

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

Mohammed Ismail Mapulle Marikkar  
of Dambadeniya.

PLAINTIFF

C.A. Case No.620/1996 (F)

D.C. Kuliyapitiya Case  
No.6540/P

-Vs-

1. Mapa Mudiyanseelage Podimahaththaya  
of Dambadeniya.
2. Mapa Mudiyanseelage Podinona (Deceased)
- 2A. Mapa Mudiyanseelage Somarathna  
of Dambadeniya.
3. Mapa Mudiyanseelage Podisingho  
of Dambadeniya.
4. Mapa Mudiyanseelage Peris Singho (Deceased)
- 4A. Mapa Mudiyanseelage Piyasiri Wasantha  
of Paluwatta, Dambadeniya.
5. Balasuriya Arachchige Dingiri Menika  
of Paluwatta, Dambadeniya.

DEFENDANTS

AND

Mohammed Ismail Mapulle Marikkar  
of Dambadeniya.

PLAINTIFF-APPELLANT

1. Mapa Mudiyansele Podimahaththaya  
(Deceased)
- 1A. Mapa Mudiyansele Gunawardana  
of Mahagedara, Dambadeniya.
- 1B. Mapa Mudiyansele Kusumawathie  
of Wewwanawatta, Palladeniya,  
Maspotha.
- 1C. Mapa Mudiyansele Susilawathie  
of Muthugal, Dambadeniya.
- 1D. Mapa Mudiyansele Chandrawathie  
of Muthugal, Dambadeniya.
- 1E. Mapa Mudiyansele Premawathie  
of Labbala, Bopitiya.
2. Mapa Mudiyansele Podinona (Deceased)
- 2A. Mapa Mudiyansele Somarathna  
of Dambadeniya.
3. Mapa Mudiyansele Podisingho (Deceased)
- 3A. P.A. Menikhamy
- 3B. Mapa Mudiyansele Premachandra  
both of Paluwatta, Dambadeniya.
4. Mapa Mudiyansele Peris Singho (Deceased)
- 4A. Mapa Mudiyansele Piyasiri Wasantha  
of Paluwatta, Dambadeniya.
5. Balasuriya Arachchige Dingiri Menika  
of Paluwatta, Dambadeniya.

DEFENDANT-RESPONDENTS

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

COUNSEL : R. Wimalaratne with Nimal Wickramasinghe for  
the Plaintiff-Appellant  
M.C. Jayaratne, PC with M.D.J. Bandara for the 3A  
and 3B Substituted-Defendant-Respondents

Decided on : 06.08.2019

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

The Plaintiff-Appellant (hereinafter sometimes referred to as “the Plaintiff”) instituted this action on 19<sup>th</sup> September, 1973 to partition a land called *Kolongahamulawatta* situated in *Dambedeniya* and morefully described in the plaint containing about 3 *lahas kurakkan* sowing extent which is depicted as Lots 1, 2 and 3 in Plan No.1713 dated 20.05.1974 prepared by K. Sivagnanasunderam, Licensed Surveyor, containing in extent 3 Roods and 36 Perches. The said Plan is marked as ‘X’ and it’s Report as ‘XI’. Originally, the plaint was filed against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only and the 3<sup>rd</sup> Defendant had been added subsequently.

In paragraph 11 of the plaint, the Plaintiff has given the shares as follows:-

- The Plaintiff is entitled to an undivided  $\frac{1}{4}$  share;
- The 1<sup>st</sup> Defendant is entitled to an undivided  $\frac{1}{2}$  share, and
- 2<sup>nd</sup> Defendant is entitled to an undivided  $\frac{1}{4}$  share.

### Identity of the Corpus

In a partition action the identity of the land is very important because unless the identity of the corpus is established, the title of the parties cannot be ascertained. The Court cannot give judgment in respect of a land which is not part of the corpus. The Defendants based their title on several deeds (VI to V10) which refer to a different land in the village except Deed No.V10. The Defendant had also submitted a Plan bearing No.254 dated

20.06.1972 and 28.09.1972 (about one year prior to the institution of this action by the Plaintiff) made by one R.A. Gunasoma Ratnayake, Licensed Surveyor. This Plan was not one prepared on a Commission issued by the Court. However, the Surveyor K. Sivagnanasunderam has made use of this Plan No.254 for identification of the corpus.

Surveyor K. Sivagnanasunderam, states in his report as follows:-

“I have superimposed Plan No.254 made by Mr. R.A. Gunasoma Ratnayake, Licensed Surveyor, on a true copy of Plan No.1713 prepared by me. The disagreement of the boundaries are shown in red. There is a slight disagreement along the northern boundary. Superimposition discloses that Lots 1 & 2 in Preliminary Plan No.1713 are identical to Lots 1, 2 & 3 in Plan 254. Lot 3 in Plan No.1713 falls outside and is not covered by the corpus depicted in Plan No.254”. From this statement, it is clear that the boundaries and extent of the land claimed by the Defendants are different from that of the land described in the Plaintiff.

As it is, there are discrepancies between the two plans. When the Defendants claim a right to a different land, it is imperative that they should move for a Commission from Court to identify the land claimed by them, which they had failed to do so in this case. When the Surveyor says that Lot 3 in Plan No.1713 falls outside the land depicted in Plan No.254, the Court must find out where this Lot 3 is located in relation to the land depicted in Plan 254. This is important from the standpoint of the court investigating the title of the parties. On 02.05.1990 when the trial commenced, the parties admitted that the land depicted as Lots 1, 2 and 3 in Plan No.1713 as the corpus. If that be so, the land depicted in Plan No.254 is not the corpus. According to Surveyor Sivagnanasunderam, the Defendants' land depicted in Plan No.254 is smaller than the land that is described in the plaint and depicted in his Plan No.1713.

Hence, it is clear that the judgment entered in this case, dismissing the Plaintiff's action had been entered without identifying the real corpus which is sought to be partitioned and proper investigation of the title of the Defendants to the land claimed by them.

## Title of the Parties

In a partition action it is the bounden duty of the Court to investigate the title of the parties. According to the Plaintiff's evidence, the Plaintiff's father Wawanna Mohammodu Ismail became entitled to a  $\frac{1}{4}$  share of the land called *Kolongahawatta* by Deed No.1426 dated 20.07.1939 marked (P3) and thereafter his father had donated the said  $\frac{1}{4}$  share of the land in extent 3 *lahas kurakkan* to the Plaintiff by Deed No.14570 dated 25.04.1968, marked (P4). In his evidence in chief the Plaintiff had traced his pedigree, according to which his father and his predecessors in title had been in possession of the undivided  $\frac{1}{4}$  share, another  $\frac{1}{4}$  share to the 1<sup>st</sup> Defendant and an undivided  $\frac{1}{2}$  share to the 2<sup>nd</sup> Defendant. He has also claimed plantations on the land.

It would appear that the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants belong to different communities and therefore one cannot expect the Plaintiff to know the relationship of the Defendants' predecessors in title or the Defendants cannot be expected to possibly know the Plaintiff's predecessors in title. In the circumstances when the Plaintiff says in his answer that he did not know the relationship of his predecessors, the Court cannot take that answer as adverse answers to the Plaintiff's title. Since his father had bought this land, the Plaintiff may not know these persons.

The Plaintiff said in his evidence under cross-examination that one Podisingho was in possession of the land but he did not know how long he was in possession. This evidence was given on 22.01.1991-that is after 18 years after the date of institution of the plaint. He says further that Podisingho gave coconuts or money to his father. This shows that after the Plaintiff's father had become the owner of  $\frac{1}{4}$ <sup>th</sup> share, Podisingho treated him as his landlord and paid him money or coconuts as rent. This evidence was not contradicted.

It must be noted that the Plaintiff father Wawanna Mohamedu Ismail, who became entitled to an undivided  $\frac{1}{4}$  share of the corpus in 1939, had been in possession of that land and had been in receipt of produce and income from the said land.

Later, when Podisingho threatened the Plaintiff not to enter the land, the Plaintiff made a complaint to the "*Sama Mandalaya*". This was in 1968. Thereafter within a short period of

five years, in 1973, the Plaintiff instituted this action against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for partition. The Plaintiff says in his evidence that he lives in the same area where the land is situated.

Prescriptive possession of the land need not be by the current owner only. His predecessor's possession is also added to the possession of the present owner. In this respect, even if the Plaintiff was not in possession of the said land, yet, his predecessors' possession must be added. In *Umma v. Ismail Lebbe*<sup>1</sup> Clarence, J. held that, "In a possessory action the plaintiff might take advantage of the possession of his predecessor in title, and that it is unnecessary that he himself should have had a year and a day's possession where that is one of the requirements for bringing a possessory action". This decision was approved by Bonser C.J. in the District Court of Negombo Case No.2795 (1898) S.C. Minutes 30.8.1898, and by Wendt, J. in *Goonewardene v. Pereira*, (1902) 5 N.L.R. 320.

The above view of Clarence, J. in *Umma v. Ismail Lebbe* (*supra*) was followed in the case of *Silva v. Saranelis Appuhamy*,<sup>2</sup> by a Court consisting of Lascelles C.J. and Wood Renton, J. and it was held that, "in a possessory action a Plaintiff might take advantage of the possession of his predecessor in title and that it is unnecessary that he should himself have had a year and a day's possession". In this case Lascelles C.J. had not followed the later view that 'for a possessory action proof of possession for a year and a day is not necessary'. On the contrary he expressed the view that: "The rule that possession for a year and a day is necessary has been repeatedly acknowledged by the decisions of this Court, and it is at any rate unlikely that it was intended in *Silva v. Dingiri Menika* (1910) 13 N.L.R. 179 to over-rule all these decisions.

I am therefore, of the view that the Plaintiff has not only paper title to the ¼ share claimed by his but also prescription possession through his predecessors. Hence, the assumption of the learned District Judge that the Plaintiff was not in possession of the corpus to entitle him to rights in the corpus is wrong and is not tenable in law.

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<sup>1</sup>4 S.C.C. 75

<sup>2</sup>(1912) 15 NLR 297, Weerakoon Reports Vol. 7 p. 27

When considering the claim of the Defendants, most of the witnesses who had given evidence on their behalf, were speaking from knowledge commencing after the action was instituted, or just about a few years before the date of the plaint. It must be noted that the possession of the parties after the action is instituted cannot be taken into consideration as if they have had long possession. The uninterrupted possession must over ten years prior to the institution of the action. The Plaintiff says that he became entitled to ¼th share in 1968 and in the same year he had made a complaint to the "*Sama Mandalaya*".

This partition action was filed in September, 1973, trial commenced in 1990 and the judgment was pronounced in 1996. Taking these dates into consideration, the Defendants' possession after institution of this action in 1973 does not inure to the benefit of the Defendants as it is not the uninterrupted possession alluded to in Section 3 of the Prescription Ordinance.

The witnesses for the Defendant had given evidence with short memories, i.e., almost closer to the date of the plaint, and having regard to the possession of the Defendants, that possession of the land cannot be accepted to give rise to prescriptive possession in favour of the Defendants.

It must be noted that except the Deed marked as V10, all the other deeds denote different boundaries which refer to a different land. The Deeds VI to V9 cannot be accepted as deeds relevant to the corpus in this action. Even if the Defendants had been in possession of a land, as they claimed, that land is not the corpus. Their land is not properly identified. As stated by Surveyor Sivagnanasunderam, Lot 3 in his Plan falls outside the land depicted in Plan No.254. The recent Deed No.17323 dated 14.05.1973 (V10) is an amicable partition deed entered into between Podisingo (1<sup>st</sup> party), Podi Appuhamy (2<sup>nd</sup> Party) and Perisingho and Podimahatmaya (3<sup>rd</sup> party) in respect of an extent 3 Roods as depicted in Plan No.254. The Plaintiff's counsel alleged this Deed No.V10 was executed after search in the Land Registry. This might have been executed after the complaint of the Plaintiff against Podisingho. After executing the amicable partition Deed No.17323 the Defendants are attempting to show that Plan No.254 relates to the corpus in this action.



The learned Judge's contention that since the deeds are about 100 years old, the boundaries may differ cannot be accepted. The purpose of a preliminary survey is to identify the land even if the boundaries are now different. The Plan No.1713 is to be accepted as correct. Accordingly, the Defendants have failed to identify their land and thereby failed to establish their prescriptive possession to the corpus in this case. Furthermore, the Defendants miserably failed to state clearly as to when their possession commenced. This is important to count the prescriptive period, leaving aside the period after the commencement of action. Only the period before the institution of the action shall be counted.

Considering all the matters set out above, I am of the view that the Plaintiff has established paper title as well as prescriptive possession to  $\frac{1}{4}$  share of the corpus. The Defendants have failed to prove that they are entitled to the corpus by prescriptive possession. Accordingly, I set aside the judgment entered in this case and remit the case back to the District Court to enter fresh judgment as prayed for in the plaint and to proceed with further steps in the action

JUDGE OF THE COURT OF APPEAL