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

SC Appeal No: 61/2013

SC/HCCA/LA No: 139/10

CA/HCA 501/2004

DC Kandy No. P/13227

Karmini Chandraleka Weerasinghe.
13, Hewahata Road, Kandy

PLAINTIFF

- VS -

1. Gayawansa Noel Opananda,
   No. 123, Hamanagoda, Katugastota

2. Donald Rathnakumara
   Hamanagoda, Katugastota.

3. Gawaripihille Gedara Harrey
   No. 128, Hamanagoda, Katugastota

DEFENDANTS

AND BETWEEN

3. Gawaripihille Gedara Harrey
   No. 128, Hamanagoda, Katugastota

3rd DEFENDANT – APPELLANT

- VS -

Karmini Chandraleka Weerasinghe.
13, Hewahata Road, Kandy

PLAINTIFF – RESPONDENT

1. Gayawansa Noel Opananda,
   No. 123, Hamanagoda, Katugastota

2. Donald Rathnakumara
   Hamanagoda, Katugastota.

1ST AND 2ND DEFENDANT – RESPONDENTS

AND NOW BETWEEN

Karmini Chandraleka Weerasinghe.
13, Hewahata Road, Kandy

PLAINTIFF – RESPONDENT APPELLANT

- VS -

3. Gawaripihille Gedara Harrey
   No. 128, Hamanagoda, Katugastota

3a. Kodikara Gedara Wickramasinghe
   No. 128, Hamangoda Katugastota.

3b. Kodikara Gedara Hemalatha
   No. 122/6, Ritigahapalana
   Pallemulla,
   Halloluwa.

3c. Kodikara Gedara Chaminda
No. 128, Hamangoda Katugastota

SUBSTITUTED 3RD DEFENDANT – APPELLANT – RESPONDENTS

1. Gayawansa Noel Opananda,
No. 123, Hamanagoda, Katugastota

1a. Srikanthi Monika Dayawickrama
No. 123, Hamangoda, Katugastota.

1b. Gosindu Sanka Gayawansa
No. 123, Hamangoda, Katugastota.

1c. Prathiba Buddhi Upahara Gayawansa
No. 123, Hamangoda, Katugastota

SUBSTITUTED 1ST DEFENDANT – RESPONDENT – RESPONDENTS

2. Donald Rathnakumara
Hamanagoda, Katugastota.

2a. Ayesha Samankathi Opananda
No. 53, Anagarika Dharmapala
Mawatha, Kandy.

2b. Tinalee Charika Rathnakumara
No. 53, Anagarika Dharmapala
Mawatha, Kandy.

SUBSTITUTED 2ND DEFENDANT – RESPONDENT – RESPONDENTS

Before : E. A. G. R. Amarasekara, J.
Janak De Silva, J.
Achala Wengappuli, J.

Counsel : Rohan Sahabandu, PC. With Ms. Chathurika Elvitigala for the Plaintiff – Respondent – Appellant.

Priyantha Gamage for the Substituted 3rd Defendant – Appellant – Respondents.

Argued on : 28.03.2024

Decided on : 13.06.2025

E. A. G. R. Amarasekara, J.

This Appeal was made by the Plaintiff – Respondent – Appellant (Hereinafter sometimes referred to as "Plaintiff" or "Appellant") against the Judgment of the Civil Appellate High Court of Kandy dated 31.10.2010. (As per the said Judgment Civil Appellate High Court

Number is C.P/ H.C.C.A /501/2004 but as per the caption in this Court it is mentioned as No. CA/HCA /501/2004). It was an appeal made by the 3rd Defendant – Appellant – Respondents (Hereinafter sometimes referred to as "3rd Defendant" or "3rd Respondent") against the Judgement of the learned District Judge of Kandy dated 21.05.2004 made in DC Kandy Case No. P/13227. The learned District Judge held in favour of the Plaintiff and decided to partition the land named "Southern Part of Pusselindewatte" morefully described in the schedule to the Plaint filed in the District Court as prayed for in the Plaint. The learned High Court Judges sitting in appeal set aside the Judgement of the learned District Judge.

The Plaintiff averred a pedigree in the Plaint which commences from the original owner Palingu and ends with Plaintiff, 1st Defendant and 3rd Defendant giving each of them 1/3 share of the subject matter owing to the execution of the deeds mentioned in the said Plaint.

As per the Plaint, the land is of 8 Kurunis of paddy sowing and the boundaries have been described as follows;

- North: Ditch of Yaddehigewatte of the remaining portion
- East: Fence of Pansalwatte
- South: Fence of Marakkalawatte
- West: Fence of Appullannagewatte

The 3rd Defendant was subsequently added as a party and he filed his Statement of Claim claiming prescriptive title to the land relevant to the case, and also averred that the matter is *Res Judicata* between the Parties since an action filed to evict the 3rd defendant from the said land by the mother of the Plaintiff was dismissed on a previous occasion. Thus, the 3rd Defendant prayed for the dismissal of the Plaintiff's action and also a declaration of title to the said land and improvements. No other land has been mentioned in the said Statement of Claim and even a mere cursory glance at the said Statement of Claim is sufficient to understand that the 3rd Defendant did not dispute the identity of the land described in the Plaint and, instead, was claiming prescriptive title to the same.

Parties went to trial and 19 points of contest were raised by the Plaintiff and the 3rd Defendant based on their pleadings. Points of contest No. 10 – 19 raised by the 3rd Defendant center around his claim of prescriptive rights and the issue of Res Judicata. The 3rd Defendant did not raise

any point of contest to challenge the identity of the corpus. After trial, the learned District Judge delivered his Judgment by which he accepted the Plaintiff's pedigree in deciding title to the land depicted in Preliminary Plan No. 751 dated 23.12.1994 made by B. M. P. B. Boyagoda, L.S. marked as X. The 3rd Defendant also tendered in evidence the Plan No.1296 dated 06.02.1997, marked as Y, made by A. R. T. Gurusinghe L.S. who admit while giving evidence that his Plan marked as Y depicts the same land depicted in the Preliminary Plan marked as X and there is a slight difference of 4 perches as to the extent of the land. Y was the subsequent survey which was done 3 years after the preliminary survey.

The learned District Judge in his Judgment accepting the Plaintiff's pedigree to the land depicted in Preliminary Plan decided that the Plaintiff, 1st Defendant and the 2nd Defendant are entitled to 1/3rd each in the subject matter. The defense based on Res Judicata was refused since the Plaintiff's mother reserved her right to file a fresh action when she withdrew the previous action and the claim on prescription was refused as the 3rd Defendant accepted that the predecessors of the 3rd Defendant came to the land as licensees.

Being aggrieved by the said decision, the 3rd Defendant made an appeal and the Appeal was heard by the Civil Appellate High Court of Kandy and as per the Judgment of the Civil Appellate High Court, it appears that, on behalf of the 3rd Defendant, it was contended before the High Court that the land sought to be partitioned was not properly being identified. The learned High Court Judges by delivering their Judgment allowed the Appeal on the ground that the land sought to be partitioned was not properly identified and the Judgment of the learned District Judge was set aside. Being aggrieved by the said Judgment, a leave to appeal application had been tendered, and when it was supported, this Court granted leave on the questions of law as set out in paragraph 19(i) to (vii) of the Petition dated 11/05/2010. However, when this matter was taken up for argument on 28.03.2024, instead of those questions of law, the Parties agreed to limit this argument to the following question of law.

"1) Whether the High Court Judge erred in law in holding in fact that the corpus has not been identified in this matter?"

Parties made their oral submissions and were allowed to file post argument comprehensive written submissions. Accordingly, written submissions have been filed on behalf of the Plaintiff as well as on behalf of the 3rd Defendant.

The rationale behind the Judgment of the High Court as demonstrated in the said Judgment is set out below;

- The evidence of the Plaintiff and the Surveyor Boyagoda who prepared the Preliminary Plan is weak in relation to the identification of the corpus to establish that the land is properly depicted in the Preliminary Plan marked X. The learned District Judge had not given due consideration to said evidence.
- The learned District Judge has come to his conclusion by comparing the Preliminary Plan with the Plan made by the Surveyor Gurusinghe on a commission taken by the 3rd Defendant and no superimposition has been done. Therefore, the said conclusion is defective.
- The boundaries of the Corpus have been described as undefined (අවිනිශ්චිත) as per the Plan made by Surveyor Boyagoda.
- As per the evidence of the Surveyor Boyagoda who did the preliminary survey, the only defined boundary is the road and the Surveyor has not verified the boundaries on his own and described them in accordance with the Plaint. For example, he has not found whether there was a ditch of Yakdehiwatte on the North.
- The Plaintiff in her evidence had stated that she cannot say the boundaries correctly, and she had admitted that the boundaries are undefined and there are no fences.
- The Plaintiff in evidence had stated that the purpose of the filing of the partition action was to identify whether the land in the schedule is the land.
- The Plaintiff in her evidence admitted that the Surveyor had not identified the boundaries.
- Surveyor Gurusinghe who executed the commission for the Defendant had identified three boundaries as per the schedule to the Plaint, and had stated in evidence that the eastern boundary, where the road is, is the only boundary which is undefined.
- As decided in the Court of Appeal case **Dias v Yasatilaka and Others (2005) 3 Sri L R 169** merely because there was no objection or challenge to the preliminary survey, a Court cannot accept a preliminary survey plan without being satisfied as to the correctness of the plan.

A lighter reading of the said Judgment may give the impression that it is sound and must stand against any challenge. However, in my view, considering the background facts and provisions

of the partition law and steps taken to safeguard interest of others who are not parties to the action, I think the learned High Court Judges failed to appreciate certain relevant factors in coming to the aforesaid conclusions.

There are two main factors that have to be considered in finding whether the learned High Court Judges erred or not.

First would be whether the 3rd Defendant who did not challenge the identity of the corpus but claimed prescriptive title to the same can contend the identification of the corpus. The second would be that however, a partition action being an action in rem which binds the whole world, whether the learned High Court Judges were correct in setting aside the learned District Judge's Judgment on the aforesaid reasons when no one came forward to challenge the identity of the corpus.

As far as the 3rd Defendant is concerned, he in his Statement of Claim did not claim rights to a different land, but claimed prescriptive title against the people who are entitled in terms of the Plaintiff's pedigree. When one claims prescription, it is to a specific and distinct land with definite identification. One cannot claim prescription to an unidentified or unknown land. As per the Statement of Claim it is clear that the prescriptive claim was made to the land in the schedule to the Plaint. No other land has been referred to in the said Statement of Claim and no other land is described in a schedule. In fact, no schedule has been included in the said Statement of Claim of the 3rd Respondent. As per Section 3 of the Prescription Ordinance, one can claim prescription only against a party (plaintiff, defendant, claimant or intervenient in the action) to the action. In various averments in the said Statement of Claim the 3rd Defendant had referred to the subject matter as the 'land relevant to this action' and it can be none other than the land in the Plaint. It is true that the 3rd Respondent had got Gurusinghe L.S to survey the said 'land relevant to the action' to prepare a plan and referred to it in an averment in the said Statement of Claim, but he has not stated that it is a different land. In fact, in the prayer to the said Statement of Claim, he prayed for a declaration of title to the land described in the Plaint. Thus, it is understood that the 3rd Defendant did not or cannot have any identity issue as to the Corpus of the action which was claimed by the Plaintiff as a co-owner on a pedigree as described in the Plaint. It must be also noted that witness of the 3rd Defendant Gurusinghe L.S also admitted in evidence that the land he surveyed on a commission issued to him as depicted in Plan No. 1296 marked Y is the same land depicted in the Preliminary Plan marked X-vide

page 106 of the brief. The only difference is that the extent in Y is 4 perches less than the extent in X. The second survey was done three years after the first survey. Due to the existence of road ways by the west and south boundaries this slight difference may occur as there may be deviation of their path during that 3 years period. It must be noted as per the report marked Y1 relating to the said Plan marked Y, 3rd Defendant was present at the time of survey and he was one of the parties who assisted showing boundaries. With that assistance, the surveyor Gurusinghe has identified all four boundaries, and description of the boundaries to the East, South and West in Y fully tally with that of plan marked X as they have been described as Pansalewatte, Marrakkalawatte and Public Road respectively in both plans. Even the description of boundaries in schedule to the Plaint as shown above, tallies on the East and South as they bear the same description, Pansalewatte and Marrakkalawatte. As per the Plaint, the boundary to the West has been described as Appullannagewatte. This description of the western boundary is the description carried forward from the deeds written in 1885 onwards-vide deed marked P1. Perhaps the roadway on the West would have come to existence later on. However, there was no dispute as to the identification of the western boundary. Now the boundary to the North has been described as Pussalindehena now watte in plan X and Yaddhigewatte (balance portion) in plan Y. As per the Plaint it is the ditch of Yaddehigewatte remaining portion. It must be understood that a ditch can be disappeared with the passage of time. In Y where 3rd Defendant took part in showing boundaries, the description tallies with the description in the Plaint as it is the ditch of Yaddehigewatte of the remaining portion. Even if the ditch disappears, Yaddehigewatte remaining portion is there in Y. On the other hand, the description of the northern boundry in X is Pusselindehena now Pusselindewatta. It is probable that this is another name for said Yaddehigewatte. As the land sought to be partitioned is the southern portion of Pusselindewatte, naturally the land on the north has to be the northern portion of Pusselidewatte. Even if there is any weakness in the Plaintiffs and Surveyor Boyagoda's evidence as to the identification of boundaries, the 3rd Defendant had actively taken part in the second survey has shown the boundaries and established through his witnesses and documents that the boundaries and description shown in the Preliminary Plan is correct. As shown above, the 3rd Defendant from his Statement of Claim has admitted the subject matter and had claimed prescriptive title to it and through his witnesses and documents had established the correctness of the description in Preliminary Plan X.

It must be also noted that any party who wants to get the Preliminary Plan and fields notes verified, they could have moved Court in terms of Section 18(3)(a) of the Partition Law. The 3rd Defendant had not taken any step in terms of Section 18(3)(a) of the Partition Law.

Without taking a position in the Original Court to challenge or object to the identity of the corpus, and while relying on the identity of the corpus to establish his stance of prescriptive title, I do not think the 3rd Defendant could take up new position in appeal before the High Court to say the corpus was not identified. The contents of the learned High Court Judges' Judgment indicate that this stance taken up by the 3rd Defendant in appeal before them tempted the learned High Court Judges and misled their minds to find that there was no proper identity of the corpus.

However, a partition action is an action in rem. A Court has to be cautious as there may be collusive attempts to defeat the rights of others who are not parties to the action. Thus, there is a duty on the courts to identify the corpus and to investigate the title relating to that corpus properly before deciding to partition the corpus involved in the action.

In a partition action, generally there are two types of disputes. One with regard to the identification of the corpus and the other regarding the pedigree. Investigation of title basically relates to the pedigree disputes. However, if there is no proper identification of the corpus, investigation of title in relation to the subject matter in the partition action becomes futile. The learned Counsel for the 3rd Defendant has cited number of cases to show that in a partition action, proper investigation of title is a must, and it is the incumbent duty of the Trial Judge. I need not refer to them here as there is no disagreement with that proposition of law. However, the issue involved in the matter at hand is whether there was proper identification of land, which has to be decided on the facts available before the judge. It is true that a wrong identification of a land may affect parties who are not before the Court.

I have already explained above that there cannot be any dispute as to the identification of the corpus between the Plaintiff and the 3rd Defendant as per the stance taken by the 3rd Defendant at the Trial Court as well as on evidence available before the Trial Court. It is also necessary to see whether the identification of the corpus by the learned District Judge is not sufficient and defective for an action in rem which binds the whole world.

First it must be stated that there is nothing to imagine that this action is a collusive action between the Plaintiff and the 3rd Defendant as their contest has now reached the apex court in the country. It must be observed that 3rd Defendant being a contesting party by his stance taken in the original Court and his witness Surveyor Gurusinghe in his evidence as well as by making of Plan Y has confirmed the identity of the corpus by the Preliminary Plan is reliable.

