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

Case No: CA-DCF-1334- 1338/2000/F
D.C. Panadura Case No:15138/P

Batugahage Don Wilbert Mahagonaduwa,
Morontuduwa (Deceased)

plaintiff

Batugahage Dona Sunila Gotami, "Siri Ananda",
Mahagonaduwa,
Morontuduwa.

Substituted plaintiff

-Vs -

1. M. Dalin Perera,
2. M. Albert Perera,
   both of Mahagonaduwa, Morontuduwa.
3. V. C. Nandawathie (Deceased),

3A. Kaluthanthrige Leelananda Peiris,
No.99E, Sri Sankitta Mawatha,
Gonaduwa, Morentuduwa.

4. K. Piyasena Perera (Deceased),

4A. Kaluthanthrige Leelananda Peiris, No.99E, Sri Sankitta Mawatha, Gonaduwa, Morentuduwa.

5. Mr. Premachandra Samarakoon
   Mahagonaduwa, Morontuduwa. (Deceased).

5A. Dona Somalata Premawathie Samarasekara,
"Sriyalatha", Mahagonaduwa, Morontuduwa.

6. U. Milaris (Deceased)

6A. Udumullage Wimalawathie Kulathunga,

7. U. Sirimanis (Deceased),

7A. Gammarachchige Sisilin Nona
All of Mahagonaduwa, Morontuduwa.

8. U. A. Rodrigo,
9. Cyril Kulatunga,
10. Daisy Kulatunga,

11. Dora Kulatunga,

12. Human Kulatgunga,

13. Beeta Kulatunga,
    All of Paragastota.

14. James Samarasekera
    (Deceased), Mahagonaduwa, Morontuduwa.

14A. Seelawathie Dharmasekera, "Pushpasiri",
     Kawatayagoda, Mahagonaduwa,
     Morontuduwa.

15. K. Helan Perera,

16. Hendrik Samarasekera
    (Deceased),

16A. Rathnayaka Mudiyanselage Jane Nona,

16B. Gamarachchige Wilmon Samarasekera,

17. K. A. Peris (Deceased),

17A. K. A. Teeman Penis,

18. M. Themis Singho (Deceased)
    All of Mahagonaduwa, Morontuduwa.

19. Gamarachchige Milton Senerath Samarasekera,
    99B, Mahagonaduwa, Morontuduwa.

20. Rev. Saddharama, Talpitiya, Wadduwa.

21. Kahawalage Littie Perera,

22. Kahawalalge Sicilin Perera,
    Both of Gonaduwa, Morontuduwa.

23. Haturusinghe Arachchige Missinona,
    Kawatayagoda, Mahagonaduwa, Morontuduwa.

24. Kahawalage Jayasena Perera, Gonaduwa,
    Morontuduwa.

25. Udumullage Ranjani Kulatunga, (Minor
    appearing by 26th defendant)

26. Patirage Milinona, Gonaduwa, Morontuduwa.

27. Gamarachchige Jinarathne Siripala Samarasekera, No.6, Bungalow of the Coconut Board Officer, Opposite Nagoda Hospital, Nagoda, Kalutara.

28. Udumullage Wimalawathie Kulatunga, Mahagonaduwa, Morontuduwa.

Also appointed as 6A defendant.

defendants

AND

K. Helene Perera

15th defendant-appellant

- Vs-

Batugahage Dona Sunila Gotami,
"Siri Ananda", Mahagonaduwa, Morontuduwa.

Substituted - plaintiff-Respondent

1. M. Dalin Perera,

2. M. Albert Perera, both of Mahagonaduwa, Morontuduwa.

3. V. C. Nandawathie (Deceased),

3A. Kaluthanthrige Leelananda Peiris, No.99E, Sri Sankitta Mawatha, Gonaduwa, Morentuduwa.

4. K. Piyasena Perera (Deceased),

4A. Kaluthanthrige Leelananda Peiris, No.99E, Sri Sankitta Mawatha, Gonaduwa, Morentuduwa.

5. Mr. Premachandra Samarakoon Mahagonaduwa, Morontuduwa. (Deceased).

5A. Dona Somalata Premawathie Samaras ekara, "Sriyalatha", Mahagonaduwa, Morontuduwa.

6. U. Milaris (Deceased)

6A. Udumullage Wimalawathie Kulathunga,

7. U. Sirimanis (Deceased),

7A. Gammarachchige Sisilin Nona Mahagonaduwa, Morontuduwa.

8. U. A. Rodrigo,

9. Cyril Kulatunga,

10. Daisy Kulatunga,

11. Dora Kulatunga,

12. Human Kulatgunga,

13. Beeta Kulatunga,
All of Paragastota.

14. James Samarasekera (Deceased), Mahagonaduwa, Morontuduwa.

14A. Seelawathie Dharmasekera, "Pushpasiri", Kawatayagoda, Mahagonaduwa, Morontuduwa.

15. K. Helan Perera,
16. Hendrik Samarasekera, (Deceased),
16A.Rathnayaka Mudiyanselage Jane Nona,

16B. Gamarachchige Wilmon Samarasekera,

17. K. A. Penis (Deceased),

17A. K. A. Teeman Peris,

18. M. Themis Singho (Deceased)
Mahagonaduwa, Morontuduwa.

19. Gamarachchige Milton Senerath Samarasekera, 99B, Mahagonaduwa, Morontuduwa.

20. Rev. Saddharama, Talpitiya, Wadduwa.

21. Kahawalage Littie Perera,

22. Kahawalalge Sicilin Perera, Both of Gonaduwa, Morontuduwa.

23. Haturusinghe Missinona, Kawatayagoda, Mahagonaduwa, Morontuduwa. Arachchige

24. Kahawalage Jayasena Perera, Gonaduwa, Morontuduwa.

25. Udumullage Ranjani Kulatunga, (Minor appearing by 26th defendant)

26. Patirage Milinona, Gonaduwa, Morontuduwa.

27. Gamarachchige Jinarathne Siripala Samarasekera, No.6, Bungalow of the Coconut Board Officer, Opposite Nagoda Hospital, Nagoda, Kalutara.

