

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

Court of Appeal
Case No.CA 1317/99 (F)
D.C. Galle
Case No: P/8817

Amarasiri Matarage Karunawathie Vitharana of
Gallandala,
Udugama.

Substituted-Plaintiff

- Vs -

1. Gamage Semanalis Wijenayaka.
2. Diddenipotha Matharage Sawnaris.
3. Koralagama Pathirage Samel Appu.
4. Jalathge Dhanapala.
5. Jalathge Rupawathie.
6. Koralegama Pathirage Upasena.
7. Diddenipotha Matharage Francis.
8. Jalathge Upasena..
9. Koralegama Pathirage Alis Nona.
10. Athukorala Aratchige William Seneviratna.
11. Jalathge Hinni John.
12. Henpita Jagoda Aratchige Pemadasa, all of
Gallandala, Udugama.
13. Diddenipola Matarage Sammy of
Akmeemana, Galle.
14. Udugama Jalathge Gunapala,
Central Hospital, Galle.
15. Udugama Jalathge Seelawathie of
Gallandala, Udugama.
16. Korale Hewage Ciciliya of
Gallandala, Udugama.
17. Korale Pathirage Piyasena of
Gallandala, Udugama.
18. Poddiwala Hewage Francis.
19. Koralega Pathiranage Podihamy.
20. The Attorney General.
21. Panangala Liyanage Piyasena.
22. Victor Wijesekara of
Heoock Watta, Hiniduma.
23. U. Ariyawathie.
24. W.K. Cathirinahamy.
25. Korale Pathirage Eddicnona.
26. Korale Pathirage Hinnihamy.
27. Korale Pathirage Jenenona.

- 28. Korale Aratchchige Jayasena Senevirathne.
- 29. Diddenipotha Matharage Handy Singho.
- 9A. Galhenage Wimalasena.
- 3A. Wannu Aratchci Leelawathie of
Kotagoda, Udugama.
- 30. Athukorala Aratchchige Piyasiri Seneviratna.
- 31. A.K. Dharmasena.
- 28A. Acilin Seneviratna.
- 11A. Panangala Liyanage Rosina.
- 32. Pathirage Podihamy.

Defendants

AND

- 4. Jalathge Dhanapala, of Gallandala,
Udugama.
- (Deceased) 5. Jalathge Rupawathie, of Gallandala,
Udugama.
- 5A. Jalathge Dhanapala, Gallandala, Udugama.
- (Deceased) 11. Jalathge Hinni John.
- (Deceased) 11A. Panangala Liyanage Rosina, of
Gallandala, Udugama.
- 11A1. Jalathge Sirisena Jayalath,
Jayalath Sevana, Gallandala, Uduagama,
Galle.
- (Deceased) 23. U. Ariyawathie.
- 23A. Galhena Appuhamylage Upul Chaminda
No.136, Idangodawatta, Galle.
- (Deceased) 24. W.K. Cathirinahamy.
- 24A. Jalathge Sirisena Jayalath,
Jayalath Sevana, Gallandala, Uduagama,
Galle.

Defendant-Appellants

VS.

Amarasiri Matarage Karunawathie Vitharana of
Gallandala, Udugama.

Substituted-Plaintiff-Respondent

- (Deceased) 1. Gamage Semanalis Wijenayaka.
- 2. Diddenipotha Matharage Sawnaris.
- 2A. Korale Pathirage Hinnihamy.
- 2B. Diddenipotha Matharage Sunil Santha.
- 2C. Diddenipola Matarage Dharmadasa.
- 3. Koralegama Pathirage Samel Appu.
- 6. Koralegama Pathirage Upasena.
- 7. Diddenipotha Matharage Francis.
- 8. Jalathge Upasena.

9. Koralegama Pathirage Alis Nona.
10. Athukorala Aratchchige William Senaviratna.
12. Henpita Jagoda Aratchchige Pemadasa, all of Gallandala, Udugama.
13. Diddenipotha Matarage Sammy, of Akmeemana, Galle.
- (Deceased) 14. Udugama Jalathge Gunapala, Central Hospital, Galle.
- 14A. Jalathge Sirisena Jayalath Jayalath Sevana, Gallandala, Uduagama, Galle.
15. Udugama Jalathge Seelawathie of Gallandala, Udugama.
16. Korale Hewage Ciciliya of Gallandala, Udugama.
- (Deceased) 17. Koralegama Pathirage Piyasena of Gallandala, Udugama.
- 17A. Kurupanawa Gamage Karunawathie, Koralegama, Panangala.
- 17B. Koralegama Pathirage Priyanthi, Koralegama, Panangala.
- (Deceased) 18. Poddiwala Hewage Francis of Gallandala, Udugama.
- 18A. Podiwala Ilewage Premalal, Gallandala, Udugama.
19. Koralegama Pathiranage Podihamy, Gallandala, Udugama.
20. The Attorney General.
21. Panangala Liyanage Piyasena, Gallandala, Udugama.
22. Victor Wijesekara of Heook Watta, Hiniduma.
25. Korale Pathirage Eddienona.
- (Deceased) 26. Korale Pathirage Hinnihamy.
- (Deceased) 27. Korale Pathirage Jenenona, all of Gallandala.
- 27A. Hiniduma Liyanage Ranjith Sarath Kumara, Hiniyawala, Katukenda, Neluwa.
28. Korala Aratchchige Jayaseba Senevirathne.
29. Diddenipotha Matharage Handy Singho.
- 9A. Galhenage Wimalasena all of Kotagoda, Udugama.
- 3A. Wannu Aratchci Leelawathie of Kotagoda, Udugama.
30. Athukorala Aratchchige Piyasiri Seneviratna, of Gallandala, Udugama.
31. A.K. Dharmasena, of Gallandala, Udugama.
- 28A. Acilin Seneviratna.

32. Pathirage Podihamy.

Defendants-Respondents

AND

Jalathge Sirisena Jayalath,
"Jayalath Sevana"
Gallandala
Udugama
Galle.

Petitioner

- Vs-

Diddenipatha Matarage Sunil Shantha,
Near the Ga/ Gallandala School
Gallandala
Panangala.

Before: Janak De Silva J.

&

N. Bandula Karunarathna J.

Counsel: B.O.P. Jayawardena with Oshadi Rodrigo for 4th, 5A, 11A1, 23A, 24A, Defendants-Appellants.

Rohan Sahabandu PC, with Sachini Senanayake for the Plaintiff-Respondent

Written Submissions: By the 4th, 5A, 11A1, 23A, 24A, Defendants-Appellants on 05.03.2020

By the Substituted-Plaintiff-Respondent on 01.02.2019

By the 4th, 5A, 11A1, 23A, 24A, Defendants-Appellants on 11.01.2019

Argued on: 23/01/2020

Judgment on: 25/11/2020.

N. Bandula Karunarathna J.

This action was instituted by the original Plaintiff on the 2nd of May 1983, seeking a partition of the land called "Gallandalayaya" alias "Gallandala Owita" described in paragraph 2 of the Plaint, among the Plaintiff and the 1st to 13th Defendants.

The Plaintiff's contention was that there were nine original owners to the said land namedly, Korale Pathirage Gedohamy, Korale Pathirage Podihamy, Korale Pathirage Andris, Korale Pathirage Udarishamy, Korale Pathirage Salman, Korale Pathirage Jamis, Korale Pathirage Apsara, Korale Pathirage Arnolis and Jalathge Lairis, and each of them were entitled to undivided 1/9th share.

The preliminary survey was done by G.H.A.A. de Silva, Licensed Surveyor, who made the plan and the report bearing number 192 dated 20.11.1983. The said plan at page 170 of the brief and the report at page 154.

On a settlement arrived at, between the parties on 30.04.1984 the same surveyor was called upon to depict a six-foot road way along the Northern Boundary of the land shown in plan 192, and the said alteration was done in the plan 192A made by the same surveyor, vide the said plan 192A at page 160 of the brief and the report at page 161.

Thereafter, 1st to 13th and 25th to 27th Defendants requested for a commission to superimpose the title plan bearing number 208517 on the preliminary plan. The said commission was executed by the Licensed Surveyor S.K. Karunasekera, who returned the plan and the report bearing number 215 dated 20.08.1995.

On a commission taken out by the 29th Defendant, the Surveyor General had prepared the plan bearing number 85/23 dated 22nd April 1986, depicting a superimposition of the F.V.P.528 on the preliminary plan 192. The Surveyor General's plan is at page 172 of the brief.

At the commencement of the trial parties agreed to exclude lots E, F, G, H, J, K, L, M, N, O, P and R of the said Surveyor General's plan as a road way belonging to the state, and to treat lots A, B and C of the said plan as the corpus in the present case.

The evidence given by the Plaintiff has not been challenged by the Defendants about claiming 1/9th share by the Plaintiff with regard to the documents marked by the Plaintiff in the trial. On perusing the cross examination of the Plaintiff, it cannot be said that the Defendants were able to show that the Plaintiff does not get 1/9th share but only 1/18th share. There was No documentary evidence to support this and no oral evidence was given in respect of this issue. If is the Defendant's argument that through their statements of claim. the Plaintiff gets only 1/18th share. If the Defendants do not lead evidence, this court cannot go on a voyage of discovery. Even in the Petition of Appeal this has not been elaborated, by the Appellant.

On the available evidence the District Court held with the Plaintiff.

In Thilagaratnam Vs. Athpunathan and others [1996] 2 Sri L.R. 66 it was held: -

Although there is a duty cast on 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 documentary and oral.

Per Ananda Coomaraswamy, J

"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 Attorneys-at-Law's work for them to get title to those shares in the corpus.

The Plaintiff produced a chain of deeds to prove his title. The Learned District Judge has examined the said deeds and given cogent reasons as to why he is accepting the deeds. The Appellants did not suggest that, the deeds were wrong invalid and did not convey the extents mentioned. Perusal of the deeds show that, what the Plaintiff says is correct.

The Appellants in their joint Statement of Claim gave the Plaintiff 1/18th share.

The contest between the Plaintiff and the contesting Defendants-Appellants irrespective of the pedigree centers whether the Plaintiff gets 1/9th or 1/18th. Although in the Statement of Claim this portion was taken the Appellants did not give evidence. The Defendants-Appellants further complaint that their witness list was rejected and therefore they could not adduce proof.

It was decided in Pushpa V Leelawathie And Others 2004 (3) SLR 162:

1. In terms of section 23(1) Partition Law list of documents has to be filed not less than 30 days before the date of trial.
2. When section 23(1) is considered with section 25(1) it is clear that the date of trial is not necessarily the first date on which the case is fixed for trial but would also include any date to which the trial is postponed.
3. As the additional list of witnesses was filed on 23.12.1998 it is very clear that the statutory limitation under section 23(1) and section 25(1) of the partition act has not complied with by the Defendant-Appellants. The case came up for further trial on the 07.01.1999. This reflex the additional list was filed within 14 days before the next trial date.

The learned District Judge correctly disallowed the additional list of witnesses file by the Defendant-Appellants as it was tendered after the Plaintiff's case was closed on the 17.11.1998.

They did not canvass this order at that time in the Court of Appeal. Furthermore, if the list was rejected the Defendants Appellants who were parties did not choose to give evidence and have not stated as to why they did not give evidence. The Learned District Judge after having perused the Deeds and the other evidence gave shares to each of the Appellants, and left 202/864th shares allotted. That is on the basis ownership to the allotted shares were not proved. The contest appears to be between the Appellants and the Plaintiff as to the correct share that the Plaintiff entitled to 1/9th or 1/18th. To come to the conclusion that the Plaintiff has only 1/18th shares of the land there were no evidence. When the Appellants did not give evidence and not proceed with their case, with diligence.

The Defendants Appellants had not shown how those rejected documents play a role for the Appellants to show their contention. Defendants Appellants without seeking to prove their portion before the trial court, now uses surmises and states that the Plaintiff ought not to get 1/9th share. The court had gone on the pedigree of the Plaintiff as there was no evidence as to the other pedigree. In any event the Appellants and the Plaintiff had got shares 1/9th for the Plaintiff and the Defendants what they claimed. The contesting Appellants, had not shown to the trial judge that these boundaries are different or that the shares as claimed by the Plaintiff as well as the other Respondents should not be given.

MOST IMPORTANTLY, proceedings of 17/11/98 reflect that all parties had agreed that, shares should be given in a particular way.

According to the points of contest raised by the parties, the main issue was with regard to the original owners. Point of contest number one by the Plaintiff was on the basis that there were nine original owners. However, very significantly eight of them had one surname and only Lairis had a different surname. The contention of these Defendants-Appellants and one to thirteen Defendants was that there were two original owners called Jalathge Lairis and Jalathge Babahamy who was entitled to undivided half each share each. The said Babahamy was married to a person who had the surname "Korala Pathirage" and the eight of the original owners mentioned by the Plaintiff were the children of the said Jalathge Babahamy. Therefore, their contention was that Jalathge Lairis who has been named as one of the original owners by the Plaintiff, in fact was entitled to undivided half share. These Defendant's pedigree emanates from the said Jalathge Lairis.

At the trial the Plaintiff testified on her own behalf and closed the case producing documents marked P1 to P5.

Thereafter, these Defendants-Appellants moved to call a witness whose name has been in the list dated the 23rd December 1998. However, the court did not permit to call the said witness. It was argued that the said order of the Learned District Judge is erroneous which could be reviewed by this Court even at this stage. This is a partition case where paramount duty is case on court to investigate title of the parties and allow declaration. The said certificate of no claim by the state was issued on an application made by Jalathge Lairis and others. Although the Learned District Judge had placed heavy reliance on the said document, to come to the conclusion that there were nine original owners who had equal shares, the said document cannot be treated as conclusive proof of the said fact. The more prudent conclusion of the said document would be that the others mentioned there, in are the children of Babahamy who had a different surname.

In this particular partition case, there is dispute regard as to who the owners are even though the Plaintiff says that there were 9 and that this Appellant says there were only 2 but the same parties in the pedigree of the Plaintiff were to get shares the parties agreed that, the Plaintiff gets 1/9th shares. After the said settlement parties cannot revile from that settlement they agreed. Now in the appeal they say something different that the Plaintiff should not get 1/9th or he should not get anything. The Defendants are estopped from denying what they stated to court. The Appellant says that the appeal should be dismissed on that ground as one cannot blow hot and cold.

This is yet another reason for this appeal to be rejected for the Appellants as are seeking to mislead this Court without making any reference to the settlement arrived on 17/11/1998.

The Plaintiff-Respondents has been mentioned that after the refusal by court of the application made on behalf of the Appellants to lead the evidence of their witness, they have not opted to lead the evidence of a party to the case. The Plaintiff says that the said submission is erroneous because the 5th Defendant-Appellant has given evidence on behalf of the Appellant's. In the said evidence she has clearly mentioned the position of these Appellants. However, the Plaintiff's contention that the District Court need not go on a voyage of discovery tracing the title and finding the shares of the parties, will not apply to the facts and circumstances of this case

because the contention of the appellants was clearly set down in the pleadings, in the issues and in the evidence adduced in the case. It is the grievance of the Appellants that although their position is established properly as aforesaid the Learned District Judge has failed to carefully analyze the pleadings and the evidence and come to the correct conclusion. In the circumstances of this case the question of going on a voyage of discovery would not arise.

The Plaintiff-Respondents has placed heavy reliance on a purported settlement appearing at page 199 of the Appeal Brief. There was an indication by some of the parties with regard to the undivided shares that they were prepared to accept, these Defendants-Appellants have never been parties to the said indication of shares. Further no party including these Defendants-Appellants have signed a so-called settlement. The parties including the Plaintiff-Respondent had invited the Court to decide the case on the points of contest raised by them. That position is further confirmed when the Plaintiff-Respondent, in the middle of his evidence raised the point of contest No.17. That goes to indicate that there was no such settlement between the parties. It is further submitted that even if there was a settlement between the parties the Court will not be absolved from its duty of investigating title.

The Appellant's predecessor who had made a claim before the government agents as per the certificate bearing number 2436 marked "P6", has disposed of his rights by the deed produced marked "4v2". That is the deed bearing No.21236 dated 16th December 1918. In that deed he has mentioned the correct share that he was entitled to and claimed before the Government Agent.

When this case was taken up for hearing on 17.11.1998 all the parties accepted that the subject matter of this case should be the E, F, G, H, J, K, L, M, N, O, P and R sections of the plan mentioned in the plan of the Surveyor General G / P / 85/23 filed in this case as government road access. It was also agreed that the access road should be kept the same. The parties also agreed that these roads should be used as road access at the final breaking of the case. Further, it has been accepted that the subject matter of this case consists of the letters A, B and C of the Surveyor's plan mentioned above.

Accordingly, the subject matter of this case consists of the letters A, B and C of the Surveyor's G / P / 85/23.

The plaintiff in this case testified that according to the plaintiff in this case, the nine original owners should be entitled to 1/9 of the undivided land, and that the plaintiff should be entitled to the balance 1/9 portion of the nine persons named Gedohami. The plaintiff also stated that he did not know under what rights the defendants enjoy the rights of other heirs from 01 to 13 as indicated in the plaint.

During the testimony of Jalatte Rupavathi, who testified on behalf of the Defendant in this case, the plaintiff stated that presented the document marked P-6 which is said to be the Government Grant, stated by the defendant. The defendant accepted the document. During the testimony of Jalatge Rupavathi the Plaintiff produce and marked a document named P-6 and the witness accepted it. It is said to be a government grant although the witness Jalatte Rupavathi and the defendant who are challenging the Plaintiff Pedigree was having the impression about this P-6 document as a government grant. But it appears that the document marked P-6 was a "Certificate of Crown having no claim to the peace of land called Gallandolawatta." This shows

that P-6 documents cannot be considered as a government grant. The said documents speak only about that the government does not claim any right to the land subject to the present law suit. The request was made from the government agent of Galle on the 04th July 1908 by Jalatge Leiris and others. If this land belonged to Jalatge Leiris and Babyhamy only, then the P-6 documents should have been written in a different way. Therefore, it is my view that the Plaintiff position has been proved by the evidence.

Considering that document, it appears that it is not a government grant, but a document stating that the government does not claim rights to the land subject to this lawsuit at the request of Jalatte Lyris et al. Hr 6 refers to Jalatte and others. According to the plaintiffs, not only Lairis and Baby Nona of Jalatte, but several others also enjoyed the land. Defendant Aki Rupavathi has admitted this in cross examination. Accordingly, it is clear that the original owners in this case are not Lairis and Babinona of Jalatte, as the defendants claim.

The plaintiff in this case and all the other defendants who have testified in this case have stated that according to the plaint, there are 9 original owners of the land involved in this case and they enjoy their rights.

The plaintiff in this case is entitled to the rights of Gedohamy, who owns 1/9th shares of the plaintiffs, on the basis of the documents submitted as P-1 to P-6. There is no dispute about that. However, the examination of the document No. 4 V 1 shows that the 10th Defendant has only 1/16th of the rights of Apsara. who owns 1/9th on the deed 4 V 1. Accordingly, the 10th Defendant should get only 9/144th shares. The remaining 7/144th share should be left unallotted.

Although it has been stated that the rights of the 10th Defendant has been transferred to the 28th Defendant, the relevant deeds have not been submitted to the court to prove it. I do not wish to make any order in this regard and the 10th Defendant should be entitled to the aforesaid shares.

The most important thing to consider in this appeal is whether all 9 original owners are having equal shares or Jalathge Lairis and Jalathge Babahamy is entitled for undivided ½ shares each. According to the available evidence, the learned District Judge as accepted the Plaintiff's version therefore, the contesting Defendants 4, 5A, 11A, 23A, and 24A Defendant-Appellants argument cannot be considered as successful on the evidence available before the Trial Judge.

It is evident that on the 17.11.1009 when the case was taken of trial the learned District Judge has specifically recorded the following sentence;

“මෙම අවස්ථාවේදී මෙම නඩුව පහත සඳහන් පරිදි කොටස් හිමිකර ගැනීමට පාර්ශ්වකරුවන් එකඟ වේ.”

After the said settlement was recorded the Learned Counsel who appeared for the 4, 5, 11A, 24 and 25th Defendant could have raised an objection if they were against for the settlement on that day. It looks like that they all agreed to get the shares according to the Plaintiff pedigree on that day but later on the Defendant-Appellants may have got a second thought after the Plaintiff's evidence was concluded. Even though the non of the parties have signed the case record to confirm the settlement agreed upon on the 17.11.1998.

After the settlement was recorded, parties can not resile from that settlement which they agreed.

The plaintiff has raised issue the 17th on the improvements in the land in question in this case and thereby raised the question as to whether the tank should go with the ground or be claimed by the plaintiffs before the surveyor. here is no evidence as to who cultivated on this land. Therefore, I also decide that the cultivation of 30-40 year old 14 coconut trees and 20-30-year-old 20 arecanut trees should go with the ground. The 18th issue Debates on the Improvements were later settled and I decide that the Plaintiff should own 8-10 year old 12 coconut trees related to the same issues. The remaining buildings on this land and all improvements should be owned by the parties as per the testimony of the Plaintiff.

It is my view that on account of the totality of evidence the finding of the Learned Trial Judge is the only finding any judge could have arrived at, in considering the evidence given by the parties.

There is no basis whatsoever for the Appellant to prefer this appeal except with the ulterior motive of prolonging the finalization of this litigation which in fact commenced on or around 02nd of May, 1982 and at present it has taken almost 38 years.

There is no merit in this Appeal.

Therefore, the judgment of the Learned District Judge dated 12.03.1999, is affirmed.

Thus, this Appeal is dismissed with cost.

Judge of the Court of Appeal

Janak De Silva , J

I agree.

Judge of the Court of Appeal