

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

SC Appeal No. 24 / 2019

SC / HCCA / LA / 329 / 2017

NWP / HCCA / KUR / 69 / 2013 (F)

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

Mohotti Arachchige Iranganie Jayalath of
Ellagonna Watta,
Arapola,
Mawathagama.

PLAINTIFF

-Vs-

1. I. M. Kumarihamy
of "Dimuth", Pilessa.
2. E. A. Dharmaratne
of "Dimuth", Pilessa.
3. W. M. Punchi Banda
of Pilessa, Yalegama.
4. E.A.P. Edirisinghe
of Kandy Road, Pilessa.

5. J. M. Sebalin Nona
of Kandy Road, Pilessa.
6. N. M. Henamma
of Hanthanegama, Kubukgatey.
7. N. M. Muthubanda
of Wathuragoda, Pujapitiya.
8. A.H.M. Jayatillake
of Sevenda, Pilessa.
9. Mallawa Thantrige Dasanayake
(nee Perera)
of “Nandanapaya”, Dahamune, Pilessa.

DEFENDANTS

AND BETWEEN

3. W. M. Punchi Banda
of Pilessa, Yalegama.

3RD DEFENDANT – APPELLANT

-Vs-

Mohotti Arachchige Iranganie Jayalath of
Ellagonna Watta,
Arampola,
Mawathagama.

PLAINTIFF – RESPONDENT

1. I. M. Kumarihamy
of “Dimuth”, Pilessa.

1ST DEFENDANT – RESPONDENT

2. E. A. Dharmaratne
of “Dimuth”, Pilessa.

2ND DEFENDANT-RESPONDENT
(DECEASED)

- 2A. E. A. Dilhani Edirisinghe
of “Dimuth”, Pilessa.

SUBSTITUED 2ND
DEFENDANT – RESPONDENT

4. E.A.P. Edirisinghe
of Kandy Road, Pilessa.
5. J. M. Sebalin Nona
of Kandy Road, Pilessa.
6. N. M. Henamma
of Hanthanegama, Kubukgatey.
7. N. M. Muthubanda

of Wathuragoda, Pujapitiya.

8. A.H.M. Jayatillake
of Sevenda, Pilessa

9. Mallawa Thantrige Dasanayake
(nee Perera)
of “Nandanapaya”, Dahamune, Pilessa.

**4TH TO 9TH DEFENDANTS –
RESPONDENTS**

AND BETWEEN

Mohotti Arachchige Iranganie Jayalath of
Ellagonna Watta,
Arampola,
Mawathagama.

**PLAINTIFF-RESPONDENT-
APPELLANT**

-Vs-

3. W. M. Punchi Banda
of Pilessa, Yalegama.

**3RD DEFENDANT-APPELLANT-
RESPONDENT**

1. I. M. Kumarihamy
of “Dimuth”, Pilessa.

**1ST DEFENDANT-RESPONDENT-
RESPONDENT**

2. E. A. Dharmaratne
of “Dimuth”, Pilessa.

**2ND DEFENDANT-RESPONDENT-
RESPONDENT**

(Deceased)

2A. E. A. Dilhani Edirisinghe
of “Dimuth”, Pilessa.

**SUBSTITUTED 2A DEFENDANT-
RESPONDENT-RESPONDENT**

4. E.A.P. Edirisinghe
of Kandy Road, Pilessa.

5. J. M. Sebalin Nona
of Kandy Road, Pilessa.
(Deceased)

5A. Edirisinghe Arachchilage Gunathilaka
Edirisinghe

5B. Edirisinghe Arachchilage Swarna
Edirisinghe

5C. Edirisinghe Arachchilage Sunil

Edirisinghe
all of Kandy Road, Pilessa.

6. N. M. Henamma
of Hanthanegama, Kubukgatey.

7. N. M. Muthubanda
Of Wathuragoda, Pujapitiya.

Currently,
No. 78, Molagoda Gedara,
Marathugoda, Poojapitiya.

7A. Samarakoon Bandaranayake
Mudiyanselage Kusumawathie Manike
No. 78, Marathugoda, Poojapitiya.

8. A.H.M. Jayatillake
of Sevenda, Pilessa.

9. Mallawa Thantrige Dasanayake
(nee Perera)
of “Nandanapaya”, Dahamune, Pilessa.

4TH TO 9TH DEFENDANTS-
RESPONDENTS-RESPONDENTS

Before : A.H.M.D. Nawaz, J.
Kumudini Wickremasinghe, J. &
K. Priyantha Fernando, J.

Counsel : Lakshman Perera, PC with Ms. Tharika Jinadasa for Plaintiff – Respondent – Appellant instructed by Ms. Niluka Dissanayake.

Niranjan de Silva with Shane Foster for 3rd Defendant – Appellant – Respondent in SC Appeal 24/2019.

Tharanga Edirisinghe instructed by Maheshika Patabendi for the 1st Defendant – Appellant – Respondent and for the substituted 2nd Defendant – Appellant – Respondent.

Argued &

Decided On : **19.03.2025**

A.H.M.D. Nawaz, J.

In the course of the submissions made by the learned President’s Counsel for the Plaintiff-Respondent-Appellant (the Plaintiff) and the learned Counsel for the 3rd Defendant-Appellant-Respondent (the 3rd Defendant), it becomes clear that the Plaintiff appears to claim more than what was secured by him to the Western portion by virtue of his deed.

This Court has granted leave to the Appellant on the following question of law;

“Did the High Court err in law by allowing the petition of appeal filed by the 3rd Defendant-Appellant-Respondent, particularly by granting all the reliefs as prayed for in the petition dated 17/05/2013 filed by the 3rd Defendant-Appellant-Respondent?”

At the instance of the Plaintiff, a preliminary survey was commissioned; however, it is clear that the 3rd Defendant was not present at the survey. The surveyor surveyed both

the Western and Eastern portions and depicted them as Lot 2 and Lot 1 respectively, based on the deeds produced at the trial. It then became apparent that Lot 1 had been distinctly given to the predecessor of the 3rd Defendant, whereas Lot 2 depicted as the Western portion, had been given by deed to the Plaintiff's predecessor.

However, the crux of the issue appears to be that the 3rd Defendant's complaint is not so much on the co-ownership pertaining to Lot 1 but on the alleged encroachment that is found to be the case upon the facts before the District Judge.

Mr. Niranjan de Silva, learned Counsel for the 3rd Defendant made submissions before this Court that there had not been a proper investigation of title and the *corpus* has not been correctly identified. The principal argument of Mr. Niranjan de Silva before this Court is that the Plaintiff by virtue of the survey plan which incorporates Lot 1 and Lot 2 in one plan has also incorporated a portion of the 3rd Defendant's land namely, Lot 1. Though both the plaint and the amended plaint depict Lot 2 to contain 2 acres and 30 perches, the preliminary plan commissioned by the Plaintiff indicates that Lot 2 engulfs an extent of 2 acres, 1 rood and 12.75 perches, which is larger than what the Plaintiff obtained by virtue of his deed.

Thus, it is evident that the Plaintiff has sought to partition a land whose extent differs from his entitlement emanating from the deed in his favour.

Though the Plaintiff confined his case of partition to embody the *corpus* in Lot 2, it would appear that the extent sought to be partitioned appears to be larger than the portion that he originally received by virtue of his deed.

Mr. Niranjan de Silva, learned counsel for the 3rd Defendant - Appellant - Respondent complains that this has prejudiced the rights of the 3rd Defendant to his entitlement in Lot 1. However, the learned President's Counsel, Mr. Lakshman Perera draws the attention of this Court to the *proviso* contained in Section 18(2) which is to the following effect:

“Provided that the Court shall, on the application of any parties to the action and on such terms as may be determined by the Court, order that the Surveyor shall be summoned and examined orally on any point or matter arising on, or in connection with any such documents or any statements of fact therein or any relevant fact which is alleged by any party to have been omitted therefrom.”

The learned President’s Counsel relied on this *proviso* and contended that there was an opportunity available to the 3rd Defendant to summon and examine the said surveyor who had drawn the survey plan, to explain the basis on which the said surveyor demarcated and separated the aforesaid Lots 1 and 2. We also notice a boundary that has been drawn on the plan bearing No. 2369 dated 03/11/1994. We see the force in the argument of the learned President’s Counsel, and we acknowledge that the 3rd Defendant had an opportunity, by virtue of the *proviso*, to summon the surveyor and have any encroachment identified. We find that the surveyor has not been called to give evidence in the case, and that this plan has just been allowed to be marked in the case. But the question arises whether there is an overriding duty on the part of the learned District Judge to go beyond the mere adoption of the plan and engage in a thorough investigation of title. The question can also be couched in the following manner, namely, whether the learned District Judge of Kurunegala must have embarked upon an inquiry as to why the extent depicted in Lot 2 in the plan is larger than the documentary evidence before that Court which shows Lot 2 to contain a lesser extent.

We have given our careful consideration to the facts in the case and we should highlight the fact that the learned District Judge has not been as engaging as he should have been in a case of this nature. There is a binding duty on the part of all District Judges to minutely undertake an examination of title which also includes the correct depiction of the *corpus* as articulated by Hon. Justice Saleem Marsoof in the case of ***Sopinona Vs. Pitipane Arachchi and 2 others***¹.

¹ 2010 1 SLR at page No. 98

Thus, we find that the learned District Judge had not engaged in a proper investigation of title and that there is no correct identification of the *corpus* on the part of the Plaintiff.

However, while the District Judge proceeded to partition the *corpus* as alleged before Court by the Plaintiff, the learned High Court Judge set aside that judgment on some erroneous basis. A cardinal error that the learned High Court Judge committed was to address altogether erroneous questions, namely, whether the Plaintiff was in fact seeking to partition not only Lot 2 but also Lot 1.

This Court makes the statement that this was never the case of the Plaintiff. Having considered holistically the entirety of the facts that have been placed before the learned District Judge, we arrive at a decision to affirm the finding that the *corpus* in this case has not been clearly identified.

Therefore, we proceed to set aside the judgment of the learned District Judge dated 21/03/2013 and affirm the judgment of the Civil Appellate High Court only insofar as it dismissed the Plaintiff's case. However, we strongly take exception to the reasoning on which he based his judgment dated 01/06/2013.

In the aforesaid circumstances, we proceed to dismiss this Appeal. Since the parties have expressed their willingness to be guided by the same judgment in *SC/APPEAL/ 25/2019*, this judgment will apply to that particular case as well.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.

I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.

I agree.

Judge of the Supreme Court