

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

In the matter of an Application for
Leave to Appeal under and in
terms of Section of 5C of the High
Court of the Provinces (Special
Provisions) (Amendment) Act, No.
54 of 2006, to be read with Article
128 of the Constitution.

R. A. S. Kulawardena,
No. 58, Sisikirana,
Hopton.

Plaintiff

SC APPEAL 30/2018

SC HC CA LA : 421/15

High Court (Civil Appeal) No. UP/HCCA/BA/48/13(F)

D.C. Badulla Case No. 293/P

Vs.

1. Logiah Narayanasamy
Balakrishan,
Thawalampelessa Road,
Lunugala.
2. R. A. D. Senanayake
21st Mile Post,
Hopton.
3. W. M. Yaswathi,
Nursery,
Rendapola,
Hopton.

4. W. M. Senevirathne,
Nursery,
Rendapola,
Hopton.

5. D. M. Jayasekera,
Nursery,
Rendapola,
Hopton.

6. Hapugastenna Plantation
Limited,
Palm Garden,
Rathnapura.

Defendants

AND BETWEEN

Hapugastenna Plantations
Limited
Palm Garden,
Ratnapura.

6th Defendant-Appellant

Vs.

R. A. S. Kulawardena,
No. 58, Sisikirana,
Hopton.

Plaintiff- Respondent

Logiah Narayanasamy
Balakrishnan
Thawalampelessa Road,
Lunugala.

1st Defendant-Respondent

AND NOW BETWEEN

R. A. S. Kulawardena,
No. 58, Sisikirana,
Hopton.

**Plaintiff- Respondent-
Appellant**

Vs.

Hapugastenna Plantations
Limited
Palm Garden,
Ratnapura.

**6th Defendant-Appellant-
Respondent**

Logiah Narayanasamy
Balakrishnan
Thawalampelessa Road,
Lunugala.

**1st Defendant-
Respondent-Respondent**

1. Selvalakshmi
2. Logiah Sivasubramaniam
Andawatta, Lunugala.

**Substituted 1st Defendant-
Respondent-Respondent**

Before : **S. Thurairaja, PC, J
Janak De Silva, J
K. Priyantha Fernando, J**

Counsel : Rasika Dissanayake with
Punarjith Isuranga and Dinusha
Pathirana for the Plaintiff-
Respondent-Appellant.

Daphne Peiris Vissundara
instructed by Sudath
Jayawardene for the 6th
Defendant-Appellant-
Respondent.

Nilantha Kumarage for the 1st
Defendant-Respondent-
Respondent.

Argued on : 09.01.2024

Decided on : 26.03.2024

K. PRIYANTHA FERNANDO, J

1. The land to which the current appeal relates is named “*Pullayar Kadura Pathana*” which is three acres, two roods and eighteen perches in extent. The Plaintiff-Respondent-Appellant (hereinafter referred to as the appellant) in this case seeks to have the judgment of the learned Judges of the High Court of Civil Appeal set aside, and have the judgment of the learned District Judge which allowed the partition of the aforementioned land affirmed.

Facts in brief

2. The appellant in the instant case states that the land by the name of “*Pullayar Kadura Pathana*” was initially owned by the State. The said land was then transferred to *Hanifa Ibu Mohammed* by way of a Crown Grant bearing No. 35 dated 16.11.1877 [P-4]. Thereafter, the said land was transferred to *Perumal Naidu Doreisamy Kanakapulle* by way of deed bearing No. 1884 dated 07.04.1916 attested by *Easther J.M.F. Taldena* Notary Public. Thereafter, the said *Perumal Naidu Doreisamy Kanakapulle* has died intestate. Then the said property devolved on his son *Doreisamy Kadirawel Logiah*.
3. *Doreisamy Kadirawel Logiah* (the son), has transferred undivided 2 Acres 2 Roods 18 Perches of the corpus to the appellant by way of deed bearing No. 602 dated 04.06.1990 attested by *S. Amarasiri*, Notary Public. Subsequently, *Doreisamy Kadirawel Logiah* has transferred the remaining undivided 1 Acre of the corpus to the 1st Defendant-Respondent-Respondent (1st respondent) by way of deed No. 603 dated 04.06.1990 attested by *S. Amarasiri*, Notary Public. Thereby the appellant states that the appellant and the 1st respondent were made co-owners of the undivided corpus of the land in question.
4. Following this position, the appellant has instituted the partition action bearing No. 293/P in the District Court of

Badulla to have the said land partitioned between the appellant and the 1st respondent. Although initially the 3rd, 4th and 5th defendants filed a joint statement of claim, upon an application being made by them, they were discharged from the case. After the action was filed, the 6th Defendant-Appellant-Respondent intervened and requested to be added as a party to the said partition action. The learned Judge of the District Court has allowed the 6th Defendant-Appellant-Respondent to be added as a party to the partition action.

5. It is the position of the 6th Defendant-Appellant-Respondent (hereinafter referred to as the 6th Defendant-Respondent) that, the land which is sought to be partitioned under the partition action No. 293/P is a part of Hopton Estate, which had been vested with the Janatha Estate Development Board (JEDB) by virtue of an order published in the Government Gazette bearing No. 718/16. Then the JEDB has handed over the possession of the said land to the 6th Defendant-Respondent under the lease agreement bearing No. 129 dated 20.04.1994 attested by *O.J. Kottage*, Notary Public. It was the position of the 6th Defendant-Respondent that the land depicted in preliminary plan bearing No. 438 prepared by *H.M. Sirisena Unawatuna* licensed surveyor is a part of Hopton Estate, which is under the management of the 6th Defendant-Respondent. It was the position of the 6th Defendant-Respondent that the said partition action should be dismissed. It is noted that, although the 6th Defendant-Respondent in their statement of claim has said that the land depicted in the preliminary plan No. 438 belongs to Hopton estate, the superintendent of Hopton estate who made a claim before the surveyor has claimed only lots 1 and 2 in the said preliminary plan.
6. The learned District Judge by judgment dated 15.01.2013 held in favour of the appellant in this case (the original plaintiff) and allowed the partition of the land in question. Accordingly, an undivided 2 Acres 2 Roods and 18 Perches of the said land would accrue to the appellant (the original plaintiff) and the residue to the 1st respondent (the original 1st defendant).

7. Aggrieved by the judgment of the learned District Judge, the 6th Defendant-Respondent preferred an appeal to the Civil Appellate High Court of the Uva Province holden in *Badulla*, bearing No. *UP/HCCA/BA/48/13(F)*. The learned Judges of the High Court by judgment dated 03.11.2015 allowed the appeal and held in favour of the 6th Defendant-Respondent.

8. Aggrieved by the judgment of the learned Judges of the High Court, the appellant preferred the instant appeal. At the hearing of this appeal, leave to proceed was granted for the questions of law set out in paragraph 14 (a),(b),(c) of the petition dated 10.12.2015. However, at the hearing of this appeal, both Counsel submitted to Court that they would be inclined to proceed on the questions of law set out in paragraphs 14 (a) and (c). Therefore, this Court will address the questions of law set out in paragraph 14(a) and (c) of the petition dated 10.12.2015.

Questions of Law

Paragraph 14

- (a) Whether the learned Judges of the Civil Appellate High Court of Uva Province Holden in *Badulla* have erred in law by coming to the conclusion that the Plaintiff in the instant case has failed to establish the pedigree set out in the Plaint with sufficient evidence?

- (c) Whether the learned Judges of the Civil Appellate High Court of Uva Province Holden in *Badulla* have erred in law by coming to the conclusion that the Plaintiff has failed to identify the corpus?

(a) Whether the learned Judges of the Civil Appellate High Court of Uva Province Holden in Badulla have erred in law by coming to the conclusion that the Plaintiff in the instant case has failed to establish the pedigree set out in the Plaint with sufficient evidence?

9. The learned Counsel for the appellant submitted that the appellant has duly established the pedigree based on which the title to the subject matter is devolved on the parties. The witness *Kosala Ajantha Hettiarachchi* called on behalf of the 6th Defendant-Respondent, during the course of the cross examination by the appellant, has expressly admitted that the 6th Defendant-Respondent has no title to the land sought to be partitioned, and that rights on the land are claimed only in the capacity of a lessee (at page 339 of the brief). The appellant further states that the 6th Defendant-Respondent failed to produce any lease agreement based on which they claimed the subject matter.
10. It is the submission of the learned Counsel for the appellant that, the witness *Kosala Ajantha Hettiarachchi* admitted that the appellant has been residing in the corpus for a long period of time whereas the 6th Defendant-Respondent company has only been incorporated in the year 1992 which is well after the execution of the deed No. 602 dated 04.06.1990 attested by *S. Amarasiri*, Notary Public [P-2] by which the appellant became a co-owner of the subject matter.
11. The learned Counsel for the 6th Defendant-Respondent submitted that, the Crown grant [P-4] is made in the year 1877 and the next deed is executed in the year 1990 which is after a considerably long period of time. In this regard, it is the position of the learned Counsel for the 6th Defendant-Respondent that, the certified copy of the document (folio) bearing No. B 15/90 which was tendered to Court with the written submission tendered on behalf of the 6th Defendant-Respondent clearly sets out that *Hanifa Ibu Mohamed* has transferred the said land to Englishmen, *Thomas George Monck Mason* and *Bernard Ambrose Starling* by deed No. 1884

attested by *B.L. Potger* Notary Public. It is the submission of the learned Counsel for the 6th Defendant-Respondent that the deed No. 1884 is fraudulent and all other deeds that flow from it has no validity in law.

12. It was submitted further by the learned Counsel for the 6th Defendant-Respondent, that the land in question is a State land and therefore it cannot be subject to partition. At the hearing of this appeal, the learned Counsel for the appellant took the position that the land in question is not a State land and brought the Plan of the Surveyor General to the attention of this Court to substantiate the position of the appellant.
13. A further submission that was made by the learned Counsel for the 6th Defendant-Respondent at the hearing of this appeal was that, although the deeds ranging from the year 1916 to 1990 were produced by the appellant, there is no death certificate of *Perumal Naidu Doreisamy Kanakapulle* tendered to Court, further, there is no evidence to show that *Doreisamy Kadirawel Logiah* was the only child of *Perumal Naidu Doreisamy Kanakapulle* as neither a birth certificate nor an affidavit was tendered to prove the same.
14. Section 25(1) of the Partition Law which deals with the trial of a Partition action reads as follows,

“On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made.”

15. In the case of ***Pathirennhelage Swarnasiri Nimal V. Pathirennhelage Leelawathie SC APPEAL No. 178/2013 SC Min. 14.12.2016*** cited with approval, the case of

Sopinona V. Cornelis and Others [2010] BLR 109, where it was stated that,

“It is necessary to conduct a thorough investigation in a partition action as it is instituted to determine the questions of title and investigation devolves on the Court. In a partition suit which is considered to be proceeding taken for prevention or redress of a wrong, it would be the prime duty of the judge to carefully examine and investigate the actual rights to the land sought to be partitioned.”

16. Further, in the case of **J.A. Jane Nona V. N.L. Dingiri-Mahatmaya [1968] 74 NLR 105** it was stated that,

“...it is the duty of a plaintiff in a partition action to set out to 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...”

17. When considering the question with regard to the pedigree relating to the land in question, it is pertinent to note the evidence of the witness *Kosala Ajantha Hettiarachchi*. He was a representative of the 6th Defendant-Respondent who was called to give evidence on behalf of the said 6th Defendant-Respondent. During the course of the cross examination of the aforementioned witness, he has clearly stated that the 6th Defendant-Respondent was in charge of the management of the Hopton estate within which the land in question was situated (at page 339 of the brief). Further, the aforementioned witness has clearly admitted that the 6th Defendant-Respondent has no title to the land in question and has only the right to manage in terms of a lease agreement. Therefore, admittedly, the 6th Defendant-Respondent has no title to the land in question and only claims rights in the capacity of a lessee. Although the 6th Defendant-Respondent takes the position that the said witness has no authority to admit this position, that argument cannot stand.

18. The certified copy of the document bearing No. B 15/90 has been tendered to this Court with the written submissions of the 6th Defendant-Respondent to substantiate the position of the 6th Defendant-Respondent, that the deeds relating to the land sought to be partitioned are fraudulent documents. However, this Court observes that the said certified copy of the document bearing B 15/90 has not been produced before the High Court and is fresh evidence before this Court. The 6th Defendant-Respondent ought to have made an application for submitting fresh evidence under section 773 of the Civil Procedure Code read with Article 139(2) of the Constitution. Therefore, this Court can neither admit this document nor its contents as evidence.
19. When addressing the issue as to whether the land sought to be partitioned is a State land, the Survey Plan and the report of the Surveyor General must be considered. The survey plan has been produced at page 440 of the appeal brief and the survey report is at page 145 of the appeal brief. When perusing the said report, it is observed that the survey report clearly sets out that, “මෙය හිමිකම් පිළිබඳව නිසා රජය සතු නොවේ.” It is pertinent to note that this commission to the Surveyor General was issued by the District Court on the application of the 6th Defendant-Respondent, the said plan was marked and produced as [V-1] by the 6th Defendant-Respondent.
20. Further, according to the land settlement report marked [V-3(අ)] (at page 456 of the appeal brief), which depicts the town plan in which the land in question is situated clearly sets out as [V-3(ආ)] (at page 457 of the brief) that the land *Pulleyar Kadura Pathana* is not a part of TP 107790.
21. In light of the above, it is my position that, it has been clearly set out in the survey report of the Survey General and the land settlement report [V-3(අ)] that the land sought to be partitioned is not a State land. Therefore, the land in question can be the subject of a partition action.

22. When considering the submission of the learned Counsel for the 6th Defendant-Respondent that there is no evidence to show that *Doreisamy Kadirawel Logiah* was the only child of *Perumal Naidu Doreisamy Kanakapulle*, it is my position that, the non-existence of a fact cannot be proved. It is impossible for the appellant to prove the non-existence of other children of *Perumal Naidu Doreisamy Kanakapulle*. If at all, it is for the 6th Defendant-Respondent to prove the existence of any such children. However, as there is no evidence to that effect, the fact that the land in question devolved on the only son of *Perumal Naidu Doreisamy Kanakapulle* can be accepted by this Court.
23. In light of the above analysis, I answer the first question of law that has been raised by the appellant in the affirmative. The learned Judges of the Civil Appellate High Court have in fact erred in holding that the pedigree set out in the plaint has not been proved.

(c) Whether the learned Judges of the Civil Appellate High Court of Uva Province Holden in Badulla have erred in law by coming to the conclusion that the Plaintiff has failed to identify the corpus?

24. The learned Counsel for the appellant submitted that, according to the plaint, the corpus '*Pulleyar Kadura Pathana*' is depicted in plan marked M/08/60 dated 17.04.1916 prepared by *G.A. Websin* Licensed Surveyor which is in extent of 3 Acres 2 Roods and 18 Perches. Thereafter, upon a commission issued to *Mr. Sirisena Unawatuna*, who was the commissioner appointed in the instant action, the preliminary plan bearing No. 438 dated 10.06.2007 [P-1] was prepared in which the subject matter has been depicted as lots 1 to 15. In view of the commissioner's report, the Plan bearing No. TP 107790 which is an older plan which depicts the corpus has been superimposed and thereby the subject matter has been duly identified by the commissioner using a Title plan prepared on April 1916. It is the submission of the learned Counsel for

the appellant that both the plans P-1 and the Plan bearing No. TP 107790 have been produced to Court without any objection by the respondents including the 6th Defendant-Respondent.

