

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

**In the matter of an Appeal
from a judgment of the Civil
Appellate High Court of
Avisawella.**

SC APPEAL 66/16
SC/HCCA/LA/227/2015
WP/HCCA/AV/382/2008(F)
D.C. HOMAGAMA 598/P

Hewa Devage Raymond Karunathilake, No.
167, Jaya Mawatha, Oruwalpitiya, Athurugiriya.

Plaintiff

Vs

1. Suduwa Devage Nimal Somasiri
2. Suduwa Devage Sunil Pathmasiri
3. Suduwa Devage Nihal Jayasiri
4. Suduwa Devage Charlette Somalatha (deceased)
All of Jaya Mawatha, Oruwalpitiya,
Athurugiriya.
- 4A. Hewa Devage Lilani Fernando, Jaya Mawatha,
Oruwalpitiya, Athurugiriya.
5. Suduwa Devage Lal Deepananda, No. 165, Jaya
Mawatha, Oruwalpitiya, Athurugiriya.
6. Pathmulla Kankanamalage Gunathilake, No.
299/4, Godagama Road, Athurugiriya.
7. Hakmana Vithanage Kamalawathie, No. 299/1,
Godagama Road, Athurugiriya.
8. Singakkuti Arachchige Wimalasena, No. 836/1,
Athurugiriya Road, Homagama.
9. Dehipitiya Mirissage Ariyawansa, No. 27,
Nandana Udyanaya, Yahampath Mawatha,
Maharagama.

10. Dehipitiya Mirissage Sedin, No. 27, Nandana Udyanaya, Yahampath Mawatha, Maharagama.
11. Hewa Devage Dhammika Chandrasiri, No. 165, Jaya Mawatha, Athurugiriya.
12. Hewa Devage Sriyani Chandrika, No. 156/5, Abayasinghe Mawatha, Athurugiriya.
- 13.K.A.G.Lesli (deceased), No. 19, Abayasinghe Mawatha, Athurugiriya.
- 13 A. Kumarapril Arachchige Don Nagananda, Samagi Mawatha, Panagoda, Homagama.

Defendants

AND NOW

Hewa Devage Raymond Karunathilake, No. 167, Jaya Mawatha, Oruwalpitiya, Athurugiriya.

Plaintiff Appellant

Vs

1. Suduwa Devage Nimal Somasiri
2. Suduwa Devage Sunil Pathmasiri
3. Suduwa Devage Nihal Jayasiri
4. Suduwa Devage Charlette Somalatha(deceased)
All of Jaya Mawatha, Oruwalpitiya, Athurugiriya.
- 4A. Hewa Devage Lilani Fernando, Jaya Mawatha, Oruwalpitiya, Athurugiriya.
5. Suduwa Devage Lal Deepananda, No. 165, Jaya Mawatha, Oruwalpitiya, Athurugiriya.
6. Pathmulla Kankanamalage Gunathilake, No. 299/4, Godagama Road, Athurugiriya.

7. Hakmana Vithanage Kamalawathie, No. 299/1, Godagama Road, Athurugiriya.
8. Singakkuti Arachchige Wimalasena, No. 836/1, Athurugiriya Road, Homagama.
9. Dehipitiya Mirissage Ariyawansa, No. 27, Nandana Udyanaya, Yahampath Mawatha, Maharagama.
10. Dehipitiya Mirissage Sedin (deceased), No. 27, Nandana Udyanaya, Yahampath Mawatha, Maharagama.
- 10 A. Egodahage Siripala Weerasiri Alwis Samarakoon, No. 671/4, Erawwala, Pannipitiya.
11. Hewa Devage Dhammika Chandrasiri, No. 165, Jaya Mawatha, Athurugiriya.
12. Hewa Devage Sriyani Chandrika, No. 156/5, Abayasinghe Mawatha, Athurugiriya.
13. K.A.G. Lesli (deceased), No. 19, Abayasinghe Mawatha, Athurugiriya.
- 13 A. Kumarapril Arachchige Don Nagananda, Samagi Mawatha, Panagoda, Homagama.

Defendants Respondents

AND NOW BETWEEN

Egodahage Siripala Weerasiri Alwis Samarakoon,
No. 671/4, Erawwala, Pannipitiya.

10 A Defendant Respondent Petitioner

Vs

Hewa Devage Raymond Karunathilake, No. 167,
Jaya Mawatha, Oruwalpitiya, Athurugiriya.

Plaintiff Appellant Respondent

- 1 A. Hewa Devage Dayawathie, No. 164/D,
Oruwalpitiya, Athurugiriya
2. Suduwa Devage Sunil Pathmasiri
3. Suduwa Devage Nihal Jayasiri
- 4A. Hewa Devage Lilani Fernando, Jaya Mawatha,
Oruwalpitiya, Athurugiriya.
5. Suduwa Devage Lal Deepananda, No. 165, Jaya
Mawatha, Oruwalpitiya, Athurugiriya.
6. Pathmulla Kankanamalage Gunathilake, No.
299/4, Godagama Road, Athurugiriya.
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Godagama Road, Athurugiriya
8. Singakkuti Arachchige Wimalasena, No. 836/1,
Athurugiriya Road, Homagama.
9. Denipitiya Mirissage Ariyawansa, No. 27,
Nandana Udyanaya, Yahampath Mawatha,
Maharagama.
11. Hewa Devage Dhammika Chandrasiri, No. 165,
Jaya Mawatha, Athurugiriya.
12. Hewa Devage Sriyani Chandrika, No. 156/5,
Abayatissa Mawatha, Athurugiriya.
- 13 A. Kumarapril Arachchige Don Nagananda,
Samagi Mawatha, Panagoda, Homagama.

Defendants Respondents Respondents.

BEFORE

**: S. EVA WANASUNDERA PCJ.,
K. T. CHITRASIRI J. &
VIJITH K. MALALGODA PCJ.**

COUNSEL

**: Nihal Jayamanne PC with Ajith
Munasinghe for the 10 A Defendant
Respondent Appellant.**

Walter Perera with Dhanapala
Walgama for the Plaintiff Appellant
Respondent.

ARGUED ON : 28.09.2017.

DECIDED ON : 27.11.2017.

S. EVA WANASUNDERA PCJ.

This Appeal arises from the judgment of the Civil Appellate High Court of Avissawella. The District Court of Homagama had given judgment **excluding a portion of the land sought to be partitioned from the corpus** that the Plaintiff had filed action to partition. The Civil Appellate High Court had overturned the judgment of the District Court and had further directed the District Court **to include in the corpus, the portion of land which was excluded** and further more to go through the pedigree and decide on the apportionment of the land.

At the stage of granting of leave to appeal sought by the 10 A Defendant Respondent Appellant, this Court has granted leave on the following questions of law:-

1. In the circumstances pleaded in the case and also in terms of the evidence adduced before Court, had the 10th Defendant established before Court the fact that Lot 2 in the Preliminary Plan is a separate and distinct land called Mahadeniya and not a portion of the land sought to be partitioned?
2. If the 10th Defendant has established before Court that, Lot 2 in the Preliminary Plan is separate land called Mahadeniya, should the said Lot 2 in the Preliminary Plan be excluded from the corpus?
3. In any event did the learned High Court Judge err in directing the learned Present District Judge to accept the corpus as shown in Preliminary Plan X and to give judgment on the evidence already led specially in view of the fact that the learned District Judge in his judgement having arrived upon a specific conclusion on the evidence led with regard to the same issue?

4. Did the learned High Court Judge err in not considering that the learned District Judge had given judgment on evidence already led?

The Plaintiff Appellant Respondent (hereinafter referred to as the Plaintiff) filed the Partition Action in the District Court of Homagama in order to partition the land called “ Idamkattiya” in extent of 4 Acres 1 Rood and 34.50 Perches morefully described in the second schedule to the Plaint. It is depicted in the Preliminary Plan bearing No. 3967 made by Court Commissioner Mervyn Samaranayake marked as X which is at pg. 111 of the Brief before this Court.

The 10A Defendant Respondent Appellant (hereinafter referred to as the 10 A Defendant) is the party who was substituted in the room and place of the deceased 10th Defendant in the District Court Partition Action. **The 10th Defendant was the only contesting party** before the trial Court. He filed a Statement of Claim and claimed that the pedigree set out by the Plaintiff does not apply to **Lot 2 in the Preliminary Plan No. 3967** marked as X ; that the said Lot 2 is called **Mahadeniya** and that the said Lot 2 had been separately possessed by the 10th Defendant and his predecessors in title as a **divided and defined portion of land** which **does not form part of the corpus** of the Patition Action. Accordingly, 10th Defendant prayed that the said **Lot 2 be excluded** from the corpus sought to be partitioned.

The issues of the 10th Defendant before the District Court were as follows:-

1. Has the land called Mahadeniya depicted in Plan No. 2055 dated 22.01.1930 been surveyed and shown by the Plaintiff in the proposed plan **improperly?**
2. Is the portion of land depicted in Plan No. 2055 depicted as Lot 2 in the Preliminary Plan?
3. Was the land called Mahadeniya in Plan No. 2055 owned and possessed by the 10th Defendant based on the deeds as stated in the statement of claim?
4. If any one , several or all of the above issues are answered in favour of the 10th Defendant, should the Lot 2 in the Preliminary Plan No. 3967 be excluded from the land proposed to be Partitioned in the case?

