

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

M.S.M.Mohamed Misba alias
Mohamed Hussain of
No 137, Mihiripenna Road,
Dharga Town.

Plaintiff-Appellant (deceased)

1 (A) Mohamed Saheed Hassan
No 137, Mihiripenna Road,
Dharga Town.

Substituted Plaintiff-Appellant

Vs

C.A.Appeal No 65/1999 (F)

D.C.Kalutara No 5730/P

1. Abdul Hassan Masrikar Fathima
Hussain,
No 137, Mihiripenna Road,
Dharga Town.

2. Mohamed Rameez Cader
3. Abdul Cader Hadjar Mohamed
Nassar
Both of No 120, Mihiripenna
Road, Dharga Town.
4. Abdul Hassan Marikar Suratul
Uhura , No 10, New Road,
New Path, Dharga Town.

Defendants-Respondents

Before : H.N.J.Perera,J.

Counsel: Ifthikar Hassim for the Substituted Plaintiff-Appellant

H.Withanachchi for the 2nd & 3rd Defendant-Respondents

Argued On: 29.08.2013

Decided On: 08.11.2013

H.N.J.Perera,J.

The Plaintiff-Appellant instituted this partition action on 30.10.1989 seeking to partition a land called "Yalagahawatte Negenahira Deken Panguwa" [Eastern Half Share of Yalagahawatte] containing in extent 1 Acre and 2 Roods at Mihiripenna. The said corpus to be partitioned had been described in the schedule to the plaint in respect of a land

called "Yahalagahawatta Divided Eastern Half Share Portion" having an extent of 1 acre and 2 roods and registered under folio No 601/179 and A214/173 and the boundaries of the said land had been described as follows:-

North: Illangankandewatta

East: Kandabodawatta

South: Kabulkotuwawatta

West: Balance portion of the said land

According to the pedigree set out in the plaint the land on suit, was owned by Ismail Lebbe Marikar Mohamadu Lebbe Marikar by virtue of deed No 9549 dated 06.10.1915 (P4). There is no dispute between the parties that the entirety of the corpus was owned by Ismail Lebbe Marikar Mohamadu Lebbe Marikar. According to plaintiff the said Mohamed Lebbe Marikar in terms of deed No 10887 dated 12.03. 1917 (P5) purported to gift the said corpus to his six children reserving unto himself a life interest and the right to revoke the said deed of gift. It is the position of the plaintiff that the said deed had not been accepted by the donees in order to constitute it as a valid deed of gift. And thereafter the said Mohamed Lebbe Marikar in terms of deed No 14383 dated 15.06.1924 (P6) gifted the said corpus excluding the house situated on the said corpus to his daughter Mohamed Lebbe Marikar Ummu Naima Nachchiya and her husband Abdul Cafoor Hadjar Abdul Hassan. The plaintiff further states that the Mohamed Lebbe Marikar Ummu Naima Nachchiya became entitled to the said entire corpus in terms of deed No 188 dated 05.07.1942 (P8) in that she had purchased what her husband had conveyed to Abdul Hasdjar Mohamed Muhsin in terms of deed No 2290 (P7).

The plaintiff further states that the said Ummu Nachchiya died leaving last will No 1847 bequeathing all rights to Abdul Hassan which was admitted to probate in D.C.Kalutara case No 3253/T and her husband, Abdul Hassan by deed No 10241 gifted 1 acre to his daughter, Marikar Fathumma, the 1st Defendant and also gifted the balance ½ acre to his son-in-law, the plaintiff. It is further averred that the original owner Lebbe Marikar who was left with the tiled house on the land died leaving six children and as Ahamed Abdulla died unmarried and issueless his rights in respect of the house devolved on his other brothers and sisters and later on the 1st, 4th, 2nd, and 3rd defendants as stated in the plaint.

The position taken by the 2nd & 3rd Defendants was that the said Lebbe Marikar by deed No 14342 (2D8) revoked the gift made on P5 and on the same day gifted the "Northern Portion of Eastern Half Share while reserving a portion from the South together with two other properties to his daughter and son-in-law by deed No 14383 (P6).

The case of the 2nd & 3rd defendants was that the land surveyed and depicted in plan No 1195 (X) was Southern Portion of the land retained by Lebbe Marikar after giving the Northern Portion on P6. When the said Lebbe Marikar executed the deed of gift P6 in favour of Ummu Nachjchiya and her husband, he had specifically excluded Southern half an acre in which his residing house was situated and retained the said portion up to the time of his death. It is submitted on behalf of the respondent that the plaintiff had misrepresented that what Lebbe Marikar had excluded from deed No 14383 (P6) was only the said house. On a perusal of the said deed P6/2D8 it is clearly

seen that what was excluded and retained by Lebbe Marikar was the Southern half an acre on which the house stood.

It is the position of the respondents that the land depicted as lot 1 in plan 1195 (x) the preliminary plan, corresponded to the "Southern Portion of Eastern half share of Yalagahawatta, and not the entire Eastern half share as alleged by the plaintiff and that it should devolve on all the children of Lebbe Marikar.

From the submissions made on behalf of the respondents and the appellants it is clearly seen that what is depicted in the preliminary plan X is only a Portion of the land described in the schedule to the plaint. The surveyor had failed to survey the entire land that is described in the schedule to the plaint.

It is submitted on behalf of the substituted plaintiff that Ismail Lebbe Marikar Mohamed Lebbe Marikar was entitled to the land called "Yahalagahawatta" divided eastern half share portion as described in the schedule to the plaint having an extent of 1Acre and two Roods.

It is also admitted that the said Lebbe Marikar had conveyed the said premises in terms of deed No 14383 (P6) to his daughter Ummu Naima Nachchiya and her husband but excluding half an acre from the southern portion of the said land together with a tiled house situated therein.

It is further submitted on behalf of the plaintiff that the corpus sought to be partitioned in this action and described in the schedule to the plaint had not been depicted in the preliminary plan No 1195 (X) but only the Southern portion of the said land that had been excluded by the said Ismail Lebbe Marikar when deed No 14383 (P6) had been executed.

It is contended that the surveyor had failed to depict the said land of 1 acre and two roods, but had depicted a part of the said land having an extent of two roods and 23.25 perches in terms of plan X. The corpus described in schedule three of deed No 14383 is said to have an extent of 2 acres of which the northern portion had one and a half acres and the southern portion an extent of half an acre and therefore should have been depicted entirety in terms of a plan to determine the northern and southern portions of the said land and that the said southern portion of the said land had not been transacted as a separate entity in any of the deeds but as a part of "Yahalagahawatta divided eastern half share portion."

In *Brampy Appuhamy Vs Menis Appuhamy* 60 N.L.R.337, it was held that:-

- (1) That the court acted wrongly in proceeding to trial in respect of what appeared to be a portion only to the land described in the plaint.
- (2) That when the surveyor proceeded to execute his commission and was unable to locate a land of about 6 acres, he should have reported that fact to court and asked for its further directions.

It was further held that it is the duty of a surveyor to whom a commission is issued to adhere strictly to its terms and locate and survey the land he is commissioned to survey. It is not open to him to survey any land pointed out by one or more of the parties and prepare and submit to the court 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 G.A.D.P.De S Jayasuriya Vs A.M.Ubaid 61 N.L.R.353 Sansoni, J. Observed that “there is no question that there was a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it was always open to him to call for further evidence in order to make proper investigation.

In a partition action there is a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it is always open to him to call for further evidence (in a regular manner) in order to make a proper investigation.

In Wickremaratne V Albenis Pererra (1986) 1 Sri L.R. 190 it was held that:-“In a partition action, there are certain duties cast on the court quite apart from objections that may or may not be taken by **the** parties “and this includes the “supervening duty to satisfy itself as to the corpus and also at the title of each and every party who claims title to it.”

In Sopinona Vs Pitipanaarachchi and two others [2010] 1 Sri L.R. 87 it was held that:-

Clarity in regard to the identity of the corpus is fundamental to the investigation of title in a partition case, without proper identification of the corpus it would be impossible to conduct a proper investigation of title.

The learned District Judge in his judgment has come to the correct conclusion that the corpus sought to be partitioned in this action and described in the schedule to the plaint having an extent of 1 Acre and 2 roods had not been depicted in the said preliminary plan marked X but only the southern portion of the said land that had been excluded by the said Ismail Lebbe Marikar when the said

deed No 14383 P6 had been executed. The corpus that had been depicted in terms of the said plan X is only the southern portion of the said land which has an extent of 2 Roods and 23.25 Perches. And yet the learned District Judge had proceeded to order the partition of the Southern portion of the said land which is only of 2 Roods and 23.25 Perches. In the instant case the plaintiff sought to partition a land of about 1 Acre and 2 Roods and the surveyor was commissioned to survey a land of about that extent. Section 16 of the Partition Law requires the court to order the issue of a commission to a surveyor directing him to survey the land **to which the action relates**. In the instant case the commissioner had surveyed a land of only 2 Roods and 23.25 Perches. Section 25 of the Partition Law empowers the court to try and determine the matters referred to therein and examine the title of each party to or in the land **to which the action relates**. In this case the action relates to one land and the determination of the court to another. The court acted wrongly in proceeding to trial in respect of what appeared to be a portion only of the land described in the schedule to the plaint.

Accordingly, for the reasons aforesaid I set aside the judgment of the District Court, Kalutara, and remit the case to the District Court for fresh proceedings to be taken in accordance with section 16 and the other provisions of the Partition Law.

Case sent back for retrial.

JUDGE OF THE COURT OF APPEAL