

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

An appeal against the judgment of the Learned Judges in case No. PHC Kegalle (Civil) 334/2007 of the High Court of Province (Civil Appellate), Kegalle dated 27.04.2011 under the High Court of Provinces (Special Provisions) Amendment Act No. 54 of 2006.

Seneviratne Mudiyansele Kirihamy
Seneviratne of Senani, Panagamuwa,
Ambulugala, Mawanella.

SC Appeal No. 151/2016

SC HCCA L/A No. 192/2011

PHC Kegalle (Civil) 334/2007

DC Mawanella No. 608/L

Plaintiff

Vs.

1. Ihala Wahumpurayalage Emalin
 2. Viyannalage Kusuma
 3. Viyannalage Wimalawathi
 4. Viyannalage Nishshanka
 5. Viyannalage Cyril
 6. Viyannalage Gamini Gunathunga
 7. Viyannalage Sita
 8. Viyannalage Sunil
 9. Viyannalage Lesly Wijethunge
 10. Viyannalage Somaratne
- all of Nayawetunehena, Attanagoda
(Panagamuwa), Ambulugala,
Mawanella.

Defendants

And Now

Seneviratne Mudiyanseelage Kirihamy
Seneviratne of Senani, Panagamuwa,
Ambulugala, Mawanella.

Plaintiff-Appellant

Vs.

1. Ihala Wahumpurayalage Emalin
2. Viyannalage Kusuma
3. Viyannalage Wimalawathi
4. Viyannalage Nishshanka
5. Viyannalage Cyril
6. Viyannalage Gamini Gunathunga
7. Viyannalage Sita
8. Viyannalage Sunil
9. Viyannalage Lesly Wijethunge
10. Viyannalage Somaratne

all of Nayawetunuhena, Attanagoda
(Panagamuwa), Ambulugala,
Mawanella.

Defendant-Respondents

And Now Between

1. Ihala Vahumpurayalage Emalin
(Deceased)

- 1A. Viyannalage Kusuma
2. Viyannalage Kusuma
3. Viyannalage Wimalawathi
4. Viyannalage Nishshanka
5. Viyannalage Cyril
6. Viyannalage Gamini Gunathunga
7. Viyannalage Sita
8. Viyannalage Lesly Wijethunge
9. Viyannalage Somaratne

all of Nayawetunuhena, Attanagoda
(Panagamuwa), Ambulugala,
Mawanella.

Defendant-Respondent-Appellants

Vs.

Seneviratne Mudiyansele Kirihamy
Seneviratne of Senani, Panagamuwa,
Ambulugala, Mawanella.

Plaintiff-Appellant-Respondent

Viyannalage Sunil (deceased)

Nayawetunuhena, Attanagoda
(Panagamuwa), Ambulugala,
Mawanella.

8. Defendant-Respondent-Respondent

Subhasinghe Mudiyansele Ranjani
Kumari of Ehawatte, Atanagoda,
Ambulugala, Mawanella.

8A. Substituted Defendant-Respondent-Respondent

Before:

Buwaneka Aluwihare, PC. J.
Priyantha Jayawardena, PC. J.
L. T. B. Dehideniya, J.

Counsel

Sunil Abeyrathne with Buddhika
Alagiyawanna for Defendant-
Respondent- Appellant.

H. Withanachchi for the Plaintiff-
Appellant-Respondent.

Argued on:

15. 11. 2018

Decided on:

14.12.2020

JUDGEMENT

Aluwihare PC. J.,

1. The Plaintiff-Appellant-Respondent (hereinafter referred to as the 'Plaintiff') filed action in the District Court of Mawanella seeking *inter alia* a declaration that the Plaintiff is the absolute owner of the land, one acre in extent, described in the second schedule to the plaint, called '*Nayawatuna Hena*' (නයාවැටුන හේන) now '*Watte Paren Yatiatha Thun Pela Paddy*' (වත්තේ පාරෙන් යටි අත වී තුන් පැලක වපසරිය) and also for an order to have the Defendant-Respondent-Petitioner-Appellants (hereinafter referred to as the 'Defendants') ejected from the land in question.
2. The Learned District Judge by his judgment dated 12th December 2005 dismissed the case of the Plaintiff subject to costs. Aggrieved by the said judgment the Plaintiff appealed to the High Court of Civil Appeals and by its judgment dated 27th April 2011, the High Court set aside the judgment of the Learned District Court and held that the Plaintiff was entitled to all the reliefs prayed for in paragraph (a) and (b) of the plaint i.e. that the Plaintiff is the absolute owner of the land depicted in the second schedule to the plaint and to have the Petitioners, their agents and servants ejected from the same.
3. In challenging the said judgment, the Defendants were granted leave to appeal on the question of law set out in Paragraph 7 (ii) of the Petition;
"Whether the Learned Judges of the High Court of Province (Civil Appellate), Kegalle have stated in their judgment erroneously that the determination or the decision by the Conciliation Board, Wakirigala area on 14th February 1976 in the matter bearing No. 295/75 had

acquired the force of a decree entered by the District Court of Kegalle?”

4. According to the Conciliation Boards Act No. 10 of 1958 (as amended) (hereinafter sometimes referred to as ‘the Act’), the Conciliation Boards have jurisdiction to settle ‘disputes’ regarding matters relating to immovable property situate wholly or partly within a particular Conciliation Board area.
5. The thrust of the argument on behalf of the Defendant-Appellant before this court was that; for the Conciliation Board to exercise its jurisdiction, there must foremost be a ‘dispute’. It was argued that ‘partitioning of a land’, not being a dispute-and being provided for by specific legislation in the form of the Partition Act- cannot be effected by a ‘settlement’ of a Conciliation Board even when such settlement has been duly filed of record in the District Court as required by Section 13 (3) (a) of the Conciliation Boards Act.

Chronology of Events

6. One Viyannalage Malida had transferred an undivided one acre from and out of the land called ‘*Nayawetuna Hena*’ upon a conditional transfer, to one Jane Nona Hettiarachchi, the wife of the Plaintiff, by Deed No. 54895 dated 25th May 1963, reserving the right to repurchase the same within 4 years. Two years later, however, by Deed No. 56097, said Malida had transferred the right to repurchase that he had retained under earlier Deed (No. 54895). Thereby, in 1965, Jane Nona became the absolute owner of the said land, one acre in extent.

7. Jane Nona, subsequently, went before the Conciliation Board of Wakirigala to have her one acre of land demarcated and carved out of the larger land, *Nayawatuna Hena*. Consequent to the decision of the Conciliation Board of Wakirigala in case No. 296/75, the divided portion of land, one acre in extent, had been surveyed and demarcated by Licensed Surveyor K. S. Panditharatne and the Plan No. 2679 dated 18th May 1976 prepared. The said divided portion is more fully described in the second schedule to the plaint. It has been submitted on behalf of the Plaintiff that Jane Nona had thus possessed a defined and a divided portion of land as a distinct and a separate land, from that point onwards.
8. In 1982, Malida had filed an action in the District Court of Kegalle against Jane Nona (case No. 2419/L) seeking a declaration that the above-mentioned deeds No. 54895 and No. 56097 are null and void and to recover the possession of the land Jane Nona was in possession of. The judgment in this case had been entered in favour of Malida.
9. Aggrieved by the aforesaid judgment, Jane Nona had appealed to the Court of Appeal. While the case was pending before the Court of Appeal Malida had passed away and Malida's wife and children were substituted. The said decision of the District Court had been set aside by the Court of Appeal. Thereafter, leave to appeal had been sought against the judgment of the Court of Appeal, which application had been refused by the Supreme Court by its order dated 26th March 1996.
10. In the year 1996, Jane Nona had transferred the said land to her husband, Kirihamy Seneviratne, the Plaintiff, by Deed No. 3946 ['P27'].

11. Undeterred by the unsuccessful attempt to have the deeds executed in favour of Jane Nona annulled, the 1st and 2nd Defendants (the wife and a child of Malida) had filed a Partition action in the District Court of Mawanella. The court had dismissed this action (case No. 201P) because the case had not been diligently prosecuted.
12. Trouble appears to have arisen again in 2003. The Plaintiff alleges that on or about 31st January 2003, the Defendants had forcibly entered the land in question and threatened the Plaintiff ordering not to enter the land, leading to the filing of the present case before the District Court, which, as referred to earlier, was dismissed by the Learned District Judge.

