THE

Sri Lanka Law Reports

Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2010] 1 SRI L.R. - PART 4

PAGES 85 - 112

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at M. D. Gunasena & Company (Printers) Ltd.

Price: Rs. 25.00

DIGEST

an award which favours an employee. An Arbitrator holds no license from the Legislature to make any such award as he may please, for nothing is just and equitable which is decided by whim or caprice or by the toss of a double-headed coin."

In this regard the pronouncement made by Sirimanne J. (H. N. G. Fernando C. J. agreeing) in the case of *Heath & Co. (Ceylon) Ltd. vs Jariyawasam*[3] – which too being a case where application was made by the petitioner for a writ of certiorari to quash an award made by an arbitrator appointed under the Industrial Disputes Act, would lend assistance here. In the said case it was held that:

"In the assessment of evidence, an arbitrator appointed under the Industrial Disputes Act must act judicially. Where his finding is completely contrary to the weight of evidence, his award is liable to be quashed by way of certiorari."

Further the pronouncement of F.N.D. Jayasuriya J, in All *Ceylon Commercial and Industrial Workers' Union vs Nestle Lanka Ltd* [4] which too being a case dealing with an award made by an arbitrator having referred for arbitration under Section 4(1) of Industrial Disputes Act also would be relevant here. It was held that:

"1. Although Arbitrator does not exercise judicial power in the strict sense, it is his duty to act judicially, though ultimately he makes an award as may appear to him to be just and equitable.

2. There is no evidence or material which could support the findings reached by the Arbitrator, findings and decisions unsupported by evidence are capricious, unreasonable or arbitrary.

3. A deciding authority which has made a finding of primary fact wholly unsupported by evidence or which had drawn an inference wholly unsupported by any of the primary facts found by it will be held to have erred in point of law.

   "No evidence rule" does not contemplate a total lack of evidence it is equally applicable where the evidence taken as a whole, is not reasonably capable of supporting the finding or decision."

Having considered the evidence had before the arbitrator and the conclusions of the arbitrator in his award (P2) I am of the view that the arbitrator's findings and decisions are not supported by the evidence before him. Further, for the reasons stated above the learned Court of Appeal Judge too had erred when he proceeded to state that:

> 'The findings and the decision of the arbitrator is in accordance with the evidence led in the inquiry'.

In view of the foregoing analysis I proceed to answer all questions of law on which special leave was granted by this Court in the affirmative. Accordingly I would allow the appeal and set aside the judgement of the Court of Appeal dated 29.04.2008 (P9) and direct that a mandate in the nature of writ of certiorari be issued quashing the impugned arbitral award dated 29.04.2005. (P2) and the Gazette Notification, produced marked P2a. The appellant company is entitled to costs of this appeal fixed at Rs. 25,000/- payable by the 1st respondent-respondent.

J. A. N. DE SILVA, C. J. - I agree

THILAKAWARDENA, J. - I agree

Appeal allowed.

SOPINONA VS. PITIPANAARACHCHI AND TWO OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
SALEEM MARSOOF, P. C., J., AND
BALAPATABENDI, J.
S. C. APPEAL NO. 49/2003
S. C. (SPL) L. A. NO. 01/2003
C. A. NO. 631/98(F)
D. C. HOMAGAMA NO. 247/P
JANUARY 13TH, 2009

Partition Law 21 of 1977, Partition Act of 1951 – Identity of the Corpus – Investigation of title – Common Ownership – Duty to answer all Points of Contest - failure - denial of justice - trial de Novo - Justifiability.

The Original Plaintiff – Respondent – Appellant, instituted action in the District Court of Colombo on 29.1.1969 seeking to partition a land called "Porikehena" The action was contested by 1st, 3rd and 19th defendants out of the 40 defendants in the original plaint. The trial was concluded on 24.3.1975. The original plaintiff Romanis had died pending the trial and Sopinona (Appellant) was substituted in his place. Before the judgment was delivered, the case was transferred to the District Court of Homagama and trial commenced de novo on 23rd April 1992. At the conclusion of the trial the learned District Judge delivered the judgment on 4.9.1998. However, the learned District Judge answered only issue No. 1 raised by the appellant in her favour, and refrained from answering any of the other issues on the basis that they did not arise and disposed of the entire case only answering issue No. 1. The 3rd and 41st Respondents appealed to the Court of Appeal. The Court of Appeal set aside the judgment and sent the case back for re-trial. The substituted plaintiff – Respondent – Appellant appealed against the judgment of the Court of Appeal. The Supreme Court granted special leave to appeal on the following questions of law.

(i) Whether in law, was there sufficient investigation of title of the parties by the Original Court.

(ii) Whether all issues need be answered by the District Judge when the answer to one issue alone sufficiently determines the title of the parties.

(iii) Whether, if the answer to a single issue, in effect is a complete answer to all the contents in the action, whether it is necessary and incumbent on the District Judge to give specific answers to each and every issue.

Held

(1) In a partition action, it would be the prime duty of the Trial Judge to carefully examine and investigate the actual rights and title to the land, sought to be partitioned. In that process it would be essential for the Trial Judge to consider the evidence led on points of contest and answer all of them, stating as to why they are accepted or rejected.

(2) Answering only points of contest raised by one party in a partition action and failing to consider the points of contest raised by other parties amounts to denial of justice to the latter parties for no fault of theirs. Failure to consider the deeds and other documents produced by the respondents at the trial leads to the conclusion, considering the rights of the respondents, there had in fact been a miscarriage of justice.

(3) Since a partition action is instituted to determine questions of title, it is necessary to conduct a thorough investigation and the duty of such investigation devolves on the Court.

