

In the Court of Appeal of the Democratic
Socialist Republic of Sri Lanka

CA 916/96 F
DC Hambantota 898 L

Mohamed Ismail
Mohamed Suhaibulla,
"Samadana Stores",
Lukagoda,
Thissamaharama.

PLAINTIFF

Vs

Badanage Martin Appuhamy,
"Lukas Idama", Lukagoda,
Thissamaharama.

1st
DEFENDANT

Mohamed Ismail
Mohamed Nasili,
"Samadana Stores",
Lukagoda,
Thissamaharama

2nd DEFENDANT

And now between

Badange Nishanka,
No223/2, Ambagahawatta,
Lukagoda,
Thissamaharama

**SUBSTITUTED APPELLANT
IN PLACE OF THE 1ST DEFENDANT**

VS

Mohamed Ismail
Mohamed Suhaibulla,
"Samadana Stores",
Lukagoda,
Thissamaharama.

PLAINTIFF-RESPONDENT

Vs

Mohamed Ismail
Mohamed Nasili,
"Samadana Stores",
Lukagoda,
Thissamaharama

2nd DEFENDANT-RESPONDENT

Before: A W A Salam, J

Counsel: W Dayaratne PC with M/S Shirome Peiris for the substituted 1st
defendant-appellant and Rohan Sahabandu for the plaintiff-respondent.

Argued on : 10.01.2011.

Written submissions tendered on: 05.08.2011.

Decided on: 10.01.2012.

A W Abdus Salam, J

This is an appeal from the judgment of the learned district judge dated 27 October 1995, granting relief in a rei vindicatio action to the plaintiff-appellant who is from now onwards referred to as the "plaintiff". The 1st defendant-appellant has died pending the determination of this appeal and hence represented (for the limited purpose of prosecuting this appeal) by the substituted -1st defendant-appellant whom I propose to refer to as the "appellant".

The facts relevant to the action and the position taken up by the deceased-1st defendant as transpired in the pleadings and the evidence adduced needs to be narrated in brief. The plaintiff filed action against the deceased-1st defendant and the 2nd defendant seeking relief against the 1st defendant as to the ownership of the subject matter of the action and for the ejection of the 1st defendant from the subject matter including the award of damages. On a chain of title, traced from the final decree entered in partition action No 110/5249 in the district court of Hambantota holden at Tangalle, the plaintiff claimed that the co-owners of the subject matter of the action are the 2nd defendant and himself. The father of the plaintiff and the 2nd defendant in partition action No 110/5249, died during the pendency of the action when the plaintiff and the 2nd defendant in the instant case were minors,

and they were nominated as substituted plaintiffs and their grandfather as the *guardian-ad-litem* over them.

During the lifetime of Meera Lebbe Marikkar Mohamed Ismail, the father of the plaintiff and the 1st defendant, the right, title and interest or the decision arranged in partition action No 5249 or the amount realized by the sale thereof were transferred to the plaintiff and the 2nd defendant by deed No 16254 dated 19 March 1951 (P2). By the final decree entered in the partition action aforesaid several allotments of land were allotted to the substituted plaintiffs in that case including Lots H 2 and H 3 in plan No 138 A made by John De Silva, Licensed Surveyor and Commissioner of Court. The plaintiff therefore claimed that the ownership of the said lots were vested in him and his brother the 2nd defendant. The subject matter of the action has been identified by the plaintiff in relation to the aforesaid final scheme of partition No 138 A. The plaintiff also maintained that the subject matter in dispute was leased out to one Walpitagamage Hendrik Appuhamy from time to time upon several indentures of Lease marked as P3 and P4 by his grandfather was the guardian ad litem over them in the partition action. The said Hendrik Appuhamy has handed back the property that was leased out to him by document marked P6 after accepting compensation from the grandfather of the plaintiff, for the improvements effected on the land. The complaint of the plaintiff against the 1st defendant is that he obstructed the plaintiff from causing the coconuts to be plucked off the trees standing on the land on or about 27 September 1983 and thereby disputed the title of the plaintiff and that of the

2nd defendant. The plaintiff sought a declaration of title and ejection in the aforementioned circumstances but the 1st defendant denied the allegation including that the plaintiff and the 1st defendant are the owners of the subject matter. Further the 1st defendant averred in his answer that the land in his occupation has been in plan No 987 dated 14.1.1989 made by Gunathunga Warnakulasuriya, Licensed Surveyor. The contention made on behalf of the 1st defendant-appellant both before me and the lower court centered round his alleged prescriptive title to the land depicted in plan No 987 and the inability of the plaintiff to identify the land properly. The learned counsel for the appellant has also urged that the plaintiff has failed to establish his title to the subject matter and therefore in any event the action of the plaintiff should have been dismissed.

As regards the alleged failure of the plaintiff to identify the subject matter of the action, the trial judge has clearly observed that the requirement to establish the identity of the subject matter has been satisfied by the plaintiff to the required standard of proof. The plaintiff has identified the subject matter of the action in relation to a scheme of partition. It consists of two well-defined and divided allotments of land. The said scheme of partition which has gained recognition against the world at large by reason of it being confirmed was produced by the plaintiff. Further, the grandfather of the plaintiff and the 2nd defendant has over long period of time leased out the subject matter to Hendrick Appuhamy who has handed back the same as is evident from the document marked P6. The evidence given by the son of Hendrick Appuhamy has been carefully considered by the trial

judge in relation to the identity of the land and the type of possession enjoyed by and on behalf of the plaintiff and the 2nd defendant. This clearly shows that the plaintiff has not only acquired a title to the subject matter in a partition action but also continue to possess the same through the lessee.

In the petition of appeal under paragraph 16 (b) the appellant has raised the question of regularity in adding the 2nd defendant as a party to the action. The reference made to section 17 (2) of the Civil Procedure Code in paragraph 16 (b) therein appears to have be an inadvertence reference whereas of properly be read as reference made to section 18 (2) of the CPC. On a perusal of the journal entries it appears that the 2nd defendant has been made a party before the commencement of the trial to be precise by the amended plaint 14 August 1989. Subsequently to the filing of the amended plaint a date has been given for consideration of the same and without any objections from the 1st defendant the amended plaint has been accepted and the matter had been fixed for trial only thereafter. Strictly speaking, the application for addition of 2nd defendant should have been made in terms of section 18 (2) of the Civil Procedure Code. Nevertheless, the application has been made by an amended plaint to which no objection had been raised and therefore the present objection is of technical in nature made too late in the day. Further, no prejudice has been caused to the 1st defendant resulting from the entry of the 2nd defendant in the case. Hence, the ground of appeal raised by paragraph 16 (b) merits no favourable consideration.