

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

Pulahinge Akman Rodrigo,  
(deceased)  
Pulahinge Punyawardena Rodrigo,  
“Pushpasiri”, Koswatte,  
Morontuduwa.  
Plaintiff-Appellant

**CASE NO: CA/249/2000/F**

**DC PANADURA CASE NO: 74/P**

Vs.

1. Pulahinnage Edwin Rodrigo,  
Koswatte, Morontuduwa, (deceased)
- 1A Nevil Arunashantha Rodrigo,  
100A, “Arunasiri”, Koswatte,  
Morontuduwa.
2. Pulahinnage Joslin Rodrigo,
3. Magoda Arachchilage Mangonona,  
(deceased)
- 3A. Mogodaarachchige Ratnapala  
Rodrigo,
4. Mogodaarachchige Wijepala Rodrigo,
5. Mogodaarachchige Ratnapala,  
All of Koswatta, Moronthuduwa.
6. Mogodaarachchige Emalin Rodrigo,  
Murutude, Haltota, (deceased)
- 6B Nandana, Haltota,  
Moronthuduwa.
7. Mogodaarachchige Emalin Rodrigo,

8. Eugene Rodrigo,
- 8A Pulahinnage Ratnapala Rodrigo,  
(Legal Representative of the  
Deceased 8<sup>th</sup> Defendant)
9. Pulahinnage Punyawardena  
Rodrigo,  
“Pushpasiri”, Koswatta,  
Moronthuduwa.
10. Mastiyage Dona Agnes Gunatillaka,
11. Kanahela Mohandiramge Kingsley  
Reginold Siriwardena,  
Licensed Rubber Sales Point,  
Moronthuduwa Road,  
Bandaragama.
12. Kanhela Mohandiramge Vasantha  
Gamini Siriwardena,  
Kalutara Road, Moratuwa.
13. Jayalathge Saraneris, (deceased)  
Moronthuduwa Junction,  
Moronthuduwa.
- 13A Haturusinghe Arachchige Ekmon  
Perera,  
(Legal Representative of the  
Deceased 13<sup>th</sup> Defendant)
14. Haturusinghe Arachchige Ekmon  
Perera, (deceased)
- 14A Athrusiri Arachchige Ranjith  
Kusumsiri,  
89/B, Morontuduwa.
15. Pulhinege Delin Rodrigo  
Defendants-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Ranjan Gooneratne for the Plaintiff-Appellant.

Ranjan Suwandarathne, P.C., for the 3A, 4, 5, 6A, 8A,  
14A Defendant-Respondents.

Decided on: 02.10.2018

Samayawardhena, J.

The plaintiff filed this action in 1986 in the District Court of Panadura seeking to partition a land known as *Kurunduwatta* about two acres in extent according to the pedigree set out in the plaint. The Preliminary Plan is Plan No. 537 (X). The 3rd, 5th-8th defendants got Plan No. 2973 (3V1) prepared to depict the corpus and set out a different pedigree in their statement of claim. After trial, the learned District Judge accepted the Plan and pedigree of the aforesaid defendants and ordered Interlocutory Decree to be entered accordingly. It is against this Judgment dated 28.01.2000 the plaintiff has preferred this appeal.

There are two disputes: (a) corpus dispute and (b) pedigree dispute.

Let me first refer to the corpus dispute. After the Preliminary Plan was prepared, the said defendants moved Court to issue another commission to another surveyor to show the entire land as described in the schedule to the plaint on the basis that the Preliminary Plan does not depict the entire land.

According to the plaint, the land to be partitioned is about two acres in extent and the Preliminary Plan depicts a land of 1A 1R 25.83P in extent. Alternative Plan No. 2973 depicts a land of 2A 0R 1.25P in extent. The District Judge in the Judgment has accepted the alternative Plan.

This procedure is completely repugnant to the Partition Law, No. 21 of 1977, as amended.

At the trial, the Preliminary Plan and the Report have been marked as X and X1 respectively through the evidence of the plaintiff without any objection and without subject to proof.

The surveyor who prepared the alternative Plan No. 2973 has been called by the said defendants to give evidence. He has categorically stated to Court that he was not aware about a Preliminary Plan prepared for the case and he saw the Preliminary Plan for the first time while being in the witness box.

If the surveyor to whom commission was first issued to prepare the Preliminary Plan could not locate the entire land by boundaries and extent as described in the commission/plaint, he should have reported it to Court and sought further instructions.

In *Uberis v. Jayawardene*<sup>1</sup> Chief Justice Basnayake held that: "*It is the duty of a surveyor to whom a commission is issued to adhere strictly to its terms and locate and survey the land he is commissioned to survey. It is not open to him to survey any land pointed out by one or more of the parties and prepare and submit to the court the plan and report of such survey. If he is unable to locate the land he is commissioned to survey, he should so report to the court and ask for further instructions.*" Vide also *Brampy Appuhamy v. Menis Appuhamy*<sup>2</sup>.

In the instant case the surveyor has not sought further instructions and sent the Plan with the Report stating that the land surveyed by him is in his opinion substantially the same as

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<sup>1</sup> (1959) 62 NLR 217

<sup>2</sup> (1958) 60 NLR 337

the land sought to be partitioned as described in the schedule to the plaint—section 18(1)(a)(iii) of the Partition Law.

This Plan and Report may, in terms of section 18(2) of the Partition Law, be used as evidence of fact without further proof.

However the proviso to section 18(2) states that "*Provided that the court shall, on the application of any party 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 connexion with, any such document or any statement of fact therein or any relevant fact which is alleged by any party to have been omitted therefrom.*"

Neither the contesting defendants nor the Court has thought it fit to summon the court commissioner and examine orally on the discrepancy of the extent either before or during the course of trial. As I have already stated, at the trial, the Preliminary Plan and the Report have been marked without any objection.

According to section 18(3) of the Partition Law, if the Court or a party is not satisfied with the Preliminary Plan, steps can be taken to issue a commission to the Surveyor-General to prepare a fresh Plan; but there is no provision in the Partition Law to issue a commission to another surveyor to prepare an alternative Preliminary Plan.

In *Fernando v. Perera*<sup>3</sup>, the petitioner was not satisfied with the Court Commissioner's Preliminary Plan and got another commission issued to another surveyor to prepare a second Preliminary Plan. At the trial, the Court accepted the

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<sup>3</sup> CALA 187/95 (DC Kalutara No.5848/P) decided on 02.10.1995

Commissioner's Plan as the Preliminary Plan, and the petitioner came before this Court by way of revision against it. Upholding the order of the District Judge, Justice Ranaraja stated that: "*Section 18 of the Partition Act provides for parties dissatisfied with the Preliminary Plan prepared on commission issued by Court to make an application for a commission to issue on the Surveyor-General. The petitioner has not availed himself of this provision of law. Similarly there is a provision in that section for a party to have a surveyor who conducted the survey to be summoned to Court and examined in any matter arising from the Preliminary Plan and Report filed in Court. The petitioner has not had recourse to that provision. Instead he had sought a fresh commission on another surveyor to conduct a second preliminary survey which is not permitted by law.*"

The District Judge made a fundamental error by accepting the alternative Plan as the Preliminary Plan.

At this stage I must also mention that although the Judgment runs into 34 pages, it merely contains repetition of evidence led at the trial. There is no proper analysis of evidence, which is what is expected from a Judge.

Apart from the legal barrier, I cannot understand why the learned District Judge accepted the alternative Plan on facts. It appears that the surveyor who prepared the alternative Plan has tried to prepare a Plan showing two acres in extent as the plaint refers to a land of that extent. Lot 3 of the alternative Plan (3V1) cannot in my view form part of the corpus. If it forms part of the corpus, the southern boundary of the corpus shall be Delgahawatta and the road; and a part of the eastern boundary shall also be the road. But there is no road in the southern or eastern boundaries

according to the plaintiff. Also, if Lot 3 was regarded part of the corpus, I fail to understand why the portion of land between Lot 2 and Lot 3 was not considered as a part thereof.

Taking all the legal and factual circumstances into account, in particular, the parties have already spent nearly 32 years on this litigation and the main witnesses who have given evidence at the trial and who could speak to the pedigree and extent of the land are no more among the living, I direct that the land depicted in the Preliminary Plan (X) shall be regarded as the land to be partitioned, and the finding of the District Judge accepting the alternative Plan (3V1) as depicting the land to be partitioned is set aside.

This leads me to consider the pedigree dispute. It is common ground that the original owner of this land was Simon Rodrigo. It is the case of the plaintiff that Simon Rodrigo had four children. All the other defendants including the 1st defendant have taken up the position that he had only three children. According to the proceedings, at the time of giving evidence, the plaintiff was 75 years old, and his younger brother, the 1st defendant, was 72 years of old. The District Judge cannot be found fault with in accepting the version of all the defendants in preference to that of the plaintiff on that matter.

Learned counsel for the plaintiff referring to section 35 of the Matrimonial Rights and Inheritance Ordinance, No.15 of 1876, as amended, states that there is no evidence that the half share gifted to Johanis by Deed P1 was released from collation and therefore on the death of Simon Rodrigo, Johanis had no claim on the balance half share. The certified copy of Deed P1 produced by the plaintiff is not clear at all, but as far as I could read, it appears to me that P1 is not a gift but an outright transfer.

For the aforesaid reasons, I affirm the Judgment of the District Court subject to the variation that the land to be partitioned is the land depicted in the Preliminary Plan (X) and not in the alternative second Plan (3V1).

Let the parties bear their own costs of appeal.

Appeal partly allowed.

Judge of the Court of Appeal