

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

1. Hettiarachchige Don Titus Joseph
Appuhamy,
Lanka Gas Company,
Naththandiya.
 2. Hettiarachchige Don Wilfred
Hettiarachchi,
Ambalayaya,
Katana.
- 2nd and 4th Defendant-Appellants

CA CASE NO: CA/623/1998/F

DC MARAWILA CASE NO: 84/P

Vs.

Halahakoonge Dona Karalina,
Wassaulla,
Ilukhena,
Kuliyapitiya.
Plaintiff-Respondent
and Several Others

Before: Mahinda Samayawardhena, J.

Counsel: Dr. Sunil Cooray with Sudharshani Cooray and
Malika Ranasinghe for the 2nd and 4th Defendant-
Appellants.

Dr. Mahinda Ralapanawa for the Substituted 23rd
Defendant-Respondent.

Upul Kumarapperuma for the 9th Defendant-
Respondent.

Chula Bandara for the 10th and 11th Defendant-
Respondents.

Decided on: 14.01.2019

Samayawardhena, J.

The plaintiff filed this action seeking partition of the land described in the schedule to the plaint according to the devolution of title set out in the plaint. After trial, the learned District Judge pronounced the Judgment excluding Lot 2 of the Preliminary Plan marked X from the corpus and partitioning the land among the plaintiff and some of the defendants. It is against this Judgment the 2nd and the 4th defendant-appellants (appellants) have preferred this appeal.

The only point raised by the learned counsel for the appellants at the argument was the exclusion of Lot 2 of the Preliminary Plan from the corpus.

This Lot has been excluded in favour of the 23rd defendant on prescription. The predecessor of the 23rd defendant had been declared entitled to Lot E of Plan No. 2459 dated 27.08.1934 marked 23(a)V3 by the Partition Judgment dated 20.05.1952 in Chilaw District Court Case No. 12447 marked 23(a)V2.

The Court Commissioner in the Report to the Preliminary Plan marked Y *inter alia* reported to the Court as follows:

Lot 2-Extent 0A. 2R. 24P. This Lot represents Lot E of Plan No. 2459 dated 27.8.1934 prepared by W.R.S. Fernando, Licensed Surveyor, and is being occupied and claimed by the 23rd defendant. The buildings appearing in this Lot have been constructed by the 23rd defendant and remained undisputed.

Plaintiff, 4th, 10th, 15th, 16th, 18th and 28th defendants dispute the claim to the soil shares.

Under Chilaw DC Case No. 12774, a judgment has been given. In this judgment the position of Plan No. 2459 dated 27.8.1934 prepared by W.R.S. Fernando, Licensed Surveyor, has been clearly clarified. Surveyor W.R.S. Fernando has given his statement regarding the distribution of shares in his evidence for this case. Hence to consult the judgment given in Case 12774 will assist Court to ascertain correctly the implications involved in the distribution of shares to the respective parties, and how the parties have claimed soil rights to Lot 2.

Vegetation-26 coconut trees 20-40 years, 13 coconut trees 8-15 years, 1 tambili tree 10 years, 2 tambili trees about 5 years.

The Court Commissioner who prepared the Preliminary Plan has given evidence at the trial confirming the said position. He has in his evidence affirmatively stated that Plan No. 2459 marked 23(a)V3 was given to him at the preliminary survey and with his wealth of experience of 43 years as a surveyor and Court Commissioner he had no doubt that Lot E of the said Plan is equal to Lot 2 of the Preliminary Plan notwithstanding no superimposition was done.

The learned counsel for the appellants strenuously contended before this Court that without a superimposition, the Court Commissioner could not have come to that conclusion. In the unique facts and circumstances of this case, I am unable to agree with that contention.

This is not a case where the Court Commissioner for the first time took up such a position in the witness box. He, before parties tendered their statements of claim, expressly stated in his Report to the Preliminary Plan that “*This Lot [Lot 2 of the Preliminary Plan] represents Lot E of Plan No. 2459 dated 27.8.1934 prepared by W.R.S. Fernando, Licensed Surveyor.*” According to section 18(2) of the Partition Law, No. 21 of 1977, as amended, that constitutes evidence without further proof subject to calling him, in terms of the proviso to section 18(2), as a witness. I concede that it would have been better had there been a superimposition on the application of the 23rd defendant. But, if the appellants disputed the said position of the Court Commissioner, they also could, as this is a partition action, have got a commission issued for a superimposition.

It must be emphasized that the plaintiff did not dispute the said fact, i.e. exclusion of Lot 2, by preferring an appeal. The reason being, as I understand, the plaintiff or his predecessor was a party to the other case No. 12447.

It is also significant to note that the substituted 23rd defendant who gave evidence at the trial on exclusion of Lot 2 was never cross-examined by the appellants on that point or any other point.

At the argument, the learned counsel for the original 9th defendant and learned counsel for the original 10th and 11th defendants sought to challenge the Judgment basically on the premise that the learned District Judge has failed to investigate title to the land. The said defendants have not filed an appeal against the Judgment nor made an application under section 772 of the Civil Procedure Code challenging the Judgment. Hence they are not entitled to canvass the Judgment before this Court. This is not a revision application.

I dismiss the appeal of the 2nd and 4th defendants. The substituted 23rd defendant is entitled to costs of the appeal recoverable from the appellants.

Judge of the Court of Appeal