

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

Jayasinghepura Devayalage Gunasekera
Timber Stores
Waliwatura
Udumulla
Kadugannawa

C.A. No:886/97(F)

D.C.Kegalle
Case No:24014/P

Plaintiff-Appellant

Vs.

- 1) Jayasinghe Pura Devayalage
Premawathi
Unagalavehera
C.P. Mawatha
Polonnaruwa
- 2) Jayasinghe Pura Devayalage
Karunawathi
Timber Stores
Waliwatura
Udamulla
Kadugannawa
- 3) Boraluwe Gedera Sediris Karunaratne
Rathna Sevana
313
Pulasthigama
B.O.P. 400
Polonnaruwa

- 4) Boraluwe Gedera Seelawathi
No.944 Jayanthipura
Unagalavehera
Polonnaruwa
- 5) Boraluwe Gedera Gunathilake
Kalkatidamana
B.O.P.400
Pulasthigama
Polonnaruwa
- 6) Boraluwe Gedera Somalatha
No.132
B.O.P.400
Pulasthigama
Polonnaruwa
- 7) Boraluwe Gedera Chandrawathi
No.42 Kahawandala
Udamulla
Kadugannawa
- 8) Dummalahene Gedera Siripala
Waliwatura
Udamulla
- 9) Dummalahene Gedera Sirisena
Waliwatura
Udamulla

Defendant-Respondents

BEFORE : M.M.A. GAFFOOR J AND
S. DEVIKA DE L. TENNEKOON J

COUNSEL : Dr. Sunil Cooray for the Plaintiff-Appellant
N.T.S. Kularatne for the Defendant-Respondents

ARGUED ON : 08.05.2017

WRITTEN SUBMISSIONS

TENDERED ON : 28.06.2017

DECIDED ON : 21.09.2017

M.M.A. GAFFOOR J

The plaintiff-appellant has preferred this appeal to set aside the judgment dated 29.04.1997 and for further relief as prayed in the prayer of the petition dated 27.06.1997.

The plaintiff-appellant instituted this action to partition the land called "Rukgahamulakotuwe Watte" stating inter alia that;

- a) The original owner of the land was one Ukku.
- b) Said Ukku transferred his rights to Kirisanda by deed No.47179.
- c) Said Kirisanda by unknown deed number transferred to Laisa
1/20 shares.

- d) Said Laisa transferred her 1/20 shares to the 8th and 9th defendants.
- e) Laisa died and the remaining share devolved on Mancho and Ranso.
- f) Mancho died leaving as her heirs the plaintiff and the 1st and 2nd defendants.
- g) Ranso died leaving as her heirs 3rd, 4th, 5th, 6th and 7th defendants.

Accordingly, plaintiff-appellant claimed that the said land should be partitioned according to the pedigree shown in the plaint.

The 8th and 9th defendant-respondents also stated inter alia that the original owner was one Langamuwe Niktenna Malinda. After his death his son Rankira became the owner to the land in question. Rankira transferred his rights by Deed No.23354 dated 11.10.1894 to Ukku. After the Ukku's death Punchina became entitled to the land in question. After Punchina's death her only child Laisa become the sole owner of the land in dispute and thereby the 8th and 9th defendants become entitled to the land in question and prayed to dismiss the plaint.

In this matter both parties admitted and identified corpus of the dispute and the original owner of land is named Ukku.

However, it is important to examine whether there is a inconsistency in the judgment dated 29.04.1997 when trial District Judge answering the Issue No.1 and 5.

The plaintiff-appellant proved that the original owner Ukku executed the deed No.47179 marked as P1 in 1936 in favour of Kirisanda of his undivided $\frac{3}{4}$ shares.

" 1. ඉහත කී උත්තරයේ අයිතිවාසිකම් 1936.11.27 වැනි දින අංක.47179 දරණ පිටපුවෙන් කිරිසන්දා හැමානි අයට හිමි වූවා ද?

(Page No.91)

පිඬු, පුටු ඉඩමේ අයිතිය තොට වී අවලාහකිත් කොමෙදු 3/4 පංචුව කිරිසන්දව ලැබුණි. "

(The judgment at page No.185)

Therefore, it is clearly coming to the findings that Kirisanda became the owner of undivided $\frac{3}{4}$ shares of the land in dispute.

However, 8th and 9th defendants position which is taken by them in their statement of claim is that after Ukku's death her only son Punchina became entitled to the land in dispute, although, 8th and 9th defendants failed to prove their position taken by them in their statement of claim.

In the case of *Gunasekera and another vs. Latiff* 1999 1 SLR pg.365, it was held-

"While Section 101 of the Evidence Ordinance is concerned with the duty to prove a case as a whole, viz the overall burden of proof Section 103 regulates the burden of proof as to a particular fact, however the devolution of the overall burden is governed by section 102 which declares that the burden of proof lies on that person who would fail if no such evidence at

all were given on either side. When the legal title to the premises is admitted or proved to be in the plaintiff the burden of proof is on the defendant to show he is in lawful possession – defendant must begin the case.”

Therefore, there is no dispute that Kirisanda got rights from Ukku from the deed marked as P1.

The said Kirisanda married to a women named as Polwattalage Gedera Laisa and who died in 1930s. From their marriage they had two children named as Mancho and Ranso. Laisa entered into a second marriage with Dummalahenegedera Kirihatana after the death of Kirisanda. From that marriage she had two children who are 8th and 9th defendants.

According to the evidence it is clear Mancho, Ranso, 8th and 9th defendants are children of Laisa.

However, Kirisanda transferred 1/20 shares by an unknown deed which was not proved to the said Laisa and she transferred her shares to her two sons 8th and 9th defendants-respondents by deed No.24448 of 16.09.1968.

In these circumstances, Mancho, Ranso and 8th and 9th defendants are co-owners of the land in dispute. Therefore, it is important to examine whether 8th and 9th defendants have acquired a prescriptive title against their own half-sisters.

The plaintiff and 1-7 respondents are the heirs of the Mancho and Ranso. Therefore, plaintiff and all other defendants are co-owners of the land to be partitioned. Therefore, 8th and 9th defendants are to become entitle to the entire land they must prove that the other co-owners were ousted by an overt act and they had been in adverse and uninterrupted possession for more than 10 years. 8th and 9th defendants failed to prove that their mother had possessed the entire land against her daughters and therefore also possessed the said land against the right of their half-sisters.

Further, Laisa died in 1974 and thereafter the disputes started among them and plaintiff instituted this action 1984. Therefore, there was no adverse possession established by the 8th and 9th defendants against the rights of the other co-owners of the land to be partitioned.

Therefore, it is clear that the learned trial Judge failed to consider the concept of ouster of co-owners by the 8th and 9th defendants who are also co-owners. In these sense, that the plaintiff and all other defendants are entitled to their shares in the land to be partitioned.

And also it is important to consider whether the learned District Judge came to the conclusion that the Mancho and Ranso do not inherits to the property of the father after they have been married in Deega (Judgment at page 178)

A daughter under the Kandyan Law inherits the father's property only in certain circumstances. They are;

- 1) if the daughter is married in Binna or
- 2) if the daughter is married after the father's death. (Section 12 (1) Kandyan Law Ordinance No.39 of 1938)

In the case of ***Hewayalage Gunasinghe vs. Hewalayage Laisa*** (1988) 2 CALR 23 stated that –

“getting married in diga and leaving the ancestral home after her father's death would not bring about forfeiture of whatever rights the daughter acquired from her father on his death as these rights would have already crystallised.”

Therefore, it is clear that the Mancho and Ranso married in Deega does not forfeiture of any rights of their father's property as they were married after their father's death.

This Court is of the opinion that the learned trial Judge in considering the prescriptive title of the 8th and 9th defendants had not taken into consideration the substantive law of prescription and the inheritance under the Kandyan Law Ordinance No. 39 of 1938. Further, we note that the observations and the decisions of the learned District Judge are contradictory as contained in the impugned judgment. This is reflected in page 167 of the judgment. Furthermore, it is to be noted that

the Judge had himself noted that the demeanor of the 8th defendant and had made a special note in page 180. The District Judge had the great advantage of seeing the witnesses. Furthermore, on a questions of fact appellate court will not overrule decisions of lower courts unless it is a perverse order, 20 NLR 332, 1993 1 SLR 119. But taking into consideration the observations of the trial judge this Court is of the opinion that the 8th defendant had not been a convincing witness as observed by the Judge at page 180. In the circumstances, taking into consideration the cumulative facts, the law and its applicability to the issues raised in this case we are not in apposition to hold with the Judgment of the learned District Judge. Therefore, on the merits of this case the plaintiff-appellant is entitled to relief as prayed for in his plaint.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

S. DEVIKA DE L. TENNEKOON J

I agree.

JUDGE OF THE COURT OF APPEAL