

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

K. D. John Patrick Kariawasam alias  
Don John Patrick of  
No.65, Avissawella Road,  
Wellampitiya.

*-Plaintiff-Appellant-*

**C. A. Case No.205/93(F)**  
**D. C. Colombo Case No.15353/P**

Vs.

1. K. D. S. Priyadhaarshani  
No.65, Awissawella Road,  
Wellampitiya.
2. K. D. Mercy  
No.65/2, Awissawella Road,  
Wellampitiya.
3. K. D. Rita  
No.65/3, Awissawella Road,  
Wellampitiya.

*-Defendant-Respondents*

**Counsel:** Nihal Jayamanee P.C. with  
D. De Silva for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents.

Manohara De Silva P.C. with Nimal Hippola for the  
Plaintiff/Appellant

**Before:** Rohini Marasinghe J

**Arguments:** 26-2-2010.

**Written Submissions:** 10-6-210

**Judgment:** 24-3-2011

**ROHINI MARASINGHE J.**

The Plaintiff/Appellant (hereinafter referred to as plaintiff) had instituted this action to partition the land more fully described in the schedule to the plaint. In the said action the plaintiff had stated that he was entitled to an undivided  $\frac{2}{3}$ <sup>rd</sup> and the 1<sup>st</sup> defendant who is his daughter was entitled to an undivided  $\frac{1}{3}$ <sup>rd</sup> share. In the said action the 2<sup>nd</sup> and the 3<sup>rd</sup> defendant are made parties. But according to the action they were not entitled to any share from the land to be partitioned. The 2<sup>nd</sup> and the 3<sup>rd</sup> defendants were his two sisters. The 2<sup>nd</sup> and the 3<sup>rd</sup> defendants claimed title to the land through their mother namely, Susan Pinto Jayawardene.

After trial the case of the plaintiff was dismissed. This appeal is against that dismissal.

The case of the plaintiff was briefly as follows:

This land was once a part of a large land owned by one Pinthu Jayawarde. And by virtue of the partition decree bearing no. 34801/P one Girigoris Perera became entitled to this portion of land which is now sought to be partitioned. The said partition decree had been produced to the Court of Appeal marked as X7. And according to X7 said Girigoris Perera was entitled to lot "A" depicted in plan no 216 dated 20-11-34. The Girigoris had 4 children. And the said children had executed the deed bearing no 73 which was marked as P1 at the trial. By virtue of that deed the plaintiff became the sole owner of the land in issue. And, the plaintiff submits that he gifted an undivided 1/3<sup>rd</sup> to his daughter who is the 1<sup>st</sup> defendant in this case.

The case of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was briefly as follows;

This land was once commonly owned by the family of their mother Susan Pinto Jayawardena. The 2<sup>nd</sup> and the 3<sup>rd</sup> defendants claimed through the title

of their mother. They claimed that their mother owned this land prior to said Girigoris. And even though said Girigoris had been allotted this land by a partition decree, the possession remained with their mother right through out. It is conceded that Girigoris had been allotted this land by virtue of the decree marked as X7.

But the important issue was whether said Girigoris had possessed this land under the partition decree or whether Susan Pinto Jayawrdena possessed this land. The issue no 4 was raised for this purpose.

The evidence led at the trail had disclosed that Susan Pinto Jayawardena was on this land prior to Girigoris. The evidence of the plaintiff on this point was as follows.

(The evidence at page 13 dated 22-1-1993 )

ප්‍ර 'තමා වි ලියාපදිංචි 1963 තරුණ දරුවා ජනිත ජයවර්ධන ප්‍රදේශ කොටස?

උ ඔව්.

ප්‍ර ඒ දරුවාගේ තාත්තා මේ මුඛ දහස් බෙලා කලියේ

උ ඔව්.

ප්‍ර තමා හෙත් කාලේ ඔට දරුවා මේ මුඛේ ජනිත බෙලා ඔව්.

ඉ . ගිරිගෝරියා පෙරේරා මෑත කලා තුළදී  
තෙහි, නැති

උ . තෙහි නැති. 88444 හේට් ජලී තුළ  
මෙහි මා සහ මා තෙහි, නැති.

ඌ . ගිරිගෝරියා පෙරේරා තුළ දී තෙහි නැති  
1942 දී.

Accordingly, the plaintiff had stated that one Walter Perera had filed action and evicted his mother and father from this land in 1942. The said Walter Perera was a son of said Girigoris. The fact that the mother and the father were evicted from this land by said Walter had not been established. The plaintiff had filed a case bearing no 4421/Re in the District Court of Colombo to evict the 2<sup>nd</sup> defendant from the land in suit. But the plaintiff had not been successful. The appeal filed by the plaintiff was also dismissed. In the said case the plaintiff had stated that the 2<sup>nd</sup> defendant had been in occupation of the premises since 1973 with his leave and license. But this contention of the plaintiff was dismissed by the Supreme Court in case bearing No. 58/88 dated 18<sup>th</sup> December 1991.

The learned trial judge in this case has not accepted the evidence of the plaintiff on the fact that their mother was ever dispossessed by the children of said Girigoris. Therefore, the learned trial judge had held that the plaintiff had failed to establish the title of Girigoris. The learned trial judge had held that the mother of the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants had prescribed to the land in suit. Therefore, irrespective of the final decree in the partition case there is a finding on prescription. Consequently, the issue no 4 had been answered in favor of the 2<sup>nd</sup> and <sup>3<sup>rd</sup></sup> ~~the~~ defendants. The learned trial judge had given cogent reasons fro this determination.

The appeal is dismissed with taxed costs.

Rohini Marasinghe. J.

Judge of the Court of Appeal.