

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

In the matter of an Application to Appeal from the Judgment dated 22.3.2012 in Appeal No. WP/HCCA/MT/67/2008(F) in terms of Section 5 C (1) of Act No. 54 of 2006.

Nilanthi Anula de Silva,  
No. 152,  
6<sup>th</sup> Cross Lane,  
Borupana Road,  
Ratmalana.

**SC APPEAL 127/2013  
SC (HC) CALA No. 169/2012**

**Plaintiff**

**WP/HCCA/MT/67/2008(F)**

**D.C.Mt.Lavinia  
Case No. 2239/P**

**Vs.**

1. Hagodage Selpi,  
No. 34/6,  
Gamini Lane,  
Casiya Avenue,  
Ratmalana.

1a. Urala Ralage Francis,  
No.34/7,  
6<sup>th</sup> Cross Street,  
Borupana Road,  
Ratmalana.

2. Hettiarachchige  
Carolina Abeysekara  
(nee Pinto Jayawardene),

No.18/3,  
Cashiya Mawatha,  
Ratmalana.

3. Hettiarachchige Newlia  
Thilakawathie Pinto  
Jayawardene,  
No.17,  
Cashiya Mawatha,  
Ratmalana.
4. Kuruppuge Dona Rosolin,  
No.32,  
Gamini Lane,  
Ratmalana,
5. Mahapathirage Ariyapala,  
No.32/A,  
Gamini Lane,  
Ratmalana.
6. S. Somawathie Jayaweera  
Bandara,  
No. 199,  
Hill Street,  
Dehiwala.
7. Sinhara Sam Silva,  
No.20/6,  
Gamini Lane,  
Ratmalana.
8. Weliketigedera Kemawathie,  
No.32/1,  
Gamini Lane,  
Ratmalana.
9. M.G.Hemawathie,  
No.67,  
St. Rita's Road,  
Ratmalana.

10. Sooriya Arachchige Simon  
Singho,  
No. 75/25,  
Walawwatte,  
Nawala,  
Rajagiriya.

10a. Suriyaarachchige Wimalaratne

11. Elabadage Josi Nona,  
No.19/12,  
Gamini Lane,  
Ratmalana.

12. A.S.Somadasa,  
No.19/2,  
Gamini Lane,  
Ratmalana.

13. A.H.Piyasena  
No. 19/2,  
Gamini Lane,  
Ratmalana.

14. A.H.Sumith,  
No.19/2,  
Gamini Lane,  
Ratmalana.

15. A.H.Lal,  
No.19/2,  
Gamini Lane,  
Ratmalana.

16. S.Waidyatilake,  
No.17/7,  
Cashiya Mawatha,  
Ratmalana.

17. Kuruppage Don Hendri  
Appuhami

**Defendants**

**AND**

Weliketigedera Kemawathie,  
No. 32/1,  
Gamini Lane,  
Ratmalana.

**8<sup>th</sup> Defendant-Appellant**

Vs.

Nilanthi Anula de Silva,  
No.152,  
6<sup>th</sup> Cross Lane,  
Borupana Road,  
Ratmalana.

**Plaintiff-Respondent**

1. Hagodage Selpi,  
No. 34/6,  
Gamini Lane,  
Casiya Avenue,  
Ratmalana.
- 1a. Urala Ralage Francis,  
No.34/7,  
6<sup>th</sup> Cross Street,  
Borupana Road,  
Ratmalana.
2. Hettiarachchige  
Carolina Abeysekara  
(nee Pinto Jayawardene),  
No.18/3,  
Cashiya Mawatha,  
Ratmalana.
3. Hettiarachchige Newlia  
Thilakawathie Pinto  
Jayawardene,  
No.17,  
Cashiya Mawatha,

Ratmalana.

4. Kuruppuge Dona Rosolin,  
No.32,  
Gamini Lane,  
Ratmalana,
5. Mahapathirage Ariyapala,  
No.32/A,  
Gamini Lane,  
Ratmalana.
6. S. Somawathie Jayaweera  
Bandara,  
No. 199,  
Hill Street,  
Dehiwala.
7. Sinhara Sam Silva,  
No.20/6,  
Gamini Lane,  
Ratmalana.
9. M.G.Hemawathie,  
No.67,  
St. Rita's Road,  
Ratmalana.
10. Sooriya Arachchige Simon  
Singho,  
No. 75/25,  
Walawwatte,  
Nawala,  
Rajagiriya.
- 10a. Suriyaarachchige Wimalaratna
11. Elabadage Josi Nona,  
No.19/12,  
Gamini Lane,  
Ratmalana.

12. A.S.Somadasa,  
No.19/2,  
Gamini Lane,  
Ratmalana.
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No. 19/2,  
Gamini Lane,  
Ratmalana.
14. A.H.Sumith,  
No.19/2,  
Gamini Lane,  
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No.19/2,  
Gamini Lane,  
Ratmalana.
16. S.Waidyatilaka,  
No.17/7,  
Cashiya Mawatha,  
Ratmalana.
17. Kuruppage            Don            Hendri  
Appuhami

**Defendants-Respondents**

**AND NOW BETWEEN**

Nilanthi Anula de Silva,  
No. 152,  
6<sup>th</sup> Cross Lane,  
Borupana Road,  
Ratmalana.

*Presently at,*  
No.21 A,  
Borupana Road,  
Ratmalana.

**Plaintiff-Respondent-**  
**Appellant**

Vs.

Weliketigedara Kemawathie,  
No. 32/1,  
Gamini Lane,  
Ratmalana.

**8<sup>th</sup> Defendant-Appellant-**  
**Respondent**

1. Hagodage Selpi,  
No.34/6,  
Gamini Lane,  
Cashiya Avenue,  
Ratmalana
  
- 1a. Urala Ralage Francis,  
No.34/7,  
6<sup>th</sup> Cross Street,  
Borupana Road,  
Ratmalana.
  
2. Hettiarachchige  
Carolina Abeysekara  
(nee Pinto Jayawardene),  
No.18/3,  
Cashiya Mawatha,  
Ratmalana.
  
3. Hettiarachchige Newlia  
Thilakawathie Pinto  
Jayawardene,  
No.17,  
Cashiya Mawatha,  
Ratmalana.
  
4. Kuruppuge Dona Rosolin,  
No.32,  
Gamini Lane,  
Ratmalana,

(Deceased)

- 4a. Mahapatiranage Gnanaratna,  
No. 127/B,  
Gammana Road,  
Aluthgama,  
Bandaragama.
5. Mahapathirage Ariyapala,  
No.32/A,  
Gamini Lane,  
Ratmalana.
6. S. Somawathie Jayaweera  
Bandara,  
No. 199,  
Hill Street,  
Dehiwala.
7. Sinhara Sam Silva,  
No.20/6,  
Gamini Lane,  
Ratmalana.
9. M.G.Hemawathi,  
No.67,  
St. Rita's Road,  
Ratmalana.
10. Sooriya Arachchige Simon  
Singho,  
No. 75/25,  
Walawwatte,  
Nawala,  
Rajagiriya.
- 10a. Sooriya Aracchige Wimalaratne,  
No. 75/25,  
Walawwatte,  
Nawala,  
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No.19/2,  
Gamini Lane,  
Ratmalana.

15. A.H.Lal,  
No.19/2,  
Gamini Lane,  
Ratmalana.

16. S.Waidyatilake,  
No.17/7,  
Kashiya Avenue,  
Ratmalana.

17. Kuruppage Don Hendri  
Appuhami

**Defendants-Respondents-  
Respondents**

**Before** : **S. Thurairaja PC, J  
A. L. Shiran Gooneratne, J  
K. Priyantha Fernando, J**

**Counsel** : **D. P. Mendis, PC, with**

J. G. Sarathkumara for the Plaintiff-Respondent-Appellant.

Ranjan Suwandarathna, PC, with Anil Rajakaruna & Ms. Shavindi Jayasooriya for the 8<sup>th</sup> Defendant-Appellant-Respondent and 4<sup>th</sup> & 5<sup>th</sup> Defendants-Respondents-Respondents.

**Argued on** : 14.12.2023

**Decided on** : 23.01.2024

**K. PRIYANTHA FERNANDO, J**

1. The Plaintiff-Respondent-Appellant (hereinafter referred to as the “appellant”) filed the above partition action in the District Court of *Mount Lavinia* seeking to partition the land more fully described in the schedule to the plaint.
2. The learned District Judge by his judgment dated 31.10.2008 in answering the points of contest, held in favour of the plaintiff allocating shares to the plaintiff, 1st, 2nd and 3rd defendants while keeping 15/100 shares unallotted.
3. Being aggrieved by the above judgment of the District Court, the 4th, 5th and 8th defendants preferred an appeal to the High Court of Civil Appeal of *Mount Lavinia*. The learned Judges of the High Court of Civil Appeal by their judgment dated 22.03.2012, allowed the appeal and set aside the judgment of the District Court. In the said judgment of the High Court of Civil Appeal, the learned High Court Judges among other things held that the corpus to be partitioned was not properly identified.

4. The instant appeal was then preferred by the appellant against the said judgment of the High Court of Civil Appeal. This court on 05.07.2013, granted leave on the following question of law:
  - 1) Whether the corpus set out in the schedule to the plaint has been properly identified by metes and bounds in this partition case and would include the boundaries and the extents of the land.
  
5. At the hearing of this appeal, the learned President's Counsel for the appellant submitted that by Deed No. 15508 (P1), her predecessor in title, *Coranelis Pinto Jayawardhena* had obtained title to the corpus. It is the submission of the learned President's Counsel that the schedule given in the P1 deed and the schedule to the plaint in the District Court case are the same. It is his submission that therefore, the corpus has been properly identified.
  
6. Learned President's counsel for the respondents submitted that, the boundaries mentioned in the preliminary plan No. 1279 and the boundaries mentioned of the land depicted in the schedule to the plaint are different. Therefore, the learned President's Counsel for the respondents submitted that the corpus has not been properly identified. It was further submitted that the extent of the land given in the schedule to the plaint and the land mentioned in the preliminary plan are totally different, in that, it is the submission of the learned President's Counsel that the extent of the land sought to be partitioned in the plaint is a land on which fifty coconut trees can be planted. However, the extent of the land surveyed and mentioned in the preliminary plan is 47.97 perches. Therefore, fifty coconut trees cannot be planted in a 47.97 perches land.

