

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

Hapanpedi Gedara Samarasinghe
of Ellewatta, Kohowala,
Meetalawa.

Plaintiff

C.A. No: CA/431/2000 F

D.C. Gampola No. P525

Vs.

1. Tikkadurayale Alias
Horathalpedigedara Laisa of
Ellewatta, Meetalawa.
2. Dombagollegedara Weerasinghe,
3. Dombagollegedara
Wickramarathne,
4. Dombagollegedara Wilbert, All of
Ellewatta, Meetalawa.
5. Sinhalapedigedara Amalawathie of
Giraulla, Meethalawa.
6. Aluthgamage Wickramarathne of
Ellewatta, Meethalawa.

Defendants

Sinhalapedigedara Amalawathie of
Giraulla, Meethalawa.

5th Defendant –Appellant

Vs.

Happan Pedigedara Samarasinghe
of Ellewatta, Kohowala,
Meetalawa.

Plaintiff - Respondent

1. Tikkadurayale Alias
Horathalpedigedara Laisa of
Ellewatta, Meetalawa.
2. Dombagollegedara Weerasinghe,
3. Dombagollegedara
Wickramarathne,
4. Dombagollegedara Wilbert, All of
Ellewatta, Meetalawa.
5. Aluthgamage Wickramarathne of
Ellewatta, Meethalawa.

Defendant – Respondents

Before: C.P. Kirtisinghe – J
D.N. Samarakoon – J

Counsel: M.D.J. Bandara for the 5th Defendant – Appellant
S.A.D.S. Suraweera for 2nd and 4th Defendant – Respondents
S.W. Premarathne for the Plaintiff – Respondents

Argued on: 27.07.2020

Written Submissions on: 04.03.2021/ 01.04.2021

Decided on: 16.12.2021

C.P. Kirtisinghe – J

The 5th Defendant-Appellant has preferred this Appeal from the judgment of the learned District Judge of Gampola dated 20.06.2000. By the aforesaid judgment, the learned District Judge had decided the corpus dispute in this case in favour of the Plaintiff.

The Plaintiff-Respondent (hereinafter referred to as the Plaintiff) had instituted this Partition action to partition the corpus in this case - Tikittadeniyahena which is morefully described in the schedule to the Plaint. The Commissioner in this case B.M.S.B. Karunaratne L.S who had done the Preliminary Survey had tendered to Court the Preliminary Plan No. 1105 marked 'X' and the report marked X1. In the aforesaid Preliminary Plan, the corpus is depicted as Lots 1 and 2.

The main dispute in this case is a corpus dispute. There is no pedigree dispute between the Plaintiff and the 1st, 2nd, 3rd and 4th Defendants who are shown as co-owners in the Plaintiff's pedigree. It is the case of the Plaintiff that the land shown in the Preliminary Plan is a land called Tikittadeniyahena which is the corpus in this case. At the trial, issue No. 1 had been raised on behalf of the Plaintiff on that basis. 1st, 2nd, 3rd and 4th Defendants are sailing with the Plaintiff. The case of the 5th Defendant is that the land shown in the Preliminary Plan is a land called Gonnagaha mula hena owned by her. At the trial, issue No. 4 had been raised on behalf of the 5th Respondent on that basis.

The learned District Judge has come to the conclusion that the land shown in the Preliminary Plan is Tikittadeniya hena - the corpus in this case. The 5th Defendant has preferred this appeal against that finding.

When this matter was taken up for argument, the parties agreed to dispose the matter by way of written submissions and I have perused the written submissions tendered by the parties.

The learned Counsel for the Plaintiff-Respondent has submitted that the learned District Judge has come to a correct conclusion regarding the corpus dispute and he has correctly decided that the land shown in the Preliminary Plan is Tikittadeniyahena the corpus in this case. It is the submission of the learned Counsel for the Plaintiff-Respondent that the lands shown in Plan No. 716 marked 581 and Plan No. 3310 marked No. 585 are lands situated outside the corpus as stated by the Plaintiff in his evidence.

The learned Counsel for the 5th Defendant-Appellant has submitted that the Commissioner had failed to conduct his own investigation to ascertain the correct boundaries demarcating them. Without doing so, the Commissioner had merely demarcated the boundaries as pointed out by the parties. Citing the case of **Uberis v Jayawardene**, the learned Counsel had submitted that it is the duty of the surveyor to whom a Commission is issued to adhere strictly to its terms and locate the land he is commissioned to survey and it is not open to him to survey any land pointed out by one or more of the parties.

The learned Counsel has also drawn our attention to the difference between the extent given in the schedule to the Plaint and the extent of the land surveyed. It is the submission of the learned Counsel that the extent given in the schedule - 6 Palas and 3 Lahas is equal to an extent of 3 Acres 3 Roods and 30 perches and therefore, the land surveyed is having more than 104.5 perches than the extent given in the schedule.

In the schedule of the Plaint the corpus of this case is described as follows:-

“මධ්‍යම පළාතේ, මහනුවර දිස්ත්‍රික්කයේ, ගම්පොළ ඉඩම් ලියාපදිංචි කිරීමේ කොට්ඨාශයේ උඩ පලාත සහ ඉහල කෝරළේ දොලොස්භාගේ, මීතලාවේ පිහිටි ටිකිත්තාදෙණියේ හේන නැමති වී අමුණු දෙකක වපසරිය ඇති ඉඩමෙන් බෙදා වෙන්කල වී හය පැලකුන් ලාස් තුනක වපසරිය ඇති උතුරට - දැඩියලාගේ ගෙදර කිරියාදුවාට සහ තවත් අයට අයිති මෙම ඉඩමේම ඉතිරි කොටසද, නැගෙනහිරට අයිති දුරයලෑගෙදර සේනුවා විදානේ සහ තවත් අයටත් අයිති ඇදගල හේනද දකුණට අදුන්දුරයලෑගෙදර රන්ගොවියා හෙවත් රණවිරට සහ තවත් අයටත් අයිති අධගහ මුලහේන සහ විත්තාදුරයලාගේ ගෙදර උක්කුට අයිති පඬේ වත්තද (පඬේ වත්ත), බස්නාහිරට මෙම ඉඩම ගොන්නගහමුල හේනෙන් වෙන්වන මල ඇලද යන මෙකී මායිම් තුල පිහිටි ඉඩම සහ ඊට අයිති ගහකොළ පලතුරු ආදි සියලු දේද වේ.”

In the Preliminary Plan the following boundaries are shown:-

To the North - ටිකිත්තා දෙණියේහේන එච්. ජී. ධම්පාල සහ එච්. ජී. රත්නපාල.

To the East - අධගහ මුලහේන - පැමිනිලිකරු.

To the South - කොහොවල සිට මීතලාවට මහාමාගර්ය.

To the West - මල ඇල (which separates the corpus from Gonnagahamulahena).

The learned Counsel for the 5th Defendant-Appellant has submitted that the Surveyor (Commissioner) had merely demarcated the boundaries of the land surveyed as pointed out by the parties without conducting his own investigation to ascertain the correct boundaries on the ground before demarcating same.

The Court Commissioner in his evidence had stated that the Plaintiff's father and the 1st Defendant showed him the boundaries of the land sought to be partitioned. But the Commissioner in his evidence had stated as follows:-

“මෙම උපලේඛණයේ විස්තර කර තිබෙන ඉඩමක් මෙම ඉඩමක් මායිම් අනුව බොහෝ දුරට සැසඳෙන බව මට කියන්න පුලුවන්”..... “නමුත් මම සකස් කරන පිඹුරේ සඳහන් ඉඩමේ මායිම් අනුව මෙම ඉඩම බවට මම සෑහීමකට පත්වෙනවා”.....

“මට නිකුත් කරපු කොමිසම අනුව මගේ නිරීක්ෂණ අනුව හුඟාක් දුරට මෙහි දක්වා ඇති මායිම් සැසඳෙනවා”

That shows that the Commissioner had done an independent investigation of his own to ascertain them before demarcating and the Commissioner had not merely demarcated the boundaries as shown by the Plaintiff's father and the 1st Defendant.

The Northern boundary of the corpus as described in the Plaint is, දැඩියලාගේ ගෙදර කිරියාදුවාට සහ තවත් අයට අයිති මෙම ඉඩමේ ඉතිරි කොටස - the balance portion of the same land (Tikittadeniyahena) owned by Kiriyaaduwa and others. In the Preliminary Plan marked X, the Commissioner has shown විකින්නා දෙණියේ හේන කුඹුර owned by එච්. ජී. ධම්පාල and H.G. Ratnapala as the northern boundary. Therefore, the Commissioner has shown a portion of the same land as the northern boundary, but the names of the owners are different. The Commissioner has explained it satisfactorily. He had stated in evidence that he had mentioned the names of the persons who own the adjoining lands now and the boundaries referred to in the schedule contain the boundaries that existed earlier in the 1930's – which means that the names referred to in the schedule are the names of the previous owners of the adjoining lands. Therefore, one can come to the conclusion that the northern boundary of the land surveyed tallies with the northern boundary described in the schedule to the Plaint.

The Eastern boundary of the land shown in the Preliminary Plan does not tally with the Eastern boundary given in the schedule to the Plaint. The Eastern boundary given in the schedule to the Plaint is Endagalahena – අයන් දුරයලෑගෙදර සේතුවා විදානේ සහ තවත් අයටත් අයිති ඇදගලහේන. As shown as in the Preliminary Plan, the Eastern boundary is අධගහමුලහේන owned by the Plaintiff.

The southern boundary as shown in the Preliminary Plan is a public road (මහාමාර්ගය) from Kohawala to Meetalawa. According to the schedule to the Plaint, the southern boundary is අධගහමුලහේන and පඹවත්ත. On the face of it, there is difference between these two boundaries, but the Commissioner and

the Plaintiff have explained it satisfactorily. While admitting that the southern boundary shown in his Preliminary Plan is different to the southern boundary shown in the schedule to the Plaint, the Commissioner had stated in his evidence that the road shown as the southern boundary in his Preliminary Plan was constructed about 5 years ago. But the 1st Defendant had stated to the surveyor that the land to the south of the corpus is Pambewatte. According to what is stated in the Surveyor's Report marked X1, the 6th Defendant who was a new claimant before the surveyor had stated that the Lot No. 2 of the Preliminary Plan is a portion of Pambewatte which means Pambewatte is situated to the south of the corpus and adjoining it. Therefore, on a balance of probabilities one can come to the conclusion that the land to the south of the Public road shown as the southern boundary in the Preliminary Plan is Pambewatte and before the construction of that road, Pambewatte was the southern boundary of the corpus as described in the schedule to the Plaint: Commissioner had stated in evidence that there was no necessity for him to show Pambewatte in the Preliminary Plan. He had shown the existing road. The Plaintiff had stated in his evidence that at the time he purchased the undivided rights in the corpus this road was existing, but in the deed, the boundaries were described in accordance with the boundaries mentioned in the earlier deeds. Therefore, on a balance of probabilities one can come to the conclusion that the southern boundary described in the schedule to the Plaint tallies with the existing boundary shown in the Preliminary Plan.

The western boundary as described in the schedule to the Plaint is මෙම ඉඩම ගොන්නගහමුල හේනෙන් වෙන්වන මල ඇල. In the Preliminary Plan marked 'X', මල ඇල (Mala Ela) is shown as the western boundary of the corpus. As shown in the Preliminary Plan මල ඇල separates the corpus from the land to the west, Gonnagahamula hena. Therefore, the western boundary shown in the schedule to the Plaint tallies with the western boundary shown in the Preliminary Plan marked 'X'.

Therefore, it should be observed that three boundaries shown in the schedule to the Plaint namely the northern, southern and western boundaries - are identical to the northern, southern and western boundaries shown in the Preliminary Plan and those boundaries tally. Although there is a discrepancy in the Eastern boundary, there is a clear physical demarcation in the Eastern boundary, namely the මල ඇල, which separates the land surveyed from the land to the East of it.

Therefore, on a balance of probabilities of evidence, one can come to the conclusion that the land shown as Lots 1 and 2 in the Preliminary Plan is the corpus in this case.

The Commissioner in cross-examination had admitted that he had shown the land Tikittadeniya at 3 places in the Preliminary Plan as an adjoining land. He had shown Tikittadeniya to the North, North West and West. The Commissioner had shown මල ඇල as a boundary in the West, and North West and the Land Tikittadeniya is shown on the other side of මල ඇල and according to the schedule to the Plaint, මල ඇල is the western boundary of the corpus. But the Commissioner had shown Tikittadeniyahena as the Northern boundary of the corpus. According to the Preliminary Plan marked 'X' the Commissioner has shown මල ඇල going round the corpus except on the southern boundary where there is a road. Therefore, he had shown මල ඇල along the Eastern, Western and Northern boundaries of the land surveyed. The Commissioner admitted that in cross-examination. But the western boundary of the corpus is described in the schedule to the Plaint as the "Mala Ela" which separates this land from Gonnagahamulanahena and it is only in the western boundary that Mala Ela separates the corpus from the adjoining land Gonnagahamulanahena. Therefore, nothing flows out of this cross examination.

'Mala Ela' which separates the corpus from the land to the west, Gonnagahamulanahena is a prominent physical demarcation of the western boundary which helps to identify the corpus. Even in the Partition Plan No. 3310 marked 535, the Final Plan in case No. 39076 prepared as far back as 1933, this මල ඇල is shown as a boundary between Tikittadeniyahena and Gonnagahamulanahena and according to the description of lands contained in the final decree marked 534, the southern boundary of Lot A of Tikittadeniya is Mala Ela. The land to the south and south west of Lot A of Tikittadeniyahena is Lot A of Gonnagahamula hena. That shows that Mala Ela was the common boundary between Lot A of Tikittadeniyahena and Lot A of Gonnagahamulanahena. Even in Plan marked 536 relied upon by the 5th Defendant-Appellant, 'Mala Ela' is shown as the western boundary of the land in dispute and on the other side of 'Mala Ela' is Gonnagahamula hena.

In Preliminary Plan marked 'X' the Commissioner had shown Gonnagahamula hena as the land to the west of the land surveyed and the 'Mala Ela' separates Gonnagahamula hena from the land surveyed.

The witness Wickramage Piyasena, the husband of the 5th Defendant who testified on behalf of the 5th Defendant, had admitted in cross-examination that a land called Gonnagahamulanahena is situated to the west of the land surveyed.

Therefore, on a balance of probabilities of evidence one can come to the conclusion that the land to the west of the land surveyed as the corpus is Gonnagahamulanehena as shown in the Preliminary Plan and Mala Ela separates Gonnagahamulanehena from the land surveyed. According to the description in the schedule to the Plaintiff, the western boundary of the corpus is the Mala Ela which separates the corpus from Gonnagahamulane hena.

It is the case of the 5th Defendant that the land surveyed is Gonnagahamulanehena and not Tikittadeniya. The 5th Defendant's husband who testified on behalf of the 5th Defendant stated in evidence that the land surveyed in the Preliminary Survey and the land shown in the Preliminary Plan is Gonnagahamulanehena and not Tikittadeniyahena. In the re-examination this witness had stated thus,

“කරුණාරත්න මහතාගේ පිඹුරේ පෙන්වා තිබෙනවා බස්නාහිර මායිමට ටිකිත්තා දෙනිය හේන කියා. එය බෙදුම් නඩුවට සම්බන්ධ ඉඩම”.

Therefore, this witness had stated that the land shown in the Preliminary Plan as Tikittadeniyahena to the west of the land surveyed is the land which was the subject of the Partition action and which is owned by the Plaintiff and the 1st Defendant.

If that is the corpus in this case, the land surveyed as the corpus should be a land called Andagalahena, according to the description in the schedule to the Plaintiff and the description in the Plaintiff's deeds and not a land called Gonnagahamulanahena. If that is the corpus in this case, Mala Ela should be situated to the west of that land and Gonnagahamulanehena should be situated to the west of Mala Ela. But according to Plan marked 'X' Mala Ela is situated to the East of that land and Gonnagahamula hena is situated to the south of that land. Although the Plaintiff in cross-examination had admitted the Plan marked 5වි1, the 5th Defendant had failed to superimpose that Plan on the Preliminary Plan marked 'X'. Therefore, there is no link between the two Plans and one cannot come to any conclusion after comparing 5වි1 with the Preliminary Plan. If it is the case of the 5th Defendant that the land shown in the Preliminary Plan is Gonnagahamulanahena and not Tikittadeniyahena, the 5th Defendant had

every opportunity to superimpose the Final Partition Plan in Case No. 39076 in D.C. Kandy marked 535 on the Preliminary Plan marked 'X' to show that the land surveyed in this case is Gonnagahamulanahena and not Tikittadeniyahena.

But the 5th Defendant had failed to take such a step.

The learned Counsel for the 5th Defendant-Appellant has drawn our attention to the discrepancy in the extent between the land described in the schedule to the Plaintiff and the land shown in the Preliminary Plan marked 'X'. The extent of the land surveyed and shown in the Preliminary Plan is 4A, 2R, 14.5P and the extent of the land described in the schedule to the Plaintiff is six Palas and 3 Lases of paddy (වී හයපැලකුන් ලාස් තුනක වපසරිය). It is the submission of the learned Counsel for the 5th Defendant-Appellant that the extent of six Palas and 3 Lases of paddy is equivalent to 3 Acres 3 Roods and 30 Perches and therefore, there is a difference of 104.5 perches between the two extents. The extent of the land shown in the Preliminary Plan is 104.5 perches more than the extent of the land described in the schedule. This can happen in the circumstances of this case. The land described in the schedule to the Plaintiff is not a land that had been described with reference to a Survey Plan. That means the extent referred to in the schedule to the Plaintiff is an extent that had been roughly calculated without surveying the land. In a situation like that the actual extent of the land can differ from the extent that had been roughly calculated without a survey.

In the schedule to the Plaintiff, the extent of the land had been described according to the Paddy sowing extent and not in Acres, roods and perches. The Paddy sowing extent depends on the area where the land is situated and further it will depend on the physical features of the land. For an example, in the Hill Country this extent will differ from the extent in the low country and in a hilly land the extent will differ from that of a flat land. In such a situation, a difference like this can arise.

In such a situation, it has to be taken into consideration that 3 boundaries in the land surveyed tally with the boundaries described in the schedule to the Plaintiff and there are physical demarcations of all the boundaries right round the land surveyed. It is a separate entity of land separated from the adjoining lands with clear physical boundaries and no one has come forward to say (other than the 6th Defendant) that a portion of an adjoining land had come into the land surveyed.

Under those circumstances, this difference in extent is not very important.

There are 2 other factors which have an important bearing in deciding the identity of the corpus. One is the nature of the claims preferred before the Commissioner at the Preliminary Survey. The other is the nature of the possession of the land in dispute.

According to the evidence of the Commissioner and the contents of the Surveyor's Report marked X1, only the 6th Defendant had preferred a claim before the Commissioner at the Preliminary Survey on the basis that Lot 2 of the land surveyed is a portion of the adjoining land Pambewatte. The 5th Defendant who is living in the same village had not appeared at the Preliminary Survey and preferred a claim to the land surveyed on the basis that it is 'Gonnagahamulanahena' owned by her and not Tikittadeniya – the corpus in this case. According to what is stated in the Surveyor's Report marked X1 and the Plan marked X, the Surveyor had surveyed the land on 2 days. The 5th Defendant's husband had stated as follows, “මම දන්නෙ නැහැ. මට හොරෙන් මැන්නා”. In a village like this, a Preliminary Survey cannot be done in secrecy: the 5th Defendant was living in the same village. She does not say that she was living elsewhere.

Before a Preliminary Survey is conducted, it is notified to the entire village by the beating of tom toms, affixing notices in the land, exhibiting a notice in the Grama Niladhari Office, etc and there is no reason why the 5th Defendant was unaware of it especially when the Preliminary Survey was done in 2 days. If the 5th Defendant had an interest in the land and if it was Gonnagahamulanahena owned by the 5th Defendant, there is no reason why she should not be present before the Surveyor at the Preliminary Survey and in such a situation, one should expect her to prefer a claim to the land on the basis that it is Gonnagahamulanahena. But the 5th Defendant had not done so.

The 2nd Defendant in his evidence had stated that prior to the purchase of undivided rights in the corpus by his mother, the 1st Defendant in 1977 his father had been in possession of the corpus on an informal lease and there was a Pela (පැල - a temporary hut) in the land. In 1973, the 2nd Defendant had built a house there. This evidence was not challenged in cross-examination and therefore, it can be accepted. Further it is corroborated by the contents of the Surveyor Report marked X1.

According to the Surveyor's Report, only the 1st Defendant, the mother of the 2nd Defendant had claimed for the entire plantation in the land:

The Commissioner had reported that the 1st Defendant is in possession of the high land and the paddy field. According to the Surveyor's Report, there are 2 houses, a kitchen and a toilet in the land and the Surveyor had reported that the 2nd and 3rd Defendants who are the sons of the 1st Defendant are living in the land. Therefore, one can come to the conclusion that after the purchase of undivided rights in the corpus in 1977, the 1st Defendant with her sons had been in possession of this land. The 1st Defendant had cultivated the high land and the paddy field attached to it and her sons had been residing in the land. Prior to 1977, the 1st Defendant's husband had been in possession of the land and he had cultivated the land on an informal lease. Thereafter, the 1st Defendant had purchased rights from the owners of Tikittadeniyahena on the basis that the land is Tikittadeniyahena. That shows that the deeds produced by the Plaintiff (was) were acted upon and the 1st Defendant and her predecessors in title had possessed this land as Tikittadeniyahena. On the other hand, there is no evidence to show that the 5th Defendant had possessed this land as Gonnagahamulanahena, other than the bare statement of her husband.

For the aforementioned reasons, on a balance of probabilities of evidence, one can come to the conclusion that the land shown as Lots 1 and 2 in the Preliminary Plan No. 1105 marked 'X' at the trial is the corpus in this case and the learned District Judge has come to a correct conclusion in respect of that matter. Although the learned District Judge had failed to evaluate the evidence in a satisfactory manner and to reason out the findings, I am satisfied that ultimately he had come to a correct conclusion which can be justified for the reasons I have set out above. Therefore, we see no reason to interfere with the findings of the learned District Judge. We affirm the judgment of the learned District Judge dated 20.06.2000 and dismiss the appeal of the 5th Defendant-Appellant. The 5th Defendant-Appellant shall pay the Plaintiff-Respondent Rs. 15,000/- as the costs of this Appeal. The 5th Defendant-Appellant also shall pay Rs. 15,000/- as the cost of this Appeal to the 1st, 2nd, 3rd and 4th Defendant-Respondents.

Judge of the Court of Appeal

I Agree

D.N. Samarakoon – J

Judge of the Court of Appeal