

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REUPBLIC OF SRI LANKA

1. Polwatte Rajapaksha Wasala
Muidyanselage Lokubanda
Weerakotuwa.

2. Polwatte Rajapaksha Wasala
Muidyanselage Chandratilake
Weerakotuwa.

(both of Palle Gunnapana, Polgolla.)

C.A.No. 983/2000(F)

D.C. Kandy No. 12301/P

Plaintiff Appellants.

Vs.

(Deceased) 1. Rajapaksha Wasala Muiyanselage
Polwattegedara Kiribanda.

1 Defendant

1a.S.M. Lokumenika.

1b. Polwatte Rajapaksha Wasala
Muidyanselage Polwattegedara Biso
Menike Rajapaksha.

1d. Polwatte Rajapaksha Wasala
Muidyanselage Polwattegedara Bandara
Menike Rajapasha.

1e. Polwatte Rajapaksha Wasala
Muidyanselage Polwattegedara
Karunatilake Rajapaksha.

1f. Polwatte Rajapaksha Wasala
Muidyanselage Polwattegedara
Hemalatha Menike Rajapaksha.

1g. Polwatte Rajapaksha Wasala
Muidyanselage Polwattegedara Indrani
Rajapaksha.
No. 115, Palle Gunnapana, Polgolla.

**Substituted Defendant
Respondents.**

Polwatte Rajapaksha Wasala
Muidyanselage Polwattegedara Anula
Rajapaksha.
No. 115, Pale Gunn Apana, Pongola.

**2nd Defendant and 1C, Substituted
Defendant Respondent.**

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

Counsel : Jacob Joseph with Sandamali Madurawala for the Appellant.
G.D. Kulathilake for the 2nd Defendant – Respondent.

Decided on : 2018.11.23.

E.A.G.R. Amarasekara, J.

The Plaintiff-Appellants (sometimes referred to as the Plaintiffs) filed this petition of appeal praying inter alia;

1. To vacate the Judgment dated 31.10.2000 delivered by the learned District Judge in the partition action D.C. Kandy No. 12301/P.
2. To partition the land depicted in the preliminary plan made in the aforesaid partition action as per the rights of the parties.

The Plaintiffs originally filed the plaint dated 28.10.1988 to get the land named 'Banage Mudune watta' consisting of 'Depela Pallaha' (in other words 2 pelas and 5 lahas) of paddy sowing.

The Plaintiffs had taken steps to register lis pendence in respect of the aforesaid land of 2 pelas and 5 lahas (vide journal entry No.12 dated 15.11.1988 at page 5 of the brief). Thereafter, the Plaintiffs took out a commission to survey the aforesaid land of 2 pelas and 5 lahas and, accordingly a preliminary survey was done by G.S.P. Lenagala, licensed surveyor on 24.04.1992. The said preliminary plan and the report were marked as X and X1 at the trial (vide pages 191 and 192 of the brief). In the said report the commissioner has stated, that the land appears to be the land sought to be partitioned but this opinion seems to have been influenced by the statement made to him by the Plaintiffs that there was a 'Dewata Road' in the past by the eastern boundary of the land surveyed. (නැගෙනහිරට ඇති ඉවුර සමඟ දෙවට පාරක් පෙර තිබූ බව පැමිණිලිකරු කීවා. මේ අනුව බෙදීමට ඇති ඉඩම බව පෙනේ.). As per the plan and the report made, the commissioner has not shown or referred to any 'Dewata Road' in existence as a boundary on the east at the time of the survey. However, this court observes that the aforesaid opinion of the commissioner with regard to the land surveyed, which was in extent 206.3 perches, was conditioned by the following representations before the surveyor at the time of the survey.

1. The statement made by the Plaintiffs that there was a 'Dewata Road' by the eastern boundary in the past and

2. The land surveyed is a land of two pelas and 5 lahas of paddy sowing.

According to the usage in that region, the commissioner has indicated in his evidence that 2 pelas and 5 lahas of paddy sowing is similar to 1 and ½ acres or 200 perches(1 and ¼ acres), though it may defer according to the circumstances (vide pages 76, 77 and 78 of the brief).Even the 1st Plaintiff Appellant while giving evidence has admitted that Depela Pallaha is about 1 and 1/2 acres and also the area surveyed as lot 1 and 2 in the preliminary plan is very much close to 1 and ¼ acres(vide pages 94 & 95 of the brief). The commissioner too has admitted that when the areas of lot1 and lot 2 are added together, the aggregate is much closer to ‘Depela Pallaha’ and he has further expressed during his evidence that he did not survey a land of 3 pelas but he surveyed a land of 2 pelas and 5 lahas, shown by the Plaintiffs (vide pages 78,74 and 75 of the brief).

This court is aware of the dicta in **Ratnayake Vs Kumarihami (2002) 1 SLR 65** where it was held that the system of land measures computed according to the extent of land required to sow with paddy or Kurakkan vary due to the interaction of several factors such as the varying degrees of the soil, the size and quality of the grain and the peculiar qualities of the sower etc. However, the extent of the area surveyed by plan X is almost the same suggested by the measures computed according to the usage in that region and supports the Defendant- Respondents’ position that the land surveyed was only 2 pelas and 5 lahas of paddy sowing in extent than the Plaintiff-Appellants’ position. As mentioned before, even the commissioner himself has admitted what is surveyed as lot 1 and 2 in plan X, the

preliminary plan, is very much closer to 2 pelas and 5 lahas (Depela Pallaha) of paddy sowing. (vide page 74 of the brief.)

However, after the preliminary survey was done, the Plaintiff -appellants amended the Plaint twice. The amendment relevant to the identity of the land is that they have described the land sought to be partitioned as a land containing 3 pelas in their amended plaints. However, it appears that they have not taken steps to register an amended lis pendence or to file section 12 statement through their lawyer or to take out a fresh commission to survey a land of 3 pelas.

The Defendants have filed their amended answer claiming rights through the pedigree described in the said answer as well as by prescription over 30 years to the land surveyed by the preliminary plan. Their position is that only their land which is 2 pelas and 5 lahas in extent was surveyed. **Thelakarathna Vs. Bastion** reported in **21 NLR 12** established that even a co-owner can claim prescriptive title to the once co-owned land by long, undisturbed and uninterrupted possession and in that case an overt act was presumed due to the long, undisturbed and uninterrupted possession. However, what is relevant here is that when the Defendants claimed prescriptive title to the land surveyed and prayed for a dismissal of the Plaintiffs' action, they were not bound to show the larger land and prove the identity of the land of 3 pelas which was sought to be partitioned by the amended plaint. The burden was on the Plaintiffs to prove the identity of the corpus they sought to partition by filing an amended plaint.

Nevertheless, the evidence led at the trial indicates that the land found to the west to the lot 1 of X belongs to the Plaintiffs and it has a name similar to the land sought to be partitioned. Furthermore, the Defendants while giving evidence have marked a plan No.2545 (V5), prepared by G.R.W.M. Weerakon, Licensed Surveyor, which includes a portion of land as lot 2, to the east of the land sought to be partitioned by the preliminary plan. The said plan appears to have been made during a different case between the parties and it clearly indicates a 'Dewata Road' as the boundary towards the south – east end of the land surveyed therein. A careful consideration of the descriptions of the boundaries of both the plans, establishes that lot 1 and 2 in preliminary plan, X, is the same portion shown as lot 1 in the aforesaid plan No. 2545 (V5), though there is a difference of few perches with regard to the extent. Hence, the Plan No. 2545 marked V5, tilt the balance in favour of the position taken by the Defendants to say that the preliminary survey was only limited to the land of 2 pelas and 5 lahas which they claim. The scheme of the partition act does not prohibit a party to use an already made plan in evidence to challenge the correctness of the preliminary plan.

It could also be noted while giving evidence even the 1st Plaintiff has admitted that he surveyed only the land of 2 pelas and 5 lahas which is only a portion of the land to be partitioned as per the amended plaint (vide pages 98,99, 100 and 101 of the brief.)

The learned District Judge had observed that the description of the eastern boundary to the land described in the schedule to the original plaint had been

deleted, erased and thereafter described as 'Dewata Road'. It appears that originally eastern boundary was described as the balance part of the "Banage mudune watta' (vide notice of preliminary survey found at page 179 of the brief and copy of the lis pendenes at page 212 of the brief, in which the word 'Dewata' is inserted by deleting the words "balance portion of the 'Banage Mudune watta'"). It appears 'Dewata Road' was later introduced as the Eastern boundary to the land described in the schedule to the original plaint to suit the schedules of the deeds which describes the 'Banage Mudune watta' of 3 pelas. Furthermore, this court observes that by deeds No. 2104(P5), No. 9202 (P6) and No. 9207 (P7), the Plaintiffs have got 5 lahas, from the eastern side of the land of 3 pelas adjoining the Dewata road making the Dewata Road the eastern boundary of what they get. These facts support the allegation that the Plaintiffs fraudulently filed the partition case to get another 5 pelas from the land in the possession of the Defendants which is the balance 2 pelas and 5 lahas of the original 'Banage Mudune watta' of 3 pelas while excluding the portion of 5 lahas from being surveyed for the preliminary plan.

The aforesaid circumstances make the truth of the statement made to the commissioner by the Plaintiffs, that there was a 'Dewata Road' in the past by the eastern boundary of plan marked X, extremely suspicious and not trustworthy, when the plan marked V5 shows the 'Dewata Road' as the boundary towards south east of that plan after the inclusion of lot 2 of V5 to the land shown in X, the preliminary plan.

The foregoing reasons support the conclusions reached by the learned District Judge of Kandy in his Judgment dated 31.10.2000.

Identification of the corpus is a must for a partition action. The Defendants' lawyer cited some decisions of the Superior Courts in this regard. However, the identification of the corpus depends on the facts of each case. A decision based on facts shall not be interfered with by an Appellate Court sitting in appeal unless it is shown that the conclusions are perverse or not supported by the evidence led. It is my considered view that the learned District Judge was correct in dismissing the plaint. Furthermore, the Plaintiffs failed to file section 12 statement as required by the partition act. Hence, I confirm the Judgment of the learned District Judge and dismiss this appeal with costs.

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E.A.G.R. Amarasekara, J

Judge of the Court of Appeal.