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

Manik Ralalage Seetin
of Mayinoluwa, Dorawake.
PLAINTIFF

C.A. Case No.555/1999 (F)

D.C. Kegalle Case
No.19899/P

-Vs-

1. Godayalage Pelis (Deceased)
of Mayinoluwa, Dorawake.

1A. Godayalage Agoris
of Mayinoluwa, Dorawake.

2. Aagampodige Endoris (Deceased)
of Mayinoluwa, Dorawake.

2A. Agampodige Podineris
of Mayinoluwa, Dorawake.

3. Agampodige Marthelis
of Mayinoluwa, Dorawake.

4. Viyannalage Soida (Deceased)
of Mayinoluwa, Dorawake.

4A. Agampodige Somadasa
of Mayinoluwa, Dorawake.

5. Agampodige Peiris
of Mayinoluwa, Dorawake.

6. Agampodige Maethelis
of Mayinoluwa, Dorawake.

DEFENDANTS

AND NOW

2B. Agampodige Nirosha Shyamalee Pushpa Kumari
of Mayinoluwa, Dorawake.

3A. Agampodige Gamini Lal Amarathunga
of Mayinoluwa, Dorawake.

4A. Agampodige Somadasa
of Mayinoluwa, Dorawake.

DEFENDANT-APPELLANTS

-Vs-

Manik Ralalage Seetin (Deceased)

PLAINTIFF-RESPONDENT

Horathal Pedige Selena
of "Vikum Wasa" Mayinoluwa, Dorawake.

Substituted PLAINTIFF-RESPONDENT

Godayalage Agoris (Deceased)

Substituted 1st DEFENDANT-RESPONDENT

1AA. Dissanayake Mudiyanselage Somawathie

1AC. Godayalage Gnanawathie

1AC. Godayalage Hemalatha
All of No. 36, Kandy Road,
Palawadunna.

Substituted DEFENDANT-RESPONDENTS

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

COUNSEL : Faisz Musthapha, PC with Asthika Devendra for the 2B, 3A and 4A Substituted Defendant-Appellants

Daya Guruge with Sarath Weerakoon for the Plaintiff-Respondents

Rohitha Wimalaweera for the Substituted 1st Defendant-Respondent

Decided on : 06.05.2019

A.H.M.D. Nawaz, J.

The Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") filed this partition action to partition a land which was described in the schedule to the plaint as *Udawatte Hena* in an extent of 12 *laha* (paddy sowing). On the pedigree set out by him, he claimed 1/3rd of the land and allotted 2/3 to the 1st Defendant-Respondent (hereinafter sometimes referred to as "the 1st Defendant"). The 1st Defendant too in his amended statement of claim claimed the 2/3rd share from the corpus. I must say at the outset that the contest in this case was in fact between the 1st Plaintiff on the one hand and the 2nd to 6th Defendants on the other.

The 2nd Defendant-Appellant (hereinafter sometimes referred to as "the 2nd Defendant") traversed the claim of the Plaintiff and the 1st Defendant and sought a dismissal of the plaint.

Filing his statement of claim, the 2nd Defendant-Appellant claimed that the corpus is known as "*Liyadhagahamulahena*" and the land sought to be partitioned is part of *Liyadhagahamula*.

At the end of the trial, the learned Additional District Judge of *Kegalle* has upheld the claim of the Plaintiff and allotted 1/3rd of the land to the Plaintiff and 2/3rd share to the 1st

Defendant. Being aggrieved with this judgment dated 21.05.1999, the 2A, 3rd and 4th Defendant-Appellants (hereinafter sometimes referred to as "the Appellants") have preferred this appeal to this Court. The judgment of the District Court of *Kegalle* dated 21.05.1999 was impugned by the learned President's Counsel on two grounds namely both the identity of the corpus and the extent of the land have not been established by the Plaintiff.

This Court will then go into the grounds of impugnment.

Identity of the corpus

a) Eastern Boundary

The schedule to the plaint depicts the eastern boundary of the land to be partitioned as "*Meegahamulawatta Ivura*" but the Deeds bearing Nos.5115 and 612 that were produced by the Plaintiff in order to prove the pedigree both state that the eastern boundary of the land is a land known as "*Meegahawatte Hena*" belonging to one Singappu Aadin.

It has to be noted that the Plaintiff on a commission had the land surveyed by licensed surveyor T.M.T.B. Thennakoon who returned to court a plan bearing No.266 and according to this plan, the land sought to be partitioned by the Plaintiff consists of two lots (Lot No.1 and Lot No.2) which constitutes an extent of 1 acre, 1 rood and 37 perches.

The survey had been done on 17.08.1973 and almost 10 years later at the trial, the Plaintiff sought to confine the corpus to be partitioned to Lot No.1 and excluded Lot No.2 from the partition-vide proceedings dated 03.10.1984.

In the course of the trial there is evidence that the Plaintiff admitted that the land that he was seeking to partition was surveyed on his instructions and it was only 10 years later that it dawned upon him what the real boundaries of the land sought to be partitioned should be-*see* proceedings dated 17.01.1993 at p.112 of the appeal brief.

Thus it is clear that the Plaintiff failed to establish the eastern boundary of the corpus. The Plaintiff concedes that what lies to the east of Lot 1 (the land to which he confined himself at the trial) is "*Liyanagahamulhena*"-Lot 2, which is claimed by the 2nd Defendant.

It has to be recalled that the deeds produced by the Plaintiff namely Deed No.5115 and 612 both refer to the eastern boundary as *"Meegahawattahena"*. If at the trial the Plaintiff confined the corpus to Lot 1 as depicted in the Plan bearing No.266 and the eastern boundary to Lot 1 is Lot 2 which is known as *"Liyanagahamulahena"*, the schedule to the plaint and the deeds too must demarcate the eastern boundary as *"Liyanagahamulla Hena"* but instead the eastern boundary in the schedule to the plaint and the deeds is designated as *"Meegahamulawatte"*.

As is demonstrable upon the plan bearing No.266 and the report of the surveyor, there is no boundary between Lot No.1 and Lot No.2 in order to set apart Lot 1 from Lot 2. This seems to tally with the claim of the 2nd Defendant that Lot No.1 and Lot No.2 should form the corpus. In fact the report of the surveyor at page 182 of the brief shows that the Appellants had claimed the plantations on Lot 1 and Lot 2.

Thus it is abundantly clear that there is a culpable failure to identify with certainty the eastern boundary of the land that was sought to be partitioned.

b) Western Boundary

The non-identification taints the western boundary as well. The deeds produced by the Plaintiff and the 1st Defendant refer to the western boundary as *"Godayalagehena"*. The 2nd Defendant called the western boundary as *"Udawattehena"*. The Plaintiff did not adduce any evidence to show that the boundary to the west of Lot 1 is *"Gadayalagehena"* as claimed by him and the 1st Defendant.

The surveyor makes no conclusions as to the boundaries in his report. It was open to the Plaintiff to have summoned the surveyor as a witness but there was an omission to do so. Even if it is contended that the Plaintiff who was a recent purchaser did not know the boundaries, the question goes a-begging as to why the 1st Defendant was not called to support the claim of his alleged co-parcener the Plaintiff. One Nandasena who claimed to be the nephew of the 1st Defendant instead gave evidence on behalf of the 1st Defendant and according to Nandasena the 1st Defendant was alive and getting about his usual business. He had even come to the threshing floor of the paddy field and supervised the

harvesting process-*see* the evidence of Nandasena on 11.10.1994. Thus the most competent witness who was quite suited to give a good account of the Plaintiff's claim kept away from court-thus raising the rebuttable presumption to be draw under Section 114 (f) of the Evidence Ordinance.

The testimonial trustworthiness of the Plaintiff's testimony too suffers for want of veracity. The Plaintiff testified that she was aware of the existence of the land prior to her purchase and that she had seen her vendor, one Kusumalatha, plucking cashew on this land but she was challenged on this testimony to the effect that there were no "*cadju*" trees on the land. Moreover, the surveyor's report does not list out a single *cadju* tree.

The pith and substance is that neither the eastern boundary nor the western boundary of the corpus claimed by the Plaintiff was established with precision and I need not reiterate the position that the learned District Judge was under a duty to satisfy herself as to the proper identification of boundaries-*see* Sansoni J's dictum in ***Jayasuriya v. Ubaid*** 61 N.L.R 167 where the learned Judge emphasized the duty on the part of a District Judge to satisfy himself as to the identity of the corpus sought to be partitioned and for this purpose it is always open to him to call for further evidence in order to make a proper investigation.

The observations of Basnayake CJ in ***Brampy Appuhamy v. Menis Appuhamy*** 60 N.L.R 337 were as follows:-

> "It is clear from the proceedings that the provisions of the Partition Act have not been strictly adhered to. Section 4 of that Act requires that "in addition to the particulars required to be stated in a plaint by the Civil Procedure Code, every plaint presented to a court for the purpose of instituting a partition action shall contain the following particulars:-
>
> *a)* the name, if any, and the extent and value of the land to which the action relates;

b) a description of that land by reference to physical metes and bounds or by reference to a sketch, map or plan which shall be appended to the plaint."

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 he strictly observed...

The statute contains elaborate provisions designed to ensure that the land which is partitioned is the land which is described in the plaint except where a defendant avers that that land is only a portion of a larger land which should have been made the subject matter of the action or that only a portion of the land so described should have been made such subject matter."

It is noteworthy that there is no determination on the part of the learned Additional District Judge that the corpus has been properly identified by the Plaintiff. No doubt there is an evaluation on her part of the title and the boundaries claimed by the Appellant but the partition law places a burden on the part of the Plaintiff to identify the corpus and on this score the learned Additional District Judge does not appear to have satisfied herself as to this material aspect of the case.

Variance in regard to the extent of the land

The schedule to the plaint alludes to a land which is in an extent of 12 *laha* (paddy sowing).

The Court of Appeal precedent of ***Rathnayake and Others v. Kumarihamy and Others*** (2002) 1 Sri.LR65 which was affirmed in appeal - [2005] 1 Sri.LR 303 set out the schedule by which the old Sinhala land measurements can be computed by the modern day land measurement. Weerasuriya, J. in the Court of Appeal usefully appended to the judgment at p.79 an Annexure 2 which deals with "Sinhalese land Measures". At page 81 of the judgment the equivalent of 1 *laha* or *Kurun's do* is given as 10 perches. Thus the extent given in the schedule to the plaint namely 12 *laha* (paddy sowing) would be equal to 120

perches. But if one looks at the preliminary plan bearing No.266, the extent of the land comprising Lot 1 and Lot 2 is 237 perches. Assuming that the land sought to be partitioned must be confined to Lot 1, as was claimed by the Plaintiff 10 years after the preparation of the plan, then its extent would be 170 perches.

Thus there is a discrepancy between the extent given in the plaint and the plan bearing No.266. It must be stated that the learned Additional District Judge of *Kegalle* does not bring to bear her mind on this discrepancy. The learned Additional District Judge proceeded to allow partition as claimed by the Plaintiff and the 1st Defendant because the land was smaller than the one claimed by the 2nd Defendant. At page 173 of the appeal brief, the learned Additional District Judge states "මායිම් කුමක්වුවද" (whatever be the boundaries).

In light of the fact that the Appellants in their statements of claim did not seek a partition of Lot 1 and Lot 2 but only sought a dismissal of the Plaintiff's action, it would be contrary to the allow the Plaintiff's claim merely because the land claimed by the Defendants is smaller than the land surveyed. The learned Additional District Judge has not adhered to imperative duty of the Plaintiff to prove not only title but also identity of the corpus.

In the overall conspectus of the case, I would summarize the following:

(i) The plaint pleaded that the land sought to be partitioned was 12 *laha* (paddy sowing) which approximates to 120 perches.

(ii) In terms of the preliminary plan bearing No.266, the extent of the land sought to be partitioned was 237 perches.

(iii) Almost 10 years after the preliminary plan had been prepared, the Plaintiff departed from his initial stance and confined the corpus to Lot 1 depicted in the preliminary plan.

(iv) Even the extent of Lot 1 is 170 perches which is larger than the land which he sought to partition initially.

Thus the Plaintiff has taken inconsistent positions as to the extent of the corpus and the failure to identify the corpus adds to the failure of the Plaintiff to discharge his burden in a partition suit.

No party can thus make contradictory claims-*allegans contraria non est audiendus.* It is a principle of good faith that a person should not be allowed to blow hot and cold at different times. In fact a person who denies today what he affirmed yesterday is not to be heard or believed. This elementary rule of logic expresses the trite saying of Lord Kenyon that a man shall not be permitted to blow hot and cold with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to prompting of his private interests-*vide* ***Wood v. Dwarris,*** 1 Exch. 493; ***Andrews v. Elliott,*** 5 E&B 502.

In the circumstances I proceed to set aside the judgment of District Court of *Kegalle* dated 21.05.1999 and allow the appeal of the Defendant-Appellants. The plaint would thus stand dismissed.

JUDGE OF THE COURT OF APPEAL