

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

G. A. Panis of
Madiwatta, Meegahatenne

PLAINTIFF-APPELLANT

C.A 406/1997 (F)
D.C Matugama 1645/P

Vs.

1. Pulanhinige Jayasena
2. K. G. Punchi Singho **(Deceased)**
- 2A K. G. Somawathie all of
Madiwatta, Meegahatenne

DEFENDANTS-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: D.M.G. Dissanayake for the Plaintiff-Appellant
Sanath Weerasinghe for the Defendant-Respondents

ARGUED ON: 22.09.2011

DECIDED ON: 15.11.2011

GOONERATNE J.

This is an appeal from a judgment in a partition suit. The judgment was delivered on or about 26.5.1997. Even the prayer to the Petition of Appeal is incorrect as it reads as judgment delivered on 26.5.1977. Plaint in the action was filed on or about January 1987 (as shown in D.C seal). But only 1987 appears (just below the caption) in the place where the date of plaint should be written. Parties proceeded to trial on 11 points of contest. Court notes that as journalized in the journal entry of 22.9.2011 counsel for the Appellant though marked the case ready, was not available to make submissions when court took up the case for argument. As such counsel for Defendant-Respondent assisted court by addressing court with his submissions supporting the judgment of the learned District Judge. This court regrets the conduct of counsel for Appellant for whatever the reason for his non appearance at the argument stage, in this appeal.

I must at this point of this judgment refer to the case reported in 14 NLR 255 & 14 NLR 233. This court could have rejected and dismissed this appeal? If that be so, case could not be reinstated?

14 NLR 255.....

Where there was no appearance for appellant when an appeal was called, and the case was allowed to stand at the bottom of the cause list for the day, and where there was no appearance even when the appeal was called a second time, the Supreme Court dismissed the appeal and refused to reinstate it.

14 NLR 233/234

A verbal application to reinstate an appeal which was dismissed for want of appearance was made by counsel for the appellant immediately after the dismissal of the appeal and was refused. Subsequently the appellant, on affidavit and petition, made a new application by another counsel, instructed by another proctor, and it was contended for the appellant that the first application was an informal one, and not the one contemplated by section 769.

Held, that the first application was a bar to the second application.

WOOD RENTON J. – “It will be observed that that proviso (to section 769) says nothing about any notice to the respondent, or any formal motion for reinstatement supported by affidavit being made, and within my own experience the practice has been for the counsel who are actually retained on behalf of the appellants to apply themselves, at the earliest possible moment, for the reinstatement of the dismissed appeal I am far from saying that, so long as a decree has not passed the seal of the Supreme Court, it is not within our power to reinstate, on fresh materials, causes in regard to which a motion for reinstatement has already been made and disallowed.”

The land sought to be partitioned is called ‘yawitawatte’ as depicted in plan 579 (x) in extent of 2 roods 90 perches. It is a part of lots 735 & 736 of final village plan 109. The original owner was K. Garlis (issue No. 3). Plaintiff has purchased the property in question by deeds P2 & P3

both deeds executed in August and September 1985. Plaintiff filed on or about January 1987. perusal of the evidence of Plaintiff itself it is evident as observed by the learned District Judge that Plaintiff never possessed the land in question. In cross examination of Plaintiff he admits that he never possessed the land in question. Nor did the Plaintiff possess the land after he purchased by deeds P2 & P3, and his attempt to possess had been resisted. In fact Plaintiff admits that it was the 1st defendant that possessed the land and that the 1st Defendant was having a bakery, shop, toilet, well and a house in the land in question. I find that the above material and evidence had transpired in the evidence of Plaintiff. The building occupied and possessed by the 1st Defendant is shown in plan x in red figures 1, 2, 3 & 4. Even the plantation is claimed by the Defendants without a dispute.

In cross examination of Plaintiff, admits that the heirs of original owner Garlis namely Alpenis, Podihamy and Punchisingho all possessed the land in question.

I would include the following extract from the judgment to clarify a position as regards the plantation and buildings relating to possession, which shows that Plaintiff-Appellant, other than paper title had not elicited material to show that he has prescribed to the land.

මෙම පැමිණිලිකාර පැතිස්ගේ මූලික සාක්ෂියෙන් දැක්වෙන ආකාරයට පුංචිසිංහේ මුල් අයිතිකාර ගාර්ලිස්ගේ දරුවෙකි. ඔහු පැ 4 ඔප්පුවෙන් ඔහුගේ අයිතිය ඔහුගේ දුවණිය වන සෝමාවතී වන මෙම නඩුවේ 2^{වන} ආදේශිත විත්තිකාරියටත් ඒකී සෝමාවතී විසින් ඇයගේ ස්වාමි පුරුෂයා වන 1 වැනි විත්තිකාර පුලහිංගේ පයසේන රද්දිගුට පැ 5 වගයෙන් ලකුණුකර ඇති ඔප්පුවෙන් තැගිකර ඇති බවටත් පෙනීයයි. පුංචිසිංහේ හා ඔහුගේ දුවණිය සෝමාවතී ඔහුගේ භාර්යාව දරුවන් හා බැනා වන 1 වැනි විත්තිකාර පයසේන රද්දිගු යන සියලු දෙනාම මෙම බෙදීමට යෝජිත 'x' පිඹුරේ කළු ඉඩරන් පෙන්නුම් කරන 2 හා 5 වන ඉඩම් කොටස් මුළුමනින්ම එහි ගොඩනැගිලි හා වගාව සහිතව බුක්ති විඳි බවට මෙම නඩුවේ ඉදිරිපත් වන සාක්ෂි සමස්තයක් වගයෙන් ගත්කල පෙනී යයි.

Punchisingho was added as the 2nd Defendant, and on his demise Somawathi was substituted as 2A Defendant. The learned District Judge does not accept the Pedigree of Plaintiff for the reasons given at folio 120 of the judgment. I find that the judgment of the original court refer to some contradictory positions which does not help the Plaintiff-Appellant. Nor has Plaintiff-Appellant established that the corpus is co-owned, and that he has prescribed to the property. But the Defendants have prescribed to the land. Position of the Defendants that Malagala L. Nonahamy (Punchisingho's mother) and that portion owned by her passed to Punchisingho. Plaintiff does not described Punchisingho's interest. Nonahamy was the original owner of lots 2 & 5 in plan 'x'. As such Punchisingho exclusively possessed those lots. By deed 1v1 in 1981 gifted ½ to his

daughter Sumanawathie (inclusive of bakery). The balance ½ claimed by his widow and other children. Defendant-Respondents have acquired prescriptive title. The trial Judge’s views on same need not be disturbed by this court. Original Court Judge considered all primary facts pertaining to prescriptive title of the Defendant- Respondents.

However before I conclude I would incorporate the evidence of the 1st Defendant-Respondents as stated in the judgment of the District Court which would fortify the position that Plaintiff-Appellant case should be dismissed.

ඔහු කියා ඇත්තේ පුංචිසිංකෝ මෙම ඉඩමේ බස්නාහිර පැත්තේ ඇති ගෙයි 1990 දී ඔහු මියයන තෙක් වාසය කල බවත් එම ගෙයට අවුරුදු 50 ක් 60 ක් පමණ වන බවත්ය. මියයන තෙක්ම මෙම පුංචිසිංකෝ මෙම ගෙදර පදිංචිව සිටිබව ඔහු කියා ඇත. මෙම නඩු පවරන තුරු මෙම ඉඩමට අයිතිවාසිකම් කියන්න කිසිවෙකු නොසිටි බවත් මෙම ඉඩමේ මුල් අයිතිකරු ගැන තමා නොදන්නා බවත් ඔහු කියා ඇත. එසේම තමා ද මෙම නඩුවට විෂයවී ඇති ඉඩමේ පදිංචිව සිටින බවත් ඔහු මෙම පුංචිසිංකෝගේ දියණිය වන සෝමාවති සමග විවාහවී මෙම ඉඩමේ ඇති නිවසේ හා එම ඉඩමේ තිබුණ සියළු වගාවන් බුක්ති විඳිබව කියා ඇත. ඉඩමේ ඇති පොල් පැල 2 ක්, තැඹිලි ගස් 2 ක් ඔහු සිටුවා ඇති බවත්, පොල් ගස්, කරාබු ගස් 1 ක් ඔහු සිටුවා ඇති බවත් කියා ඇත. පැරණි ගස් කොළන් වගයෙන් කොස්, පුවක් ගස්, සිංහල දෙල් ගසක් ආදිය ඇති බවත්, මෙම සියළු වගාවන් බුක්ති වින්දේ ඔහුගේ මාමණ්ඩිය පුංචිසිංකෝ ඇතුළු පවුලේ සියළු දෙනා බවත් කියා ඇත. තවද මෙම පැමිණිලිකරු ඇතුළු ඔහුගේ පුර්වගාමින් වන කරෝලිස් ගුණරත්න හෝ ඇලිස් හෝනා රුපසිංහ යන අය හෝ

ඇයගේ දරුවන්ද මෙම ඉඩමට කිසිම දිනක පැමිණියේ නැති බවත් මෙම ඉඩම 1968 වර්ෂයේ සිට ඔහු දන්නා බවත් කියා ඇත.

In all the above circumstances I see no basis to interfere with the judgment of the learned District Judge. Appeal dismissed without costs.

Appeal dismissed.

~~JUDGE OF THE COURT OF APPEAL~~