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

1. **Rupasinghe Irin Somawathie Karunarathne**
2. **Meegamuwage Samadara Karunarathne**

Both of Galle Road, Pothupitiya, Wadduwa.

PLAINTIFFS

C.A. Case No. 664/1995 (F)

D.C. Panadura Case No. 14078/P

-Vs-

1. **Migel Hewage Anula Kalyani Wijesinghe** of Pothupitiya, Wadduwa.
2. **Migel Hewage Chandrasoma Palitha Wijesinghe** of Pothupitiya, Wadduwa.
3. **Susew Hewage Siyaneris Fernando** (deceased)

3A. **Susew Hewal Rathna Kamala Sujatha Wickramasinghe** of Pothupitiya, Wadduwa.

4. **Thiramuni Aron Fernando** (deceased)

4A. **Thiramuni Ananda Premathialaka** of Galle Road, Pothupitiya, Wadduwa.

5. **Meegamuwage Ajith Nandalal Karunarathne** (deceased)

5A. **R.A. Jayasinghe** of Galle Road, Pothupitiya, Wadduwa.

5B. **Liyana Ralalage Indrani**

No. 214, Galle Road,

Pothupitiya, Wadduwa.

6. **Jasenthu Hewage Piyadasa** of Pothupitiya South, Wadduwa.
7. **Jasenthua Hewage Piyasili** (deceased)

7A. **A. Karanis** of Samanpaya, Thalpitiya, Wadduwa.

8. Thiramuni Eliso Fernando (deceased)

8A. R. Sumanwathie of Pushparama Road, Pothupitiya North, Wadduwa.

DEFENDANTS

4A. Thiramuni Ananda Premathialaka of Galle Road, Pothupitiya, Wadduwa.

4A DEFENDANT-APPELLANT

1. Rupasinghe Irin Somawathie Karunarathne
2. Meegamuwage Samadara Karunarathne

Both of Galle Road, Pothupitiya, Wadduwa.

PLAINTIFF-RESPONDENTS

1. Migel Hewage Anula Kalyani Wijesinghe of Pothupitiya, Wadduwa.
2. Migel Hewage Chandrasoma Palitha Wijesinghe (deceased)

2A. Jayantha Chandrakumara Wijesena

Methsiri Dayananda

2B. Both of Circular Road, Pothupitiya North, Wadduwa.

3A. Susew Hewal Rathna Kamala Sujatha Wickramasinghe (deceased)

3A1. Asoka Indukantha Wickramasinghe

3A2. Senaka Padmakumara Wickramasinghe

3A3. Saliya Nishantha Wickramasinghe

All of near the Walukarama Temple, Pothupitiya North, Wadduwa.

5A. R.A. Jayasinghe of Galle Road, Pothupitiya, Wadduwa.

5B. Liyana Ralalage Indrani

No. 214, Galle Road,

Pothupitiya, Wadduwa.

6. **Jasenthu Hewage Piyadasa** of Pothupitiya South, Wadduwa.

7A. **A. Karanis** of Samanpaya, Thalpitiya, Wadduwa.

8A. **R. Sumanwathie** (deceased)

8A1. **Rakina Hewage Ranjith Weerasinghe**

8A2. **Sudath Weerasinghe**

Both of Kammanayawatta, Pushparama Road, Pothupitiya North,

Wadduwa.

DEFENDANT-RESPONDENTS

BEFORE	:	**A.H.M.D. Nawaz, J.**
COUNSEL	:	Rohan Sahabandu, PC for 4A Defendant-Appellant N.R.M. Daluwatta, PC for the Defendant-Respondents
Decided on	:	13.12.2017

A.H.M.D. Nawaz, J.

The Plaintiffs have filed this action on 30.08.1974 in the District Court of Panadura to have the land called the Southern portion of Ambagahawatte partitioned, which is morefully described in the schedule to the plaint. After the plaint was filed, a commission had been issued and the Plan No.3035 dated 04.03.1975 prepared by Surveyor W. Fernando and his report have been filed marked X and X1. According to this Plan the extent of the corpus is 2 Roods.

The main contestant in the case is the 4th Defendant, who died after giving evidence in the case and in his place the 4A Defendant has been substituted. The position of the 4th Defendant is that the corpus as shown in the said Plan No.3035 and described in the schedule to the plaint, constitutes not only the land called the Southern portion of Ambagahawatte sought to be partitioned, but also another land lying adjacent to the North of it, which is separately owned and possessed by the 4th Defendant, and his position is that this Northern portion should not be included into the corpus that is to be partitioned.

In order to depict the two lands better, he too got a commission issued through the Court to the same surveyor, whose Plan No.3035A (4D1) and the Report dated 21.09.1977 (4D1A) (Page 203 & 204 of the brief) are filed of record. This second plan divides the original corpus shown in the earlier Plan No.3035 into two blocks, marked A and B separately. The extent of Lot A is 19.5 perches and Lot B is said to be 1 Rood and 20.5 perches. According to Plan No.3035A only the total extent of Lots A and B is 2 Roods, as stated in the plaint.

