

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

**C.A. Appeal No. 339/98(F)**

**D.C. Kaluthara No. 5183/P**

Weerawardena Perlin de Silva of  
Galhena, Beruwala. (Deceased)

1<sup>st</sup> and 18<sup>th</sup> Defendant-  
Appellant

Weerawardena Mahindaratna  
Sirisoma de Silva,

Substituted 1A and 18A  
Defendant Appellant

V.

1. Weerawardena Eadin de Silva,  
(Deceased).
- 1A. Weerawardena Asoka  
Chandrajith de Silva of  
'Vijitha', Kaluwamodara,  
Aluthgama.
2. Thenkutti Wijitha Hemawathie,  
(Deceased).
- 2A. Weerawardena Asoka  
Chandrajith de Silva of  
'Vijitha', Kaluwamodara,  
Aluthgama.

Plaintiffs-Respondents

2. Weerawardena Blassie Nona of  
Kanda Vihara Road,  
Kaluwamodara,  
Aluthgama. (Deceased)

2A. Gnanasiri Nissanka of  
'Thilina', Near Kande Vihare,  
Kaluwamodara,  
Aluthgama. And others.

Defendants-Respondents

**BEFORE**

: **JANAK DE SILVA, J**  
**K.PRIYANTHA FERNANDO, J**

**COUNSEL**

: Athula Perera with Vindya Divulwewa  
for the substituted 1A and 18A  
Defendant-Appellant.  
W. Premathilake for the 1A and 2A  
Plaintiffs Respondents.

**ARGUED ON**

: 01.04.2019

**WRITTEN SUBMISSIONS**

**FILED ON**

: 30.11.2018 by the 1A and 18A  
Defendant-Appellant.  
03.07.2018 by the 1A and 2A  
Plaintiffs-Respondents.

**JUDGMENT ON**

: 17.07.2019

**K. PRIYANTHA FERNANDO, J.**

01. Plaintiffs Respondents (Plaintiffs) instituted the above partition action in the District Court of Kalutara to partition the land called 'Heendiganowitawatta' in extent of about 01 Acre, more fully described in the schedule to the plaint. The only dispute among the Plaintiffs and the Defendant Appellant (Appellant) was the identity of the corpus. Disputes with regard to the pedigree were settled among the parties. After trial, the learned District Judge delivering his judgment on 30.03.1998 accepted the identity of the corpus as shown in the preliminary plan No. 4887 prepared by Licensed Surveyor W. Seneviratne marked as 'X', and made order to partition the land as prayed for by the Plaintiffs. Being aggrieved by the said judgment, Appellant preferred this appeal.
  
02. Contention of the Appellant is that the preliminary plan No.4887 does not show the land sought to be partitioned correctly. Appellant's position is that lots 01 and 02 in the preliminary plan 4887 consists of portions of another land called 'MahathottamOwita' alias 'Mahathotaowita', which is the subject matter of the partition case bearing No. 5143P pending in the same District Court which has been instituted prior to the instant partition case. Counsel for the Appellant submitted that the lands sought to be partitioned in this case in plan 4887 (lots 01 and 02), are the lots D and B shown in the plan No. 3102 which is the preliminary plan in case No. 5143P. Therefore, Appellant has sought the lots 01 and 02 in plan 4887 should be excluded from this case.

03. Counsel for the Respondent submitted that in terms of the schedule in the plaint in case No. 5183P the extent of the land 'HeendiganowiteWatta' is around 01 acre. According to the schedule in the plaint in case No. 5183P, land 'MahathottamOwita' is the land adjoining the land sought to be partitioned and it is to the northern boundary of 'HeendiganowiteWatta'. It is further submitted that in terms of the schedule in the plaint in case No. 5143P, land sought to be partitioned is 'MahathottamOwita', which is to the Northern boundary of 'HeendiganOwita'. The extent of 'MahathottamOwita' as per the schedule is 03 acres 0 roods and 32 perches. It is submitted further that in almost all the deeds submitted, the extent of land 'HeendiganOwita is about 01 acre. There are no deeds to show that 'MahathottamOwita' is a land with extent of 03 acres except deed No. 61 dated 14.11.1987. However, the said deed refers to deed No. 178 which described the land 'MahatottamOwita' has an extent about 03 roods. Hence, it is submitted that it is erroneous to accept that 'MahatottamOwita' has an extent of 03 acres.
04. In case No 5143P, Plaintiffs Respondents in this case had been the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, and the Appellant in this case had been the Plaintiff. The learned Trial Judge in that case has delivered the judgment in favour of the Plaintiff. Judgment in case No. 5143 was marked as 1V6 in case No. 5183P. Counsel for the Appellant with his written submissions has filed the copy of the judgment of the Court of Appeal in case No. 5143P (C.A. No. 58/95F) delivered on 20.08.2008. It is pertinent to note that Court of Appeal has set aside the judgment on case No. 5143P and has ordered a trial *de novo*. In paragraph 35 of his submission dated 30.11.2018, counsel submitted that the proceedings in case No. 5143P are laid by until the conclusion of the instant appeal.

05. In case No.5183P, on behalf of the Appellant, surveyor Alexandor Fonseka who prepared plan No. 1075 had been called to testify. According to him, he has assisted Surveyor U.M.de Silva to survey the land in plan 3102 (1V7). He has prepared the plan No.1075 (1V10). However, in cross examination he admitted that he did not have the original of old plan No.6125 which was superimposed on plan No.1075. He admitted that he did not have that old plan even at the time of survey (Page 221 of the brief). He then admitted that he had not mentioned in his report on plan No. 1075, the fact that he superimposed the said old plan. Then he admitted that there were no land marks found in respect of plan 6125 when he surveyed. He also admitted that he did not superimpose the preliminary plan No. 4887 on his plan No. 1075. He therefore admitted that he is unable to say what lots in plan No. 4887 are in his plan No. 1075. On this evidence of the surveyor Alexandor Fonseka, the learned Trial Judge in his judgment in this case (5183/P) has rightly concluded that the Court cannot act on his evidence.
06. Boundaries to the land mentioned in the schedule to the plaint in this case tallies with the boundaries mentioned in the preliminary plan 'X'.
07. When deciding on the corpus to be partitioned, not only the boundaries but also the extent of the land would be useful. When the 2<sup>nd</sup> Plaintiff Vijitha Hemawathi de Silva gave evidence on the pedigree, she referred to the deed No. 25703 dated 26.06.1936. As she could not obtain a certified copy of that deed, she submitted a letter from the Land Registry Kalutara as P6, stating that a certified copy could not be issued as the deed is destroyed (Page 128 and 129 of the court record). At that stage the Defendant (Appellant) submitted the original deed as '1V1' from their custody. On perusing the said deed 1V1 which is admitted by the Appellant, it is clear that both

'MahathottamOwiteWatta and 'HeendiganowiteWatta' are adjoining lands. Both these lands are mentioned in the schedule in 1V1. Also it is clear that the extent of 'MahathottamOwiteWatta is around 02 acres, not 03 acres as mentioned by the Appellant. It is also clear that the extent of the land, HeendiganOwiteWatta' which is the corpus in this case is about 01 acre. Schedules of all other deeds marked as P1, P2, P4, P5, P7, P8 shows that the extent of the land 'Heendiganowitawatta' is around 01 acre. It is also pertinent to note that according to the schedules of the deeds marked P3,P7,P8 as well as 1V1 (submitted by the Appellant), the extent of the land 'MahatottamOwitaWatta', which is adjoining 'HeendiganOwitaWatta, is around 02 acres, not 03 acres as mentioned by the Appellant. Hence, on the basis of the boundaries as well as the schedules of the deeds, the learned Trial Judge was right when he found that the land 'Heendiganowitawatta' is depicted in the preliminary plan No.4887 marked as 'X'.

Hence the appeal is dismissed with costs.

**JUDGE OF THE COURT OF APPEAL**

**JANAK DE SILVA, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**