

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

H. Winnie Fernando

No. 16, Walana, Panadura.

10th Defendant-Appellant

Case No. C. A. 769(A)/96(F)

D. C. Panadura Case No. 246/P

Vs.

Wijaya Prasanna Malalasekera

No. 102/3, Rosmead Place, Colombo 07.

Plaintiff-Respondent

1. Anoma Maheshwari Wijeratne (nee
Malalasekera)
Lakshimi Wijewardene of No. 8, Elliot Place,
Colombo 08.
2. Chitra Arundathie Ranawake (nee
Malalasekera) (Deceased)
No. 180/12, Polhengoda Terrace, Colombo 05.
- 2a. Samatha Anudhi Ranawaka
- 2b. Kalidasa Kamantha Kumar Ranawaka
- 2c. Ruwan Sumedha Ranawaka
- 2d. Gamunu Pradeep Ranawaka
All of No. 180/12, Polhengoda Terrace,
Colombo 05.
(Substitution effected in the Supreme Court)
3. Pushpa Malalasekera
4. Gehan Malalasekera
5. Sonali Malalasekera
6. Aruni Malalasekera
7. Shiranthi Malalasekera
All of No. 102/3, Rosmead Place, Colombo 07.

8. Kantha Sobhini Gunawardene (nee Malalasekera)
No. 535/1, Nawala Road, Rajagiriya.
9. Arjuna Chandrakeerthi Malalasekera
No. 12A/3, Pangiriwatte Mawatha, Mirihana, Nugegoda. (Deceased)
- 9a. Lakshmi Malalasekera (nee Jayasundera)
No. 12A/3, Pangiriwatte Mawatha, Mirihana, Nugegoda.
(Substitution effected in the Supreme Court)
11. Kariyawasam Godage Sunil
No. 216/3, Pangiriwatte Mawatha, Mirihana, Nugegoda.
12. Edirisinghe Mudiyanseelage Seneviratne Rajapakse
Katumana Road, Homagama.
1st to 9th, 11th & 12th Defendant-Respondents

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Kariyawasam Godage Sunil
No. 216/3, Pangiriwatte Mawatha, Mirihana, Nugegoda.

11th Defendant-Appellant

Case No. C. A. 769(B)/96(F)
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Plaintiff-Respondent

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Nugegoda.
(Substitution effected in the Supreme Court)
10. H. Winnie Fernando
No. 16, Walana, Panadura.
12. Edirisinghe Mudiyanseelage Seneviratne
Rajapakse
Katumana Road, Homagama.

1st to 10th & 12th Defendant-Respondents

Before: Janak De Silva, J.

K. Priyantha Fernando, J.

Counsel:

Ranjan Suwandarathne P. C. with R. D. Perera for the 10th Defendant-Appellant in C. A. 769(A)/96(F)

Sanjeeewa Dasanayaka with Hasan Hameed for the 11th Defendant-Appellant in C. A. 769(B)/96(F)

R. Gooneratne for the Plaintiff-Respondent

Written Submissions tendered on:

10th Defendant-Appellant on 25.03.2011

11th Defendant-Appellant on 13.05.2019

Plaintiff-Respondent on 14.02.2019 and 01.03.2019

Argued on: 21.01.2019 and 21.03.2019

Decided on: 29.10.2019

Janak De Silva, J.

These are two appeals against the judgment of the learned District Judge of Panadura dated 27.08.1996. Parties agreed that one judgment can be delivered in both appeals.

The plaintiff instituted the above styled action in the District Court of Panadura seeking inter alia to partition the adjoining lands called Appukuttiyawatta and Parangiyawatta depicted in Plan No. 8016 dated 03.05.1922 made by B. M. F. Caldera, Licensed Surveyor and containing in extent A.0-R.3-P.2 morefully described in the schedule to the amended plaint dated 08.12.1989. The said lands are also depicted in Plan No. 2604 dated 08.08.1971 made by W. R. B. Silva, Licensed Surveyor as Lots 1 – 6 and contains in extent A.0-R.2-P.36. The plaintiff averred in his amended plaint that –

1. The original owners of the said lands were G. D. Siyadoris Appuhamy and K. D. Bacho Hamine;
2. By Deed No. 350 dated 09.09.1923 (භූ.1), they gifted it to their daughter, G. D. Clarice subject to the condition that if the donee (i.e. G. D. Clarice) contracts an undesirable marriage against the wishes or without the consent of the donors (i.e. G. D. Siyadoris Appuhamy and K. D. Bacho Hamine) then the gift shall become null and void;
3. After the demise of G. D. Siyadoris Appuhamy, G. D. Clarice got married to Dr. G. P. Malalasekera with the consent of K. D. Bacho Hamine;

4. G. D. Clarice died leaving the Last Will and Testament No. 5044 dated 1970.10.11 (පැ.2) and 'පැ.2' was proved in D. C. Colombo Case No. P. O. 897 and the probate was granted to the executors of 'පැ.2' namely the plaintiff and Indrajith Vasantha Malalasekera;
5. By the Executor's Conveyance No. 6755 dated 16.02.1986 (පැ.5), the plaintiff, 1st and 2nd defendants, Indrajith Vasantha Malalasekera, 8th and 9th defendants became entitled to the said lands in the following manner –

Plaintiff	Undivided 1/10
1 st Defendant	Undivided ½
2 nd Defendant	Undivided 1/10
Indrajith Vasantha Malalasekera	Undivided 1/10
8 th Defendant	Undivided 1/10
9 th Defendant	Undivided 1/10

6. Subsequent to the demise of Indrajith Vasantha Malalasekera, his wife (3rd defendant) and his children (4th – 7th defendants) became entitled to an undivided 1/10 share of the said lands as the heirs of the deceased;
7. The 10th defendant is made a party to the instant action as he claims the ownership of the said lands;
8. However, there has been a rei vindicatio action (D. C. Panadura Case No. 12417) between the 10th defendant and G. D. Clarice, the judgment of which declared the said G. D. Clarice to be the owner of the said lands and the said judgment operates as res judicata against the 10th defendant;
9. The 11th defendant is made a party to the instant action as he claims the ownership of the said lands under and by virtue of Deed No. 72 dated 19.06.1985;
10. But there has been a rei vindicatio action (D. C. Panadura Case No. 10875) between the grantor of the said Deed No. 72 (i.e. V. Siripala Fernando) and G. D. Clarice, the judgment of which declared the said G. D. Clarice to be the owner of the said lands and the said judgment operates as res judicata against the 11th defendant;
11. The 12th defendant is made a party to the instant action as he claims the ownership of the said lands under and by virtue of Deed No. 235 dated 02.02.1989.

Accordingly, the plaintiff prayed the said lands to be partitioned among the parties to the action in the following manner –

Plaintiff	Undivided 1/10
1 st Defendant	Undivided ½
2 nd Defendant	Undivided 1/10
3 rd – 7 th Defendants	Undivided 1/10
8 th Defendant	Undivided 1/10
9 th Defendant	Undivided 1/10

The 1st – 9th defendants, by their statement of claim dated 30.11.1992, accepted the plaint and the pedigree of the plaintiff.

The 10th defendant filed his amended statement of claim on 06.07.1993 and took up the position that –

1. S. Joseph Fernando, S. Andiris Fernando, S. Louis Fernando and S. Juwanis Fernando became entitled to the land called Appukuttiyawatta under and by virtue of Deed No. 3572 dated 21.05.1861;
2. S. Louis Fernando died intestate and S. Juwanis Fernando transferred his undivided share to G. D. Siyadoris Appuhamy;
3. S. Joseph Fernando's undivided share devolved to his son, Nomis Fernando and then to Danister Fernando;
4. Danister Fernando transferred his title to the 10th defendant by Deed No. 9893 dated 08.04.1968;
5. S. Andiris Fernando's undivided share devolved to his daughter, Christina alias Podi Nona and then to her two children, Lionel Fernando and the 10th defendant;
6. Lionel Fernando's undivided share devolved to the 10th defendant;
7. The 10th defendant is enjoying and possessing the northern portion of Appukuttiyawatta in lieu of his undivided share;
8. The 10th defendant has been in the undisturbed and uninterrupted possession of northern ½ share of Appukuttiyawatta for over 10 years and therefore, he has prescriptive title to the said portion of land;
9. After entering the decree in D. C. Panadura Case No. 12417, no writ of possession was taken out by the plaintiff of that case (i.e. G. D. Clarice) against the 10th defendant to get him ejected.

The 11th defendant filed his amended statement of claim on 24.07.1991 and averred inter alia that –

1. Under and by virtue of Deed No. 46 dated 13.12.1924 and Deed No. 50 dated 22.12.1924, Lionel Oswin Fernando became entitled to an undivided 3/8 share of the disputed land;
2. He transferred his entitlement to H. Thomas Fernando by Deed No. 76 dated 13.07.1925;
3. Subsequent to the demise of H. Thomas Fernando, his widow transferred undivided five (05) perches to V. Siripala Fernando by Deed No. 601 dated 18.08.1967;
4. V. Siripala Fernando transferred the said undivided five (05) perches to the 11th defendant by Deed No. 72 dated 19.06.1985.

The 12th defendant filed his amended statement of claims on 23.06.1993. He accepted the title of the 10th defendant and further stated that –

1. The 10th defendant transferred undivided sixteen (16) perches to 12th defendant by Deed No. 235 dated 02.02.1989;
2. The 10th defendant and the 12th defendant are the sole owners of the said lands.

The 12th defendant prayed the said lands to be partitioned among the 10th and the 12th defendants in the following manner –

10 th Defendant	Undivided 100/116
12 th Defendant	Undivided 16/116

After a lengthy trial, the learned District Judge entered judgment in favour of the plaintiff and decided that the said lands should be partitioned in the manner laid down in the plaint. Being aggrieved, the 10th and 11th defendants appealed.

The 10th defendant sought to impugn the judgment of the learned District Judge mainly on the ground that after entering the decree in D. C. Panadura Case No. 12417, no writ of possession was taken out by the plaintiff of that case (i.e. G. D. Clarice) against the 10th defendant to get him ejected. The 10th defendant was the 3rd defendant of D. C. Panadura Case No. 12417. The decree nisi (පැ.8) was entered on 19.01.1973 declaring G. D. Clarice to be the owner of the said lands. Judicial eviction is not mere physical eviction. It need not be dispossession by order of court. The certainty of eviction by a court of law is sufficient to constitute judicial eviction [*Mohammado Cassim v. Mahmood Lebbe* (53 N.L.R. 1)]. Where the plaintiff in an action rei vindicatio obtained a declaration of title but no decree for possession was entered in his favour, he is not debarred from obtaining a decree for possession in a subsequent action for ejectment [*Wimalasekera v. Dingirimahatmaya* (39 N.L.R. 25)].

Therefore, I hold that non-execution of the writ of possession does not prevent the successors of G. D. Clarice from claiming the ownership of the said lands by virtue of the judgment in D. C. Panadura Case No. 12417.

The 10th defendant further submitted that he has been in possession of the said lands since 1973 and has acquired prescriptive title to the said lands.

A judgment-debtor against whom a decree for ejectment from a land has been passed acquires a right to a decree under Section 3 of the Prescription Ordinance if, despite attempts made at execution of writ, he continues to remain on the land for a period of over 10 years after the date of the decree without doing any act by which he directly or indirectly acknowledges a right in the judgment-creditor or any other person [*Samuel v. Dharmasiri* (62 N.L.R. 505)].

