

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

**SRI LANKA**

Jayalath Pedigedara Rankira (deceased)

**Plaintiff**

Jayalath Pedigedara Abesinghe  
Dodanwala, Muruthalawa.

**Substituted Plaintiff**

**CA No. 1258/9(F)**  
**District Court Kandy**  
**Case No: 9602/P**

**-Vs-**

1. Elamaldeniye Karunadhipathigedara  
Jothirathne (deceased)  
IA. Elamaldeniye Karunadhipathigedara  
Amarasena.
2. Elamaldeniye Karunadhipathigedara  
Sewranga (deceased)  
2A. Elamaldeniye  
Karunadhipathigedara Samarasena.
3. Jayalath Pedigedara Premapala  
(deceased)  
3A. Jayalath Pedigedara  
Jayasuriya.
4. Herath Mudiyansegedara  
Ranmenika.
5. Y.B.M. Ekanayake.
6. N.M.Nandawathi  
All of Dodanwala,  
Muruthalawa.

**Defendants**

**And**

Jayalath Pedigedara Sarath Jayasuriya  
Dodanwala, Muruthalawa.

**3<sup>rd</sup> Substituted Defendant-Appellant**

-Vs-

Jayalath Pedigedara Abesinghe  
Dodanwala, Muruthalawa.

**Substituted Plaintiff-Respondent**

IA. Elamaldeniye Karunadhipathigedara  
Amarasena.

2A. Elamaldeniye Karunadhipathigedara  
Samarasena.

4. Herath Mudiyansegedara  
Ramenika.

5. Y.B.M. Ekanayake.

6. N.M. Nandawathi.

**Defendants-Respondents**

Before: C.P. Kirtisinghe - J.  
R. Gurusinghe - J.

Counsel: A. S. M. Perera, PC with Prabodini Kumarawaduge for the substituted  
3A Defendant Appellant.  
Respondents are absent and unrepresented.

Argued on: 08.03.2023

Decided On: 06.06.2023

**C. P. Kirtisinghe - J.**

The 3<sup>rd</sup> Substituted – Defendant – Appellant has preferred this appeal from the judgement of the learned District Judge of Kandy dated 02.12.1999. By the aforesaid judgment the learned District Judge had accepted the pedigree of the plaintiff subject to minor deviations and decided the pedigree dispute in favour of the Plaintiff.

The Plaintiff had instituted this partition action to partition the land called “Wesbadeniye Kumbura” alias “Wesbaange Kumbura” which is more fully described in the schedule to the amended plaint. The Commissioner in this case B.K. Cader LS had prepared and tendered to court the preliminary plan no. 489 which was marked ‘X’ at the trial. In that plan the corpus is depicted as LOTS 1,2 and 3. Surveyor Bernard P. Rupasinghe who had conducted an alternative survey had prepared the alternative plan No. 546A which was marked as ‘Y’ at the trial. In preparing this plan Surveyor Rupasinghe had superimposed the Commissioner’s plan on the boundaries he had surveyed.

The trial had proceeded on 43 issues. The Plaintiff had raised the issues No. 1 – 4 and 1A and 2A Defendants had raised the issues No. 5 – 16. Issues No. 17 – 24 had been raised on behalf of the 3<sup>rd</sup> Defendant. The 4<sup>th</sup> Defendant had raised the issues No. 25 – 29 and the 5<sup>th</sup> Defendant had raised the issues No. 30 – 36. The 6<sup>th</sup> Defendant had raised the issues No. 37 – 43.

There had been several corpus disputes and pedigree disputes between the parties. The 6<sup>th</sup> Defendant was asking for the exclusion of LOT No. 1 of the preliminary plan of the commissioner which is also shown as LOT 1 in the alternative plan marked ‘Y’ on the basis that it is a part of the adjoining land owned by her. According to the evidence of Survey Rupasinghe and the superimposition done by him, it is obvious that the aforesaid LOT 1 is a part of the adjoining land. The Substituted - Plaintiff had not denied this position in his evidence. Therefore, the learned District Judge has correctly excluded that portion from the corpus. The 4<sup>th</sup> Defendant had asked for a prescriptive right to LOTS 2 and 3A in plan ‘Y’ on the basis of long and continued possession and the issue No. 28 had been raised on that basis. LOT 3A is a part of paddy field and LOT 2 is a high land. The Substituted – Plaintiff in his cross examination had admitted that the 4<sup>th</sup> Defendant is in exclusive possession of the high land portion and she is residing there since 1950. The 4<sup>th</sup> Defendant is also in possession of the portion of the paddy field shown as LOT 3A in plan ‘Y’ from the time that he could remember. The 4<sup>th</sup> Defendant is not a co-owner of the corpus and she is not entitled to any undivided rights according to the proved pedigree. Therefore, the learned District Judge was justified in coming to the conclusion that the 4<sup>th</sup> Defendant had established a prescriptive right to LOTS 2 and 3A in plan ‘Y’.

There are several corpus disputes between the parties and the main dispute is between the plaintiff and the 3<sup>rd</sup> Defendant. The 4<sup>th</sup> Defendant had disclosed

only a portion of the devolution of title. The 5<sup>th</sup> Defendant had accepted the plaintiff's pedigree. The 1<sup>st</sup> and the 2<sup>nd</sup> Defendants are disputing the devolution of the rights of Suramba, Ganitha and Punchina as shown in the Plaintiff's pedigree. They accept the major portion of the plaintiff's pedigree. The 3<sup>rd</sup> Defendant had disclosed a different devolution of title. The learned District Judge has carefully taken into consideration the devolution of title of the parties.

The learned District Judge has rejected the pedigree of the 4<sup>th</sup> Defendant on the basis that it is an incomplete pedigree and the 4<sup>th</sup> Defendant has not preferred an appeal against that finding. The 4<sup>th</sup> Defendant had produced deeds to show that she is entitled to a 1/3<sup>rd</sup> share of the corpus but was unable to disclose the devolution in respect of the balanced 2/3<sup>rd</sup> share. Therefore, the learned District Judge was justified in rejecting that pedigree. The 3<sup>rd</sup> Defendant had disclosed a different devolution of title as against the pedigree of the Plaintiff. The learned District Judge has preferred to accept the pedigree of the Plaintiff and rejected the pedigree of the 3<sup>rd</sup> Defendant. One has to prove his pedigree on a balance of probability of the available evidence and for that purpose one has to compare the two pedigrees and decide which is more probable. When considering the Plaintiff's pedigree, one has to take in to consideration the devolutions disputed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

The 3<sup>rd</sup> Defendant had disclosed the following pedigree in his amended statement of claims. One Sirimala had owned an extent of two Pelas of paddy in this land on two deeds and he had transferred those rights to Pinchiukku in 1900 by the deed No. 3470 (marked 3V4). Pinchiukku had transferred those rights to Pinchiukkuwa by deed No. 29662 dated 10.10.1930 (marked 3V5). Pinchiukkuwa had transferred same to the 3<sup>rd</sup> Defendant by deed No. 1697 dated 27.05.1974 (marked 3V6). According to this pedigree the original owner shown was Sirimala. But the 3<sup>rd</sup> Defendant in his evidence had stated that the original owner was one Punchirala. According to his evidence Sirimala had purchased those rights in a public auction and to substantiate this position produced the deed marked 3V3. The extent mentioned in the deed is one Amunam and two Pelas. According to the evidence of the 3<sup>rd</sup> Defendant, Punchirala's rights had devolved on the 3<sup>rd</sup> Defendant on the deeds marked 3V4, 3V5 and 3V6. The learned District judge had observed that in the deed marked 3V3 upon which Punchirala's rights were transferred to Sirimala there is a reference to an earlier deed which shows that Punchirala was not the original owner of the corpus. The learned District judge has observed that the 3<sup>rd</sup> Defendant had made a false statement in his evidence to the effect that Punchirala was the original owner when Punchirala had

derived his rights from a previous owner. That is not material infirmity in the 3<sup>rd</sup> Defendant's evidence because in a pedigree there can always be a still older previous owner.

The learned District Judge had observed that the land referred to in the deed marked 3V3 is a land in extent of one Amunam and two Pelas (paddy sowing extent) out of which one Pela had been transferred to Sirimala. The learned District Judge has also observed that the Plaintiff had instituted this partition action to a land which defers to it in extent. In his extensive written submission where he had not left a single stone unturned in the interest of his client, the learned Presidents Counsel for the substituted Defendant-Appellant had drawn our attention to the fact that there is a reference to an extent of three Pelas in the deed marked 3V4. Therefore, it is the submission of the learned Presidents Counsel that although only an extent of one Pela was transferred to Sirimala by 3V3, Sirimala had acquired rights to this land on two deeds and therefore Sirimala owned three Pelas in the land. The extent referred to in 3V4 is an extent of three Pelas. We agree with that submission. However, as the learned District Judge has correctly observed there is a discrepancy in extent of the land referred to in the deeds produced by the 3<sup>rd</sup> Defendant and the land referred to in the deeds produced by the plaintiff. The deeds marked 3V4, 3V5 and 3V6 produced by the 3<sup>rd</sup> Defendant refer to a land in extent of three Pelas. The land referred to in the deeds produced by the Plaintiff is a land in extent of one Yelamuna which is equal to an extent of six Pelas. Therefore, one cannot come to the conclusion that the deeds produced by the 3<sup>rd</sup> Defendant refer to the corpus in this case which is very much larger (double the extent) than the land referred to in the deeds produced by the 3<sup>rd</sup> Defendant. There are discrepancies in the boundaries also. The boundaries referred to in the deeds produced by the 3<sup>rd</sup> Defendant do not tally with the boundaries in the land surveyed in this case. In the deeds produced by the 3<sup>rd</sup> Defendant the Northern, Eastern and Western boundaries are referred to as "Ella" but in the land surveyed the Northern, Eastern and Western boundaries are referred to as "Banage Watta, Palpalekura and Wesbadeniye Watta". In the 3<sup>rd</sup> Defendant's deeds, the Southern boundary is referred to as a portion of the same land. But according to the preliminary plan a portion of the same land does not border the corpus to the South. According to the preliminary plan the Southern Boundary is "Batugedarawatta". None of the boundaries referred to in the 3<sup>rd</sup> Defendant's deeds tally with the existing boundaries of the corpus as shown in the preliminary plan. Therefore, one cannot come to the conclusion that the land referred to in the deeds

produced by the 3<sup>rd</sup> Defendant is the corpus in this case and one cannot come to the conclusion that those deeds apply to the corpus in this case. The 3<sup>rd</sup> Defendant had also failed to disclose a complete pedigree. He had only disclosed how he had acquired his rights. He had not disclosed the devolution of the balanced rights. The only factor which is in favour of the 3<sup>rd</sup> Defendant is that he and his predecessors in title had possessed a portion of the corpus on the basis that they had acquired title to the corpus by those deeds. On the other hand, the Plaintiff had disclosed a full and complete pedigree which is corroborated by deeds which had acted upon. Therefore, on a balance of probability one can accept the pedigree disclosed by the Plaintiff and the learned District Judge had come to a correct conclusion in respect of that matter. The boundaries referred to in the deeds produced by the Plaintiff, 1<sup>st</sup> and the 2<sup>nd</sup> Defendants tally with the existing boundaries of the corpus as shown in the preliminary plan. The Western and the Eastern boundaries referred to in those deeds namely “Wesbadeniye Watta” and “Palpele Kumbura” are still physically existing according to the preliminary plan. “Palpele Kumbura” is a field that had been partitioned by the District Court of Kandy in case No. 1579/P which is a prominent landmark that will assist to identify the corpus. Therefore, one can come to the conclusion that the deeds produced by the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants apply to the corpus in this case. Those deeds had been acted upon and the 1<sup>st</sup>, 2<sup>nd</sup> and the 5<sup>th</sup> Defendant shown in the Plaintiff’s pedigree had been in possession of the corpus on the basis that they have acquired undivided rights in the corpus by those deeds. Punchikira is the original owner shown in the Plaintiff’s pedigree. His rights had devolved on his six children shown in the pedigree. Out of those six children Kiriukkuwa had died unmarried and his rights had devolved on his sisters and brothers. Therefore, the other five children of Punchikira get a 1/5<sup>th</sup> share each. Out of those 5 the devolution of the rights of Ganitha had not been proved by the Plaintiff and the learned District Judge had correctly kept that right unallotted. The 1/5<sup>th</sup> share owned by Dingiri alias Juanis, a son of Punchikira had devolved on another child of Punchikira namely Surendra who had already inherited a 1/5<sup>th</sup> share from his father and the brother. Surendra who owned a 2/5<sup>th</sup> share had transferred 1/3<sup>rd</sup> to Siripina and Surendra Yakdessa. Siripina’s rights had devolved on the 5<sup>th</sup> Defendant by the deeds marked 5V1 – 5V4. The rights of Surangani and Sodina, two children of the original owner and the balance rights of the Surendra had devolved on Surendra Yakdessa on පැ2, පැ3 and පැ6. Thus, Surendra Yakdessa became the owner of a 19/30 share. Out of those rights Surendra Yakdessa had gifted a 1/5<sup>th</sup>

share to his children Suramba, Ganitha and Sewranga the 2<sup>nd</sup> Defendant. Surendra Yakdessa had transferred another 1/15<sup>th</sup> share to the 1<sup>st</sup> Defendant by the deed marked 1V2. Still there is a balance 13/30 share owned by Surendra Yakdessa. There was a dispute regarding the devolution of Suramba's rights and Ganitha's rights. Both of them had died unmarried before their parents. As shown in the Plaintiff's pedigree their rights had devolved on their mother Punchina and the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants had disputed that fact. Their case was that those rights devolved on their father Surendra Yakdessa and after his death those rights devolved on his two surviving children, the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants. There is no dispute that this devolution was governed by the Kandyan law. The learned District Judge has come to the finding that both Suramba and Ganitha had died before the Kandyan law Declaration and Amendment Ordinance No. 39 of 1938 came into operation and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had not appealed against that finding. The law that existed prior to this Ordinance came in to operation had been discussed in the case of **Kalu Vs Kiriya** reported in 18 NLR 465 and accordingly the mother inherits the rights of the deceased unmarried children. In that case it was held that a Kandyan mother inherits her children's acquired properties in preference to the father. This rule is not restricted only to cases where the mother was married in *binna*; nor only to cases where the property has been acquired from a source other than the father. Therefore, Suramba's and Ganitha's rights should devolve on their mother Punchina. Surendra Yakdessa and Punchina had transferred a 1/15<sup>th</sup> share to the 1<sup>st</sup> Defendant on 1V2. Thereafter, Punchina had transferred a 1/15<sup>th</sup> share to Sodina on 378. Sodina had transferred those rights to Hendrick on 379 and Hendrick had transferred same to the Plaintiff on 3710. The learned District Judge has come to the conclusion that the balance rights owned by Surendra Yakdessa and his wife Punchina should devolve on their three children, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Sodina. At the trial the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had disputed the fact that Sodina inherited the rights from her parents. It was the case of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that since Sodina entered into a deega marriage, she did not inherit any rights from her parents. To substantiate this position, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had produced in evidence a marriage certificate marked 1V1 which is purported to be the marriage certificate of Sodina. That marriage certificate refers to a deega marriage. According to that document the name of the female party is Karunadhipathiyale Gedara Sodina. The learned District Judge has correctly observed that in deeds 378 and 379 Sodina's name is described as Elamaldeniye Karunadhipathiyalage Sodina.

Therefore, there is a discrepancy between the name referred to in 1V1 and the two deeds. The word 'Elamaldeniye' is missing in 1V1 and the word 'Gedara' is not there in 379. In 1V1 the name of Sodina's father is referred to as Dingira. It was the case of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that Dingira is the brother of Surendra Yakdessa and both were living together with a common wife in the same house which was a custom that existed in the Kandyan provinces which was known as "එකගෙයි කෑම" and the name of Dingira was entered in 1V1. The learned District Judge has come to the correct finding that there was no sufficient evidence to come to that conclusion. It was the case of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that the contents of the two deeds marked 378 and 379 indicate that Sodina was not living in her native village and she was living elsewhere which shows that Sodina had entered into a deega marriage and left the village. The learned District Judge has come to the conclusion that he cannot rely on that theory. Therefore, he has come to the finding that the fact that Sodina had entered into a deega marriage had not been established and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are not disputing that finding. There is no reason for us to interfere with that finding. Therefore, the balance rights of Punchina and Surendra Yakdessa should devolve on 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Sodina. Therefore, the rights acquired by Sodina on 378 and the rights she had inherited should devolve on Hendirik on 379 and those rights should go to the Plaintiff. For the aforesaid reasons, on a balance of probability of evidence one can come to the conclusion that the Plaintiff had proved his pedigree and the 3<sup>rd</sup> defendant had failed to prove his pedigree. The learned District Judge has come to a correct conclusion regarding the devolution of title and we see no reason to interfere with that finding.

The learned Presidents' Counsel for the Substituted – 3<sup>rd</sup> Defendant Appellant has submitted that the 3<sup>rd</sup> Defendant had acquired a prescriptive right to the land. But the prescriptive claim of the Substituted 3<sup>rd</sup> Defendant Appellant must fail for the following reasons;

The 3<sup>rd</sup> Defendant in his amended statement of claim had not asked for a prescriptive right either to the entire corpus or to a specific portion of it. However, issue no. 23 had been raised on behalf of the 3<sup>rd</sup> Defendant at the trial, without any objection, that the 3<sup>rd</sup> Defendant had prescribed to the entire corpus.

Issue No. 23 reads as follows;

23. 3 වන විත්තිකරු සහ ඔහුගේ පූර්වගාමීන් එම ඉඩම දීර්ඝකාලීන භුක්තිය මත භුක්තියට සවිච්චේ අයිතිවාසිකම් ලබා සිටීද?



The evidence reveals that although the 3<sup>rd</sup> Defendant had cultivated a portion of the paddy field which is inside the corpus, he did not have exclusive possession to the corpus. The 5<sup>th</sup> Defendant and 1<sup>st</sup> and 2<sup>nd</sup> Defendants had also cultivated portions of the paddy field. Therefore, the 3<sup>rd</sup> Defendant did not have exclusive possession to the entire corpus. Therefore, the 3<sup>rd</sup> Defendant did not have undisturbed possession which is a necessary requirement to establish a prescriptive right. In the case of **Siman Appu Vs. Christian Appu (1895) 1 NLR 288** Withers J. had described the concept of undisturbed possession as follows;

“Possession is disturbed either by an action intended to remove the possessor from the land or by acts which prevent the possessor from enjoying the free and full use of the land of which he is in the course of acquiring the dominion, and which convert his continuous into a disconnected and divided user.”

In the same case Lawrie ACJ had observed as follows;

“A disturbance is something less than an interruption; it is a disturbance if, for a time, someone succeeds in getting partial possession, not to the entire exclusion of the former possessor, but jointly with him.”

The 3<sup>rd</sup> Defendant had possessed the corpus jointly with 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants and therefore, he did not have undisturbed and exclusive possession to the entire possession. Therefore, his prescriptive claim must necessarily fail. The 3<sup>rd</sup> Defendant is not asking for a prescriptive right for the portion of the paddy field in which he is in possession. As the learned District Judge had correctly observed the 3<sup>rd</sup> Defendant had not asked for a prescriptive right to a specific portion of the corpus. To ask for a prescriptive right to the portion of the paddy field which is possessed by the 3<sup>rd</sup> Defendant, he must show that portion in the plan. But the 3<sup>rd</sup> Defendant had not shown that portion in a plan and superimposed that plan on the preliminary plan. In any event he cannot establish a prescriptive possession to that portion of land. 3A Defendant in his evidence had stated as follows;

“කට වචනයකින් වෙන් කර භුක්ති විදින්නේ”

That shows that the parties had possessed different portions of the corpus with the consent of each other. Therefore, the 3<sup>rd</sup> Defendant could not have had adverse possession to the portion in which he was in possession. Therefore, his prescriptive claim must necessarily fail.

For the aforementioned reasons we are of the view that the learned District Judge has come to a correct conclusion in this case and we see no reason to interfere with those findings. Therefore, we affirm the judgement of the learned District Judge dated 05.10.1999 and dismiss this appeal without costs.

**Judge of Court of Appeal**

**R. Gurusinghe - J.**

**I Agree**

**Judge of Court of Appeal**