

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

Johanis Karunaratne (Deceased)
Mihiripenna, Talpe.

Plaintiff

Koggala Wellaage Nissanka Karunaratne
(Deceased)
Mihiripenna, Talpe.

Substituted Plaintiff

1A. Dadellage Priyani Jayathilake

1B. Ghanaka Udaya Karunaratne
Both of Mihiripenna, Talpe.

Substituted 1A and 1B Plaintiffs

**Case No. C. A. 1233/2000(F)
D. C. Galle Case No. P/6865**

Vs.

1. Stephen Wijetunga Karunanayake
Mahawatta, Unawatuna.

1A. Dolares Priyanthi Wijetunga Karunanayake
'Hill House', Kirindigala, Balangoda.

2. Hillarina Ramanayake

3. Albert Ramanayake

4. William Ramanayake

5. Paul Ramanayake

6. Somawathie Ramanayake (Deceased)

6A. Alfred Ramanayake
All of No. 851, Balasuriya Mawatha,
Gotatuwa, Angoda.

7. Thalpe Gamage Rene Matilda
No. 28, Thoramba Road, Thalanga.
8. Pulukkutti Arachchige Martha Hamine
Galahitiyawa, Kuliypitiya.
9. Pulukkutti Arachchige Regina Hamine
C/O P. C. Chilaw, K. A. Appuhamy, Police
Station, Chilaw.
10. James Robert Peter Ranaweera Jayawardena
of Yakkala (Deceased)
- 10A. Wilfred Herbert Wijayawardhana
11. Victor Ranaweera Jayawardena of
Siyambalanduwa, Monaragala.
- 11A. Wilfred Herbert Wijayawardhana
12. Wilfred Robert Ranaweera Jayawardena of
Usiddamalwatte, Mihiripenna, Talpe.
13. Francis Ranaweera Jayawardena
14. Eda Jayaweera Maria Ranaweera
Jayawardena
15. Mary Ranaweera Jayawardena
All of No. 11, Wilfred Gunasekara Mawatha,
Matara Port.
16. Mariya Josephin Ranaweera Jayawardena
17. Mary Trece Ranaweera Jayawardena
18. Nihal Joseph Ranaweera Jayawardena

19. Mary Hayasinth Ranaweera Jayawardena
All of No. 38, Kithulwala Temple Road,
Walpola, Matara.
20. Martha Wijethunga Karunanayake (Deceased)
- 20A. Mary Manel Kahadaarachchi
- 20B. Martha Kahadaarachchi
- 20C. Sarath Kumara
21. Joseph Wijethunga Karunanayake (Deceased)
- 21A. Kalahepadi Kankanamge Rupa Serasinghe
- 21A. b. Simon Marshal
- 21A. c. Don George De Silva Wijethunga
Karunanayake
- 21A. d. Nirmala Eujini
- 21A. e. Don Justin Wijethunga Karunanayake
- 21A. f. Reeta Silva Wijethunga Karunanayake
- 21A. g. Padma Kumar
- 21A. h. Priyantha Wijethunga Karunanayake
22. Korneliya Wijethunga Karunanayake
23. Issabella Wijethunga Karunanayake
(Deceased)
- 23A. Doleras Priyanthi Wijethunga Karunanayake

- 23B. Mary Manel Kahadaarachchi
- 23C. Martha Kahadaarachchi
- 23D. Sarath Kumara
- 23E. Simon Marshal
- 23F. Don George De Silva Wijethunga
Karunanayake
- 23G. Nirmala Eujini
- 23H. Don Justin Wijethunga Karunanayake
- 23I. Reeta Silva Wijethunga Karunanayake
- 23J. Padma Kumar
- 23K. Priyantha Wijethunga Karunanayake
- 23L. Koraneliya Wijethunga Karunanayake (22nd
Defendant)
- 23M. Sister Mary Doleras (25th Defendant)
All of Mahawatte, Matarambe, Matara.
24. Sister Mary Welarina (Deceased) of St.
Gabrielle Convent, Colombo 03.
- 24A. Doleras Priyanthi Wijethunga Karunanayake
- 24B. Mary Manel Kahadaarachchi
- 24C. Martha Kahadaarachchi
- 24D. Sarath Kumara
- 24E. Simon Marshal

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- 24L. Koraneliya Wijethunga Karunanayake (22nd
Defendant)
- 24M. Sister Mary Doleras (25th Defendant)
25. Sister Mary Doleras of Holy Theresa Convent,
Kurudugaha Mile, Elpitiya.
26. Kahanda Kaluarachchige Robert (Deceased)
- 26A. M. Wijethunga Karunanayake
27. Wewala Pandithage Arlin (Deceased)
- 27A. Wewala Pandithage Justin
28. Wewala Pandithage Gimara alias Lora Hmania
29. Wewala Pandithage Justin (Deceased)
- 29A. A. W. Hinnihami (Deceased)
All of Mahawatte, Mataramba, Unawatuna.
- 29A. b. Wewala Pandithage Dayawathi
- 29A. c. Wewala Pandithage Somawathi

- 29A. d. Wewala Pandithage Ariyawathi
30. Urapola Gamage Heenappuhamy (Deceased)
- 30A. U. D. Tudor of North Cooperative Society,
Thalpe, Unawatuna.
31. Urapola Gamage Dewadasa
32. Urapola Gamage Brawjans Dhanapala
33. Urapola Gamage Tudor Rathnasiri
34. Urapola Gamage Amitha Padmaseeli
Chandralatha
All of Bandaranayakapura, Udalamatta,
Nagoda.
35. Leelawathi Jayalath
Ramanayake Stores, Station Road, Ragama.
36. Karagoda Gamage Gimara Hamine (Deceased)
- 36A. Mandawala Kankanamge Nimal Dayananda
37. Karagoda Gamage Annie Hamine
All of Deegoda, Ukwatte, Ginthota.
38. Padikoralage Anthonis (Deceased)
Kaluwakanaththa, Mataramba.
- 38B. Padikoralage Wimalawardhana
Kaluwakanaththa, Mataramba.
39. Chitra Rohini Damayanthi
40. Game Kankanamge Wimalawathi
41. Wewala Pandithage Somawathi

Mataramba, Unawatuna.

42. Wewala Pandithage Hemawathi
Kajjugahagedara, Digaredda, Ahangama.

Defendants

AND NOW

1. Stephen Wijetunga Karunanayake
Mahawatta, Unawatuna.
- 1A. Dolares Priyanthi Wijetunga Karunanayake
'Hill House', Kirindigala, Balangoda.

Substituted 1st Defendant-Appellant

Vs.

Johanis Karunaratne (Deceased)
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Plaintiff

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Substituted Plaintiff

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- Substituted 1A and 1B Plaintiffs-Respondents**

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4. William Ramanayake

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Mataramba, Unawatuna.
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Kajjugahagedara, Digaredda, Ahangama.

Defendant-Respondents

Before: Janak De Silva J.

Counsel:

Lal Matarage with Prasad Morawaka for the Substituted 1st Defendant-Appellant

S.C.B. Walgampaya P.C. with Upendra Walgampaya for the Substituted 1A and 1B Plaintiffs-Respondents

Argued on: 12.02.2019 and 09.07.2019

Written Submissions tendered on:

1st Defendant-Appellant on 18.01.2013, 30.05.2018 and 24.07.2019

Substituted Plaintiff-Respondent on 29.01.2013, 21.05.2018 and 22.07.2019

Decided on: 17.10.2019

Janak De Silva J.

This an appeal against the judgment of the learned Additional District Judge of Galle dated 08.03.2000.

The Plaintiff-Respondent (Plaintiff) by original plaint dated 11.12.1975 [Appeal Brief page 91] sought to partition the land called "Mahagederawatta" alias "Mahawatte" alias "Hegodayamullewatte" alias "Gamagewatte" situated at Thalpe Pattuwe in the District of Galle about six acres in extent.

The Plaintiff pleaded that the original owner of the corpus was one Don Mathes who is said to have gifted 1/30 share in the corpus the donee of which cannot be ascertained. Don Mathes died leaving as heirs 8 children who each became entitled to an undivided 29/240 shares in the corpus.

It was further averred that one Thoronis who was one of the children of the deceased Don Mathes had transferred his 29/240 shares to one Marthenis by deed no. 2459 dated 06.12.1927 and the said 29/240 shares was later purchased by one Pedris upon Fiscal's Conveyance in D.C. Galle case no. 17808/CR by deed no. 586 dated 16.08.1938. The said Pedris transferred the said 29/240 shares to the Plaintiff by deed no. 201 dated 09.03.1951.

At the conclusion of the trial the learned Additional District Judge of Galle allotted the following shares to the Plaintiff and 1st Defendant amongst other parties to the action:

Plaintiff - 7015680/58060800

1st Defendant - 6041280/58060800

The 1st Defendant appeals on the following grounds:

- (1) No proper identification of corpus
- (2) No proper evaluation of the evidence regarding prescriptive right claimed by the 1st Defendant against the Plaintiff

Identification of Corpus

Section 25(1) of the Partition Law requires the court to examine the title of each party and hear and receive evidence in support thereof. It has been consistently held that it is the duty of the Court to examine and investigate title in a partition action, because the judgement is a judgement *in rem*. In *Gnanapandithen and another v. Balanayagam and another* [(1998) 1 Sri.L.R. 391 at 395] G.P.S. De Silva C.J. explained this duty as follows:

“Mr. Samarasekera cited several decisions which have, over the years, emphasized the paramount duty cast on the court by the statute itself to investigate title. It is unnecessary to repeat those decisions here. For present purposes it would be sufficient to refer to the case of *Mather v. Thamoatham Pillai* ⁽²⁾ decided as far back as 1903, where Layard, CJ. stated the principle in the following term: - "Now, the question to be decided in a partition suit is not **merely matters between parties which may be decided in a civil action**; . . . The court has not only to decide the matters in which the parties are in dispute, **but to safeguard the interests of others who are not parties to the suit**, who will be bound by a decree for partition . . . "Layard, CJ. stressed the importance of the duty cast on the court to satisfy itself "that **the plaintiff has made out a title to the land sought to be partitioned, and that the parties before the court are those solely entitled to such land.**" (emphasis added). “

An investigation of title is impossible unless and until the identity of the corpus is first established. It is trite law in partition actions that the trial judge is under a "supervening duty to satisfy itself as to the identity of the corpus" [*Wickremaratne v. Alpenis Perera* [1986] 1 Sri LR 190 at 199]. This is because "clarity in regard to the identity of the corpus is fundamental to the investigation of title in a partition case." [*Sopinona v. Pitipanaarachchi and two others* (2010) 1 Sri.L.R. 87 at 105].

The 1st Defendant submitted that the corpus to be partitioned in the present case has not been correctly and properly identified due to the following reasons:

- (i) The plaint identified the corpus to be six acres in extent [Appeal Brief page 96]

- (ii) The Preliminary Plan No. 302 marked X identified the corpus as A.3 R.1 P. 23.4 [Appeal Brief page 174]
- (iii) In Plan No. 338 prepared by the same surveyor marked Y the extent of the corpus is identified as A. 3 R. 3 P. 10.2 [Appeal Brief page 173]
- (iv) In the Surveyor Report of Preliminary Plan (marked X1 at paragraph 53) the Surveyor states that it is difficult to decide whether the land surveyed is the land sought to be partitioned [Appeal Brief page 152]

The 1st Defendant further submitted that even certain boundaries in the plaint and Preliminary Plan do not tally. In particular the eastern boundary in terms of the plaint is supposed to be “Madangaha addara owita or madangaha addara” whereas in terms of the Preliminary Plan the eastern boundary is shown as “Madangaha addara owita or madangaha addara” and “Ambagaha pittaniya” [Appeal Brief page 174]

The learned counsel for the Substituted 1st Defendant-Appellant (Appellant) relied on the decisions in *Brampy Appuhamy v. Menis Appuhamy* (60 N.L.R. 337), *Richard and Another v. Seibel Nona and Others* [(2001) 2 Sri.L.R. 1] and *Sopaya Silva v. Magilin Silva* [(1989) 2 Sri.L.R. 105].

In *Richard and Another v. Seibel Nona and Others* (supra) Court accepted as the land to be partitioned a larger land than the land sought to be partitioned as given in the plaint. It is in this context that it was held that the Court had failed to decide on the corpus. It was further held that in the event of any party seeking to have a larger land to be made the subject matter of the action, Court shall specify the party to the action to file in Court an application for the registration of the action as a Lis Pendens affecting such larger land and the Court shall proceed with the action as though it has been instituted in respect of such larger land after taking necessary steps under sections 16, 17, 18, and 29 of the Partition Act.

In *Sopaya Silva v. Magilin Silva* (supra) the plaintiff filed plaint to partition a land of 8A 3R 29P in extent and Lis Pendens was registered in the folios where the deeds for this land were registered. When the Commission was taken out the surveyor surveyed an extent of 11 AR 1 - P 33. No contest was raised about the registration of the Lis Pendens. At the trial the contest was resolved

and evidence led accordingly. The learned District Judge dismissed the case holding that the Lis pendens was wrongly registered. This Court held that:

(1) It was not open to the District Judge to dismiss the case on the point of wrong registration of the Lis pendens - a point on which there was no contest and no argument was heard. It is a violation of natural justice.

(2) The Lis pendens being registered in the folios where the deeds of the Sand described in the plaint were registered was correctly registered.

(3) On receipt of the surveyor's return which disclosed that a substantially larger land was surveyed the District Judge should have decided on one of the following courses after hearing the parties:

(i) to reissue the Commission with instructions to survey the land as described to the plaint. The surveyor could have been examined as provided in section 18(2) o) the Partition Law to consider the feasibility of this course of action.

(ii) to permit the Plaintiffs to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment of the plaint and the taking of consequential steps including the registration of a fresh Lis pendens.

(iii) to permit any of the Defendants to seek a partition of the larger land as depicted to the preliminary survey. This course of action involves an amendment of the statement of claim of that defendant and the taking of such other steps as may be necessary in terms of section 19(2) of the Partition Law.

(4) The surveyor under section 18(1)(a) (iii) of the Partition Law must in his report state whether or not the land surveyed by him is substantially the same as the land sought to be partitioned as described in the schedule to the plaint. Considering the finality and conclusiveness that attach in terms of s. 48 (1) of the Partition Law to the decree in a

partition action, the Court should insist upon due compliance with this requirement by the surveyor.

Hence in that case as well the land sought to be partitioned was larger than the land described in the plaint.

On the contrary in this case while the land described in the plaint was about six acres in extent the land that was partitioned is A. 3 R. 3 P. 10.2 in extent. Therefore, the facts of this case are distinguishable from *Richard and Another v. Seibel Nona and Others* (supra) and *Sopya Silva v. Magilin Silva* (supra).

In *Brampy Appuhamy v. Menis Appuhamy* (supra) the surveyor surveyed a land of which two boundaries did not tally with the description of the land given in the schedule to the commission. It is in this context that court held that the surveyor has not duly executed his commission and went on to state that where the surveyor is unable to locate the land, he must report that fact to court and ask for its further directions. *Brampy Appuhamy v. Menis Appuhamy* (supra) was decided under the then Partition Act No. 16 of 1951.

In the present case Licensed Surveyor W. Ranasinghe executed two commissions to survey the corpus. Preliminary Plan No. 302 (X) was prepared after a survey done on 25th and 26th August 1976. That contained three lots of land identified as 'අ', 'ආ' and 'ඇ' containing a total of A.3 R. 1 P. 23.4 in extent. The second survey took place on 14th March 1977 which resulted in Survey Plan No. 338 (Y) which contained four lots of land identified as 'අ', 'ආ', 'ඇ' and 'ඈ' containing a total of A.3 R. 3 P. 10.2 in extent. The learned Additional District Judge held that the corpus to be partitioned consists of lots of land identified as 'අ', 'ආ' and 'ඇ' in Preliminary Plan No. 302 (X) and lot 'ඈ' in Survey Plan No. 338 (Y). It is observed that the Surveyor has in his report of Plan Y stated that lots 'අ', 'ආ' and 'ඇ' in Preliminary Plan No. 302 (X) is the same as lots 'අ', 'ආ' and 'ඇ' in Plan No. 338 (Y) [Appeal Brief page 164].

It is after the preparation of these two plans that the 1st Defendant filed his answer on 07.11.1977 [Appeal Brief page 100]. There he admits that lots 'අ', 'ආ' and 'ඇ' in Survey Plan No. 338 (Y) should be the corpus in the partition action while claiming that lot 'ඈ' therein must be excluded from the corpus.

Nowhere in the answer did the 1st Defendant assert that a larger land should be part of the corpus sought to be partitioned. In this context section 642 (1) of the Administration of Justice Law No. 25 of 1975 is relevant which states that where a defendant in a partition action avers that the plan of the land surveyed does not correctly depict the land described in the plaint, he may apply to the Court to issue a commission to the surveyor to whom the commission for the preliminary survey was issued to survey the extent of land referred to by that defendant.

Indeed the 1st Defendant did make such an application as a result of which a new commission was issued to Licensed Surveyor W. Ranasinghe [Appeal Brief pages 154-5]. It directed the Surveyor to include the land that has been omitted as pointed out by the 1st Defendant. The second survey which took place on 14th March 1977 which resulted in Survey Plan No. 338 (Y) was as a result of this new commission.

But the 1st Defendant did not show the land that was excluded but should now be included. All what he had pointed out is that lot 'ඈ' in Survey Plan No. 338 (Y) should be included in the corpus to be partitioned while lot 'ඇ' therein should be excluded. Even if that is done the total extent of the corpus to be partitioned does not increase to six acres as set out in the plaint. Thus the 1st Defendant has failed to act as required by section 642 (1) of the Administration of Justice Law No. 25 of 1975.

In fact, before the commencement of the trial (proceedings of 03.03.1978, Appeal Brief page 180) Counsel for the 1st Defendant submitted to Court that only a portion of the land had been shown to the Surveyor at the time of the preliminary survey. The learned District Judge directed the 1st Defendant to take steps. But as pointed out by the learned counsel for the Appellant the 1st Defendant did not take steps and the case proceeded to trial.

I further observe that no points of contest were raised on the corpus being a smaller portion of land to that set out in the plaint. It is apposite to also refer to section 642(5) of the Administration of Justice Law No. 25 of 1975 which states:

“642(5) A discrepancy between the description of the land surveyed and depicted in the preliminary plan and the description of the land set out in the schedule to the plaint shall not by itself affect the plaintiff’s right to maintain the action.”

In fact, points of contest nos. 5 and 6 proposed by the 1st Defendant clearly suggests that the corpus consists of the four lots depicted in Plan No. 338 (Y).

For the foregoing reasons, I hold that it is not open to the 1st Defendant now to claim that a larger portion of land should form the corpus sought to be partitioned.

Prescriptive Claim

The 1st Defendant claims that although Marthenis executed deed no. 586 transferring his rights to Pedris who by deed no. 201 transferred the land to the Plaintiff, the said deeds were not acted upon and that the 1st defendant was in possession of Marthenis’ share. It is on these facts that the 1st Defendant seeks to establish a prescriptive claim against the Plaintiff.

In *Juliana Hamine v. Don Thomas* (59 N.L.R. 546 at page 548) L.W. De Silva A.J. held:

“The paper title being in the 2nd and 3rd defendants, the burden of proving a title by prescription was on the plaintiff.”

I have given careful consideration to the evidence supporting the claim of prescriptive title of the 1st Defendant. I hold that he has failed to establish his claim and that the learned Additional District Judge was correct in rejecting this claim.

For all the foregoing reasons, I see no reason to interfere with the judgment of the learned Additional District Judge of Galle dated 08.03.2000.

Appeal is dismissed with costs.

Judge of the Court of Appeal