763/764/765/95 (F)

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

6A.Balachandra Arachchige Dona
Gnanawathie, Swarnalatha,
Amuwatta, Bogamuwa,
Boyagane Post.

6A Substituted-Defendant-Appellant

4.Kultunge Mudiyanselage Dingiri Banda
Kulatunga, Hangamuna, Maspotha.

4th Defendant-Appellant

9.Heath Mudiyanselage Kapuru Banda,
Bogamuwa, Boyange Post.

9th Defendant-Appellant

C.A.Case No:- 763/764/7675/99(F)

D.C.Kurunegala Case No:-5236/P

V.

Ratnayake Mudiyanselage Punchi Banda
Bogamuwa, Keeragandahaya Korale,
Willi Hatpattuwa, Weuda, Boyange Post.

Plaintiff-Respondent

1.Kulatunga Mudiyanselage Dingiri

Mahatmaya, alias Dingiri Menika
Demalussa, Walgampattu Korale,
Devamedi Hatpattuwa,
Bamunakotuwa Post.(deceased)

1a.Abeykoon Mudiyanselage Dayaratne
Demalussa, Maspotha Post.

2. Kulatunga Mudiyanselage Ukku Amma
Bogamuwa, Boyagane Post.(deceased)

2a.Watte Vithanalage Jayatilleke
Bogamuwa, Boyagane Post.

3.Kulatunga Mudiyanselage Punchi
Banda, Bogamuwa, Boyagane Post.

5.Korotti Gamage Karunawathie
Bogamuwa, Bodigama Post.

6b.Mapa Mudiyanselage Dingiri Menika
Kahapathwala, Kahapathwala Post.

6c.Mapa Mudiyanselage Podi Menike
Siyabalagamuwa, Maspotha Post.

6d.Mapa Mudiyanselage Somawathie
Ranawarawewa, Ambanpola Post.

6e.Mapa mudiyanselage Sumanawathie
Ranawana, Thorayaya Post.

6f.Mapa mudiyanselage Tikiri Menika
Balangoda, Balangoda Post.
7.Kulatunga Mudiyanselage Karuna
Sidath Bandara,Bogamuwa,
Boyagane Post.
8.Watte Vithanalage Jayatilleke
Menike,Bogamuwa,
Boyangane Post.

Defendant-Respondents

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

Counsel:-Upali de Almeida with R.J.U.Almeida for the 6A Substitued-Defendant-Appellant

Rasika Wellappuli with J.D.Gamage for the 9th Defendant-Appellant

Shyamalee Weliwatte with P.Agalawatta for the
2A Defendant-Respondent

Argued On:-20.01.2014

Decided On:-02.12.2015

H.N.J.Perera, J.

Plaintiff-respondent instituted this partition action in the District court of Kurunegala seeking to partition the land called Madithiyagahamula watta more fully described in the schedule to the plaint.

Accordingly a commission was issued to Licensed Surveyor K.Sivagnanasunderam to survey the corpus. Accordingly a plan was prepared bearing N0.1812 dated 02.09.1974 which identified the land as consisting of four lots depicted as lots 1,2,3 and 4 in the said Preliminary plan.

The original 6th defendant took up the position that lot 1,2 and 3 depicted in the said preliminary plan marked X at the trial does not form the subject matter of the action and lot 4 alone forms the corpus. The 6th defendant took up the position that lot 1, 2 and 3 in the preliminary plan constituted a separate land called Madugahamula Watta and that she was in possession of the said lot 3 as a co-owner of the said land. Therefore at the trial the main issue was on the identification of the corpus and as to whether the aforesaid lot 1,2 and 3 was part of the subject matter of the action or not. The learned trial Judge by his judgment dated 24.11.1995 entered judgment holding with the plaintiff-respondent that the corpus consists of lots 1 to 4 in the said preliminary plan marked X at the trial and partitioning the land in accordance with the devolution of title pleaded in the plaint.

The 4th defendant too claimed rights to the said corpus under deeds marked 4V1 to 4V 5 at the trial. The learned trial Judge after trial held that the 4th defendant is not entitled to any rights from the said corpus under deeds marked 4V3, 4V4 and 4V5 at the trail. Aggrieved by the said judgment of the learned trial Judge the 4th defendant too had preferred an appeal to this court.

The 9th defendant who was added as a party to this case claimed rights under the 2nd defendant Ukku Amma by deed No. 30599 marked 8V2 at the trial. The issues raised by the 9th defendant was answered negatively by the learned trial Judge and the 9th defendant was not given rights on the basis that his deed was registered after the registration of the lis pendens. Aggrieved by the said judgment of the learned trial Judge the 9th defendant too had preferred an appeal to this court.

The 6th defendant took up the position that lot 1,2, and 3 in the preliminary plan constituted a separate land called Madugahamula watta for which the 6th defendant claimed independent title.

It has been the practice of the courts to exclude a separate land wrongly included by a plaintiff as being part of the corpus of the partition case. In C.N.Hevavitharana V Themis De Silva & others 63 N.L.R 68 it was held that:-

"In an action instituted under section 2 of the Partition Act to partition a land the court has inherent power, under section 839 of the Civil Procedure Code, to make an order excluding a separate or divided lot or land which has been wrongly included by the plaintiff as being part of the corpus."

It was contended by the counsel for the 6a defendant-appellant that the learned trial Judge has failed to evaluation the evidence relating to the question whether the corpus is depicted as lots 1-4 in preliminary plan marked X as contended by the plaintiff-respondent or is depicted as lot 4 only, as claimed by the original 6th defendant. Firstly whether the boundaries of the subject matter of the action as described in the plaint and the deeds of the plaintiff-respondent tally with those shown in the Preliminary plan marked X. The 6a. defendant-appellant claimed that the part of the corpus to the West of the road comprising of lots 1-3 in the plan marked X does not form the subject matter of the action, in which

event, lot 4 alone forms the corpus. Whether the land sought to be partitioned is lot 4 or lot 1-4, the Eastern boundary in either case is Madugahamulahena according to the said plan X. Likewise the Southern boundary would remain as Hitinawatta.

It was contended on behalf of the 6A defendant-appellant that the schedule to the plaint and the deeds of the plaintiff-respondent describe the Northern boundary of the corpus as Undiyaralage watta. However, a perusal of the preliminary plan marked X reveals that the Northern boundary of the corpus as depicted therein is described as not only Undiyaralage watta as found in the schedule to the plaint and the plaintiff-responded deeds, but also as Gederawatta belonging to the plaintiff-respondent himself. It was the contention of the counsel for the 6a defendant-appellant that as the Northern boundary of lots 1-3 in preliminary plan marked X is Gederawatta and not Undiyaralage watta, in the absence of any compelling reason, prima facie the said lots 1-3 would fall outside the corpus.

It is to be noted that in deeds marked P1 to P4 by the plaintiff-respondent the Northern boundary is stated or given as Undiyaralage watta. None of the deeds marked by the plaintiff respondent gives the Northern boundary as Undiyaralage watta and Gederawatta.

In G.A.D.P De S Jayasuriya V. 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 further evidence (in the regular manner) in order to make a proper investigation.

In Wickremaratne V.Albenis Perera (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 as to the title of each and every party who claims title to it."

Further in Sopinona V. 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.

In the said judgment the leaned trial Judge has held that the description of the Northern boundary in deed marked P4 is identical with the Northern boundary as depicted in preliminary plan marked X. The learned trial judge has held that in the said plan of the Surveyor Sivagnanasundram the Northern boundary is the lands owned by the plaintiff-respondent Gederawatta and Undiralalage watta and that it tally's with the Northern boundary of P4. On perusal of the said deed P4 and as well as the other deeds marked by the plaintiff-respondent P1,P2,P3 it is clearly seen that the Northern boundary is given as Undiralalage watte only. On perusal of the said plan X it is clearly seen that the Northern boundary of the lots 1, 2 and 3 is Gederawatta and not Undiralalage watta as stated in the judgment. The plaintiff-respondent too had admitted that the Northern boundary of the corpus as Undiralalage watta.

The 4th defendant who did not have any dispute with the plaintiff-respondent either in relation to the identity of the corpus or the devolution of title has clearly stated that there is a land owned by the plaintiff-respondent by the name of Gederawatta and that the 6th defendant too has rights to the said land. Both in the schedule to the

plaint as well as in all the deeds marked P1 to P4 the Northern boundary is given as Undiralalage watta.

The extent given in the deeds by which the plaintiff-respondent got rights (P1-P5) is 2 Seers of Kurakkan sowing extent. Learned Counsel for the 6th defendant-appellant contended that the English equivalent to the customary measure of sowing of 2 Seers is equivalent to ½ an acre. In the said deeds marked P1-P4 the extent of the corpus is given as two 2 Kurakkan Seruwa or Seers. The 4th and the 6th defendant-appellants has also in their evidence stated that 2 Kurakkan Seers is about ½ an acre. This fact has not been challenged by the plaintiff-respondent or any other party to this case. In the case in Ratnayake and others V. Kumarihamy and others [2002] 1 Sri.L.R page 675, the Counsel for the defendant-appellant contended like in this case that one Laha is equal to one acre. In the annexure 2 of the said case at page 80, it is stated that 2 Manawas is equal to one Neliya, Seruwa or Seer. And 4 Neli's is equal to 1 Kuruniya or Laha. In the Ferguson's Sri Lanka Directory 81-83 under the heading of Sinhalese Land Measures it is stated that a Laha is the equivalent of an acre in the case of Kurakkan. Therefore it is quite apparent that if one Laha or 4 seers is equivalent to one acre, 2 Seers is equivalent to half an acre of land. Therefore it is very clear that the plaintiff-respondent has instituted this action to partition a land in extent about ½ an acre. But in the said preliminary plan the extent is given as 1 acre, 1 Rood and 29 perches. It is about three times the extent given in the said deeds marked P1-P4.

Section 16 of the Partition Law requires that a commission be issued to a surveyor directing him to survey the land **to which the action relates**. It implies that the land surveyed must conform **substantially,** with the land as described in the plaint as regards the location, boundaries and the extent. Further, it is for this reason that section 18(1) (a) (iii) requires the surveyor to express an opinion in his report" whether or not the land

surveyed by him.... Is substantially the same as the land sought to be partitioned as described in the schedule to the plaint."

In the instant case the surveyor in his report X1 has stated that he has surveyed the land according to the boundaries shown by the plaintiff. Nowhere in the said report has he stated, that he is of the opinion that the land surveyed by him is substantially the same as the land sought to be partitioned as described in the schedule to the plaint.

In Sopaya Silva and another V. Magilin Nona [1989]2 Sri.L.R 105 it was held that-

"If the land surveyed is substantially different from the land as described in the schedule to the plaint, the court has to decide at that stage whether to issue instructions to the surveyor to carry out a fresh survey in conformity with the commission or whether the action should be proceeded with in respect of the land as surveyed."

In the instant case the Commissioner had surveyed a land of 1 acre 1Rood and 29 Perches. Section 25 of the partition Law empowers the court to try and determine the title of each party to or in the land **to which the action relates.** The court acted wrongly in proceeding to trial in respect of what appeared to be a larger land than that was described in the schedule to the plaint. The action relates in this case to a land in the extent of 2 Kurakkan Seers or equal to an extent of about ½ an acre of land called Madithiyagahamula watta. The commissioner had surveyed a land in extent of 1 acre 1 Rood 29 Perches which is about three times in extent of the land described in the schedule to the plaint.

In Brampy Appuhamy V. Menis Appuhamy 60 N.L.R 337 it was 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 the instant case the 6A defendant-appellant position was that lots 1-3 in the preliminary plan constituted a separate land called Madugahamula watta. 6th defendant claimed title to the said land by deeds marked 6V1 to 6V3 and claimed 1/3 share of the said land. The learned trial Judge in his judgment had held that because of the difference of the extent of the two lands, the 6th defendant is not entitled to any share in the land to be partitioned in this case. Issues No.11 to 15 has been raised on behalf of the 6th defendant-appellant at the trial. It is very clear that the 6th defendant has not claimed any rights from the corpus to be partitioned in this case. But only sought an exclusion of the lots 1,2 and 3 on the basis that the said lots form a different land named Madugahamula Watta and that she is entitled to 1/3 share of the said land in terms of deeds marked 6V1 to 6V3. The 6th defendant had sought only an exclusion of the said lots 1 to 3 on the basis that it is a different land of which she is a co-owner.

The 6th defendant has never claimed any rights from the land Madithiyagahamula watta, the land sought to be partitioned in this case. On perusal of the judgment of the learned trial Judge it is very clear that the learned trial Judge has misdirected himself in thinking that the 6th defendant had claimed rights from the land to be partitioned. The learned trial Judge has very clearly stated in his judgment that the 6th defendant cannot claim any rights under the said deeds marked 6V1 to 6V3 to the land sought to be partitioned. If the court accepts the position of the 6th defendant then the court could only exclude the said lots 1 to 3 from the land to be partitioned in this case and partition only lot 4 in the said preliminary plan marked X. The 6th defendant does not claim

any rights from the lot 4 in the said preliminary plan marked X but has claimed rights from lots 1-3 on the basis that the said lots are part of a land called Madugahamula watta of which she is a co-owner.

Unlike the judgments in other cases, the judgments in partition actions binds not only the parties to the action but also the whole world. Therefore Judges in partition actions are burdened with severe responsibility in investigating the title of parties. The mere fact that the 6A defendant-appellant has failed to prove that the land shown in the preliminary plan consists of portions of another land does not in any way lesson the responsibility and the duty of the court to find out and to be satisfied that the commissioner has properly surveyed the land sought to be partitioned as described in the schedule to the plaint or not. For this purpose it was always open to the learned trial Judge to call for further evidence in order to make proper investigation.

The court acted wrongly in proceeding to trial in respect of what appeared to be a larger land than that was described in the schedule to the plaint. The plaintiff-respondent has instituted this action to partition a land called Madithiyagahamula Watta, a land in extent of 2 seers of Kurakkan or about ½ an acre in extent. The lis pendens has been registered to partition a land called Madithiyagahamula Watta in extent of two seers of kurakkan only. The court has entered judgment and Interlocutory decree to partition a land about 6 seers of Kurakkan or 1 ½ acres of land. The trial Judge also has misdirected himself as to the real nature of the dispute that was between the 6th defendant and the plaintiff. The 6th defendant has only claimed an exclusion of the lots 1, 2 and 3 in the said preliminary plan marked X on the basis that they form a different land called Madugahamula Watta. The 6th defendant has not claimed any rights from the land that is to be partitioned namely Madithiyagahamula Watta.

For these reasons I would allow the appeal of the 6A defendant-appellant and set aside the judgment of the learned trial Judge dated 24.11.1995 and dismiss the plaintiff-respondents action. In view of the decision arrived by me, I am of the opinion that it is unnecessary for this court to consider the matters raised in the appeals filed by the 4th and 9th defendant-appellants in this case. This dismissal should not be a bar for the plaintiff-respondent or any other party to institute another action in the District Court to partition the said land called Madithiyagahamula Watta. I make no order for costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL