

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

In the matter of an Appeal under section 754 of the  
Civil Procedure Code.

**DC Avissawella Case No:**

Welliwaththage Mendis Singho (Deceased)  
of Bope, Padukka

**DC-13796/P**

**Plaintiff**

**CA Appeal No:**

**Vs.**

**DCF-0715-97**

- 1.(A) Surrage Pranghasena  
Gamage Waththa, Bope
- 2.(A) Surrage Pranghasena  
Gamage Waththa, Bope
3. Surage Harmanis (Deceased)  
Gamage Waththa, Bope
4. Pathmaperumage Pransina Hami  
Gamage Waththa, Bope
5. Padukkage Simon Singho  
| Gamage Waththa, Bope
6. Munagamme Hettiarachchige Neris  
Singho, Bope Gamage Waththa
7. Padukkage Piyasena  
Bope Gamage Waththa
8. W.A. Maggi Nona  
Bope Gamage Waththa
9. W.A. Eating Nona  
No. 515/1, Deepika Mawatha.  
Pitipana North

**Defendants**

**And now between**

Welliwaththage Mendis Singho (Deceased)  
of Bope, Padukka

**Plaintiff- Appellant**

Welliwaththage Priyantha Anura Kumara  
Bope, Padukka

**Substituted Plaintiff- Appellant**

**Vs.**

- 1.(A) Surrage Pranghasena  
Gamage Waththa, Bope
- 2.(A) Surrage Pranghasena  
Gamage Waththa, Bope
3. Surage Harmanis (Deceased)  
Gamage Waththa, Bope
- 3.(A) Surage Sriyalatha  
Gamage Waththa, Bope
- 3.(B) Surage Kamalawathi  
Hadapangoda, Udahawatta
- 3.(C) Surage Rangani Kusumalatha  
Gamage Waththa, Bope
- 3.(D) Surage Jayarathne  
Gamage Waththa, Bope
- 3.(E) Surage Pathmasiri  
Gamage Waththa, Bope
- 3.(F) Surage Somalatha  
Gamage Waththa, Bope
- 3.(G) Surage Ruwan Lakshman  
Gamage Waththa, Bope
4. Pathmaperumage Pransina Hami  
Gamage Waththa, Bope

- 4.(A) Padukkage Don Piyasena  
Gamage Waththa, Bope, Padukka
- 4.(B) Padukkage Don Premadasa  
Mahagaswaththa, Madala, Ellarawa
5. Padukkage Simon Singho  
| Gamage Waththa, Bope
5. (A) Gnanawathi Amarasinghe  
Gamage Waththa, Bope, Padukka
5. (B) Padukkage Don Nihal Ananda  
Gamage Waththa, Bope, Padukka
- 5.(C) Padukkage Don Suneetha Irangani  
Grama Niladari Division, 454, Uggalla,  
Padukka
- 5.(D) Padukkage Don Ranjith Kularathne  
Gamage Waththa, Bope, Padukka
6. Munagamme Hettiarachchige Neris  
Singho, Bope Gamage Waththa
- 6.(A) Munagame Hettige Ratnasiri  
Bope Gamage Waththa
7. Padukkage Piyasena  
Bope Gamage Waththa
8. W.A. Maggi Nona (Deceased)  
Bope Gamage Waththa
- 8.(A) Wadippuliachchige Eating Nona  
No. 515/1, Deepika Mawatha.  
Pitipana North
9. Wadippuliachchige Eating Nona  
No. 515/1, Deepika Mawatha.  
Pitipana North

**Defendant - Respondents**

**Before:** M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

**Counsel:**

Lakashan Perera PC with Fernando, instructed by D.M. Niluka Dissanayake for  
the substituted Plaintiff-Appellant

**Argued on:** 01.02.2022

**Written submissions tendered on:**

23. 02.2022 by the Plaintiff - Appellant

**Order delivered on:** 19.05.2022

**S.U.B. Karalliyadde, J.**

The Plaintiff-Appellant (hereinafter referred to as the Plaintiff) instituted the instant partition action in the District Court of Avissawella seeking to partition a land called and known as 'Kahatagahawatta'. Before the institution of the instant action, the same land was sought to be partitioned by one Martin Singho in P 8179 and by the Plaintiff in P 11863. Nevertheless, both actions were withdrawn without proceeding to trial. Thereafter, the Plaintiff has instituted the instant action bearing No. P 13796. The instant action proceeded to trial on 2 admissions and 15 points of contest recorded on 31.06.1990. Accordingly, it has been admitted by the parties that the land sought to be partitioned is depicted in Plan No. 82 A dated 20.04.1974 (marked as X) prepared by the Surveyor Mr. Welagedara as lots 1 and 2 and that the original owner of that land was Baba Appu. Even through, it has not been recorded as admissions, the parties are not at variance about the facts that said Baba Appu had 4 children namely, David alias Jarcolis, Naris, Julis and Juwanis, that said Juwanis died intestate and issueless and his

rights were devolved on his siblings, David alias Jarcolis, Naris and Julis hereinbefore mentioned.

The instant action has been instituted by the Plaintiff on the basis that said Naris and Julis also died intestate and issueless and therefore, their rights were devolved on David alias Jacolis and he became the sole owner of the land sought to be partitioned. At the trial, changing his position, the Plaintiff has testified that Naris and Julis had no legally valid marriages and therefore, their children would not inherit their rights of the land.

The position of the 4<sup>th</sup> to 7<sup>th</sup> Defendant-Respondents (hereinafter referred to as the 4<sup>th</sup> to 7<sup>th</sup> Defendants) have been that the co-owners of the land sought to be partitioned had executed the amicable partition agreement dated 30.06.1943 marked 3 8 and prepared a partition plan bearing No. 724 dated 12.07.1943 marked 3 8 through the Surveyor Mr. Rodrigues according to the amicable partition agreement marked 3 6. Therefore, the argument of the 4<sup>th</sup> to 7<sup>th</sup> Defendants has been that since the land sought to be partitioned has been amicably partitioned between the co-owners, the Plaintiff is not entitled to maintain the action. Plan marked 3 8 has been superimposed by the Commissioner of the case, Mr. welagedara on a copy of his preliminary plan marked X and prepared the superimposition plan and the report marked 3 9 and 3 9 4 respectively. According to the report marked 3 9 4, the Court could be satisfied that the land shown in the preliminary plan marked X is identical to the land shown in the superimposed plan marked 3 9.

By the impugned judgment dated 13.03.1997, the learned Additional District Judge has held that the Plaintiff has failed to prove the pedigree to the land and it has been proved that the land sought to be partitioned had been divided among the co-owners as per the amicable partition plan marked 3 8 and possessed the land by them according to that

plan. On that basis the action has been dismissed by the learned Additional District Judge.

For the convenience of the Court, I will first consider whether there had been evidence in the case for the learned Additional District Judge to come to the conclusion that after the amicable partition plan marked 3 B 8 was prepared the co-owners had possessed the land according to that plan. By the amicable partition agreement dated 30.06.1943 marked 3 B 6, it has been agreed by the co-owners to prepare a partition plan and accordingly, the plan No. 724 dated 12.07.1943 marked 3 B 8 had been prepared by the Surveyor Mr. Rodrigues. Nevertheless, there is no evidence before the Court that the parties to the agreement marked 3 B 6 had possessed the land according to 3 B 8. The Plaintiff has denied the fact that plan marked 3 B 8 had been prepared and that the co-owners had possessed the land according to that plan. On behalf of the defence, only the 6<sup>th</sup> Defendant has given evidence at the trial. Nowhere in his testimony he has stated that the co-owners of the land have possessed the land according to the amicable partition plan prepared by Mr. Rodrigues in the year 1943 marked 3 B 8. According to the preliminary plan and report marked X and X1 respectively, and the superimposition plan and the report prepared by the Commissioner of the case Mr. Welagedara marked 3 B 9 and 3 B 9 a respectively, there are no definite boundaries situated physically on the ground to separate the land into lots as depicted in the amicable partition plan marked 3 B 8. No Surveyor has given evidence at the trial. Apart from that the deeds produced at the trial on behalf of both parties, marked 3 B 1 dated 24.05.1973, 3 B 2 dated 22.02.1948, 3 B 1 dated 26.07.1955, 3 B 7 dated 04.12.1933 and 3 B 8 dated 01.08.1953 which were executed subsequent to the amicable partition agreement dated 30.06.1943 marked 3 B 6 was made and the partition plan dated 12.07.1943 marked 3 B 8 was prepared neither speaks about 3 B 6 nor 3 B 8. Under the above stated

circumstances, I hold that the 4<sup>th</sup> to 7<sup>th</sup> Defendants have failed to prove that the co-ownership of the parties had come to an end, after the amicable partition agreement and the plan were prepared for the reason that there is no evidence that the co-owners have acted upon and possessed the land according to the amicable partition agreement and the plan.

Now I will consider the contest regarding the pedigree. In the 2<sup>nd</sup> paragraph of the Plaint dated 12.11.1973 (at page 65 of the appeal brief) it has been stated that Naris and Julis died unmarried and issueless. The Plaintiff was the 2<sup>nd</sup> Defendant in the partition action bearing No P 8179. In his amended statement of claim dated 29.05.1958 marked 3 ̄ 4 (at page 271 of the appeal brief) the Plaintiff had admitted *inter alia*, that Julis died, leaving 7 children, each of them became entitled to 1/7 share of Julis's rights and the 7 children of Julis had acquired prescriptive rights to the Julis's rights.

Apart from the above stated facts, the Plaintiff had bought rights of the land sought to be partitioned from one Bodhipala on deed No. 11492 dated 26.07.1955 marked 3 ̄ 1. Said Bodhipala had derived title to the land on deed No. 8645 dated 22.02.1948 marked 3 ̄ 2 and the vendor of 3 ̄ 2 is one Sandohamy. She had transferred on 3 ̄ 2, the rights she inherited from her father, Julis. It is relevant to note that the Plaintiff had obtained an injunction in P 8179 in the year 1961 against the 5<sup>th</sup> Defendant to restrain him from constructing a building on the land sought to be partitioned on the basis that the Plaintiff had acquired rights of the land on the hereinbefore mentioned deed marked 3 ̄ 1. Under such circumstances, the Plaintiff could not argue that Julis demised intestate and issueless or he had no legally valid marriage and therefore, his children would not inherit Julis's rights. According to the Defence, upon the death of Julis, his rights have been devolved on his 7 children, namely; Podihamy, Helenahamy, Sandohamy, Disihamy, Podisingho, Thasohamy and Kumanaris.

Even though, the Plaintiff has instituted the instant action on the basis that Naris and Julis had died unmarried and issueless, while giving evidence at the trial he had attempted to say that said Naris and Julis had not contracted legally vailed marriages and therefore, David became the owner of the entire land sought to be partitioned. That position of the Plaintiff has been based on the journal entry dated 27.10.1965 (marked ວຸ 3) of the case record in P 8179. According to that journal entry, the learned Counsel who had appeared for Martin singho who was the plaintiff in that action had submitted to the Court that he is withdrawing the action for the reason that the vendor of the deed in favour of Martin singho was not married to Julis and therefore, Martin singho cannot maintain the action. Martin singho's rights to the land had been based on a deed executed in his favour by a woman who had recited her title to the land as the wife of Julis. In that journal entry, the learned Counsel who had appeared for the 11<sup>th</sup> and 12<sup>th</sup> Defendants (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the instant action) had submitted to the Court that out of 4 children of Baba Appu, only David was married. The argument on behalf of the Plaintiff in the instant action has been that in view of the above stated submissions recorded in the journal entry marked ວຸ-3, the parties had admitted that Naris and Julis had no legally valid marriages and therefore, their rights had been devolved upon their brother, David. Other than the 1<sup>st</sup> and 2<sup>nd</sup> Defendants neither the Plaintiff nor the other Defendants in the instant action had been parties to the action bearing No. P 8179.

Even though, the facts stated in ວຸ-3 had been recorded as submissions of the learned Counsel appeared for the plaintiff and the 11<sup>th</sup> and 12<sup>th</sup> defendants in P 8179, those facts were not recorded in that case as formal admissions between the parties.

When cross-examining on 18.11.1982, the Plaintiff has testified thus;



“පුලිය, නේරිය, පුවානිය ගේ කසාදයක් ගැන දැනගෙන හිටියේ නැහැ. කසාද බැඳල බව මම දන්නේ නැහැ.... මම අද වන තෙක් දන්නේ නැහැ පුලියට දරුවන් හිටියද කියල. මම ඒ අය ගැන දන්නේ නැහැ.“ (at page 90 of the appeal brief.)

