

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRILANKA

**In the matter of an Appeal from the
judgment of Civil Appellate High Court of
Kalutara in case
No. WP/HCCA/KAL/8/2001(F) dated
30.07.2009.**

**SC APPEAL 174 /10
SC /HC/CA/LA/ 231/2009
WP/HCCA/KAL/ 8/ 2001 (F)
DC KALUTARA /5556 /P**

Maddumaralalage Dona Mary Nona of
Galhena, Beruwala.

Plaintiff

Vs

1. Maddumaralalage Don Justin
2. Maddumaralalage Don Piyadasa
3. Budagoda Arachchige Jayasena Wijewardena
4. Budagoda Arachchige Sirisena Wijewardena
- 4a. Gammampila Imiyage Dona Karunawathi
5. Maddumaralalage Susil
6. Maddumaralalage Don Leelarathne
7. Maddumaralalage Don Hemachandra
8. Maddumaralalage Don Asilin
9. Maddumaralalage Don Thilakarathne
10. Maddumaralalage Don Chandrasena
11. Payagala Mudiyanseelage alias Payagala
Mudalige Nandawathi
All of Galhena, Beruwala.
12. Kamburawala Kankanamge Panis Singho
Of No. 5, Wickremasinghe Place, Kaluth-
-ara South.
13. Hubert Danapala Ranasinghe of Kurun-
-duwatta, Indajothi Mawatha, Hirana,
Panadura.
14. Dodangoda Liyanage Podinona of Wata-
-raka, Gintota.
15. Pitawala Kankanamge Don Poliyar
Jayathilaka of Galhena, Beruwala.

Defendants

And

5, 9A. Maddumaralalage Sucil
9. Maddumaralalage Don Thilakarathne
(dead)
11. Payagala Mudiyansele alias Payagala
Mudalige Dona Nandawathi.
All of Galhena, Beruwala.
5th, 9th and 11th Defendants Appellants

Vs

Maddumaralalage Dona Marynona of
Galhena, Beruwala.

**Plaintiff-Respondent and 1a Defendant
Respondent**

1. Maddumaralalage Don Justin (Dead)
2. Maddumaralalage Don Piyadasa
3. Budagoda Arachchige Jayasena Wijewardena (Dead)
- 3A. B.A.D. Kanthi Wijewardena
- 3B. B.A.D. Dharmasena Wijewardena
4. Budagoda Arachchige Sirisena Wijewardena
- 4a. Gammampila Imiyage Dona Karunawathi
6. Maddumaralalage Don Leelarathne
7. Maddumaralalage Don Hemachandra
8. Maddumaralalage Dona Asilin
10. Maddumaralalage Don Chandrasena
12. Kamburawala Kankanamge Panis Singho
Of No. 51/2, Wickremasinghe Place, Kaluthara South
13. Hubert Danapala Ranasinghe of Kurunduwatta, Indajothi Mawatha, Hirana, Panadura.
14. Dodangoda Liyanage Podinona of Wataraka, Gintota West.
15. Pitawala Kankanamge Don Poliyar Jayathilake of Galhena, Beruwala (Dead)

Defendants Respondents

And Now Between

5, 9A - MaddumaralalageSucil

11 - PayagalaMudiyanselage alias
PayagalaMudalige Dona Nandawathie ,

All of Galhena, Beruwala.

**5th 9A and 11th Defendant Appellants
Appellants**

Vs

Maddumaralalage Dona Marynona of
Galhena, Beruwala.

**Plaintiff-Respondent-Respondent and
1A Defendant-Respondent-Respondent**

2.Maddumaralalage Don Piyadasa
3.Budagoda Arachchige Jayasena Wijewa-
-rdena (Dead)

3A. B.A.D. Kanthi Wijewardena

3B. B.A.D. Dharmasena Wijewardena

4A. Gammampila Imiyage Dona Karunawathi

6. Maddumaralalage Don Leelarathne

7. Maddumaralalage Don Hemachandra
(dead)

8. Maddumaralalage Dona Asilin (Dead)

10.Maddumaralalage Don Chandrasena

12.Kamburawala Kankanamage Panis Singho
of No. 5, Wickremasinghe Place, Kalutara
South.

13. Hubert Danapala Ranasinghe of
Kurunduwatta, Indrajothi Mawatha,
Hirana, Panadura.

14. Dodangoda Liyanage Podinona of
Wataraka, Gintota West.

15. Pitawala Kankanamage Don Poliyar
Jayathilake of Galhena, Beruwala (Dead)

Defendants Respondents Respondents

BEFORE : **S. EVA WANASUNDERA PCJ,**
SISIRA J DE ABREW J &
UPALY ABEYRATHNE J.

COUNSEL : Rohan Sahabandu, PC with S.O. Withanage for 5th 9A and 11th
Defendants Appellants Appellants.
H. Withanachchi for Plaintiff Respondent and 1A Defendant
Respondent Respondent.

ARGUED ON : 15.02.2016.

DECIDED ON : 08.06.2016.

S. EVA WANASUNDERA PCJ

Leave to appeal was granted on 30. 08. 2010. on the questions of law contained in paragraph 19 (a) to (h) of the Petition dated 10th September, 2009.

The main grievances against the judgment of the District Court and the judgment of the High Court can be identified from the questions of law, to be that **all the issues raised were not answered by the trial judge** and by doing so **the court has not investigated the title of parties** concerned and that **the land was not identified as per the extent of the same** and thereby there is a miscarriage of justice.

In the Civil Procedure Code, the requisites of a judgment is laid down in Sec. 187 , which reads as follows:

“ The judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively.”

It is procedure known and accepted in the District Court trials that the ‘points for determination’ are set down at the conception of the trial, naming the same

as “issues”. Even though the issues are raised by the plaintiff and each and every defendant or parties to the case, the trial Judge has to frame them and conduct the trial at his discretion. The Judge can accept the issues, re-frame the issues, reject the issues suggested by parties and somehow get the path straight to conduct the trial on the said points for determination because it is his onus to write the judgment on those issues. It is also trite law that when the issues are framed, the pleadings of the case recede to the back ground because it is only the issues which will be attended to by the Judge at the time of writing the judgment. Of course, he has to place at the beginning of the judgment , a ‘concise statement of the case’, which means a summary of the pleadings of the plaintiff and the pleadings of other parties and what they are contesting about etc. as it is presented to the Court. It would be a narration of facts and the focus would be the reason why they are before court.

In a Partition action, the procedure is laid down by the Partition Act as to how to file a partition action, what should be done first and how court can issue a commission to survey the land etc. but at the end of the case, writing of the judgment has to be done in compliance with Sec. 187 of the Civil Procedure Code. In a partition action, the judge has to decide what share of the land should be allotted to which party. It is different from answering issues in a money recovery case, a divorce case, a rent and ejection case, a land dispute case, a debt recovery case, a case based on contract or a case based on delict etc. In those cases, the answers could be in the affirmative or in the negative, may be with some comment or a remark which would show the inclination to the final decision. But in a partition action, each party claims different portions of one big land and the Judge is expected to sort out what share of the land should be granted to which plaintiff and or defendant. For this reason, I find that the onus of the Judge in a partition case is somewhat more difficult than in any other kind of case, since the Judge has to specifically calculate the share of entitlement. If all the parties were friends with each other living on one land, they can come to a settlement in how to partition the land and how many perches or what extent of land each one would get, then get it surveyed by a surveyor and enter into an amicable partition. Then they need not file a partition action. They can write an amicable partition deed, if they wish to do so.

Those who come before court in a partition action are those who cannot share the land and use the same peacefully. They have to plead that the reason for

filing the action is that peaceful possession and enjoyment of the land as co-owners is difficult as a pre condition to requesting court to decide on each one's share at the end of the case. The parties normally contest that the share which they have been in possession and have been enjoying be granted to them. In the case in hand I observe that most of the parties in their statements of claim have claimed rights over the cultivation of permanent crops such as coconut trees, jak trees etc. Some have made claims on prescription.

At the trial in this case, 32 issues were raised by all the parties. The plaintiff had raised 8 issues; the 5th 9th and 11th Defendants filing a joint statement of claims had raised 6 issues; the 2nd Defendants had raised 6 issues; the 4th Defendant had raised 3 issues ; the 3rd Defendant had raised 3 issues; and the 10th, 12th, 13th, and 14th Defendants had raised 6 issues on 08. 03. 1993.

The whole land was a consolidation of 9 lands with different names. All the parties had agreed that the corpus to be partitioned was according to Plan No. 1050 done by the Court Commissioner W.L.Fonseka dated 18th October, 1989. The Commissioner's report is attached to it with the same date. Lots 1 and 3 of the said Plan No. 1050 was accepted as the land to be partitioned excluding Lot 2 of about 30 perches for the ' heen ela ' meaning the narrow waterway. I observe that there was no dispute regarding the extent of the land being of an extent of 13 Acres 2 Roods and 22Perches. I see no merit in the third contention of the Appellants that the land was not identified specifically with regard to the extent of the land because it was accepted by all parties that it is the land to be partitioned.

The District Judge, having recorded the 32 issues and having gone through a lengthy trial with almost all the defendants having given evidence with regard to their permanent plantations etc. had answered only issues 1 to 7. He had added that " in view of the answers given to issues Nos. 1 to 7, answering the other issues does not arise ". The Appellants appealed to the High Court and it was held that the District Judge had written the judgment in accordance with Sec. 187 of the Civil Procedure Code and the Appeal was dismissed.