25. It was the submission of the learned Counsel for the appellant that the boundaries of the corpus of the preliminary plan [P-1] tally with the boundaries of the plan TP 107790 and the boundaries as depicted in the schedule to the plaint and the boundaries as described in the deeds marked [P-2], [P-3], [P-4] and deed No. 603.
26. The importance of the identification of the corpus was duly discussed in the case of **Sopaya Silva and Another V. Magilin Silva [1989] 2 SLR 105.**

“Section 16(1) of the Partition law requires that a commission be issued "to a surveyor directing him to survey the land to which the action relates". It implies that the land surveyed must conform substantially, with the land as described in the plaint (and in respect of which a lis pendens has been registered), as regards the location, boundaries and the extent. Further, it is for this reason that section 18(1)(a)(iii) requires the surveyor to express an opinion in his report.

“whether or not the land surveyed by him is substantially the same as the land sought to be partitioned as described in the schedule to the plaint". Considering the finality and conclusiveness that attach in terms of section 48 (1) of the Partition Law to the decrees in a partition action, the Court should insist upon a due compliance with the requirement by the surveyor.

If the land surveyed is substantially different from the land as described in the schedule to the plaint, the Court has to decide at that stage whether to issue instructions to the surveyor to carry out a fresh survey in conformity with the commission or whether the action should be proceeded with in respect of the land as surveyed.”

27. When considering the survey report [P-1(a)] that has been prepared by the Court Commissioner based on the preliminary plan [P-1] (at page 133 of the appeal brief), it is clearly stated that TP 107790 which is an older plan has been superimposed on the preliminary plan. The commissioner has also stated in P-1(a), that the land depicted in the preliminary plan is in fact the land sought to be partitioned as described in the schedule to the plaint.
28. The learned Judges of the High Court at pages 28 and 29 of the judgment has proceeded on the basis that the preliminary plan bearing No.438 prepared by *H.M. Sirisena Unawatuna*, Licensed Surveyor has not been prepared by physically surveying the land in question but by way of superimposing TP 107790. The learned Judges of the High Court have erred when they took this position. When perusing the Survey report on the preliminary plan [P1(a)], it is clear that the surveyor who prepared the said preliminary plan has in fact physically surveyed the land. He has also mentioned the details of the parties who were present in the land in question, the parties who showed the boundaries of the said land and the parties who claimed the land.
29. Therefore, it is my position that, as the said preliminary plan has been duly prepared by the Court Commissioner by physically surveying the land, and further, as the boundaries of the said preliminary plan tallies with the boundaries of the schedule to the plaint, the corpus has been duly identified.
30. Therefore, in answering the second question of law that has been raised by the appellant, it is my position that the learned Judges of the Civil Appellate High Court have erred in stating that the appellant has failed to identify the corpus.
31. Thus, as both questions of law have been answered in the affirmative, the appeal of the appellant is allowed. Hence, I set aside the judgment of the Civil appellate High Court of Uva Province holden in *Badulla* dated 03.11.2015, bearing case No. UP/HCCA/BA/48/13(F). I affirm the judgment of the learned

District Judge of Badulla dated 15.01.2013 bearing case No. 293/P/04. The appellant is awarded the cost of the cause.

The appeal is allowed

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA, PC, J

I agree

JUDGE OF THE SUPREME COURT

JUSTICE JANAK DE SILVA, J.

I agree

JUDGE OF THE SUPREME COURT