

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

In the matter of an appeal from the
final judgment in the District Court of
Kalutara in Case No. 6112/P.

CASE NO: CA/DCF/768/99

D.C. Kalutara, Case No. 6112/P.

Premalal Vidana Arachchi,
Palatota Junction,
Palatota, Kalutara.

Plaintiff

Vs.

1. Thesa Appuhamilage Annie
Nona Siriwardena,
Palatota Junction,
Palatota, Kalutara.
2. Hulagahavithanalage Dona Lily
Nona,
Gulwala,
Palatota, Kalutara.
3. Wehella Mudalige Dona
Amarawathie
4. Galhenage Premathilaka Perera
Both of Palatota, Kalutara.

Defendants

And

Premalal Vidana Arachchi,
Palatota Junction,
Palatota, Kalutara.

Plaintiff-Appellant

Vs.

1. Thesa Appuhamilage Annie
Nona Siriwardena (*Deceased*)
- 1(a) Vidana Archchige Siriyalatha
- 1(b) Vidana Archchige Pemalal
- 1(c) Vidana Archchige Champa
Devika
- 1(d) Vidana Archchige Chandrika

All of Palatota Junction,
Palatota, Kalutara.

**1(a)-1(d) Substituted
Defendant-Respondents**

2. Hulagahavithanalage Dona Lily
Nona, Gulwala,
Palatota, Kalutara.
3. Wehella Mudalige Dona
Amarawathie
4. Galhenage Premathilaka Perera
Both of Palatota, Kalutara.

**2nd – 4th Defendants-
Respondents**

And Now

Premalal Vidana Arachchi,
Palatota Junction,
Palatota, Kalutara.

Plaintiff-Appellant-Petitioner

Vs.

1. Thesa Appuhamilage Annie
Nona Siriwardena (*Deceased*)
- 1(a) Vidana Archchige Siriyalatha
- 1(b) Vidana Archchige Pemalal

- 1(c) Vidana Archchige Champa
Devika
1(d) Vidana Archchige Chandrika

All of Palatota Junction,
Palatota, Kalutara.

**1(a)-1(d) Substituted
Defendant-Respondents**

2. Hulagahavithanalage Dona Lily
Nona, Gulwala,
Palatota, Kalutara.
- 2(a) Delgahatenna Mohottalage
Premaratne,
Gulwala, Palatota,
Kalutara.
3. Wehella Mudalige Dona
Amarawathie
4. Galhenage Premathilaka Perera
Both of Palatota, Kalutara.

**2(a), 3rd and 4th Defendants-
Respondent-Respondents**

1. Delgahathenna Mohottalage
Premaratne
2. Delgahathenna Mohottalage
Udara Premaratne
3. Delgahathenna Mohottalage
Gangani Wajiramala
4. Delgahathenna Mohottalage
Kumudu Vithana

All of Gulwala, Palatota,
Kalutara South

Respondents

Before: **M. T. MOHAMMED LAFFAR, J. and
K. K. A. V. SWARNADHIPATHI, J.**

Counsel: M.D.J. Bandara for the Plaintiff-Appellant.

Written Submissions on: 18.03.2019 (by the Plaintiff-Appellant).

Argued on: 25.03.2021

Decided on: 26.07.2021

MOHAMMED LAFFAR, J.

This is an appeal preferred by the Plaintiff-Appellant (hereinafter referred to as the “Appellant”) from an undated judgment¹ of the learned District Judge of Kalutara. However, as per the Journal entry No. 51, the impugned judgment had been pronounced in open Court on 15.09.1999.

The Appellant instituted action in the District Court of Kalutara in case bearing No. 6112/P to partition the land called Kalasiyagodellawatta *alias* Kalasiyagodella and lot-A of Himidiriya-Agara which is morefully described in the 2nd schedule of the plaint, between the Appellant and the 1st Defendant-Respondent (hereinafter referred to as the “1st Respondent”). The 2nd Defendant-Respondent (hereinafter referred to as the “2nd Respondent”) moved for a dismissal of the action on the basis that she is the owner of the subject matter.

After trial, the learned District Judge dismissed the action on the footing that the land sought to be partitioned was not properly identified in terms of the provisions of the Partition Law, No. 21 of 1977. Being aggrieved by the judgment the instant appeal is preferred by the Appellant.

¹ Vide judgment at page 202 of the appeal brief.

The preliminary plan bearing No. 449 dated 26.05.1993 made by G. Adikaram, Licensed Surveyor is marked as X2. Thereafter, at the request of the appellant, an alternative plan, namely No. 8038 dated 09.03.1995 has been submitted by W. Seniviratne, Licensed Surveyor marked X. At the trial, the Appellant raised points of contest and led evidence for the purpose of the identification of the corpus, not on the preliminary plan but on the alternative Plan marked X.

The learned District Judge was of the view that, in partition actions the corpus should be identified upon the preliminary plan made by the Commissioner and not on the alternative plan made by another surveyor.

The contention of the learned Counsel for the Appellant was that there is no impediment for the learned District Judge to adjudicate the matter on the alternative plan.

In partition actions, there will be one preliminary plan that is made by the commissioner, and all the title plans relied upon by the parties are to be superimposed on the said preliminary plan. The court is entitled to issue a commission to the Surveyor General to prepare a plan to identify the corpus, on its own motion or upon the application of the parties to the action.

If the necessity arises to survey any larger or smaller land than that pointed out by the plaintiff, where a party claims that such survey is necessary for the adjudication of the action, such commission should be issued to the same commissioner who made the preliminary plan, and not to another Surveyor, as stated in section 16 (2) of the Partition Law, which reads thus,

“The commission issued to a surveyor under subsection (1) of this section shall be substantially in the form set out in the Second Schedule to this Law and shall have attached thereto a copy of the plaint certified as a true copy by the registered attorney for the plaintiff. The court may, on such terms as to costs of survey or otherwise, issue a commission at the instance of any party to the action, authorizing the surveyor to survey any larger or smaller land than that pointed out by the plaintiff where such party claims that such survey is necessary for the adjudication of the action.”

It is to be noted that the word “the surveyor” used in the aforesaid section is referring to the commissioner to whom the commission to prepare the preliminary plan was issued in terms of section 16(1) of the Partition Law.

In this regard, I wish to refer the case bearing No. **CA/LA 187/95**². This is an application in revision from the order of the learned District Judge refusing to accept the plan made on a second commission issued as the preliminary plan in the case. In that case, the petitioner filed action to partition the land called “Kuda Arambawatta.” Commission was issued to Surveyor W. Seniviratne who returned the commission with plan No. 6617 and report to court on 27.05.1992. The petitioner who was not satisfied with the plan and the report moved for another commission, on another Surveyor. The court allowed this application. The fresh commission was issued to B.K.P.W. Gunawardena. Subsequently, he returned the commission duly executed with plan No. 518 with report dated 22.12.1992. When the matter was taken up for trial, objections were raised to the application of the petitioner that surveyor Gunawardena’s plan and report being accepted as the preliminary plan and report in the case. The learned District Judge accepted the preliminary objections and directed that plan No. 6617 prepared by surveyor Seniviratne be accepted as the preliminary plan. Dr. Ranarajah, J. observed that,

“Section 18 of the Partition Law 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 provision, in that section for a party to have a surveyor who conducted the survey to be summoned to court and examined on 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. There is no error in the order made by court.”

² Court of Appeal Minutes dated 02.10.1995 (from D. C. Kalutara, Case No. 5848/P).

In **Sumanasena vs. Premaratne**³, the District judge identified the corpus upon the plan No. 653A made by Gunasingha, Licensed Surveyor, of consent of the parties to the action, and the preliminary plan made by the commissioner, namely Mr. Mendis (No. 516) was disregarded. Salam, J. observed that,

“It has been stressed in several judgments of the appellate courts that after the preliminary survey is done, any further commissions under 16 (2) should be issued to the same surveyor who carried out the original commission under Section 16 (1). This legal position is quite clear on a comparative analysis of Sub Section 1 and 2 of Section 16

This clearly shows that commission to carry out the preliminary survey invariably has to be issued to a surveyor who is listed for that purpose. Similarly, under Section 16 (2), to survey a larger or smaller land the Court is bound to issue the commission to the same Surveyor.

The advantages of the strict adherence to Section 16 (2) are worthy of being mentioned here. In terms of Section 18(2) the report of the Surveyor, Plan and various other documents referred to in paragraphs (a), (b) and (c) of Subsection (1) of Section 18 may, without further proof, be used as evidence of the facts stated or appearing therein at any stage of the partition action. Quite unfortunately, no such evidential value can be attached, to any survey plan or report prepared in violation of Section 16 of the Partition Law. Hence, the purported preliminary plan made by U. D. C Gunasingha, L.S attracts no such evidential value, unlike in the case of the plan and report submitted by D.C Mendis, Commissioner of Court

The facts disclosed above as regards the two commissions issued, the latter having been issued in blatant violation of Section 16 (2) of the Partition Law makes it abundantly clear that the learned District Judge has acted in violation of the imperative Provisions of the Partition Law. Hence, it will be a travesty of justice to allow the judgment and the interlocutory decree to stand in this case, as the learned District Judge has failed to identify the corpus in reference to a legally admissible preliminary plan.

The consent of the parties cannot confer power or authority in court, unless such a power has not been conferred by the Statute. Consent of

³ CA/1336 & 1337/F, CA Minutes dated 06.03.2014 – per Salam, J. agreeing with Rajapaksha, J.

the parties, however, can give no authority or jurisdiction to a court, to deviate from the substantial law or an imperative procedural step. It is a fundamental principle that no consent can confer a court the authority to exercise its power in a particular way, when the Law expects the Court to do it in a different manner. Therefore, the decision of the learned District Judge to treat Lot A and C depicted in the second plan as the corpus, lacks any legal bar.

The Court has a duty to identify the corpus without causing damages to third parties by dragging their lands into the corpus. One of the ways in which it could be achieved is by having recourse to a legally prepared preliminary plan and a report. In the absence of such a plan and report court may unconsciously extend a helping hand to collusion against the rest of the world which can take away the sanctity attached to a final decree. Hence, it is totally unsafe to decide on the corpus with the help of a plan and report prepared outside the Legislative guidance shown under Section 16 and 18.”

In **Hettige Don Tudor and others vs. Hettige Don Ananda Chandrasiri**⁴, the Supreme Court observed that,

“The provisions under section 16 does not recognize any 2nd plan in a partition action. In any single partition action there should be only one preliminary plan that is made by the court commissioner and all the plans relied upon by the parties are to be superimposed on the said preliminary plan. After the preliminary plan is made and filed in Court, if necessary, the trial Court is entitled to issue a commission to the Surveyor General to prepare a plan to identify the corpus, on its own motion or at the instance of the parties to the action. If the necessity arises to survey any larger or smaller land than that pointed out by the plaintiff, where a party claims that such survey is necessary for the adjudication of that action, such commission can be issued to the same commissioner who made the preliminary plan. It cannot be issued to another surveyor. In the case in hand, the Court had issued another commission to another surveyor which is quite contrary to the provisions of the Partition Law.

.....

An action for partition of land is an action in rem. When the decree in a partition action is entered, it is a decree in rem which binds the whole world and not only the parties to the partition action. It will be effective

⁴ SC.Appeal No: 134/16. SC/HC/CALA 435/2015, SC Minutes of 19.02.2018).

at all times. That is the vital point and the basis for the Partition Law being enacted. The provisions are imperative. Going beyond the provisions of the Partition Law is not a technical matter as alleged by the appellants' Counsel in his written submissions. The fact that the parties to the action had agreed to go ahead with the 2nd plan done by another commissioner, when the application to do so was made by the plaintiffs of the case at the trial and the Court had allowed the same, is no reason to be regarded to support the judgment of the trial Court. It was erroneous to accept the 2nd plan. The District Court was wrong in having accepted the 2nd plan done by a different surveyor. The provisions of the Partition Law are mandatory and should be followed in every step of the way in any partition action before the District Court. The argument of the appellants that it is only a technical matter fails...”⁵

As such, it is abundantly clear that the plan and the report made by the surveyor, to whom the commission was issued under section 16 (1) of the Partition Law, is the preliminary plan in a partition action. When the parties are not satisfied with the preliminary plan, the court may direct the same commissioner to survey the larger or smaller land, or to superimpose any title plan tendered. If the court is of the opinion that the commissioner is not in a position to carry out the commission issued by court, a fresh commission can be issued to the Surveyor General to prepare a plan. In such a situation, the plan and the report made by the Surveyor General can be accepted as a preliminary plan of the action. It is pertinent to be noted that, issuing a commission to another surveyor, other than the commissioner who made the preliminary plan or the Surveyor General is erroneous and contrary to the Partition Law.

In these respects, this Court is of the considered view that the determination made by the learned District Judge to dismiss the action on the basis that the corpus sought to be partitioned can not be identified on the purported alternative plan marked X, is not wrong.

⁵ Vide pp. 9-10 of the judgment – *per* Eva Wanasudera, PC, J.

For the foregoing reasons, I see no basis to interfere with the judgment of the learned District Judge of Kalutara dated 15.09.1999.

Accordingly, the appeal is dismissed with costs, fixed at Rs. 10,000/- and the said judgment is affirmed.

The Registrar is directed to dispatch the judgment along with the original case record to the District Court of Kalutara.

Judge of the Court of Appeal

K. K. A. V. SWARNADHIPATHI, J.

I agree.

Judge of the Court of Appeal