7. On behalf of the appellant, it was submitted that in a partition action, if the extent of the corpus is reduced, the co-owners in terms of the title will get affected by the division of a smaller land but that would not affect the trespassers. It was further submitted that physical changes such as roads coming up would change the boundaries over time. The learned District Judge has analysed the above facts, however, the High Court of Civil Appeal has failed to analyse the same. It was further submitted in the written submissions that, although the appellants say that the preliminary plan does not show in its entirety, the appellant never attempted to show at the trial what the larger land is.
  
8. In the written submissions filed on behalf of the respondents it was submitted that, the extent of the land depicted in the preliminary plan is 47.9 perches and at least five main buildings are situated within the said portion of land occupied by parties who were not made defendants originally. It is their submission that a land which is sufficient to plant 60 to 70 coconut trees is considered as a land approximately about 1 acre. Hence, the extent of a land sufficient to plant 50 coconut trees would therefore be around 3 roods. It is further submitted that, boundaries of the land described in the schedule to the plaint and the land depicted in the preliminary plan are different. Therefore, it is the submission on behalf of the respondents that the learned Judges of the Civil Appellate High Court were correct when they decided that the corpus has not been properly identified.
  
9. The boundaries of the land described in the schedule to the plaint are as follows:  
  
North : Ovita owned by Rambukkana  
Maggonage Mahasen Perera and  
Others.

East and South : Land called Thombagahawaththa.

West : Land owned by Norman Mendis and Others.

Extent : A land that 50 coconut trees can be planted.

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10. The boundaries of the land depicted in the preliminary plan No.1279, drawn by *B. H. A. De Silva*, Licensed Surveyor and Court Commissioner:

North : Gamini Lane.

East : Road and premises bearing assessment No.17/7 of Dombagahawaththa.

South : Land bearing assessment No. 20/16, Gamini Lane.

West : Premises bearing assessment No.s 20/11, 20/2, 30A, and 30 of Gamini Lane.

Extent : 47.97 perches (includes Lots 1, 2 and 3).

11. On perusing the above boundaries, it is clear that the boundaries mentioned in the land sought to be partitioned in the plaint, and the land depicted in the preliminary plan do not tally.

12. The report of the Commissioner who prepared the preliminary plan is marked and produced at the trial as ['X1']. According to the Commissioner's report, it is clearly mentioned that the plaintiff (appellant) did not know the exact Eastern and the Southern boundaries.

The plaintiff has also informed the Commissioner that part of the premises in assessment no. 17/7, which is in the Eastern side of the corpus in the preliminary plan, should also be part of the corpus. Further, the appellant has clearly stated that the extent of the corpus to be partitioned should be 110 perches.

13. In the case of **Sopaya Silva v. Magilin Silva [1989] 2 Sri LR 106 at 108** , his Lordship Justice S. N. Silva held that,

*“Section 16(1) of the Partition law requires that a commission be issued “to a surveyor directing him to survey the land to which the action relates”. It implies that the land surveyed must conform substantially, with the land as described in the plaint (and in respect of which a lis pendens has been registered), as regards the location, boundaries and the extent. Further, it is for this reason that section 18(1)(a)(iii) requires the surveyor to express an opinion in his report “whether or not the land surveyed by him.....is substantially the same as the land sought to be partitioned as described in the schedule to the plaint”. Considering the finality and conclusiveness that attach in terms of section 48(1) of the Partition Law to the decrees in a partition action, the Court should insist upon a due compliance with the requirement by the surveyor.*

*If the land surveyed is substantially different from the land as described in the schedule to the plaint, the Court has to decide at that stage whether to issue instructions to the surveyor to carry out a fresh survey in conformity with the commission or whether the action should be proceeded with in respect of the land surveyed.*

*In the case of Brampy Appuhamy v. Monis Appuhamy (supra) it was held that the Court acted wrongly in proceeding with a partition action where the land surveyed was substantially smaller than the land as described in the plaint.”*

14. In the instant case as stated in paragraph 12 of this judgment, the Commissioner who prepared the preliminary plan has failed to mention in his report that the land depicted in the preliminary plan is the land sought to be partitioned in the plaint. Further, the plaintiff (appellant) herself has failed to identify the land and has stated to the Surveyor that the extent of the land should be 110 perches.
  
15. In the above premise it is clear that the corpus has not properly been identified at the trial and that the learned Judges of the Civil Appellate High Court has correctly concluded that the corpus has not been identified properly. Hence, the question of law, will be answered in the negative.

*Appeal dismissed with costs.*

**JUDGE OF THE SUPREME COURT**

**JUSTICE S. THURAIRAJA, PC.**

I agree

**JUDGE OF THE SUPREME COURT**

**JUSTICE A. L. SHIRAN GOONERATNE.**

I agree

**JUDGE OF THE SUPREME COURT**