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

1. Herath Mudiyanselage Podi Nilame,
2. Herath Mudiyanselage Seneviratne, (Deceased)

2A. H.M. Podinilame,
All of
Bogala Road,
Kotiyakumbura.
Plaintiffs

SC APPEAL NO: SC/APPEAL/52/2018
SC LA NO: SC/HCCA/LA/94/2015
HCCA KEGALLE NO: SP/HCCA/KEG/860/2011/F
DC KEGALLE NO: 25389/P

Vs.

1. Walpola Kankanamalage Gunarathne of
Morawawka, Ruwanwella.
2. E.N. Margret Nona of
Pattiyamulla, Kotiyakumbura.
(Deceased)

2A. Hapuarachchilage Susantha Rohan Hapuarachchi of
Pattiyamulla, Kotiyakumbura.

3. Dadagama Ralalage
   Sumanawathie Menike of
   Ampe, Kotiyakumbura.
4. Kanthi Asoka of
   Ampe, Kotiyakumbura.
5. Hapuarachchilage Susantha
   Rohan Hapuarachchi of
   Pattiyamulla, Kotiyakumbura.
6. H.M. Chandrasekara of
   No. 20,
   Parawatte Janapadaya,
   Kotiyakumbura.
7. H.M. Chandrawathie Herath,
   C/O W.A. Gunathilake of
   Delgamuwa, Warakapola.
8. H.M. Sumanawathie,
   C/O S.S. Chandrasekara of
   No. 20,
   Parawatta Janapadaya,
   Kotiyakumbura.
9. H.M. Anula Herath,
   C/O V.G.R.S. Raja of
   Udapelpita, Weragala,
   Warakapola.
10. M.N. Saliya Niroshane Herath of
    No. 10965,
    Police Official Quarters,
    Peduru Kotuwa,
    Trincomalee.

    Defendants

AND BETWEEN

2A. Hapuarachchilage Susantha
Rohan Hapuarachchi of
Pattiyamulla, Kotiyakumbura.

3. Dadagama Ralalage
Sumanawathie Menike of
Ampe, Kotiyakumbura.

4. Kanthi Asoka of
Ampe, Kotiyakumbura.

5. Hapuarachchilage Susantha
Rohan Hapuarachchi of
Pattiyamulla, Kotiyakumbura.

2A, 3rd to 5th Defendant-Appellants

Vs.

1. Herath Mudiyanselage Podi
Nilame,

2A. H.M. Podinilame,
All of
Bogala Road,
Kotiyakumbura.

Plaintiff-Respondents

1. Walpola Kankanamalage
Gunarathne of
Morawawka,
Ruwanwella.
(Deceased)

1A. Seelawathi Podimanike,
1B. Shayamala Gunarathna,
1C. Nalaka Nishantha Gunarathna,
1D. Chanaka Nishantha Gunarathna,
All of
Morawaka, Ruwanwella.

6. H.M. Chandrasekara of
No. 20,
Parawatte Janapadaya,
Kotiyakumbura.

7. H.M. Chandrawathie Herath,
C/O W.A. Gunathilake of
Delgamuwa, Warakapola.

8. H.M. Sumanawathie,
C/O S.S. Chandrasekara of
No. 20,
Parawatta Janapadaya,
Kotiyakumbura.

9. H.M. Anula Herath,
C/O V.G.R.S. Raja of
Udapelpita, Weragala,
Warakapola.

10. M.N. Saliya Niroshane Herath of
No. 10965,
Police Official Quarters,
Peduru Kotuwa,
Trincomalee.
Defendant-Respondents

AND NOW BETWEEN

2A. Hapuarachchilage Susantha
Rohan Hapuarachchi of
Pattiyamulla, Kotiyakumbura.

3. Dadagama Ralalage
Sumanawathie Menike of
Ampe, Kotiyakumbura.

4. Kanthi Asoka of
Ampe, Kotiyakumbura.

5. Hapuarachchilage Susantha
Rohan Hapuarachchi of
Pattiyamulla, Kotiyakumbura.

2A, 3rd to 5th Defendant-
Appellant-Petitioners

Vs.

1. Herath Mudiyanselage Podi
Nilame,

2A. H.M. Podinilame,
All of
Bogala Road,
Kotiyakumbura.

Plaintiff-Respondent-Respondents

1A. Seelawathi Podimanike,

1B. Shayamala Gunarathna,

1C. Nalaka Nishantha Gunarathna,

1D. Chanaka Nishantha Gunarathna,
All of
Morawaka, Ruwanwella.

6. H.M. Chandrasekara of
No. 20,
Parawatte Janapadaya,
Kotiyakumbura.
7. H.M. Chandrawathie Herath,
C/O W.A. Gunathilake of
Delgamuwa,
Warakapola.
8. H.M. Sumanawathie,
C/O S.S. Chandrasekara of
No. 20,
Parawatta Janapadaya,
Kotiyakumbura.
9. H.M. Anula Herath,
C/O V.G.R.S. Raja of
Udapelpita,
Weragala,
Warakapola.
10. M.N. Saliya Niroshane Herath of
No. 10965,
Police Official Quarters,
Peduru Kotuwa,
Trincomalee. (Deceased)
10A. Sayibudeen Neyi Rahima,
C/O S.M. Rahima of
Trincomalee Road,
Saliya Mawatha,
Mihinthale.
<u>Defendant-Respondent-Respondents</u>

Before: P. Padman Surasena, J.
Yasantha Kodagoda, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Harsha Soza, P.C., with Zahara Hassim for the 2A, 3rd to 5th Defendant-Appellant-Appellants.

K. Asoke Fernando with A.R.R. Siriwardane for the Plaintiff-Respondent-Respondents.

Chathura Galhena with Manoja Gunawardana for the 1B Defendant-Respondent-Respondent.

Rasika Dissanayake with Chandrasiri Wanigapura and Shasir Hussair for the 6th, 7th and 9th Defendant-Respondent-Respondents.

Pulasthi Hewamanna with Harini Jayawardhana and Anjalee Karunaratna for the 10A Defendant-Respondent-Respondent.

Argued on : 29.04.2021

Written submissions:

by the 2A, 3rd to 5th Defendant-Appellant-Appellants on 30.05.2018.

by the Plaintiff-Respondent-Respondents on 20.09.2018.

by the 10th Defendant-Respondent-Respondent on 23.10.2018.

Decided on: 10.06.2021

Mahinda Samayawardhena, J.

The two Plaintiffs filed this action in the District Court of Kegalle seeking to partition the land described in the schedule to the plaint among the two Plaintiffs, the 1st and 6th to 10th Defendants. Of all the Defendants, only the 1st and 2nd Defendants filed a joint statement of claim. At the trial, apart from the Plaintiffs, the 2nd to 5th Defendants raised issues. Upon conclusion of the trial, the learned District Judge delivered the Judgment partitioning the land depicted in the Preliminary Plan in accordance with the pedigree set out by the Plaintiffs. The appeal filed by the 2nd to 5th Defendants against this Judgment to the High Court of Civil Appeal was dismissed. Hence the appeal to this Court by the 2nd to 5th Defendants. This Court granted leave to appeal on the question whether the Plaintiffs have properly identified the land to be partitioned.

In a partition action, if the corpus cannot be identified, *ipso facto*, the action shall fail. If the corpus cannot be identified, there is no necessity to investigate title, as title shall be investigated on an identifiable portion of land. The Court shall not first investigate title and then look for the land to be partitioned. It shall happen *vice versa*. The finding that the corpus has not been identified decides the fate of the case without further ado, this finding shall only be reached after careful consideration of all the facts and circumstances of the case, and not as a convenient method to summarily dispose of long-drawn-out partition actions without analysing the complicated pedigrees set forth by the parties to the action.

A partition action cannot be filed to partition a portion of the land. The entire land should be brought into the action and the co-owners of the whole corpus should be made parties.

In the instant action, as described in the schedule to the plaint, the land sought by the Plaintiffs to be partitioned is as follows:

> *The amalgamated land called Egodawatta and Batalawatta situated at Ampe in Kandupita Pattu of Beligal Korale of Kegalle District in the Sabaragamuwa Province and bounded on the North by Paddy Field, East by Paddy Field, South by Limit of Galpathage Watta, and West by Ditch and Stone Fence, and containing in extent 15 Lahas of paddy sowing area.*

In terms of section 16(1) of the Partition Law, the Court issued a commission to survey the land and prepare the Preliminary Plan depicting the said land sought to be partitioned. The Preliminary Plan together with the Report was received by Court in 1991. In the Preliminary Plan, the land surveyed is described in the following manner:

> *The amalgamated land called Egodawatta and Batalawatta situated at Ampe in Kandupita Pattu of Beligal Korale of Kegalle District in the Sabaragamuwa Province and bounded on the North by Madugahamula Kanati and Aswaddume Paddy field, East by Aswaddume Paddy field and Gamsabha road, South by Millagahamula Watta alias Hitinawatta, and West by Madugahamula Kanati and Paddy field containing in extent 1 acre, 1 rood and 32 perches.*

In the Report to the Preliminary Plan, the surveyor records that at the survey the 2nd Defendant informed him that a portion of the land on the western boundary should be included in the corpus. However the 2nd Defendant did not show the portion which shall be included in the corpus to the surveyor. Neither was such an application made to Court.

According to section 16(2) of the Partition Law, on the application of a defendant, the Court can direct the surveyor to survey any larger or smaller land than that pointed out by the Plaintiff to him.

Section 16(2) reads as follows:

> *The commission issued to a surveyor under subsection (1) of this section shall be substantially in the form set out in the Second Schedule to this Law and shall have attached thereto a copy of the plaint certified as a true copy by the registered attorney for the Plaintiff.*
>
> *The court may, on such terms as to costs of survey or otherwise, issue a commission at the instance of any party to the action, authorizing the surveyor to survey any larger or smaller land than that pointed out by the Plaintiff where such party claims that such survey is necessary for the adjudication of the action.*

Perhaps in consideration of the said observation made by the surveyor in his Report, the Court granted at least eight specific dates for consideration of the Preliminary Plan prior to the 1st and 2nd Defendants filing their statement of claim in 1994. But none of the Defendants took steps to take out a commission to

prepare an alternative Plan to show the portion of land purportedly excluded in the Preliminary Plan.

As I mentioned earlier, only the 1st and 2nd Defendants filed a joint statement of claim. The 3rd to 5th Defendants informed the Court that they would abide by the statement of claim filed by the 1st and 2nd Defendants.

In the second paragraph of the statement of claim of the 1st and 2nd Defendants, it is repeated that the entire land to be partitioned is not depicted in the Preliminary Plan, as a portion of the land on the western boundary has been left out. However, even in the statement of claim, the 1st and 2nd Defendants do not specify the excluded portion or at least the extent of it.

This is against section 19(2) of the Partition Law which lays down the detailed procedure to be followed by a Defendant who seeks to have a larger land partitioned. In short, such a defendant shall take all the steps afresh that a plaintiff in a partition action shall take, which include compliance with the provisions of sections 12-18 of the Partition Law. No such steps were taken by the 2nd-5th Defendants.

Section 19(2) reads as follows:

> *19(2)(a) Where a defendant seeks to have a larger land than that sought to be partitioned by the Plaintiff made the subject-matter of the action in order to obtain a decree for the partition or, sale of such larger land under the provisions of this Law, his statement of claim shall include a statement of the particulars required by section 4 in respect of such larger land; and he shall comply with the*

requirements of section 5, as if his statement of claim were a plaint under this Law in respect of such larger land.

(b) Where any defendant seeks to have a larger land made the subject-matter of the action as provided in paragraph (a) of this subsection, the court shall specify the party to the action by whom and the date on or before which an application for the registration of the action as a lis pendens affecting such larger land shall be filed in court, and the estimated costs of survey of such larger land as determined by court shall be deposited in court.

(c) Where the party specified under paragraph (b) of this subsection fails to comply with the requirements of that paragraph, the court shall make order rejecting the claim to make the larger land the subject-matter of the action, unless any other party, in whose statement of claim a similar claim shall have been set up, shall comply therewith on or before the date specified in paragraph (b) or within such extended period of time that the court may, on the application of any such party, fix for the purpose.

(d) After the action is registered as a lis pendens affecting the larger land and the estimated costs of the survey of the larger land have been deposited in court, the court shall-

> *(i) add as parties to the action all persons disclosed in the statement of claim of the party at whose instance the larger land is being made the subject-matter of the action as being persons who ought to be included as parties to an action in respect of such larger land under section 5; and*

(ii) proceed with the action as though it had been instituted in respect of such larger land; and for that purpose, fix a date on or before which the party specified under paragraph (b) of this subsection shall, or any other interested party may, comply with the requirements of section 12 in relation to the larger land as hereinafter modified.

(e) Where the larger land is made the subject-matter of the action, the provisions of sections 12, 13, 14 and 15 shall, mutatis mutandis, apply as if the statement of claim of the party seeking a partition or sale of the larger land were the plaint in the action; and-

(i) such party shall with his declaration under section 12, in lieu of an amended statement of claim, file an amended caption including therein as parties to the action all persons not mentioned in his statement of claim, but who should be made parties to an action for the larger land under section 5, and such amended caption shall be deemed for all purposes to be the caption to his statement of claim in the action;

(ii) summons shall be issued on all persons added as parties under paragraph (d) of this subsection and all persons included as necessary parties under sub-paragraph (i) hereof;

(iii) notice of the action in respect of the larger land shall be issued on all parties to the action in the original plaint together with a copy of the statement of claim referred to above;

(iv) the provisions of section 20 shall apply to new claimants or parties disclosed thereafter.

(f) If the party specified by the court under paragraph (b) of this subsection or any other interested party fails or neglects to comply with the provisions of section 12, as hereinbefore modified on or before the date specified in that paragraph, the court may make order dismissing the action in respect of the larger land.

(g) Where the requirements of section 12 as hereinbefore modified are complied with, the court shall order summonses and notices of action as provided in paragraph (e) of this subsection to issue and shall also order the issue of a commission for the survey of the larger land, and the provisions of sections 16, 17 and 18 shall accordingly apply in relation to such survey.

Although at the outset the 1st and 2nd Defendants filed a joint statement of claim, the 1st Defendant seems to have later accepted the Preliminary Plan and the pedigree of the Plaintiffs.

Ultimately, on the seventh date of trial, the 2nd to 5th Defendants made an application to Court to issue a commission for an alternative Plan. Notwithstanding this was a belated application, the Court took the case out of the trial roll and directed the said Defendants to take steps to issue the commission. However no steps were taken, and on the commission returnable date the said Defendants informed the Court that an alternative Plan was not necessary. Such was the nature of the complaint of the 2nd to 5th Defendants.

The 2nd to 5th Defendants raised issues at the trial. The first issue was whether the land to be partitioned was depicted in the Preliminary Plan and, if not, whether the Plaintiffs could maintain this action. The District Court answered this issue against the said Defendants. This issue was not specific and shall be understood in line with the second paragraph of the statement of claim of the 1st and 2nd Defendants, where they state that the entire land to be partitioned was not depicted in the Preliminary Plan because a portion on the western boundary had not been brought into the action.

It is significant to note that the complaint of the 2nd to 5th Defendants is not that a different land was surveyed but that the entire land was not surveyed; or, to be more specific, that a portion on the western boundary was not surveyed.

At the trial, the Preliminary Plan and the Report were marked X and X1 respectively by the 1st Plaintiff, without objection. Notwithstanding that the 2nd to 5th Defendants did not take out a commission for an alternative Plan, if they still had some concerns that a portion of the land had been left out by the surveyor, they could have summoned the surveyor to give evidence. This was not done.

Section 18(1) deals with the return of the surveyor's commission after the preliminary survey.

Section 18(2) states *inter alia* that the Preliminary Plan and Report may be used as evidence without further proof subject to the surveyor being summoned to give oral testimony on the application of any party to the action.

Section 18(2) of the Partition Law reads as follows:

The documents referred to in paragraphs (a), (b) and (c) of subsection (1) of this section may, without further proof, be used as evidence of the facts stated or appearing therein at any stage of the partition action:

Provided that the court shall, on the application of any party to the action and on such terms as may be determined by the court, order that the surveyor shall be summoned and examined orally on any point or matter arising on, or in connection with, any such document or any statement of fact therein or any relevant fact which is alleged by any party to have been omitted therefrom.

Let me now consider on what basis the 2nd to 5th Defendants state that a portion of the land on the western boundary is not included in the corpus. As I stated earlier, this was not addressed in the statement of claim but is discernible by going through the questions put to the 1st Plaintiff by learned Counsel for the 2nd to 5th Defendants during the course of the cross examination in the District Court. The 1st Plaintiff was cross examined by learned Counsel for the 2nd to 5th Defendants on the extent of the land to be partitioned. The cross examination was based on the premise that in the area where the land to be partitioned is situated (at Ampe in Kegalle), 8 *lahas* of paddy sowing area is equal to 1 acre. This was also emphasised in the written submissions tendered to the District Court after the conclusion of the trial. The 1st Plaintiff admitted this during the course of the cross examination.

The 1st Plaintiff in his evidence in chief described the boundaries of the schedule to the plaint as the land surveyed by the surveyor. These are the same boundaries which are stated in all

the title deeds of the Plaintiff. They are P1 executed in 1961, P2 executed in 1980, P3 executed in 1939, P4 executed in 1927, and P5 executed in 1929. It is significant to note that all the deeds marked by the 2nd to 5th Defendants carry the same boundaries. They are 1V1 executed in 1965, 1V2 executed in 1980, 3V1 executed in 1988, 4V1 executed in 1988, 5V1 executed in 1965, and 5V2 executed in 1988.

The extent of the land as described in the old deeds (for instance, P5 executed in 1929) is 15 *lahas* of paddy sowing area. The schedule to the plaint is a reproduction of the land described in these old deeds. Without surveyor Plans being available, the extent of the land given in these old deeds is speculative. Hence it was a common occurrence at that time for a deed to purport to convey either much more or much less than what a person was entitled to.

According to the above conversion (i.e. 8 *lahas* of paddy sowing area being equal to 1 acre in that area), it was the position of the 2nd to 5th Defendants before the District Court that the Preliminary Plan shall depict a land little less than 2 acres but instead depicts a land only in extent of 1 acre, 1 rood and 32 perches. It is on this basis the said Defendants took up the position that only a part of the land was surveyed by the surveyor.

However, the position of the learned President's Counsel for the 2nd to 5th Defendants before this Court is contradictory. His position before this Court is that according to the accepted Sinhala land measures, as cited in *Ratnayake v. Kumarihamy [2002] 1 Sri LR 64 at 80*, 7 *lahas* is equal to 1 bushel, and 1 bushel being 2 roods, 14 *lahas* is equal to 4 roods or 1 acre.

According to this conversion, learned President's Counsel submits that 15 *lahas* would be a little over one acre, *viz.* 1 acre and 12 perches, but the surveyor surveyed a land of 1 acre, 1 rood and 32 perches, a land in excess of the land to be partitioned, and therefore there is a serious question as to the identification of the corpus.

This is a textbook case for highlighting the unreliability in comparing ancient land measures with English standard equivalents.

In *Ratnayake v. Kumarihamy (supra)*, the Plaintiff filed a partition action seeking to partition a land of 4 *lahas* of kurakkan sowing extent. The extent of the land shown in the Preliminary Plan was 8 acres, 1 rood and 16 perches, which the contesting Defendants contended was far in excess of the extent described in the schedule to the plaint. Counsel for the Defendants contended that the English equivalent to the customary Sinhala measure of 1 *laha* of kurakkan sowing extent is 1 acre, and the Preliminary Plan depicted a land more than double the correct extent. However upon consideration of the totality of the evidence led in the case, the District Court held, and the Court of Appeal affirmed, that the land described in the Preliminary Plan was the land described in the schedule to the plaint, notwithstanding that it did not correspond to the traditional Sinhala measurement. On appeal, the Supreme Court upheld the Judgment of the Court of Appeal, which is reported in *Ratnayake v. Kumarihamy [2005] 1 Sri LR 303*. Udalagama J. in the Supreme Court stated at 307-308:

> *I would also reiterate the observations of the President of the Court of Appeal in the impugned judgment that land*

> *measures computed on the basis of land required to be sown with Kurakkan vary from district to district depending on the fertility of soil and quality of grain and in the said circumstances difficult to correlate the sowing extent with accuracy. Thus there cannot be a definite basis for the contention that 1 Laha sowing extent be it Kurakkan or even paddy would be equivalent to 1 acre.*

This is a common issue confronted by Judges and Lawyers in partition actions where the extent of the land in old deeds is given by way of traditional land measures based on paddy or kurakkan sowing extent without reference to a Plan. The Plaintiff reproduces in the schedule to the plaint the schedule to the old deeds prepared decades if not centuries ago as the land to be partitioned. The surveyor commissioned to prepare the Preliminary Plan records the existing boundaries of the land, not the old boundaries stated in the schedule to the plaint. The surveyor further records the extent of the land in English standard measures and not ancient land measures. The difficulties arise when the traditional land measures are compared with the English standard equivalents. The common conversion tables found in various sources are unreliable.

If I may reiterate what has already been stated by experienced Judges in the past, it is not possible to correlate sowing extents accurately with surface extents. Such a correlation depends on various factors such as the size and quality of the grain, the fertility of the soil, the peculiarities of the sower and local conditions (e.g. the violence of the wind at the time of sowing and the water supply to the sowing area). In unfertile soil the seed would be sown thicker than in fertile soil. An

inexperienced sower would scatter seeds unevenly, thereby requiring more seeds than an experienced sower. If the quality of the grain, be it paddy or kurakkan, is poor, more grain would be necessary than if the quality were high. It is also relevant to note that the sizes (the capacity) of the traditional measures such as *lahas* and *neliyas* differ not only between districts but also within districts.

In addition to the 2nd to 5th Defendants disputing the identification of the corpus by making a comparison between sowing extent and surface area, the said Defendants attempted before the High Court and this Court to add another string to their bow when they stated that, of the four boundaries shown in the Preliminary Plan, two boundaries differ from the boundaries given in the title deeds. I must mention that this is an afterthought. This was not in their contemplation when they filed their statement of claim (after the Preliminary Plan had been tendered to Court).

As I have already emphasised, the boundaries in the schedule to the plaint are given as stated in the deeds of which the first one was executed as far back as 1927. The land was surveyed to prepare the Preliminary Plan in 1991, i.e. 64 years after the execution of the first deed produced in the case. The 2nd to 5th Defendants admit that the northern and eastern boundaries as stated in the deeds correspond with those in the Preliminary Plan. But they say the southern and western boundaries do not match. This argument on boundaries, similar to the argument on the extent of the land, is unsustainable.

The 3rd and 5th Defendants gave evidence on behalf of the 2nd to 5th Defendants. The 5th Defendant in his evidence in chief did

not speak about the boundaries or the extent of the land. In fact, in the cross examination he admitted that the land described in the schedule to the plaint is the land in suit, which means it is the land depicted in the Preliminary Plan.

The 3rd Defendant in her evidence in chief stated that a portion on the western boundary was not included in the corpus. I have already dealt with this matter to a certain extent.

Let me first deal with the southern boundary. According to the deeds, the southern boundary is "the limit (boundary) of Galpathage Watta". According to the Preliminary Plan, the southern boundary is Millagahamula Watta alias Hitina Watta. The 3rd Defendant in her cross examination accepted that Millagahamula Watta alias Hitina Watta and Galpathage Watta are one and the same land. Learned President's Counsel for the 2nd to 5th Defendants submits that the 3rd Defendant did not make a spontaneous admission to this effect and the said answer was only in response to a leading question put to her during the cross-examination. I am unable to accept this submission. The same question has been asked or suggested more than once.

Even assuming there was no such admission, it is noteworthy that in the old deeds the southern boundary is identified by the owner of the land and not by the name of the land. Galpathage Watta means "the land belonging to Galpatha". In the Preliminary Plan, the surveyor records the existing boundaries. Galpatha, who is mentioned in the old deeds, would not have been among the living at the time of the survey, and his descendants and successors would have been in possession of the land to the south of the land to be partitioned. Instead of

giving the names of the present owners of the land on the southern boundary, the surveyor has recorded the name of the land. This discrepancy cannot be interpreted as the southern boundary in the Preliminary Plan being different from the boundary of the title deeds.

The same principle applies to the western boundary. The old title deeds identify the western boundary as "Ditch and Stone Fence". In the Preliminary Plan prepared 64 years after the first known deed executed in 1927, the surveyor identifies the western boundary as Madugahamula Kanati (the name of the land) and the Paddy Field. This does not necessarily mean there is a discrepancy in the western boundary. The name of the land to the western boundary is not given in the old deeds. The ditch and the stone fence which existed many moons ago cannot be expected to have remained unchanged when the surveyor went to the land more than 64 years after the execution of the first known deed. Furthermore, the stone fence indicates that there were two lands separated by a fence in 1927.

It is a grave error to conclude in partition actions that the identification of the corpus is not established upon a mere superficial comparison of the schedule to the plaint, which is a reproduction of the schedules to old deeds, with the existing boundaries as depicted in the Preliminary Plan. Boundaries do not remain unchanged. They change over the years due to various factors, be it natural or man-made. Whether or not the Preliminary Plan represents the land described in the schedule to the plaint shall be determined upon a consideration of the totality of the evidence led in the case and not solely by such a comparison.

Learned President's Counsel for the 2nd to 5th Defendants makes another point to contend that the land to be partitioned has not been properly identified. This relates to the Survey Report tendered to Court together with the Preliminary Plan. The surveyor has not stated in the Report that the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint. Section 18(1)(a)(i)-(viii) of the Partition Law sets out the several items which shall be included in the Report. Section 18(1)(a)(iii) refers to the above requirement. In the Report relevant to this case, both this question and the answer are not there. This is different from leaving the question unanswered or answering the question in the negative. It is not clear whether the surveyor failed to mention it by mistake in his handwritten Report. It may have even been intentional since the 2nd Defendant had told the surveyor that a portion of the land to the west should be included in the corpus and the surveyor was awaiting further directions. Without raising this issue for the first time in this Court, the 2nd to 5th Defendants should have raised it in the District Court when the Court granted the parties a number of dates for consideration of the Preliminary Plan. I accept that the surveyor shall record the above-stated question and answer it in the Report. *(Sopaya Silva v. Magilin Silva [1989] 2 Sri LR 105)* However, failure to answer this question or answering it in the negative shall not be decisive. In other words, the Court cannot dismiss a partition action on the basis that the surveyor in his Report to the Preliminary Plan has failed to answer or answered in the negative the question "*Whether or not the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint*". Nor can the Court blindly accept that the Preliminary Plan depicts

the entire land to be partitioned, if the surveyor in his Report answers the above question in the affirmative. Whether or not the land has been correctly identified shall be finally decided not by the surveyor but by the Court having taken into consideration the totality of the evidence adduced before it. The answer to the said question by the surveyor is undoubtedly an important item of evidence but it cannot decide the whole case.

I must also add that in terms of section 16(2) of the Partition Law, together with the commission a copy of the plaint shall also be sent to the surveyor. In the commission issued in this action, the surveyor was directed to survey the land described in the schedule to the plaint and prepare the Preliminary Plan accordingly. Although the surveyor failed to answer the question required by section 18(1)(a)(iii), he states in the Report that he executed the commission in terms of the directions given. This means what is depicted in the Preliminary Plan is the land described in the schedule to the plaint. This observation shall not be taken as licence for Court Commissioners to be remiss in their duties in sending Reports to Court in partition actions.

In the facts and circumstances of this case, I hold that the land to be partitioned as stated in the schedule to the plaint is depicted in the Preliminary Plan. The corpus has been properly identified. I answer the question of law in respect of which leave was granted in the affirmative.

The Judgment of the High Court of Civil Appeal is affirmed and the appeal is dismissed with costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.
I agree.

Judge of the Supreme Court