Per Saleem Marsoof., J. –

(1) Where any person's possession was originally not adverse, and he claims that it has become adverse, the onus in on him to prove it. In doing so, he is required not only to prove intention on his part to possess adversely, but also a manifestation of that intention to the true owner against whom he sets up his possession.

(2) Clarity in regard to the identity of the corpus is fundamental to the investigation of title in a partition case. Without proper identification of the corpus it would be impossible to conduct a proper investigation of title.

(3) A basic principle in all the enactments on Partition Law is that where there has been no investigation of title, any resulting partition decree necessarily has to be set aside.

(4) The judge must evaluate and consider the totality of the evidence, giving a short summary of the evidence of the parties and witnesses and stating the reasons for his preference to accept the evidence of one party as opposed to that of the other.

Per Saleem Marsoof, J., - (dissenting with the conclusion on the question of trial de Novo.)

"I am also firmly of the opinion that, in any event, no useful purpose would be served by sending this case back to the original court for trial *de novo,* as directed by the Court of Appeal. This would constitute a third trial of this case more than four decades since the matter was first brought before the District Court".

"I note that Sopinona, Carolis and Cornelis, the witnesses presented before the Courts in the second trial before the District Court of Homagama, would by now be more than 80 years old if they are living, and their descendants may not know about the facts of this case even to extent Sopinona, Carolis and Cornelis knew".

"Considering therefore all the circumstances of this case, and in particular, the uncertainty regarding the identity of the corpus, the failure to register lis pendens for the larger land of 1 acre and 16.85 perches, the weakness in the case of the Appellant as presented at the trial, the difficulty of finding witnesses who can testify at a fresh trial, and evidence led at the trial which show that the land sought to be partitioned was not co-owned property, I am of the opinion that it is appropriate to make order setting aside the judgment of the Court of Appeal dated 22nd November 2002 as well as the judgment of the District Court dated 4th September 1998, and substitute therefore an order that the action filed in the District Court by the substituted Appellant should stand dismissed".

Cases referred to :

1. *Victor v. Cyril de Silva* [1998] 1 Sri L.R. 41
2. *Warnakula v. Ramani Jayawardena* [1990] 1 Sri L. R. 206
3. *Wijesundera v. Herath Appuhamy and others* 67 C. L. W. 63

4. *Dharmadasa v. Meraya* [1948] 50 N. L. R. 197
5. *Peiris v. Perera* (1896) 1 N. L. R. 362
6. *Mather v. Thamotheram Pillai* (1903) 6 N. L. R. 246
7. *Neelakuttu v. Alvar* (1918) 20 N. L. R. 372
8. *Batagama Appuhamy v. Dingiri Menika* (1897) N. L. R. 129
9. *Fereira v. Haniffa* (1912) 15 N. L. R. 445
10. *Fernando v. Mohamadu Saibo* (1899) 3 N. L. R. 321
11. *Fernando v. Perera,* 1 Thambyah Reports 71
12. *Manchohamy v. Andiris* 9 S. C. C. 64
13. *Gooneratne v. Bishop of Colombo* (1931) 32 N. L. R. 337
14. *Nagamuttu v. Ponnampalam* 4 Thambyah 29
15. *Caronchi Appuhamy v. Manikhamy* 4 Thambyah 120
16. *Cooke v. Bandulhamy* 4 Thambyah 63
17. *John Singho v. Pediris Hamy* (1947) 48 N. L. R 345
18. *Tikiri Menika v. Deonis* (1903) 7 N. L. R. 337
19. *Dona Lucihamy et al v. Ciciliyahamy et al* (1957) 59 N. L. R. 214
20. *Meera Mohindeen v. Pathuamma* 76 C. L. W. 107
21. *Cooray v. Wijesuriya* (1958) 62 N. L. R. 158
22. *De Silva v. De Silva* 3 C. W. R. 318
23. *Wickremaretne v. Albenis Perera* [1986] 1 Sri LR 190
24. *Jayasooriy v. Ubaid* 61 N. L. R. 352
25. *Gnanapandithen and Another v. Balanayagam and Another* [1998] 1 Sri LR 391
26. *Corea v. Appuhamy* 15 NLR 65
27. *Tillekertarne v. Bastian* 21 NLR 12
28. *Maria Fernando and Another v. Anthony Fernando* (1997) 2 Sri LR 356

28(a) *Siyadoris v. Simon* - 30 CLW 50

29. *Gunasekara v. Tissera and Others* [1994] 3 Sri LR 245
30. *Kobbedakuwa v. Seneviratne* 53 NLR 354
31. *Ithohamy v. Karanagoda* 56 NLR 250, 252

32. *Bank of Ceylon v. Chelliah Pillai* 64 NLR 25 (PC)

33. *Peiris v. Municipal Council,* Galle 65 NLR 555

34. *Mohinudeen and Another v. Lanka Bankuwa, York Street, Colombo 01* [2001] 1 Sri LR, 290

35. *Muthukrishna v. Gomes and Others* [1994] 3 Sri LR

Nihal Jayamanne, P. C., with *Dilhan de Silva* for Substituted – Plaintiff – Respondent – Appellant.

Rohan Sahabandu for Defendants – Appellants – Respondents.

Cur.adv.vult.

February 03rd, 2010

DR. SHIRANI BANDARANAYAKE, J.

I have had the advantage of reading in draft, the judgment of my brother Marsoof, J. Although I am in agreement with the findings of Marsoof, J., that the three (3) questions of law on which special leave to appeal was granted by this Court on 01.07.2003, must be answered in the negative, I am not in agreement with his conclusion that the judgment of the Court of Appeal dated 22.11.2002 be set aside.

I do not intend to make reference to the facts of this appeal since that had been dealt in detail by Marsoof, J. I would also not dwell on the three questions of law on which special leave to appeal was granted, as I am of the view that, considering the facts and circumstances, and more importantly the legality of the questions raised, they must be answered in the negative.

In the light of the above, I would only consider the questions as to whether it would be correct to conclude that the judgment of the Court of Appeal dated 22.11.2002, which decided to set aside the judgment of the learned District Judge and to hold a trial *de novo* should be set aside.

The main issue before the Court of Appeal was on the basis that the learned District Judge had answered only one issue, which was raised by the plaintiff-respondent-appellant (hereinafter referred to as the appellant). The contention of the learned President's Counsel for the appellant was that since the main issue raised by the appellant was answered by the learned District Judge, there was no necessity to answer the other issues framed by the defendants-appellants-respondents (hereinafter referred to as the respondents). Considering the submissions made by both learned Counsel before the Court of Appeal, Somawansa, J., had taken the view that the learned District Judge had failed to consider and analyse the totality of the evidence led before the District Court and more importantly that she had decided on the allocation of shares in accordance with the pedigree given in the plaint without examining the devolution of title. In arriving at this conclusion, learned Judge of the Court of Appeal had referred to several instances, where the learned District Judge had erred. Referring to such instances, Somawansa, J., in his judgment had stated thus:

> "The fact that she has not given her mind to analyse the evidence is borne out by her misstatements that the 3rd defendant-appellant is a son of Jeeris when in fact he was a grandson and again that Carolis is a son of Haramanis's brother when in fact he was the son of Odiris, who is the son of Haramanis.
>
> It is apparent that the learned District Judge has failed to consider and analyse the totality of the evidence led and more importantly has failed to examine the title of parties. With a sweeping statement she has directed that allocation of shares should be in accordance with the pedigree as shown in the plaint when in fact it was incumbent

on her to examine the devolution of title. It is also to be noted that the learned District Judge has failed to consider and answer 13 issues on the basis that in view of answer to issue No. 01 it was not necessary to answer the other issues. Here again, I am of the view that she has erred in not answering the balance 13 issues. For issue No 01 is based not only on devolution of title, but also on prescription. Therefore it becomes necessary to consider and analyse the evidence to ascertain whether parties disclosed in the plaint had prescribed which the learned District Judge has failed to do."

Learned Judge of the Court of Appeal had referred to several decisions (*Victor v Cyril de Silva*[1], *Warnakula v. Ramani Jayawardena*[2], *Wijesundera v. Herath Appuhamy and others*[3], *Dharmadasa v. Meraya*[4], *Peiris v. Perera*[5] and *Mather v. Thamotheram Pillai*[6].

By this the learned Judge of the Court of Appeal had emphasized the need to evaluate both oral and documentary evidence in a partition action in order to ascertain the actual owners of the land in question before entering the decree, which is good and conclusive against the whole world.

The action in question was initially instituted in the District Court of Homagama Seeking to partition a land, which was known as Porikiyahena in extent 3R. 11P., morefully described in the schedule to the plaint and depicted as lots A and B in the preliminary plan No. 255 prepared by A. P. S. Gunawardena, Licensed Surveyor dated 06.07.1970.

Since a partition action is instituted to determine questions of title, it is necessary to conduct a thorough investigation and the duty of such investigation undoubtedly devolves on the Court. Bertram A. C. J., in *Neelakutty v. Alvar*[7]

had considered the reason underlying the need for a careful investigation by Court and had clearly stated that it is due to the effect of a partition decree, which is much the same as that of a judgment in rem. Browne A. J. in *Batagama Appuhamy v. Dingiri Menika*[8] emphasized the fact that in order to obtain a decree of partition, which is binding against the whole world, the Court should require the parties to prove their title. This position was again considered by Bonser, C. J., *Peiris v. Perera (supra)*, where it was clearly stated that,

> "It is obvious that the Court ought not to make a (partition) decree, unless it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property. The Court should not, as it seems to me, regard these actions as merely to be decided on issues raised by and between the parties. The first thing the Court has to do is to satisfy itself that the plaintiff has made out his title, for unless he makes out his title, his action cannot be maintained; and he must prove his title strictly, as has been frequently pointed out by this Court."

The need for a careful investigation of all titles has been emphatically reiterated by our Courts in many decisions (*Mather v. Tamatheram Pillai (supra)*, *Ferreira v. Haniffa*[9], *Fernando v. Mohamadu Saibo*[10], *Fernando v. Perera*[11], *Manchohamy v. Andiris*[12], *Gooneratne v. Bishop of Colombo* [13] *Nagamuttu v. Ponampalam*[14], *Caronchi Appuhamy v. Manikhamy* [15], *Cooke v. Bandulhamy*[16] and there is no doubt regarding the necessity for a thorough investigation of title in partition actions.

It is not disputed that the learned District Judge had not carefully examined and analysed the totality of the evidence

placed before her and had not taken steps to investigate the title of parties before the District Court. It is also not disputed that the learned District Judge had answered only issue No. 1 and had not answered the 13 issues raised by the respondents.

An important feature in our Civil Procedure Code is the requirement that specific issues be framed (Civil Procedure in Ceylon K. D. P. Wickramanayake, 1st edition, 1971, pg. 177). In partition actions they are commonly known as points of contest and not as issues in *John Singho v. Pediris Hamy* (17) reference was made to such points of contest in a partition action.

Considering all the aforementioned circumstances, I would now turn to consider the question, that was raised at the outset, as to whether it would be correct to conclude that the judgment of the Court of Appeal dated 22.11.2002, which decided to set aside the judgment of the District Court and to hold a trial *de novo*, should be set aside.

Section 187 of the Civil Procedure Code deals with the requisites of a judgment of a trial Court and reads as follows:

> *"The judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively."*

Considering the provisions contained in Section 187 of the Civil Procedure Code, in *Warnakula v. Ramani Jayawardena (supra)*, The Court of Appeal observed that the learned District Judge had failed to consider the totality of the

evidence led on behalf of the plaintiff-appellant and had held that,

> "Bare answers to issues without reasons are not in compliance with the requirements of Section 187 of the Civil procedure Code. The evidence germane to each issue must be reviewed or examined. The judge must evaluate and consider the totality of the evidence."

In *Tikiri Manika v. Deonis*[18] it was held that a judgment which does not deal with the points in issue and does not pronounce a finding definitely on them is not a judicial pronouncement and as stated in *Dona Lucihamy et al. v. Ceciliyanahamy et.al.*[19] bare answers in a judgment to issues are insufficient, unless all matters, which arise for decision under each head have been examined. Moreover examining the provisions contained in Section 187 of the Civil Procedure Code, Sirimane, J. in *Meera Mohideen v. Pathumma*[20] had clearly stated that,

> "A trial Judge should assess the oral evidence and bring his mind to bear on the facts relevant to the dispute and give reasons for his decision of the dispute as required by Section 187 of the Code."

Considering the facts and circumstances of this appeal, it is evident that by only answering the point of contest raised as the only issue by the appellant in the District Court and not giving any consideration to the points of contest raised by the respondents, justice was denied to them for no fault of the respondents. The respondents' allegation before the Court of Appeal was that there deeds were not at all considered, which leads not only to the conclusion that there had been a denial of justice, but also considering the rights of

the respondents that there had in fact been a miscarriage of justice. In *Cooray v. Wijesuriya*(21), Sinnetamby, J. referred to the importance of Court being cautious of its investigations regarding the entitlement of parties in a partition action. According to Sinnetamby, J.,

> "It is unnecessary to add that the Court, before entering a decree, should hold a careful investigation and act only on clear proof of the title of all the parties,."

It is to be borne in mind that a partition suit could be said to be a proceeding taken for the prevention or redress of a wrong within the ambit of section 3 of the Court's Ordinance (*De Silva v De Silva*(22). Accordingly in a partition action, it would be the prime duty of the Trial Judge to carefully examine and investigate the actual rights and titles to the land, sought to be partitioned. In that process it would essential for the Trial Judge to consider the evidence led on points of contest and answer all of them, stating as to why they are accepted or rejected.

It is not disputed that this action has been pending since 1969 for a period of over 4 decades. It is unfortunate to note that even after such a long time span, to this date the points of contest taken up in the form of issues at the District Court, have remained unanswered. Whilst the inordinate delay from the very commencement of this case cannot be condoned, in order to mete out justice in a fair and a rational manner, it would be necessary for the District Court to take up this matter de *novo* to carefully examine the devolution of title on the basis of oral and documentary evidence on the allocation of shares and to take steps to answer all the points of contest raised as issues, as otherwise there could be a miscarriage of justice.

Accordingly, for the reasons aforesaid the question is answered in the negative and the judgment of the Court of Appeal dated 22.11.2002, which set aside the judgment of the District Court, Homagama and directed the case to be sent back for a trial *de novo,* is affirmed.

The Registrar is directed to send the case record to the District Court Homagama forthwith and the learned District Judge is directed to hear and conclude the case as expeditiously as possible.

I make no order as to costs.

BALAPATABENDI, J. – I agree.

Appeal dismissed

SALEEM MARSOOF, J.

Over four decades ago, on 29th January 1969 the original Plaintiff-Respondent-Appellant, Welapahala Arachchige Remanis, of Pitipana South, Homagama, instituted action in the District Court of Colombo seeking to partition a land called "Porikehena", in extent 3 roods and 11 perches and situated in the village of Pitipana in the Hewagam Korale then falling within the Colombo District. The action was contested only by the 1st, 3rd and 19th Defendants, out of the 40 persons named as Defendants in the plaint. The land sought to be partitioned was described in the schedule to the plaint by reference to Plan No. 167058 dated 2nd July 1985 authenticated by D. G. Mantale, Surveyor General, and referred to in Crown Grant No. 30258 dated 28th December 1985 (P1), by which the said land was granted to Remanis's

grandfather Pitipana Achachchige Jeeris jointly with another person named Thantirige Haramanis, of the same village. The said Jeeris had four children, one of whom was Sethuhamy, who was admittedly the mother of the original Plaintiff, Remanis.

It must be mentioned at the outset that this case has had a long and checkered history despite the fact that after the initial steps that necessarily take time in partition cases, the trial had commenced and was concluded on 24th March 1975. Since Remanis had died prior to the said trial date, his widow, Poragalage Sopinona (hereinafter referred to as "the Appellant") who had been substituted in his place, and another witness, Thantirige Carolis, testified on behalf of the Appellant. On behalf of the contesting Defendant-Appellant-Respondents (hereinafter referred to as the "Respondents"). Pitipana Arachchige Tikonis, the original 1st Defendant, and Matarage Menchinona, who had been substituted as the 41st Defendant in place her deceased husband Pitipana Arachchige Obias, gave evidence. However, before the judgement was delivered in this case, the case was transferred to the newly established District Court of Homagama and trial commenced *de novo* on 23rd April 1992.

At the commencement of the fresh trial before the District Court of Homagama on 23rd April 1992, the parties admitted that the land described in the schedule to the plaint is shown in the preliminary Plan No. 255 dated 6th July 1970 and certified by A. P. S. Gunawardene, Licenced Surveyor, and that Emis, Sadiris, Charlis and Sethuhamy are the heirs of Jeeris. It is noteworthy that the said Preliminary Plan bearing No. 255 depicts two lots marked as 'A' and 'B' respectively in extent 2 roods and 26.8 perches and 1 rood and 30.05

perches, which add up to a land extent of 1 acre and 16.85 perches. This is far in excess of the corpus as described in the schedule to the plaint which is only 3 roods and 11.9 perches. The Respondents, although admitting that the land described in the schedule to the plaint is shown in the Preliminary Plan No. 255, had alluded to this discrepancy at paragraph 20 of their answer, and asserted that after the death of Jeeris, the land called Porikehena which he had possessed by virtue of the Crown Grant, was amalgamated with two other lands separately owned by him namely, Indipitiya and Mahakele Mukalana, and Plan No. 1868 dated 27th July 1940 certified by D. A. Goonatilleka, Licenced Surveyor (3DI) was prepared to amicably divide the amalgamated land amongst his heirs Emis, Sadiris, Charlis and Sethuhamy. It was the case of the Respondents that accordingly, lot 'A' of the said Plan was allotted to Charlis, while lots 'B' and 'E' were allotted to Emis, and lots 'C' and 'D' respectively were allotted to Sadris and Sethuhamy, and that they continued to possess the said lots as defined and divided portions of land for the exclusion of all others.

The issues that were raised at the commencement of the trial are set out below.

On behalf of the Appellant

(1) Are the parties mentioned in the plaint entitled to the land described in the schedule to the plaint by virtue of the pedigree set out in the plaint and prescription?

On behalf of the Defendant

(2) Did Jeeris Appu possess the land which is the subject matter of this case and two other lands, namely, Indipitiya

and Mukalana situated adjoining the said land as one piece of land (එක ඉඩමක් වශයෙන්)?

(3) Did Jeeris Appu's children Emis, Sadiris, Charlis and Sethuhamy possess the aforesaid three lands as one piece of land?

(4) Did the aforesaid four persons after possessing the aforesaid three lands as one amicably partition of the said lands among themselves by Plan No. 1868 dated 27th June 1940?

(5) Accordingly, did Sethuhamy possess lot 'D', Sadiris possess lot 'C', Emis possess lots 'B' and 'E' and Charlis possess lot 'A' of the said Plan?

(6) Did Sethuhami sell her rights to lot 'D' to the Plaintiff (who is her son and the present Appellant) by Deed No. 1845 dated 3rd February 1950?

(7) If answer to the above question is in the affirmative, can Plaintiff act in a manner inconsistent with the amicable partition effected by Plan No. 1868?

(8) Are lots 'A' and 'E' of Plan No. 1868, the same as the lot 'A' and 'B' of Plan No. 255 prepared for this case?

(9) Are any portion of the aforesaid two lands own by the Plaintiff or other parties mentioned in his pedigree?

Apart from these issues certain additional issues were also formulated on the suggestion of Counsel for the Appellant and Counsel for the Respondents as issues (10) to (14) which seek to further clarify the matters on which parties were at variance. While at the trial *de novo* the same witnesses, Sopinona and Carolis, testified on behalf of the Appellant, since the original 1st Defendant Tikonis had passed away, the original 3rd Defendant, Pitipana Arachchige

Cornelis alone gave evidence on behalf of the Respondents. The question that loomed large at the trial was whether Jeeris had possessed the land sought to be partitioned to the exclusion of Haramanis, and in particular whether the amalgamation of the said land with his other lands Indipitiya and Mahakele Mukalana, and the allotment of distinct portions of the amalgamated land to Emis, Sadiris, Charlis and Sethuhamy as set out in the Plan No. 1868 dated 27th June 1940 (3DI), constituted evidence of ouster.

The learned District Judge, held with the Appellant, and in the course of her judgement dated 4th September 1998, agreed with the submissions made on behalf of the Appellant that Jeeris or Jeeris' heirs, who are entitled only to an undivided half share of the land, cannot prescribe to the other undivided half share of Haramanis since a co-owner cannot in law prescribe against his other co-owner in the absence of proof of ouster. The learned District Judge observed that –

> "තරඟ කරන විත්තිකරුවන්ගේ හිමිකම් ප්‍රකාශයෙන් පීරිස් අප්පුට පැමිණිල්ලේ උපලේඛනයේ සඳහන් ඉඩම අයිතිවූ පදනම් පැහැදිලි නොකරයි. කෙසේ වෙතත් එම හිමිකම් ප්‍රකාශයේ 02 වෙනි ඡේදය අනුව පීරිස් අප්පුට පැමිණිල්ලේ උපලේඛණයේ සඳහන් ඉඩමේ එකම අයිතිකරු වශයෙන් බුක්ති විඳ කාලාවරෝධී අයිතිය ලබා ඇති අතර හරමානිස් ක්‍රියා කළා නම් ක්‍රියා කළේ පීරිස් අප්පුගේ නියෝජිතයෙක් වශයෙන් බව ප්‍රකාශ කරයි. එබැවින් හරමානිස්ටද මෙම දේපලෙන් 1/2 කොටසක අයිතිය තිබී ඇති බැවින් ඔහු එම දේපල බුකිති විඳීමෙන් පමණක් ඔහුගේ අයිතිය පීරිස් අප්පුට පැවරෙන්නේ නැත. පීරිස්ට එම අයිතිය පැවරෙන්නේ හරමානිස් තම අයිතිය අතහැර නොගොස් එනම් හරමානිස්ට එරෙහිව කාලාවරෝධී අයිතියක් පැවරෙන්නේ නම් *නෙරපා හැරීමක්* (ouster) පෙන්නුම් කළ යුතුය. එනම් මෙම නඩුවේ එවැනි නෙරපා හැරීමක් මත හවුල් අයිතිය හිමිවී ඇති ආකාරයක් නොදක්වයි. එබැවින් හවුල් අයිතිය නීතිය පවතින ආකාරයට හරමානිස්ට එසේම නොබෙදූ 1/2 ක කොටසකට තිබිය යුතුය. පීරිස්ගේ උරුමය සම්බන්ධයෙන්

තර්කයක් නැත. තරඟ කරන විත්තිකරුවන් හරමානිස්ගේ අයිතිය ප්‍රතික්ෂේප කර ඇති අතර ඔහුගේ අයිතිය ඇත්තේ හෝ ඇත්නම් එය පීරිස්ගේ නියෝජිතයෙක් ලෙස පමණක් බව හිමිකම් ප්‍රකාශයේ සඳහන් කර ඇත."

Accordingly, the Learned District Judge answered issue No. 1 raised by the Appellant in her favour, and refrained from answering any of the other issues on the basis that they did not arise. I quote below the final paragraph of the said judgment –

"ඒ අනුව ඉදිරිපත් කර ඇති ඔප්පු හා සාක්ෂි අනුව තන්තිරිගේ හරමානිස් මෙම ඉඩමේ හවුල් අයිතිකරුවෙකු වශයෙන් සිටි බව පිළිගත යුතුය. ඉහත පීරිස් අප්පු සමඟ මෙම බෙදීමට යෝජිත ඉඩම මුලින්ම හවුල් අයිතිකරුවෙකු වශයෙන් සිටි බව පිළිගත යුතුය. හරමානිස්ගේ එම අයිතිය ඔහු පහ කිරීමකින් නැතිවී නැත. එබැවින් මෙම ඉඩමේ ඔප්පු සියල්ලම සළකා බැලීමේදී අධිකරණය සෑහීමකට පත් වී ඇත්තේ පැ. 1 දරණ රජයේ පත්‍රය මගින් පීරිස් අප්පුට හා හරමානිස්ට මෙම බෙදීමට යෝජිත ඉඩමෙන් නොබෙදූ 1/2 ක කොටස බැගින් හිමිවී ඇති අතරම එම බෙදීමට යෝජිත ඉඩම අංක 255 දරණ සැලැස්මෙන් පෙන්නුම් කර ඇතත් එම බෙදීම හරමානිස්ගේ එකඟත්වය ඇතිව කරන ලද බෙදීමක් නොවන අතර කම්බි ගසා වෙන් කරන ලදුව සාදන ලද බෙදීමක් ද නොවන අතර එම බෙදීමෙන් පෙන්නුම් කරන ඉඩම එනම් අංක: 1868 දරණ සැලැස්ම මෙම නඩුවට අදාළ සැලැස්ම ලෙස ඔවුන්ගේ පිළිගැනීම් වලින්ම ප්‍රතික්ෂේප වී ඇත. ඒ අනුව පාර්ශවකරුවන්ට ඔවුන්ගේ කොටස් හිමිවිය යුත්තේ පැමිණිල්ලේ සඳහන් පෙළපත අනුව යැයි මම තීරණය කරමි. ඒ අනුව මෙම නඩුවේ පැමිණිල්ල විසින් 15 වෙනි ඡේදයේ පෙන්නුම් කර ඇති ආකාරයට පාර්ශවකරුවන්ට තම කොටස් හිමිවිය යුතුයැයි මා තීරණය කරමි. විසඳනාවන් වලට මෙසේ පිළිතුරු දෙමි.

01 ඔව්.

ඉහත සඳහන් විසඳනාවට පැමිණිල්ලේ වාසියට පිළිතුරු ලැබී ඇති බැවින් අනෙක් විසඳනාවන්ට පිළිතුරු දීම අවශ්‍ය නැත."

Aggrieved by this decision, the 3rd and 41st Respondents appealed to the Court of Appeal. It was submitted on behalf of the Respondents that the learned District judge had not considered all the documentary and other evidence tendered on behalf of the Respondents and had thereby failed to discharge her duty to properly investigate title. In allowing the appeal, Andrew Somawansa, J., in the course of his judgement dated 22nd November 2002 with which N. E. Dissanayake, J. concurred, noted that while 5 deeds were marked by the Appellant and 9 marked by the Respondents, the learned District Judge had considered only 4 of the said deeds. Somawansa, J. held that the learned District Judge had seriously erred in seeking to dispose of the whole case through his answer to issue No. 1 his Lordship observed that –

> "Here again, I am of the view that she has erred in not answering the balance issues. For issue No. 1 is based not only on devolution of title but also on prescription. Therefore it becomes necessary to consider and analyse the evidence to ascertain whether parties disclosed in the plaint had prescribed which the learned District Judge has failed to do."

Accordingly, Somawansa, J. concluded that –

> "Had she answered them, this Court would be in a position to consider her findings on the said issues. However, as she has failed to answer the rest of the issues, though with reluctance, I am compelled to set aside the judgement of the learned District Judge and send the case back for re-trial."

This Court has granted special leave to appeal against the said judgement of the Court of Appeal on the following questions of law:-

"(a) Whether in law there was sufficient investigation of title of the parties by the original court;

(b) Whether all issues need be answered by the District Judge when the answer to one issue alone sufficiently determines the title of the parties to the land both on deeds and on prescription;

(c) Whether, if the answer to a single issue, in effect is a complete answer to all the contents in the action, whether it is necessary and incumbent on the District Judge to give specific answers to the other issues. Specially, if in arriving at the answer to the issue the Learned District Judge has considered and dealt with the matters raised in the other issues."

Identity of the Corpus

Before dealing with the first substantial question of law on which special leave has been granted by this Court in this appeal, it is necessary to deal with the question of identity of the land sought to be partitioned, which is a matter of vital importance in any partition case. Without proper identification of the corpus it would be impossible to conduct a proper investigation of title. As G.P.S. de Silva, J. (as he then was) emphasized in the course of his judgement in *Wickremaratne v. Albenis Perera*[23] at 199, in a partition action, "there are certain duties cast on the court quite apart from objections that may or may be taken by the parties" and this includes the "supervening duty to satisfy itself as to the identity of the corpus and also at to the title of each and every party who claims title to it." In *Jayasooriay v Ubaid*[24] at 353 Sansoni, J. observed that "there is no question that there was a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for

this purpose it was always open to him to call for further evidence in order to make a proper investigation." This is because clarity in regard to the identity of the corpus is fundamental to the investigation of title in a partition case.

In this connection, it is necessary to observe that in the plaint filed in this case, the original Plaintiff Remanis sought to partition the land described as Porikehena in extent 3 roods and 11 perches. However, as already noted, the Preliminary Plan No. 255 covers a much larger extent of 1 acre and 16.85 perches, which is far in excess of the land described in the schedule to the plaint and covered by the Crown Grant No. 30258, dated 28th December 1895 (P1) from which the Appellant claims to have derived title. Despite the said discrepancy in the extent of land being adverted to in paragraph 20 of the answer filed by the contesting Respondents, at the commencement of the trial *de novo* on 23rd April 1992 all parties to the action admitted that the said Plan depicts the land described in the scheduled to the plaint and sought to be partitioned, and no point of contest or issue was raised in regard to the identity of the corpus. However, when Carolis Singho have evidence on 21st August 1997 he spoke about the discrepancy in the land extent, and his Counsel moved to raise two more issues in regard to the failure to properly register *lis pendens*, which application was turned down by the learned District Judge on the ground that this aspect of the matter should have been taken up before the commencement of the trial.

There esists a lack of clarity, even amongst each of the parties themselves, with regard to the description of the corpus described in the schedule to the plaint as Porikehena in extent 3 roods and 11 perches by reference to Plan No. 167058 dated 2nd July 1895 authenticated by D. G. Mantale,

Surveyor General. This Plan was not produced in court by any of the parties. It must be noted, that lots 'A' and 'E' of Plan No. 1868 dated 27th July 1940 and prepared by Licensed Surveyor M. D. A. Goonatilleka (3D1) showing parts of Porikehena which were subjected to the amicable partition amongst Jeeris's heirs, also add up to a extent of 3 roods and 11 perches, and a superimposition of the said lots 'A' and 'E' of the said Plan on the Preliminary Plan No. 255 dated 11th October 1970 prepared by Licensed Surveyor A. P. S. Gunawardena clearly shows that the said Preliminary Plan depicts a land extent of 1 acre and 16.85 perches which *exceeds the land claimed by the Appellant as well as by the Respondents by approximately 1 rood and 5.85 perches.* The Respondents, in their evidence and submissions at the various stages of this case, have sometimes seemingly admitted the corpus as described in the plaint to be Porikehena, despite the aforesaid disparity, and at other times sought to challenge this position. The parties have not shown consistency in this regard, and failed in their preliminary duty to describe adequately and with clarity the corpus being the subject matter of these proceedings.

The identity of the corpus is also a matter of fundamental importance in ensuring that all persons who have any claim to it to participate in the partition action, which ultimately confers title *in rem*. The Partition Act No 16 of 1951, that was applicable at the time of the institution of the action in 1969, provided for the registration of *lis pendens* and other steps which had as their objective the proper investigation of title. It appears from the original record maintained in the District Court which was called for by this Court, that *lis pendens* was registered in terms of Section 6 of the Partition Act on 13th February 1969 in folio G 384/48 at the Land Registry with respect to the land referred to in the schedule to the

plaint in extent 3 roods and 11 perches. However, an examination of the journal entries in the original record maintained in the District Court in this case (from 18th April 1989, being the date of the reconstruction of the record after the original record was destroyed by fire) did not show any evidence that *lis pendens* was registered for the larger extent of land depicted in the Preliminary Plan No. 255 in extent 1 acre and 16.85 perches, and the fact that learned Counsel for Carolis Singho on 21st August 1997 sought to raise two additional issues in this regard suggests that in fact there was no such registration.

It has been expressly provided in Section 23(3) of the Partition Act of 1951 that where a survey made on a commission issued by court in a partition case "discloses that the land described in the plaint is only a portion of a larger land which should have been made the subject matter of the action, the court shall specify the party to the action by whom, and the date on or before which, an application for the registration of the action as a *lis pendens* affecting that larger land shall be filed in court" to enable the filling of *lis pendends* showing the larger land and taking other mandatory steps under the Act, which are necessary to ensure that all interested parties are before court. The District Court has ordered the partitioning of the said larger portion of land depicted in Preliminary Plan No. 255 consisting of 1 acre and 16.85 perches. Which far exceeds the land described in the schedule to the plaint, and in the absence of material to show that Section 23 of the Partition Act was complied with, raises serious doubts at to the regularity and legality of the impugned decision of the District Court in this case.

Sufficiency of Investigation of Title

The first substantial question of law on which special leave to appeal was granted against the decision of the Court

of Appeal is whether in law there was sufficient investigation of title by the original court. Learned President's Counsel for the Appellant strenuously contended that there was, and learned Counsel for the Respondents argued with equal force that there was not.

It is trite law that, in a partition suit which is instituted to bring an end to co-ownership of land through a decree which is binging not only on the parties to the suit but *in rem* over the entirety of society, the dispute is not to be settled on issues alone, but on any points of interest that the court sees fit in discharging its sacred duty for the full investigation of title. As was observed by Layard, C. J. in *Mather v. Thamotharam Pillai (supra)* at pages 250 to 251,

> "…. The question to be decided in a partition suit is not merely matters between parties which may be decided in a civil action; the Court has to decide in every such suit matters in respect of which the parties need not necessarily be in dispute and on which in this particular suit they are not at issue, viz., *that the land is held in common by the plaintiff and defendants, and they solely have title to the land sought to be partitioned.* The Court has not only to decide the matters in which the parties are in dispute, but to safeguard the interests of others who are no parties to the suit, who will be bound by a decree for partition made by the Court under the provisions of the Ordinance." *(Italics added)*

Layard, C. J. was there interpreting the *Partition Ordinance* No. 10 of 1863, which has since been repealed, but the same obligation is cast on the court by the provisions of the Partition Act No. 16 of 1951 which applied at the time of institution of the action from which this appeal arises. In fact, *dicta* from the judgement of Layard, C. J.

were quoted with approval by G. P. S. de Silva, C. J. in *Gnanapandithen and Another v. Balanayagam and Another*[25] which was decided under the provisions of the current legislation on the subject, namely, the *Partition Law* No. 21 of 1977, as subsequently amended, which replaced the Partition Act of 1951. A basic principle in all the enactments is that where there has been no proper investigation of title, any resulting partition decree necessarily has to be set aside.

In the context of the stringent legal provisions of the relevant legislation, learned Counsel for the Respondent submitted the Appellant has failed to establish that the land is held in common by the Appellant and Respondents, and that the Respondents solely have title to the land sought to be partitioned. He submitted that it was clear from the evidence that Haramanis never possessed Porikehena, that Jeeris and his heirs alone possessed the entirety of Porikehena along with the two adjoining lands called Indipitiya and Mahakele Mukalana and had in fact, over the course of 30 years of exclusive possession, prescribed to Porikehene as against the said Haramanis. It was submitted by learned Counsel for the Respondents that any instance at which Haramanis had acted in relation to Porikehena is explicable on basis that he functioned as an agent of Jeeris. He explained that when Jeeris died leaving as his heirs Emis, Sadiris, Charlis and Sethuhamy who continued to possess all three lands in common, they put an end to their common ownership by amalgamating and amicably divided the said lands among themselves by Partition Plan No. 1868 dated 27th July 1940 certified by D. A. Goonatilleka, Licenced Surveyor (3D1). Learned Counsel for the Respondents submitted that the said lots 'A' and 'E' were by the said Plan marked 3D1, apportioned to Charlis and Emis respectively, and that lot

'A' was subsequently transferred to Obies (the original 13th Defendant) whose widow Matarage Menchinona (the 41st Substituted Defendant) now contests the Appellant's case along with the issue of Pitipana Arachchige Cornelis (the 3rd Defendant) who it was submitted gained title to Lot 'E' from Emis.

It was further submitted by the learned Counsel for the Respondents that the Appellant, only had title to parts of Lot 'D' of Plan No. 1868 (3D1) through Sethuhamy and Sethuhamy's son, Welapahala Arachchige Remanis, her late husband who was the original Plaintiff. It was his contention that the exclusive, undisturbed and uninterrupted possession by the Respondents of defined and divided lots along with the other parties to the 1940 division, prior to, or at least, from the date of the said division, defeated through prescription the co-ownership established by the initial Crown Grant. It was also submitted by learned Counsel for the Respondents that the Appellant's case was doomed to fail as the identity of the corpus was in grave doubt, and additionally, as the land known as Porikehena ceased to exist as a distinct land its following amalgamation in 1940 with Indipitiya and Mahakele Mukalana. Learned Counsel for the Respondent stressed that the Appellant is legally bound by this division as Sethuhamy, the mother of Remanis, who had participated in the division had executed Deed No. 1845 marked as 3D3, whereby she conveyed lot 'D' of Plan No. 1868 (3D1) to Remanis. He contended that by accepting the said conveyance, Sethuhamy precluded herself as well as her successors-in-title, from disputing the validity of 3D1. He submitted that the Appellant, who is the widow of Remanis, by claiming title based on the said Deed No. 1845 (3D3) and her own testimony in court, had admitted the said amalgamation and division, vitiating her right to claim otherwise.

Learned President's Counsel for the Appellant submitted that the original court has adequately discharged its obligation of satisfying itself that the land described in the schedule to the plaint (1) was held in common; and (2) that title devolved on the parties in the manner and to the extent as set out in the plaint. He submitted that by virtue of Crown Grant No. 30258, dated 28th December 1895 (P1), Pitipana Arachchige Jeeris and one Thantirige Haramanis, became entitled to equal shares in the land sought to be partitioned called Porikehena, in extent 3 roods and 11 perches. He further submitted that the said Haramanis and Jeeris owned two lands in common, namely, Porikehena, the corpus sought to be partitioned in the action which led to this appeal, and Kirigaldeniya. It was his contention that while Jeeris lived on Porikehena and Haramanis lived on Kirigaldeniya, neither did Jeeris give up his rights to Kirigaldeniya nor did Haramanis give up his rights to Porikehena. He submitted that this position is evidenced by the fact that the heirs of Jeeris had sold rights in Kirigaldeniya on Deed No. 7066 dated 15th August 1922 attested by D. T. S. S. Jayatilake, Notary Public (P4) to the heirs of Haramanis and that some heirs of Haramanis had in turn sold by Deed No. 1874, dated 17th October 1967 (P2), rights in Porikehena to the heirs of Jeeris, including the original Plaintiff, Welapahala Arachchige Remanis. He submitted that the District Court had examined all relevant evidence carefully, and was justified in upholding the claim of the Appellant for a 21/48th share of Porikehena under the said purchase from the heirs of Haramanis, and a further 1/56th share of Porikehena under the birth right of her deceased husband Remanis, as an heir of Jeeris. Learned President's Counsel for the Appellant emphasized that Jeeris and Haramanis, being co-owners, their undivided rights cannot be prescribed by each other, in the absence of clear evidence of ouster or something equivalent to ouster.