

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

SC Appeal No. 161/2015
SC (HCCA) LA No. 4/2015
WP/HCCA/KT/90/2008(F)
DC Mathugama Case No.1920/P

In the matter of an Application for Leave to Appeal to the Supreme Court against the Judgment dated 27th November 2014 delivered by the High Court of the Western Province (exercising Civil Appellate jurisdiction at Kalutara) in Appeal No. WP/HCCA/KT/90/2008(F) D.C. Mathugama Case No. 1920/P

In the District Court of Mathugama

Epage Suwaris of Meddekanda,
Rathmale, Polgampola.

PLAINTIFF

Vs.

1. Diyapaththugama Vidanelage Hendrick Samarasinghe (**since Deceased**)
- 1A Diyapaththugama Vidanelage Sirisena Samarasinghe
2. Seemon Suwandagoda of Kurupita, Polgampola.
3. Abraham Samarasinghe
4. Marynona Samarasinghe
5. Jayasinghe Siriwardanage Piyadasa

All of Rathmale Polgampola.

DEFENDANTS

**AND BETWEEN IN THE PROVINCIAL HIGH
COURT OF WESTERN PROVINCE**

- 1A Diyapaththugama Vidanelage
Sirisena Samarasinghe
3. Abraham Samarasinghe
5. Marynona Samarasinghe

All of Rathmale Polgampola.

DEFENDANTS-APPELLANTS

Vs.

Epage Suwaris of Meddekanda,
Rathmale, Polgampola.

PLAINTIFF-RESPONDENTS

2. Seemon Suwandagoda of
Kurupita, Polgampola.
- 5 Jayasinghe Siriwardanage Piyadasa
Both of Rathmale, Polgampola.

DEFENDANTS-RESPONDENTS

**AND NOW BETWEEN IN AN APPLICATION
TO THE SUPREME COURT**

3. Abraham Samarasinghe

5. Marynona Samarasinghe
All of Rathmale, Polgampola.

DEFENDANTS-APPELLANTS-PETITIONERS

Vs.

Epage Suwaris of Meddekanda,
Rathmale, Polgampola.

PLAINTIFF-RESPONDENT-RESPONDENT

2. Seemon Suwandagoda of
Kurupita, Polgampola.
5. Jayasinghe Siriwardanage Piyadasa
Both of Rathmale, Polgampola.

**DEFENDANTS-RESPONDENTS-
RESPONDENTS**

BEFORE: Sisira J. de Abrew J.
Anil Gooneratne J. &
K. T. Chitrasiri J.

COUNSEL: J. A. J. Udawatta for the 3rd & 4th
Defendant-Appellant-Petitioner-Appellants

Razik Zarook P.C. with Chanukya Liyanage
For Plaintiff-Respondent-Respondent-Respondent

Rohana Deshapriya for the 5th Defendant-Respondent-
Respondent-Respondent

**WRITTEN SUBMISSIONS OF THE
3rd & 4th APPELLANTS FILED ON:**

09.11.2015

**WRITTEN SUBMISSIONS OF THE
PLAINTIFF-RESPONDENT-RESPONDENT**

FILED ON: 15.12.2015

ARGUED ON: 11.11.2016

DECIDED ON: 09.02.2017

GOONERATNE J.

This was an action filed in the District Court of Mathugama to partition a land called “Delgahawatta” in extent of about 1 Acre, more fully described in the schedule to the plaint. Parties proceeded to trial on 15 points of contest. Learned District Judge Mathugama after trial entered Judgment in favour of the Plaintiff on 30.04.2008. The 1st, 3rd and 4th Defendants appealed to the Civil Appellate High Court, Kalutara and the High Court dismissed the appeal and affirmed the Judgment of the learned District Judge. The said Defendants being aggrieved by both the above Judgments sought Leave to Appeal from the Supreme Court and this court on 25.09.2015 granted Leave to Appeal on questions of law set out in paragraph 16(A) to (D) of the petition dated 05.01.2015. The said questions reads thus:

- (a) Did the learned High Court Judges err in holding that the land sought to be partitioned is the land depicted in the Preliminary Plan

- (b) Did the learned High Court Judges err in affirming the judgment of the learned District Judge thereby accepting that though the land sought to be partitioned are two different lands parties have possessed same as Delgahawatta which is the land sought to be partitioned.
- (c) Did the learned High Court Judges err in failing to take in to cognizance of the principle of law that there is a duty cast on a Judge trying a partition suit to identify the land sought to be partitioned as decided in the case of *Jayasuriya vs Ubaid* 61 NLR 352.
- (d) Did the learned High Court Judges fail to consider that the learned District Judge has not duly considered and evaluated the oral and documentary evidence with regard to the identity of the corpus sought to be partitioned.

The only point urged before the Supreme Court was on the question of identity of the land sought to be partitioned. Appellants, before this court fault the High Court and the District Court in their failure to evaluate oral and documentary evidence with regard to the identity of the corpus.

The learned High Court Judge observes, in a brief Judgment, on the preliminary plan the Commissioner states that the land surveyed do not tally with the boundaries described in the plaint, and the High Court Judge states the Commissioner does not state it is not the land sought to be partitioned. The learned High court Judge also state that the Defendant-Appellant moved for a commission to identify lands called 'Meegahawatta' and 'Migahaingewattegodella' depicted in Title Plan 269303 and Title Plan 339864

respectively and after superimposition, plan 'Y' (No 1050A) produced, and learned High Court Judge observes that identification of the corpus upon superimposition of Title Plan is acceptable and land sought to be partitioned is not called 'Meegahawatta' or 'Migahaingewattegodella'. It appears that the High Court Judge place emphasis on certain items of evidence of the Surveyor which according to Survey's evidence, land sought to be partitioned is called 'Delgahawatta'. However Surveyor's report X1 (folio 72) and item 5 of same clarifies the position. I will advert to same in this Judgment.

