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

2(a) Tanne Gedera Gunapala,

Epitamulla, Muwandeniya,

Matale

3. Wasalamuni Arachchige Yasona,

Epitamulla, Muwandeniya,

Matale

4. Tanne Gedara Jinona, Epitamulla, Muwandeniya,

Matale

Case No. 1421/99(F)

D.C. Matale No. 2211/P

DEFENDANTS-APPELLANTS

Vs.

1(a) Lagamuwe Aluthgedera Dayani Geetha Kumari,

1(b) Rajasinghe Dewage Malani Senehelatha,

1(c) Lagamuwe Aluthgedera Siri Padmalal Ediriweera,

1(d) Lagamuwe Aluthgedera Pradeepika Shirani Manel,

1(e) Lagamuwe Aluthgedera Hemamali Chandralatha,

All of Epitamulla, Muwandeniya,

Matale

2 Lagamuwe Aluthgedera
Dayani Geetha Kumari,

Epitamulla, Muwandeniya,

Matale

PLAINTIFFS-RESPONDENTS

Diyunu Hewage Darmasena,

Epitamulla, Muwandeniya,

Matale

1ST DEFENDANT-RESPONDENT

Before: Janak De Silva J.

Counsel: Sanjeewa Dasanayake with Dilini Premasiri for 2(a), 3rd and 4th Defendants-Appellants

N.T.S. Kularatne with Sadeep Kulasooriya for 1(a) and 2nd Plaintiffs-Respondents

Written Submissions tendered on: 2(a), 3rd and 4th Defendant-Appellant on 22nd September 2017

1(a) and 2nd Plaintiffs-Respondents on 18th September 2017

Argued on: 6th September 2017

Decided on: 9th October 2017

Janak De Silva J.

The plaintiffs-respondents (hereinafter referred to as 'plaintiffs') filed the above action in the District Court of Matale seeking to partition the land called Idamagedara watta also known as Keenagahamula watta situated at Epitamulla, Muwandeniya, in the district of Matale. The land was said to be 8 kurakkan neli sowing in extent.

Having set out the chain of title in the plaint, the plaintiffs claimed that the parties were entitled to undivided rights as follows:

1st plaintiff	1/9
2nd plaintiff	2/9
1st defendant	2/9
2nd defendant	1/9
3rd defendant	1/9
4th defendant	1/9
Portion remaining for	
Wasalamuni Alisa	1/9

Only the 4th defendant-appellant (hereinafter referred to as '4th defendant') filed a statement of claim wherein she claimed an undivided 1/9 portion of the corpus whilst admitting the devolution of title pleaded by the plaintiff.

Trial commenced with the parties making the following admissions:

1. The corpus sought to be partitioned in this case.
2. The corpus sought to be partitioned is depicted in preliminary plan bearing no. 3516 prepared by S. Ranchagoda, Surveyor.
3. The parties are entitled to shares to be allocated as set out in paragraph 15 of the plaint.

The 1st plaintiff gave evidence and during his evidence eight deeds forming the chain of title were marked without any objection from the defendants. There was no cross examination. The 2(a), 3rd and 4th defendants-appellants (hereinafter referred to as 'defendants') did not lead any evidence.

The learned District Judge in his judgment held that the corpus should be divided between the parties as follows and to enter interlocutory decree accordingly:

1st plaintiff	1/9
2nd plaintiff	2/9
1st defendant	2/9
2nd defendant	1/9
3rd defendant	1/9
4th defendant	1/9
Portion not given to any any party	1/9

The defendants have preferred this appeal against the said judgment. Two grounds are urged by the defendants to assail the judgment of the learned District Judge.

Firstly, it is contended that the land described in the plaint and the land subsequently partitioned are not the same as there is a huge discrepancy in extent between the lands described in the plaint and deeds and the land surveyed. Secondly, it is argued that the learned District Judge has not investigated the title properly.

The defendants contend that there is a great discrepancy in the extent of the corpus which is fatal to the partition action. They argue that the extent of the corpus to be divided is set out as 8 kurakkan neli sowing in the plaint whereas the preliminary plan sets out the extent of the corpus as 2 roods 33 perches which the defendants claim is less than 8 kurakkan neli sowing. The defendants rely on the case of *Ratnayake and others v. Kumarihamy and others*[1] and contend that 8 kurakkan neli sowing is equal to 2 acres of land.

[1] (2002) 1 Sri.L.R. 65

The defendants rely on the decisions in *Brampy Appuhamy v. Mendis Appuhamy*[2] and *W. Uberis v. M.W. Jayawardene*[3] to argue that where the surveyor doing the preliminary survey is unable to locate the full extent of the land described in the plaint, he should report that fact to court and seek its further directions. In *Brampy Appuhamy* the surveyor surveyed a land of which two boundaries did not tally with the description of the land given in the schedule to the commission. It is in this context that court held that the surveyor has not duly executed his commission and went on to state that where the surveyor is unable to locate the land he must report that fact to court and ask for its further directions. In *Uberis* also it is clear that the surveyor had not surveyed the corpus correctly as there was a discrepancy in one of the boundaries set out in commission and what was identified in the survey report. Furthermore, and more importantly the surveyor had in his report stated that the 11th defendant had informed him that he had surveyed only a portion of the land but he did so as the plaintiff stated and requested him to survey only a portion as he had filed action only for that portion. It is in this context that court held that the preliminary survey was not in conformity with the commission.

Section 16(1) of the Partition Law No. 21 of 1977 facilitates the duty of the Court to examine and investigate title in a partition action by providing for a preliminary survey. It is a mandatory step in a partition action as it states that "the court **shall** forthwith order the issue of a commission to a surveyor directing him to survey the **land to which the action relates** to..."(emphasis added). The fact that the surveyor is required to "survey the land to which the action relates to" indicates that an important part of his duty is to assist court by verifying whether the land surveyed is what is described in the plaint.

[2] 60 NLR 337
[3] 62 NLR 217

Brampy Appuhamy v. Mendis Appuhamy[4] and *W. Uberis v. M.W. Jayawardene*[5] were decided under the then Partition Act No. 16 of 1951. There is an important difference between a preliminary survey report prepared under that law and the present Partition Law No. 21 of 1977. Unlike Partition Act No. 16 of 1951, Section 18 (1)(a) (iii) of Partition Law No. 21 of 1977 requires the surveyor to state in his report, supported by affidavit, whether or not the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint. In view of this important difference between the two laws a party who is claiming that the surveyor preparing the preliminary plan has surveyed only a portion of the corpus must during the preliminary survey inform this matter to the surveyor.

The preliminary survey report filed in this case states that the land surveyed was the land described in the schedule to the plaint. It is clear that the surveyor did not have a problem in locating the land he was commissioned to survey. Thus, the facts of this case are distinguishable from the facts in *Brampy Appuhamy v. Mendis Appuhamy*[6] and *W. Uberis v. M.W. Jayawardene*[7]. The preliminary survey report further states that the plaintiff, 1st, 3rd and 4th defendants were present and pointed out the land to be surveyed and its boundaries. Unlike in *W. Uberis v. M.W. Jayawardene*[8] case, neither of the defendants informed the surveyor that he had only surveyed a portion of the land.

In this case parties made three important admissions at the trial. In particular it was admitted that the land sought to be partitioned is depicted in preliminary plan bearing no. 3516 prepared by S. Ranchagoda, Surveyor. The defendants have in their written submissions contended that the learned District Judge did not make any reference in the judgment to the preliminary plan. This is not correct. The learned District Judge has stated that the parties have admitted that the land sought to be partitioned is the land referred to in the preliminary plan bearing no. 3516 prepared by S. Ranchagoda, Surveyor.

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[4] 60 NLR 337
[5] 62 NLR 217
[6] 60 NLR 337
[7] 62 NLR 217
[8] 62 NLR 217

Section 18(2) of the Partition Law states that the survey report may, without further proof, be used as evidence of the facts stated therein. The proviso thereto allows the surveyor to be orally examined on any matter therein on the application of any party. No such application was made in this case. Neither did the defendants make an application for a fresh survey. The defendants cannot now be heard to state that the preliminary plan and preliminary survey report is not in conformity with the provisions of the Partition Law. In these circumstances, the learned District Judge was correct in relying on the preliminary plan, the admissions and the evidence led in determining the identity and extent of the corpus to be partitioned. In *Maddumaralalage Susil and another v. Maddumaralalage Dona Marynona and others*[9] Eva Wanasundera J. stated that:

> "According to the Partition Law, a commission to survey the land is taken out at the initial stages and at that stage, the parties to the action resolve the matter about the identification of the land. Thereafter it should be taken as an admitted fact."

There may well be a good reason for the purported difference in extent of the corpus set out in the schedule to the plaint and the corpus to be partitioned. It is to observed that in all the eight deeds forming the chain of title the extent of the corpus is set out on the basis of land required to be sown with kurakkan. The preliminary plan in this case appears to be the first instance where the extent of the land has been surveyed. In *Ratnayake and others v. Kumarihamy and others*[10] the Court of Appeal was confronted with a similar case where the extent of corpus set out in the preliminary plan differed from the extent set out in the deeds computed on the basis of land required to be sown with kurakkan. Weerasuriya J. stated that:

> "the extent given in the deed by which the plaintiff-respondent got rights (P5) is 4 *lahas* of Kurakkan sowing extent. Learned Counsel for the defendant-appellants contended that the English equivalent to the customary Sinhala measure of sowing of one *laha* is one acre. However, it is to be noted that this system of land measure computed according to the extent of land required to sow with paddy or Kurakkan vary due to the interaction of several factors. The amount of seed required could vary according to the varying

[9] S.C. Appeal 174/2010; S.C.M. of 08.06.2016
[10] (2002) 1 Sri.L.R. 65

degress*(sic)* of fertility of the soil, the size and quality of the grain, and the peculiar qualities of the sower. In the circumstances, it is difficult to correlate sowing extent accurately by reference to surface areas. (vide Ceylon Law Recorder, vol. XXII, page XLVI)..*"[11]

The above statement was quoted with approval by the Supreme Court in appeal[12].

In any event, as observed earlier the 1st, 3rd and 4th defendants were present when the preliminary plan was made and pointed out the land to be surveyed and its boundaries. In the District Court, they never challenged the preliminary plan. On the contrary they were content to inform court that they will not lead any evidence. The burden of controverting the extent of the corpus claimed by the plaintiff was on the defendants[13]. The defendants have failed to do so in this case. For the reasons set out above I have no hesitation in rejecting the argument made by the defendants on the discrepancy between the corpus and the land partitioned.

Section 25(1) of the Partition Law requires the court to examine the title of each party and hear and receive evidence in support thereof. It has been consistently held that it is the duty of the Court to examine and investigate title in a partition action, because the judgement is a judgement *in rem.* In *Gnanapandithen and another v. Balanayagam and another*[14] G.P.S. De Silva C.J. explained this duty as follows:

"Mr. Samarasekera cited several decisions which have, over the years, emphasized the paramount duty cast on the court by the statute itself to investigate title. It is unnecessary to repeat those decisions here. For present purposes it would be sufficient to refer to the case of *Mather v. Thamotharam Pillai* (2) decided as far back as 1903, where Layard, CJ. stated the principle in the following terms :- "Now, the question to be decided in a partition suit is not **merely matters between parties which may be decided in a civil action**; . . . The court has not only to decide the matters in which the parties are in dispute, **but to safeguard the interests of others who are not parties to the suit**, who will be

[11] Ibid. at 68
[12] Udalagama J. in *Ratnayake and others v. Kumarihamy and others* (2005) I Sri.L.R. 303 at 307
[13] *Ratnayake and others v. Kumarihamy and others* (2005) I Sri.L.R. 303
[14] (1998) 1 Sri.L.R. 391

bound by a decree for partition . . . "Layard, CJ. stressed the importance of the duty cast on the court to satisfy itself "that the plaintiff has made out a title to the land sought to be partitioned, **and that the parties before the court are those solely entitled to such land.**" (emphasis added)."[15]

The defendants have cited the cases of *W.G. Roslin v. H.B. Maryhamy*[16], *Piyaseeli v. Mendis and others*[17], *Juliana Hamine v. Don Thomas*[18] and *Mohamedaly Adamjee v. Hadad Sadeen*[19] in support of their argument that it is the duty of the court in a partion action to investigate title carefully. I concur with the long line of cases. However, Court can do so only within the limits of pleadings, admissions, points of contest, evidence both documentary and oral. Court cannot go on a voyage of discovery tracing the title and finding the shares in the corpus for them, otherwise parties will tender their pleadings and expect the Court to do their work and their Attorney-at-Law's work for them to get title to those shares in the corpus[20].

The learned District Judge has carefully examined each of the deeds forming the chain of title and investigated the devolution of title. Having done so he has determined how the shares in the corpus should be apportioned between parties which is in conformity with the shares pleaded in paragraph 15 of the plaint. The 4th defendant has been granted the share claimed by her. The defendants did not at the hearing or in the written submissions point out where the learned District Judge has erred in the investigation of title. In these circumstances, the argument of the defendants that the learned District Judge has not investigated title in this case is without merit.

For the foregoing reasons, I see no reason to interfere with the judgment of the learned District Judge of Matale. Accordingly, I dismiss the appeal with costs.

Judge of the Court of Appeal

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[15] Ibid. at 395
[16] (1994) 3 Sri.L.R.263
[17] (2003) 3 Sri.L.R.273
[18] 59 NLR 549
[19] 58 NLR 217
[20] Anandacoomaraswamy J. in *Thilagaratnam v. Athpunathan and Others* (1996) 2 Sri.L.R. 66 at 68