IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

E. A. Edwin
Devamitta Place,
Heiyanthuduwa
15th Defendant-Appellant

C.A.No.84/98 (F) **Vs**

D.C.GAMPAHA CASE NO.30360/P

E. A. Dona Babynona,
No.68,
Gonawala
And another
Plaintiff – Respondents

E. A. Dona Mayawathi Yagabamunu
Madabawita,
Danowita
And 15 others
Defendant-Respondents

COUNSEL	:	Gamini Marapane P.C.with Keerthi Sri Gunawardane for the 15th Defendant-Appellant
		S.A.D.S.Suraweera for the Plaintiff-Respondents
ARGUED ON	:	10.03.2014
WRITTEN SUBMISSIONS FILED ON	:	28th April 2014 by the 15th Defendant-Appellant
	:	30th April 2014 by the Plaintiff-Respondents
DECIDED ON	:	**29.05.2014**

CHITRASIRI, J.

This is an appeal seeking to set aside the judgment and the interlocutory decree dated 27th January 1998 of the learned District Judge of Gampaha. In the petition of appeal, 15th defendant-appellant (hereinafter referred to as the 15th defendant) has also sought to have the action of the plaintiff-respondents (hereinafter referred to as the plaintiffs) dismissed. Action of the plaintiffs is to have a partition decree in respect of the land referred to in the schedule to the plaint. 15th defendant filed his Statement of Claim, claiming prescriptive title to Lot 1 referred to in Preliminary Plan bearing No.362 marked "X" in evidence. Whilst claiming prescriptive rights to the aforesaid lot 1 in plan "X", 15th defendant has also sought to have the Lots 1, 4 and 5 in that plan, excluded from the land sought to be partitioned having mentioned reasons for such a claim in his statement of claim.

However, when the matter came up for trial before the learned District Judge, 15th defendant have raised issues disputing the identity of the corpus, abandoning his claim to have the lots 1, 4 and 5 excluded though his pleadings are to that effect. 1st point of contest of the plaintiffs and the 4th & the 5th points of contest of the 15th defendant had been framed in order to determine the identity of the corpus. Pedigree of the plaintiffs has not been challenged by the defendants. However, it must be noted that the burden of proof of same still lies on the plaintiffs though it was not been challenged. Upon hearing witnesses, learned District Judge answered the points of contest raised on the

question of identity of the corpus in favour of the plaintiffs and made order to partition the land referred to in the plan marked "X" accordingly.

As mentioned before, basically the issue was the identity of the land sought to be partitioned when the matter was pending in the Court below. It is the same issue that was argued in this Court as well. In determining identity of a particular block of land, generally the name, extent and the boundaries mentioned in the respective deeds & plans and its physical nature are the matters that should be looked at. In this instance, land sought to be partitioned being identified by four different names in the schedule to the plaint. However, in the deeds marked P2, P3, P8 and P9, it is being identified only by two names and those are namely Dambugahalanda alias Padawatte. Names Alubogahawatte and Jambugahawatte do not appear in those two deeds though those two names also appear in the schedule to the plaint. In the deed marked P3 only the name Dambugahalanda is found to identify the land. In the deeds P1 and P5, the land put in suit is named as Alubogahawatta alias Jambugahawatte and the names Dambugahalanda alias Padawatte is not mentioned in those two deeds. Accordingly, it is seen that there is no clear evidence as to the name of the land sought to be partitioned for the Court to decide that the land referred to in the title deeds of the plaintiff is the identical land mentioned in the schedule to the plaint.

Furthermore, following differences are found in respect of the boundaries of the land sought to be partitioned. Northern boundary mentioned in the schedule to the plaint is the land of D.Charlis Appu whereas the northern boundary in the plan marked "X" is bounded by Dambugahalanda alias Padawatte and by Hedapanikkiya Deniya claimed by the 15th defendant and others. Western boundary in the schedule to the plaint is the land belonging to Heiyanthuduwage Piloris Appu whereas the lands to the west in the plan marked "X" are Dombagahawatta and Etambagahawatta. Therefore, it is seen that two boundaries of the land described in the schedule to the plaint are completely different when those are compared with the boundaries found in the plan marked "X"

Plaintiffs have sought to partition a land which covers an area of four bushels of paddy sowing. It is so mentioned in the schedule to the plaint. However, the land subjected to partition in this case is the land referred to in the preliminary plan bearing No.362 marked "X" which contains Three Acres Three Roods and Three Perches (3A.3R.P3) in extent. According to the English standard of measurements, one bushel of paddy sowing is equivalent to Two Roods in extent. When four bushels of paddy sowing is converted in accordance with English standards of measurements, the plaintiffs by their plaint have sought to partition a land in extent of two acres only. Hence, it is seen that the plaintiffs have obtained a partition decree to a land in extent of nearly 4 acres having sought to partition a land in extent of two acres. The title of the plaintiffs that had derived through the deeds marked in evidence also is for a land in

extent of four bushels. It is equelant to two acres of land when converted making use of English standards of measurements. However, the learned District Judge has made order to partition a land in extent of Three Acres Three Roods and Three Perches (3A.3R.P3). Therefore, the land that had been partitioned has an extent of nearly double the amount of the entitlement of the plaintiffs. The plaintiffs have failed to establish the reasons to have such a difference even though the aforesaid conversion could be varied according to the varying degrees of the soil, the size and quality of the grain and also the peculiar qualities of the person who sow paddy. **Ratnayake and others v. Kumarihamy and others, [2002 (1) S.L.R. at page 65]**

When looking at the differences referred to above, as to the name, boundaries and the extent of the land sought to be partitioned, it is seen that no clear evidence is forthcoming to establish that the land shown in the plan marked "X" is the same land referred to either in the schedule to the plaint or in the title deeds of the plaintiffs. Learned District Judge has not addressed his mind to the aforesaid differences. In the circumstances, it is clear that the learned District Judge has misdirected himself when he decided that the land sought to be partitioned in this case is the land depicted in the plan 362 marked "X".

More importantly, it is necessary to note that a duty is cast upon the Judge hearing a partition action to follow the provisions contained in the Partition Law. 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. Section 18 (1)(a)(iii) requires the commissioner to express his/her opinion in his report whether the land surveyed by him ..... is substantially the same as the land sought to be partitioned as described in the schedule to the plaint or not. In this instance, action is filed to partition a land in extent of four bushels paddy sowing which is equivalent to 2 Acres of land in extent in accordance with the accepted measurement standards of conversion. The commissioner, who surveyed the land, has reported to Court that he could not state whether the land he surveyed is the land referred to in the schedule to the plaint or not.

Upon considering the matters referred to above, it is clear that the land that had been surveyed is substantially different from the land described in the schedule to the plaint. In such a situation, when the commissioner returned the commission, the Court should have decided whether to issue necessary instructions to the surveyor to carry out a fresh survey or whether the action should be proceeded with, in respect of the land as surveyed. It was thus held in **Sopaya and another v. Magilin Silva. [1989 (2) S.L.R. at page 108]** In that decision Sarath N Silva J (as he then was) held that:

> *"it was incumbent on the District Judge to decide on one of the following courses of action, after hearing the parties, viz:*
>
> *(i) to reissue the commission with instructions to survey the land as described in the plaint. The Surveyor could be e been examined orally as provided in section 18(2) to consider the feasibility of this course of action:*

(ii) to permit the Plaintiffs to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment of the plaint and the taking of other consequential steps including the registration of a fresh lis pendens.

(iii) to permit any of the Defendants to seek a partition of the larger land as depicted in the preliminary survey. This course of action involves an amendment of the statement of claim of that Defendant and the taking of such other steps as may be necessary in terms of section 19(2)."

Also, in the case of **Brampy Appuhamy v. Menis Appuhamy, [60 N.L.R. at page 337]** it was held as follows:

"when the surveyor proceeded to execute his commission and was unable to locate a land of about 6 acres, he should have reported that fact to the Court and asked for its further directions."

No such directions have been issued by Court to the commissioner in this instance upon return of the commission even though the commissioner has informed Court that he could not state whether the land he surveyed is the land referred to in the schedule to the plaint. The Court has failed to record even any reason as to why it proceeded with the action despite the views expressed by the commissioner on the question of identity of the corpus. Hence, it is clear that the learned District Judge has failed to follow the correct procedure contained in the Partition Law No.21 of 1977 in this instance.

Learned Counsel for the respondent referring to the case of **Yapa v. Dissanayake Sedera [1989 (1) S.L.R. at page 361]** has argued that inconsistency in extent will not affect the question of identity if the portion of the land surveyed is clearly described and can precisely be ascertained. However, it must be noted that in that partition action learned trial Judge has identified the land sought to be partitioned, not only by looking at the schedule to the plaint but also having evaluated the evidence of the surveyor and of the other witnesses. In that instance there was clear evidence to identify the land though a difference in extent had been found when the plan was produced in evidence. In this case the surveyor had not given evidence at all. The witnesses have not explained the differences in extent and of the boundaries. Therefore, the decision in **Yapa v. Dissanayake Sedera (supra)** cannot be made applicable in this instance particularly because the issue as to the identity of the corpus has not been explained on this occasion.

The circumstances mentioned hereinbefore, show that the land surveyed is substantially different from the land described in the schedule to the plaint. Therefore, I hold that the learned District Judge erred in proceeding with the action to partition a land substantially larger than the land described in the schedule to the plaint. He has failed to act in terms of the provisions contained in the Partition Law.

Accordingly, for the reasons set out above, I allow the appeal and set aside the judgment and the interlocutory decree entered on 27th January 1998.

Further, I direct that proceedings should be commenced a fresh from the stage of the return of the commission by the surveyor. I make no order as to the costs of this appeal.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL