

S.C.Appeal No.107/10

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

In the matter of application for  
Leave o Appeal to appeal under  
and in terms of section 5C of the  
High Court of the Provinces (special  
provisions) Act No. 19 of 1990 as  
amended by High Court of the  
Provinces (special Provisions)  
(amendment) Act No. 54 of 2006.

**S.C.Appeal No:-107/10**

**S.C.H.C.(CA) LA No:-36/10**

**Civil Appeal No:-HCCA/KAG/350/2007**

**D.C.Case No:-25263/P**

- 1.Ranminipura Dewage Hemathunga
- 2.Ranminipura Dewage Darmasena
- 3.Ranminipura Dewage Gunathilaka
- 4.Ranminipura Hewage Somarathna
- 5.Raminipura Dewage Malani Premasiri

6.Ranminipura Dewage Sunil

Dayarathna

All of Kamuradeniya Danowita.

**PLAINTIFFS**

**Vs**

1.Ranminipura Dewage Agoris

1a.Ranminipura Dewage Karunawathi

2.Ranminipura Dewage Thegis

2a.Ranminipura Dewage Thegis

3.Ranminipura Dewage Maiya

4.Ranminipura Dewage Jayasinghe

5.Ranminipura Dewage Gunasinghe

6.Ranminipura Dewage Nimal Ranasingha

7.Ranminipura Dewage Peries

8a.Raminipura Dewage Senewirathna

8a.Ranminipura Dewage Anoma

Chadralatha Senewirathna

9.Ranminipura Dewage Martin

10.Ranminipura Dewage Alpenis

10a.Ranminipura Dewage Jayalath

Premathilaka

All of Kamburadeniya, Danowita.

11. Corporative Society,

Kamburadeniya, Danowita.

12. Ranminipura Dewage Karunathi

13. Ranminipura Dewage Bebinona

14. Ranminipura Dewage Jen

15. Ranminipura Dewage Premalatha

16. Ranminipura Dewage Albert

17. Ranminipura Dewage Smaradasa

18. Ranminipura Dewage Somapala

19. Ranminipura Dewage Kamalawathi

All of Kamburadeniya Danowita.

**DEFENDANTS**

**AND**

Ranminipura Dewage Hemathunga

Kamburadeniya, Danowita.

**1<sup>st</sup> PLAINTIFF-APPELLANT**

**Vs**

2. Ranminipura Dewage Darmasena

3. Ranminipura Dewage Gunathilaka

4. Ranminipura Dewage Somarathna

5. Ranminipura Dewage Malini Premasiri

6.Ranminipura Dewage Sunil Dayarathne

All of Kamburadniya, Danowita.

**2<sup>nd</sup> to 6<sup>th</sup> PLAINTIFF-RESPONDENTS**

1a.Ranminipura Dewage Karunawathi

2a.Ranminipura Dewage Maiya

3.Ranminipura Dewage Maiya

4.Ranminipura Dewage Jayasinghe

5.Ranminipura Dewage Gunsinghe

6.Ranminipura Dewage Nimal Ranasinghe

7.Ranminipura Dewage Peries

8a.Ranminipura Dewage Anoma

Chandralatha Senewirathne

9.Ranminipura Dewage Martin

10a.Ranminipura Dewage Jayalath

Premathilaka

All of Kamburadeniya, Danowita.

11.Corporative Society, Kamburadniya

Danowita.

12.Ranminipura Dewage Karunawathi

13.Ranminipura Dewage Bebinona

14.Ranminipura Dewage Jen

15.Ranminipura Dewage Premalatha

16.Ranminipura Dewage Albert

17.Ranminipura Dewage Smaradasa

18.Ranminipura Dewage Somapala

19.Ranminipura Dewage Kamalawathi

All of Kamburadeniya Danowita.

**DEFENDANT-RESPONDENTS**

**AND NOW BETWEEN**

1a.Ranminipura Dewage Karunawathi

“Somi Niwasa” Kamburadniya

Danowita.

13.Ranminipura Dewage Bebinona

No. D/53, Alwis Watta

Kamburadeniya, Danowita.

8.Ranminipura Dewage Somapala

No.D 46/1, Kamburadeniya

Danowita.

19.Ranminipura Dewage Kamalawathi

No.D 46/2A, Kamburadeniya

Danowita.

1a/12,13,18 & 19<sup>th</sup> DEFENDANT-RESPONDENTS

**Vs**

Ranminipura Dewage Hemathunga  
Kamburadeniya, Danowita.

**1<sup>st</sup> PLAINTIFF-APPELLANT-RESPONDENT**

2.Ranminipura Dewage Darmasena

3.Ranminipura DewageGunathilaka

4.Ranminipura Dewage Somarathna

5.Ranminipura Dewage Malini Premasiri

6.Ranminipura Dewage Sunil Dayarathne

All of Kamburadeniya Danowita.

**2<sup>nd</sup> to 6<sup>th</sup> PLAINTIFF-RESPONDENT-RESPONDENTS**

2a.Ranminipura Dewage Maiya

3.Ranminipura Dewage Maiya

4.Ranminipura Dewage Jayasinghe

5.Ranminipura Dewage Gunasinghe

6.Ranminipura Dewage Nimal

Ranasinghe

7.Ranminipura Dewage Peries

8a.Ranminipura Dewage Anoma

Chandralatha Senewirathne

9.Ranminipura Dewage Martin

10a.Ranminipura Dewage Jayalath

Premathilaka

All of Kamburadeniya, Danowita.

11. Corporative Society

Kamburadeniya, Danowita.

14. Ranminipura Dewage Jen

15. Ranminipura Dewage Premalatha

16. Ranminipura Dewage Albert

17. Ranminipura Dewage Smaradasa

All of Kamburadeniya, Danowita.

**DEFENDANT-RESPONDENT-APPELLANTS**

**BEFORE:-B.P.ALUWIHARE, PC,J.**

**ANIL GOONERATNE,J**

**H.N.J.PERERA, J**

**Counsel:-**Rasika Dissanayaka for the 1/12<sup>th</sup>,13<sup>th</sup>, 18<sup>th</sup> &19<sup>th</sup>

Defendant-Respondent-Appellants

Premani Pothupitiya for the 14<sup>th</sup> & 15<sup>th</sup> Defendant-

Respondent-Respondents

Anura Guneratne with S.Gurugaloda for the

6<sup>th</sup> Plaintiff-Respondent-Respondent

**ARGUED ON:-04.09.2017**

**DECIDED ON:-24.11.2017**

## **H.N.J.PERERA, J.**

The 1<sup>st</sup> to 6<sup>th</sup> Plaintiff-Appellant-Respondents (here-in-after referred to as Plaintiffs) instituted action in the District Court of Kegalle bearing No.25263/P to partition the land called Siyambalagahamulawatta alias Duwehenawatta .The said land is depicted as lot 1 to 5 in the Preliminary plan No.3764 dated 11.11.91 marked X prepared by surveyor K.S.Panditharthne.

According to Plaintiffs the corpus consists of lots 1 to 5 in Plan X. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, & 13<sup>th</sup> Defendant-Respondent-Appellants (here-in-after referred to as Defendants) whilst admitting that lots 1, 2 & 5 of the said plan comprises the corpus, disputed that the lots 3 and 4 form part of the land to be partitioned. They claim that lot 3 and 4 in the said Plan X are part of another land called Hitinawatta and sought an exclusion of the said lots from the land sought to be partitioned. The learned District Judge by his judgment dated 17.02.2006 held with the Defendants and made order to exclude lot 3 and 4 from the land sought to be partitioned. Aggrieved by the said judgment, the 1<sup>st</sup> Plaintiff preferred an appeal to the Civil Appellate High Court of Kegalle. The Civil Appellate High court delivered the judgment dated 1.02.2010 setting aside the judgment of the Learned District Judge and held that lot 1 to 5 of the preliminary plan marked X form part of the corpus. The said Court also held that the Plaintiff has established Undiya's pedigree and that the evidence revealed that Undiya owned ½ share of the land to be partitioned. Accordingly the Court also held that the parties are entitled to shares as stated in the said judgment and directed the Learned District judge to enter the Interlocutory decree accordingly.

Being aggrieved by the said judgment of the Civil Appellate High Court of Kegalle, the Defendants had made an application to leave to appeal from the said decision of the Civil Appellate High court of kegalle. This Court

granted leave to appeal on the questions of law stated in paragraph 18 (i) to (vi) of the Petition. When this matter was taken up for argument on 04 09.2017, the learned Counsel for the Appellant submitted to Court that he will confine and restrict this appeal to question of law No. IV. whether their Lordships of the Civil Appellate High court have erred in law by coming to a conclusion that lots 3 and 4 of the preliminary plan is also a part of the land sought to be partitioned.

The Plaintiff's contention was that lot 1 to 5 in the Preliminary plan marked X consists of the land to be partitioned. The Defendants position was that only lot 1, 2, and 5 consists of the land to be partitioned and lot 3 and 4 should be excluded from the corpus as they form part of another land called Hitinawatta.

The schedule to the plaint describe the land to be partitioned as follows.  
A land called "Siyambalagahamulawatta" alias "Duwa Hena Watta" of two acres:-

North:- Land of Marthelis

South:- Hiri kumbure wela

East:- Bomaluwe Watta

West:- Paranagedera Watta

According to the preliminary plan marked X the boundaries are as follows:-

North:- Pahalagedera Watta - ( according to Plaintiff)

Sidalage Watta - ( according to 2<sup>nd</sup> and 3<sup>rd</sup> defendants)

South:- Hirikumbura Wela

East:- Bo-Maluwe Watta and the Cemetery

West:- Paranagedera Watta

The description of the land to be partitioned as set out in the schedule of the plaint was not disputed by any defendant. In fact the 1a defendant giving evidence had admitted the description of the corpus stated in the schedule to the plaint. The 8<sup>th</sup> defendant too whilst giving evidence had admitted the corpus consists of lots 1 to 5 in plan X. He has further stated that the Eastern boundary is Bomaluwe Watta and that the Cemetery too is situated in a part of Bomaluwe Watta.

On perusal of the said plan X it is clearly seen that the Southern boundary of the corpus is a paddy field. The schedule of the plaint describes the Southern boundary as Hirikumbura Wela. In plan X the Southern boundary of lot 3 is Iwura, Ellamulla Kumbura, Hirikumbura. None of the witnesses has disputed the said boundary to the South.

If one were to accept the position of the contesting defendants the Eastern and Southern boundary of the corpus has to be Hitina Watta. And the northern and Western boundaries of lot 3 and 4 has to be Siyambalagahamula watta alias Duwa Watta. None of the deeds produced by the contesting defendants proves this fact. In fact on perusal of the deed marked 1V4, being the oldest deed produced by the defendants gives as Eastern boundary of Hitina Watta as Gal enda and the Cemetery, and Western boundary as Gal enda. The preliminary plan does not show any Gal enda in the said plan.

The Northern boundary of lot 3 and 4 in the preliminary plan is Siyambalagahamula Watta alias Duwahena Watta. In the said deed marked 1V4, the Northern boundary of the Land Hitina Watta is stated as Bomaluwe watta. In the preliminary plan marked X the Northern boundary of lots 3 and 4 is lot 2, admittedly a part of the corpus to be partitioned called Siyambalagahamula Watta. The extent given in the said deed marked 1V4 of Hitina Watta is only 2 lahas, about 20 perches.

Lots 3 and 4 of the plan X is 1 rood and 36 perches. The difference in the extent of the said two lots 3 and 4 in the plan X too clearly establish that the said lots 3 and 4 in the preliminary plan cannot be regarded as a different land called Hitina Watta.

It is to be noted that lot No.5 is a rock is situated in the middle of the corpus to be partitioned. None of the plaintiffs deeds refer to a rock as a boundary to the land to be partitioned. Lot No.5 is only a part of the land to be partitioned described in the schedule to the plaint which consists of a rock. And no party has specifically claimed any right to it. It cannot be considered as a boundary of the land to be partitioned.

According to the statement of claims of 1A, 2A, 3<sup>rd</sup>, 12<sup>th</sup> and 13<sup>th</sup> defendant's lots 3 and 4 in the preliminary plan X consists of a land called Hitina Watta .The boundaries are as follows:-

North:- Bomaluwe Watta

South:- Iwura (bund) of the paddy field

East:- Gal enda of the Cemetery

West:- Gal enda

Nowhere a rock is situated as a boundary to the land called Hitina Watta.

On perusal of the deed marked 1V4, it is clear that, where a rock is situated as a boundary, it has been referred to as a rock and not as Gal enda. The third schedule of the said deed marked 1V1 /1V4 refers to a land called 1/4<sup>th</sup> share of Siyambalagahamula Watta of 8 lahas in paddy sowing. The eastern boundary of the said land is given as a rock. The schedule 2 of the said deed refers to a land called Hitina Watta and boundary to the east is given as gal enda of the cemetary and to the west as gal enda. Therefore it is very clearly seen that it is only a gal enda and not a rock, which has been referred to as the eastern boundary of the

said land Hitina watta. If a rock is situated as a boundary to the east of the said land Hitina Watta, then the Eastern boundry of Hitina Watta would have been referred to as a rock and not as gal enda as stated in the said deed marked 1V4.

In C.A.L.A 187/95 Fernando V. Perera, decided on 02.10.1995, Dr.Ranaraja, held that:-

“Section 18 of the Partition Act provides for parties dissatisfied with the preliminary plan prepared on commission made 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 in 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 which is not permitted by law.”

The contesting defendants too have failed to make any application under section 18 of the Partition Act. The contesting Defendants have failed to summon the surveyor who prepared the preliminary plan and to examine him on this issue. Nor have they made an application to court to issue a commission to the Survey General for the purpose of identifying the corpus to be partitioned in this case.

The scheme of the Partition Act is that once an action is instituted the action must proceed in respect of the land described in the plaint except where a larger land is made the subject matter of the action. The court has to issue a commission to the Surveyor to make the preliminary survey of the land set out in the plaint. The Surveyor has to make the survey and furnish a report in which he must set out the particulars specified in section 18 of the Act. The Surveyor has accordingly executed the commission and has tendered the preliminary plan depicting the land

sought to be partitioned as lots 1 to 5 and the report, marked X and X1. The plaintiff's position is that the land depicted as lot 1 to 5 in the said Preliminary plan X is the land described in the schedule to the plaint and the land sought to be partitioned in this case.

The land described in the title deed and described in the schedule to the plaint has been sufficiently identified as the land shown in the preliminary plan. The contesting defendants have failed to satisfy court that lot 3 and 4 in the said preliminary plan X consists of the land called Hitina Watta.

Therefore I answer the question of law raised in this case in the negative and in favour of the Plaintiff-Respondent. I affirm the judgment of the Civil Appellate High Court dated 01.02.2010 and dismiss the Defendant-Respondent-Appellants appeal with costs.

**JUDGE OF THE SUPREME COURT**

**B.P.ALUWIHARE, PC J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**ANIL GOONERATNE, J.**

I agree.

**JUDGE OF THE SUPREME COURT**