According to the 4th Defendant it is only Lot B in the second Plan No.3035A (4D1), which is referred to as the Southern Portion of Ambagahawatte, that constitutes the corpus sought to be partitioned and Lot A in the said Plan is said to be a distinct and separate land which is exclusively owned and possessed by him, and thus it should be excluded from the corpus, and it is not part of the corpus sought to be partitioned.

It was also contested by the 4th Defendant that he was also entitled to some undivided rights in Lot B in Plan No.3035A, according to the pedigree filed by him along with his statement of claim and opposed to the pedigree set out by the Plaintiffs. The basis of his claim of undivided rights in Lot B was that his mother Podinona who was entitled to an undivided ½ share of this land by way of inheritance did marry another co-owner of this property called John Fernando and that on the death of his parents their undivided rights did devolve on him and his brothers and sisters as their children.

According to the 4th Defendant the land mark separating the corpus sought to be partitioned from his land is an old unused well. He stated in evidence that this well which was 3 ½ feet below the surface and covered with earth at the time of the preliminary survey, was cleared up and shown to the surveyor when he came to prepare the second Plan No.3035A, and the Northern boundary of the land to be partitioned was shown by the 4th Defendant to be running just below the old unused well. (See 4D1), It is relevant to note that the Surveyor has shown this well in his Plan No.3035, but the 4th Defendant who was present at that time of the first survey was silent about this unused well and did not mention about it to the Surveyor on the preliminary survey. He could have shown this well as constituting a boundary land mark between the corpus to be partitioned and the land on the Northern side claimed by him. This clear land mark, too prominent a construction, though lying underground, cannot be forgotten by the 4th Defendant as this well separated his land from the corpus.

After the trial commenced on 15.08.1978, the evidence of the Surveyor, the 3rd and 4th Defendants was led by all parties and the learned District Judge delivered his judgment on 22.06.1979, according to which, the claim of the 4th Defendant was upheld. The Plaintiffs appealed against this judgment to this Court and this Court by its judgment dated 19.12.1986, set aside the judgment of the learned District judge on several grounds and ordered a re-trial on all matters in issue.

Thereafter the Plaintiffs filed an amended Plaint. The 3rd Defendant who had given evidence in the earlier trial had died and the 3A Defendant was substituted. The 3A Defendant filed an amended Statement of Claim which was further amended and that the 4A Defendant also filed his amended Statement of Claim. On these amended pleadings, the parties proceeded to trial on 31.05.1990. Issues were raised by the parties, Issues 1-3 by the Plaintiffs, 4-8 on behalf of 3A Defendant and 9-12 by the 4A Defendant. Later on 27.02.1991, the issues raised by 3A Defendant and 4A Defendant were withdrawn and new issues 4-6 were raised on behalf of 3A Defendant and issues 7-11, were raised on behalf of 4A Defendant with permission of court.

The Plaintiff relied on their pedigree and the 4th Defendant reiterated the exclusion of Lot B in Plan No.3035A. At the trial the Plaintiffs did not give evidence but the 3A Defendant was called to give evidence on their behalf. On 23.04.1991, applications were made by Counsel for the 3rd ad 4th Defendants to adopt their respective evidence as they had died, and the applications were allowed by court.

It is to be noted in this case that the Plaintiffs and the 3A Defendant on the one side and the 4A Defendant on the other, are at variance on three matters.

(a) with regard to the corpus;

(b) with regard to original ownership; and

(c) with regard to the devolution of rights.

The Plaintiffs' claim is that their land is the Southern Portion of Amabagahawatte in extent 1 Rood 36 Perches, whereas the 4th Defendant's position is that the land shown in Plan X is a portion of the Northern Portion of Ambagahawatte, which according to him is sometimes referred to as Northern half share of Ambagahawatte *alias* Kosgahawatte.

It must be noted that documentary evidence given in the case by deeds refer to the corpus as a land in extent of 1 Rood 36 Perches, and some deeds give a lesser extent. The Court has failed to look into the contradictory nature of the extent described in the deeds produced and marked on behalf of the Plaintiffs.

According to the 4th Defendant, whose evidence was recorded before his death and adopted later, the land shown in Plan X includes a portion of the Northern half share of Ambagahawatte *alias* Kosgahawatte, and in order to show this he had taken a second commission and secured the second Plan No.3035A.

It must be noted that when the land was first surveyed by Surveyor R.W. Fernando, there was no distinct boundary that existed between the Northern and Southern portions of Amabagahawatte. The dilapidated well was shown by the 4th Defendant as a boundary only at the time of the second survey. If that be so, the question arises when these two portions were actually separated and how the separated lots were possessed

by the predecessors of the parties to this case as separate lots. The evidence of the parties on this material point has not been evaluated by the trial Judge. This is very necessary to decide the exclusion of the Northern Portion from the corpus sought to be partitioned, as claimed by the 4A Defendant.

A clear finding of the Court is not available in the judgment of the trial Judge as to which portion of the land called Ambagahawatte, i.e., whether Lot A alone or Lot A and B together is to be partitioned. The evidence of 4th Defendant is that there was a barbed wire fence separating the Northern portion from the Southern Portion, and his father John removed it and shifted it to the North as he wanted to plant on a portion of the corpus along with a portion of the land to the North. This evidence is not clearly analyzed by the Court in coming to the conclusion that the issue raised by the 4A Defendant as to the exclusion claimed by him was not proved.

This creates a doubt in the mind of any reasonable person. If the 4A Defendant's father had shifted the barbed wire fence towards North would the owners of the Northern land for the time being have permitted this?

A party may say anything as a witness to his advantage but in evaluation of that evidence the probabilities and the likelihood of the truth must be examined in the light of the facts and circumstances. The Court has a bounden duty to discharge its duty in evaluating the evidence given by a witness.

Having considered the evidence led in this case the learned District Judge has delivered his judgment on 11.10.1995 answering the issues 7-11 raised by the 4A Defendant as follows:-

7. not proved
8. does not arise
9. not proved
10. does not arise
11. cannot be

According to this judgment the learned trial Judge has held that the 4A Defendant has failed to prove that the Northern Portion shown in Plan No. 3035A is the ½ share of the

land called Ambagahawatte *alias* Kosgahawatte and thereby rejected the claim of the 4A Defendant for exclusion of that Northern Portion. But he has not given any reason as to why he has rejected the exclusion that was sought. The learned District Judge has just stated "I examined the evidence given on behalf of the 4A Defendant". He has also said that since the 4A Defendant who claimed long prescriptive rights from Meegamuwage Salaaman Fernando and Seeman Fernando has failed to prove his long possession as stated in his amended statement of claim, he is not entitled to that portion.

But the learned Judge decided to exclude the shop house and the soil under it as shown as A in plan marked X from the corpus sought to be partitioned.

This judgment on the whole is not a valid judgment giving definite reasons for its findings. Other than giving a short summary of the oral and documentary evidence given by the witnesses, the learned trial Judge has not given any tangible reasons for his conclusion to answer the issues raised by the 4A Defendant.

This is a partition action, in which the Court has a bounden duty to investigate the title of the parties. This particular case, which had gone on appeal earlier, should have been given utmost consideration by the trial Judge when he made his findings. I am therefore of the view that the trial Judge has not gone into an exhaustive evaluation and analysis of the evidence of the witnesses and the documents submitted by the parties.

This is a peculiar partition action. The peculiarity is that while the earlier Judge had decided, on the oral and documentary evidence led in the case, to exclude the Northern portion of the corpus, the subsequent Judge has denied exclusion. The Court of Appeal has in the earlier appeal had commented on the procedural defects in the judgment and decided to remit the case for re-trial and directed that due and proper steps must be taken by Court to add the necessary parties as Defendants and grant them an opportunity to file answer if necessary. No decision was made by the Court of Appeal about exclusion.

The present appeal is from the judgment of the subsequent Judge who has disallowed 4A Defendant's claim for exclusion of the Northern portion. There is a defect in the judgment as one surveys the decision of the trial Judge. He has not stated the reasons in his judgment on what ground or basis he has come to this decision. It is not the question whether the 4A Defendant's claim can be allowed or not allowed. But the question is when one Judge has granted exclusion and the other Judge refuses it, there must be cogent evidence to arrive at this decision. This is necessary for a judgment to be legally valid.

No doubt remanding the case back to the District Court for the second time to have a third trial (a trial de novo at that) should be discouraged. The Plaintiffs instituted this action on 30.08.1974, which is more than 4 decades ago. In this regard, the view expressed by Saleem Marsoof J. in his dissenting judgment, in ***Sopinona v. Pitipanaarachchi and Two Others,*** 2010 (1) Sri L.R. 87 is relevant to this case as well. His Lordship said *"I am also firmly of the opinion that, in any event, no useful purpose would be served by sending this case back to the original Court for trial de novo, as directed by the Court of Appeal. This would constitute a third trial of this case more than four decades since the matter was first brought before the District Court"*-See page 89 of the judgment.

Hence, I am strongly of the view that this case should be sent back only for the purpose of perusing the evidence already led in this case and to decide the rights of parties and whether the exclusion claimed by the 4A Defendant should be allowed or not.

I would therefore set aside the judgment of the trial Judge and remit the case back to the District Court of Panadura to pronounce the judgment on the material available, in which event parties may be permitted to make oral and if necessary written submissions before the learned District Judge. It is my considered view that it is open to the new Judge to adopt the whole evidence already led in the case and pronounce the judgment if the parties consent to that procedure. In any event no costs are ordered.

JUDGE OF THE COURT OF APPEAL