

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

000175

CA 1188/96F  
DC Balapitiya 1114/P

Hettigodage Somapala,  
Uragaha  
2<sup>nd</sup> Defendant-Appellant  
Vs  
Hettigodage Subasena,  
Uragaha.  
Plaintiff-Respondent

Before: A W A Salam J  
Counsel: S A Suraweera for the substituted 2A defendant-  
appellant and Bimal Rajapakshe for plaintiff-respondent.  
Argued On: 23.02.2011  
Written submission tendered on: 26.08.2010  
Decided on: 26.03.2012

**A W ABDUS SALAM, J**

The facts relevant to this appeal are that the plaintiff-respondent (plaintiff) filed partition action seeking to put an end to the coownership of lots 20, 73 and 74 of the land called Dombagahapitiya Okanda, Gulane Koratuwa and Duwewatta. The plaintiff pleaded that shares from and out of the corpus should be allotted him and the 1st defendant in the proportion of 5:6. There was no contest with regard to the manner of devolution of shares.

The 2nd defendant intervened in the action and sought an exclusion on the basis that a portion of his land namely lot 76 depicted in plan No 2596A filed of record in DC Galle in case No 27875 has been erroneously included into the corpus.

As stated above the three allotments of land the plaintiff sought to partition, namely 20, 73 and 74 are depicted in plan No 2596 A. In the

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same manner the allotment of land claimed by the 2<sup>nd</sup> defendant also has been depicted in the same plan. Allotments marked as 73 and 74 are contiguous lots and to the south of lot 73 is lot 76 claimed by the 2<sup>nd</sup> defendant.

The position of the 2<sup>nd</sup> defendant is that a portion of lot 76 has been unlawfully taken into lot 73, in preparing the preliminary plan. The two preliminary plans drawn for the partition case are numbered as 3388 and 3389. Lot 73 and 74 have been depicted in the preliminary plan 3389 as lot C. The extent of lot C in the preliminary plan is 33.2 perches. According to the plaint the extent of lot 73 is 29 perches and lot 74 is in extent of 40 perches or 1 Rood.

The 2<sup>nd</sup> defendant has taken out a commission and caused the plan in the earlier partition action superimposed on the preliminary plan. The 2<sup>nd</sup> defendant relied on plan No 499 marked Z made by Surveyor Manukulasuriya to establish his claim. The grievance of the 2<sup>nd</sup> defendant was that lot A in plan No 499 is in fact a portion of this land 76. The position of the plaintiff was that the stone fence separates lots 76 and 73 while the 2<sup>nd</sup> defendant maintained that the stone fence itself was within his lot 76.

The various extents of the different lots which formed the corpus cannot simply be ignored. According to Garvin Silva, LS and Commissioner of Court who prepared the preliminary plans, the stone fence falls within lot 76 and based on this disclosure the learned district judge should have granted the exclusion sought by the 2<sup>nd</sup> defendant.

The superimposition of the earlier plan applied on the preliminary plan by Surveyor Manukulasuriya and the evidence given by him, indicate that the probability of lot A being within the boundaries of lot 76 is much higher than it being outside the corpus.

In the circumstances, the answers given to points of contest No 2, 3 and 4 are deleted and re-answered in the following manner.

Point of contest No 2 - yes

Point of contest No 3 – yes

Point of contest No 4 – yes

Subject to the above answers, the judgement and interlocutory decree entered by the learned district judge to partition the corpus are affirmed.

There shall be no costs.

Judge of the Court of Appeal

NR/-