I observe that 25 issues have not been answered by the District Judge. Going through the evidence, it is apparent that some plantations were highly contested and some of the land was claimed on prescription as well as on paper title.

In the case of *Dona Lucihamy Vs Cicilianahamy* 59 NLR 214, it was held by the Supreme Court that **Court must answer the points of contest**. This was a Partition Action and Sec. 187 of the Civil Procedure Code was discussed. The District Judge had mentioned that, “ All the issues that have been raised can be crystalised in this one contest and that it whether the land in suit is Dewatagahawatta or Hedawakagahawatta “ , and gone ahead with only deciding that. The answers to the issues had been only addressed as “yes”, “no” and “does not arise” and the Supreme Court had held that “ Bare answers to issues or points of contest, whatever may be the name given to them, are insufficient unless all matters which arise for decision under each head are examined”. Since the trial judge had failed to examine title of each party it was held that it had prejudiced the substantial rights of the parties and therefore the Supreme Court had ordered a new trial.

In an even earlier case, in *Mohamedaly Adamjee and others Vs Hadaad Sadeen*, 58 NLR 217, it was laid down by the Privy Council that “ if it appears to the Apex Court when hearing an appeal in a partition case, **the investigation of title has been inadequate it should** ,even though no party before had raised that point, **set aside the decree.**” In *Chandrasena Vs Piyasena* 1999, 3 SLR 201, the same principle was adopted. It was held 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 the powers of revision’.

The Appellant further contested that the land to be partitioned was not identified as to the extent of the same. In almost all the land and partition cases which come before this Court, I find that this is one of the questions of law. According to the Partition Law, a commission to survey the land is taken out at the initial stages and at that stage, the parties to the action resolve the matter about the identification of the land. Thereafter it should be taken as an admitted fact. But more often than not, the parties who are not satisfied with their share or not getting a share, complain in appeal that the land was not identified, the extent is not the same as in the plaint or that it bears a different name as the name of the land in the deeds are different. The main purpose of the Partition Law fails at the end of the case. The main purpose is to get their block of land neatly demarcated as being co-owners of one land had become troublesome and possession of their blocks of land peacefully had become impossible. In the case *of Sopaya Silva and another Vs Magilin Silva* 1989

2SLR 105, Justice Sarath N. Silva (as he then was) dealt with the case where the plaintiff in the partition action said that it is of an extent of 8A 3R 29P and when the Commission was taken out the surveyor surveyed an extent of 11A 1R 33P. When the case is such, the Supreme Court held that ;

“On receipt of the surveyor’s return which disclosed that a substantially larger land was surveyed the District Judge should have **decided on one of the following courses after hearing the parties:**

- i. To reissue the Commission with instructions to survey the land described in the plaintiff. The surveyor could have been examined as provided as provided in section 18(2) of the Partition Law to consider the feasibility of this course of action.
- ii. To permit the Plaintiffs to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment of the plaintiff and the taking of consequential steps including the registration of a fresh lis pendens.
- iii. To permit any of the Defendants to seek a partition of the larger land as depicted in the preliminary survey. This course of action involves an amendment of the statement of claim of that defendant and the taking of such other steps as may be necessary in terms of section 19(2) of the Partition Law.
- iv. The **Surveyor** under section 18(1) (a)(iii) of the Partition Law **must** in his report state 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 plaintiff**. Considering the finality and conclusiveness that attach 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 this requirement by the Surveyor.**

In this case also a fresh trial was ordered according to the guidelines given above. I am of the view that in all the partition cases, the aforementioned guidelines should be adhered to.

In the case in hand , I hold that the District Judge has not investigated the title of the parties to the action. He has only answered issues Nos. 1 to 8 only out of the 32 issues raised by all the parties. Evidence in this case was very long. The District Judge had not analyzed the evidence at all. He has just held that the

shares should be allocated according to the plaintiff has mentioned in the plaint. He has not given reasons for having done so either. According to the way he has written the judgment, if it is decided that the Plaintiff is correct, it is not necessary to look into other issues raised and/or other claims placed before court by others even though they all led evidence at the trial.

The High Court Judges have affirmed the judgment of the District Court , by not having any concern with regard to the Appellants' arguments but going on the basis that some of the issues overlap each other and therefore the District Judge has decided to answer only the issues which are a summary of all the issues etc. I hold that the High Court also had come to a wrong finding.

In the circumstances, even though another trial would take time, there is no other option but to order a fresh trial since the title of all the parties have to be gone into in the interest of justice. I set aside the Judgment of the High Court and the judgment of the District Court. I make order that a trial de novo to be held before the District Court. The Appeal of the Appellants is allowed. I order no costs.

Judge of the Supreme Court

Justice Sisira J De Abrew

I agree.

Judge of the Supreme Court

Justice Upaly Abeyratne

I agree.

Judge of the Supreme Court