

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

1. Mohamed Sheriff Mohamed Naim Alias  
Ismail,  
67, Arab Road, Beruwala,

**Plaintiff.**

- 1a. Mohamed Ismail Mohamed Abdul  
Cader,  
67, Arab Road, Beruwala

C.A. Appeal No. 565/2000 (F)

D.C. Kalutara case No. 4146/P

**Substituted Plaintiff.**

Vs

1. Seinadeen Mohammed Ziard  
42/17, Henewatta, Beruwala.
2. Seinadeen Mohamed Sadik  
42/17, Henewatta, Beruwala.
3. Abdul Hamid Mohamed Wahabdeen  
43A. 1 Usuf Avenue, Beruwala.
4. Mohamed Sally Kaira  
45, Old Road, Beruwala.
5. Mohamed Cassim Mohamed Iqbal  
Old Road, Beruwala.
6. Ahamed Rahuman Umma  
42/20, Henewatte, Beruwala.

7. Abdul Hamid Mohomed Hashim  
42/20, Henewatte, Beruwal.
8. Abdul Hamid Mohomed Samsudeen  
38/26, Henewatte, Beruwala.
9. Charlis Fernando  
42/15, Henewatte, Beruwala.
10. Miskin Patumma  
38/32, Henewatte, Beruwala.
11. Abdul Majid Sitti Nushina  
43A/1 Usuf Avenue Beruwala.
- 6a. Mohomed Ahamed Abdul Hameed  
Henewatte, Beruwala.
- 9a. Kankanathanthrige Leelawathi Silva  
H2/15 Henewatta, Beruwala.
- 6a. Abdul Hamid Patumma  
42/20 Henewatte, Beruwala.
- 8a. Samsudeen Mohomed Ziard  
Henewatte, Beruwala.

**Defendants.**

AND NOW BETWEEN

- 1a. Mohomed Ismail Mohomed Abdul  
Cader.  
67, Arab Road, Beruwala.

**Substituted                      Plaintiff**  
**Appellant.**

-VS-

1. Seinadeen Mohomed Ziard  
42/17, Henewatte, Beruwala.
2. Seinadeen Mohomed Sadik  
42/17, Henewatta, Beruwala.
3. Abdul Hamid Mohamed Wahabdeen  
43A. 1 Usuf Avenue, Beruwala.
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45, Old Road, Beruwala.
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38/26, Henewatte, Beruwala.
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H2/15 Henewatta, Beruwala.

6a. Abdul Hamid Patumma  
42/20 Henewatte, Beruwala.

8a. Samsudeen Mohomed Ziard  
Henewatte, Beruwala.

2A. Mohomed Mustafa Lebbe Waseela  
Umma

2B. Mohomed Sadik Esmin Begam  
Both are of 39/1, Henewatte,  
Beruwala.

9B. Mahabaduge Nimal Shantha  
Fernando Jayasooriya.  
42/15, Henewatte, Beruwala.

**Defendant – Respondents.**

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

Counsel : Milindu Sarathchadra AAL with Asthika Devendra AAL for the  
Substituted Plaintiff – Appellant.

N.I.S. Kularathna AAL with S.A. Kulasooriya for the Defendant-  
Respondent.

Decided on : 05.10.2018.

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

This is an appeal filed by the substituted Plaintiff – Appellant against the Judgment dated 22.08.2000, delivered by the learned District Judge of Kalutara, in the Partition Action No.4146/P. By the said Judgement, the learned District Judge dismissed the Plaintiff's Action mainly on the ground that the corpus sought to be partitioned had not been identified.

The aforesaid District Court case was filed in 1976 by the deceased Plaintiff to partition a land in the extent of 2 roods and 9 perches, called Senetottam and more fully described in the schedule to the Plaint. The original Plaint named only five Defendants. However, 6 to 10<sup>th</sup> Defendants claimed their rights during the preliminary survey and later intervened to the action as added parties. The 6<sup>th</sup> and 7<sup>th</sup> Defendants together and the 8<sup>th</sup>, 9<sup>th</sup>, and 10<sup>th</sup> Defendants separately filed their statements of claim taking up the position that the land sought to be partitioned in the Plaint is not the land surveyed for the preparation of the preliminary Plan No. 966 made by G. Ambepitiya Licensed Surveyor. The said preliminary Plan was marked as 'X' at the trial.

