

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

**C. A. Appeal No. 355/97 (F)**

D.C., Walasmulla No. 533/P

1. Shanthilal Malalgoda  
(Minor)
2. John Senarath Pathirana  
(Next friend)  
Omara, Walasmulla.

**Plaintiffs**

**VS.**

1. Weerakutti Arachchige  
Martin
2. Madduma Gamage  
Chandradasa  
Omara, Walasmulla

**Defendants**

**AND**

1. Weerakutti Arachchige  
Martin (*Deceased*)
- 1A. Weerakkody Arachchige  
Issebella,  
Bathalawelkoratuwa,  
Omara, Walasmulla.
- 1B. Weerakkody Arachchige  
Kusumawathie,  
Thalawagedara,  
Malahemage Aina,  
Julampitiya
- 1C. Weerakkody Arachchige  
Karunawathii  
'Nirmala' Omara,  
Walasmulla
- 1D. Weerakkody Arachchige  
Wimala  
Murugegedara, Omara,  
Walasmulla.

1E. Weerakkody Arachchige  
Subasinghe  
No. 243, thalapathgama,  
Sewanagala

2. Madduma Gamage  
Chandradasa,  
Omara, Walasmulla.

**Defendant-Appellants**

**VS.**

1. Shanthilal Malalgoda  
(Minor)  
2. John Senarath Pathirana  
(Next friend)  
Omara, Walasmulla.

**Plaintiff-Respondents**

**BEFORE** : **M. M. A. GAFFOOR, J.**

**COUNSEL** : Danuka Lakmal with Nimal Rajapaksha for the 2<sup>nd</sup>  
Defendant-Appellant

: K. G. Jinasena with Mihiri Kolambage for the Plaintiff-  
Respondents

**WRITTEN SUBMISSIONS**

**TENDERED ON** : 30.08.2018 (by the 2<sup>nd</sup> Defendant-Appellant)

**DECIDED ON\_** : **13.02.2019**

**M. M. A. GAFFOOR, J.**

This is an appeal from the judgment of the learned District Judge of Walasmulla in respect of a partition action bearing Case Number 533/P.

The Plaintiffs-Respondents (hereinafter referred to as the "Plaintiffs") instituted this action seeking to partition the land called "Katuimbulahena" in extent of 1 Acre 1 Rood and 26 Perches situated in Hambantota.

The Defendants-Appellants stated that the original owner of the land was one Senerath Pathiranage Don Davith Vas and he transferred to Senerath pathiranage Etanahamy and she died leaving her widow husband G. M. D. D. Hendric and son Peneris.

Hendrick sold his undivided half share to Andirishamy and Andirishamy transferred his shares to the 1<sup>st</sup> Defendant-Appellant (hereinafter referred to as the "1<sup>st</sup> Defendant"). Also, Peneris transferred his undivided half share to the 1<sup>st</sup> Defendant. Then the 1<sup>st</sup> Defendant transferred the entire land to the 2<sup>nd</sup> Defendant-Appellant.

The Plaintiffs submitted that apart from Peneris, Ethanahamy who had another child called Heenhamy *alias* Hamina and she had sold her undivided  $\frac{1}{4}$  shares to the 1<sup>st</sup> Plaintiff-Respondent by virtue of Deed No. 742 on 28.10.1970.

Upon conclusion of the trial, the learned District Judge had delivered his judgment on 29.05.1996 and allocated the shares as follows;

1<sup>st</sup> Plaintiff- undivided  $\frac{1}{4}$  share

1<sup>st</sup> Defendant- undivided  $\frac{3}{4}$  share and to enter a partition decree accordingly.

Defendants-Appellants being dissatisfied with the judgment of the learned District Judge of Walasmulla have preferred this appeal and prayed to set aside the judgment of the learned District Judge on the ground stating that the learned District Judge of Walasmulla has failed to evaluate the evidence correctly and as a result he has misdirected himself on the law and facts.

It is to be observed that the Plaintiffs submitted Heenhamy and Hamina is the same person and she is one of the children of Ethanahamy. Her birth certificate was produced and marked as P2.

Further, both Peneris and Heenhamy were called to give evidence and established that their parents were Ethanahamy and Hendrick.

2<sup>nd</sup> Defendant-Appellant submitted that he is the owner of the entire land in dispute according to Deed No. 6142 dated 30.05.1991 and also upon the ground of prescription.

It is important to consider the provisions of Section 3 of the Prescription Ordinance 2 of 1889 the claimant must prove,

1. Undisturbed and uninterrupted possession
2. Such possession to be independent or adverse to the claimant plaintiff and
3. Ten years previous to the bringing of a such action

In order to initiate a prescriptive title, it is necessary to show a change in the nature of the possession and the party claiming prescriptive right should show an ouster.

In ***Kanapathipillai Vs. Meerasaibo*** 58 NLR 41 Sansoni, J. with N. J. Fernando, J. concurring has held as follows,

*“The rule is well settled that, when a co-owner conveys the entire land held in common to a stranger, and the latter enters into possession of the entire land under the conveyance, he can, by possession adverse to all the co-owners for ten years, acquire a prescriptive title. But where such a stranger is aware, at the time he obtains the conveyance, that his vendor was only a co-owner and was not the sole owner of the land, ten years’ possession by him will not give him a prescriptive title. Such a purchaser cannot be said to have entered into possession as sole owner, for he had knowledge that there were others who owned shares in the land, and he will be presumed to have possessed the land as a co-owner. The ordinary rule which applied to possession by co-owners will then apply, viz., that before one can prescribe against the others, there must be an ouster or its equivalent, such as notice to those other co-owners that he was setting up a title adverse to them.”*

I opined that the 2<sup>nd</sup> Defendant- had not fulfilled the requirements set out to prove his prescriptive title in accordance with section 3 of the Prescription Ordinance.

Further, that Heenhamy *alias* Hamina is one of the children of Ethanahamy has been suppressed and who also legal heir and entitled to the specific land.

I am of the firm view that learned District Judge of Walasmulla had carefully examined the title and the evidence placed before him and correctly delivered his judgment.

For the foregoing reasons, I affirm the judgment delivered by the learned District Judge of Walasmulla and dismiss the appeal with cost.

*Appeal dismissed.*

**JUDGE OF THE COURT OF APPEAL**