

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

Vithanage Asoka Malini,  
Modera Patuwatha,  
Dodanduwa.

**Case No. CA 970/97(F)**

**PLAINTIFF-APPELLANT**

**D.C. Galle 10498/P**

Vs.

1. Ranasena Vithana,  
Modera Patuwatha,  
Dodanduwa.
2. Warusavithana Gunasekera  
Nandawathie,  
Saranajothi Mawatha,  
Modera Patuwatha, Dodanduwa.

3A. Dissanayaka Mudiyanseelage  
Sudumenika

3B. Petta Yaddehige Asanka Manoj,

3C. Petta Yaddehige Rasika Sameera,

3D. Petta Yaddehige Primali Dilrukshi,

All of 328/1 Wella Addara, Dodanduwa.

**DEFENDANTS-RESPONDENTS**

**Before:** M.M.A. Gaffoor J.

Janak De Silva J.

**Counsel:** Daya Guruge for Plaintiff-Appellant

Chris Caderamanpulle for 2<sup>nd</sup> Defendant-Respondent

**Argued on:** 20<sup>th</sup> September 2017

**Decided on:** 19<sup>th</sup> October 2017

**Janak De Silva J.**

The plaintiff-appellant (hereinafter referred to as 'plaintiff') filed the above action on 28<sup>th</sup> April 1988 in the District Court of Galle seeking to partition the land called Welabodawatta also known as Dangahaowita situated at Modera Patuwata in the district of Galle. The land was said to be A0. R1. P0 in extent. The corpus has been depicted as lot A in plan No. 345 dated 08.12.1989 made by Mr. Anton Samararatne, Licensed Surveyor. Initially only the 1<sup>st</sup> defendant-respondent was named as a defendant and the plaintiff claimed that each of them are entitled to ½ share of the corpus. After the institution of the action the 2<sup>nd</sup> and 3<sup>rd</sup> defendant-respondents were added as parties as a result of an application made by the plaintiff for an interim injunction against them restraining them from cutting down trees and construction of buildings which was settled on an undertaking given by them.

The 2<sup>nd</sup> defendant-respondent (hereinafter referred to as '2<sup>nd</sup> defendant') filed a statement of claim and pleaded that the land depicted in plan no. 345 is not the land sought to be partitioned by the plaintiff, but is a distinct and separate land which belonged entirely to the 2<sup>nd</sup> defendant and that the plaintiff had pointed to the surveyor the land called Dangahawatta also known as Palaturuwatta situated at Modera Patuwata in Dodanduwa containing in extent A0. R2. P0.

After trial, the learned Additional District Judge dismissed the action of the plaintiff with costs inter alia on the basis that the plaintiff had failed to prove the corpus as the identical land referred to in the plaint and that the 2<sup>nd</sup> defendant had satisfied court that the land depicted in plan no. 345 is land belonging exclusively to the 2<sup>nd</sup> defendant. Hence this appeal by the plaintiff.

Since the identity of the corpus is a fundamental issue in this case the preliminary survey report prepared in terms of Section 18 of Partition Law No. 21 of 1977 acquires importance as Section 18 (1)(a) (iii) 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. Mr. Anton Samararatne, Licensed Surveyor who prepared the preliminary survey report has stated therein that he thinks the land he surveyed and the land described in the schedule to the plaint is the same. He has not made a

categorical statement that both the lands are identical. He has further recorded that the 2<sup>nd</sup> defendant informed him that the land belongs to her.

The learned Additional District Judge has also considered the deeds on which the plaintiff relies on to establish title and observed that the land described therein is about one rood in extent whereas the land depicted in plan no. 345 is 19.25 perches in extent. The evidence shows that previously when the 2<sup>nd</sup> defendant attempted to construct a house on her land bearing assessment no. 26/7 saranajothi mawatha the plaintiff had objected claiming that the 2<sup>nd</sup> defendant sought to do so on land belonging to the plaintiff. The learned Additional District Judge concludes that the land pointed out by the plaintiff to be partitioned bears assessment no. 26/7 which belongs to the 2<sup>nd</sup> defendant. It is in these circumstances that the learned Additional District Judge has dismissed the action.

I have considered the evidence led in this case and agree with the findings and the judgment of the learned Additional District Judge. At the argument Mr. Daya Guruge counsel for plaintiff informed court that although the plaintiff has sought to assail the judgment of the learned Additional District Judge on three grounds, he is not in a position to support any one of the said grounds. He in fact called upon the court to dismiss the appeal without costs. We appreciate this concession from counsel and wish that such acts will become practices in appeals where the appellant does not have an arguable case.

I affirm the findings and judgment of the learned Additional District Judge and dismiss the appeal without costs.

Judge of the Court of Appeal

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

I agree.

Judge of the Court of Appeal