

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

In the matter of an application for Leave to Appeal against the order made on 29.8.2005 under section 48(4) Of the Partition Law, in Case No 31879/P in District Court of Gampaha.

**Court of Appeal Case No:
CA/LTA/0347/2005**

**Gampaha District Court
Case No: 31879P**

Liyanage Somawathie Perera of No 282.
Kanduboda, Delgoda.

Plaintiff

Vs

1. Solanga Arachchige Ranjan Rohitha of No 372. Mahawatta Road, Delgoda.
2. Solanga Arachchige Ramyalatha of No 372 Mahawatta Road, Delgoda.
3. Edirisinghe Arachchige Daya Sarath Kumara Rohitha Edirisinghe of No 276/A, Kanduboda, Delgoda.
4. Rajapaksha Pathiranehelage Pablis Perera of Mahawatta, Delgoda.

5. Solanga Arachchige Dona Hemawathie of No. 276/A, Kanduboda, Delgoda.
(Deceased)
6. Edirisingha Arachchige Piyadasa of No 278A, Kanduboda. Delgoda.
7. Edirisinghe Arachchige Appu Singho of No 278A, Kanduboda, Delgoda.
8. Edirisinghe Arachchige Simon Singho
(Deceased)
9. Hettiarachhige Seelawathie
10. Edirisinghe Arachchige Gunasekara
11. Edirisinghe Arachchige Amaradasa
12. Edirisinghe Arachchige Upasena
13. Edirisinghe Arachchige Thilak
14. Edirisinghe Arachchige Leelawathie
15. Edirisinghe Arachchige Kamalawathi
16. Edirisinghe Arachchige Chandrakanthi
17. Edirisinghe Arachchige Pushpakanthi
18. Edirisinghe Arachchige Nalani
19. Edirisinghe Arachchige Samaneris
20. Edirisinghe Arachchige Siman Singho All of No 277, Kanduboda, Delgoda.
21. Edirisinghe Arachchige Wimalaratne of No 277. Naranwala, Weliweriya.
22. Edirisinghe Arachchige Karunadasa of No 277, Kanduboda, Delgoda.

23. Edirisinghe Arachchige Premaratne of No 277, Kanduboda, Delgoda.
24. Edirisinghe Arachchige Sediris Appu of 276A, Kanduboda, Delgoda.
25. Liyanage Leelawathi of No 276A, Kanduboda, Delgoda.
26. Edirisinghe Arachchige Premaratne alias Sumanadasa of No 277, Kanduboda, Delgoda.
27. Kuruppu Arachchige Sopihami of No 278A, Kanduboda, Delgoda.

Defendants

11. Edirisinghe Arachchige Amaradasa of No 277, Kanduboda, Delgoda.
16. Edirisinghe Arachchige Chandrakanthi of No 277, Kanduboda, Delgoda.
17. Edirisinghe Arachchige Pushpakanthi of No 277, Kanduboda, Delgoda.
19. Edirisinghe Arachchige Samaneris of No 278B, Kanduboda, Delgoda.
24. Edirisinghe Arachchige Sediris.
25. Liyanage Leelawathi Both of No 278A, Kanduboda, Delgoda.

11, 16, 17, 19, 24, and 25th

Defendants-Petitioners

Vs.

Liyanage Somawathie Perera of No 282,
Kanduboda, Delgoda.

Plaintiff-Respondent

1. Solanga Arachchige Ranjan Rohitha of No 372. Mahawatta Road, Delgoda.
2. Solanga Arachchige Ramyalatha of No 372 Mahawatta Road, Delgoda.
3. Edirisinghe Arachchige Daya Sarath Kumara Rohitha Edirisinghe of No 276/A, Kanduboda. Delgoda.
4. Rajapaksha Pathiranelage Pablis Perera of Mahawatta, Delgoda.
- 5a. E.A.Rupika Sandya Kanthi of No. 276/A, Kanduboda, Delgoda.
6. Edirisingha Arachchige Piyadasa of No 278A, Kanduboda, Delgoda.
7. Edirisinghe Arachchige Appu Singho of No 278A, Kanduboda, Delgoda.
- 8a. Edirisinghe Arachchige Simon Singho of No 278A, Kanduboda, Delgoda.
9. Hettiarachhige Scclawathic
10. Edirisinghe Arachchige Gunasekara
12. Edirisinghe Arachchige Upasena
13. Edirisinghe Arachchige Thilak
14. Edirisinghe Arachchige Leelawathie
15. Edirisinghe Arachchige Kamalawathi

18. Edirisinghe Arachchige Nalani
20. Edirisinghe Arachchige Siman Singho All
of No 277, Kanduboda, Delgoda

21. Edirisinghe Arachchige Wimalaratne of
No 277, Naranwala, Weliweriya

22. Edirisinghe Arachchige Karunadasa of No
277, Kanduboda, Delgoda.
23. Edirisinghe Arachchige Premaratne of No
277, Kanduboda, Delgoda.
26. Edirisinghe Arachchige Premaratne alias
Sumanadasa of No 277, Kanduboda,
27. Kuruppu Arachchige Sopihami of No
278A, Kanduboda, Delgoda.

Defendants-Respondents

11. Edirisinghe Arachchige Amaradasa of
No 277, Kanduboda, Delgoda (Deceased)
- 11A. Kamathegedara Sunil Chandralatha of
No.277, Kanduboda, Delgoda.
16. Edirisinghe Arachchige Chandrakanthi of
No.277, Kanduboda, Delgoda.
17. Edirisinghe Arachchige Pushpakanthi of
No.277, Kanduboda, Delgoda.
19. Edirisinghe Arachchige Samaneris of
No.278B, Kanduboda, Delgoda. (Deceased)
- 19A. Edirisinghe Arachchige Dayananda
Jayasiri.
- 19B. Edirisinghe Arachchige Indrani of

No.278B, Kanduboda, Delgoda.

24. Edirisinghe Arachchige Sediris Appu
(Deceased)

24A. Chandani Priyanka Edirisingha of
No.276/A, Kanduboda, Delgoda.

25. Liyanage Leelawathie both of No.278A,
Kanduboda, Delgoda.

**11,16,17,19,24, and 25th Defendants -
Petitioners-Petitioners.**

Vs

1. Liyanage Somawathie Perera of No 282,
Kanduboda, Delgoda. (Deceased)

1a. Panapiti Kankanamlage Dona Nanda

1b. Panapiti Kankanamlage Don Nivtan
Thilakasiri,

1c. Panapiti Kankanamlage Don Palitha
Nimalsiri,

1d. Panapiti Kankanamlage Dona Sriyani
Dhammika all of No.282/A, Kanduboda,
Delgoda.

1e. Panapiti Kankanamlage Dona Silvi of
No.282/A, Kanduboda, Delgoda.

**Substituted Plaintiffs-Respondents-
Respondents**

1. Solanga Arachchige Ranjan Rohitha of No.
372, Mahawatta Road, Delgoda. (deceased)

- 1A. Solanga Arachchige Don Ranjan
2. Solanga Arachchige Ramyalatha of No.372,
Mahawatta Road, Delgoda. (Deceased)
- 2A. Solanga Arachchige Don Ranjan of
No.372, Mahawatta Road, Delgoda.
3. Ediringhe Arachchige Daya Sarath Kumara
Rohitha Edirisingha of No. 276/A,
Kanduboda, Delgoda.
4. Rajapaksha Pathirannehelage Pabilis
Perera of Mahawatta, Delgoda.(deceased)
- 4A. Sunil Ratna Rajapaksha of Mahawatta,
Delgoda
5. Solanga Arachchige Don Hemawathie
(Deceased)
- 5A. E.A. Rupika Sandaya Kanthi of No. 276A,
Kanduboda, Delgoda.
6. Edirisingha Arachchige Rupika
Saumyawathi of No.278A, Kanduboda,
Delgoda.
7. Edirisingha Arachchige Appu Singho of
No.278A, Kanduboda, Delgoda.
- 8A. Edirisingha Arachchige Simon Singho of
No.278A, Kanduboda, Delgoda. (deceased)
- 8B. Rajasekara Waduge Kulawathie
- 8C. Edirisingha Arachchige Vijitha Nilanthi
both of No. 278/A, Kanduboda, Delgoda
9. Hettiarachchige Seelawathie
10. Edirisingha Arachchige Gunasekera

12. Edirisingha Arachchige Upasena
(Deceased)
- 12A. Edippili Arachchige Chithra Sriyakanthi
of No.278/C, Kanduboda, Delgoda
13. Edirisingha Arachchige Thilak
14. Edirisingha Arachchige Leelawathie
15. Edirisingha Arachchige Kamalawathie
18. Edirisingha Arachchige Nalani (Deceased)
19. Edirisingha Arachchige Samaneris
(Deceased)
- 19A. Edirisingha Arachchige Dayananda
Jayasiri of No.278/C, Kanduboda, Delgoda
- 19B. Edirisingha Arachchige Indrani of
No.278/B2, Kanduboda, Delgoda
20. Edirisingha Arachchige Siman Singho all
of No.277, Kanduboda, Delgoda.
21. Edirisingha Arachchige Wimalaratne of
No.277, Naranwala, Weliweriya
22. Edirisingha Arachchige Karunadasa of
No. 277, Kanduboda, Delgoda.
23. Edirisingha Arachchige Premaratne of
No.277, Kanduboda, Delgoda.
26. Edirisingha Arachchige Premaratne alias
Sumanadasa of No.277, Kanduboda,

27. Kuruppu Arachchige Sopihami of
No.278A, Kanduboda, Delgoda. (Deceased)

Defendants-Respondents-Respondents

Before	:	D. THOTAWATTA, J. K. M. S. DISSANAYAKE, J.
Counsel	:	Rohan Sahabandu, PC with C. Elvitigala, S. Senanayake and P. Weerasuriya for the 11 th , 16 th , 17 th , 19A, 19B, 24A and 25 th Defendant-Petitioners-Petitioners.
		Kumar Dunusinghe instructed by Manouri Herath for the 5A and 6 th Defendant- Respondents- Respondents.
		Shanel Jayasinghe for the 19A and 19B Substituted Defendant-Respondents- Respondents.
		Other Defendant-Respondents- Respondents except for the Defendant- Respondents- Respondents referred to above, are absent and unpresented.
Argued on	:	29.04.2025
Written Submissions of the 11,16,17,19,24, and 25 th		

Defendants -Petitioners

-Petitioners tendered on : 12.06.2025

Written Submissions

of the Plaintiff-Respondent

-Respondent tendered on : Not Tendered.

Written Submissions

of the Defendants-Respondents

-Respondents tendered on : Not Tendered.

Decided on : 14.01.2026

K. M. S. DISSANAYAKE, J.

This is an appeal with leave to appeal being granted by this Court on 25.03.2011 against an order of the learned Additional District Judge of Gampaha dated 29.08.2025 (**P8**), made by him in respect of three applications made to it by the 11th, 16th and 17th Defendant-Petitioners-Petitioners (hereinafter called and referred to as 'the 11th, 16th and 17th Defendants) and the 19th Defendant-Petitioner-Petitioner (hereinafter called and referred to as 'the 19th Defendant) and the 24th and 25th Defendant-Petitioners-Petitioners (hereinafter called and referred to as 'the 24th and 25th Defendants') under and in terms of section 48(4) of the Partition Law No. 21 of 1977 (as amended) (hereinafter called and referred to as 'the Act') in a partition action bearing No. 31879/P instituted by the Plaintiff-Respondent-Respondent (hereinafter called and referred to as 'the Plaintiff') in the District Court of Gampaha seeking partition of the land morefully, described in the schedule to the plaint filed in Court in terms of the chain of title recited therein by way of a pedigree appended thereto as per the scheme of share distribution set out therein among the Plaintiff and the 1st to 21st Defendants named in the caption to the plaint with 36/1920 share being

left unallotted, whereby, the learned Additional District Judge of Gampaha had rejected all three applications so made to it with costs. It is this order that the 11th, 16th, 17th, 19th, 24th and 25th Defendants now, seeks to impugn before us in this joint appeal on the grounds of appeal urged by them in paragraph 17(a) to (e) of the petition of appeal among any other grounds of appeal that may be urged by learned Counsel at the hearing of the instant appeal and they may be reproduced *verbatim* the same as follows;

- “a. The said order is contrary to Law and the facts of this case;
- b. The learned District judge has correctly accepted the evidence of the 11th Defendant that the summons could not have been served on him as he was away from Sri Lanka at that time and that there is no proof of summons been served on the 16th and 17th Defendants. Despite that acceptance, the learned judge had concluded that there had been Defendants to this action who were siblings of 11,16 and 17 Defendants, they should have been aware of this pending action and therefore they could have participate at the action to claim for their rights to the corpus. On that basis, the application of the 11,16,17 Defendants under section 48(4) had been disallowed.

The learned judge has failed to consider that serving of summons is mandatory and therefore, non serving of summons to a party to a partition action is a sufficient ground which warrants an application under 48(4) and therefore erroneously had disallowed the said application;

- c. The learned judge has erroneously decided that the 19th Defendant too had claimed before the surveyor and therefore ought to have known about the action;
- d. The learned judge has erroneously concluded that the 24th and 25th Defendants who had been claimants before the Surveyor ought to have known about this action and contested it. However the learned judge has

failed to consider that it's a mandatory requirement to sent notices to such disclosed parties by registered post under section 20 of the Partition Law. Further it is to be observed that despite the issuance of notices as aforesaid and in the absence of any minute to say such notices have been tendered by Plaintiff or have been issued by Court, the said 24, 25 Defendants have been added as parties to this action in their absence and they being unrepresented.

e. It is to be observed that from a very early point of time of this action, the 8th Defendant had been deceased and no steps what so ever had been taken by the Plaintiff to effect substitution. The trial had been concluded and the judgment too had been entered when the 8th Defendant was deceased and no person had been substituted in his room until and after the judgment is delivered. Even after the final Plan is prepared, the substitution has been affected for deceased 8th Defendant on 24.1.2000, subsequent to an application by the 11th Defendant himself. In the said circumstances, the judgment delivered have been delivered against a defendant who is deceased and not been properly substituted, and therefore in null and void.”

When this matter came on before us on 25.07.2025 for judgement of this appeal, it was observed by Court that notices had not been served on some of the parties to the instant appeal and therefore, the Appellant was directed to furnish forthwith to Court the requisite notices to be issued on those parties under registered cover which had been the cause for delay in delivering the judgement of this appeal on the day originally fixed for the same.

The pivotal basis for the respective applications made to Court under and in terms of section 48(4) of the Act by the 11th, 16th and 17th Defendants as well as the 19th Defendant being non-service of the summons on each of them of the said partition action and in consequence, the right, title, or interest of them to or in the land sought to be partitioned which formed the subject matter of the

interlocutory decree entered by Court in the said partition action had been extinguished or they had been otherwise, prejudiced by the interlocutory decree entered by Court.

On the other hand, the basis for the application made to Court by the 24th and 25th Defendants under and in terms of section 48(4) of the Act was that each of them being made parties to the partition action without them being given notice of the partition action as being claimant before the Surveyor at the preliminary survey as required by section 20(1)(a) of the Act and in consequence, the right, title, or interest of them to or in the land sought to be partitioned which formed the subject matter of the interlocutory decree entered by Court in the said partition action had been extinguished or they had been otherwise, prejudiced by the interlocutory decree entered by Court.

However, it is to be observed that, the learned Additional District Judge of Gampaha, had having correctly, come to a definite finding on the evidence adduced by the 11th Defendant at the inquiry into the said applications that summons had not been served on the 11th, 16th and 17th Defendants, nevertheless, proceeded to dismiss the application made to Court by them by holding that despite the fact that summons had not been served on each of them, they ought to have been aware of the partition action by reason of the fact that some of the parties to the partition action being siblings and thus, they could have been able to establish their entitlement to the land sought to be partitioned had they really, so endeavoured. It is the legality and or the proprietary of these findings of the learned Additional District Judge of Gampaha which led him to have dismissed the application so preferred to Court by the 11th, 16th and 17th Defendants, the learned President's Counsel now, seeks to canvas before us in the instant appeal

Hence, the pertinent question that would arise for our consideration in this appeal is whether; these findings can sustain in law as contended by the learned

President's Counsel for the 11th, 16th, 17th, 19th, 24th and 25th Defendants at the hearing before us.

It may now, be examined.

The Plaintiff had instituted the said partition action in the District Court of Gampaha seeking partition of the land morefully, described in the schedule to the plaint filed in Court in terms of the chain of title recited therein by way of a pedigree appended thereto as per the scheme of share distribution set out therein between the Plaintiff and the 1st to 21st Defendants named in the caption to the plaint with 36/1920 share being left unallotted, and the learned District Judge of Gampaha had entered an interlocutory decree in terms of the judgement delivered by him thereby allotting shares to the Plaintiff and the 1st to 21st Defendants with certain amount of shares being left unallotted and the scheme of final partition too, had also been submitted to the Court by the Court Commissioner in terms of the commission issued to him by Court. It was at this stage that those three applications had been made to Court by the said Defendants.

The instant partition action is governed by the provisions of the Act. In terms of section 13(1) of the Act, the Court shall order summons to be issued on the Defendants thereto and section 14 thereof provides that the provisions of the Civil Procedure Code relating to the service of summons shall apply to the service of summons in a partition action. Section 19(1) of the Act provides that, on or before the date specified in the summons issued in a partition action or on or before such later date as the Court may fix for the purpose, any Defendant in the action may file or cause to be filed in Court a statement of claim setting out the nature and extend of his right, share or interest to or in the land to which the action relates and shall, if he disputes any averment in the plaint relating to the devolution of title, file or caused to be filed in Court together with his statement of claim a pedigree showing the devolution of title.

A careful analysis of sections 13(1), 14 and 19(1) of the Act makes it abundantly, clear that the requirement that the defendant should have notice of the action either by personal service or substituted service of summons is a condition precedent to the assumption of jurisdiction against the defendant in a partition action like in any other civil action for; failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant and that it is only by service of summons on the defendant that the Court gets jurisdiction over the defendant and that if a defendant is not served with summons or otherwise notified of the proceedings against him, the judgment entered against him in those circumstances is a nullity.

It was emphatically, laid down by Court in **Ittepana v. Hemawathie 1981[1] SLR 476** that,

"The principles of natural justice are the basis of our laws of procedure. The requirement that the defendant should have notice of the action either by personal service or substituted service of summons is a condition precedent to the assumption of jurisdiction against the defendant. 'Jurisdiction' may be defined to be the power of a court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it. When the jurisdiction of a Court is challenged the Court is competent to determine the question of jurisdiction. An inquiry whether the Court has jurisdiction in a particular case is not an exercise of jurisdiction over the case itself. It is really an investigation as to whether the conditions of cognizance are satisfied. Therefore, a Court is always clothed with jurisdiction to see whether it has jurisdiction to try the cause submitted to it. Failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. It is only by service of summons on the defendant that the Court gets jurisdiction over the defendant. If a defendant is not served with

summons or otherwise notified of the proceedings against him, the judgment entered against him in those circumstances is a nullity. The proceedings being void, the person affected by them can apply to have them set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court which is saved by S. 839 of the Civil Procedure Code. Hence the District Judge acted within his jurisdiction in inquiring into the question of non-service of summons.”

The Act in its section 48(4)(a)(i) provides a special remedy for a party to a partition action, whose right, title or interest in and over the land sought to be partitioned had been extinguished or such party had been otherwise, prejudiced by the interlocutory decree in consequence of him being not served with summons, thereby conferring statutory recognition upon the well-established requirement that the defendant should have notice of the action either by personal service or substituted service of summons, is a condition precedent to the assumption of jurisdiction against the defendant wherein it *inter-alia*, enacts that whenever a party to a partition action has not been served with summons, and in consequence thereof the right, title or interest of such party to or in the land which forms the subject-matter of the interlocutory decree entered in such action has been extinguished or such party has been otherwise prejudiced by the interlocutory decree, such party may, on or before the date fixed for the consideration of the scheme of partition under section 35 or at any time not later than thirty days after the return of the person responsible for the sale under section 42 is received by court, apply to the court for special leave to establish the right, title or interest of such party to or in the said land notwithstanding the interlocutory decree already entered.

It is under these provisions of the Act, the 11th, 16th, 17th, 19th, 24th, and 25th Defendants had made an application to the District Court of Gampaha seeking special leave to establish the right, title or interest of them to or in the land

sought to be partitioned in the instant partition action notwithstanding the interlocutory decree already entered therein based on the said premise.

Upon a careful perusal of the journal kept by Court in the said partition action, it becomes abundantly, clear that in view of journal entries No. 6 of 09.10.1989, No. 7 of 16.10.1989 and No. 8 of 05.03.1990, summons had never been furnished to Court by the Plaintiff to be served on the 16th and 17th defendants notwithstanding the order of Court to issue summons on each of them upon furnishing the same to Court by the Plaintiff thus, clearly, manifesting that summons had never been served on the 16th and 17th defendants as rightly, found by the learned Additional District Judge of Gampaha in the impugned order (**P8**).