The Trial Judge delivered his judgment making **an order to exclude Lot 2 in Plan X** as claimed by the 10th Defendant. The Plaintiff appealed to the Civil Appellate High Court and the High Court set aside the judgment of the District Court and

directed the District Judge to **accept the corpus** and **to write the judgment again** after examination of the title of parties on the available evidence and enter judgment accordingly.

The 10th Defendant's position was that the land he possessed was Mahadeniya and it is described in the very old Plan No. 2055 dated 22.01.1930 made by H.D.de Silva Licensed Surveyor. A copy of the said Plan was marked in evidence as 10 V1. The said land in Plan No. 2055 was resurveyed in 1986 by Surveyor D.S.S. Kuruppu and the said Survey Plan No. 397 dated **01.01. 1986** was marked in evidence as 10 V 3. In this Plan No. 397, the Surveyor has specifically mentioned that the name of the Land is **Mahadeniya**.

The Court issued a commission to superimpose the said Plan 2055 on the corpus sought to be partitioned. The Preliminary Plan 3967 marked as X had been drawn in the course of this action in February, 1993 and the superimposition of Plan 397 on Plan 3967 marked X was done in May, 2000. The superimposed Plan and the Report dated 05.05.2000 were produced in Court and marked in evidence as 10 V 2 and 10 V 2A.

The Court Commissioner who has prepared this superimposed plan has given evidence before Court and explained matters well. He was cross examined by the counsel for the Plaintiff. The report annexed to the Plan was marked as 10 V 2A. In the report, the surveyor specifically states that the land depicted in Plan 2055 as well as in Plan 397 are **exactly the same as Lot 2** in the Preliminary Plan No. 3967 marked as X. He further states that the Surveyor General's first **Plan 87331** on which the Plaintiff has based the relief to partition the land has **no specific name of the land mentioned** therein at all.

The Plan 87331 is at page 324 of the Brief. It is marked as P 4. Perusing the said plan, I do not find any name of the land mentioned anywhere and the legend on the Plan 87331 reads in English language as " Plan of an Allotment of Land situated in the village of Athurugiriya in Palle Pattuwa of the Hewagam Korale in the District of Colombo, Western Province ". It is of an extent of 8A 3R 29P and the Plaintiff has moved to partition the **Western half** of the said land which is described as **just an allotment of land without a name** of an extent of **4A 1R**

35.25 P. Having gone through the Plaintiff and the Plan of the Plaintiff which is based on none other than a Surveyor General's Plan 87331, I hold that there exists **no name** of the land sought to be partitioned in the Plaintiff.

The other contention of the Plaintiff was that the 9th and 10th Defendants have no title to the land which is the subject matter of this case.

According to the evidence led by the 10th Defendant, Dehipitiya Mirissage Sedin, documents were produced by way of Deeds to support that **Lot 2 in the Preliminary Plan X** should be excluded from the corpus in the Plaintiff. Plan X was prepared by order of Court at the beginning of the District Court Case as the first step in the partition case. The document marked as **10 V 4** is a Deed conveyed by the executrix of the **Last Will No. 520** dated 26.01.1946 of Don Albert Alexander Pathberiya and his wife Gonsal Bothejuge Grace Harriette Boteju Pathberiya attested by D.S.Ganegoda Notary Public Colombo, which was **proved in the District Court** of Colombo in Testamentary Case No. **14656**. By that deed the executrix granted the land called **Mahadeniya** of an extent of 2A 2R 18P as shown in Plan No. **2055** dated 22.01.1930 as aforementioned to Don Harishchandra Pathberiya. Thereafter the said D.H.Pathberiya transferred the same land to Don Asoka Chandrakirthi by Deed 10V3. Later he transferred the same land to Don Kusumawathie Pathberiya by Deed 10V7 who in turn transferred the same land to the 10th Defendant, Denipitiya Mirissage Sedin.

Therefore it is quite clear from the deeds of the 10th Defendant that he has got title to Mahdeniya depicted in Plan 2055 which, when superimposed was exactly the same as Lot 2 in the Preliminary Plan X.

The Plaintiff in this case, namely Hewadewage Raymond Karunathilake has received title by Deed No. 483 dated 18.01.1989 from Hewa Hakuruge Basthian Fernando for the land morefully described in the Schedule thereto. It was marked in evidence by the Plaintiff marked as P 32. The Schedule in P 32 reads in Sinhalese as follows:

බස්නාහිර පළාතේ කොළඹ දිස්ත්‍රික්කයේ හේවාගම කෝරළයේ පල්ලේ පත්තුවේ, අතුරුගිරිය යන ගම පිහිටි ඉඩම් කට්ටියට නියම වූ මායිම් බස්නාහිරට සහ උතුරටත් නිටපු මුදියන්සේ රාළනාමි නමින් බුක්ති විදගෙන එන ඉඩමද ,නැගෙනහිරට ඔටුන්නට අයිතිය කියන ඉඩමද, වැසියන්ට අයිතිය දකුණට නොමිමර 87332 ප්ලෑන කඩදාසියට මැනි තිබෙන ඉඩමද යන මෙකී මායිම් ඇතුළත ඉඩමෙන් වැටි තිබෙන පාර සහ එම පාරට අයිතිව දම්වැල් පුරුක්

තිහක් පලල ඇති හරියේ ඉඩමක් අත්හැර අක්කර අටකුත් රුඬි තුනකුත් පරවස් විසිනවයක් විශාල වූ ඉඩමෙන් වැටි මහන්සියට ඇර තිබෙන නැගෙනහිර පැත්තේ, දෙකෙන් පංගුව අත්හැර බස්නාහිර පැත්තේ, ඉතුරු දෙකෙන් පංගුවෙන් දෙකෙන් පංගුවකින් නොබෙදුපු තුනෙන් දෙපංගුව යන දේපලවේ.

Therefore it is evident that in the Plaintiff's own deed by which he claims title the name of the land is **not even mentioned as** "Idam Kattiya".

Then again, it can be seen that the name of the land is not Idam Kattiya, when reading P33 which is the last document produced by the Plaintiff at page 490 of the Brief before this Court. P33 is the Deed No. 6509 dated 28.07.1919 to which the learned High Court Judges have referred to, in their Judgment. At page 1 of the Deed, the land is described with no name of any land, in Sinhalese as follows:

“ කොළඹ දිස්ත්‍රික්කයේ හේවාගම් කොරළයේ පල්ලේ පත්තුවේ, දැඩිගමුව යන ගම පදිංචි හේවාදේවගේ සාදිලිස් ප්‍රනාන්දු වන මම වර්ෂ 1916 ක් වූ ජූලි මස 22 වැනි දින නොම්මර 29354 ලකුණු කොට ඩී.සී.ඩී.ඇස්.ජයතිලක කොළඹ දිස්ත්‍රික්කයේ ප්‍රසිද්ධ නොනාරිස් වරයා සහතික කල විකුණුම් කර ඔප්පුව පිට අයිතිව මා විසින් නිරවුල් ලෙස බුක්ති විදගෙන එන බස්නාහිර පළාතේ කොළඹ දිස්ත්‍රික්කයේ හේවාගම් කොරළයේ පල්ලේ පත්තුවේ අතුරුගිරිය යන නම තිබෙන ඉඩම් කට්ටියට මායිම්ව බස්නාහිරට සහ උතුරට හිටපු මහමුදියන්සේ රාළහාමි නමින් බුක්ති විද එන ඉඩමද, නැගෙනහිර ඔටුන්නට අයිතිව තිබේ දැනට වැසියන් සන්නකව තිබෙන ඉඩමද දකුණට අංක.87332 සිතියමට මැනී තිබෙන ඉඩමද යන මායිම් තුළ ඉඩමෙන් වැටි තිබෙන පාර සහ එම පාරට අයිති ආණ්ඩුවෙන් හැර තිබෙන දම්වැල් පුරුක් 30 ක් පලල ඇති හරියේ ඉඩමක් අත්හැර අක්කර අටකුත් රුඬි තුනකුත් පරවස් විසිනවයක් විශාලකම ඇති ඉඩමෙන් බස්නාහිර දෙස නොබෙදු දෙකෙන් පංගුවෙන් දෙකෙන් පංගුවකින් තුනෙන් දෙපංගුවෙන් හයෙන් පංගු පහ සහ ,

However, I observe that in some of the other deeds written by different Notaries Public they have mentioned in the schedules of the deeds as if the name of the land is Idam Kattiya. It looks like that because there was no name of the land from which title was derived, the notaries have adopted the word Idam Kattiya as the name of the land. The Original Plan of the Surveyor General No. 87331 or the Plaintiff's own title Deed No. 483 to which I have referred to above does not have in the Schedule, any name of the land as Idam Kattiya.

