

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

C. A. Appeal No. 648/96 (F)

D.C., Horana Case No. 1410/P

Thibbotuge Salman Perera,
Ramminika,
Millaniya.

PLAINTIFF

VS

1. B. Mainonna
2. Thibbotuge Rathnapala
3. Thibbotuge Gunapala
4. Thibbotuge Seelawathie
5. Thibbotuge Sirimawathie
6. Thibbotuge Sumithipala
(Deceased)
All of Ramminika North,
Millaniya.

- 6A. Udugodage Ramani Rodrigo
Dhamingamuwa, Millaniya
7. Thekuttige Akmon
(Deceased)
- 7A. Thenkutige Alisnona,
Pihahena, Millaniya
8. Idhippulige Alpinona
(Deceased)
- 8A. Hettiarachchige Garliss
9. Hettiarachchige Rupananda
10. Hettiarachchige Dhandiriss
11. Hettiarachchige Garliss
12. Hettiarachchige Mainona
13. Athulduraarachige Alipinona
(Deceased)
- 13A Hettiarachchige
Hemawathie

14. Hettiarachchige Punchinona
15. Hettiarachchige Hemawathie
16. Hettiarachchige Milinona

All of Ramminika North,
Millaniya

17. Thaibbotuge Babysingho
(Deceased)

- 17A. Thibbotuge Siriwardena

Both of Ramminika South,
Millaniya

18. Thibbottuge Thinohami
Damingamuwa, Millaniya
19. Thibbotuge Noihami
20. Thibbotuge Dimitiyes
(Deceased)

- 20A. Thibbotuge Jayasena

21. Thibbotuge Noishami
(Deceased)

- 21A. P. A. Perera

All of Ramminka, Millaniya

22. Thibbotuge Jandinahami,
Labugama, Halhota

23. Kalubowilage Advin

24. Kalubowilage Hendrick Singho

25. Kalubowilage Miviss Singho

26. Kalubowilage Publiss

27. Kalubowilage Garliss Singho

28. Kalubowilage Hemawathie

29. Thibbotuge Asilinnona

30. Thibbotuge Thinoris
(Deceased)

- 30A. Thibbotuge Piyasena

All of Ramminika, Millaniya

31. Kariyakaranage Thomas

Perera, Labugama, Halhota

32. Withanage Jimo Singho

33. Bamunusinghage Chalonona
Both of Ramminika, Millaniya
34. Munasinghe Arachchige
Babanona,
3/85, Biyagama, Lower
Malwana.
35. Hettiarachchige Aron perera
36. Thibbotuge Rosalin Nona
37. Thenkuttige Santin Singho
(Deceased)
All of Ramminika North,
Millaniya
- 37A. Thenkuttige Nihal
Ramminike, Millaniya
38. Hettiarachchige Metheeyas
Perera
39. Kedin Perera
40. Hettiarachchige Kulman Perera
41. Thenkuttige Somapala
42. Thenkuttige Sisilinnona

All of Ramminika North,
Millaniya
43. Thekuttige Punchinona,
Remuna, Anguruwathota
44. Manchanayakage Jayanoris,
Mawathagama, Halhota.
45. Thibbotuge Yasapala
46. Thibbotuge Adinona
47. Hettiarachchige Podinona
48. Thibbotuge Babynona
All of Millaniya
49. Vedikkarage Gunasundara,
Remuna, Aguruwathota
50. Lokumanage Peter Perera,
Millaniya

DEFENDANTS

35. Hettiarachchige Aron Perera,
Ramminika North, Millaniya

DEFENDANT-APPELLANT

35A. Thibbotuge Babynona,
Ramminika North, Millaniya

35B. H. A. Ranasinghe, Ramminika
North, Millaniya

35C.H. A. Dayarathna, Ramminika
North, Millaniya

35D. H. A. Ramyawathi,
No. 176, Mahabellana,
Alubomulla

**SUBSTITUTED DEFENDANT-
APPELLANT**

VS

Thibbotuge Salman Perera
Ramminika, Millaniya

PLAINTIFF-RESPONDENT

Thibbotuge Kalyanawansha,
Ramminika, Millaniya

**SUBSTITUTED PLAINTIFF-
RESPONDENT**

1. B. Mainonna
2. Thibbotuge Rathnapala
3. Thibbotuge Gunapala
4. Thibbotuge Seelawathie
5. Thibbotuge Sirimawathie
6. Thibbotuge Sumithipala
(Deceased)
All of Ramminika North,
Millaniya.

- 6A. Udugodage Ramani Rodrigo
Dhamingamuwa, Millaniya
7. Thekuttige Akmon (*Deceased*)
- 7A. Thenkutige Alisnona,
Pihahena, Millaniya
8. Idhippulige Alpinona
(*Deceased*)
- 8A. Hettiarachchige Garliss
9. Hettiarachchige Rupananda
10. Hettiarachchige Dhandiriss
11. Hettiarachchige Garliss
12. Hettiarachchige Mainona
13. Athulduraarachchige Alipinona
(*Deceased*)
- 13A Hettiarachchige Hemawathie
14. Hettiarachchige Punchinona
15. Hettiarachchige Hemawathie
16. Hettiarachchige Milinona
- All of Ramminika North,
Millaniya
17. Thaibbotuge Babysingho
(*Deceased*)
- 17A. Thibbotuge Siriwardena
- Both of Ramminika South,
Millaniya
18. Thibbottuge Thinothami
Damingamuwa, Millaniya
19. Thibbotuge Noithami
20. Thibbotuge Dimitiyes
(*Deceased*)
- 20A. Thibbotuge Jayasena
21. Thibbotuge Noishami
(*Deceased*)
- 21A. P. A. Perera
All of Ramminka, Millaniya

22. Thibbotuge Jandinahami,
Labugama, Halthota
23. Kalubowilage Advin
- 23A. Thibbotuge Chandana
Padma Kumara,
No. 108, Ramminika
North, Millaniya
24. Kalubowilage Hendrick
Singho
25. Kalubowilage Miviss
Singho
26. Kalubowilage Publiss
27. Kalubowilage Garliss
Singho
28. Kalubowilage Hemawathie
29. Thibbotuge Asilinnona
30. Thibbotuge Thinoris
(Deceased)
- 30A. Thibbotuge Piyasena
All of Ramminika,
Millaniya
- 30AA. Hibbotuge Siriyalatha
- 30AB. Thibbotiuge Rasika
Shyamalee
Both of Ramminike North,
Millaniya
- 30AC. Thibbotuge Aruni
Samanmalee
No. 126B, Welagedara,
Dhiyakada, Aththanagalla,
C/O W. H. A. Ananda
- 30AD. Thibbotuge Ajantha
Priyadarshanee,
Ramminika North,
Milliyana

31. Kariyakaranage Thomas
Perera, Labugama, Halhota
32. Withanage Jimo Singho
33. Bamunusinghage Chalonona
Both of Ramminika,
Millaniya
34. Munasinghe Arachchige
Babanona,
3/85, Biyagama, Lower
Malwana.
35. Hettiarachchige Aron perera
36. Thibbotuge Rosalin Nona
- 36A.Thuduwage Don Hema
Indrasir Perera
37. Thenkuttige Santin Singho
(Deceased)
- 37A.Thenkuttige Nihal
Ramminike, Millaniya
38. Hettiarachchige Metheeyas
Perera
39. Kedin Perera
40. Hettiarachchige Kulman
Perera
41. Thenkuttige Somapala
(Deceased)
All of Ramminika North,
Millaniya
- 41A. Thibbotuge Somawathie
- 41B. Thenkuttige Geethani
Priyadarshanee
Both of No. 107, Ramminika
North, Millaniya
42. Thenkuttige Sisilinnona
43. Thekuttige Punchinona
(Deceased), Remuna,
Anguruwathota

- 43AA. Lionel Gunarathne, Gangoda
Road, Remuna,
Anguruwathota
- 43AB. Dhammika Keshani,
No. 70, Budhop Watta,
Batagoda, Galpatha
- 43AC. Lakshman Jayaratne, Near
Boo Tree, Remuna,
Anguruwathota
- 43AD. Neetha Ranjani, No. 70,
Budhop Watta, Batagoda,
Galpatha.
- 43AE. Anura Nandana, No. Near Boo
Tree, Remuna,
Anguruwathota
- 43AF. Lalani Hemamali, No. Budhop
Watta, Batagoda, Galpatha.
44. Manchanayakage Jayanoris,
Mawathagama, Halhota
(Deceased)
- 44A. Kothalawala Kiriwatuduwege
Mary Nona
- 44B. Manchanayakage Somasiri
- 44C. Manchanayakage
Kularathna
All of No. 137, Mawathgama,
Halhota
45. Thibbotuge Yasapala
46. Thibbotuge Adinona
47. Hettiarachchige Podinona
48. Thibbotuge Babynona
All of Millaniya
49. Vedikkarage Gunasundara,
Remuna, Aguruwathota
50. Lokumanage Peter Perera,
Millaniya

Before : **M. M. A. Gaffoor, J.**

Counsel : Saliya Peiris P. C. for the 35A-35D Substituted
Defendant-Appellant

Reshani S. Seresinghe for the 23rd Substituted
Defendant-Respondent

Athula Perera with Vindya Divulwewa for the 27th
Defendant-Respondent

Written Submission

Filed on : 10.02.2012 (by the 35A-35D Substituted Defendant-
Appellant)

10.01.2017, 09.10.2018 (by the 23rd Substituted
Defendant-Respondent)

26.09.2018 (by the 27th Defendant-Respondent)

Decided on : **21.02.2019**

M. M. A. Gaffoor, J.

The Plaintiff-Respondent (hereinafter referred to as the ‘Plaintiff’) instituted this partition action in the District Court of Horana to partition the land known as ‘Konduruwawatta’ *alias* ‘Ambauyanawatta’ morefully described in the 2nd schedule to the amended plaint dated 27.01.1989.

The said partition action had been so instituted, citing the 1st to 31st Defendant-Respondents as parties thereto, and the 32nd to 50th Defendant-Respondents were added as parties to the said action subsequently.

The 35th Defendant-Appellant filed his Statement of claim dated 07.03.1985 and 09.09.1988 and stated that he and the 48th Defendant-Respondent are entitled to 1/8th share of the aforesaid land.

The trial of the case commenced on 27.10.1988 and on that day the learned District Judge observed that the land described in the schedule to the plaint is 4 Acres but, the subject land which was surveyed is 2 Acres 1 Rood and 10.5 Perches. Thus, the learned District Judge ordered a commission to the Plaintiff and directed to survey the entire land described in the plaint. Thereafter, the Plaintiff filed an amended plaint on 27.01.1989.

At the beginning of the case both parties have admitted the corpus should be Lot 1 to 4 in Preliminary Plan No. 972 dated 15.12.1982 and 02.03.1982 prepared by P. L. D. Fernando Licensed Surveyor described in the 2nd schedule to the plaint (marked as 'X') and no dispute arose as to the original ownership to the land by one Munasinghe Arachchige Pinthu Naide and Munasinghe Arachchige Jonappu Naide (*vide page 275, 290 & 291 of the appeal brief*).

During the trial, a dispute arose among the Defendant-Respondents as to the title of the land by Munasinghe Arachchige Jonappu Naide. The 23rd to 30th and 36th Defendant-Respondents have claimed that they have earned the rights through **Angohamy** who was the only child of Munasinghe Archchige Jonappu Naide. But the 35th Defendant-Appellant had objected to this claim by arguing that the said **Angohamy was not the daughter of Jonappu Naide but the wife of Hendrick who was the only child of Jonappu Naide**. Therefore, he further averred that the said Hendrick and Angohamy have

transferred their rights to Jagath Appu and Bastian and those rights have evolved from them to the 35th Defendant and 48th Defendant-Respondent.

It is in these circumstances, at the trial only dispute between parties was regard to the devolution of the title of Jonappu Naide and there was no dispute between parties with regard to the corpus.

The learned District Judge on 05.03.1996 delivered the judgment accepting the pedigree of the Plaintiff with regard to the rights of the original owner Pinthu Naide, rejecting the claims of the 35th Defendant-Appellant, and also accepting the pedigree of the 23rd-29th Defendant-Respondents with regard to the rights of Jonappu Naide and made order to partition the land.

Being aggrieved by the said judgment, the 35th Defendant-Appellant (hereinafter referred to as the 'Appellant') preferred this appeal to set aside the judgment and get the reliefs set out in the petition of appeal.

In the appeal, the position of the Appellant's was that the said Jonappu Naide died intestate leaving his only child Hendrick and said Hendrick married Angohamy, to support of this version, the Appellant have evidence with marking documents **35D1-25D4**.

The Appellant further submitted that neither the Appellant himself nor the 23rd to 29th, 30A 36th Defendants-Respondents submitted a marriage certificate or a birth certificate to support their versions. Therefore, he is in a position that the learned District Judge erred when examining the title of the parties.

However, I do not subscribe to the above view of the Appellant.

At this point, I wish to re-call the findings of Sinnetamby, J. in **Cooray Vs. Wijesuriya** 62 NLR 158:

“Before a Court can accept as correct a share which is stated in a deed to belong to the vendor there must be clear and unequivocal proof of how the vendor became entitled to that share. Apart from proof by the production of birth, death and marriage certificates, the relevant provisions of the Evidence Ordinance in regard to proof of a pedigree are to be found in sections 32 (5), 32 (6) and 60 (2).”

Further, the following words of the Sinnetamby, J. are noteworthy:

“The relevant provisions of the Evidence Ordinance in regard to proof of a pedigree are to be found in section 32 (5), section 32 (6) and section 50 (2) - I am omitting for the moment proof by the production of birth, death and marriage certificates. It almost always happens that birth and death certificates of persons who have died very long ago are not available: in such cases the only way of establishing relationship is by hearsay evidence. Section 32 (5) of the Evidence Ordinance renders a statement made by a deceased person admissible:-

‘When the statement relates to the existence of any relationship by blood, marriage, or adoption between

persons as to whose relationship by blood, marriage, .or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.'

It is under this provision of law that oral evidence of pedigree is generally sought to be led. What practitioners and the Court sometimes lose sight of is the fact that before such evidence can be led there must be proof that the hearsay evidence sought to be given is in respect of a statement made by a person having special means of knowledge; furthermore, it must have been made ante litem motam . Where the statement is made by a member of the family such knowledge may be inferred or even presumed, but where it is a statement made by an outsider proof of special means of knowledge must first be established.

Therefore, the above findings seem to me that, pedigree and oral statements regarding a title are would be acceptable-evidence in a partition action. In the case in hand, the learned District Judge also mindful on his duty to verify the deeds and pedigrees of both parties to reach a conclusion that whether there are conclusive evidence to determine the actual parties of the case.

In the circumstances, a careful perusal on the documents marked by the Appellant (**35D1-35D4**) show that the boundaries described in the schedule to the deeds are not tally and not refer to the land sought to be partitioned. While, the conclusion of the learned District Judge regarding the deeds (24D1-24D3) submitted by the 23rd to 30th and 36th Defendant-Respondents are in

respect of the land sought to be partitioned is correct and according to the evidence adduced at the trial. Therefore, I hold that the learned Judge has correctly held in this regard.

It is clear accustomed legal rule that in a civil action the standard of proof is balance of probability. [Vide: **Rhesa Shipping Vs. Edmunds** (1985) 1 WLR 948 (House of Lords); **Davies Vs. Taylor** (1972) 3 WLR 801 **Golagoda Vs. Mohideen** (1937) 40 NLR 92; and **Wijeyaratne and Another Vs. Somawathie** (2002) 1 SLR 93]. Having concentrated the standard of proof in a civil suit, it is also important to note that (as has been stated by the Supreme Court and this Court in several precedents before), the duty of the Court in a partition action is primarily to investigate the title of the parties to the case to its satisfaction. In this context it is important to recall the words of Bonser C.J in the case of **Peris Vs. Perera**, (1896) 1 NLR 36:

“It is obvious that the court ought not to make a decree, except 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.”

In these circumstances, I am of the view that the learned District Judge has correctly evaluated the evidence put forward in the trial.

Therefore, I do not wish to interfere with the judgment dated 05.03.1996.

I would dismiss the appeal without Cost.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL