

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

**C.A. 339/99 (F)**

District Court of Kegalle  
Case No. 24165/P

Hewayalage Nandawathei  
Gederawela  
Dorawake

**Plaintiff**

**Vs.**

1. Wasinge Janenona of  
Dorawaka
2. Wasinge Pina of  
Dorawaka
3. Wasinge Seda of  
Dorawaka
- 3(A) Yoda Pedige Piyadasa of  
Dorawaka
4. Yoda Pedige Somarathne  
of Dorawaka
5. Yoda Pedige Karunadasa  
of Dorawaka
6. Shelton Rajaratne of  
Dorawaka
7. Dinunugalge  
Wickramaseeli of  
Gederawala, Dorawaka.

**Defendants**

**AND NOW**

1. Wasinge Pina of  
Dorawaka
2. Yoda Pedige Somarathne  
of Dorawaka

**2<sup>nd</sup> and 4<sup>th</sup> Defendant-  
Appellants**

Hewayalage Nandawathei  
Gederawela  
Dorawake

**Plaintiff-Respondent**

1. Wasinge Janenona of  
Dorawaka
- 3(A) Yoda Pedige Piyadasa of  
Dorawaka
5. Yoda Pedige Karunadasa of  
Dorawaka
6. Shelton Rajaratne of  
Dorawaka
7. Dinunugalge  
Wickramaseeli of  
Gederawala, Dorawaka.

**Defendants-Respondents**

**NOW AND BETWEEN**

Yoda Pedige Somarathne  
No. 207, Yeddemulla  
Dorawake

**4<sup>th</sup> Defendant-Appellant-  
Petitioner**

**VS.**

Hewayalage Nandawathe  
Gederawela  
Dorawake

**Plaintiff-Respondent-  
Respondent**

**AND**

1. Wasinge Janenona of  
Dorawaka
- 3(A) Yoda Pedige Piyadasa of  
Dorawaka
5. Yoda Pedige Karunadasa of  
Dorawaka
6. Shelton Rajaratne of  
Dorawaka
7. Dinunugalge  
Wickramaseeli

**Defendant-Respondents-**

AND

Wasinge Pina of Dorawake  
(Deceased)

**2<sup>nd</sup> Defendant-Appellant**

2 A. Yoda Pedige Somarathne  
No. 207, Yeddemulla  
Dorawaka.

2 B. Yoda Pedige Hemawathie  
Meegahawatte  
Ballappana.

2 C. Yoda Pedige  
Karunawathei  
Idangawatte  
Hewadiwala.

2 D. Yoda Pedige  
CharlottePitawala  
Hewadiwala.

2 E. Yoda Pedige Dayawathei  
C/O Y. P. Sanath Ananda  
Konegastenna  
Dorawaka.

2 F. Yoda Pedige  
Kusumawathei alias Yoda  
Pedige Kusuma Wijesinghe  
182/6, Darawala Road,  
Dikoya.

2 G. Yoda Pedige Sunethra,  
635/5A, Medamandiya,  
Panagoda, Homagama.

2 H. Yoda Pedige Sanath alias  
Yodasinghege Sanath Ananda,  
Konegastenna, Dorawaka.

**Substituted 2<sup>nd</sup> Defendant-**

**BEFORE** : M. M. A. GAFFOOR, J.

**COUNSEL** : Shyamal A. Collure with A. P. Jayaweera  
for the 4<sup>th</sup> Defendant-Appellant  
Nuwan Bopage for the Plaintiff-  
Respondent

**WRITTEN SUBMISSIONS**

**TENDERED ON** : 03.04.2018 (Plaintiff-Respondent)  
17.05.2018 (4<sup>th</sup> Defendant-Appellant)

**DECIDED ON** : 28.09.2018

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**M. M. A. GAFFOOR, J.**

The Plaintiff-Respondent (hereinafter referred to as the 'Respondent') instituted this partition action in the District Court of Kegalle on 23.01.1985 to partition the land known as 'Hitinawatta' which is 3 Roods and 36 Perches in extent as per the allotment of shares set out in the paragraph 9 of her plaint. *(Page 83 of the appeal brief).*

The said partition action had been so instituted; citing the 1<sup>st</sup> to 3 A Defendants as parties thereto, and the 4<sup>th</sup> Defendant as well as the 5<sup>th</sup> to 7<sup>th</sup> Defendant-Respondents were added as parties to the said action subsequently.

As per the Preliminary Plan bearing No. 3322 dated 1985.06.06 the said land marked as 'K' depicted as Lots 1 and 2. But the Corpus contained 1 Acre 1 Rood and 8 Perches in extent (Marked as 'X' and X1).

The 2<sup>nd</sup> and 4<sup>th</sup> Defendants filed a joint statement of claim and subsequently the 4<sup>th</sup> Defendant-Appellant's (hereinafter referred to as the 'Appellant') contention was that Lot 3 in Plan No. 3599 also should be included in the said partition action.

Accordingly, the matter was fixed for trial and all the parties raised their respective issues at the commencement of the trial. The Respondent, Grama Niladhari of the area have testified on behalf of the Respondent and Mr. K. S. Panditharatne, Licensed Surveyor, Appellant, 6<sup>th</sup> Defendant and 7<sup>th</sup> Defendant have testified on behalf of the Defendants.

Thereafter the learned Additional District Judge delivered the judgment on 04.03.1999, allocating shares as referred to in the plaint.

Being aggrieved by the said Judgment, the Appellant has preferred this appeal seeking to set aside the Interlocutory Decree.

During the trial, the Respondent has produced all title-deeds relating to her pedigree and the extent of the property has been referred to in those deeds as 3 Roods and 36 Perches. But, according to the Preliminary Plan the actual extent of the property was identified as 1 Acre 1 Rood and 8 Purchases.

None of the parties disputed the extent of the property whereas the Appellant took up the position that another portion of the land situated at the eastern boundary should be a part of the corpus. Therefore, the Appellant stated that in the Preliminary Plan which has been marked as 'X' the entire corpus has not been shown by the

Respondent; and he called an alternative survey on the said plan and was produced it to the court marked as 'Y'. In this plan, a land was marked as Lot 3 therefor; the Appellant submitted that the Lot 3 should be included in the partition action according to the plan.

However, the Respondent argued that the subject matter of this case is 'Hitinawatta' but the Appellant has specifically stated that the **eastern boundary** of the corpus was 'Baduwatta', therefore, the Respondent took up a position that under any circumstances the land called Baduwatta cannot be included to the corpus of his case.

The Trial Judge was mindful on this averment; he clearly analysed the all deeds produced by both parties. Thus the learned Judge clearly stated that according to the deeds submitted by the Appellant, he has not obtained the title to Hitinawatta but he got the title to Baduwatta which cannot be a part of the corpus.

Furthermore, the Respondent had given evidence that there had been a marked boundary as depicted in Plan X and that the Appellant had obliterated the said boundary. The Grama Niladhari also in his evidence had confirmed this position. Therefore, the observation of the learned Judge in this context is well founded on the evidence adduced by Grama Niladhari who was provided independent evidence.

The learned District Judge further analysed a fact that the deeds 7V1 and 7V2 which had been produced by the 7<sup>th</sup> Defendant relating to land called 'Meegahamullewatta' which was the **eastern boundary** of the land.

Hence, the learned Additional District Judge had taken into consideration the evidence of Grama Niladhari, Licensed Surveyor and the oral and documentary evidence 7V1 , 7V2, concluded that **the Lot 3 in Plan marked 'Y' should be excluded from the corpus to be partitioned**

As has been stated by this Court and the Supreme Court in several precedents before, the duty of the Court in a partition action is primarily to investigate the title of the parties to the case to its satisfaction. In this context it is important to recall the words of Bonser C.J in the case of *Peris vs Perera*, (1896) 1 N.L.R 362.

*"It is obvious that the court ought not to make a decree, except it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property. The court should not, as it seems to me, regard these actions as merely to be decided on issues raised by and between the parties."*

In *Brampy Appuhamy vs. Monis Appuhamy* 60 N.L.R. 337 Basnayake, C. J. states as follows:

*"It is imperative that in an action such as a partition action which gives the decree under it (section 48(1) an effect which is "final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have to or in the land to which such decrees relate", the provisions of the Partition Act should be strictly observed."*

In *Jayasuriya vs. Ubaid*, 61 N.L.R. 352 Held –

*“In a partition action there is a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it is always open to him to call for further evidence (in a regular manner) in order to make a proper investigation.”*

In these circumstances and authorities, I am of the view that the appellant had failed to establish his averment that the said Lot 3 should be included in to plan X.

Therefore, I hold that the learned Judge had correctly apportioned the shares to be allocated to the parties to the action as follows:-

|                           |   |       |
|---------------------------|---|-------|
| Respondent                | - | 21/36 |
| 2 <sup>nd</sup> Defendant |   |       |
| (Deceased)                | - | 5/36  |
| 3 <sup>rd</sup> Defendant | - | 5/36  |
| 6 <sup>th</sup> Defendant | - | 5/36  |

In regard to this, this Court observes that in the case of *De Silva & Others v. Senaviratna and Another* (1981) 2 S.L.R. page at 07- when an appellate court is invited to review the findings of the trial judge on the question of facts, the principles that should be guided is as follows:-

- a. *where the finding on questions of fact are based upon the credibility of witnesses on the footing that the trial judge's perception on such*



*evidence, then such findings are entitled to great weight and the utmost consideration and will be reversed only if appears to the appellate court that the trial judge has failed to make full use of his advantage of seeing and listening to the witnesses and the appellate court is convinced by the plainest considerations that would be justified in doing so.*

- b. that however where the of fact are based upon the trial judge's evaluation of facts, the appellate court is then in in as good a position as the trial judge to evaluate such facts and no sanctity attaches to such findings of fact of a trial judge.*
- c. where it appears to an appellate court that on either of the grounds the findings of fact by a trial judge should be reversed then the appellate court "ought not to shrink from that task"*

In the light of the above reasons, this court is not inclined to interfere with the findings of the learned Additional District Judge.

Therefore, I dismiss this appeal and award costs in a sum of Rs.15,000/- payable to the Respondent by the Appellant.

*Appeal dismissed.*

**JUDGE OF THE COURT OF APPEAL**