Nonetheless, the Plaintiff has failed to prove that Mahadeniya is part of the so called land Idam Kattiya. There is no oral or documentary evidence whatsoever to that effect. The Plaintiff 's position is that there is no land called Mahadeniya and

the corpus of the partition case includes the land which the 10th Defendant claims in his Statement of Claim.

The learned High Court Judges had considered the evidence led before the trial judge in the same way as the trial judge had analyzed. The High Court had done the analysis, in 9 pages out of the 10 pages of their judgment and in the last paragraph of the 9th page of the judgment the High Court has stated as follows: “on a perusal of Deed 10 V4 it appears that Alexander became entitled to the land by virtue of deed of transfer bearing No. 6509 dated 28.07.1919 marked as P33 at the trial. It is significant that the vendor of the said Deed P33 has transferred undivided 5/36 from the land called Idam Kattiya morefully described in the second schedule to the Plaintiff. **It is important to note that 10th Defendant in his evidence stated that he purchased a portion from the land sought to be partitioned.**” Having said so in the analysis of evidence , the High Court has erred in concluding that the land bought by the 10th Defendant should be included in the corpus to be partitioned.

It is clear from this analysis that the corpus to be partitioned as claimed by the Plaintiff , should not include the portion sold out of that land which has been inherited by others and finally reached the 10th Defendant. The final conclusion of the High Court Judge is quite wrong.

In P 33 at page 490 of the Brief the land is described as “අතුරුගිටිය යන ගම තිබෙන ඉඩම් කට්ටිය”. In P5 the land has been described as “ අතුරුගිටිය යන ගම තිබෙන ඉඩම් කට්ටිය නිර්නාමික ඉඩම් කට්ටිය වු”.

It is obvious that there is no land called ‘Idamkattiya’ as mentioned in the Plaintiff of the Plaintiff. It is the word used to describe “ an allotment of land ”.

I find that the High Court Judges have tried to look into the fact finding evidence leaving aside the analysis of the trial judge for no reason explained by them. It is trite law that the Appellate Courts should not interfere with the judgments of the trial court unless there is a grave legal discrepancy in the decision of the trial court or there is a grave error in the analysis of the evidence before the trial court. When the trial judge has gone through the evidence and the documents

which reveal facts pertinent to the matters to be decided on, the Appellate Court Judges should not disturb the factual findings of the trial judge.

In the case in hand, the evidence before the trial court was analyzed by the trial judge; the Preliminary Plan was prepared; the land was identified; the 10th Defendant's deeds were gone into and a superimposition of his land on the preliminary plan was done ; the reports of the surveyor was taken into account and finally decided that Mahadeniya was included within the land proposed to be partitioned by the Plaintiff and therefore the said land should be excluded. The Court sitting in Appeal should not disturb the said findings of fact concluded by the trial judge in the District Court.

In this instance, without stating that there is a grave error if any, in the analysis of the evidence, the High Court Judges sitting in Appeal have again tried to consider the evidence within the deeds. The High Court has disturbed the facts found to be correct by the District Judge. I hold that the Appellate Judges have acted wrongly in this instance in view of the ratio decidendi in **Bandaranayake Vs Jagathsena and Others 1984, 2 SLR 397, Ceylon Cinema and Film Studio Employees Union Vs Liberty Cinema Ltd. 1994, 3 SLR 121 and Jayasuriya Vs Sri Lanka State Plantation Corporation 1995, 2 SLR 379.**

The Civil Appellate High Court Judges have failed to give reasons as to why the rationale given by the District Court Judge after the analysis of the facts on evidence before the trial court , should be varied or not accepted. The High Court has not set down any valid argument for having concluded that the present trial judge in the District Court should write another judgment taking the subject matter as the complete corpus as described in the Plaintiff and considering the evidence already led at the trial.

The Appellate Court Judges have moreover directed the District Court Judge to accept the Preliminary Plan X and write another judgment on the evidence available without delay. The High Court judges are totally in error when they directed the District Judge to write another judgment on the available evidence because that is what the trial judge has already done. I cannot agree with the submissions made by the Counsel for the Plaintiff who argued that the High Court was correct in its conclusion.

I answer the questions of law enumerated above in the affirmative in favour of the 10 A Defendant Respondent Appellant and against the Plaintiff Appellant Respondent. I set aside the judgment of the Civil Appellate High Court of Avissawella. I affirm the judgment of the District Court of Homagama.

This Appeal is allowed. However I order no costs.

Judge of the Supreme Court

K.T.Chitrasiri J.

I agree.

Judge of the Supreme Court

Vijith K. Malalgoda PCJ.

I agree.

Judge of the Supreme Court