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

Athuraliya Balasuriyage Robert Walter Peiris

of 164. Asgiriwalpola,

Udugampola.

C.A.No. 1066/2000(F) **Plaintiff**

District court Gampaha

Case No. 30913/P - VS –

1. Amarasinghe Arachchige Dharmadasa Amarasinghe of 170A, Asgiriwalapola, Udugampola.

Deceased 1st Defendant

1A. Amarasinghe Arachchige Seetha Ranjanie Amarasinghe, 170A, Asgirwalpola, Udugampola.

Lawful representative of the deceased 1st Defendant.

2. Henry Perera Abeysinghe of No. 171, Asgiriwalpola, Udugampola

2nd Defendant.

And now between

Athuraliya Balasuriyage Robert Walter Peiris of 164, Asgiriwalpola.
Udugampola.

Plaintiff – Appellant

-Vs-

1. Amarasinghe Arachchige Dharmadasa
Amarasinghe of 170A, Asgiriwalapola,
Udugampola.

Deceased 1st Defendant Respondent

1A Amarasinghe Arachchige Seetha Ranjanie Amarasinghe, 170A,
Asgirwalpola, Udugampola.

Lawful representative of the deceased 1st Defendant.

2. Henry Perera Abeysinghe of No. 171, Asgiriwalpola, Udugampola

Deceased 2ndDefendant Respondent.

2(a)(i) Abeysinghe Arachchchige Pushpakanthi Abeysinghe

2(a)(ii) Abeysinghe Arachchchige Dunstan Perera Abeysinghe

Substituted Defendant Respondents

BEFORE : A.H.M.D.Nawaz J

E.A.G.R. Amarasekara J

COUNSEL : S.A.D.S Swraweera for the Plaintiff - Appellant

Sudarshani Coorey for the 1st Defendant – Respondent.

Sunil Prmadasa for the 2(a)(ii), 2(a)(ii) Defendant- Respondent.

Decided on :13.11.2017

Judgment

E.A.G.R.Amarasekara J.

The Plaintiff appellant has preferred this appeal to this court by Petition of appeal dated 14.12.2000 inter alia praying;

a) that the judgment of the learned District Judge dated 18.10.2000 be set aside.

b) that the judgment be entered in favour of the Plaintiff appellant as prayed for in the plaint.

c) For cost etc.

Factual matrix as per the district court case record:

1. The Plaintiff Appellant instituted the case No. 30913/P in the District Court of Gampaha seeking to partition a land called Nagahawatta alias Nagahalanda containing 1 Acre and 11 perches.
2. Originally only the 1st Defendant Respondent was disclosed in the plaint with a pedigree giving shares only to the Plaintiff Appellant and the 1st Defendant Respondent and the 2ndDefendant Respondent intervened on 21.11.1988 (Vide J.E.No. 8)
3. After exhibiting public notices in accordance with Section 15 of the Partition Act (vide J.E.No.8) the preliminary survey was done on 06.03.1989 that is after the intervention of the 2nd defendant (Vide plan no. 19/1989 marked as X).
4. The preliminary plan and the report was tendered to District Court on 24.04.1989 (Vide J.E.No.9 dated 89.04.24.)
5. Though the stance taken by the 2nd Defendant Respondent in his statement of claim that prayed for a dismissal of the Plaintiff Appellant's action was that land sought to be partitioned and surveyed was an undivided portion of a lager land called

Nagahalanda in extent of 9 acres 3 roods and 38 Perches, neither the 2nd Defendant Respondent nor any person who gets title to that larger land as per the pedigree in 2nd Defendant Respondent's statement of claim was present before the surveyor to show the larger land or to make claims to the plantation or improvements described in the report to the preliminary plan (Vide report of the preliminary plan marked as X1)

6. Even though the 2nd Defendant Respondent has referred to a plan no.24803 dated 08.04.1823 (Marked as 2V3 in evidence), as a plan depicting the larger land, he has not taken any step to superimpose that plan on the preliminary plan marked as X to show that the land sought to be partitioned is part of the corpus of that plan.

7. The Commissioner in his report marked as X 1 has stated that he superimposed plan no.139 dated 10/2/1939 (marked as P7 in evidence) and the land surveyed is the land sought to be partitioned but the 2nd defendant respondent has not resorted to section 18(3) (a) of the Partition Act to get the preliminary plan

verified or corrected if he was of the view that it was only a portion of a lager land or the contents of the report is incorrect.

8. The four boundaries of the land depicted in preliminary plan has been described as follows;

North : Gam Sabha Road

East : High way (from Udugampola to Kirindiwita)

South : Ambagahawatte of A.A.Babasingno

West : Nagahalanda of A.S.Peris and others

9. P7, the plan no.139 made in 10.02.1939 for the land sought to be partitioned in the plaint and deeds marked by the Plaintiff Appellant as P1, P2, P3, P4, P5, P6, and P9 have boundaries with same or similar description.

10. 2V3, the plan depicting the larger land as alleged by the 2nd defendant respondent does not depict a land called Ambagahwatta to the south of it and no road way or a high way is shown anywhere in the said Plan 2V3 either as a boundary or within the corpus. No facts were placed before district court to show that the road and highway in X (Preliminary Plan) can now be found within or as boundaries of the corpus depicted in

plan marked 2V3 or any land depicted in plan 2V3 as its southern boundary is now called as Ambagahawatte.

11. The deed no. 1133 marked as 2V1 shows that the land at the northern boundary of Ambagahawatta (which seem to be the southern boundary of the land sought to be partitioned in the plaint) belongs to one Baba Appu. It can be seen that the original owner of the 2nd defendant respondent's pedigree is one Amusinhage Baba Appu (vide statement of claim and 2 V 4)

12. There is no evidence placed before the district court to show that Baba Appu mentioned in 2 V 1 as the owner of the land to the north of Ambagahawatte is one and the same Amusinhage Baba Appu referred to in 2V4 as well the land belongs to Baba Appu mentioned in 2 V1 as the northern boundary is the alleged larger land Nahahalanda referred to in the statement of claim of the 2nd defendant respondent.

13. Plan No.139 marked P7 had been made on 10.02.1939 in respect of the land called Nagahawatta depicted therein and registered under the Rubber Control Ordinance and boundaries of P7 are compatible with the boundaries of the land sought to

be partitioned in the plaint and depicted in preliminary plan marked X.

14. There are deeds written, from 1943 onwards, for a land called Nagahawatta having the same extent and boundaries similar to the land sought to be partitioned in the Plaint(vide P8, P1toP6)

15. It is only in the last deed of the Plaintiff Appellant's pedigree, namely deed No. 27250 marked as P6, the land is described as Nagahawatta alias Nagahlanda and otherwise it has been always referred to as Nagahawatta of 1 acre and 11 perches in extent in other deeds marked by the plaintiff. Only in the preliminary plan marked as X the extent is given as 1 acre 13.771 perches indicating an increase of 2.771 perches. It can be also noted boundaries of P7 (Plan No 139) made in 10.2.1939 are compatible with the schedules of Nagahawatta or Nagahawatta alias Nagahalanda referred to in the deeds tendered by the Plaintiff to prove his pedigree (vide P1 – P8) '

16. Land sought to be partitioned by the Plaintiff appellant is registered in the land registry as a land of 1 acre and 11 perches under the name Nagahwatta and entries in the land registry

commenced in 1959. (Vide extracts taken from land registry marked as P9.)

17. The 2nd defendant respondent's deeds describe a land called Nagahalanda of 9 aces 3 roods and 38 Perches. Though the 2nd defendant respondent has tendered the deeds relating to the alleged larger land called Nagahalanda, some of which written in as far back as 1870 and 1916, none of them refers to a land called Ambagahwatta as its southern boundary.

18. Even the 2nd defendant respondent in his evidence dated 1.10.1999 at pages 3 to 9 has admitted the existence of a 1 acre and 11 perches land named Nagahawatta of which the Plaintiff Appellant has ½ share.

19. After the trial, the Plaintiff's case was dismissed as prayed for by the 2nd defendant respondent on the reason given in the judgment dated 18.10.2000.

It is clear from the judgment of the district court that the learned district judge has not given due consideration to many of the facts highlighted above in this judgment.

As per the Learned District Judge's Judgment he has taken the view that the land sought to be partitioned is a part of a larger land. Following seem to be the reasons for his conclusion.

1. The existence of a land called Nagahalanda as the western boundary of the land sought to be partitioned by the Plaintiff.
2. The description of the land in P6 as Nagahawatta alias Nagahalanda on the request of Plaintiff Appellant where in P1 to P5 it is described as Nagahawatta.
3. The case in the district court has been filed after a short period of time of the execution of P6 (It seems Learned district judge has suspected Plaintiff's move to name the land as Nagahawatta alias Nagahalanda was to use it in a litigation that was going to be instituted).
4. The reference in 2V1 to 2V14 of the defendant respondent's pedigree to a separate land called Nagahalanda (On this the Learned district judge has come to the inference that whatever the existence of Nagahawatta alias Nagahalanda, in truth there is a land called Nagahalanda in Asgiriwalpola village and in P1 to P5 the name Nagahawatta has been mentioned for the land named Nagahawatta alias Nagahalanda)

5. There is no reference to a land called Nagahawatta alias Nagahalanda in any of the deeds other than P6 which was executed less than two years prior to the institution of the action. (On this learned district Judge seems be have come to the inference that there is no evidence to prove the existence of a land called Nagahawatta alias Nagahalanda.

Analysis

In a village even adjoining separate lands may have the same names. For example, a large land that existed many decades ago may become separate lands with separate identity by long prescriptive possession by its co-owners or outsiders. They may use the same name for the separate portion they acquired by prescription.

Therefore, the corpus surveyed for the district court case and depicted in the preliminary plan cannot be said forming part of alleged larger land called Nagahalanda merely because one boundary (namely the western boundary) found in preliminary plan is called Nagahalanda.

On the other hand if the land in preliminary plan is part of alleged larger land Nagahalanda, Ambagahawatta found in preliminary plan to the South of its corpus should be a boundary to the larger land

called Nagahalanda but no deed, Plan (2V3) or schedule to the 2nd defendant respondent's statement of claim describe the southern boundary of the alleged larger land including Ambagahwatta as a boundary to it, no evidence was led to show any connection of the description of southern boundary in 2nd defendant respondent's deeds and plan marked 2V3 (i.e. gardens of Anthony Appu and Hathanhamy etc.) to Ambagahwatta found in preliminary plan as the Southern boundary. Citing of land belongs to Baba Appu as the Northern boundary of Ambagahwatta in deed No. 1133 (2V1) is not sufficient to prove that land surveyed in preliminary plan is part of Nagahalanda without any proof to show that said Baba Appu is the same Baba Appu referred to as the original owner in 2nd defendant respondent pedigree and the name of the land described therein as the Northern boundary is Nagahalanda.

Mere inclusion of the name Nagahalanda and description of the land as Naghawatta alias Naghalanda in deed marked P6 and filing of the district court case less than a lapse of two years will not prove any dishonest behavior of the plaintiff. Actually, when all deeds previous to P6 describe the land as Nagahawatta, on his request the name 'Nagahalanda' was mentioned in the description of the land in the

schedule to P6 to his detriment. If the Plaintiff Appellant restrained himself from describing the land as Nagahawatta alias Nagahalanda and stick to the same schedule in P1 to P5, there is no nexus what so ever to the alleged larger land called Nagahalanda. In this back drop it is difficult to accept the view of the learned district judge that naming of the land as Nagahawatta alias Nagahalanda was to use it in litigation as plaintiff appellant has not claimed from Nagahalanda. The plaintiff appellant might have started to describe the land in that manner due to other reason such as usage in actual practice even though not used in any deed prior to P6.

The Learned District judge has come to the inference that there is a separate land called Naghalanda in Asgiriwalpole village due to the fact that name is referred to in deed marked 2V1 to 2V14. Even though this court cannot find fault with that inference, there was no evidence to show that the name Nagahawatta was mentioned in P1 to P5 for the land called Nagahalanda or for the land called Nagahawatta alias Naghalanda as inferred in the following quoted passages of the Judgment of the learned district judge.

" 'එක්ස්' දරණ පිඹුරට අනුව බටහිර මායිම නාගහලන්ද නැමැති ඉඩමයි. 2 වන විත්තිකරුගේ නඩු විභාගයේදී ඔහුගේ අයිතිවාසිකම් සනාථ කිරීම සඳහා

ඉදිරිපත් කරනු ලැබූ 2වි1 සිට 14 දක්වා වූ ඔප්පු වලින් 'අස්ගිරි වල්පොල' පිහිටි නාගහලන්ද නම් වූ වෙනම ඉඩමක් නිරූපනය කර දක්වා ඇත. මේ අනුව සත්‍ය වශයෙන් අස්ගිරි වල්පොල ග්‍රාමයෙහි නාගහවත්ත හෙවත් නාගහලන්ද නැමැති ඉඩම කෙසේ වෙතත් නාගහලන්ද නැමැති ඉඩමක් නම් ඇති බව 2වි1 සිට 14 දක්වා ඔප්පු වලින් පෙනී යයි. එසේම තවදුරටත් පැ.1 සිට පැ.5 දක්වා වූ ඔප්පු සලකා බැලීමේදි නාගහවත්ත හෙවත් නාගහලන්ද නැමැති ඉඩමක් වෙනුවට නාගහවත්ත නැමැති ඉඩමක් පැමිණ ඇති බව පැහැදිලිව පෙනී යයි."

Though the learned district judge, at page 5 of his judgment, has come to the inference that the name Nagahawatta has been mentioned for the land called Nagahawatta alias Nagahalanda in deeds marked as P1 to P5, quite contrary to that, at page 6 of his judgment he has come to the conclusion that there is no definite oral or documentary evidence with regard to a land called Nagahawatta alias Nahahalanda and that only fact clearly represented by those evidence is that there are two separate lands called Nagahawatta and Nagahalanda.

" මේ අනුව පැමිණිලිකරු සිය පැමිණිල්ලේ උප ලේඛණයේ සඳහන් කරනු ලබන නාගහවත්ත හෙවත් නාගහලන්ද නැමැති ඉඩම තිබුණ බවට පෙන්නුම් කෙරෙනු එකම ඔප්පුව පැ.6 පමණකි. එයද මෙම නඩුව පැවරීමට අවුරුදු දෙකකට වඩා අඩු කාල සීමාවක් තුල ලියා අත්සන් කරනු ලැබූ ඔප්පුවකි.

එබැවින් පැමිණිලිකරු සඳහන් කරන නාගහවත්ත හෙවත් නාගහලන්ද නැමැති ඉඩමක් ගැන කිසිදු නිශ්චිත සාක්ෂියක් පැමිණිල්ලේ හෝ විත්තියේ සාක්ෂි වලින් හෝ ලේඛණ වලින් නිරූපනය වී නොමැත. පැහැදිලිව නිරූපනය කර ඇති එකම කරුණ වනුයේ නාගහවත්ත සහ නාගහලන්ද නැමැති ඉඩම් දෙක වෙන වෙනම ඇත යන කරුණු පමණකි."

Only land revealed in evidence as Nagahawatta is the land which is described in plaintiff's deeds marked P1 to P5. If it is a separate land as found by learned district judge in his judgment at page 6, it should be the same land found in P6 as extent and boundaries are compatible with the extent and boundaries of the land described in P1 to P5. On the other hand, the donor of P6 has referred to his title as deriving from P5. Therefore, it is crystal clear that P6 refer to the same separate land called Nagahawatta that is found in deed P1 toP5. What facts placed before the district court proves is that the Naghawatta alias Naghalanda of 1 acre 11 perches referred to in the plaint and P6 is the same land described as Naghawatta in P1toP5. If it was part of alleged larger land Naghalanda naturally co- owners as per the 2nd defendant respondent's pedigree should have taken an interest to claim before the surveyor since the preliminary survey was done after exhibiting public notice as per section 15 of the Partition Act. No one

else other than plaintiff appellant and 1st defendant respondent has claimed before the surveyor. Not even the 2nd defendant respondent came forward to claim improvements and plantation in the land surveyed. It should be noted that the preliminary survey was done only afterthe2nd defendant respondent intervened to the case.

X2, the report to the preliminary plan clearly show that the improvements and plantations were claimed only by the plaintiff appellant and the 1st defendant respondent and the 2nd respondent appellant has not taken any steps under section 18(3) of the Partition Act. Therefore, the facts mentioned in the preliminary plan and the report becomes evidence without any further proof. Even though the 2nd defendant respondent has cross examined the surveyor, the claims to the plantation and improvement have not been challenged by the 2nddefendant respondent. There is plantation aged 40-50 years among the plantation claimed by the plaintiff appellant and the 1st defendant respondent proving that the plaintiff appellant, the 1st defendant respondent and their predecessors were in very long procession of about 40 to 50 years in the land surveyed in the preliminary plan. When those facts if evaluated by the district judge together with the dates of P7, P8 and entries in P9, the learned district judge could have

easily come to the conclusion that the plaintiff appellant, 1st defendant respondent and their predecessors were in long exclusive possession of the land sought to be partitioned at least since 1939 as there was no evidence to show that anyone in the 2nd defendant respondent's pedigree had possession of that land during that time. As per the decision in ***Tillakaratne Vs Bastian 21 NLR 12*** the learned district judge could have presumed prescriptive title of the plaintiff appellant and 1st defendant respondent and their predecessors to the land to be partitioned and surveyed and identified in the preliminary plan, even if it is presumed to be a part of a larger land in the past. (It is pertinent to note that there is no clear and definite evidence to prove that the land surveyed for the preliminary plan is part and parcel of a larger land at any given time in the past.)

It is true that the burden to prove the identity of the corpus was with the plaintiff appellant who filed the partition action in the district court. He has fulfilled that burden as follows:

a) By marking a plan depicting the corpus which was made in 1939.

   (Vide P7) and getting it superimposed on preliminary plan marked as X.

b) Marking the folios of land registry where the corpus has been registered as a separate land with relevant entries commencing from 1959. (Vide P 9)

c) Marking the deeds written to the corpus from 1943 onwards. (Vide P 9, P1to P6 and 2V1)

d) Marking the preliminary survey report X 1 to show only the parties who gain title according to Plaintiff appellant's pedigree has claimed improvements and plantation before the commissioner.

Under such circumstances, the evasion from taking steps to superimpose the plan marked 2V3 while having it with him by the 2nd defendant respondent should have been considered as causing an adverse inference under section 114 of the evidence ordinance. Close perusal of the boundaries of P7, P8, P1 to P6 and X Preliminary plan show that all of them are for the same land.

It is clear from P7, P8, P9 and P1 to P5 that there exists a land called Nagahawatta of 1 Acre 11 perches with a separate identity at least from 1939 onwards. It is also clear P6 relates to the same land though

the plaintiff appellant has instructed to name it as Nagahawatta alias Nagahalanda in P6.

This court has no doubt that the same land is depicted in X, the preliminary plan though it shows an addition of negligible 2.7 perches to its extent. Even if it is considered for the sake of argument that the land sought to be partitioned would have formed a part of a larger land in the past, there are enough facts to consider and presume that plaintiff appellant, 1st defendant respondent and their predecessors got title by long prescriptive possession to the land sought to be partitioned and depicted in preliminary plan marked X.

The pedigree shown by the plaintiff is proved by the deeds P1 to P6 and 2 V 1. The claims to the improvements and plantation reported in X1 were not challenged during the trial.

For the forgoing reasons this court is of the view that the learned district judge erred in not taking into consideration what is relevant and taking into consideration what is not relevant.

Therefore, this court decides to set aside the judgment of the learned district judge dated 20.10.18 and direct the district judge to partition the land depicted in preliminary plan as per the prayer in the plaint

and the district judge is further directed to decide the rights to improvements and plantation as per the claims made before the surveyor. The Plaintiff Appellant is entitled to the cost of this appeal.

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JUDGE OF THE COURT OF APPEAL

A.H.M.D. Nawaz J

I agree

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JUDGE OF THE COURT OF APPEAL