

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRILANKA

Warnakula Arachchiralalage Dona
Annie Rita Fonseka alias Annie
Seetha Fonseka,
'Swarna' Kuda Paiyagala,
Paiyagala.

Plaintiff

C A 379 / 97 (F)

Vs.

D.C. Kalutara No. 5921 / P

1. Hewafonsekage Prasad Annesley
Fonseka, Kuda Paiyagala,
Paiyagala.
2. Hewafonsekage Sunil Stanley
Remand Fonseka, Kuda Paiyagala
Paiyagala.
3. Hewafonsekage Chandra Kumari
Hyscinth Fonseka, Kuda Paiyagala
Paiyagala.
4. Don Nikulas Clament Derrick
Weerasooriya, Kuda Paiyagala,
Paiyagala.
5. Kurukula Karunathilake
Dissanayake Don Nikulas Clament
Derrick Weerasooriya, No. 2,1/13,
Galle Road, Kuda Paiyagala,
Paiyagala.
6. Lekam Mudiyansele Nimal
Patricia Megdaline Alexander,
No.2, 1/13, Galle Road,
Kuda Paiyagala, Paiyagala.

Defendants

AND NOW BETWEEN

4. Don Nikulas Clament Derrick
Weerasooriya, Kuda Paiyagala,
Paiyagala.
6. Lekam Mudiyansele Nimal
Patricia Megdaline Alexander,
No.2, 1/13, Galle Road,
Kuda Paiyagala, Paiyagala.
4th & 6th Defendant Appellants

Vs.

Warnakula Arachchiralalage Dona
Annie Rita Fonseka alias Annie
Seetha Fonseka,
'Swarna' Kuda Paiyagala,
Paiyagala.

Plaintiff Respondent

1. Hewafonsekage Prasad Annesley
Fonseka, Kuda Paiyagala,
Paiyagala.
2. Hewafonsekage Sunil Stanley
Remand Fonseka, Kuda Paiyagala
Paiyagala.
3. Hewafonsekage Chandra Kumari
Hyscinth Fonseka, Kuda Paiyagala
Paiyagala.
5. Kurukula Karunathilake
Dissanayake Don Nikulas Clament
Derrick Weerasooriya, No. 2,1/13,
Galle Road, Kuda Paiyagala,
Paiyagala.

Defendants-Respondents

BEFORE : UPALY ABEYRATHNE, J.
COUNSEL : Romesh De Silva PC with Sugath Caldera for the
4th and 6th Defendant Appellants
Ranjan Gunaratne for the Plaintiff Respondent
ARGUED ON : 08.11.2013
DECIDED ON : 03.03.2014
UPALY ABEYRATHNE, J.

The Plaintiff Respondent (hereinafter referred to as the Respondent) instituted the said action in the District Court of Kalutara seeking for a judgment to partition the land described in the schedule to the plaint. The 4th and 6th Defendant Appellants (hereinafter referred to as the Appellants) took up the position that the subject matter of the action has been depicted as lot 1A in plan bearing No 6799 dated 17.11.1992 made by W. Seneviratne Licensed Surveyor. The learned District Judge after trial had decided that the land to be partitioned was lot No. 01 depicted in the preliminary plan No. 120 made by K. D. L. Wijenayake licensed surveyor. Being aggrieved by the said judgment dated 25.04.1997 the Appellants have preferred the instant appeal to this court.

The learned counsel for the Appellants contended before this court that the learned District Judge has failed to determine properly the corpus of the action. I now consider the said submission. According to the schedule to the plaint the Respondent has sought to partition a land called 'The Northern Half Share Portion of Gadambagahawatta' situated at Paiyagala and bounded on the north by a portion of this land in the name of Warnakula Arachchiralalage Don Juwan on the east by a portion of this land in the name of Don Andris Presenthirala on the south by the remaining half share portion of this land and on the west by high road and containing in extent about 01 rood.

It is apparent that lot No 01 in the preliminary plan No. 120 (X) has been depicted as lots 1A and 1B in plan No. 6799 (6 V 1). Both Surveyors who had prepared X and 6 V 1 had reported the fact that the lands depicted in X and 6 V 1 were the land to be partitioned. Surveyor Seneviratne in his evidence (at pages 6 and 7 of the proceedings dated 13.08.1996) has stated that lot 1A and 1B depicted in plan bearing No 6799 was the land sought to be partitioned and it appeared to be one land.

The 4th and 6th Appellants in paragraph 4 of their joint statement of claim have stated that lot No. 1B in plan No 6799 made by W. Seneviratne licensed surveyor was originally owned by Lembert, Wilprad and Alexender De Soysa and they had transferred the said land to Pestheruwe Liyanaralalage Pilip Cooray by a deed bearing No 184 dated 08.12.1911. In proof of the said transfer the Appellants have produced an extract of land register marked 6 V 3. The said land had been described in 6 V 3 as “Gaddambagahawatta defined portion marked Lot No 2 in Plan No 1016 dated 29 September 1876 situated at Paiyagala and bounded on the north by portion of Gaddambagahawatta marked lot No 1 in the said plan on the east by Gaddambagahawatta in the name of Don Andris on the south by Kongahawatta and on the west by high road and containing in extent of twenty square perches.”

But the Appellants, in contrary to the said position, has described the land in schedule 01 to their statement of claim as “Gatambagahawatta situated at Payagala South, Badde Kuda Payagala, and bounded on the north by a portion of 1/6th portion of this land owned by J. W. D. Girigoris (presently lot 1A in plan No 6799) on the east by a portion of this land on the south by Kongahawatta and on the west by high road and containing in extent of 33.56 perches.

Said descriptions of the lands in 6 V 3 and schedule 01 to the said statement of claim of the Appellants clearly show that the said two lands were not identical as claimed by the Appellants. It is very clear that the Appellants are now claiming a larger land which containing in extent of 33.56 perches instead of the land described in 6 V 3 containing in extent of 20 perches. At the trial the Appellants have not produced the original plan bearing No 1016 dated 29.09.1876.

Further more the Appellants have produced a deed of transfer bearing No 1304 dated 20.07.1936 marked 6 V 6. According to the schedule to the said 6 V 6, a land called "Gatambagahawatta situated at Paiyagala in Paiyagal Badda in Kalutara Thotamune in Kalutara District and bounded on the north by one sixth part of the same land in the name of W. D. Girigoris on the east by a portion of the same land on the south by Kongahawatta and on the west by high road and containing in extent of 34 perches as depicted in plan No 2007 dated 4th July 1929 made by T. F. Collette licensed surveyor. The Appellants have not produced the said plan No 2007 at the trial. Surveyor Seneviratne has not superimposed his plan No 6799 with the said two plans No 1016 and No 2007.

In the said circumstances I am of the view that the Appellants have failed to prove that the land depicted in plan No 1016 dated 29.09.1876 or plan No 2007 dated 4th July 1929 has formed a part of lot 1 depicted in the preliminary plan No 120 dated 12.09.1991. Hence the Appellants are not entitled for an exclusion of lot 1B depicted in plan No 6799 dated 17.11.1992.

For the forgoing reasons the appeal of the Appellants is dismissed with costs.

Appeal dismissed.

Judge of the Court of Appeal