

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

In the matter of an
application for leave to
appeal

Court of Appeal No. CALA 265/98

District court of Balapitiya No. 1593/P

L.A.D. William Appuhamy

Plaintiff-Petitioner

Vs.

Imali Manjula Vithana

9A Defendant-Respondent
and several other Defendant-
Respondents

Before: **Eric Basnayake J**

Counsel: Rohan Sahabandu for Plaintiff-Petitioner

Pubudu Alwis for 9A Defendant-Respondent

Argued on: 19.10.2011

Written submissions tendered on: For the 9A Defendant-Respondent: 2.12.2011

Decided on: 11.5.2012

Eric Basnayake J

1. The plaintiff-petitioner (plaintiff) filed this leave to appeal application on 2.11.1998 inter alia to set aside the order dated 15.10.1998 of the learned District Judge of Balapitiya. By this order the learned Judge had approved plan No. 2328 ("Y") of P.A.R. Chandrasiri Licensed Surveyor and Court Commissioner.
2. The plaintiff instituted this action in the District Court of Balapitiya to partition the land called "Pitapotte Kumbura" in extent 4 acres and 07 perches. After trial the judgment was

pronounced on 25.5.1993 which awarded the plaintiff 36793/175984 shares and the 9th defendant respondent (9th defendant) 6541/175984 shares. The major share-holders were the plaintiff, the 3rd, 10th, 14th, 19th and 20th defendants. There was no dispute with regard to the pedigree and the shares. The plantation and the improvements were as per the Commissioner's report.

3. D.G. Mendis Licensed Surveyor and Court Commissioner prepared the preliminary plan No. 2745 dated 4.8.1989. According to this plan the major portions namely lots 2 and 6 contained paddy land. Out of 4 acres and 07 perches, 3 acres 2 roods and 20 perches contain paddy. Lot 4 of this plan is a high land with 35 perches in extent. This allotment contains a house, a well and a lavatory. The plaintiff claimed these improvements. The 9th defendant claimed that she had a house towards the north eastern boundary of lot 4 of the preliminary plan. However the surveyor has reported in his report that he did not find any trace of a house in the land. In other words the surveyor was not convinced of the truth of what the 9th defendant had said.

Final Plan No. 440

4. The plantation consists of coconut and areca nut trees which were claimed by the plaintiff. The 9th defendant too made a claim to the plantation. The 9th defendant did not file a statement of claim. The 9th defendant was not present and was not represented at the trial. After the interlocutory decree was entered, S.D. Weerawardene Licensed Surveyor submitted the final plan No. 440 of 7.8.1996. According to this plan lot No. 15, 35 perches in extent was allotted to the plaintiff. Lot No. 6 was allotted in common to the plaintiff, 5th and 18th defendants (wife and son of the plaintiff). The 9th defendant was given lot No. 12 which contained a narrow strip (22 ft. wide) from the paddy field with a road frontage. It appears that the land had been divided in such a way as to enable the parties to have access to the road.

Objections of 9A defendant and the alternative plans Nos. 580 and 2328

5. The 19A defendant tendered an alternative plan No. 580 dated 7.8.1997 of Victor Godahena Licensed Surveyor. The 9A defendant filed objections to plan No. 440 and tendered an alternative plan No. 2328 of 8.8.1997 made by R. Chandrasiri Licensed Surveyor. In that she complained that she was given a narrow strip of land (lot No. 12). The 9A defendant also complained that her predecessor in title had been in possession of a portion of high land namely lot No. 15, and that she be given lot 12A in plan No. 2328 (which is a portion carved out of lot 15 of plan No. 440 (and 580)). She claimed that the 9th defendant and her predecessor in title were in possession of lot 12A. Lot 12A is part of the high land which is on the north eastern side of lot 4 in the preliminary plan where the 9th defendant claimed to have a house. If a party could successfully claim improvements, only then will it help him claim a particular area based on improvements.

Law relating to improvements in partition cases

6. It is well settled law that whenever it is practical the co-owners should be allotted the portions that contain their improvements unless it would cause substantial injustice to another co-owner. Section 33 of the Partition Law is as follows:-

The surveyor shall so partition the land that each party entitled to compensation in respect of improvements effected thereto or of buildings erected thereon will, if that party is entitled to a share of soil, be allotted, so far as is practicable, that portion of the land which has been so improved or built upon, as the case may be.

7. Lascelles C.J. observed in *Moldrich vs. La Broody* 14 N.L.R. 331 that “in dividing the property it is no more than equitable, and it is in accordance with the authority that where it can be conveniently done, the improving co-owner should be allotted the property on which he made the improvements”. K.D.J. De Silva J in *Premathiratne vs. Fernando* 55 N.L.R. 369 at 370 said that “whenever possible, a co-owner should be given at the partition a lot which carries his improvements...unless a substantial injustice is likely to be caused to the other co-owner”. Jayatileke J stated in *Thevchanamoorthy vs. Appakuddy*

51 N.L.R. 317 at 312 that “the policy of the law has been to allot to a co-owner the portion which contains his improvements whenever it is possible to do so”. Sansoni J (as he then was) in Liyanage vs. Thegiris 56 N.L.R. 546 at 548 stated that “in dividing the property it is no more than equitable that when it can be conveniently done, the improving co-owner should be allotted the portion which contained his improvements, unless it involves substantial injustice to the other co-owners” (also Kumarasinghe vs. Andirishamy 55 N.L.R. 539 at 540, Sinchi Appu vs. Wijegoonsekera 6 N.L.R. 1, Sanchiappu vs. Marthelis 17 N.L.R. 297, H. Pubuduni Silva Vs. P. Kamala Mendis CALA 93/2001 CA minutes of 30.10.2009)

8. Thus the 9A defendant could succeed in obtaining a portion from high land provided she has her improvements. In this case the 9th defendant was not awarded any improvements.

Inquiry

9. An inquiry was held with regard to the objections of 9A defendant on 2.3.1998 and 14.5.1998. At this inquiry the following witnesses had given evidence, namely:-

P.A.R. Chandrasiri
9A defendant
Victor Godahena

10. P.A.R. Chandrasiri had prepared plan No. 2328 on 15.8.1997 at the instance of 9A defendant. He had given lots 12A which is high land and 12B which is paddy land in extent of 15 perches and 8.7 perches respectively to 9A defendant. The balance high land containing 20 perches was given to the plaintiff. Chandrasiri stated in evidence that he found an old fence dividing lots 12A from 15. Lot 15 contained a house. The basis of allocating 15 perches of high land to the 9A defendant was explained by Chandrasiri in his evidence. He states that he was told by 9A defendant that the 9th defendant had

occupied the house given to the plaintiff for a long period of time. This house is in lot 15 and to the south eastern side of the high land. According to D.G. Mendis (report to the preliminary plan) the 9th defendant claimed that she possessed an area towards the north eastern boundary of lot 4 of the preliminary plan.

11. Surveyor Chandrasiri admitted that this house is occupied (house and a boutique) by the plaintiff. However the 9A defendant was given a portion of the high land (lot 12A in plan No. 2328) on the basis that 9A defendant occupied the high land.
12. The 9th defendant admitted that her residence is at Ratmalana in the district of Colombo. She said that they were in possession of lot 12A. She also said that she had possessed coconuts trees and used to travel from Colombo to pluck coconuts. She also spoke of a fence. Under cross examination she admitted that she no longer enjoy possession. She states that until the plaintiff was given possession of the trees that she had possession. Although she states that she possessed the coconut trees, the coconut trees were claimed by the plaintiff before the surveyor in 1989. The 9th defendant too made a claim to the plantation at the preliminary survey. However at the trial the plaintiff was given the entire plantation and the buildings. That was in 1993. There was no evidence whatsoever of the 9th or 9A defendant occupying or enjoying any plantation or buildings.
13. Victor Godahena was called to give evidence on behalf of 9A defendant. Under cross examination for the plaintiff he denied the existence of a fence as spoken to by P.A.R. Chandrasiri and 9A defendant. Although this witness was cross examined for the 9A defendant he was not questioned about the existence of a fence.

14. Whilst analysing the evidence of these three witnesses it becomes clear that the 9A defendant was trying to make out a case to claim a portion of the high land. It is by claiming that 9A defendant had possession. She tried to prove possession by claiming that she and her mother the 9th defendant, lived in lot No. 12A and also plucked coconuts. At the time of the preliminary survey M.G. Mendis, Licensed Surveyor did not find any evidence of possession. Thereafter the 9A defendant claimed that she lived in the house

that was given to the plaintiff. In that case she would have been in a position to make out a case for high land. At the inquiry she said that she possessed lot 12A.

15. The entire extent of the high land is 35 perches. Two surveyors had given the entire 35 perches of high land to the plaintiff on the basis of his possession and improvements (plans 440 and 580). It is only the plaintiff who made a claim for the buildings which are on the high land. 9th defendant and 9A defendant never claimed the building given to the plaintiff. The plaintiff also claimed the plantation. The 9th defendant had told D.G. Mendis who did the preliminary survey that she dwelled in a house towards the north eastern side of the high land. However the surveyor did not find a trace of a building on the north eastern side. 9A defendant had told Chandrasiri that she occupied the house given to the plaintiff. Chandrasiri had allotted lot 12A a land 15 perches in extent, to the 9A defendant. Now the 9A defendant states that she occupied lot 12A.

16. If 9th or 9A defendant had a claim to the house in the high land, why didn't the 9th or 9A defendant file a statement to claim the house? If they had a claim to the house they could have claimed the land from where they have their improvements. Did they lie to court regarding improvements? Did Chandrasiri and 9A defendant lie to court with regard to the existence of a fence? If there was a fence why weren't any questions put to Victor Godahena? Answering to questions of the counsel for the plaintiff Victor Godahena denied the existence of a fence.

The order

17. The learned Judge appears to have relied on the evidence with regard to the fence. Evidence with regard to the fence was given by Licensed Surveyor Chandrasiri and the 9A defendant. Victor Godahena denied that there was such a fence. No fence is shown in the preliminary plan. The fence was made use of to carve out a portion (lot 12A) from lot 15 to be given to 9A defendant. The plan No. 2328 was made at the instance of 9A defendant. It was a private plan. Therefore the evidence of Surveyor Chandrasiri should have been examined carefully.

18. The learned Judge has referred to the evidence of 9A defendant with regard to possession. 9A defendant had said that a house they had in the high land come down. The learned Judge has also considered the evidence of the 9A defendant with regard to plucking coconuts and the existence of a fence. This evidence has been accepted as correct without any analysis. Considering the report of the preliminary plan and the contradictory evidence of Surveyor Chandrasiri and 9A defendant and the evidence of Victor Godahena I am of the view that the learned Judge had erred in the finding that 9th or 9A defendant had possession. The evidence led in this case proves the contrary. For this reason I am of the view that the order dated 15.10.1998 should be set aside.

19. Considering the submissions of all the parties I am of the view that plan No. 580 of 7.8.1997 of Victor Godahena is more appropriate and I direct the learned Judge to issue a commission on the Court Commissioner to divide the land as per plan No. 580. The appeal is allowed with costs against 9A defendant. Appeal allowed.

Judge of the Court of Appeal