

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

Marasinghe Pedige Dharmasena (Deceased)
No. 52, Konthraduwatta, Horampella.

Plaintiff

Amarasinghe Arachchige Somawathie
No. 52, Konthraduwatta, Horampella.

Substituted Plaintiff

**Case No. C. A. 1086/1996(F)
D. C. Negombo Case No. 2116/P**

Vs.

1. Kadawan Pedige Karunasena
Galkanda, Horampella.
2. Kadawan Pedige Nandawathie
3. Kadawan Pedige Wijesinghe
Both of L. B. 2, Boralukanda, Hingurakgoda.
4. Kadawan Pedige Edirisinghe
Bolanagama, Horampella.
5. Kadawan Pedige Rathnapali Amarawathie
Horampella, Kudagoda.
6. Kadawan Pedige Aruna Shanthi Ariyasinghe
Horampella, Kudagoda.

Defendants

AND NOW BETWEEN

1. Kadawan Pedige Karunasena
Galkanda, Horampella.
2. Kadawan Pedige Nandawathie
3. Kadawan Pedige Wijesinghe
Both of L. B. 2, Boralukanda, Hingurakgoda.
4. Kadawan Pedige Edirisinghe (Deceased)
Bolanagama, Horampella.
- 4a. Diyunugal Pedige Premawathie
- 4b. Kadawan Pedige Gunasinghe

4c. Kadawan Pedige Piyathunga
All of Bolangama, Horampella.

1st, 2nd, 3rd and 4th Defendant-Appellants

Vs.

Amarasinghe Arachchige Somawathie
No. 52, Konthraduwatta, Horampella.

Substituted Plaintiff-Respondent

5. Kadawan Pedige Rathnapali Amarawathie
Horampella, Kudagoda.

6. Kadawan Pedige Aruna Shanthi Ariyasinghe
Horampella, Kudagoda.

5th and 6th Defendant-Respondents

Before: Janak De Silva, J.

Counsel:

Sapumal Bandara with Raasnidha Rizvi for the 1st, 2nd, 3rd and 4th Defendant-Appellants

S.A.D.S. Suraweera for the Substituted Plaintiff-Respondent

Argued on: 08.03.2019

Written Submissions tendered on:

1st, 2nd, 3rd and 4th Defendant-Appellants on 28.05.2019

Substituted Plaintiff-Respondent on 28.05.2019

Decided on: 14.02.2020

Janak De Silva J.

This is an appeal against the judgment of the learned District Judge of Negombo dated 06.12.1996.

The original plaintiff instituted the above styled action in the District Court of Negombo seeking inter alia to partition Lot B of Meegahawatta in plan No. 170 dated 12.11.1925 made by C. R. Pelsinger, Licensed Surveyor containing in extent A.O-R.O-P.39.19 more fully described in the schedule to the plaint dated 13.12.1984 [page 41 of the Appeal Brief]. The original plaintiff averred in his plaint that –

1. The original owner of the said Lot B was Kadawan Pedige Donja alias John;
2. The said Lot B was transferred several times between the said Donja and numerous other parties and Donja finally became entitled to the said Lot B under and by virtue of Deed of Transfer No. 8092 dated 02.11.1959 attested by S. D. J. Jayawardena, Notary Public (භූමි);

3. By Deed of Transfer No. 8736 dated 24.05.1960 attested by S. D. J. Jayawardena, Notary Public (පැ7), he transferred an undivided 7/10 share to the original defendant (later the 1st defendant) and K. Yasapala who became entitled to an undivided 7/20 share each;
4. The said K. Yasapala died intestate and his widow (A. P. Pemawathie) and his two children (K. Ratnapalie Amarawathie and K. Arunashanthi Ariyasinghe) collectively became entitled to his undivided 7/20 share;
5. The said A. P. Pemawathie and the said K. Ratnapalie Amarawathie transferred their entitlement (i.e. an undivided 21/80 share) to the original defendant by Deed of Transfer No. 2312 dated 04.10.1979 attested by S. K. Chandrasekara, Notary Public (181);
6. The said K. Arunashanthi Ariyasinghe transferred her undivided 7/80 share to the original plaintiff by Deed of Transfer No. 1751 dated 12.09.1984 attested by J. Hewasundara, Notary Public (පැ8);
7. Donja, by Deed of Gift No. 749 dated 29.12.1980 attested by O. M. S. De Fonseka, Notary Public (පැ9), conveyed the remaining undivided 3/10 share to W. Josie Nona and she conveyed it back to Donja by Deed of Gift No. 993 dated 30.12.1982 attested by O. M. S. De Fonseka, Notary Public (පැ10);
8. Thereafter, Donja transferred the remaining undivided 3/10 share to the original plaintiff by Deed of Transfer No. 1334 dated 12.01.1984 attested by J. Hewasundara, Notary Public (පැ11);
9. The original plaintiff, by Deed of Transfer No. 1436 dated 15.03.1984 attested by J. Hewasundara, Notary Public (පැ12), transferred the remaining undivided 3/10 share to Donja and he transferred it back to the original plaintiff by Deed of Transfer No. 1437 dated 15.03.1984 attested by J. Hewasundara, Notary Public (පැ13).

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

| | |
|--------------------|-----------------|
| Original Plaintiff | Undivided 31/80 |
| Original Defendant | Undivided 49/80 |

A commission was issued to survey the land to be partitioned. Accordingly, plan No. 4882 dated 23.02.1986 made by K. A. G. Amarasinghe, Licensed Surveyor [page 61 of the Appeal Brief] and the surveyor's report dated 25.02.1986 [page 58 of the Appeal Brief] were produced and the land to be partitioned was properly identified despite the minor discrepancy in the extent.

The original defendant initially filed his statement of claim on 26.08.1986 [page 52 of the Appeal Brief] and accepted the pedigree of the original plaintiff and he claimed all the buildings situated on the said Lot B.

Pending trial, the original plaintiff passed away and his widow was substituted in his place by the order dated 22.09.1987 [page 65 of the Appeal Brief].

Thereafter, on 19.01.1988, three parties made an application to intervene. It was allowed and they were added as the 2nd – 4th defendants. On 06.09.1988, the 1st – 4th defendants filed an amended statement of claim and took up the position that –

1. The original owner of the said Lot B was not Donja but his father (i.e. Kadawan Pedige Abadduwa);
2. Subsequent to the death of the said Abadduwa, his widow and his five children namely Subaya, Giranis, Santhiya, Obiya and Donja became entitled to the said Lot B;
3. Sitty (i.e. the widow of Abadduwa) transferred her undivided $\frac{1}{2}$ share to Subaya by Deed No. 10507 dated 23.06.1916 attested by T. H. De Silva, Notary Public and Subaya became entitled to an undivided $\frac{6}{10}$ share accordingly;
4. Subaya, by Deed of Transfer No. 16249 dated 23.04.1919 attested by T. H. De Silva, Notary Public (182), transferred the said undivided $\frac{6}{10}$ share to Jayathuwa and he transferred it to R. P. Noyya by Deed of Transfer No. 2950 dated 18.09.1920 attested by D. A. S. Samaraweera, Notary Public (183). The said Noyya, by Deed of Transfer No. 1576 dated 29.09.1926 attested by A. D. C. Amritaweera, Notary Public (184) transferred the said undivided $\frac{6}{10}$ share to Donja.
5. Accordingly, Donja became entitled to an undivided $\frac{7}{10}$ share (by paternal inheritance and under and by virtue of '184'). By Deed of Transfer No. 8736 dated 24.05.1960 attested by S. D. J. Jayawardena, Notary Public (187/185), Donja transferred the said undivided $\frac{7}{10}$ share to the 1st defendant and K. Yasapala who became entitled to an undivided $\frac{7}{20}$ share each;
6. Thereafter, the said K. Yasapala died intestate and his widow (A. P. Pemawathie) and his two children (K. Ratnapalie Amarawathie and K. Arunashanthi Ariyasinghe) collectively became entitled to his undivided $\frac{7}{20}$ share;
7. The said A. P. Pemawathie and the said K. Ratnapalie Amarawathie transferred their entitlement (i.e. an undivided $\frac{21}{80}$ share) to the 1st defendant by Deed of Transfer No. 2312 dated 04.10.1979 attested by S. K. Chandrasekara, Notary Public (181);

8. The said K. Arunashanthi Ariyasinghe transferred her undivided 7/80 share to the original plaintiff by Deed of Transfer No. 1751 dated 12.09.1984 attested by J. Hewasundara, Notary Public (පැර);
9. As aforesaid, the 1st defendant became entitled to an undivided 49/80 share and the original plaintiff became entitled to an undivided 7/80 share;
10. In 1976, Obaya died intestate and his two children (i.e. the 1st and 4th defendants) became entitled to an undivided 1/20 share each;
11. In 1979, Giranis died intestate and his two children (i.e. the 2nd and 3rd defendants) became entitled to an undivided 1/20 share each;
12. In 1978, Santhiya died unmarried, issueless and intestate. His undivided 1/10 share devolved among Donja, the defendants, Subaya's two children (i.e. Kadawan Pedige Romanis and Kadawan Pedige Agilina) and K. Yasapala's two children (i.e. K. Ratnapalie Amarawathie and K. Arunashanthi Ariyasinghe). Accordingly, Donja became entitled to an undivided 2/80 share, the defendants became entitled to undivided 1/80 share each and Kadawan Pedige Romanis, Kadawan Pedige Agilina, K. Ratnapalie Amarawathie and K. Arunashanthi Ariyasinghe collectively became entitled to an undivided 2/80 share;
13. Since Donja only had title to an undivided 2/80 share, what he transferred by the deeds mentioned in the plaint is the said undivided 2/80 share. And therefore, the original plaintiff only became entitled to the said undivided 2/80 share.
14. The 1st defendant is entitled to all the improvements and/or cultivations planted after 1960.

Accordingly, the 1st – 4th defendants sought to add Kadawan Pedige Romanis, Kadawan Pedige Agilina, K. Ratnapalie Amarawathie and K. Arunashanthi Ariyasinghe as parties to the action and the said Lot B to be partitioned in the following manner –

| | |
|---------------------------|-----------------|
| Original Plaintiff | Undivided 9/80 |
| 1 st Defendant | Undivided 54/80 |
| 2 nd Defendant | Undivided 5/80 |
| 3 rd Defendant | Undivided 5/80 |
| 4 th Defendant | Undivided 5/80 |
| Parties to be Added | Undivided 2/80 |

K. Ratnapalie Amarawathie and K. Arunashanthi Ariyasinghe were added as the 5th and 6th defendants. They filed their statement of claim on 06.10.1989. Even though they accepted the pedigree produced by the 1st - 4th defendants, they sought to divide the improvements and/or cultivations proportionate to the corpus.

After trial, the learned District Judge held that the said Lot B should be partitioned in the manner laid down in the plaint. Being aggrieved, the 1st – 4th Defendants-Appellants (1st-4th Defendants) appealed.

Section 25 (1) of the Partition Law reads –

“On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made.”

In a partition case, it is incumbent on the judge to investigate into the title of each party before he arrives at a determination [*Chandrasena v. Piyasena and Others* (1999) 3 Sri.L.R. 201] and it would be the prime duty of the trial judge to carefully examine and investigate the actual rights and titles to the land sought to be partitioned [*Sopinona v. Pitipanaarachchi and Two Others* (2010) 1 Sri.L.R. 87].

The parties have admitted [page 73 of the Appeal Brief] that the land to be partitioned is depicted in plan No. 4882 dated 23.02.1986 made by K. A. G. Amarasinghe, Licensed Surveyor [page 61 of the Appeal Brief]. The said plan No. 4882 describes the land as Lot B of Meegahawatta. According to the surveyor’s report dated 25.02.1986 [page 58 of the Appeal Brief], it is the same land sought to be partitioned by the original plaintiff. All the deeds marked by the substituted plaintiff refer to the said Lot B and shows an unbroken chain of title to the same.

However, a careful perusal of the deeds marked by the defendants (except ‘181’ and ‘භූ7/185’) show that the said deeds refer to a land with the same name but larger in extent with different boundaries. The schedule of ‘182’ refers to three divided land portions called Meegahawatta [page 207 – 209 of the Appeal Brief] containing in extent about one (01) acre, two (02) roods and three (03) roods respectively. The schedules of ‘183’ and ‘184’ refer to a land containing in extent about one (01) acre.

In view of the above, it is very clear that the deeds marked by the defendants (except '181' and 'පැ7/185') do not refer to the land sought to be partitioned by the original plaintiff. If the defendants wished to partition the larger land/s described in the deeds they placed reliance on, it was open for them to follow the procedure laid on in Section 19(2) of the Partition Law.

It must also be noted that '181', a deed by which the 1st defendant got the undivided entitlement of A. P. Pemawathie and K. Ratnapalie Amarawathie (the widow and one of the children of late K. Yasapala), and 'පැ7/185' refer to the land sought to be partitioned. By 'පැ7/185', Donja transferred an undivided 7/10 share to the 1st defendant and K. Yasapala who became entitled to an undivided 7/20 share each. After the demise of K. Yasapala, his widow and one of his children transferred their entitlement to the 1st defendant (i.e. an undivided 21/80 share). The balance portion of K. Yasapala's entitlement was transferred to the original plaintiff by 'පැ8'. If Donja did not have proper title to the land to be partitioned as claimed by the defendants, then the 1st defendant cannot rely on the said deeds in establishing his title to the same.

The contention of the defendant is that the substituted plaintiff has failed to mark a deed (Deed No. 27356 dated 16.02.1944 attested by D. J. Jayawardena, Notary Public) referred to in 'පැ1'. The schedule of 'පැ1' describes the land to be partitioned as a divided partition of Meegahawatta (බෙදා වෙන් කරන ලද B අක්ෂරය දරණ කට්ටිය). When the boundaries of the land to be partitioned are carefully perused, an inference can be gathered that the larger land was later amicably partitioned as the land to be partitioned is bounded by ලිවිනියාට බෙදුන මෙම ඉඩමේ C අක්ෂරය (on the east) and ආර්. බී. සුබයාට සහ සුබ්බන් අයිති මෙම ඉඩමේ A අක්ෂරය දරණ කට්ටිය වෙතස් වීමට දැනට තිබෙන ගම්සභා පාර (on the west). Even though the defendants have taken up the position that the above mentioned names do not belong to any of the siblings of Donja [page 8 of the written submissions dated 28.05.2019], it must be noted that the defendants have failed to produce any cogent evidence during the trial to show that Donja had four siblings named Subaya, Giranis, Santhiya and Obiya.

In *Appuhamy v. Premalal and Eight Others* [(1984) 1 Sri.L.R. 299], Moonemalle, J. held:

*"An amicable division can be given effect to (a) by a deed of partition and a partition plan where all the co-owners sign agreeing to the division or by a cross conveyance executed by each of the co-owners whereby the notarial deeds would be the best evidence of the termination of the common ownership; or (b) by proving that each of the co-owners entered into separate possession of the divided portions allotted to each and that **the co-owners possessed their respective divided portions for a period of at least ten years***

undisturbed and uninterrupted so that the common ownership would in law come to an end." [Emphasis added]

As I observed earlier, an inference can be gathered by the contents of 'පැ1' that the land sought to be partitioned is a divided partition of a co-owned larger land and it is established by evidence, both oral and documentary, that Donja was in quite possession of the same for a period of at least 30 years ['පැ1' – 'පැ4', page 98 of the Appeal Brief].

Although there is a duty cast on the court to investigate title in a partition action, the court can do so only within the limits of pleadings, admissions, points of contest, evidence both oral and documentary. The court cannot go on a voyage of discovery tracing the title and finding the shares in the corpus for them [*Thilagaratnam v. Athpunathan and Others* (1996) 2 Sri.L.R. 66].

As I observed earlier, none of the deeds marked by the defendants (except '181' and 'පැ7/185') refer to the land sought to be partitioned. During the cross-examination, when the 1st defendant was asked about the deeds marked by him and their references to different lands, he has failed to give an answer or to make any clarification [page 120 of the Appeal Brief]. Even though the defendants claim that the original owner of the land to be partitioned is Abadduwa and it devolved to his widow and his children subsequent to his demise, no evidence was placed before the court to substantiate this position. Also, the defendants failed to lead evidence, both oral and documentary, to support the pedigree produced by them.

On the other hand, the documents produced by the substituted plaintiff as well as the evidence led on behalf of the substituted plaintiff clearly establishes the pedigree pleaded by the original plaintiff.

I have given careful consideration to the evidence led during the trial and the conclusions thereon of the learned District Judge. Having correctly evaluated and examined the evidence led, both oral and documentary, the learned District Judge has very specifically and accurately calculated the share entitlements of the parties to the land to be partitioned.

For all the foregoing reasons, I see no reason to interfere with the judgment of the learned District Judge of Negombo dated 06.12.1996.

The appeal is dismissed with costs.

Judge of the Court of Appeal