

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

In the matter of an Appeal under section 754
of the Civil Procedure Code

**Court of Appeal No. CA/DCF/54/97
D.C. Kuliypitiya Case No. 6502/P**

1. Atapattu Mudiyansele Podiratne, of
Narammala Postal, Karappala.
2. Atapattu Mudiyansele
Dingirimahaththya, of
Narammala Postal, Karappala.
3. Atapattu Mudiyansele
Gunarathmenike, Narammala Postal,
Yakkawita.
4. Atapattu Mudiyansele Podimenike,
Narammala Postal, Panthanigoda.
5. Atapattu Mudiyansele Punchimenika,
Narammala Postal, Panthanigoda.

PLAINTIFFS

-Vs -

1. Atapattu Mudiyansele Podi Appuhami
of Narammala Postal, Yakkawita.
2. Senanayake Atapattu, Narammala
Postal, Yakkawita.
3. Upali Ratnayake Atapattu,
Narammala Postal, Yakkawita.
4. Kusumawathi Menike alias
Kusumawathie Manike Balasuriya of
No.22, Kesbewa Road, Boralessgamuwa.
5. Atapattu Mudiyansele Somawathie
Menike Balasuriya, of Nawagattegama
Postal, Nawagattegama.

6. Atapattu Mudiyansele Nandawathie
Atapattu, Narammala Postal, Yakkawita.
7. Balasuriya Mudiyansele
Gunathmenika of Narammala Postal,
Yakkawita.

DEFENDANTS
AND BETWEEN

1. Atapattu Mudiyansele Podi Appuhami
(Deceased)
of Narammala Postal, Yakkawita.
- 1A. Senanayake Atapattu, of Narammala
Postal, Yakkawita **(Deceased)**
"Nisasala", Kuliyaipitiya Road, Hettipola.
- 1B. Atapattu Mudiyansele Tharindu
Dasun Atapattu, "Nisasala", Kuliyaipitiya
Road, Hettipola.
- 1C. Upali Ratnayake Atapattu, Narammala
Postal, Yakkawita.
- 1D. Kusumawathi Menike alias
Kusumawathie Manike Balasooriya,
Lindagawa Gedera, Yakkawita,
Narammala.
- 1E. Atapattu Mudiyansele Somawathie
Menike Balasuriya,
C/o. R.H.M.U.P.K. Rajakaruna, No.14,
Airport Residence, Kimbulapitiya Road,
Katunayaka.
- 1F. Atapattu Mudiyansele Nandawathie
Atapattu alias Nanda Dissanayake, No.396,
Madugoda Road, Gelioya.
2. Senanayake Atapattu, of Narammala
Postal, Yakkawita. **(Deceased)**
"Nisasala", Kuliyaipitiya Road, Hettipola.

- 2A. Atapattu Mudiyanseelage Tharindu
Dasun Atapattu
"Nisasala", Kuliyaipitiya Road, Hettipola
3. Upali Ratnayake Atapattu,
Narammala Postal, Yakkawita.
4. Kusumawathi Menike alias
Kusumawathie Manike Balasuriya, of
No.22, Kesbewa Road, Boralesgarnuwa.
Presently at: Lindagawa Gedara,
Yakkawita, Narammala.
5. Atapattu Mudiyanseelage Somawathie
Menike Balasuriya, of
Nawagattegama Postal
Nawagattegama.
Presently at:
C/o. R.H.M.U.P.K.Rajakaruna, No.14,
Airport Residence, Kimbulapitiya Road,
Katunayake.
6. Attapattu Mudiyanseelage Nandawathie
Atapattu alias Nanda Dissanayake,
Narammala Postal, Yakkawita..
Presently at: No.396, Madugoda Road,
Gelioya, Kandy.
7. Balasuriya Mudiyanseelage
Gunathmenika, of Narammala Postal,
Yakkawita **(Deceased)**
Presently at:
"Nisasala", Kuliyaipitiya Road, Hettipola.
- 7A. Atapattu Mudiyanseelage Tharindu
Dasun Atapattu,
"Nisasala", Kuliyaipitiya Road, Hettipola.
- 7B. Upali Ratnayake Atapattu,
Narammala Postal, Yakkawita.
- 7C. Kusumawathi Menike alias
Kusumawathie Manike Balasuriya,

Lindagawa Gedara, Yakkawita,
Narammala.

7D. Atapattu Mudiyansele Somawathie
Menike Balasuriya,
C/o. R.H.M.U.P.K.Rajakaruna,
No.14, Airport Residence, Kimbulapitiya
Road, Katunayake.

7E. Atapattu Mudiyansele Nandawathie
Atapattu alias Nanda Dissanayake,
No. 396, Madugoda Road, Gelioya.

Vs.

1. Atapattu Mudiyansele Podiratne
of Narammala Postal, Karappala.

(Deceased)

1A. Ratnayake Mudiyansele
Karunawathie, Karalappala, Narammala.

1B. Athapattu Mudiyansele Chaminda
Kumara Athapattu, Karalappala,
Narammala.

1C. Athapattu Mudiyansele Chandima
Kumari Athapattu, Karalappala,
Narammala.

2. Atapattu Mudiyansele
Dingirimahaththaya, of
Narammala Postal, Karappala.

3. Atapattu Mudiyansele
Gunarathmenike Narammala Postal,
Yakkawita.

4. Athapattu Mudiyansele Podimenike,
Narammala Postal, Panthanigoda,

4A. Hanchapola Appuhamilage Daya
Sandaseeli Menike.
Narammala Postal, Panthanigoda,

5. Atapattu Mudiyansele Punchimenika,
Narammala Postal, Panthanigoda.

PLAINTIFFS-RESPONDENTS

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

&

R. Gurusinghe J.

Counsel: Ranjan Suwadarathna PC with Amali Tennakoon AAL for the 1st to 7th defendant -appellants.

M.C Jayaratne PC with M.D.J. Bandara AAL for the 1st, 2nd, 3rd, 4th and 5th plaintiff-respondents.

Written Submissions: By the 1st to 7th defendant -appellants on 01.07.2011 and 21.08.2020

By the 1st, 2nd, 3rd, 4th and 5th plaintiff-respondents on 30.09.2020

Argued on: 25.02.2021, 04.08.2021 and 03.11.2021

Judgment on: **30.03.2022.**

N. Bandula Karunarathna J.

This is an appeal preferred by the 1st to 7th defendant-appellants (hereinafter referred to as the appellants) against the judgement dated 27.02.1997 by the Learned District Judge of Kuliyaipitiya.

The plaintiff-respondents (hereinafter called and referred to as the Respondents) instituted this partition action on 04.11.1981 and the amended plaint was filed on 11.02.1993, against the 1st to 7th defendant-appellants under the provisions of Partition Act No.21 of 1977 seeking to enter a partition decree dividing the subject matter as per the pedigree set out in his amended plaint in favor of the plaintiff and the defendant.

The plaintiff took up the position in his Plaint, inter-alia that, the subject matter is called as “නාගහකොටුවගේන හෙවත් නාගහකොටුවවත්ත”, “භීටිනාවත්ත” and “සියඹලාගහමුලවත්ත”, as per paragraph 6 of the plaint. The original plaint was amended on 10.06.1987 adding another two defendants as per journal entry number 41 dated 31.07.1989.

The 1st - 6th defendants filed their statement of claim on 13.08.1990 and sought to dismiss the action of the plaintiff and moved to the 7th defendant, B.M. Gunarath Menike is added as a party and thereafter again on 11.02.1993, the plaintiff added 3 other defendants and confined the said partition action only in respect of the land called "SIYAMBALAGAHAMULA WATTA" in extent 5 Lahas of Kurakkan sawing area. Depicted as lots 1 & 2 in Plan No.717/කුලී/82 (marked as X) dated 05.05.1982 made by A.B.M. Weber, the Licensed Surveyor.

The 1st-7th defendant-appellants did not file an amended statement of claim after filing of the said 3rd amendment to the plaint. Upon those pleadings, the trial started on 06.06.1994 and no admissions were recorded and issue numbers 1 to 4 were recorded on behalf of the 1st to 4th plaintiffs, while issue numbers 5 to 17 were raised on behalf of the 1st to 7th defendants. The case was postponed to 27.07.1994 as to consider whether the *Lis pendens* has been correctly registered or not. As per journal entry number 57 of the case record which is available on page 52 of the appeal brief, the *Lis pendens* was duly registered and duly minuted on 12.10.1993. The matter was taken up for the trial and the judgement was delivered by the then learned District Judge of Kuliypitiya on 27.02.1997.

This appeal preferred against the said judgement

In the original plaint, the plaintiff-respondent described the original owner of the property in suit as one Ranhamy and after his death, his rights were devolved on his children namely, Kirimudiyanse and Kapuruhamy. Kirimudiyanse's rights were conveyed to the plaintiff-respondent by Deed No. 13405 dated 01.02.1971 and alleged that the rights of Kapuruhamy have been conveyed to the 1st defendant-appellant by a deed which the plaintiff respondents cannot be traced. The property which is described in the schedule to the plaint is described as 3 parcels of land and those 3 lands are described as Nagahakotuwe hena presently Watta which is in the extent of about 1 acre, Hitinawatte which is in the extent of about 2 lahas kurukkan sewing and land called Siyabalagahamula Watta in the extent of about 5 lahas kurukkan sewing. The plaintiff-respondent sought to partition 3 different lands by way of the original plaint.

The preliminary plan number 717/Kuli/82 was prepared by the surveyor A.B. M. Weber on 02.05.1982 depicting a land in an extent of 7 acres and 31 perch. Thereafter, the 2nd to 7th defendant-appellants intervened in the said partition action. The original plaint was amended and the amended plaint dated 10.6.1987 is on page 61 of the appeal brief. In terms of the said amended plaint, the plaintiff-respondent alleged that Kapuruhamy's rights were devolved on all the appellants but in the schedule, the undivided 5/10 share was given only to the 1st defendant-appellant.

On 11.02.1993, 12 years after the institution of the partition action the plaintiff-respondent filed the 2nd amended plaint and by the said amended plaint completely changed the original devolution of title which is set out in the original plaint as well as in the 2nd amended plaint. It was stated that by deed number 427 dated 12.03.1929 the said original owner Ranhamy conveyed his rights to his two children Kirimudiyanse and Kapuruhamy and pointed out that Kirimudiyanse by deed number 19671 dated 08.10.1941 attested by P.W.R. Pathirana Notary Public leased out to Kapuruhamy and another Appuhamy for 40 years. The lease period was expired on 08.10.1981.

Kirimudiyanse's rights were devolved on the plaintiff-respondent by deed number 313405 dated 01.02.1971 and Kapuruhamy's rights by deed number 5125 dated 28.04.1964. The defendants became entitled to the balance half share of the said property and by the said amended plaint

completely left out the original schedules given in the original plaint as well as the first amended plaint and confined the case to the preliminary plan number 717/Kuli/82. The 1st defendant-appellant filed his original statement of claim on 17.11.1982 and pointed out that by the preliminary plan number 717/Kuli/82, the 3 separate lands sought to partition by the plaintiff respondents has not been separately shown and on that basis moved for a dismissal of the partition action.

The 1st defendant-appellant filed an amended statement of claim on 19.09.1988 which is on page 68 of the Appeal Brief and stated clearly that preliminary plan number 717/Kuli/82 is not properly depicting the 3 lands described in the schedule to the plaint. It was also explained of various discrepancies about the identification of the 3 lands and pointed out by deed number 5125, only the high land of "Siyambalagahamula Watta kumbura" has been conveyed. Thereafter, stated that by deed number 5125, A.M.D.M. Atapattu, A.M.D.M. Senanayake Atapattu, A.M.D.M. Somaratne Atappattu, A.M.D.M. Nimal Ratnayake Atapattu and A.M.D.M. Gunarathmenike became entitled to undivided 1/10th of the high land of "Siyambalagahamula Watta".

After the death of Nimal Ratnayake Atapattu, his rights were devolved on his brothers and sisters, Dissanayake Atapattu, Sennayake Atapattu, Somarathne Atapattu, Kusumwathie Menike Balasuriya, Somawathie Menika Balassuriya and Nandawathie Menike Atapattu subject to the life interest of Balasuriya Mudiyansele Gunarathmenike. It was revealed that Nimal Ratnayake Atappattu was a Kandyan and therefore the rights were devolved in terms of the Kandyan Law.

The rights of Dissanayake Atapattu, Senanayake Atapattu and Somarathne Atapattu were conveyed to the 1st defendant-appellant by deed number 23849. It was further argued that the 1st defendant-appellant by deed number 26408 conveyed 1/8th share of "Siyabalagahamula Watta" to Senanayake Atappattu. It was revealed that A.M. Gunarathmenika conveyed her 1/10th share of Siyambalagahamula Watta to Upali Ratnayake Atapattu by deed number 15411 and the rights of Hitinawatte which is described as the 2nd land Kapuruhamy conveyed by deed number 5123 subject to his life interest to Nimal Ratnayake Atapattu and Dissanayake Atapattu. Thereafter, Dissanayake Atapattu, Senanayake Atappattu and Somaratne Atapattu conveyed their rights in Hitinawatte by deed number 23849 to the 1st defendant-appellant and by deed number 26408, he conveyed those rights subject to his life interest, to Senanayake Atapattu. The appellants pointed out that the *Lis pendens* of this case has not been properly registered and on that basis, the plaintiff-respondent cannot maintain this partition action regarding all 3 lands described in the schedule to the original plaint as well as the 1st amended plaint.

The appellants filed their amended statement of claim on 13.08.1990 which is on page 71 of the appeal brief and argued that the preliminary plan number 717/Kuli/82 has not properly depicted the 3 separate lands which are registered in separate folios and under those circumstances in any event the plaintiff-respondent cannot have and maintained this partition action for those 3 separate lands. The appellants by their amended statement of claim which is on page 71 of the appeal brief set out their undivided rights of Siyambalagahamula Watta (high land only) in paragraph 12 of the said plaint argued that by which the 1st defendant-appellant should get

24/70, 3rd defendant-appellant should get 8/70 and 4th to 6th defendant appellants should get 1/70 each of the said property.

In para 17 of the said amended statement of claim the undivided rights of Hitinawatte is described as follows:

1 st defendant appellants	-	undivided 10/28
3 rd to 6 th defendant appellants	-	undivided 1/28 each

According to the amended statement of claim of these appellants, they have not claimed any rights about the land called Nagahakotuwehena presently Watte which is also considered as a land included in the schedule to the plaint and therefore it is clear that the plaintiff respondents cannot have and maintain this speculatively filed partition action to partition all 3 lands described in the schedule to the original plaint by way of the said action nor they can seek to partition the 7 acres land which is described in the preliminary plan number 717/Kuli/82, which is very much larger than the aggregate extent of the properties depicted in the schedule of the original plaint as well as the 1st amended plaint.

When this case was taken up for trial on 17.01.1985 no admissions were recorded and the plaintiff-respondent raised 5 issues and the defendant-appellant in countering those issues raised 2 issues about the maintainability of the partition action. Thereafter, the issues, in this case, were raised afresh on 05.05.1992 and on that date the plaintiff-respondent raised 3 issues but thereafter on 26.8.1992 the defendant appellants raised 2 issues about the corpus and also about the maintainability of this partition action. On 06.06.1994 the trial was taken afresh and on that day the plaintiff-respondent raised 3 issues and the appellant raised 13 issues. Those issues are based on the maintainability of the partition action and also the accuracy and the correctness of the preliminary plan. About the identification of those separate lands and in addition to that, the appellants claimed rights only about Siyambalagahamula Watta and Hitinawatte and contended strongly that the respondents cannot have and maintain the partition action as constituted.

On 12.10.1994 the 1st plaintiff-respondent testified and he was cross-examined by the counsel for the appellant. The Appellant opted not to lead evidence because the corpus of the said partition action has not been identified to show that the 3 lands are included and prepared the said preliminary plan number 717/Kuli/82. Specially in comparing the boundaries of those separate lands given in the original plaint with the boundaries of the preliminary plan number 717/Kuli/82 and the learned trial Judge without considering those vital matters and also the evidence led at the trial and the documents specially marked as V1 to V7, entered judgment on 27.02.1997 in favour of the plaintiff respondents as prayed for in the amended plaint. The deeds of the appellants were produced during the cross-examination of the 1st plaintiff-respondent, the learned trial Judge had not considered those deeds V1 to V7 in arriving at his final judgment and thereby arrived at an erroneous judgment which is not supported by the deeds submitted to Court at the trial.

It was argued that on behalf of the appellants by deed V2 which is on page 131 of the appeal brief which is only about Siyambalagahamula Watta and the plaintiff respondents have not got any rights. Deed V1 is only about Nagahakotuwehena presently Watta by which only the 1st plaintiff-respondent has got his rights by deed V3 on which Upali Ratnayake got rights about Siyambalagahamula Watta and not about the other lands V4 about Siyabalagahamula Watta and also about Hitinawatte but not about Nagahakotuwehena presently Watta. Deed V5 is in relation to Siyambalagahamula Watta only by which Balasuriya Mudiyanseelage Gunarathhamy got rights by deed V6 which is at page 147. Nimal Ratnayake Atapattu and Dissanayake Atapattu has got rights only in relation to Hitinawatte and not to other lands. V7 is on page 151 of the appeal brief and by which the 1st defendant-appellant got rights about Siyambalagahamula Watta as well as Hitinawatte but not to Nagahakotuwehena presently Watta.