28. Udumullage Wimalawathie Kulatunga, Mahagonaduwa, Morontuduwa. Also appointed as 6A defendant.

defendant-Respondents

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Thilan Liyanage with Shehan Gunawardhena for the 5B and 27th defendant-appellant in 1337/2000(F).

Reveendra Sumathipala for the 1st, 2nd, 18A defendant-appellant in 1336/2000(F)

J.A.J. Udawatta with Anuradha Ponnamperuma for the Substituted-plaintiff-Respondent

Eranda Kandegama for the 6A defendant-appellant in 1338/2000(F).

Written Submissions: By the 5B, and 27th defendants-appellants on 23.09.2019 and 01.03.2021

By the 1st 2nd and 18A defendant-appellant-appellants on 12.12.2019.

By the substituted plaintiff-respondent on 14.07.2016

By the 6A defendant-appellant on the 26.07.2020

Argued on: 27/09/2019 and 22/02/2021

Judgment on: **03/11/2021.**

N. Bandula Karunarathna J.

The defendant-appellants (hereinafter called and referred to as the "defendants") preferred this appeal against the judgment dated 22.09.2000 of the learned Additional District Judge of Panadura in case No. 15138/P.

There were 5 appeals filed by the defendants against the said judgement. They are namely;

1. 15th defendant-appellant
2. 19th defendant-appellant (Nothing)
3. 1st, 2nd & 18A defendant-appellants (Nothing)
4. 5A & 27th defendant-appellants
5. 6A & 28th defendant-appellants (Nothing)

The plaintiff-respondent (hereinafter called and referred to as the "plaintiff") filed this action by plaint dated 5.4.1977 to partition the land called Galagawalanda, the extent is about 6 1/2 acres bounded as follows:

North: Meddevila Kumbura

East: Gamage Kalumadinnawatte

South: Abanchige Hena

West: Crown Land

This land was identified in plan 3593 dated 07-03-1979 prepared by R.W Fernando, Licensed Surveyor, marked X as lots 1 — 13. When the trial commenced, the defendants except the 1st,2nd,16th,18th and the 19th defendants admitted the corpus as being correctly depicted in plan 3593 as lots 1 — 13. By the end of the trial, there was no serious contest to the corpus as set out in plan 3593.

On the pedigree there was an admission that Daniel was the original owner of the land. He died leaving two children, Karnelis and Punchi Appu who were entitled to half share each. On Karnelis's rights, the dispute on the pedigree was settled by limiting Karnelis's interest to 5/16 and conceding the 2/16 to Dosahamy. There was no dispute about the devolution of Dosahamy's rights.

At the trial 58 issues were raised. The learned counsel for the 15th defendant-appellant says that the issues which concern the 15th defendant are 39 to 53. All these issues were answered "Yes" by the learned District Judge. However, these issues were not discussed in the judgement clearly to permit a proper decree be entered and some of the issues although decided in favour of the 15th defendant, were wrongly decided. Further, she says that being aggrieved by the judgement to this extent the 15th defendant-appellant decided to appeal from the said judgement to have the issues so answered correctly, confirmed and included in the interlocutory decree and the issues wrongly assessed be corrected.

Issues 39 — 42 do not arise because these issues are covered by the settlement entered in the case.

It was argued by the 15th defendant-appellant that learned District Judge has held in the course of the judgement that Punchi Appu died leaving 6 children. The evidence in the case is that he died leaving several children, 5 according to some and 6 according to others, but there was an agreement that only 3 children, Joronis, Silunduhamy and Peiris lived to inherit rights.

Peiris by deed 1903 in year 1895 (marked as 15වි10) gave 1/12 share to Appusingho. The learned District Judge has correctly answered issue 42. By issue 57 the learned District Judge has held that this share devolved according to the 15th defendant's statement of claim but the correct position should be that it devolved according to the evidence led.

It was further argued by the 15th defendant-appellant that the learned District Judge has correctly held, by deed 6162 (Marked 15වි2) Joronis gave 1/8 to Kahawalage Arnolis. Issue 44 was correctly answered but he has answered issue 49 according to the judgement. It is not clear how Arnolis' rights devolved. Arnolis' rights devolved on Dandiris and his rights devolved by Deed 6820 (Marked as 15වි9) on Ekmon and Maggie. The devolution should be, as set out in the evidence of the 15th defendant. There was no serious challenge to this evidence. The learned Trial Judge has answered issue 45 as “yes”. Although the issue was raised by the 15th defendant, he abandoned the position that Silunduhamy married Arnolis Perera. His position was abandoned when he gave his evidence. This was because the 5th defendant proved that Silunduhamy married Velun.

It was argued by the learned counsel for the 15th defendant-appellant that, the 15th defendant only claims the rights of Appusingho as a child of Silunduhamy. The rights of Appusingho were obtained by deed 1903 (marked as 15වි10). The 15th defendant-appellant concedes that issues 45, 46, 47 were answered wrong. Issue 48 was answered wrong because Dandiris was not a child of Silunduhamy and a brother of Appusingho. The learned District Judge has answered issues 52 and 53 correctly and the said evidence was discussed in the judgement.

The 16th defendant and his son, the 19th defendant-appellant moved to have lot 1 in the X plan excluded on the ground that they and their predecessors in title had prescribed to to the said lot 1. The pedigree they set out in their statements of claim says that they were not co-owners along with the other parties to the land sought to be partitioned. The 16th defendant died during the pendency of this action. His son, the 19th defendant was, substituted in that place.

The surveyor in his report marked X1 stated that only the 16th defendant claimed the plantations and the buildings on lot 1. The plaintiff and the other contesting defendants conceded that only the 16th defendant possessed lot 1. The 16th defendant also produced the deed marked 1901. In that deed, Lot 1 is described as a defined and separate land with distinct boundaries. The learned District Judge in answering the issues holds that the 16th and 19th defendants have not proved that they have prescribed to Lot 1. Being aggrieved by the said judgement the 19th defendant-appellant appealed to this court on the following grounds.

(a) The said judgment is contrary to law and against the weight of evidence.
(b) The learned District Judge misdirected himself on the facts in determining that all parties admitted that Daniel was the original owner of the land sought to be partitioned. It was admitted by the parties other than, the 1st,2nd,16th 18th and 19th defendants.
(c) The learned District Judge has failed to give any reason for determining lots 1 to 13 constitute the entire corpus sought to be partitioned.
(d) the learned District Judge has failed to give reasons for accepting the evidence of the 15th defendant.
(e) The learned District Judge has not considered whether the possession of Lot 1 by the 16th defendant and the 19th defendant amounts to adverse possession and no reasons whatsoever as to determining that the appellant has not proved that he and his father's possession is adverse.

The judgement is twenty-three pages long and in the second and third pages the learned District Judge gives a summary of the contents of the plaint and of the statements of claim of the respective parties. From pages 3 to 10 the learned District Judge sets out the points of contest raised by the parties. From pages 10 to 17 the learned District Judge gives a summary of the evidence given by the substituted plaintiff, the second, fourth and 6A/28 defendants. At pages 17 and 18, the learned District Judge deals with the settlement suggested by the 15th defendant's counsel. The 19th defendant's counsel stated that he is not agreeable to be bound by the settlement. At page 18 the learned District judge refers to the evidence given by 6A, 14th,15th and 19th defendants.

From pages 20 to 23 the learned District Judge sets out the findings he has arrived at. With reference to the evidence given by the 19th defendant-appellant, it was argued by the learned counsel that the learned District judge makes no reference to the fact that he sought an exclusion of Lot 1 from the partition.

It was further argued that the learned District Judge in failing to give reasons for his determinations, and in particular to the finding that the 19th defendant-appellant has failed to prove that he acquired prescriptive title to Lot 1, has not taken proper advantage of having seen and heard witnesses. The 19th defendant-appellant prays to set aside the judgement and decree of the learned District Judge and to determine that the 19th defendant - appellant has prescribed to Lot 1 in plan marked X and to determine that the said Lot 1 be excluded from the partition.

5B and 27th defendant-appellants say that except for the 1st, 2nd, 16th, 18th and 19th defendants all other parties admitted that the corpus is depicted as lots 1 to 13 in the aforesaid Preliminary Plan marked as X. It was also admitted by all parties except for the aforesaid 1st, 2nd, 16th, 18th and 19th defendants that the original owner of the land sought to be partitioned was one Daniel. He had two children, namely Karthelishamy alias Karnelis and Punchappu who had in turn become entitled to ½ share each from and out of the corpus.

During the pendency of the action the 5th defendant died and his wife was substituted as the 5A Substituted-defendant. The 5A Substituted-defendant filed a comprehensive statement of claim with a pedigree with regard to the devolution of title to the land in issue. The son of the original plaintiff who is also the 27th defendant-respondent-appellant has been substituted as the 5 B defendant-respondent-appellant.

The following issues were raised by parties who dealt with the devaluation of ½ share of Karthelis alias Karnelis.

(a) Issue number 2 was raised on behalf of the substituted plaintiff.
(b) Issues 4 to 17 were raised on behalf of the 1st, 2nd and 18th defendant.
(c) Issues 18 to 21 were raised on behalf of the 5B and 27 defendant-appellants.
(d) Issues 34 and 35 were raised on behalf of the 3rd and 4th defendants.
(e) Issues 39, 40 and 41 were raised on behalf of the 15th and 18th defendants.

when the case came up for trial on 05.03.1999, a settlement was arrived at between the plaintiff, the 5B and 27th defendant and the 15th defendant with regard to the devaluation of the said ½ share of Karthelis.

The following was the outcome in view of the said settlement.

(a) The 5B and 27th defendant appellant agreed to take 1/16 share from and out of the share of Karthelis alias Karnelis.
(b) The plaintiff agreed to take 6/16 from and out of the share of Karthelis alias Karnelis.

The dispute between the plaintiff and the 1st, 2nd, 18th, 3rd and 4th defendants were not resolved by the above settlement and if any share were to devolve on them it would have to be taken from the plaintiff's 6/16 share.

The main dispute in this case with regard to the rights claimed by 5A defendant centers around the ½ share to which Punchappu had become entitled. It is in evidence that this Punchappu died leaving as his heirs 5 children namely, Joronis, Silinduhamy, Peiris, Carolis and Podisingho of whom the last 2 had died unmarried without issue. Thus, the said Joronis, Silinduhamy and Peiris were entitled to 1/6 share each.

With regard to the devolution of ½ share of Punchappu the following Issues had been raised:

(a) Issue No's 22, 23, 25, 25 and 26 (ඇ), on behalf of the 5A defendant-appellant.

(b) Issues 27 and 28, on behalf of the 6A defendant-appellant who is also the 28th defendant-respondent.

(c) Issues 36, 37 and 38, on behalf of the 14A defendant-respondent.

(d) Issues 42, 43, 44, 45, 46, 47, 48, 49, 50 and 51, on behalf of the 15th defendant - respondent.

With regard to issues 22, 23, 24, 25 and 26(ඇ) raised on behalf of 5A defendant, the present 5B defendant-appellant had given evidence.

With regard to issues 27 and 28, the 6A defendant-respondent had given evidence.

With regard to issues 42 to 51 the 15th defendant-respondent had given evidence.

Issues raised on behalf this 5A defendant with regard to the devaluation of the ½ share of Punchappu were answered in the judgement by the learned trial Judge as follows;

Issue 22. Did Joronis, a son of ½ share owner Punchappu marry Marietta alias Punchi Nona in community of property and die?

Answer – vide judgment (not proved).

Issue 23. Has ½ share of Joronis's rights devolved on the 5A defendant as set out in her amended statement of claim?

Answer – vide judgment.

Issue 24. Did Silinduhamy alias Selenchihamy, a child of ½ share owner, Puchappu marry Kahawalage Velun?

Answer – not proved.

Issue 25. Have the rights of Silinduhamy alias Selenchihamy devolved on the 5th defendant and Appu Singho as set out in the amended statement of claim of the 5A defendant?

Answer – vide judgment

Issue 26. Has the 5th defendant possessed the interests of said Silinduhamy and acquired a prescriptive title to the same?

Answer – vide judgment

With regard to the Issues 42 to 53 raised on behalf of the 15th defendant, the learned trial Judge has in his Judgment answered all the issues in the affirmative, except Issue No. 49 where the answer is – vide judgment.

It is evident that except in the case of the 14A defendant, all the others who claimed rights from the said ½ share of Punchappu had accepted the position that the said Punchappu had died leaving as his heirs 5 children namely; Joranis, Silinduhamy, Peiris, Carolis and Podisingho. Out of them the last mentioned 2 had died unmarried without issues and the remaining three namely Joronis, Peiris and Silinduhamy were entitled to 1/6 share each.

It was the 5A defendant-appellant's case that, Joronis who had become entitled to 1/6 share was married in community of property (before 1877) to Punchinona alias Marietta. Issue number 22 which was raised with regard to the said contention of the appellant.

The learned Trial Judge at page 35 in his judgment (page 1029 of the brief) had stated that 5A defendant – appellant had not proved that Joronis was married.

"ජොරෝනිස් යන අය විවාහ වූ බවටද කිසිම සාක්ෂියක් ඉදිරිපත්වී නොමැත"

The learned Trial Judge erred in arriving at this conclusion because a marriage certificate had not been produced. But the deed No. 6162 dated 26.02.1875 marked (*15වි2),* which had also been produced marked 5වි10, is a conveyance by the said Joronis to Kahawalage Aranoris Perera referred to in paragraph 16 of the 15th defendant's statement of claim. In this deed there is a reference to Joronis inheriting certain interests from his widow in the lands called *Moonamalgahawatta* and *Dombagahawatta*. This reference has been marked as 5වි10 (අ) in 5වි10.

It is important to note that 5වි10 is a deed that had been executed 125 years ago and the reference to Joronis's widow (ස්ත්‍රී සන්තකින්), is not only proof that Joronis was married, but also proof that he was married before 1877 when community of property was in operation.

the following evidence of the 15th defendant (at page 967 of the appeal brief) is important as the learned counsel for the 15th defendant, was challenging the marriage of Joronis. The 15th defendant states that-

ප්‍ර : ඒ ඔප්පුව (15වි 2 or 5.වි.10) දෙනකොට ජොරානිස් කසාද බැඳලා තිබුනේ?
උ ඔව්
ප්‍ර : එවිට ඔහුගේ භාර්යාව මියගොස් නේද?
උ ඔව්

It is very clear that the learned Trial Judge had erred in not answering Issue No. 22 in the affirmative. At the time the said Joronis executed deed No. 6162 (15වි2) = (5වි10) in 1875 as he was married in community of property, out of his 1/6 share he was entitled to only ½ of it, that is to 1/12 share. Therefore, what passes on the said deed to Kahawalage Arnolis Perera is only a 1/12 share and not 1/8 as stated in the said deed. The learned Trial Judge erred in answering Issue number 44 in the affirmative when it is proved that 1/8 share was not passed on the said deed.

Thus, Issue number 44 should have been answered in the negative.

The rights of Punchappu's remaining son namely Peiris is entitled to 1/6 share. The said Peiris along with Joronis are said to be the donors referred to in deed No. 9322 dated 16.07.1881 (marked as 6වි1). When this deed was executed, Joronis had no rights left since out of his 1/6 share, half had already been passed on deed (15වි1) = (5වි10) and the balance ½ had passed on to his two children Meinona and Arnolis on the death of his wife due to his marriage in community of property.

In the circumstances, what passed on deed 6වි1 were the rights from Peiris only. The learned Trial Judge had not considered as to what had in fact passed on the said deed 6වි1. Before deciding as to what passed on deed No. 1903 of 5.2.1895 marked 15වි10 given by Peiris to Appu Singho, one has to ascertain as to what Peiris's balance interests were upon the execution of the deed 6වි1 in 1881. The learned Trial Judge has erred in answering Issue No. 42 in favor of the 15th defendant-respondent.

The said Peiris, had died unmarried without issues, leaving as his heirs his brother Joronis and his sister Silinduhamy. Due to the failure of the learned Trial Judge to ascertain what Peiris's balance interests were after deed 15වි10 and 6වි1, has led to a failure in finding out as to what share had devolved on the said Joronis and Silinduhamy on the death of Peiris.

According to the evidence of the 5 B defendant-appellant, the said Silinduhamy was married to Kahawalage Velun Appu and both of them had died leaving 5 children namely Arnolis, Girohamy, Podihamy, Appu Singho and Haramanis. In order to prove this part of the pedigree and also to prove further the facts of marriage between the said Joronis and the said Punchinona, few documents were produced by the 5 B and 27th defendant-appellants.

(a) The death certificate of Gamage Meinona Perera marked (5වි13) where it is stated that she died on 08.11.1943 at the age of 80 and her father was Gamage Joronis and her mother was Kalutantrige Punchinona Peiris.

(b) The death certificate of Gamage Arnolis marked (5වි23*)* where his name is given as Gamage Arnolis Perera alias Gamaaratchige Arnolis Samarasekera and his father was Joronis.

(c) The death certificate of Kahawalage Arnolis Perera marked (5වි24) where it is stated that this Arnolis died on 15.07.1914 and his father was Kahawalage Velun Appu and his mother was Gamage Silinduhamy.

As set out above, this Silinduhamy, was a child of the ½ share owner Punchappu and Arnolis referred to in 5වි24, is the grantee in deed No. 6162 of 26.02.1875 marked (5වි10) = (15වි2).

in terms of the averment in paragraph 17 of the statement of claim of the 15th defendant to the effect that Silinduhamy married Arnolis, it is erroneous since Arnolis was her son.

(d) According to the death certificate of Kahawalage Haramanis marked 5වි26, Haramanis had died on 10.07.1909 and his parents' names were given as Kahawalage Velun Perera and Gamage Silinduhamy.

(e) The deed No. 36654 marked 5වි28 had been executed in 1903 and the vendee was Gamage Kathonis and one of the vendors was Kahawalage Girohamy, whose mother was referred to as Gamage Silinduhamy.

(f) In fiscal deed 3571 of 1895 marked 5වි2, it was alleged that the rights of Punchinona, the widow of Joronis, were purchased. It may be stated that on this deed and the following deeds 5වි11 and 5වි12, no rights passed to Punchinona since she had died before 1875, vide deed 5වි10. Therefore, the balance rights of Joronis had devolved on their 2 children Meinona and Gamage Arnolis.

It is my view that the learned Trial Judge had erred in not considering the above documents in his Judgment and had erroneously accepted the devolution set up by the 15th defendant and erred in answering the Issues pertaining to the said devolution in favor of the 15th defendant.

It was argued by the 5B & 27 defendant-appellants that Joronis who was entitled to 1/6 share had married in community of property and after executing deed 5වි10, his balance 1/12 had devolved on his 2 children Meinona and Gamage Arnolis Perera, each of whom becoming entitled to 1/24 shares. The devolution of Meinona's 1/24 on deeds 5වි14, 5වි15, 5වි16 and 5වි17 was to Gamage Arnolis Perera who was the father of the 5th defendant and the brother of Meinona. All those deeds deal with a 1/24 share. Similarly, the 1/24 share, which the other child of Joronis who was Gamage Arnolis Perera had inherited devolved on his wife Isabella Perera on deeds 5වි19 and 5වි20. These deeds too correctly deal with 1/24 share. The learned Trial Judge had failed to consider the said documents.

When this case had come up for further hearing on 03.12.1992 three further issues had been raised. Those were issues 59, 60, and 61 which had been accepted by Court. (vide pages 585 and 586 of the brief). The learned Trial Judge has not answered these issues in his judgment.

Issue No. 59. මෙම පැමිණිලිකරුගේ පූර්වගාමීන් විසින් මෙම නඩුවේ 2, 18 විත්තිකරුවන් වන එම නඩුවේ 10, 11 විත්තිකරුවන්ට විරුද්ධව ඉදිරිපත් කර තිබුණ නඩුව නිශ්ප්‍රභා කර ඇත්ද?

Answer should have been - ඔව්.

Issue No. 60. එය මෙම පැමිණිලිකරුට විරුද්ධව විනිශ්චිත කරුණක් වී ඇත්ද?
Answer should have been - නැත.

Issue No. 61. පානදුර දිසා අධිකරණයේ අංක 12349/බෙදුම් දරන නඩුවේ පැමිණිල්ල නිශ්ප්‍රභා කර ඇත්තේ එම නඩුවේ පාර්ශවකරුවන් සමතයකට පත් වූවාට පසුවද?
Answer should have been - ඔව්.

Page 1031 of the brief in the judgment, it was stated as follows:

"ජොරෝනිස්ට 2.2/45 දරන කොාටස හිමිවන අතර එය ජොරෝනිස්ගේ උරුමකරුවන් සහ 5වන විත්තිකරුට හිමි බවට මම තීන්දු කරමි. සිලිදුහාමියන අයට 9.4/48 යන කොටස හිමි බවට මම තවදුරටත් තීන්දු කරමි"

On the basis of the said judgment it was argued by the learned counsel for the 5A defendant-appellant that an interlocutory decree cannot be entered, since it cannot be comprehended as to the manner in which the learned District Judge had arrived at the above shares.

It was further argued by the 01st, 02nd and 18A defendant-appellants that according to the plaint, it was pleaded that at a certain point in the pedigree one Appu Singho who owned ½ share from the corpus transferred his rights to, Athuldura Arachchige John Singho and Medagama Liyanage John Perera. The said Medagama Liyanage John Perera's ¼ share was transferred to the 18th defendant by deed No.4408 dated 28.02.1925. However, it was also pleaded that the 18th defendant had mortgaged the said land and as the 18th defendant could not pay back and release the mortgage, an action was filed in the Requests Courts and was sold at the fiscal's conveyance. At the fiscal's conveyance, Arnolis Perera bought the said share by deed No.12449 dated 1941.01.10.

It is evident that the 1st and 2nd defendants are the children of said 18th defendant. The 18th defendant says that he is in exclusive possession of Lot 4 of the Preliminary Plan marked as X and had claimed the entire plantation and all that is standing thereon.

The 1, 2 and 18th defendant-appellants filed a statement of claim and pleaded that;

(i) Medagama Liyanage John Perera was entitled to ¼ shares from the corpus.

(ii) Thereafter, said Medagama Liyanage John Perera transferred his rights to the 18th defendant by deed No.4408 and thereafter the 18th defendant had enjoyed and possessed the said share and the house which said Medagama Liyanage John Perera was possessing.

The said shares are depicted in Lot 4 of Preliminary Plan No.3593 dated 07-03-1979 was made by R.W. Fernando Licensed Surveyor. At the fiscal's conveyance, Arnolis Perera bought the share which was mortgaged by deed No.12449 dated 1941.01.10 by the 18th defendant. Although it was mortgaged and thereafter sold by a fiscal's conveyance, the 1st, 2nd and the 18th defendants and their family members did not hand over possession of the same and had been in occupation of Lot 4 of Preliminary Plan marked X.

Then, the 18th defendant had gifted his rights to the 1st and 2nd defendant-appellants subject to the life interest of the 18th defendant's wife, Misinona by deed No. 4045 dated 11.11.1970. Thereafter, by deed No.1014 dated 1971.02.03, the original owners, namely Athuldura Aarachchige John Singho transferred 26 Perches out of his remaining share (after deducting ¼ Acres which was transferred to the 3rd defendant) to the 2nd defendant. Thus, the 2nd defendant is entitled to the said 26 Perches. However, on prescription these 1st and 2nd defendants are claiming to the entirety of Lot 4 of the Preliminary Plan and request that the said lots should be excluded from the corpus.

