

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

Edirisinghe Arachchige
Chandrasiri Edirisinghe,
Polwatte Clinic, Debathgama,
Kegalle.
Plaintiff-Respondent-Appellant

Edirisinghe Arachchige Saumya
Subashini Edirisinghe of
G 134/2/A, Thalewela, Hettimulla.
Substituted Plaintiff-Respondent-
Appellant

SC APPEAL NO: SC/APPEAL/245/2014

HCCA NO: SP/HCCA/KAG/683/2010

DC MAWENELLA NO: 13163/P

Vs.

1. Edirisinghege Dayawathie
Edirisinghe of B 238/1,
Debathgama, Kegalle.
1st Defendant-Appellant-
Respondent
- 1a. Thushara Dilrushki of B 238/1,
Debathgama, Kegalle.
Substituted 1st Defendant-
Appellant-Respondent

2. Medagoda Durayalage Gunasena of B 238, Debathgama, Kegalle.
- 2a. Medagoda Durayalage Wasantha Manel Rajkumar of B 238/1, Debathgama, Kegalle.
- 2b. Thushara Dilrushki of B 238/1, Debathgama, Kegalle.
3. Edirisinghe Pedige Hemadasa of Polwatte, Debathgama, Kegalle.
4. Edirisinghe Pedige Gunathileke, C/O E.D. Hemadasa of Polwatte, Debathgama, Kegalle.
- 4a. Priyantha Edirisinghe Edirisinghe of C/O E.D. Hemadasa of Polwatte, Debathgama, Kegalle.
5. Edirisinghe Pedige Nimal Chandrasiri of Polwatte, Debathgama, Kegalle.
- 6a. Edirisinghe Pedige Nancy Edirisinghe of Debathgama, Kegalle. (also 7a and 12th Defendants)
7. Edirisinghe Pedige Seeladasa Edirisinghe of Near School, Debathgama, Kegalle.
- 7a. Edirisinghe Pedige Nancy Edirisinghe of Debathgama, Kegalle. (also 6a and 12th Defendants)

8. Edirisinghe Pedige Jayasena
Edirisinghe of Aluthkumbura,
Debathgama, Kegalle.
9. Anton Gamini Edirisinghe of
C/O Jayasinghe Edirisinghe,
Debathgama, Kegalle.
- 9a. Edirisinghege Jayasinghe of
Debathgama, Kegalle.
- 10a. Edirisinghege Sunil Edirisinghe of
Debathgama, Kegalle.
- 11a. E. Ramya Kumari Dissanayake of
Debathgama, Kegalle.
12. Edirisinghe Pedige Nancy
Edirisinghe of Debathgama,
Kegalle. (also 6a and 7a
Defendants)
13. Edirisinghege Raja Wijesena
alias Edirisinghege Wijeratne of
Debathgama, Kegalle.
14. Edirisinghege Hemachandra of
Udabage, Debathgama, Kegalle.
15. Ranhawadi Gedara Thilakawathie
of Udabage, Debathgama, Kegalle.
Defendant-Respondent-
Respondents

Before: Hon. Justice S. Thurairaja, P.C.
Hon. Justice Kumudini Wickremasinghe
Hon. Justice Mahinda Samayawardhena

Counsel: Dr. Sunil F.A. Coorey with Sudarshani Coorey for the
Substituted Plaintiff-Respondent-Appellant.
Sapumal Bandara with Vishmi Abeywardena 1st Defendant-
Appellant-Respondent.

Written Submissions:

By the Plaintiff-Respondent-Appellant on 02.02.2015

By the 1st Defendant-Appellant-Respondent on 24.04.2015

Argued on: 18.03.2024

Further Written Submissions:

By the Plaintiff-Respondent-Appellant on 06.05.2024

By the 1st Defendant-Appellant-Respondent on 02.05.2024

Decided on: 16.07.2024

Samayawardhena, J.

The plaintiff filed this action in the District Court of Mawanella naming 11 defendants seeking to partition the land called Gederawatte alias Kospelawatte in extent of 18 lahas of paddy sowing area. The 12th to 15th defendants intervened subsequently. The contest was between the plaintiff and the 1st defendant, the plaintiff's sister, regarding the identification of the corpus, not the pedigree. The 1st defendant sought dismissal of the action on that basis. The District Court held in favour of the plaintiff and partitioned the land accordingly. The High Court of Civil Appeal of Kegalle allowed the appeal of the 1st defendant and dismissed the plaintiff's action. The plaintiff is now before this Court against the judgment of the High Court. The appeal is confined to the question of identification of the corpus.

