

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. Appeal No.118/2012

SC/HC/CALA No. 510/2012

H.C. Kalutara Civil Appeal

No. WP/HCCA/Kal/67/2005(F)

D.C. Panadura Case No.691/P

In the matter of an Application for Leave to Appeal under Section 5C(1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with the Supreme Court Rules 1990 from the Judgment pronounced on 22.05.2012 by the High Court of the Western Province sitting in Kalutara in Civil Appeal No. WP/HCCA/Kalutara/67/2005 (F) in terms of Section 5A(1) of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 and now an Appeal upon leave having been granted on 06.07.2012.

Gamathige Dona Premawathie Perera
'Sinhaleña', Hirana, Panadura.

PLAINTIFF

1. Kongaha Pathiranage Don Sarath
Gunarathne Perera
Hirana, Panadura.
2. Tantrige Neulin Peiris
(Near Dispensary)
Hirana Panadura.

DEFENDANTS

AND BETWEEN

Tantrige Neulin Peiris
(Near Dispensary)
Hirana Panadura.

2nd DEFENDANT-APPELLANT

Vs.

Gamathige Dona Premawathie Perera
'Sinhaleña', Hirana, Panadura.

PLAINTIFF-RESPONDENT

Kongaha Pathiranage Don Sarath
Gunarathne Perera
Hirana, Panadura.

1ST DEFENDANT-RESPONDENT

AND NOW BETWEEN

Tantrige Neulin Peiris
(Near Dispensary)
Hirana Panadura.

**2ND DEFENDANT-APPELLANT-PETITIONER-
APPELLANT**

Vs.

Gamathige Dona Premawathie Perera
'Sinhaleña', Hirana, Panadura.

**PLAINTIFF-RESPONDENT-RESPONDENT-
RESPONDENT**

Kongaha Pathiranage Don Sarath
Gunarathne Perera
Hirana, Panadura.

**1ST DEFENDANT-RESPONDENT-RESPONDENT-
RESPONDENT**

BEFORE:

B.P. Aluwihare P.C., J.
Anil Gooneratne J. &
Vijith K. Malalgoda P.C., J

COUNSEL: S. N. Vijithsing for the
2nd Defendant-Appellant-Petitioner-Appellant

Chandana Prematilleke with Yuran Liyanage
For the Plaintiff-Respondent-Respondent-Respondent
And 1st Defendant-Respondent-Respondent-Respondent

ARGUED ON: 27.07.2017

DECIDED ON: 04.09.2017

GOONERATNE J.

This was a partition action filed in the District Court of Panadura to partition the land morefully described in the schedule to the plaint. The said land is described in the plaint as two contiguous lands called Kosgahawatte. There was no contest between Plaintiff-Respondent-Respondent-Respondent (Plaintiff) and the Defendant-Respondent-Respondent-Respondent (1st Defendant). It was a contest between the Plaintiff and the 2nd Defendant-Appellant-Petitioner-Petitioner (2nd Defendant) who made a claim before the Court Commissioner on 17.02.1997. As such the 2nd Defendant was added as a party. The material placed before court indicates that the 2nd Defendant claims that, a strip of her land has been wrongfully included in the corpus. It is pleaded that land situated to the north of the land sought to be partitioned which was

earlier part of a ditch/drain including some alastonia trees (ඹිඹිකුරු) along with other trees are wrongfully included in the land sought to be partitioned.

The main and the only dispute seems to be the strip of land which includes a ditch/drain according to the 2nd Defendant along with trees as stated above is the issue. Parties proceeded to trial on 11 points of contest. Further the 2nd Defendant does not claim any rights to the corpus itself but seeks an exclusion from plan produced marked V3, and to exclude 'Y' from the land sought to be partitioned. Both the District Court and the High Court Judgments have analysed the factual position to a great extent.

2nd Defendant states that the dispute arose when the Plaintiff had cut the Alastonia trees and claimed other trees which were in the drain. Disputed ditch/drain has been claimed by the 2nd Defendant before Surveyor, Kumarage at the preliminary survey. The 2nd Defendant did not give evidence.

The 2nd Defendant claim the strip of land on which the alastonia trees with other trees stood. This strip of land is to the north of the land sought to be partitioned. The 2nd Defendant further describes the strip of land by reference to some survey plans. It is said that lot 5 in plan V4, (3705) and superimposition of V4 and plans X 242 by Surveyor Malwenna on his plan V3, 1439 shows that the land to the north of the land sought to be partitioned is lot 5 in plan V4. In other words it is stated that the land to the north claimed by

Plaintiff is the land to which lot 5 of V4 applies according to the superimposition. 2nd Defendant's position is that as above lot 5 in plan V4 applies to the land to the north of Plaintiff's land which includes the strip of land claimed by the 2nd Defendant. At the hearing of this appeal it was suggested that parties explore the possibility of settling the dispute in view of the fact that the strip of land is a very small extent of land, but the Plaintiff's learned counsel was not willing to do so. The 2nd Defendant's learned counsel also argued that there was an old ditch between the land of the 2nd Defendant and the land of the Plaintiff. However as at present the so called ditch cannot be found and no signs of such a ditch. 2nd Defendant maintain that in the past there had been a drain. It is possible that after a long lapse of time ground situation is bound to change.

The 2nd Defendant also rely on plan 3705 marked V4 which is dated 19th March 1919. Plan of one J.N. Wickremaratne which shows ditch to the south and east of Lot 5. A ditch belonging to lot 5 that separated it from the land sought to be partitioned as far back as 1919. Does the ditch belong to the Plaintiff or the 2nd Defendant? Or does it merely separate the two lands as a boundary?

Plaintiff argue that PP 242 ('X') of Court Commissioner Kumarage's plan does not show any ditch/drain as the boundary between the corpus and 2nd Defendant's land lot 5, but a fence on which ගිනිකුරු and එරබඳු trees are found.

Plaintiff argue that 2nd Defendant's own plan No. 3705 also does not give the southern boundary of lot 5 as a drain/ditch but describes as "Kongahakurunduwatta of Carolis Peiris and Kosgahawatta of the heirs of late B.I. Eranis. A ditch is shown, not as a separate strip of land nor was it a part of lot 5, but it is a part of the corpus owned by the 1st Defendant and Plaintiff.

It was also submitted on behalf of the Plaintiff that the 2nd Defendant should have sought an exclusion of the strip of land alleged to be part of her land – lot 5. 2nd Defendant has not prayed for such exclusion but seek a declaration of title to lot 5 and that it is not possible to do so. 2nd Defendant prayer is misconcieved.

I note, as pointed out by the Plaintiff, points of contest No. 9 and 11 include a claim by the 2nd Defendant to the drain/ditch. It is also a point of contest that lots X, Y & Z in plan No. 1439, dated 10.08.1999 of Surveyor Malwenna is possessed by the 2nd Defendant. Whatever it may be having perused the evidence before the District Judge and the two Judgments I find that the Plaintiff and her father in law planted the alastonia and the erabadu trees. This was Plaintiff's evidence (uncontradicted). 2nd Defendant has not given evidence at the trial but relies on the evidence of Surveyor more particularly Surveyor Malwenna to whom a commission was issued. The Court Commissioner's plan and report does not indicate any ditch/drain was found at

the time of the survey. Only in 1919 according to plan V4 a ditch existed at that time which is almost 100 year ago. When Malwenna surveyed, accordingly to his evidence there was no ditch, in 1999.

I agree with the views of the learned High Court Judge and the District Judge that Surveyor Malwenna in plan V3 superimposed Wickremaratne's plan and there was no ditch between the corpus and 2nd Defendants Lot 5, and according to Surveyor Wickremaratne there was no ditch in 1995 between the two lands.

I also note that Surveyor Malwenna in his evidence, though called by the 2nd Defendant party who prepared plan V3 (1493) in his report states there was no ditch on the southern boundary to lot 5. What is found as stated by Surveyor Malwenna in his evidence is only a few trees, which could be found as shown in his plan in the boundary. He further states that in the eastern side of the southern boundary a ditch could be found. It is clear from his evidence that a ditch cannot be found on the southern boundary of lot 5. This Surveyor also shows lot Y is an extra portion of land surveyed by him. As such lot 5 does not form a part of lot 5 in plan V4. Further Surveyor Malwenna in his plan V3 emphasise that he superimposed Wickremaratne's plan. It does not show a ditch between the corpus and the 2nd Defendant's Lot 5. There was no ditch in 1995, between the lands and learned High Court Judge also states so.

Having considered all the material placed before this court I see no legal basis to interfere with the Judgment of the High Court. The learned District Judge has analysed all factual points very correctly. The land surveyed by the Court Commissioner Kumarage's plan depicts the land sought to be partitioned. Plan No. 242 marked 'X' correctly show the boundaries of the corpus. Land shown in V3 and V5 has not been included in the land sought to be partitioned. This court granted leave on 06.07.2012 on the following questions of law.

- (i) Whether the learned High Court Judges erred in law by coming to the conclusion that the 2nd Defendant's land was not encroached by the Plaintiff in the circumstances of this case.
- (ii) Did the learned High Court Judges err in law by not identifying of the corpus to the satisfaction of the Court in terms of Partition Act?
- (iii) Whether the learned High Court Judges erred in law by the conclusion that the land surveyed was less than the extent given in schedule to the plaint there could not have been encroachment?
- (iv) Whether the learned High Court Judges err in law by accepting the preliminary plan prepared according to the boundaries shown by the parties as against the superimposed plan No. 1439 prepared by Gamini Malwenna Licensed Surveyor?

All questions of law are answered in favour of Plaintiff-Respondent in the negative. I affirm the judgment of the learned High Judge. This appeal stands dismissed. In the circumstances of this case I make no order for costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT.

B.P. Aluwihare P.C., J

I agree.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda P.C., J.

I agree.

JUDGE OF THE SUPREME COURT