It is clear, by the evidence both documentary and oral of the plaintiff, that rates to the urban council regarding the said lands were paid by him since 1973. Initially, the 10th defendant stated in his evidence that he paid the rates for both lands. However, no evidence was led to establish the position taken up by him. Also, the evidence shows that the 10th defendant has agreed to accept alternative accommodation provided by the plaintiff. He has not only made a statement to the Mediation Board in 1976 but also made a statement to the police that he is willing to move into the house constructed by the plaintiff. During the trial, the 10th defendant has stated that the said police statement was recorded under duress. However, no evidence was led to show that the 10th defendant attempted or made a complaint to the relevant authorities regarding the alleged duress exerted on him.

Therefore, I hold that the learned District Judge is correct in holding that the 10th defendant has failed to establish his prescriptive title to the said lands.

For the foregoing reasons, I hold that the 10th defendant had no title whatsoever to convey to the 12th defendant by Deed No. 235 dated 02.02.1989.

The 11th defendant claims undivided five (05) perches under and by virtue of Deed No. 72 dated 19.06.1985. According to the statement of claims of the 11th defendant, the grantor of the said Deed No. 72 became entitled to the said undivided portion of land under and by virtue of Deed No. 601 dated 18.08.1967. However, the evidence shows that there has been a rei vindicatio action (D. C. Panadura Case No. 10875) between the grantor of the said Deed No. 72 (i.e. V. Siripala Fernando) and G. D. Clarice, the judgment of which declared the said G. D. Clarice to be the owner of the said lands. In terms of the said judgment, it is clear that V. Siripala Fernando had no title to transfer to the 11th defendant by the said Deed No. 72.

Relying on the decision of *Wimalasekera v. Dingirimahatmaya* (supra) and *Danasekara v. Ranmenika* (53 N.L.R. 497), the 11th defendant contends that subsequent to the judgment of D. C. Panadura Case No. 10875, V. Siripala Fernando continued to be in possession of the said lands and thereby acquired prescriptive title.

Where persons, who are entitled by prescriptive possession to a part of a land, convey an undivided share of the whole land; and where the persons so deriving title pass on the same title to others, then the persons claiming under that title, unless they can show that they themselves have acquired title by prescription, must be bound by the terms of their deed i.e. they cannot be allowed to claim that part of the land to which the original transferee had a prescriptive title [*Fernando v. Podi Sinno* (6 C.L.R. 73)].

Even if it is assumed that V. Siripala Fernando acquired prescriptive title to the said lands subsequent to the judgment of D. C. Panadura Case No. 10875, he has not transferred his prescriptive title to the 11th defendant by the said Deed No. 72. All that is conveyed by the said Deed No. 72 is the title vested with V. Siripala Fernando under and by virtue of the said Deed No. 601. On that basis I hold that the 11th defendant has no entitlement whatsoever to the said lands. Another submission made by the 11th defendant is that the learned District Judge has failed to identify the corpus to be partitioned and that the learned District Judge erred in partitioning two lands in one proceeding.

It must be noted that, at the time the Preliminary Plan No. 725 dated 12.05.1990 was marked, the 11th defendant has not raised an issue regarding the partitioning of two lands. There was no contest regarding the identity of the corpus as well. Further, it must be noted that the 11th defendant made a claim for prescriptive title to the said lands through his predecessor indirectly accepting the lands be partitioned as described by the plaintiff in his plaint. Therefore, I hold that there is no merit in the submission made by the 11th defendant.

I have given careful consideration to the evidence led in this matter and the conclusions thereon of the learned District Judge. I see no reason to interfere with the Judgment of the learned District Judge of Panadura dated 27.08.1996. Both appeals in C.A. 769(A)/1996(F) and C.A. 769(B)/1996(F) are dismissed with costs.

Judge of the Court of Appeal

K. Priyantha Fernando J.

I agree.

Judge of the Court of Appeal