

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

In the Matter of Application for
substitution under chapter XXV of
the Civil Procedure Code

**C.A Appeal 1023/99 (F)
D.C Matale – No. 2143/P**

Rajakaruna Devage Dharmasena
Morahela
Thibbatuwawa.

Plaintiff-Appellant

Vs.

1. Halgolle Gedera Nandawathi
2. Hathurusighe Devage
Ramyalatha Gunasinghe
3. Hathurusighe Devage Violat
Kulasinghe
4. Kanatiwala Gedera
Aryasinghe
5. Hathurusighe Devage
Ranasinghe Gunasinghe
(Deceased)
Morahela, Thibatuwawa

Defendant-Respondents

BEFORE : **M.M.A GAFOOR J**

COUNSEL : W.D Weeraratne for Plaintiff-Appellant
J. Joshep for the 4th Defendant-Respondent

Rasika Dissanayake for 2nd, 3rd and 5A Defendant-Respondent

WRITTEN SUBMISSIONS

TENDERED ON : 4th Defendant-Respondent – 16.03.2018
Defendant-Respondents – 05.04.2018
Plaintiff -Appellant - 06.06.2018

DECIDED ON : 30.08.2018

M.M.A GAFOOR J

This is an appeal against the judgment of the Learned District Judge of Matale (dated 12.02.1999) in respect of a partition action Number P 2143. The Plaintiff-Appellant instituted this action seeking to partition the land called “Maussagala Rubberwatte” more fully described in the schedule to the plaint as per the pedigree set out in the plaint.

According to the Plaintiff-Appellant’s pedigree Segu Mohammed Lebbe, Rahuma Umma and Kassim Mohammed Sheriff were the original owners of the land described in the schedule to the plaint as per the pedigree set out in the plaint.

According to the Plaintiff-Appellant’s pedigree an undivided 1/3 share originally belonged to Segu Mohammed Lebbe transferred to five

persons namely Abdul Aziz, Sulaiman Taufiq, Mohammed Rauf, Jinnah Umma and Abuza Umma and after the demise of the Segu Mohammed Lebbe his heirs and the above said five persons transferred their undivided shares to Pragnadasa by way of Deed bearing No. 484 dated 17.09.1979 marked as P 9.

In addition to another person called Rahuma Umma who own undivided 1/3 share of the same land above described transferred her rights to Pragnadasa through Deed marked as P 9. Then Pragnadasa who transferred his rights to the Plaintiff-Appellant, 1st, 2nd and 3rd Defendants-Respondents.

Later Rahuma Umma and Kassim Mohammed Sheriff transferred their undivided 2 Roods to 5th Defendant-Respondent. And then Kassim Mohammed Sheriff had transferred his undivided 2 Acres 2 Roods 20 Perches to the 4th Defendant-Respondent.

The land called "Maussagala Rubberwatte" more fully described in the schedule to the plaint is in extent of 10 Acres. But according to the Preliminary Plan 8047 dated 24.08.1994 (Marked as 'X') prepared by the Licensed Surveyor J. M Jayasekara was in extend of 9 Acres 3 Roods 32 Perches consisting of Lots 1,2,3 and 4.

The Learned District Judge of Mattale delivered his judgment on 12.02.1999 admitting the corpus only Lots 1, 2 and 3 which had been shown in the Preliminary Plan and he has allocated the shares to the parties as follows:

- Plaintiff-Appellant undivided 0 A 1 R 19.33 P
- 1st Defendant-Respondent undivided 1 A 3 R 19.33 P
- 2nd Defendant-Respondent undivided 1 A 3 R 19.33 P

- 3rd Defendant-Respondent undivided 2 A 0 R 38.00 P
- 4th Defendant-Respondent undivided 2 A 2 R 20.00 P

(Page at 165)

The Plaintiff-Appellant being dissatisfied with the Judgment of the Learned District Court judge appealed and prayed before this Court to set aside the judgment of the Learned District Judge on the basis that there is an error in the calculation of the shares by the Learned District Judge of Matale.

It is to be noted that according to the Plaintiff-Appellant's pedigree set out in the plaint the land was originally 10 Acres extent. After the survey the specific above mentioned land was found to be in extent of 9 Acres 3 Roods 32 Perches consisting of lots 1, 2, 3 and 4.

The Plaintiff-Appellant pleaded that the corpus of the action consists of Lots 1 to 4 meanwhile 2nd, 3rd and 5th Defendants-Respondents argued that Lot 4 Cannot be a part of the land sought to be partitioned and thus it be should be excluded.

Later after the trail before the Learned District Judge of Matale the subject matter was resolved and that Plaintiff-Appellant also admitted himself only to the lots 1, 2 and 3 and then the partition action was proceeded accordingly in the District Court. *(Page at 163)*

It is clear that lot 4 was excluded from the corpus and the corpus is restricted to lot 1, 2 and 3 in the Preliminary Plan and now the land available to be partitioned is only **8 Acres 3 Roods and 36 perches.**

It is also to be noticed that one Pragnadasa who acquired undivided shares from the original owners had transferred to the Plaintiff-Appellant, 1st, 2nd and 3rd Defendants-Respondents in equal shares.

I am of the view that the Learned District Judge of Matale in his judgment has calculated the shares of the Plaintiff-Appellant, 1st, 2nd and 3rd Defendants-Respondents according to the reduced extent which is **8 Acres 3 Roods and 36 Perches**, but when calculating the shares of the 4th Defendant-Respondent he has not considered the reduced extent and misdirected himself considering according to the proportions in 4th Defendant-Respondent's respective deeds and came in conclusion that the 4th Defendant-Respondent entitled for 2 Acres 2 Roods 20 Perches.

In **Mather vs. Tamotheram Pillai** 6 NLR 246, **Layard C.J.** clearly pointed out the duty of a trial judge that he should ascertain the portion (land) and the correct parties.

'...the paramount duty is cast by the Ordinance upon the Judge himself in partition proceedings to ascertain who the actual owners of the land ought to be partitioned...'

'...no loophole should be allowed to a Judge by which he can avoid performing the duty cast expressly upon him by the ordinance.' (Page at 250)

Therefore, I am of the firm view; the allocation of the shares to all the parties should have been on the basis of **8 Acres 3 Roods and 36 Perches**.

For these foregoing reasons, I allow the appeal and set aside the judgment of the Learned District Judge of Matale.

I further hold that calculation on the basis of 8 Acres 3 Roods and 36 Perches as follows:

- Plaintiff-Appellant undivided 1 A - 1 R - 28.00 P
- 1st Defendant-Respondent undivided 1 A - 1 R - 28.00 P
- 2nd Defendant-Respondent undivided 1 A - 1 R - 28.00 P
- 3rd Defendant-Respondent undivided 2 A - 0 R - 39.00 P
- 4th Defendant-Respondent undivided 2 A - 1 R - 31.00 P

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL