

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALSIT
REPUBLIC OF SRI-LANKACA.**

Mahepala Edirisinghe of
Meegahatenne.

Plaintiffs/Appellants

M.K. Chandradasa of
Botalawala, Meegahatenne.

2(a) Defendant/Respondent.

No.781/88(f)

D.C.Matugama No.2385/P.

Counsel:S.N. Vijithsingh for

Plaintiff/Appellant.

K.V.Sirisena for

2nd Defendant/Respondent

Written Submissions: 8-12-09 (Appellant)

8-3-2010(Respondent)

Before: Rohini Marasinghe J.

Judgment: 22-2-2011-

Rohini Marasinghe J

The Plaintiff/Appellant hereinafter referred to as the appellant instituted a partition action to partition the land called "Dawatagahawatte" situated in the district of kalutara. The said land was surveyed by a commission issued by court. The said survey plan bearing no 360 dated 10-4-1967 was marked as "X" at the trial. There was no dispute that the original owner of this land was one Allis Appu. The plaintiff contended that the said original owner of the land in question had two children namely, Podinona and Dochchinona. To the contrary the contesting defendants alleged that said Allis Appu had 2 more children by a subsequent marriage. Their names were Balahamy alias Ungihamy and Podihamy Therefore, the said Allis Appu as contended by the contesting defendants had 4 children as heirs of Allis Appu. The learned District Judge held with the contesting defendants. This appeal was filed against that judgment.

Admittedly, only dispute in this case was whether the said Allis Appu had 2 children alleged by the plaintiff or 4 children as alleged by the 1st and 3rd plaintiffs/appellants. The parties raised issues on that basis. The issues No 5 was raised by the plaintiff. And issue No's 8 and 9 were raised by the contesting defendants. And after hearing evidence on this point the learned trial judge answered the issues of the defendants in their favour. According to the evidence led before the trial court the witness of the 3rd defendant had disclosed that the said Allis Appu had married one Soidahamy. And by that

marriage there were two children. Thereafter the said Allis Appu had married one Lokuhamy alias Madduma Hamy. And by the second marriage Allis Appu had 2 more children. And according to the findings of the learned trial judge the undivided $\frac{1}{2}$ share of Allis Appu should devolve on all four children as intestate heirs of Allis Appu. The submissions of the appellants were that the learned trial judge had erred in coming to this conclusion. As contended by the appellants, the trial judge had reached this finding without a marriage certificate of Allis Appu or the birth certificates of his children. However, in the impugned judgment it is disclosed that the marriage certificates of the two children which were marked as 1V1 and 1V2 had disclosed that the father of the two children namely Ungihamy and Podihamy was Allis Appu. In addition to these documents the witness Milix in his evidence had established the fact that Allis Appu had contracted a second marriage and had 2 children by that marriage. The page 5 of the judgment deals with this question of fact. The learned trial judge had preferred to accept the evidence of the 3rd defendant on this point. Unless there was a gross misdirection by the trial judge of the oral testimony led at the trial which had resulted in a miscarriage of justice the appellate court do not interfere with the findings of a trial judge.

As I have dealt with the main ground of appeal, I do not intend to deal with the preliminary objection raised by the respondent that this appeal had been filed contrary to the provisions contained in section 754(4) of the CPC.

The appeal is dismissed.

Rohini Marasinghe J

Judge of the Court of Appeal.