The Judgment of the High Court of Civil Appeals

13. The High Court of Civil Appeals, by its judgment of 27th April 2011 set aside the decision of the Learned District Judge and determined that the Plaintiff is the sole owner of the portion of land described in the second schedule to the plaint and that the Plaintiff is in fact entitled to eject the Defendant-Respondents and their agents and those who are claiming under them from the possession of the said land.
14. The High Court had held in its judgment that; *“It is clear upon the perusal of the document marked P35, that the determination made by the Conciliation Board on 14th February 1976 and the Certificate of settlement issued on 20th November 1976, in accordance of provisions of section 13(2) of the Conciliation Board Act has been filed of record, in accordance with the provisions of section 13(3)(a) of the said act, in the case bearing number 2498/Sama Mandala of the District Court of Kegalle.”*

“In the circumstances, the determination or the decision made by the Conciliation Board of Wakirigala area on 14th February 1976 in the matter bearing no 295/75 had acquired the force of a decree entered by the District Court of Kegalle.”

“We are of the opinion that the learned District Judge had erred himself in law by holding that the Conciliation Board Act did not vest authority with the Conciliation Board to partition a land.” (Page 10-11 of the judgment)

15. In arriving at their decision, the Learned Judges of the High Court relied on Section 13 of the Conciliation Boards Act. Here, it would be useful to consider Section 13 within the make and mechanism of the Conciliation Board as formulated by the Act.

Make and Mechanism of the Conciliation Board

16. Conciliation Boards as established by the Conciliation Boards Act functioned until such time as they were abolished and subsequently replaced with Mediation Boards constituted under the Mediation Boards Act No. 72 of 1988. The purpose of Conciliation Boards was to provide a forum to settle minor disputes at the community level without the time consuming and costly process of litigation before a formal court. The make and mechanism of the Conciliation Boards are such that the dispute between the parties need not be settled by an application of the rules of law. Panels of Conciliation are not constituted by persons learned in the law, but rather by any person resident in a Conciliation Board area or any public officer engaged in any work in that Conciliation Board area fit to be a member of such panel, in the

opinion of the recommending body or person (See Sections 3 (3) and 3 (4)).
No pleadings or precise definition of legal issues takes place.

17. Section 13 of the Conciliation Boards Act reads thus;

Section 13. (1) Any party to a civil dispute which is settled by a Conciliation Board in any Conciliation Board area may, within thirty days after the date of settlement of such dispute, in writing notify to the Chairman of the Panel of Conciliators constituted for such Conciliation Board area that, with effect from such date as shall be specified in the notification, the settlement effected by such Board will be repudiated by him for the reasons stated in the notification, and, where such notification is made with such reasons stated therein, such settlement shall cease to be in force from the date specified in such notification.

*(2) Where the written notification referred to in subsection (1) is not received by such Chairman within thirty days after the date of settlement of such dispute, such **Chairman shall forthwith transmit to the District Court** or the Court of Requests or the Rural Court, as the case may be, having jurisdiction to hear and adjudicate upon such dispute, **a copy of the settlement recorded by that Board**. Such copy shall be signed and certified by the President of that Board.*

*(3) (a) Immediately upon the receipt by the District Court or the Court of Requests, as the case may be, of the copy of the settlement referred to in subsection (2), the District Judge or the Commissioner of Requests of that court shall cause such copy to be filed of record in such court. **Such settlement shall, with effect from the date of such filing, be deemed to be a decree of that court, and such of the provisions of the***

Civil Procedure Code as relate to the execution of decrees shall, as far as may be practicable, apply mutatis mutandis to and in relation to such settlement which is deemed to be a decree.....

18. Section 13 of the Act- on which the decision in the High Court pivoted- has the effect of bestowing on a settlement of a Conciliation Board, the force of a decree of the District Court, once it is duly registered in the District Court. However, we are of the opinion that Section 13 of the Conciliation Boards Act, rather than being read in isolation, should be read together with the other provisions of the Act and applied.

Jurisdiction of the Conciliation Boards

19. Section 6 of the Conciliation Boards Act sets out the offences or disputes that can be brought before a Conciliation Board thus;

Section 6. The Chairman of the Panel of Conciliators constituted for any Conciliation Board area may, and shall, upon application made to him in that behalf, refer for inquiry to Conciliation Boards constituted out of that Panel the following disputes and offences:-

(a) any dispute in respect of any movable property that is kept, or any immovable property that is wholly or partly situate, in that Conciliation Board area; (emphasis added)

(b)

20. Section 6 delineates that where the subject matter is any immovable property wholly or partially situate in the particular Conciliation Board area, a ‘dispute’ regarding such property can be brought before the Conciliation Board. R. K. W. Goonesekere and Barry Metzger in their

research evaluating the role of the Conciliation Boards, titled *'The Conciliation Boards Act: Entering the Second Decade'* appearing in *'The Journal of Ceylon Law'* (Volume 2, June 1971) in reference to Section 6 of the Act, have expressed the opinion that *"... regard must be had for the terms used in Section 6, particularly the use of the word "dispute". It suggests a deliberate restriction of the Board's jurisdiction to something less than all matters which can be brought before a civil court. A dispute implies that there is an area of conflict which, if not resolved will lead to an action by one party against the other. The facts should reveal the existence of a dispute...."* (at page 53). The writers have gone on to express the view that *"certain matters which properly may be brought before the court do not involve a dispute. For example, a partition action is founded on the inconvenience of co-ownership, not on there being a dispute between parties as to their respective rights."* The authors say that, as these matters do *'not necessarily involve a dispute'*, they cannot, therefore, be inquired into by a Conciliation Board.

21. The learned counsel for the Defendant-Appellants presented his argument on a basis similar to that which is set out in the preceding paragraph. The learned Counsel contended that; the Conciliation Boards are not vested with the power to partition lands, since partition actions do not come under the category of 'civil disputes' and they are special matters, as explained in the then Partition Act No. 16 of 1951, and drew the attention of court to Section 2 of the Partition Act, the law that was applicable at the point of time relevant to the dispute in issue.
22. Section 2 of the Partition Act of 1951 states; *"Where any land belongs in common to two or more owners, any one or more of them may institute an action for partition or sale of the land in accordance with the provisions of this Act"*.

23. On the basis of the aforesaid, it was argued that the settlement reached before the Conciliation Board (No. 295/75) and the District Court of Kegalle, by causing the said settlement to be filed of record (2498/සෞම මණ්ඩල), cannot be considered as a partition action under the Partition Act. Thus, it was contended on behalf of the Defendant-Appellants, that the learned judges of the High Court of Civil Appeals erred in holding that the decision of the Conciliation Board has acquired the force of a decree.
24. It is true that in the case of **R. Arnolis v. R. Hendrick** 75 NLR 532 it was held that an action for partition of land can be instituted without the production of the certificate from a Conciliation Board, which is referred to in Section 14 (1) of the Conciliation Board Act. I do not see a conflict between the decision in **Arnolis** (*supra*) and the jurisdiction of the Conciliation Board to entertain a complaint relating to a land dispute. On one hand any co-owner of a land, to obtain relief against the inconvenience of common possession has the right to make an application to a District court for relief and may do so, not necessarily due to the existence of a dispute. K.D.P. Wickremesinghe in his work “The Law of Partition in Ceylon” states that “*a Partition action is not founded upon a ‘wrong’* (page 24).”
25. The law, on the other hand, would not stand in the way if co-owners decide to have a co-owned land partitioned amicably without the intervention of the court. Where similarly, two co-owners may enjoy the property, provided they know what each is entitled to. If a **dispute arises** in relation to the enjoyment of land under any of the arrangements referred to, their right to refer such matter to the Conciliation Board (presently Mediation Board) for a settlement cannot be denied, for the simple reason that, now there exists a **dispute relating to immovable property**.

26. If the disputing parties reach a settlement and that settlement is not repudiated by a party within the 30-day period provided by Section 13(1) of the Act and consequently once it is forwarded to the relevant District Court and filed of record in terms of Section 13(3) of the Act, the settlement so reached would be deemed to be a decree of that District Court by operation of law.
27. One needs to appreciate, however, the **distinction** between a Partition decree and a settlement entered before a Conciliation Board. The settlement, once it acquires the status of a decree of court, would **only bind the parties** to the settlement or anyone who claims rights under those parties and no other. As opposed to that, the essence of a Partition decree is that the persons declared under it obtains a title good against the whole world, it being an action *in Rem*. Thus, proceedings before the Conciliation Board cannot be equated to the partition proceedings contemplated by the Partition Act.
28. On the other hand, whenever parties seek the assistance of the Conciliation Board to resolve any ‘dispute’ relating to immovable property, the objectives of the Act demand that the Conciliation Board makes every endeavour to mediate and bring about a settlement to the dispute within the framework of the Act. In my view, it would be artificial to argue that ‘partitioning’ of land cannot strictly be considered a dispute thereby ousting the jurisdiction of the Conciliation Board and driving the parties to litigation continuing for generations, wringing them dry of resources. Thus, whether the parties approached the Conciliation Board due to a subsisting dispute or not is a matter to be determined based on the facts and circumstances of each case.

29. It is pertinent to note here that the above reasoning finds support in the continuation of the research (alluded to before) by Goonesekere and Metzger published in the December 1971 Volume (2) of **'The Journal of Ceylon Law'** titled *'The Conciliation Boards Act: Necessary Amendments and Administrative Reforms'* Expressing the opinion that although it would be prudent to say that certain civil actions, including partition actions "*for differing reasons are inappropriate for Conciliation*", the writers observed that the jurisdiction of Conciliation Boards could nevertheless be invoked "*as to partition actions requiring an attempt at reconciliation*" while making clear that the Boards have no power to enter settlements partitioning land with the in rem effect of a decree under the Partition Ordinance.
30. The writers went onto state that, "*It is desirable, as much as possible, to encourage amicable partitions by conveyances rather than by judicial decree. This may be encouraged by conciliation; according to J. S. C. statistics already 15 per cent of all partition actions filed are settled. The settlement of partition disputes may not prove as successful as might be hoped, however, because of the frequent desire of the parties, even if they are in agreement as to their shares, to have a judicial partition nonetheless to settle title and thus remedy any flaws in their paper pedigrees. Where parties are willing to partition amicably, but there is a dispute as to the shares or the manner of partition, proceeding before a Conciliation Board can help resolve the differences. Jurisdiction of the Conciliation Boards should therefore require these matters to be brought before the Boards and settlements should be confined to enabling the parties to conclude any of the non-judicial modes of partition recognized by law. Boards' experience under such a rule should be closely monitored because of the strong possibility such jurisdiction will not yield the substantial benefits hoped for.*" (at page 295).

31. The facts of the case before us, therefore, must be considered in the backdrop of the legal position referred to above.

Did a Dispute Subsist, within the parameters of the Conciliation Board?

32. A certified copy of the case record in District Court of Kegalle case no. 2419/L was marked and produced as 'P3', in the proceedings before the District Court in the instant case. Kirihamy had testified to the effect that after Malida transferred the land to Jane Nona in 1965, one acre was demarcated and fenced with the assistance of the Grama Niladari on 19th February 1965. Since then he and his wife Jane Nona had improved and enjoyed the portion of the land so demarcated (page 169 of the brief). Subsequently, however, they had been harassed by one of Malida's sons and the fence had been damaged by removing the barbed wire. At this point Kirihamy maintains that his wife went to the Conciliation Board as they wanted to carve out their one acre with a proper boundary. The relief sought from the Conciliation Board had been to separate the land belonging to Jane Nona and formally fix the boundary. Thus, Jane Nona sought the assistance of the Conciliation Board, owing to her peaceful possession being disturbed by Malida's son Nissanka, who, according to Kirihamy, was residing with Malida (page 176 of the brief).

33. From the facts, it appears that there had been a dispute between the Defendant-Appellants and the Plaintiff at the point of time the matter was referred to the Conciliation Board. The Conciliation Board having entertained the complaint, had directed surveyor Panditharathne to survey the land. He had done so on 19th April 1976 and had prepared the plan No. 2679 dated 27th July 1976, which had been marked and produced as 'P12' in the instant case and the same refers to the Wakirigala conciliation case

No. 295/75. The plan clearly depicts a one-acre land carved out of *Nayawatuna Hena*. The surveyor Panditharathne in his evidence in the case 2419/L has stated that he received a commission from the Wakirigala Conciliation Board to carve out, an extent of one acre, from and out of the land called *Nayawatuna Hena*. Accordingly, he had gone to the land and had explained to Malida the manner in which he intends to separate one acre from the larger land. He had added that, having surveyed, he prepared the plan No. 2679 depicting the boundaries of the one-acre lot, separated from the larger land of *Nayawatuna Hena*. He also had stated that he surveyed the portion of land which one party had enjoyed possession (page 160 of the brief).

34. Ironically the Defendant-Appellants themselves had taken up the position that *“there was only a decision to carving of a portion, ONE ACRE of this land and to give same to the Respondent”*. (Paragraph 7 of the written submissions dated 13th September 2016, filed before this court on behalf of the Defendant- Appellants). There is no doubt, this is exactly what was done by the Conciliation Board and the order of settlement clearly reflects this position.
35. The settlement recorded by the Conciliation Board clearly states that the *“the parties agreed to settle the dispute on 14.02.1976”* and it is further recorded that *“pursuant to the survey carried out by the licensed surveyor K.S.D. Panditharathne on 19.04.79, land in extent of 1-acre owned by D.J. Hettiarchchi was surveyed and separated.”* (...මැන වෙත් කරන ලදී.)
36. The facts of the instant case not only belie this argument but in fact conclusively prove that the case does not come within the ambit of the Partition Act as well, in as much as by deeds 54859 and 56097, executed by the original owner Malida, Jane Nona became the absolute owner of the

property, exclusively possessed it and the one acre of Nayawatuna Hena in question ceased to be part of the common property.

The action that was filed by the heirs of Malida was nothing more than a covert attempt to bring the case within the ambit of the Partition Act, deprive Jane Nona and her successors of property which was rightfully theirs and give the Defendants a title in rem.

In two cases century apart, this court has come down hard on the practice. In **Selenchi Appuhamy v. Livinia and Others** 9 N.L.R.59, Layard CJ stated *“I have never come across a more manifest attempt to abuse the Partition Ordinancethe object being to obtain good title against all the world in respect of a land not held in common Plaintiff’s action must be dismissed”*

37. The above position was followed by a series of decisions that followed after **Selenchi Appuhamy** (*supra*) and notably the pronouncement made by his Lordship Justice Weerasuriya in the case of **Angela Fernando v. Devadeepthi Fernando and Others** 2006 2 SLR 188 where his Lordship succinctly stated;

*“It is a prerequisite to every partition action that the land sought to be partitioned **must be held in common** as seen from the provisions of section 2 (1) of the Partition Law. What is understood as **common ownership** is where **persons do not hold on separate and distinct titles** or where **land is not held as separate and divided lots**. When land is not held in common, but exclusively by a party even though under prescriptive title, no action can be maintained to partition such land.*

It is imperative that the investigation of the title must be preceded by a careful examination of the preliminary issue whether the land sought to be partitioned is commonly owned as required by section 2 (1) of the Partition Law. Learned District Judge having carefully examined this question had

correctly held that the land was dividedly possessed as from 1938 and proceeded to dismiss the action without resorting to a full and exhaustive investigation as to the rights of the parties, which in the circumstances was lawful and justified.”

It is manifestly clear that even in the instant case, both Malida and Jane Nona had enjoyed distinct portions of land since 1965.

38. When one considers the totality of the facts relating to this matter, it is apparent that the incident had had all the hallmarks of a ‘dispute’ relating to ‘immovable property’ between Malida and Jane Nona Hettiarchchi and the Conciliation Board has acted well within the jurisdiction vested in it, to resolve the dispute.

39. I am also of the view that, when the learned judges of the High Court of Civil Appeals stated that *“We are of the opinion that the learned District Judge had erred himself in law by holding that the Conciliation Board Act did not vest authority with the Conciliation Board to partition a land.”* The learned judges did not refer to the word ‘partition’ in the context of the partitioning land in terms of the Partition Act (Partition Law) but in a literal sense.

40. Considering the reasoning referred to above, I answer the question of law on which leave to appeal was granted in the negative. The judgement of the High Court of Civil Appeal dated 27th April 2011 is affirmed.

41. Accordingly, I make order dismissing this appeal.

The Respondents are entitled to the cost of this appeal.

Appeal Dismissed

Judge of the Supreme Court

Priyantha Jayawardena, PC. J.

I agree.

Judge of the Supreme Court

L. T. B. Dehideniya, J.

I agree.

Judge of the Supreme Court