The Plaintiff-Respondent-Respondent in their written submissions support the views of Judgments of both lowers courts, and argues that boundaries in the schedule to the plaint are identified except the southern boundary and the extent almost same, variation being 3 perches. Further Surveyor's report on the eastern boundary (Dola) in the schedule to the plaint is about 4 chains away from the corpus. Plaintiff produced marked P4 partition plan No. 2125 filed in D.C. Kalutara Case No. P 1788. In that plan it is stated as the eastern boundary of preliminary plan 1050. But I observe that P4 does not seem to show "Delgahawatta" as any of its boundaries.

The learned counsel for 3rd and 4th Defendants-Appellants-Petitioners-Appellants, in order to stress the point on identity of the corpus, invited this court to consider the duty cast upon the trial court in this regard. He

drew the attention of this court to Section 25(1) of the Partition Law. i.e particularly on examination of title of land to which the action relates. He also cited important cases on the supervening duty and a fundamental duty of the trial court to satisfy itself as to identity of corpus. *Jayasuriya Vs. Ubaid* 61 NLR 352; *Wickramaratne Vs. Alpenis Perera* 1986 (1) SLR 190; *Sopinona Vs. Pitipanaarachchi and other* 2010 (1) SLR 91.

It was the learned counsel's further submission that except for the northern boundary in the land sought to be partitioned, none of the other boundaries of the preliminary plan correspond to the land described in the schedule to the plaint. As such it appears that the discrepancy in the boundaries of the land surveyed with that of the land described in plaint cannot be reconciled so easily. Even the Plaintiff-Respondent does not deny the above discrepancy nor provide an acceptable explanation but attempt to show that it is not a matter that has any bearing to the case in hand. I am unable to accept the contention of Plaintiff-Respondent in this regard.

I would as stated above incorporate as follows, survey's report (clause 5) which explains above.

The boundaries of the land surveyed by me does not agree with the boundaries described in the schedule to the plaint. Eastern boundary of the land sought to be partitioned is described as Dola. But the actual Eastern boundary is Lot in partition plan No. 2125, dated 24th January

1968, prepared by Mr. W.R.B. Silva, Licd. Surveyor, filed of record in D.C. Kalutara case No. P 1788, which was produced by Plaintiff. As per same plan the name of the land surveyed by me is Metiokandegodella, whereas Delgahawattha as per schedule to the plaint.

Our attention was drawn to the statutory requirement in Section 18(1)(a) of the Partition Law. The Court Commissioner is required as per the said section to state, “whether or not the land surveyed is substantially the same land sought to be partitioned as described in the schedule to the plaint. As stated above the Court Commissioner very categorically state that the boundaries of the land surveyed by him do not agree with the boundaries described in the schedule to the plaint. This would no doubt cast a serious doubt on the question of identity of the corpus. Learned counsel for Appellant also referred to folio 320 of the brief, regarding lis pendens, registered where no prior entries were available and stated therein subject to ‘decay’ ‘දිරාපත් බැවින්’

The material available to this court no doubt suggest that the boundaries of the land sought to be partitioned differ from the land described in the schedule to the plaint. The extent is also different and not the same as pleaded by Plaintiff. The Plaintiff produced marked P4 the partition plan No. 2125. Plan 2125 does not show ‘Delgahawatte’ as a boundary. In short the location, boundaries and extent differ. Plaintiff himself admits in evidence that

the land surveyed is in fact land depicted in Survey General's Title Plan No. 339864 and Title Plan 269302. Lots A, B & C is comprised in preliminary plan 1050 (X) and the commission plan 1050 A are filed of record. (By the same Surveyor) which has lots A, B1, B2, B3 & C. The lots A, B & C in plan 1050 are shown as A, B1, B2, B3 & C in plan No. 1050A. Lot A in plan 1050A is the same as lot A in plan 1050. This lot A is part of Title Plan 339864 which is called 'Migahaingewattegodella' lot B1 is part of lot B in plan 1050 and part of Title Plan 269302. Lot B2 is part of lot 'B' in preliminary plan 1050 are part of Title Plan 269303 called Metiokandegodella. Lot B3 is part of lot B in plan 1050 and is part of Title Plan 339864, called 'Migahaingewattegodella'. Lot 'C' is a path (part of T.P 269303 & 339864). As such the names of land are also different, and not the land called Delgahawatta.

The statutory requirement in a partition case is discussed in the case of Sopiya Silva Vs. Magilin Silva 1989(2) SLR 105. (Judgment of S.N. Silva J. as he was then). It refers to Section 16(1) of the Partition Law. It implies that the land Surveyed must confirm substantially, with the land as described in the plaint (in respect of which a lis pendens had been registered) as regards location, boundaries and the extent . It is for this reason that Section 18(1) (a) (iii) requires the Surveyor to express an opinion in his report.

The Commissioner has not identified the corpus. Learned District Judge should have, based on the Commissioner's report insisted upon due compliance with the requirement by the Surveyor. It has not been done. It is very clear that the land described in the plaint is different and at this stage it cannot be reconciled. The location, extent, boundaries and name of land are different. Both the District Court and the Civil Appeal Court erred in law and fact. As such I answer all questions of law in favour of the Appellant in the affirmative. Yes.

Judgments of the District Court and the Civil Appellate High Court are set aside. Appeal allowed with costs.

Appeal allowed.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew J.

I agree.

JUDGE OF THE SUPREME COURT

K. T. Chitrasiri J.

I agree.

JUDGE OF THE SUPREME COURT

