

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

In the matter of an appeal against the Judgment of the District Court
of Gampaha in case No.27222/P.

1. Kalunayake Alawala Arachchige alias
Achchige Gunathunga (Deceased)
2. Lenagala Kankanamalage Martin Singho (Deceased)
- 2A. Liyana Mudiyanseelage Alice Nona
3. Liyana Mudiyanseelage Podihamy
4. Liyana Mudiyanseelage Manchi Nona (Deceased)
- 4A. L.K. Gunapala
5. Weerakkody Arachchige Podi Menike
All of Meewala Temple Road, Rukgahawila.

Plaintiffs

CA 1351/2000 (F)

DC Gampha Case No: 27222/P

Vs.

1. Munagama Achchilage Somadasa Perera,
Temple Road, Meewala, Rukgahawila.
2. Senarath Mudalige Priyanka Kumari Sampath Kumari Senarath.
3. Vithana Pelpita Korralage Gunaratne,
Temple Road, Meewala, Rukgahawila.
4. Rev. Pannasara Thero, (Deceased)
Incumbent, Jayanandarama Temple, Meewala.
- 4A. Palagama Sarananda Thero, Jananandarama Temple,
Meewala, Rukgahawila.
- 4B. Kotagama Pannasiri Thero, Jananandarama Temple,
Meewala, Rukgahawila.
5. Jayakody Arachchige Johanahamy (Deceased)
Meewala, Rukgahawila.
- 5A. Registrar, District Court, Gampaha.
6. Heeralu Achchige Charlis, Meewala, Rukgahawila.
7. Heeralu Achchige Jane Nona, Meewala, Rukgahawila.
8. Heeralu Achchige Magilin, Meewala, Rukgahawila.

9. Kalunayake Alawala Achchige Yothan,
Meewala, Rukgahawila.
10. Kalunayake Alawala Achchige Jamis,
11. Kalunayake Alawala Achchige Jayasena,
12. Kalunayake Alwala Achchige Alpinona
13. Kalunayake Alwala Achchige Karunawathie
14. Kalunayake Alawala Achchige Somawathi
15. Kalunayake Alwala Achchige Emalin Nona
16. Heeralu Arachchige Josaphine
17. Kahandawa Arachchige Kamalawathi
All of Meewala, Rukgahawila.

Defendants

And Between

03. Vithana Pelpita Koralalage Gunaratna
17. Kahandawa Arachchilage Kamalawathie (Deceased)
- 17A. Kalunayaka Alawala Arachchilage Sanjeewa Upul
Kalunayaka.
Both of Temple Road, Meewala, Rukgahawila.

Defendant-Appellants.

Vs.

1. Kalunayake Alawala Arachchige alias
Achchige Gunathunga (Deceased)
- 1A. Senarath Mudalige Elisabeth
- 1B. Lalitha Shanthi Gunathunga
- 1C. Shaminda Gunathunga
- 1D. Anoma Priyadarshani Gunathunga
- 1E. Anura Prasanna Gunathunga

All of Temple Road, Meewala, Rukgahawila

2. Lenagala Kankanamalage Martin Singho (Deceased)
- 2A. Liyana Mudiyansele Alice Nona (Deceased)
- 2B. L.A. Gunapala
All of Temple Road, Meewala, Rukgahawila.

3. Liyana Mudiyansele Podihamy alias Lenagala
Kankanamalage Somawathi (Deceased)

3A. D. Hemakanthi

No.391/5, Galle Road, Wellawatta, Colombo

4. Liyana Mudiyansele Manchi Nona (Deceased).

4A. L.K. Gunapala

5. Weerakkody Archchilage Podi Menike

All of Meewala Temple Road, Rukgahwila.

Plaintiff-Respondents

1. Munagama Achchilage Somadasa Perera,
Temple road, Meewala, Rukgahawila.

2. Senarath Mudalige Priyanka Kumari Sampath Kumari
Senarath

4. Rev. Pannasara Thero, (Deceased) incumbent,
Jayanandarama Temple, Meewala.

4A. Palagama Sarananda Thero,
Jananandarama Temple, Meewala, Rukgahawila.

4B. Kotagama Pannasiri Thero,
Jananandarama Temple, Meewala, Rukgahawila.

5. Jayakody Archchige Johanahamy (Deceased)
Meewala, Rukgahawila.

5A. Registrar, District Court, Gampaha

6. Heeralu Achchige Charlis,
Meewala, Rukgahawila.

7. Heeralu Achchige Jane Nona,
Meewala, Rukgahawila.

8. Heeralu Achchige Magilin,
Meewala, Rukgahawila.

9. Kalunayake Alawala Achchige Yothan,
Meewala, Rukgahawila.

10. Kalunayake Alawala Achchige Jamis,
Meewala, Rukgahawila.

11. Kalunayake Alawala Achchige Jayasena,
Meewala, Rukgahawila.

12. Kalunayake Alwala Achchige Alpinona.
13. Kalunayake Alwala Achchige Karunawathie
14. Kalunayake Alwala Achchige Somawathi
15. Kalunayake Alwala Achchige Emalin Nona
16. Heeralu Arachchige Josaphine

1st to 16th Defendant-Respondents

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

**COUNSEL: K.G. Jinasena with D.K.V. Jayanath
For the 3rd and 17th (A) Defendant-Appellants.**

**S.A.D.S. Suraweera
For the 1st Plaintiff-Respondent.**

Argument: By way of written submissions.

Date of Judgment: 20.10.2022

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

JUDGMENT

The Plaintiff filed the original case at the District Court of Gampaha under case No.27222/P. to partition a land called Migahawatte allies Kongahawatha in the extent of 04 Acres, 01 Rood and 9 2/5 Perches.

Licensed Surveyor K.L.P. Francis Perera drew the preliminary Plan under No.388 on 23.10.1985. This Plan was marked as "X" and the report as "X1" at the trial. After the parties filed their respective Statements of Claim proceeded to trial. The Judgment was pronounced on 24.11.2000.

Aggrieved by the said Judgment, the 3rd and 17th Defendants appealed to this Court to set aside the Judgment, among other relieves.

The contesting Plaintiff-Respondent took up a preliminary objection that the 3rd Defendant-Appellant had not raised a point of contest regarding the identity of the corpus, nor had he sought an exclusion at the original Court. Therefore, he is barred from taking a position not contested at the lower Court.

As seventeenth, Defendant-Appellant had not filed a Statement of Claim or participated in the trial. He, too, is barred from applying to this Court. Parties agreed to argue the preliminary issue and the main Appeal together. Parties filed their written submissions in argument; this Judgment is based on the written submissions and all case documents.

On the preliminary issue raised by the Plaintiff-Respondent, whether the 17th Defendant-Appellant and the 3rd Defendant-Appellant could maintain the Appeal. Partition Act No.21 of 1977 Section 36A reads as:

"Any person dissatisfied with an order of the court made under Section 36 may prefer an appeal against such order to the court of Appeal, with the leave of the Court of Appeal first had and obtain" In Gunathilaka Vs. Murial Silva 79(1) NLR 481. Even a party who was not added an appeal."

Partition Law, unlike any other action, decides the rights of parties, and that decision is against the entire world. It bounds everyone by such Judgment. That is why a Judge who decides a partition action must turn all stones and not keep any loopholes or unclear points. That is why the burden is

cast upon the Judge to evaluate every document and evidence carefully; if the Judge is of the view to call for more documents to clarify a point, he is empowered to do so.

This preliminary objection is taken after nearly two decades. A preliminary objection should be made at the earliest and not as an afterthought. Perusing the entry on record for 16.06.2015, the case was to be called to fix for argument, and the entry of 14.07.2015 states, "of consent the matter is fixed for argument on 05.11.2015. The preliminary objection should have been taken in 2015. For the reasons set out above, we dismiss the preliminary objections.

The 3rd Defendant-Appellant had given evidence and marked "3D1" document, which was the Plan drawn by P. Jayakody, Licensed Surveyor, in 1999, which W.D. Fernando, Licensed Surveyor initially drew, in the year 1885, a land in extent of 04 Acres, 01 Rood and 9-40-100 square perches of a garden called Meegahawatta alias Kongahawatte situated in the village Meewala. His evidence was regarding Lot No.4 and 05 of the preliminary Plan marked "X". The third Defendant-Appellant had produced "3D5", which is a superimposition Plan. 3D5 is a plan drawn by P. Jayakody Licensed Survey, and on that Plan, he had marked the superimposition of plan 1688 of K.A.P. Kasthurirathna (L.S) of W.D Fernando(L.S) drawn in 1885.09.14 plan No:2312 of M.D.J.V.Perera (L.S), plan No: 388 of k.L.P.N.Perera (L.S) and plan No:549 drawn by J.H.W.Samith (L.S) In settling the Judgment the learned District Judge had not given due attention to 3D5. He had discussed Plan No:1749 drawn by P.Jayakody(L.S) as a document marked as P5. He had merely stated all the facts in document 3D5 but did not discuss or evaluate them with other evidence. Document P5 is a deed produced by Plaintiff. Deed No: 22068 of D.A.P.S Samarawikrama (N.P) is a transfer by Lenagala Kankanamlage Sasinona of land and paddy land to Lenagala Kamkananlaga Manchinona. This deed had not been discussed in the Judgment. In evidence, Plaintiff marked Deed No: 22068 as P5 on the 28th of June 1991.

When perusing the report marked "X1", the Surveyor who carried out the preliminary survey stated that he could not identify the land as the land to be partitioned. That proves that he is in doubt regarding the land to be partitioned.

The most important aspect of a partition case is to identify the land. In this instance, the Surveyor is in doubt. In *Sopaya Silva and Another Vs. Magilin Silva*¹ states that:

(4) The Surveyor, under Section 18(1)(a) (iii) of the partition law, must in his report states 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 attached in terms of Section 48(1) of the Partition Law to the decree in a Partition action, the Court should insist upon due compliance with the requirement by the Surveyor.

In this instance, if Surveyor cannot identify the land, he must refer to any other plan and superimpose on his Plan to satisfy himself regarding the land's identity. When the identity of the land is in question, one should never discuss the devolution of shares.

Every Judge who hears and determines a partition case must be satisfied that the land to be partitioned is identified. He must discuss in his Judgment how he became satisfied. Mainly when the Surveyor report back to Court that he cannot identify evidence, must be led, and that evidence must be evaluated.

¹ (1989 2 SLR 105)

The learned Judge's Judgment had answered contest No.1 in the affirmative, which deals with the identification but nowhere in the Judgment had he discussed the evidence, documentary or oral and explained how he came to identify the land. Until the land is identified, devolution of shares or exclusion of land cannot be considered.

The primary duty of the Judge is to identify the land to be partitioned clearly, and he must express his opinion with a proper evaluation. In the present case, there is no indication of how the learned Judge identified the land. When he had not correctly identified the land, he cannot conclude the claims of the 3rd or 17th (a) Defendant-Appellants.

For reasons set above, we allow the Appeal of the 3rd and 17th (a) Defendant-Appellants and set aside the Judgment of Additional District Judge of Gampaha entered in case No.27222/P on 24.11.2000.

No order of cost is made. We direct the Registrar of this Court to communicate this Judgment to the District Judge of Gampaha.

Judge of the Court of Appeal

PRASANTHA DE SILVA, J.

I agree.

Judge of the Court of Appeal