The 8<sup>th</sup> Defendant, who was the 3<sup>rd</sup> claimant at the survey to prepare the preliminary Plan, sought another commission to be issued to include the correct name and description of the boundaries to the corpus surveyed by the preliminary Plan. His position was that the land surveyed for the preliminary Plan was not Senetottam as described in the schedule to the Plaint but a land called Barasiyawatta Kattiya as described in the schedule to his statement of claim. The

6<sup>th</sup> and 7<sup>th</sup> Defendants in their amended statement of claim have named the subject matter as “Barasiyathottam”

After the 2<sup>nd</sup> commission, the Commissioner G. Ambepitiya, Licensed Surveyor had submitted the Plan No. 966A which was marked as 781 at the trial, naming the land surveyed as “portion of Barasiyawatta”. It is common ground that physical metes and bounds and the extent depicted in the aforesaid Plain No. 966A and the same of the preliminary Plan marked ‘X’ are identical, except for the name of the land and the manner by which the boundaries are described. However, the Western and Eastern boundaries in Plan No. 966A (781) are described as “Kottawasalawatta alias Land belonging to Mohammed Kandu Master” and “Kelawantottam alias Nakiyawatte” respectively, which description is similar to the description of Western and Eastern boundaries of the Preliminary Plan No.966. As per the preliminary Plan the Southern boundary is described as ‘Henewatta alias Henatottam’, which as per 781 (Plan No. 966A) is described as ‘Senetottam Watta alias ‘land wherein the heirs of Uduman Labbe Marikkar reside’. However, there is a similarity or closeness in both the descriptions as one is ‘Henetottam’ and the other is ‘Senetottam Watta’. However, the Northern boundary in 781 (Plan No. 966A) is described as a portion of the same land. In other words, it can be also described as a portion of ‘Barasiyawatta’ as the land surveyed is named as ‘portion of Barasiyawatte’. Even in the Preliminary Plan the Northern boundary is described as ‘Barasiyawatta’. The aim of making the 781 (Plan No. 966A) is to show that the land surveyed in the preliminary Plan is a part of Barasiyawatta containing 2 roods 14.50 perches, but not Senetottam of 2 roods and 9 perches as described in the

schedule to the Plaintiff. This court observes, as per the evidence placed by the Plaintiff the relevant assessment number given for Senetottam, the land sought to be partitioned is 3050. This is also supported by the land registry extracts (පැ. 1, පැ.2) in relation to Senetottam of 2 roods and 9 perches in extent and deeds marked පැ.1, පැ.9 and පැ. 7 which refer to the assessment No. 3050 to describe the premises or the land. This Court further observes the commissioner in describing the land in a true copy of 7ඒ1 (Plan No. 966A) found on page 158 of the District Court case record has referred to the same assessment No. 3050 but the original of Plan marked 7ඒ1 found on page 152 does not refer to that assessment number in describing the land. However, since deeds marked 7ඒ2, 7ඒ3, 7ඒ4 and 7ඒ5 refer to the same assessment number to describe a bigger land of one acre named Barasiyawatta, this Court finds it difficult to think that the use of assessment number 3050 in describing the land in Plan No. 966A (7ඒ1) or any other document such as land registry extracts or deeds is decisive in deciding the identity of Senetottam, the land sought to be partitioned.

The Land to the South to the land surveyed in Plan No. 966 marked as X is identified as Henewatta alias Henetottam and the same is described in Plan No. 966A (Plan marked as 7ඒ1) as Senetottam Watta. If the two lands that form the boundaries of the East and West (namely Kottawasalathottam and Kelawantottem) extend further to the south, the boundaries described in the schedule to the Plaintiff may tally with the boundaries of the land described as the southern boundary in the Plans No. 966 and 966A. Even a portion of the land surveyed in aforesaid plans together with a portion of the land to the North or South to the land surveyed may form a corpus that may tally with the description of boundaries given to the land in

the schedule to the Plaint, if the lands on the east and west to the land surveyed extend beyond the north and/or south limits of the land surveyed.

It must be noted that there are Defendants who do not get title according to the Plaintiff's pedigree, but have claimed plantation and buildings found within the corpus surveyed without any challenge or cross claim. Some of them have filed their answers showing their title through a different pedigree to a land with a different name. The Plaintiff has attempted to say some of these are licensees of his predecessors or their descendants. If it is the truth, he could have revealed that in the Plaint and made them parties to the action. The position of the Plaintiff that some of them are licensees or their descendants appears to be an afterthought.

In the same manner the Plaintiff has attempted to state in his evidence that Senetottam has another name as Barisiyawatta. If so, he could have mentioned that in his Plant. This too appears to be an afterthought of the Plaintiff that originated after seeing the positions taken by the Defendants. This Court also observes that the boundaries described in the schedule to the statement of claims to the portion of Barisiyawatta are totally compatible to the Plans made, but the northern boundary of the land in the schedule to the Plaint is not compatible with the northern boundary of the plans made unless Senetottam is another name for Barisiyawatta.

In the aforesaid circumstances and when the position of the Defendants is that the land surveyed is part of Barisiyawatta, the burden is on the Plaintiff to prove that the land sought to be partitioned is properly depicted in the preliminary Plan.

