

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

In the matter of an Appeal to the Court of
Appeal of the Democratic Socialist Republic of
Sri Lanka.

CA No. 562/2000 (F)

DC Kegalle 22505/P

1. L. M. Karolis Singho

2. L. M. Podi Appuhamy (Deceased)

2A. L. M. Karolis Singho

3. L. M. Julis Singho

all of Medagama, Algama.

Plaintiffs

-Vs-

1. L. M. Wijesena,

Medagama, Algama.

2. L.M. Gunasekara (Deceased),

Egodagama, Algama.

2A. L.M. Ratnayake (Deceased),

Egodagama, Algama.

2B. L.M. Jagath Keerthi Ratnayake,

Egodagama, Algama.

Defendants

AND NOW BETWEEN

2B. L.M. Jagath Keerthi Ratnayake,

Egodagama, Algama.

2B Substituted Defendant - Appellant

-Vs-

1. L. M. Karolis Singho (Deceased)

1A. Willara Arachchige Gunasekara,

Medagama, Algama.

1B. Willara Arachchige Premawathie,

Uduwaka, Algama.

1C. L.M. Gunasinghe,

Medagama, Algama.

1D. L.M. Abeysinghe,

Medagama, Algama.

2. L. M. Podi Appuhamy (Deceased)

2A. L.M. Karolis Singho (Deceased)

2B. Willara Arachchige Gunasekara,
Medagama, Algama.

2C. Willara Arachchige Premawathie,
Uduwaka, Algama.

2D. L.M. Gunasinghe,
Medagama, Algama.

2E. L.M. Abeysinghe,
Medagama, Algama.

3. L.M. Julis Singho (Deceased)

3A. Willara Arachchige Gunsekara,
Medagama, Algama.

3B. Willara Arachchige Premawathie,
Uduwaka, Algama.

3C. L.M. Gunsighe,
Medagama, Algama.

3D. L.M. Abeysinghe,
Medagama, Algama.

Substituted Plaintiffs - Respondents

1. L.M. Wijesena (Deceased),
Medagama, Algama.

1A. L.M. Jayathilake,
Medagama, Algama.

1A Defendant - Respondent

BEFORE : **A.H.M.D. Nawaz, J.**

COUNSEL : S.C.B. Walgampaya, P.C. with Upendra
Walgampaya for Defendant-Appellant.

Rohan Sahabandu, P.C. with S.D. Withanage
for Plaintiff-Respondents.

Argued on : 25.05.2015

Decided on : 27.04.2016

A.H.M.D. NAWAZ, J,

The original Plaintiffs (now deceased) instituted this action in the District Court of Kegalle for the partitioning of a land called “Paluwatta” which was morefully described in the schedule to the plaint. Thereafter a commission was issued to C. Kurukulasuriya, Licensed Surveyor, whose Plan No.878 dated 21st October 1981 and his report were filed in the case marked X and X1 respectively. The three Plaintiffs

sought to partition the said land among themselves (1/3), and with the 1st and 2nd Defendants, each to be allotted 1/3 shares of the remainder of the land.

The original 2nd Defendant, who is now deceased filed his statement of claim stating that the land which was to be partitioned in this case was not "Paluwatta" but "lhalawatta" in an extent of 5 *lahas* paddy sowing, which the 2nd Defendant averred his predecessors had been in possession for over 70 years. The 1st Defendant had not filed his statement of claim but had accepted the pedigree of the Plaintiffs.

The action went to trial on 15 points of contest, Nos.1-4, 13 and 14 by the Plaintiffs, No.5 by the 1st Defendant and No.6 to 12 and 15 by the 2nd Defendant. The 1st Defendant gave evidence and produced documents marked 1V1 to 1V5. On behalf of the 2nd Defendant, one Weerakkodi Arachchilage Sirisena, one Athukorale and the substituted 2B Defendant gave evidence and marked documents 2V1 to 2V3.

The crux of the dispute between the current parties to this appeal namely the substituted Plaintiffs-Respondents and the 2B substituted Defendant-Appellant is of the identity of the land. It is traceable to the case that was presented before the Additional District Judge of Kegalle. Whilst the Plaintiffs stated that the corpus was "Paluwatta", the 2nd Defendant asserted that it was "lhalawatta" and not Paluwatta.

After the conclusion of the Trial, the learned Additional District Judge of Kegalle delivered the judgment on 30th June 2000 rejecting the position of the 2nd Defendant and holding that the corpus is the land called "Paluwatta" as claimed by the Plaintiffs and the said land must be partitioned between the Plaintiffs and the 1st Defendant in equal shares, i.e., each to get ½ shares.

Being dissatisfied with the judgment dated 30th June 2000 the 2B substituted Defendant has preferred this appeal to this Court, seeking a reversal of the judgment and grant of other reliefs prayed for in the petition of appeal.

Imperative duty to investigate title and its rationale

As has been stated by this Court and the Supreme Court in several precedents before, the duty of the Court in a partition action is primarily to investigate the title of the parties to the case to its satisfaction. In this context it is pertinent to recall the words of Bonser C.J in the case of **Peris v Perera**.¹

"It is obvious that the court ought not to make a decree, except it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property. The court should not, as it seems to me, regard these actions as merely to be decided on issues raised by and between the parties.

*The first thing the Court has to do is to satisfy itself that the plaintiff has made out his title, for, unless he makes out his title, his action cannot be maintained; and he must prove his title strictly, as has been frequently pointed out by this Court."*²

Again in 1897 Browne A.J emphasized in **Batagama Appuhamy v Dingiri Menika**³ that in order to obtain a decree of partition, which is binding against the whole world, the court should require the parties to prove their title. In the same breath when Bertram A.C.J stated in **Neelakutty v Alvar**⁴ that the effect of a partition decree is much the same as that of a judgment in rem, possibly the imperative duty to investigate title is inherent in that pronouncement. Comparable dicta are found in

¹ (1896) 1 N.L.R 362.

² Ibid at p 367

³ (1897) 3 N.L.R 129

⁴ (1918) 20 N.L.R 372

many a decision such as *Mather v Thamotheram Pillai*⁵, *Perera v Haniffa*⁶, *Fernando v Mohamadu Saibo*⁷ and *Goonertane v Bishop of Colombo*.⁸

In the process of title investigation it becomes necessary to establish the identity of the corpus. It is for this purpose that a commission is issued to a licensed surveyor who is qualified in the field to identify the land on the ground with metes and bounds. In the present case, such a commission was issued to a surveyor whose plan No.878 and report have been filed of record. According to the preliminary plan No.878, the land, which is the subject matter of this action has been identified by the commissioner as the land called "Paluwatta".

Non notice of the survey

In this regard, it is necessary to see whether the parties were noticed of the survey and whether they were present at the time of survey. The written submission filed on behalf of the 2B Substituted Defendant-Appellant (at page 5) states that "the preliminary Plan No.878 was prepared without giving notice to the 2nd Defendant and the said survey is therefore unlawful". This assertion is borne out by evidence.

The surveyor states in his report that the only parties who were present at the time of survey, and the persons who showed the boundaries are the Plaintiffs and the 1st Defendant. So, it is clear that the original 2nd Defendant was not present at the time of survey. It is established by evidence of the 1st Plaintiff that the 2nd Defendant was not noticed.

The surveyor's report X1 states that, "although the plaintiff states that Liyana Mudiyenselage Gunasekara is a defendant his name is not mentioned in the

⁵ (1903) 6 N.L.R 246

⁶ (1912) 15 N.L.R 445

⁷ (1899) 3 N.L.R 321.

⁸ (1931) 32 N.L.R 337.

commission issued to me". It appears therefore that since the commission issued to the surveyor did not contain the name of the 2nd Defendant, the surveyor did not issue notice on the 2nd Defendant about the survey of the corpus. This irresistibly leads one to the conclusion that the Plaintiffs must have purposely omitted the 2nd Defendant's name in the commission prepared by his Attorney-at-Law. This is a vital omission on the part of the Plaintiffs.

The report also states (just above the above remarks) that "one Liyana Mudiyanseelage Gunasekera, living at Algama Egodagoda (and not being a party) is a claimant". But this claimant had not been noticed by Court to be added as a party or a person as having some interest in the case. The names of the claimant and the 2nd Defendant both sound alike but it is not clear whether both these persons are one and the same or different. Nevertheless, the fact remains that the person named as a claimant was also not noticed by the Court. Section 20(1)(a) of the Partition Law makes it imperative that 'the Court shall order notice of a partition action to be sent by registered post to every claimant (not being a party to the action) who is mentioned in the report of the surveyor under subsection (1) of section 18. These notices must be filed in Court by the Plaintiff (See Section 20(2)(a)). This vital omission vitiates the proceedings in the case as due process contemplated in partition actions has been flouted.

Boundaries and Extent of the Corpus

The Plaintiff in their original plaint and amended plaint give the boundaries of the corpus known as "Paluwatta" as follows:-

North : Wela
East and South : Pela ini weta

West : Karanis Appuge watte pela ini weta

However, the surveyor in his Plan No.878 describes the boundaries surveyed by him as follows:-

North : Mahakumbura

East : W.A.Kiribanda's land

South : Gam Sabha Road

West : Main Road, Paluwatta and Paluwatta Kanatiya

The southern boundary Gam Sabha Road is a permanent and conspicuous boundary which cannot escape the attention of anyone, including the Plaintiffs. If so, why the Plaintiffs had failed to mention this Gam Sabha Road as the southern boundary of their land is a question that puzzles any reasonable person.

The other matter that should be noted is the western boundary. According to the Plan No.878, the western boundary is the Main Road and mainly the other portion of the land called "Paluwatte" and Paluwatte Kanatiya. This prominent boundary is not given in the plaint and instead Karanis Appuge Watte pela ini weta is given as the western boundary. The above discrepancies in the southern and western boundaries must be taken note of. The 1st Plaintiff who gave evidence at the trial has not given any explanation, when cross-examined on the point, as to these discrepancies in the plaint. Describing the southern boundary as "*Pela ini weta*" (live fence) is not sufficient to describe a boundary. Any land may be surrounded by fences or live fences or by no fences, but the real boundary must refer to the name of adjoining owners, roads, river, canal or lands etc. The evidence of the 1st Plaintiff and that of the 1st Defendant failed to reconcile with the boundaries shown in the Preliminary

Plan No.878. In short, none of the boundaries of the land described in the schedule to the plaint corresponds to land depicted in Preliminary Plan No.878.

The 1st Plaintiff has admitted in his evidence (under cross-examination) that the land surveyed is a portion of a larger land called "Paluwatta and the remaining portion of this larger land which belongs to 12 persons is situated on the western side of the corpus. This position is affirmed by the Preliminary Plan No.878, which describes the western boundary as Paluwatta and Paluwatte Kanatiya. The 1st Plaintiff has unequivocally admitted that the larger portion of Paluwatta is situated on the western boundary and that larger portion is presently possessed by 12 persons and the fact remains that it was not surveyed and divided by a plan or deed. Interestingly enough the present action was filed in respect of a portion of that larger land.

Considering the Preliminary Plan No.878 and the evidence of the 1st Plaintiff, it is abundantly clear that the land which was the subject matter of this action and was surveyed and shown as the corpus in Plan No.878, is not the entire land called "Paluwatta" but only a portion of it, and the remaining portion is on the western boundary of the corpus of this case.

According to the evidence of the 1st Plaintiff, it is established under cross-examination, that the extent of the land described in their title deeds is in extent of 1 *pela*, which is equal to one acre and one rood (A.1 R1.). But the land surveyed and shown as Lot 1 and Lot 2 in Plan No.878 boundary of which was pointed by the Plaintiffs and 1st Defendant is 3 roods and 14.25 perches. This creates a doubt as to the extent of the corpus. Why cannot the entire land called "Paluwatta" including the portions now possessed by the 12 persons on the western boundary form 1 acre and 1 rood as described in the plaint?

It has been decided by the Supreme Court in several cases that when a land is possessed in portions by several co-owners undividedly such possession does not confer definite title on them unless a decree by Court in a partition action of the entirety finally disposes of the rights of the parties. This proposition was affirmed in the case of *Girigoris Appuhamy vs. Maria Nona*⁹ where Sansoni J. held that where a land is possessed in different portions by different co-owners for convenience of possession, a partition action cannot be maintained in respect of one portion only; the entire land should be brought into the action.

The 2nd Defendant has failed to adduce any evidence to prove that the corpus in the case is not “Paluwatta” but “lhalawatta” as stated in his statement of claim. Nonetheless this failure is immaterial in view of the fact that the land surveyed as “Paluwatta” is not properly identified as “Paluwatta” as claimed by the Plaintiffs, as there is sufficient evidence to show that a larger portion of “Paluwatta” has been omitted by the Plaintiffs in the schedule to their plaint. Therefore, I am of the considered view that the land sought to be partitioned is not properly identified.

Title of the Parties

Originally the Plaintiffs filed this action claiming 1/3rd share of the corpus for themselves, and 1/3rd share for the 1st Defendant and a third 1/3 share for the 2nd Defendant. But in the amended plaint this position was altered. According to the amended plaint, the corpus is to be divided between the Plaintiffs and 1st Defendant in equal shares, i.e., ½ share for the Plaintiffs and the other ½ share for the 1st Defendant. The 2nd Defendant was not given any share. No explanation was given, but the 1st Plaintiff has, in his evidence, admitted that the 2nd Defendant was in possession of the house shown ‘C’ in the plan No.878.

⁹ 60 N.L.R 330

It is the position of the Plaintiffs that since the 2nd Defendant claimed right to the land he was made a Defendant. But this is not correct. The 2nd Defendant was in possession of the land and that explains why he claimed right to it. On his behalf 2V1 to 2V3 were marked and produced by 2B Defendant but these documents were rejected by the learned District Judge without any investigation.

The Plaintiffs have failed to prove their title to their claim of ½ share of the corpus. The learned Additional District Judge has also failed to investigate the title of the Plaintiffs. She failed to investigate why the 2nd Defendant who was given 1/3rd share originally was not given any share at all by the amended plaint. This is a vital lapse on the part of the learned District Judge. On the contrary, the 2nd Defendant has established his possession through his witness Sirisena and the Grama Sevaka Athukorale. How did the 2nd Defendant possess the land without any title? If proper investigation of title had done, the answer to this question would have been elicited.

In the case of ***Mohamedaly Adamjee vs. Hadad Sadeen***¹⁰ the Privy Council observed that “If it appears to the Supreme Court when hearing an appeal in a partition case, that investigation of title has been inadequate it should, even though no party before it has raised the point, set aside the decree acting under its powers of revision”. This principle would equally apply in the case of an appeal.

In conclusion, therefore, I hold that:

1. The plaintiffs have failed to name the 2nd defendant as a defendant in the commission to survey and thereby he was deprived of the notice of the survey; Please see page 226 of the brief where a copy of the commission is filed of record in which the 2nd defendant's name does not appear and the commissioner also refers to it in his report. This omission on the part of the

¹⁰ 58 N.L.R 217 at p226

plaintiffs cannot be overlooked by this court. Furthermore a notice on the claimant mentioned in the surveyor's report (page 227 of the brief) was not served in terms of section 20(1)(a) of the Partition Law;

2. The land called "Paluwatta" which is the land sought to be partitioned has not been properly identified;
3. The corpus surveyed is a portion of a larger land called "Paluwatta" while the remaining portion which is situated on the western boundary of the land was not surveyed in the case;
4. The boundaries of the land described in the Plaint is different from the land depicted in Preliminary Plan No.878;
5. The extent of the land described in the Plaint is in excess of the extent depicted as Lots 1 and 2 in Plan No.878;
6. The learned Additional District Judge has failed to investigate the title of the parties.

Taking into consideration of the above infirmities in this case, I set aside the judgment dated 30th June 2000 entered in this case with costs.

JUDGE OF THE COURT OF APPEAL