

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

1. Madibae Ayrene de Soysa Rajapakse
2. Sandadura Nimal de Silva Gunasekara
3. Sandadura Anura de Silva
4. Sandadura Ramya de Silva Gunasekara

All of whom resident at,
Moragalla, Beruwala.

C.A. Case No. 1050/2000 F

D.C. Kalutara Case No.
6308/Partition

PLAINTIFFS

-Vs-

1. Najith Gunaratne Jayathilake
2. Sandadura Susilawathie Silva
3. Seneriya Ranasinghe Chandralal Silva
4. Seneriya Ranasinghe Dayalal Silva
5. Seneriya Ranasinghe Amarawathie Silva
6. Seneriya Ranasinghe Ariyawathie Silva
7. Seneriya Ranasinghe Malani Silva
8. Seneriya Ranasinghe Amarasiri Silva
9. Seneriya Ranasinghe Pushpa Ranjanie Silva
10. P. Winnie Silva
11. Seneriya Ranasinghe Nandis Silva
12. Seneriya Ranasinghe Saralin Silva
13. Dinayadura Sally
14. Sandadura Dayaratne Silva
15. Sandadura Jayaratne Silva

16. Diyagaarachchige Premawathi Perera
 17. Sandadura Susilawathie
 18. Seneriya Ranasinghe Aidin Silva
 19. Sandadura Chitra Lumbini Gunaratne Jayathilake
 20. Sandadura Vineetha Rohini Gunaratne Jayathilake
- All of whom resident at,
Moragalla, Beruwala.

DEFENDANTS

AND NOW BETWEEN

1. Najith Gunaratne Jayathilake
19. Sandadura Chitra Lumbini Gunaratne Jayathilake
20. Sandadura Vineetha Rohini Gunaratne Jayathilake

DEFENDANT - APPELLANTS

-VS-

- 1A. Sandadura Nimal de Silva Gunasekara
 - 1B. Sandadura Anura de Silva
 - 1C. Sandadura Ramya de Silva Gunasekara
 2. Sandadura Nimal de Silva Gunasekara
 3. Sandadura Anura de Silva
 4. Sandadura Ramya de Silva Gunasekara
- All of whom resident at

Moragalla, Beruwala.

PLAINTIFF - RESPONDENTS

2. Sandadura Susilawathie Silva
3. Seneriya Ranasinghe Chandralal Silva
4. Seneriya Ranasinghe Dayalal Silva
5. Seneriya Ranasinghe Amarawathie Silva
6. Seneriya Ranasinghe Ariyawathie Silva
7. Seneriya Ranasinghe Malani Silva
8. Seneriya Ranasinghe Amarasiri Silva
9. Seneriya Ranasinghe Pushpa Ranjanie Silva
10. P. Winnie Silva
11. Seneriya Ranasinghe Nandis Silva
12. Seneriya Ranasinghe Saralin Silva
13. Dinayadura Sally
14. SandaduraDayaratne Silva
15. SandaduraJayaratne Silva
16. Diyagaarachchige Premawathi Perera
17. Sandadura Susilawathie
18. Seneriya Ranasinghe Aidin Silva

All of whom resident at,
Moragalla, Beruwala.

DEFENDANT - RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Lasith Chaminda with Mihiri Abeyratne for the
1st, 19th and 20th Defendants-Appellants.

Senany Dayaratne with Mrs. Eshanthi Mendis
for the 2nd, 3rd and 4th, Plaintiff-Respondents
(also designated as 1A, 1B and 1C Plaintiff-
Respondents)

Jayantha Daluwatte with Ayesha Peiris for the
10th, 11th and 16th a Defendant-Respondents.

Argued on : 12.05.2015
Written Submissions on: 09.06.2015 (2nd, 3rd & 4th Plaintiff-Respondents)
06.09.2013 (1st, 19th & 20th Defendant-
Appellants)
Decided on : 11.01.2016

A.H.M.D. Nawaz, J.

This appeal is preferred by the 1st, 19th and 20th Defendant-Appellants (hereinafter sometimes referred to as “the Appellants”) against the judgment of the District Court of Kalutara entered in this case on 19.09.2000.

The Plaintiff-Respondents (hereinafter sometimes referred to as “the Plaintiffs”) filed this action on 26.11.1993 to partition a land called Penpiriwatte *alias* Achchigewatte situated at Aluthgambadde, Thotumana South, Kalutara, which was depicted as Lots 1, 2 and 3 in Plan No.346 dated 07.03.1994 made by K.D.L. Wijanayake, Licensed Surveyor, on a commission issued by the District Court of Kalutara in this case. The said Plan and its report which are marked as X and XI have been filed of record.

When the case was taken up for trial on 04.10.1996, the parties accepted Lots 1 and 3 shown in the said Plan No.346 as the corpus and Lot 2 should be used as a 6 ft. road along the boundary and the balance land to be taken into the corpus.

It was recorded as an admission that except the client of Ms. Marie Fonseka, Attorney-at-Law, all other parties would agree to accept the pedigree set out in the plaint. Ms. Marie Fonseka’s clients are the 1st, 19th and 20th Defendant-Appellants

before this Court. It is therefore to be noted that except the Appellants, all other parties have accepted the pedigree of the Plaintiffs. Thus the dispute as to the entitlement of the corpus is between the 1st, 19th and 20th Defendants on one side and all other parties including the Plaintiffs on the other.

Since no steps regarding the substitution of the deceased 16th Defendant-Respondent had been taken and the Appellants were absent and unrepresented, the appeal abated on 25.07.2012, but subsequently after a successful re-listing application, the case was fixed for hearing. Thereafter both Counsel made oral submissions and the Counsel for the Appellants stated that they wished to file written submissions. But on 26.05.2015 it was intimated to court that the 1st, 19th and 20th Defendants-Appellants would not be filing their written submissions. Only the Plaintiff-Respondents have filed their written submissions since the argument.

The main ground of appeal of the 1st, 19th and 20th Defendants-Appellants, as stated in paragraph 5 of their petition of appeal dated 14.11.2000, is that the trial Judge had not gone on to investigate their title as shown in their statement of claims and not considered Deed No.5400 dated 26.02.1970 marked as IV3 tendered on their behalf. Since the Court failed to accept IV3 and investigate their title, they moved that the judgment entered in this case be set aside and trial *de novo* ordered.

Only the Plaintiff and the 1st Defendant gave evidence at the trial. Since there is no dispute as to the corpus, the question arises as to title of the parties. As the plaintiffs' pedigree has been accepted by all the parties except the Appellants, it is the duty of the Appellants to prove their title according to their statement of claim.

According to the Plaintiff-Respondents, the 1st Defendant has been given 1/6th share to which he became entitled by IV1. But the 1st Defendant also claims a further share under one *Sandradura Gunaratne Jayatillake Mahagurunnanse*. In support of this claim he sought to mark IV2 and IV3 but IV3 was rejected as it was objected to by other parties. (See proceedings of 28.05.1998 page 5).

The evidence of the 1st Defendant appears to be utterly unsatisfactory. He does not profess to know his own pedigree. He was unable to establish his right to the share of 5/18 claimed by him. He has failed to give evidence in this regard. On the contrary he has admitted that he does not know how he became entitled to his share in the corpus (See page 140 of the Appeal Brief). The 1st Defendant has failed to prove his title to a larger share except the 1/6th share allotted by the Plaintiff in her pedigree. The deed IV3 is torn and tattered and its bits and pieces are pasted on a paper. Nothing is apparent to the naked eye. The names of the transferor and the transferee and the schedule of the land described in this deed are illegible. In this situation how can the Appellants expect a court to investigate their title? Although there is a duty cast on the Court to investigate title of the parties in a partition action, the Court cannot investigate the title of the parties in the dark. The Court can do its investigation only within the limits of pleadings, admissions, points of contests and evidence both documentary and oral. In this case the Appellants have failed to discharge their duty to assist court by providing clear evidence, oral and documentary, to enable the Court to investigate their title. As Anandacoomaraswamy J. (P/CA with Edussuriya J. concurring) declared in *Thilagaratnam v. Athpunathan & Others* 1996 (2) Sri L.R. 66 at 68;

“Court cannot go on a voyage of discovery tracing the title and finding the shares in the corpus for them, otherwise parties will tender their pleadings and expect the Court to do their work and their Attorney-at-Law's work for them to get title to those shares in the corpus.”

On behalf of the Appellants, it was only the 1st Defendant who testified at the trial but admitted in his evidence that he did not know the details as to the share he was claiming. The 19th and 20th Defendants (two of the three appellants) had not given any evidence. The evidence of the 1st Defendant is unsatisfactory and the deed IV3 is illegible and in these circumstances, the rejection of IV3 by the Court is not without any foundation.

The deed marked IV3 was objected to by other parties on the ground that it was neither pleaded in the statement of claim of the Appellants nor was it included in their list of witnesses. This objection was upheld by the trial Judge (See page 132 of the Appeal Brief).

I am of the view that the trial Judge has considered whatever evidence led in this case, on behalf of the Plaintiffs and the Defendants, especially the evidence led on behalf of the 1st Defendant and has come to a correct finding.

One more matter which I wish to mention is that the Appellants, having failed to prove their entitlement to the shares claimed by them in the lower Court, are now seeking to establish their rights in appeal. This procedure is impermissible having regard to the fact that such an exercise involves an appraisal of facts that were not properly led before the District Court. It is more often than not the case that questions of law are raised in appeal on the facts that have already been led in the trial and fresh evidence on facts cannot be raised unless the three conditions as postulated by Denning, L.J in *Ladd v. Marshall* (1954) 1 W.L.R 1489; (1954) 3 All E.R 745; (1954) 98 S.J 870, are satisfied. The three conditions of Lord Denning, L.J followed by a series of cases in Sri Lanka inclusive of *Ratwatte v. Bandara* 70 N.L.R. 231 are worthy of recapitulation. Lord Denning said,

“In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although, it need not be decisive: third, the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible”

See the recent application of Lord Denning’s criteria in *Absolute Lofts South West London Ltd v. Artisan Home Improvements Ltd* [2015] EWHC 2632 (IPEC); Ch D; 17 September 2015.

The application of the above indicia does not arise in this case. In a partition action it is the duty of every party to prove their title to the satisfaction of Court. As against the pedigree of the Plaintiffs, which has been accepted by all the parties except the three Appellants, the pedigree, the documents and the evidence led by the Appellants would not require a trial *de novo*, which would be a needless waste of time, considering the long lapse of time that ensued since the judgment was entered on 19.09.2000.

In these circumstances, I do not wish to interfere with the judgment of the trial Court and affirm its judgment and dismiss this appeal but without costs.

JUDGE OF THE COURT OF APPEAL