

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

Acharige Gunawardena,
Othnapitiya,
Nelundeniya.
2nd Defendant-Appellant

CASE NO: CA/251/2000/F

DC KEGALLE CASE NO: 22256/P

Vs.

Othnapitiya Acharige Jayaratne,
Othnapitiya,
Nelundeniya.
Plaintiff-Respondent
Acharige Wijehamy alias Wijesinghe,
Othnapitiya,
Nelundeniya.
1st Defendant-Respondent

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: S.A.D.S. Suraweera for the 2nd Defendant-
Appellant.
Udaya Bandara for the Plaintiff-Respondent and
the 1st Defendant-Respondent.

Argued on: 11.06.2019
Decided on: 21.06.2019

Mahinda Samayawardhena, J.

The plaintiff filed this action in the District Court to partition the land known as Hitinaawatta between the plaintiff and the 1st defendant. At the preliminary survey the 2nd defendant presented himself as a claimant. The Preliminary Plan was marked as Y at the trial.¹ The 2nd defendant does not claim any rights from Hitinaawatta. He claims rights from the lands known as Aluthwatta and Delgahapurane Kumbura lying to the South of Hitinaawatta.² The only issue raised by the 2nd defendant before the District Court was to exclude Lots 3-5 of the Preliminary Plan from the corpus on the basis that those three Lots belong to Aluthwatta and Delgahapurane Kumbura. The learned District Judge in the Judgment has rejected that claim and decided that those three Lots also form part of the land sought to be partitioned, that is, Hitinaawatta. It is against that Judgment the 2nd defendant has preferred this appeal.

It is clear from the evidence of the 2nd defendant that, at the time he was giving evidence, there had been a partition case pending before the same District Court (Case No. 25255/P) to partition the said lands known as Aluthwatta and Delgahapurane Kumbura. The 2nd defendant is also a party to that partition action. The Preliminary Plan prepared for that partition case has been marked as P6 through the evidence of the 2nd defendant.³ The 2nd defendant in his evidence has clearly admitted that Lots 3-5 in the Preliminary Plan of the present case was not shown as part of Aluthwatta and Delgahapurane Kumbura in that partition action

¹ Vide page 198 of the Brief.

² Vide the southern boundary of the Preliminary Plan at page 198 of the Brief.

³ Vide page 151 of the Brief.

No. 25255/P which was filed to partition Aluthwatta and Delgahapurane Kumbura.⁴ The plaintiff in that partition action is one Tikiri Appu Wijesinghe. The 1st defendant in the present action also seems to be a party to that partition action. Tikiri Appu and the 1st defendant do not say that Lots 3-5 in the Preliminary Plan of the present case are parts of Aluthwatta and Delgahapurane Kumbura. This is relevant for the reason that the 2nd defendant is not the sole owner of Aluthwatta and Delgahapurane Kumbura. It is a co-owned land. It appears from the evidence of the 2nd defendant that the 2nd defendant sought to take out a commission to show Lots 3-5 of the Preliminary Plan of the present case as part of Aluthwatta and Delgahapurane Kumbura in the other partition case.⁵ However, it is not clear whether the 2nd defendant pursued that application. By now that partition action, which was filed to partition Aluthwatta and Delgahapurane Kumbura, must have been concluded. If the 2nd defendant thought that Lots 3-5 of the Preliminary Plan of the present case are parts of Aluthwatta and Delgahapurane Kumbura which is the subject matter in the then pending partition action No.25255/P, he should have made that application in that case. There is no doubt that the land depicted in Plan P6, which is the Preliminary Plan in the other case, is the southern boundary of the Preliminary Plan in this case marked Y. That has been admitted by the 2nd defendant in cross examination.⁶ There is no necessity to have a superimposition done to understand it.

⁴ Vide pages 151-152 of the Brief.

⁵ Vide last question at page 155 of the Brief and the answer to it at page 156 of the Brief.

⁶ Vide pages 151-152 of the Brief.

Against that strong evidence, in my view, there is no necessity to consider the exact location of the Endaru fence, which separated Hitinaawatta from Aluthwatta and Delgahapurane Kumbura. The plaintiff has given evidence to say that it was along the southern boundary of Plan Y, but the 2nd defendant in 1970s destroyed it, and he complained it to the police. The position of the 2nd defendant is that the Endaru fence was along the northern boundary of Lots 3-5 of the Preliminary Plan of this case and the plaintiff destroyed it, and he made a complaint to the Grama Sevaka about it. Neither party has marked the said complaints at the trial. In the facts and circumstances of this case, the learned District Judge cannot be found fault with accepting the version of the plaintiff in that regard.

This appeal of the 2nd defendant is dismissed with costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal