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

1. Polwatte Lekamlage Podi Appuhamy (Deceased)

1A. Polwatte Lekamalage Premasiri of Meneripitya Parakaduea.

Substituted – Plaintiff Appellant.

D.C. Avissawealla case
No. 15858/P.
Case No. CA 1110/2000(F)

Vs.

1. Mudannaka Arachchilage Gunasekera (Deceased)

1A. Mudannaka Arachchilage Punchimenika

2. Polwatte Lekamlage Alis Nona.
3. Polwatte Lekamalage Podi Appuhamy.
4. Polwatte Lekamlage Heen Mahathmaya
5. Polwatte Lekamlage Yasawardana
6. Maldeniya Koralage Indradasa Appuhamy (Deceased)

6(A) Maldeniya Koralage Badrawathie (Deceased)

6(A1) Aruna Priyantha Fernando.

7. Maldeniya Koralage Podi Ralahamy.

8. B.V. Jayawardana.
9. Weerasinghe Arachchilage Wijesoma.
10. Madagammana Arachchige Appuhamy
11. Polwatta Lekamlage Karunarathna Hamine.

Defendant- Respondents.

BEFORE : A.H.M.D. NAWAZ, J

E.A.G.R. AMARSEKARA, J

COUNSEL: M.I.M Naleen with M.H. Aslam for substituted Plaintiff Appellant.

Rohan Sahabandu PC with S.D. Withanage for 6th Defendant Respondent.

Athula Perera instructed by R. Navodaya with Nayomi N. Kularatne for 11th Defendant Respondent.

Decided on: 15.01.2018

E.A.G.R. Amarasekara, J

Judgment

The plaintiff appellant (here in after sometimes referred to as the plaintiff) has filed this appeal against the judgment dated 13/12/2000 of the learned district judge of the Awissawella District Court in the partition action 15858/P.

The aforesaid partition action was instituted by the plaintiff against the Defendant-Respondents for a partition of the land called Medawatte described in the scheduled to the plaint, in accordance with the devolution of title shown in the plaint.

The 2nd,4th,5th ,6th ,8th and 9th Respondents originally filed a statement of claim which is to certain extent compatible with the devolution of title shown in the plaint. 10th and 11th Defendant Respondents who were not made parties to the original plaint but who were claimants before the commissioner filed a statement of claim presenting a corpus dispute stating that the land surveyed in preliminary plan No.1213 includes a portion of another land called Phalawatte within its boundaries. Later another plan No. 1213A was made by the same commissioner depicting the disputed portions as lots no. 2/1, 5 and 6. After the making of plan No.1213A ,4th, 5th, 6th, 8th and 9th Defendant Respondents have filed an amendment statement of claim refusing to accept the plan no.1213A but it must be noted neither in their original statement of claim nor in their amended statement of claim the 6th defendant respondent has taken a stance that he is entitled to the corpus or portion of it solely to the exclusion of others. Even the 6A substituted defendant thereafter has filed an amended statement of claim dated 21/6/1996 through her registered attorney Cecil Gamage admitting the share given to the 6th defendant respondent in the plaint but thereafter taking a different stance 6A substituted defendant has filed another amended statement of claim dated 17/ 9/1996 claiming prescriptive title to the lots No.1,2,3 and 4 of the plan made by the commissioner. 10th and 11th defendant respondents too have filed an amended statement of claim praying for an order to exclude lots 5, 6 and 2/1 of plan No 1213A from the partition.

Parties have raised 15 points of contests on 21/08/1996 and 6A defendant has raised points of contest no.16 and 17 based on his aforesaid claim on prescription, on 27/02/1997.

Substituted Plaintiff has closed his case after giving his evidence and marking the documents X, X1, P1, P2 and P3 which includes preliminary plan and report, the deeds he relies on. None of these documents were objected at the closure of plaintiff's case.

2nd,4th and 5th and 8A defendant respondent have closed their case after leading the evidence of 8th and 4th defendant respondents and marking their deeds 4v1,8v1,8v2, and 8v3, which were not objected at the closure of their case.

6A substituted defendant has given evidence in support of his case marking documents 6Av1 ,6Av2 and 6Av3, which are the extracts of electoral register for assessment No.149 in Grama Niladari Division 127, Pathberiya. At the closure of 6A defendant respondent's case these documents were not objected by other parties to the case.

10th defendant respondent and 11th defendant respondents have closed their case after leading 10A substituted defendant's and 11 defendant respondent's evidence while marking the deed they rely on as 10v1, which was not subject to any objection at the end of their case.

The 2nd plan No.1213A and its report by the commissioner have been marked during the cross examination of the substituted plaintiff as Y and Y1 and they were not subject to any objection at the time of their marking.

Only X and X1 (Preliminary Plan and Report) were objected at the time of their marking. Anyway, these objections were not reiterated at the closure of plaintiff's case. However, the plan and report marked Y and Y1 made by the same commissioner, which contains additional information had been marked without any objection. However, when this court consider the decision in Sri Lanka Ports Authority Vs. Jugolinija-Boal East reported in (1981)1SLR 18, all the documents marked during the trial of the partition action can be considered as evidence for all the purposes of this case.

As per the pleadings and points of contest raised at the trial, it is clear that there was a corpus dispute raised by the 10th and 11th defendant respondent. A claim of prescriptive title by 6A defendant respondent against the stance taken by the plaintiff in its plaint too were there.

The learned District Judge after trial has delivered his judgment on 13.12.2000 and has come to the conclusion that no party had adduced acceptable evidence to prove a pedigree pertaining to the land. On that premise the learned District Judge has dismissed the action for partition and on the same footing further held that it is not necessary to inquire in to the corpus dispute and the prescriptive claim.

As correctly stated by the learned district judge in his judgment it is the duty of the judge to investigate title to the land to be partitioned, but this does not mean that the judge must either accept plaintiff's pedigree or a pedigree presented by one of the parties. In investigating title, the judge has to consider the evidence and deeds placed before him and find on the preponderance of evidence whether co-ownership is established and share (if any) of each party in that co-ownership. A court must also take into its cognizance that a substitute party /parties may not have possessed the same firsthand knowledge about original owners expressed by the original plaintiff or original defendants in their plaint or statements of claims because most of the time they are born many years after the birth of original parties to the action. What is important is whether the substituted party or parties is/are able to prove the co-ownership and the share or shares of such party or parties.

According to section 25 of the Partition Act, at the trial the district judge is duty bound to examine the title of each party and he shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share or interest of each party to, of, in the land to which the action relates. According to section 26 among other orders district judge can demarcate and separate a portion of the land which represent the share of any particular party and also order that any share remain unallotted. This shows even if one party to the action proves his share it can be partitioned and the other portions can be left unallotted.

For the reasons elaborated later in this judgment I am of the view that certain parties to the partition action has proved their co-ownership and their title to the land to be partitioned. Thus, the learned district judge should not have dismissed the partition action.

Furthermore, for the reasons given in the judgment the learned district judge has not decided on the corpus dispute and the claim on prescription. As I am of the view that the land described in the plaint could have been partitioned, now I will consider whether the learned District Judge could have solved the corpus dispute.

Land sought to be partitioned by the plaint is a land called 'Medawatte' which is bounded on the:

North; by Kiri Ethanage Watta

East; by Kaluhamyge watta

South; by Ela

West; by Asseddume Kumbura

Except the 10th and 11th defendant Respondents no other party has disputed the identity of the corpus.10th and 11th defendant respondents' stance was that lots 2/1,5 and 6 of plan no.1213A should be excluded from the corpus as they belong to another land called Phalagedara Watta.

The party who prosecute the partition action or the parties who want to partitioned the land has/have to prove the identity of the corpus. The substituted plaintiff and the others who wanted to partition the land depicted in plan No.1213 seem to rely on the fact that Mala Dola which is the southern boundary of the lot 1 and undisputed portion of lot 2 of that plan runs further towards southwest forming the southern boundary of lots 2/1 and 5 in plan No.1213A, which are the disputed portions of land. Mala Dola normally means a ditch that carries water during the rainy season but as per the plaint the southern boundary of the Corpus is described as Ela (a Canal). Perhaps with the passage of time a canal may dried up and may limit its function of caring water to rainy season only. On such a situation one may refer to it as Mala Dola. Whatever the description may be, merely because the southern boundary of lots 2/1 and 5 of plan no.1213A is Mala Dola, it is difficult to accept without other proof that those lots, namely lots 2/1 ,5 and 6(which is a path within four boundaries of lot 5) of plan no. 1213A are part of Medawatta or land sought to be partitioned because Mala Dola or Ela is not a feature limited to the Corpus. Even according to the two plans made for this action it could be seen that Mala Dola starts before the eastern boundary and runs passing the western boundary of the land/lands depicted in those plans. Even the evidence led at the trial proves that its length is about 3/4th of a mile and it flows across many lands passing the land sought to be partitioned towards southwest (vide page 20 of the plaintiff's evidence recorded on 01/07/1998.Evidence of 4th defendant respondent recorded on25/03/1999at page 38.). Therefore lots 2/1, 5 and 6 may even be some other land that Mala Dola flows through. The substituted Plaintiff or any other defendant respondent who stands with the plaintiff to partition the whole area depicted in plan no.1213 has not used any previous plan

to the land sought to be partitioned to prove that lots 2/1 ,5 and 6 are within the four boundaries of Medawatta, the land sought to be partitioned.

On the other hand, it is an undisputed fact, according to the evidence led at the trial, that 10th and 11th defendant respondents have been there in the possession of lots 2/1, and 5 of plan number 1213A for very long period of time and the 10th defendant respondent was there even at the time of the substituted plaintiff's birth. (vide cross examination of the substituted plaintiff by the 10th and 11th respondents; cross examination of the 8th defendant respondent by the 10th and 11th defendant respondents; cross examination of the 4th defendant respondent by the 10th and 11th respondents; cross examination of the 6A defendant respondent by the 10th and 11th defendant respondents and evidence of 10A and 11 defendant respondents). The plaintiff and the parties who wanted to partition Medawatta have not shown any right that belong to 10th and 11th defendant respondents to the corpus through their pedigree or any other means. They have not proved that 10th and 11th defendant respondents are licensees. Some tries to say that 10th defendant respondent came to the land as the brother-in-law or relative of the 6th defendant respondent (vide 4th defendant respondent's evidence) but there is no acceptable evidence to prove that 10th and 11th defendant respondents came to the land on permission of a co-owner to the land. Looking at the ages of these witnesses it can be presumed that they could not have been born or could be infants at the time the 10th and 11th defendant respondents came to the possession of disputed portions. Therefore, mere statements saying they came to the land as relatives of the 6th defendant respondent is not acceptable. If it is true 6A defendant respondent would be eager to contest the soil rights in lots 2/1, 5 and 6 of plan number 1213A. It is also clear from the commissioners report to plan 1213A that no one has claimed the plantations in lots 2/1 and 5 against the claim of 10th and 11th defendant respondents. The substituted plaintiff under cross examination states that he neither claims the plantation nor possession of lots 2/1 and 5. Even 8th defendant respondent under cross examination admits the possession of 10th and 11th defendant respondents of the disputed portions and that no one came forward to claim the possession of the disputed portions. Even the 4th defendant respondent, while admitting the 10th and 11th defendant respondents' possession, states in cross examination that he does not claim rights to the lots possessed by 10th and 11th defendant respondents. Thus, aforesaid parties who wanted to partition the whole land in plan 1213 do accept the possession of 10th and 11th defendant respondents in lots 2/1 and 5 in plan number 1213A which are the disputed portions. They do not challenge such possessions and some even do not want to challenge the rights of 10th and 11th defendant respondents. They are unable to establish how 10th and 11th defendant respondents came to the possession of the disputed portions or a right accrued to them according to their pedigrees. This by preponderance of evidence shows that lots 2/1, 5 and 6 could be a different land as claimed by the 10th and 11th defendant respondents. If not, they have prescribed to those disputed portions and those disputed portions have a separate identity now. Therefore, my considered view is that there was sufficient evidence before the learned district judge to exclude lots 2/1 ,5 and 6 of plan number 1213A from the land surveyed in plan number 1213 by the commissioner.

As per the judgment the learned district judge has not gone in to the issue whether the 6th defendant respondent has gained prescriptive title to the land sought to be partitioned. Actually, the learned district judge should not have allowed the amendment to the statement of claim that brought forward a prescriptive claim as it is against the original stance taken by the 6th defendant respondent. 6th defendant respondent had been admitting co-ownership in his original statement of claim dated 11.05.1984 filed together with 2nd, 4th, 5th, 8th and 9th defendant respondents. Even the substituted 6A defendant respondent admitted the co-ownership in her amended statement of claim dated 24.06.1996. In both those statements of claim 6th and 6A defendant respondents have asked to partition the land. Only in the statement of claim dated 17.09.1996 6A defendant respondent tendered a claim of prescription. That was almost after 16 years from the inception of the partition case. 6A defendant respondent should have stepped in to the shoes of the 6th defendant respondent after the death of 6th defendant respondent. She cannot take a new stance unless she joined as a new party. On the other hand, 6A defendant respondent herself has filed her 1st amended statement of claim admitting co-ownership. Now she cannot claim prescription as she herself and her predecessor admitted the co-ownership after filing the plaint. Therefore, it is my considered view that there were sufficient grounds before the learned district judge to refuse the claim of 6A defendant respondent on prescription.

It is clear from the evidence of the substituted plaintiff that his personal knowledge with regard to the pedigree in the plaint is not satisfactory. He has admitted in evidence that he has no knowledge with regard to the pedigree. In many occasions in his evidence he has referred to what his father has expressed with regard to the pedigree. What the learned district judge failed to properly assess are the unchallenged documents (deeds) tendered by the plaintiff. As said before these deeds (P1 to P3) were not challenged when they were marked or at the closure of the plaintiff's case and they have become evidence for all the purposes of this action. The deed number 3038 marked as P1 shows that Marthenis has transferred 1/12 of Medewatta to Polwatta Lekamlage Podi Appuhami, the plaintiff. This deed also shows that the share of 1/12th was inherited by Marthenis from his mother Bala Ethana. Bala Ethana is among the original owners referred to in the plaint. Therefore, this deed P1 prove original ownership of Bala Ethana to 1/12th and its devolution to the original plaintiff. Boundaries to Medewatta in P1 is similar to land described in the schedule to the plaint. Even in the preliminary plan 1213 and plan number 1213A, this court can find boundaries that are compatible with the boundaries to Medawatte in P1. i.e. road to North, Kaluhamige watta to East, Ela to South, Asswaddume Kumbura to West. Land to the north of Medawatta in preliminary plan and the subsequent plan number 1213A is described as UthuruMedawatta while in the plaint and P1 it is described as Kiri Ethanage Watta. It was common ground that lots 1,2 and 4 of plan number 1213A belongs to the corpus and no one took up the position that land shown north to the land in that plan belongs to the corpus. In such a situation the learned district judge had

sufficient grounds to presume land shown to the north of preliminary plan number 1213 and plan number 1213A, namely Uthurumedawatta is the land named Kiri Ethanage Watta which is described as the northern boundary in the schedule to the plaint and P1. Therefore, it is my considered view that there was sufficient evidence before the learned district judge to prove that 1/12th share of the land sought to be partitioned devolved upon the original plaintiff from the original owner Bala Ethana. Deed number 3862 marked as P2 and deed number 23145 marked as P3 also refers to a transfer of a land called Medawatta but it should be noted that the Medawatta referred to in these 2 deeds are of an extent of three bushels of paddy and boundaries defer from the land sought to be partitioned in the plaint and in the plans made. Particularly northern and eastern boundaries in P2 and P3 are described as Abayhamige watte agala and Mohotti Hamige watte galwetiya or galwaetiya respectively but these boundaries are not compatible with boundaries described to the north and east in the schedule to the plaint as well as in the plans. No acceptable evidence has been led to prove that those descriptions too refer to the same boundaries. In such a back drop there is no acceptable evidence led to prove that Bandara Asswedduma and Dawaka Kumbura described as the eastern boundary in P2 and P3 is the same Assweddume Kumbura described as the eastern boundary in the schedule to the plaint and the plans made. Furthermore, it can be observed that in deeds marked as 8V1,8V2 and 8V3 there are two lands called as Medawatta. One is named as Medawatta Uthuru Irawalala while the other is named as Medawatte Dakuna Irawalala. The land called Medawatta Uthuru Irawalala has Abayhamige watta as its northern boundary and Galweta as the eastern boundary. These descriptions are compatible with the northern and eastern lands described as boundaries to Medawatta in P2. On the other hand, boundaries to Medawatta Dakunu Irawalala in 8v1, 8v2 and 8v3 are more compatible with the land sought to be partitioned in the plaint and the plans made. Most probably the foot path described as the northern boundary can now be found in the preliminary plan and plan number 1213A as a road. Eastern boundary of Medawatta Dakunu Irawalala which is described as Kaluhamige watta in 8v1 8v2 and 8v3 can be found in the schedule to the plaint, plans made and even in Medawatta referred to in P1. Even the southern and western boundaries to the Medawatta Dakunu Irawalala in 8v1, 8v2 and 8v3 are compatible with the lands sought to be partitioned in the plaint, land depicted in the plans made for this case and land described as Medawtte in P1. Therefore, 8v1, 8v2 and 8v3 show that Medawatte which has the Abayhamige Watta as the northern boundary is different from the lands sought to be partitioned which has Kaluhamige Watta as the eastern boundary like in Medawatta Dakunu Irawallala in 8v1 8v2 8v3. For the reasons mentioned above it is my considered view that there was no sufficient evidence led before the learned district judge to prove Medawatta in P2 and P3 refers to the land sought to be partitioned and there was evidence to show that it is a different land.

As the learned district judge correctly observed, evidence led at the trial does not reveal any personal knowledge of the 8th defendant respondent with regard to the pedigree but the deeds he marked as 8v1, 8v2 and 8v3 were not objected on any ground at the time they were marked or at the closure of the 8th defendant respondent's case. Therefore, these deeds can be treated as evidence for all the purposes of this case. On 25.03.1995 at page 3, 8th defendant respondent has named the land sought to be partitioned as Medawatta alias Medawatta Pahala Irawalala which is described as the second land in 8v2. The second land in 8v2 is Madawatta Dakuna Irawalala, boundaries of which this court earlier in this judgement found as compatible with the land sought to be partitioned.(Though the 8th defendant respondent referred to the 2nd land in 8v2 as the land sought to partitioned, this court observes the cross examination thereafter by the 6th defendant respondent was based on the other land named Medawatta Uthuru Irawalala) As 8v1, 8v2 and 8v3 were not challenged, they prove that 8th defendant respondent got 1/18th of the corpus which was once owned by Menerapitiya Hatharabage Lekamlage Punchi Manika who is referred to in the plaintif's pedigree. Though there was no sufficient material to prove Ran Ethana was the original owner for 1/3rd as described by the plaintiff in his pedigree or 1/18th of the land devolved on aforesaid Punchi Manika in the manner described in the plaint, these 3 deeds prove that aforesaid Punchi Manika was the owner of 1/18th before executing 8v3, which fact was not challenged by any party. Therefore, afore said Punchi Manika referred to in the plaintiff's pedigree (not as an original owner) could have been considered as an original owner in the past by the learned district judge. Substituted parties may not be able to prove the pedigree their predecessors presented to court, but it is the duty of the court to investigate title. The evidence led in this case was sufficient to prove that one-time aforesaid Punchi Manika was owner of 1/18th of the land and it devolved upon the 8th defendant respondent.

Even the evidence of the 4th defendant respondent shows that he does not have sufficient personal knowledge to prove the complete pedigree presented by the plaintiff in his plaint, on which he too relied on but he has marked 4v1 without any objections. No one has challenged that it is a false document or its contents. No one has challenged saying that it does not relate to the land sought to be partitioned. 4v1 is evidence for all the purposes of this action. Only issue with 4v1 is that it describes the land as Medawatta Uthuru Irawalala but the boundaries referred to in the schedule to the deed are not boundaries of Medawatte Uthuru Irawalala in 8v1, 8v2 and8v3 but of Medawatta Dakunu Irawalala in 8v1,8v2 and 8v3, boundaries of which are compatible with the land sought to be partitioned. Description of the boundaries of 4v1 shows that though it is misnamed as Medawatta Uthuru Irawalala it is the land sought to be partitioned. As 4v1 was not challenged or objected by any party it shows that one Siriwardena have once owned 1/8th of the land sought to be partitioned and it devolved upon 4th defendant respondent. No acceptable evidence was to be found at the trial to show that the share shown in the aforesaid deeds are false. Therefore, it is my considered view that at the trail there was sufficient evidence before the learned district judge to decide that land sought to be partitioned is co-owed land. Furthermore lots 2/1, 5and 6 of plan number 1213A were not proved to be part of corpus and

learned district judge could have exclude them from the corpus. On the preponderance of evidence, the learned district judge could have decided share of co-ownership of each party in the following manner.

Plaintiff 1/12 = 6/72

4th defendant 1/8th = 9/72

8th defendant 1/18 = 4/72

Not proved = 53/72

Therefore, the learned district judge could have allotted shares of the corpus, after excluding lots 2/1, 5 and 6 of plan number 1213A, in the following manner.

Plaintiff = 6/72

4th defendant = 9/72

8th defendant = 4/72

Unallotted = 53/72

Claims to the plantation could have been decided as per the claims made before the surveyor

For the reasons given above I am inclined to set aside the judgement dated 13.12.2000 of the learned district judge and order that interlocutory decree to be entered as per the decision made in this judgment.

.....

I Agree.

.....

A.H.M.D. Nawaz J