

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

In the matter of an Appeal made in terms of
article 128 of the Constitution of the Democratic
Socialist Republic of Sri Lanka and the Supreme
Court rules thereof.

1. P. Dona Ransohamy,
146, Thumbowila,
Piliyandala. (Deceased)
- 1(a). S.A. Dona Nandawathi,
146, Thumbowila,
Piliyandala.
2. S.A. Dona Wijerathne,
146, Thumbowila,
Piliyandala. (Deceased)
- 2(a). E.K. Suraweera,
Maiden Name,
Kathriarachchige Dona Kamalawathi,
146, Thumbowila,
Piliyandala.

Plaintiffs

SC Appeal No: 132/2014
SC (SPL) LA No: 212/2008
CA Appeal No: CA/1284/2000 (F)
DC Panadura Case No. 69/P

Vs.

1. S.A. Dona Gunawathi,
A 59, Wewa Road,
Boralesgamuwa.
2. S.A. Don Karunarathna,
394/2, High Level Road,
Makumbura,
Pannipitiya.
3. S.A. Dona Premawathi,
A 59, Wewa Road,
Boralesgamuwa. (Deceased)
- 3(a). B.P. Jayawardena,
57 A, Wewa Road,
Boralesgamuwa.
4. S.A. Dona Kusumalatha,
246, Colombo Road,
Mampe North,
Piliyandala.
5. S.A. Dona Somawathi,
146, Thumbowila,
Piliyandala.
6. S.A. Dona Nandawathi,
146, Thumbowila,
Piliyandala.
7. D.M.A. Peter,
238, Jaliyagoda,
Mampe North,
Piliyandala.

8. H.N. Pinto Jayawardena,
57 A, Wewa Road,
Boralesgamuwa.

9. J. Athukorala,
238, Jaliyagoda,
Mampe North,
Piliyandala.

Defendants

AND

1. S.A. Dona Gunawathi,
A 59, Wewa Road,
Boralesgamuwa.

3(a). B.P. Jayawardena,
57 A, Wewa Road,
Boralesgamuwa.

7(a). D.D. Munasinghe,
238, Jaliyagoda,
Mampe North,
Piliyandala.

8. H.N. Pinto Jayawardena,
57 A, Wewa Road,
Boralesgamuwa.

9. J. Athukorala,
238, Jaliyagoda,
Mampe North,
Piliyandala.

Defendants-Appellants

Vs.

1(a). S.A. Dona Nandawathi,
146, Thumbowila,
Piliyandala.

2(a). E.K. Suraweera,
Maiden Name,
Kathriarachchige Dona Kamalawathi,
146, Thumbowila,
Piliyandala. (Deceased)

2(a). S.A. Don Chandana,
146, Thumbowila,
Piliyandala.

Plaintiffs-Respondents

2. S.A. Don Karunarathna,
394/2, High Level Road,
Makumbura,
Pannipitiya.

4. S.A. Dona Kusumalatha,
246, Colombo Road,

Mampe North,
Piliyandala.

5. S.A. Dona Somawathi,
146, Thumbowila,
Piliyandala.

6. S.A. Dona Nandawathi,
146, Thumbowila,
Piliyandala.

Defendants-Respondents

AND NOW BETWEEN

1(a). S.A. Dona Nandawathi,
146, Thumbowila,
Piliyandala.

Plaintiff-Respondent-Appellant

Vs.

1. S.A. Dona Gunawathi,
A 59, Wewa Road,
Boralesgamuwa. (Deceased)

1(a). H.N. Pinto Jayawardena,
57 A, Wewa Road,
Boralesgamuwa.

- 7(a). D.D. Munasinghe,
238, Jaliyagoda,
Mampe North,
Piliyandala.
8. H.N. Pinto Jayawardena,
57 A, Wewa Road,
Boralesgamuwa.
9. J. Athukorala,
238, Jaliyagoda,
Mampe North,
Piliyandala. (Deceased)
- 9(a). D.D. Munasinghe,
238, Jaliyagoda,
Mampe North,
Piliyandala.

Defendants-Appellants-
Respondents

2. S.A. Don Karunarathna,
394/2, High Level Road,
Makumbura,
Pannipitiya. (Deceased)
- 2(a). Hettiarachchige Kamala Perera,
394/2, High Level Road,
Makumbura,
Pannipitiya.
4. S.A. Dona Kusumalatha,
246, Colombo Road,

Mampe North,
Piliyandala.

5. S.A. Dona Somawathi,
146, Thumbowila,
Piliyandala.

6. S.A. Dona Nandawathi,
146, Thumbowila,
Piliyandala.

Defendants-Respondents-
Respondents

2(a). S.A. Don Chandana,
146, Thumbowila,
Piliyandala.

Plaintiff-Respondent-
Respondent

Before: **Justice P. Padman Surasena**

 Justice A.L. Shiran Gooneratne

 Justice Achala Wengappuli

Counsel: Harsha Soza, PC with Srihan Samaranayake for the **1(a) Substituted**
Plaintiff-Respondent-Appellant.

Manohara De Silva, PC with Hirosha Ekanayake Munasinghe, Harithriya Kumarage and Kaveesha Gamage for the **1st and 8th Defendant-Appellant-Respondents.**

Navin Marapana, PC with Uchitha Wickremesinghe and Saumya Hettiarachchi for the **7(a) and 9(a) Defendants-Appellants-Respondents.**

Argued on: 02/07/2024

Decided on: 18/10/2024

A.L. Shiran Gooneratne J.

[01] The Plaintiff-Respondent-Appellant instituted this action to partition the land called Indigahaowita alias Puwakgahaowita in extent 1 Rood and 27 perches (A.0 R.1 P.27) depicted in Surveyor General's title Plan No. 183522 dated 04/10/1899, and morefully described in the schedule to the Amended Plaint dated 12/03/1990. The Plaintiff-Appellant's claim was based on a Crown Grant given in the year 1900. However, there was no reference to any plan depicting the said corpus as described in the schedule to the Plaint. A Preliminary Plan of the land sought to be partitioned was appended to the Amended Plaint and in that the Plaintiffs have given undivided rights to the Plaintiffs and to the 1st to 6th Defendants.

[02] The 1st, 3rd, 7th, 8th, and 9th contesting Defendants-Appellants-Respondents in their joint Amended Statement of Claim dated 10/09/1990 took up the position that Lots Nos. 1 and 2 depicted in the Preliminary Plan No. 123 dated 16/05/1987 made by Michel J. Silva Licensed Surveyor marked 'X', and the corresponding report

marked 'X1', in extent of One Rood and Twenty Seven decimal Three Eight Five Perches (A.0 R.1 P.27.385) is a different land called Malapawulaowita alias Indigahaowita and sought a dismissal of the partition action. The Defendants-Respondents contend that in the absence of convincing evidence, the learned District Judge could not have decided with certainty the identity of the corpus and it was incumbent upon the trial court to ascertain the correctness of boundaries, demarcations of limits between owners of contiguous land deeds by landmarks, witnesses etc.

- [03] All contesting Defendants-Respondents are challenging the identity of the corpus and are relying on a separate chain of title to the land called Malapawulaowita alias Indigahaowita commencing from the year 1947, registered in a separate folio. The Defendants-Respondents set out a pedigree, pursuant to the deeds they have submitted.
- [04] Therefore, the substantial issue to be resolved in this action is whether the corpus sought to be partitioned is Indigahaowita alias Puwakgahaowita as submitted by the Plaintiff-Appellant or Malapawulaowita alias Indigahaowita as is the position of the contesting Defendants-Respondents.
- [05] The learned District Judge by Judgment dated 13/11/2000, held in favor of the Plaintiffs and allowed the partition of the land depicted in Preliminary Plan No. 123 (X) dated 16/05/1987 made by Michel J. Silva, Licensed Surveyor.
- [06] The Court of Appeal by Judgment dated 30/07/2008, set aside the Judgment of the District Court, essentially on the basis that the Plaintiffs have failed to establish the identity of the corpus.
- [07] I will now briefly deal with the devolution of title relied upon by the Plaintiff-Appellant and the Defendants-Respondents. It is observed that the Court of Appeal has not specifically reversed the findings of the learned District Judge with regard to the devolution of title set out by either party.

