

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

M. P. Siyathuwa of  
Halahentenna, Bodawela,  
Beligala.

**7<sup>TH</sup> DEFENDANT-APPELLANT**

C.A 184/1997 (F)  
D.C. Kegalle 24605/P

M. P. Dammika Kumari of  
Bodawela, Beligala.

**7<sup>TH</sup> SUBSTITUTED-  
DEFENDANT-APPELLANT**

Vs.

1. W. P. Siyathuwa of  
Halahantenne,  
Bodawela, Beligala.
2. M. P. Mahinda Seneviratne of  
Halahantenne,  
Bodawela, Beligala.

**SUBSTITUTED-PLAINTIFF-  
RESPONDENTS**

1. Wickremapedge Premadasa of  
Akasa Kanda, Bodawela, Beligala.
2. M. P. Kirimenika of  
Bodawela, Beligala.
3. M. P. Srisena of  
Bodawela, Beligala.
- 4A1 R. P. Somawathie
- 4A2 M. P. Dinesh Chandana
- 4A3 M. P. Ishara Jeevanthie

**All of Welekade, Bodawela,  
Beligala.**

5. M. P. Kirisaduwa of  
Bodawela, Beligala.
6. M. P. Martin of  
Thalagala, Beligala
7. R. P. Siyathuwa of  
Ambatenna, Bodawela, Beligala.
- 7B1. R. P. Somawathie
- 7B2. R. P. Simon
- 7B3. R. P. Somapala
- 7B4. R. P. Leelawathi
- 7B5. M. P. Jayalatha
- 7B6. R. P. Mahinda Jayalal
- 7B7. R. P. Ajith Priyalal
- 7B8. R. P. Karunawathie
- 7B9. R. P. Kamalawathie
- 7B10. R. P. Jayasekera
- 7B11. R. P. Sumanawathie
- 7B12. R. P. Dharmadasa

**All of Ambatenna,  
Bodawela, Beligala**

8. M. P. Pectara of  
Bodawela, Beligala.
- 8A1. H. P. Komali
- 8A2. M. P. Amarasiri Tilakaratne
- 8A3. M. P. Dayananda Amarasuriya
- 8A4. M. P. Nandana Premasiri
- 8A5. M. P. Wilson Seneviratne
- 8A6. M. P. A. Kusumadasa

**All of Ambatenna, Bodawela,  
Beligala**

9. R. P. Kalu of Uriledeniya,  
Devalagama.
10. R. P. Isadi Kalu of Uriledeniya,  
Devalagama.
11. R.P.Manike of  
Ballapana, Ambanpitiya

**DEFENDANT-RESPONDENTS**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** Kumar Dunusinghe for the 7A Substituted-Defendant-Appellant

Bimal Rajapakse with Ravindra Anawaratne  
for the Plaintiff-Respondents

**ARGUED ON:** 31.05.2012

**DECIDED ON:** 07.02.2013

**GOONERATNE J.**

This is an appeal from the judgment of the District Court of Kegalle in a partition suit. The 7A Substituted-Defendant-Appellant is the Appellant in this appeal. He complains that the trial judge has not analysed and failed to act upon the evidence favourable to the said Appellant by way of oral and documentary evidence. The Appellant allege that he produced sufficient evidence to prove that lot 1 in the preliminary plan was cultivated by his father 'Mohotta' with rubber under the approval of State Authorities and the documents 7V2 & 7v3 are documents produced to prove that there was a rubber cultivation, which had been ignored by the learned District Judge. Further the 8<sup>th</sup> Defendant's evidence that the 7<sup>th</sup> Defendant-

appellant's father cultivated lot 1 above with rubber are valuable items of evidence not considered by the trial judge. In the judgment the 7<sup>th</sup> Defendant-Appellant's claim has been rejected.

Apart from above a very fundamental matter has been raised by the Appellant. Plaint has been filed to partition a land called Halahantenna Kaduruwamulahena in extent of 7 palas and 5 lahas of paddy sowing. This converted into English standard measurements it is about 1 Acre, 2 Roods and 10 Perches. Journal entry 9, indicates that the lis pendens had been registered, though the particular of same are not available. The preliminary plan and it's extent does not tally with the extent shown in the plaint. The Surveyor has surveyed a very much larger land which the Appellant contends to be three times the land described in the schedule to the plaint. The preliminary plan gives an extent of 3 Acres, 3 Roods, 35 Decimal and 6 Perches.

The Plaintiff-Respondents on the other hand support the judgment of the learned District Judge, and inter alia urge that identity cannot be raised at this stage of the appeal, and attempt to support that by reference to the position of the 8<sup>th</sup> Defendant. Plaintiff-Respondent attempts to attack the case of the Appellant by referring to the title deeds of the Appellant which contends boundaries in consistent with the plan 'X' .

I will not consider the merits of this case. As stated above, this court need to consider a very preliminary question. All this could be explained by reference to the following case laws, which would be binding on this court.

In *Sopaya Vs. Magilin* 1989 (2) SLR 105..

On receipt of the surveyor's return which disclosed that a substantially larger land was surveyed, the District Judge should have decided on one of the following courses after hearing the parties.

- (i) To reissue the Commission with instructions to survey the land as described in the plaint. The surveyor could have been examined as provided in section 18(2) of the Partition Law to consider feasibility of this course of action.
- (ii) To permit the Plaintiffs to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment of the plaint and the taking of consequential steps including the registration of a fresh lis pendens.
- (iii) To permit any of the Defendants to seek a partition of the larger land as depicted in the preliminary survey. This course of action involves an amendment of the statement of claim of that defendant and the taking of such other steps as may be necessary in terms of section 19(2) of the Partition Law.

The surveyor under section 18(1)(a)(iii) of the Partition Law must in his report state whether or not the land surveyed by him to substantially the same as the land sought to be partitioned as described in the schedule to the plaint. Considering the finality and conclusiveness that attach in terms of section 48(1) of the Partition Law to the decree in a partition action, the Court should insist upon due compliance with this requirement of the surveyor.

### In W. Uberis Vs. M.W. Jayawardena 62 NLR 217 ...

In a partition action when a commission is issued to a surveyor to carry out a preliminary survey, it is the duty of the surveyor to adhere strictly to its terms and to locate and survey the land he is commissioned to survey. It is not open to him, even with the consent of the parties, to survey a portion only of the land and submit the plan and report of such survey. If he is unable to locate the land he is commissioned to survey, he should so report to the Court and ask for further instructions.

### In Bininda Vs. Sediris Singho 64 NLR 208...

When preparing a preliminary plan in a partition action, it is irregular, for a surveyor, in the absence of an additional commission issued to him under section 23(1) of the Partition Act, to survey and include in the corpus any land other than that which is referred to in the plaint and which his commission authorizes him to survey. The Surveyor will not be entitled to receive fees in respect of that part of the survey which he makes in excess.

Partition Law of Sri Lanka in Practice - Mahanama Thilakaratne pgs. 33/34 (in this text reference is made to some important principles through case law)

Failure to register Lis Pendens duly, invalidates the proceedings. On the other hand the expenses parties have to incur would be enormous if adequate precautions are not taken by parties and Court to ascertain due registration of Lis Pendens. This unhappy state of affairs could be viewed from the unreported case Sansoni J. with Thambiah J. agreeing said "The Learned District Judge had found that Lis Pendens was not duly registered. In view of that finding, it appears to us that summons should not have been issued on the defendants, since the correct registration of Lis Pendens was a

necessary step to have been taken by the plaintiff before such an order was made. We therefore set aside the interlocutory decree entered in this case and all proceedings taken at the trial. The case will go back in order that the plaintiff might register the Lis pendens correctly. Thereafter summons may be issued on the defendants and the intervenient will also have an opportunity of putting forward his claim. A fresh commission to survey the land must also be issued. As all proceedings that have taken place since the filing of plaint are bad, proceedings must commence de novo. Vide 63 NLR 501, "Non observance of an essential step such as due registration of Lis Pendens renders the proceedings void, and puts back the partition action to the stage of the acceptance of the plaint

Due registration of Lis Pendens, like due service of summons on a party is an essential step. Failure to comply with either would not come within the term "Omission or defect of procedure" in section 48(1) these words should be confined to omissions or defects of much more venial character as pointed out by Sansoni J. in 56 NLR 400.

One can imagine the immeasurable hardship parties have to undergo if Lis Pendens is not correctly registered. Any laps of this part, vitiates all proceedings and the action has to proceed de novo. Even summons served will not help, until the proceedings are regularized by ensuring that Lis Pendens is registered correctly.

Having examined the material before court (as intimated by Appellant) Registered Attorney of Plaintiff in his affidavit dated 19.6.1997 states that lis pendens registered under volume/folio E119/148, 832/41, 854/74 but the application for registration of lis pendens states E118/385, 648/124, 832/94 & 854/94, indicative of different volumes. As

such due registration under Section 6 of the Partition Law is not done correctly.

When a larger land surface in the preliminary plan, court has to consider Section 19(2)(b) of the Partition Law. Non observance of essential steps would render the entire proceedings void and the case has to commence afresh from the beginning. Even with hardships that has to be undergone by parties, the due procedure need to be adopted. In all the above circumstances of this case, I set aside the judgment of the District judge and send the case back to the District Court to comply with the necessary procedural requirements and commence the case afresh. Judgment set aside.

Case sent back to the District Court.

JUDGE OF THE COURT OF APPEAL