Having investigated the title under section 23 of the Partition Act no. 21 of 1977, it is my view that the claim of prescription by the 01st 2nd and 18th defendants had not been established for the whole of Lot 4, before the learned trial Judge. Therefore, the claim to the entirety of Lot 4 of the Preliminary Plan by the 01st, 2nd and 18th defendant-appellants and their request for the said lots should be excluded from the corpus cannot be accepted. They are entitled only for the 26 Perches which was given to them by John Singho on deed No.1014 dated 1971.02.03 and entitled for prescriptive rights, for the following buildings and soil covered by the said buildings only. Considering the long stay, permitted to have the possession of building numbers 17, 18, 19 & 20 in schedule 1 of the X 1 report.

When a land is gifted or transfer by a deed, it creates a co-ownership, as far as paper title is concerned, there cannot be any dispute on equal shares between the parties. The question is as regards prescriptive title in the manner claimed by the defendant. The 18th defendant had not prescribed to the entire lot 4 in plan X. Before examining these competing claims, let me turn to the law relating to prescription among co-owners.

The substantive principle of law regarding this matter was authoritatively laid down in the case of Corea v. Iseris Appuhamy 15 NLR 65, in which it is stated that the possession of one co-owner is in law the possession of the other co-owners. It was also laid down in that case that it was not possible for one co-owner to put an end to that possession by any secret intention in his mind and that nothing short of an ouster or something equivalent could bring about that result.

The principle of substantial law laid down in that case, was refined in the case of Tillekeratne v. Bastian 21 NLR 12, by the application from the field of the law of evidence, a presumption, that it was open to court from the lapse of time, in conjunction with other circumstances of a case, to presume that possession originally that of a co-owner, had since become adverse.

In Simon Perera Vs. Jayatunge 71 NLR 339, it was decided that there was sufficient evidence of ouster and that B had acquired as against the other co-owners, prescriptive title from the time of ouster in respect of the lot which she possessed exclusively in pursuance of the amicable division. In this case Thambiah J. said that "the question whether a co-owner has acquired prescriptive title to a divided lot as against the other co-owners is one of fact and has to be determined by the circumstances of each case."

It would be essential to keep in mind that the law relating to co-ownership and "Ouster" to be entitled for the defendant to claim the entire corpus, as against the other co-owners. The contention of the 1st 2nd and 18A defendants seems to be that the 1st, 2nd and 18A defendants have prescribed to the entire lot 4 by long possession adverse to the plaintiff. But it was not proved.

In Seetiya Vs. Ukku 1986 (1) SLR 225, it was decided that nothing short of ouster or something equivalent to ouster is necessary to make possession adverse and end co-ownership. Although it is open to a court from lapse of time in conjunction with other circumstances of a case to presume that possession originally that of a co-owner had later become adverse, the fact of co-owners possessing different lots, fencing them and planting them with a plantation of coconut which is a common plantation in the area cannot make such possession adverse.

The substituted plaintiff giving evidence at the trial mentioned that her grandfather did not take possession of the land and allowed the 18th defendant to be in possession of same. It was her oral testimony to such effect and there was iota of evidence although the 1st, 2nd and 18A defendant-appellants have vehemently denied such leave and licensee of Arnolis Perera from 1941. The substituted plaintiff

states that the plantation was also enjoyed by her predecessors in title and it was a reasonable oral testimony to prove such fact.

The substituted plaintiff denied that the 2nd defendant had obtained a share of 26 Perches by deed already marked as 'ඇ 12' and later marked as '2වි1'. It is evident that 'ඇ 12' was a transfer deed and the 2nd defendant was given 26 Perches of land as a settlement on 03.02.1971 in Panadura District Court Case No. 12349/P. The dispute appears to have started in 1970, when the 18th defendant and the 2nd defendant were attempting to put up a house on the disputed land. The plaintiffs in case No. 12349/P were Arnolis and Chilbert and they were having life interest in the said disputed property. They filed case No. 12349/P seeking an injunction restraining the 18th defendant in the present case (Themis) and his son 2th defendant in the present case (Albert), for erecting a house on the disputed land. Although the substituted plaintiff denied that the 2nd defendant had obtained a share of 26 Perches by a deed already marked as 'ඇ 12' and later marked as '2වි1', the 2nd defendant was given the said deed for 26 Perches of land on deed No. 1014 dated 03.02.1971. Thus, the substituted plaintiff's denial has no merit in this issue.

After the plaintiff closed her case marking in evidence up to 'ඇ 18' the 2nd defendant started to give evidence. The 2nd defendant vehemently denied that his father, 18th defendant was a leave and licensee of Arnolis Perera (grandfather of the Substituted plaintiff-respondent).

It was argued by the 1st, 2nd and 18A defendant-appellants that the learned District Judge had failed to consider the fact that they have prescribed to Lot 4 after 1941, in the absence of any leave and licensee of the 18th defendant. Accordingly, all the issues raised by the said defendant-appellants were answered in the negative.

1st, 2nd and 18A defendant-appellants says that the learned District Judge has failed to appreciate, the 18th defendant, had started to possess the land as of his own, against the ownership of Arnolis Perera after the Fiscal's Conveyance was executed in the year 1941, which phenomenon is interpreted as 'Adverse Possession" thereafter.

In the case of Government Agent Western Province Vs. Perera 11 NLR 337, the usufructuary mortgagees of a land purchased the land at a sale by the Fiscal under a subsequent mortgage, and claimed to set off the amount due on their mortgage against the purchase money. The usufructuary mortgagees did not obtain any Fiscal's transfer, but possessed the land for over ten years. A Bench of three Judges of the Supreme court held that the usufructuary mortgagees had acquired title by prescription to the land, in as much as, after their purchases at the Fiscal's sale, the character of their possession changed and thereafter they did not possess the land.

In Alwis Vs. Perera 21 NLR 321, a person transferred his lands to certain relatives, but continued to be in possession of same for sixty years until the date of action. The Supreme Court held that, in the circumstances of the case, the possession was not permissive and it was decided to have become adverse.

1st, 2nd and 18A defendant-appellants further say that in the present case they and their mother had been in exclusive possession of Lot 4 of Preliminary Plan which lot is separately fenced off from the rest of the land, until this action was instituted in 1977. The substituted plaintiff had tried to prove to Court that after 1941, the 18th defendant was in a permissive possession. It was only her oral testimony and no other witnesses were called to corroborate such evidence. In fact, when she gave evidence in this action, she was 40 years at that time, which denoted that she was born during 1950's.

The 2nd defendant-appellant himself gave evidence that they were in possession of Lot 4 from 1941 for nearly 37 years without any leave and license of any person. In their statement of claim filed by the 18th

defendant along with 1st and 2nd defendants, specifically averred that the 18th defendant was in exclusive possession of lot 4 adversely against anyone's rights.

Under the law of the Sri Lanka, 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 plaintiff in the action. The parenthetical clause which follows, 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.

The concept of 'adverse possession' was explained by Canekeratne J. in Fernando Vs. Wijesooriya, 48 NLR 320 **'**there must by a corporeal occupation of land attended with a manifest intention to hold and continue it and, when the intent plainly is to hold the land against the claim of all other persons, the possession is hostile or adverse to the rights of the true owner. It is the intention to claim the title which makes the possession of the hold of the land adverse, if it be clear that there is no such intention there can be no pretense of an adverse possession" (Vide- The Law of Property in Sri Lanka, Vol 1 G.L. Peiris pg. 99, 100).

In the circumstances 1st, 2nd and 18A defendant-appellants says that Lot 4 of Preliminary Plan No. 3593 marked as X was made by R.W. Fernando, Licensed Surveyor should be excluded from the said plan and the 'adverse possession' of the 1st, 2nd and 18A defendant-appellants should be upheld.

When considering the above-mentioned legal provisions and authorities I am unable to agree with the arguments of the 1st, 2nd and 18A defendant-appellants.

6A defendant appellant's statement of claim dated 12th January 1987 indicated that the 6A defendant-Appellant accepted the plan No 3593 which was relied by the plaintiff. Not only that the 6A defendant admitted the plaintiff's stance that Daniel the original owner gifted it to his two children Karnelis and Punchi appu, half of the said land going to each heir. This appellant however limited her claim to only lot 5 of the land depicted in the said plan No 3953 and also explained the pedigree thoroughly in her statement of claim and how the portions of land had been passed on, in the said lot 5.

The appellant then concluded that 7/12 of lot 5 were owned by her, 4/12 were for Sirimanis (7th defendant) and 1/12 for a minor child named Ranjini and asked that the judgment in this partition action depicting same. During the trial the 6A defendant - appellant commenced leading evidence on the 17th of June 1997 and concluded her evidence on the 5th March 1999.

The 6A defendant - appellant argued that the original owner of the land described in the plaint was one Daniel and as claimed by the plaintiff the said land devolved upon his children Karthelis and Punchi Appu. The half share of Punchi Appu devolved upon Joronis, Silinduhamy and Pieris. The said Joronis and Pieris by deed No 9322 dated 16th July 1881 (6වි1) transferred their respective portions to Dochanhamy. The title of Dochan hamy devolved to his children Ango appu and Lisa Hamy in equal share. Ango Appu's title devolved upon John Singo.

John Singho by d eed No 2571 dated 11.09.1948 gifted his title by 6වි2 in equal shares to his three children Elaris Kulatunghe, Emanis Kulaunghe and Sirimanis Kulatunghe (1/6 each). Elaris then in 1975 gifted his 1/6 to the 6A defendant and Ranjani Kulathunga who in turn got 1/12th each in terms of 6වි3. Emanis Kulathunghe's 1/6 devolved to 6 individuals, namely; U. A Rodrigo (8th defendant), Cyril Kulatunga (9th defendant), Daisy Kulatunga (10th defendant), Dora Kulatunga (11th defendant), Newton Kulatunga (12th defendant) and Beta Kulatunga (13th defendant). The 10th to 13th defendants by 6වි4 gifted their shares to the 6A defendant - appellant who thereby received 2/12th shares.

The remaining 1/6 belonging to Laisa hamy was given to her six children in 1/12 portions. Namely, to Davith, Maginona, Nonnohamy, Rango Nona, Simon and William. Then Simon and William gifted their share of 1/12th each to U. Sirimanis by virtue of the deed marked as 6වි5. Davith's 1/12th passed on to Kalo Nona, Maginona's 1/12th passed on to Emanona, Nanno hamy's 1/12th passed on to Premadasa and Rango Nona's 1/12th passed on to Belin Nona. The said Kato Nona, Emanona, Premadasa and Belin Nona jointly executed deed No 117 marked as 6වි6 in favour of the 6A defendant who in turn got a total of 4/12th portions. The plaintiff's position is also that the original owner of the land described in the plaint was one Daniel. As claimed by the plaintiff the said land devolved upon his children Karthelis and Punchi Appu. The half share of Punchi Appu devolved upon Joronis, Silinduhamy and Pieris.

The appellant tendered as evidence the following 6 documents during the trial;

a) 6වි1- Deed No. 9322 certified by Notary K.D Juanis dated 16th July 1881
b) 6වි2 Photocopy of a Deed No. 2571 dated 17th of October 1948 - 6v2A -certified copy of the above deed.
c) 6වි3 Deed No. 84 certified by Notary public, Hemaratna Perera dated 17th January 1975.
d) 6වි4 Deed No. 6407 certified by Notary public, Hemaratna Perera dated 22nd December 1985.
e) 6වි5- Photocopy of Deed No. 4657 dated 1947/12/18 – 6වි5A- certified copy of the above deed.
f) 6වි6 - Deed No. 117 certified by Hemaratna Perera, Notary public, dated 02.03.1975.

