

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

1. Wahindara Mudiyanse Lage Kasturi Gedara  
Jayasinghe  
Pattiyatenne Road, Walala,  
Menikhinna.
  
2. W.M.K.G. Muthumenike  
Walala, Menikhinna.

**C.A. No.504/97(F)**

**D.C. Kandy Case  
No.12222/P**

**Defendants-Appellants**

**Vs.**

Kasturi Gedara Mudiyanse  
of 33/1, Pattiyatenne Road,  
Walala, Menikhinna.

**Plaintiff-Respondent**

**BEFORE** : **M.M.A GAFFOOR J AND  
JANAK DE SILVA J**

**COUNSEL** : Lasitha Chaminda for the 1<sup>st</sup> Defendant-Appellant  
Nimal Muthukumarana for the 2<sup>nd</sup> Defendant-  
Appellant  
Pradeep Fernando for the Plaintiff-Respondent

**ARGUED ON** : 30.10.2017

**WRITTEN SUBMISSIONS**

**TENDERED ON** : 07.12.2017 (1<sup>st</sup> Defendant-Appellant)  
11.12.2017 (Plaintiff-Respondent)

**DECIDED ON** : 24.05.2018  
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**M.M.A GAFFOOR J**

The plaintiff-respondent (hereinafter referred to as the plaintiff) instituted the action in the District Court of Kandy to partition the amalgamated land called Wattakiyana Hena and Kosgollewatte Hena morefully described in the schedule to the plaint. Upon a commission being issued to Mr. C.B. Illangasinghe Licensed Surveyor prepared the Preliminary Survey Plan No. EL 132 dated 30.08.1989 and the same was furnished to the District Court together with the Report thereon. The said Plan and the Report were marked in evidence in the present action as **X** and **X1** respectively.

The 1<sup>st</sup> defendant-appellant (hereinafter referred to as the 1<sup>st</sup> defendant) and the 2<sup>nd</sup> defendant-appellant (hereinafter referred to as the 2<sup>nd</sup> defendant) filed their joint statement of claims on or about 16.03.1992 in which they pleaded that, the land depicted in the preliminary survey plan is not one and the same land as described in the schedule to the plaint. According to the said defendants, the land depicted in the preliminary survey plan is the land called Thombadeniya which is described in the schedule to the statement of claims of these defendants (vide statement of claims at pages 238 to 242 of the brief). Accordingly, they pleaded for a rival pedigree in the present action.

The case proceeded to trial on 27.06.1996 on 14 issues for the plaintiff and 8 issues for the defendants (vide pages 60 to 64 of the brief). In any event, at the end of the trial the judgment was delivered by the learned District Judge of Kandy ordering that the subject matter be partitioned in such manner in which only the plaintiff is entitled to undivided 9/14 and the remainder should be left unallotted (vide the judgment at pages 125 to 137 of the brief).

Being aggrieved by the said judgment of the learned District Judge of Kandy this appeal was preferred to this Court by the 1<sup>st</sup> defendant-appellant.

The preliminary survey was carried out on behalf of the plaintiff by Surveyor Illangasinghe bearing No. EL 132 and the same was marked at the trial as 'X' which is found at page 213 in the appeal brief.

Since the defendants have taken up the position that the land depicted in the schedule to the plaint is not the land shown in the preliminary survey plan bearing No. EL 132 referred to above, the defendants too have taken out a commission and accordingly at the instance of the defendants, Surveyor Piyasena had prepared Plan No.659 which was marked as 'Y' at the trial and the same is at page 210 in the appeal brief.

The plaintiff-respondent submits that as such the core issue is whether the separate surveys carried out by the two surveyors referred to as X and Y in the appeal brief, relate to one and the same land or if not they are in respect of two separate lands. It was submitted that this becomes the all important question to be determined by this Court as per the directive given to Counsel that written submissions are to be limited to assisting Court to determine the said matter only.

In the judgment dated 19.06.1997 the learned trial Judge having considered the evidence placed by both sides had arrived at the conclusion that the two separate surveys carried out marked X and Y relate to one and the same land and that is the land sought to be partitioned by the plaintiff. Accordingly the plaintiff has been allotted the 9/14 share of land claimed by him as per the plaint and in demarcating the said entitlement to the plaintiff Court has held that preference should be given to the area which has already been occupied by the plaintiff including the permanent buildings marked A and C together with the connected right of way shown in Plan EL 132.

In arriving at this finding the learned trial Judge has also held that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have failed to establish any chain of title

relating to the pedigree claimed by them and accordingly has decided to keep the remaining 5/14 share unallotted.

In arriving at this finding the learned trial Judge had correctly analyzed the surveyor plans prepared at the instance of the plaintiff and the defendants marked respectively as 'X' and 'Y' at the trial, the separate schedules appearing in the plaint and the statement of claim of the defendants, particularly the boundaries, the shape and extent of the land shown in the two separate plans that the land sought to be partitioned has been correctly identified by the surveyor who carried out the preliminary survey bearing No. EL 132. Even more to this finding is that the learned trial Judge had also held that the land surveyed by the defendant's surveyor also relates to none other than the land surveyed by the plaintiff's surveyor. As such there is no doubt that the two separate surveys relate to one and the same land and that is the land stated in the schedule to the plaint.

The defendants in their attempt to show that the land claimed by the plaintiff in the schedule to the plaint is different to the land shown in the preliminary plan and that the land shown in the said preliminary plan is different land called 'Thombadeniya', have taken up the position both in their statement of claim as well as the issues framed on their behalf that the boundaries have got mixed up accidentally as upside down by their

notary. Nevertheless they state that Plan No.659 relied on by the defendants, the said boundaries are correctly explained (vide paragraph 22 in their statement of claim at page 241 and issues 19 and 20 framed on their behalf appearing at page 64 in the appeal brief). In effect this Court observes that what the defendants are thereby relying on is the survey Plan bearing No.659 dated 24.10.1990 which has been prepared after the institution of this action which was marked as 'Y' at the trial.

As such, in order to ascertain for the purpose of finality of this appeal whether the two separate surveys carried out by the two separate surveyors marked as 'X' on behalf of the plaintiff and as 'Y' on behalf of the defendants relate to two separate lands or does the survey Plan marked 'Y' on behalf of the defendants reveal that it conforms to the plan prepared by the plaintiff's surveyor marked as 'X', it is best that the two separate schedules appearing in the plaint and the statement of claim be compared with the boundaries disclosed in the said two surveyor plans marked 'X' and 'Y'.

The schedule to the plant western boundary is 'Arambahena Idama'. Surveyor in Plan marked EL 132 whilst confirming that it is 'Arambahena Watta' has also marked a State owned Textile Weaving Centre (Peshakarma Madyastanaya) at the western boundary. If the defendants claim to the contrary is to succeed then the western boundary

in their plan marked 659 should obviously be something different. But this Court observes that in the defendants' said plan marked 659 too, their surveyor Piyasena has marked 'Arambatenna Watta' and the Textile Weaving Centre at the western boundary. As such it is respectfully submitted that the western boundary in Plan EL 132 as well as in Plan 659 are absolutely identical to one another.

Turning next, in the schedule to plant southern boundary is 'Aluthgammehahene Idama'. Surveyor in Plan EL 132 confirmed that it is 'Aluthgammehahene Watta'. The defendants' surveyor Piyasena in his Plan 659 has confirmed that the southern boundary is 'Aluthgammehahene Watta'. Even the schedule in the defendants' statement of claim has described the southern boundary as 'Altugammehahene'. As such it is respectfully submitted that in both plains southern boundary is clearly identical.

In the schedule to the plant northern boundary is 'Hembadiniya Siyatuge Watte Idama'. Surveyor Plan EL 132 has confirmed the said description as 'Hembadeniya Siyatuge Watta' and also has stated that the said land is also referred to as 'Pattiyatenna watta'. In the schedule of the defendants' statement of claim the northern boundary has been described as 'Pattiyatenne watta' and the defendants' surveyor Piyasena too has confirmed the said boundary to be 'Pattiyatenne watta'.

This position once again confirms without any ambiguity whatsoever that the northern boundary in both Plan X and Y are identical to one another.

The above three boundaries confirmed identical to the schedule to the plaint by the preliminary survey EL 132 has thus been confirmed identical by the survey done by the defendants' surveyor.

In this backdrop it is most respectfully submitted to this Court that the defendants' contention in their statement of claim that the land sought to be partitioned differs in Plan EL132 is absolutely baseless and is without any merit. The analysis by the learned trial Judge in arriving at the finding that the plaintiff should succeed in the District Court action is not only based on the identity and comparison of the two plans referred alone. In fact as clearly borne out by the findings in the lengthy judgment wherein the learned trial Judge had gone into detail in analyzing the pedigree claimed by the respective parties and the relationship they claim to have. In doing so he has come to the finding that on those grounds too, the defendants' statement of claim is without merit.

This Court is of the view that it becomes manifestly clear that the learned trial Judge has arrived at the correct finding. Therefore, we do not wish to interfere with the findings of the learned District Judge and dismiss this appeal.



Appeal dismissed with costs

JUDGE OF THE COURT OF APPEAL

**JANAK DE SILVA J**

I agree.

JUDGE OF THE COURT OF APPEAL