On the other hand, at the initial stages of a partition action, the compliance with publication of notices in the land, Grama Niladari office as well as making an oral proclamation made after beat of tom-tom is necessary. Thus, not only the parties even the public get notice of the action as well as to the name of the land sought to be partitioned. Thus, if the land where the notice was affixed is not the land, interested parties get an opportunity to intervene and object. No one has come forward as per such notices and oral proclamation. Not only that, even the surveyor at least 14 days prior to the date fixed for the preliminary survey has to orally proclaim the survey to be done after beat of tom-tom. Thus, every body living in that area get prior notice of the survey. Hence the people on the land and adjoining lands come to know about the Preliminary Survey – vide Sections 13,15, 16 and 17 of the Partition Law. If the surveyor, surveys a land other than the one named in the Plaint or exceeds its limits to include parts of other lands, the owners or occupiers of any different land or adjoining lands naturally come to know such acts and would naturally intervene to claim their rights. No such parties have intervened in this action. No one has taken up the position that aforesaid steps were not taken in the partition action relevant to this appeal. In fact, J.E 37 dated 21.10.97 and X1 and Y1 reports confirm that such steps were taken. Nonintervention of others claiming that their lands have been affected by the Preliminary Survey or the second survey indicates that the land surveyed was none other than the one sought to be partitioned. The learned High Court Judges have failed to observe the above in coming to his conclusions.

It is true that the Boyagoda L.S. who did the Preliminary Survey has described certain boundaries as undefined which indicates that specific things such as fences, line of trees or ditches could not be found. However, when a Preliminary Survey is carried out, where there are undefined boundaries, it is the duty of the surveyor to demarcate them with boundary marks which are not easily removed or destroyed. As this is done after the aforesaid public proclamations and notices, if there is any encroachment occurred, the occupiers or owners of the adjoining lands would have come forward and intervened. As no one came forward or intervened, it indicates that nothing wrong occurred during the Preliminary Survey. On the

other hand, even it is mentioned as undefined, Boyagoda L.S, in his plan, has shown two roads on the boundaries to West as well as to South, which have now become the demarcations that separate the adjoining lands on those sides. On the east he has found two posts and certain trees over the boundary shown to him. Even on the northern boundary line there are certain trees that he has identified- vide the diagram of Preliminary Plan.

It is true that the Surveyor Boyagoda had stated that on his own he did not get the boundaries verified. There is no previous plan to superimpose and use such findings to identify the boundaries on his own. Therefore, the commissioner has to depend on the parties or people present at the survey to find the description as to the boundaries. It is true that the Plaintiff while giving evidence had stated she cannot say the boundaries. One may not be able to describe the boundaries to a land orally in open court. It depends on that person's education, ability to perceive the nature of the question, that person's knowledge as to the names of the adjoining lands and many other things but she as co-owner of the land has shown the boundaries to the Surveyor and no one has disputed it at the survey which was done after the publishing of the aforesaid notices and oral proclamations. Even the Plan done by the Gurusinghe L.S., confirms the identification by the Preliminary survey. No one has taken up the position that the Gurusinghe L.S. surveyed a different land.

The learned High Court Judges had relied on the aforesaid case **Dias v Yasatilaka.** The facts involved in that case are quite different from the facts of the case at hand. In that case, the Lis-Pendens was registered for a bigger land and which included a portion acquired by the State. The Preliminary Plan had a lesser extent. The Preliminary Plan was made without any reference to the land acquired by the State. Thus, even there was no challenge to the Preliminary Plan in that case, there were facts to say in the said case that the land was not properly identified as there was no clarity as to the part excluded through the said acquisition.

The duty of a Judge sitting in appeal is different from the function of the Trial Judge. The Trial Judge decides on the facts and the Appellate Court Judge is to find whether the Trial Judge came to his conclusion according to law by considering the relevant facts and disregarding irrelevant facts and whether the conclusion of the Trial Judge is perverse or not rationally possible- Vide **Mahawithana v Commissioner of Inland Revenue 64 N L R 217**. In my view, it is not the duty of the Appellate Judge to replace the opinion of the Trial Judge regarding the facts involved with his opinion unless the opinion of the Trial Judge is rationally impossible or

perverse. I do not think that the decision of the learned District Judge is perverse or rationally not possible.

Thus, the question of law quoted above has to be answered in the affirmative.

Hence this Appeal is allowed with costs.

The Judgment of the High Court dated 31.03.2010 is set aside and the Judgment of the learned District Judge is affirmed.

Appeal allowed with costs.

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Judge of the Supreme Court

Janak De Silva, J.

I agree.

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Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

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Judge of the Supreme Court