

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

In the matter of an application for Revision under Article
138 of the Constitution of the Democratic Socialist
Republic of Sri Lanka.

1. Dahanakage alias Dasanayake Mudiyansele
Gnanawathie of Angitihaldeniya, Anhetigama.
2. Udabage Vidanelage Nandawathie of Vidanelage
Nandawathie, Deraniyagala.

Plaintiffs

C.A. (Rev) No.144/2003

D.C. Avissawella No.17591/P.

Vs.

1. U.D. Punchimahaththaya (Deceased)
- 1A. U.D. Podiappuhamy (Deceased)
2. Dahanakge Gunawardana
3. Udapola Sangarathana Thero (Deceased)
- 3A. Udapola Dahanayakge Podi Appuhamy (Deceased)
4. Dahanakge Podiappuhamy all of Udapola, Deraniyagala.

4A. W/ Rupasingha of Udapola, Deraniyagala.

5. Ekanayake Arachchilage Dingiri Menike Ilangakon, 83/1,
Bailey Road, Nawalapitiya.

6. Sisiliya Ranmenike Halangoda (Deceased)

6A. Stanley Daya Halangoda of 83, Karapincha Road, Hidellana,
Ratnapura.

7. Udapola Dahanakge Heenmahattaya of Udapola, Deraniyagala.

8. Ekanayake Arachchige Charles Nelson Bandara.

9. Silviya Helen Bandara

10. Samuel Bertram Bandara all of Hidellana, Ratnapura.

Defendants

AND NOW BETWEEN

Udapola Dahanayakge Siriwardena of Udapola, Malwathukanda,
Deraniyagala (Deceased)

1st Claimant Petitioner

U.D. Karunaratne of Udapola, Malwathukanda, Deraniyagala.

Substituted 1st Claimant Petitioner

Vs.

1. Dahanakage alias Dasanayake Mudiyanseelage Gnanawathie of
Angitihaldeniya, Anhettigama.

2. Udabage Vidanelage Nandawathie of Vidanelage
Nandawathie, Vidyala Mawatha, Deraniyagala.

Plaintiff-Respondents

1. U.D. Punchimahaththaya (Deceased)

1A. U.D. Podiappuhamy

2. Dahanakge Gunawardana

2A. Kusuma Gunawardhana,

Egodakkanda, Pannila, Godagampala.

3. Udapola Sangarathana Thero

3A. Udapola Dahanayakge Podi Appuhamy

4. Dahanakge Podiappuhamy all of Udapola, Deraniyagala.

1B,3B,4A W. Rupasingha of Udapola, Deraniyagala.

Substituted 1A,3A, 4A Defendant-Respondent

5. Ekanayake Arachchilage Dingiri Menike Ilangakon, 83/1,
Bailey Road, Nawalapitiya.

6. Sisiliya Ranmenike Halangoda (Deceased)

6A. Stanley Daya Halangoda,

No 82, Karapincha Road, Hidellana, Ratnapura.

7. Udapola Dahanakge Heenmahattaya,
Udapola, Deraniyagala (Deceased)

7A. Sumanasiri Dhanayaka,

Udapola, Deraniyagala.

8. Ekanayake Arachchige Charles Nelson Bandara

9. Silviya Helen Bandara

10. Samuel Bertram Bandara,

All of Hidellana, Ratnapura.

Defendant-Respondents

1. Erathne Pathirannehelage Podimahathtaya of Udapola,
Malwathukanda, Deraniyagala. (Deceased)

1A. Jayalath Menike of Udapola, Malwathukanda, Deraniyagala.

2. Kahabiliyage Gunawardana (Deceased)
 - 2A. U.D. Chaminda Dipal Dahanayaka of Ranvijayagama,
Udapola, Deraniyagala.
3. U.D. Sirisena (dead)
 - 3A. A.W. Podinona (Deceased)
4. Udapola Dahanakge Podiappuhamy (Deceased)
 - 4A. U.D. Jinadasa
5. Udapola Dahanakge Heenmahattaya all of Udapola,
Deraniyagala.
 - 5A. Sumanasiri Dhanayaka of Udapola, Deraniyagala.

Claimant Respondents

BEFORE: **PRASANTHA DE SILVA, J.**
K.K.A.V. SWARNADHIPATHI, J.

COUNSEL: Sampath Wijewardena
For the Petitioner

Samantha Vithana
For the 1st A, 1st B, 1st C and 2nd Plaintiff-Respondents.

Kalum Duminda
For the Claimant-Respondent

Argument: By written submission

Date of Judgment: 20.10.2022

K.K.A.V. SWARNADHIPATHI, J.

JUDGMENT

The Plaintiff-Respondents instituted partition case No.17591/P at the District Court of Avissawella seeking a Judgment to partition a land called Gallenehena in the extent of 10 pelas among the Plaintiffs and 1st – 4th Defendants.

