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

Jayasinghe Arachchige
Thilakeratne,
Pannala Post,
Galayaya
Plaintiff

SC APPEAL NO: SC/APPEAL/82/2020
SC LA NO: SC(HC)CALA/244/2014
HCCA KURUNEGALA NO: NWP/HCCA/KURU/130/2010 (F)
DC KULIYAPITIYA NO: 10705/P

Vs.

1. Jayasinghe Arachchige Wijesena
   (Deceased)

1A. Jayasinghe Arachchige
   Wimalawathie,
   Pannala Post, Galayaya

2. Jayasinghe Arachchige Piyadasa,
   Belvian Market, Hingurakgoda

3. Jayasinghe Arachchige
   Karunawathie,
   Pannala Post, Galayaya

4. Jayasinghe Arachchige
   Wimalawathie

5. Jayasinghe Arachchige
   Weerasinghe,

Pothuwatawana Post,
Pothuwatawana

6. Don George Lionel Senarath,
   Pannala Post, Galayaya
7. Warnakulasuriya Patrick
   Valentine Fernando,
   Sudharshni Ulu Mola, Negombo
   Road, Galayaya
8. Guruge Mervyn Dharnawardene,
   No. 884, Ja-ela Post,
   Weligampitiya
9. A.M. Shanthi Sagarika Kumari,
   Pannala Post, Galayaya
10. Ranhamige Sarath Wickremapala
11. W.M.U. Rohana Parakrama,
    Gonawila Post, Makandura
12. L.A. Lal Pathirana
13. M.M. Hemantha Kumara,
    Gonawila Post, Makandura
14. Herath Hitihami Appuhamilage
    Lenard Krishantha
15. Rajakaruna Mudiyanselage
    Chandrasiri Janaka of Mukalana
16. Ranasinghe Arachchilage Leena
    Damayanthi
17. Wijesuriya Arachchige Sheron
    Crishantha
18. Dombawala Hitihamilage Anura
    Crishantha
19. Dona Harriet Somalatha
20. Indrani Padmalatha

21. Indrani Sandhya,
All of Pannala Post,
Galayaya
Defendants

AND BETWEEN

1. A.M. Shanthi Sagarika Kumari,
Pannala Post, Galayaya
2. Ranhamige Sarath Wickremapala,
Pannala Post, Galayaya
3. W.M.U. Rohana Parakrama,
Gonawila Post, Makandura
4. L.A. Lal Pathirana,
Pannala Post, Pallama
5. M.M. Hemantha Kumara,
Gonawila Post, Makandura
6. Herath Hitihami Appuhamilage
Lenard Krishantha,
Pannala Post, Galayaya
7. Rajakaruna Mudiyanselage
Chandrasiri Janaka of Mukulana
8. Ranasinghe Arachchilage Leena
Damayanthi,
Pannala Post, Galayaya
9. Wijesuriya Arachchige Sheron
Crishantha,
Pannala Post, Galayaya
10. Dombawala Hitihamilage Anura
Crishantha,
Pannala Post, Galayaya

11. Dona Harriet Somalatha,
    Pannala Post, Galayaya
12. Indrani Padmalatha,
    Pannala Post, Galayaya
13. Indrani Sandhya,
    Pannala Post, Galayaya

    9th to 21st Defendant-Appellants

    Vs.

    Jayasinghe Arachchige
    Thilakeratne,
    Pannala Post, Galayaya
    Plaintiff-Respondent

1. Jayasinghe Arachchige Wijesena
   (Deceased)

1A. Jayasinghe Arachchige
    Wimalawathie,
    Pannala Post, Galayaya

2. Jayasinghe Arachchige Piyadasa,
   Belvian Market, Hingurakgoda
3. Jayasinghe Arachchige
   Karunawathie,
   Pannala Post, Galayaya
4. Jayasinghe Arachchige
   Wimalawathie,
   Pannala Post, Galayaya
5. Jayasinghe Arachchige
   Weerasinghe,

Pothuwatawana Post,
Pothuwatawana

6. Don George Lionel Senarath,
   Pannala Post, Galayaya
7. Warnakulasuriya Patrick
   Valentine Fernando,
   Sudharshni Ulu Mola, Negombo
   Road, Galayaya
8. Guruge Mervyn Dharnawardene,
   No. 884, Ja-ela Post,
   Weligampitiya

Defendant-Respondents

AND NOW BETWEEN

Jayasinghe Arachchige
Thilakeratne,
Pannala Post, Galayaya

Plaintiff-Respondent-Petitioner

Vs.

1. Jayasinghe Arachchige Wijesena
   (Deceased)

1A. Jayasinghe Arachchige
Wimalawathie,
Pannala Post, Galayaya

2. Jayasinghe Arachchige Piyadasa,
   Belvian Market, Hingurakgoda

2A. Jayasinghe Arachchige
Chandrasekara,

Belvian Market, Hingurakgoda

3. Jayasinghe Arachchige
Karunawathie,
Pannala Post, Galayaya

4. Jayasinghe Arachchige
Wimalawathie,
Pannala Post, Galayaya

5. Jayasinghe Arachchige
Weerasinghe,
Pothuwatawana Post,
Pothuwatana

6. Don George Lionel Senarath
(Deceased)

6A. Malani Senarath,
Pannala Post, Galayaya

7. Warnakulasuriya Patrick
Valentine Fernando (Deceased)

7A. Warnakulasuriya Mary Theres
Thamel

7B. Warnakulasuriya Donald Suresh
Fernando

7C. Warnakulasuriya Rovin Suwinda
Fernando

7D. Warnakulasuriya Ramya Shamoli
Sudarshika Fernando
All of Sudharshni Ulu Mola,
Negombo Road, Galayaya

8. Guruge Mervyn Dharnawardene,
No. 884, Ja-ela Post,
Weligampitiya

1st to 8th Defendant-Respondent-Respondents

9. A.M. Shanthi Sagarika Kumari,
   Pannala Post, Galayaya
10. Ranhamige Sarath Wickremapala,
    Pannala Post, Galayaya
11. W.M.U. Rohana Parakrama,
    Gonawila Post, Makandura
12. L.A. Lal Pathirana,
    Pannala Post, Pallama
13. M.M. Hemantha Kumara,
    Gonawila Post, Makandura
14. Herath Hitihami Appuhamilage
    Lenard Krishantha,
    Pannala Post, Galayaya
15. Rajakaruna Mudiyanselage
    Chandrasiri Janaka of Mukalana
16. Ranasinghe Arachchilage Leena
    Damayanthi,
    Pannala Post, Galayaya
17. Wijesuriya Arachchige Sheron
    Crishantha,
    Pannala Post, Galayaya
18. Dombawala Hitihamilage Anura
    Crishantha, Pannala Post,
    Galayaya
19. Dona Harriet Somalatha,
    Pannala Post,
    Galayaya
20. Indrani Padmalatha,

Pannala Post,
Galayaya

21. Indrani Sandhya,
Pannala Post, Galayaya
Defendant-Appellant-Respondents

Before: L. T. B. Dehideniya, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Ranjan Suwandaratne, P.C., with Ramith Dunusinghe for the Plaintiff-Respondent-Appellant.

Lahiru Abeyrathna for the 2A, 3rd, 4th and 5th Defendant-Respondent-Respondents.

Dr. Sunil Coorey for the 6A Defendant-Respondent-Respondent.

Saumya Amarasekera, P.C., with Subash Gunathillake for the 7th Defendant-Respondent-Respondent.

Chathura Galhena with Dharani Weerasinghe for the 8th Defendant-Respondent-Respondent.

Lakshman Livera instructed by M. Munasinghe for the 9th, 11th, 12th, 13th and 15th Defendant-Appellant-Respondents.

Chandrasiri Wanigapura for the 10th, 16th & 19th Defendant-Appellant-Respondents.

Senany Dayaratne with Eshanthi Mendis for the 14th, 17th, 18th and 21st Defendant-Appellant-Respondents.

Argued on: 08.03.2022

Written submissions:

by the 6A Defendant-Appellant-Respondent on 04.05.2021 and 14.03.2022.

by the Substituted 7A-7D Defendant-Respondent-Respondents on 06.05.2021 and 15.03.2022.

by the 17th, 18th and 21st Defendant-Appellant-Respondents on 16.03.2022.

by the 9th to 21st Defendant-Appellant-Respondents on 30.04.2021.

by the 8th Defendant-Respondent-Respondent on 28.04.2021 and undated post-argument written submissions.

by the Plaintiff-Respondent-Petitioner on 18.01.2021.

Decided on: 23.09.2022

Mahinda Samayawardhena, J.

Introduction

The plaintiff filed this action in the District Court of Kuliyapitiya to partition the land known as *innawatta* morefully described in the schedule to the plaint among the plaintiff and the 1st to 6th defendants. The 1st to 5th defendants filed a statement of claim accepting the pedigree set out in the plaint. The 6th defendant neither filed a statement of claim nor raised issues but gave evidence at the trial for the 8th defendant. Although the 7th defendant filed a statement of claim, it is not clear whether he

seeks partition of the land or dismissal of the action. Nor did he raise issues at the trial.

In practical terms, the only contesting defendant was the 8th defendant, a land developer and land seller who bought a portion of *innawatta* (essentially lot 2 in the preliminary plan) from the 6th defendant by two deeds marked 8V7 and 8V8. The deeds marked 8V9 to 8V24 are the transfer deeds executed by the 6th and 8th defendants in favour of the 9th to 21st defendants upon blocking out lot 2. In the prayer to the statement of claim, the 8th defendant prayed for the exclusion of lot 2 from the corpus. This was the relief sought by the 8th defendant in his evidence as well. The 9th to 21st defendants filed a joint statement of claim seeking exclusion of their lots.

At the trial, apart from the plaintiff, only the 8th defendant raised issues. The 8th defendant raised three main issues. They relate to (a) the exclusion of lot 2, (b) acquisition of lot 2 by deeds and prescription and (c) identification of the corpus. After trial, the learned District Judge answered these three issues against the 8th defendant and delivered the judgment partitioning the land as prayed for by the plaintiff. Three appeals had been filed against the judgment of the District Court, and after considering the appeals the High Court of Civil Appeal of Kurunagala by judgment dated 24.04.2014 set aside the judgment of the District Court and allowed the appeals. The plaintiff's action was dismissed with costs on the basis that **the plaintiff filed the action to partition a land in extent of 3 *lahas* of kurakkan sowing area and 3 *lahas* of kurakkan sowing area is equivalent to 3 acres and the preliminary plan shows a land more than double the extent (6 acres, 1 rood and 11 perches) and therefore the**

plaintiff's action must fail since the land has not been properly identified. Hence this appeal by the plaintiff to this court.

This court granted leave to appeal against the judgment of the High Court only on the question of identification of the corpus. The question of law upon which leave was granted reads as follows:

> *Have the High Court judges erred in law by arriving at a finding that the petitioner has surveyed a larger land than the corpus described in the schedule to the plaint especially in considering the fact that no other party has taken any steps to show a different property as the corpus of the said partition action and also have not contested during the course of the trial that the areas of different properties are included into the corpus depicted in the preliminary plan X?*

Execution of deeds after the registration of *lis pendens*

The plaint was filed on 04.08.1993 and the *lis pendens* was registered on 16.08.1993. The dates of execution of the two deeds (8V7 and 8V8) through which the 8th defendant acquired rights to the land from the 6th defendant are significant. The deed 8V7 dated 03.01.1993 had been executed seven months before the *lis pendens* was registered and the deed 8V8 dated 01.12.1994 was executed after the *lis pendens* had been registered. The deeds marked 8V9 to 8V24 are the transfer deeds executed by the 6th and 8th defendants in favour of the 9th to 21st defendants upon sub-division of lot 2. Of these, except for 8V9 and 8V12, all the other deeds have been executed after the *lis pendens* was registered: 8V9 was executed one week before and 8V12 was

executed two days before the institution of the action. No issue was raised at the trial challenging due registration of the *lis pendens*. All these deeds executed after the *lis pendens* was duly registered are void in terms of section 66(2) of the Partition Law, No. 21 of 1977 (*Virasinghe v. Virasinghe [2002] 1 Sri LR 1*). Section 66 of the Partition Law reads as follows:

> *66(1) After a partition action is duly registered as a lis pendens under the Registration of Documents Ordinance no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates shall be made or effected until the final determination of the action by dismissal thereof, or by the entry of a decree of partition under section 36 or by the entry of a certificate of sale.*
>
> *(2) Any voluntary alienation, lease or hypothecation made or effected in contravention of the provisions of subsection (1) of this section shall be void;*
>
> *Provided that any such voluntary alienation, lease or hypothecation shall, in the event of the partition action being dismissed, be deemed to be valid.*
>
> *(3) Any assignment, after the institution of a partition action, of a lease or hypothecation effected prior to the registration of such partition action as a lis pendens shall not be affected by the provisions of subsections (1) and (2) of this section.*

But this section does not prohibit alienation, lease or hypothecation of an interest to which a co-owner may ultimately become entitled by virtue of the decree in a pending action (*Sirisoma v. Sarnelis Appuhamy (1950) 51 NLR 337, Sillie*

Fernando v. Silman Fernando (1962) 64 NLR 404, Karunaratne v. Perera (1966) 67 NLR 529). The contesting defendants' deeds do not fall into this category. They are voluntarily executed outright transfers of defined portions.

Was the identification of the corpus a real issue before the District Court?

In the prayer to his statement of claim, the 8th defendant only sought exclusion of lot 2 in the preliminary plan from the corpus, not the dismissal of the action, on the basis that the corpus has not been properly identified. However, at the trial, the 8th defendant raised the following vague issue (issue No. 6) on the identification of the corpus:

> *Is the land proposed to be partitioned not properly shown on the preliminary plan?*
> *If so, can the plaintiff maintain this action?*

It is important to realise that there is a distinction between contesting the case on the basis that the land to be partitioned is not properly depicted in the preliminary plan and seeking exclusion of a particular lot depicted in the preliminary plan on a different basis such as prescription.

The reason I say the above issue is vague is because the 8th defendant does not say whether a larger land is surveyed or a smaller land is surveyed or from which side of the land (boundary) the expansion or shrinkage, if at all, has taken place. In my view, given the scheme of the Partition Law, it is unfair to allow a party in a partition action to raise such an unspecific and vague issue/point of contest for the first time at the trial.

Issues are raised to narrow down the scope of the trial and for the trial to be conducted with discipline. Issues must be specific for the opposite parties to meet and the presiding Judge to understand the real dispute or disputes between the parties and answer them properly. Technically, it is the duty of the presiding Judge to raise issues but practically it is the duty of counsel for the respective parties to raise correct issues. Practitioners of the District Court know this ground reality.

The preliminary plan was tendered to court on 08.09.1998 (Journal Entry No. 28) and the court gave several dates to consider the preliminary plan: *vide inter alia* JE No. 30 dated 24.11.1998, JE No. 31 dated 23.02.1999, JE No. 33 dated 04.05.1999, JE No. 39 dated 05.10.1999 and JE No. 40 dated 18.01.2000.

Although the 8th defendant filed his statement of claim dated 25.04.2000 more than 1 ½ years after the preliminary plan had been tendered to court, he never stated in his statement of claim or at any time thereafter until the said vague issue No. 6 was raised at the trial that the land to be partitioned was not properly depicted in the preliminary plan and therefore the plaintiff's action must fail.

If the land to be partitioned was not properly depicted in the preliminary plan, what should the 8th defendant have done?

I accept that there is an overarching obligation cast upon the District Judge hearing a partition action to satisfy himself that the land is properly identified. If the corpus cannot be properly identified, investigation of the title does not arise. The title needs to be investigated on a properly identified corpus. However, this

does not mean that identification of the corpus is exclusively left to the District Judge. It is the duty of the relevant parties to assist the court and make applications for the court to make incidental orders to identify the corpus if there is a question on the identification of the corpus.

In the case of *Dharmaratana Thero v. Siyadoris [1995] 2 Sri LR 245*, the contention of counsel for the petitioner was that the District Judge was in serious error when he refused the application to register the *lis pendens* in respect of the larger land on the basis of belatedness by first failing to carry out the imperative duty imposed upon the District Judge under section 19(2)(b) of the Partition Law which reads "*Where any defendant seeks to have a larger land made the subject matter of the action as provided in paragraph (a) of this sub-section,* ***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.*" In response to this contention, G.P.S. de Silva J. (later C.J.) held at 246-247:

> *It would appear that on a literal reading of the section, the duty is cast on the court to specify the party by whom an application for the registration of the action as a lis pendens in respect of the larger land has to be filed. But the relevant question is, at what point of time does such duty arise? It seems to me that the duty of the court arises only upon the party defendant interested in having the larger land partitioned moving the court to make the appropriate order in terms of the section. This is a matter which would normally*

> *come up in the course of the motion roll and it was surely the duty of the Attorney-at-Law representing the petitioner to have invited the court to make the required order. How else is the court to be made aware of the need to make an order in terms of section 19(2)(b)? The interpretation contended for on behalf of the petitioner would place an undue burden on the court.*

Concluding a partition case is a costly and time-consuming process. The law makes provision for a defendant who raises concerns about the identification of the corpus to do so before the case is taken up for trial and during the course of the trial. Without taking such steps, a defendant in a partition action cannot scuttle the whole process, which has run into several decades, by taking up the position that the corpus has not been properly identified for the first time on appeal. Merely raising an open-ended issue on the identification of the corpus is insufficient. A partition case is not a criminal case to create doubt about the plaintiff's case and remain silent. Although technically there are plaintiffs and defendants in a partition case as in any other civil case, practically all parties play a dual role in a partition action; a defendant today can become the plaintiff tomorrow and *vice versa* for the prosecution of the action to termination (section 70 of the Partition Law).

In terms of section 16(1) of the Partition Law, the court issues a commission to survey the land and prepare the preliminary plan depicting the land sought to be partitioned. According to section 16(2), on the application of any party, the court can direct the surveyor to survey any larger or smaller land than that pointed out by the plaintiff to the surveyor.

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.*

Such an application was not made by the contesting defendants including the 8th defendant. Nor did the 8th defendant get a separate commission issued to another surveyor and have that plan superimposed on the preliminary plan for the court to understand the real issue on the identification of the corpus and come to a correct conclusion.

Section 19(2) of the Partition Law lays down a detailed procedure to be followed by a defendant who seeks to have a larger land partitioned. In short, such a defendant shall take afresh all the steps that a plaintiff in a partition action shall take, which include compliance with the provisions of sections 12-18 of the Partition Law.

Section 18(1) deals with the return of the surveyor's commission after the preliminary survey. Section 18(2) enacts *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.*

At the trial, the preliminary plan and the report were marked X and X1 respectively by the plaintiff. If any of the contesting defendants thought that a larger land had erroneously been included, such defendant could have summoned the surveyor to give evidence and sought clarifications. This was not done.

What was the real issue put forward by the 8th defendant at the trial?

The 8th defendant (by issue No. 7) sought exclusion of lot 2 on the basis that lot 2 is a defined portion of *innawatta*, which he acquired on deeds and prescription:

> *Is the 8th defendant entitled to lot 2 of the preliminary plan on deeds and prescription as stated in the statement of claim of him?*

The exclusion of lot 2 in favour of the 9th to 21st defendants was the only concern of the 8th defendant at the trial. The 8th defendant in his evidence has not gone into the conversion of traditional land measures to English equivalents.

In my view, there was no live issue at the trial that the preliminary plan depicts a land double in extent of the land sought to be partitioned as concluded by the High Court of Civil Appeal.

Is a land double in extent of the land sought to be partitioned depicted in the preliminary plan?

The 8th defendant purchased lot 2 in the preliminary plan from the 6th defendant. According to the 6th defendant, after his father's testamentary case (8V2), *innawatta* devolved on him and his elder brother. In the testamentary case, *innawatta* was described as a land of 4 acres.

Thereafter, upon an arrangement between the 6th defendant and his brother, the deed of exchange 8V3 dated 09.01.1981 had been executed conveying the rights of the 6th defendant's brother in *innawatta* to the 6th defendant. In 8V3, *innawatta* was described as a land in extent of <u>about</u> 5 acres, not 4 acres or exactly 5 acres.

The 6th defendant got plan 8V4 dated 19.11.1984 prepared after this arrangement. According to this plan, *innawatta* comprises 5 acres, 1 rood and 28 perches.

The 7th defendant in paragraph 2 of his statement of claim (filed more than one year after the preliminary plan was sent to court) states that the plaintiff cannot maintain this action as the plaintiff has filed the action to partition a portion of *innawatta*. In other

words, his contention was that a smaller land is shown in the preliminary plan.

As seen from pages 270 and 272 of the brief, even counsel for the 9th to 21st defendants suggested to the plaintiff during cross-examination that a portion on the northern boundary has been left out in the preliminary plan, suggesting that a smaller land had been surveyed.

When it was suggested to the plaintiff by counsel for the 9th to 21st defendants at page 269 of the brief that one *laha* of kurakkan sowing area in the north western province is equivalent to one acre, the plaintiff has denied it and stated that one *laha* of kurakkan sowing area is equivalent to two acres, although he has later admitted by answering a leading question at page 271 that 3 acres means 3 *lahas*.

The 6th defendant at pages 355 and 363 of the brief has admitted in cross-examination that 3 *lahas* of kurakkan sowing area is equivalent to around six acres of land.

It is clear that there was uncertainty about the extent of *innawatta*.

During the argument, it was stated that the exclusion of lot 2 is sought based on an amicable partition identifying lot 2 as a long-standing distinct and defined portion.

According to the original plan 8V4, the line between lot 1 and 2 drawn on that plan in red is an artificial line drawn by the surveyor but not found on the ground. The northern point of that line is a “stake” and the southern point is a “hik” tree. Far from proof of adverse possession, there is no cogent evidence to say

that lot 2 was a defined portion for well over 10 years before the institution of this action to claim prescriptive title to lot 2.

The contesting defendants find fault with the plaintiff for not producing the alleged amicable partition deed No. 24134 dated 17.03.1939, which the plaintiff has referred to in paragraph 8 of the plaint. At the argument, learned President's Counsel for the plaintiff stated that the plaintiff does not have this amicable partition deed but referred to it since one deed (1V1) refers to the amicable partition deed. The plaintiff does not accept this amicable partition deed. The exclusion of lot 2 is sought not by the plaintiff but by the contesting defendants. If the contesting defendants rely on this deed to say that lot 2 in the preliminary plan was a divided lot from the rest of the land from the time the alleged amicable partition deed was executed, the burden is on them to prove it *inter alia* by producing that deed. This was not done.

By deed No. 24137 executed on 17.03.1939 (1V1), the predecessor in title of the 6th defendant and the 8th defendant, namely Lewis Senerath, transferred an undivided 1 rood out of lot A of *innawatta* in extent of 2 acres and 2.5 perches to David Appuhamy, and David Appuhamy in turn transferred that portion to the 1st defendant by deed P6 dated 21.08.1985. These two deeds are accepted by the 6th and 8th defendants.

The present 1st defendant filed partition action No. 10524/P (8V1) against the present 6th defendant and others based on deed P6. It is misleading to say that according to 8V1, *innawatta* comprises only 2 acres and 2.5 perches; this is only part of *innawatta* which has been identified as lot A of *innawatta*.

Although a partition action cannot be settled in this manner, as seen from page 567 of the brief, the said partition action was settled between the present 1st and 6th defendants allowing the present 1st defendant to demarcate 1 rood with the assistance of a surveyor. If lot 2 was entirely possessed by the 6th and 8th defendants and their predecessors as a separate and defined lot, there was no reason for the 6th defendant to arrive at such a settlement. Although the 8th defendant tendered selected documents of the said partition action compendiously marked as 8V1, he did not tender any of the plans referred to in the plaint and settlement in that case.

The deed 8V5 dated 09.06.1993 was tendered by the 8th defendant. The original of 8V5 was marked by the plaintiff as P7. The schedule of 8V5 (which I have reproduced below) goes to show that *innawatta* of about 5 acres in extent was still an undivided land in 1993. By this deed, the 6th defendant had transferred 3 perches to the 1st defendant (in terms of the settlement reached in 10524/P) out of 5 acres, not out of lot A comprising 2 acres and 2.5 perches.

> ඉහත කී විකුණුම්කාර මට වර්ෂ 1981 ක්වූ ජනවාරි මස 09 වන දින එච්.පී.පී. බංඩා ප්‍රසිද්ධ නොතාරිස් සහතික කල අංක 4999 දරණ හුවමාරු කිරීමේ ඔප්පුව පිට අයිතිව නොකඩවා නිරවුල්ව භුක්ති විඳගෙන එන වයඹ පළාතේ කුරුණෑගල දිස්ත්‍රික්කයේ කටුගම්පල හත්පත්තුවේ කටුගම්පල මැදපත්තු බස්නාහිර කෝරළේ ගලයාය පිහිටි 'ඉන්නාවත්ත' නමැති ඉඩමට මායිම්:- උතුරට:- ප්‍රසිද්ධ පාර සහ බේලින්ට සහ තව අයට අයිති ඉඩම්ද, නැගෙනහිරට:- පහල ගලයායට යන පාර සහ වලෝසිංඤෝගේ උරුමක්කාරයින්ට අයිති ඉඩමද, දකුණට:- සාපින් මුදලාලිට අයිති ඉඩම සහ මුදියන්සේගේ සහ පුංචප්පුහාමිගේ උරුමක්කාරයින්ට අයිති ඉඩම්ද, බස්නාහිරට:- සාපින් මුදලාලි, මුදියන්සේගේ උරුමක්කාරයින්ට සහ අබරන් අප්පුට ද, ඩිංගිරි මැණිකාට අයිති ඉඩමද, යන මායිම් තුල අක්කර පහක් පමණ විශාල කුලියාපිටිය ඉඩම් ලියා

පදිංචි කිරීමේ කාර්යාලයේ එල් 59/49 ලියා පදිංචි කොට ඇති ඉඩමෙන් බෙදා වෙන් කර ගත් වර්ෂ 1993 පෙබරවාරි මස 18 වන දින සුමනරත්න බී. අබේකෝන් බලයලත් මිනින්දෝරු මැන සෑදූ අංක 2873 දරණ පිඹුරේ නිරූපනය කොට ඇති ලොට් 1 ඒ 1 දරණ ඉහත කී ගලයාය පිහිටි 'ඉන්නවත්ත' නමැති බෙදූ ඉඩම් කොටසට ඉහත කී පිඹුරේ ප්‍රකාර මායිම් :-

උතුරට :- ඉහත කී අංක 2873 දරණ පිඹුරේ ලොට් ඒ 2 දරණ කොටස

නැගෙනහිරට :- මෙම මුල් ඉඩමේ කොටසක් වන ජේ. ඒ. විජේසේනට සහ තව

අයට අයිති බී අක්ෂරය දරණ කැබැල්ල

දකුණට :- මෙම මුල් ඉඩමේ කොටසක් වන දැනට ඩී. ජී. එල්. සෙනරත්ට අයිති අංක ඒ 1 දරණ කැබැල්ල

බස්නාහිරට :- මෙම මුල් ඉඩමේ කොටසක් වන දැනට ඩී. ජී. එල්. සෙනරත්ට අයිති අංක ඒ 1 දරණ කැබැල්ලද,

යන මායිම් තුල පර්චස් තුනක් විශාල බෙදූ ඉඩම් කොටස සහ එයට අයත් සියලු දේත් වේ.

As I have already stated, the 6th defendant had prepared plan 8V4 after the execution of deed of exchange 8V3. When 8V4 is compared with the preliminary plan, there is no issue regarding the northern, southern and western boundaries of *innawatta*. Those three boundaries tally. The only boundary at variance is the eastern boundary.

It is significant to note that according to 8V3, although the eastern boundary of *innawatta* is the road leading to Pahala Galayaya and the land of the heirs of Chalo Sinno, the eastern boundary of 8V4 does not extend up to the road, but the eastern boundary in the preliminary plan does. This means plan 8V4 does not depict the eastern boundary of *innawatta* correctly.

All this indicates that the summary disposal of the long-drawn-out partition case by the learned High Court Judges, without analysing any evidence but by the mechanical application of a standard formula that 1 *laha* of kurakkan sowing area is equivalent to 1 acre and therefore the land depicted in the preliminary plan is double in extent of the land to be partitioned and hence the plaintiff's action must fail, is clearly erroneous.

Where did the High Court of Civil Appeal go wrong?

The finding of the learned High Court Judges which is reflected in the following paragraph of the judgment is contradictory.

> *The preliminary plan shows a land of 6 acres 1 rood and 11 perches. The plaintiff has admitted in evidence that the northern boundary of the land has not been properly demarcated, hence the subject matter is not correctly depicted and that the land sought to be partitioned is 3 lahas of kurakkan sowing which is equivalent to 3 acres. The land shown in the preliminary plan is more than double that extent.*

On the one hand, the learned High Court Judges say that a portion of the northern boundary has been left out (i.e. the entire land has not been included in the preliminary plan) and on the other hand they say that more than double the extent has been included in the preliminary plan.

The learned Judges of the High Court of Civil Appeal presupposed that one *laha* of kurakkan sowing area is one acre. They considered this a rigid, fixed formula whereas it is not so.

In the case of paddy land, it was held in *Ariyawathie De Silva v. Wijesena* (*CA/608/2000/F, CA Minutes of 01.04.2019*) that there was "*no hard and fast rule that one amunam or five pelas of paddy sowing area shall necessarily equal to 2 ½ Acres*".

As held in *Hapuarachchi v. Podi Nilame* (*SC/APPEAL/52/2018, SC Minutes of 10.06.2021*), it is wholly unreliable to convert ancient land measures to English standard equivalents in identifying the corpus in a partition action. The extent of *innawatta* described in the old deeds tendered by the plaintiff is 3 *lahas* of kurakkan sowing area (P1 executed in 1893, P2 executed in 1903, P3 executed in 1916, P5 executed in 1939). The schedule to the plaint is a reproduction of the land described in these old deeds executed more than a century ago. Without surveyor plans being available, the extent of the land given in these old deeds is speculative. 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.

I accept that according to standard conversion tables found in various sources, one *laha* of kurakkan sowing area is equal to one acre (*vide The Ceylon Law Recorder*, Parts VI and IX of Vol XXII, *Ratnayake v. Kumarihamy [2002] 1 Sri LR 65 at 81*); but the court cannot strictly go by this formula disregarding all other factors in deciding the extent of the land. The question of identification of the corpus is not a mathematical question where mechanical application of a standard formula is appropriate. It is a question of fact and not a question of law which can be raised for the first time on appeal. This is amply demonstrable by the judgment in *Ratnayake v. Kumarihamy* itself where the standard conversion table is reproduced.

In *Ratnayake v. Kumarihamy*, 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 in extent (which is the same argument taken up in the instant case). However, upon consideration of the totality of the evidence led in the case, the District Court held that the preliminary plan depicts the correct land to be partitioned, which was affirmed by the Court of Appeal. 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*. Justice Udalagama 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. In those days, the surface area was measured by the quantity of seed required to sow the land. The plaintiff reproduces in the schedule to the plaint the schedule to old deeds prepared decades if not centuries ago as the land to be partitioned, as in the instant case, whereas the surveyor commissioned to prepare the preliminary plan shows the existing boundaries of the land, not the old boundaries stated in the schedule to the plaint. The surveyor further shows 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 English standard equivalents.

There is no rigid correlation between surface extents and sowing extents although surface extent is decided on sowing extent. Such a correlation depends on various factors including 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, 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.

Law Recorder Miscellany, page xxx, in *The Ceylon Law Recorder*, Vol XXII, Part VI records:

> *The amount of seed required varied according to the varying degrees of fertility in different parts of the Island, as fertile soil does not require as much seed as poor soil. For instance, an amunam in a fertile area will sometimes be twice as many square feet as an amunam in an unfertile area.*

It is also relevant to note that the sizes (capacity) of the traditional measures such as *lahas* and *neliyas* differ not only between districts but also within districts. In the instant case the measure under consideration was *laha.* In this regard, Law Recorder Miscellany, page xlv, in *The Ceylon Law Recorder*, Vol XXII, Part IX, reproducing an extract from a paper presented by the then Superintendent of Surveyors, states:

> *The Laha was also a measure of varying size. Within the same district and sometimes in the same Chief Headman's division, in different parts, a different size of Laha was in use. In the North-Western Province alone, in different parts, these are in use even today, four sizes of Lahas containing in capacity, 4, 5, 6 and 7 Neliyas respectively. The largest size of Laha according to my investigations is one in use in the Inamaluwa Korale of Matale North, and contains twelve Nelis.*

This is not a recent phenomenon. The following observation made by Canekeratne J. as far back as in 1948 in the case of *Noordeen Lebbe v. Shahul Hameed 49 NLR 274 at 276* highlights the imprecise nature of traditional land measures and the necessity to look for other evidence in deciding the extent of the land:

> *Though the description by paddy sowing extent is not an absolutely precise measurement, it can be determined within a fairly definite limits and most villagers in the locality would be able to show the extent: the evidence led shows that one pela is about ¾ of an acre. Then one comes to the boundaries.*

When there is a question of identification of the corpus, the court cannot merely go by the extent given in the deed. The court must take into consideration all the facts and circumstances of that particular case, including the boundaries given in the deeds, the conduct of the parties and the totality of the evidence led at the trial to come to the correct conclusion.

In *Noordeen Lebbe v. Shahul Hameed (1948) 49 NLR 274*, two contiguous lots of land referred to as the eastern lot and the western lot were sold in execution of a mortgage decree. The auctioneer's conveyance described each lot separately but further described the two lots by way of a survey plan which erroneously depicted only the western lot. The son of the original owner took up the position that only the western lot was conveyed by the auctioneer's conveyance. Although the District Court accepted this position, on appeal, the Supreme Court reversed this finding and held "*both lots passed to the purchaser on the conveyance. The addition of an erroneous plan did not vitiate an adequate and sufficient definition with certainty of what was intended to pass by the deed.*" The Supreme Court at page 275 observed "*the Court must look at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was therein expressed as the intention of the parties*" and further explained at 276-277 "*where there are several descriptions which, when evidence of surrounding facts is admitted, are not consistent with each other, the Court must in every case do the best it can to arrive at the true meaning of the parties upon a fair consideration of the language used and the facts properly admissible in evidence. The description by reference to the plan when taken with the earlier part of the schedule is inaccurate and misleading. The descriptions contained in the earlier part of the schedule are certain and unambiguous.*"

In the instant case there is no inconsistency as to the extent because that matter cannot be decided solely on what is stated in conversion tables. Even assuming there is such an inconsistency, if the boundaries are clearly ascertainable, discrepancy in the extent can be reconciled or disregarded.

In *Gabriel Perera v. Agnes Perera [1950] 43 CLW 82*, the boundaries of the land were given in the deed without reference to a plan and the extent was stated to be about 1 rood and 5 perches whereas it was in fact 1 rood and 22 perches. Basnayake J. at page 88 held:

> *It is settled rule of interpretation of deeds that, where the portion conveyed is perfectly described, and can be precisely ascertained, and no difficulty arises except from a subsequent inconsistent statement as to its extent, the inconsistency as to extent should be treated as a mere falsa demonstratio not affecting that which is already sufficiently conveyed.*

In *Silva v. Ismail (1943) 44 NLR 550* it was held that in describing the property in a conveyance, if specific dimensions of the premises sold are given <u>at the beginning of the schedule</u> (e.g. in *Silva*'s case, seventy and a half feet in length and thirty feet in width together with the entire boutique), those specific dimensions must control the description of the boundaries given <u>at the end of the schedule</u>.

Appuhamy v. Gallella (1976) 78 NLR 404 is a similar case where in the deed the extent of the land was followed by the boundaries, not *vice versa* as usually happens. The question was whether only 10 perches or the entire land containing about 40 perches was

transferred by the deed. The uncertainty arose from the inconsistent descriptions of the extent: the area description covered 10 perches while the boundary description was about 40 perches. Taking all the circumstances into account, the Supreme Court set aside the judgment of the District Court and held that the deed conveyed only 10 perches and not the entire land falling within the boundaries in the schedule. The Supreme Court expounded the governing principles in the following manner:

> *Where the extent of a grant of land is stated in an ambiguous manner in a conveyance, it is legitimate to look at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was therein expressed as the intention of the parties. It is permissible to resort to extrinsic evidence in order to resolve the ambiguity relating to the subject matter referred to in the conveyance. In such circumstances it is proper to have regard to the subsequent conduct of each of the parties, especially when such conduct amounts to an admission against the party's proprietary interest.*

In my view, the description of *innawatta* contained in the 6th defendant's deed of exchange marked 8V3 (where the eastern boundary of *innawatta* is the road) read with the 6th respondent's plan marked 8V4 (where the eastern boundary of *innawatta* is not the road) makes it clear that the preliminary plan marked X (where the eastern boundary of *innawatta* is the road) depicts the entire extent of *innawatta* (6 acres, 1 rood and 11 perches) and it is erroneous to say that the preliminary plan shows a land more than double in extent of *innawatta*.

Application of previously decided cases

The learned High Court Judges and learned counsel for the contesting defendants strongly rely on *Sopaya Silva v. Magilin Silva [1989] 2 Sri LR 105* to justify the dismissal of the partition action by the High Court on the basis that there is a significant discrepancy in the extents of the lands described in the plaintiff's deeds and the preliminary plan. Learned counsel for the 6th defendant in her written submissions even cautions that the principles enumerated in *Sopaya Silva*'s case should be upheld and consistency in the law regarding identification of the corpus maintained.

The principles of law enunciated in one case have no universal application to all future cases of the same species indiscriminately unless the facts are similar. Bearing in mind the established principles of law, each case must be decided on the unique facts and circumstances of that particular case. The *ratio decidendi* in *Sopaya Silva*'s case cannot be mechanically applied whenever there is an issue in relation to the identification of the corpus in a partition action.

In *Sopaya Silva*'s case the plaintiff filed action to partition a land in extent of 8 acres, 3 roods and 29 perches but the surveyor prepared the preliminary plan in extent of 11 acres, 1 rood and 33 perches. There was no contest in the case. Having found this discrepancy at the time of writing the judgment regarding the extent of land sought to be partitioned and the land surveyed, the District Judge dismissed the action on the basis that a larger land had been surveyed. This he did without hearing the parties on that matter. On appeal, the Court of Appeal held that the dismissal of the action without hearing the parties was wrong and

what the District Judge ought to have done was to reissue the commission with instructions to survey the land as described in the plaint or to permit the plaintiff or any of the defendants to seek partition of the larger land after taking steps including the registration of a fresh *lis pendens*.

The facts in the instant case are totally different. In the instant case there was no denial of a hearing to the parties on the issue of the identification of the corpus or any other matter. More importantly, in *Sopaya Silva*'s case the plaintiff sought to partition a specific extent of land, namely, 11 acres, 1 rood and 33 perches, presumably identified by way of a plan, whereas in the instant case the extent given was not specific as it was stated in an ancient Sinhala land measure, namely 3 *palas* of kurakkan sowing area. Hence the learned High Court Judges erred in concluding that the guidelines given in *Sopaya Silva*'s case should have been followed in this case.

The other case the learned High Court Judges cite is *Jayasuriya v. Ubaid (1957) 61 NLR 352*. In *Jayasuriya*'s case, the plaintiff filed action to partition lot 160/6 in T.P. 269370 in extent of 3 acres, 1 rood and 7 perches. The plaintiff claimed ½ share and pleaded that the other ½ share should go to the 1st defendant. The 1st defendant disputed the corpus. At the trial, the preliminary plan was not marked in evidence. When this was raised by counsel for the 1st defendant at the closing submissions, the District Judge, without issuing summons to the surveyor who prepared the preliminary plan, issued a fresh commission to another surveyor in the belief that the first surveyor would not be available. The 1st defendant did not take part in the further hearing. When the new surveyor gave evidence on the new plan, it transpired that the

land which the plaintiff in fact wanted to partition was not lot 160/6 in T.P. 269370 but lot 1 in T.P. 269370 and two other lots that fell outside the said Title Plan. The District Judge delivered the judgment on the mistaken assumption that the first plan and the second plan both depicted the same corpus. On appeal, the judgment of the District Court was rightly set aside and retrial was ordered. It is in this backdrop that the Supreme Court observed "*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*". I need hardly emphasise that the facts in *Jayasuriya*'s case and the instant case are incomparable.

Although learned counsel for some of the contesting defendants state that a larger land than that sought to be partitioned was ultimately partitioned without a new *lis pendens* being registered, there was no necessity to register a fresh *lis pendens* for a larger extent of land because no larger land is depicted in the preliminary plan.

Conclusion

On the facts and circumstances of this case, the finding of the District Court that the preliminary plan depicts the land sought to be partitioned is justifiable. The finding of the High Court of Civil Appeal that the corpus has not been properly identified and therefore the plaintiff's action is bound to fail cannot be allowed to stand. I answer the question of law upon which leave to appeal was granted in the affirmative and set aside the judgment of the High Court of Civil Appeal and restore the judgment of the District Court and allow the appeal of the plaintiff with costs.

Judge of the Supreme Court

L.T.B. Dehideniya, J.
I agree.

Judge of the Supreme Court

Achala Wengappuli, J.
I agree.

Judge of the Supreme Court