

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

Kuruvitage Beny Silva
No. 25,
1st Lane,
Rampart R2,
Ethul Kotte,
Kotte.

Plaintiff

**SC Appeal No. 86/2011
SC HCCA (LA) No. 49/2010
WP/HCCA (Civil) No. 318/04(F)
DC Colombo Case No. 18284/P**

V.

1. Kuruvitage Susila Nandanie Silva
No. 31/14,
Ethul Kotte.

2. S. Saradiel Fernando
No. 26/4,
2nd Lane,
Rampart Road,
Ethul Kotte.
(Deceased)

2A.Siyabalagodage Dayawathie
Fernando
No. 26/24,
2nd Lane,
Rampart Road,
Ethul Kotte.

3. Allen Chamini Johnson
No. 20,
2nd Lane,
Rampart Road,
Ethul Kotte.

4. Lionel Fernando
No. 22,
1st Lane,
Rampart Road,
Ethul Kotte.
5. S. K. A. Gunawathie
No. 31/8,
1st Lane,
Rampart Road,
Ethul Kotte.
6. Kuruvitage Somapala Silva
No. 31/9,
1st Lane,
Rampart Road,
Ethul Kotte.
7. Sumithra Arachchige Sadhatissa
No. 31/9,
1st Lane,
Rampart Road,
Ethul Kotte.
(Deceased)
- 7A. Kuruvitage Sita Ranjanie Silva
No. 31/9,
1st Lane,
Rampart Road,
Ethul Kotte.
8. Pahalagamage Arunamali
No. 29,
2nd Lane,
Rampart Road,
Ethul Kotte.
9. Pahalagamage Dharmadasa
No. 29,
2nd Lane,
Rampart Road,
Ethul Kotte.

9A.Senarath Paranayapa Kamalawathi
No. 29,
2nd Lane,
Rampart Road,
Ethul Kotte.

Defendants

AND BETWEEN

1. Allen Chamini Johnson
No. 20,
2nd Lane,
Rampart Road,
Ethul Kotte.
2. Lionel Fernando
No. 22,
1st Lane,
Rampart Road,
Ethul Kotte.
3. S. K. A. Gunawathie
No. 31/8,
1st Lane,
Rampart Road,
Ethul Kotte.
4. Kuruvitage Somapala Silva
No. 31/9,
1st Lane,
Rampart Road,
Ethul Kotte.
5. Kuruvitage Sitha Ranjani Silva
No. 31/9,
1st Lane,
Rampart Road,
Ethul Kotte.
6. Pahalagamage Arunamali
No. 29,
2nd Lane,

Rampart Road,
Ethul Kotte.

7. Senarath Paranayapa
Kamalawathie
No. 29,
2nd Lane,
Rampart Road,
Ethul Kotte.

**3, 4, 5, 6, 7A, 8 & 9A Defendant-
Appellants**

V.

1. Kuruvitage Beny Silva
No. 25,
1st Lane,
Rampart R2,
Ethul Kotte,
Kotte.

Plaintiff-Respondent

2. Kuruvitage Kuruvitage Susila
Nandanie Silva
No. 31/14,
Ethul Kotte.

1st Defendant-Respondent

3. Siyambalagodage Dayawathie
Fernando
No. 26/4,
2nd Lane,
Rampart Road,
Ethul Kotte.

2A Defendant-Respondent

AND NOW BETWEEN

1. Allen Chamini Johnson

No. 20,
2nd Lane,
Rampart Road,
Ethul Kotte.

2. Lionel Fernando
No. 22,
1st Lane,
Rampart Road,
Ethul Kotte.

3. S. K. A. Gunawathie
No. 31/8,
1st Lane,
Rampart Road,
Ethul Kotte.

4. Kuruvitage Somapala Silva
No. 31/9,
1st Lane,
Rampart Road,
Ethul Kotte.

5. Kuruvitage Sitha Ranjani Silva
No. 31/9,
1st Lane,
Rampart Road,
Ethul Kotte.

6. Pahalagamage Arunamali
No. 29,
2nd Lane,
Rampart Road,
Ethul Kotte.

7. Senarath Paranayapa
Kamalawathie
No. 29,
2nd Lane,
Rampart Road,
Ethul Kotte.

**3, 4, 5, 6, 7A, 8 & 9A Defendant-
Appellant-Appellants**

V.

