

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

In the matter of an appeal in terms of Section 5C of the Act No.19 of 1990 amended by Act No.54 of 2006, against the Judgment dated 11.06.2018 delivered by the High Court of Civil Appeals of the Western Province holden at Kalutara in Appeal No. WP/HCCA/LA/22/2017 and Order dated 12.05.2017, delivered in the District Court of Panadura Case No. P/866.

SC Appeal No. 60/2020
SC HCCA Application No.
222/2018
SC HCCA Kalutara No.
WP/HCCA/LA/22/2017
SC Panadura Case No.
P/866

1. Gunasinghe Chandrawathie of
Pothupitiya South,
Wadduwa.

PLAINTIFF

v.

1. Gunasinghe Siriyawathie,
(Deceased) of Pothupitiya South,
Wadduwa.

1A. Gunasinghe Somadasa of
Pothupitiya South,
Wadduwa.

2. Kekiriwaragodage Sunil

3. Duware Amara Kumari

4. Gunasinghe Somadasa

5. Jasenthuhewage Nandani all of
Pothupitiya South,
Wadduwa.

DEFENDANTS

AND BETWEEN

(In the matter of scheme inquiry under Section
35 of the Partition Law No. 21 of 1977 in the
District Court of Panadura)

1. Gunasinghe Chandrawathie of
Pothupitiya South,
Wadduwa.

PLAINTIFF - PETITIONER

v.

1. Gunasinghe Siriyawathie,
(Deceased) of Pothupitiya South,
Wadduwa.
- 1A. Gunasinghe Somadasa of
Pothupitiya South,
Wadduwa.
2. Kekiriwaragodage Sunil
3. Duware Amara Kumari
4. Gunasinghe Somadasa
5. Jasenthuhewage Nandani all of
Pothupitiya South,
Wadduwa.

DEFENDANTS – RESPONDENTS

AND BETWEEN

(In the matter of an Appeal from an Order of the District Court of Panadura 12.05.2017 in terms of Section 754 (2) of the Civil Procedure Code read with the High Court of Provinces (Special Provisions Amendment) Act No.54 of 2006 and Section 36A of the Partition Law No. 21 of 1977 in the High Court of Civil Appeals of the Western Province holden at Kalutara Appeal No. WP/HCCA/Kalutara 22/2017.)

1. Gunasinghe Chandrawathie of
Pothupitiya South,
Wadduwa.

PLAINTIFF – PETITIONER – PETITIONER

1. Gunasinghe Siriyawathie,
(Deceased) of Pothupitiya South,
Wadduwa.

- 1A. Gunasinge Somdasa of
Pothupitiya South,
Wadduwa.

2. Kekiriwaragodage Sunil.

3. Duware Amara Kumari (Deceased)

- 3A. Kakiriwaragodage Sunil.

4. Gunasinghe Somadasa
All of Pothupitiya South,

Wadduwa.

5. Jasenthuhewage Nandani (Deceased)

5A. Walchoru Thanuja Sujani De Silva

Gorakagahawatta.

Pothupitiya South,

Wadduwa.

DEFENDANTS – RESPONDENTS
-RESPONDENTS

AND NOW BETWEEN

1. Gunasinghe Chandrawathie of

Pothupitiya South,

Wadduwa.

PLAINTIFF - PETITIONER - PETITIONER –
APPELLANT

1. Gunasinghe Siriyawathie,
(Deceased) of Pothupitiya South,
Wadduwa.

1A. Gunasinge Somdasa of
Pothupitiya South,
Wadduwa.

2. Kekiriwaragodage Sunil.

2A. Kakiriwaragodage Ananda
No.382, Kerawalapitiya,
Hendala, Wattala.

3. Duware Amara Kumari (Deceased)

- 3A. Kakirigodage Sunil.
- 3B. Duware Wilbert alias Gilbert,
517, Kahatagahawatta,
Pothupitiya South,
Wadduwa.
- 3C. Duware Wimalasiri,
517, Kahatagahawatta,
Pothupitiya South,
Wadduwa.
- 3D. Duware Nilanthi Ashoka,
517, Kahatagahawatta,
Pothupitiya South,
Wadduwa.
4. Gunasinghe Somadasa
All of Pothupitiya South,
Wadduwa.
5. Jasenthuhewage Nandani (Deceased)
- 5A. Walchoru Thanuja
Sujani De Silva,
Goralagahawatta,
Pothupitiya South,
Wadduwa.

DEFENDANTS – RESPONDENTS –
RESPONDENTS- RESPONDENTS

BEFORE : A. L. Shiran Gooneratne, J.
K. Priyantha Fernando, J. &
M. Sampath K. B. Wijeratne J.

COUNSEL : Chamara Nanayakkarawasam with Ms.
Patali Abayarathna for the Plaintiff –
Petitioner – Appellant.

K. Muditha C. K. Perera with Nihal
Weerasinghe and M. D. Rasika Prabath
Maddumage for the 1A and 4th
Defendant – Respondent – Respondent –
Respondents.

Lasitha Kanuwanaarachchi with Ms.
Vipuni Peiris, Ms. Tharushi Amarasinghe
and Shakila Koswatta for the 2A
Defendant – Respondent – Respondent –
Respondent.

Nisala Seniya Fernando for the 3B, 3C
and 3D Defendant – Respondent –
Respondent – Respondents.

ARGUED ON : 18.02.2025

DECIDED ON : 03.04.2025

M. Sampath K. B. Wijeratne J.

This is an application seeking leave to appeal against the judgment of the High Court of the Civil Appeals of the Western Province, holden at Kalutara, delivered on June 11, 2018, in an appeal challenging the order of the learned District Judge of Panadura, made on May 12, 2017.

The Plaintiff-Petitioner-Petitioner-Appellant (hereinafter referred to as the ‘Plaintiff-Petitioner’) instituted Partition Action No. P/866 in the District Court of Panadura, seeking partition of the land known as ‘Damminnagahawatta’

alias 'Daminagahawatta,' morefully described in the schedule to the plaint, naming five Defendants.

As per the plaint, the Plaintiff sought to partition the *corpus* among the Plaintiff and the 1st to 4th Defendants in the following proportions: 12/48 shares to the Plaintiff, 9/48 shares each to the 1st to 4th Defendants, and 9/48 shares to remain unallotted. The 5th Defendant was named as a party on the basis that she was in possession of a portion of the *corpus*.

Following the preliminary survey of the *corpus* and the filing of statements of claim by the Defendants, the case proceeded to trial.

After trial, the learned District Judge delivered judgment on April 19, 2005, allotting shares of the corpus to the parties as stated in the plaint. An interlocutory decree was accordingly entered, and a Commission was issued to Licensed Surveyor and Court Commissioner, Mr. Gamini Peiris, to prepare the final scheme of partition.

The Commissioner, upon executing the Commission, submitted Plan No. 2662 along with his report dated September 18, 2013. In accordance with the plan, the corpus was divided, and the parties were allotted specific lots as follows.

- (a) Lot 1 (17.5 perches) and Lot 7 (3.02 perches) to the Plaintiff-Petitioner.;
- (b) Lot 2 (14.00 perches) and Lot 5 (1.39 perches) to the 1st Defendant-Respondent (deceased wife of the 4th Defendant - Respondent);
- (c) Lot 3 (14.00 perches) and Lot 8 (1.39 perches) to the 2nd and 3rd Defendant - Respondents;
- (d) Lot No. 4 (15.39 perches) to 4th Defendant - Respondent;
- (e) Lot No. 6 (9.09 perches) and Lot No. 9 (6.30 perches) - unallotted.

The Plaintiff-Petitioner, being dissatisfied with the proposed scheme of partition, filed a Petition dated January 27, 2014, supported by an affidavit, along with an alternative scheme of partition depicted in Plan No. 816, dated November 14, 2013, prepared by L.P. Liyanage, Licensed Surveyor.

The 4th Defendant-Respondent-Respondent-Respondent (hereinafter referred to as the "4th Defendant-Respondent") filed a statement of objections dated November 25, 2016, supported by an affidavit, opposing the alternative scheme of partition proposed by the Plaintiff -Petitioner.

Consequently, the learned District Judge of Panadura conducted an inquiry into the matter. At the inquiry, the Plaintiff-Petitioner, Licensed Surveyor Mr. L.P. Liyanage, and the 4th Defendant - Respondent gave evidence.

The learned District Judge, after inquiring into the scheme of partition, has ordered the sale of amalgamated Lots No. 7 and 8 as a single lot and the sale of Lot No. 5 initially, among the parties to the partition action. If no party to the action bids or if the bids are below the valuation, the lots were ordered to be offered to outsiders. The learned District Judge has further ordered that the proceeds of the auction be distributed among the parties who were allocated shares in those three lots, in proportion to the shares specified in the judgment. Subject to these directives, the learned District Judge confirmed the Commissioner's Plan No. 2662, dated September 13, 2013.

Against this order, the Plaintiff-Petitioner sought leave to appeal from the Civil Appellate High Court of Kalutara. The learned Judges of the High Court initially granted leave to appeal from the said order¹. However, by judgment dated June 11, 2018, they refused the appeal presented by the Plaintiff-Petitioner. Thereafter the present application to this Court was made where this Court granted leave on the two questions of law set out in paragraphs 34 (A) (iii) and 34 (C) of the petition, which reads in verbatim as follows:

“(1) Paragraph 34 (A)(ii):

‘Has the learned District Judge erred in law by his failure to take into consideration the fact that Mr. Gamini Peiris, the Licensed Surveyor who made his return to the commission in the present case and whose scheme of partition was confirmed by the Order of the learned District Judge after the scheme inquiry had failed to comply with Section 31(2)

¹ Order dated June 22,2017.

of the Partition Law 22 (sic) of 1977 in that he had not divided the land so far as practicable in such a manner as would enable the allotment or sale of Lot 5, Lot 7 and Lot 8 as one lot although the extent of each one of them are less than the minimum extent required by written law regulating the subdivision of land for development purposes?’

(2) **Paragraph 34 (C):**

‘Have the learned Judges of the High Court of Civil Appeals of the Western Province holden at Kalutara and the learned District Judge of Panadura erred in law by his failure to take into consideration the fact that Mr. Gamini Peiris, the Licensed Surveyor who made his return to the commission in the present case and whose scheme of partition was confirmed by the Order of the learned District Judge after the scheme inquiry had failed to comply with Section 31(2) of the Partition Law No:22 (sic) of 1977, in that he had not divided the land so far as practicable in such a manner as would enable the allotment or sale of Lot 5, Lot 7 and Lot 8 as one lot although the extent of each one of them are less than the minimum extent required by written law regulating the subdivision of land for development purposes?’

Since both questions of law are pertaining to the same matter, I will address them simultaneously.

During her testimony at the scheme inquiry, the Plaintiff – Petitioner has stated that the extent of Lot No. 7 allotted to her was only 3.02 perches, which was less than the minimum extent required by the Local Government Authority for the subdivision of land under the Urban Development Authority Planning and Building Regulations. She has contended that if 1.5 perches were deducted from Lot No. 7 and added to Lot No. 1, she would be able to utilize Lot No. 1 more effectively, particularly as it is the area where she resides.

However, I find no logical basis for her statement, as her initial complaint to the District Court, on which the learned District Judge initiated the inquiry, was that Lot No. 7 had been allotted to her in violation of the applicable

Regulations. Reducing Lot No. 7 by 1.5 perches would further diminish its extent from 3.02 perches to 1.52 perches, which would still not conform to the Regulations. Moreover, such a reduction would further limit its viability for agricultural or horticultural use, apart from development.

In the alternative plan, Licensed Surveyor Mr. L.P. Liyanage reallocated 1.5 perches from Lot No. 7 to the Plaintiff-Petitioner's Lot No. 1, where she resides, by carving out a small strip of land from Lot No. 2, which had been allotted to the 1st Defendant-Respondent-Respondent-Respondent (hereinafter referred to as the "1st Defendant - Respondent").

This adjustment, if allowed, would reduce the effective enjoyment of the backyard of the 1st Defendant - Respondent's dwelling house, which is situated within Lot No. 2. Additionally, it would result in both the Plaintiff - Petitioner's Lot No. 1 and the 1st Defendant - Respondent's Lot No. 2 being reshaped into irregular and impractical configurations.

I do concede that the plan prepared by Commissioner Mr. M. Gamini D. Peiris is not in conformity with the Regulations. Not only is Lot No. 7, allotted to the Plaintiff -Petitioner, below the required extent, but Lot No. 5, allotted to the 1st Defendant -Respondent, and Lot No. 8, allotted to the 2nd and 3rd Defendant -Respondent -Respondent-Respondents (hereinafter referred to as the "2nd and 3rd Defendant -Respondents"), each measure only 1.39 perches, which also fails to meet the required standards.

Although the 1st to 3rd Defendant-Respondents did not raise any objection regarding their respective allocations, the fact remains that such allocations are in violation of the Regulations and cannot be permitted to stand under the Partition Law.

In terms of Section 31(2) of the Partition Law No. 21 of 1977, the Commissioner, Mr. M. Gamini D. Peiris, should have, as far as practicable, divided the land in a manner that would allow for the allotment or sale of such portions as a single lot. This was particularly necessary given that Lots No. 5,

7, and 8 were each below the minimum extent required by the Regulations for development purposes. Yet, even when combined, the total extent of these three lots would still not meet the required minimum extent of six perches. Nevertheless, if these lots are sold as a single lot, bidders would likely offer a better price at the sale, or the Defendants to whom the adjoining Lots 6 and 9 have been allotted may even choose to purchase them.

The Commissioner appears to have acted in the best possible manner by allotting the improvements claimed by each party during the preliminary survey. In fact, the contesting party, the Plaintiff -Petitioner, was allotted 17.5 perches in Lot No. 1, which is 0.5 perches more than the 17 perches she originally claimed during the preliminary survey.

Since buildings are situated on each lot adjacent to one another, it is evident that no scheme of partition could be prepared in a way that accommodates each party's entitlement from a single lot. This view is further supported by the alternative plan submitted by the Plaintiff-Petitioner, which was prepared by Mr. L. P. Liyanage, Licensed Surveyor.

Hence, as suggested by Mr. Lasitha Kanuwanaarachchi, the learned Counsel for the 2A Defendant-Respondent, the only practicable way to make the Commissioner's scheme of partition viable is to relocate Lot No. 5, which is currently situated along the Northern boundary of Lot No. 6, to the Southern part of Lot No. 6 and to merge the existing Lot No. 5 with Lot No. 6.

This course of action is not repugnant to the Partition Law. Our courts have time and again observed that the phrase "*the court shall, after a summary inquiry, confirm such scheme with or without modifications*" in Section 37 (2) of the Partition Law should not be interpreted as permitting only minor alterations. In confirming the scheme, the trial judge has the discretion to adopt the partition scheme prepared by the Commissioner, with any modifications he considers justified.

I note that the Plaintiff-Petitioner's intention in submitting an alternative scheme of partition was revealed through the testimony of his own surveyor,

Mr. L.P. Liyanage, Licensed Surveyor. In response to a question posed on behalf of the 4th Defendant–Respondent regarding the Plaintiff – Petitioner’s grievance, he stated that the Plaintiff had instructed him to make room for the construction of a washroom.

I am of the view that such a need of an individual party should not be a determining factor in the scheme of partition in this case.

It is settled law that in a partition action, the Commissioner’s scheme of partition should not be lightly rejected². However, in this instance, the Commissioner in allotting Lot No 5,7, and 8 to the 1st Defendant-Respondent, Plaintiff-Petitioner and 2nd and 3rd Defendant-Respondents has acted in violation of a statutory provision in the Partition Law; specifically, Section 31(2).

Hence, I order the relocation of Lot No. 5 along the Southern boundary of Lot No. 6 and merger of existing Lot No. 5 with Lot No. 6. Even to the naked eye, it is easy to perceive that Lot No. 5. can be re-located to the Southern boundary of Lot No. 6, if necessary, with a slight alteration in the shape. I issue this direction since if this matter is sent back to the District Court for the re-consideration of alterations, it could allow a party to re-agitate the same issue through legal channels, potentially prolonging the proceedings, even reaching this Court again, a process that has already spanned twelve years since the final scheme of partition.

In light of the above analysis, I find no reason to interfere with the impugned order of the learned District Judge dated May 12, 2017, and of the learned Judges of the High Court except for the modification ordered by this Court regarding Lot No. 5.

In this case, unlike in an ordinary case, it is possible to include a special direction for the sale of Lots No 5,7 and 8 in the interlocutory decree since this order is made after the preparation of the scheme of partition.

² *Appuhamy v. Weeratunge* 46 N.L.R. p. 461 and *Gunasekara v. Soothanona* [1988] 2 SLR 8.

The learned District Judge is directed to issue a Commission to the Commissioner to modify the final scheme of partition in accordance with the order of this Court. As per Section 26(2)(b) of the Partition Law, the interlocutory decree **may** contain an order for sale of the entirety of the *corpus* or a share or a divided lot. Therefore, the learned District Judge is directed to enter an interlocutory decree, giving effect to this order, before issuing the commission for the modified scheme of partition. Furthermore, the learned District Judge shall make the necessary orders under Sections 38 to 42 concerning the auction of Lots No. 5, 7, and 8, which the Commissioner must depict as a single lot.

Hence, I answer in the affirmative the two questions of law on which this Court granted leave to appeal.

Accordingly, the appeal is partially allowed subject to the aforementioned direction. The parties shall bear their own costs.

JUDGE OF THE SUPREME COURT

A. L. Shiran Gooneratne, J.

I Agree.

JUDGE OF THE SUPREME COURT

K. Priyantha Fernando, J.

I Agree.

JUDGE OF THE SUPREME COURT