

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

In the matter of an Appeal to the Supreme
Court of The Democratic Socialist Republic
Of Sri Lanka

Akuran Thilakage Alice Mallika (Deceased)
Of Kithalawa Thepel Unaleeya

SC APPEAL No. 31/2010
SC/HC/CA/LA Application No. 173/2008
NWP/HCCA/KUR/158/2002 (F)
DC Kuliypitiya Case No. 11328/P

PLAINTIFF

Meragal Kulathilakage Wimal
Samaraweera of
Kithawala Thepel Unaleeya

SUBSTITUTED PLAINTIFF

Vs.

1. Meragal Pedidurayalage Tikira Alias
Ananda Piyaratne (Deceased)
2. S.S. Premaratne of Kithawala
Thepel Unaleeya
3. Meragal Kulathilakage Thilakaratne
(Deceased) of Kithawala Thepel
Unaleeya

- 3A. Meragal Kulathilakage
Sarath Chandraratne of
Kithawala Thepel Unaleeya
4. Meragal Kulathilakage Dayaratne of
Kithawala Thepel Unaleeya
5. Meragal Kulathilakage Sarath
Chandraratne of Kithawala Thepel
Unaleeya
6. Meragal Kulathilakage Nimal
Senaratne of Kithawala Thepel
Unaleeya
7. Meragal Kulathilakage
Premathilake of Kithawala Thepel
Unaleeya
8. Meragal Kulathilakage Keerthiratne
of Kithawala Thepel Unaleeya
9. Meragal Pedidurayalage Sirisena
(Deceased) of Kithawala Thepel
Unaleeya
- 9A. Meragal Pedidurayalage
Karunaratne of Kithawala
Thepel Unaleeya
10. Meragal Pedidurayalage
Karunaratne of of Kithawala Thepel
Unaleeya

DEFFENDANTS

AND

6. Meragal Kulathilakage
Nimal Senaratne
of Kithawala Thepel Unaleeya

DEFFENDANT – APPELANT

Vs.

Akuran Thilakage Alice Mallikaa (Deceased)
of Kithawala Thepel Unaleeya

PLAINTIFF – RESPONDENT

Meragal Kulathilakage Wimal
Samaraweera of Kithawala Thepel
Unaleeya

SUBSTITUTED PLAINTIFF – RESPONDENT

1. Meragal Pedidurayalage Tikira Alias Ananda Piyaratne (Deceased)
2. S.S. Premaratne of Kithawala Thepel Unaleeya
3. Meragal Kulathilakage Thilakaratne (Deceased) of Kithawala Thepel Unaleeya
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7. Meragal Kulathilakage Premathilake of Kithawala Thepel Unaleeya

8. Meragal Kulathilakage Keerthiratne
of Kithawala Thepel Unaleeya

9. Meragal Pedidurayalage Sirisena
(Deceased) of Kithawala Thepel
Unaleeya

9A. Meragal Pedidurayalage
Karunaratne
of Kithawala Thepel Unaleeya

10. Meragal Pedidurayalage
Karunaratne of of Kithawala Thepel
Unaleeya

DEFFENDANTS – RESPONDENTS

AND NOW BETWEEN

Akuran Thilakage Alice Mallika (Deceased)
Of KiKithalawa Thepel Unaleeya

PLAINTIFF – RESPONDENT – APPELLANT

Meragal Kulathilakage Wimal
Samaraweera of
Kithawala Thepel Unaleeya

**SUBSTITUTED PLAINTIFF – RESPONDENT –
APPELLANT**

Vs.

6. Meragal Kulathilakage Nimal
Senaratne of Kithawala Thepel
Unaleeya

DEFFENDENT – APPELLANT RESPONDENT

1. Meragal Pedidurayalage Tikira Alias
Ananda Piyaratne (Deceased)

2. S.S. Premaratne of Kithawala Thepel Unaleeya
3. Meragal Kulathilakage Thilakaratne (Deceased) of Kithawala Thepel Unaleeya
- 3A. Meragal Kulathilakage Sarath Chandraratne of Kithawala Thepel Unaleeya
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6. Meragal Kulathilakage Nimal Senaratne of Kithawala Thepel Unaleeya
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DEFFENDANTS – RESPONDENTS – RESPONDENTS

Before : Saleem Marsoof J,
S.I.Imam J,
R.K.S.Suresh Chandra J.

Counsel: Harsha Soza PC with Upendra Walgampaya for Substituted –
Plaintiff-Respondent-Appellant

J.P.Gamage for 6th Defendant-Appellant-Respondent

Argued on: 6th September 2010

Written Submissions tendered on

21st September 2010 for Substituted-Plaintiff-Respondent-Appellant

Decided on: 10th March 2011

R.K.S.Suresh Chandra J,

This is an appeal from the judgment of the High Court of Civil Appeals Kurunegala which had set aside the judgment of the District Court of Kuliypitiya.

The Plaintiff-Respondent-Appellant instituted action in the District court of Kuliypitiya to partition the land called “Atha Wetuna Pitiye Watta” depicted in Preliminary Plan No.1103 of 11.06.1996. The contesting parties were the 6th to the 10th Defendants-Respondents. At the commencement of the trial by agreement between the parties the corpus was restricted to Lots 1,2,3 and 4 in the said Plan. There was no dispute regarding the corpus.

The original owner as set out in the plaint and maintained by the Substituted Plaintiff-Respondent-Appellant (The Original Plaintiff having died during the pendency of the case) was Sethuwa Maraduraya. He had transferred to Horatala and Balaya an undivided half share each of the said property by Deed No.2977 (P1) . Horatala by Deed No.6302(P2) conveyed to Handuwa 3 acres 2 roods and 23 perches excluding therefrom an extent of 2 acres and 2 roods. Handuwa by Deed No.15204 (P3) transferred his rights to Tikira alias Ananda Piyarathna, the 1st Defendant, Pina alias Bilinda and Peter. Balaya by deed No.33415(P4) gifted

his rights to the said Tikira alias Ananda Piyarathna the 1st Defendant, Pina alias Bilinda and Peter 3 acres 2 roods and 23 perches excluding therefrom 2 acres and 2 roods. Horatala and Balaya were brothers. Tikira alias Ananda Piyarathna, the 1st Defendant, Pina alias Bilinda and Peter were the children of Horatala. Peter died unmarried and without issue in 1941 and his rights devolved equally on his two surviving brothers Tikira alias Ananda Piyarathna, the 1st Defendant and Pina alias Bilinda. Pina alias Bilinda predeceased his wife Tikiri. His rights devolved on their only child Anulawathie subject to a life interest in favour of Tikiri. Anulawathie had died unmarried and issueless. Tikiri had contracted a second marriage with the 3rd Defendant Tillekeratne. They had five children Sarath Chandraratne, the 5th Defendant, Dayaratne, the 4th Defendant, Nimal Senaratne, the 6th Defendant, Hemalatha and Swarnalatha. Hemalatha and Swarnalatha had died unmarried and issueless. The parties were subject to Kandyan Law and the shares in the said property had devolved on the basis of the applicable Kandyan Law. The devolution of the shares in the said property in the above manner was based on the evidence given by the substituted Plaintiff-Respondent-Appellant and on which basis the property was claimed by the Substituted Plaintiff-Respondent-Appellant and the 1st Defendant in equal shares. The contesting 6th Defendant claimed rights on the basis that he was a child of Tikiri being a child of Tikiri's second marriage with Tillekeratne. The 7th and 8th Defendants claimed Lots 2 and 3 on the basis of prescription. The 6th Defendant and the 8th Defendant too gave evidence. The learned District Judge accepted the evidence of the Substituted Plaintiff and ordered the partition of the corpus on the basis that the substituted Plaintiff and the 1st Defendant were entitled to an undivided half share each of the said property having considered the evidence of the 6th Defendant and the 8th Defendant and rejecting their claims.

The 6th Defendant-Appellant-Respondent appealed against the said judgment of the District Court to the High Court of Civil Appeals, Kurunegala and the learned High Court by judgment dated 13.11.2008 allowed the appeal and set aside the judgement of the learned District Judge and dismissed the Plaintiff's action on the basis that the Plaintiff had not established his case.

The Plaintiff made an application for leave to appeal to the Supreme Court, and the Court had granted leave on the questions set out in para.16 of the petition namely:

- (i) Did the High Court of Civil Appeals, Kurunegala err in law in dismissing the action on the material placed before Court?
- (ii) Is the property inherited by Bilinda from Peter paraveni property?
- (iii) According to Kandyan Law does the paraveni property of Bilinda inherited by him from Peter which upon Bilinda's death devolved upon his only child

Anulawathie revert to her sole surviving paternal uncle the 1st Defendant upon her death ?

- (iv) According to Kandyan law, does the acquired property of Bilinda which upon his death passed to his only child Anulawathie and which as paternal acquired property of Anulawathie passed to her mother Tikiri upon her death revert to the sole surviving paternal uncle the 1st Defendant upon the said Tikiri's death ?
- a. Are the children of Tikiri by her second marriage entitled in Kandyan Law to any rights in respect of the acquired or paraveni property of Tikiri's first husband Bilinda which devolved on his only child Anulawathie who predeceased her mother Tikiri?

Question (i) involves the manner in which the learned High Court Judges have considered the judgment of the District Court while Questions ii to v involve a consideration of the concepts of **“paraveni property”** and **“acquired property”** and their devolution according to Kandyan law.

In relation to Question (i) a perusal of the judgment of the District Court reveals that the learned District Judge has considered all the evidence placed before Court both oral and documentary and arrived at his conclusion. Much reliance has been placed by Court on the evidence of the Substituted Plaintiff who is the son of Tikira alias Ananda Piyarathna, the 1st Defendant, and a grandson of Horatala and his mother was Alice Mallika, the original plaintiff and wife of the first defendant and was 58 years at the time of giving evidence and apparently was aware of the relationship of the parties who were his predecessors and also the events that had taken place in the family circle. His evidence had not been seriously challenged by the contesting parties specially in relation to the relationships of the parties. In that context it would appear that the pedigree as set out by the substituted Plaintiff had been accepted by all parties and the District Court cannot be faulted for accepting and acting on such evidence. The High Court had erroneously stated that there was no evidence to establish that Tikira alias Ananda Piyarathna, the first defendant, Pina alias Bilinda and Peter are the children of Balaya whereas that was not the position of the substituted Plaintiff. His position was that Tikira alias Ananda Piyarathna, the first Defendant, Pina alias Bilinda and Peter were the children of Horatala and thereby the High Court had misdirected itself in considering the pedigree of the parties. Further the High Court had misapplied the dicta in *Cooray v Wijesuriya* 62 N.L.R. 158 and thereby erred in disregarding the evidence of the Substituted Plaintiff.

In that case evidence was given of the relevant pedigree by a total stranger who was not familiar with the relationships between the parties and the Court held that in those

circumstances in respect of statements made by such a witness proof of special means of knowledge must first be established whereas if such statements were made by a member of the family as in the present case, such knowledge may be inferred or even presumed. .

Regarding questions (ii) to (iv) it would be relevant to consider the position as regards the devolution of “paraveni property” and “acquired property”.

Section 10 of the Kandyan Declaration Ordinance provides as follows:

10(1) – The expressions “paraveni property” or “ancestral property” or “inherited property” and equivalent expressions shall mean immovable property to which a deceased person was entitled (a) by succession to any other person who has died intestate, or (b) under a deed of gift executed by a donor to whose estate or a share thereof the deceased would have been entitled to succeed if the donor had died intestate immediately prior to the execution of the deed, or (c) under the last Will of a testator to whose estate or a share thereof the deceased would have been entitled to succeed had the testator died intestate. Provided, however, that if the deceased shall not have left him surviving any child or descendant, property which had been the acquired property of the person from whom it passed to the deceased shall be deemed acquired property of the deceased.

(2) Where the paraveni property of any person includes a share in any immovable property of which that person is a co-owner, any divided part of or interest in that property which may be assigned or allotted to that person by any deed of partition executed, or by any decree for partition entered by a Court, after the commencement of this Ordinance, shall for all purposes be and be regarded as paraveni property of that person.

(3) Except as in this section provided, all property of a deceased person shall be deemed to be “acquired property”.

(4) The expressions “paternal paraveni” and “maternal paraveni” and similar or equivalent expressions shall be deemed to mean paraveni property as hereinbefore described derived from or through the father or from or through the mother, as the case may be.

It would appear therefore that all property acquired otherwise than by inheritance falls into one class, which is acquired property, whereas inherited property is classified into paternal or maternal. Paraveni property has been regarded as meaning ancestral property which has descended by inheritance, and property derived by any other source of title or by any other means as acquired property. *Lebbe v Banda* 31 N.L.R. 28.

According to the evidence given by the substituted Plaintiff Appellant and as the parties were subject to Kandyan Law, the original owner of the corpus was Sethuwa Maraduraya and he had on P1 transferred an undivided half share each to Horathala and Balaya. Horathala had

transferred an undivided half share by P2 to Tikira alias Ananda Piyarathna the 1st Defendant, Pina alias Bilinda and Peter. Balaya had by Deed P4 transferred an undivided half share to Tikira alias Ananda Piyarathna , Pina alias Bilinda and Peter. Pina alias Bilinda married Tikiri and had a daughter Anulawathie who died unmarried and issueless. Tikiri married a second time and had five children from that marriage of whom two children had died leaving the 4th, 5th and 6th defendants as the surviving children. When Peter died unmarried and issueless, his share devolved on Tikira alias Ananda Piyarathna the 1st Defendant on the basis of half that share as Brother of Pina and the other half as paternal uncle of Anulawathie. Thus Tikiri became entitled to 2/3rd (from Handuwa being acquired property) and 1/3rd from Peter being paraveni property) making a total of 2/3rds. The same devolution applied in relation to the half share of Balaya. The 1st Defendant had transferred half of his 2/3rd to the Plaintiff by deed P5.

The remaining 1/3rd of the property is the share that has to be resolved. What Anulawathie inherited from her father Pina alias Bilinda is paternal paraveni property according to Section 10(1) of the Kandyan Law Declaration Amendment Ordinance. This property would not revert to the 1st defendant as the paternal uncle as had been contended earlier by the Substituted Plaintiff. This position was conceded to by Counsel for the Appellant at the argument. Anulawathie's rights comprise of 1/6th share derived from her father Bilinda which he had inherited from his brother Peter and another 1/6th share which her father Pina alias Bilinda had acquired upon Deeds P3 and P4. Anulawathie's acquired 1/3rd share of the property on her death would pass on to her mother Tikiri who survived her and thereupon devolve on the three surviving children of Tikiri, namely the 4th, 5th and 6th Defendant in equal shares. Therefore the final devolution of the corpus (as has been agreed to by Counsel for the Appellant as well as the Counsel for the 6th Defendant at the argument) would be as follows: 3/9th shares to the Substituted-Plaintiff-Appellant, 3/9th shares to the 1A Defendant-Respondent, 1/9th share to the 4th Defendant-Respondent, 1/9th share to the 5th Defendant-Respondent and 1/9th share to the 6th Defendant-Respondent.

It is to be observed that this action had commenced in 1995 and that even prior to that there had been litigation between some of the parties in relation to the same land which transpired during the course of the trial. After the institution of the action in 1995 several parties had died and substitution had to be effected. The District Court judgment was delivered in 2002 while the High Court disposed of the appeal in 2008. The dismissal by the High Court of the Plaintiff's action would result in the dispute between the parties remaining unresolved further which probably would very likely lead to further litigation. The High Court should have considered the fact that there was substantial evidence placed before the District Court by the Plaintiff and the Substituted Plaintiff and that there had been no serious contest as far as the pedigree was concerned. It is disheartening to see that the High Court had not considered the nature of the contest between the parties and that a dismissal of such an action would perpetuate the conflicts between them who apparently are relatives. It would be in the best interests of justice if cases of this nature are viewed with an end to resolve disputes between such parties in a more flexible and realistic manner.

The judgment of the The Provincial High Court (Civil Appeal) of the North western Province is accordingly set aside and the judgment of the District Court of Kuliyaipitiya is affirmed subject to the amendment in the devolution of shares as set out above. There will be no costs.

Judge of the Supreme Court

Saleem Marsoof J.

I agree.

Judge of the Supreme Court

S.I.Imam J.

I agree.

Judge of the Supreme Court