The Preliminary Survey was carried out by A.C.P. Gunasena (Licensed Surveyor) and submitted the commission and the report on court order. The learned District Judge accepted his Plan No.277/P. at the trial. Six persons, including the Petitioners, made claims before the Surveyor, and he duly mentioned the fact to the Court. All parties had accepted this.

According to the 31st journal entry, Registrar had reported to the Court that the Surveyor had identified the land as the land to be partitioned according to the report of the Surveyor. All steps had been taken. An order was made to serve notices on claimants on 03.06.1991, according to journal entry No.27. When the case was called on 12.08.1991, except for the first and second claimants, notices were served on the 3rd to sixth claimants. Only the sixth claimant was in Court; therefore, he was added as the 7th Defendant.

Notices were duly served on the 3rd to fifth claimants. However, there is no minute to clarify that notices were served on the first and second claimants. The only order regarding them was that the Plaintiff was ordered to submit to the Court their proper addresses. The trial proceeded on the parties' consent to the action; evidence of the 2nd Plaintiff was recorded on 31.01.2000, and Judgment was delivered on 19.01.2001 to partition the land.

After an amendment to the Judgment under Section 189 of the Civil Procedure Code, an order was made to issue a commission calling for the final plan. After the interlocutory decree, the first claimant preferred his appeal to this Court.

In this Court, parties were heard, and Judgment was entered to dismiss the application of the 1st Respondent-Petitioner on 28.02.2011, emphasizing the judgment *Perera and Others Vs. Adlin and Others*¹.

Aggrieved by that Judgment, the first claimant Petitioner moved to the Supreme court. Before a final determination case was referred back for an order of substitution on behalf of the deceased 7th Defendant-Respondent, in this Court, that step was not taken, but the parties agreed to re-argue the matter and to obtain a judgment regarding the main matter.

The first claimant, the Petitioner, took the stand that Plaintiff had failed in his duty to issue notice to all claimants. Referring to 20(1) of the Partition Act No.21 of 1977, the Petitioner had argued that the partition judgment could not stand violating a mandatory provision.

The second argument was that no party to the action claimed the crops. Only the 1st Plaintiff claimed the building marked as "A" in the Preliminary Plan where he was residing. In evidence, the 2nd Plaintiff had admitted that the first claimant had made his claim regarding certain buildings. In his evidence, he had pleaded to keep those buildings unallotted. The first claimant, the Petitioner, argued that Plaintiff had violated yet another provision which demands the Plaintiff to bring to the notice of the Court all persons having rights, shares or interests regarding the land to be partitioned, which is more fully clarified in Section 5 of the Partition Act. The Court also should have returned the plaint to Plaintiff to comply with those sections.

¹ [2000] 3 SLR 93.

The Plaintiff-Respondent argued that they had taken all measures stipulated in the Partition law. The claimant knew about the case from the moment he made his claim to the Surveyor. He should have been vigilant enough to inquire and safeguard his rights. He was aware for nearly 17 years that a partition action was in progress at the courts. He knew there was a Partition action pending in courts and that not taking steps to intervene was nothing but carelessness.

We consider that a *lis pendens* was duly registered at the Land Registry of Avissawella. If the claimant was interested, he could have perused the folios at the Land Registry to find out about the case pending in the District Courts. According to the journal entry dated 28.05.1990, Tom Tom beatings had taken place, and notices were fixed in the land to be partitioned. According to journal entry No.31 dated 27.02.1992, the Registrar had reported to the Court that all necessary steps had been taken, including the declaration by the Attorney-at-Law of the Plaintiff.

Why is the Partition Law specific regarding tom-tom beatings and notices affixed in the land? In the instance case, according to journal entry No.7 dated 01.11.1985. Daraniyagala Grama Seva Niladari had reported that he had published the notices. It is because any judgment entered by the Court is in rem. Therefore, the notice indicates any party with a claim or interest to be present before the Court and make his claim.

There is a mandatory provision to issue notice to the 1st claimant-Petitioner who had claimed before the Surveyor. The Court must think twice to set aside an action after sixteen years merely on this issue. In a situation such as this Court will have to consider the claims of the claimant. In the present case, even the 2nd Plaintiff, in evidence, had pleaded regarding the first claimant's request to be kept unallotted. The Petitioner can claim the trees that were mentioned. An application to Court regarding the un-allotted shares can be considered if a proper application is made to the Court at any time without disturbing the Judgment.

The tom-tom beating is a wake-up call to any party who has a claim to be vigilant. In this instance, the first claimant had claimed before the Surveyor. Therefore, he had a duty to find out, but by

being silent, he had failed to safeguard his rights. In discussing the lachers of the Plaintiff court will have to consider the lachers of the claimant as well. He had been sleeping on his rights.

Since the claimant can claim his rights from the undivided share and for monitory claims, he has other legal remedies.

For reasons discussed above, we see no reason to disturb the Judgment entered on 19.01.2001 by the learned District Judge of Avissawella in the case bearing No.17591/P.

The appeal is dismissed. No order for cost is made.

Judge of the Court of Appeal

PRASANTHA DE SILVA, J.

I agree.

Judge of the Court of Appeal