

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

Case No. 991/2000/C.A. (Final)  
Kandy District Court case  
No. 11979/P

Wijekoon Mudiyansele Tissa Wijekoon,  
Kapukotuwa,  
Godamunne.

**Plaintiff.**

Vs.

01. Wijekoon Mudiyansele Kamalawathie  
Wijekoon of Godamunne.

02. Wijekoon Mudiyansele Yasawathie  
Wijekoon of Godamunne. (Deceased)

2A. Jayadasa Kulugamma of  
"Manel",  
Akiriya.

**2A Substituted- Defendant.**

03. Wijekoon Mudiyansele Chitra Wijekoon.  
of Kalyani Stores, Talatu Oya.

04. Wijekoon Mudiyansele Indra Wijekoon.  
of Wendaruwa.

05. Napana Saranankara Thero,  
Sagama Viharaya,  
Talatu-Oya.

**Defendants.**

**Now And Between**

1. Wijekoon Mudiyansele Kamalawathie  
Wijekoon, of Godamunne.

**1<sup>st</sup> Defendant – Appellant.**

**Vs.**

1. Wijekoon Mudiyansele Tissa Wijekoon.  
Godamunne.(Deseased)

**Plaintiff-Respondent.**

- 1A. Yasawathie Ekanayake,  
No. 136, Yalewela,  
Kapukotuwa, Godamunne.
- 1B. Ramya Kumari Wijekoon,  
Arangala, Naula.
- 1C. Chethiya Bandara Wijekoon,  
No.136, Yalewela, Kapukotuwa,  
Godamunne.
- 1D. Pujitha Bandara Wijekoon,  
Yakeweka, Kapukotuwa,  
Godamunne,

**1A,1B,1C,1D Substituted –  
Plaintiff-Respondents.**

02. Wijekoon Mudiyansele Yasawathie  
Wijekoon. (Deseased.)  
Godamunne.

- 2A. Jayadasa Kulugamma, of  
“Manel”  
Akiriya.

**2A Substituted – Defendant –  
Respondent,**

3. Wijekoon Mudiyanseelage Chitra Wijekoon,  
Kalyani Stores, Thalatu-Oya

4. Wijekoon Mudiyanseelage Indra Wijekoon,  
Wenduruwa.

5. Napana Saranankara Thero (Deceased),  
Sagama Viharaya,  
Talatu-Oya

5A. Ampitiya Dharmapala Thero,  
Sagama Viharaya,  
Talatu-Oya.

**5A Substituted-Defendant-  
Respondent.**

**Respondents**

Before : E.A.G.R. Amarasekara. J.

Counsel : Mr. Eranjan Attapattu instructed by Sunil Dayarthna for the  
Defendant Appellant.

Mr. Athula Perera for the 5A Substituted Defendant – Respondent.

Decided On : 03.08.2018

**E.A.G.R. Amarasekara. J.**

The 1<sup>st</sup> Defendant, Appellant filed this appeal against the Judgement in the Partition case No. 11979 in the Kandy District Court dated 31.10.2000 praying inter alia;

- a) That the portion of the Judgement of the learned trial Judge excluding Lot 3 in Plan 'X' from the corpus sought to be partitioned be set aside.
- b) That Lot 3 in the said plan be declared a part of the corpus to be partitioned in this case.
- c) For cost and such other further reliefs as this court shall seem meet.

Thus, it is clear that the Appellant is not dissatisfied with the learned District Judge's reasonings with regard to the pedigree and the share entitlements.

The Deceased Plaintiff filed the aforesaid action No. 11979 P seeking a partition of the land called 'Maddegodahena' of two amunums paddy sowing in extent. As per the Plaint and the title deeds marked at the trial, it was bounded as follows;

North : By Dissanekgadera Hena, and Vihara Hena

East : By Ela

South : By Yalwela Kumbura

West : By Sagama Vihare Hena (vide deeds marked as 'පැ1' to 'පැ9', '104' and schedule to the Plaint.).

This court observes that in the plaint and the deed marked පැ 4 the western boundary is described as Vihare Kumbura.

However, as per the aforesaid boundaries, land sought to be partitioned has to be bounded on the North and West by lands belongs to a temple ('Viharaya').

A commission was issued and the preliminary plan no. 199 marked as X and the report marked as X1 were prepared by S.M.K.B Mawalagadera, Licensed Surveyor. According to the aforesaid report marked as X1, the Plaintiff has shown lot 1,2,4,5,6 as the land sought to be partitioned and further stated that Lot 3 belongs to the

temple while the 1<sup>st</sup> Defendant claimed Lot 3 as part of the land sought to be partitioned. The report further reveals that the 5<sup>th</sup> Defendant, Napana Saranankara Thero too claimed Lot 3 as part of the temple land.

If Lot 3 in the preliminary plan marked X does not belong to the corpus, but to the temple land, the description of the boundaries in Plan No. 54552 (582) showing 'Meddegodahena' (Meddegodahena is the name of the land sought to be partitioned) comprising the Southern and Southwestern boundaries of the land depicted there in (temple land) becomes more compatible. On the other hand, as mentioned before, in the plaint and the title deeds, the Northern boundary to the corpus is described as Dissanekgadera Hena and Vihara Hena (temple land) while the Western boundary is described as Vihara Hena (temple land) but in the preliminary Plan Dissanekgadera Hena is found more towards the North East. If the location of Dissanekgadera Hena in Preliminary Plan is considered as the Northern boundary, while treating Lot 3 as the temple land (not as part of the corpus) it will tally with the description of boundaries to the corpus in title deeds as well as in the schedule to the plaint.

If Lot 3 in the preliminary plan is considered as part of the corpus the temple land becomes the boundary of the corpus more towards the North but not to the North and West as described in the title deeds and the plaint. Furthermore, when Lot 3 is considered as part of the corpus (Meddegodhena), Meddegodahena may not become a part of the Southwest boundary of the Temple land as described in 582.

The Plaintiff, though he tried to change his stance while giving evidence, has stated in X1 (preliminary Plan Report) to the surveyor that Lot 3 forms part of the land belonging to the Temple. The surveyor has also reported that the 1<sup>st</sup> Defendant claimed Lot 3 as part of the corpus. In such a backdrop, this court cannot think that the surveyor misreported what the Plaintiff stated to him during the preliminary survey. Due to the aforesaid circumstances the Plaintiff is not a reliable

witness to prove that Lot 3 of Plan X is part of the corpus. Even though 1<sup>st</sup> Defendant in his evidence has stated that Lot 3 is part of the corpus, as mentioned before the description of boundaries in the title deeds, 5V2 and the plaint show that what is more probable is that Lot 3 is not part of the corpus. On the other hand, other than her mere statement she has not adduced any material to show that Lot 3 is part of the corpus, but the 5<sup>th</sup> Defendant has taken steps to survey the disputed area and superimpose plan no. 54552 (5B2) which shows the temple lands, and preliminary Plan (X). The licensed surveyor C.B. Elangasinghe who did the said survey and superimposition also has given evidence to show that Lot 3 is temple land.

The 1<sup>st</sup> Defendant argues that superimposition is not worth any consideration since the surveyor has not surveyed the entire land belong to the temple. If a surveyor is able to identify the existing boundaries of the disputed area and to establish the boundaries as per the plans to be superimposed by identifying the boundary marks or descriptions in those plans, I do not see any obstacle to produce an acceptable superimposition. The Licensed surveyor Elangasinghe in his 5B1 report has stated that he identified the land using the following factors;

1. A footpath which has now become a high road.
2. Dasanakgedara Watta alias Dissanekgadera Watta and Arachchige Meddegodahena which are situated west to that said road.

No cross examination was done or evidence led to show that those factors are not sufficient to identify the disputed boundaries of the temple land. However, the surveyor himself has admitted that the correctness of his superimposition is 50%. Thus, as per the superimposition there is a possibility of 50% for Lot 3 to be a part of temple land. It is the duty of the parties who ask for a partition to prove the identity of the corpus. If the superimposition establishes that there is a possibility of 50% for the disputed Lot 3 to be a part of temple land, the 1<sup>st</sup> Defendant's mere statement cannot prove on balance of probability that Lot 3 is part of the corpus to be partitioned. For the foregoing reasons, I cannot find fault with the findings of the learned District Judge to exclude Lot 3 from the partition even though there is

a misstatement in his judgement stating that the 1st Defendant showed Lot 3 to the commissioner as part of the temple land. In fact, as said before, it was the Plaintiff who had stated so. The 1<sup>st</sup> Defendant further argues that the learned District Judge has not answered the issue No. 25 raised on 24.07.1998 but this court finds that issue No. 23 raised on 16.05.1997 is materially the same.

The learned District Judge has answered the issue number 23 in the affirmative.

Thus, the answer to issue No. 25 is contained in the answer to issue No. 23.

Hence, I do not see any reason to grant relief as prayed for in the petition of appeal.

Therefore, this appeal is dismissed with costs.

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E.A.G.R. Amarasekara

Judge of the Court of Appeal.