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

In the matter of an Appeal under and in terms of Section 5 (C) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

S.C. Appeal No:
44/2020

SC/HCCA/LA No:
439/2019

WP/HCCA/MT No:
90/17/(F)

District Court Mount Lavinia
Case No: 659/09/P

1. Hettigoda Gamage Sugathadasa,
   No, 128/6, Anderson Road, Dehiwala.
2. Hettigoda Gamage Gunadasa,
   No. 195/3, Neelammahara Road,
   Godagamuwa, Maharagama.

PLAINTIFFS

Vs.

Hettigoda Gamage Gnanawathi,
No. 128/5, Anderson Road, Dehiwala.

DEFENDANT

AND BETWEEN

1. Hettigoda Gamage Sugathadasa,
   No. 128/6, Anderson Road, Dehiwala.
2. Hettigoda Gamage Gunadasa,
   No. 195/3, Neelammahara Road,
   Godagamuwa, Maharagama.

PLAINTIFF-APPELLANTS

Vs.

Hettigoda Gamage Gnanawathi,
No. 128/5, Anderson Road, Dehiwala.
DEFENDANT-RESPONDENT

AND NOW BETWEEN

Hettigoda Gamage Gnanawathi,
No. 128/5, Anderson Road, Dehiwala.
DEFENDANT-RESPONDENT-APPELLANT

Vs.

1. Hettigoda Gamage Sugathadasa,
   No. 128/6, Anderson Road, Dehiwala.
2. Hettigoda Gamage Gunadasa,
   No. 195/3, Neelammahara Road,
   Godagamuwa, Maharagama.

PLAINTIFF-APPELLANT-RESPONDENTS

Before **:** A.L. Shiran Gooneratne, J.

: Janak De Silva, J.

: Sampath B. Abayakoon, J.

Counsel **:** J.A.J. Udawatta with Anuradha Ponnamperuma instructed by Ganga Wanigarathna for the Defendant-Respondent-Appellant.

: Lasitha Kanuwanaarachchi with Tharushi Amarasinghe and Charith Widanapathirana instructed by Aruni De Silva for the Plaintiff-Appellant-Respondents.

Argued on : 28-02-2025

Written Submissions : 15-07-2020 (By the Defendant-Respondent-Appellant)

: 20-08-2020 (By the Plaintiff-Appellant-Respondents)

Decided on : 30-05-2025

Sampath B. Abayakoon, J.

This is an appeal preferred by the defendant-respondent-appellant (hereinafter sometimes referred to as the defendant or defendant-appellant) on the basis of being aggrieved of the judgment pronounced by the Provincial High Court of the Western Province holden in Mount Lavinia while exercising its civil appellate jurisdiction.

The said judgment has been pronounced on 15-10-2019 in Case No. WP/HCCA/MT/90/2017 (F).

The facts that led to the judgment of the learned District Judge and the impugned appellate judgment of the learned Judges of the High Court are as follows.

The plaintiff-appellant-respondents (hereinafter referred to as the plaintiffs) have instituted the Partition Action No. 659/09/P before the District Court of Mount Lavinia, seeking to partition the land morefully described in the schedule of the amended plaint between the two plaintiffs only, although they have mentioned the defendant as a party to the action.

After trial, the learned District Judge of Mount Lavinia, pronouncing her judgment on 12-10-2017, has determined among other matters that, the plaintiffs have only sought to partition a portion of a larger land without disclosing the rights of the defendant, which cannot be allowed in terms of Partition Law. It has also been determined that there is no basis for the Court to grant a 10-foot-wide road access to reach the portion of the land they sought to partition. After having discussed the facts as well as the relevant Partition Law in that regard, the learned District Judge has proceeded to dismiss the partition action.

Being aggrieved of the said judgment, the plaintiffs have appealed to the Provincial High Court of the Western Province holden in Mount Lavinia. Having considered the appeal preferred, the Provincial High Court while exercising its civil appellate jurisdiction, has determined that there was sufficient basis for the learned District Judge to order the partitioning of the land sought to be partitioned. It has been determined that since it is the duty of the Court to investigate the title of each party, the learned District Judge could have examined the title of the defendant as well, although the plaintiffs have not sought a partition decree against the defendant.

Accordingly, it has been determined that the plaintiffs and the defendants are co-owners of the land sought to be partitioned, and the land should be divided based on the preliminary plan prepared for the purposes of the partition action in the following manner;

1st Plaintiff	undivided 11/52
2nd Plaintiff	undivided 11/52
Defendant	undivided 30/52

It has also been determined that the plaintiffs are entitled to a 10-foot-wide road access as the original plan relied on by all parties, as well as the deeds relied on by them, refer to such an access road given to the plaintiffs.

When this matter was supported for Leave to Appeal before this Court, this Court granted leave based on paragraph 17(a) of the petition dated 19-11-2019.

The said question of law reads as follows,

> 17(a) Did the learned High Court Judges err in law in arriving at the conclusion that partitioning only a portion of two contiguous allotments of land with regard to which the respondents have title form the balance portion of the same contiguous allotments of land possessed by the petitioner should be permitted in this case, when in fact this action is misconceived and unmaintainable in law, since it had been instituted to partition a portion of a corpus only?

At the hearing of this appeal, the learned Counsel for the defendant-appellant submitted that it is abundantly clear from the amended plaint filed by the plaintiffs that their intention had been to obtain a 10-foot-wide access road to the land possessed by them, rather than obtaining a proper partition decree in terms of the Partition Law. The learned Counsel referred to the facts of the matter and the manner in which the plaintiffs have presented the plaint, to argue that there was no possibility for the learned District Judge to pronounce a partition judgment in relation to a portion of a larger land, as sought by the plaintiffs.

It was his submission that although it is the duty of a trial Judge to investigate the title to and allocate shares, it can only be done within the pleadings, the evidence placed before the Court, and having considered the relevant law, and not by going through a voyage of discovery.

He contended that the learned District Judge was legally correct in her determinations and the learned Judges of the Provincial High Court of Western Province holden in Mount Lavinia have erred as to the relevant law when the judgment of the learned District Judge was set aside, and the partitioning of the land was allowed.

The learned Counsel who represented the plaintiffs argued that since it was the duty of a trial Judge to investigate the title of all parties in terms of section 25 of the Partition Law, although the plaintiffs may not have pleaded for the partitioning of the portion of the land belonging to the defendant, since the relevant evidence was placed before the Court, a proper partitioning decree should have been pronounced by the learned District Judge.

The learned Counsel relied on the judgment pronounced by **His Lordship E.A.G.R. Amarasekara, J.** in the case of **L.M. Munasinghe Vs. K.R. Podimanike and Others, S.C. Appeal No. 113/2019 on 13-11-2023**, in order to advance her submission.

It was her position that since the original plan relied on by the parties to identify the corpus of the action has given a 10-foot-wide road access to the plaintiffs, there was no impediment for the learned District Judge to make a determination in that regard as well. It was her contention that there is no reason before this Court to interfere with the appellate judgment pronounced by the Provincial High Court of the Western Province Holden in Mount Lavinia.

For the purposes of this appeal, I will now consider the matters urged before this Court and the relevant law in that regard, in order to come to a finding whether the learned Judges of the Provincial High Court have erred, or whether the learned District Judge of Mount Lavinia was correct in dismissing the partition action.

In this context, I find it necessary to consider the amended plaint filed by the plaintiffs on 14-09-2009, where the partitioning of the land has been sought.

They have claimed that the original owner of the land sought to be partitioned was one Wijesekara Gama Arachchige Sisiliyana Hamine Perera, and has stated that the said Sisiliyana Hamine gifted an undivided 11 perches of the land by deed No. 687 dated 19-07-1983 to them. Accordingly, they have claimed title to an undivided 11 perches of land depicted in plan No. 693 dated 20-08-1942 by Surveyor I.W.W. Indatissa, where the said land has been shown as lot A and B, together with a right of way adjacent to the Southern boundary of the land.

It has been pleaded that the said Sisiliyana Hamine, who was the original owner, passed away on 04-09-1996, unmarried and without issues, and hence, it has become necessary for the plaintiffs to set apart the 11 perches of land owned by them, including the right of way as mentioned, from the land the defendant is possessing.

On that basis, the plaintiffs have only set out their entitlement to a portion of the land sought to be partitioned. It is clear that their intention had been to get a partition judgment only in relation to the said portion, and not for the entire land.

The relevant paragraph 08 and 10 of the amended plaint reads as follows;

> 08. මෙම නඩුවේ පැමිණිලි කරුවන්ට ඉහත කී තෑගී දීමනා කාරිය විසින් ප්‍රසිද්ධ නොතාරිස් ටි. වි. එ. අමරතුංග මහතා විසින් 1983.07.19 වන දින ලියා සහතික කල අංක 687 දරන ඔප්පුව මගින් හිමි කොට පවරා දී ඇති මෙම පැමිණිල්ලේ උපලේඛනයේ දක්වා ඇති බලයලත් මානක අයි. ඩබ්ලිව්. ඩබ්ලිව්. ඉන්දතිස්ස මහතා විසින් 1942.08.20 දින මැන සහතික කල අංක 693 දරන පිඹුරේ දක්වා ඇති ලොට් අංක ඒ සහ බී දරන ඉඩම් කොටස් වලින් සමන්විත සහ එකී පිඹුරේ දක්වා අති මාර්ග අයිතිය අතුලුව එකී ඉඩමෙන් පැමිණිලි කරුවන්ට හිමිව බුක්ති විඳිනු ලබන පර්චස් 11 ක කොටස මෙම නඩුවේ විත්තිකාරිය විසින් බුක්ති විඳිනු ලබන මෙහි ඉහතින් දක්වා ඇති ඉඩම් කොටසින් වෙන් කරවා ගැනීමට අවශ්‍ය වී ඇත.
>
> 10. ඉහත කී පෙළපත ප්‍රකාර මෙහි පහත උපලේඛනයේ දැක්වෙන දේපලේ හවුල් අයිතිකරුවන් වෙත පහත දැක්වෙන අයුරින් නොබෙදු අයිති වාසිකම් හිමිව ඇත.
>
> | | | |
> |---|---|---|
> | පලවන පැමිණිලි කරුට | - | නොබෙදු පර්චස් 5 ½ |
> | දෙවන පැමිණිලි කරුට | - | නොබෙදු පර්චස් 5 ½ |

In paragraph 11 of the amended plaint, they have set out what they claimed as their right to obtain a 10-foot-wide road access from the Western boundary of the plan No. 693 dated 20-08-1942, and has stated that accordingly, a cause of action has accrued to them to get the land described in the schedule of the amended plaint to be partitioned in terms of Partition Law No. 21 of 1977.

It is quite apparent from the prayer of the plaint that the plaintiffs have prayed to partition only 11 perches out of the land depicted in plan No. 693 dated 20-08-1942, and for other incidental reliefs.

At the trial, there had been no disputes as to the facts that the original owner of the land was the earlier mentioned Sisiliyana Hamine Perera, and that she has gifted an undivided 11 perches of land by deed No. 687 dated 19-07-1983 to the plaintiffs, and that they are the owners of the said undivided portion of land along with the road access mentioned, and that they have acquired prescriptive rights to the said portion of land as well.

There had been no dispute that the plaintiffs are in possession of the house, which bears assessment No. 128/5, situated towards the Western boundary of the land.

The points of contest raised by the plaintiffs clearly show that their intention had been only to partition their undivided rights, and to have a 10-foot-wide access road to the said land on the basis that the original plan relied on by them have given such an access road to them, and accordingly, they are entitled to the said access road.

The defendant had raised her points of contest on the basis that she is the owner of an undivided 15 perches of land based on deed No. 2768 dated 07-04-1974, and the plaintiffs can only have rights to a 5-foot-wide access road to their land and nothing more. She has also taken up the position that after the original survey plan relied on by the plaintiffs, another amicable plan was prepared by the same surveyor, and accordingly, plaintiffs have prepared a partition deed as well, and the parties are possessing the land as separate lots.

It had been her contention that the partition action should be dismissed since there was no basis to partition the land.

It is clear from the learned District Judge's judgment that the learned District Judge has correctly identified the law relating to a partition action. It has been determined that the plaintiffs have failed to follow the necessary provisions of Partition Law when instituting the partition action, and that there is no possibility for the Court to partition only a portion of a land as claimed by the plaintiffs. It has also been determined that the real purpose of instituting this action had been to obtain a 10-foot-wide right of way over the land, in the guise of a partition action, and that there is no basis for such a determination.

