly explained in the judgment.

We see no reason to disturb the judgment dated 05.12.2000 delivered by the learned District Judge of Marawila in the case bearing No.441/P.

We dismiss the Appeal with a cost of LKR 10,000/-.

Judge of the Court of Appeal

PRASANTHA DE SILVA, J.

I agree.

Judge of the Court of Appeal