The devolution of title relied upon by the Plaintiff-Appellant

- [08] According to the pedigree set out in the Complaint, Kaththriarachchige Don Samel who lived in the land to be partitioned for over 80 years, claimed ownership by long continued possession. The said Samel by Deed No. 2794 dated 22/08/1939 (P5), conveyed his title to Kaththriarachchige Don Charlis. Don Charlis by Deed No. 6368 dated 19/07/1947 (P6), conveyed title to Kaththriarachchige Don Simeon. Don Simeon by Deed No. 4184 dated 10/06/1951 (P7), transferred title to Kaththriarachchige Dona Aljinhamy. Dona Aljinhamy by Deed No. 14270 dated 02/08/1960 (P8), has conveyed title to Sendanayakaachchige Don Karunarathna (the 2nd Defendant). The said Don Karunarathna by Deed No. 20489 dated 12/09/1966 (P9), conveyed his title to Don Karlinahamy who died unmarried and issueless.
- [09] Karlinahamy's rights devolved on her deceased brother Don Heralis Singho to an undivided $\frac{1}{2}$ share and the balance $\frac{1}{2}$ share to her deceased sister Dona Aljinhamy's children Dona Gunawathie, Don Karunarathne, Dona Premawathie and Dona Kusumalatha (the 1st, 2nd, 3rd and 4th Defendants respectively) in equal shares. Heralis Singho died leaving his heirs, his widow Dona Ransohamy an undivided $\frac{1}{4}$ th share (the 1st Plaintiff), and an undivided $\frac{1}{12}$ th share each to Don Wijeratne, Dona Somawathie, and Dona Nandawathie (the 2nd Plaintiff and 5th and 6th Defendants).
- [10] It is submitted that there were two houses and a cultivation belonging to Dona Karlinahamy within the said corpus, and that her brother Singho who lived in one of the houses predeceased her and Dona Premawathie has taken possession of the house and rented it. In 1985, Diyalape Munasinghe Arachchige Peter (7th Defendant) came into possession of the said house claiming title to the portion of the land in which the said house is situated.

The devolution of title relied upon by the Defendants-Respondents

- [11] The Preliminary Plan No. 123 dated 16/05/1987 (X), made by Surveyor Michel J. Silva, refers to the land Indigahaowita alias Puwakgahaowita which is bounded on the North by the land claimed by U.A. Don Martin Munasinghe (State Plan No. CO 283), on the East by the road from Horana to Colombo and Mahakumbura claimed by G. Alpanis and others, on the South by, Mahakumbura claimed by G. Alpanis and others and Mahakumbure ela, and on the West by, Mahakumbure ela, and land claimed by U.A Don Martin Munasinghe (State Plan No. CO 283), in extent of One Rood and Twenty Seven decimal Three Eight Five Perches (A0-R1-P27.385). The position of the Defendants-Respondents is that the land depicted in the Preliminary Plan No. 123, made by Michel J. De Silva, Licensed Surveyor dated the 16/05/1987 is Malapaulaowita alias Indigahaowita and not the land sought to be partitioned by the Plaintiff-Appellant, as it appears in the schedule to the Plaint. In their schedule to the answer, the Defendants-Respondents identify the corpus as Malpaulaowita alias Indigahaowita bounded on the North by, Mampe Owita, East by a road leading to Rathnapura, South by Maddage Owita and West by Dombagaha Kumbura, in extent of around three bushels.
- [12] The Defendants have appended a pedigree of their own, which shows the devolution of title to the land described morefully in the Schedule to the Answer. In the said pedigree it is contended that Dewage alias Kaththriarachchige Nonahamy has inherited the said land in extent of three bushels through maternal and paternal inheritance and her rights were devolved on the parties referred to, as pleaded in their Statement of Claim.
- [13] Accordingly, the said Nonahamy has conveyed title to an undivided 3/4th share of the corpus along with the house situated towards the southern boundary, which is described as a house with asbestos roofing sheets to Suraweera Arachchige Dona Karlinahamy and the remaining undivided 1/4th share along with the house towards the northern boundary, described as a small house with zinc sheets to Suraweera

Arachchige Dona Aljinahamy, her daughters, by Deed of Transfer No. 6389 dated 01/08/1947 (1V1). Thereafter, by Deed No. 14269 dated 02/08/1960 (P14), Dona Aljinahamy transferred her entitlement to Dona Gunawathie (1st Defendant) while Dona Karlinahamy by Deed No. 22498 dated 01/08/1968 (1V2), transferred her share to Dona Gunawathie.

- [14] Dona Gunawathie by Deed No. 25970 dated 27/11/1978 (1V4), transferred an undivided $\frac{1}{2}$ share and the house bearing No. 238 to Dona Premawathie and by Deed No. 25971 dated 27/11/1978 (1V5), an undivided $\frac{1}{2}$ share and the newly built house with roofing sheets was transferred to Nandika Pinto Jayawardane (the 8th Defendant). Dona Premawathie by Deed No. 6608 dated 09/11/1985 (1V6) transferred her title to Joslin Athukorale the 9th Defendant, who presently occupies the said house No. 238.
- [15] The Defendants-Respondents in their written submissions tendered to the trial court state that the 1st Defendant Dona Gunawathie has clearly identified the land surveyed by Plan No. 123 (X) as the land described in the schedule to the Statement of Claim. The Defendants relied upon title deeds marked '1V1' to '1V6' to establish that Dona Gunawathie was in possession of the said land since Karalinahamy and Aljinahamy transferred their rights to her in 1968.
- [16] It is the evidence of the Surveyor that the land depicted in Preliminary Plan No. 123 (X) is the land that is sought to be partitioned and it is the same land that is depicted in title Plan No. 183522. It is also his evidence that Lots 1 and 2 depicted in Preliminary Plan No. 123 encapsulates the corpus that the Plaintiffs-Appellants seeks to partition, and that the superimposition of Plan No. PP Co. 283 was carried out to locate the northern boundary to identify the lands which belongs to the State. The Surveyor, superimposed title Plan No. 183522 marked 'P1' and 183505 on the said Preliminary Plan No. 123, (X), and produced Plan No. 468, marked 'Y', and the report marked 'Y1'.

- [17] The learned District Court Judge was of the view that the land described in the schedule to the Amended Plaintiff depicted as Lots 1 and 2, in Preliminary Plan No. 123 (X) and the buildings marked as A, B, C, D and F belongs to the said Karlinahamy. Based on the said superimposition the trial court came to the finding that the land depicted in Preliminary Plan No. 123 and Plan No. 183522 is one and the same, therefore the corpus to be partitioned has been sufficiently identified. The trial court was of the view that the title deeds tendered by the Defendants did not correspond to the Preliminary Plan (X), or sufficiently identify the corpus to the satisfaction of the evidence placed before court. The learned District Judge having analyzed the evidence came to the conclusion that title deeds tendered by the Plaintiffs are not challenged in evidence and therefore the pedigree relied upon by the Plaintiffs can be accepted.
- [18] In support of the findings of the trial court, the Plaintiff-Appellant in the written submissions filed in this Court submits that the land surveyed and depicted in the said Plan No. 123 (X), made by Surveyor Michel J. Silva, is the land sought to be partitioned and that Lots 1 and 2 of the said Plan constitutes the corpus.
- [19] It is contended that the evidence given by the Surveyor, relied upon by the trial court was essentially to show that no State land was included in the corpus. Plan No. 468 (Y) made by the same Surveyor, shows the superimposition of title Plan Nos. 183522 and 183505. According to the report marked 'Y1', an accumulation of 8 Lots are marked as Lots 1 to 8 in Plan No. 183522.
- [20] The Plaintiffs-Appellants do not dispute the fact that Plan No. 183505 was superimposed to ascertain the accuracy of the northern boundary of the corpus which was to ensure that no part of State land is included within the corpus.
- [21] With reference to the evidence, the Plaintiff-Appellant submits that having superimposed Plan No. 183505, the Surveyor came to the conclusion that the lands

depicted in the Preliminary Plan No. 123 (X) and the land depicted in title Plan No. 183522 are one and the same.

[22] It is strongly contended that the Court of Appeal erred when it mistakenly considered title Plan No. 183505 as the corpus sought to be partitioned, which the Plaintiff-Appellant submits to be clearly not within the corpus and is not the corpus sought to be partitioned in this case. It is also the contention of the Plaintiff-Appellant that the Court of Appeal failed to recognize that Deed Nos. 14269 and 14270 are connected to the corpus, which establishes beyond doubt that there are two separate lands called Indigahaowita alias Puwakgahaowita and Malapawulaowita alias Indigahaowita.

[23] In this background it is important to note that, the learned District Judge has definitively stated that the corpus described in Plan No. 468 (Y), is the same corpus described in Preliminary Plan No. 123 (X). It is also the finding of the District Court that by superimposing Plan No. 183522 (P1) on Plan No. 468 (Y), the corpus to be partitioned has been identified. The court was of the view that even though the village boundaries in Plan No. 183522 (P1) were not found and could not be identified with the superimposition, the boundaries were satisfactorily identified.

[24] As observed earlier in this Judgment, the Plaintiffs obtained a court commission therein, Preliminary Plan No. 123 (X) dated 24/09/1987 was prepared by Michel J. Silva, Licensed Surveyor. The same Surveyor, superimposed title Plan No. 183522 and 183505 on the said Preliminary Plan (X) and, Plan No. 468 (Y) was prepared. In Plan No. 468 (Y) the land is described as Indigahaowita alias Puwakgahaowita bounded on the North by Part of the land claimed by U.A Don Martin Munsainghe in Plan No. 183505, on the East by Colombo - Horana Road, on the South by part of the land claimed by J. Athukorala and also Mahakumbura claimed by Alpenis and others and Mahakumbura Ela, on the West by Mahakumbure Ela and part of the land claimed by U.A. Don Martin Munasinghe and A. Don Wijeratne by Plan No. 183505, depicted as Lots 1 to 8, in extent One Rood and Twenty-Seven Perches

(A0-R1-P27). In the said superimposition Plan No. 183505 assumes no lesser significance than Plan No. 183522, since it was essentially carried out to locate the northern boundary to identify the lands which belongs to the State.

- [25] Plan No. 183522 (P1), which identified the corpus to be partitioned as described in the schedule to the Plaint, made by the Surveyor General dated the 04/10/1899, refers to a land called Indigahaowita or Puwakgahaowita in Mampe village, Palle Pattu, Salpiti Korale, Colombo District in the Western Province bounded on the North by, title Plan No. 183505, on the East by a road and title Plan No. 182718, on the South by land claimed by the villagers, and on the West by a land also claimed by the villagers, in extent of One Rood and Twenty Seven perches (A0-R1-P27).
- [26] At paragraph 7 of the report dated 24/09/1987 (X1), the Surveyor, has identified the said land as the corpus to be partitioned. The buildings marked as A, B, C, D, and F in Lots 1 and 2 were identified as belonging to Karlinahamy.
- [27] According to the Surveyor's evidence and the report Y1, changes in the corpus were observed pursuant to the making of Plan No. 468 (Y) therein, the Colombo Road on the eastern boundary of Lots 1 and 2 had been widened and the portion of land taken over for the said road widening is depicted as Lot 4 in the said Plan No. 468 (Y), in extent 2.83 perches.
- [28] During the cross examination, the Surveyor revealed that the southern boundary in Plan No. 183522 is identified as a village boundary, however, in the superimposed Plan No. 468 (Y), it is identified as Mahakumbure Ela, which creates an uncertainty in identifying the southern boundary. Even after observing the said infirmities, in Report marked 'Y1', the Surveyor is of the view that the boundaries of the land to be partitioned as described by the plaintiff has been satisfactorily identified as one and the same land.
- [29] The Surveyor was of the view that there was a need to superimpose the northern boundary due to the existence of State Plan No. 283 and accordingly, to identify

whether any part of the land to be partitioned encroached the State land. He further stated that in title Plan No. 183522, the southern boundary is given as a village boundary as identified by the villagers. It is noted that Preliminary Plan No. 123 (X) does not show the southern and western boundaries as a village boundary as shown in the title Plan No. 183522. Having surveyed the land, the southern boundary was identified as a canal. Furthermore, it is observed that the canal shown as “Mahakumbure Ela” is a fixed permanent boundary. However, no such boundary has been shown in the title Plan No. 183522, and there is no evidence that the said “Ela” was constructed in recent times, or that the village boundary was replaced by the “Ela”. This position was admitted during the cross examination of the Surveyor.

[30] In these circumstances it is the contention of the Defendants-Respondents that Preliminary Plan No. 123 (X) does not in any way establish that the said land depicted in the title Plan No. 183522 is one and the same land.

[31] The Surveyor in his report, Y1 states that, since he was not satisfied with the northern boundary of Lot 1 in Preliminary Plan No. 123 (X), identified at the preliminary survey, with the land described in the schedule to the Plaint, and the superimposition of State Plan Co. 283, Surveyor General’s Plan No. 183505 was used to ascertain the correctness of the northern boundary.

[32] At Paragraph 10 of the said report ‘Y1’, the superimposition of Plan No. 183505 on Plan No. 468 (Y), had shown that the northern boundary tallies only up to 54%, the eastern boundary does not tally at all, the southern boundary tallies only up to 52%, while the western boundary tallies only up to 29%. At paragraph 10:4 it is observed that on an average the boundaries tally only up to 47.3% with the title plans. The court commissioner clearly states that the boundaries of the land surveyed by him do not agree with the boundaries described in Plan No. 183505.

[33] On the identity of boundaries, the Court of Appeal stated that;

“...It must be bone [sic] in mind that the Surveyor was cross examined at length, which creates doubts about identity but one should be mindful of the fact that the Survey done in Plan P1 is over 100 year [sic] old. There is bound to be changes on ground or the ground situation could change but the Surveyor has not been able with all these discrepancies to identify the boundaries with certainty. Report ‘Y’ in paragraphs 10:1, 10:2, and 10:3 indicates only satisfactory superimposition.”

[34] In respect of the superimposition of Plan No. 183505, the Plaintiff-Appellant in the written submissions filed in this Court states that,

“[it] would appear that the Surveyor need not have even gone so far as to do a superimposition of the said Plan No. 183505. It appears that out of a zeal for accuracy he has done so. The Surveyor has admittedly surveyed the corpus with its presently existing boundaries.”

[35] The Court of Appeal having held that the northern boundary of Preliminary Plan No. 123 (X), is shown as a land belonging to Don Martin Munasinghe, was of the view that his ownership has not been proved to a reasonable degree. The Court observed that a physical identification of the northern boundary was not carried out by the Surveyor. Although the superimposition of the northern boundary is seen as the land belonging to Don Martin, the Court was of the view that the Surveyor must investigate and identify, what is on the ground is the land depicted in Plan No. 183505.

[36] Considering the finality and conclusiveness that attach in terms of Section 48(1) of the Partition Law, the Surveyor *“must in his report state 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. It was held in **Mary Nona vs. Don Justin,**¹*

¹ [2016] BLR 130 SC

that the court should insist upon the due compliance with this requirement by the Surveyor”.

- [37] The continuity of a partition action was clearly postulated in the case of *Iluppengamu Appuhamylage Martin Appuhamy and others vs. Iluppengamu Appuhamylage Milrad Chandrawathie and others*², where Justice Mahinda Samayawardane held on Page 13,

“... If the land to be partitioned as described in the schedule to the plaint has not been properly identified, the Plaintiff’s action shall fail. In such a situation the necessity to investigate title does not arise. Title shall be investigated on a properly identified parcel of land. The Court shall not first investigate title and then look for the land to be partitioned. It shall happen vice versa.”

- [38] Furthermore in a partition suit the court must require evidence in support of the titles of all parties. There is no doubt that the ground situation could change, since the Survey done in Plan P1 is over a hundred years. According to the Surveyor’s report Y1, the significance of superimposing Plan No. 183505 in preparing Plan No. 468 (Y) was to identify the northern boundary of the corpus devoid of any State land being attached to it. The Surveyor in his return to court was not certain of the boundaries to the north and south, and a clear disparity was seen when identifying the boundaries as stated in the said report marked ‘Y1’. As observed by the Court of Appeal, the duty casted on the trial judge is not only to investigate title but also to satisfy himself with the identity of the corpus. The Court was of the view that *“in this case it seems to have not happened the way it should be done.”*

- [39] Both President’s Counsel appearing for the contesting Defendant-Respondents submitted that the boundaries of the corpus have not being identified on a balance of probability. It is observed that in terms of Section 16(1) of the Partition Law, there should be a physical survey done on the corpus and a mere superimposition of

² SC Appeal 172/2015, decided on 21.05.2021

survey plans would not suffice in identifying the corpus. In the absence of cogent evidence establishing the identity of the corpus sought to be partitioned, the District Court should have emphasized upon the Plaintiff to adequately identify the corpus.

[40] *“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 pendense has been registered), as regards the location, boundaries, and the extent.” Sopaya Silva and another vs. Magilin Silva³.*

[41] According to the provisions of Section 18(1)(a)(iii) of the Partition Law, the commissioner has to state *inter-alia* 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 Plaint.

[42] In the Judgment of the Court of Appeal, Anil Gooneratne J, stated that, based on a number of facts the corpus was not sufficiently identified, when he observed that;

“[the] Learned District judge seems to have not considered the evidence of the Licensed Surveyor correctly, as the district judge has considered the possession from the point that arose on Karlinahamy’s death”

[43] When analyzing the identification of the boundaries, the primary concern of the Court of Appeal was that the boundaries of the land was not sufficiently identified. The Court of Appeal was mindful that the northern boundary of Preliminary Plan No. 123 (X) [F], is shown as a land belonging to Don Martin Munasinghe. A physical identification of the northern boundary was not carried out. The superimposition of the northern boundary, although seen as the land belonging to Don Martin Munasinghe, the Surveyor has failed to physically investigate the ground situation and identify the land as depicted in Plan No. 183505.

³ [1989] 2 Sri LR 108

- [44] When a Surveyor is on notice of any person in possession of land belonging to the State and made boundaries to the same, it is his bounden duty to physically inspect such land and the boundaries, to be satisfied that the land is sufficiently and clearly defined, marked to indicate the land excluding State land and to provide a memorandum to that effect.
- [45] As observed earlier in this Judgment, due to the intervention of parties to this action or effaced by third parties or by an undisclosed atmospheric change which caused the destruction of at least the limits of one boundary, there is an uncertainty surrounding the making of proper boundaries and the limits of lands belonging to deferent owners.
- [46] When old boundaries cannot be conveniently restored and new boundaries are to be fixed by the Judge, the onus of proof is on the Plaintiff to lead such evidence of its metes and bounds at the trial, as it will enable the court to determine the same in its judgment. It is the view of this Court that the evidence led before the trial court, was totally insufficient to place boundaries differently from that are already in existence.
- [47] In *Jayasuriya vs. Ubaid*⁴ Sansoni J. held 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”
- [48] In *Mary Nona vs. Don Justin*⁵ Eva Wanasundara PC. J. stressed the need and the duty of court to investigate title and the importance of substantially identifying the subject matter, when Her Ladyship stated that the onus of a District Judge in a partition case is greater than any other case, since the Judge has to calculate the share of entitlement to each party.

⁴ 61 NLR 352

⁵ *Mary Nona* (n 1).

[49] The identification of the corpus is the nucleus of a partition case from which it derives its existence. As such, the Surveyor's return is fundamental in identifying whether the land surveyed is substantially the same land described in the Plaint which is relied upon by the Plaintiff. Any inconclusiveness in identifying the boundaries (as is the case here), would negate the required proof of identifying the corpus on a balance of probability.

[50] In *Thiththalapitige Tilakaratne vs. Thiththalapitige Chandrawathi Perera*⁶, this Court held,

“In a partition action if the corpus cannot be identified, ipso facto, the action shall fail. There is no necessity to investigate title until the corpus is properly identified. The decision that the corpus has not been properly identified decides the fate of the action without further ado...”

[51] Having examined the evidence of all interested parties, the Court of Appeal held that *“...on the evidence of the Surveyor Silva and Plaintiff, who in my view, could not place evidence of identity of land and the pedigree in an acceptable manner.”*

[52] Having considered the oral and written submissions made by the parties before this Court, we have no hesitation in accepting the above view in the facts and circumstances of this case. Accordingly, the two questions of law where leave to appeal was granted by this Court on 31/07/2014,

(1) Has the Court of Appeal erred in holding that the identity of the corpus sought to be partitioned has not been established.

(2) Has the Court of Appeal erred in not accepting the finding of the trial judge that the corpus sought to be partitioned and the land claimed by the contesting Defendants are two different lands.

⁶ SC Appeal 125/2016 decided on 21.05.2021

are both answered in favor of the Defendants-Respondents.

[53] In these reasons, the Judgement dated 13/11/2000 of the District Judge is set aside and the Judgement dated 30/07/2008 of the Court of Appeal is hereby affirmed and this Appeal is dismissed with Costs.

Judge of the Supreme Court

P. Padman Surasena J.

I agree

Judge of the Supreme Court

Achala Wengappuli J.

I agree

Judge of the Supreme Court