

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

In the matter of a final appeal
from the judgment entered into in
case No. 1480/P District Court of
Balapitiya.

Warnasuriya Jayawardena,
Chandrasiri,
Pitiwella,
Boossa.

Plaintiff

District Court (Balapitiya)

Case No. 1480/P

CA No. 1198/96 (F)

Vs.

1. Walahanduwa Gamage
Saddhasena "Saddhawasa"
Vidanagoda.
2. Paniyanduwege Upaneris Silva
3. Kallumarakkala Ellen Nona

4. Paniyanduwege Piyadasa

All of Paniyanduwa,

Ambalangoda.

Defendants

And Between

Paniyanduwege Upaneris Silva,

Paniyanduwa,

Ambalangoda.

2nd Defendant – Appellant

Vs.

Warnasuriya Jayawardena,

Chandrasiri,

Pitiwella,

Boossa.

Plaintiff – Respondent

Walahanduwa Gamage Indra

Malani of No. 307, Pitiwella,

Boosa.

**Substituted Plaintiff –
Respondent**

5. Walahanduwa Gamage

Saddhasena “ Saddhawasa”

Vidanagoda.

1st Defendant – Respondent

3. Kallumarakkala Ellen Nona

4. Paniyanduwage Piyadasa

Both of Paniyanduwa,

Ambalangoda.

3rd and 4th Defendant –

Respondents

BEFORE

: **P.W.D.C. JAYATHILAKE, J**

COUNSEL

: Athula Perera with Chathurani De
Silva for the 2nd Defendant
Appellant.

M.U.M. Ali Sabry PC with Nalin

Alwis for the 1st Defendant
Respondent.

ARGUED ON

: 26.03.2014

DECIDED ON

: 24.02.2015

P.W.D.C. Jayathilake, J

This partition action has been filed to terminate the co-ownership of the Plaintiff and the 1st Defendant of the land called Degodawatte Kabella, 1 rood in extent situated in Panianduwa, Ambalangoda. The Plaintiff owns 20 perches and the 1st Defendant owns the balance according to the plaintiff's pedigree.

The preliminary plan prepared by the commissioner of the case which has been marked as X at the trial shows a land of 19.75 perches in extent.

The 2nd Defendant has been present at the survey as a claimant. He has claimed all temporary buildings situated in the land without any dispute and plantation with dispute of the plaintiff. The 2nd Defendant has filed his statement of claim disclosing another two parties whom had been added as the 3rd and the 4th Defendants. In his statement of claim the 2nd Defendant has stated the subject matter described in the plaint is just an imagination. Stating that according to the boundaries mentioned to the subject matter in the plaint, it is a land called Degodawatta A.4 R.0 P.25.27 in extent depicted in the plan 4008 of Vanruyan, licensed surveyor prepared for the case no. 31219 of District Court, Galle in 1875, the 2nd Defendant has claimed the prescriptive title to the land which is depicted in the preliminary plan. The 2nd Defendant has further stated that the plaintiff and the 1st Defendant acting in collusion have filed this action on the collusive, notarial deeds. Therefore he has prayed for dismissal of the plaintiff's action.

As it has been alleged that the proposed land to be partitioned is a imaginary land on the request of the 2nd Defendant, court had made an order to lead evidence of the commissioner. Accordingly, M.C. Mendis, licenced surveyor summoned by the Plaintiff has given evidence. He has stated that he surveyed

the land shown by the plaintiff. According to his evidence, he has not made any effort to find the land described in the plaint as the subject matter of the case even though the land he has surveyed is less than 50% of its extent. The commissioner has accepted that the boundaries given in the subject matter are similar to the boundaries of the land depicted in the Plan No. 955 which has been marked as V2. V2 is the plan of a land of 4 acres mentioned in the statement of claim of the 2nd Defendant. The commissioner has stated that he is unable to say without superimposing whether the portion of the plan V2 north of the road matches the plan X.

The Plaintiff had been living since his birth in Pitiwella, a village situated 15 miles away from Panianduwa where the subject matter is located. The 1st Defendant was the brother-in-law of the Plaintiff who had been living 1 ½ miles off the place where the Plaintiff was living. As per the Plaintiff's evidence, the 1st Defendant had bought entirety of the subject matter from one Somapala in 1974. The 1st Defendant had gifted 20 perches to the Plaintiff in 1977. This action had been filed in the same year.

There had been two main issues to be decided by the trial court. One is that whether the subject matter described in the plaint has been correctly identified by the commissioner. The other is whether there had been co-ownership that genuinely existed.

The Sec.18 (1) of the partition law provides that

The surveyor shall dully execute the commission issued to him and in doing so shall, where any boundary of the land surveyed by him is undefined, demarcate that boundary on the ground by means of such boundary marks as are not easily removed or destroyed and shall, on or before the date fixed for the purpose, make due return thereto and shall transmit to the court.

In the perusal of the surveyors report in this case it appears that the surveyor has not followed the directions set out in the Sec. 18(1) (a) (iii) of the partition law which is as follows.

“Whether or not the land surveyed by him is, in his opinion substantially the same as the land sought to be partitioned as described in the scheduled to the plaint”.

What he has stated in para 5 of his report is that it is found that the land is smaller than the land referred to in the plaint. It is obvious that his answer is a deliberate avoidance of giving his opinion. It is supposed that surveyors as experts should, without drawing a plan basing on the boundaries shown by the Plaintiff and other parties which is a technical job, check whether there are

previous plans of the said land, observe the lands around to find whether they match the boundaries of the subject matter and so on.

Sanson J in *Jayasooriya Vs Ubaid*¹ was held “ 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 called for further evidence (in a regular manner) in order to make a proper investigation.

It has been held by Saleen Marsoof J in *Sopinona Vs. Pitipana Arachchi and two others*² (2010) 1SLR 88 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 trial judge has observed that the 2nd defendant has been unable to prove the connection between the subject matter and the plan No. 4008 filed in the case No. 31219 in District Court, Galle. Here, it seems that the position of the District Judge suggests that he had presumed that the preliminary survey of the commissioner has to be accepted unless it is proved to be incorrect.

Partition law requires the surveyor to verify his report and the plan, by an affidavit. Specimen form for the surveyor’s report is provided in the 2nd

schedule of the partition law. The form of the affidavit is shown at the bottom of the form. Even though the commissioner of this case has submitted his report in the said form, in the affidavit, there is no name and rubber stamp of the Justice of the peace deemed to have attested the affidavit. Due to this, one could challenge the validity of the affidavit hence the verity of the plan and the report.

As accepted in the series of the decided cases, it is a fundamental duty of the trial judge of a partition action, to identify the subject matter rightly and investigate the title of co-owners.

Mather V. Tamotharam Pillai³ , In partition proceedings the paramount duty, is cast by the Ordinance upon the District Judge himself to ascertain who are the actual owners of the land. As collusion between the parties is always possible, and as they get their title from the decree of the Court, which is made good and conclusive as against the world, no loopholes should be allowed for avoiding the performance of the duty so cast upon the Judge.

Peris V. Perera⁴ , The Court should not regard a partition suit as one to be decided merely on issues raised by and between the parties, and it ought not to make a decree, unless it is perfectly satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned.

Fernando V. Mohamadu Saibo⁵ , Where plaintiffs alleged common possession and common title with defendants and subsequent ouster by defendants, but defendants claimed the whole land as their own and pleaded that an action for partition was not open to the plaintiffs until they established their title in a separate action.

Held, it was irregular to reject the prayer for partition and to order the case to proceed as an action for declaration of title.

Per Lawrie, A.C.J., Neither the fact that the title of plaintiff or defendant is denied, nor the fact that neither plaintiffs nor defendants are in possession, is a good objection to an action for partition.

The Court must in all cases of partition carefully investigate all titles, and must refuse to make title on admissions or insufficient proof.

Sopinona V. Pitipanarachchi⁶ , Since a partition action is instituted to determine question of title, it is necessary to conduct a thorough investigation and the duty of such investigation devolves on the Court.

In the instant case, the preliminary survey of the surveyor is a flawed one. The learned trial judge has not paid his attention to the fact that the subject matter has not been properly identified.

The trial judge should have paid his special attention to the fact that there is a case praying to terminate the co-ownership created by the 1st Defendant, once shown in the Plaintiff's pedigree as the sole owner of the subject matter, having gifted undivided 20 perches to the Plaintiff, a brother-in-law of his in deciding this case.

I don't see any purpose of sending this case for trial *de novo* as the error has occurred at the very beginning of the case proceedings. Therefore, this court set aside the judgment of the learned District Judge and dismisses the plaint.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

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1. 61 NLR 352
 2. 2010 1 SLR 88
 3. 6 NLR 246
 4. 1 NLR 362
 5. 3 NLR 321
 6. 2010 NLR 87