

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

*In the matter of an Application for
Orders in the nature of Writs of
Certiorari, Prohibition and Mandamus
under Article 140 of the Constitution of
the Democratic Socialist Republic of Sri
Lanka.*

1. Kaluthota Investments and Leasing
(Pvt) Ltd,
No. 49, Hudson Road,
Colombo 03.

2. Loku Kaluthotage Nandasena,
No. 49, Hudson Road,
Colombo 03.

CA (Writ) App. No. 834/2024

PETITIONERS

Vs.

1. Ginthota Sarukkali Patebendige
Somabandu,
Sapna, Kudawella North,
Nakulugamuwa.

2. Uggala Bebilagamage Jayantha
Pushpakumara,
No.75/43, Silva Mawatha,
Meethotamulla, Wellampitiya.

3. Koku Hennage Lushan Champika,
Waduruppa, Ambalanthota.
4. Mahamadakalapuwege Prabath,
Viduranga, Diwaragam, Mailagama,
Kataragama.
5. Kaluhennadige Hendhi,
Isuru Electricals, Gramodhaya
Mawatha, Uthuru Kudawella,
Nakulugamuwa.
6. Kaluhennadige Sugathadasa,
Isuru Electricals, Gramodhaya
Mawatha, Uthuru Kudawella,
Nakulugamuwa.
7. Kaluhennadige Premachandra,
Isuru Electricals, Gramodhaya
Mawatha, Uthuru Kudawella,
Nakulugamuwa.
8. Kaluhennadige Dayawathi,
Isuru Electricals, Gramodhaya
Mawatha, Uthuru Kudawella,
Nakulugamuwa.
9. Kaluhennadige Anulawathi,
Isuru Electricals, Gramodhaya
Mawatha, Uthuru Kudawella,
Nakulugamuwa.
10. Kaluhennadige Sriyalatha,
Isuru Electricals, Gramodhaya
Mawatha, Uthuru Kudawella,
Nakulugamuwa.
11. Kaluhennadige Shanthasili,
Isuru Electricals, Gramodhaya
Mawatha, Uthuru Kudawella,
Nakulugamuwa.
12. Kaluhennadige Siriyawathi,

Isuru Electricals, Gramodhaya
Mawatha, Uthuru Kudawella,
Nakulugamuwa.

13. Pallewela Gamage Indika Lakmal
Sandamali,
No.25, Getamanna Road, Beliaththa.
14. Kaluhennadige Priyanthi Rupika
Buddhika, Madhyama Kudawerlla,
Nakulugamuwa.
15. Sisira Abeygunawardena
Sisimali, Pahajjawa, Nakulugamuwa.
16. Andrew Nanayakkara,
No.31, Rasapaya, Heneththa,
Thihagoda.
17. Rathnaweera Patabedige Chandrasena,
No.35, Hunukotuwalawaththa,
Madhyama Kudawella,
Nakulugamuwa.
18. Jayasuriya Arachchi Patabedige Ishan,
Rathna,
Kudabolana, Ambalanthota.
19. Julgoda Manage Matida De Silva,
No.201, Modharawaththa, Batahira
Kudawella, Nakulugamuwa.
20. Sudharma Alahapperuma,
No.201, Modharawaththa, Batahira
Kudawella, Nakulugamuwa.
21. Abeysuriya Patabedige Chandrashanthi
Abeysuriya Shath,
Kudawella, Nakulugamuwa North.
22. Muthumalage Meginona Vihaga,
Uthuru Kudawella.

23. Dodampalahewage Jayantha Namal,
No.21, Mahawela, Nakulugamuwa.
24. Lasantha Piyumali Paranamana
No.21, Mahawela, Nakulugamuwa.
25. Ruchina Roshini Sri Warnasinghe,
No.312, Havelock Road, Colombo 05.
26. Jayaweera Liyanapatabedhige
Hemananda,
No.65/2, Madhyama Kudawella,
Nakulugamuwa.
27. Andrahendige Meththapala,
No.84, Dakunu Kudawella,
Nakulugamuwa.
28. Jayaweera Liyanapetige Sheltath,
No.235/A, Sadungahapara,
Kambiwaththa, Tissamaharama.
29. Juwan Hennadige Chandika De Silva,
No.201, Modharawaththa, Batahira
Kudawella, Nakulugamuwa.
30. Ranaweera Patabedige Sirimal
Mamadala, Ambalanthota.
31. Pramawathi Galappaththi,
No.159, Beliaththa Road, Tangalle.
32. Indra Rathnaweera Patabedige Manel
Kudawela North, Nakulugamuwa.
33. Muthumalage Disinona Buddhika,
Madhyama Kudawella,
Nakulugamuwa.
34. Kristhombu Badhuge Dharmadasa,
Lolupathana, Ambalanthota.
35. Diyogi Hennadige Saliya,

Boralessa Junction, Walauwaththa
Road, Ambalanthota.

36. Shirly Thisera Saranasinghe
Wickramasuriya,
No.66, Mahawidhiya, Ambalanthota.
37. Buddhika Wickramasuriya,
No.391/07, Edirisuirya Pedesa,
Pelanwaththa, Pannipitiya.
38. Denagama Vitharanage Gunawathi,
Nidanpokuna waththa, Mirissa Dakuna,
Mirissa.
39. Kaluhennadige Karunawathi,
Lot No.478, Kudagammana Road,
Dakununu Iura, Lunugamwehera.
40. Loku Yaddhehige Leela,
Idam Waththa, Kudawella,
Nakulugamuwa.
41. Loku Yaddhehige Karuna,
Idam Waththa, Kudawella,
Nakulugamuwa.
42. Abeydheera Liyanapatabedige Sathya
Hansani,
No.262/C/23, Crescent Garden,
Waliwita, Kaduwela.
43. Loku Yaddhehige Sunil Shantha,
Idam Waththa, Kudawella,
Nakulugamuwa.
44. Loku Yaddhehige Miyuriyal,
Idam Waththa, Kudawella,
Nakulugamuwa.
45. Loku Yaddhehige Piyasena,
Idam Waththa, Kudawella,
Nakulugamuwa.

