

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

1. Mary Chandrika Perera
2. Irangani Perera, Both of Palliya watta,
Kirimatiyana, Lunuwila.

D.C.Marawila Case No.73/P

Plaintiffs

-Vs-

Court of Appeal No.37/98/F

(Dead)

(Dead)

1. W.A.Sugathawardhana
2. J.K.Claribel Harriet Perera
3. S.M.Wijerathna
4. H.J.Belin Nona Hamy
5. W.M.Gunasekera
6. Martial Perera
7. K.R.A.Anthoney Fernando
8. K.R.M.Ubesena
9. S.M.Somapala
10. W.M.Saman Wijerathna
all of Palliya watta, Kirimetiyan,
Lunuwila

Defendants

AND

1. W.A.Sugathawardhana
2. J.K.Claribel Harriet Perera Both of
Palliyawatta, Kirimetiyan,
Lunuwila.

1st and 2nd Defendant-Appellants

-Vs-

1. Mary Chandrika Perera
2. Irangani Perera, Both of Palliya watta,
Kirimatiyana, Lunuwila.

Plaintiff-Respondents

(Dead)

3. S.M.Wijerathna
4. H.J.Belin Nona Hamy
5. W.M.Gunasekera of Paliyawatta,
Kirimetiyan, Lunuwila.
- 5 a. Hettiarachchige Gunawathie
Charles Mawatha,
Kirimetiyan North,
Lunuwila.

Defendant-Respondents

Counsel:Romesh De Silva P.C with

Sugath Caldera for the Appellants.

N.R.M. Daluwatt PC with Neville Abeyratne for
Plaintiffs/Respondents.

Sunil Cooray with Buddika Gamage for the 5th Respondent

Arguments: 29-9-2011.

Written submissions: 24-3-2010

Before:Rohini Marasinghe J.

Judgment:4-5-2011.

CA 37/98(f)

The Plaintiffs/Respondents hereinafter referred to as plaintiffs instituted a partition action to partition the land called “Palliyagahawatte. The said land is more fully described in the schedule to the plaint. The parties to the said action were the 2 plaintiffs namely, Mary Chandirika Perera and Irangani Perera and the 4 defendants namely, W.A Sugathawardena, Caribell

Harriette Perera who are the appellants in this case and S.M Wijeratne and Belin Nona Hamine.

Upon a commission issued by court the said land was surveyed by the licensed surveyor G.O.R. Silva on 27th and 28th December 1975. The plan bearing No 163 was marked as "X" and the survey report was marked as "X1". According the said plan the extent of the corpus in issue was 17 acres 1 rood and 36.8 perches.

The main contention of the appellants was that the partition action had been filed to partition an undivided portion of a larger land. According to the appellants the corpus in issue consists of 9 distinct allotments of lands having an extent of 29 acres 3 roods and 35 perches. The appellants further submitted that the land called "Palliayagahawatte" is a portion of the larger land which was also called "Palliyagahawate". However, no commission had been taken to survey the entire land as averred by the appellants. However, even if there was no averment made by the defendants it is wrong for the court to proceed to trial in respect of an undivided portion only of the larger land described in the plaint and sought it to be partitioned.

In the plaint the corpus sought to be partitioned was disclosed as a land in the extent of 18 acres 3 roods. The surveyor however, had surveyed a land of only 17 acres 1 rood and 36.8 perches. The Interlocutory decree was entered in respect of a land of 18 acres and 3 roods. The learned trial judge in the impugned judgment had stated that the discrepancy in extent was not a substantial difference. However, no reasons have been given to this discrepancy between the extent given in the plaint and of that shown in the plan 163.

According to the deeds marked by the plaintiffs it is evident that the land to be partitioned consisted of several lands. According to the first deed bearing no 5636 marked by the plaintiffs there were 13 allotments of lands. And all these land have been gifted by its owner one Eliyas Prera to one Anton Prera and Goergu Prea subject to a fideicommissum. According to the said fideicommissum the fiduciaries were the heirs of said Anton and Georgu. The said Gorgu had transferred his half share to his brother Anton. The said Anton then became the owner of the entire land subject to the condition contained in the said deed 5636. The fiduciaries being his heirs would be the widow and the 2 children namely, Mary Isabell Perera and the two plaintiffs. The deed bearing No 17995 marked as P6 was the deed by which said Isabell prera had transferred a divided extent of 9 acres 3 roods and 38 perches being her 1/3rd share from the land called Palliyagahawatte having an extent of 29 acres 3 roods and 35 perches. It is clear from the contents of these deeds that the land called "Palliyagahawatte" was made of 9 contiguous lands and joins together as follows;;

1. Palliyagahawatte in extent of 17 acres 1 rood.
2. Makuluuagahawatte having an extent of 3 acres 0 roods and 38 perches.
3. U 70 in Kirmatiyane having an extent of 2 roods and 4 perches.
4. Y 51 in Kirimatyana having and land bearing 2100 having an extent of 2 acres.
5. Konghawatte having an extent of an area where 24 plants could be planted.
6. U51 called Damminagahawatte in extent of 3 acres and 1 rood.

7. Ketekelahawatte in extent of 1 acre 2rodds. Kongahawatte in extent of 2 roods.
8. An undivided 1/48 share of land called Kohombagahawatte in extent of 6 acres out of an extent of 29 acres 3 roods and 35 perches.

Consequently, said Isabell had transferred to Robert Aloysius Fernando from deed No 17995 a divided extent of 9 acres 3 roods and 38 perches from one of the lands from this large land mentioned above. Therefore, it is clear that the trial had proceeded wrongly in respect of what appeared to be only a portion of a larger land described in the plaint.

. The owners of all the portions of the larger land are not made parties to the action. The plaintiffs appears to have wrongfully included one portion of land from the 9 allotments of land which have been amalgamated together as one land and filed this partition action. This position very is also very clear from the deed marked as V1.

Therefore, I am of the view that the District Court had wrongly proceeded to partition a portion of a bigger land.

The appeal is allowed. The Interlocutory Decree is set aside.

Rohini Marasinghe J
Judge of the Court Appeal