

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

Ahamad Ismail Musthapha Kamal of No. 530, Galle Road, Kalutara South.

**Plaintiff**

**Case No. C. A. 469/2000(F)  
D. C. Kalutara Case No. P/6282**

**Vs.**

1. Ahamad Ismail Mohamed Nisthar of No. 495, Main Street, Kalutara South.

2. Damayanthi Laura Dayawathie Meegahawatta of No. 503, Galle Road, Kalutara South.

3. Cader Sahib Uduman Ummul Muneera

4. Cader Sahib Mohamed Uduman

Both of No. 501/10A, Galle Road, Kalutara South.

5. Cader Sahib Aseena

6. Mohamed Yaseen Mohamed Refai

Both of No. 1103/4, Galle Road, Kalutara South.

7. Atalugamage Don Gnanaratne of 'Chandra Grocery', Gang Ima, Dodangoda (Deceased)

7A. Dona Chandrawathie Alahakoon

8. Wickrama Aratchige Piyasena of No. 501/7, Puraviyawatta, Galle Road, Kalutara South (Deceased)

8A. Karunawathie Jayasinghe of Galle Road, Katukurunda, Kalutara South.  
(Legal Representative of Estate of 8<sup>th</sup>).

9. Hettiaratchige Somawathie of No. 15/501, Galle Road, Kalutara South.

10. Mohamed Uduman Mohamed Jabir of No. 501/10, Main Street, Kalutara South.
11. Ahamad Ismail Mohamed Nisthar of No. 495, Main Street, Kalutara South.

**Defendants**

**AND BETWEEN**

Ahamad Ismail Musthapha Kamal of No. 530, Galle Road, Kalutara South.

**Plaintiff-Appellant**

**Vs.**

1. Ahamad Ismail Mohamed Nisthar of No. 495, Main Street, Kalutara South.
2. Damayanthi Laura Dayawathie Meegahawatta of No. 503, Galle Road, Kalutara South.
3. Cader Sahib Uduman Ummul Muneera
4. Cader Sahib Mohamed Uduman  
  
Both of No. 501/10A, Galle Road, Kalutara South.
5. Cader Sahib Aseena
6. Mohamed Yaseen Mohamed Refai  
  
Both of No. 1103/4, Galle Road, Kalutara South.
7. Atalugamage Don Gnanaratne of 'Chandra Grocery', Gang Ima, Dodangoda (Deceased)
- 7A. Dona Chandrawathie Alahakoon
8. Wickrama Aratchige Piyasena of No. 501/7, Puraviyawatta, Galle Road, Kalutara South (Deceased)

8A. Karunawathie Jayasinghe of Galle Road,  
Katukurunda, Kalutara South.  
(Legal Representative of Estate of 8<sup>th</sup>).

9. Hettiaratchige Somawathie of No. 15/501, Galle  
Road, Kalutara South.

10. Mohamed Uduman Mohamed Jabir of No.  
501/10, Main Street, Kalutara South.

11. Ahamad Ismail Mohamed Nisthar of No. 495,  
Main Street, Kalutara South.

**Defendant-Respondents**

**Before:** Janak De Silva J.

K. Priyantha Fernando J.

**Counsel:**

S. N. Vijith Singh for Plaintiff-Appellant

Sanjeewa Dissanayake for 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants-Respondents

Eraj Atapattu for 7A, 8<sup>th</sup> and 9<sup>th</sup> Defendants-Respondents

**Written Submissions tendered on:**

Plaintiff-Appellant on 31.07.2018 and 16.05.2019

4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants-Respondents 11.07.2019

7A, 8<sup>th</sup> and 9<sup>th</sup> Defendants-Respondents 31.07.2018 and 11.07.2019

**Decided on:** 22.06.2020

**Janak De Silva J.**

This is an appeal against the judgment of the learned District Judge of Kalutara dated 18.08.2000. The Plaintiff-Appellant (plaintiff) instituted the above styled action in the District Court of Kalutara seeking to partition the land called 'Two-Forth portion of Paraviyawatta' (පරවියාවත්ත භතරෙන් දෙපංශ කට්ටිය) containing in extent A.0-R.1-P.39 morefully described in the schedule to the plaint dated 22.09.1993 [page 68 of the Appeal Brief].

The plaintiff set out a pedigree in his plaint and prayed that the said land to be partitioned among the parties to the action in the following manner –

Plaintiff	Undivided 144/672
1 <sup>st</sup> Defendant	Undivided 144/672
2 <sup>nd</sup> Defendant	Undivided 384/672

A commission was issued to survey and identify the land to be partitioned. Accordingly, plan no. 347 dated 22.01.1994 made by K. R. Perera, Licensed Surveyor [page 93 of the Appeal Brief] and the surveyor's report dated 24.01.1994 [page 90 of the Appeal Brief] were produced. The land sought to be partitioned is depicted as Lots 1 – 4 in the said plan no. 347.

According to the said surveyor's report, Lot 2 is claimed by the 8<sup>th</sup> defendant, Lot 3 is claimed by the 7<sup>th</sup> defendant and Lot 4 is claimed by the 9<sup>th</sup> defendant.

The 1<sup>st</sup>defendant filed his statement of claim on 16.08.1995 [page 82 of the Appeal Brief] and accepted the land to be partitioned as Lots 1 – 4 in the said plan no. 347 [paragraph 3 of his statement of claim]. However, he produced an alternative pedigree and prayed that he and the plaintiff are entitled to an undivided 5/14 share each.

The plaintiff accepted the pedigree produced by the 1<sup>st</sup> defendant and agreed to lead evidence accordingly [page 100 of the Appeal Brief].

The added 3<sup>rd</sup>–6<sup>th</sup> defendants filed their statement of claim on 01.03.1995 [page 79 of the Appeal Brief] and disputed both the land to be partitioned and the pedigree produced by the plaintiff. Further, they averred that the land sought to be partitioned by the plaintiff is a portion of a much larger land called 'Paraviyawatta' containing in extent A.1-R.2-P.0 more fully described in the schedule to their statement of claim.

The 9<sup>th</sup> defendant filed her statement of claim on 01.03.1995 [page 76 of the Appeal Brief] and disputed the land to be partitioned. She claimed sole ownership to Lot 4 of the said plan no. 347 by prescription and sought to exclude the same from the land to be partitioned.

After a lengthy trial, the learned District Judge dismissed the plaint for the reason that the plaintiff and the 1<sup>st</sup> defendant have failed to establish their co-ownership rights to the land sought to be partitioned. Being aggrieved, the plaintiff appealed.

In the appeal, the plaintiff contested *inter alia* that the learned District Judge has failed to properly identify the land sought to be partitioned.

In a partition action, there is a duty cast on the Judge to satisfy him as to the identity of the land sought to be partitioned [*Jayasuriya v. Ubaid* (61 N.L.R. 352)]. There are certain duties cast on the court quite apart from objections that may or may not be taken by the parties. In addition to the duty that is cast on the court to resolve the disputes that are set out by the parties in their issues, the court has a supervening duty to satisfy itself as to the identity of the corpus and also as to the title of each and every party who claims title to it [*Wickremaratne and Another v. Alpenis Perera* (1986) 1 Sri.L.R. 190]. Without proper identification of the corpus it would be impossible to conduct a proper investigation of title [*Sopinona V. Pitipanaarachchi* (2010) 1 Sri.L.R. 87].

In *Sopinona v. Pitipanaarachchi* (Supra) at 107, Saleem Marsoof, J. further observed –

*“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 contention of the 3<sup>rd</sup> – 6<sup>th</sup> defendants was that the land sought to be partitioned by the plaintiff cannot be partitioned alone as it forms part of a larger land. However, the defendants did not seek to have the larger land partitioned. They sought a dismissal of the action of the plaintiff on the basis that he is seeking to partition only a portion of a larger land co-owned by the parties to the instant action. In the event the court proceeds to partition the land sought to be partitioned by the plaintiff, they prayed for their undivided entitlements pleaded in their statement of claim.

Sections 19(2)(a) of the Partition Law reads –

*“Where a defendant seeks to have a larger land than that sought to be partitioned by the plaintiff made the subject-matter of the action in order to obtain a decree for the partition or, sale of such larger land under the provisions of this Law, his statement of claim shall include a statement of the particulars required by section 4 in respect of such larger land ; and he shall comply with the requirements of section 5, as if his statement of claim were a plaint under this Law in respect of such larger land.”*

It is imperative on the part of the defendants who seek to have a larger land than that sought to be partitioned by the plaintiff to follow the procedure laid down in section 19(2) of the Partition Law and move for the larger land to be partitioned [*Soysa v. Silva and Others* (2000) 2 Sri.L.R. 235, *Meegaha Arachchilage Princy Aleckman v. Dasanayake Ranasinghe Mudiyanseralahamilage Arthur Eheliyagoda and Others* (C.A. 664/99(F) decided on 28.02.2020)].

The 3<sup>rd</sup> – 6<sup>th</sup> defendants filed their statement of claim on 01.03.1995 and averred that the land sought to be partitioned by the plaintiff is a portion of a much larger land called 'Paraviyawatta' containing in extent A.1-R.2-P.0 morefully described in the schedule to their statement of claim. However, they have not acted according to the provisions of section 19(2) of the Partition Law. On the other hand, the plaintiff sought to partition a divided and a defined land portion called 'Two-Forth portion of Paraviyawatta'. The deeds marked by the plaintiff and the 1<sup>st</sup> defendant also refer to a land called 'Two-Forth portion of Paraviyawatta' (පරවියාවත්ත භතරන් දෙපංගු කව්විය). In plan no. 347 dated 22.01.1994 made by K. R. Perera, Licensed Surveyor and the surveyor's report thereof, it was identified as the land sought to be partitioned and is depicted as Lots 1 – 4 in the said plan no. 347.

However, it is essential to consider whether Lots 2 – 4 in the said plan no. 347 should be excluded from the land to be partitioned as they are claimed by the 7<sup>th</sup> – 9<sup>th</sup> defendants by prescription.

Section 3 of the Prescription Ordinance reads –

***"Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs."*** [Emphasis added]

It is trite law that in order to constitute prescriptive title to an immovable property, it shall be an exclusive and adverse possession against all the other persons/owners.

Accordingly, the 7<sup>th</sup> – 9<sup>th</sup> defendants must establish the requisites stipulated in section 3 of the Prescription Ordinance. This means that, as set out in section 3, they have to prove, on a balance of probabilities, that they have had undisturbed and uninterrupted possession for a minimum of ten years and that such possession has been adverse to or independent of the owners of the land.

The 7A – 9<sup>th</sup> defendants, during the trial, gave evidence stating that they have been in possession and there has been a fence dividing Lot 1 from Lots 2 – 4 for a period of 35 – 40 years or more [pages 224 – 227, 255, 267 and 268 of the Appeal Brief]. Even though they have collaborated the evidence led by each other, no independent witness, not even the licensed surveyor who prepared the preliminary plan, was called to give evidence on their behalf.

The plaintiff and the other defendants who gave evidence accepted that the 7<sup>th</sup> – 9<sup>th</sup> defendants are in possession of Lots 2 – 4. However, they took up the position that the fence dividing Lot 1 from Lots 2 – 4 is not a permanent one and it was built about 6 – 8 years ago [pages 155, 156, 176 and 202]. It must also be noted that, according to the preliminary plan, the fence dividing Lot 1 from Lots 2 – 4 is recognized as a පැළ ඉනි වැට. Even though the 7A and 9<sup>th</sup> defendants have stated that the fence consists of several eramudu trees [pages 225, 231 – 232 and 275 of the Appeal Brief], no such information is recorded by the licensed surveyor in his report. During the cross-examination, when it was suggested to the 7A defendant that the alleged fence is non-existent, she has failed to answer [pages 241 – 242 of the Appeal Brief]. The 8A defendant has also not properly explained about the nature of the alleged fence [page 266 of the Appeal Brief]. When a witness giving evidence of prescriptive possession states “I possessed” or “I’ve possessed”, the court should insist on those words being explained and exemplified [*Alwis v. Perera* (21 N.L.R. 321), *Juliana Hamine et al v. Don Thomas et al* (59 N.L.R. 546)].

In view of the above, I hold that the 7A – 9<sup>th</sup> defendants have failed to prove, on a balance of probabilities, their prescriptive title to Lots 2 – 4 and the learned District Judge has erred in excluding the said allotments of land from the land sought to be partitioned.

To establish the pedigree pleaded by the 1<sup>st</sup> defendant, the plaintiff has relied on several deeds. However, some of such deeds [deed no. 9474 dated 11.12.1877, deed no. 3322 dated 14.06.1873, deed no. 1878 and deed no. 2036 dated 06.11.1886] are not marked in evidence. Nor was any reason given to explain such failure.

According to the pedigree of the 1<sup>st</sup> defendant, Wellawattage Don Suwaris De Silva Appuhamy and Salpadoruge Arnolis De Silva became entitled to an undivided 2/7 share each by the said unmarked deeds except deed no. 2036 dated 06.11.1886, deed no. 3415 dated 08.09.1873 (පැළ 3) and by prescription. Later, Salpadoruge Arnolis De Silva sold his entitlement to Wellawattage Don Suwaris De Silva Appuhamy by deed no. 2525 dated 04.04.1882. According to ‘පැළ 1’, the said deed no. 2525 is decayed. However, by deed of gift no. 8241 dated 04.05.1895 (පැළ 4), Wellawattage Don Suwaris De Silva Appuhamy conveyed the entitlement he got from the said deed no. 2525 to Wellawattage Don Robert De Silva Appuhamy, Wellawattage Don Peter De Silva Appuhamy,



Wellawattage Don Podinona De Silva Hamine and Wellawattage Don Lilinona De Silva Hamine. 'පැ4ආ' shows that only an undivided 1/7 share was gifted. It is not clear as to what happened to the balance undivided 1/7 share, if there was any.

According to the 1<sup>st</sup> defendant, the undivided entitlement of Wellawattage Don Podinona De Silva Hamine was transferred to Wellawattage Don Robert De Silva Appuhamy by deed no. 14737 dated 22.10.1924 (පැ5).

A careful perusal of 'පැ5' shows that Wellawattage Don Podinona De Silva Hamine not only transferred the entitlement she got from 'පැ4' but the entirety of her entitlement in respect of 'Two-Forth portion of Paraviyawatta'. According to the recital and the schedule of 'පැ5' [pages 324 and 326 of the Appeal Brief], she became entitled to an undivided  $1/14 \times 1/2 \times 1/6$  (i.e. 1/168) by virtue of 'පැ4', the inheritance of her deceased brother (i.e. Wellawattage Don Peter De Silva Appuhamy) and the testamentary case bearing no. 83. It must be noted that what she transferred by 'පැ5' is less than what she became entitled to by 'පැ4'. What happened to the balance portion is not revealed by the evidence led.

The absence of several title deeds and the uncertainty regarding the undivided shares held by the previous co-owners render it impossible to calculate the total shares owned by the subsequent co-owners of the land sought to be partitioned.

Other than the deeds marked, the plaintiff and the 1<sup>st</sup> defendant largely rely on oral evidence and the family history of their predecessors' in establishing the pedigree produced by the 1<sup>st</sup> defendant. However, it is apparent, by the evidence led, that neither the plaintiff nor the 1<sup>st</sup> defendant had sufficient knowledge regarding the alleged family relationships of their predecessors or their prescriptive rights. No cogent evidence was placed before the court to prove the said allegations.

In the case of *Maddumaralalage Dona Mary Nona v. Maddumaralalage Don Justin and Others* (2016 B.L.R. 130), Eva Wanasundera, P. C., J. held as follows –

*"In a partition action, the Judge has to decide what share of the land should be allotted to which party. It is different from answering issues in a money recovery case, a divorce case, a rent and ejectment case, a land dispute case, a debt recovery case, a case based on contract or a case based on delict etc. In those cases, the answers could be in the affirmative or in the negative, may be with some comment or a remark which would show the inclination to the final decision. But in a partition action, each party claims different portions of one big land and the Judge is expected to sort out what share of the land should be granted to which plaintiff and/or defendant. For this reason, I find that **the onus of the Judge in a partition case***



*is somewhat more difficult than in any other kind of case, since the Judge has to specifically calculate the share of entitlement.*" [Emphasis added].

In view of the above, I hold that the learned District Judge was correct in dismissing the plaint for the reason that the plaintiff and the 1<sup>st</sup> defendant have failed to establish their co-ownership rights to the land sought to be partitioned.

For all the foregoing reasons, I vary the judgment of the learned District Judge of Kalutara dated 18.08.2000.

Subject to the above, I dismiss the appeal without costs and answer the issues as follows –

1. පැමිණිල්ලේ බෙදා වෙන් කිරීමට ඉල්ලා සිටින ඉඩම, මිනින්දෝරු කේ. ආර්. පෙරේරා මහතාගේ 1994.01.22 වැනි දින දරණ අංක. 347 දරණ පිඹුරේ කැබලි අංක. 1 – 4 දක්වා පෙන්වා ඇත් ද? ඔව්.
2. මෙම ඉඩම 1 විත්තිකරුගේ හිමිකම් ප්‍රකාශයේ සඳහන් පරිදි 4/7 කට මුල් අයිතිකරු ව සිටියේ වැල්ලවත්තගේ දොන් සුවාරිස් අප්පු සහ සල්පදෝරුගේ අරනෝලිස් ද සිල්වා යන දෙදෙනා ද? ඔප්පු කර නොමැත.
3. තවත් 1/7 කට මුල් අයිතිකරු ව සිටියේ ජොරෝනිස් ද සිල්වා ද? ඔප්පු කර නොමැත.
4. එම අයිතිවාසිකම් 1 විත්තිකරුගේ හිමිකම් ප්‍රකාශයේ සඳහන් පරිදි පැමිණිලිකරුට සහ 1 විත්තිකරුට හිමි විය යුතු ද? ඔප්පු කර නොමැත.
5. බෙදීමට යෝජිත ඉඩමේ 2/7 කොටසක් සහ දීර්ඝ කාලීන භුක්තිය මත මුල් අයිතිකරු ව සිටියේ මීගහවත්තගේ දොන් ඩෝල් යන අය ද? පැන නොනගී.
6. එම අයිතිවාසිකම් 2 විත්තිකරුගේ හිමිකම් ප්‍රකාශයේ සඳහන් පරිදි ඇයට හිමි විය යුතු ද? පැන නොනගී.
7. මෙම නඩුවට ගොනු කර ඇති ඉහත සඳහන් අංක. 347 දරණ සැලැස්මේ පෙන්වා ඇත්තේ 3 – 6 දක්වා විත්තිකරුවන්ගේ හිමිකම් ප්‍රකාශයේ උපලේඛනයේ විස්තර කර ඇති 'පරවිච්ඡාදන' නමැති ඉඩමේ කොටසක් ද? නැත.
8. එසේ නම් පැමිණිලිකරුට මෙම නඩුව පවත්වාගෙන යා හැකි ද? පෙළපත ඔප්පු කර නොමැති හෙයින් පවත්වාගෙන යා නොහැක.
9. එසේ නැතිනම්, පැමිණිලිකරුගේ නඩුව නිශ්ප්‍රභා කළ යුතු ද? ඔව්.
10. ඉහත කී 3 – 6 දක්වා විත්තිකරුවන්ගේ හිමිකම් ප්‍රකාශයේ උපලේඛනයේ විස්තර කර ඇති ඉඩමේ මුල් අයිතිකරු ව සිටියේ මුස්තාපා හජ්ජියාර් නමැති අයෙකු ද? පැන නොනගී.
11. ඔහුගේ අයිතිවාසිකම් 3 – 6 දක්වා විත්තිකරුවන්ගේ හිමිකම් ප්‍රකාශයේ සඳහන් පරිදි 3 – 6 දක්වා විත්තිකරුවන්ට හිමි විය යුතු ද? පැන නොනගී.
12. 3 – 6 දක්වා විත්තිකරුවන් විසින් මෙම නඩුවට ගොනු කර ඇති අංක. 347 දරණ සැලැස්මේ පෙන්වා ඇති ඉඩම දීර්ඝ කාලීන භුක්ති විඳීමෙන් භුක්තියට සවි කරගෙන ඇත් ද? පැන නොනගී.

13. එය එසේ නම්, පැමිණිල්ල නිශ්ප්‍රභා කළ යුතු ද? පැන නොනැගී.
14. මිනින්දෝරු කේ. ආර්. පෙරේරා මහතාගේ අංක. 347 දරණ පිඹුරේ අංක. 4 දරණ ඉඩම් කැබැල්ල 9 විත්තිකාරිය විසින් දීර්ඝ කාලීන භුක්තිය මත කාලාවරෝධී අයිතිවාසිකම් ලබාගෙන ඇත් ද? ඔප්පු කර නොමැත.
15. එකී අංක. 4 දරණ කැබැල්ලේ ඇති වැවිලි සහ වැඩිදියුණු කිරීම් 9 විත්තිකාරියට කාලාවරෝධී අයිතිවාසිකම් මත හිමි විය යුතු ද? නැත.
16. එම විසඳිය යුතු ප්‍රශ්නයට 'ඔව්' යනුවෙන් පිළිතුරු ලැබෙන්නේ නම්, අංක. 4 දරණ කැබැල්ල නඩුවේ විෂය වස්තුවෙන් ඉවත් විය යුතු ද? පැන නොනැගී.
17. මිනින්දෝරු මහතාගේ වාර්තාවේ අංක. 1 දරණ කැබැල්ලේ අවුරුදු 30 ට වැඩි වයස ඇති වගාවන් පාර්ශවකරුවන්ගේ පොළොවේ අයිතිවාසිකම් අනුව හිමි විය යුතු ද? පැන නොනැගී.
18. අංක. 1 දරණ කැබැල්ලේ ඇති සියලු ම වගාවන් 3 – 6 දක්වා විත්තිකරුවන්ට හිමි විය යුතු ද? පැන නොනැගී.
19. අවසරලත් මිනින්දෝරු කේ. ආර්. පෙරේරා මහතා විසින් මැන සකස්කොට මෙම නඩුවට ගොනු කර ඇති අංක. 347 දරණ පිඹුරේ අංක. 2 සහ 3 වශයෙන් සලකුණු කර තිබෙන කැබලි පිළිවෙලින් 8<sup>වැනි</sup> විත්තිකරුවන්, 7 විත්තිකරුවන් දීර්ඝ කාලීන භුක්තිය මත ඔවුන් විසින් ගොනු කරන ලද හිමිකම් ප්‍රකාශය පරිදි ලැබිය යුතු ද? නැත.

The learned District Judge of Kalutara is directed to enter decree accordingly.

Judge of the Court of Appeal

**K. Priyantha Fernando J.**

I agree.

Judge of the Court of Appeal