

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

Jayasinghe Wasamge Ariyasena of Arambe,
Beligodapitiya, Rambukkana.

CA 678/97(F)

D.C. Kegalle Case No. 25397/P

Plaintiff

Vs.

1. Jayasinghe Wasamge Ariyawathie
C/O J. W. V. Ariyasena of Arambe,
Beeligodapitiya, Rambukkana.
2. Tennakoon Mudiyanseelage Tikiri Banda
of Beraluwa, Godagadeniya,
Rambukkana.
3. N. M. Podinilame of Medagoda,
Rambukkana.

Defendants

AND NOW

Anura Nawarathne,
Medagoda,
Rambukkana.

Substituted 3rd Defendant - Appellant

Vs.

Jayasinghe Wasamge Ariyasena of Arambe,
Beligodapitiya, Rambukkana.

Plaintiff – Respondent

Jayasinghe Wasamge Ariyawathie
C/O J. W. V. Ariyasena of Arambe,
Beeligodapitiya, Rambukkana.

1st Defendant – Respondent

T. M. Podimenike,
No. 577/S, Rammuthugala,
Kadawatha.

Substituted 2nd Defendant Respondent

BEFORE: M.M.A. GAFFOOR J

S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL:

Nihal Jayawardena PC with D.
Abeygunawardana for the Defendnat –
Appellant

Dushan Nagahena for the Plaintiff –
Respondent

ARGUED ON:

28.02.2017

WRITTEN SUBMISSIONS –

Filed by both parties

DECIDED ON:

29.09.2017

S. DEVIKA DE LIVERA TENNEKOON J

The Plaintiff – Respondent (hereinafter referred to as the Respondent) instituted action in the District Court of Kegalle to partition the land described in the schedule in the Plaint dated 03.12.1990 between the Plaintiff and the 1st and 2nd Defendants in equal shares.

The 3rd Defendant – Respondent (hereinafter referred to as the Appellant) filed his statement of claim dated 03.09.1992 and claimed that Lot 1 and Lot 2 depicted in preliminary plan prepared by licensed surveyor G. A. R. Perera licensed surveyor bearing No. 1026 dated 06.01.1992 does not form part of the corpus, namely “Ingulana Hena” but formed part of the land known as “Kurukappetiye Hena” owned by the Appellant. The Appellant set out a pedigree in his statement of claim tracing title to him and further claimed prescriptive rights over the said lots which he claimed ought to be excluded from the partition action.

Trial commenced on 24.01.1994 and issue Nos. 01 – 04 were raised on behalf of the Respondent and issue Nos. 05 – 13 were raised by the Appellant while no admissions were recorded.

Upon evidence been led by both parties the learned District Court Judge pronounced judgment dated 15.09.1997 in favour of the Plaintiff and allotted shares to the Plaintiff and the 1st and 2nd Defendant as prayed for in the Plaint.

Being aggrieved by the said judgment the Appellant preferred the instant Appeal by Petition of Appeal dated 09.10.1997 on the grounds mainly that;

- a) Where the Court has held that some of the boundaries do not tally exactly into Lots 1 & 2 in the said plan the claim of prescription of the Appellant ought to have been considered,
- b) A part of the Plaintiff's pedigree has been accepted contrary to law.

In essence this Court finds that the matter to be dealt with in these proceedings are whether the Appellant has acquired title to the said Lots marked 1 & 2 by the pedigree set out in the statement of claim of the Appellant or by way of prescription and if so whether Lots 1 & 2 ought to be excluded from the corpus.

At the outset it is pertinent to examine the extent of land which is the subject of this partition action. As per the Plaint dated 03.12.1990 the land sought to be partitioned called "Ingulana Hena" is in extent of 2 pela, which translates to approximately 5 roods. The title deeds submitted by the Respondent also refer to the corpus as being 2 pela. The schedule contained in the statement of claim of the Appellant in which he claims ownership to the said Lots 1 & 2 refer to the extent as 2 pela. The title deeds submitted by the Appellant also refer to "Kurukappetiye Hena" as being 2 pela.

However, the preliminary plan bearing No. 1026 dated 06.01.1992 prepared by the Court Commissioner G.A.R. Perera licensed surveyor indicates that the land surveyed is in extent 2 Acres, 1 Rood, 10.1 Perches (approximately 4 pela).

Therefore it seems that nearly double the extent of what is being claimed by the Respondent has now become the subject matter of the partition action.

In the case of Rathnayake & others Vs. Kumarihami & others 2002 (1) SLR 65 it was held by Weerasuriya, *J inter alia*;

"The 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 degrees 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."

Although, the said system of land measurement is not as accurate as the system of measurement computed using precision instruments, it is an accepted form of land measurement which has been used in Sri Lanka since ancient times. It is agreed that several factors could affect the accuracy of measurement using this system but in relation to lands which are adjacent to one another or situated in the same area, the room for such variation is minimalized considering that the factors which affect the measurement would more or less be the same.

In the instant case both the Appellant and Respondent claim title to land in extent 2 pela. The Appellant contends that "Kurukappetiye Hena" which belongs to him has

been wrongly included as “Ingulana Hena” which is the subject of the partition action which is now before this Court. In view of the fact that the preliminary plan bearing No. 1026 dated 06.01.1992 describes the corpus more than double of what has been claimed by the Plaintiff, this Court finds that there is some merit to the claim of the Appellant.

It is unfortunate however that the Appellant has failed to present his case with due diligence before the learned Trial Judge resulting in a decision against him. It is evident that even at the time of surveying the said land, as per the surveyor report, the Appellant is said to have been in possession of Lots 1 & 2. Further, the Appellant has constructed a building on Lot 2 without any objection from the Respondents. However, as correctly contended by the Respondent the Appellant has stated in cross examination that Lot 1 was possessed by the 2nd Defendant – Respondent. This view is contrary to the position of the Appellant.

On the other hand the Respondent has stated in cross examination (vide page 67 of the Appeal brief) that Lots 1 & 2 were owned by the Respondent and Appellant in common.

Therefore, it is evident that both the Appellant and Respondent have contradicted their respective positions in evidence.

In these circumstances this Court agrees with the submission made by the learned Counsel for the Appellant who relies on the case of Jayasuriya Vs. Ubaid 61 NLR 352 in which it was held that;

‘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 for further evidence (in a regular manner) order to make a proper investigation.’

For the reasons mentioned above we set aside the judgment of the learned District Judge dated 15.09.1997 and order *trial de novo*.

Considering the time exhausted on the matter in dispute the learned District Judge is directed to hear this matter expeditiously giving priority to this case.

Appeal Allowed.

Judge of the Court of Appeal

M.M.A. GAFFOOR J

I Agree.

Judge of the Court of Appeal