

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

W. K. Abeyratna  
Udugala, Ayagama.

**PLAINTIFF**

C.A No. 1142/1996(F)  
D.C. Ratnapura Case No. 1092/P

Vs.

1. Gangabodage Andiris Mudalali (Deceased)
- 1A. Gangabodage Somapala
2. Mahagamage Mansina (Deceased)
- 2A. Mahagamage Charlis
3. Mahagamage Charlis
4. M. Sadiris of Inndolawatta
5. M. Mery Nona of Ayagama
6. W. I. Juwanis of Ayagama
7. K. Sirianchiya (Deceased)
- 7A. K. Kamalasiri
8. David Piyasena of Ayagama
9. K. Jemisa (Deceased)
- 9A. Dapitigoda Kelemnage Gnanawathi of Ayagama.
10. K. Themisingho of Ayagama.
11. Galahitiyalage Diyoni of Ayagama
12. Gammaddemanage Somaratna of Ayagama
13. Gammaddemanage Hemapala of Ayagama
14. Gammaddemanage Piyaseeli
15. Gammaddemanage Somatilake
16. Gammaddemanage Mulin
17. Gammaddemanage Violet
18. Dahiligoda Kelamannage Gnanawathi
19. M. Surabial
20. M. H. Leelawathi
21. M. Sayaneris of No. 31. of Ayagama

**DEFENDANTS**

**And now**

W. K. Abeyratna  
Udugala, Ayagama.

**PLAINTIFF-APPELLANT**

1. Gangabodage Andiris Mudalali (Deceased)
- 1A. Gangabodage Somapala
2. Mahagamage Mansina (Deceased)
- 2A. Mahagamage Charlis
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19. M. Surabial
20. M. H. Leelawathi
21. M. Sayaneris of No. 31. of Ayagama

**DEFENDANTS-RESPONDENTS**

**And now between**

In the matter of an application for substitution

W. K. Abeyratna  
Udugala, Ayagama.

**PLAINTIFF-APPELLANT-PETITIONER**

Vs.

1. Gangabodage Andiris Mudalali (Deceased)
- 1A. Gangabodage Somapala
2. Mahagamage Mansina (Deceased)
- 2A. Mahagamage Charlis
3. Mahagamage Charlis
4. M. Sadiris of Inndolawatta
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20. M. H. Leelawathi
21. M. Sayaneris of No. 31. of Ayagama

**DEFENDANTS-RESPONDENTS-  
RESPONDENTS**

Mahagamage Ranjith Somaweera  
Of Ayagama.

**RESPONDENT**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** B. O. P. Jayawardena with Srihan Samarasinghe  
For the Plaintiff-Appellant

A. Dharmaratnewith with I. Jayaweera for the  
Substituted 2AA and 3A Defendant-Respondents

**ARGUED ON:** 09.09.2011

**DECIDED ON:** 03.11.2011

**GOONERATNE J.**

This was a partition action filed in the District Court of Ratnapura to partition a land called 'Subaragewatta' alias Horamula in extent of about 2 palas of paddy sowing. In the Petition of Appeal it is pleaded that on 1.7.1991 the case was taken up for trial and parties to the action agreed to settle the case and accordingly interlocutory decree was entered. According to the interlocutory decree Plaintiff-Appellant was given an undivided 1/16<sup>th</sup> share of the corpus from lot 3 in plan No. 756 of 12.04.1975 (x) and that it is to be allotted from the southern portion of the corpus. The proceedings of 1.7.1991 which records the settlement in the last

sentence it is stated, තවද 1/16 අංශුව පැමිණිලිකරුගේ කැබලි අංක 3 න් දකුණු පැත්තෙන් වෙන්කර ගත යුතු බවට පාර්ශව කරුවන් එකඟ වේ. This is confirmed by plaintiff's evidence led in court on the said date and the judgment at folio 146 dated 2.12.1992. The interlocutory decree is at folios 147-149 of the brief. Thereafter a commission was issued to survey the land and submit the final plan. Accordingly final plan and commission was returned to court (plan No. 439 of 23.5.95). The final survey plan shows that lot 8 of same had been allocated to the Plaintiff-Appellant. The extent of lot (8) is 18.40 perches.

The position of the Appellant is that the report of Surveyor on the final plan No. 439, it is stated that since the portion towards the southern side is a small strip, lot (8) was allocated to Plaintiff-Appellant. Learned Counsel for Appellant relies on the above observations of Surveyor's report and stressed the fact that his client is satisfied with the final plan and allocation of lots and that it should have been confirmed. In the submissions to court by learned counsel for appellant inter alia submitted that

- (a) the date on which final survey was done (30.1.1993). Agents of Plaintiff and 1<sup>st</sup> – 3<sup>rd</sup> Defendants were present at the site.
- (b) The 3<sup>rd</sup> Defendant's son one Sunil Pathmalal who was present at the site informed the Surveyor that the 3<sup>rd</sup> Defendant is satisfied with lot (9) of the final plan and that fact is recorded in the report.

- (c) Two and a half years later from the date of visit to the site by Surveyor, the 1<sup>st</sup> – 3<sup>rd</sup> Defendants, submitted an alternative plan No. 3726 of Surveyor Samarasekera and moved court to accept the said alternative plan No. 3726.
- (d) The parties relying on the above alternative plan No. 3726 did not specifically object to the plan No. 439 and the journal entries do not refer to any such objections.
- (e) However on a suggestion by the original court another plan bearing No. 1012 of 7.9.96 was submitted to court (prepared by surveyor Wijesinghe) by the Appellant.

In the above circumstance the District Court held an inquiry on the question as to which of the plans should be accepted to finally conclude this matter and the learned District Judge by his order of 11.12.1996 made order to accept and confirm the alternate plan No. 3726 of Surveyor Samarasekera. This is the order (11.12.1996) that is being canvassed in this court by the Plaintiff-Appellant.

The learned counsel for 1<sup>st</sup> – 3<sup>rd</sup> Defendant-Respondent supported the order of the learned District Judge and sought to demonstrate to this court that the District Judge very correctly accepted the above alternative plan 3726 based on the settlement between parties. He emphasized that the Plaintiff-Appellant requested for a portion of land from the southern side of the corpus and that the alternative plan give effect to such position of Plaintiff and the settlement arrived at by parties and in terms of the interlocutory decree.

The learned District Judge in his order observes that the alternate scheme (In plan 3726) has not been made contrary to the interlocutory decree. The southern portion of lot (3) in the preliminary survey has been allocated and named as lot 10 in plan No. 3726. This is in keeping with the settlement entered in court and the interlocutory decree. This no doubt is a question of fact, and decision has to be made by comparison of the survey plans submitted to court i.e the preliminary plan No. 756(x), final plan No. 439 and alternate plan No. 3726. The Surveyor is bound to prepare the scheme of partition in conformity with the interlocutory decree (Section 31 re-scheme of partition). The surveyor appointed by court becomes an officer of court and his duty is to hold the scales equally between litigants 8 NLR 298. As such court is dependant on the plan and report submitted by the Surveyor in a partition case.

Section 32 (now section 33) of the Partition Act requires the Surveyor to partition the land in such a way to give the party who had built on the land or effected improvements such portion of land as far as practicable 17 N.L.R 297. Court could also give any special directions to the Commissioner or to partition a land in a particular way (generally keeping with the interlocutory decree) 55 N.L.R 530 at 540. It is also said that nevertheless, this is not an invariable and rigid rule, which must be followed

in all cases. In Premathiratne et al vs. Elo Fernando 55 NLR 369 held ... in a partition decree a co-owner should whenever possible, be given the lot which carries his improvements, this principle should not be adhered to, if in the process of giving effect to it, substantial injustice is likely to be caused to other co-owner. 56 N.L.R 546 followed.

In Narayan Chettiar & others vs. Kaliappa Chettiar & others 22 Ceylon Law Recorder Reports 41 held. The more convenient allocation of lots than that adopted by the trial Judge is not a proper subject for appeals to the Privy Council.

Albert vs. Ratnayake 1988 (2) S.L.R 246. ... In confirming the scheme the expression “modification” should not be taken to mean only “slight alterations”. In an appropriate case a scheme with substantial changes could be adopted. The trial Judge may adopt the scheme of partition prepared by the Commissioner with changes in any manner which he deems necessary.

The learned District Judge should have given his mind to the question whether parties have built on the land in question or some improvements have been done or effected. This could be gathered by looking at all the above plans referred to in this order and the report of the



Surveyor. More particularly the report pertaining to plan 439. The judgment and interlocutory decree states that Plaintiff be allotted the southern portion of lot 3 in preliminary plan 756. As such it could be in the southern portion of lot (3) and not any portion from lot 6 in plan 756. The order of the District Judge does not refer to any report of a Surveyor. When I consider the above mentioned authorities and the Surveyor's report, plan No. 439 seems to be reasonable and in order.

When I take another look at the plan (439) and report the following are noted.

- (a) 1<sup>st</sup> Defendant gets on the plan, lots 1, 4 & 7 each of these lots have a building or dwelling house or shop. In the report Surveyor adds that plantation of 1<sup>st</sup> Defendant has also been included in the above lots. It is stated in the report that මෙම කොටස් 1 වන විත්තිකරුගේ පුතා වන 2 වන විත්තිකරුට භාර දුන්නේම.
- (b) 2<sup>nd</sup> Defendant gets on the plan, lots 2, 3 & 6. In lots 2 & 6 building or dwelling houses are included. That Mahagamage Sunil Pathmalal Somaweera and Gooneratne represented the 2<sup>nd</sup> & 3<sup>rd</sup> Defendant and were shown the boundaries. The said persons are residing in the said blocks or lots.
- (c) 3<sup>rd</sup> Defendant takes on the plan, lots 4 & 9 lot 4 includes a building and lot 9 no doubt a bear land.
- (d) Plaintiff gets lot (8) – bear land.

The shares according to interlocutory decree are as divided would be –

Plaintiff 4/64

1<sup>st</sup> Defendant 30/64

2<sup>nd</sup> Defendant 15/64

3<sup>rd</sup> Defendant 15/64

On the alternate plan (3726) (without a report) gives the Plaintiff lot 10 the extreme southern portion of the corpus. The 1<sup>st</sup> Defendant gets lots 1, 4, 7 & 9. Other than lot 1 the rest consist of buildings.

The 2<sup>nd</sup> Defendant gets lots 2, 5 & 8 other than lot 5 the rest have buildings.

The 3<sup>rd</sup> Defendant gets lots 3 & 6 (with building) Plaintiff gets from the extreme southern portion of the corpus (lot 10).

In all the above circumstances this court as well as the original court had the benefit of perusing plan 439 and it's report. It has been prepared in compliance with the statutory provisions, considering the proportionate rights or shares of all parties, and the report indicates that parties had not objected to such division since the Surveyor had as far as possible allotted the building and plantation to the persons claiming same. The alternate proposal had come up at least after a lapse of 2 years, and may be an after thought. As such I set aside the order of the learned District Judge dated 11.12.1996, and allow this appeal with costs in terms of sub paragraph 2 of the prayer to the Petition of Appeal.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL