

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

In the matter of an application for leave to
appeal to the Supreme Court under in terms
of Section 5C (1) of the High Court of the
Provinces (Special Provisions) Act No. 19 of
1990, as amended by Act No. 54 of 2006.

SC/Appeal No. **SC/APP/13/2020**
SC/LA/Application No.
SC/HCCA/LA/97/2016
Civil Appellate High Court Case No.
WP/HCCA/AV/1494/2014(F)
DC Homagama Case No. **372/P**

Kandambige Timan Piyatissa *alias*,
Kandambige Tiyanan Piyatissa,
No. 355/1, High Level Road, Kottawa,
Pannipitiya.

PLAINTIFF

vs

1. Kandambige Gunapala of No.355/1,
High Level Road,
Kottawa, Pannipitiya.
2. Kandambige Gunaseeli of No. 388,
Old Road, Pannipitiya,
Kottawa.
3. Kandambige Mahinda Siripala,
No. 355, High Level Road,
Kottawa, Pannipitiya.
4. Ranasinghe Arachchige Dona Lalitha
Piyaseeli, No. 389,
Old Road, Kottawa.
5. Hiniduma Liyanarachchige Piyadasa,
No. 389, Old Road,
Kottawa, Pannipitiya.

- 5A. Hiniduma Liyanarachchige Nalin Prasanna of
No. 389,
Old Road, Kottawa,
Pannipitiya.
6. Ranasinghe Arachchige Dona Nanda,
No. 354, High Level Road,
Kottawa, Pannipitiya.
7. Thennakoon Mudiyanseelage Jayawardane,
No. 354, High Level Road, Kottawa,
Pannipitiya.
8. Ranasinghe Arachchige Merinona,
No. 694, Kulasewana Road, Kottawa,
Pannipitiya.
- 8A. Dona Hemawathi Kumarapeli
Senanayake, No. 694, Kottawa,
Pannipitiya.

DEFENDANTS

And Between

6. Ranasinghe Arachchige Dona Nanda, No.
354, High Level Road,
Kottawa, Pannipitiya.
7. Thennakoon Mudiyanseelage Jayawardane,
No. 354, High Level Road, Kottawa,
Pannipitiya.

6th & 7th DEFENDANTS - APPELLANTS

vs

Kandambige Timan Piayathissa *alias*
Kandambige Tiyanan Piyatissa of No. 355/1,
High Level, Kottawa, Pannipitiya.

PLAINTIFF – RESPONDENT

1. Kandambige Gunapala (Deceased) of
No.355/1,
High Level Road,
Kottawa, Pannipitiya.
- 1A. Kandambige Rashini Prasanthika of No.
355/1, High Level Road, Kottawa,
Pannipitiya.
2. Kandambige Gunaseeli (Deceased) of No.
388,
Old Road, Pannipitiya,
Kottawa.
- 2A. Kandambige Mahinda Siripala of No. 355/1,
High Level Road,
Kottawa, Pannipitiya.
3. Kandambige Mahinda Siripala,
No. 355, High Level Road,
Kottawa, Pannipitiya.
4. Ranasinghe Arachchige Dona Lalitha
Piyaseeli (Deceased), No. 389,
Old Road, Kottawa.
- 4A. Hiniduma Liyanarachchige Nalin Prasanna of
No. 389,
Old Road, Kottawa,
Pannipitiya.
5. Hiniduma Liyanarachchige Piyadasa
(Deceased),
No. 389, Old Road,
Kottawa, Pannipitiya.
- 5A. Hiniduma Liyanarachchige Nalin Prasanna of

No. 389,
Old Road, Kottawa,
Pannipitiya.

8. Ranasinghe Arachchige Merinona,
(Deceased)
No. 694, Kulasewana Road, Kottawa,
Pannipitiya.

8A. Dona Hemawathi Kumarapeli (Deceased),
Senanayake, No. 694, Kottawa,
Pannipitiya.

8B. Siriwardana Attanayakage Chandra,
No. 447, Housing Scheme, New Town,
Polonnaruwa.

DEFENDANTS – RESPONDENTS

And Now Between

1A. Kandambige Rashini Prasanthika of No.
355/1, High Level Road, Kottawa,
Pannipitiya.

2A. Kandambige Mahinda Siripala of No. 355/1,
High Level Road,
Kottawa, Pannipitiya.

3. Kandambige Mahinda Siripala,
No. 355, High Level Road,
Kottawa, Pannipitiya.

1A, 2A & 3rd DEFENDANTS- RESPONDENTS -PETITIONERS

vs

Kandambige Timan Piayathissa *alias*
Kandambige Tiyanan Piyatissa of No. 355/1,
High Level, Kottawa, Pannipitiya.

**PLAINTIFF – RESPONDENT –
RESPONDENT**

And

1. Hiniduma Liyanarachchige Nalin Prasanna of
No. 389,
Old Road, Kottawa,
Pannipitiya.

**4A DEFENDANT - RESPONDENT-
RESPONDENT**

2. Hiniduma Liyanarachchige Nalin Prasanna of
No. 389,
Old Road, Kottawa,
Pannipitiya.

**5A DEFENDANT – RESPONDENT –
RESPONDENT**

3. Ranasinghe Arachchige Dona Nanda of No.
354, High Level Road, Kottawa,
Pannipitiya.

**6th DEFENDANT – APPELLANT –
RESPONDENT**

4. Thennakoon Mudiyanseelage Jayawardane,
No. 354, High Level Road, Kottawa,
Pannipitiya.

**7th DEFENDANT – APPELLANT –
RESPONDENT**

Siriwardana Attanayakage Chandra,
No. 447, Housing Scheme, New Town,
Polonnaruwa.

**8B DEFENDANT -RESPONDENT -
RESPONDENT**

BEFORE

: Janak De Silva, J.
Menaka Wijesundera, J.
M. Sampath K. B. Wijeratne, J.

COUNSEL

: Navin Marapana. P.C. with Uchitha
Wickremasinghe and Saumya Hettiarachchi
instructed by Nandana Kumara for the 1A, 2A
& 3rd Defendant – Respondents - Appellants.

Dr. Sunil Cooray with Sudharshani Cooray and
Neminda Kariyawasam instructed by Shanika Epa
for the Plaintiff – Respondent – Respondent.

Kaushalya Nawaratne, P.C. with Nimaya
Wijayasundara instructed by Amali Tennakoon for
the 4A & 5A Respondents.

Faisz Musthapaha, P.C. with Nivantha
Satharasinghe instructed by P.W. Wijewardena for
the 6th & 7th Defendant – Appellant – Respondent.

Erusha Kalidasa with Shenela Jayasinghe
instructed by Anusha Wickremasinghe for the 8B
Defendant – Respondent – Respondent.

ARGUED ON

: 25.09.2025

DECIDED ON

: 02.07.2026

M. Sampath K. B. Wijeratne J.

Introduction

The Plaintiff instituted this action in the District Court of Homagama against the 1st to 8th Defendants for the partition of the land known as '*part of Dambugahawatta*', more fully described in the schedule to the plaint and depicted in Preliminary Plan No. 567 prepared by S.D. Sarathchandra, Licensed Surveyor, marked as 'X'.

The 1st Defendant filed his statement of claim and moved either for dismissal of the action or to partition the land in terms of paragraphs 5 and 7 of his answer. The 2nd and 3rd Defendants sought partition of the land in terms of paragraph 5 of their statement of claims. The 4th and 5th Defendants filed their respective statements of claim, claiming Lot A1 in Preliminary Plan No. 567 by prescription.

The 6th and 7th Defendants filed their statement of claims and sought to exclude Lot No. 02 from the partition action, relying on a different pedigree and contending that, in lieu of their undivided share, they had taken over exclusive possession of Lot A in Plan No. 2271, which is superimposed on Plan No. 537.

The trial proceeded on two admissions and twenty-eight issues. The 1st Defendant raised an issue (Issue No. 15) regarding the genuineness of Deed No. 707 dated August 18, 1986 ('P3'), on the basis that it was not the act and deed of Martin Singho, the alleged donor. Subsequently, the 6th and 7th Defendants-Appellants raised a further issue (Issue No. 29) disputing the identity of the *corpus*.

After trial, the learned District Judge, by judgment dated October 10, 2023, rejected Deed 'P3' on the ground that it had not been proved. The learned District Judge also rejected the claims of prescription advanced by the 4th, 5th, 6th, and 7th Defendants.

However, the court held that the 4th and 5th Defendants were entitled to the undivided shares of the *corpus* in accordance with the proved pedigree. Further, the plantations and buildings on Lot No. 1 were awarded to the 4th and 5th Defendants, while the 6th and 7th Defendants were held entitled to the plantations and buildings on Lot No. 2.

Being aggrieved by the judgment of the learned District Judge, the 6th and 7th Defendants appealed to the High Court of Civil Appeal of the Western Province holden at Avissawella. The learned Judges of the High Court affirmed the judgment of the learned District Judge, subject to several variations.

