

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

In the matter of an appeal under section 754
of the Civil Procedure Code.

1. Mohottige Nomis Perera (Deceased)

1(a) Henarath Mohottige Albert Perera
Biyagama, Malwana and another.

Court of Appeal Case No. DCF /CA/710/99/ (F)

DCF /CA/711/99/ (F)

DCF /CA/712/99/ (F)

D.C. Gampaha case No. 19077/P

- PLAINTIFFS

Vs.

1. Kariyawasam Gamage Piyasena
Biyagama, Malwana and 21 others,

DEFENDANTS

AND BETWEEN

5(a). Kumarapeli Arachchige Wilson
(Deceased)
Hena Ihathhta, Biyagama,
Malwana.

5(b).Kumarapeli Arachchige Don
Piyadasa No.545, Henihaththa,
Biyagama

18. Narangoda Liyanage Dharmasiri
Perera (Deceased)
Hena Ihathhta, Biyagama,
Malwana.

18(a) Narangoda Liyanage Don Upul
Priyantha Perera
No.546/2, Henihaththa, Biyagama

SUBSTITUTED 5B & 18A

DEFENDANT APPELANTS

Vs.

1. Mohottige Nomis Perera (Deceased)

1(a) Henarath Mohottige Albert
Perera Hena Ihathhta, Biyagama,
Malwana.

2. Kumarapeli Arachchige Luwisa Nona
(Deceased)

2(a) Henarath Mohottige Albert
Perera Hena Ihathhta, Biyagama,
Malwana.

PLAINTIFF RESPONDENTS

1. Kariyawasam Gamage Piyasena
Hena Ihathhta, Biyagama,
Malwana.

2. Kumarapeli Arachchige Luwisa
Nona (Deceased)

2(a) Henarath Mohottige Albert
Perera Hena Ihathhta, Biyagama,
Malwana.

3. Kumarapeli Arachchige Dona
Premalatha (Deceased)

3(a) Undikkunda Arachchige
Chandrasena

4. Undithunda Arachchige Arnolis
Perera

6. Kumarapeli Arachchige Deeman
(Deceased)

6(a) Kumarapeli Arachchige
Gunawathie

7. Kumarapeli Arachchige Ruban
(Deceased)

6(a) Kumarapeli Arachchige Don Nimal
Gunaratne

8. Kumarapeli Arachchige John
(Deceased)

8(a) Kumarapeli Arachchige Gamini,

9. Kumarapeli Arachchige
Somapala,

10. Kumarapeli Arachchige
Leelawathie,

11. Edirisinghe Arachchige Luwis,

12. E.A Carolis, (Deceased)

12(a) M.P Jane Nona,

13. E.A Lenoris, (Deceased)

- 13(a) A.A Gunasena,
14. E.A Simon,
15. E.A Podinona, (Deceased)
15(a) Kumarapeli Arachchige
Pemadasa,
16. E.A Babanona, (Deceased)
16(a) M.M.A.D Tilakawathie,
17. E.A Sanohamy, (Deceased)
17(a) Juliot Francis,
19. Akmeemana Liyanage
Cathrinahamy, (Deceased)
19(a) H.A Anthonious Perera,
20. Undithunda Arachchige Jacolis,
21. Pannipitiyage Dona Babynona,
All of Hena Ihaththa, Biyagama,
Malwana.
22. Hon. Attorney General Attorney
General's Department, Colombo
12.

DEFENDANT RESPONDENTS

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Ranjan Suwadarathna PC with I. Hendawitharana for the Substituted 5B and 18A Defendant Appellants in DCF/CA/710/99F.

Bimal Rajapaksha with Amrit Rajapaksha and Jason Dias for the 1A and 21 Defendant Appellants in DCF/ CA/711/99F

M.U.M. Ali Sabry PC with Shehan Alwis for the 10th and 13Ath Defendant-Appellant in DCF/ CA/712/99F

Gamini Premahilake with S. Panchadsara for the 03rd and 4A Respondents

M. Hassan Hameed for the 05th Respondent

W.D. Weeraratne for the 1A and 2A Plaintiff – Respondents

B. Manawadu for the 2A – 2E Defendant Respondents

Written Submissions: By the Substituted 5B and 18A Defendant-Appellant DCF/ CA/710/99F on 03/05/2019 and 22.07.2020
By the 1A and 21 Defendant Appellants in DCF/ CA/711/99F on
By the 10th and 13Ath Defendant Appellants in DCF/ CA/712/99F on
By the 03rd and 4A Defendant Respondent on 11.09.2019 and 22.07.2020
By the 05th Defendant Respondent
By the 1A and 2A Plaintiff – Respondent on 25.09.2019
By the 2A – 2E Defendant Respondents on 30.04.2015

Argued on: 08/05/2019, 22-02-2021 and 08.03.2021

Judgment on: 19-01-2022

N. Bandula Karunarathna J.

This appeal is preferred by the defendant-appellants (hereinafter referred to as the appellants) seeking to set aside the judgement dated 13.08.1999 by the learned Additional District Judge of Gampaha.

There are 3 appeals filed by the defendant-appellants against the said judgement. They are as follows;

1. 5A and 18A defendant-appellants preferred appeal DCF/ CA/710/99F.
2. 1st and 21st defendant-appellants preferred appeal DCF/ CA/711/99F.
3. 10th and 13A defendant-appellants preferred appeal DCF/ CA/712/99F.

The plaintiff-respondent instituted this action on 07.12.1976 to partition the land called 'Millagahawatta' morefully described in the schedule to the plaint, which is at page number 109 and the pedigree is at page number 115 of the appeal briefs. There were 21 defendants. The extent of the land according to the plaintiff is 12 bushals. It is nearly 6 Acres.

The preliminary survey was done by D.A.S. Yapa, Licensed Surveyor, who made the plan and the report bearing number 546 dated 12.06.1997. The said plan was marked as X and the report as X1. The extent was 5 Acres 1 Rood and 6 Perches.

The 3rd and 4th defendants moved for an alternative commission which it was marked as Y and prepared by K.G. Hubert Perera Licensed Surveyor who made the plan bearing no. 1089 dated 25.09.1978. It is on page number 570 of the appeal brief. According to the said plan, the total extent is 10 Acres 2 Roods and 35.4 Perches

At the trial, the plaintiff, 1st defendant, 3rd and 4th defendants, 21st, 21 (a) and 21 (d) defendants and K.G. Hubert Perera, Licensed Surveyor gave evidence.

Thereafter, the learned District Judge delivered the judgment on 13.08.1999.

When all 3 appeals were taken up for argument all parties agreed that one judgement can be pronounced. The plaintiff-respondent says that this case should not be sent for re-trial as it has already completed 42 years. As the case was filed in 1977, unfortunately, 45 years had lapsed by now.

In P. Victor Perera vs. Kusumsiri Tours Ltd 2- Srikantha Law Reports page 93, it was held that a fresh judgment may be replaced by the Appeal Court after the submissions and arguments of the parties find that the judgment should not stand.

The Supreme Court held in Sopinona vs. Pitipanaarachchi and two others 2010 (1) SLR 87 that a case of this nature should not be sent for retrial but the judgment can be substituted.

The learned counsel for the plaintiff-respondents submits that the Appeal Court can either allow the judgment to stand or to replace the judgment with a suitable decision.

Before the trial was started all parties agreed to exclude a triangular strip of land from and out of the subject matter. It was shown in plan Y, on page 570 of the appeal brief and plan X on page 564 of the appeal brief. The said triangular strip lies to the very north of the subject matter. The said admission is recorded on page 183 of the appeal brief vide proceedings dated 05.09.1986. The trial started on 28.11.1986 where points of the contest were raised by counsel and accepted by the learned trial Judge.

Son of the original plaintiff (1C & 2A) gave evidence and documents P1 to P12 were marked. Others who gave evidence were the 1st defendant, 2nd defendant, 4th defendant (husband of 3rd Defendant), 21st defendant and surveyor Hubert Perera. After the Judgement was delivered on 13.08.1999, the learned District Judge ordered to partition the land shown in plan Y or 3 V 2, seen on page 570 of the appeal brief.

Learned counsel for 1A and 21 defendant respondents argued that this judgment is impeachable and should be accordingly set aside as the *lis pendens* for a larger land was not registered. The 3rd and 4th defendant-respondents were instrumental in bringing up plan Y, but no serious attempts were made by them, to comply with section 19(2) of Partition Law.

The extent of land shown in plan X, was 5 Acres 1 Rood 6 Perches, whereas, the extent in plan Y, was 10 Acres 2 Roods 35.4 Perches. The commission issued to surveyor Perera and ordered him to survey 'Millagahawatta' of 12 Bushels. He has surveyed a land twice in extent. As *lis pendens* for a larger land was not registered, 1A and 21 defendant respondents argued that it is illegal to violate section 19(2) of Partition Law. It was further argued that the District Court lacked jurisdiction patently, and, importantly, even parties cannot give their consent.

Regarding this objection raised by 1A and 21 defendant-respondents, my learned predecessor decided on 16.11.2018 and overruled the preliminary objection saying that the judgement should not be set aside on the ground of non-registration of *lis pendens*. There was no appeal against the said order.

The 4th defendant-respondent claimed lot 8, in plan Y. Though he said that the 1st defendant evicted him in 1964, the 4th defendant failed to file an action against the 1st defendant. The learned counsel for the 1A and 21st defendant-respondent says that deeds of 21st defendant

relate to lots 5, 6 and 7 of plan Y and deeds 21 V 2 - 21 V 14 deal with a land called and known as 'Delgahalanda'. Therefore, lot 8 therein relate to 1/7 portion of 'Millagahawatta' and not the corpus in said plan X. The deed 1 V 1, is the corpus in plan X.

According to the evidence on page 329 of the appeal brief surveyor Perera who made plan Y, had surveyed a much bigger land. It is important to note that the boundaries in the schedule to the plaint are the same boundaries in plan Y. 1A and 21st defendant-respondents seek to partition the corpus, depicted in plan X and not what is shown in plan Y. Further, they request to exclude lots 3 to 8 from and out of plan Y to fall in line with said plan X.

The legal objection about the maintainability of the judgment of the District Court in view of the authorities especially about the preliminary plans prepared, violates the provisions contained in section 16 as well as section 18 (3) of the Partition Law No. 21 of 1977.

The learned counsel for 1A and 21st defendant-respondents argued that It is a well-established principle of law that when a preliminary plan is prepared in relation to a partition action, it is not possible in view of the aforementioned amended provisions to prepare any alternative preliminary plans and even if there is any error or mistake in such plan the only option available to the co-owners of a partition case, not to obtain several alternative plans from court commissioners appointed by the court and it is mandatory to obtain a commission to the Survey General in terms of the provisions contained in section 18 (3) of the Partition Law no. 21 of 1977.

This provision applies only to cause them to be verified and to be certified as correct or, where such field notes and plans are incorrect, cause fresh field notes and a fresh plan to be made. If so, the new commission should be issued to the Surveyor-General

The 3rd and 4th defendant-respondents obtained an alternative commission as they were not satisfied with the preliminary plan number 546 dated 12.06.1977 and then prepared plan number 1089 dated 25.9.1978 made by K.G. Hubert Perera, Licensed Surveyor, which is in the extent of 10 Acres 2 Roods and 35.04 Perches. It is almost twice the extent of the preliminary plan number 546 made by D.A.F. Yapa, Licensed Surveyor which is in the extent of 5 Acres 1 Rood and 6 Perches.

The learned trial Judge by way of his judgment dated 13.08.1999 accepted the subsequently prepared plan number 1089 dated 25.9.1978 depicting an extent of 10 Acres 2 Roods and 35.04 Perches as the corpus and went into entering judgment based on the said plan which is prepared by a private surveyor though the said plan has been prepared in consequence to a commission issued by the court without entering judgment in terms of the original plan number 546 dated 12.6.1977.

It is important to note that the present partition action was filed on 07.12.1976. It is very clear that Act No. 21 of 1977 came into effect on 29.11.1977. Therefore, the said amendment does not apply to this partition case as it was filed before the amendment. I will compare the difference between the amended partition Act No. 21 of 1977 and Act No. 16 of 1951 later in the judgement.

It was stated in the appeal number CA 711/99 at paragraph 2 of the petition of appeal by the 1st and 21st defendant-appellants that the land sought to be partitioned is correctly depicted in plan marked as "X" and in any event, lot 8 in plan number 1089 or 3/D/2 is a separate land called 1/7th portion of 'Millagahawatte' and lots 5, 6 and 7 were also another land called 'Delgaha-Landa'. In paragraph 7 they further stated that according to the judgment no shares were allotted to the 1st defendant and he was only entitled to compensation of the rubber plantation. The 21st defendant was also not given anything by the learned trial Judge. They stated that the judgment is contrary to law and against the weight of the evidence led in the case. Not only that, it was further stated that the conclusion of the Judge is also erroneous.

The learned District Judge has drawn his attention to the evidence led by the 01st defendant-appellant and that the deed produced in the District Court did not apply to any part of what is depicted in the plan 3/D/2 or the plan number 1089. The 1st and 21st defendant-appellants' version is that the learned District Judge had erred in including lots 5, 6, 7 and 8 of plan 1089 or document marked 3/D/2 in the corpus to be partitioned. They have not asked for a re-trial and have prayed mainly to set aside the judgment. Therefore, they cannot find any relief from this Court, in this appeal.

The 1st and 21st defendant-appellants have marked and produced 6 deeds. They are 1/D/2, 1/D/3, 1/D/4, 1/D/5, 1/D/6 and 1/D/7. Out of these 6 deeds, the 1st defendant does not know what is the land given to him by the donor, the earlier owner Abraham. Even the donor does not state about the land and does not specify the allotment.

The evidence in page 645 of the appeal brief is as follows;

Evidence in chief (Proceedings on 18.01.1989)

ප්‍ර : ඒබ්‍රහම් දුන්න ඔප්පුවේ තිබෙන්නේ 1/7 කොටසද?

උ : ඒක මට හරියට කියන්න බැහැ.

අධිකරණයට ;

ප්‍ර : ඒබ්‍රහම් දෙන්නේ ඒ ඉඩමේ කොච්චරද දන්නේ නැහැ නේද?

උ : ඒක හරියට කියන්න බැහැ.

In deed number 10403 (which is marked as 1/වි/1) the boundaries of the schedule of deeds are equivalent to the boundaries mentioned in the plaint. It is also only a true copy of the deed attested on 26.03.1958 by the Notary Public. It is not a copy of the registered deed. The original signature cannot be seen there.

Further, It states that in the same deed;

“මට ඇති සියළු අයිතිවාසිකම්ද මා සාදන ලද ගෙය සහ අනෙකුත් ගොඩනැගිලි යනුවෙනි.”

Similarly, the 3rd and the 4th defendants are claiming their rights over the document marked as පැ 12 (P/ 12), deed number 9402 attested on 13.12.1956. In the said deed, the donor has given 23/40 shares to the 3rd and 4th defendants. The properties were received by the 3rd and the 4th defendants and the relevant issue was also answered accordingly by the trial Judge. The 1st defendant in his evidence in chief stated that 5 deeds were already marked as 1/වි/5, 1/වි/4, 1/වි/3, 1/වි/2, and 1/වි/1. Out of these deeds, the deed of gift 10403 had been attested

on 26.03.1958. But only a true copy was submitted after receiving from the Notary Public. In 1/වි/1 the boundaries are equivalent to the schedule of the plaint.

In page 648 of the appeal brief, the 1st defendant answered as follows;

(Proceedings dated 18.01.1989)

ප්‍ර : ඒ අන්දමට සඳහන් කර ඒබ්‍රහම්, 04වන වින්තිකරුට දී තිබෙන බව දන්නවාද?

උ : 23/40 පංගුවක් දීලා තියෙන්නේ.

ප්‍ර : ඒක අරනෝලිස්ට පැවරුන බවත් පිළිගන්නවාද?

උ : පිළිගන්නවා. ඒ මගේ මස්සිනා.

The 1st defendant-appellant in appeal case number CA 711/99 admitted the rights of the 4th defendant. This was submitted in the document marked පැ 12 (P/ 12) by plaintiff in this case. The date of the deed is 13.12.1956 (පැ 2) registered in the Land Registry of Colombo on the vol-folio C/238/262. As per this deed, the rights of the donor and the particular land has been transferred to the 3rd and 4th defendants in this case.

Page 245 of the appeal brief is as follows; (Proceedings dated 02.06.1989)

ප්‍ර : තමන් කියනවා නේද ලොට් අංක 8 වශයෙන් දක්වා තිබෙන ඉඩම් කොටස අංක 1089 දරණ සැලැස්මේ මිලිලඟහවත්තේ කොටසක් නොවේ කියලා?

උ : දෙවන මැනීමට අයිති නැහැ. පස්සෙ මැනපු ඉඩමේ තිබෙනවා. නමුත් අංක 11628 ඔප්පුවට අයිති නැහැ මේ ඉඩම.

ප්‍ර : ඉස්සෙල්ල මැන්න අංක 546 සැලැස්ම x වශයෙන් ලකුණු කරපු සැලැස්ම නේද?

උ : ඔව්.

ප්‍ර : ඊට පස්සෙ දෙවෙනි සැලැස්ම මැන්නා නේද?

උ : ඔව්.

ප්‍ර : අංක 8 නේද පිට කරන්න කියන්නේ?

උ : ඔව්.

ප්‍ර : ජිමෝනාගේ 1 වි 1 ඔප්පුවෙන් අයිති උනා නේද?

උ : ඔව්.

ප්‍ර : තමන්ගේ හිමිකම් පුකාශයේ විස්තර කර තිබෙනවා නේද ඒ ඉඩම?

උ : ඔව්.

(අංක 1089 දරණ සැලැස්ම පෙන්වයි)

ප්‍ර : තමන් කියන්නේ මෙහි අංක 8 පිට කරන්න කියලාද?

උ : ඔව්.

ප්‍ර : අංක 8 කොටස, තමන් කියන්නේ මේ බෙදීමට යෝජිත ඉඩමෙන් කොටසක් නොවෙයි කියලා නේද?

උ :ඔව්.

ප්‍ර :නමුත් තමන් පිළිගන්නවා නේද ඒක මිලේලගභවත්ත ඉඩමේ කොටසක් කියලා?

උ :මිලේලගභවත්ත කියල තමයි ඒකටත් කියන්නේ.

In page 256 of the appeal brief the 1st defendant admitted the donation of Abraham to the 3rd and 04th defendants.

In page 259 of the appeal brief the 1st defendant says as follows;

ප්‍ර :අද කවුරුත් වී බ්‍රසල් 9ට එකග වෙනවාද?

උ :නැහැ.

ප්‍ර :ඊට වඩා දෙගුණයකටත් වැඩි ප්‍රමාණයක්

උ :ඔව්.

ප්‍ර :ඒ අනුව පැමිණිලිකරු මැන්නා හරි නැහැ කියා තමා පිළිගන්නවාද?

උ :ඔව්.

In page 261 of the appeal brief the 1st defendant says as follows;

ප්‍ර :පැමිණිලිකරු සාක්ෂි දී තිබෙනවා පෙලපත අනුව?

උ :ඔව්.

ප්‍ර :ඒ පෙලපත අනුව තමයි නේද ඒ ඉඩමේ අයිතිවාසිකම්ද පවතින්නේ?

උ :ඔව්.

ප්‍ර :තමන් එයත් පිළිගන්නවා නේද?

උ :ඔව්.

නැවත ප්‍රශ්න නොමැති බව සඳහන් කරයි.

In page 666 and 667 of the appeal brief the 1st defendant says as follows; (the date of cross examination is 02.06.1990.)

ප්‍ර :මේ ඉඩමේ ඒබ්‍රහම්ට අයිති ඉඩම තියෙන්නේ පළමුවෙන් තිබුණු වී බ්‍රසල් 9 නෙහොත් 12 තිබුණු ඉඩමට. ඒ ඉඩම දැන් ඒබ්‍රහම්ට පවරා තිබෙන බව දන්නවාද?

උ :පවරා තිබෙනවා. ඔප්පුවකින් පවරා තිබෙන බව දන්නවා.

ප්‍ර :ඒබ්‍රහම් තමයි නේද එය පවරා තිබෙන්නේ?

උ :ඔව්.

ප්‍ර :3 වන විත්තිකරුට 4 වන විත්තිකරුට එය පවරා තිබෙනවා නේද?

උ :ඔව්.

ප්‍ර :3, 4 විත්තිකරුවන්ට ඉඩම අයිතිය කියා පිළිගන්නවාද ඒ අනුව.

උ :ඔව්.

Even a similar copy of a deed has been submitted by the 2nd defendant to the District Court, where he does not get real ownership derived from the donor Abraham, to the 01st defendant.

The 10th and 11 A defendant-appellants also sought to exclude lots 3-8 in plan "3 V 2" from the corpus on the basis that the said lots are separate land called 'Delgahalanda' and the said lands were owned and possessed by the 10th and 11 A defendant-appellants and their predecessors as separate lands. In contrast, it was the position of the contesting respondents that the corpus has been correctly depicted in plan "3 V 2". The main question during the trial was whether the corpus consists of lots 1 and 2 in plan X or whether lots 1-8 in plan "3V2".

The learned trial Judge pronounced his judgment on the 13.08.1999 *inter alia* holding that the corpus consists of lots 1-8 in plan "3 V 2" and further held that none of the parties had prescribed to any of the Lots in the corpus. Being aggrieved by the said judgment the 10th and 13th defendant-appellants, 5th and 18th defendant-appellants and 1st and 21st defendant-appellants appealed to this Court to set aside and vacate or vary the said judgment of the learned District Judge of Gampaha dated 13.08.1999 and the 5th and 18th defendant-appellants also sought for a retrial or trial de novo.

It was argued by the 3 A and 4 A defendant-respondent that D.A.F Yapa, Licensed Surveyor to whom the commission was issued had violated the terms under which the commission is issued. Therefore, he cannot be recommissioned.

In Uberis Vs. Jayewardene 62 NLR 17, it was held that in a partition action when the commission is issued to the commissioner to carry out the preliminary survey, the surveyor has to adhere strictly to the terms and to locate and survey the land he is commissioned to survey. It is not open to him even with the consent of parties to survey a portion of the land and submit the plan and report of the survey. It was further held he is unable to locate the land he is commissioned to survey or he should report to the court and ask for further instructions.

In the present case surveyor Yapa was commissioned to survey land with clear boundaries which existed for over 100 years and so declared in over twelve deeds which were submitted with the plaint.

The boundaries are as follows;

- North - Wela
- South - Hendrick Police officer's land
- East - Isan Francisco's land
- West - Proctor Livera's wall

It is evident that in deed number 13007 dated 17.11.1906 attested by K.D.R.C. Samaranayake, Notary Public and deed number 9402 dated 13.12.1956 attested by D.A.S. Amaratunga, Notary Public give the same boundaries. According to a journal entry dated 10.02.1977, the lis-pendens was registered under C 4/324.

It was decided in Don Sadirishamy vs Heenhamy 68 NLR 17, a lis-pendens is duly registered when it is registered in the folio with the continuation of the oldest deed relating to the land is registered.

In the present case, 12 deeds were registered in the same folio C 4/325 including deed number 101 the title deed of the defendant-appellant in CA 711/99 F, who claims all the buildings in the main land mentioned in plan X.

Yapa, Licensed Surveyor in preparing the preliminary plan which was marked and produced as X has violated the terms of the commission and it cannot be recommissioned to him. Therefore, another surveyor has to be commissioned. Therefore, the question as to whether he should be commissioned does not arise because he has violated the terms of the commission.

Since the introduction of partition law in this country, when a defendant says that the land described in the plaint is only a portion of a larger land or *vice versa*, the Court has authority to re-issue a commission to another surveyor. *Curcus curiae* were always the alternative plan which is commissioned to be made by another surveyor. Even Act No 16 of 1951 section 23(1) states as follows;

“23(1) Where a Defendant in a Partition action avers that the land described in the Plaint is only a portion of a larger land which should have been made the subject matter of the action or that only portion of the land so described should have been made the subject matter of the action or that only a portion of land so described should have been such subject matter the court may on such terms as to the deposit or payment of costs of the survey as the court order, issue a commission to a surveyor directing him to survey the extent of land referred to by that defendant.”

In this section, it is mentioned that another surveyor has to be commissioned.

In Partition Act No 21 of 1977 Section 16 (2) states,

"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 a smaller land than that pointed out by the Plaintiff where such party claims that such survey is necessary for the adjudication of the action"

In the Sinhalese version 16(2) of Partition Law No 21 of 1977.

“නඩුව විනිශ්චය කිරීම සඳහා පැමිණිලිකරු විසින් පෙන්වා දී ඇති ඉඩමට වඩා විශාල ඉඩමක් හෝ කුඩා ඉඩමක් හෝ මැනීම අවශ්‍ය බව නඩුවේ යම් පාර්ශවකරුවකු විසින් කියා සිටිනු ලැබීමේ අවස්ථාවක මැනීමේ ගාස්තු පිළිබඳ යම් නියමයන් පිට එම මැනීම සඳහා මිණින්දෝරුවරයෙකුට බලය දෙන අධිකාරි පත්‍රයක් අධිකරණය විසින් ඒම පාර්ශවකරුගේ උවමනාව පිට නිකුත්කළ හැකිය”

Sinhala version says a surveyor and the English version says the surveyor. It is pertinent to state here in case number 19007/P of the District Court of Gampaha, the lis-pendans was registered on 10.02.1977 whereas the Partition Act No 21 of 1977 was certified on 29.11.1977.

Therefore, in this case, this section would not apply and the Sinhala version prevails over the English version. The commission in terms of section 19 of the Partition Act in case No.19007/P of the District Court of Gampaha should have been issued to two different surveyors and not to the same surveyor.

The preliminary plan number 546 on page 320 of the appeal briefs is marked as X and the report as X 1. In the preliminary plan, only lots 1 and 2 of the corpus is depicted. The boundaries given in the schedule to the plaint and the 13 deeds are not properly demarcated. The question of the identity of the land has been considered by the learned trial Judge.

In identifying the land, the inconsistency in extent is not material when the land is identified by its boundaries. The learned trial judge observes that in a situation where there have been no earlier survey plans in respect of the land to be partitioned, the land has to be identified by the boundaries. The learned trial Judge has pointed out that even in a land which has not been surveyed earlier, even if the original owner makes a mistake regarding the extents when shown in bushels, they will not make a mistake regarding the boundaries of the land which they have possessed continuously for a long period.

In Yapa Vs Dissanayake Sedara 1989 (1) SLR 361, it was held that inconsistency in extent will not affect the question of identity if the portion of the land conveyed is clearly described and can be precisely ascertained.

In Gabriel Perera vs Agnes Perera and others 48 CLW 82, it was held that "where in a deed the portion of land conveyed is clearly described and can be precisely ascertained, a mere inconsistency as to the extent thereof should be treated as a mere *falsa demonstratia* not affecting that which is already sufficiently conveyed".

Therefore, it is clear that if the land can be properly identified, the extent given in deeds is immaterial.

In preliminary plan "X" the Northern boundary and the Western boundary are correctly demarcated. The Eastern boundary and the Southern boundary are not given in accordance with deeds පැ 1 to පැ 12 and the schedule to the plaint. The Eastern boundary is given as Dharmasiri's land and not Isan Fransisco's land as given in Deeds පැ 1 to පැ 12.

Dharmasiri occupies lot 3 of plan number 3 V 2 and gives the boundary correctly. The Southern boundary instead of demarcating as Hendricks Police Officer's land in the preliminary plan X is shown as Piyasena's land. Piyasena is the 01st defendant-appellant-respondent in CA 711/99 who admits the boundaries of the 12 deeds marked and produced as පැ 1 to පැ 12 by the plaintiff. He marks 1 D 1 which gives the boundaries as given by the plaintiff.

Therefore, the two boundaries of the preliminary plan X do not tally with the boundaries given in පැ 1 to පැ 12 and the learned trial Judge has accepted the alternate Plan 3 V 2, plan number 1089 prepared by Hubert Perera licenced surveyor, at page 323 of the appeal brief. However, at the trial, the parties agreed to exclude the state land given in plan Y from the corpus, which is based on 3 V 2.

In light of the reasons aforesaid, having regard to the facts and legal principles involved in the present matter in question, this appeal has failed to hold any merit.

Considering the above there is no reason to interfere with the findings of the learned trial Judge. Accordingly, we affirm the Judgement dated 13.08.1999 by the learned Additional District Judge of Gampaha.

Appeal dismissed with cost.

Registrar is directed to send the original case record along with a copy of this judgement to the District Court of Gampaha.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal