

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

In the matter of an Appeal under Article 138 of the
Constitution of the Democratic Socialist Republic
of Sri Lanka.

Don John Edward Wijesinghe,
No 398, Mullewatte, Gothatuwa, Angoda

Plaintiff

Vs.

C.A. (DCF) Case No:

324/97/F

D.C. (Mt. Lavinia) Case No:

1246/P

1. D. Vilodovine,
No 70, Rattanapitiya, Borelasgamuwa
2. W.A. Dona Hilda,
No 70, Rattanapitiya, Borelasgamuwa
3. W.P. Fonseka,
No702, Ratlanapitiya, Borelasgamuwa
4. Wehelage Somawathei Paravithana,
No 70, Rattanapitiya, Borelasgamuwa
5. Mutha Merannage Sethyavadi, No 70/3,
Kesbewa Road, Borelesgamuwa

Defendants

And now between

Don John Edward Wijesinghe,
No 398, Mullewatte, Gothatuwa, Angoda

Plaintiff-Appellant

Vs.

1. D. Vilodovine (deceased)
Substituted by
1A.W.A. Don Silva,
No 70, Rattanapitiya, Borelasgamuwa
2. W.A. Dona Hilda, No 70, Rattanapitiya.
Borelasgamiwa.
3. W.P. Fonseka No 70/2, Rattanapitiya,
Borelasgamuwa.

4. Wehellige Somawathei Paranavithana,
No 70, Rattanapitiya, Borelasgamuwa
5. Mutha Merannage Sethyavadi
(Deceased)
Substituted by
- 5A. Chamandir Sathyawadi
- 5B. Randir Sathyawadi
- 5C. Sikkuarachchige Yamuna
Ramyakanthi Sathyawadi

Defendant-Respondents

Before: M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

Counsel:

Ranjan Suwandaradne, PC with Y.P. Matugama instructed by Ms. Ineka
Hendawitharana for the Plaintiff-Appellant

W.R.J. Peiris instructed by Ms. Chamali K. Rannulu for the substituted
5th Defendant-Respondents

Written submissions tendered on:

17.01.2020 (by the Plaintiff-Appellant)

25.11.2019 (by the substituted 5th Defendant-Respondents)

Argued on: 17.12.2021

Decided on: 18.02.2022

S.U.B. Karalliyadde, J.

The Plaintiff-Appellant (the Plaintiff) instituted the partition action in the District Court of Mount Lavinia making the 1st and 2nd Defendant-Respondents (the 1st and 2nd Defendants) as parties to the action for partitioning a land called “*Dawatagahawatta*” morefully described in the schedule to the plaint. The 3rd - 5th Defendant-Respondents

(the 3rd - 5th Defendants) intervened to the case after the preliminary survey was done. The 3rd - 5th Defendants claimed that the land depicted in the preliminary plan No. C/87/81 dated 03.12.1981 prepared by Mr. Bernard Joseph, Licensed Surveyor (marked as X) is not the land described in the schedule to the plaint but it is a land called “Kahtagahawatta” which they are co-owners.

The 3rd - 5th Defendants took out a Commission (Commission papers are at page 348 of the Appeal brief) to Mr. Sena Dharmawardhana, Licensed Surveyor to superimpose the three surveyor plans on the preliminary plan made by Mr. Bernard Joseph. Those three plans were plan No. 201 dated 06.02.1940 of Mr. K.G.W. Silva (marked as 4V1), plan No. 35/1970 dated 22.03.1970 made by Mr. Jerad Amarasinghe (marked as 4V3) and plan No. 2833 dated 11.12.1983 of Mr. U.M. de Silva (marked as 4V4). Mr. Sena Dharmawardhana prepared the superimposed plan bearing No. 1858^A dated 15.01.1993 (marked as 4V2).

The case proceeded to trial on an admission on jurisdiction and two points of contest raised on behalf of the Plaintiff. The Defendants did not raise any points of contest. The two points of contest raised for the Plaintiff are as follows;

“01. මෙම නඩුවට ගෙනු කොට ඇති මානක එස්. එච්. බර්නාඩ් ජෝර්ජ්ස් මහතාගේ පිඹුරු අංක : සී/87/81 යන පිඹුරු ඒ.බී.සී. ඩී හා ඊ යන්න මෙම නඩුවේ විෂය වස්තුවද?”

02. එකී දේපල පැමිණිල්ලේ පැමිණිලිකරු පෙන්වා ඇති ආකාරයට පාර්ශවකරුවන්ට හිමි විය යුතුද?”
(at page 90 of the Appeal brief)

After the trial, the learned District Judge held that the Plaintiff has failed to establish that the land sought to be partitioned is depicted in the preliminary plan prepared by Mr. Bernard Joseph Licensed Surveyor (marked as X) and the Pedigree. Therefore, the points of contest were answered negatively and the action was dismissed. By this appeal, the Plaintiff seeks reliefs, *inter alia*, to set aside the judgement dated 24.03.1997 of the District Court and direct the learned District Judge to partition the land depicted in plan X in terms of the Partition Act, No. 21 of 1977 according to the evidence of the Plaintiff allotting the shares to the parties to the action.

When this appeal was taken up for argument, both parties consented to abide by a judgement delivered by this Court on their written submissions, dispensing with their rights to make oral submissions. As per the schedule to the plaint, the extent of the land

sought to be partitioned is ‘about’ 1 Acre. The extent of the land shown in plan marked X is 2 Roods 30.66 Perches. Hence, it is apparent that there is a considerable difference in extents between the land described in the schedule to the plaint and the land depicted in plan X. Nevertheless, while giving evidence, neither Mr. Bernard Joseph, who prepared the plan X nor the Plaintiff when giving evidence had explained the reasons for that difference.

Since the judgements in partition actions are judgements *in rem*, the District Court Judges should take utmost care in deciding the corpus and the title in partition actions. Our Apex Courts in many occasions emphasised the importance of considering the boundaries and the extent when deciding to partition a land.¹ In the instant action, the boundaries of the land called ‘*Davatagahawatta*’ which is sought to be partitioned, according to the title deeds produced by the Plaintiff at the trial (marked as P1 and P2) and the schedule to the plaint are as follows;

“උතුර :- දොන් ජොහානිස් විජේසිංහට අයත් එම ඉඩමෙහි කොටසක්

නැගෙනහිර :- කහටගහවත්තේ ගබඩා (Stores)

දකුණ :- එම ඉඩමෙහි කොටසකි. එහි පළමු අයිතිකරු වූයේ ගල්හේනගේ පිලිසා පෙරේරාය. දැන් අයිතිකරු දොන් ජොහානිස් විජේසිංහය.

බස්නාහිර :- දොන් ජොහානිස් විජේසිංහ, රක්ගහඕවිට කලින් මෙම ඉඩමේ කොටසක අයිතිකරු වූයේ ගල්හේනගේ ජුහනිස් අල්විස්ය. එම බිම් ප්‍රමාණය අක්කර එකක් පමණය. ලියාපදිංචි කර ඇත්තේ H 205/185”

Mr. Bernard Joseph, the Commissioner of the case has not mentioned about the boundaries of the land depicted in his plan marked as X in a reference key. Nevertheless, the Court will observe that even though, the Commissioner has stated in his Report (marked as X₁) that he had surveyed the land called *Davatagahawatta* described in the schedule to the plaint none of the boundaries of the land shown in plan X tallies with the boundaries of the land mentioned in the title deeds of the Plaintiff and the plaint. Though the Commissioner had given evidence at the trial, not even a single question had been asked from him about the boundaries of the land described in the schedule to the plaint.

¹ *Brampy Appuhamy Vs. Menis Appuhamy* (60) NLR 337, *W. Uberis Vs. M.W. Jayawardena* (62) NLR 217, *Sedohami Vs. Mahomadu Ali* (7) NLR 247.

The learned Counsel for the Plaintiff argued that though, the 3rd to 5th Defendants argues that the land depicted in the Commissioner's plan is *Kahatagahawatta*, they never produced any plan or acceptable material to the Commissioner to consider and decide on their contest on the basis that the land in fact is not *Dawatagahawatta* but *Kahatagahawatta*. In the instant action, the burden is on the Plaintiff to prove that the land described in the schedule to the plaint which is known as *Dawatagahawatta* is the land which is shown in the Commissioner's plan and no burden cast on the 3rd to 5th Defendants to prove that the land shown in that plan is not *Dawatagahawatta* but it is *Kahatagawatta*.² Therefore, necessity does not arise for those Defendants to furnish material to the Commissioner to consider whether the land surveyed by him is *Kahatagahawatta*. I, therefore, hold that the above argument of the learned Counsel for the Plaintiff is without merits.

The learned Counsel for the Plaintiff further argued that the superimposed plan prepared by Mr. Sena Dharmawardhana (marked as 4V2) on behalf on the 3rd to 5th Defendants could not be considered in determining the corpus for the reasons that plan 4V2 had been prepared in gross violation of the mandatory provisions contained in section 16 and 18 of the Partition Act, No. 21 of 1977. On close examination of the impugned judgement, it is apparent that even though, the learned District Judge has considered 4V2, he has refused to accept that plan for the reasons mentioned in the judgement. That fact is evident from the following portions of the judgement.

" ඒ අනුව සේන ධර්මවර්ධන මහතා සිය '4වී2' පිඹුරේ 1858 බී ලෙස කර ඇති අධිෂ්ඨාපනය මට පිළිගත නොහැක." (at page 159 of the Appeal brief)

" ඒ අනුව මට '4වී2' පිඹුරේ අධිෂ්ඨාපනය කෙරෙහි විශ්වාසය තැබිය නොහැක." (at page 160 of the Appeal brief)

The learned District Judge has further observed that;

"4වී2 අධිෂ්ඨාපනය ප්‍රතික්ෂේප කලත්, පැමිණිලිකරුටද මෙම ඉඩම දවටගහවත්ත බව සනාථ කිරීම සඳහා කිසිදු පිඹුරක් අධිකරණයට ඉදිරිපත් කිරීම සඳහා නොමැති බවද, සැලකිල්ලට ගත යුතු වේ." (at page 160 of the Appeal brief)

² Sections 101, 102, and 103 of the Evidence Ordinance.

In such circumstances, it is clear that the learned District Judge has not considered plan 4V2 in deciding that the Plaintiff has failed to establish the corpus. Therefore, the above stated argument of the learned Counsel for the Plaintiff also has no merits.

Considering all the above stated facts, I hold that the learned District Court Judge has correctly held that the Plaintiff has failed to establish the corpus sought to be partitioned and dismissed the action. Since the Plaintiff has failed to prove the identity of the land, it is a futile exercise for the Court to examine the finding of the learned District Court Judge about the title.

Under the above stated facts and circumstances, I hold that the impugned judgement dated 24.05.1997 of the learned District Court Judge is according to the facts of the case and the law. Therefore, I affirm that judgement and dismiss the Appeal. The Plaintiff will pay Rs. 30,000/= to the 5th Defendant as costs of this Appeal.

JUDGE OF THE COURT OF APPEAL

M.T. MOHAMMED LAFFAR, J.

I agree.

JUDGE OF THE COURT OF APPEAL