Dissatisfied with the judgment of the High Court of Civil Appeal, the 1A Defendant, 2A Defendant, and the 3rd Defendant have preferred this appeal. Upon hearing the submissions of both parties, this Court granted leave to appeal on the questions of law set out in paragraphs 18(a), (b), and (c) of the Petition of Appeal dated February 24, 2016.¹

“

- a. *Have Their Lordships failed to consider that the Deed bearing No. 707 (P3) was marked at the Trial subject to proof and was not proved by calling any evidence?*
- b. *Have Their Lordships of the High Court erred in entertaining any Appeal from the Plaintiff, when in fact any such Appeal was not filed by the said Plaintiff?*
- c. *Have their Lordships of the High Court erred in the interpretation and application of provisions of the Section 68 of the Partition Law and the Section 102 of the Evidence Ordinance?”*

¹ Journal entry dated 06.02.2020.

Analysis

On a plain reading, the very description of the land indicates that it forms part of a larger land. The Eastern and Western boundaries further confirm this position. It is settled law that a portion of a larger land cannot ordinarily form the subject matter of a partition action. However, the deeds demonstrate that a land bearing these boundaries has existed at least since 1938. The preliminary plan marked 'X' also depicts on the ground a land with definite and ascertainable boundaries. In the case of ***Obeyesekere vs. Endories***² (C.A.) the court held that “*separate possession of that share for over 20 years has been clearly proved, and those who possessed it are entitled to claim that they have acquired prescriptive title to it. I do not think this is a case where a lot was separated off for mere convenience of possession and as a temporary arrangement. It is much more likely to have been intended as a permanent mode of possession, and the lot so separated off would, with the lapse of time and exclusive possession, cease to be held in common with the rest of the land.*”

A similar view has been expressed in ***Lucyhamy vs. Perera Et Al***³ where a land was amicably divided into an eastern and western half and possessed as such, and the eastern half share was wrongly described as undivided in a conveyance, the Court held that the ‘*conveyance passed title to the portion possessed as the eastern half share as a distinct corpus.*’

In such circumstances, the portion of land that is proven to have had a separate and distinct existence over a long period of time can be the subject matter of a partition action, as in the instant partition action.

Be that as it may, the identity of the *corpus* is not an issue that arises for determination before this Court. Therefore, I will now turn my attention to the questions of law raised before this Court.

² 66 NLR 457

³ 40 NLR 232.

Questions of law (a) and (c)

The 1st Defendant, in his statement of claim, asserted that Deed ‘P3’ was a fraudulent instrument and that it was not the act and deed of the alleged executant, Martin Singho.

The Plaintiff contended that, since the Defendants had not specifically challenged the due execution of Deed ‘P3’ on the ground of non-compliance with the requirements of Section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840, as amended, the Plaintiff was not required to prove due execution. It was further submitted on behalf of the Plaintiff that where fraud is alleged, the burden of proving such allegation lies upon the party making it, and that the Defendants had failed to discharge that burden in the present case. In support of this contention, learned Counsel relied on Sections 102 and 103 of the Evidence Ordinance.

It must be noted that Deed ‘P3’ was admitted subject to proof, and the 1st Defendant objected to its being received in evidence at the close of the Plaintiff’s case. Further, three issues were raised in relation to Deed ‘P3’. In this context, the learned District Judge concluded that Deed ‘P3’ had not been duly proved.

The learned High Court Judges, however, reached the opposite conclusion, holding that, notwithstanding the objection raised to its production, there was no requirement to prove the deed on the basis that the burden rested on the 1st Defendant to establish that it was a fraudulent instrument.

The learned High Court Judges were of the view that Section 68 of the Partition Law, read together with Section 102 of the Evidence Ordinance, could be invoked in favour of the Plaintiff in the present case.

Section 68 of the Partition Law, No. 21 of 1977, reads as follows:

*“It shall not be necessary in any proceedings under this Law to adduce formal proof of the execution of any deed which, on the face of it, purports to have been duly executed, **unless the genuineness of that deed is impeached by a party***

claiming adversely to the party producing that deed, or unless the court requires such proof.” (emphasis added)

A careful perusal of Section 68 of the Partition Law reveals that no formal proof is required where a deed, on its face, purports to have been duly executed, unless its genuineness is impeached by a party claiming adversely to the party producing it.⁴ Accordingly, in a partition action, where the genuineness of a deed is impeached, the party relying on such deed is required to prove its due execution. The burden under section 101 and 102 in proving an alleged fraud would arise only after the **plaintiff** successfully led evidence in terms of section 68 of the Evidence Ordinance.

Section 2 of the Prevention of Frauds Ordinance (as amended) states:

“No sale, purchase, transfer, assignment, or mortgage of land or other immovable property...shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses”.

Elaborating on the aforesaid section, Samayawardhena J. in **Weerappuli Gamage Gamini Ranaweera vs Matharage Dharmasiri and Others**⁵ held that:

“To prove due execution of a deed, this section requires proof of four matters: (a) the deed was signed by the executant (b) it was signed in the presence of a licensed notary public and two or more witnesses (c) the notary public and the witnesses were present at the same time (d) the execution of the deed was duly attested by the notary and the witnesses.” Section 31(9) of the Notaries Ordinance requires that either the executant or the two attesting witnesses be personally known to the Notary, thereby ensuring execution of the deed by the true executant.

⁴ *Sangarakkita Thero vs Buddarakkita Thero* 53 NLR 457.

⁵ SC APPEAL 56/2020, SC Minutes of 20.05.2022.

The Legislature further reinforced this requirement through the amendments introduced by the Notaries (Amendment) Act, No. 31 of 2022, which amended Section 31(9) of the Notaries Ordinance, thereby strengthening the safeguards relating to the identification of the executant. Section 31(9) of the Notaries Ordinance, as amended, now reads as follows: “[Notary] shall not authenticate or attest any deed or instrument unless one of the executants to the deed or instrument or the two attesting witnesses be known to notary or by the identity of the executants to a deed or instrument is established by such notary by inspection of the national identity card, bio-page of the passport or the driving licence of such executants [...]”

However, the 2022 Amendment has no application to the present case, as Deed ‘P3’ was executed prior to its enactment. Nevertheless, the rationale underlying the said amendment remains relevant to the issues arising in the present case.

Therefore, in order to establish “due execution” under Section 2 of the Prevention of Frauds Ordinance, mere presence of the parties is not sufficient; the identity of the executant must also be satisfactorily proved. Having regard to the totality of the circumstances, I am of the view that the 1st Defendant had, in fact, impeached the genuineness of Deed ‘P3’, and that the learned Trial Judge, in the absence of formal proof of due execution of the said deed, correctly held that ‘P3’ had not been proved. Accordingly, no title devolved upon the Plaintiff under the said deed, as it remained the duty of the Trial Judge to determine whether Deed ‘P3’ had been proved in accordance with law. It follows that the learned High Court Judges erred in holding that rights devolved on the Plaintiff under ‘P3’ on the basis that the 1st Defendant had failed to prove that it was a fraudulent deed.

Hence, I answer questions of law (a) and (c) in the affirmative.

Question of Law (b)

The 1A, 2A, and 3rd Defendants submit that the Plaintiff did not appeal against the judgment of the learned District Judge, nor did he file a cross-appeal against

the said judgment. Accordingly, it is contended that the learned High Court Judges erred in pronouncing upon the validity of Deed ‘P3’, as that issue was not raised in the Petition of Appeal.

In response, the Plaintiff contended that, in a partition action, it is the duty of the Court to determine the correctness of the pedigree, the identity of the *corpus*, and other matters in issue, as a partition action is one *in rem*, and that this duty extends to the appellate court as well. In support of this contention, the Plaintiff relied on *Tissera vs Leelawathie (C.A.)*⁶, *Banda vs Dissanayake (C.A.)*⁷, *Basnayake vs Peter (C.A.)*⁸, *Somasiri vs Faleela (C.A.)*⁹, and *Piyaseeli vs Mendis (C.A.)*¹⁰.

I do agree that it is the duty of the Trial Judge to investigate the title and pedigree. However, the scope of judicial investigation is not infinite. The court cannot embark on a journey in search of the parties’ title, as correctly stated by Ananda Coomaraswamy J. in *Thilagaratnam vs Athpunathan and Others*¹¹ (C.A.) in the following manner: “*Court cannot go on a voyage of discovery tracing the title and finding the shares in the corpus for them; otherwise parties will tender their pleadings and expect the court to do their work and their Attorneys- at-Law’s work for them to get title to those shares in the corpus.*”

I also agree with the contention that, even on appeal, the appellate court may review the correctness of the Trial Judge’s investigation into title. However, such review should not be undertaken *suo motu* without the issue being raised by a party in appeal. To do otherwise would compel the Appellate Court to usurp the functions of the Trial Court, an outcome that is both unwarranted and prejudicial.

Accordingly, I answer question of law (b) in the affirmative.

⁶ [2005] 2 Sri LR 127.

⁷ [2006] 2 Sri LR 87.

⁸ [2005] 3 Sri LR 197.

⁹ [2005] 2 Sri LR 121.

¹⁰ [2003] 3 Sri LR 273.

¹¹ [1996] 2 Sri LR. 66.

Conclusion

For the reasons stated above, I answer all three questions of law in the affirmative. I set aside the variations made by the learned High Court Judges and affirm the judgment of the learned District Judge.

The appeal is allowed.

The 1A, 2A and 3rd Defendants are entitled to costs.

JUDGE OF THE SUPREME COURT

Janak De Silva, J.

I agree.

JUDGE OF THE SUPREME COURT

Menaka Wijesundera, J.

I agree.

JUDGE OF THE SUPREME COURT