

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

Elamaldeniyalage Piyaseeli,
No. 01, Pilanduwa,
Warakapola.

Plaintiff

**C.A. Appeal
No.321-A/99 (F)**

-Vs-

**D.C. Kegalle Case
No. 23719/P**

(Deceased)
(JE.57)

1. Bothalayalage Marynona
2. Ihalagedera Hewayalage alias
Morawaka Arambayalage
Simandiris
3. Arambayalage Gnanawathi
4. Suduhakuruge Premalatha
5. Ihalagedera Hewayalage Sirineris
6. Ihalagedera Hewayalage John
Perera
All of Thambadiya,
Mahapallegama
- 6a. Kaluwadewage Lalitha
Rathnawathie
10/416, Wanawasala, Kelaniya.
(Legal representative of deceased
6th Defendant)
7. Ihalagedera Hewayalage
Karunaratne
8. Ihalagedera Hewayalage
Dharmasena
9. Ihalagedera Hewayalage Odiris

10. Pahalagedera Hewayalage
Alpinona
11. Pahalagedera Hewayalage
Wijayawardena
12. Pahalagedera Hewayalage
Dayananda
13. Pahalagedera Hewayalage
Aberatne
14. Pahalagedera Hewayalage
Kusuma Ratnaseeli
All of Thambadiya,
Mahapallegama.

Defendants

5. Ihalagedera Hewayalage Sirineris
Thambadiya,
Mahapallegama.

9. Ihalagedera Hewayalage Odiris
Thambadiya,
Mahapallegama.

5th and 9th

Defendant-Appellants

-Vs-

Elamaldeniyalage Piyaseeli,
No. 01, Pilanduwa,
Warakapola.

Plaintiff-Respondent

1. Bothalayalage Marynona
2. Ihalagedera Hewayalage alias
Morawaka Arambayalage
Simandiris
3. Arambayalage Gnanawathi
4. Suduhakuruge Premalatha
All of Thambadiya,
Mahapallegama

- 6a. Kaluwadewage Lalitha
Rathnawathie
10/416, Wanawasala, Kelaniya.
7. Ihalagedera Hewayalage
Karunaratne
8. Ihalagedera Hewayalage
Dharmasena
10. Pahalagedera Hewayalage
Alpinona
11. Pahalagedera Hewayalage
Wijayawardena
12. Pahalagedera Hewayalage
Dayananda
13. Pahalagedera Hewayalage
Aberatne
14. Pahalagedera Hewayalage
Kusuma Ratnaseeli
All of Thambadiya,
Mahapallegama.

1 to 4, 6A, 7, 8 and 10 to 14

Defendant-Appellants

And

Elamaldeniyalage Piyaseeli,
No. 01, Pilanduwa,
Warakapola.

Plaintiff

**C.A. Appeal
No.321-B/99 (F)**

**D.C. Kegalle Case
No. 23719/P**

-Vs-

1. Bothalayalage Marynona
2. Ihalagedera Hewayalage alias
Morawaka Arambayalage
Simandiris
3. Arambayalage Gnanawathi
4. Suduhakuruge Premalatha
5. Ihalagedera Hewayalage Sirineris
All of Thambadiya,
Mahapallegama

(Deceased)
(JE.57)

6. Ihalagedera Hewayalage John Perera
Thambadiya,
Mahapallegama
- 6a. Kaluwadewage Lalitha Rathnawathie
10/416, Wanawasala,
Kelaniya.
(Legal representative of deceased 6th Defendant)
7. Ihalagedera Hewayalage Karunaratne
8. Ihalagedera Hewayalage Dharmasena
9. Ihalagedera Hewayalage Odiris
10. Pahalagedera Hewayalage Alpinona
11. Pahalagedera Hewayalage Wijayawardena
12. Pahalagedera Hewayalage Dayananda
13. Pahalagedera Hewayalage Aberatne
14. Pahalagedera Hewayalage Kusuma Ratnaseeli
All of Thambadiya,
Mahapallegama.

Defendants

4. Suduhakuruge Premalatha
Thambadiya,
Mahapallegama
4th Defendant-Appellant

Elamaldeniyalage Piyaseeli,
No. 01, Pilanduwa,
Warakapola.

Plaintiff-Respondent

1. Bothalayalage Marynona
2. Ihalagedera Hewayalage alias
Morawaka Arambayalage
Simandiris
3. Arambayalage Gnanawathi
All of Thambadiya,
Mahapallegama

- 6a. Kaluwadewage Lalitha
Rathnawathie
10/416, Wanawasala,
Kelaniya.

7. Ihalagedera Hewayalage
Karunaratne
8. Ihalagedera Hewayalage
Dharmasena
9. Ihalagedera Hewayalage
Odiris
10. Pahalagedera Hewayalage
Alpinona
11. Pahalagedera Hewayalage
Wijayawardena
12. Pahalagedera Hewayalage
Dayananda
13. Pahalagedera Hewayalage
Aberatne

14. Pahalagedera Hewayalage
Kusuma Ratnaseeli
5. Ihalagedera Hewayalage
Sirineris
All of Thambadiya,
Mahapallegama.

Defendant-Respondents

Before: C.P. Kirtisinghe – J.
Mayadunne Corea – J.

Counsel: Shantha Karunadhara for the Substituted 5th and 9th Defendant-Appellants.
Rohan Sahabandu, PC with Ms. Senanayake for the 4A Substituted Defendant-Appellant.
Plaintiff-Respondent is absent and unrepresented.

Argued on: 12.10.2022

Decided On: 24.11.2022

C. P. Kirtisinghe – J.

The 5th and 9th Defendants – Appellants have preferred the appeal no. CA/321 A of 99 (F) from the judgment of the learned District Judge of Kegalle dated 04.03.1999 and the 4th Defendant - Appellant has preferred the appeal no. CA/321 B of 99(F) from the same judgement. The Plaintiff – Respondent (hereinafter referred to as the Plaintiff) had instituted this partition action to partition the land called ‘Makumbura’ which is more fully described in the schedule to the amended plaint. The Commissioner in this case P.M.G. Munasinghe LS has depicted the corpus as Lot 01 in the preliminary plan no. 145 which was marked X at the trial. There is no corpus dispute in this case and it can be decided that the land shown as Lot 01 in

the preliminary plan is the corpus in this case. According to the pedigree shown by the Plaintiff Dinesa and Siriya had been the original owners of the corpus. Dinesa had a 22/48 share and Siriya had a 26/48 share. After Dinesa's death his rights devolved on Silindu and Doisa. Doisa had transferred a portion of her rights to Singho. Silindu, Doisa and Singho had transferred a 66/192 share to Podi Singho, Simandiris and Abedeva. Podi Singho's rights had devolved on the 1st Defendant Merry Nona. Simandiris' Rights had devolved on the 2nd Defendant and Abedeva's rights had devolved on the 3rd Defendant. The balance rights of Doisa had devolved on the 4th Defendant. The other original owner Siriya's rights had devolved on Abanchiya. Abanchiya had transferred a 6/48 share to Podina. Abanchiya had also transferred a 20/48 share to Podiya. Podina's rights had devolved on the Plaintiff and the 10th to 14th Defendants. Podiya's rights had devolved on the 5th, 6th, 7th, 8th and 9th Defendants.

According to the amended statement of claim of the 5th to 9th Defendants the original owner Denesa had a 7/12 share and the other original owner Siriya owned a 5/12 share. After Siriya's death those rights had devolved on Abanchiya the son. Abanchiya had transferred that right to Podiya and Podiya's rights had devolved on 5th to 9th Defendants. Further the 5th to 9th Defendants had pleaded that the judgement in case number 17265 of the District Court of Kegalle operates as *res judicata* between the parties to this action. At the trial the issues number 2 and 3 were raised on behalf of the Plaintiff on the basis that the rights of the corpus should devolve on the Plaintiff and the 1st to 4th Defendants as shown in the amended plaint. Issue number 5 was raised on behalf of the Plaintiff on the basis that the 5th to 9th Defendants are estopped from challenging the title of the Plaintiff by their conduct.

05. මෙම නඩුවේ 5, 6, 7, 8 සහ 9 විත්තිකරුවන් හට පැමිණිලිකාරියට එරෙහිව, ඇගේ අයිතිවාසිකම් වලට එරෙහිව කරුණු දැක්වීම ක්‍රියාවෙන් ප්‍රතිබන්ධනය වී තිබේද?

On the following trial date the issues number 6th, 7th and 15th had been raised on behalf of the Plaintiff on the same basis.

6. පැමිණිල්ලේ සඳහන් ඩී. පී. පුනාන්දු නොතාරිස් මහතාගේ අංක 1696 දරණ පැමිණිල්ලේ පෙලපතේ දක්වන ඔප්පු පිළිගත හැකි ඔප්පුවක් ලෙස 5,6,7,8,9 විත්තිකරුවන් ක්‍රියා කර තිබේ ද?

7. එසේ නම් එම 16967 ඔප්පුව 5, 6, 7, 8, 9 විත්තිකරුවන් හට වැරදි සහගත ඔප්පුවක් හෝ අනීත්‍යානුකූල ඔප්පුවක් වශයෙන් හැඳින්වීම ප්‍රතිබන්ධනය වේද?

15. 1922.10.24 වෙනි දින කැගල්ල ඉල්ලුම් උසාවියේ අංක 17265 දරණ නඩුවේ තීන්දුව 1950.06.30 වෙනි දින ටී. ඒ. සමරකෝන් නොකාරිස් මහතාගේ අංක 4235 දරණ ඔප්පුවෙනුත්, 1950.06.26 වෙනි දින කේ. බී. කරුණාරත්න නොකාරිස් තැනගේ අංක 26366 දරණ ඔප්පුවෙනුත් අවලංගු භාවයට පත් වී තිබේද?

Following issues had been raised on behalf of the 5th to 9th Defendants.

8. පැමිණිල්ලේ මුල් අයිතිකාර සිරියා මිය ගොස් එම අයිතිය හිමි වූයේ අබන්වියාට ද?

9. එම අබන්වියා 1918.02.03 ලියන ලද 16965 දරණ ඔප්පුවෙන් එම අයිතිය පොඩියා නැමැති තැනැත්තියට පැවරුවාද?

10. එම ඔප්පුව මත පොඩියාට ලැබුණු අයිතිවාසිකම් සම්බන්ධයෙන් කැගල්ල ඉල්ලුම් උසාවියේ නඩු අංක 17265 දරණ නඩුවේ තීන්දුව විනිශ්චිත කරුණක් වේද?

11. එම පොඩියා මිය ගියෙන් එම අයිතිය 5, 6, 7, 8, 9 විත්තිකරුවන්ට 10 වසර කට වැඩි කලකක් අඛණ්ඩව, නිරවුල්ව බුක්ති විදීමෙන් ඔවුන්ට බුක්ති අයිතිවාසිකම් ලැබෙනවා ඇත්ද?

13. එසේ නම් පැමිණිලිකරුට මෙම නඩුව තව දුරටත් ගෙන ගිය හැකිද?

14. පැමිණිල්ලෙන් අයිතිය කියන 1918 අවුරුද්දේ 16967 ඔප්පුවට වඩා මෙම විත්තිකරුගේ හිමිකම් ප්‍රකාශයේ සඳහන් කරන 1918, 16965 ඔප්පුව බලසම්පන්න වේද?

Issue number 14 had been raised on the basis that, the deed number 16965 upon which 5th to 9th Defendants claim will prevail over the deed number 16967 upon which the Plaintiff claims. Issue number 10 had been raised on the basis that the judgement in case number 17265 in the Court of Request in Kegalle will operate as *res judicata* on the question of Podiya's rights.

There is no dispute regarding the devolution of title of Denesa, one of the two original owners. There is also no dispute that the rights of the other original owner Siriya had devolved on his son Abanchiya. Abanchiya had executed two deeds on the same date 03.01.1918. on the deed number 16965 which had been attested before the other deed Abanchiya had transferred a 5/12 share of the corpus to Podiya along with the rights of several other lands. Thereafter, on the deed number 16967 marked පැ2 attested on the same day Abanchiya had transferred a 1/8 share

of the corpus to Podina. Although the deed number 16965 in favour of Podiya had been attested earlier the subsequent deed number 16967 was registered at the land registry prior to the deed number 16965. The learned Counsel for the 5th to 9th Defendant Appellants submitted that the deed number 16967 marked පැ2 will not prevail over the deed number 16965 marked 5V1 by virtue of prior registration as no consideration had passed on පැ2. The learned Counsel who had appeared for Podina in case number 17265 in the District Court of Request Kegalle was of the same view. On that mistaken belief Podina had entered in to a settlement in that case in 1922. In the attestation of the deed 16967 marked පැ2 the notary who had attested the deed had stated that the consideration was not paid before the notary but that does not mean that no consideration had passed on the deed. In the body of the deed the transferor had stated that the consideration was paid to him and he accepted same after counting it. He had stated as follows,

“...පොඩිනාට මෙයින් සින්නක්කරයේ විකුණා අයිතිකර හිමිකර පවරා භාරදී එකී මුදල ඉහත කී මා විසින් සම්පූර්ණයෙන් ගැන භාරගන්නා ලදී”

Therefore, a valuable consideration had passed on the deed number 16967 marked පැ2 and for the same reason it should prevail over the deed number 16965 marked 5V1 by virtue of prior registration. The extracts of the land registry show that both deeds had been registered in the same folio and therefore the question of registering in the wrong folio will not arise. However, the question of priority by prior registration will arise only in a situation where the two deeds are competing with each other. According to the amended pedigree of the Plaintiff these two deeds are not competing with each other and both deeds can be accommodated within the pedigree disclosed by the Plaintiff. According to the amended pedigree of the Plaintiff Abanchiya had inherited a 26/48 share from Siriya. Out of those rights Abanchiya had transferred a 20/48 share to Podiya on the deed marked 5V1. The remaining 1/8 share had been transferred to Podina by the deed marked පැ2. Therefore, the two deeds are not competing with each other and the question of priority by prior registration will not arise. However, the 5th to 9th Defendants had taken up the position that the judgment in the case number 1725 in the Court of request in Kegalle will operate as *res judicata* between the parties in this case. According to the issues number 10, 13 and 14 it was the case of the 5th to 9th Defendants that, by virtue of the judgement in case number 17265 and by operation of the doctrine of *res judicata* Podina ceased to have rights in the corpus and therefore the Plaintiff cannot maintain this partition action. Abanchiya’s rights

should devolve on Podiya on the deed marked 5V1 and that deed should prevail over the deed marked ௪2 in favour of Podina.

By answering the issue number 10 in a negative the learned District Judge has come to a conclusion that a judgment in the case number 17265 does not operate as *res judicata* in respect of the rights accrued to Podiya as Podina had not acted upon on that judgement. Accordingly, the learned District Judge had answered the issue number 13 in the affirmative and come to the conclusion that the Plaintiff can maintain this partition action. By answering the issue number 14 in the negative the learned District Judge has come to the conclusion that, the deed marked 5V1 will not prevail over the deed marked ௪2 in favour of Podina.

The findings of the learned District Judge and the conclusions reached by her can be upheld for the following reasons.

For the reasons stated earlier I have come to the conclusion that, a valuable consideration had passed on the deed number 16967 marked ௪2 and it has been registered in the correct folio. Therefore, if a competition arises that deed should prevail over the earlier deed marked 5V1 by virtue of priority by prior registration. The parties had arrived at a settlement in case No. 17265 ignoring this legal position. It appears from the proceedings in the case No. 17265 the Plaintiff in that case Podina who was a minor at that time had entered in to the settlement with Podiya on the wrong footing that she was unable to prove the fact that the consideration had passed on the deed marked ௪2 in favour of her when the contents of the deed spoke to that fact. Therefore, Podina had entered in to that settlement on a mistaken belief of a question of law namely, whether the deed number 16967 marked ௪2 in favour of her could gain priority by prior registration. After the entry of the aforementioned settlement it becomes a consent decree which has the same force of a decree entered by Court. In the case of **Katiritamby Vs. Parupathipillai reported in 23 NLR 209**, it was held that an erroneous decision on a pure question of law will operate as *res judicata quoad*, the subject-matter of the suit in which it is given, and no further. In that case Garvin A. J. had cited the following passage from Caspersz on Estoppel "A decision which is erroneous cannot have the force of *res judicata* in a subsequent proceeding for a different relief. Or when the cause of action is different, but the matter has already been in controversy, then the estoppel ought to be limited to matters distinctly put in issue and determined previously, and should further be restricted to questions of fact or of mixed law and fact.....Section 537.....But as regards the law, an erroneous

decision does not prevent the Court from deciding the same question arising between the same parties in a subsequent suit according to law.”

The decision in **Katiritamby’s case** was followed by the Supreme Court in the case of **Subramaniam Vs. Kumaraswami 57 NLR 130** in which case it was held that an erroneous decision on a pure question of law will operate as *res judicata* in regard only to the subject matter of the suit in which it is given. It does not prevent the Court from subsequently deciding the same question correctly in another suit between the same parties when the subject matter of the suit is different. Therefore, assuming that the consent decree in the earlier case based on a settlement entered between the parties on a mistaken belief of a question of law and which is contrary to law, contains a decision of Court it cannot operate as *res judicata* as far as the devolution of the rights of Abanchiya and Podina are concerned and it does not prevent the District Court from subsequently deciding the same question correctly in another suit between the same parties.

In cross examination it has been suggested to the 5th Defendant that the plaintiff who claims her title through Podina who has no title according to the earlier settlement had possessed her rights in the corpus and the 5th Defendant had not denied that suggestion. Plaintiff’s husband who testified on behalf of the Plaintiff had stated that the 5th Defendant Sirineris and Jayadewa cultivated this paddy field and gave the Plaintiff her share. The 12th Defendant who is the son of Jemma who had purchased rights from Podina after the settlement stated in evidence that the 5th Defendant Sirineris cultivated the land and gave a share of the produce to Jemma. Later Sirineris gave this share to Jemma’s children. The evidence of the Plaintiff’s husband and the 12th Defendant regarding Sirineris giving a share to them were not taken in cross examination and therefore that evidence can be believed. That shows that the parties to the earlier settlement had not acted upon it and those who had purchased rights from Podina had possessed the corpus without any objections from Podiya’s heirs. The contents of the deed marked ௪௭7 show that Podina had transferred her rights in three lands to Wijehamy on that deed. In that deed Podina had referred to the fact that she derived her title to those three lands on the deed number 16967 marked ௪௭2. In terms of the settlement marked 5V5 Podina had consented to confine her rights only to one land called Alawalagewatta and she had agreed to give up the rights in the other lands she had purchased on

භූ2. But in addition to Alawalagewatta she had sold two other lands which she had acquired on භූ2 and which she had disclaimed in the settlement to Vijehamy on භූ7. Vijehamy in turn had sold those rights to 5th Defendant Sirineris, Jayadewa and Ordiris on භූ8. Sirineris, Jayadewa and Ordiris are children of Podiya in whose favour the earlier settlement was entered. If Podina lost her rights to the other two lands after the settlement and if Podiya became the owner of the other two lands and if the parties had acted upon that settlement, it was not necessary for Podiya's children to purchase the rights of those two lands from Wijehamy who had purchased those rights from Podina. That shows that the parties to the earlier settlement had never acted upon that settlement. Lord Blanesburgh in delivering the judgment of the Privy Council in **Charles Hubert Vs. Edward Keith Walcott A. I. R. 1929 P. C. 289: 118 I. G. 7 (P. C.)** had observed as follows,

“For such a purpose an order by consent not discharged by mutual agreement and remaining unreduced is as effective as an order of the Court made otherwise than by consent and not discharged on appeal.”

Accordingly, an order by consent is as effective as an order made by court otherwise than by consent only if it is not discharged by mutual agreement. Dr. Nand Lal in his treatise **The Law and Doctrine of Res Judicata 2nd edition 1965** observes thus, “But the compromise is a contract between the parties superadded with command of the court but is subject to all the infirmities of a contract.” Professor C. G. Weeramanthry in his treatise **The Law of Contracts** volume 2 at page 710 states that the termination of a contract by agreement may take the following forms.

- A. Release or waiver
- B. Compromise
- C. Novation

He states that the release may however be made tacitly by conduct as where the creditor hands over the instrument of debt to the debtor or where a landlord who has given notice to his tenant of the termination of tenancy thereafter accepts rent without any reservation of his rights or where a tenant abandons premises without any intention of returning to them and the intention to abandon is clear.

For the reasons I have stated earlier one can come to the conclusion that the heirs and successors in title of Podina and the heirs and successors in title of Podiya had not acted upon on the compromise effected between Podina and Podiya in court and they have abandoned the settlement by their conduct. They have waived off the terms of settlement by their subsequent conduct. Therefor the learned District Judge had come to a correct conclusion when she answered the issues number 5, 6 and 7 in the affirmative in favour of the Plaintiff. The learned District Judge has given to the successors in title of Podiya (5th, 6th, 7th, 8th and 9th Defendants) the entire 5/12 share which had been transferred to Podiya by Abanchiya. The learned District Judge had given to the successors in title of Podina the entire 1/8 share which had been transferred to Podina by Abanchiya. Both those deeds can be accommodated within the pedigree disclosed by the Plaintiff. The 5th and 9th Defendants cannot ask the court to prevent Podina's successors in title from getting their undivided rights because of a compromise which the parties and their successors in title had waived off by their conduct. Therefore, the appeal of 5th and 9th Defendants must necessarily fail.

The 4th Defendant-Appellant is claiming rights under Doisa. As shown in the amended plaint Doisa had transferred her balance rights – a 22/192 share to Abiththa who in turn had transferred the same to Rapiel. Rapiel had transferred that share to the 4th Defendant-Appellant Premawathie. It is the case of the 4th Defendant-Appellant that at the trial the deed No. 20746 upon which Doisa had transferred her balance rights to Abiththa had not been produced due to the non-availability of the deed and as a result that share had not been given to the 4th Defendant-Appellant. Therefore the 4th Defendant-Appellant prays that she be allowed to produce that deed and claim for that share. This cannot be done without setting aside the judgement. The Plaintiff's husband who testified on behalf of the Plaintiff had stated in his evidence that the balance rights of Doisa – a 22/192 share devolved on the 4th Defendant. But he had not disclosed the complete devolution. He had not produced any deeds to prove that limb of the devolution but the 2nd Defendant had disclosed that devolution and produced the deeds except the deed No. 20746. But the 2nd Defendant had failed to disclose the balance right which Doisa had transferred to Abiththa. According to the evidence of the Plaintiff's

husband and the amended plaintiff Doisa had transferred a 22/192 share to Abiththa. The learned District Judge has taken into consideration that limb of the pedigree and the evidence led regarding the same. According to what she had observed, as shown in the amended pedigree Dinesa owned a 22/48 share which is equal to 88/192. That right had devolved on Silindu and Doisa. Silindu and Doisa had transferred a 7/16 share (84/192) to Podisingho, Simanderis and Abedewa on 01.03.1999. After transferring a 84/192 share on 01.03.1999, Doisa did not own a balance 22/192 share to dispose on the deed No. 20747. Therefore, the learned District Judge has refused to accept that limb of the devolution and we see no reason to interfere with that finding.

For the aforementioned reasons we see no merit in these two appeals. We are of the view that the learned District Judge had come to a correct conclusion regarding the devolution of title of the co-owners and we see no reason to interfere with that finding. Therefore, we affirm the judgement of the learned District Judge dated 04.03.1999 and dismiss both appeals. We make no order for costs.

Judge of Court of Appeal

Mayadunne Corea – J.

I Agree

Judge of Court of Appeal