Hence, the said findings of the learned Additional District Judge of Gampaha so arrived at by him on the evidence adduced before him at the said inquiry, namely; summons had never been served on the 16th and 17th defendants, had been well supported and fortified by the contents of the journal entries No. 6 of 09.10.1989, No. 7 of 16.10.1989 and No. 8 of 05.03.1990.

However, it is rather unfortunate to observe that, the learned Additional District Judge of Gampaha, had having correctly, come to a definite finding on the evidence adduced by the 11th Defendant at the inquiry into the said applications which was well supported by the contents of the journal entries No. 6 of 09.10.1989, No. 7 of 16.10.1989 and No. 8 of 05.03.1990 that summons had not been served on the 16th and 17th Defendants, nevertheless, proceeded to dismiss the application made to Court by them by holding that despite the fact that summons had not been served on each of them, they ought to have been aware of the partition action by reason of the fact that some of the parties to the partition action being siblings and thus, they could have been able to establish their entitlement to the land sought to be partitioned had they really, so endeavoured, which is in total contravention of the clear provisions contained in sections 13(1), 14 and 19(1) of the Act read in conjunction with the well-

established principle of law as enumerated above, namely; Failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant and that it is only by service of summons on the defendant that the Court gets jurisdiction over the defendant and that if a defendant is not served with summons or otherwise notified of the proceedings against him, the judgment entered against him in those circumstances is a nullity.

In the circumstances, I would hold that the learned Additional District Judge of Gampaha had been in grave error in dismissing the application made to it by the 16th and 17th Defendants without granting special leave under and in terms of section 48(4)(a)(i) of the Act seeking special leave to establish the right, title or interest of them to or in the land sought to be partitioned notwithstanding the interlocutory decree had already been entered by erroneously, holding so.

I would therefore, hold that the order (**P8**) cannot in any manner, sustain both in fact and law and as such it ought to be set aside.

Hence, I would proceed to grant special leave under section 48(4)(a)(i) of the Act as prayed for by the 16th and 17th Defendants in their joint application made to the District Court of Gampaha.

Furthermore, the learned Additional District Judge of Gampaha had come to similar findings with regard to the application made to Court by the 11th Defendant too, that he too, had not been served with summons in view of the fact that he had been away from the country during all the time material to the service of summons on him.

However, it is regretful to observe that the learned Additional District Judge of Gampaha had having so found, nevertheless proceeded to reject his application too, on the same premise as enumerated above, in total contravention of the clear provisions contained in sections 13(1), 14 and 19(1) of the Act read in conjunction with the well-established principle of law as enumerated above,

namely; Failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant and that it is only by service of summons on the defendant that the Court gets jurisdiction over the defendant and that if a defendant is not served with summons or otherwise notified of the proceedings against him, the judgment entered against him in those circumstances is a nullity.

In the circumstances, I would hold that the learned Additional District Judge of Gampaha had been in grave error in dismissing the application made to it by the 11th Defendant under and in terms of section 48(4)(a)(i) of the Act seeking special leave to establish the right, title or interest of them to or in the land sought to be partitioned notwithstanding the interlocutory decree had already been entered by erroneously, holding so.

I would therefore, hold that the order (**P8**) cannot in any manner, sustain both in fact and law and as such it ought to be set aside.

Hence, I would proceed to grant special leave under section 48(4)(a)(i) of the Act as prayed for by the 11th Defendants in the joint application made to the District Court of Gampaha.

I would now, propose to deal with the application made to the District Court of Gampaha under section 48(4)(a)(i) of the Act by the 19th Defendant seeking special leave thereunder, and the order made therein by the learned Additional District Judge of Gampaha.

The point to be noted here is that Fiscal in his affidavit submitted to Court (**P4**) affirms to the fact that summons had been duly, served on the 19th Defendant by way of personal service and in view of the presumption of regularity arising out of illustration 'd' of the section 114 of the Evidence Ordinance, namely; the Judicial and Official acts have been regularly, performed, it is presumed that summons had been duly, served upon the 19th Defendant and if he asserts on the contrary, the sole burden of proof will have to be undertaken by him to rebut

the presumption so attached to the service of summons on him, by proof on the contrary as required by sections 101 and 102 of the Evidence Ordinance. However, it is interesting to observe that the 19th Defendant had not even opted to give evidence in Court in order to rebut the presumption of due service of summons on him as enumerated above, arising out of the Fiscal report (**P4**) and contents therein at the inquiry into his application.