It should be noted that the land sought to be partitioned has been described in the schedule to the Plaint as the land shown in the Plan No. 317 dated 27.07.1939. It



is nothing else but the 2 roods 9 perches land that is depicted in the said plan is the subject matter of the partition action. The Plaintiff argues that there need not be a previous plan for the subject matter of a partition action. It may be true, but here in this action what is sought to be partitioned is the land depicted in the said plan. Especially where there is a dispute as to whether the land is Senetottam of 2 rood 9 perches or portion of Barisiyawatta, the best way to prove that it is the land sought to be partitioned is the superimposition of the pervious plan used to describe the said land in the schedule to the Plaint and plaintiff's title deeds. The Plaintiff has failed to do that and had not given any acceptable reasons for that while giving evidence. In his written submissions the counsel for the Plaintiff attempts to show that the said plan was destroyed by fire that engulfed the Beruwala Urban Council building. The Plaintiff in his evidence had said that certain documents were destroyed by fire at the Urban Council building, but it was when he was questioned with regard to the certificate of sale by which the Urban Council got title to the subject matter. However, no witnesses who came from the Beruwala Urban Council has said that the documents were destroyed by fire. The Plaintiff not being an employee or officer of the Urban Council cannot state by his personal knowledge that such and such documents were destroyed by fire at the Urban Council building unless he was communicated with such information. No such communication had been marked by the Plaintiff at the trial. Nothing was led through a witness of the Urban Council to prove that there was a fire that destroyed the documents.

On behalf of the plaintiff, the counsel argues that Henewatta (Senathottam) is a bigger area and Barisiyawatta is only a portion of it and furthermore, Barisiyawatta is also called Henewatta. If Henewatta or Senatottam is a bigger area of land, it

makes it more necessary to superimpose the plan referred to in the schedule to the Plaintiff to identify the land of 2 roods 9 perches in extent which is sought to be partitioned and its location within the bigger area of land. It is worthy to note that as per some deeds, even Barisiyawatta is about 1 acre in extent.

The counsel for the Plaintiff brought this court's attention to the 2<sup>nd</sup> paragraph of the report of the preliminary plan marked X1 and stated that the Commissioner had identified the land surveyed as land sought to be partitioned but this court observes that he had not done any superimposition or given any reason to substantiate such opinion. The facts revealed at the trial show that the boundaries of the land surveyed tally with the boundaries given to the land described in the schedule to the statement of claim of the 8<sup>th</sup> Defendant. Furthermore, in his 2<sup>nd</sup> plan the same commissioner had named the land as a portion of Barisiyawatta and shown the northern boundary as a portion of the same land. It must be noted that as per the deeds marked by the 7<sup>th</sup> Defendant, Barisiyawatta is a land of 1 acre in extent. As per the report made to plan 966A marked as 782, it appears that the 2<sup>nd</sup> commission was issued to show the correct name of the land sought to be partitioned. Accordingly, he has named the land surveyed in the 2<sup>nd</sup> plan No. 966A as a portion of Barisiyawatta and abutting lands with additional descriptions when compared with the preliminary plan. In the report to the aforesaid 2<sup>nd</sup> plan the commissioner has not stated that he named and described the land and the boundaries in the manner described by the Defendants and the true descriptions are as mentioned in the preliminary plan and report. Therefore, the report of the plan marked 966A qualify the statement made by him previously in the report of the preliminary plan marked X1 stating that the land surveyed is the land sought to be partitioned by the Plaintiff.

The claims made to certain Plantations by the Plaintiff without a dispute does not suffice to prove the land sought to be partitioned is properly depicted by the preliminary Plan. Even the possession of certain part of Barisiyawatta by wrongly considering it as the land sought to be partitioned or falling of a portion of the land sought to be partitioned within the boundaries of the land surveyed may explain the possibility for such claims to the plantation. Such claims along with the claims made to the plantations and buildings by the defendants, who do not get title under plaintiff's pedigree, but relying on a different pedigree to a differently named land, confirms the need of a superimposition of the plan referred to in the schedule to the plaint.

Even the Plaintiff's counsel in his written submissions at para 5.69 states as follows:

(Quote) "However, it is submitted that the learned District Judge has not conducted a proper investigation to identify the corpus. Nevertheless sufficient evidences were in the brief to identify the corpus." (Unquote)

If there is sufficient evidence, the learned District Judge cannot be blamed for not conducting a proper investigation with regard to the identity of the corpus, but by blaming the learned district judge for not conducting a proper inquiry, the counsel himself doubts the sufficiency of evidence. On the other hand, the learned District Judge cannot go on a voyage of discovery. The burden of proof with regard to the identity of the corpus is on the Plaintiff but he has failed to discharge that burden.

Identification of the corpus of a partition action is based on facts but not on law.

Unless the decision is perverse this court shall not interfere to change it.

As per the reasons given above, the Plaintiff failed in proving the identity of the corpus through the preliminary Plan made for the partitioned action. In that backdrop, this Court's view is that the appeal must fail.

Hence the appeal is dismissed with costs.

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E.A.G.A. Amarasekara

Judge of the Court of appeal.