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

In the matter of Appeal against the Judgement dated 27/08/1998 of the District Court of Kandy

Court of Appeal Case No.

CA/DCF/1143/1998 F

DC Kandy 11414/P

3. Alupothegedera Petor Wijewardena,
No. 415, Iriyagama, Peradeniya. (Deceased)

1AA & 3A. Iriyagama Allupotegedara Sudath Pritiraj Wijewardana
No. 415, Subodharama Mawatha,
Peradeniya.

4. Alupothegedera Harry Petor, No. 416,
Iriyagama,

5. Alupothegedera Baby, No. 80, Danthurey Walagampaya.(Deceased)

5A. Mahadura Gedera Sriyani Karunaratna
104/136 B, Sapugahatenna Road,
Kalagedihena.

6. Prema Keerthilatha,
No. 405,
Iriyagama,
Peradeniya.

Appellants

Vs.

1. Rantilaka Gedera Agnus, (Deceased)

la. Iriyagama Alupothegedera Ariyadasa,

1b. Iriyagama Alupothegedera Karunaratna,

1c. Iriyagama Alupothegedera Piyadasa,
1d. Warnakulasuriyage Kusumalatha
Perera, of No. 41, Iriyagama, Peradeniya.

le. Iriyagama Alupothegedera Gunaratna,

1f. Iriyagama Alupothegedera Saman Pushpalatha,

1g. Iriyagama Alupothegedera Wijeratna,

1h. Iriyagama Alupothegedera Sarathchndra

2. Iriyagama Alupothegedera Ariyadasa, (DECEASED)

2a Iriyagama Alupothegedara Indika Chaminda Ariyadasa

2b Iriyagama Alupothegedara Thusari Sanjeewani Samandhika Kumari.

2c Iriyagama Alupothegedara Manjula Namal Sandaruwan Kumara

3. Iriyagama Alupothegedera Karunaratna,

4. Iriyagama Alupothegedera Piyadasa,

5. Iriyagama Alupothegedera Wimalaratna, (Deceased)

5A. Warnakulasuriyage Kusumalatha Perera,

5B. Madusha Thishan Wimalaratna,

5C. Damsha Nethmini Wimalaratna,

5A, 5B & 5C of of No. 41, Iriyagama, Peradeniya.

6. Iriyagama Alupothegedera Gunaratna, (DECEASED)

6a. Embulange Pahalagedera Padma Jayasinghe.
6b. Eriyagama Alupothegedera Lakshani Esanka Gunaratna,

6c. Eriyagama Alupothegedera Dananjani Subhodika Gunaratna,

6d. Eriyagama Alupothegedera Dinisha Gayamali Gunaratna,

6a to 6d Defendants-Respondents all of No. 41, Iriyagama, Peradeniya.

7. Iriyagama Alupothegedera Saman Pushpalatha,

8. Iriyagama Alupothegedera Wijeratna

9. Iriyagama Alupothegedera Sarathchndra by his next friend Ratnatilake Gedera Agnus.

All of No. 41, Iriyagama, Peradeniya.

Plaintiffs-Respondents

Rev. Peradeniya Dharmasena Thero,
Sarananda
Piriwena, Peradeniya.
(Deceased)

2nd Defendant-Respondent

Alupothegedera Wilson, No. 413,
Subodharama Mawatha, Iriyagama,
Peradeniya. (DECEASED)

7A & 8th Defendant-Respondent

Kadegedera Agnus of No. 413,
Subodharama Mawatha, Iriyagama,
Peradeniya.

7B & 8A Defendant-Respondent

Before: : **M. T. MOHAMMED LAFFAR, J.**

S. U. B. Karalliyadde, J.

Counsel:	H. Soza, P.C. with R. Perera for 1A, 2nd, 3rd, 4th Defendant - Appellants
	Rohan Sahabandu P.C. for the 7B & 8B Respondents
	Dr. Sunil Cooray with N. Perera for 1A to 9th Plaintiff - Respondents.
Argued on:	08-04-2022
Decided on:	31-08-2022

MOHAMMED LAFFAR, J.

This is an Appeal from the judgment of the learned District Judge of Kandy dated 27-08-1998.

