

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

Dolewatta Arachchige Don Martin Perera
of Udupila, Delgoda.

C.A. Case No.1332/2000 (F)
D.C. Gampaha Case No.2701/P

1. Dolewattage Dona Karunawathie
2. Dolewattage Don Nimalasena
3. Dolewattage Dona Kusumawathie
4. Dolewattage Don Kayatissa

All of Udupila, Delgoda.

Substituted-PLAINTIFF-RESPONDENTS

-Vs-

- 1A. Hemawathie Gunarathne
of Udupila, Delgoda.
- 2A. Liyanage Sandya Perea
of Mudugamuwa Watta, Mealiya,
Kurunegala.
- 3A. Rathnayake Arachchige Dayawathie
of Mudugamuwa Watta, Mealiya,
Kurunegala.
5. Ranathunga Achchi Lekamlage Premarathna
No.334, Delgoda.
6. Kumarapeli Arachchige Don Edmund
Gunawardane
No.330, Walawwatta,
Delgoda.

7. Amarasinghe Kaluarachchige Chandrasiri
Amarasinghe
of Kossinna, Imbulgoda.
8. Rajaguru Mudiyansele Nimal
No.17, Meegahawatta, Delgoda.
9. The Attorney General,
Attorney General's Department,
Colombo 12.
10. Mabulage Dona Anulawathie
of Walawwatta, Delgoda.
11. L.M.K.D. Perera
Walawwatta, Delgoda.
12. L.S.G. Dhammika Perera
13. Asirikumara Chndrasiri Perera
of Walawwatta, Delgoda.
14. W.M. Piyasena
No. 172, Bollatha, Ganemulla.

DEFENDANT-RESPONDENTS

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

COUNSEL : M.U.M. Ali Sabry, PC with Nuwan S. Bopage for
the 4th Defendant-Appellant
Manohara R. De Silva, PC with Hirosha
Munasinghe for the Substituted IA Defendant-
Respondent
M.S.A. Wadood with Tharanga Edirisinghe for the
1st Substituted-Plaintiff-Respondent

Decided on : 30.05.2019

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

The main argument in this appeal focused on the question whether the identity of the corpus sought to be partitioned in the case was properly established. Among many other grounds which the learned District Judge of *Gampaha* has recited in his judgment dated 30.11.2000, all Counsel who argued this matter before this Court concentrated principally on one ground-namely the Plaintiff-Respondent failed to identify the corpus.

The Plaintiff instituted this action to partition a land called “Lot B of *Delogodawalawwe Watte*” which is morefully described to the schedule to the plaint. In fact the plaint described the property as follows:-

The boundaries referred to in the schedule are given as follows:-

බස්නාහිර පළාතේ ගම්පහ දිස්ත්‍රික්කයේ ගම්පහ ඉඩම් ලියාපදිංචි කිරීමේ කොට්ඨාශය තුළ සියණෑ කෝරළේ අදිකාරිපත්තුවේ දෙල්ගොඩ පිහිටි දෙල්ගොඩ වලව්වේවත්ත බී දරන කැබැල්ලට මායිම් උතුරට ආර්. ඩී. තිලකරත්නට සහ භාර්යාවට අයිති වලව්වේවත්ත ද, සහ දෙල්ගොඩ වලව්වත්තේ උතුරු කොටස, නැගෙනහිරට කේ. බැස්ටියන් අප්පුගේ ඉඩම සහ පැලවත්ත ලියනයේ අල්ලිසාට අයිති ඉඩම, දකුණට පනාපිටකන්කානම්ලයේ දොන් අරුණොලිස්ට සහ තව අයට අයිති කුඹුර, බස්නාහිරට ලොට් A දරන පාර සහ මොනියස්ට සහ තව අයට අයිති ඉඩම යන මෙහි තුල අක්කර විසිවකකුත් පර්චස් විසිපහයි දශම හයයි අටක් (අ:21 රූ:0 බ:25.68) වශාල ඉඩම් කාර්යාලය C 118/228 යටතේ ලියාපදිංචි ඉඩම.

The preliminary survey of the land that was effected on several dates in the year 1985 revealed the following boundaries.

- උතුරට : ආර්. ඩී. තිලකරත්නට සහ භාර්යාවට අයිති වලව්වේවත්තද, සහ දෙල්ගොඩ වලව්වත්තේ උතුරු කොටස,
- නැගෙනහිරට: කේ. බැස්ටියන් අප්පුගේ ඉඩම සහ පැලවත්ත ලියනයේ අල්ලිසාට අයිති ඉඩම,
- දකුණට : පනාපිටකන්කානම්ලයේ දොන් අරුණොලිස්ට සහ තව අයට අයිති කුඹුර,
- බස්නාහිරට : ලොට් A දරන පාර සහ මොනියස්ට සහ තව අයට අයිති ඉඩම.

One of the issues raised at the trial on behalf of the 1st Defendant-Respondent Liyanage Herath Perera was whether the land referred to in the schedule has been identified by the preliminary plan bearing No.2435. The learned District Judge of *Gampaha* by his judgment dated 30.11.2000 held *inter alia* that the Plaintiff failed to establish the identity of the corpus and accordingly the Plaintiff's action was dismissed with costs. It is against the said judgment that the 4(a) Defendant-Appellant has preferred this appeal.

Oral submissions were made in this Court by the two learned President's Counsel for both the 4(a) Defendant-Appellant and the 1A Defendant-Respondent and Mr. Nuwan Bopage the Junior Counsel for the 4(a) Defendant-Appellant too made some impressive submissions following his learned Senior Counsel and the Counsel for the Plaintiff-Respondent who associated with both oral and written submissions of the 4(a) Defendant-Appellant has filed comprehensive written submissions on the merits of the case.

In order to arrive at a decision whether the learned District Judge was correct in dismissing the Plaintiffs' action on the ground of failure to identify the corpus, a comparison of the boundaries depicted in the deeds, the schedule to the plaint and preliminary plan becomes relevant. Since the boundaries in the relevant deed (PI) is reproduced in the schedule to the plaint, I would compare the boundaries in the schedule to the plaint vis-à-vis the preliminary plan.

	Plaint	Preliminary Plan
North	Walawwewatte belonging to R.D. Thilakaratne and his wife and Northern Portion of Delgodawalwawatte	Land now belonging to Mathes Appu and others, a Land belonging to Pirivena and a land belonging to W.M. Piyasena
East	Land belonging to K. Bastian Appu and land belonging to Pelawatte Liyanage Alliya	Land belonging to K. Bastian Appu and land now belonging to Indrani Sooriyarachchi and another new person
South	Paddy filed belonging to Panapitiya Kankanamlage Don Aranolis and another new person	Canal and Main Road

West	A road bearing No. lot A and land belonging to Monias and another new person	Delgoda-Weliweriya main road and a land now belonging to Mathes Appu and another new person
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As could be seen, the Northern and Southern boundaries given in the plaint vis-à-vis the preliminary plan do not tally at all and assuming that the Eastern boundaries may tally to the some extent, the Western boundaries are inconsistent with each other and it was argued quite vigorously on behalf of the 4(a) Defendant-Appellant that given the changing times and development activities taking place all around, boundaries of lands do change over an effluxion of time and what existed as a paddy field in the year 1928 on the southern boundary to the corpus may have become a canal by the time of the preliminary survey in 1985. I would not gainsay this submission and it is true that boundaries of land do change over the tide of time.

But one cannot resile from an important aspect of partition law. The land surveyed must be the land to which the deeds apply. The Plaintiff is only entitled to get a partition decree of a land to which he is entitled on the deeds. A corpus is identified by reference to boundaries in the schedule to the deeds. With the passage of time names of boundaries may differ but the divergence must be explained by a Plaintiff who seeks to partition a land. Or the change may even be manifested in the preliminary plan.

One cannot conjecture on the change of name of boundaries without some evidence being led on the change that has occurred. It is precisely because of this imperative duty to identify the corpus with certainty that Section 18(i)(a)(iii) of the Partition law requires the surveyor to transmit to court a report, substantially in the form set out in the Second schedule to the law, verified by affidavit, which states *inter alia*: “whether or not the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint”.

Even the form of surveyor’s report which is set out in Second schedule to Partition law, requires the Commissioner to express his opinion in Item No.(v) “*whether or not the land*

surveyed is substantially the same as the land sought to be partitioned as described in the schedule to the plaint”.

In order for the Commissioners to comply with the above statutory duty, Section 16(2) of the Partition Law provides:-

“The Commission issued to a surveyor under subsection (1) of this section shall be substantially in the form set out in the Second Schedule to this Law and shall have attached thereto a copy of the plaint certified as a true copy by the registered attorney for the Plaintiff.....”

The legislative intent of Section 16 to compel the mandatory attachment of a copy of the plaint with commission papers is aimed at facilitating the commissioner to identify the corpus depicted in the plaint with existing physical boundaries and metes and the opinion of the Surveyor has to be mandatorily in the form of surveyor’s report as given in the Second Schedule and a mere mention of the name of the land on the plan as in the plaint is not a due compliance with the imperative requirement of Section 18(1)(a)(iii).

In fact in *Sopaya Silva v. Magilin Silva* (1989) 2 Sri L.R 105, S.N. Silva, J. (as His Lordship then was with Abeywira, J. agreeing) held that the surveyor under Section 18(1)(a)(iii) must in his report state whether or not the land surveyed by him is substantially the same as described in the schedule to the plaint. Considering the finality and conclusiveness that attach in terms of Section 48(1) of the Partition Law to the decree in a partition action, the Court should insist upon its compliance with this requirement by the surveyor.

The necessity to seek further directions from Court was emphasized by Court in *Brampy Appuhamy v. Menis Appuhamy* 60 N.L.R 337.

If the land surveyed is substantially different from the land as described in the schedule to the plaint, the Court has to decide at that stage whether to issue instructions to the surveyor to carry out a fresh survey in conformity with the commission or whether the action should be proceeded with in respect of the land as surveyed.

If one peruses the report of the surveyor at p.443 of the appeal brief, it is wanting in this material particular-namely the corpus surveyed is substantially the same as depicted in the plaint. As a result I would hold that the surveyor's report would be devoid of evidential value as it lacks a material particular.

There are other precedents which have reiterated the imperative nature of the surveyor's duty in a number of cases.

In *Hengada Vithanachchi Sumanasena v. G.K. Premaratna* (CA 1336-1337/99F) D.C. Galle 7028/P decided on 06.03.2014, A.W.A. Salam, J. (with Sunil Rajapaksha, J. agreeing) held as follows:-

“The significance of complying with section 16 of the Partition Law cannot be lightly disregarded or undervalued. Amongst other directions a commission issued under section 16 includes a command on the surveyor to survey the land to which the action relates and section 18 (1) (a) (iii) requires him to express an opinion in his report by way of an affidavit as to whether or not the land surveyed is considerably the same as the land sought to be partition as described in the schedule to the plaint. Taking into account the far-reaching consequences of the final decree entered in a partition action and the extent to which it binds the whole world, the Court should, so long as it is not impracticable, insist on the compliance of Section 16(2).”

Partition Law stands in a class *sui generis* and there are specific provisions that apply to partition suits alone. If the surveyor's report is in conformity with Section 18(1)(a), then Section 18(2) is to the effect that the report may be adduced in evidence without further proof in order to establish the facts stated in the report as evidence.

There was definitely an abdication of a mandatory duty on the part of the surveyor but though I will not go to the extent of holding that then on-compliance with Section 18 is not *per se* a ground to vitiate a decree, I take the view that if the preliminary plan and report are returned to Court without coming with Section 18(2) of the Partition Law, such noncompliance deprives the report of its evidentiary value as to identification of corpus and the Plaintiff has to resort to evidence *aliunde* to establish that what was

surveyed was what had been depicted in the schedule to the plaint. The importance of proof of identity becomes more pronounced if a specific issue has been raised as regards the identity of the corpus. If there is divergence of descriptions between the deeds and the preliminary plan as to identity of the corpus, the Plaintiff must offer evidence to explain the divergence and this evidence can even take the form of summoning the surveyor to give evidence. None of the above has happened in the case-also see *Sopaya Silva v. Magilin Silva* (1989) 2 Sri L.R 105 at 108.

If one peruses the evidence of the Plaintiff, the Plaintiff too does not explain nor does he utter anything about the boundaries. There is no independent evidence flowing from the Plaintiff to establish the identity of the corpus.

If one looks at the title deed of the plaintiff marked at the trial as P1, one would observe in the schedule a description of an amalgamated land called "Delgodawatta" in an extent of 36 acres. It also refers to "Lot No. B" of the said *Delgodawatta* as depicted in Plan bearing No.398 which is in an extent of 21 acres, 25 perches x 68/100. This shows that the Plaintiff was describing a part of the corpus. In other words it would appear that the plaintiff was seeking to partition a part of a larger land. Even in his testimony the Plaintiff admitted that he was seeking to partition on the part of the corpus-see page 137.

It is axiomatic that a party cannot seek to secure a partition decree for a part of a larger land.

In the circumstances the learned District Judge reached the correct finding in holding that the corpus to be partitioned has not been correctly identified and I see no reason to disturb this finding. Accordingly I affirm the judgment of the learned Additional District Judge of *Gampaha* dated 30.11.2000 and dismiss this appeal.

JUDGE OF THE COURT OF APPEAL