

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

In the matter of an appeal under Sec.
755(3) of the Civil Procedure Code.

C.A Case No. 104/99 (F)

D.C. (Tangalla)

Case No. 1616/P

Kithalampitiya Koralage Sandasiri

Ranasinghe of Ihalabeligalla, Beliatta.

14A Defendant Appellant

Vs.

Nakulugamuwa Gamage Gunapala

Ihalabeligalla, Beliatta.

(Deceased)

Wijayapali Hettiarachchi

‘Sampatha’, Ihalabeligalla, Beliatta.

(Substituted Plaintiff Respondent)

And

1. Senarath Arachchige Don Janis of
Kulabedigama, Weeraketiya.
2. Ranasinghe Arachchige Piyasena of
Athgalamulla, Vitharandeniya.
3. Ranasinghe Arachchige Don Samel

4. Ranasinghe Arachchige Done
Siyadoris both of Kulabedigama,
Weeraketiya.
5. Ratnayake Kankanamge Nandawathie
Ihalabeligalla, Beliatta.
6. Kithalampitiya Koralage Sumathipala
of Ovilana, Beliatta.
7. Pantis Wijesinghe of Galagama
Nakulugamuwa.
8. Thuduwe Wattage Somawathie of
Kahawatta, Beliatta.
9. Thuduwe Wattage Karlinahamy
10. Thuduwe Wattage Somawathie
11. Malani Mallika Karunaratne all of
Hunnadeniya, Dickwella.

12.-do- Amarawathie Karunaratne

13.-do- Milie Mallika Karunaratne

14.Hettiarachchige Wijewansa all of
Ihalabeligalla, Beliatta.

Defendant – Respondents

COUNSEL

: S. Kalalpitiya with D.C.

Wijesinghe for the 14A

Defendant Appellant.

W. Dayaratne P.C. for the

Substituted Plaintiff

Respondent.

D.M.G. Dissanayake with

B.C. Balasuriya for the 15A

Substituted Plaintiff

Respondent.

ARGUED ON : 29.04.2015

DECIDED ON : 24.07.2015

P.W.D.C. Jayathilake, J

Trial proceedings of this case had started on 14.06.1983. A.V. Amarasena a retired school principle had been called to give evidence for the Plaintiff's case. His evidence had been led on 28.11.1983 and 16.03.1988. These proceedings appear on the pages 58-62 of original record. Further proceedings of the trial whose proceedings appear on page 63, had commenced on 17.07.1990 before the succeeding judge. At the commencement of proceedings of that day, parties had agreed to adopt the previous proceedings before the new trial judge and another witness of the Plaintiff's case had been called. After leading the evidence of the said witness and another witness, the Plaintiff's case had been closed leading evidence P1 – P4.

The evidence of the 11th Defendant had been led on 07.09.1993 before the next succeeding judge after adopting the previous proceedings before him. The case

for the 11th, 12th and 13th Defendants had been closed leading 11 V 1 and 11 V 2 after the evidence of the 11th Defendant. The evidence of the 14th Defendant had been led on 21.06.1994 and 19.06.1995 before the same trial judge. The next trial proceedings appear on page 82 had commenced before the next succeeding judge on 09.01.1996 (inadvertently the date is written as 09.01.1995). On that day, the evidence of a witness for the 14 Defendant had been led after adopting the previous trial proceedings before the new trial judge. Next appears the judgment on Page 89 dated 15.12.1998 which has been declared by the next succeeding judge of the District Court, Tangalle.

Accordingly, trial proceedings had taken place from 14.06.1983 to 09.01.1995 at intervals that is, for 11 years and 6 months and 25 days, before 04 trial judges. Out of the 5 judges of this case, the 5th judge, before whom no trial proceedings had taken place, has given the judgment.

As minuted in the 90th journal entry dated 05.05.1998 which was the 38th date of trial, after informing the court that no further witnesses would be called, all the parties had consented to adopt the evidence before the new judge and the new judge had accepted the request.

This case has been filed to terminate the co-ownership of the land called "Pansale Kotuwe Kebella", situated in Ihalabeligalla of Giruwa Pattuwa. Mervin Wimalasooriya, licenced surveyor who is the commissioner of the case has

surveyed the subject matter and submitted the plan No. 1525 dated 16.08.1973 as lot 1 01 acre 01 rood 18 perches in extent.

According to the Plaintiff's pedigree, the ownership of this land Don Juwanis had had as the original owner was devolved on the Plaintiff and 1-6 Defendants as stated in the plaint. The 11th, 12th and 13th Defendants had claimed undivided $\frac{1}{4}$ share on a different pedigree. The 14th Defendant had claimed the entirety of the subject matter on the basis that he had acquired the prescriptive title to the subject matter by uninterrupted and undisturbed continued possession for more than 30 years.

The learned District Judge who delivered the judgment has considered the evidence led for the 14 Defendant's case and has expressed his opinion about it. According to him, the 14 Defendant had lied after becoming bemused in his testimony. The learned judge had come to this decision after comparing his evidence with that of Andreyas. (inadvertently mentioned as Dharmadasa). The judge has also observed the evidence of Abesiri Narayana and Don Mathes who were 80 and 78 years old respectively, the witnesses of the Plaintiff's case that Thiloris, the Vidane Ralahami had been residing in this land until his death. Accordingly, the judge had decided that Dharmadasa had no adverse possession until the death of Thiloris.

The deed 14 V 7 is a deed of lease by which 60 coconut trees in this land had been given on lease, a document produced in favour of the 14th Defendant to prove his adverse possession. But the learned District Judge had observed that not only the 14 Defendant Dharmadasa, but also Harriet, the wife of Thiloris had signed as a lessor. The opinion expressed by the learned judge on the item of the said evidence that if Dharmadasa had had adverse possession by that time, there was no need for Harriet to sign, being a party as a lessor to the said deed of lease. The learned judge has come to the conclusion that the 14th Defendant had failed to prove that he had acquired the prescriptive title to the subject matter by the time of this action being instituted. He has investigated into the title of the subject matter accepting the deeds marked P 1 to P 4 and decided that undivided shares of the subject matter shall be allotted in accordance with the pedigree shown in the plaint.

This is an appeal filed by 14 A Defendant Appellant who is the substituted Defendant in room of the deceased 14th Defendant. He has filed this Appeal on the ground that the learned District Judge had decided the case erroneously on facts disregarding the fact that the 14 Defendant had to acquired the prescriptive title the entire land. But at the hearing of this Appeal, the point raised by the learned counsel for the Appellant was that the learned District Judge has given the judgment after taking the evidence of Amarasena into

consideration that the Plaintiff had stated that he was striking off the said evidence. He submitted that the testimony of the 1st witness of the Plaintiff, A.V. Amarasena was *inter alia* incomplete and inadmissible, thus it cannot be considered by court in determining and adjudicating the case. Furthermore, the learned counsel invited the attention of the court that the said incomplete testimony of A.V. Amarasena has been expunged on an application made by the counsel for the Plaintiff on 14.03.1990, thus his testimony and document marked through him could be neither considered nor relied upon in the judgment. This argument is based on the 62nd journal entry on page 32 in the original case record. A photocopy of this page is included at the end of this judgment as a part thereof. It is obvious that the said minute does not draw one's attention on its own unless the special attention is directed.

The counsel for the 14 A, Defendant Appellant in the trial court has filed written submissions on the direction of the court after trial. This submission is filed on Page 49 and 50 in the original case record. There is no reference in the said written submission to the point, raised in this court.

A case record in District Court comprises 5 parts. The 1st part is the journal entries which include the minutes of the procedures. The pleadings are the part II dealing with plaint and statements of claims or answers of the parties. Part III is the trial proceedings which include evidence led in the trial. The orders and/or

the judgments made by the court are the next which is the part IV. The last part that is the 5th includes the documents relevant to the case.

As mentioned earlier, the trial proceedings of this case had taken place for a period of more than 11 years before five succeeding trial judges. All the parties have made an Application before the 5th judge before whom no trial proceedings had taken place, to adopt the previous proceedings and delivered the judgment. The learned judge, accepting the said request of the parties, had gone through the entire trial proceedings and the documents and delivered the judgment. On the face of the trial proceedings, Amarasena's testimony is not an incomplete one as he had been cross examined by counsel for all contesting Defendants and there is no mention about his testimony being expunged in trial proceedings.

Moreover, provided that the parties had had accepted that Amarasena's testimony was expunged, when the case was taken up for trial before the newly come trial judge on 16.03.1988, it should have been a fresh trial. Instead, the parties had requested to adopt the evidence, so far led before the previous judge and to continue the trial before the new trial judge. By that time, there was no other evidence led other than that of Amarasena. As this adoption of evidence had taken place subsequent to the aforementioned journal entry, it has to be decided that this journal entry has no impact on the trial. Therefore, this court rejects the ground of Appeal raised for the Appellant based on the said

point. In addition to that, the learned counsel for the Appellant, in his written submission has emphasized the requirement of the investigation into the title of each and every party before the court in a partition Action. He has referred to the decisions of ***Chandrasena Vs Payasena and others¹***, ***Fahleel Vs Argeen and others²***, ***Cadija Umma and another Vs Don Manis Appu and others³***.

As accepted in the series of the decided cases, it is a fundamental duty of the trial judge of a partition action, to identify the subject matter rightly and investigate the title of co-owners.

Mather V. Tamotharam Pillai⁴, in partition proceedings the paramount duty, is cast by the Ordinance upon the District Judge himself to ascertain who are the actual owners of the land. As collusion between the parties is always possible, and as they get their title from the decree of the Court, which is made good and conclusive as against the world, no loopholes should be allowed for avoiding the performance of the duty so cast upon the Judge.

Peris V. Perera⁵ , The Court should not regard a partition suit as one to be decided merely on issues raised by and between the parties, and it ought not to make a decree, unless it is perfectly satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned.

The learned Judge, after rejecting the claim of prescription of the 14 Defendant had investigated the title to the subject matter on the evidence led in the Plaintiff's case. He has come to the conclusion that the evidence of Amarasena has been corroborated by the deeds marked P1 to P4. Accordingly, the learned judge has decided that the Plaintiff's pedigree has been proved.

In the circumstances, this court sees no reason to set aside the judgment of this case which had been delivered after 25 years of the institution of the Action.

Today, this court dismisses this Appeal after a lapse of 17 years from the judgment and after a lapse of 45 years from the institution of the Action.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

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1. (1999-3 SLR 201)
 2. (2004 1 SLR 48 and 1 LM)
 3. (40 NLR 392)
 4. 6 NLR 246
 5. 1 NLR 362

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S. J. Smith 20/7/17