The Plaintiff-Respondent (hereinafter referred to as the Plaintiff) instituted action to partition the land called **Dunuke Angewatta,** more fully described in the schedule to the Plaint. There is no dispute as to the pedigree set out in the Plaint. The Plaintiff is seeking to partition lots 1, 2, 3 and 4 of the preliminary plan bearing No. 5757 dated 23-04-1985 made by G.R.W.M. Weerakoon, Licensed Surveyor marked X. The report of the Commissioner is marked as X1. The 1st to 6th Defendant-Appellants (hereinafter referred to as the respective Defendants) are seeking to exclude lots 3 and 4 in the preliminary plan marked X on the basis that the said lots are not part of the land sought to be partitioned, but the land called **Manikrala Pandigewatta** owned by the said Defendants**.** In this scenario, the only question to be determined by the learned trial Judge was whether the disputed lots 3 and 4 in plan X were part of the subject matter or the land called Manikrala Pandigewatta. After trial, the learned trial Judge, having rejected the claim of the 1-6 Defendants, held that lots 1, 2, 3 and 4 are the corpus sought to be partitioned. Being aggrieved by the said determination, the 1 – 6 Defendants have preferred the instant Appeal.

In this context, the question that arises for determination in this Appeal is whether lots No. 3 and 4 in plan X are part of the land sought to be partitioned, namely Dunuke Angewatta or the land called Manikrala Pandigewatta, claimed by the 1-6 Defendants.

It is settled law that, in partition suits, identification of the corpus is very important before considering the devolution of shares of the co-owners. In the event of failure to identify the corpus, the action should be dismissed without considering the pedigree. In this regard, I refer to the determination of the Supreme Court in the case of **Sopinona Vs. Pitapanaarachchi and others**[1]**,** Saleem Marsoof, J. observed that *"Clarity in regard to the identity of the corpus is fundamental to the investigation of the title in a partition case. Without proper identification of the corpus, it would be impossible to conduct a proper investigation of title."*

The Court of Appeal in case No. **CA-504/84F- CA-Minute dated 9-10-1996**[2]**,** held that *"if the Plaintiff cannot identify the land sought to be partitioned, (correctly) action must be dismissed. (The boundaries given in the Plaint and the boundaries mentioned by the Plaintiff in evidence and deeds are different.).*

It is settled law that the land sought to be partitioned can properly be identified with the boundaries. Even if there is any inconsistency in extent, it will not affect the identity of the subject matter when the boundaries are correct.

In **Yapa Vs. Dissanayake Sedara**[3]**,** It was held that *"inconsistency in extent will not affect the question of identity if the portion of land conveyed is clearly described and can be precisely ascertained."*

In the case of **Welegedera Sekera Vs. Ratnapala,**[4] *Chithrasiri J.* observed that *"inconsistency in extent will not affect the question of the identity of lands. The land can be identified as having looked at its boundaries and also by referring to the manner in which it was possessed."*

[1] 2010 (1) SLR-p87.
[2] BASL-News letter dated 1997 June-page4- Weerasekera.J & Wigneswaran.J.
[3] 1989-1SLR-p361- CA.
[4] (CA. No. 698/98F. Decided on 12-09-2014).

In the light of the foregoing decisions of Apex Courts, I shall now turn to the evidence adduced before the trial Court as to the identification of the land sought to be partitioned in the case in hand

As per the schedule of the Plaint and the title deeds of the Plaintiffs marked as P1-P12, the corpus is bounded as follows;

NORTH by……The Summit of Korale Mahathmaya's Hena.

EAST by……The Fence of Ukkuwa's Garden.

SOUTH by……The Ella of Dunuke Ange Kumbura.

WEST by……The fence of Ukkuwa Paniwidakaraya's Garden

The land (lots- 1,2,3 and 4) depicted in the Preliminary plan is bounded as follows;

NORTH by……Korale Mahathmaya's Watta.

EAST by……Ukkuwa's Watta.

SOUTH by……Dunuke Ange Kumbura.

WEST by……Ukkuwa Paniwidakaraya's Watta.

It is pertinent to be noted that all four boundaries of the land described in the schedule of the Plaint and the title deeds of the Plaintiff tally with all four boundaries of the land depicted in the Preliminary plan marked X. As such, it is well established that the land shown in plan X is the corpus sought to be partitioned.

Moreover, the Commissioner, under section 18(1){a) (iii) of the Partition Law, must in his report state whether or not the land surveyed by him is substantially the same as the land sought to be partitioned as described in the schedule to the Plaint (Vide- **Sopaya Silva Vs. Magilin**[5]). In terms of section 18 (2) of the Partition Law No. 21 of 1977 (as amended), the facts stated in the preliminary plan and the report, are deemed to be correct and the same can be accepted at any stage of the partition action without further proof. However, on the application of any party, the Court is empowered to summon the commissioner to testify the facts stated

[5] 1989 (2) SLR-105- CA.

therein. In this case, the Commissioner in his report marked as X1 has categorically stated that the land depicted in the Preliminary plan is the land sought to be partitioned which is admissible evidence in terms of the provisions of the Partition Law. Besides, G.R.W.M. Weerakoon, Licensed Surveyor who prepared the preliminary plan, while giving evidence in Court, without any ambiguity asserted that lots 1, 2, 3 and 4 in plan X are the corpus sought to be partitioned.

According to the Plaint, the extent of the subject matter is approximately one *Amunam* which is equivalent to approximately 2 Acres. The land depicted in plan X is A1-R1-P20.60 which is less than the actual extent, and therefore, it is understood that the disputed lots are too part of the corpus. However, as enunciated by the Court of Appeal in **Yapa's case** and **Welegedera Sekera's case** (Supra), inconsistency in extent will not affect the question of the identity of lands.

To establish the fact that the disputed lots are the land called Manikrala Pandigewatta, the 1-6 Defendants have obtained a plan bearing No. 1000 dated 21-10-1993 made by T. Piyasena, Licensed Surveyor marked Z. It is to be noted that the plan Z has not been superimposed on the preliminary plan marked X.

In partition actions, there will be one preliminary plan that is made by the commissioner, and all the title plans relied upon by the parties are to be superimposed on the said preliminary plan. The Court is entitled to issue a commission to the Surveyor General to prepare a plan to identify the corpus, on its own motion or upon the application of the parties to the action.

If the necessity arises to survey any larger or smaller land than that pointed out by the Plaintiff, where a party claims that such survey is necessary for the adjudication of the action, the such commission should be issued to the same commissioner who made the preliminary plan, and not to another Surveyor, as stated in section 16 (2) of the Partition Law, which reads thus;

> *"The commission issued to a surveyor under subsection (1) of this section shall be substantially in the form set out in the Second Schedule to this Law and shall have attached thereto a copy of the*

Plaint certified as a true copy by the registered attorney for the Plaintiff. The Court may, on such terms as to costs of survey or otherwise, issue a commission at the instance of any party to the action, authorizing the surveyor to survey any larger or smaller land than that pointed out by the Plaintiff where such party claims that such survey is necessary for the adjudication of the action."

It is to be noted that the word "the surveyor" used in the aforesaid section is referring to the commissioner to whom the commission to prepare the preliminary plan was issued in terms of section 16(1) of the Partition Law.

In this regard, I refer to the case bearing No: CALA 187/95, Court of Appeal minute dated 02-10-1995 (from D. C. Kalutara case No: 5848/P). This is an application in revision from the order of the learned District Judge refusing to accept the plan made on a second commission issued as the preliminary plan in the case. In that case, the petitioner filed action to partition the land called "Kuda Arambawatta." Commission was issued to Surveyor W. Seniviratne who returned the commission with plan 6617 and report to Court on 27-05-1992. The petitioner who was not satisfied with the plan and the report moved for another commission, on another Surveyor. The Court allowed this application. The fresh commission was issued to B. K. P. W. Gunawardena. Subsequently, he returned the commission duly executed with plan No: 518 with a report dated 22-12-1992. When the matter was taken up for trial, objections were raised to the application of the petitioner that surveyor Gunawardena's plan and report being accepted as the preliminary plan and report in the case. The learned District Judge accepted the preliminary objections and directed that plan No: 6617 prepared by surveyor Seniviratne be accepted as the preliminary plan. Dr. Ranarajah, J. observed that;

"Section 18 of the Partition Law provides for parties dissatisfied with the preliminary plan prepared on commission issued by Court to make an application for a commission to issue on the Surveyor General. The petitioner has not availed himself of this provision of law. Similarly, there is a provision, in that section for a party to have a surveyor who conducted the survey to be summoned to Court and examined on any matter arising from the preliminary plan and report filed in Court. The petitioner has not had recourse to that provision. Instead, he had sought a fresh commission on another surveyor to conduct a second

preliminary survey which is not permitted by law. There is no error in the order made by Court."

In **Sumanasena Vs. Premaratne**[6], the District Judge identified the corpus upon the plan No: 653A made by Gunasingha, Licensed Surveyor, of consent of the parties to the action, and the preliminary plan made by the commissioner, namely Mr. Mendis (No: 516) was disregarded. Salam, J. observed that,

"(1). It has been stressed in several judgments of the appellate Courts that after the preliminary survey is done, any further commissions under 16 should be issued to the same surveyor who carried out the original commission under Section 16 (1). This legal position is quite clear on a comparative analysis of Sub Section 1 and 2 of Section 16

(2). This clearly shows that a commission to carry out the preliminary survey invariably has to be issued to a surveyor who is listed for that purpose. Similarly, under Section 16 (2), to survey a larger or smaller land the Court is bound to issue the commission to the same Surveyor.

(3). The advantages of the strict adherence to Section 16 (2) are worthy of being mentioned here. In terms of Section 18(2), the report of the Surveyor, Plan and various other documents referred to in paragraphs (a), (b) and (c) of Subsection (1) of Section 18 may, without further proof, be used as evidence of the facts stated or appearing therein at any stage of the partition action. Quite unfortunately, no such evidential value can be attached, to any survey plan or report prepared in violation of Section 16 of the Partition Law. Hence, the purported preliminary plan made by U. D. C Gunasingha, L.S attracts no such evidential value, unlike in the case of the plan and report submitted by D.C Mendis, Commissioner of Court

(4). The facts disclosed above as regards the two commissions issued, the latter having been issued in blatant violation of Section 16 (2) of the Partition Law makes it abundantly clear that the learned District Judge has acted in violation of the imperative Provisions of the Partition Law. Hence, it will be a travesty of justice to allow the judgment and the interlocutory decree to stand in this case, as the

[6] CA-1336F and 1337F. CA Minute dated 06-03-2014.

learned District Judge has failed to identify the corpus in reference to a legally admissible preliminary plan.

(5). The consent of the parties cannot confer power or authority in Court, unless such a power has not been conferred by the Statute. Consent of the parties, however, can give no authority or jurisdiction to a Court, to deviate from the substantial law or an imperative procedural step. It is a fundamental principle that no consent can confer a Court the authority to exercise its power in a particular way when the Law expects the Court to do it in a different manner. Therefore, the decision of the learned District Judge to treat Lot A and C depicted in the second plan as the corpus lacks any legal bar.

(6). The Court has a duty to identify the corpus without causing damages to third parties by dragging their lands into the corpus. One of the ways in which it could be achieved is by having recourse to a legally prepared preliminary plan and a report. In the absence of such a plan and report Court may unconsciously extend a helping hand to collusion against the rest of the world which can take away the sanctity attached to a final decree. Hence, it is totally unsafe to decide on the corpus with the help of a plan and report prepared outside the Legislative guidance shown under Sections 16 and 18."

In **Hettige Don Tudor and others Vs. Hettige Don Ananda Chandrasiri**,[7] the Supreme Court observed that;

"……the provisions under section 16 do not recognize any 2nd plan in a partition action. In any single partition action, there should be only one preliminary plan that is made by the Court commissioner and all the plans relied upon by the parties are to be superimposed on the said preliminary plan. After the preliminary plan is made and filed in Court, if necessary, the trial Court is entitled to issue a commission to the Surveyor General to prepare a plan to identify the corpus, on its own motion or at the instance of the parties to the action. If the necessity arises to survey any larger or smaller land than that pointed out by the Plaintiff, where a party claims that such survey is

[7] (SC.Appeal No: 134/16. SC/HC/CALA 435/2015- SC-Minute of 19-02-2018. Eva Wanasundera PC, Acting CJ, Priyantha Jayawardena PCJ and H.N.J. Perera J.)

necessary for the adjudication of that action, the such commission can be issued to the same commissioner who made the preliminary plan. It cannot be issued to another surveyor. In the case in hand, the Court had issued another commission to another surveyor which is quite contrary to the provisions of the Partition Law.

An action for partition of land is an action in rem. When the decree in a partition action is entered, it is a decree in rem which binds the whole world and not only the parties to the partition action. It will be effective at all times. That is the vital point and the basis for the Partition Law being enacted. The provisions are imperative. Going beyond the provisions of the Partition Law is not a technical matter as alleged by the appellants' Counsel in his written submissions. The fact that the parties to the action had agreed to go ahead with the 2nd plan done by another commissioner when the application to do so was made by the Plaintiffs of the case at the trial and the Court had allowed the same, is no reason to be regarded to support the judgment of the trial Court. It was erroneous to accept the 2nd plan. The District Court was wrong in having accepted the 2nd plan done by a different surveyor. The provisions of the Partition Law are mandatory and should be followed in every step of the way in any partition action before the District Court. The argument of the appellants that it is only a technical matter fails……"

As such, it is abundantly clear that the plan and the report made by the surveyor, to whom the commission was issued under section 16 (1) of the partition Law, is the preliminary plan in a partition action. When the parties are not satisfied with the preliminary plan, the Court may direct the same commissioner to survey the larger or smaller land or to superimpose any title plan tendered. If the Court is of the opinion that the commissioner is not in a position to carry out the commission issued by Court, a fresh commission can be issued to the Surveyor General to prepare a plan. In such a situation, the plan and the report made by the Surveyor General can be accepted as the preliminary plan of the action. It is pertinent to be noted that, issuing a commission to another surveyor, other than the commissioner who made the preliminary plan or the Surveyor General is erroneous and contrary to the partition law.

In this respect, it is the considered view of this Court that the plan marked as Z, relied upon by the contesting Defendants is bad in law and has no evidential value attached to the same on the basis that the said plan was not prepared by the Commissioner who made the preliminary plan and the same was not superimposed on the preliminary plan. Moreover, plan Z has not been made in accordance with any title plan, whereas it is transpired from the evidence of Mr. T. Piyasena, the Surveyor who prepared plan Z that the same was made as pointed out by the contesting Defendants. As such, plan Z and the evidence adduced on that plan should be disregarded. On the same footing, the plans marked as 3V1 and 3V2 are also liable to be disregarded.

Besides, the learned District Judge has rightly drawn his attention to the fact that all four boundaries of the land described in the schedules of the title deeds produced by the contesting coDefendants do not tally with the boundaries of lots 3 and 4 in plan X. It is pertinent to be noted that according to the contesting Defendants the Western boundary of their land, namely Manikrala Pandigewatta should be the corpus in this case, namely Dunuke Angewatta. But, as per the title deeds of the contesting Defendants, the Western boundary is shown as Kalogana. Hence, it is apparent that lots 3 and 4 in plan X are not the land called Manikrala Pandigewatta.

Furthermore, the schedules described in the statements of claim of the contesting Defendants indicate the Dunuke Angewatta (corpus), not the purported land claimed by them[8]. According to the title deeds of the contesting Defendants (3V1, 3V2, 3V3 and 3V4) the original land is shown as Dunuke Angewatta (corpus).

In these circumstances, having scrutinized the oral and documentary evidence adduced, on the balance of probability, it is well established that lots 3 and 4 in plan X are also part of the subject matter, namely Dunuke Angewatta. There is no adequate evidence before the learned trial Judge to accept the contention of the contesting Defendants.

For the foregoing reasons, I see no basis to interfere with the judgment of the learned District Judge of Kandy dated 27-08-1998. Thus, the Appeal

[88] Appeal brief-page No. 80 and 359.

is dismissed with costs fixed at Rs. 50,000/- and the impugned judgment is affirmed.

The Registrar is directed to dispatch a copy of this judgment along with the original case record to the District Court of Kandy.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

S. U. B. Karalliyadde, J.

I agree.

JUDGE OF THE COURT OF APPEAL