In the plaint, the plaintiff sought to partition the land known as Gederawatte alias Kospelawatte bounded on the North by Aswedduma Kumbura, Ela Wella; East by Aluth Kumbure Ivura; South and West by Aluth Kumbure Hene Agala in extent of 18 lahas of paddy sowing area.

The contention of the 1st defendant is that Gederawatte alias Kospelawatte is one land, while Kospelawatte is another land. The plaintiff combined both lands and created a fictitious land not identifiable on the ground.

At the trial, only the plaintiff and the 1st defendant gave evidence. The plaintiff categorically stated that there are not two lands, but only one land, which is Gederawatte alias Kospelawatte, and it is this land he seeks to partition.

The plaintiff's position is not supported by his own evidence.

The plaintiff marked 14 deeds as P1-P14 without any objection. Of these, the deeds marked P1, P2, P11 and P14 refer to Gederawatte alias Kospelawatte, while deeds marked P3-P10 refer to Kospelawatte. Significantly, deeds marked P12 and P13 identify Gederawatte alias Kospelawatte as one land and Kospelawatte as another land.

By deed marked P12, the plaintiff gifted these two lands to the 1st defendant and her husband, the 2nd defendant.

In P12, the first land is described as Gederawatte alias Kospelawatte bounded on the North by Aswedduma Kumbura; East by Ivura of the same land (i.e. Gederawatte alias Kospelawatte); South and West by Karunapedige Hene Agala in extent of 18 lahas of paddy sowing area.

The second land is described as Kospelawatte bounded on the North by Ela Wella; East by Aluth Kumbure Ivura; South and West by Aluth Kumbure Hene Agala in extent of 18 lahas of paddy sowing area.

In P12, the plaintiff also sets out how he became entitled to those two lands: the first land, by Deed of Transfer No. 316 dated 08.11.1979, and the second land, by Deed of Transfer No. 11097 dated 26.10.1978, along with several other deeds. Deed No. 316 was marked P2, and Deed No. 11097 marked P9.

Deed marked P13 is the Deed of Cancellation executed by the plaintiff cancelling the deed marked P12. According to P13, as described by the plaintiff in the schedule to the deed, these two lands have been registered in the Land Registry as two different lands in two different folios: Gederawatte alias Kospelawatte in folio C430/102, and Kospelawatte in folio C445/200.

Thereafter, the plaintiff had filed an action in the same District Court (Case No. 526/L) to evict the 1st and 2nd defendants from both lands and recover damages. The plaint filed in that case was marked 1V2. In that plaint, the plaintiff clearly mentioned that there are two lands and, in the prayer, sought ejectment of the 1st and 2nd defendants from both lands.

As suggested by counsel for the 1st defendant during cross-examination of the plaintiff in the District Court, what the plaintiff has done is to combine details from both lands into one, albeit with an extent of 18 lahas of paddy sowing area, not double that amount (despite each land having an extent of 18 lahas of paddy sowing area).

If I may elaborate this further, according to P12, the northern boundary of Gederawatte alias Kospelawatte is Aswedduma Kumbura, whereas the northern boundary of Kospelawatte is Ela Wella. The plaintiff in this action has given the northern boundary of Gederawatte alias Kospelawatte as Aswedduma Kumbura and Ela Wella.

The eastern boundary of Gederawatte alias Kospelawatte is Ivura of the same land (Gederawatte alias Kospelawatte), whereas the eastern

boundary of Kospelawatte is Aluth Kumbure Ivura. The plaintiff in this action has given the eastern boundary of Gederawatte alias Kospelawatte as Aluth Kumbure Ivura.

The southern boundary of Gederawatte alias Kospelawatte is Karunapedige Hene Agala, whereas the southern boundary of Kospelawatte is Aluth Kumbure Hene Agala. The plaintiff in this action has given the southern boundary of Gederawatte alias Kospelawatte as Aluth Kumbure Hene Agala.

The western boundary of Gederawatte alias Kospelawatte is Karunapedige Hene Agala, whereas the western boundary of Kospelawatte is Aluth Kumbure Hene Agala. The plaintiff in this action has given the western boundary of Gederawatte alias Kospelawatte as Aluth Kumbure Hene Agala.

According to the Preliminary Plan marked X, the boundaries are as follows: North by Aluth Kumbure Ela; East by Aluth Kumbure Ela and Aluth Kumbure Hene claimed by K.G. Somawathie; South by Aluth Kumbure Hene claimed by K.G. Somawathie and Baby Nona; West by Aluth Kumbure Hene claimed by Seeladasa, Karuna Pediya Watta according to the 1st and 2nd defendants but Aluth Kumbure Hena according to the plaintiff, Karuna Pediya Watta according to the plaintiff but Kospela Watta according to the 1st and 2nd defendants.

The surveyor has surveyed a land of 1 Acre, 1 Rood and 4.30 perches. Both parties accept that 10 perches is equal to 1 laha of paddy sowing in that area, resulting in a discrepancy of 24 perches because the plaintiff sought to partition a land of 18 lahas, equivalent to 180 perches.

The surveyor was not called to give evidence by the plaintiff although the main contest was the identification of the corpus, and particularly, the identification of the western boundary.

According to the report of the Preliminary Plan marked X1, the 1st and 2nd defendants, the 11th defendant and another person who is not a party to the action were living on that land. The 1st defendant in her evidence has stated that during her lifetime the plaintiff did not possess the land. She was 59 years of age at the time. This evidence was not challenged.

The 1st defendant's position is that the plaintiff is in possession of an adjoining portion of land, which was shown by the 1st defendant as lot 1 in plan marked 1V3. According to 1V3, the 1st to 4th defendants, 11th defendant and another person who is not a party to the action were living on the land to be partitioned. This plan was also prepared on a commission issued by the Court at the instance of the 1st defendant.

There is a real dispute regarding the identification of the corpus. The assertion of the plaintiff that there are not two separate lands by the names of Gederawatte alias Kospelawatte and Kospelawatte, but only one common land by the name of Gederawatte alias Kospelawatte, cannot be accepted. In addition to the plaintiff's deeds referred to above, the defendants' deeds marked 1V5, 3V1-3V5 refer to Gederawatte alias Kospelawatte, whereas deeds marked 5V1, 9V1-9V3, 10V1 and 11V1 refer to Kospelawatte. The deed marked 1V4 (also marked by the plaintiff P12) and 11V2 refer to both lands. However, in 11V2, although two lands are referred to, both are titled Kospelawatte but with different boundaries. The boundaries of the first Kospelawatte correspond to those of Gederawatte alias Kospelawatte, while the boundaries of the second correspond to those of Kospelawatte.

It is not clear which deeds marked in evidence at the trial are relevant to the land depicted in the Preliminary Plan. The plaintiff's position that all the deeds are relevant to the land depicted in the Preliminary Plan, which is described as Gederawatte alias Kospelawatte, cannot be accepted.

In a partition action, identification of corpus is a *sine qua non* before proceeding to the investigation of title. The rationale behind this principle is that title cannot be investigated in a vacuum or in the abstract without a specific subject matter. This principle is applicable not only to partition cases but also to any land case. In essence, if the corpus cannot be properly identified, the action must fail on that ground alone.

However, I must hasten to add that, after lengthy trials, dismissal of cases on non-identification of the corpus, without going into the merits and complexities of the case, should not be a convenient method of disposing of cases. It must be a well-considered serious decision. The Court cannot decide on the identification of the corpus by merely comparing the boundaries and extent of the land described in the schedule to the plaint, which details have been extracted from old deeds, with the land surveyed by the Court commissioner. Boundaries change over the years and so does the extent. The Court also cannot totally depend on conversion tables that equate traditional land measures to English standard equivalents. The Court must decide on the question of identification of the corpus upon consideration of the totality of the evidence, not on isolated pieces of evidence.

It is also important to note that if a party intends to contest a case on the identification of the corpus, it must be raised as an issue in the trial court, as the identification of the corpus is a pure question of fact that cannot be raised for the first time on appeal.

In *Jayasuriya v. Ubaid* (1957) 61 NLR 352 it was held that “*In a partition action there is a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it is always open to him to call for further evidence (in a regular manner) in order to make a proper investigation.*”

This was highlighted in several cases of this Court including *Brampy Appuhamy v. Menis Appuhamy* (1958) 60 NLR 337, *Uberis v. Jayawardene* (1959) 62 NLR 217, *Piyasena Perera v. Margret Perera and Others* [1984] 1 Sri LR 57, *Abeyasinghe v. Kumarasinghe* [2008] BLR 300, *Sopinona v. Pitipana Arachchi and Others* [2010] 1 Sri LR 87 at 105-108, *Hapuarachchi and Others v. Podi Nilame* [2021] 1 Sri LR 134.

The failure to identify the corpus to be partitioned has been considered a fatal error, amounting to a serious miscarriage of justice. This warrants the Court's intervention through its extraordinary revisionary jurisdiction to rectify the injustice, especially when it impacts third parties. The leading case in this regard is *Somawathie v. Madawela* [1983] 2 Sri LR 15.

Indian Courts have also regarded the identification of the land in suit as an imperative requirement. It was held by the Supreme Court of India in *Nahar Singh v. Harnak Singh and Others* 1996 (6) SCC 699 that "*it is well settled that unless the property in question for which the relief has been sought for is identifiable, no decree can be granted in respect of the same.*"

This position was endorsed by the Supreme Court in *Pawan Kumar Dutt and Another v. Shakuntala Devi and Others* (2010) 15 SCC 601 at paragraph 7, where it was opined that specific performance could not be decreed if there is uncertainty as to the identity of land:

It is clear from the suit agreement that no boundaries of the suit property which was sold are specified in the agreement. It is not clear from what point the area is to be measured. It is also not clear that these 4 bighas 2 biswas is a portion of the land situated in the middle of the total land or in one portion or at the extreme end or at a particular place, in other words, there is no clear identity of the property agreed to be sold. The courts are not expected to pass a

decree which is not capable of enforcement in the courts of law. If the argument of the learned counsel for the appellants is to be accepted and if a decree is to be granted for specific performance, without identification of the suit property, it will not be possible to enforce such a decree.

In *IDPL Employees Co-Operative Housing Building Society Ltd, Hyderabad and Another v. B. Rama Devi and Others* 2004(5) ALD 632, the following was stated by the High Court of Andhra Pradesh at paragraph 22:

It is a matter of common knowledge that in a suit for partition, the important aspects to be undertaken by the Court are ascertainment of the shares, identification of the property available for partition, division of the available property by metes and bounds and allotment of the divided parts to the parties, commensurate with their shares.

The Supreme Court of Nigeria in the case of *Lasisi Aremy v. Alhaji Lawal Adetoro* (2007) LLJR-SC, articulated this principle more clearly. Pius Olayiwola Aderemi, J. held as follows:

*In my humble view, the only issue raised by the respondent captures the real matter in controversy in this appeal. Proof of identity of a piece of land in dispute is of utmost importance if any success is to be attained in any land suit. A plaintiff seeking the reliefs of the nature claimed in this matter has a cardinal duty to show, with certainty, the area of land being claimed and to which he wants the order of court to relate to; failure to do so, the entire case must stand dismissed. See *Baruwa v. Ogunsola* 4 WACA 159; *Elias v. Omobare* (1982) 5 S.C. 25; *Awere v. Lasaju* (1975) N.M.L.R. 100 and *Sangosanya v. Salawu* (1975) N.M.L.R. 27. Although a survey plan is not an absolute necessity in every land case. See *Olusanmi v.**

Oshasona (1992) 6 N.M.L.R. (pt. 245) 22; where however a plaintiff desires to draw up or cause to be drawn up a survey plan showing the land in dispute, such a plan must show clearly the dimensions of the land, the boundaries and other salient features. See Arabe v. Asanlu (1980) 5-7 S.C. 78. The demand for this is in consonant with the maxim: "Id Cerium Est Quod Cerium Reddi Potest; Sed It Magis Certum Est Quod De Semet Ipso Est Certum" meaning: "That is certain which can be made certain; but that is most certain which is certain on the face of it." See Ayinla v. Adisa (1992) 7 N.W.L.R. (pt.255) 566.

Learned counsel for the plaintiff complains that the High Court did not accord sufficient weight to the affirmative answer given by the surveyor in his report marked X1 to the question "*Whether or not the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint*". As held in *Hapuarachchi and Others v. Podi Nilame (supra)* at 147-148 the failure to answer this question or answer it in the affirmative or negative is not decisive. The Court cannot dismiss a partition action on the basis that the surveyor in his report to the Preliminary Plan has failed to answer or answered that question in the negative. Nor can the Court readily accept that the Preliminary Plan accurately represents the entire land to be partitioned, if the surveyor in his report answers the above question in the affirmative. There is no doubt that the surveyor's answer to that question carries great weight. Nevertheless, whether the land has been correctly identified shall ultimately be decided not by the surveyor, but by the Court, after considering the totality of the evidence presented before it.

On the facts and circumstances of this case, I am not satisfied that the plaintiff properly identified the corpus. The High Court was correct in

overturning the judgment of the District Court on that basis. I answer the question of law, whether the High Court was wrong to have set aside the judgment of the District Court on non-identification of the corpus, in the negative. I affirm the judgment of the High Court and dismiss the appeal with costs.

Judge of the Supreme Court

S. Thurairaja, P.C., J.

I agree.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.

I agree.

Judge of the Supreme Court