

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

*In the matter of an Appeal under in terms
of section 5C (1) of the High Court of the
Provinces (Special Provisions)
(Amendment) Act No. 54 of 2006 against
the Judgment of the Civil Appeal High
Court of Gampaha.*

S.C. Appeal No:
68/2016

Morawakayalage Babiya,
Nikahetiyakanda, Veyangoda.

PLAINTIFF

SC/HCCA/LA No:
78/15

Vs.

WP/HCCA/GPH No:
201/09(F)

1. Napayalage Gnanaratne
2. Napayalage Subatheris both of
Nikahetiyakanda, Veyangoda. **(Now
Deceased)**

D.C. Gampaha Case No:
35758/P

2a. Godayalage Maglin of
Nikahetiyakanda, Veyangoda.
3. M. D. Peter of No. 98,
Nikahetiyakanda, Veyangoda.
4. Wimal Ananda
5. Priyangani Geethika
6. Priyani Chandrika
All of Nikahetiyakanda, Veyangoda.

DEFENDANTS

AND

3. M. D. Peter of No. 98,
Nikahetiyakanda, Veyangoda.

(Now Deceased)

3rd DEFENDANT-APPELLANT

3a. Wimal Ananda of No. 98,
Nikahetiyakanda, Veyangoda.

**SUBSTITUTED 3a DEFENDANT-
APPELLANT**

Vs.

Morawakayalage Babiya,
Nikahetiyakanda, Veyangoda.

PLAINTIFF-RESPONDENT

1. Napayalage Gnanaratne
2. Napayalage Subatheris both of
Nikahetiyakanda, Veyangoda. **(Now
Deceased)**

2a. Godayalage Maglin of
Nikahetiyakanda, Veyangoda.

4. Wimal Ananda

5. Priyangani Geethika

6. Priyani Chandrika

All of Nikahetiyakanda, Veyangoda.

DEFENDANT-RESPONDENTS

AND BETWEEN

3a. Wimal Ananda of No. 98,
Nikahetiyakanda, Veyangoda.

4. Wimal Ananda of No. 98,
Nikahetiyakanda, Veyangoda.

**SUBSTITUTED 3a DEFENDANT-
APPELLANT 4th DEFENDANT-
RESPONDENT-APPELLANT**

Vs.

Morawakayalage Babiya,
Nikahetiyakanda, Veyangoda.

**PLAINTIFF-RESPONDENT-
RESPONDENT**

1. Napayalage Gnanaratne
2. Napayalage Subatheris both of
Nikahetiyakanda, Veyangoda. **(Now
Deceased)**

2a. Godayalage Maglin of
Nikahetiyakanda, Veyangoda.

5. Priyangani Geethika

6. Priyani Chandrika

All of Nikahetiyakanda, Veyangoda.

**DEFENDANT-RESPONDENT-
RESPONDENTS**

AND NOW BETWEEN

3a. Wimal Ananda of No. 98,
Nikahetiyakanda, Veyangoda.

4. Wimal Ananda of No. 98,
Nikahetiyakanda, Veyangoda.

**SUBSTITUTED 3a DEFENDANT-
APPELLANT 4th DEFENDANT-
RESPONDENT-APPELLANT**

Vs.

Morawakayalage Babiya,
Nikahetiyakanda, Veyangoda.

(Now Deceased)

PLAINTIFF-RESPONDENT-
RESPONDENT

Napayalage Amarasiri,
Nikahetiyakanda, Veyangoda.

SUBSTITUTED PLAINTIFF-
RESPONDENT-RESPONDENT

1. Napayalage Gnanaratne
2. Napayalage Subatheris both of
Nikahetiyakanda, Veyangoda. (Now
Deceased)
- 2a. Godayalage Maglin of
Nikahetiyakanda, Veyangoda.
5. Priyangani Geethika
6. Priyani Chandrika all of
Nikahetiyakanda, Veyangoda.

DEFENDANT-RESPONDENT-
RESPONDENTS

Before

: P. Padman Surasena, C.J.

: Achala Wengappuli, J.

: Sampath B. Abayakoon, J.

Counsel : S. A. D. S. Suraweera with K. A. T. Fernando
instructed by K. I. Perera for the 3a Substituted
Defendant-Appellant 4th Defendant-Respondent-
Appellant.
: S. N. Vijith Singh with K. Jackson instructed by
Mr. Balitha for the Substituted Plaintiff-
Respondent -Respondent.

Argued on : 18-02-2026

Written Submissions : 26-08-2016 (By the Plaintiff-Respondent-
Respondent)

Decided on : 15-07-2026

Sampath B. Abayakoon, J.

The substituted 3a defendant-appellant who was also the 4th defendant in the District Court action (hereinafter referred to as the 3rd defendant) preferred this appeal on being aggrieved of the judgment dated 21-01-2015 pronounced by the Provincial High Court of the Western Province holden in Gampaha while exercising its civil appellate jurisdiction.

From the impugned judgment, the High Court affirmed the judgment dated 08-10-2009 pronounced by the learned Additional District Judge of Gampaha, while dismissing the appeal.

When this matter was considered before this Court on 24-03-2016 for the purpose of granting of leave to appeal, leave was granted on the question of law as set out in sub-paragraph (ii) of paragraph 17 of the petition dated 03-03-2015.

The said question of law reads as follows,

- ii. Did the learned Judges of the Provincial High Court err in law as well as in fact in their assessment of evidence to arrive at the decision as to the identity of the corpus specially at a time when there was an admission by the plaintiff to the effect that the two blocks of lands in issue were declared to be part of the 3rd defendant's land in the previous action and hence is the said judgment bad in law?

At the hearing of this appeal, this Court heard the submissions of the learned Counsel who represented the 3rd defendant and also the submissions of the learned Counsel who represented the substituted plaintiff-respondent. The Court also had the benefit of considering the written submissions tendered in determining this appeal.

Facts in Brief

The plaintiff-respondent-respondent (hereinafter referred to as the plaintiff) instituted proceedings before the District Court of Gampaha under the provisions of the partition law seeking to partition the land morefully described in the schedule of the plaint dated 16-12-1992.

In her plaint, she has named two defendants and has set out title of herself and the said defendants while seeking to keep an undivided 3/12 share unallocated on the basis that she is unable to find the rights of the undivided right holders of the said share. The 3rd to 6th defendants have been subsequently named as defendants on the basis of the 3rd defendant's claim made before the surveyor when he, as the Commissioner appointed for the purposes of this action, surveyed the land.

The 3rd defendant has claimed that lot No. B and C of the preliminary plan No. 395 dated 06-06-1994 should not be a part of the corpus to be partitioned as the said two lots fall within the land owned by him. It appears that although it has been only the 3rd defendant who has claimed exclusion of the said lots, the 4th to 6th defendants, who are the children of the 3rd defendant, have also been made parties to the action.

There had been no dispute as to the corpus to be partitioned which has been depicted as lot A, B, C in the above-mentioned plan marked as X during the trial and also the devolution of title between the plaintiff and the 1st and 2nd defendants.

Apart from other added defendants, only the 3rd defendant has filed a statement of claim on the earlier mentioned basis that lot No. B and C should be excluded. He has claimed that the said lots are part and parcel of the land morefully described in the 2nd schedule of his statement of claim. He has also claimed that there is no road access depicted as lot C in the preliminary plan. It has been his position that the action filed by the plaintiff claiming road access depicted as lot C was dismissed in the previous District Court of Gampaha Case No. 29471/1, which was between him and the plaintiff, and therefore, that should stand *res judicata* between the parties.

The case has proceeded to trial without any admissions. The plaintiff has settled 4 points of contest as to the corpus to be partitioned as well as her title. The 3rd defendant has settled points of contest No. 5 to 10. Although the plaintiff has raised a matter of *res judicata* in the statement of claim, it needs to be emphasized that no point of contest has been raised on such a basis.

It appears that although the 3rd defendant has also taken out a commission to show his land where he claims exclusion, the said plan has not been marked in evidence and no witness has been called to prove the said plan.

At the trial, the plaintiff has given evidence and has closed her case marking the preliminary plan as X and its report as X1, and also her title deeds marked P1 to P4. When it was the turn of the defendants to present their case, the 3rd defendant had given evidence and had marked his title deeds as 3V1 and 3V2. It has been his position that lots B and C of the preliminary plan are held and possessed by him and it is part and parcel of his land in accordance with the deeds marked 3V1 and 3V2. On the said basis, he has sought the exclusion of the mentioned two lots from the corpus.

Having considered the evidence placed before the trial Court, it is very much apparent that the only question before the Court that needed a considered

answer was whether lot B and C of the preliminary plan should be excluded as claimed by the 3rd defendant, which has been the real contest between the contesting parties.

In his judgment, the learned Additional District Judge has considered the said contest in order to determine whether the said two lots should be excluded from the land sought to be partitioned. Although the commission taken out by the 3rd defendant has not been put in evidence, the learned Additional District Judge appears to have considered the said plan No. 6122 as well for the same reason. Accordingly, it has been determined that there was no evidence placed before the Court to exclude the said lots from the land sought to be partitioned.

It has also been determined that the defendant failed to establish any prescriptive rights to the said lots. Having determined as such, the learned Additional District Judge has determined that the land sought to be partitioned should be lot A, B, and C of the preliminary plan marked X. After considering the title pleaded by the parties to the said land which was an uncontested matter between the parties who are entitled to undivided rights, the learned Additional District Judge has pronounced his judgment allowing the partitioning of the land while answering the points of contest accordingly.

At the hearing of the appeal preferred to the High Court, the learned Judges of the High Court too held the same view and dismissed the appeal preferred by the 3rd defendant, affirming the judgment of the learned Additional District Judge.

Consideration of the Question of Law

I find that the question of law under which leave to appeal was granted refers to a previous action between the parties on the basis that in the said action, the two blocks of land in dispute were declared as part of the land belonging to the 3rd defendant.

However, I find that such a position was never a point of contest that needed determination before the District Court, nor an admission by the plaintiff in his evidence. Apart from asking questions when the plaintiff was under cross-

examination as to the case number of the previous case and the fact that it was dismissed, no such position has been taken by the 3rd defendant. It has been revealed that the said action was in relation to a dispute over a right of access and nothing else. The defendant has not produced the judgment of the said action to establish the reasons for the dismissal of the action or any document to show that there was a specific determination as to the disputed lots of land.

It is well settled law that issues should not necessarily be limited to the pleadings. However, when the admissions and issues are settled, the pleadings recede to the background and the matter before the Court has to be decided based on the admissions and issues.

It was decided in the case of **Cellate International Company Vs. Turner Steiner East Asia Ltd. (S. C. Appeal No. 17/98, SC minute dated 21-06-2001, BASL Newsletter October 2001 page 05)** that although in an answer, there is a denial of a particular matter pleaded in plaint, unless that matter is put in issue at the trial, such denial is deemed to have been waived.

In the case of **Hanaffi Vs. Nallamma (1998) 1 SLR 73**, it was held that;

“Once issues are framed the case which the court has to hear and determine become crystallised in the issues and the pleadings recede to the background.”

It was held in the case of **Dharmasiri Vs. Wickrematunga (2002) 2 SLR 218**;

“It is well settled law that once issues are framed and accepted by Court pleadings recede to the background.”

Hence, it is my considered view that facts relating to the question of law under which leave to appeal has been allowed was never a point of contest before the trial Court or the High Court, and hence, there was no necessity for the learned Additional District Judge as well as the High Court to consider such a position as relevant.

It also needs to be reminded that this question of law refers to questions of fact and such questions of fact cannot be taken up for the first time in appeal.

Interestingly, this is a position taken up for the first time before the Supreme Court, leave alone the Civil Appellate High Court.

In the case of **Candappa nee Bastian Vs. Ponnambalampillai (1993) 1 SLR 184**, it was held;

“A party cannot be permitted to present in appeal a case different from that presented in trial court where matters of fact are involved which were not at issue at the trial such case not being one which raises a pure question of law”

It was held in the case of **Leechmen and Company Ltd. Vs. Rangalla Consolidated Ltd. (1991) 2 Sri L.R. 373**;

“Where the point depends upon a question of fact which is disputed and should be determined on evidence, then it cannot be taken up for the first time in appeal unless the facts necessary for the determination appear in the evidence and are not in dispute at all. If the court in any case is itself satisfied it has no jurisdiction to entertain a matter it is its duty to give effect to its view taking, if necessary, the initiative upon itself.”

For the reasons considered as above, I find no basis for the question of law under which this appeal was considered.

However, in order to dispense justice towards the parties, I will now proceed to consider whether the learned Additional District Judge or the learned Judges of the High Court have misdirected themselves as to the evidence placed before the trial Court when it was determined that the 3rd defendant had failed to establish the claimed exclusion.

In his judgment, the learned Additional District Judge has considered the boundaries given in the title deeds of the plaintiff and the preliminary plan. The learned Additional District Judge has correctly determined that apart from the Northern boundary which is a crown land, the other 3 boundaries have been described in title deeds in relation to land lots, whereas in the plan marked X, the said boundaries have been shown in relation to the persons who are claiming rights to the said lands.

The learned Additional District Judge has considered the fact that although the schedule of the plaint refers to a land of 1 acre 2 roods and 4 perches as the land sought to be partitioned, the actual land extent mentioned in the preliminary plan marked X was a land of 1 acre and 15 perches. He has proceeded to accept the evidence of the plaintiff that as to the discrepancy, which was an extent less than the land sought to be partitioned, that the adjoining land owners have encroached upon the land and she is now seeking to partition what is left out of the land. It is very much apparent since the plaintiff has pleaded title to the land sought to be partitioned based on very old deeds, such a reduction in extent can take place over the passage of time.

It is clear from the evidence placed before the trial Court, though the 3rd defendant has claimed that lot B and C should be part and parcel of his land called Ambungahalanda (අම්බුන්ගහලන්ද), in his statement of claim, he has given the boundaries to his land in the 2nd schedule, which refers to a Village Council Road as his Northern boundary. That means, lot B and C claimed by him as part and parcel of his land should be towards the South of the said Village Council Road. However, it is clear from the plan marked X that there was no Village Council Road bordering the Southern boundary of the land sought to be partitioned, which goes on to establish that the mentioned Village Council Road should be more towards the South of the Southern boundary shown in the preliminary plan.

Moreover, if a party to a partition action is seeking an exclusion of a portion of the land sought to be partitioned on the basis that the said portion belongs to a separate land owned by him, it is the duty of that party to establish that fact to the satisfaction of the Court. The only way to do that would be to obtain a commission through Court to survey his land as claimed by him and get that plan superimposed on a copy of the plan which shows the land sought to be partitioned, and identify the land that should be excluded. Although it appears that the 3rd defendant has prepared a plan through the Court to show his land, for some reason, he has not placed that as evidence before the Court. It is my view that the only presumption that can be reached is that had he

produced the plan prepared by him as evidence, it would not have supported his claim that lot B and C of the preliminary plan should be excluded.

I am of the view that the 3rd defendant has clearly failed to establish the claimed exclusion of lot B and C from the land sought to be partitioned. I find that the learned Additional District Judge has well considered these facts, which need no disturbance from this Court.

Although the 3rd defendant has claimed prescription, no evidence has been placed before the trial Court to establish any prescriptive rights over the said lots.

For the reasons as considered above, I find no reasons to interfere with the judgment of the learned Additional District Judge of Gampaha and also that of the appellate judgment of the High Court.

Accordingly, I answer the question of law under which leave to appeal was granted in the negative.

The appeal is dismissed for want of any merit, and the judgment of the High Court is affirmed.

There will be no costs of this appeal.

Judge of the Supreme Court

P. Padman Surasena, C.J.

I agree.

Chief Justice

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court