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

In the matter of an application for Restitutio-in-Integrum under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No:
CA/RII/25/2018

District Court Matale
Case No: 1946/P

4a) Abdul Fareed Mohamed Munas
No.62/5, Hussain Avanue,
Matale,

Substituted 4th Defendant-Appellant-Petitioner

-Vs-

1. Ameenathul Sureyan Razeed,
2. Ameenathul Roshan Razeed,
No.110/7, 1st Lane,
Kaludawala, Matale.

Plaintiff -Respondent-Respondents

1. Seenath Umma,
Madawala Bazaar,
No.30, Gonawela Road,
Matale.

2. Suhardeen
No.15, Station Road, Matale.

3. Asia Umma (deceased)
No. 46/2, Gongawala Road,
Matale.

3a. M.R.M. Thaupik
Kanampitiya Road,
Galle.
(Representative of the 3rd Defendant)

5. Aisan Umma
Meepilimana, Ambewela Road,
Nuwaraeliya.

6. Asia Nona (daughter of Sathar)
No.24, Molandapitiya Road,
Matale.

7. Abdul Samad Pushparubee
No.30, Meepilimana, Nuwaraeliya.

8. Commercial Bank of Ceylon Ltd.
Raja Weediya, Matale.

9. A.C. Ramsy
No.46/1, Gongawala Road,
Matale.

Defendant-Appellant-Respondents

Before: Hon. D.N. Samarakoon, J.
Hon. Sasi Mahendran J.,

Counsel: Mr. S.N. Wijithsingh for the Substituted 4th Defendant- Appellant - Petitioners.

Mr. Sadi Wadood with Mr. Palitha Subasinghe with Mr. Hashane Mallawarachchi for the Substituted -2nd Defendant- Appellant Respondent [2 A]
Mr. Kushan De Alwis, P.C. with Mr. Kaushaluya Nawaratne for the Plaintiff- Respondent.
Mr. Jayaruwan Wijayalath Arachchi for the 1st Defendant Respondent.

Argued on: 20.01.2022[1]

Written submission tendered on: 25.03.2022 by the 4(i) to 4(viii) Defendant-Appellant-Petitioners.
08.04.2022 by the Substituted 2nd Defendant-Respondent.
01.04.2022 by the 1st and 2nd Plaintiff-Respondent-Respondents.

Decided on: 05.04.2024

Hon. D. N. Samarakoon J.,

J U D G E M E N T

In this case, instituted in 1989, the subject matter is shown in Mr K.S.Samarasinghe's plan dated 1991 and in Mr. Egerton SI Rajakaruna's plan in 1999 as 'Sawalakkara Gedara Watta'. The former plan was marked 'Y' and the latter plan was marked 'X.' The 4A defendant has claimed from Thangachchi Umma, in plaintiff's pedigree. According to the 4A defendant, Thangachchi

[1] The delivery of this judgment was delayed as the original case record P 1946 called from the District Court of Matale was missing. The Registry maintained the position for sometime that it is with me. They showed an entry where my former Peon has signed. But what had happened was that on a date thereafter the docket as well as the original case record of District Court of Matale had been taken to open court and then during the ordinary course gone to the Registry. As the Registry was not accepting this, on 19.01.2024 I gave an order from the Bench for the Registrar to trace that record and send to me; and on a day following, i.e., 29.02.2024 it came; and hence this judgment. The original case record of District Court of Matale 1946 P had been in the Registry during the period they maintained that it is with me.

Umma gets 4/18 shares. This appears to be correct even according to the pedigree adopted by the learned District Judge.

According to that pedigree, relied upon by the 4A defendant, title comes to Asia Nona, Abdul Satar's daughter who is the 6th defendant. The 4th defendant says he and his wife are in possession in lots 1 and 2 in plan 'X' which is lot 2 in plan 'Y' on the rights of Asia Nona. The learned District Judge has not given any share to the 4A defendant. Among other things, he has said that Thangachchi Umma by P1 in 1874 transferred her share to one Meera Lebbe. But the position of the 4A defendant is that by P1 Thangachchi Umma transferred only ¼ of her rights.

It does not appear that the learned District Judge has considered the title of 4A defendant and his right to possess the aforesaid lots exclusively on the basis that it is a separate land called 'Sawalakkara Walauwa', in the correct perspective. The 4A defendant, after the judgment, in 2010 has gone before the Civil Appellate court of Kandy which court in 2014 dismissed the appeal on a technical ground.

The original case record was called by this Court and it has been received from the District Court of Matale.

The plaintiff instituted action in respect of "Sawalakkaragedarewatte" of one seer Kurakkan in extent amongst himself and the 01st and 02nd defendants.

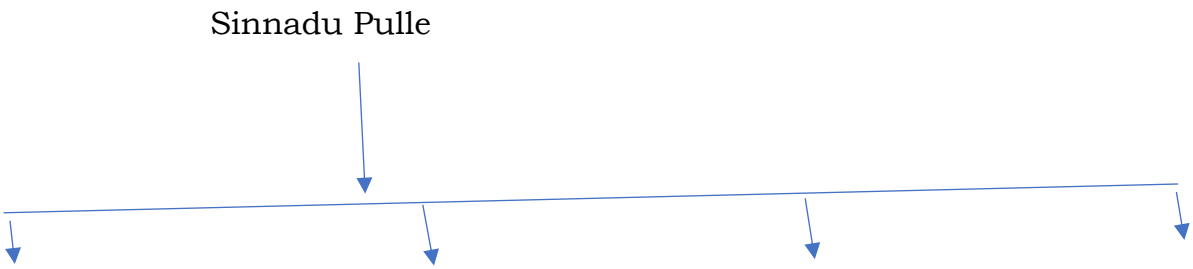
The shares according to plaintiff are,

1st plaintiff - undivided 28/72
2nd plaintiff - undivided 28/72

1st defendant - undivided 11/72

2nd defendant - undivided 5/72

The pedigree was as follows,



Meera Lebbe	Wappu Lebbe	Tangachchi Umma	Aisath Umma
2/6	2/6	1/6	1/6

Aisath Umma died intestate, unmarried and issuless. Her 1/6th was inherited by her siblings 1/18th each. Hence title devolved as follows,

Meera Lebbe - 2/6 + 1/18 = 7/18

Wappu Lebbe – 2/6 + 1/18 = 7/18

Tangachchi Umma - 1/6 + 1/18 = 4/18

Tangachchi Umma by deed No. **2556**/17.12.1874 gave to Meera Lebbe.

Hence Meera Lebbe gets – 7/18 + 4/18 = 11/18

Meera Lebbe died leaving

(i) Abdul Razak

(ii) Ummu Saleema

(iii) Yakoob

(iv) Seyyadu

Abdul Razak and Yakoob by deed No. **33286**/22.06.1966 gave to the 1st defendant

Hence 1st defendant Zeenath Umma

Ummu Saleema by deed No. **15509**/08.03.1945 gave to Hamiduge Abila Umma

Abila Umma by deed No. **19830**/ 01.02.1958 gave to H. M. M. Hajjiyar

Hajjiyar's share was inherited by his son S. H. Mohamed

S. H. Mohamed died leaving his heir the 2nd defendant Sahardeen

Wappu Lebbe died leaving Marikkara who inherited that share

Marikkar by deed No. **171**/12.10.1915 gave to Seyyadu above named

Seyyadu died leaving his widow Cadeja Umma and children Saadikin, Isath Umma and Izadeen

Cadeja Umma and children Saadikin and Izadeen together with Isath Umma (not the deceased daughter of the original owner) gave by deed No. **31047**/14.01.1963 to S. M. Raseed

Raseed by deed No. 344/20.05.1985 gave to 01st and 02nd plaintiffs

The 03rd and 04th defendants were made parties just because they are in the possession of the land.

The petitioner is the 04A defendant

She claims, that,

(i) By the undisputed deed marked P. 01, only 1/4th share has been transferred and the balance should come to the petitioner

(ii) There is a duty under Partition Law No. 21 of 1977 (section 25 (1) to (3)) for the district judge to investigate the title

(iii) There could be only one preliminary plan

The allegation in(i) above:

Deed No. 2536 dated 17.12.1874 referred to above was marked as P.01 on 17.03.2008 (at page 189 of the docket)

The judgment gives shares as follows,

01st plaintiff	- 42.5/162
02nd plaintiff	- 42.5/162
01st defendant	- 44/162
02nd plaintiff	- 33/162

The learned district judge says in the judgment (page 299 – 300) that 04A defendant says the original owner is Tangachchi Umma. She is (I think what the learned judge means is a former owner) a "mulgamkariyak". The learned judge says Tangachchi Umma has transferred her rights by deed No. 2556 in 1874, which he says 125 years ago. So he concludes, that, 04A defendant has no title (page 304).

Now the 04th defendant petitioner does not say that deed No. 2556 in 1874 was executed. What she says is only 1/4th share was dealt with.

Now I am looking at the certified copy from the "duplicate" of that deed at the Land Registry of Matale filed of record in the original case record, which was called by this Court (page 360 of the case record). The following is apparent,

(i) Vendor: Sinnadu Pillai Tangachchi Umma
(ii) Title claimed from: paternal inheritance from Sinnadu Pulle
(iii) Land: Sawalakkaragedarawatte of one seer Kurakkan sawing
(iv) Boundaries: North: Wall belonging to Pakeer Tamby, East: Ditch of the land of Uduma Lebbe, South: Ditch and road West: road
(v) Share: undivided 1/4th share belonging to me ("mata ayithi nobedaapu hatharen panguwa")

The duplicate of a deed is also an original. What is tendered to the district court is a certified copy from it dated 11.09.1968. P.01 (this deed) was marked by the plaintiff. There is no contest about the authenticity of the deed.

The learned district judge reminds himself of his duty under section 25 at page 265.

At page 289 he rejects the pedigree pleaded for 03,05 and 07 defendants.

Issue No. 06 raised by the plaintiff.

"06. Whether Tangachchi Umma transferred her rights to the land described in the schedule to the amended plaint, by deed No. 2556 dated 17.12.1874 to Meera Lebbe?

The answer is "yes".

The judgment of the learned district judge is 67 pages.

Most of it is devoted to decide a question on the corpus. There is no wrong in it.

He refers to the 1874 A. D. deed (P.01) in two places.

At page 45 of the judgment (page 300) he refers to this deed in connection with the pedigree of 04A defendant. He says, as it was said above too, Tangachchi Umma has transferred her share to Meera Lebbe 125 years ago.

The other place he refers to this deed is at page 60 of the judgment (page 315). That is in reference to plaintiff's pedigree. He says Tangachchi Umma transferred her undivided 4/18 to Meera Lebbe and Meera Lebbe gets 11/18 alias 99/162 shares.

This is the pedigree of the plaintiff referred to above.

Sinnadu Pulle dies, Meera Lebbe gets (at the proportion of 2:1) 2/6 or 6/18.

With the demise of his sister Aisath Umma he gets 1/18 more. Now he has 7/18.

Then by P.01 he gets (according to the plaintiff) Tangachchi Umma's share, which is 4/18. So the total share of Meera Lebbe is 11/18.

Now, did the learned district judge performed his duty under section 25?

The answer is "no". In both places he took for granted that Tangachchi Umma transfers her all right title and interest to Meera Lebbe.

It could be (i) P.01 transferred all right title and interest of Tangachchi Umma or (ii) it transferred only a part of it.

This is not yet examined by this Court.
What this Court questions is whether the learned district judge performed his duty?

Nowhere the judgment says "undivided 1/4th share belonging to me ("mata ayithi nobedaapu hatharen panguwa") was transferred. Nowhere the judgment considers what could be its possible meaning.

Issue No. 27 (raised for the 04 and 06 defendants)

"27. Whether that part of the land devolved on 04 and 06 defendants as per paragraphs 03 to 10 of the amended statement of claims?"

Issues were raised for the second time on 23.04.2007. The giving of evidence commenced on 17.03.2008.

The amended statement of claims of 04 and 06 defendants is dated 12.02.1993 (original case record page 176)

There is a statement of claims of 04A defendant dated 14.10.2005 at page 160.

But what issue No. 27 refers to seems to be that at page 176.

Paragraphs 03 to 10 says: The land called the Western part of Sawalakkara Walawwa was owned by Tangachchi Umma; that was inherited by her daughter Sellamma; she transferred that by deed No. 842/15.01.1931 to Roshan Beebi; she transferred that by deed No. 16783/14.09.1949 to the 06th defendant Abdul Sattar's daughter Aisa Nona; she transferred by deed No. 22223/04.12.1953 to Abdul Latif; he transferred it by deed No. 28413/05.08.1958 to A. D. M. Jeid; Jeid gave it by deed No. 3451/09.12.1967 to Aisa Nona referred to above; she by

deed No. 4076/19.03.1969 gave it to T. R. A. Samad and he gave it by deed No. 8380/06.03.1986 back to Aisa Nona.

The 04th defendant (deceased) was the husband of Aisa Umma the 06th defendant.

Now the learned district judge says at page 47 of the judgment (page 302 of the docket) that deed No. 842 dated 15.01.1931 was not produced.

He also from page 45 to 47 of the judgment reproduces an extract from the evidence of the 04A defendant.
He particularly refers to the Question and answer at page 47, where the 04A defendant was asked whether his statement of claims say, that, Tangachchi Umma was the original owner his answer that he does not know it. He gives lot of importance to this saying that the 04A defendant refused to accept what was in his predecessor's statement of claims, the predecessor in adieation of inheritance, his deceased father, the 04th defendant.

Now the 04A defendant, according to the original case record, commenced giving evidence on 08.02.2010. His name is Abdul Fareed Mohamed Munas. He was 64 years old then. He said D. R. M. Fareed, the deceased 04th defendant was his father. (page 275 of the case record)

As already said, the amended statement of claims of 04th and 06th defendants (the husband and the wife – the parents of the above witness) was filed on 12.02.1993 – 17 years ago). At that time the 04A defendant was 47 years old.

Without just condemning the witness and his testimony in toto, just because he says, that, he does not know what is their in his father's (*Attorney-at-Law's*) statement of claims filed 17 years ago and (*without knowing what is the effect of*

his answer and under the "heat" of cross examination) at page 280 of the record saying, that, the statement in the statement of claims, that, Tangachchi Umma was the original owner was incorrect, the learned district judge should have considered,

(i) That statement was filed in court 17 years ago when this witness was just 47 years old (*there is a vast difference of a man's life between 47 and 64 – he is being asked questions about the contents of a statement of claims filed by the Attorney-at-Law of his deceased father 17 years ago*) and anyone who has practiced as an Attorney at Law should know that at least some of the original court practitioners will have no time to refresh the memory of such a witness – it was his father, if at all, gave instructions to prepare the statement not him. Furthermore, the practitioner's counsel has to draw the line between refreshing the memory of the witness who is about to give evidence and "coaching" the witness.

It is said,

"Witness Familiarization vs. Coaching:
There is an important distinction between witness familiarization (*aiming to make a witness comfortable with the courtroom and associated process*) and coaching.
Familiarization is acceptable, but coaching that influences a witness's testimony is problematic[2]."

These things this Court just mentioned, contained in the above passage has been taken into account by Sir James Fitzjames

[2] 20180921-Ethics_of_Witness_Preparation.pdf (farris.com)

Stephen[3], one of the most eminent jurists of the nineteenth century, when he drafted "The Indian Evidence Act", in 1872[4].

The Sri Lankan Evidence Ordinance No. 14 of 1895 is a reproduction of the Indian Act, ipsisima verba.

It says at the **main section** (as opposed to the illustrations) in section 114, that,

"**The court may presume the existence of any fact which it thinks likely to have happened**, regard being had to the common course of natural events, **human conduct**, and public and private business in their relation to the facts of the particular case."

What this Court said above regarding the testimony of 04A defendant is included in the "common course of natural events" and "human conduct." It is because, this main part of section 114 should operate, in believing and disbelieving witnesses, that, even in this 24th year of the second millennium evidence is taken and considered by a human being (*although Artificial Intelligence, which started in a smaller way around 1986 is now in its 37th year is in an advanced condition*).

But ironically, sometimes, judges tend to cling on to what is referred to in an "illustration" of a section, than in the section itself. It happened in this case too.

[3] Review of the Indian Evidence Act, 1872 | Law Commission of India Reports | Law Library | AdvocateKhoj

[4] This legislation, was originally passed in India by the Imperial Legislative Council in 1872, during the British Raj. Unfortunately, in February 2024 – after 152 years – it was replaced in India by "Bharatiya Sakshya Adhiniyam".

The learned district judge at page 47 of the judgment (page 302 of the docket) criticizes the 04A defendant for being unable to produce deed No. 842 dated 1931, by which it was claimed, that the alleged original owner, Tangachchi Umma's daughter Sellamma is said to have transferred her rights down the line of the pedigree pleaded for the 04th defendant.

The learned district judge at page 48 (page 303) applies the illustration at 114(f) of the Evidence Ordinance. It says,

"The Court **may** presume

.....

(f) that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it;.."

Having not thought of considering the fact that the statement of claims was filed 17 years before the witness saw the "colour of the court" and the fact that he was a "trader" by profession and the fact that he was 64 years old when giving evidence under the main part of section 114, the learned district judge applies this "illustration" in full force, so to speak, as if that "illustration" said, that the court "shall" presume. Just consider the "illustration" in 114(a).

"The Court may presume

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;..."

How "soon" or how "late" is "soon after"? If a pickpocket on the run puts the stolen item into a pocket of a passer by that man will be, under the strict

application of this illustration, **presumed guilty**. The illustration says, unless he can account but a court might say that his account of his innocence is false.

This provision is contrary to Article 13 (5) which says, that, "Every person shall be presumed innocent until he is proved guilty:…"

However due to Article 16(1) of the Constitution, section 114(a) is valid.

"16. (1) All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter."

The presumption in 114(f), with great respect to that eminent jurist Sir James Stephen is an affront to reason, logic and common sense.

As it was said in the celebrated public law case, Cooper vs. Wandsworth Board of Works (1863) 14 CB (NS) 180, where the board of works sent men late in the evening to demolish a house that has reached the second story, on the basis, that, the builder had not given 07 days notice to the board of works, Erle CJ said:

> I think the board ought to have given notice to the plaintiff and to have allowed him to be heard. **The default in sending notice to the board of the intention to build, is a default which may be explained**. <u>There may be a great many excuses for the apparent default</u>.

The deed that was not produced is dated 1931. The trial was in 2007. Seventy six years apart. There could have been great many valid reasons as to why it could not have been produced. It is true that plaintiff had managed to obtain a certified copy of the 1874 A. D. deed in 1968. That itself is not a reason to say that 1931 A. D. deed was also available but the 04A defendant did not produce it as the production of it was unfavourable to it. With respect, these are some of

the defective provisions in the excellent piece of legislation of Sir James and such provisions are rare in the otherwise logical Evidence Ordinance.

(ii) An incident in regard to the plaintiff, the learned district judge should have taken into account has not been considered.

When the 01st plaintiff, Haminathul Sureyyia Rasheed was cross examined on 05.01.2009 she said as follows at page 245 of the case record,

Q. Sinnadu Pulle had a child called Aisath Umma?

A. Asia Umma.

Q. Does she has children?

A. Not now.

Q. Had she (children) then?

A. Yes.

As the initial part of the pedigree of the plaintiff shows, this is Aisath Umma, who had an undivided 1/6th share. The amended plaint claims that she died intestate and unmarried and issueless and her share devolved on her siblings 1/18th each.

The shares of

Meera Lebbe - 2/6 + 1/18 = 7/18

Wappu Lebbe – 2/6 + 1/18 = 7/18

Tangachchi Umma - 1/6 + 1/18 = 4/18

have been calculated on this basis. As the plaintiff himself has admitted, that, Aisath Umma had children, the above shares could not be correct. The learned district judge had neither referred to this evidence (amounting to an admission by the plaintiff against his own interest) nor explained as to why he is not acting upon this evidence.

Instead, he says at page 59 of the judgment, (page 314 of the docket), that Aisath Umma died and it has been established, that, her undivided 1/6th alias undivided 3/18 was inherited by her siblings Meera Lebbe, Wappu Lebbe and Tangachchi Umma.

The pedigree of title of the plaintiff is defective, to say the least.

Unlike the 04A defendant, on the day the plaintiff gave evidence he was 49 years old and a teacher by profession.

(ii)The duty of the learned district judge under section 25 of the Partition Law:

Section 25(1) is as follows,

"(1) On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made".

Among certain decided cases, referred to by the learned district judge to demarcate the boundaries of the scope of his duty to investigate the title of the parties, he has cited the case of THILAGARATNAM v. ATHPUNATHAN AND OTHERS 1996 (2) SLR page 66.

That case decided by Anandacoomaraswamy J., P/C. A. in the Court of Appeal with the concurrence of Edussuriya J., among other things, says,

"The Learned Counsel for the Appellant cited several authorities Goonaratne v. Bishop of Colombo,(1) Peries v. Perera,(2) Neela Kutty v. Alvar,(3) Cooray v. Wijesuriya,(4) Juliana Hamine v. Don Thomas(5) & Sheefa v. Colombo Municipal Council,(6) and stated that it is the duty of the Court to examine and investigate title in a partition action, because the judgement is a judgement in rem.

We are not unmindful of these authorities and the proposition that it is the duty of the Court to investigate title in a partition action, but the Court can do so only within the limits of pleadings, admissions, points of contest, evidence both documentary and oral. **Court cannot go on a voyage of discovery tracing the title and finding the shares in the corpus for them, otherwise parties will tender their pleadings and expect the Court to do their work and their Attorney-at-Law's work for them to get title to those shares in the corpus**".

The first paragraph referred to above contains a list of cases some learned district judges and other courts cite "by heart" not "by brain", so to speak, the citation of which is superfluous on the face of the lucid dictates of section 25(1) of the Partition Law. This is a provision based on the legal principle, that, as the decree in partition is a decree in rem (as it binds non parties too) the court has to satisfy itself as to the title to a degree somewhat deeper than in a usual civil dispute.

However, this does not alter the degree of proof, which is the preponderance of evidence (balance of probability).

The above statement itself sets the limits: No difference on the burden of proof, that is preponderance of evidence, but then, a duty to investigate the title. What does this mean?

In a usual civil dispute (an action in personam) the degree of proof is preponderance of evidence. In a criminal case, there is a presumption of innocence to rebut. Presently this is recognised in Article 13(5) of the Constitution. Hence the degree of proof is beyond reasonable doubt. The words used in section 25(1) are,

"…**the court shall examine the title of each party** and shall hear and receive evidence in support thereof **and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party** to, of, or in the land to which the action relates…."

As this is not a change of the degree of proof, this is an alteration of the degree of examination. With all the due respect to the learned judges who made the above pronouncement in the Court of Appeal on 14th February 1996 (28 years ago) if the district judge is to depend (thus handicapped) on the pleaders and parties only hence circumscribing his power of examination bestowed upon him by the legislature in its wisdom, there can be no difference between an action for partition and a civil dispute which binds parties in personam. By using "catchy" terms and idioms, such as, "voyage of discovery" (or in a certain other context "two bites of the cherry") the district court cannot be dissuaded to perform the duty cast upon it to examine the title of each party. The use of such phrases to shirk the duty otherwise cast upon a judge by law is unprofessional, with respect and must be discouraged. In other words, what this Court says is, that, when

the legislature in its wisdom casts a duty on a court, the courts cannot and the courts are not free to use idiomatic and other expressions to stultify the intention of the legislature. This Court respectfully, but strongly disagree, that, a district judge holding a partition trial must wholly depend on the pleader and the party but could not or should not look further. To say so is ignorance of the law and violation of the mandate the parliament has given. This does not mean, that, once the plaint is instituted and may be the statements of claims of defendants are also filed, the district judge must find everything by himself or herself, whether the parties take steps or not. But surely, as in this case, if the plaintiff in evidence admits, that, a certain former co owner had heirs, which have neither been made parties nor any valid reason given as to why they need not be made parties, the district judge must take a step forward to find their title, if any, without which the duty cast upon him by section 25(1) will not be discharged.

The lack of appreciation and confusion of the above principles is evident by the judgment in this case: at page 10 of the judgment (page 265 of the docket) the learned district judge says he has to personally satisfy on the title. At page 12 of the judgment (page 267 of the docket) he says that there is no personal responsibility cast upon the judge. The question is not on the word “personally”. A judge must satisfy personally even in an ordinary civil dispute about the preponderance of evidence. Here the difference is that he must take a further step to fill the gaps the pleaders and parties leave. This does not mean, that, he should himself do or cause to be done a search in the land registry for deeds, marriage certificates, death certificates or birth certificates and the like. But he must put his foot down and say, that, I will not enter the decree you ask unless you bring this or that (which fills the gap that was left open). He need not proceed to dismiss the entire action if that party fails to bring to court what is required. The Partition Law permits him to leave “unallotted” the shares to which title was not proved. He must also be mindful, that, they are kept unallotted for the purpose of a party who was already in the case, or a new one coming and

establishing before the same court title to such unallotted lots, in which case, they must be allotted.

(iii) There could be only one preliminary plan:

As it was said in the opening paragraph of this judgment, there are two plans,

(i) Mr. K. S. Samarasinghe's plan No. 3847 dated 11.03.1991 marked "Y" (page 456 of the case record)
Depicts lots 01 to 05 -Total extent 0A.0R.18.92P.
Boundaries – North Assessment Nos. 46 and part of 44 Gongawala Road
East Cement Ditch
South Harrisson Jones road
West Gongawala road

(ii) Mr. Egerton S.I. Rajakaruna's plan No. 236 dated 05.02.1999 marked as "X" (page 467 of the case record)
Depicts lots 01 to 07 – Total extent 0A.0R.19.16P.
Boundaries – North Assessment Nos. 46 and 46A Gongawala road
East Stream
South Harrison Jones road
West Gongawala road

Both the plans depict the land as 'Sawalakkara Gedara Watta'.

Both the plans show, more or less, the same land.

The 04A defendant when giving evidence at page 276 – 277 of the case record claimed lot 02 and the building A in Mr. Rajakaruna's plan (X). Lot 02 is 1.30 perches and A is No. 42, Gongawala Road which is an asbestos roofed building material shop.

The 04A defendant also referred to plan Z. This is at page 479 of the case record. It is plan No. 1098 dated 21.04.1987 of Mr. A. G. W. Giragama, Licensed Surveyor. It shows assessment No. 42. The extent is 2.78 perches. Boundaries are North assessment No. 44, Gongawala road East assessment Nos. 23 and 25, Harrison Jones road South Harrisson Jones road and West Gongawala road.

Mr. Egerton Rajakaruna was the opening witness on 17.03.2008 (page 209 of the case record). Through him his plan No. 236 (X) was marked at page 210 of the case record. The learned counsel who appeared for 04A defendant too, through certain other defendants, commenced cross examination from page 214. Through Mr. Rajakaruna he marked plan No. 3748 of Mr. Samarathunge too as Y. Plan No. 1098 was shown to the surveyor at page 217 and following Questions and Answers were recorded,

Q. Plan No. 1098 shows Gongawala road and Harrisson Jones road?

A. Yes.

Q. Plan No. 1098 roughly shows lots 01 and 02 in plan X?

A. Yes.

Q. What you have shown as building A is shown there?

A. Yes.

Q. That building is shown in pink?

A. Yes.

At this stage plan No. 1098 was marked as Z.

It appears from pages 14 to 44 (page 269 to 299 of the docket) that the learned district judge has referred to both the plans X and Y “in common”. To his credit, however, he has at page 15 (page 270 of the docket) says that the position of the

plaintiff is that the corpus is depicted in plan No. 236 (X). Having said that both plans are referred to at the same time.

Plan No. 3847 dated 11.03.1991 of Mr. K. S. Samarasinghe marked "Y" (page 456 of the case record) is earlier in point of time. It depicts a land of 18.92 perches.

Plan No. 236 dated 05.02.1999 of Mr. Egerton S.I. Rajakaruna marked as "X" (page 467 of the case record) is later in point of time. It depicts a land of 19.16 perches.

The Journal Entries 01 to 56 in the case record are "moth eaten" and cannot be deciphered. The J. E. No. 57 says Mr. Rajakaruna's plan has been received.

The statement of claims of 04 and 05 defendants dated 12.12.1993 (prior to plan X) refers to a plan No. 3477 filed of record. They ask to exclude lots 01 and 02. In the schedule they refer to a land in extent ½ seer Kurakkan sawing. Boundaries are North by the wall of Sellamma daughter of Pakeer Thamby, East by the rest of the land belonging to the heirs of Seyyadu, South by the rest of the land and Harrisson Jones road and to the West by Gongawala road. This is what is claimed by 04A defendant in his evidence, as referred to above, as lot 02 and the building A in plan X. There is no such plan as No. 3477 filed of record. It appears to be a reference to plan No. 3847 (Y). What is asked to be excluded are lots 01 and 02. They depict almost the land as claimed by the 04A defendant in his evidence, lot 02 and building A in plan No. 236(X).

The 03,05 and 07 defendants in their statement of claims dated 25.04.1996 referred to lot 05 in plan No. 3847 (Y). They asked to exclude it.

The 02nd defendant in his statement of claims dated 05.12.1996 requested to determine that lots 01,03 and 04 of plan No. 3847 (Y) to be the corpus for partition.

Hence, it appears, that, plan No. 236 dated 05.02.1999 of Mr. Egerton Rajakaruna was made due to the instigation of none, but the plaintiff herself.

The extent of Y made earlier is 18.92 perches.

The extent of X made later is 19.16 perches.

The increase is 0.24 perches.

Section 16,17 and 18 of the Partition Law deal with the preliminary survey. Section 18(1) and (2) deal with the return of the preliminary survey plan and report by the surveyor to whom it was issued. Then comes section 18(3). It says,

"(a) Notwithstanding anything in subsection (2) of this section, **the court, either of its own motion or on the application of a party to the action**, may, before using the copy of the surveyor's field notes and the plan, cause them to be verified and to be certified as correct or, where such field notes and plan are incorrect, **cause fresh field notes and a fresh plan to be made by the Surveyor-General or by any officer of his department authorized by him in that behalf, and may for that purpose issue a commission to the Surveyor-General**.

So if it was the plaintiff herself who asked for the second plan, the correct procedure was to do it through the Surveyor General.

Issuing a fresh commission to a surveyor on the "panel" of the district court comes, if a defendant, at the time of filing statements of claims, say that a larger land must be shown as the corpus. This is dealt with at section 19(2)(a) which says, that,

"(a) **Where a defendant seeks to have a larger land than that sought to be partitioned by the plaintiff made the subject-matter of the action in order to obtain a decree for the partition or**, sale of such larger land under the provisions of this Law, his statement of claim shall include a statement of the particulars required by section 4 in respect of such larger land ; and he shall

comply with the requirements of section 5, as if his statement of claim were a plaint under this Law in respect of such larger land".

If this was done, under section 19(2)(e) which says,

"(e) Where the larger land is made the subject-matter of the action, the provisions of sections 12, 13, 14 and 15 shall, mutatis mutandis, apply as if the statement of claim of the party seeking a partition or sale of the larger land were the plaint in the action; and-….."

there should be a fresh declaration by the plaintiff's Attorney at Law and a fresh registration of lis pendence (section 12), issue and service of summons (if necessary) to the new parties to be added (sections 13 and 14) and public notice of the institution of the partition action (section 15).

However, those sections apply, "mutatis mutandis" and as the increase was only 0.24 perches it could be presumed that sections 13 to 15 do not apply. But following of section 12 is mandatory. That does not depend on the smaller extent of the increase of the corpus. This is more so as this is a comparatively smaller land showing (in the second plan marked X too) only 19.16 perches. There is no entry to say, that, a fresh lis pendence was registered after the receipt of what was later marked as X, the plan No. 236. Although this is an irregularity, still the increase of the extent from plan Y to plan X was 1.25 per cent.
So now, the contest as to the corpus is as follows,

(i) Plaintiff claims as corpus - lots 01 to 07 of plan No. 236 (X)

(ii) 04A defendant wants in evidence to exclude – lot 02 and building A in plan No. 236 (X). His (father's and mother's) statement of claims in 1993 (prior to the making of X in 1999) claims to exclude lots 01 and 02 in plan Y. Lot 2 in plan Y is also the same building A. The extent of lot 02 and building A in plan X is 4.03 perches (*this is taking A to be lot 01 in this plan because there are "clichés" on both sides of building A indicating*

that building A and lot 01 represents one unit). **But in X, only lot 01 in extent 2.73 perches was claimed before the surveyor (according to the plan) by 04 and 06 defendants**. Lot 02 was claimed before the surveyor by the 02nd defendant. Hence the extent claimed by the predecessors of 04A defendant in plan X is 2.73 perches (lot 01). As already said the statement of claims of 04 and 06 defendants claim lots 01 and 02 in plan No. 3847 (Y) made in 1991. They are in extent 4.17 perches. As it will be recalled in X this area was 4.03 perches. So in both plans X and Y, the area claimed by the father and mother of the 04A defendant (by their statement of claims) and the area claimed by the 04A defendant (in his evidence) are almost same. **But, in plan Y of 1991 too, Mr. Samarasinghe has recorded, that, the 04th defendant claimed lot 02 with building A standing on it. This is in extent 2.87 perches**. On that plan there was no claimant for lot 01. So in X the 04th defendant claimed lot 01 of 2.73 perches in extent. In Y the 04th defendant claimed lot 02 in extent of 2.87 perches.

(iii) 03,05 and 07 defendants in their statement of claims dated 1996 (before the coming of X) claimed to exclude lot 05 and its building I on plan No. 3847 (Y). There is no clash of these defendants with the 04A defendant.

The learned district judge says at page 43 – 44 of the judgment (page 298 – 299 of the docket) that the 04th defendant has not objected to both the surveyors in 1991 and 1999 for surveying of the part of the land he claimed. But it must be appreciated, that, there is a difference when a surveyor goes to survey Kosgahawatte if he also surveys Delgahawatte, to take an example and this. Here the plaintiff claims the land as Sawalakkaragedera watte. The 04th defendant says Sawalakkara walawwa western part. There is a similarity. It could well be; and it appears to be so, that, what 04th defendant claimed is also a part (he also says Western part) of the same land, identified by both names (The terms "gedare watta" and "walawwa" both refer to a residence). So as in (ii) above, his claiming (a) lot 01 in extent 2.73 perches in plan X and (b) lot 02 with building A standing

on it in extent 2.87 perches in plan Y is more than sufficient and both the surveyors showing that part also is correct.

As it was said above, the plaintiff's pedigree is defective. One reason is that the 01st plaintiff herself said Aisath Umma had heirs. The 04A defendant in his evidence marked without any objection by any of the parties deed No. 8380 dated 06.03.1986 as 04 D 01. A partition action is a civil case. In such cases if a party produces a document and if it is not objected, it becomes a part of evidence. It is true, as said above, under section 25(1) the court has to examine the title. This deed transfers the land of ½ seer Kurakkan soweing called the western part of Sawalakkara walawwa to Abdul Sattar's daughter Aisa Nona. This is the 06th defendant, the mother of 04A defendant. The vendor is Thambirasa Abdul Samad. He claims title from a deed No. 4076 dated 19.03.1969. This partition action was instituted in 1989. Hence 20 years prior to that the 06th defendant received her rights. The 04A defendant has given evidence at page 276 of the case record, that, Abdul Samad was his father's younger brother. The land was transferred to Samad by his mother (06th defendant) to obtain some money for his father. The 04A defendant said, that, he lives on this land for 55 years. He gave evidence in 2010. Hence this was from or around 1955. That was 34 years prior to the institution of the partition action. There is no doubt that his mother the 06th defendant and father 04th defendant were there even before that. This evidence was not challenged. The cross examination, only for the plaintiffs are from page 278 to 285 of the case record. That concentrated, as said earlier, about 04A defendant's knowledge of Tangachchi Umma, who may have lived at the turn of the 20th century (she executed P.01 in 1874 A. D.) and about the boundaries of the part of the land he claimed. The execution, the authenticity and the veracity of 04 D. 01 was never challenged. Despite the duty cast upon the court to examine the title, as said above, in a partition action too, the degree of proof is preponderance of evidence or the balance of probability. As this Court sees, it is not only probable, but it is highly probable; and there is cogent evidence before this Court (and the district court) that the 04A defendant has and his mother

and her predecessors in title had title and also independent, uninterrupted and adverse possession to the part they claimed to be excluded, that is, lot 01 in extent 2.73 perches of plan No. 236 (X).

Therefore, lot 01 in plan No. 236 (X) of 0A.0R.2.73P., together with the building A is excluded from the subject matter of partition and from the interlocutory and final decrees of this action.

The 04A defendant is declared the owner of this land excluded from the subject matter.

There is no order on costs.

JUDGE OF THE COURT OF APPEAL

HON. JUSTICE Sasi Mahendran
I agree.

JUDGE OF THE COURT OF APPEAL