

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

Nagoda Gamage Seelawathie
Mulane, Parana Thanayamgioda
Nagoda

C.A. No: 1034/97(F)
D.C. Galle 11166/P

4th Defendant-Appellant.

Vs,

Nagoda Gamage Thelenis of
Mulane, Parana Thanayamgioda
Nagoda

Plaintiff-Respondent.

1. Nagoda Gamage Premawathie
2. Nagoda Gamage Uperis

3. Nagoda Gamage Francis

All of Mulane, Parana
Thanayamgoda

4. Nagodagamage Karunawathie
Ihalagedara, Naththewela,
Wandhuramba.

Defendants-Respondents.

C.A.No.1034/97 (F)

D.C.Galle 11166/P

BEFORE : **M.M.A.Gaffoor,J.**
S.Devika de L.Tennakoon,J.

COUNSEL : M.I.M.Naleem with M.Dissanayake
for the 4th Defendant-Appellant.
Jagath Abenayake for the Plaintiff-Respondent

ARGUED ON : 07/12/2017.

DECIDED ON : 08/05/2017.

M.M.A.Gaffor,J.

This appeal is against a District Court Judgment dated 1997/09/04 delivered in a partition action. The Appellant is the 4th Defendant in the original Court. The appellant and all the other parties including the plaintiff are siblings.

According to the petition of appeal filed by the 4th defendant/Appellant, she challenges District Court judgment only on the ground that the building depicted as item No.2 in the survey plan "X" has not been allotted to her but to the plaintiff.

In addition to the aforesaid ground of appeal, the Appellant's written submission filed in this Court, she challenges the judgment of the District Court Judge on the ground of her prescriptive title as well.

According to the devolution of shares stated in the plaint, plaintiff claim 7/12 share of the property and 1/12 share to each of the 1st to 5th Defendants. At the beginning of the trial, all the parties have admitted the identity of the corpus and the devolution of shares stated in the

plaint. Therefore the contention before this Court by the 4th Defendant/Appellant on the ground of prescriptive title should necessarily fail as she has already admitted the devolution of shares by admission No.2.

Therefore the only matter to be decided by this Court in this Appeal is to see whether the learned trial Judge has misdirected himself in granting the premises No.2 in the survey plan marked "X" to the plaintiff, but not to the Appellant.

Only the plaintiff and the 4th Defendant have given evidence in the trial. 4th Defendant in her statement of claim for number of plantations in the corpus. Plaintiff has admitted in evidence that the 4th defendant is in possession in the corpus for the last couple of decades and for that reason he has consented to give number of plantations to the 4th Defendants, to which other defendants have not objected. The real contention between the plaintiff and the 4th Defendant is with regard to premises No.2 in the survey plan marked "X".

Plaintiff in evidence stated that the building in item No.2 was built by his mother and transferred to him by deed marked “ P7”. Plaintiff and all the others have got equal shares from the Deed of transfer marked as “ P7”, executed by their mother. In the said Deed, there is a specific reference to say that “ the masonry built eleven cubits tiled house” is to the plaintiff while the land is transferred to all the six parties in this case in equal shares.

The contention of the 4th Defendant in evidence that premises No.2 was built by her husband and for that reason the said premises should be allocated to her.

In the surveyor report relate to survey plan marked “X”. it refers to a permanent house is being made in cement without a roof, as Premises No.1 to which 4th Defendant has claimed. The said report refers to a permanent house made in *Woduressa* with local roof- tiles as premises No. 2 which also 4th Defendant has claimed and resides.

It is undisputed from the evidence of the plaintiff and the 4th defendant that premises in item No. 2 is a permanent house made in *Waduressa* with local roof-titles. According to plaintiff, the said house has been built in around 1945 by their mother.

The 4th Defendant in her evidence has stated contrary evidence with regard to the time period in which the said house was built. In examination - in - chief 4th Defendant has stated that the said house was built by her in 1945. When she gave evidence in 1996, her age was 67. If so, she must be around 15 years of age in 1945. Therefore, the evidence that she built the house when she was around 15 years of age is highly improbable. Further, under cross- examination the 4th defendant has stated that the said house was built by her husband after their marriage in 1967. Therefore the evidence of 4th Defendant is *per se controrary* with regard to the premises in item No.2. Furthermore, under cross-examination (at page 87) the 4th Defendant in her answer implied that her mother promised to give the said house to her, but the plaintiff has got his mother to execute the Deed (X7) in secret.

When analyzing the evidence of the plaintiff and the 4th defendant with regard to premises identified as item No.2, the evidence of plaintiff is more reliable. The learned trial Judge has analyzed these evidence carefully and have come to a correct finding.

Therefore, I do not find any reason to interfere with the judgment of the District Court dated 04/09/1997. This appeal is therefore dismissed with costs of Rs.20,000/-.

JUDGE OF THE COURT OF APPEAL

S.Devika de L.Tennakoon

I agree.

JUDGE OF THE COURT OF APPEAL