46. Loku Yaddhehige Pemadasa,
Idam Waththa, Kudawella,
Nakulugamuwa.
47. Loku Yaddhehige Sumana,
Idam Waththa, Kudawella,
Nakulugamuwa.
48. Loku Yaddhehige Sugathadasa,
Idam Waththa, Kudawella,
Nakulugamuwa.
49. Loku Yaddhehige Sumanawathi,
Idam Waththa, Kudawella,
Nakulugamuwa.
50. Loku Yaddhehige Asirin Sriyalatha,
Idam Waththa, Kudawella,
Nakulugamuwa.
51. Loku Yaddhehige Seetha Renuka,
Idam Waththa, Kudawella,
Nakulugamuwa.
52. Loku Yaddhehige Chandrasena,
Idam Waththa, Kudawella,
Nakulugamuwa.
53. Loku Yaddhehige Mala Sujeewani,
Idam Waththa, Kudawella,
Nakulugamuwa.
54. Loku Yaddhehige Ranjani,
Idam Waththa, Kudawella,
Nakulugamuwa.
55. Sellahe wage Ajantha Kamani,
Idam Waththa, Kudawella,
Nakulugamuwa.
56. Sellahe wage Pradeep Priyantha,
Idam Waththa, Kudawella,
Nakulugamuwa.

57. Sellahewage Nirmala Priyadarshani,
Idam Waththa, Kudawella,
Nakulugamuwa.
58. Sellahewage Sunethra Manohari,
Idam Waththa, Kudawella,
Nakulugamuwa.
59. Loku Yaddhehige Irangani,
Idam Waththa, Kudawella,
Nakulugamuwa.
60. Loku Yaddhehige Indika Roshan,
Idam Waththa, Kudawella,
Nakulugamuwa.
61. Loku Yaddhehige Manjula Roshan,
Idam Waththa, Kudawella,
Nakulugamuwa.
62. Wijeweera Patabedige Melani,
Idam Waththa, Kudawella,
Nakulugamuwa.
63. Wijeweera Patabedige Mesi Nona,
Idam Waththa, Kudawella,
Nakulugamuwa.
64. Kaluhennadige Priyangani
Pannegamuwa, Tissa Road, Weerawila.
65. Jayasuriya Aarakattu Patabedige
Wasantha Abasewana,
Palathuduwa, Marakolliya, Tangalle.
66. Kaluhennadige Nandani,
Wadubapiyara Gedara,
Madhyama Kudawella,
Nakulugamuwa.
67. Kaluhennadige Upathissa,
Daru Niwasa Road, Dakunu
Kudawella, Nakulugamuwa.

68. Kaluhennadige Pushpa Sriyani,
Madhyama Kudawella,
Nakulugamuwa.
69. Kaluhennadige Pathmini,
No.116, Mayurapura, Hambantota.
70. Kaluhennadige Nalini,
No.80, Dhewara Gammanaya,
Kahadamodhara.
71. Kaluhennadige Krishanthi,
Siyabalawaththa, Marakolliya.
72. Kaluhennadige Jayanthi,
No.211/1, Piya Mawatha,
Pallikkudawa, Tangalle.
73. Rathnaweera Patabedige Soma
Randima,
No.113/62, Moraketiaara,
Nakulugamuwa.
74. Marakkala Hennadige Dayawathi,
No. 324, Modarawaththa, Mirissa.
75. Dias Ranjith Suwarnasinghe, Gammna
Waththa, 6 post, Gamunupura,
Ethimale, Monaragala.
76. Nilantha Kumara Muthumala,
No. 48, Dupathgoda, Madhyama
Kudawella, Nakulugamuwa.
77. Lokuhennadige Piyasena Susila,
Kudawella Dakuna, Kudawella.
78. Kudawella Kassapa Thero,
Sadharmaramaya, Galwelmodara,
Thalluruwa, Panadura.
79. Mahindalal Rubasinghe,

Amarasekara Mawatha, Lalpe,
Karathota,
Hakmana.

80. Suwada Hennadige Dami Jayawathi,
No. 166/5, Weera Mawatha,
Weeraketiya Road, Danketiya,
Tangalle.
81. Julgoda Manage Pushpa De Silva,
No. 49, Highwaycity, Pothuhera,
Bulugolla.
82. Mahamadakalapuwege Heennona,
Karawile Junction, Sellakatharagama.
83. Julgoda Manage Latha, Parana
Buththala Road, Sellakatharagama.
84. Hewamanage Shirani Nirmal,
B/Kadurupokuna, Tangalle.
85. Julgoda Manage Mangalika,
No. 98, Galle Road, Pohodhdhawala,
Wadduwa.
86. Julgoda Manage Asida Wimalawathi,
Randika, Aluthgoda, Dikwella.
87. Julgoda Manage Nandasiri,
No. 72, Walasmulla Road, Beliaththa.
88. Julgoda Manage Rupa Indrani,
No. 72, Walasmulla Road, Beliaththa.
89. Julgoda Manage Lalitha Chandrani,
No. 72, Walasmulla Road, Beliaththa.
90. Julgoda Manage Swarnalatha,
No. 72, Walasmulla Road, Beliaththa.

91. The Registrar of the District Court of
Tangalle, Tangalle Court Complex,
Tangalle.

RESPONDENTS

Before: Dr. D. F. H. Gunawardhana, J.

Counsel:

Kuwera de Zoysa, P.C. with Sumedha Mahawanniarachchi instructed by Madhawa Rupasinghe for the Petitioners.

Priyantha Alagiyawanna with Sahan Gunasekera for the 15th Respondent.

Sampath Wijesinghe instructed by Chathurani Chandrallake for the 38th and 78th Respondents.

Anuradha N. Ponnampereuma with S. Ponnampereuma instructed by Sawani Rajakaruna for the 39th, 64th, 65th, 67th, 69th, 70th, 71st and 72nd Respondents.

Manoja Gunawardana for the 20th & 29th Respondents.

Sandamal Rajapaksha with Kassala Kamer for the 26th, 27th and 28th Respondents.

Upendra Walgampaya with Sudarshana Deshapriya instructed by Dhanuka Lakmal for the 40th – 51st and 53rd – 63rd Respondents.

T.W K. L. Chandika & Thilina Wariyapperuma for the 31st, 32nd, 73rd and 74th Respondents.

Argued on: 28.10.2025

Delivered on: 20.11.2025

Dr. D. F. H. Gunawardhana, J.

Judgement

Introduction

The Plaintiff-Respondent (herein after sometimes referred to as the “Plaintiff”), as a co-owner, has instituted the partition action bearing No. P/4326/16 (hereinafter referred to as the “partition action”) in the District Court of Tangalle, in terms of the Partition Law, No. 21 of 1977 (hereinafter referred to as the “Partition Law”) seeking the partition of the corpus known as “*Colonnekanda kebella*”, a land of 6 sheers of Kurakkan sowing extent (as described in paragraph 2 of the Plaint at Page 84 of the Brief of the partition case). Several Defendants have filed their Statement of Claims; this includes the Defendants who have been added as Claimants even at the preliminary survey carried out in respect of the corpus.

The 2nd Defendant-Petitioner (hereinafter referred to as the “Petitioner”) is a company incorporated under the laws of Sri Lanka, which is capable of suing and being sued in its corporate name, and therefore, is a juristic person in the light of the law; and also had purchased several shares from and out of the same corpus as discovered by the Plaintiff and his lawyer. Therefore, as the Plaintiff indicated in this Plaint, is cited as the 2nd Defendant.

On the perusal of the record of the partition action, which is also annexed to the Petition in this Application, I found before filing the Statement of Claim by the 2nd Defendant, it had obtained an alternative commission on the basis that the Plaintiff had not identified the corpus on the preliminary plan correctly.

However, the Petitioner has filed its amended Statement of Claim seeking the dismissal of the action on the basis that only a part of the corpus is depicted in the preliminary plan; therefore, there

is no cause of action made out by the Plaintiff to partition the corpus as law permits. In addition to that, it has taken up the position, that it has acquired the prescriptive title to the entire larger land depicted on the Mr. Ediwickrama's plan marked as **P7** annexed to the Petition.

Several other Defendants have made their claims by their Statements of Claim, and thereafter the case has proceeded to trial. Prior to the trial, the parties have filed their respective Points of Contests in writing and so far, the learned District Court judge has not identified and settled those Points of Contest to be determined at the end of the trial.

In the meantime, the Petitioner has come before this Court seeking a *Writ of Prohibition*, preventing the District Court Judge of Tangalle from proceeding with the partition action bearing No. P/4326/16, further seeking a *Writ of Mandamus*, compelling the District Judge of Tangalle to dismiss the Plaint of the Petitioner marked as **P3** to this Application. The Petitioner has further sought an interim order staying all proceedings in the District Court of Tangalle in case bearing No. P/4326/16 until the final determination of this application.

After it was supported before then the Honourable President, His Lordship having issued formal notice, granted a Stay Order to stay the proceedings at the District Court in favour of the 2nd Defendant (the Petitioner in this case). After the new President assumed duties, His Lordship was gracious enough to transfer the same before this Court. This Application came up before us on the 17th October 2025, and thereafter it was fixed for final argument of the consent of all counsel on 28th October 2025, since all the pleadings had been completed.

This was argued before me, and the following arguments were advanced by the counsel. In addition to that, I invited them to file their written submissions on or before 14th November 2025 and thereafter, fixed this application for judgement on 20.11.2025; hence, this judgement.

Arguments

The thrust of the main argument advanced by Counsel for the 1st and 2nd Defendants-Petitioners, is that the Plaintiff-Respondent's cause of action set out in the Plaint (bottom printed page No. 84) of the Plaintiff is misconceived since he has sought to partition a part of a larger land called “*Colonnekanda kebella*”.

His next argument is that his client has purchased the entirety *Colonnekanda kebella*, the land depicted in Survey Plan marked as **P7** in the brief, and he has purchased his title from different co-owners, (all the deeds are marked as **P4(i)** to **P4(xxxvii)**). Therefore, the Petitioner claims the entirety of the *Colonnekanda kebella*, which is in extent of about 49 Acres as depicted in **P7**. Therefore, entertaining the Plaint itself and fixing it for trial by the learned District Court judge after preliminary steps were taken, is misconceived in law. As such, he argues that a *Writ of Mandamus* lies to compel the District Court judge to dismiss the action.

In addition to that, by way of written submissions, it has been argued for and on behalf of the Petitioner that the reason for filing this Application in the Court of Appeal is that the 1st and 2nd Respondents, as investors, are to construct a five-star tourist hotel, investing Rs. 6,000,000,000/- (Six Billion Rupees). Due to the filing of the instant action in the District Court of Tangalle bearing No. P/4326/16, the entire process is now stalled. Therefore, the Petitioners are seeking to invoke the jurisdiction of this writ court in terms of Article 140 of the Constitution.

Furthermore, it is also submitted that in *Weragama v. Eksath Lanka Wathu Kamkaru Samithiya and Others*¹, the jurisdiction of this Court is not hindered or eroded by the jurisdiction of any other

¹ [1994] 1 Sri. L.R. 293

court. It is argued that the jurisdiction conferred on this Court by Article 140 of the Constitution cannot be eroded by reason of any other provision of any other law.

On the other hand, Mr. Alagiyawanna, the Counsel for the Plaintiff, argues that the Plaintiff has instituted the action in the District Court to partition the *Colonnekanda kebella*, citing several defendants initially as several co-owners; later, several others have made claims and filed their Statements of Claim, including the Petitioner who is a party claiming the entirety of the corpus sought to be partitioned, and in fact the Petitioner has claimed a dismissal of the action on the basis that corpus has not been identified in the preliminary plan **P6(B)** or described in the plan which is in the forefront of the suggested Points of Contest as well; and now the case has been fixed for trial; therefore, he argues that all those matters are questions of facts, and only the District Court can look into them by evaluating the evidence placed before it, as the Writ Court cannot act on it. Therefore, he moves for the dismissal of this Application.

However, as a preliminary matter he raises that since a writ is sought against a District Court judge, who has not been made a party in this Application, and thus, this Application cannot be maintained.

Mr. Wijesinghe made his submissions on the basis that the matter has to go into the District Court and not this Court, and Mr. Walgampaya for and on behalf of 2nd Defendant contended that in terms of Section 25 and 26 of the Partition Law, the District Court should look into this matter and not the Writ Court. He further argued that a writ court cannot look into the evidence where no evidence is led.

Mr. Ponnampereuma also advanced a similar contention on the basis that a writ court should not usurp the jurisdiction of a District Court while relying upon the case of *Deshabandu Tennakoon v. Hon. B.A. Aruna Indrajith Buddhadasa* [2025]².

However, before the reply by the Counsel for the Petitioner, I posed to all the counsel for their comments on whether this Court can arrogate the jurisdiction of the District Court of Tangalle, within whose jurisdiction the land (corpus) sought to be partitioned is situated, established in terms of the Judicature Act and whose District Court judge is appointed in terms of Article 111H of the Constitution by the Judicial Service Commission which directly derives its power from Articles 3 and 4 of the Constitution.

In reply, even commenting on the issue raised by me, the Counsel for the Petitioner argues that Article 138 of the Constitution empowers the Court of Appeal of the Democratic Socialist Republic of Sri Lanka to revise all the orders of any original court, which includes the Partition Court sitting in Tangalle. However, I brought it to his notice about the very recent judgement of Justice Samaywardhena in the case of *W.T.S. Nilanatha Fernando v. P.M.S. Nilanthi Perera* [2025]³, and he did not make any comment on it.

Issues before this Court

In this Application, the Petitioner has sought to invoke the jurisdiction of this Court under Article 140 of the Constitution, seeking to obtain a *Writ of Prohibition* preventing the District Judge from proceeding to try the said partition action, and a *Writ of Mandamus* compelling the learned District Judge to dismiss the Plaint. However, on the other hand, since most of the parties, who are co-

² *Deshabandu Tennakoon v. Hon. B.A. Aruna Indrajith Buddhadasa of the Magistrate's Court and Others* [2025] [CA (WRT) 168/2025] CA Minutes 17.03.2025

³ *W.T.S. Nilanatha Fernando v. P.M.S. Nilanthi Perera* [2025] S.C. Minutes 10.10.2025

owners or claimants, have sought a partition of the corpus in the action before the Tangalle District Court, they have sought a dismissal of this Application.

As such, in this case, the main issue to be decided is;

- i. Whether this Court can assume and/or arrogate and/or usurp the jurisdiction of the District Court of Tangalle in deciding the issues in a partition action relating to a land sought to be partitioned, which is situated within the territorial jurisdiction of Tangalle?

If the question above is answered in the affirmative, this Court then can decide the following ancillary issues:

- ii. Whether this Court can look into the issue of identification or non-identification of the corpus by the Plaintiff?
- iii. Whether (without first deciding the corpus) this Court can look into the issue of title, and then deciding the issue of improvements, in compelling the District Court to dismiss a partition action summarily, as sought by the Petitioner in this Application.
- iv. If the answer to main issue is not in the negative, how to answer the issues No. (ii) and (iii) above.

Factual matrix

Before I come to consider the issues that I have raised, I wish to mention the following undisputed facts that transpired in the pleadings of the partition action bearing No. P/4326/16 in the District Court of Tangalle, which have been briefed to me as part of the record of this Application. I do so to avoid repetition and also wish to narrate the relevant facts in chronological order, as far as possible, for clarity.

The Plaintiff by his Plaintiff has allotted the following shares to the respective parties on the basis of co-ownership, this includes the allotment of shares to the 2nd Defendant as well.

<i>“Undivided in the Plaintiff</i>	<i>105/252 share</i>
<i>Undivided to the 1st Defendant</i>	<i>77/252 share</i>
<i>Undivided to the 2nd Defendant</i>	<i>14/252 share</i>
<i>Undivided to the 3rd Defendant</i>	<i>14/252 share</i>
<i>Undivided to the 4th Defendant</i>	<i>14/252 share</i>
<i>Undivided to the 5th to 12th Defendant</i>	<i>14/252 share</i>
<i>Undivided to Kaluhannadige Adarahamy</i>	<i>14/252 share (the part left unallotted)”⁴</i>

After the *lis pendens* was registered, the Plaintiff has taken steps under Section 12(1) and (2) of the Partition Law. Accordingly, the Court has issued summonses, relevant notices, and appointed a commissioner to carry out the preliminary survey. At the preliminary survey also, several claimants have made claims; in addition to that, certain other parties also have been added. Altogether now, there are 90 Defendants before the District Court.

It is also an undisputed fact that, that several alternative commissions have been issued by the Court to prepare alternative plans on applications made by the Defendants which is obnoxious to the Partition Law at that time; consequently, several alternative commissioners have been appointed, and alternative (preliminary) plans and reports have been made depicting a larger land as the corpus, and are in the file of record.

In the course of the argument before me, all the Counsel conceded that nobody has taken steps to proceed with the action after being substituted as Plaintiff in terms of Section 19(1) of the Partition

⁴ Bottom Page No. 86 of the Plaintiff (page 79 of **P3** annexed to the Petition)

Law to partition a larger land, though it is alleged or asserted in the statements of claim of some of the Defendants that the corpus should be larger than the land described by the Plaintiff in the Plaint, which is depicted on the preliminary plan marked as **P6(B)** annexed to the Petition.

It is also common ground that the relevant interested parties have filed their respective Statements of Claim, and in addition to that, all of them have filed their Points of Contest in writing.

The Petitioner (2nd Defendant) in his amended Statement of Claims dated 30.06.2023, claims the entirety of the land sought to be partitioned according to the alternative plan No. 4452 made by Mr. Ediriwickrama, marked as **P7** annexed to the Petition, dated 23.05.2017. The Petitioner has claimed the said larger land depicted in **P7** which includes the land sought to be partitioned by the Plaintiff and depicted as corpus in the preliminary plan **P6(B)** prepared by Mr. Somachandra. The said larger land in **P7** is in extent of 49 Acres, prepared on the alternative commission by Mr. Ediriwickrama. Therefore, I must reiterate adoption and following such procedure is alien to the Partition Law as at that time, without following the steps in Section 19(1) of the Partition Law.

It is also undisputed that the Petitioner seeks a dismissal of the partition action on the basis that the Plaintiff has failed to identify the corpus on the preliminary plan **P6(B)** of Mr. Somachandra as only part of the corpus is depicted thereon. The Petitioner has filed its written Points of Contest on that basis.

Then, as the last general entry provided on the record indicates, the case has been fixed for trial by the learned District Judge. Before the trial, the Petitioner has come before this Court and moved to invoke the writ jurisdiction of this Court in this Application.

Jurisdiction of the court to try a partition action

Now I will consider which court has the jurisdiction to take a decision or deliver a judgement in the partition action, on either to dismiss or try the case and come to the finality.

Partition actions should be filed according to the Partition Law. Section 3 of the Partition Law provides as to how territorial jurisdiction of a court to try a partition action is vested, which reads thus;

“(1) Every partition action shall be instituted by presenting a written plaint to the District Court, within the local limits of whose jurisdiction the land which is the subject-matter of the action is situated in whole or in part.

“(2) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more courts any land is situated, any one of those courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any partition action relating to the land; and such action so entertained and disposed of shall for all purposes be deemed to be and to have been duly instituted in a court of competent jurisdiction.” [Emphasis is mine]

The partition action has been instituted in the District Court of Tangalle, in whose jurisdiction the land is situated. In any case so far there is no uncertainty about the situation of the land to make an order in terms of Section 3(2) of the Partition Law. Therefore, I assume that the territorial jurisdiction lies with the District Court of Tangalle to hear and determine this case. In addition to that, Section 6 of the Civil Procedure Code, read with Sections 79 and 83 of the Partition Law, further buttresses my view.

The Plaintiff has instituted the above styled action to partition the land owned by several co-owners, where the Plaintiff is also one of the co-owners, on the basis that such co-ownership need not be

maintained anymore. Therefore, if any co-owner desires to end the co-ownership, that itself gives him the cause of action to end such co-ownership to obtain a decree under the Partition Law to partition the corpus. He need not establish any other 'cause of action' that Section 5 of the Civil Procedure Code stipulates. This proposition was enunciated in the case of *Marshal Perera v. Elizabeth Fernando*⁵, by Justice H. N. G. Fernando (as he then was).

*“The Partition Ordinance does not render it essential for the plaintiff to prove in such a suit that common possession, is inconvenient, nor have the Courts held that inconvenience of possession must be established. The Ordinance presupposes an inherent right in any person who is for the time being a co-owner to secure a divided holding for himself or else, in appropriate circumstances, to obtain his proportionate share in the proceeds of sale of the land. If, therefore, any notion of a ‘cause of action’ is involved in a partition suit pure-and simple, it is this inherent right of a co-owner for the time being which constitutes the ‘cause of action’.”*⁶

Issue between the Petitioner and the other parties in the partition case

On a perusal of the pleadings of the 'Partition action', the Plaintiff has come before Court to end the co-ownership of the corpus of the said partition action, exercising his right as a co-owner to obtain a decree of partition which is recognised by Section 2 of the Partition Law, and he has allotted shares to other co-owners except the shares of one co-owner whose heirs are not to be found; therefore, her shares are left unallotted in the Plaint. The paragraph 2 of the Plaint describes the corpus as follows;

⁵ [1956] 60 NLR 229

⁶ *Marshal Perera v. Elizabeth Fernando* [1956] 60 NLR 232 at 229.

“දකුණු පළාතේ හම්බන්තොට දිස්ත්‍රික්කයේ දකුණු ගිරුවා පන්තුවේ නංගල්ල ප්‍රාදේශීය ලේකම් කොට්ඨාශයට අයත් කුඩාවැල්ල යන ගමේ කුඩාවැල්ල දකුණු ග්‍රාම නිල..ඊ වසම තුළ පිහිටි ‘කොලොන්නකන්ද කැබැල්ලක්’ නැමැති ඉඩම වන උතුරට : මුහුදු වෙරළ ද, නැගෙනහිරට : පනස්වල ද, දකුණට : කොකුහැන්නදිගේ දාවින් අප්පුට අයිති කැබැල්ල ද, බස්නාහිරට : මුහුදු වෙරළ ද මායිම් වූ කුරක්කන් කුරුනි හයක පමණ වපසරිය ඇති ඉඩම මෙම නඩුවේ විෂය වස්තුව වේ.”

The 2nd Defendant has merely denied what is stated in paragraph 2 of the Plaintiff.

“5. පැමිණිල්ලේ 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 සහ 20 යන ඡේදයන්හි සඳහන් සම්ප්‍රකාශ විත්තිකරු විසින් ප්‍රතික්ෂේප කර සිටී.”

There are so many other claimants who also have filed Statements of Claims based on their title and shares or other claims. They all have sought from the Court either to partition or have their titles declared, except the Petitioner who has only sought a dismissal of the partition action on the basis that the Plaintiff seeks to partition a part of the corpus not its entirety.

In addition to that, it is the Petitioner’s position taken up in the forefront of its defence in the amended Statement of Claims, that the Plaintiff has not described the land in the Plaintiff properly, nor has he identified it in the preliminary plan; as such, moves for dismissal. In fact, before the commencement of the trial proper, all the parties including the Petitioner has filed their Points of Contest based on their Statements of Claims.

Accordingly, it is very clear that except for the 2nd Defendant-Petitioner, all the other parties have either sought a partition, the exclusion of some portion, or declare their rights and entitlement under the Partition Law other than the improvements. The only person who has sought a dismissal is the 2nd Defendant, on the basis that the Plaintiff has not identified or described the corpus.

Now I will consider based on those issues, whether the District Court of Tangalle can go into those issues or whether the Writ Court can or should go into those issues in terms of Article 140 of the Constitution.

Corpus to be identified first

In a partition action, what is expected of the Court is first to decide whether the corpus is correctly identified. According to Section 24 of the Partition Law, there should be a preliminary plan along with the report on which a partition case can proceed to trial, which reads thus;

“(1) After the expiry of the period fixed for the filing of statements of claim, and after the return of the surveyor to the commission for preliminary survey has been received, the court shall appoint a date for the case to be called in open court in order-to fix the date of trial of the action and shall give notice in writing of such date by registered post to all parties who have furnished a registered address and tendered the costs of such notice as provided by subsection (3) of section 19.

(2) On the day appointed under subsection (1) of this section, or where it appears to the court that the case is not ready for trial, on any later date to which the matter shall on that date have been postponed, the court shall fix the date of trial of every partition action in open court.

It shall not be necessary to give notice of the date of trial to any party, unless the court in special circumstances otherwise orders.” [Emphasis is mine]

According to the above provisions, when the partition action proceeds to trial to decide the rights of the parties based on their title or other claims which is reflected in the Points of Contest raised by the parties or settled by the Court at the commencement of the trial, the Court can so proceed

to trial only after a decision is taken on the identification of the corpus; the issues relating to the title and improvements or any other claims including servitude rights and all other matters can be decided only in respect of ‘certain corpus’. The Court is empowered to take decisions and give judgements in respect of such a ‘certain corpus’ on the following matters as Section 26 stipulates.

“26. (2) The interlocutory decree may include one or more of the following orders, so however that the orders are not inconsistent with one another: -

(a) order for a partition of the land;

(b) order for a sale of the land in whole or in lots;

(c) order for a sale of a share or portion of the land and a partition of the remainder;

(d) order that any portion of the land representing the share of any particular party only shall be demarcated and separated from the remainder of the land;

(e) order that any specified portion of the land shall continue to belong in common to specified parties or to a group of parties;

(f) order that any specified portion of the land sought to be partitioned or surveyed be excluded from the scope of the action;

(g) order that any share remain unallotted.”

In those circumstances, it is my view, that the first thing the partition judge should be satisfied with is that there should be a preliminary plan on which a partition action can proceed to trial. After the return to the Commission by the Commissioner appointed in that behalf, **the learned trial judge should call the case in open court to consider the plan, report, and the field notes, which a paramount duty expected of a trial judge.** This is reflected in the judgements of His

Lordship Henry Hema Basnayake in the cases of *Brampy Appuhamy v. Menis Appuhamy*⁷, and also in His Lordship Justice Sarath Silva's (as he then was) judgement in *Sopaya Silva v. Magilin Silva*⁸. If the corpus is not identified and depicted according to the description given in the Plaint on the preliminary plan, before fixing the case for trial, the learned trial judge has to follow three steps as enunciated in *Sopaya Silva v. Magilin Silva* [1988];

“(i) to reissue the Commission with instructions to survey the land as described in the plaint. The surveyor could have been examined as provided in section 18(2) of the Partition Law to consider the feasibility of this course of action.

(ii) to permit the Plaintiffs to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment of the plaint and the taking of consequential steps including the registration of a fresh lis pendens.

(iii) to permit any of the Defendants to seek a partition of the larger land as depicted in the preliminary survey. This course of action involves an amendment of the statement of claim of that defendant and the taking of such other steps as may be necessary in terms of section 19(2) of the Partition Law.”

In the instant case, when the preliminary plan prepared by Mr. Somachandra (**P6(B)**) was returned to the Commission with the report marked as **P6(A)**, and the learned District Judge having received the same, should have called the case in open court to consider the plan since by that time the summonses had been served, and most of the parties were before court. But the learned District Judge had failed to do so as enunciated in the case of *Sopaya Silva* [1988]. Therefore, it is very clear that there is a dereliction of duty on the part of the learned District Judge in this case. The

⁷ [1958] 60 NLR 337

⁸ [1988] 2 Sri LR 105

learned District Judge should have considered the plan and the report along with the field notes with the assistance of the parties. Consideration of the preliminary plan is a duty on the part of the judge in terms of Section 24(1) of the Partition Law, as opposed to the consideration of the final plan as a duty of the allottees (the parties).

Unfortunately, the next step that the parties had taken was to ask for alternative commissions to prepare further preliminary plans on the basis that there is a land which is larger than the land depicted in the (original) preliminary plan prepared by Mr. Somachandra. This is also obnoxious to the Partition Law as at that time⁹; because without taking steps under Section 19(1), no party should have been permitted to obtain alternate commissions to prepare a plan to show a larger land. Such an alternative commission should have only been issued on the application of Section 19(2); and it should have been issued only by the same commissioner as the law stood at that time. However, the learned District Judge in this case has failed to consider this also as he appears to have been dictated by the lawyers for the issuance of the alternative plans. In addition to that, all the lawyers of this case are responsible and privy too.

When a party asserts that a larger land than what is depicted in the preliminary plan forms part of the corpus, then he has to take steps under Section 19(2) of the Partition Law. Before that, he should make an application for that purpose, and then on his pleadings, he must be made a plaintiff to be able take steps accordingly, as per *Soysa v. Silva and Others*¹⁰.

⁹ *H. Vithanachchi Sumanasena v. G.K. Premaratna* [2014] [CA (WRT) 1336-1337/99F]; *H. Don Tudor and 2 Others v. H.D. Ananda Chandrasiri and Others* [2018] [SC (Appeal) 134/2016] SC Minutes 19.02.2018

¹⁰ [2000] 2 Sri L.R. 235

Therefore, this part of the delay in this partition case before the District Court of Tangalle is purely on the learned District Judge, and the lawyers for the parties must also be held responsible, so blame should be put on them.

However, thereafter, even without taking the necessary steps provided under Section 19(2), particularly the Petitioner (the 2nd Defendant) raised that objection in the forefront of his Statement of Claims. Therefore, the learned District Judge should have conducted the trial immediately after those issues were raised; which he has failed to do. The lawyers for the 2nd Defendant have also failed in their duty since they have not taken steps under Section 19(2), prosecuted that case, or asked for a dismissal as their defence in the District Court and have the case decided upon the original preliminary plan. Therefore, that part of the delay is mainly the fault of the 2nd Defendant-Petitioner. He has further caused more delay through this case in the Court of Appeal; therefore, it will be considered to order cost.

Duty of the District Court

I wish to juxtapose to further elucidate this point through the following dicta of His Lordship Basnayake in the case of *W. Uberis v. M.W. Jayawardene [1959]*¹¹ to emphasise the duty cast upon the District Judge in a partition action and the steps to be followed before issuing summons;

“I have had the advantage of reading the judgment prepared by my brother Pulle, with which I agree.

I wish to add that this is one of many cases that have come up in appeal in which the surveyor commissioned to carry out a preliminary survey in proceedings under the law relating to partition has failed to appreciate the functions entrusted to him. It is the duty of

¹¹62 NLR 217

a surveyor to whom a commission is issued to adhere strictly to its terms and locate and survey the land he is commissioned to survey. It is not open to him to survey any land pointed out by one or more of the parties and prepare and submit to the court the plan and report of such survey. If he is unable to locate the land he is commissioned to survey, he should so report to the court and ask for further instructions.

Another matter I wish to stress is that Judges of first instance should give their personal attention to the formulation of the terms of the commission issued in proceedings for the partition of land and not leave it to be done mechanically by a member of the clerical staff attached to the court. A commission is an instrument issued by the court and should receive its careful consideration and specify in detail what the surveyor is required to do. The instant case is a good illustration of the neglect of that duty by the Judge.”

Further I wish to advert to the following dicta of His Lordship Basnayake in *Brampy Appuhamy v. Menis Appuhamy* [1958] to illustrate the duty cast upon the lawyers to avoid any delay caused due to the lackadaisical way that a partition case is prosecuted;

“It is unfortunate that these proceedings which commenced in 1952 should now after the lapse of six years have to be set aside and that the parties have to incur expense which could easily have been avoided had their lawyers been careful, and had the court itself shown vigilance in seeing that provisions of the Act were observed. We think that the fairest order in this case is that the case should go back for a retrial from the stage of the plaint. We accordingly set aside the interlocutory decree entered by the learned District Judge and direct that the case should be sent back for a retrial commencing from the first step prescribed by the Act. The plaintiff will no doubt consider whether his plaint needs amendment in the light of what has transpired. If any of the defendants had averred

timeously that only a portion of the land described in the plaint should have been made the subject matter of the action to the plaint, the delay and expense consequent on taking the objection at this late stage could have been avoided. The proctors for the parties must take the blame for the present situation. It is their lack of care that has rendered a retrial necessary. We refrain from ordering the proctors to pay the costs of their clients in the hope that they will not charge fees from their clients in the retrial that has been rendered necessary.”

Otherwise, if no party wants to go for a partition of a larger land, then such a defendant who raises that point, can raise it as a Point of Contest and move for a dismissal of the action at the trial. Then the learned Trial Judge has to decide the identification of the corpus first. As such, it is my view that the entire gamut of statutory law, substantive and procedural law enunciated in judgements which are also unwritten law¹² respectively provide that only a District Judge of a particular District Court within whose jurisdiction the corpus is situated is empowered to decide upon those issues.

Jurisdiction of the Court of Appeal

Having held so, now I will consider whether this Court, namely the Court of Appeal of the Democratic Socialist Republic of Sri Lanka established by Article 137 of the Constitution, can take cognizance of this matter.

Accordingly, the Court of Appeal derives its appellate jurisdiction in terms of Articles 138 and 139 of the Constitution. This appellate jurisdiction includes *restitutio in integrum* as well. In addition to that, the Court of Appeal is vested with the power to issue writs in the nature of

¹² *Walker Sons & Co. (U.K.) Ltd v. Gunatilake and Others* [1979] 1 Sri L.R. 231

Certiorari, Procedendo, Prohibition, Quo Warranto, and Mandamus in terms of Article 140 of the Constitution. There are many other powers vested in the Court of Appeal, but I shall confine to these relevant powers based on the issues raised by the parties as well as the Court to determine this matter since those issues arise in the pleadings and arguments.

In this application, the Plaintiff has sought two writs from this Court; namely,

- i. *Writ of Prohibition*, preventing the District Court Judge from proceeding with the partition action.
- ii. *Writ of Mandamus*, compelling the District Judge to dismiss the action on the basis of the non-identification of the corpus in the preliminary plan of the Plaintiff, since only part of the land is depicted on the preliminary plan.

Then the next question arises whether this Court vested with the power in the circumstances explained above, to issue those two writs as sought by the 1st Defendant.

District Court of Tangalle has jurisdiction

As I have mentioned above, the land is situated in the jurisdiction of the District Court of Tangalle (it is common ground), and it is a co-owned land as asserted by the Plaintiff. If it is subjected to a co-ownership, such co-ownership can be ended in various ways. One is by successfully instituting a partition action. Accordingly, as the Plaintiff asserts, he has chosen to end the co-ownership seeking the intervention of the Court by the institution of this partition action.

For that, he has chosen the correct court as provided thereof by the law as mentioned above, namely the District Court of Tangalle, and he asserts that the land sought to be partitioned is subject to co-ownership; he has to establish it as the burden of proof is on him. According to him, the co-owners who are entitled to the shares are also mentioned in the Plaint, except the fragment of the shares

that remains to be allotted to the heirs of one co-owner who is dead and gone and not to be found. In addition to that, any case starts with the cause of action as asserted by the Plaintiff in this case, who asserts the co-ownership and seeks the intervention of the Court to terminate the said co-ownership as law provided. However, the burden remains on him to establish that, particularly where there is a dispute.

The District Court of Tangalle, as I mentioned above, derives its jurisdiction from the Judicature Act; the Judicature Act derives its power from the Constitution; the Constitution derives its power by way of Article 3 and 4 from the sovereignty of the People. Therefore, it is my view that the District Court of Tangalle has the jurisdiction exclusively in respect of this matter. The Writ Court of this country is empowered to issue a writ only by virtue of Article 140 of the Constitution; though it is empowered to issue a writ against a Court of First Instance, after inspecting and examining the records. However, in this instant case, there is no allegation by the Petitioner, that the learned District Judge has committed some error on the face of the record, denied the rules of natural justice, or has taken a decision so far adversely affecting the rights of the 1st Defendant, or has exceeded its powers conferred; thereby, making his actions *ultra vires* as clearly explained in *R v Electricity Commissioners ex p London Electricity Joint Committee Co. (1920) Ltd.*¹³ formula.

*“Wherever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.”*¹⁴

¹³ [1924] 1 KB 171

¹⁴ H. W. R. Wade and C.F. Forsyth, “Administrative Law” (8th Edition) Chapter 17 “Prerogative Remedies” Page 597

Still the trial is yet to commence, and as I mentioned above, the District Judge is fully empowered to decide upon the issues (Points of Contest) that the parties have raised in their respective claims, including the Petitioner; so far, the learned District Judge has acted *intra vires* and not taken a decision. As such, it is my view that if the writ court of this country issues a *Writ of Prohibition* preventing the District Judge from taking a decision which he is empowered to do derived from the sovereign power of people, it will amount to a violation of Articles 4(c) and 3 of the Constitution, which this Court is not empowered to do and therefore, cannot do. In the same breath I hold that this Court cannot compel the District Judge to dismiss the action without trying it, since he is fully equipped with all the legal powers by virtue of the principles and norms discussed above that the jurisprudence of this country recognises.

Arrogation of jurisdiction

Now I will consider whether this Court can assume and/or arrogate and/or usurp the jurisdiction of the District Court of Tangalle, which I raised as a question in this case.

The power of the District Court derives from Section 19 of the Judicature Act, and the appointment of such a Judge to a particular District Court is made by the Judicial Service Commission in terms of Article 111H(2)(a) of the Constitution. The said power derives from Articles 3 and 4(c) of the Constitution.

Now I will further consider the situation from an alternative perspective. Article 3 of the Constitution declares that the sovereignty of the people is with the people and that it is inalienable, and sovereignty should be exercised in the manner prescribed in Article 4. Article 4(c) clearly declares and stipulates that the judicial power of the people should be exercised by the Courts and such other institutions established by the Constitution and any other law. Here, the District Court

of Tangalle is established by another law, namely the Judicature Act, while the jurisdiction of the said Court, as I mentioned above, derives from the Constitution through the Judicature Act, and the appointment of the Judges is also made by the Judicial Service Commission with the power that derives from the Constitution. Accordingly, such power exercised by the District Court is the sovereign power of the people. Arrogation of such power by the Court of Appeal in the name of writ jurisdiction is a clear violation of Article 3 and 4 of the Constitution, which is against the rationale of *Weragama v. Eksath Lanka Wathu Kamkaru Samithiya and Others* [1994].

For the reasons adumbrated by me above, it is my view that the Court of Appeal of the Democratic Socialist Republic of Sri Lanka cannot take a decision in the instant partition action, except which falls within Article 140 of the Constitution. Therefore, the first issue that I raised above, should be answered in the negative. Therefore, no writ lies in this case. As such this Application is liable to be dismissed.

In addition to that, I hold the justice loudly demands in this case to dismiss this frivolous application by which the Petitioner has obtained a stay order which now operates, preventing the District Judge from proceeding with the action, which has caused a huge delay.

Conclusion

Accordingly, I am compelled to dismiss this Application, subject to the cost of Rs. 210,000/- (Two Hundred and Ten Thousand Rupees), payable by the 2nd Respondent-Petitioner to the Plaintiff.

JUDGE OF THE COURT OF APPEAL