Kuruvitage Beny Silva
No. 25,
1st Lane,
Rampart R2,
Ethul Kotte,
Kotte.
(Deceased)

Plaintiff-Respondent-Respondent

Kuruvitage Sajith Deepashika Silva
No. 25,
1st Lane,
Rampart R2,
Ethul Kotte,
Kotte.

**Substituted Plaintiff-Respondent-
Respondent**

Kuruvitage Susila Nandanie Silva
No. 26/24,
1st Lane,
Rampart Road,
Ethul Kotte.
(Deceased)

**1st Defendant-Respondent-
Respondent**

Haputhanthirige Don Dinithi
Dasun
No. 31/14,
1st Lane,
Rampart Road,
Ethul Kotte.

**1A Defendant-Respondent-
Respondent**

Siyambalagodage Dayawathie
Fernando
No. 26/27,
2nd Lane,
Rampart Road,
Ethul Kotte.

**2A Defendant-Respondent-
Respondent**

Before : **S. Thurairaja, PC, J
Kumudini Wickremasinghe, J
K. Priyantha Fernando, J**

Counsel : Rohan Sahabandu, PC with Ms. Chathurika
Elvitigala and Ms. S. Senanayake instructed
by Asela Sumanasuriya for the 3rd -9A
Defendant-Appellant-Appellants.

Charles de Silva instructed by Ms. Anoma
Goonetilleke for the Substituted Plaintiff-
Respondent-Respondent.

Argued on : 22.10.2024

Decided on : 11.02.2025

K. PRIYANTHA FERNANDO, J

1. This is an appeal from the judgment of the High Court of Civil Appeal Colombo dated 07.01.2010 that held in favour of the Plaintiff-Respondent-Respondent and allowed the partition of the land which forms the subject matter of this action. The 3rd – 9th Defendants-Appellants-Appellants preferred this appeal from the judgment of the High Court on the basis that the corpus of the subject matter has not properly been identified.

Facts in brief

2. The Plaintiff-Respondent-Respondent (hereinafter referred to as plaintiff) instituted action to partition the land called '*Pussekumbura*' between the plaintiff, and the 1st and the 2nd Defendants-Respondents-Respondents (hereinafter referred to as the 1st and 2nd defendants). The land in question is referred to in the schedule to the amended plaint dated 29.08.2001.
3. According to the amended plaint, the plaintiff states that he became entitled to $\frac{1}{2}$ share of the land described in the schedule to the amended plaint and the 1st defendant became entitled to the other half of the said land. The plaintiff also states that the 2nd defendant to the action has been in possession of 5 perches of the said land for a long period, and therefore has become entitled to the same. The plaintiff sought that the land in question be partitioned between the plaintiff, and the 1st and the 2nd defendants and sets forth the shares as follows.
 - For the plaintiff – an undivided share of 41/84.
 - For the 1st defendant – an undivided share of 41/84
 - For the 2nd defendant – an undivided share of 2/84
4. The plaintiff states that the 3rd and the 9th defendants have been made parties to the action as they have illegally entered the land and claimed entitlement to the land.
5. The 3rd-9th defendants in their amended statement of claim dated 14.09.2001 stated that, the lots 1 to 11 depicted in the preliminary plan bearing No. 2287 is not a part of the land described in schedule to the plaint. It is the position of the 3rd to 9th defendants that lots 1 and 3-11 of the preliminary plan belongs to them and that the plaintiff, the 1st defendant and the 2nd defendant has no entitlement to the land.
6. The learned District Judge delivering his judgment dated 29.11.2004 held in favour of the plaintiff and ordered the land to be partitioned.
7. Being aggrieved by the decision of the learned District Judge, the 3rd-9th defendants preferred an appeal to the Court of Appeal and the said appeal was subsequently transferred to the Civil Appellate High Court of the Western Province holden in Colombo. The High Court by its judgment dated 07.01.2010 dismissed the appeal of the 3rd-9th defendants.

8. Being aggrieved by the decision of the High Court, the 3rd-9th defendants preferred an appeal to this Court. Leave to appeal was granted on the questions of law set out in paragraph 22 of the petition dated 19.02.2010. However, at the hearing of this appeal, due to the ambiguity of the questions of law, the Counsel for the parties agreed to confine to the question of law set out in paragraph 22(i) of the petition as the question of law that is to be determined by this Court.

9. **Question of law**

Paragraph 22(i)

“Has the plaintiff identified the corpus by its metes and bounds”

10. The learned President’s Counsel for the appellant submitted that, in an action for partition, the plaintiff must establish the corpus. It is the position of the appellants that the corpus in the instant case has not properly been identified.

11. The learned President’s Counsel further submitted that, before the amended plaint was filed, a lis pendens has been registered. However, after the amended plaint had been filed, no lis pendens has been registered. There exist only 2 lands but three registration numbers, and due to this, it is ambiguous as to which land it refers to. Therefore, it is the position of the learned President’s Counsel that there is no proper identification. It is submitted that, as the lis pendens in the present case has not been registered properly, the plaintiff cannot have and maintain the present partition action.

12. In the case of **Ranasinghe and Another V. Gunasekera and Another [2006] 2 S.L.R. 393** it was stated that,

“The effect of registration or improper registration of a lis pendens on the finality of the interlocutory decree and the final decree under the provisions of section 48(3) of the Partition Act No.16 of 1951 is no more in the Partition Law No.21 of 1977. The provisions in section 48(3) of the Partition Act that the non registration or improper registration of a lis pendens is a ground of assailing the final and conclusive character of a partition decree has been removed and is not available in the Partition Law No.21 of 1977. The resulting effect of the change in the law

is that non registration or improper registration of the lis pendens is no more a ground of challenge to the conclusive effect of the partition decree.”

13. When considering the issue in relation to the improper registration of the lis pendens, according to *Ranasinghe(supra)* it will not affect the conclusive character of the partition decree.

14. The learned President’s Counsel submitted that the land in question has been surveyed and the preliminary Plan bearing No. 2287 dated 01.12.1999 has been prepared by *J.P. Kammanankada* licensed surveyor. It was his submission that, however, the land surveyed is not the land described in the schedule to the plaint.

15. According to the schedule to the amended plaint, the boundaries of the land sought to be partitioned have been describes as follows,

උතුරට - කුරුවිටගේ යකෝනිස් සිල්වාට අයිති වන්න

නැගෙනහිරට - යකෝනිස් සිල්වා සහ නව අයට අයිති බෝගහකුඹුර

දකුණට - කුරුවිටගේ මිනිසුන්ට අයිති මුනමල්ගහකුඹුර

බස්නාහිරට - ඇලකන්ද

16. According to the preliminary plan, the boundaries of the land in question are described as follows,

උතුරට - කොටුබැම්ම

නැගෙනහිරට - බෝගහකුඹුර සහ මැනුම්පනිගේ අංක 5425 දරන මූලික පිඹුරේ අංක 1 දරන කැබැල්ල

දකුණට - මැනුම්පනිගේ අංක 5425 දරන මූලික පිඹුරේ අංක 1 දරන කැබැල්ල

බස්නාහිරට - කොටුබැම්ම

17. The learned President’s Counsel submitted that only one of the boundaries described in the schedule to the plaint tallies with the boundaries described in the preliminary plan. He submitted that the northern and the western boundaries of the land as described in the plaint are the land belonging to *Kuruwitage Yakonis Silva* and *Elakanda*, respectively, and according to the preliminary plan, the northern and western boundaries to the land are *Kotubemma*. It is the position of the learned Counsel that, the *Kotubemma* has existed

from the time of *kotte* kingdom and it has not changed since then. It was the submission of the learned President's Counsel that, in an instance where the subject matter has not properly been identified by its boundaries, the land in question cannot be partitioned.

18. It was also submitted by the learned President's Counsel that, the learned District Judge has erred in stating that “නවද මේ කිසිදු මාසිමක් මූලික පිම්බුරේ මාසිම සමග නොගැලපේ. පැමිනිල්ලේ උපලේඛණයේ සඳහන් ඉඩමේ මාසිම ද, මූලික පිඹුරේ මාසිම සමග නොගැලපෙන බව මෙම අවස්තාවේදී කිව යුතු ය. එහෙත් මීට වසර ගණනාවකට ඉහත දී ලියන ලද ඔප්පු වල සඳහන් අයුරින්ම වර්තමානයේ ද මාසිම නිබිය යුතු බව ඉන් අදහස් නොවේ”. It was the position of the learned Counsel that the කොටුබැම්ම cannot change as it is very old. The learned President's Counsel submits that it is the duty of the trial Judge to identify the land with precision before allowing it to be partitioned.

19. The learned Counsel for the respondent submitted that the land sought to be partitioned has been correctly depicted in the preliminary plan bearing No. 2287. On perusing the schedule to the amended plaint and the preliminary plan, it is apparent that the eastern boundary tallies in both the preliminary plan and the schedule to the plaint. Both refers to the boundary as “*Bogahakumbura*”.

20. The learned Counsel for the respondent drew the attention of this Court to deeds marked P-1, P-2, and P-5 (at pages 334, 336, and 348 of the brief respectively). These are deeds drawn in relation to “*Pussekumbura*” which is the subject matter of this action.

21. According to deed marked P-1, the northern, western and the southern boundaries are described as follows,

උතුරට - කුරුවිටගේ යකෝනිස් සිල්වාට අයිති වන්න

බස්නාහිරට - ගල්කන්ද

දකුණට - කුරුවිටගේ මිනිසුන්ට අයිති මුනමල්ගහකුඹුර

22. According to deed marked P-2, the northern, western and the southern boundaries are described as follows,

North -Garden of Kuruwitage Yakonis Silva

West -Agalkanda

South – Munamalgaha Kumbura of Kuruwitage People

23. According to deed marked P-5, the northern, western and the southern boundaries are described as follows,

උතුරට සහ බස්නාහිරට = ගල්කන්ද

දකුණට - කුරුවිටගේ යකෝනිස් සිල්වාට සහ නව අයට අයිති කුඹුර

24. The learned Counsel for the respondent asserted that in addition to the eastern boundary of the land sought to be partitioned, the western boundary and the southern boundary of the land described in schedule to the plaint also tallies with the preliminary plan. In order to support this position, the learned Counsel for the respondent submitted that, the western boundary of the land in question is described in the plaint as ඇලකන්ද, in the preliminary plan as කොටුබැම්ම, in P-1 as ගල්කන්ද, in P-2 as Agalkanda and in P-5 as ගල්කන්ද.

25. It was the submission of the learned Counsel that, in relation to the western boundary, what is called Elakanda, Kotubemma, *Galkanda*, *Agalkanda*, refers to one and the same thing. Thereby, it was his submission that, the western boundary described in the plaint tallies with the western boundary set out in the preliminary plan.

26. When considering the southern boundary of the land in question, it is described in the plaint as කුරුවිටගේ මිනිසුන්ට අයිති මුනමල්ගහකුඹුර, in the preliminary plan as මැනුම්පතීගේ අංක 5425 දරන මූලික පිඹුරේ අංක 1 දරන කැබල්ල, in P-1 as කුරුවිටගේ මිනිසුන්ට අයිති මුනමල්ගහකුඹුර, in P-2 as Munamalgaha Kumbura of Kuruwitage People and in P-5 as කුරුවිටගේ යකෝනිස් සිල්වාට සහ නව අයට අයිති කුඹුර. The learned Counsel submitted that thereby, the southern boundary described in the plaint also tallies with the preliminary plan.

27. Therefore, the learned Counsel for the respondent submitted that three boundaries which includes the eastern, western and the southern boundary of the land in question tallies with the preliminary plan and it is only the northern boundary that does not tally with the preliminary plan.

28. In the case of **Jayasooriya V. Ubaid 61 NLR 352 at 353** His Lordship Sansoni, J. stated that,

“there is no question that there was a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it was always open to him to call for further evidence in order to make a proper investigation.”

29. Identification of the corpus is a fundamental aspect that has to be satisfied in an action for partition of a land. In this instance, three boundaries have been clearly identified.

30. In **Sopaya Silva and Another V. Magilin Silva [1989] 2 SLR 105** it was stated 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”

31. Acting in accordance with section 18(1)(a)(iii) of the Partition Act, the surveyor in executing the commission issued to him, has clearly stated in paragraph no. 08 in the report of the preliminary plan that, “මනින ලද ඉඩම මෙම නඩුවේ පමිනිල්ලේ උපලේඛනයේ විස්තර වන හා මෙම නඩුව මගින් බෙදා වෙන් කිරීමට අපේක්ෂිත ඉඩම බව මගේ හැඟීම වේ”. Additionally, the surveyor has not given evidence and the preliminary plan and the report has been marked and produced without objection.

32. Thus, in light of what has been discussed, the corpus has sufficiently been identified. The learned District Judge has correctly addressed all aspects in detail having regard to the evidence before the Court.

33. I affirm the judgment of the High Court of Civil Appeal Colombo dated 07.01.2010 and the judgment of the District Court dated 29.11.2004. The appeal is dismissed.

Appeal is dismissed

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA, PC, J.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE KUMUDINI WICKREMASINGHE, J.

I agree

JUDGE OF THE SUPREME COURT