The documents marked 6වි2 and 6වි5 were marked subject to proof as they were photocopies. Thereafter, the certified copies of 6වි2 and 6වි5 were marked as 6වි2A and 6වි5A respectively. Thus, all the documents marked by the 6A defendant have been accepted without any further challenge. As per 6වි3 the 6A defendant became the owner of 1/12th share of the land more fully set out therein. (that deed is dated 17.01.1975). As per 6වි4 the 6A defendant became the owner of four (04) portions of 1/24th shares which equals 2/12th of the land more fully setout therein. As per 6වි6 the 6A defendant became the owner of 4/12th share of the land more fully setout therein. (that deed is dated 02.03.1975).

It is evident that all the aforesaid deeds refer to the same two-acre property. Thus, the 6A defendant acquired a total of 7/12th shares (1/12th + 2/12th + 4/ 12th) of the two-acre property. The title of the 6A defendant emanates from the deed marked as 6වි1 which refers to the said two-acre property. In terms of the 6A defendant's evidence, her claim is in relation to Lot 5 and 6 of the plan No 3593 08.03.1979 prepared by R. W. Fernando, Licensed Surveyor and produced as X.

The 6A defendant-appellant says that the judgment is contrary to law and is against all evidence. The learned District Judge has whilst narrating what the witnesses stated failed to evaluate such evidence or analyze the rights of each party. The position of the 6A defendant-appellant is that in lieu of the rights derived from Peiris and Joranis on 6වි1, Gamage Dochanhamy the grantee of the said deed possessed lot 5 in plan X as a separate entity and prescribed to to the same. The learned District Court Judge has rejected the appellant's claim of prescription, but completely failed to state what share of the corpus Dochanhamy and her heirs are entitled to. The pedigree accepted by the learned trial Judge is not supported by evidence lead and demonstrated in the District Court case.

The learned Judge has held that the plantations and improvements in Lot 5 (in plan X) should go to Dosihamy, but there is no evidence for this, and moreover, it is contrary to the evidence led. As the plantations and improvements in lot 5 have been exclusively claimed by the 6A defendant-appellant and

the 7th defendant only. It was argued by the 6A defendant-appellant that by the judgment, the learned District Judge has not analyzed the evidence and yet answered the 6A defendant's issues against her.

It was revealed that there were 3 disputes regarding the corpus.

a) The 1st defendant and the 2nd defendant, with their father (the 18th defendant) claimed lot 4 by prescriptive possession in plan X.

   2nd defendant was entitled to 26 Perches on deed No. 1014 of 03.02.1971 (marked as P12) from lot 4 in plan X. Therefore, Albert (2nd defendant) being a co-owner cannot prescribe lot 4 as there is no ouster proved against the plaintiff in this case.

b) 6A defendant and 28th defendant claimed lot 5 and 6 by prescriptive possession in plan X.

c) 16th defendant and 19th defendant claimed lot 1 by prescriptive possession in plan X.

The 19th defendant is the son of the 15th defendant who died during the pendency of this action. 19th defendant claims lot 1 on a deed given by the 16th defendant. That is the deed marked as 19වි8 dated 18.02.1979, deed No. 1417. This deed was written, pending the present partition action and therefore no title passes to the 19th defendant. The said 19th defendant has accepted that the lot he claims on 19වි8 is a portion of the larger land. When he was giving evidence 19th defendant admitted that his father came on to the disputed land with the leave and license of Lawanis Peiris, who was the 17th defendant and a co-owner of the land who got rights under deed 15වි6.

It is my view that the 16th defendant cannot prescribe lot 1 because admittedly he was a licensee of Lawanis and lot 1 is a portion of the disputed corpus. It is very clear that no title passes to the 19th defendant on 19වි8 as the said deed was executed pending this partition action. Thus, compensation is payable for the building and plantations, to the estate of the 16th defendant.

In the above circumstances I find that the material placed before the trial judge does not establish exclusive title to lot 1 in plan X. It is my view that according to the evidence available, the 19th defendant-appellant failed to prove that he and his predecessors prescribed to Lot 1 in Plan marked X and therefore the said lot 1 need not to be excluded from the corpus.

The corpus should be lot 1 to lot 9 and lot 13 of the Preliminary Plan marked as X. Lot 9 should be reserved as a common road. Similarly, lot 13 should be left as a common road.
In the above said circumstances, we set aside the judgment dated 22.09.2000 and re-calculate the shares of the land in accordance with the pedigree tendered by different parties.

The new shares are as follows:

Substituted – plaintiff	16/48
1st defendant	No shares
2nd defendant	26 Perches Only
03rd & 04th defendants	40 Perches Only
05th defendant	18/48
06th defendant	53 Perches (1/3 from 1 Acre)
07th defendant	53 Perches (1/3 from 1 Acre)

08th defendant	8 Perches (1/18 from 1 Acre)
09th defendant	8 Perches (1/18 from 1 Acre)
10th defendant	8 Perches (1/18 from 1 Acre)
11th defendant	8 Perches (1/18 from 1 Acre)
12th defendant	8 Perches (1/18 from 1 Acre)
13th defendant	8 Perches (1/18 from 1 Acre)
14th defendant	80 Perches Less from 4/48
15th defendant	80 Perches Less from 6/48
16th defendant	No shares (entitled only for compensation for the improvements)
17th defendant	1/48
18th defendant	No shares (entitled for prescriptive rights, for the following buildings and soil covered by the said buildings only. Considering the long stay, permitted to have the possession of building numbers 17, 18, 19 & 20 in schedule 1 of the X 1 report.)
19th defendant	No shares (entitled for prescriptive rights, for the following buildings and soil covered by the said buildings only. Considering the long stay, permitted to have the possession of building numbers 3,4,5,6 & 7 in schedule 1 of the X 1 report.)
Un allotted	3/18

Appeal allowed.

Plantation and improvements should be given and divided according to the Preliminary Survey Report marked as X1.

Interlocutory Decree be entered accordingly.

The plaintiff is entitled for cost in the District Court as well as in this Court.

Registrar is directed to send the original case record along with a copy of this judgement to the District Court of Panadura.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal