

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

Mahappu Thanthirige Ariyadasa,
Pinnaduwa,
Walahanduwa.
Plaintiff-Appellant

CASE NO: CA/1165/2000/F
DC GALLE CASE NO: 12604/P

Vs.

1. Mahappu Thanthirige Jinadasa,
Pinnaduwa,
Walahanduwa.
 2. Meepe Aluthgamage Marynona,
(Deceased)
Pinnaduwa,
Walahanduwa.
- 2A(1) Yaggaha Ruhnage Sirisena,
2A(2) Yaggaha Ruhnage Manjula
Sampath Udayasiri,
2A(3) Yaggaha Ruhnage Manoj,
2A(4) Yaggaha Ruhnage Manura
Jeewantha,
2A(5) Yaggaha Ruhnage Nilani,
All of
No. 218/A,
Palliyawatta,

Pinnaduwa,
Walahanduwa.
Substituted 2nd Defendant-
Respondents

Before: Mahinda Samayawardhena, J.
Counsel: Kamal Dissanayake for the Plaintiff-Appellant.
Anura Gunaratne for the Substituted 2nd
Defendant-Respondents.

Decided on: 01.11.2018

Samayawardhena, J.

The plaintiff filed this action in the District Court of Galle naming two defendants to partition the land described in the schedule to the plaint between him and his brother, who has been named as the 1st defendant, in equal shares. The 2nd defendant, according to the plaint, has no title whatsoever to the land. The 2nd defendant in her statement of claim unfolded a pedigree, which is not in total harmony with that of the plaintiff, and claimed undivided $\frac{1}{2}$ share of the land, with the balance $\frac{1}{2}$ share to be equally divided between the plaintiff and the 1st defendant.

At the trial, the plaintiff and the 2nd defendant gave evidence. Having considered the evidence led at the trial, the learned District Judge, who saw and heard both of them giving evidence, accepted the pedigree of the 2nd defendant as the more probable one, and entered the Judgment accordingly.

It is against this Judgment dated 10.02.2000 the plaintiff has preferred this appeal.

According to the plaintiff, the original owner of the land is Bastian. The learned District Judge has disbelieved that assertion *inter alia* by making reference to the plaintiff's first Deed marked P1, which in my view, is correct. According to P1, Bastian has got title only to an undivided 7/24 share of the land and not to the whole land. In terms of paragraph 7 of the plaint, the balance 17/24 share of Bastian has devolved on Baby and Emalishamy. The plaintiff either in the plaint or in evidence does not state how Bastian became entitled to the balance 17/24 share.

Then in paragraph 8 of the plaint, the plaintiff states that the aforesaid Baby gifted her rights to the plaintiff and the 1st defendant by the Deed marked at the trial P5 dated 30.09.1994.

Admittedly, the 2nd defendant is in possession of the land. So do the plaintiff and the 1st defendant—vide the Preliminary Plan and its Report marked X and X1 respectively.

It is the position of the plaintiff, as seen from paragraph 12 of the plaint, that the 2nd defendant came into possession of the land with the leave and licence of her mother, and later the 2nd defendant got a Deed dated 26.01.1994 executed in her favour from the aforesaid Baby, but no title passes from that Deed to the 2nd defendant. This Deed was marked at the trial as 2V1.

I cannot understand on what basis the plaintiff says that no title passes on that Deed. The Deed 2V1 has been executed and registered before the Deed P1 and therefore gets priority over P1.

The fact that the 2nd defendant came into possession of this land with the leave and licence of the plaintiff's mother was never proved except *ipse dixit* of the plaintiff.

In his evidence, the plaintiff says that the 2nd defendant came as such in or around 1975.¹ The action has been filed in 1994.

The plaintiff during the cross-examination has accepted that Baby had a brother named Alwis² who was in occupation of this land even when he was born in 1950.³

It is the position put forward by the 2nd defendant during the cross-examination that the 2nd defendant came to the house Alwis was in occupation and bought Baby's rights by the aforementioned Deed marked 2V14, which was denied by the plaintiff.

As the learned District Judge has correctly pointed out in the Judgment, the plaintiff in cross-examination has accepted the pedigree of the 2nd defendant.⁵

The pivotal argument of the learned counsel for the appellant is that when the learned District Judge has accepted the plaintiff's first Deed marked P1, it is inconsistent to accept the pedigree of the 2nd defendant. I cannot bring myself to accept that argument, as I understand, the learned District Judge has referred to the Deed P1 in the Judgment, to defeat the argument of the plaintiff that Bastian is the sole original owner of the land and not for any other purpose.

¹ Page 78 of the Appeal Brief

² Page 74 of the Brief

³ Page 75 of the Brief

⁴ Pages 76-78 of the Brief

⁵ Pages 82-84 of the Brief

Against the evidence led at the trial, the learned trial Judge cannot be found fault with, on balance of probability, to have accepted the version of the 2nd defendant than that of the plaintiff as to the pedigree.

Appeal is dismissed without costs.

Judge of the Court of Appeal