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

In the matter of an under Rule 3 and 11(B) of the Supreme Court Rules published in Part – 1 Sec, (1) (General) Gazette Extraordinary of the Republic of Sri Lanka.

C.A.Case No. 767/99(F)

D.C.(Balapitiya)

Case No. 633/P

Malwenna Hewage Subaneris

Puwakgahahena, Galahenkanda,

Ampegama.

Plaintiff

Vs.

1. Walawe Durage Caroline

   Galahenkanda,Ampegama.

2. Walawe DurageTimel

   Dissanayaka

   Galahenkanda, Ampegama.

   And 15 others

Defendants

Now Between

Walawe DurageTimel

Dissanayaka, Nagahathota,

Galahenkanda, Ampegama.

2nd Defendant – Appellant

Walawe DurageSudharman

Dissanayaka, Nagahathota,

Puwakgahahena, Galahenakande,

Ampegama.

Heir to the 2nd Defendant – Appellant

Vs.

Malawanna Hewage Subaneris

Puwakgahahena, Galahenkanda,

Ampegama.

Plaintiff – Respondent

1. Walawe Durage Caroline

   Galahenkanda, Ampegama.

   And 15 others

Defendant – Respondents

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

COUNSEL : Dr. Mahinda Ralapanawa with Nisansala Fernando for the Substituted 2nd Defendant Appellant.

D.Akurugoda with Upali

Alwis for the Plaintiff –

Respondent.

ARGUED ON : 29.05.2015

DECIDED ON : 20.07.2015

P.W.D.C. Jayathilake, J

The Plaintiff Respondent instituted this partition case seeking to terminate the co-ownership of the land called "Dombagahawatta" two acres in extent. He has shown undivided shares 2/3 + 2/9 to him and the balance in undivided shares to 1st to 17th Defendants except the 2nd Defendant. It has been stated in the Plaint that the 2nd Defendant was made a party for the purpose of information of the case. The commissioner of the case, B.L.D. Fernando by

executing the commission issued on him for the preliminary survey has submitted the Plan No. 1421 dated 31.10.1983.

The 2nd Defendant filed his statement of claim stating that the Plan No.1421 depicts' the Northern part of the land called Godalla Uda ThotupaleWattha. He further states that he had been in possession of the said land for a period of over ten years prior to the date of this Action stating that he had acquired prescriptive title thereto. The commission moved by the 2nd Defendant had been issued to P.A. Robin Chandrasiri, licenced surveyor with the original plan of the commissioner of the case. The surveyor Robin Chandrasiri had made three Superimpositions. Firstly, the boundaries of his survey in red colour, secondly, the portion of Lot No.854 of the title Plan 665 in green colour and finally the Plan No.1145 of P.H.A. De Silva, licenced surveyor in blue colour.

Though it has been mentioned in trial proceedings that the plan No. 1421, which is the preliminary Plan, is marked as 'X' and the report as X/1, in the said Plan found in page 185 of the record, such marking and/or initialling the trial judge cannot be seen. Neither the commissioner nor the Surveyor Robin

Chandrasiri had been called for giving evidence. In accordance with the provisions of Partition Law, the Preliminary Plan made by the commissioner of the case can be accepted as evidence. The fact that the subject matter of a partition case is to be properly identified is emphasized in our law, since a Partition Case is an 'action in rem' and the Final Decree entered in a Partition Action is effective against the whole world.

The learned trial judge, in his judgment, has stated that calling the commissioner of the case to give, evidence is not necessary. Though the learned trial judge has mentioned that the 2nd Defendant had not produced the plan of the alternative commission moved by him, it seems that the trial judge has not noted that it is on the plan X that the plan of the alternative survey had also been drawn. There is no reason to wonder about the fact that the attention of the learned trial judge had not been directed to this, because he has not even initialled the plan. The report of the preliminary survey is filed in page 194 of the case record even which has not been initialled by the trial judge. The commissioner, in the said report, has stated that this land can be

declared to be the one described in the schedule of the plaint. It is the Plaintiff who had pointed out the boundaries, according to the report. The report of the preliminary survey of a partition case shall be in a form of affidavit in terms of the Partition Law. The report under consideration cannot be considered as an affidavit as there is no proper jurat and the name of the Justice of the Peace who has attested the signature of the affirmant. This shows the negligence of the court commissioners in discharging their duties and fulfilling responsibilities.

The commissioner has ended his duty and responsibilities by surveying the land according to the boundaries shown by the Plaintiff and stating that the subject matter is the land described in the schedule of the Plaint. The surveyor who was commissioned of drawing a plan of his own, has made changes on the plan of the commissioner. The Plaintiff or the 2nd Defendant has left the making of decision on the subject matter to court, without calling the surveyors for testifying. The trial court has come to the decision on the subject matter even without seeing the preliminary plan.

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.

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.

In the circumstances it is unavoidable that this court coming to the conclusion that the trial court had made an error in deciding the question relating to the subject matter. Thus, the judgment of the trial court has to be necessarily set aside.

Although, it is now twenty six years since this Action was instituted and sixteen years since the judgment was delivered, the relief that could be granted by this

court is an order for re-trial. Accordingly, I set aside the judgment dated 06.09.1999 of this case and make an order for a re-trial.

Judgment set aside.

Re-trial ordered.

JUDGE OF THE COURT OF APPEAL

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1. **61 NLR 352**
2. **2010 1 SLR 88**