

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

1. Dewyalage Susirilatha
1. Binduwa Dewyalage Jayawardene
2. Puwakgahahene Gedara Piyasena
3. Binduwa Dewyalage Susirilatha
4. Binduwa Dewyalage Jayawardene

All of Gallawa, Iriyagolla.

**2<sup>nd</sup> to 5<sup>th</sup> Defendant – Appellants**

**C.A.Appeal No. 561/2000(F)**

**D.C. Kurunegala Case No. 2980/P**

**Vs**

1. Mahamadu Abdul Hasan
2. Mahamadu Suwasiri Umma
3. Mahamadu Saleen
4. Mahamadu Mirisaath

All of Kurugodapitiya, Panagamuwa.

**1<sup>st</sup> to 4<sup>th</sup> Plaintiff – Respondents**

5. Janguwa Wedalage Gedara Kira

Gallawa, Iriyagolla.

**1<sup>st</sup> Defendant – Respondent**

**BEFORE** : Deepali Wijesundera J.  
: M.M.A. Gaffoor J.

**COUNSEL** :Chula Bandara with S.C.  
Samarakoon For the  
Defendant - Appellants  
H.Withanachchi for the  
Plaintiff - Respondents

**ARGUED ON** : 13<sup>th</sup> October, 2015

**DECIDED ON** : 01<sup>st</sup> July, 2016

**Deepali Wijesundera J.**

The plaintiff respondents have instituted a partition action in the District Court of Kurunegala to partition the land described in the schedule to the plaint. After trial the District Judge had delivered the judgment on 21/07/2000 in favour of the plaintiff respondents. Being aggrieved by the said judgment the appellant had filed this appeal.

The learned counsel for the appellants submitted that the learned District Judge failed to identify the corpus. He stated that the plaintiff respondents sought to partition the land described in the plaint and the trial Judge is statutory bound to investigate the title of the parties and identify the land under *Sec. 25 (1) of the Partition Act and Sec. 41 of the Civil Procedure Code*. The appellant citing the judgment in **Thirunayake vs Fernando S.C. Appeal 18 B of 2009** stated that there should not be any discrepancy as to the identity of the land in dispute. The appellants stated

that the boundaries of the land "*Agalapita Gedarawatte*" depicted in plan no. 279 which was surveyed by a commissioner appointed by the District Court does not correspond to the boundaries of the schedule to the plaint. The appellant submitted that during the trial in the District Court the plaintiff respondents failed to identify the boundaries and they could only name the land, therefore the District Judge erred in law when he decided that the corpus in dispute had been properly identified and failed to evaluate the evidence led by the parties.

The counsel for the appellants further submitted that allotment of land to the fourth respondent is wrong according to Muslim Law. He stated that the respondents are members of the same family who claimed they inherited the land from their father, and a female heir inherits as an agnatic heir  $\frac{1}{2}$  the share allotted to a male heir. He stated that if the respondents inherited their father's rights to the corpus in terms of the Muslim Law the share allocation can not be equal to males and females.

The learned counsel for the respondents stated that the boundaries of the corpus were identified with the boundaries set out in the schedule of the deed no. 9538 upon which the predecessor of the plaintiff respondents got his title to the corpus, and that they were identified with reference to the existing geographical settings. He further stated that the first and third respondents and first and second and fourth appellants had been present before the surveyor when the land was surveyed and that the surveyor had expressed the opinion that the land he surveyed was the land depicted in the schedule to the plaint.

The respondents stated that the difference in the names of the boundaries of the land in the schedule to the plaint and that of the

preliminary plan is due to the fact that the schedule to the plaint is based on deed no. 9538 and since then owners of the adjoining lands and geographical conditions have undergone drastic changes.

The respondents argued that the preliminary plan and the report were marked in evidence and accepted by the appellants without any objections at the trial. The respondents stated that the failure to object to a document being received in evidence would amount to a waiver of the objection as it thereafter becomes part of the evidence for all intents and purposes as mentioned in the judgment of **Sri Lanka Ports Authority vs Jugulinja Boat East Co. 1981 1 SLR 18.**

The respondents stated that the appellant had the opportunity under *sec. 18 (2) of the Partition Law* to make an application to court alleging omission on the part of the surveyor and in the absence of such an application the land depicted on plan 279 substantially corresponded to the land in the schedule to the plaint.

The respondents stated that on the question of application of Muslim Law to them in devolution of title, since the respondents jointly claimed  $\frac{1}{2}$  share of the property even now it could be allotted in terms of the Muslim Law.

On perusal of the schedule to the plaint and the preliminary plan it is clear that the boundaries are different and that the land has not been identified at the trial. The plaintiffs have failed to identify the land in evidence they have only mentioned the name of the land. A land is identified by the boundaries.

As stated by the respondents if the boundaries have undergone changes since their original owners time they should have stated that in a second schedule to the plaint to correctly identify the land and the surveyor should have mentioned the names of the earlier boundaries in his report as well as the plan. The respondents argued that the preliminary plan and the report was accepted by the appellants without an objection at the trial which amounts to evidence unchallenged in terms of the judgment in **Sri Lanka Ports Authority vs Jugulinja Boat Co. case**, this judgment has no relevance to a survey plan and report in a partition action where the corpus has to be properly identified.

The respondents mentioning the proviso to sec. 18 (2) of the Partition Act had said no application was made on behalf of the appellants to summon the surveyor to identify the land surveyed and to see whether it is the same land described in the schedule does not make a good argument. It is the duty of the trial judge to identify the land to be partition first. Whether the defendants have made an application or not is totally irrelevant. If the parties are not in agreement about the identity of the corpus and boundaries it is the duty of court to identify the correct land.

In the instant case the boundaries of the preliminary plan no. 279 and the title deed of the plaintiff respondents are different in the schedule the northern boundary is Kiriya and the fence belonging to others in the plan it is Nandadewa's land, southern boundary in the schedule is Dewata separating Bandiya's land in the plan it is Agalapitiya Watte owned by Dingiriya the Western boundary in the schedule is paddy land called Dawatagaha and in the plan road from the Egodamulla to Panagamuwa only the Eastern boundary is the same, fence belonging to Bandiya.

The main issue to be considered in the instant case is whether the extents and the limits of the land had been established to identify the corpus correctly. The land in suit must be described with precision and there should not be any discrepancy as to the identity of the land *Section 44 of the Civil Procedure Code* is very clear on this. The learned District Judge of Kurunegala had erred in law when he decided that the corpus in dispute had been properly identified. He had also erred in law when he allocated share to the respondents by not considering the Muslim Law.

For the afore stated reasons I decide to allow the application of the appellants and set aside the judgment of the District Judge of Kurunegala dated 21/07/2000.

**JUDGE OF THE COURT OF APPEAL**

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

I agree

**JUDGE OF THE COURT OF APPEAL**