

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

Hathurusinghe Arachchige Ramanie
Damayanthi Hathurusinghe,
Elaboda Road,
Ingiriya.

Plaintiff-Appellant

Court of Appeal Case No:
DCF 1253/1996
DC Horana Case No: **4332/P**

-Vs-

1. Hathurusinghe Arachchige Wimalawathie,
No. 52, Mangala Mawatha,
Walana, Panadura.
(Deceased)
2. Thennakoonlage Dona Karunawathie,
Elaboda Road,
Ingiriya.
3. Hathurusinghe Arachchige Yamin Chandana
Hathurusinghe,
Elaboda Road,
Ingiriya.
4. Hathurusinghe Arachchige Maiththrimurthi
Hathurusinghe,
Elaboda Road,
Ingiriya.

5. Hathurusinghe Arachchige Indika
Hathurusinghe,
Batugampola,
Handapangoda.
6. Hathurusinghe Arachchige Ayoni
Hathurusinghe,
Elaboda Road,
Ingiriya.
(Deceased)
- 6A. T.D. Karunawathie,
Elaboda Road,
Ingiriya.
7. Athukoralage Dhanawardana,
Jayalathgama,
Ingiriya.
(Deceased)
- 7A. Athukoralage Dharmasiri Athukorala,
No. 397, Jayalathgama,
Ingiriya.
8. Mithrasena Ranasinghe,
Jayalathgama,
Ingiriya.

Defendant-Respondents

Before : A.L. Shiran Gooneratne J.

&

Mahinda Samayawardhena J.

Counsel : Rohan Sahabandu, PC with Sayonara Wickramasinghe
for the Plaintiff-Appellant.

Anurangi Singh for the 7th Respondent.

Written Submissions: By the 8th Defendant-Respondent on 05/03/2019

By the 7A Defendant-Respondent on 06/03/2019

By the Plaintiff-Appellant on 18/03/2019

Argued on : 07/11/2019

Judgment on : 28/01/2020

A.L. Shiran Gooneratne J.

This is an appeal from the judgment of the learned District Judge of Horana.

The Plaintiff-Appellant instituted this action seeking to partition the land called "Millagahalanda" more fully described in the schedule to the Plaint.

It is the Appellant's case that Publis Singho, the grandfather of the Appellant by Deed of Gift No. 13403, dated 14/02/1985, marked 'P4', attested by D.D.S. Gunathilake, Notary Public, conveyed his interest in the land to be partitioned to the Appellant. The 7th Defendant-Respondent claims that the

buildings marked 'A' (house) and 'B' (latrine) in the preliminary plan No. 3497, dated 20/09/1992, made by B.L.D. Fernando Licensed Surveyor marked 'X', were built by him. On the other hand, the Plaintiff-Appellant and the 2nd to 6th Defendant-Respondents claim that the said buildings were built by the said Publis Singho, who gifted his undivided $\frac{1}{4}$ share of the land along with the buildings to the Plaintiff-Appellant by virtue of the said Deed marked 'P4'.

The learned District Judge by judgment dated 10/07/1996, decided that the buildings marked 'A' and 'B', built by the said Publis, were allotted to the Appellant and the 2nd to 6th and the 8th Defendant-Respondents in common proportionate to their soil rights. It is the contention of the Appellant that the learned District Judge has failed to appreciate that by the said Deed of Gift marked 'P4', the land has been gifted to the Appellant who became the sole owner of the said buildings.

The 8th Defendant-Respondent, who is also before Court contends that the house, the lavatory pit and the well depicted as 'C', 'D' and 'E' respectively, in the said preliminary plan marked 'X', were constructed by him has been wrongfully allotted in common, to the Appellant and the 2nd to 6th and 8th Defendant-Respondents.

The 7th Respondent argues that, he was in possession of the said buildings for two generations and that throughout the 20 year duration prior to the institution of the instant partition action, he had undisputed and uninterrupted possession to

the disputed buildings. The claim by the 7th Respondent of acquiring prescriptive title to the corpus against the rights of the rest of the parties are mainly based on the fact that the said land was cultivated for over 4 decades by the said Respondent. It is clearly established in evidence that the 7th Respondent occupied the house claimed by him with leave and license of Publis who had constructed the house. The original Court considered the age of trees cultivated in the land sought to be partitioned and the time period relevant to the construction of the house as claimed by the said Respondent, vis. the evidence given by the witnesses and has come to a correct finding to disregard the position taken by the said Respondent. Therefore, the prescriptive rights claimed by the 7th Respondent is unfounded.

There is no dispute in the identification of the corpus or the determination of soil rights between the parties.

Prior to commencement of trial at the District Court, the Appellant and 1st to 6th and 8th Respondents agreed that the allotment of shares be decided with the inclusion of the buildings depicted as 'A' and 'B' in the said plan marked 'X'. Acting on the said premise the Court allotted to each of the parties shares to the undivided extent of land. It is also observed that the learned District Judge's conclusion on the claim put forward by the 8th Respondent regarding the buildings marked 'C', 'D' and 'E' is factually correct, since there is clear evidence on record that the Appellant had objected to the construction of the said buildings. In this

action the 8th Respondent is claiming the house depicted as 'C' to be solely allotted to him on the basis that he constructed the said house.

In *Wanigaratne & Another Vs. Wanigaratne* (1997 2 SLR 267) *Edussuriya J.* held that,

"It is well settled law that a male fide possessor was not entitled under the Roman Dutch Law to compensation for Impensa Utiles, except in cases where the owner of the property stood by and allowed the building to proceed without notice to his own claim, in such a case the male fide possessor would be in the position of a bona fide possessor with the rights of retention."

The order dated 16/09/1991 (Vide page 111 of the brief) is as follows;

"....මෙම සමථය හේතු කොටගෙන මෙම ඉඩම බෙදා වෙනස්කර ගැනීමේදී 8 වන විත්තිකරුට වරණීය අයිතිවාසිකම් නැති වන බවට එකඟ බවද, එසේ වරණීය අයිතිවාසිකම් නොලැබෙන ලෙසට මෙම සමථය ඇතිකර ගැනීමට එකඟ වේ."

It is also important to note that prior to the grant of the said interim order, as a settlement between the parties, the 8th Respondent agreed to forego the preferential rights and for damages to be claimed over the said buildings and therefore, the Court decided that the said buildings claimed by the 8th Respondent should equally be shared between the Appellant and the 1st to 6th and 8th Respondents.

Section 33 of the Partition Law states that;

The surveyor shall so partition the land that each party entitled to compensation in respect of improvements effected thereto or of buildings erected thereon will, if that party is entitled to a share of the soil, be allotted, so far as is practicable, that portion of the land which has been so improved or built upon, as the case may be.

In ***Appuhamy Vs. Sanchihamy (21 NLR 33)***, Court held that,

“Where a co-owner has effected improvements on a portion of the land sought to be partitioned, and such portion is allotted to another co-owner, the compensation to be paid to the co-owner who has effected the improvements is the present value of the improvements or the cost of effecting the improvements, whichever may be less.”

As claimed by the Appellant, exclusion of the buildings marked ‘A’ and ‘B’ from the scheme of partition of the land taking into consideration the value of the house in the undivided portion of the land sought to be partitioned is on the basis of the Deed of Gift marked ‘P4’. However, such concern was not raised as an issue of contention at the trial stage. Therefore, granting the Appellant entitlement to an undivided extent of land to which the action relates to, at this stage, would not only prejudice the rights of the parties before Court, but also to persons who are entitled to the allotment of shares not before Court. In any event, if an adjustment as suggested by the Appellant and the 8th Respondent to allocate

the respective buildings on the payment of compensation as may be agreed and determined by Court to any other person entitled to the said undivided extent of the land, the original Court could consider such adjustment before the final scheme of partition.

In the circumstances, the judgment is affirmed and the appeal is dismissed without costs.

Appeal dismissed.



JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree.



JUDGE OF THE COURT OF APPEAL