

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

Maddumage Don Somaratne
No. 64/15, Templers Road,
Mt. Lavinia.

Plaintiff

SC APPEAL NO: SC/APPEAL/75/2017

SC HCCA LA NO: SC/HCCA/LA/524/2014

HCCA NO: WP/HCCA/MT/35/2009(F)

DC MT. LAVINIA NO: 206/96/P

Vs.

1. Maddumage Don Somapala
No. 64/15, Templers Road,
Mt. Lavinia.
2. M.D. Albert (Deceased)
No. 64/16, Templers Road,
Mt. Lavinia.
- 2A. M.D. Rohan Nishantha
No. 64/16, Templers Road,
Mt. Lavinia.

Defendants

AND BETWEEN

2. M.D. Albert (Deceased)
No. 64/16, Templers Road,
Mt. Lavinia.

2A. M.D. Rohan Nishantha
No. 64/16, Templers Road,
Mt. Lavinia.
2nd Defendant-Appellant

Vs.

Maddumage Don Somaratne
No. 64/15, Templers Road,
Mt. Lavinia.
Plaintiff-Respondent

Maddumage Don Somapala
No. 64/15, Templers Road,
Mt. Lavinia.
1st Defendant-Respondent

AND NOW BETWEEN

2A. M.D. Rohan Nishantha
No. 64/16, Templers Road,
Mt. Lavinia.
2(a) Defendant-Appellant-Appellant

Vs.

Maddumage Don Somaratne
No. 64/15, Templers Road,
Mt. Lavinia.
Plaintiff-Respondent-Respondent

Maddumage Don Somapala
(Deceased)

No. 64/15, Templers Road,
Mt. Lavinia.

1st Defendant-Respondent-
Respondent

1A. M.D. Swarnaseeli,

No. 64/15, Templers Road,
Mt. Lavinia.

1(a) Defendant-Respondent-
Respondent

Before: Hon. Justice Vijith K. Malalgoda, P.C.
Hon. Justice Yasantha Kodagoda, P.C.
Hon. Justice Mahinda Samayawardhena

Counsel: Rohan Sahabandu, P.C. with Chathurika Elvitigala for the
2(a) Defendant-Appellant-Appellant.
Ranjan Suwandarathne, P.C. with Anil Rajakaruna for the
Plaintiff-Respondent-Respondent.

Written Submissions:

By the Appellant on 16.03.2022

Argued on: 23.01.2023

Decided on: 12.02.2024

Samayawardhena, J.

The plaintiff filed this action, naming two defendants, seeking to partition the land described in the schedule to the plaint among the plaintiff and the 1st defendant. The plaintiff is the son of the 1st defendant and the 2nd defendant is the brother of the 1st defendant.

The preliminary plan No. 510 dated 16.06.1998 consists of lots 1 and 2.

The position taken up by the 2nd defendant-appellant at the trial by way of issues was that he is entitled to lot 1 of the preliminary plan by prescription.

After trial, the District Court refused the prescriptive claim of the 2nd defendant and partitioned the land between the plaintiff and the 1st defendant. On appeal, the High Court of Civil Appeal affirmed it.

This Court granted leave to appeal on the following two questions:

- (a) Did both courts below investigate title to the land in question as required in a partition action?
- (b) In any event, did the respondent have title to the corpus?

The point made by learned President's Counsel for the 2nd defendant-appellant before this court was that the plaintiff became entitled to 8 perches from lot 1 in plan No. 1839 dated 31.07.1956 but he filed the partition action to partition lot 2 in plan No. 1839. However, he admits that the preliminary plan depicts lot 1 in plan No. 1839. It is on that basis, learned President's Counsel states that the District Court has failed to investigate title to the land to be partitioned.

In the written submissions filed before this court, learned President's Counsel states thus:

The plaintiff Somarathne was seeking to partition lot 2 in plan 1839. It is respectfully submitted that Somarathna could not partition lot 2 as he got 8 perches from lot 1 and lot 2 was given to Cornelis Appuhamy. The preliminary plan No. 510 dated 16.06.1998, G. Saranasena licensed surveyor shows not lot 2 but lot 1. The surveyor has surveyed a different land to the land in the plaint.

The description of the land in the schedule to the plaint is unclear. It identifies the land as lot 2(1) of plan No. 1839 with an extent of 22.5 perches. However, the lot number does not align with either lot 1 or lot 2 of plan No. 1839 but rather refers to both. Notably, each lot 1 and lot 2 of plan No. 1839 has an extent of 22.5 perches.

The preliminary plan No. 510 and its report were marked as X and X1 at the trial without objection. There was no objection at any stage of the District Court proceedings or High Court proceedings that the preliminary plan does not depict the land to be partitioned. There is no dispute that the land depicted in the preliminary plan is lot 1 of plan No. 1839. It is clearly stated in the preliminary plan itself. According to the report X1, the land to be partitioned had been shown to the surveyor by the plaintiff and the two defendants. In the preliminary plan the land is shown as lots 1 and 2. The 2nd defendant in his evidence in chief itself categorically stated that the land to be partitioned is depicted as lots 1 and 2 in the preliminary plan. There was no dispute on the identification of the corpus in the District Court or in the High Court. The 2nd defendant raised issues on the basis that he prescribed to lot 1 of the preliminary plan. When the 2nd defendant failed his claim on prescriptive title, he cannot now be permitted to thwart the partition action filed more than 27 years ago by raising a technical objection on the identification of the corpus comparing the schedule to the plaint with the land shown in the preliminary plan.

The identification of the corpus is a question of fact or, at least, a mixed question of fact and law. It is not a pure question of law that can be raised for the first time on appeal. Therefore, a party to an action cannot raise the question of identification of the corpus for the first time before the High Court or in the Supreme Court, whether it is a partition case or a land case.

I answer the two questions on which leave was granted in the affirmative and dismiss the appeal with costs.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.

I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.

I agree.

Judge of the Supreme Court