As per the said evidence of the Plaintiff, it is evident that he had no knowledge about the inheritance under Naris and Julis. Under the above stated circumstances, the Court can come to the conclusion that the Plaintiff has failed to prove that Naris and Julis had not contracted legally valid marriages.

According to the evidence placed before the learned Additional District Judge, upon the death of Naris his rights had been devolved on his 4 children, namely; Wastuhamy, Sophihamy, Karlinahamy, Singhappu and Abilinsingho. Other than said Wastuhamy, the other 3 children of Naris had transferred their rights to Wijesinghe Appuhamy on deed bearing No. 14692 dated 14.12.1919 marked 3 ටී 9. There is no evidence about the devolution of the rights under said Wastuhamy and Wijesinghe Appuhamy. Therefore, the Court will leave the rights of said two persons un-allotted and anyone who is entitled to that rights could prove rights before the District Court and claim those rights.

There had been evidence in the case that Julis had died intestate and issueless leaving 7 children as his heirs, namely; Podihamy, Helenahamy, Sandohamy, Disihamy, Podi Singho, Thesohamy and Kumaneris. Said Sandohamy's rights had been devolved on Bodhipala on deed No. 8645 dated 22.02.1948 marked 3 ටී 2 and he had transferred his rights to the Plaintiff by deed No. 11492 dated 26.07.1955 marked 3 ටී 1. Upon the death of Disihamy her rights had been devolved upon her daughter, Pransina, the 4<sup>th</sup> Defendant. Thesohamy had conveyed his rights to Simiyonsingho and Elisahamy on deed No. 13056 dated 04.12.1933 marked 3 ටී 7 and they had transferred their rights to Piyasena, the 7<sup>th</sup> Defendant on deed No. 12435 dated 05.06.1953 marked 3 ටී 8. There

is no evidence acceptable to the Court about the devolution of rights under Podihamy, Helenahamy, Podisingho and Kumaneris. Therefore, their rights will be left un-allotted and anyone who is entitled to those rights could prove rights before the District Court and claim those rights.

The original owner, Baba Appu's child David alias Jacolis's rights had been devolved upon his death on his children; Peirissingho (the 1<sup>st</sup> Defendant), Carolissingho (the 2<sup>nd</sup> Defendant), Sophyhamy and Johanahamy. Sophyhamy and Johanahamy had transferred their rights by deed No. 12964 dated 24.05.1973 marked 1 to the Plaintiff.

There is no evidence to prove that the co-owners had acquired prescriptive rights over the other co-owners.

The parties are entitled to the following undivided shares of the land depicted in plan marked X as lots 1 and 2.

Plaintiff – 90/420

1<sup>st</sup> Defendant – 35/420

2<sup>nd</sup> Defendant -35/420

4<sup>th</sup> Defendant – 20/420

7<sup>th</sup> Defendant -20/420

Un-allotted - 220/420

The following shares will keep un-allotted and anyone who is entitled to those shares could prove title before the District Court.

Wijesinghe Appuhamy – 112/420

Wastuhamy – 28/420

Podihamy -20/420

Helenahamy -20/420

Podisingho – 20/420

Kumaneris – 20/420

The 4<sup>th</sup> Defendant is entitled to 4 Lunumidella trees between the age of 25-30 years and 2 Jack trees between the age of 30-40 years in lot 1 mentioned in the Surveyor report marked X1. Other than the said plantation, the parties are entitled to all other plantation and improvements in lots 1 and 2 as claimed by them before the Surveyor. The Surveyor is directed to partition the land in a manner which could be included the plantation and other improvements claimed by the parties before the Surveyor as far as possible. The cost of the case should be taxed cost and cost of litigation. The parties should bear the costs proportionately. The Plaintiff should bear the costs in respect of the un-allotted shares and he could recover the same from the parties who would be declared entitled to those un-allotted shares. The learned Additional District Judge is directed to enter an interlocutory decree according to his judgement. Impugned judgement dated 12.03.1993 of the learned Additional District Judge is set aside. No costs ordered.

**JUDGE OF THE COURT OF APPEAL**

**M.T. MOHAMMED LAFFAR, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**