It was contended on behalf of the appellants that in considering those deeds and the rights conveyed by those deeds, it is clear that the devolution about specially Siyambalagaha Watta and Hitinawatte is not identical and the proportion of those rights are diffident and these appellants have not claimed rights of Nagahakotuwehena and presently Watta. Therefore, in any event, the defendant appellants argued that this partition action could not have been maintained by the plaintiff respondents.

Learned counsel for the plaintiff respondents submitted that after the 3rd amendment of the Plaintiff of the Plaintiffs, the Schedule confined to the land called "Siyambalagahamula Watta" and accordingly the relevant *Lis pendens* was duly registered and it has been duly minuted on 12.10.1993 as per Journal Entry No.57 of the appeal brief. Therefore, the defendants-appellants cannot take up the position that the *Lis pendens* has not been registered, and accordingly, Issue No.16 be decided negatively and the learned District Judge very correctly answered the said Issue No.16. The 1-5 plaintiff-Respondents had full right to maintain their action according to the 3rd Amended Plaintiff, where no statement of claim filed by the 1st - 7th defendants, contesting the corpus to be partitioned in the said partition action bearing No.6502/P other than the dismissal of the action of the 1st to 5th plaintiffs-respondents. If the defendant-appellants were relying on a larger land than the said "Siyambalagahamula Watta" they should have acted in terms of section 19(2)(a) of the partition act (as amended) and in the instant action defendant respondents have not taken any step to obtain a defendant's commission to apprise the Court that "Hitinawatta" too includes, to comprise the subject matter of the action and the 1st defendant-respondents in his evidence admitted as follows:

- “ප්‍ර - තමා උත්තර බැඳලා අධිකරණයට කියා සිටියා මේ ඉඩම් 3හි විවිධාකාර කොටස් මේකෙන් බෙදන්න බැහැ කියා?
- උ - ඔව්.
- ප්‍ර - එකී සියලුලාගහමුල වත්ත පමණක් බෙදා ගැනීමට නේද සංශෝධිත පැමිණිල්ලක් ඉදිරිපත් කළේ?
- උ - ඔව්.”

“ඒ අනුව මේ නඩුවෙන් සියඹලාගහමුල වත්ත පමණක් බෙදා ගැනීමට, ඉඩ දීලා තිබෙනවා. අයිතිවාසිකම් සම්බන්ධව ප්‍රශ්නයක් නැහැ. ‘පැ 1’ දරණ අංක 927 දරණ ඔප්පුවෙන් මේ ඉඩම 3න්ම නොබෙදූ ½ ක් කපුරුහාමි හා කිරිමුදියන්සේ යන දෙදෙනාට අයිතියි කියා. ඒක හරි. මා හා අනෙක් විත්තිකරුවන් අයිතිවාසිකම් කියන්නේ කපුරුහාමිගේ ½ පංගුවට. කිරිමුදියන්සේ ½ පංගුවකට අයිතිවාසිකම් කියන්නේ පැමිණිලිකරුවන්. 1, 2, 4,5 පැමිණිලිකරුවන්ට ඒක ඔහු දීලා තිබෙනවා. කිරිමුදියන්සේගේ දරුවන්ට ½ ක පංගුවක් මට හා අනෙක් විත්තිකරුවන්ට සියඹලාගහමුල වත්තෙන් ½ ක් අයිතියි.”

In this case, the 1st defendant and the rest of the defendants have not objected, when the plaintiff tendered the Preliminary Plan bearing No.717/කුලී/2082 produced marked as "X" and the report annexed thereto. Therefore, later they cannot question the said surveyor has not properly prepared the said Preliminary Plan and the Report without a defendant's commission being obtained and produced; contrary to plan or report, to contradict the contents of Plan "X" and its report. The said Preliminary Plan bearing No. 717/කුලී/2082 produced and marked as "X" and the report annexed thereto be admitted as evidence to prove the corpus to be partitioned in the Action.

The learned counsel for the plaintiff-respondent further submitted that the schedule to the 3rd amendment of the plaintiff-respondents clearly stated that the corpus to be partitioned is “අංක 717/කුලී/82 දරණ ජලැනයේ අංක 1 සහ 2 වශයෙන් නිරූපණය කර ඇති සියඹලාගහමුල වත්ත නැමති ගොඩ මඩ ඉඩම (එල්-712-114)”. By not submitting a statement of claim against the 3rd amendment to the plaint of the plaintiff-respondents, the appellants cannot take up the position that Lot 1 in the said plan number අංක 717/කුලී/82 is not a paddy field later, developed and therefore the said Lot 1 is a part and parcel of the land called සියඹලාගහමුල වත්ත which is sought to be partitioned.

The learned counsel for the defendant-appellants argued that the 1st defendant-respondent has admitted the Title to the said "Siyambalagahamula Watta" as per the deed number 927 (පැ 1) that the original owners were Kapuruhamy and Kirimudiyanse and he is claiming Kapuruhamy's share while plaintiffs claim the said undivided 1/2 share of Kirimudiyanse. Therefore, there is no dispute over the title to the land to be partitioned and the learned District Judge's Interlocutory Decree dated 27.02.1997 is very correct both in facts and law. It was further argued by the learned counsel for the plaintiff-respondents that there is no reason to set aside the judgement and the appeal of the 1st - 7th defendants-appellants should be dismissed.

The basic principle about a partition action is if a Plaintiff is seeking to partition several separate lands in one partition action the most important element that should be available is that the lands sought to be partitioned in one action must not only be contiguous allotments but the devolution of all lands included in a partition action should have a common devolution of title. It is practically impossible to give undivided rights at the end of the trial as the devolutions are not equal and hence by the final judgment it is not possible to set out the proportions by which the parties are entitled from the entire corpus.

Another important matter is the identification of the corpus about the extents given in respect of the several lands which are to be partitioned in one action. It is important to identify those separate lands within the preliminary plan of which the entire corpus is surveyed and set out otherwise the common boundary of the actual corpus which consists of several lands will be impossible to ascertain without knowing where those properties are situated within the corpus surveyed to prepare the preliminary plan.

In the present case, the preliminary plan number 717/කුලි/82 which is on page 126 of the appeal brief contains 3 lots as lots 1, 2 and 3 and the extent is given as 7 acres and 31 perches. The total extent given in the preliminary plan is not compatible with the extent given about the 3 lands described in the schedule to the original plaint which is on page 64 of the appeal brief.

The extents are as follows;

- Land number 1 - Nagahakotuwehena presently watta - extent is about 1 acre.
- Land number 2 - Hitinawatte - extent of 2 lahas Kurakkan
- Land number 3 - Siyambalagahamula watta extent is - 5 lahas Kurakkan.

Learned President's Counsel for the defendant-respondents argued that considering the extents given in the 3 lands the property surveyed by plan X is much more than the aggregate extent given as per the schedule of the original plaint and the boundaries given in the preliminary plan under no circumstances can be compared with the boundaries given in the preliminary plan number 717/Kuli/82 which is at page 126 of the appeal brief. It is also significant to note that the boundaries of the 3 contiguous lands cannot be reasoned out at all concerning the boundaries given about the 3 lands described in the schedule to the original plaint.

After the institution of this partition action, an amended plaint was filed on 10.06.1987 by which all 3 lands were set out but the plaintiff-respondent attempted to allege that lot 1 is a land called Nagahakotuwehena presently Watta and tried to identify as lot 1 of the preliminary plan number 717/Kuli/82 and alleged that the Hitinawatte is lot 3 of preliminary plan number 717/Kuli/82 and Siyambalagahamula Watta is lot 2 of the said preliminary plan. The plaintiff-respondent described the 3 lands in terms of the allotments contained in the preliminary plan number 717/Kuli/82, the boundaries of those 2 allotments of the preliminary plan is different from the boundaries given in the 3 schedules even of the original plaint as well as the 1st amended plaint. The 2nd amended plaint was filed on 11.02.1993 and the said last amended plaint the plaintiff attempted to restrict the corpus to only Siyambalagahamula Watta and alleged that Siyambalagahamula Watta represents lots 1 and 2 of the preliminary plan number 717/Kuli/82.

By doing so the plaintiff-respondents have not violated any provision in the partition law. The learned District Judge decided the case considering the amended plaint filed on 11.02.1993 and the subject matter was restricted to lots 1 and 2 of the preliminary plan number 717/Kuli/82.

