

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

In the matter of an application for Appeal
from the order of the High Court (Civil
Appeal) Western Province Holden at
Avissawella in WP/HCCA/AV/01/2014 (Rev)
dated 18.12.2014

Keragalage Aron Perera (Deceased),
Nakadamulla, Ranala.

Plaintiff

Pathmalatha Keragala,
Nakadamulla, Ranala.

Substituted Plaintiff

S.C. Appeal No. 128/2016 Vs.

WP/HCCA/AV/01/2014 (Rev)

D.C. Homagama Case No. 221/1536/P

1. Meeriyyagallage Soidahami (Deceased),
Nakadamulla, Ranala.

1A. Keragalage Caroline Perera
(Deceased),
No. 43, Sumanasekarapura,
Walipillawa, Dadigamuwa.

1B. M.D. Somasiri,
No. 43, Sumanasekarapura,
Walipillawa, Dadigamuwa.

2. Keragalage Luwis Singho,
Nakadamulla, Ranala.

3. Keragalage Misihami,
Nakadamulla, Ranala.

4. Keragalage Asinona (Deceased),
Nakadamulla, Ranala.

4A. W. Mahawatta,
Nakadamulla, Ranala.

5. Keragalage Alis Nona (Deceased),
Nakadamulla, Ranala.

5A. Edirisinghe Arachchige Chinthia
Nilmini Edirisinghe,
No. 157, Nakadamulla, Ranala.

6. Keragalage Julis Singho (Deceased),
Nakadamulla, Ranala.

6A. Sujeewa Janak Prasanna Keragala,
Nakadamulla, Ranala.

7. Lokuhiraluge Podihami,
Nakadamulla, Ranala.

8. Meeriyagallage Jane Nona (Deceased),
Nakadamulla, Ranala.

8A. Horana Gamage William Singho
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Nakadamulla, Ranala.

8B. Horana Gamage Caroline Nona,
Nakadamulla Ranala.

9. T.K. Magi Nona (Deceased),
Nakadamulla, Ranala.

9A,10. D.W. Meeriyagalla
No. 287/B, Galahitiyawa,
Ganemulla.

11.Rupawathie Meeriyagalla (Deceased),
No. 767/5, Millagahawatta Road,
Thalangama North, Malabe.

11A.Pushpa Gamage,
No. 767/5, Millagahawatta Road,
Thalangama North, Malabe.

12.Horana Gamage Piyadasa,
Nakadamulla, Ranala.

13.M. Saranelis Perera (Deceased),
Kottawa, Pannipitiya.

13A,14.H. Eugine Perera,
Kottawa, Pannipitiya.

15.Kalupahanage Shanthilatha (Deceased),
Nawalamulla, Ranala.

15A.Arambawattage Karolis alias Gunadasa
Rodrigo,
No. 37/2, Walawwatta, Ranala.

16.Habarakada Saranelis Perera (Deceased),
745, Katukurunda,
Kottawa, Pannipitiya.

16A.Habarakada Eugine Perera,
No. 981, Katukurunda, Kottawa,
Pannipitiya.

Defendants

AND BETWEEN

Henadirage Chandrasiri,
No. 202, Nakadamulla, Dedigamuwa,
Ranala.

Petitioner

Vs.

Keragalage Aron Perera (Deceased),
Nakadamulla, Ranala.

Plaintiff-Respondent

Pathmalatha Keragala,
Nakadamulla, Ranala.

Substituted Plaintiff-Respondent

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Pannipitiya.

Defendant-Respondent-Respondent-
Respondents

Before: **Sisira J. De Abrew, J.**
K.K. Wickramasinghe, J.
Janak De Silva, J.

Counsel: Jacob Joseph with Kaushali Rubasinghe and Kushani Harischandra for the Petitioner-Petitioner-Appellant
Seevali Amitirigala, PC with Pathum Wijepala for the Substituted Plaintiff-Respondent-Respondent-Respondent

Written Submissions on :

01.08.2016, 23.06.2017 and 24.03.2021 by the Petitioner-Petitioner-Appellant
05.09.2016 and 10.03.2021 by the Substituted Plaintiff-Respondent-Respondent-Respondent

Argued on: 04.03.2021

Decided on: 02.06.2021

Janak De Silva J.

The Plaintiff-Respondent-Respondent-Respondent instituted this action in the District Court of Homagama to partition the land called Mahawatte containing in extent 3 Bushels paddy sowing more fully described in the schedule to the plaint dated 7th April 1981.

A Preliminary Plan No. 1445 dated 26th January 1982 (P3A) was prepared by Sena Iddamalgoda, Licensed Surveyor where the extent of the corpus was specified as R.3 P. 31.

A second Preliminary Plan No. 400 dated 24th December 1982 (P4A) was prepared by Mervin Samaranayake, Licensed Surveyor where the extent of the corpus was specified as A.2 R.1 P. 5.7. The increase in extent was as a result of the 7th Defendant-Respondent-Respondent-Respondent insisting that a larger portion of land should be surveyed. The extra portion of land in extent R.3 P.5.7 is marked as Lot 3 in P4A. The Survey Report (P4B) states that Miriyagallage Don Obious Singho, Henadheerage Gnanawathie, Henadheerage Emis Singho and Henadhirage Johanis Singho made claims to Lot 3 before the surveyor.

On or before 29th July 1987 the original case record was destroyed by fire and a new case record was reconstructed on 12th July 1988.

At the commencement of the trial, parties reached a settlement which was duly approved by the learned District Judge by judgment dated 24th April 2003. Aggrieved by the said judgment, 15th Defendant-Respondent-Respondent-Respondent appealed to the Court of Appeal which set aside the judgment and directed the learned District Judge to enter judgment strictly according to the terms of settlement entered between parties. Accordingly judgment (P13) and interlocutory decree (P14) was entered on 19th October 2010.

On 15th November 2013 the Petitioner-Petitioner-Appellant (hereinafter referred to as "Appellant") filed an application in the District Court of Homagama seeking to set aside the interlocutory decree and to be permitted to enter into the case and file a statement of claim. The Appellant contended that although his father Henadheerage Emis Singho and sister Henadheerage Gnanawathie made claims to Lot 3 in Preliminary Plan No. 400 (P4A), they were not aware whether this land was included as part of the corpus and that the Appellant only became aware that it was so included when the surveyor came to the land to block out on 12th November 2013. The learned District Judge dismissed the application.

Thereafter the Appellant invoked the revisionary jurisdiction of the High Court (Civil Appeal) Western Province holden at Avissawella seeking to set aside the judgment and interlocutory decree and to be permitted to enter into the case and make a claim. This application was dismissed and hence this appeal.

Leave to Appeal has been granted on the following questions of law:

- (i) *Was the said judgment of the High Court (Civil Appeal) Western Province holden at Avissawella contrary to law and against the submission made?*
- (ii) *Whether the High Court (Civil Appeal) Western Province holden at Avissawella erred in law when it decided that the Petitioner has failed to establish that the Court defaulted to serve him notice due to failing to tender the journal entries from 1981 to 1988, which has been destroyed due to fire, and to ascertain whether the Court had failed to issue notice on the Petitioner in terms of Section 20 of Partition Law, in the absence of any journal entry which is beyond the control of the Petitioner which does not permit the Court to conclude that the Petitioner had failed to establish the fact that he was not served the notices by Courts?*
- (iii) *Whether the High Court (Civil Appeal) Western Province holden at Avissawella erred in law when it decided that the Petitioner has failed to establish that the Court has defaulted to issue notice since Kalupahanage Shanthilatha had been made the 15th Defendant of the case as a result of the claim she made before the Commissioner who made the Preliminary Survey dated 1st October 1982 marked “P3A”?*
- (iv) *Whether the High Court (Civil Appeal) Western Province holden at Avissawella failed to consider the statutory provisions given in the Partition Law No. 21 of 1977 to add a party to a pending case as set out in Sections 18(1), 21(a), 21(b) and 69(1)(b) of the Partition Act?*

The learned counsel for the Appellant after citing several authorities submitted that although section 48 of the Partition Law invests interlocutory and final decrees entered under the Partition Law with finality, the revisionary powers of the appellate courts are left unaffected when there is a fundamental vice in the proceeding resulting in a miscarriage of justice. In particular reliance was placed on the decision in *Somawathie v. Madawela and Others* [(1983) 2 SLR 15].

In seeking to establish a miscarriage of justice, the learned counsel for the Appellant relies heavily on the provisions in section 20(1) of the Partition Law which reads:

"20(1) The Court shall order notice of a partition action to be sent by registered post -

(a) to every claimant (not being a party to the action) who is mentioned in the report of the surveyor under subsection (1) of Section 18; and
(b) to every person disclosed under paragraph (c) of subsection (1) of Section 19 by a defendant in the action."

It is contended that the Appellant did not receive any notice in terms of these provisions and as a result his rights have been affected.

Notice in terms of these provisions should be sent only to claimants mentioned in the report of the surveyor or to a person disclosed by a defendant under paragraph (c) of subsection (1) of section 19. However, neither of the two surveyor reports (P3B) (P4B) mentions the Appellant as a claimant to the land surveyed. Furthermore, none of the defendants have disclosed the Appellant under paragraph (c) of subsection (1) of Section 19. Accordingly, I hold that the Appellant is not entitled to be noticed in terms of section 20(1) of the Partition Law.

The fundamental proposition sought to be established by the Appellant is that he did not receive notice in terms of section 20 of the Partition Law. For the reasons given above, he is not entitled to such notice.

In any event, there is nothing in the evidence before Court to indicate that the District Court failed to give effect to section 20 of the Partition Law. The burden of establishing any such failure is upon the Appellant as it is he who asserts. This he has failed to do. I will now examine this aspect in greater detail.

It is true that his father Henadheerage Emis Singho and sister Henadheerage Gnanawathie made claims before the surveyor to the corpus. However, the claim made by the Appellant to the corpus is not based on paternal inheritance. He claims upon deeds bearing Nos. 24440 (P19) and 1916 (P20).

The two vendors of deed no. 24440 (P19) are Miriyagallage Don Obious Singho and Miriyagallage Karunadasa and it has been executed on 26th September 1984 which is two years after Miriyagallage Don Obious Singho made a claim before the surveyor. There is nothing on record to indicate that Obious Singho had made any application alleging lack of notice. Miriyagallage Karunadasa never made a claim before the surveyor to the land surveyed.

The vendor of deed no. 1916 (P20) is Miriyagallage Don Saveriyel and it was executed on 25th October 1992. However, Don Saveriyel did not make any claim before the surveyor.

Although the father of the Appellant, Henadheerage Emis Singho also made a claim before the surveyor to the corpus, there is no evidence of any claim made by him of any lack of notice until his death on 22nd March 1993 (P36).

More importantly the Survey Report (P4B) states that Henadheerage Gnanawathie, sister of the Appellant, also made a claim to Lot 3 before the surveyor. However, she has not made any application to the District Court claiming that she was not noticed in terms of section 20 of the Partition Law.

Since the record was destroyed by fire, the next best evidence of the alleged failure on the part of the District Court to comply with section 20 of the Partition Law would have been the evidence of Gnanawathie that she was not duly noticed as required by law. Nevertheless, the Appellant has failed to provide any evidence from Gnanawathie with his application to the District Court although he claimed before the High Court (Civil Appeal) Western Province holden at Avissawella that Gnanawathie also resides on the land depicted in Preliminary Plan no. 400 (P4A). One of the questions of law for determination includes a reference to section 69(1)(b) of the Partition Law. However, that has no application since the Appellant sought to be added as a party after the judgment was delivered.

Accordingly, I answer the questions of law (i), (ii) and (iv) in the negative. Question of law (iii) does not arise for determination in view of the answers given to the other questions of law.

For the aforesaid reasons, I affirm the judgment of the High Court (Civil Appeal) Western Province holden at Avissawella dated 18th December 2014 and the judgment and interlocutory decree dated 19th October 2010 of the learned District Judge of Homagama and dismiss the appeal. Registrar is directed to take steps accordingly.

The Substituted Plaintiff-Respondent-Respondent is entitled to his costs in this Court as well as in the High Court (Civil Appeal) Western Province holden at Avissawella.

Judge of the Supreme Court

Sisira J. De Abrew, J.

I agree.

Judge of the Supreme Court

K.K. Wickramasinghe, J.

I agree.

Judge of the Supreme Court