Hence, I would hold that, the 19th Defendant had not in any manner, been able to rebut the presumption of regularity arising out of illustration 'd' of the section 114 of the Evidence Ordinance that summons had been duly, served on him as reported to Court by the Fiscal in his affidavit (**P4**) as rightly, found by the learned Additional District Judge of Gampaha,

There is a further point, which vehemently, supports and fortifies the findings of the learned Additional District Judge of Gampaha that summons had been duly, served on the 19th Defendant and this arises out of his own admission made by the 19th Defendant in paragraph 12 of the petition of appeal filed before this Court that he had been in Court on 16.10.1989 and he is thus, presumed to have been in Court on that day in response to the summons duly served upon him by Fiscal as reported to Court in his affidavit (**P4**) by him.

In the circumstances, I would see no reason to interfere with the decision of the learned Additional District Judge of Gampaha dismissing the application made to it by the 19th defendant under section 48(4)(a)(i) of the Act.

Hence, I would affirm the decision of the learned Additional District Judge of Gampaha dismissing the application made to it by the 19th defendant under section 48(4)(a)(i) of the Act.

I would next, deal with the application made to it by the 24th and 25th defendants under and in terms of section 48(4)(a)(i) of the Act seeking special leave to establish their right, title or interest in or over the land sought to be partitioned in the instant partition action on the basis that, their right, title or interest

therein, had been extinguished or they have been otherwise, prejudiced by the interlocutory decree entered in the said partition action in view of the fact that they being claimant before the Surveyor at the preliminary survey had been added as parties to the instant partition action without notices being issued on them as required by section 20 (1)(a) of the Act to be read with section 20(2)(a) thereof and their addition as parties to the instant partition action has therefore, been illegal and unlawful thereby making them totally, unaware of the partition action to assert their lawful rights to the land sought to be partitioned.

It is common ground that, the 24th and 25th defendants had been claimant before the Surveyor at the preliminary survey and according to the report to the preliminary plan, notice of the action had been served by the surveyor on them as required by section 16(3) of the Act. However, there had been nothing on record to show that notices as required by section 20(1)(a) of the Act had been issued on the 24th and 25th defendants nor, had any of them made an application under section 20(3) of the Act to add them as parties to the instant partition action. However, the learned District Judge of Gampaha had in total contravention of the express provision contained in section 20(3) of the Act, proceeded to add 24th and 25th defendants as parties to the instant partition action *ex mero motu* without an application being made thereto, by them as manifest from the journal entry 17 of 12.08.1991 so that the addition of both of them as the 24th and 25th defendants to the instant partition action was totally, unwarranted and therefore, in total contravention of the express provision contained in section 20(3) of the Act and the inevitable legal consequence that would derive therefrom is that, neither of them can in any manner, be regarded as a party to the instant partition action.

In the result, neither of them being parties to the instant partition action, can invoke the provisions of section 48(4)(a)(i) of the Act to seek special leave to establish their alleged right, title or interest in or over the land sought to be

partitioned in the instant partition action for; only a party to a partition action can invoke the provisions of section 48(4)(a)(i) of the Act.

I would therefore, hold that the application made to Court by the 24th and 25th defendants is misconceived in law and as such it cannot sustain in law and therefore, it ought to have been rejected *in-limine* by the learned Additional District Judge of Gampaha on this ground alone and not on the ground adduced by him for dismissal of the same.

I would therefore, proceed to affirm the order of the learned Additional District Judge of Gampaha dismissing the application made to Court by the 24th and 25th defendants under section 48(4)(a)(i) of the Act seeking special leave as aforesaid for the reasons adduced therefor, by me in this judgement and not on the reasons adduced therefor, by the learned District Judge of Gampaha.

In view of the above, I would direct the learned District Judge of Gampaha to hold an inquiry into the joint application made to Court by the 11th, 16th and 17th defendants strictly in terms of the law as provided for by section 48(4)(c), (d) and (e) of the Act and conclude it as expeditiously, as possible.

In the circumstances, I would allow the appeal only of the 11th, 16th and 17th defendants however, without costs, and dismiss the appeal of the 19th, 24th and 25th defendants with costs.

I would, accordingly, vary the order (**P8**). Subject to the aforesaid variation, I would affirm the order (**P8**).

JUDGE OF THE COURT OF APPEAL

D. THOTAWATTA, J.

I agree.

JUDGE OF THE COURT OF APPEAL