Learned President's Counsel for the defendant-respondents argued further that the plaintiff even by original plaint and the two amended plaints failed to identify the actual corpus of the said partition action and he always amended by taking up contradictory stands and hence the *Lis pendens* registered at the inception of the partition action which is reflected by the journal entry No. 1 as well as 2 cannot be considered as valid *Lis pendens*, in considering the changes of the schedules by the Plaintiff time to time. The appellants have not claimed any rights from Nagahakotuwehena and therefore under no circumstances, the said partition can be allowed about the 3 properties to which the *Lis pendens* is registered and about the 3 lots depicted in the preliminary plan number 717/Kuli/82.

The learned counsel for the defendant appellants says that the devolution of Siyambalagaha Watta and Hitinawatte are also different and hence both properties cannot be partitioned in the said partition action. When the plaintiff decides to restrict by way of the amended statement of claim filed on 11.02.1993 restricting the corpus for lots 1 and 2 of the preliminary plan number 717/Kuli/82 on the basis that those two lots described as Siyambalagahamula Watta and the boundaries of lots 1 and 2 are not compatible with the following boundaries given in respect of lots 1 and 2 of preliminary plan number 717/Kuli/82 which is at page 126.

Boundaries given in the schedule of Siyambalagahamula Watta in the amended plaint dated 11.02.1993 are as follows;

- North - Hena previously owned by Ranhamy
- East - Hethuhamige watte
- South - Kirimudiyanse and Kapuruhami's land
- West - Pinwatte.

The boundaries of lots 1 and 2 are as follows:

- North - Bulugahamula watte of A.M. Kiribanda and also owned by A.M. Punchibanda, land of A.M. Ukkumenika called Bulanegedera watte
- East - lot 3 of preliminary plan number 717/Kuli/82 and Medegederawatte owned by Punchibanda and another.
- South - Nagahakotuwa owned by S.A.M. Podiralahamy, Aluambagahamula watte owned by Ranbanda and Wendesiwatte owned by Punchibanda and another.
- West - Pinwatte belonging to Kalundawa Temple

In considering the aforementioned boundaries of Siyambalagahamula Watta and lots 1 and 2 of the preliminary plan number 717/Kuli/82, it is clear that lots 1 and 2 can be considered as Siyambalagahamula Watta and hence there is no barrier for the plaintiff-respondent to seek for a partition of lots 1 and 2 disregarding the position and the entitlement of the appellants about the properties surveyed for the said partition action. There is no legal restriction to enter a partition judgment in considering the variable stands taken up by the plaintiff-respondent about the corpus. Because of the strong defence taken up on behalf of the appellants stating that the property surveyed by the preliminary plan is not larger than the actual extent of those lands described in the schedule to the 3rd amended plaint as well as for the fact that the plaintiff-respondent has established the 4 boundaries at least of the Siyabalagahamula Watta which the plaintiff-respondent finally restricted to partition by this partition action.

The defendant-appellants state that if any partition decree is entered and divided lots 1 and 2 of preliminary plan number 717/Kuli/82, grave injustice and irreparable damage would be caused to the appellants and they will lose their entitlements to those properties which they become entitled to, as mentioned in their statement of claims specially because the issues 5 to 17 raised on behalf of the appellants had taken up the apparent discrepancies and errors in the pleadings of the plaintiff-respondent. I do not agree with the said argument of the defendant-appellants and all parties can claim their rights when partitioning lot 1 and 2 of the preliminary plan, according to the partition act.

In the above said circumstances, we set aside the judgment dated 27.02.1997 and re-calculate the shares of the land in accordance with the pedigrees tendered by both parties.

The new shares are as follows;

1 st plaintiff	- undivided 7/70
2 nd plaintiff	- undivided 7/70
3 rd plaintiff	- undivided 7/70
4 th plaintiff	- undivided 7/70
5 th plaintiff	- undivided 7/70
1 st defendant	- undivided 24/70
3 rd defendant	- undivided 8/70
4 th defendant	- undivided 1/70
5 th defendant	- undivided 1/70
6 th defendant	- undivided 1/70

Appeal allowed.

Plantation and improvements should be given and divided according to the Preliminary Survey Report marked as X1.

Interlocutory Decree be entered accordingly.

The plaintiff is entitled for Cost in the District Court as well as in this Court.

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

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal