

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIASLIT
REPUBLIC OF SRI LANKA.

Pettagan Jinadasa alias
Pettagan Janadasa
No.502, Bogahawatta,
Ambalangoda.
1st defendant-appellant

Vs.

C.A. No. 855/97(F)
D.C. Balapitiya No.601/P

1. Obinamuni Methsiri de Silva
No.3, Tissa Madya Maha
Vidyalaya Road, Kalutara.
2. Kirahandi Adlin Nona,
(died)
3. Obinamuni Indralatha.
Bogahawatte, Ambalangoda.
Plaintiff-Respondents
2. Obinamuni Jinadasa de Silva.
Wickramasooriya Road,
Ambalangoda.
3. Obinamuni Gunadasa de
Silva. (died)
4. Obinamuni Saminona de
Silva.
Elpitiya Road,
Bogahawatte, Ambalangoda.
5. Ilandari Deva Danasiri
6. Ilandari Deva Chaleena
7. Ilandari Deva Wijesiri
8. Ilandari Deva Abesiri
All of Devagoda, Madampe,
Ambalangoda.
9. Lanka Deva Meelin Nona
10. Obinamuni Dayawathi.
11. Obinamuni Dayasiri
12. Obinamuni Dharmawathi
13. Obinamuni Damayanthi
All of Godagama, Hikkaduwa
14. Lanka Deva Peelinona

Appointed by 9th Defendant as the custodian with the 12th and 13th Defendants.

Defendant-Respondents

AND NOW

Pettagan Jinadasa alias
Pettagan Janadasa
No.502, Bogahawatta,
Ambalangoda.

1st defendant-Appellant
(Deceased)

Pettagan Deepika
No.778, D2, 1st Lane,
Asiri Uyana,
Pelawatta,
Battaramulla.

Substituted 1st Defendant-Appellant

Vs.

1. Obinamuni Methsiri de Silva
No.3, Tissa Madya Maha
Vidyalaya Road, Kalutara.
 2. Kirahandi Adlin Nona,
(died)
 3. Obinamuni Indralatha.
Bogahawatte, Ambalangoda.
- Plaintiff-Respondents**
2. Obinamuni Jinadasa de Silva.
Wickramasooriya Road,
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Elpitiya Road,
Bogahawatte, Ambalangoda.
 5. Ilandari Deva Danasiri
 6. Ilandari Deva Chaleena
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All of Devagoda, Madampe,

- Ambalangoda.
9. Lanka Deva Peelin Nona
 10. Obinamuni Dayawathi.
 11. Obinamuni Dayasiri
 12. Obinamuni Dharmawathi
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All of Godagama, Hikkaduwa
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Appointed by 9th Defendant as
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Vidyalaya Road, Kalutara.
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2. Obinamuni Jinadasa de Silva.
Wickramasooriya Road,
Ambalangoda.
 3. Obinamuni Gunadasa de
Silva. (died)

4. Obinamuni Saminona de Silva
Elpitiya Road, Bogahawatta,
Ambalangoda.
5. Illandari Deva Danasiri
6. Illandari Deva Chaleena
7. Illandari Deva Wijesiri
8. Illandari Deva Abesiri
All of Devagoda, Madampe,
Ambalangoda.
9. Lanka Deva Peelin Nona
(Deceased)
Obinamuni Dayawathi
No.64, Unilevers Housing
Scheme, Katupolwatta,
Rathgama.

**Substituted 9A Defendant-
Respondent**

10. Obinamuni Dayawathi
11. Obinamuni Dayasiri
12. Obinamuni Dharmawathi
13. Obinamuni Damayanthi
All of Godagama , Hikkaduwa
14. Lanka Deva Peelinona
Appointed by 9th Defendant as the
custodian with the 12th and 13th
Defendants.

Defendant-Respondents

BEFORE : **DEEPALI WIJESUNDERA, J. &
M.M.A. GAFFOOR, J.**

COUNSEL : E.R.S.R. Coomaraswamy (Jr.) for the
substituted 1st Defendant-Appellant.
N. Fernando with Ananda de Silva for the
Plaintiff-Respondents.

ARGUED ON : 05th August, 2015

DECIDED ON : 22nd January, 2016.

M.M.A. GAFFOOR, J.

The defendant-appellant has preferred the present appeal against the judgment and interlocutory decree entered on 14.10.1997 to partition the subject matter of the action among the 1st defendant-appellant and the plaintiff-respondents. The land sought to be partitioned by the plaintiff is depicted in the preliminary plan dated 07.04.1993 bearing No.1365 dated 17.04.1993 together with the connected report was prepared by D.G. Mendis, Licensed Surveyor. The 1st respondent-appellant who did not agree with the corpus depicted in the said preliminary plan and produce a plan No. 90/541 authenticated by Surveyor General and that plan was marked 1V5. On 26.03.1990 when the case was taken up for the trial the 1st defendant again moved for another commission on the Surveyor General on the purported ground that the Surveyor General had acted beyond the scope of commission. Accordingly, the application for further commission was allowed and it was also issued to the Surveyor General to return his commission with plan No. 90/541 and the report dated 21.06.1991. After the commission the 1st defendant amended statement of claim on 26.06.1989. The other defendants did not make any appearance though summons were duly served on them possibly due to the minuteness or insignificance of shares they will be allotted with after the adjudicator

of the matter. Therefore, the contest between the plaintiff and the 1st defendant having admitted the devolution of title, the sole issue to be decided by the learned trial Judge was in relation to the identification of the corpus as evidenced by the points of contest No.1 formulated on behalf of the plaintiff and point of contest No. 3 formulated on behalf of the 1st defendant which reads as follows:-

- (1) "is the corpus in this lot 6B of Siddahandiwatta shown as lot 6B in the Plan No. 1365 dated 17th and 18th April 1983 made by G.D. Mendis, Licensed Surveyor?"
- (3) "Is the corpus correctly shown in Plan No. 90/541 made by the Surveyor General?"

The learned District Judge came to the finding after the lengthy evaluation of evidence has held that the Plan No. 1365 depicts the corpus and the shares should be devolved on the parties as per judgment dated 14.10.1997. The learned District Judge in his judgment gave reason as to what compel him to reject the possession of the plaintiff that the land depicted in the Plan No. 90/541 made by Surveyor General does not form the corpus.

The learned District Judge having considered the deed produced in the action and the three plans produced by the 1st defendant- appellant and the plaintiff-respondent has rightly come to a conclusion that the land sought to be partitioned consist of lot 6B of

Siddahandiwatta shown as lot 6B in the Plan 1365 dated 17/18-04.1993 made by G. D. Mendis, Licensed Surveyor. I do not see any reason to find fault with the judgment of the learned District Judge with regard to the point of contest relied into the identity of corpus. But the defendant-appellant stated that the Plan No.1365 has been prepared fraudulently. When the case was taken up for trial following facts were recorded as admissions.

- (a) There is no dispute regarding the pedigree of the title.
- (b) All the cultivation should be according to the Surveyor's report.

But the 1st defendant-appellant in his submissions says, that the learned District Judge had erred in law and facts in accepting the preliminary Plan No. 1365 and rejecting the Surveyor General's Plan No. 90/541 made by C.G. Gunawardena, Surveyor General and further he says that D.G. Mendis who prepared the Preliminary Plan No.1365 dated 18.04.1983 marked "X" in his plan states as follows:-

යොමුව

දැනට පොළවේ පිහිටි සහ මවිසින් මනින ලද මායිම් කළ ඉරිවලින් පෙන්වා ඇත. 1 වන පැමිණිලිකරු විසින් ඉදිරිපත් කරන්නට යෙදුන බලයලත් මිනින්දෝරු ඊ. ඩී. ඉසෙඩ්. ගුණවර්ධන මහතාගේ අංක 3172 සහ 1952.03.04 වන දඟන දරණ පිඹුර අධිෂ්ඨාපනය කොට රතු ඉරි වලින් පෙන්වා ඇත.

Further to this, he states that the North and South boundaries did not remain on the ground the 1st plaintiff requested him to establish the boundaries according to the Plan No.3172 made by E. de Z. Gunawardena. Accordingly, he superimposed this plan and established the boundaries. The present boundaries on the ground are indicated in black coloured lines and the superimposition of Plan No.3172 is indicated in red coloured lines. The plaintiff-respondent submits that the extent shown in the Surveyor General Plan No. 09/90/541 in 6.5 perches whereas the extent shown in the preliminary Plan marked "X" is 8 perches which is identical in extent to the description in the plaint and plan No. 3172 referred to in the title deeds relied on by both parties for their respective claims and also he draws the attention to paragraph 7 of the statement of claim of the 1st defendant where he states as follows:-

“එක් අංක 3172 දරණ බෙදුම් පිඹුර හා ඊට අදාළ අංක. 21663 දරණ සමගි බෙදුම් ඔප්පුව නීත්‍යානුකූලව සහ නිසි අන්දමට සකස්කර නැති බැවින් ද, එය වංචා සහගතව සකස්කර ඇති බැවින් ද මෙම පිඹුර සහ ඔප්පුව මෙම විත්තිකරු ප්‍රතික්ෂේප කර පිළි නොගනී”

Therefore, he states that it is important to note, the 1st defendant is trying to challenge the accuracy of the said PlanNo.3172 marked 181, the deed No. 738 marked 184, by which the 1st defendant-appellant himself derived title and also plaintiff-respondent says that he is respectfully

submitted that the 1st defendant-appellant is bound by 181, and 184, and he cannot repudiate his own documents after about 25 years from the date of execution of the said deed and the said plan. The plaintiff-respondent also states that having denied the said Plan No.3172 the 1st defendant by paragraph 7 and 8 of his amended statement of claim stated as follows:-

“7. ඉහත සඳහන් පළමුවන විත්තිකරු පැමිණිලිකරුවන්ගේ පැමිණිල්ලේ 13 වන ඡේදයේ නිමකර දී ඇති නොබෙදූ 120/336 පංගුව නිවැරදි බවට පිළිගන්නේ බෙදා වෙන් කිරීමට යෝජිත කැබලි අංක ‘6බී’ දරණ බිම් කැබැල්ලේ බිම් ප්‍රමාණයට පර්චස් 8 ක් වශයෙන් නිවැරදිව තිබුණ හොත් පමණි”

“8. ඉහත සඳහන් පළමුවන විත්තිකරු සඳහන් කර සිටිනුයේ මිනුම්පති විසින් මෙම නඩුවට ගොනු කරන ලද අංක ගා/වි 86/17 හා 1987.05.19 දිනැති පිඹුර ස්ථිර කොට මෙම පිඹුරේ මායිම් සහ බිම් ප්‍රමාණයන් අනුව මෙම ඉඩම බෙදා වෙන් කිරීමට නියෝග කරන ලෙසයි ”

Therefore, he says that the position taken by the 1st defendant in the above quoted paragraph are contradictory and irreconcilable preventing the confirmation of either plan as none of them satisfies the first defendant's condition namely, the plan to be accepted should show 8 perches and at the same time it should be the Surveyor General's Plan which shows 6.5 perches only in the action.

In the event, the Surveyor General's Plan No. 86 tallies with the lot 6 B in the preliminary Plan No. 1365 except in extent which is 6.5 perches and not 8 perches. The learned trial Judge has stated that the Court is entitled to presume that the 1st defendant-appellant did not produce the said Plan No. 86/17 as it would be unfavourable to the 1st defendant, if it is produced. In the event the learned trial Judge is accepting the preliminary Plan No. 1365 had taken into consideration in evidence of the Surveyor and his application of Plan No. 1372 marked as "P1" as precise one with sufficient data for such an application. On the other hand, the learned trial Judge in rejecting the preliminary plan made by the Surveyor General has stated though the Surveyor General was directed by the Court to superimpose that plan on "P1" he has superimposed his Plan on a copy of "P1" instead of "P1" which has been prepared 7 years later.

Before we come to a conclusion, I would like to draw the attention to the final paragraph of the judgment written by the learned District Judge.

“තවද 1 විත්තිකරුගේ සංශෝධිත උත්තරයේ 8 වැනි ඡේදය අනුව පෙනීයන්නේ ඔහු අංක 86/17 පිඹුර කෙරේ විශ්වාසය තබා ඇති බවයි. එම පිඹුර අනුව ඉඩම බෙදන ලෙස ඉල්ලා ඇත. එම 86/17 පිඹුරද මිනුම්පති විසින් සකස් කරන ලද අතර එය නඩුවට ගොනුකර ඇත. එපමණක් නොව මෙම පිඹුර 1 විත්තිකරුගේ ලේඛණ

ලැයිස්තුවටද ඇතුළත් කර ඇත. එහෙත් 1 විත්තිකරු මෙම ලේඛණ සිය සාක්ෂියේදී ඉදිරිපත් නොකරන ලදී. මානක ඩී. ජී. මෙන්ඩිස් මහතාගේ අංක 1365 (X) දරණ පිඹුර අංක 3172 (පැ1) දරණ පිඹුරේ මායිම් සමග සැසඳෙන බවට එම අංක 86/17 පිඹුරේ සඳහන් කර ඇත. එහෙත් ඉහත ගා 90/541 පිඹුරේ විෂය වස්තුව පෙන්වන බවට 1 විත්තිකරු කියා සිටියද ඔහු එය සිය උත්තරයෙන් අයැද නැති බවටද පැහැදිලිවේ. මෙලෙස 1 විත්තිකරු විසින් 86/17 දරණ පිඹුර සිය සංශෝධිත උත්තරයේ සඳහන් කර තිබියදීත් එවගේම ලේඛණ ලැයිස්තුවේ සඳහන්කර තිබියදීත් එය සාක්ෂි සඳහා ඉදිරිපත් නොකිරීමෙන් පෙනීයන්නේ එය ඉදිරිපත් කළහොත් එමගින් ඔහුට අවාසියක් සිදුවිය හැකිය යන හේතුව නිසා බවට පිළිගැනීමට සිදුවේ. එම නීතිමය තත්වය සාක්ෂි ආඥාපනතේ 114 වගන්තියේ (7) පැහැදිලි කිරීමෙන් පෙන්වා ඇත.

ඉදිරිපත්වී ඇති මෙම සියළුම කරුණු සැලකිල්ලට ගනිමින් පැමිණිල්ල සිය නඩුව ඔප්පු කර ඇති බවට තීරණය කරමි. බෙදීමට යෝජිත ඉඩම වන සිද්දහන්දිවත්ත නමැති ඉඩමේ '6බී' කැබැල්ල X දරණ අංක 1365 පිඹුරේ නිවැරදිව පෙන්වා ඇත. ඒ අනුව අදාළ ඉඩම පහත සඳහන් පරිදි බෙදී යායුතු බවට තීන්දු කරමි.”

Anyway taking into consideration and the finding relating to the identity of corpus, the revolution title and the inability on the part of the defendant-appellant to establish his claim, I do not think they call for any intervention by this Court. In that circumstances, I affirm the

Impugned judgment and the interlocutory entered in the case and dismiss the appeal preferred by the 1st defendant-appellant subject to costs.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL