

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

In the matter of an Appeal under Section
754 (1) of the Civil Procedure Code.

Dikwella Vidanage Jardias,
Baduwatte,
Dikwella. (Deceased)

Plaintiff

Dikwella Vidanage Hansawathie,
Baduwatte,
Dikwella.

Substituted - Plaintiff

C.A. No. DCF – 0524A/99

DC Hambantota No. 280/P **-Vs-**

1. Karunaratne Gallage,
Deiyyangewatte, Wehella Road,
Dikwella.
2. Colambage Pantis,
Diyasyaya, Cornel Idama,
Tissamaharama (Deceased)
- 2A. Dionysius Colambage,
Diyasyaya, Cornel Idama,
Tissamaharama.

(Substituted 2nd Defendant)

3. Dikwella Vidanage Dawtis,
Nedigamwila,
Tissamaharama. (Deceased)
- 3A.Nupehewage Punchinona alias
Podinona,
Godigamuwa, Nedigamwila,
Tissamaharama (Deceased)
(Substituted 3rd Defendant)
- 3B.Dikwella Vidanage Sugathadasa,
Mailagahawatte, Diyasyaya,
Tissamaharama.
Substituted 3A Defendant)
4. Dikwella Vidanage Jantis,
Baduwatte, Dikwella.
5. Dikwella Vidanage Pemaseeli,
Kombakumbura, Wattegama,
Dikwella.
6. Dikwella Vidanage Wimalaseeli,
Korabogahahena, Wattegama,
Dikwella.
7. David Weeratunge,
Suduweli Pelessa, Bolana,
Ambalantota.
8. Disneris alias Don Bastian
Weeratunge,
No. 37, Bandagiriya,
Weligatte.
9. Jayawardene Pathiranage Pemadasa,
No. 815, Bandagiriya,

- Weligatte.
- 10.Sudusinghe Sirisena,
Walgampattuwa,
Tissamaharama.
- 11.Kankanam Pathiranage Mendias
Appu,
Kasingama, Tissamaharama
(Deceased)
- 11A.Kalugamage Gunadasa,
No. 4, Methiwarana Niwasa,
Weerawila.
- (Substituted 11th Defendant)**
- 12.Wattu Hewage Heenona Wijesinghe,
Kasingama, Tissamaharama.
- 13.Handisingho Sudusinghe,
Kasingama, Tissamaharama.
- 14.Kankanam Pathiranage Dayaseeli,
Kasingama, Tissamaharama.
- 15.Kankanam Pathiranage Nandaseeli,
Kasingama, Tissamaharama.
- 16.Kankanam Pathiranage Upawathie,
Kasingama, Tissamaharama.
- 17.Kankanam Pathiranage Amarawathie,
Kasingama, Tissamaharama.
- 18.Kankanam Pathiranage Jayaseeli,
Kasingama, Tissamaharama.
- 19.Kankanam Pathiranage Sirisena,
Kasingama, Tissamaharama.
- 20.Kankanam Pathiranage Jayatissa,

Kasingama, Tissamaharama.

Defendants.

-AND-

Dikwella Vidanage Hansawathie,
Baduwatte, Dikwella.

Substituted –Plaintiff–Appellant

-Vs-

1. Karunaratne Gallage,
Deiyyangewatte, Wehella Road,
Dikwella. (Deceased)

1A.Gallage Asela Dhammika
Karunaratne,
“Pasindu”, Ratmale Road,
Thummullahandiya, Dikwella.

(Substituted 1A Defendant-Respondent)

2. Colambage Pantis,
Diyasyaya, Cornel Idama,
Tissamaharama. (Deceased)

2A.Dionysius Colambage,
Diyasyaya, Cornel Idama,
Tissamaharama.

**(Substituted 2nd Defendant-
Respondent)**

3. Dikwella Vidanage Dawtis,
Nedigamwila,
Tissamaharama. (Deceased)

3A.Nupehewage Punchinona alias

Podinona,
Godigamuwa, Nedigamwila,
Tissamaharama (Deceased)

(Substituted 3rd Defendant)

3B.Dikwella Vidanage Sugathadasa,
Mailagahawatte, Diyasyaya,
Tissamaharama.

(Substituted 3A Defendant)

4. Dikwella Vidanage Jantis,
Baduwatte, Dikwella (Deceased)
- 4A.Ahangama Vidanage Kusumawathie,
- 4B.Kamani Nilanthi,
- 4C.Dikwella Vidanage Lalith Jayalath,
- 4D.Dikwella Vidanage Sunethra
Damayanthi,
- 4E.Dikwella Vidanage Thanusha
Samanthi,
All of Baduwatte, Ratmale Road,
Dikwella.

**(Substituted 4th Defendant-
Respondents)**

5. Dikwella Vidanage Pemaseeli,
Kombakumbura, Wattegama,
Dikwella.
6. Dikwella Vidanage Wimalaseeli,
Korabogahahena, Wattegama,
Dikwella.
7. David Weeratunge,
Suduveli Pelessa, Bolana,

Ambalantota (Deceased)

7A.Wengappuli Aratchige Silinona,
97, Behind the Old Post-Office,
Bolana, Ridiyagama.

7B.Pallemulle Hewa Geeganage Don
Cyril Weeratunge,
87/1, Srimath Gajaba Mawatha,
Manajjawa, Ambalantota.

7C.Pallemulle Hewa Geeganage Dona
Pathminie Weeratunge,
97, Behind the Old Post-Office,
Bolana, Ridiyagama.

7D.Pallemulle Hewa Geeganage Dona
Kanthie Weeratunge,
97, Behind the Old Post-Office,
Bolana, Ridiyagama.

7E.Pallemulle Hewa Geeganage Dona
Nandanie Weeratunge,
97, Behind the Old Post-Office,
Bolana, Ridiyagama.

**(Substituted 7th Defendant-
Respondents)**

8. Disneris alias Don Bastian
Weeratunge,
No. 37, Bandagiriya,
Weligatte.

9. Jayawardene Pathiranage Pemadasa,
No. 815, Bandagiriya,
Weligatte.

10.Sudusinghe Sirisena,
Walgampattuwa,
Tissamaharama (Deceased)

10A.Padmasiri Sudusinghe,
Thummulla Idama, Kasingama,
Kirinda Road, Tissamaharama.

**(Substituted 10th Defendant-
Respondent)**

11.Kankanam Pathiranage Mendias
Appu,
Kasingama, Tissamaharama
(Deceased)

11A.Kalugamage Gunadasa,
No. 4, Methiwarana Niwasa,
Weerawila.

(Substituted 11th Defendant)

12.Wattu Hewage Heennona Wijesinghe,
Kasingama, Tissamaharama.

13.Handisingho Sudusinghe,
Kasingama, Tissamaharama.
(Deceased)

13A.Sujeewa Kanthi Sudusinghe,
Thummulla Idama, Kasingama,
Kirinda Road, Tissamaharama.

**(Substituted 13th Defendant-
Respondent)**

14.Kankanam Pathiranage Dayaseeli,
Kasingama, Tissamaharama.

15.Kankanam Pathiranage Nandaseeli,

- Kasingama, Tissamaharama.
- 16.Kankanam Pathiranage Upawathie,
Kasingama, Tissamaharama.
- 17.Kankanam Pathiranage Amarawathie,
Kasingama, Tissamaharama.
- 18.Kankanam Pathiranage Jayaseeli,
Kasingama, Tissamaharama.
- 19.Kankanam Pathiranage Sirisena,
Kasingama, Tissamaharama.
- 20.Kankanam Pathiranage Jayatissa,
Kasingama, Tissamaharama.

Defendant – Respondents

- BEFORE** : Dr. Ruwan Fernando J. &
M.Sampath K.B. Wijeratne J.
- COUNSEL** : Shyamal A. Collure with A.P.
Jayaweera, P.S. Amarasinghe and
Rowindra S. de Silva for the Substituted-
Plaintiff-Appellant.
- M.Nisam Kariapper, P.C. with
M.I.M.Iynullah for the 12th Defendant-
Respondent.
- Chandana Wijesooriya with Wasthsala
Dulanjani and Sadun Dissanayaka for
the 13A Defendant-Respondent.
- ARGUED ON** : 18.02.2020 & 05.03.2020

WRITTEN SUBMISSIONS

TENDERED ON : 11.02.2020 & 24.08.2020
(by the Substituted-Plaintiff-
Appellant)
04.01.2021 (by the 12th Defendant-
Respondent
16.10.2020 (by the 13A Defendant-
Respondent)

DECIDED ON : 08.02.2021

Dr. Ruwan Fernando, J.

Introduction

[1] This is an appeal from the judgment of the learned Additional District Judge of Hambantota dated 25.01.1999. By that judgment, the learned Additional District Judge of Hambantota decreed to partition the land depicted in the Preliminary Plan No. 154 dated 05.04.1983 made by J.G. Amadoru, Licensed Surveyor marked “X” according to the shares determined by the learned Additional District Judge in his judgment dated 25.01.1999.

[2] The original Plaintiff instituted the above-mentioned action in the District Court of Hambantota by Plaint dated 05.01.1982 seeking to partition a land called “Thummulla” containing in extent of 7 acres 2 roods and 21.3 perches morefully described in paragraph 2 of the said Plaint.

[3] The Court Commissioner G. Amadoru, Licensed Surveyor executed the Commission and tendered the Preliminary Plan No. 154 dated 05.04.1983 marked “X” and the corpus of the action comprises Lots 1-5 containing in extent of 7 acres 1 rood and 30.3 perches.

Background to the Appeal

The summary of the Plaintiff's Case

[4] The Plaintiff pleaded in the Plaint *inter alia*, that:

- i. Dikwella Vidanage Niculas Appu became the original owner of the land sought to be partitioned by virtue of the Final Decree entered in the District Court of Tangalle Partition Case bearing No. 4726 (P1);
- ii. The said Dikwella Vidanage Niculas Appu who married to Ahangama Lanka Geeganage Wimalawathie Gajanayake had no children and expired on 31.10.1963 leaving behind his wife and four siblings, namely, Dikwella Vidanage Punchihamy, Dikwella Vidanage Nonahamy, Dikwella Vidanage Charlinahamy and Dikwella Vidanage Didereus;
- iii. Upon the demise of the said Dikwella Vidanage Niculas Appu, a Testamentary Case bearing No. T 52 was filed in the District Court of Tangalle and the estate of the said Dikwella Vidanage Niculas Appu was administrated in the said Testamentary Case;
- iv. While the said Testamentary Case was pending in the District Court of Tangalle, it was revealed that the said Dikwella Vidanage Niculas Appu and his wife, namely, the said Ahangama Lanka Geeganage Wimalawathie Gajanayake, by Deed No. 1232 dated 02.12.1962 had allegedly gifted the subject-matter of this action to one Sudusinghe Sirisena (the 10th Defendant);
- v. Upon the said revelation, the 4 heirs of the said Dikwella Vidanage Niculas Appu, namely Dikwella Vidanage Jardiyes, Dikwella Vidanage Punchihamy, Dikwella Vidanage Nonahamy, Dikwella Vidanage Charlinahamy instituted an action in the District Court of

Tangalle bearing Case No. 324/L for the cancellation of the said Deed No. 1232;

- vi. The District Court of Tangalle in its judgment dated 27.02.1973 cancelled the said Deed and the appeal filed against the said judgment was dismissed by the Court of Appeal on 13.12.1979 and thus, the 10th Defendant was not entitled to any right in the subject matter of this action;
- vii. Upon the demise of the said Dikwella Vidanage Punchihamy, her rights devolved on her children, namely, the 2nd Defendant, Colombage Santis and Colombage Meurin alias Wimalawathie who by Deed No. 2160 (2D1) sold their rights to the 2nd Defendant;
- viii. Upon the demise of the said Dikwella Vidanage Nonahamy, her rights devolved on her three children, namely, Johana Weeratunga *alias* Podihamy, David Weeratunga (the 7th Defendant), Disneris *alias* Don Bastian Weeratunga (the 8th Defendant);
- ix. The said Johana Weeratunga *alias* Podihamy by Deed No. 810 dated 25.06.1981 conveyed her 1/24 share to the Plaintiff and the said Dikwella Vidanage Charlinahamy Ukku by Deed No. 2154 dated 21.03.1981 conveyed her rights to the 2nd Defendant and upon the demise of the said Dikwella Vidanage Didereus, his rights devolved on his 5 children, namely, the Plaintiff, the 3rd to 6th Defendants;
- x. The said Ahangama Lanka Geeganage Wimalawathie Gajanayake who became entitled to ½ share of the subject-matter, by Deed No. 707 dated 12.03.1980 (1D1) transferred her share to the 1st Defendant who by Deed No. 708 dated 03.12.1980 transferred undivided 1/6 share to the Plaintiff;

xi. Upon a search made at the Land Registry, it was found that the widow of the said Niculas Appu, the said Ahangama Lanka Geeganage Wimalawathie Gajanayake by Deed No. 162 dated 23.06.1981 had transferred the entire subject matter of the action to the 9th Defendant. However, the 9th Defendant could not have claimed any such right in the subject matter of this action.

[5] Accordingly, the Plaintiff claimed that the parties are entitled undivided rights in the following manner:

The Plaintiff	$1/6 + 1/24 + 1/40$	- undivided	28/120
The 1 st Defendant	$2/6$	- undivided	40/120
The 2 nd Defendant	$3/24 + 1/8$	- undivided	30/120
The 3 rd Defendant	$1/40$	- undivided	3/120
The 4 th Defendant	$1/40$	- undivided	3/120
The 5 th Defendant	$1/40$	- undivided	3/120
The 6 th Defendant	$1/40$	- undivided	3/120
The 7 th Defendant	$1/24$	- undivided	5/120
The 8 th Defendant	$1/24$	- undivided	5/120

[6] The 2nd Defendant-Respondent (hereinafter referred to as the 2nd Defendant) filed statement of claim and claimed his undivided rights as pleaded in the Plaint.

[7] The 9th Defendant-Respondent (hereinafter referred to as the 9th Defendant) filed statement of claim and while admitting paragraphs 1-6 of the Plaint denied that the 1st Defendant was entitled to undivided rights on Deed No. 707. The 9th Defendant further stated that Wimalawathie Gallage by Deed No. 1627 dated 23.06.1981 transferred her undivided $1/2$ share to him and claimed that he was entitled to undivided $1/2$ of the land sought to be partitioned.

[8] The 10th Defendant-Respondent (hereinafter referred to as the 10th Defendant) filed statement of claim and whilst denying that the said Wimalawathie Gajanayake by Deed No. 707 transferred undivided ½ share of the said land to the 1st Defendant claimed that he possessed the land depicted in Plan No. 154 for more than 10 years and acquired prescriptive right to the same;

[9] The 11th Defendant-Respondent (hereinafter referred to as the 11th Defendant) filed statement of claim denying the pedigree pleaded in the Complaint and claimed that the said Dikwella Vidanage Nonahamy had 4 children and one of her children, namely Anagihamy is his wife. He claimed that the rights of the said Anigahamy devolved on him and her 7 children.

[10] The 12th Defendant-Respondent (hereinafter referred to as the 12th Defendant) filed statement of claim and stated *inter alia*, that her deceased husband, Gunapala was the tenant cultivator of Lots 1 and 3 depicted in Plan No. 154 and that upon his demise, she cultivated the said Lots as the tenant cultivator. She further claimed that her husband Gunapala built a thatched house, planted trees and acquired prescriptive title to Lot 4 depicted in Plan No. 154 by undisturbed and uninterrupted possession for over a period of 10 years. She sought a declaration that she is the tenant cultivator of Lot 1 and 3 depicted in Plan No. 154 and that she had acquired prescriptive title to Lot 4 depicted in the said Plan.

[11] The 13th Defendant-Respondent (hereinafter referred to as the 13th Defendant) filed statement of claim and stated *inter alia*, that in 1955, he obtained possession of Lot 2 depicted in Plan No. 154 from the original owner Niculas Appu and thereafter, he planted all 20 coconut trees and acquired prescriptive title to Lot 2 depicted in Plan No. 154 by undisturbed and uninterrupted possession for a period of over 10 years.

The 13th Defendant further claimed that he is the tenant cultivator of the paddy land in extent of 3 acres and sought an order to exclude Lot 2 depicted in Plan No. 154 from the corpus of the action on the basis of his prescriptive rights. He further sought a declaration that he is the tenant cultivator of the paddy land in extent of 3 acres.

Admissions & Main Issues before the District Court

[12] There was no dispute with regard to the corpus of the action and the dispute was only in respect of the rights of the parties. At the commencement of the trial on 03.11.1987, 21 points of contest were raised on behalf of the contested parties and thereafter, the original Plaintiff commenced his evidence and the trial was postponed for various reasons. When the case was taken up for trial on 07.03.1989, the Court was informed that the original Plaintiff had passed away and accordingly, the Substituted Plaintiff was appointed in place of the deceased original Plaintiff.

[13] When the case was taken up for trial on 26.02.1990, the following two admissions were recorded by the parties:

1. The corpus of the action is properly depicted as Lots 1-5 in the Preliminary Plan No. 154 dated 05.04.1983 made by J. G. Amadoru, Licensed Surveyor;
2. The original owner of the land sought to be partitioned was Dikwella Vidanage Niculas Appu.

[14] Of consent, fresh points of contest were raised on behalf of the Substituted-Plaintiff and the 9th to 13th Defendants and accordingly, the case proceeded to trial on 17 points of contest. The main issues before the District Court were as follows:

1. Whether the rights of the said Dikwella Vidanage Niculas Appu devolved on the parties according to the pedigree pleaded in the Plaint;
2. Whether the said Wimalawathie Gajanayake by Deed No. 1627 dated 23.01.1981 transferred her undivided $\frac{1}{2}$ share of the subject matter to the 9th Defendant;
3. Whether the 10th Defendant had undisturbed and uninterrupted possession of the land in dispute for a period of over 10 years and acquired prescriptive title to the same;
4. Whether the 12th Defendant is the tenant cultivator of the paddy lands depicted as Lots 1 and 3 in Plan No. 154 and the 13th Defendant is the tenant cultivator of the paddy land in extent of 3 acres;
5. Whether the 12th Defendant and the 13th Defendant had undisturbed and uninterrupted possession of the Lot 4 and 2 respectively, for a period of over 10 years and acquired prescriptive title to the same.

Judgment of the District Court

[15] After trial, the learned Additional District Judge of Hambantota by judgment dated 25.01.1999 held that:

- (i) The Plaintiff has established the pedigree pleaded in the Plaint;
- (ii) Deed No. 1627 dated 23.01.1981 (9V1) had been duly registered in the Land Registry in the correct folio whereas Deed No. 707 dated 12.03.1980 (1V1) had not been registered in the Land Registry and accordingly, the 1st Defendant could not have claimed undivided $\frac{1}{2}$ share of the land on Deed No. 707 dated 12.03.1980 (1D1);

- (iii) The 9th Defendant had duly purchased undivided ½ share of the land from Wimalawathie Gajanayake on Deed No. 1627 dated 23.07.1981 (9V1) and thus, the 9th Defendant is entitled to undivided ½ share of the land sought to be partitioned;
- (iv) The Plaintiff who had claimed that he derived undivided 1/6 share of the land on Deed No. 708 dated 03.11.1980 (P3) is not entitled to the said undivided 1/6 share of the subject matter of the action from Wimalawathie Gajanayake;
- (v) Although the said Niculas Appu and Wimalawathie Gajanayake were said to have gifted the land in dispute to the 10th Defendant on Deed No. 1232 dated 02.12.1962 (P13), the said Deed had been cancelled by the judgment dated 27.02.1973 of the District Court of Tangalle Case bearing No. 324/L and the appeal filed against the said judgment was dismissed by the Court of Appeal on 13.12.1979;
- (vi) As the 10th Defendant had claimed that he took over the possession of the land in dispute after the demise of Niculas Appu in 1963, the continuity of his possession was interrupted with the filing of the District Court Case bearing No. 324/L on 19.04.1971. As the appeal was finally decided on 13.12.1979 against the 10th Defendant and this action was filed on 05.01.1982, the 10th Defendant could not have proved uninterrupted possession for a period of 10 years;
- (vii) Although the 12th and the 13th Defendants had claimed that they were the tenant cultivators of the paddy lands under the 10th Defendants, the 10th Defendant was not the owner of the paddy land in question and thus, the 12th and 13th Defendant could not have been declared as tenant cultivators of the paddy lands in question;

(viii) The 12th and the 13th Defendants have, however, established that they had undisturbed and uninterrupted possession of Lots 4 and 2 respectively in Plan No. 154 and acquired prescriptive title to the said Lots and thus, the said Lots 2 and 4 depicted in Plan No. 154 ought to be excluded from the corpus of the action.

[16] Having accepted the Plaintiff's pedigree subject to the rights of the 9th Defendant, the learned Additional District Judge by his judgment dated 25.01.1999 excluded Lots Nos. 2 and 4 from the corpus of the action. Accordingly, after excluding the said Lots 2 from the corpus of the action, the 9th Defendant was declared entitled to ½ share of the corpus of the action and following parties were declared entitled to the balance portion of the corpus in the following manner:

The Plaintiff	-	undivided	20/120
The 2 nd Defendant	-	undivided	30/120
The 3 rd Defendant	-	undivided	3/120
The 4 th Defendant	-	undivided	3/120
The 5 th Defendant	-	undivided	3/120
The 6 th Defendant	-	undivided	3/120
The 7 th Defendant	-	undivided	5/120
The 8 th Defendant	-	undivided	5/120

[17] The 12th and the 13th Defendants were also declared entitled to the buildings, improvements and plantation in Lots 4 and 2 respectively, depicted in Plan No. 154.

Appeals filed against the Judgment of the District Court

[18] Aggrieved by the said judgment of the learned Additional District Judge of Hambantota, the Substituted-Plaintiff-Appellant and the 12th Defendant-Appellant have preferred two appeals to this Court.

Appeal filed by the 12th Defendant-Appellant (Appeal bearing No. CA 524/99 (F))

[19] When this matter was mentioned on 16.10.2020, the learned President's Counsel for the 12th Defendant-Appellant in Appeal bearing No. 524/99 (F) submitted that in view of the fact that the learned Additional District Judge had answered the points of contest No. 9 in favour of the 12th Defendant, the 12th Defendant did not pursue the Appeal bearing No. 524/99 (F). He submitted that accordingly, the 12th Defendant-Appellant does not intend to pursue the Appeal filed by the 12th Defendant and invited this Court not to consider the Appeal filed by the 12th Defendant together with the Appeal No. 524A/99 filed by the Substituted-Plaintiff-Appellant. Accordingly, I shall confine this judgment to the Appeal filed by the Substituted-Plaintiff-Appellant bearing No. 524A/99 (F).

Appeal filed by the Substituted-Plaintiff-Appellant (Appeal No. CA 524A/99 (F)) & Submissions made on behalf of the Substituted-Plaintiff-Appellant

[20] When this Appeal bearing No. 524A/99 (f) filed by the Substituted-Plaintiff-Appellant was taken up for hearing on 18.02.2010, Mr. Shayamal Collure relied on the following three grounds of Appeal:

1. Once issues are framed, they cannot be struck out or left unanswered, but the learned Additional District Judge has erred in not answering the points of contest raised by the parties on 03.11.1987;
2. The learned Additional District Judge has erred in excluding Lots 2 and 4 depicted in Plan No. 154 from the corpus of the action on the ground of prescription;

3. The findings of the learned Additional District Judge that the 9th Defendant's Deed No. 1627 dated 23.07.1981 (9V1) gives priority over the Deed No. 707 dated 12.03.1980 (1V1) on the basis that the said Deed No. 707 marked 1V1 had not been registered in the correct folio is erroneous.

[21] Mr. Collure however, brought to the attention of Court that as the 9th Defendant is absent and unrepresented at the hearing, the determination of his third ground of appeal on prior registration will affect the rights of the 9th Defendant and thus, he moved for time to consider the question whether or not he should proceed with his third ground of Appeal on prior registration.

[22] On 05.03.2010, Mr. Collure submitted that as the 9th Defendant is absent and unrepresented and that every effort made by him to find the whereabouts of the 9th Defendant or his heirs, was unsuccessful, he wished to forgo his third ground of appeal on prior registration. Mr. Collure restricted his grounds of appeal and submissions on the issue of prescription (ground of appeal No. 2) and thus, all Counsel invited this Court to fix the matter for judgment reserving their right to file further written submissions in the Registry after taking steps for substitution in respect of the deceased 7th Defendant-Respondent.

[23] This case was fully argued before a Bench comprising Justice Shiran Gooneratne and myself and upon an application being made by the learned Counsel for the Substituted-Plaintiff to take steps for substitution in respect of the deceased 1st Defendant-Respondent, this Court issued notice on the proposed party to be substituted in place of the deceased 1st Defendant-Respondent and as he was absent and unrepresented on 12.01.2021, this Court made order substituting the 1A Defendant-Respondent in place of the deceased 1A Defendant-Respondent.

[24] As Justice Shiran Gooneratne has been elevated to the Supreme Court, this Court on 19.01.2021, inquired from the Attorneys-at-law for the Substituted-Plaintiff, the 12th and the 13A Defendants whether they wished to re-argue this matter before the present Bench. All three attorneys-at-law, representing the Substituted-Plaintiff, the 12th and the 13A Defendants invited the present Bench comprising the remaining Judge before whom also the case was fully argued, to deliver the judgment upon the written submissions filed by the parties without any further re-argument.

Issue on Appeal

[25] In view of the submissions made by the learned Counsel for the Substituted-Plaintiff on 05.03.2010 restricting the grounds of Appeal to the issue of prescriptive rights of the 12th and the 13th Defendants, the only matter for decision is whether the 12th and the 13th Defendants had acquired a prescriptive title to Lot 4 and 2 respectively depicted in Plan No. 154 marked “X”.

Decision

Section 3 of the Prescription Ordinance

[26] A perusal of the judgment of the learned Additional District Judge of Hambantota reveals that he has accepted the Plaintiff’s pedigree subject to the rights of the 9th Defendant and allotted undivided rights to the parties accordingly. It is not in dispute that the parties who were allotted shares had derived their rights from the original owner, namely, Dikwella Vidanage Niculas Appu. The 12th and the 13th Defendants did not dispute the paper title of the heirs of the said Niculas Appu and they only invoked the provisions of section 3 of the Prescription Ordinance in order to

defeat the ownership of the said heirs of Niculas Appu to the land in dispute.

[27] Section 3 of the Prescription Ordinance No. 22 of 1871 reads as follows:

*“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....”*

[28] It is settled law that the person who claims prescriptive title to a defined block of land is obliged to prove that he had an exclusive possession and acquired prescriptive title without any interruption well over a period of 10 years (*Alwis v. Piyasena Perera* 1993 (1) SLR 119). Under the law, possession relied upon in support of a prescriptive title is required to be “by a title adverse to or independent of that of the claimant or the plaintiff in the action”. Accordingly, the three elements that are set out in section 3 of the Prescription Ordinance for the proof of prescriptive title are:

1. the undisturbed and uninterrupted possession;
2. the adverse to or independent possession; and
3. period of ten years previous to the bringing of such action

[29] Section 3 of the Prescription Ordinance contains a parenthetical clause which is intended to explain the character of the possession which, if held adversely to the owner of the land (adverse possession) for ten

years, will result in prescription. As noted, the parenthetical clause in section 3 reads thus,

“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 acknowledgement of a right existing in another person would fairly and naturally be inferred.”

[30] As regards the mode of proof of prescriptive possession, it is apt to refer to the following passage from Walter Pereira ’s Laws of Ceylon, 2nd Edition, page 396:

“As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witness should speak to specific facts, and the question of possession has to be decided thereupon by Court”

[31] In *Kirihamy Muhandiram v. Dingiri Appu* 6 NLR 200, Moncreiff J. stated:

“It would appear then that, in order that a person may avail himself of section 3 of the Prescription Ordinance, No. 22 of 1871-

- (1) Possession must be shown from which a right in another person cannot be fairly or naturally inferred;*
- (2) Possession required by the section must be shown on the part of the party litigating or by those under whom he claims;*
- (3) The possession of those under whom the party claims means possession by his predecessors in title;*
- (4) judgment must be for a person who is a party to the action and not for one who sets up the possession of another person, who is neither his predecessor in title nor a person to the action”.*

[32] The burden of proof of a person who invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership

of an adverse claimant, rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights (*Chelliah v. Wijenathan*, 54 NLR 337 & 342 & *Sirajudeen v. Abbas* 1994 (2) SLR 365).

Commencement of possession by the 12th and the 13th Defendants

[33] The learned President's Counsel for the 12th Defendant, Mr. Kariapper has submitted that the learned Additional District Judge has clearly come to the conclusion that the 12th Defendant having initially come to the land in dispute as a tenant cultivator and thereafter possessed the land from 1963 upto the point of the filing of the action in 1982 adversely to all the others without paying a single rental to any person and acquired prescriptive title to the same. He has further submitted that after her husband's death in 1982, she continued to possess and occupy the house on Lot 4 while cultivating Lots 1 and 3 and acquired prescriptive title to Lot 4 depicted in Plan No. 154 by undisturbed and uninterrupted possession adversely to the Plaintiff, the 10th Defendant and all others.

[34] The learned Counsel for the 13A Defendant has submitted in the written submissions filed on behalf of the 13A Defendant that although the 13th Defendant entered upon the land in 1955 under Niculas Appu, he commenced possession adversely to all the others in Lot 2 for a period of over 10 years and acquired prescriptive title to the same while cultivating an extent of 3 acres in the paddy land as a tenant cultivator.

[35] As noted, there is no dispute among the parties with regard to the subject-matter of the action. The Preliminary Plan No. 154 dated 05.04.1983 made by J. G. Amadoru, Licensed Surveyor reveals that the corpus consists of 5 Lots as follows:

Lot No	Extent			Nature
	A.	R.	P.	
1	0	1	4.5	Paddy land
2	1	0	11.8	Highland
3	5	1	19.5	Paddy land
4	0	2	12.5	High land
5	0	0	22.0	Paddy land

7 1 30.3

[36] Although the 12th Defendant has stated in her statement of claim that she entered upon the land in dispute in 1938 and had undisturbed and uninterrupted possession adversely to all the others, her evidence was that Lots 1 and 3 in Plan No. 154 were handed over to her husband Gunapala by Niculas Appu.

ප්‍ර: තමාගේ ස්වාමි පුරුෂයා මියගියාට පස්සේ තමයි තමා අඳුගොවියා බවට පත්වුනේ?

උ: ඔව්. ස්වාමි පුරුෂයා මියගියේ 82 ජූනි මාසෙ. ඊට පස්සේ තමයි මම මෙම කුඹරේ කැබලි දෙකේ අඳුගොවිකම පටන් ගත්තේ. ඊට පෙර මගේ ස්වාමි පුරුෂයා කැබලි අංක 1 සහ 3 හි අඳුගොවියා. එම කැබලි දෙක මගේ ස්වාමි පුරුෂයාට බාර දුන්නේ දික්වැල්ල විද්‍යානගේ නිකුලස් අප්පු. (275)

[37] The 13th Defendant too has stated in evidence (p. 281) that Niculas Appu first handed over the paddy land to him and thereafter, he handed over the high land (Lot 2) for him in order to cultivate the paddy land:

ප්‍ර: තමාට මුලින් කුඹුර බාර දුන්නේ කවුද?

උ: නිකුලස් ගමබාරය. ඔහු ඉස්සරවෙලා දුන්නේ කුඹුර. කුඹුරේ වැඩපල කරගෙන ඉන්න තමයි ගොඩැල්ල දුන්නේ. දැන් මම කුඹුරු වැඩ කරන්නේ නැහැ. 96 දී කුඹුර අහිමි වන තෙක් මම ඒ කුඹුරේ අඳුගොවියා හැටියට වැඩ කළා. (281)

[38] At the trial, both the 12th and the 13th Defendants have thus, taken up the position that initially, they entered upon the land in dispute under Niculas Appu as his tenant cultivators (Vide pages 275 and 281) and after

the death of the said Niculas Appu, they cultivated the paddy lands in question under Sirisena Sudusinghe who was the original 10th Defendant.

[39] If this position is correct, the 12th and the 13th Defendants should have commenced their possession in a dependent or subordinate capacity and thus, prescriptive possession is reckoned only from the point of time at which a change in the character of possession, which satisfies the requirement of “adverse possession” is capable of being proved. This legal position was clearly recognized in the following passage in the judgment of Bonser C.J. in *Maduanwila v. Ekneligoda* 3 NLR 213,215:

“A person who is let into occupation of property as a tenant or as a licensee must be deemed to continue to occupy on the footing or as a licensee, must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in another capacity. No secret act will avail to change the nature of his occupation”.

[40] This approach of Bonser C.J. in *Maduanwila v. Ekneligoda* was further confirmed by Howard C.J. in *Navarathne v. Jayathunga* 44 NLR 517 wherein, he stated that where a person enters into occupation of property belonging to another with the latter’s permission, he cannot acquire title to such property by prescription unless he gets rid of his character of licensee by doing some overt act showing an intention to possess adversely.

[41] In terms of the above-mentioned testimony of the 12th and the 13th Defendants at the trial, they cannot acquire prescriptive title unless they get rid of their character of tenancy or licensee by doing some overt act showing an intention to possess adversely.

[42] The learned Counsel for the 13A Defendant has heavily relied on the decision of the Court of Appeal in *Meeruppe Sumanatissa Terunnanse v. Warakapitiya Pagnananda Terunnanse* 70 NLR 313 in support of his

contention that after the death of Niculas Appu, their license with Niculas Appu was automatically terminated and hence, when the licensees continued to possess the highlands adversely to the heirs of Niculas Appu for a period of over 10 years, they acquired prescriptive title to the same (Vide- written submissions-page 5). In the aforesaid circumstances, he invited us to apply the decision in *Meeruppe Sumanatissa Terunnanse v. Warakapitiya Pangnananda Terunnanse (supra)* and hold that upon the death of Niculas Appu in 1963, the licence came to an end and thereafter, from 1963, up to the point of filing this action in 1983, the 13th Defendant possessed the highland (Lot 2) adversely to all the others and acquired prescriptive title to the same.

[43] In *Meeruppe Sumanatissa Terunnanse v. Warakapitiya Pangnananda Terunnanse (supra)*, the respondent, bhikku who was the defendant in the original proceedings in the District Court was granted a licence in 1942 by the appellant, who claimed to be the Viharadhipathi or Chief Incumbent of the Temple, to live on a piece of land of about 18 acres in extent, as part of its property. After 1942, the respondent built on this land an Avasa in which he lived with dayakas attached to him and handed over in terms of the license to the Chief Incumbent, the paraveni of the produce of the land. After 1953, he refused to do so. The appellant filed action seeking to eject the respondent from the land. It was held that license, which was granted to him in 1942 was clearly a revocable one and a revocable license is automatically determined by the death of the licensor or by the assignment, of the land over which the license is exercised.

[44] In the case of *Meeruppe Sumanatissa Terunnanse v. Warakapitiya Pangnananda Terunnanse (supra)*, the fact that the respondent (defendant) was granted a licence by the appellant (plaintiff) on the basis

of the mutually settled terms was not disputed at the trial. In the present case, however, the Plaintiff challenged the position of the 12th and the 13th Defendants that they entered upon the land in dispute on the basis of a license granted by Niculas Appu or that they acted as tenant cultivators of Niculas Appu until his death in 1963.

[45] The position of the 4th Defendant who represented the Plaintiff upon his death was that (i) prior to Gunapala (husband of the 12th Defendant) and the 13th Defendant occupied the houses on the land, one Charananda and Mendis cultivated and occupied the land in dispute as tenant cultivators of Niculas Appu; (ii) Charananda occupied the house in the highland prior to Gunapala (p. 202) and Mendis occupied the house prior to the 13th Defendant; (p. 182 & 192); (iii) after the death of Niculas Appu in 1963, the 10th Defendant forcibly evicted Charananda and Mendis and gave over the cultivation to Gunapala and Handi Singho (the 13th Defendant) who thereafter occupied the highlands and worked as the tenant cultivators of the 10th Defendant only after the death of Niculas Appu in 1963 (p. 182 & 193); (iv) the heirs of Niculas Appu who became aware of a purported Deed of Gift No. 1232 (10V1) said to have been given by Niculas Appu and his wife to the 10th Defendant during the proceedings of the Testamentary Case, instituted action against the 10th Defendant in 1971 for the cancellation of the said Deed; (v) the District Court of Tangalle cancelled the said Deed in 1973 and the appeal filed against the said judgment was dismissed in 1979.

[46] If there is proof, however, that a valid licence was granted by Niculas Appu to Gunapala (husband of the 12th Defendant) and the 13th Defendant, the general rule is that the licence will be terminated on the death of the Niculas Appu as licensor and/or Gunapala and the 13th Defendant as licensees or by the assignment of the land over which the

license is exercised. The question of the termination arises, however, where there is evidence that there was a valid, binding agreement between Niculas Appu as licensor and Gunapala and Handi Singho as licensees, either explicitly or impliedly on the basis of the mutually agreed terms.

[47] In the circumstances, the first question that arises is whether there is satisfactory proof that Gunapala (the husband of the 12th Defendant) and Handi Singho (13th Defendant) entered upon the land in question upon a valid binding license granted by Niculas Appu prior to his death in 1963.

[48] It is not in dispute that Niculas Appu expired on 30.10.1963. It is to be observed that only the 13th Defendant has pleaded in the statement of claim that he entered upon the land in dispute under Niculas in 1955. The 12th Defendant has not pleaded at all in his statement of claim that he entered upon the land under Niculas Appu.

[49] The learned Counsel for the 13A Defendant heavily relies on the failure on the part of the 4th Defendant to answer the suggestion made by the Counsel for the 13th Defendant at the trial that the 13th Defendant possessed Lot 2 for a period of over 10 years on his own. He has submitted that his silence amounts to an admission that the 13th Defendant came into the possession of the land under Niculas but continued to possess the same after his death and acquired prescriptive title to the same by undisturbed and uninterrupted possession adversely to all the others over a period of 10 years. The said suggestion at page 200 of the brief reads as follows:

- ප්‍ර: තවදුරටත් 13 වෙනි විත්තිකරු වෙනුවෙන් කියන්නේ ඔහු එනම් මේ 13 වෙනි විත්තිකරු මෙම අංක 02 දරණ කැබැල්ල ඔහුගේ ඉඩමක් හැටියට අවුරුදු 10 කට අධික කාලයක් තිස්සේ බුක්ති විදගෙන ආවා කියයි.
- උ: (පිලිතුරක් නැත.) (200)

[50] It is seen, however, that the 4th Defendant has categorically denied in evidence the suggestion made on behalf of the 12th Defendant that the 12th Defendant entered upon the land under Niculas Appu and stated that the 13th Defendant entered upon the land in dispute only after the death of Niculas Appu in 1963 (pages 200-202):

ප්‍ර: හිත් නෝනා මේ ඉඩමේ 1947 පමණ සිට ඉන්නවා කියා කීවොත් තමා එය පිලිගන්නවාද?

උ: එසේ මා පිලිගන්නේ නැහැ. (201)

ඒ ඉඩමේ 1963 න් පස්සේ විත්තිකාරිය ඉන්න බවයි මා දන්නේ. ගෘහමූලික ලැයිස්තුවට ඒ අයගේ නම තිබෙනවා ද කියා මා දන්නේ නැහැ. (202)

[51] The 12th Defendant in her statement of claim has further stated that she along with her husband Gunapala and her mother-in-law possessed Lot 4 from 1938. She has, however, admitted under cross examination that she first came to the land in 1964 after her marriage (page 275) but changed her own version and stated that she came to the land after 1968 (page 277).

[52] Although the 12th and the 13th Defendants maintained their position at the trial that they were the tenant cultivators of Niculas Appu before his death, no credible evidence was presented by them to prove their claim. On the other hand, the original 10th Defendant while claiming that both Gunapala (husband of the 12th Defendant) and the 13th Defendant were his tenant cultivators after 1962 has stated that Niculas Appu did not use tenant cultivators and that he was the first person to appoint Gunapala and Handi Singho as tenant cultivators (Page 228).

[53] The 10th Defendant did not, however, assert that the husband of the 12th Defendant or his own brother, the 13th Defendant entered upon the land under Niculas Appu or that they built the cadjan houses in Lot 2 and 4 prior to the death of Niculas Appu in 1963. On the other hand, the

Paddy Lands Registers marked P14-P19 clearly indicate that the husband of the 12th Defendant and the 13th Defendant had been the tenant cultivators under the 10th Defendant for the years, 1966, 1968, 1970, 1971 and 1976 and therefore, there is no proof whatsoever, that the 12th and the 13th Defendants had been the tenant cultivators of Niculas Appu as claimed by them.

[54] It is significant to note that the Surveyor has stated in his report dated **20.05.1983** that there were 84 trees, 40-80 years old, such as siyabala, kohomba, coconut and mango in Lot 2 which are all paraveni trees and there were 31 trees, 10-20 years old, namely, 7 wood apple, 8 coconut and 16 arecanut trees. The 13th Defendant who was present at the preliminary survey had only claimed the said 10-20 years old trees and not the 40-80 years old paraveni trees.

[55] The Surveyor has further reported that there were 43 coconut trees, 40-50 years old in Lot 4, which are paraveni trees and 6 coconut saplings, 2-3 years old, 4 mango trees, 5-6 years old and 8 kohoba trees, 8 years old. The 12th Defendant who was present at the preliminary survey had not claimed the said paraveni trees, 40-50 years old, but claimed only 6 coconut saplings, 2-3 years old, 4 mango trees, 5-6 years old and 8 kohoba trees, 8 years old.

[56] The testimony of the 4th Defendant was that Gunapala and Handy Singho entered upon the land in 1963 after the previous tenant cultivators of Niculas Appu, namely, Mendis and Charananda were evicted by the 10th Defendant after the death of Niculas Appu in 1963. The Preliminary Survey was done in 1983 and both the 12th and the 13th Defendants had claimed the trees which are either only 15-20 years old. The fact that the 12th and the 13th Defendant had claimed trees which were only 15-20 years old in 1983 is consistent with the evidence of the 4th Defendant that

Gunapala and Handy Singho entered upon the land only in 1963 after the death of Niculas Appu.

[57] The 13th Defendant has admitted under cross examination, that Mendis, who worked in the paddy field for two seasons was evicted by the Fiscal and thereafter, the heirs of Mendis instituted action against him. He has further admitted that the possession of the paddy field in which he cultivated was handed over to the heirs of Mendis in 1996 when he lost the appeal. His evidence at pages 283-284 of the brief is as follows:

- ප්‍ර:- හිකුලස් අඳ ගොවියා වශයෙන් යොදවා තිබුණේ මැන්ඩිස්?
- උ:- නැහැ. කරල් දෙකක් බදු දීම තිබුණා. ඒ කාලේ මැන්ඩිස් වැඩ කළා.
- ප්‍ර:- බලහත්කාරයෙන් එලවපු හිසා තමයි ගොවිජන සේවා පනත යටතේ තමාට විරුද්ධව නඩුවක් දැමීමේ?
- උ:- සිරිසේන නෙවෙයි එලෙව්වේ. පිස්කල් එකෙන් අස්කලේ. මට විරුද්ධව නඩුවක් තිබුණො නෑ.
- ප්‍ර:- මැන්ඩිස්ගේ උරුමකරුවන් විසින් තමාට විරුද්ධව නඩුවක් දැමීමේ නැද්ද ගොවිජන සේවා පනත යටතේ තමා විසින් අඳගොවිකම බලහත්කාරයෙන් ගන්න කියා?
- උ:- නඩුවක් දැමීම. ඒක කොළඹට දාල කොළඹින් තීන්දුවෙලා ආව.
- ප්‍ර:- ඇපැල් උසාවියෙන් එම නඩුව හම්බන්තොට මහාධිකරණයට එවා තිබුණා. හම්බන්තොට මහාධිකරණයේ අංක 62/96 එච්.සී.ඒ ?
- උ:- ඇපැල් උසාවියේ තීරණය අනුව මෙම ඉඩම මට තීන්දුවෙලා ආව.
- ප්‍ර:- ඔක්තීය භාර දුන්න කාටද?
- උ:- මට භාර දුන්නා.
- ප්‍ර:- 62/96 නඩුව ඉදිරිපත් කලේ ඇයි?
- උ:- ආයෙමත් අනික් පැත්තට තීන්දුව දුන්නා.
- ප්‍ර:- ඒ නඩුවේ මැන්ඩිස්ගේ උරුමකරුයින්නට අඳ හිතිය 1996 දී හිමි වුවාද?
- උ:- ඔව්.

[58] At the trial, it had been suggested to the 12th Defendant that Charananda was evicted by the 10th Defendant and her husband Gunapala was put into cultivation by the 10th Defendant in 1968. The 12th Defendant has avoided answering the question by simply saying that she

was not aware of such incidents as she came to the land after 1968. Her evidence at page 277 of the brief is as follows:

ප්‍ර:- පැමිණිල්ල වෙනුවෙන් යෝජනා කරන්නේ තමාගේ ස්වාමිපුරුෂයාට සිටියේන මේ ඉඩම වගා කිරීමට ඩාර දන්නේ 1968 කියා පිළිගන්නවාද?

උ:- මට කියන්න බැහැ. මම ආවේ ඊට පස්සේ.

ප්‍ර:- තමා දන්නේ නැහැ 1968 ට පෙර වාගානන්ද කියා ගොවියෙක් මේ ඉඩම වගා කළ බව?

උ:- අපි දන්නේ නැහැ ඒව.

ප්‍ර:- ඔහු 1968 දී එලවල තමයි තමාගේ පුරුෂයාට මේ ඉඩම ඩාර දන්නේ?

උ:- ඒව මම දන්නේ නැහැ.

[59] The admission made by the 13th Defendant that Mendis also cultivated the paddy field in dispute prior to him for 2 seasons and after the eviction of Mendis, his heirs instituted action against him and the possession was ultimately handed over to the heirs of Mendis is consistent with the evidence of the 4th Defendant. This corroborates the testimony of the 4th Defendant that Mendis and Charananda who worked under Niculas were evicted by the 10th Defendant and thereafter, after the death of Niculas in 1963, Gunapala and the 13th Defendant were put into cultivation by the 10th Defendant.

[60] No credible documentary evidence such as Electoral Registrar or a Grama Niladhari Certificate or such similar credible document or oral evidence was presented by the 12th and the 13th Defendant to establish that they entered upon Lots 2 and 4 respectively, and built the cadjan houses standing thereon prior to the death of Niculas Appu in 1963 on the basis of any permission granted by Niculas Appu. On the other hand, the aforesaid attendant circumstances coupled with the admission of the 13th Defendant under cross examination clearly indicate that Gunapala (husband of the 12th Defendant) and Handi Singo (the 13th Defendant) had only entered upon the land in question after the death of Niculas Appu in 1963.

[61] For those reasons, there is no satisfactory and credible evidence that has been presented by the 12th and the 13th Defendants that they entered upon the land in question upon a license granted by Niculas Appu prior to his death in 1963. For those reasons, I hold that the application of the principle relied on by the learned Counsel for the 13A Defendant in *Meeruppe Sumanatissa Terunnanse v. Warakapitiya Pangnananda Terunnanse (supra)* will not apply to the present case.

The character of possession of Gunapala and Handi Singo

[62] Mr. Collure, the learned Counsel for the Substituted-Plaintiff has submitted in his written submissions that while the learned Additional District Judge correctly held that the 10th Defendant has failed to acquire prescriptive title to the property in dispute, at best, the 12th and the 13th Defendants could only be regarded as agents or licensees of the 10th Defendant. His contention was that the 12th and the 13th Defendants being the agents or licensees of the 10th Defendant could not claim prescriptive title to Lots 2 and 4 when the 10th Defendant fails to prove prescriptive title to the property in dispute.

[63] I find that the testimony of the 4th Defendant was that the original 10th Defendant came into possession of the property in 1963 after the death of Niculas Appu and thereafter, he put Gunapala and Handi Singho into occupation after 1963 by chasing away Mendis and Charananda who worked under Niculas Appu until his death.

[64] The testimony of the 10th Defendant was that the land was originally owned by Niculas Appu and after he became the owner of the land by virtue of a Deed of Gift bearing No. 1232, he entered into the possession of the entire land in 1962. His evidence was that his brother Handi Singho (13th Defendant) and Gunapala worked as his tenant cultivators (page 228). He has specifically stated in evidence that he possessed the entire

land, including the two highlands (Lots 2 and 4) and Gunapala and Handi Singo cultivated and occupied the two highlands under him paying rent to him in respect of the paddy field. (page 223 & 224).

කුඹුරේ ගොඩැල්ලේ තිබෙන එළඳුව මම ගන්නවා.

පැමිණිලිකරුවෝ බුක්තිය ගන්න කවදාවත් ආවෙ නැහැ. 1962 සිට නිරවුල්ව, අඛණ්ඩව සම්පූර්ණ ඉඩම බුක්ති විදුගෙන එන්නෙ මම. එම හේතුව මත එනම් බුක්තිය මත අයිතියක් මට තියෙනවා. ඒ මත මට නියෝගයක් කරන ලෙස මා ඉල්ලා සිටිනවා.

13 විත්තිකරු මා යටතේ පොල් ගොඩැලිත් බුක්ති විඳින්නෙ.

[65] The testimony of the 10th Defendant was very clear that Gunapala and Handi Singho were his tenant cultivators who worked under him paying the rent to him and thus, the husband of the 12th Defendant, Gunapala and his brother, the 13th Defendant, were tenant cultivators who occupied the highlands in their capacity as his tenant cultivators while he (the 10th Defendant) possessed both the paddy lands and highlands.

[66] A perusal of the record reveals that the 12th and the 13th Defendants did not challenge the evidence of the 10th Defendant who stated that the husband of the 12th Defendant and the 13th Defendants worked under him and paid rent to him while he possessed the entire land including the two highlands (Lots 2 and 4). It is significant to note that the 12th Defendant almost admitted the testimony of the 10th Defendant when she stated that the paddy land and the highland (Lots 1, 3 and 4) were given to her by the 10th Defendant who possessed the entirety of the land through her and she only paid the rent to the 10th Defendant. Her evidence at page 272, 276 and 277 of the brief is as follows:

වැවිලි සේරම මම හදා ගෙන තියෙන ඒව. සිරිසේන සුදුසිංහ සම්පූර්ණ ඉඩම බුක්ති විඳින්නෙ මම මාර්ගයෙන්. පැමිණිලිකරුට කිසිම අයිතියක් නැහැ. මේ කට්ටිය කවදාවත් දැක්කෙන් නැහැ (272)

ප්‍ර:- කුඹුරු වැඩ කරලා ප්‍රවේණිය දෙන්නෙ සිරිසේනට?

- උ:- ඔව්. මේ හඬුවේ 10 වන විත්තිකරු.
- ප්‍ර:- ඔහු කියා තියෙනව නම් මෙම කුඹුරු කොටස සහ මෙම ගොඩ ඉඩම් කොටස තමාට බාරදීම තියෙනව කියා තමා පිළිගන්නවද?
- උ:- ඔව්.
- ප්‍ර:- අංක 4 කැබැල්ල තමාට බාරදුන්න කියා සිරිසේන සුදුසිංහ ඔහුගේ සාක්ෂියේදී කියා තියෙනව නම් ඒක පිළිගන්නවද?
- උ:- පිළිගන්නව.
- ප්‍ර:- සිරිසේනගේ සාක්ෂිය තමා පිළිගන්න?
- උ:- ඔව්.

[67] It is also significant to note that the 13th Defendant who asserted that he possessed the plantation in Lot 2, however, did not challenge the testimony of his brother, the 10th Defendant when the 10th Defendant testified to the effect that he (the 10th Defendant) took the harvest of the highlands including coconuts in the 2 highlands and the 13th Defendant, his brother worked under him (page 224). The character of the 12th and the 13th Defendants as the cultivators of the 10th Defendants in the paddy lands is further confirmed by the documents marked P14-P19 which describe that Gunapala and Handi Singho had acted as tenant cultivators of the 10th Defendant from 1966.

[68] In the circumstances, it is crystal clear that after the death of Nicolas Appu in 1963, the 12th and the 13th Defendants had entered upon the paddy land in dispute as cultivators and occupied the two highlands (Lots 2 and 4) for the purpose of cultivation under the 10th Defendant. As noted, the 12th and the 13th Defendants have failed to present satisfactory evidence and prove that they entered upon Lots 2 and 4, built new houses and occupied the said two Lots prior to 1963.

Requirement of uninterrupted possession of the original 10th Defendant

[69] The learned Additional District Judge has held that although the 10th Defendant possessed the land in question from 1963, the heirs of Nicolas

Appu who became the co-owners of the property in question instituted an action against the 10th Defendant and the widow of Niculas Appu in the District Court on 19.04.1971 (P8) and the judgment delivered by the District Court on 27.02.1973 (P12) against the said Defendants was affirmed by the Court of Appeal on 13.12.1979 (P12). Therefore, the possession of the 10th Defendant was interrupted before the expiration of the period of 10 years when the action was instituted against the 10th Defendant in 1971.

[70] The learned Additional District Judge has correctly held that as the present action was filed on **05.01.1982** after the dismissal of the appeal in **1979**, the 10th Defendant could not have lawfully acquired prescriptive title to the land in dispute for a period of over 10 years in terms of section 3 of the Prescription Ordinance.

Prescriptive claims of the 12th and the 13th Defendants to Lots 2 and 4

[71] It was the submission of Mr. Collure that the learned Additional District Judge having found that the 10th Defendant had failed to acquire prescriptive title to the subject-matter in terms of section 3 of the Prescription Ordinance could not have decided that the 12th and the 13th Defendants, being his mere agents or licensees acquired prescriptive title to Lots 2 and 4 depicted in Plan No. 154. His submission was that the 12th and the 13th Defendants could not have claimed a title adverse to or independent of that of the lawful heirs of Niculas Appu when it was demonstrated that they were mere agents or licensees of the 10th Defendants and accordingly, the exclusion of Lots 2 and 4 from the corpus of the action is erroneous in law.

[72] Mr. Collure has further submitted that the high land portions, namely, Lots 2 and 4 depicted in Plan No. 154 are the two threshing floors (Kamathas) of the paddy field called “Thunmulla” and that these

two highland portions which were not separated from the paddy lands were used by the two cultivators who resided there for the sole purpose of cultivating paddy. He has submitted that accordingly, the highland portions are part and parcel of the entire land called “Thunmulla”. The learned Counsel for the 13A Defendant has, however, disputed this position and submitted that the Plaintiff himself has pleaded in his Plaint that the land to be partitioned consists of the highlands, namely, Lot 2 and 4 and the paddy lands, namely, Lot 3 and 5 and therefore, the Plaintiff is estopped from denying that the two highland portions are separate from the paddy lands depicted in Plan No. 154.

[73] The submission of the learned Counsel for the 13A Defendant was that the prescriptive title of the 13A Defendant should be limited to the area of possession, namely, Lot 2 depicted in Plan No. 154 and thus, the consideration of the paddy areas are irrelevant. He invites us to consider the evidence of the 13th Defendant and the findings of the learned Additional District Judge that the 13th Defendants had occupied the house in Lot 2, planted trees and possessed the said Lot for a period of over 10 years against all the others and acquired prescriptive title to the same.

[74] In view of these submissions, the question that arises for consideration is whether the 12th and the 13th Defendant can claim an independent prescriptive title in respect of Lots 2 and 4 if these two areas form part of the paddy field and the cultivators occupied them for the sole purpose of cultivating the paddy on behalf of the person who put them into occupation.

[75] Now the question is whether in deciding the prescriptive possession of the 12th and 13th Defendants in respect of the actual area of possession, due regard should also to be given to the nature and use of the property of which it is susceptible including any payment or services rendered by the

12th and the 13th Defendants in respect of the property. In *Raki v. Lebbe* 16 NLR 138, the issue arose whether the title acquired by prescription must be limited to the actual area of possession which was held by the party claiming prescriptive title. Wood Renton J. referred to the words “any other person” in the explanation in section 3 of the Prescription Ordinance and held at page 140 that it does not mean that a prescriptive title should be proved against the whole world:

“I don’t think that the words “another person” in that explanation (in section 3 of Ordinance No. 22 of 1871) would justify us in holding that a declaration of title on the ground of prescriptive possession could never be successfully claimed unless the claimant was in a position to show a title adverse to the whole world. It would, perhaps, not be right to limit the scope of the words with “another person” to the particular person against whom prescriptive title was set up”.

[76] Lascelles C.J. while observing that it is possible for a party to an action to establish title by prescription without proving that his possession was adverse to the whole world, but that question, must be answered with due regard to the manner of occupancy, the nature of the property and to the use and cultivation of which it is susceptible. Lascelles C.J. at page 143 stated:

“The other ground of appeal relates to the extent of land to which the plaintiffs have established title . It is said that title acquired by prescription must be limited to the actual area of which possession is had, and authorities were cited for that proposition. This, as a general proposition, is good law, but it must be applied with due regard to the nature of the property and to the use and cultivation of which it is susceptible”.

[77] It is, thus, important to examine whether there is any closeness or relationship between the highland and the paddy lands in terms of nature, use, occupation and cultivation of which it is susceptible as the

submission of Mr. Collure was that both highland portions are the threshing floors (Kamatha) of the paddy field and hence, are used for the cultivation and connected purposes.

[78] A perusal of the testimony of the 4th Defendant reveals that there are two threshing floors (Lots 2 and 4) on the paddy field (Lots 1 and 3) and the two cultivators are residing on the two highland portions and the trees planted on the said high land portions belong to the paddy field. His testimony was that it is in these highland portions where paddy was stored, threshed, the crop was stacked and other connected activities in the paddy field occur (page 193). In fact, the 12th Defendant has admitted in evidence that the highland in extent of ½ acre was used as the threshing floor of the paddy field (pages 278-279).

ප්‍ර:- කොයිගම් අවස්ථාවකවත් පුරුෂයා පිටත් වූන කාලයේ හරි තමා කුඹුර බාරගන්නට පස්සෙ හරි තමාගෙ අඳුගොවි අයිතිවාසිකම් කැඩුණද?

උ:- හැහැර. ගොඩ බිම අක්කර 1/2යි. ඒක තියෙන්නෙ කුඹුරට යාබදුව.

ප්‍ර:- ඒ අක්කර 1/2 ගොඩැල්ල සමහර අවස්ථාවල තමා පාවිච්චි කරනවද කුඹුරේ කමත වශයෙන් ගොයම් ගොඩ ගහන්න?

උ:- ඔව්. ගොයම් ගොඩ ගහනව තමයි. කමත වශයෙන් පාවිච්චි කළා.

[79] The 13th Defendant has also admitted in evidence that he used the high land (Lot 2) as the threshing floor, including for storing, sorting and stacking of paddy until he lost his tenancy rights:

ගොඩැල්ල පාවිච්චි කළා මම කුඹුරේ කමත වශයෙන්. ගොයම් ගොඩ ගැහුව. ඒ ගොඩැල්ලෙ තියාගෙන පැහුව. දැනට ඉදිරිපත් කර තිබෙන පිඹුරේ කැබලි අංක 2 හැටියට ඒ ගොඩැල්ල සඳහන් කරන්නෙ. ඒ අංක 2 කැබැල්ල තමයි කමත වශයෙන් පාවිච්චි කළේ අඳුගොවිභාවය අහෝසි වන තෙක් (page 282).

[80] It is crystal clear that the two high lands (Lots 2 and 4) were used by the 12th and the 13th Defendants as threshing floors, namely for cultivation purposes such as storage, separating, drying and stacking of paddy and other connected activities by the cultivators with no defined

boundaries. In the circumstances, the two highland portions (threshing floors) forming part of the two paddy fields were used by the cultivators who worked under the 10th Defendant and resided in the two houses standing thereon for cultivating purpose from 1963 as correctly submitted by Mr. Collure in his written submissions.

[81] The 12th Defendant has clearly admitted the evidence of the 10th Defendant and stated that Lot 4 was handed over to her by the 10th Defendant who possessed the entire land (Lots 1-5) through her (සිරිසේන සුදුසිංහ සම්පූර්ණ ඉඩම බුක්ති විලින්හ මම මාර්ගයන්)-page 272 and that she only paid the rent to the 10th Defendant. The 13th Defendant did not challenge the evidence of his brother, the 10th Defendant who stated that he possessed the entire land, including the coconut trees on the high land portions and the 13th Defendant only worked under him (p. 224).

[82] The question that arises for decision in this case is whether the 12th and the 13th Defendant who claimed to be tenant cultivators under the 10th Defendant and demonstrably occupied the highlands under him for the cultivation purpose could acquire the prescriptive title to the high land portions when the 10th Defendant himself has failed to prove his prescriptive title to the whole land.

[83] The 10th Defendant is not the lawful owner of the paddy field and thus, he cannot lawfully appoint the 12th and the 13th Defendants as his lawful tenant cultivators as correctly held by the learned Additional District Judge in his judgment. Although any arrangement between the 10th Defendant and the 12th and the 13th Defendants may be binding on the parties to such arrangement, it is not binding on the lawful owners of the paddy field as the 10th Defendant cannot create tenancy rights against the rightful owners without their authority or consent or subsequent ratification.

[84] Although the 10th Defendant claimed prescriptive title against the lawful co-owners of Niculas Appu and put the 12th and the 13th Defendants into occupation on the basis of an invalid Deed of Gift and possessed the land for some time through the 12th and the 13th Defendant, the co-owners disputed his title and accordingly, the said Deed of Gift was cancelled by the District Court.

[85] It is not in dispute that the cadjan houses, cadjan kitchens and the temporary lavatories in Lot 2 and 4 were claimed only by the 12th Defendant and the 13th Defendants who reside there. No evidence was, however, presented by them that those buildings were made with the intention of holding Lot 2 and 4 adverse to the true owners other than occupying them for cultivating the paddy field. In this regard, it is to be noted that when the 12th Defendant was questioned as to who made the buildings on Lot 4, her answer was that she repaired the buildings that existed there before and that they were made by those who previously claimed their rights.

ප්‍ර: මේ ඉඩමේ තමාට පදිංචි වී ඉන්න ගෙයක් තියෙනවද?

උ: ඔව්. අතු සෙවලි, වරිච්චි ගෙයක්. අතු සෙවලි, වරිච්චි කුසිසියක් තියෙනව. තාවකාලික වැසිකිලියක් තියෙනව.

ප්‍ර: ඒව තමාල හදාගන්න ඒව නෙවේද?

උ: කැඩෙනකොට අපි හදාගන්න. අලුතින් ගෙයක් අඬිතාලම් දාල තියෙනව. **තිබ්ච්චි ගොඩනැගිලි අපි අලුත්වැඩියා කළා. මට ඉස්සරවෙලා අයිතිවාසිකම් කී අය ඒව හදල තියෙන්නෙ. අපේ නැන්දම්මල ඉන්න ඉඩමේ මම තවමත් ඉන්නෙ. නැන්දම්ම පදිංචිවෙලා සිටි බවට මට සාක්ෂි ඉදිරිපත් කරන්න පුළුවන්. අද ඉදිරිපත් කරන්න බැහැ. (276)**

[86] The words “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 acknowledgement of a right existing in another person would be fairly and naturally be inferred” in section 3 of the Prescription Ordinance are significant in considering the question

whether the 12th and the 13th Defendants could claim any prescriptive possession as against the co-owners of Niculas Appu.

[87] In *Kiri Hamy Muhandiram v. Dingiri Appu* 6 NLR 197, Moncrieff J. stated that in order that a person may avail himself of section 3 of the Prescription Ordinance No. 22 of 1871, the possession must be shown from which a right in another person cannot be fairly or naturally inferred. In *Jain Carrim v. Rahim Dhall* (1892) 2 C.L.R. 118, Burnside C.J. stated that “such a possession, if not accompanied by payment of rent or performance of service or some act from which an acknowledgment of title in another may be inferred, and if it so continues for the prescriptive period, gives a good title by prescription”. Burnside C.J. Further observed, however, that “mere occupation, such as that of a servant or agent or guest of another would not amount to possession under this Ordinance”.

[88] it is well settled that the possession of the agent is the possession of the principal and in view of the relationship between the agent and principal, the agent could not be permitted to claim his own possession as long as he was in the position of the agent (*David Lee v. John Lawson Kennedy* [1889] XIV H.L. (E) 437 and *Chandrakantaben v. Vadilal Bapalal*, AIR 1989 SC 1269).

[89] In the present case, the 10th Defendant who claimed to have acquired prescriptive title to the entire land has failed to establish prescriptive title against the lawful co-owners of Niculas Appu. Once the 10th Defendant fails to establish his title by prescription against the lawful owners, the 12th and the 13th Defendants who worked under him either as his cultivators or agents or licensees are also estopped from acquiring prescriptive title against the lawful owners unless they are able to

establish an independent possession adversely to the lawful owners by a manifestation of an intention of holding Lot 2 and 4 as owners.

[90] In the case of *Maduwanwala v. Ekneligoda* 3 NLR 213, Bonser C.J held that “a person who is let into occupation of the property as a tenant, or as a licensee, must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in any other capacity. No secret act will avail to change the nature of his occupation”. Bonser C.J further held that “possession, as I understand it, is occupation either in person or by agent, with the intention of holding the land as the owner”.

[91] In *Siyaneris v. Jayasinghe De Silva* 52 N.L.R. 289, the Privy Council decided that if a person goes into possession of a land as an agent for another, prescription does not begin to run until he has made it manifest that he is holding adversely to his principal. Mere general statements of witnesses that a claimant possessed the land or planted trees and mere occupation under some other person or persons for a number of years are not evidence of adverse possession necessary to support a title by prescription under section 3 of the Prescription Ordinance. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Courts (*Sirajudeen v. Abbas* (supra)).

[92] In the present case, the 12th and the 13th Defendants who worked under the 10th Defendant should be fully aware that Niculas Appu was the original owner and that the 10th Defendant’s Deed of Gift was cancelled and thus, the heirs of Niculas Appu became the co-owners upon his death in 1963. As possession of the 12th and the 13th Defendants was not originally adverse but only in a representative capacity and thus, when they claim that it has become adverse, as against the lawful owners and

the 10th Defendant, they must prove an intention on their part to possess Lot 2 and 4 adversely. How do they prove this intention? They must prove a manifestation of that intention to the lawful owners, the heirs of Niculas Appu, against whom they set up their adverse possession.

Adverse possession

[93] Undoubtedly, the element of “adverse possession” is a hostile or possession against the title of the lawful owner and it includes exclusive possession, for example, by a defendant to the action in practical contravention of the plaintiff’s right with the intention to hold the property in the possessor’s own right and against the right of the lawful owner (*Sona Devi v. Nagina Singh*, AIR 1997 part 67). Adverse possession in this sense implies that it commenced in wrong and is maintained against right (*Achal Reddy v. Ramakrishna Reddiar*, AIR 1990 SC 553 at 555).

[94] It is to be noted that where a person who claims title to a property by adverse possession, must plead and prove:

1. on what date he came into possession;
2. when and how the adverse possession commenced (starting point);
3. what was the nature of his adverse possession;
4. whether the factum of adverse possession was known to the lawful owner;
5. how long his possession has continued; and
6. his possession was open and undisturbed and uninterrupted.

[95] The mere long possession of a property of a person in any representative capacity under another person without any interference from the lawful owners, by itself is not enough to acquire prescription by adverse possession, as long possession is not necessarily adverse possession. Thus, mere long possession, it is trite, for a period of more

than 10 years without anything more does not ripen into an adverse possession under section 3 of the Prescription Ordinance.

[96] Unless a clear intention is manifested by the possessor by clear and unequivocal evidence that his possession was adverse to the lawful owners, there would be no reason to hold, by the mere fact of long possession or that the lawful owners had not prevented such possessor from doing some acts, that the possessor held the property by adverse possession against the lawful owners.

[97] The 12th Defendant has admitted that the 10th Defendant possessed the entire land through her and the 13th Defendant did not challenge the evidence of the 10th Defendant who claimed that the 12th and the 13th Defendants worked under him. The attendant circumstances and the admissions made by the 12th and the 13th Defendants, however, demonstrate that the 12th and the 13th Defendants who entered upon the paddy land under the 10th Defendant, paid the rent to the 10th Defendant and occupied Lots 4 and 2 respectively under him for cultivation activities.

[98] They being agents or cultivators or licensees of the 10th Defendant, more or less acknowledge the possession of the 10th Defendant and thus, they could not claim prescriptive title by adverse possession against the lawful owners by a mere long possession or mere occupation in Lots 2 and 4 in the eye of the law unless they have made it manifest that they are holding Lots 2 and 4 adversely to the rightful owners of the land.

[99] The well settled rule of law is that a possession of a licensee or of an agent or a permissive possession to become adverse, must be established by cogent and convincing evidence to show hostile possession adverse to the knowledge of the lawful owners and thus, mere possession for howsoever length of time, does not result in converting such possession

into adverse possession (*Thakur Kishan Singh v. Arvind Kumar*, AIR 1995 SC 73 at 74).

[100] In my view, that mere possession or mere occupation in Lots 2 and 4 or rebuilding cadjan houses or planting trees or taking produce by the 12th and the 13th Defendants for a period of over 10 years in representative capacity as agents of the 10th Defendant are insufficient to treat the land as their own and adverse to the rightful owners. I desire to point out that the 12th and the 13th Defendants' acts and conduct are quite consistent with the position of agents under the 10th Defendants and they continued to occupy the property in that capacity until they can establish a starting point for their acquisition of prescriptive rights by proving a manifestation of an intention to the rightful owners against whom they set up their adverse possession.

[101] In the instant case, there was no evidence of open assertion of hostile title against the lawful owners by a clear manifestation of intention of holding the property as to when possession had become adverse and hostile. When it has been demonstrated that the 12th and the 13th Defendants went into possession of Lots 2 and 4 under the 10th Defendant as his agents, the time does not run until, they have made it manifest by cogent and convincing evidence, an intention of holding Lots 2 and 4 adversely to the lawful owners.

[102] In short, the possession to become adverse, must be *nec vi, nec clam, nec precario*, that is to say, the possession required must be adequate in continuity, in publicity and in extent to show that possession is adverse to the competitor (*Secretary of State for India v. Debendra Lal Khan* (28) AIR 1934 PC 23). It is sufficient that possession be overt and without any attempt at concealment so that the person against whom time is running out, if he exercises due vigilance, to

be aware of what is happening (*V. Muthiah Pillai v. Vadambal*, AIR 1986 Mad 106). In the present case, the lawful owners of the property, who became aware of the purported Deed of Gift No. 1232, exercised due diligence and instituted action against the 10th Defendant who put the 12th and the 13th Defendants into possession as his agents and the said case was decided in their favour.

[103] They have failed to show that their position changed by a manifestation of an intention of holding Lots 2 and 4 as owners, i.e., by some overt act to possession against the rightful owners of the property. i.e., a holding with the intention of keeping Lots 4 and 2 to himself as owners.

[104] Accordingly, the 12th and the 13th defendants have not established the requirements of adverse possession for a period of 10 years previous to the filing of the action, which are explicitly adverted to in Section 3 of the Prescription Ordinance. It is quite apparent that the 12th and the 13th Defendants as mere agents of the 10th Defendant have failed to establish their prescriptive title by a manifestation of an intention of holding Lots 2 and 4 to the lawful owners. In the result, the findings of the learned Additional District judge that the 12th and the 13th Defendants have established prescriptive title to Lots 4 and 2 respectively, depicted in Plan No. 154 are set aside.

[105] The 12th and the 13th Defendants would, in my view, be only entitled to compensation for improvements made to the cadjan houses, cadjan kitchens and temporary lavatories and the plantations claimed in Lot 2 and 4 depicted in the Preliminary Plan No. 154 as per the Report of the Commissioner dated 20.05.1983.

[106] On a consideration of the totality of the evidence and the circumstances of this case, I hold that the learned Additional District

Judge wrongly excluded Lots 2 and 4 from the corpus of the action on the basis of prescriptive title of the 12th and the 13th Defendants.

Share allocation of the parties

[107] As noted, the 9th Defendant was entitled to undivided $\frac{1}{2}$ share on Deed No. 1627 dated 23.06.1981 (9V1) and thus, the 1st Defendant could not have claimed undivided rights on Deed No. 707 dated 12.03.1980 (1V1). Accordingly, the learned Additional District Judge has correctly decided that the Plaintiff could not have claimed undivided $\frac{1}{6}$ share from the 1st Defendant on Deed No. 708 dated 12.03.1980 (P3) (Vide-page 30 of the judgment). In the result, the Plaintiff is only entitled to undivided $\frac{1}{24} + \frac{1}{40}$ shares of the corpus of the action.

[108] A perusal of the judgment however, reveals that the learned Additional District Judge has allotted undivided $\frac{20}{120}$ shares to the Plaintiff when the Plaintiff is only entitled to undivided $\frac{1}{24} + \frac{1}{40}$ shares ($\frac{8}{120}$ share) and thus, the said share allocation ought to be corrected in accordance with this judgment.

[109] In the circumstances, the parties would be entitled to undivided rights in the following manner:

The 9 th Defendant	$\frac{1}{2}$	-	undivided	$\frac{60}{120}$
The Plaintiff	$\frac{1}{24} + \frac{1}{40}$	-	undivided	$\frac{8}{120}$
The 2 nd Defendant	$\frac{3}{24} + \frac{1}{8}$	-	undivided	$\frac{30}{120}$
The 3 rd Defendant	$\frac{1}{40}$	-	undivided	$\frac{3}{120}$
The 4 th Defendant	$\frac{1}{40}$	-	undivided	$\frac{3}{120}$
The 5 th Defendant	$\frac{1}{40}$	-	undivided	$\frac{3}{120}$
The 6 th Defendant	$\frac{1}{40}$	-	undivided	$\frac{3}{120}$
The 7 th Defendant	$\frac{1}{24}$	-	undivided	$\frac{5}{120}$
The 8 th Defendant	$\frac{1}{24}$	-	undivided	$\frac{5}{120}$

Conclusion

[110] For those reasons, the decision of the learned Additional District Judge of Hambantota to exclude Lots 2 and 4 depicted in Plan No. 154 is set aside and those two Lots are directed to be included in the corpus of the action.

[111] In view of the foregoing, I hold that the 9th Defendant is entitled to undivided $\frac{1}{2}$ share of the subject-matter of the action (undivided 60/120) as correctly decided by the learned Additional District Judge. Accordingly, it is hereby declared that the following parties are entitled to undivided rights of the corpus of the action in the following manner:

The Plaintiff	-	undivided	8/120
The 2 nd Defendant	-	undivided	30/120
The 3 rd Defendant	-	undivided	3/120
The 4 th Defendant	-	undivided	3/120
The 5 th Defendant	-	undivided	3/120
The 6 th Defendant	-	undivided	3/120
The 7 th Defendant	-	undivided	5/120
The 8 th Defendant	-	undivided	5/120
The 9 th Defendant	-	undivided	60/120

[112] The 12th and the 13th Defendants are entitled to compensation for the improvements made to cadjan houses, cadjan kitchens and the temporary lavatories in Lots 4 and 2 respectively, depicted in the Preliminary Plan as described in the Report marked “X1” (without any soil rights). The 12th and the 13th Defendants are also entitled to compensation in respect of the plantations claimed by them before the Commissioner as referred to in the Report of the Commissioner marked “X1”. Other plantations shall be allotted as per the Report of the Commissioner marked “X1”.

[113] The portion of land entitled to the 2nd Defendant shall be allotted from the southern-eastern side of Plan bearing No. 154 as directed by the learned Additional District Judge in his judgment. The pro rata costs shall be borne by the parties in proportion of their respective rights to the land.

[114] The learned District Judge of Hambantota is directed to enter judgment and interlocutory decree in accordance with the directions enumerated in this judgment and proceed to partition accordingly.

[115] The judgment of the learned Additional District Judge of Hambantota dated 25.01.1999, in part is set aside and the judgment is varied. Subject to the said variation, the Appeal of the Substituted-Plaintiff is allowed. No costs.

JUDGE OF THE COURT OF APPEAL

M.Sampath K.B. Wijeratne J.

I agree.

JUDGE OF THE COURT OF APPEAL