However, when the District Court judgment was appealed against to the Provincial High Court of the Western Province holden in Mount Lavinia, it has been determined by the learned Judges of the Provincial High Court that the plaintiffs have pleaded the title of the defendant as well, and that the defendant has rights to 15 perches of land out of the 26 perches depicted in the original plan relied on by the plaintiffs, namely plan No. 693 dated 20-08-1942. It has been determined that since the plaintiffs and the defendant are co-owners, although the plaintiffs have pleaded only to partition their entitlement to the land, it was the duty of the trial Judge to examine the title of each party, and that the learned District Judge should have ordered the partitioning of land.

Based on the original plan relied on by the plaintiffs, it had been determined that the title deeds of the plaintiffs have given them a 10-foot-wide right of way to reach their portion of the land. It has also been determined that the plaintiffs are entitled to such an access road.

Having drawn their attention to the fact that although the original plan relied on by the plaintiffs referred to 26 perches of land, the plan prepared by the Commissioner appointed for the purposes of the partition action has identified a land of only 24.87 perches, it has been ordered that the said land should be

divided between the plaintiffs and the defendant, in the manner I have described previously.

It is well settled law that in a partition action, it is the duty of the plaintiff of the action to establish the identity of the land sought to be partitioned, as well as the title of the said land, to the parties in action to the best of his or her knowledge. The plaintiff should conduct an investigation to the title of the land sought to be partitioned not only as to his or her rights, but also as to the rights of the other parties, before the institution of the partition action. It is the duty of the plaintiff to set up a clear pedigree of the persons who are entitled to the land, and as to their share entitlements to the land sought to be partitioned. If a plaintiff is unable to find the entitlement of a co-owner, in my view, the plaintiff must indicate that fact in a separate averment in the plaint, and seek to leave the share of such entitlement unallocated, until established by the party who is entitled to the said share from the corpus.

In the case of **Jane Nona Vs. Dingirimahatmaya 74 NLR 105,** it was held as follows;

> *"In a partition action the plaintiff must set out his title fully. It is the duty of the plaintiff in a partition action to set out the best of his knowledge and ability a full and comprehensive pedigree showing the devolution of title with reference to all the deeds of sale on which title is alleged to have passed. In view of the very far-reaching consequences of a decree under the Partition Act, a Court should not assist a plaintiff who either through carelessness or indifference does not place before the Court evidence which should be available to him."*

It is clear that the plaintiffs have relied on plan No. 693 dated 20-08-1942 by Surveyor I.W.W. Indatissa to claim title to an undivided 11 perches of land out of the land called Kahatagahawaththa mentioned in the said plan, which depicts two contiguous lots marked as A and B with an extent of 26 perches. It is clear from the said plan that when the land was surveyed, a 10-foot-wide

road reservation has been kept from the Southern boundary of the land shown in plan No. 693, which is a reservation kept for a road access from the land mentioned in the said plan towards the Anderson Road.

It is clear that the said reservation had not been included as a part of the plan No. 693, which depicts a total extent of 26 perches, and therefore, it is clear that the plaintiffs have no basis to claim a 10-foot-wide road access from the Western boundary of the land as of a right as claimed by them in the amended plaint.

In the amended plaint, other than pleading the partitioning of the 11 perches of land out of the total extent of 26 perches, they have not pleaded the title of the defendant, stating that they intend to separate their land from the land possessed by the defendant.

They have failed to aver that they are unaware of her title or that the said portion of land should be kept unallocated.

After having considered the averments of the amended plaint, points of contest and the evidence placed before the trial Court by the parties, I am in agreement with the learned Counsel for the defendant-appellant that, although the plaintiffs have filed this action under the provisions of the Partition Law, their real intention had not been that.

If they carried out a proper Land Registry search in relation to the land mentioned in their plaint, they would have found that in fact, the same original owner claimed by them has gifted an undivided extent of 15 perches including a portion of the house bearing assessment No. 128/3, Anderson Road, towards the South, to the defendant by referring to the same plan relied on by the plaintiffs, by deed No. 2768 dated 07-04-1974 by the Notary L.W. Jansz, which has been duly registered. It is clear that the said 15 perches of land has been gifted to the defendant excluding a 5-foot-wide foot path along the Eastern boundary of the land as a right of way to enter the remaining portion of the

land from the 10-foot-wide road reservation that has been mentioned in plan No. 693 by Surveyor Indatissa.

Therefore, it is clear that for some reason, plaintiffs had suppressed or had decided to ignore the rights of the defendant when they filed the partition action in relation to the portion of the land mentioned in the schedule of the plaint.

It is clear from the plan marked as V-01 on behalf of the defendant, which is the plan No. 3555 dated 13-12-1983 by Surveyor I.W.W Indatissa, which has been referred to in the partition deed marked as V-02, namely deed No. 709 dated 12-02-2002 by Notary Public S.P.K. Samarathunga, the said plan had been used for the purpose of an apparent amicable partition plan between the two plaintiffs for the 11 perches of land claimed by them. The said amicable partition plan refers to a road reservation of 5 feet in width, which is a clear reference to the road reservation excluded by the deed of gift No. 2768, where the defendant became entitled to an undivided 15 perches of land from the land mentioned in the schedule of the amended plaint.

Although the mentioned amicable partition deed V-02 has no legal validity as correctly determined by the learned District Judge of Mount Lavinia, since it was only a deed between the two plaintiffs who owned part of the land, and not between all the co-owners which should include the defendant, what is clear is that the plaintiffs have been using a 5-foot-wide foot path right throughout after they received the deed of gift upon which they claimed title to the land.

In the case of **Girigoris Appuhami Vs. Maria Nona 60 NLR 330**, it was determined that;

> *"Where a land is possessed in different portions by different co-owners for convenience of possession a partition action cannot be maintained in respect of one portion only; the entire land should be brought into action."*

It is trite law that in a partition action, it is the duty of the trial Judge to investigate title and come to a finding with regard to the rights of the parties. However, it is my considered view that a trial Judge cannot be expected to go on a voyage of discovery in the guise of examination of title.

It was held in the case of **Thilagaratnam Vs. Athpunathan and Others (1996) 2 SLR page 66**;

1. Although there is a duty cast on Court to investigate title in a partition action the Court can do so only within the limits of pleadings, admissions, points of contest, evidence both documentary and oral.

Per Ananda Coomaraswamy, J.,

> *"We are not unmindful of these authorities and the proposition that it is the duty of the Court to investigate title in a partition action but, the court can do so only within the limits of pleadings, admissions, points of contest, evidence both documentary and oral. Court cannot go on a voyage of discovery tracing the title and finding the shares in the corpus for them, otherwise parties will tender their pleadings and expect the Court to do their work and their Attorneys-at-Law work for them to get title to those shares in the corpus."*

In this context, although the plaintiffs have sought to partition a portion of the land, the defendant's pleadings had been on the basis that this is a land where the plaintiffs and herself are possessing as separate lots based on a subsequent plan, and that there is no need for her to partition the land. She has only pleaded for the dismissal of the action.

I find that the facts in the case **S.C. Appeal No. 113/2019 (supra)** relied on by the learned Counsel for the plaintiff were very much different to the facts of the matter under appeal. In the said case, the plaintiff instituted the partition

action pleading his title for an undivided 1/3 share of the corpus sought to be partitioned and stating that although he is aware that the defendants are also entitled to rights from the corpus, he is unaware as to how they derive title. He has also disclosed the fact of existence of several deeds pertaining to the land, but has stated that he could not ascertain rights based upon them.

The defendants have pleaded their title to the land sought to be partitioned and had claimed rights although they have sought either the partitioning of the land or the dismissal of the action.

The learned trial Judge has investigated the title of each party and has pronounced his judgment ordering the partitioning of the land, but when the matter was appealed to the Provincial High Court, the learned Judges of the High Court has thought it fit to dismiss the partition action on the basis that the plaintiff of the District Court action has only set up his rights for 1/3 share of corpus, but has failed to show the co-ownership among the parties.

It was under the above context the said appeal has been considered before the Supreme Court, where the appellate judgment of the learned Judges of the High Court was set aside and the judgment of the learned District Judge was affirmed.

I am in full agreement with the relevant provisions of the Partition Law discussed in the said Supreme Court judgment in relation to the facts in the said case. However, it is my considered view that given the facts of the matter under appeal, the same legal principles cannot be made applicable to the facts of the matter in order to pronounce a partition decree as contemplated by the learned Counsel for the plaintiffs.

Therefore, it is my considered view that the learned Judges of the Provincial High Court of the Western Province Holden in Mount Lavinia was misdirected in deciding to order the partitioning of the land based on the evidence placed before the trial Court. I find that that learned Judges of the Provincial High Court were misdirected in relation to the facts as well, when it was decided that

the entire land should be divided based on the share entitlement mentioned in the High Court judgment.

They are also totally misdirected when it was decided that the plaintiffs are entitled to have a 10-foot-wide road way to access their portion of the land.

It is abundantly clear that the original owner, namely Sisiliyana Hamine, has conveyed an undivided 15 perches out of the land mentioned in plan No. 693 dated 20-08-1942 to the defendant on 07-04-1974 by the deed of gift No. 2768. The said deed has been duly registered at the Land Registry. Hence, the defendant's right for an undivided 15 perches out of land mentioned in the said plan takes precedence over any other rights regarding the land.

The deed relied on by the plaintiffs, namely deed No. 687, was a deed executed on 19-07-1983 giving rights for an extent of 11 perches out of the land depicted in plan No. 693 on the basis that the total extent of the land amounts to 26 perches.

However, when the land was surveyed for the purposes of the partition action under appeal, the Commissioner has reported that the present extent of the land only amounts to a total of 24.87 perches. Therefore, it is clear that even if the total extent of the land is to be taken as the corpus in order to partition the land as sought by the plaintiffs, it can be done only after allocating 15 perches out of the presently available 24.87 perches of the total extent of the land to the defendant, and not by going on the basis of 26 perches of land as mentioned in plan No. 693 dated 20-08-1942.

Accordingly, I find no basis to justify the share allocation given by the learned Judges of the Provincial High Court in the appellate judgment on the basis of fractions of 11/52 for each of the two plaintiffs and 30/52 to the defendant.

When it comes to the question of roadway allocated by the learned Judges of the High Court, I find that the said allocation has been done on a misinterpretation of the original plan relied on by the parties. If one carefully

looks at the original plan No. 693 dated 20-08-1942, as I said previously, the road reservation was not a part of lot A and B mentioned in the plan. It has been kept as a road reservation from the Southern boundary of the land to have access to the main road.

The plan of the Commissioner of the case shows that the said access has been provided to enter Anderson Road. There is no basis for the plaintiffs' claim that they are entitled to a 10-foot-wide access road from the Western boundary of the land as claimed by them. It is clear from the preliminary survey plan prepared by the Commissioner K.A. Perera (plan No. 659 dated 27-03-2010), that the road access marked lot 02 is an access with a width of 5 feet, which has provided access to the portion of the land held and possessed by the two plaintiffs. The said lot 02 is clearly in line with the title deed relied on by the defendant to claim title to the undivided 15 perches of land where the original owner has clearly kept a 5 feet wide path from the Eastern boundary of the land to gain access to the balance portion of the land, which she has later gifted to the plaintiffs.

For the reasons as considered above, I find that the learned District Judge of Mount Lavinia was correct in deciding to dismiss the partition action as it was the only option available under the given circumstances.

I find that the learned Judges of the Provincial High Court of the Western Province Holden in Mount Lavinia erred in setting aside the judgment of the learned District Judge of Mount Lavinia and deciding to order partitioning of the land when there was no basis for such a pronouncement.

Accordingly, I answer the question of law in the affirmative and set aside the judgment dated 15-10-2019 pronounced by the Provincial High Court of the Western Province Holden in Mount Lavinia, while exercising its civil appellate jurisdiction.

The judgment dated 12-10-2017 by the learned District Judge of Mount Lavinia is hereby affirmed.

The appeal is allowed. The two plaintiffs shall pay Rs. 25,000/- each as costs of the action to the defendant-appellant.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court

Janak De Silva, J.

I agree.

Judge of the Supreme Court