

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

C.A.630/97 (F)  
D.C.Walasmulla No.250/P

Weerapulige Diyonis of  
Wadumaduwa, Horewela  
Walasmulla.

**13<sup>th</sup> Defendant-Appellant-**

Vs.

Warusamanage Somasiri,  
Udakanatta,  
Horawela,  
Walasmulla.

**Substituted-Plaintiff-Respondent**

1A Gamage Dharmapala  
"Lakshmi"  
Horewela, Walasmulla

And 15 others.

**Defendant-Respondents.**

BEFORE : Deepali Wijesundera J., and  
M.M.A. Gaffoor J.,

COUNSEL : Chathura Galhena with Manoja  
Gunawardena for the 13<sup>th</sup>  
Defendant-Appellant.

Daya Guruge with Premani  
Pothupitiya for the Substituted-  
Plaintiff-Respondents.

ARGUED ON : 18/03/2015

DECIDED ON : 10/9/2015

**M.M.A. Gaffoor J.**

The plaintiff has filed this action on 23.02.1987 to partition this land called 'Aralaga Koratuwa" among the parties name in the plaint. The said land in dispute as lot 1-6 in plan No.1481 dated 02.10.1988 and made by S.K.Piyasena license surveyor. This plan is marked X and its report is X1. Lot 6 is a roadway and hence, the plaintiff has asked to partition only lot 1 to 5. It must be noted that originally the plaintiff has named only 12 defendant but later this number has been increased to 16 as

per the Petition of Appeal. The 13<sup>th</sup> defendant who is the only contesting party had appeared before the surveyor as 3<sup>rd</sup> "New claimant", and had put forward claims to Lots 1 and 2 and the improvements and buildings in lot 1 and 2.

The Plaintiff has stated in the plaint of his pedigree and of the 1-12 defendants and allotted their respective shares in para 9 of the plaint. The 13<sup>th</sup> defendant claims exclusive possession by himself and through his predecessor in title to lots 1 and 2 and prayed that as he and his predecessor in title have been possessing these two lots for over 45 years these two lots (i.e. Lots 1 and 2) should be excluded, from the land to be partitioned.

However, the learned District Judge has rejected this claim of the 13<sup>th</sup> defendant and held that he is entitled to the plantations only and not to the soil. The judgment was delivered on 18.07.1997. The 13<sup>th</sup> defendant has appeal against this judgment to this Court.

The trial commenced in this case on 04.3.1997, 1-10 issues were raised by plaintiff. Issues 11 to 22 by 13<sup>th</sup> defendant. Thereafter the plaintiff has given evidence. In his evidence he has stated that the 13<sup>th</sup> defendant appeared before the surveyor as "3<sup>rd</sup> new claimant". This is important to note because, according to the surveyor's report marked "X1" The persons who claimed Lots 1 and 2 and this buildings and plantation therein are the 13<sup>th</sup> defendant and 3<sup>rd</sup> new claimant. But according to the evidence of the plaintiff these two persons are one and the same and not two and therefore the persons who claimed Lot 1 and 2 and the improvements before the Surveyor is only one person the 13<sup>th</sup> defendant. According to the Surveyor's Report X1, land was surveyed on 15.09.1988. When the Surveyor surveyed the land, the plaintiff and the 2<sup>nd</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> 10<sup>th</sup> and 12<sup>th</sup> defendants and the representatives of the 1<sup>st</sup> and 3<sup>rd</sup> defendants were present, but none of these persons had claimed Lot 1 and 2 and the buildings and plantations in Lot 2. It was only the 13<sup>th</sup> defendant (3<sup>rd</sup> new

claimant) who had claimed rights to Lot 1 and 2 and the buildings and plantations.

The Surveyor says in his report that the 3<sup>rd</sup> new claimant had stated that he and his predecessors in title has been possessing Lot 2 for about 40 years without any disturbance from any one. The road shown in broken lines appears to be if 4 or 5 years old and is used by the plaintiff to go to his land. The surveyor does not say when the plaintiff's land is situated to use this road to go to that land.

The main contest in this case is about Lots 1 and 2 which the 13<sup>th</sup> defendant claimed to be excluded from the corpus that is to be partitioned. It is to be noted that the surveyor says that Lot 1 is not part of the corpus which is depicted in the Title Plan No. 286580. As such, it is to be excluded and may be given to the 13<sup>th</sup> defendant because he is the only person who made a claim to this lot. Further the plaintiff did not

have an answer to the suggestion by 13<sup>th</sup> defendant's lawyer that Lots 1 and 2 are situated as one land. (See page 87 of the brief). As such, Lots 1 and 2 has been possessed by 13<sup>th</sup> defendant as one land. The plaintiff has admitted in his evidence that the 13<sup>th</sup> defendant claimed for buildings and plantations and were planted by him. (See pages 88 and 89 of the brief).

The evidence of Gamage Dharmapala (1A defendant) is also important to note. He too admitted that the 13<sup>th</sup> defendant possessed Lot 1 and 2 for the last 15-20 years. He says that all the buildings and plantations were done by him and no one came to dispute his possession (see pages 92, 93 and 94 of the brief).

The evidence of Hewa Pasgodage Yasapala the 6A defendant too is very clear that the Northern Portion of this land was possessed by Diyaoni (13<sup>th</sup> defendant) and his grandmother and they did the plantations. After his

grandmother's death Diyoni only was possessing and cultivating the land. (page 98 of the brief).

The name of the corpus, according to T.P. 286580 of the surveyor General and Plan No. 1481 of S.K. Piyadasa Licenced Surveyor, is "Aralange Koretuwa" in Horawela Village. A deed was shown to the 13<sup>th</sup> defendant, No. 1570 marked P5 and was suggested to him by the Plaintiff's Attorney that it was a deed of gift executed in his favour by his father Heen Appu. But this deed does not relate to the land known as "Aralange Koretuwa". The schedule in deed No. 1570 describes a land called "Matihatta". Hence, it has nothing to with the corpus known as "Aralanga Koratuwa".

The learned District Judge has refused to exclude the Lots 1 and 2 from the corpus on the ground that they were not separately identified. Although the learned District Judge has answered issues No. 12 and 13 affirmatively which refers to the possession of Lot 1 and 2 by 13<sup>th</sup> defendant and his grandmother, yet the learned Judge had doubted the

identity of the Lots and therefore he refused to exclude these two Lots from the corpus. This decision is obviously wrong. According to other evidence of Hewa Pasgodage Yasapala (page 99) and 13<sup>th</sup> defendant (pages 104 and 106) there are boundary marks with some flower plants and trees between the North of Lot 3 and South of Lot 2. In a remote village like Horawela, one cannot expect a permanent wall as a boundary. Many a land is divided by plants and trees which are sufficient for the purpose of showing the boundaries of the occupiers. The present boundary marks which are exhibited by the remains of flower plants and (Makulatha) trees were shown to the Surveyor, but the Surveyor has not shown these marks. However Lot 1 and 2 are identified on the ground by the Surveyor Piyadasa as the lands possessed by the 13<sup>th</sup> defendant within Plan No. 1481. Therefore, it is not correct to hold that the land possessed by the 13<sup>th</sup> defendant is not identified by permanent boundary.

The findings of the learned District Judge as to the possession and improvements in Lot 2 are important. (See

pages 126, 127, 128 of the Brief). In these pages, the evidence of the 13<sup>th</sup> defendant as to the possession of the land over 45 years and his claim for improvements are accepted by the learned Judge. But only ground for his rejection to excluded Lot 1 and 2 from the corpus is, according to him, that there was no permanent boundary or something to that effect. For this he puts this burden on the 13<sup>th</sup> defendant that he failed to call the surveyor to clarify this matter. But under Section 18(3)(a) of the Partition Law No. 21 of 1977 it is also the duty of the Court, either on its own motion or on the application of a party to the action, to call the Surveyor to verify this matter. This step has not been taken in this case. If this step was followed the doubt as to the boundary of Lot 1 and 2 from other Lots could have clearly been solved. Nevertheless, the evidence of 13<sup>th</sup> defendant and other witnesses as to the 13<sup>th</sup> defendant's possession of Lots 1 and 2 is un contradicted. There is ample evidence that the plantations in Lots 1 and 2 and the buildings in Lot 2 were claimed by 13<sup>th</sup> defendant only. The Surveyor's report X1 is very clear about this. None of these persons, whether plaintiff or other defendants, who

were present at the times of the Survey claimed any of the plantations or buildings in Lot 1 and 2. It is common sense that a person's cannot claim buildings and plantations without possessing the land in which they are situated. Except for a demarcation of a boundary between Lot 2 and 3, all the evidence led in this case clearly establish this fact that Lot 1 and 2 are possessed by the 13<sup>th</sup> defendant exclusively and without and disturbance from any other person. The evidence of the 13<sup>th</sup> defendant and other witness sufficiently proved that the 13<sup>th</sup> defendant's grandmother and he had been possessing Lots 1 and 2 and after the grandmother death, the 13<sup>th</sup> defendant alone independently is possessing these Lots as shown in Plan No. 1481 dated 02.10.1988 made by S.K. Piyadasa, Licensed Surveyor, marked X and filed of record. The learned District Judge has misdirected himself as to the identify of these two lots by a permanent boundary. It is to be noted that at the time of the survey, the 13<sup>th</sup> defendant and others including the plaintiff were present and in their presence the 13<sup>th</sup> defendant had pointed out the boundary of Lot 2 to the Surveyor. At that time, neither the plaintiff nor

the defendants who were present, disputed the boundary shown by the 13<sup>th</sup> defendant. Accordingly, the Surveyor had surveyed the land and given the markings in his plan. This plan No. 1481 and its reports are admitted in evidence without any objection. Therefore, it is incorrect by the learned District Judge to hold that the 13<sup>th</sup> defendant failed to prove by clear boundaries of Lots 1 and 2 possessed by him. It is also incorrect to hold by the learned Judge that the 13<sup>th</sup> defendant possessed Lots 1 and 2 and did the plantations with the leave and license of the other parties. This is not the case of the plaintiff and others. There is no any evidence to establish this position. It is abundantly clear that the 13<sup>th</sup> defendants possession was exclusive, uninterrupted and independent of all others.

I therefore hold that Lots 1 and 2 in Plan No. 1481 should be excluded from the corpus to be partitioned which must be restricted to Lots 3, 4 and 5, which may be allotted to the plaintiff and 1<sup>st</sup> to the 8<sup>th</sup> , 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 15<sup>th</sup> defendants as determined by the learned District Judge in his Judgment dated 18.09.1997. Subject to this variation, this

appeal is allowed and the case is sent back to the District Court for further proceedings. The 13<sup>th</sup> defendant is entitled to cost in the cause.

**JUDGE OF THE COURT OF APPEAL**

**Deepali Wijesundera, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**

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