

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

*In the matter of an appeal with
leave to appeal obtained from this
Court.*

**HEWAWASAM
THUDUWAWATHTHAGE
SARATH**

"Sri Wijaya Mawatha", Maliyagoda,
Ahangama.

PLAINTIFF

SC Appeal No. 103/2011
SC HCCA LA No. 362/2009
HCCA SP Appeal No. 039/2002 [F]
DC Galle Case No.11092/Partition

VS.

- 1. KAMALAWATHIE WIJEWEERA**
Maliyagoda, Ahangama.
- 2. D.W. SAMINONA,**
"Sri Wijaya Mawatha",
Maliyagoda, Ahangama.
- 3. LOKUBARANIGE PATHMINI
KARAWITA,**
"Sri Wijaya Mawatha",
Maliyagoda, Ahangama.
- 4. L.D. WAIDYARATHNE,**
No.149A, Gabada Weediya,
Matara.
- 5. W. ABEYGUNAWARDENA,**
Visaka Mawatha, Gampaha.
- 6. I.ABEYGUNAWARDENA,**
Visaka Mawatha, Gampaha.
- 7. LILIAN SILVA WIJERATHNE,**
No.155B, John Rodrigo Mawatha,
Katubedda, Moratuwa.

DEFENDANTS

AND BETWEEN

**HEWAWASAM
THUDUWAWATHTHAGE SARATH**
“Sri Wijaya Mawatha”, Maliyagoda,
Ahangama.

PLAINTIFF-APPELLANT

VS.

- 1. KAMALAWATHIE WIJEWEERA**
Maliyagoda, Ahangama.
- 2. D.W. SAMINONA,**
“Sri Wijaya Mawatha”,
Maliyagoda, Ahangama.
- 3. LOKUBARANIGE PATHMINI
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- 7. LILIAN SILVA WIJERATHNE,**
No.155B, John Rodrigo Mawatha,
Katubedda, Moratuwa.

DEFENDANTS-RESPONDENTS

AND NOW BETWEEN

KAMALAWATHIE WIJEWEERA
Maliyagoda, Ahangama.
**1st DEFENDANT-RESPONDENT-
PETITIONER/APPELLANT**

VS.

**HEWAWASAM
THUDUWAWATHTHAGE SARATH**
“Sri Wijaya Mawatha”, Maliyagoda,
Ahangama.

**PLAINTIFF-APPELLANT-
RESPONDENT**

2. D.W. SAMINONA,
“Sri Wijaya Mawatha”,
Maliyagoda, Ahangama.

**3. LOKUBARANIGE PATHMINI
KARAWITA,**
“Sri Wijaya Mawatha”,
Maliyagoda, Ahangama.

4. L.D. WAIDYARATHNE,
No.149A, Gabada Weediya,
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5. W. ABEYGUNAWARDENA,
Visaka Mawatha, Gampaha.

6. I.ABEYGUNAWARDENA,
Visaka Mawatha, Gampaha.

7. LILIAN SILVA WIJERATHNE,
No.155B, John Rodrigo Mawatha,
Katubedda, Moratuwa.

**2nd TO 7th DEFENDANTS-
RESPONDENTS-
RESPONDENTS**

BEFORE: Sisira J. De Abrew, J.
Upaly Abeyrathne J.
Prasanna Jayawardena, PC, J.

COUNSEL: Palitha Bandaranayake with D.M. Siriwardena, Ms. Dulani
Jayanetti and Dilipa Fernando for the 1st Defendant-
Respondent-Petitioner/Appellant.
Athula Perera with Ms. Chathurani de Silva for the Plaintiff-
Appellant-Respondent.

WRITTEN SUBMISSIONS FILED: By the 1st Defendant-Respondent-Petitioner/Appellant on 9th December 2016.
By the Plaintiff- Appellant-Respondent on 14th December 2016.

ARGUED ON: 31st October 2016.

DECIDED ON: 22nd June 2017.

Prasanna Jayawardena, PC, J.

This an appeal from a Partition Decree entered in favour of the Plaintiff-Appellant-Respondent by the High Court of Civil Appeal which set aside the judgment previously entered by the District Court in favour of the 1st Defendant-Respondent-Petitioner/Appellant. The only question to be decided in this appeal is whether the learned High Court Judges erred in law by failing to consider the documents produced in evidence at the trial by the 1st Defendant-Respondent-Petitioner/Appellant and basing their decision solely on the absence of proof of the document marked “132”, which is said to be the Last Will of Lokuge Don Adiriyana De Silva.

The Plaintiff-Appellant-Respondent (“the plaintiff”) filed this case, in the District Court of Galle, against the 1st Defendant-Respondent-Petitioner/Appellant and the 2nd and to 3rd Defendants-Respondents-Respondents above named, praying to partition the land called “Kiramawaththa addara Ketakalagawatta” also known as “Kahatagawatta”, which is situated at Kathaluwa village in the Galle District. This land, which was sought to be partitioned, is referred to as “the land” in this judgment.

The plaintiff prayed for a partition decree dividing the land between the plaintiff and the 1st Defendant-Respondent-Petitioner/Appellant [“1st defendant”] in the following shares:

The plaintiff	-	560/720 th share
The 1 st defendant	-	<u>160/720th share</u>
		720/720
		=====

In his plaint, the plaintiff claimed the aforesaid 560/720th share of the land upon the following *four* different chains of title: (a) *firstly*, an **undivided 11/90th share originating from the title of S.V.A.Peter** who held a 11/90th share in the land and later transferred that share to L.D.P.Silva by Deed No. 2980 dated 20th September 1947 [which was produced at the trial marked “31”], who transferred that share to S.Avudiris Appu by Deed No. 4759 dated 07th November 1960 [“32”], who transferred that share to W. Charlis Appu by Deed No. 1167 dated 05th November 1964 [“33”], who gifted that share to W. Kusumawathie by Deed No. 17307 dated 10th June 1985 [“34”], who then transferred that share to Dayawathie Ramanayake

by Deed No. 17680 dated 20th January 1987 [“පැ5”], who **transferred that 11/90th share to the plaintiff** by Deed No. 18460 dated 08th May 1990 [“පැ6”]; (b) secondly, an **undivided 1/12th share originating from the title of G.V.Carlinahamy** who held a 1/12th share in the land and later transferred that share to S. Podisingho by Deed No. 31 dated 24th October 1924 [“පැ7”], who then transferred that share to S. Jai Appu by Deed No.565 dated 04th July 1928 [“පැ8”], who transferred that share to S.Carolis Appu by Deed No. 5321 dated 30th June 1931 [“පැ9”], who later re-transferred that share to S. Jai Appu by Deed No. 4128 dated 13th February 1948 [“පැ10”], who transferred the aforesaid 1/12th share to S.Roslin by Deed No. 150 dated 22nd November 1950 [“පැ11”], whose aforesaid 1/12th share [together with the 11/45th share referred to hereinafter] devolved on her two heirs, namely Ebert Jayasinghe and Sarath Jayasinghe, who together transferred the aforesaid 1/12th share [together with the 11/45th share referred to hereinafter] to Dayawathie Ramanayake by Deed No. 3760 dated 28th November 1984 [“පැ12”], who then transferred the aforesaid 1/12th share [together with the 11/45th share referred to hereinafter] to K.P.Aaron Singho by Deed No. 18336 dated 17th November 1989 [“පැ13”], who transferred **the aforesaid 1/12th share to the plaintiff** [together with the 11/45th share referred to hereinafter] by the Deed No. 18441 dated 10th April 1990 [“පැ14”]; (c) thirdly, an **undivided 11/45th share originating from the title of S. Andiris, S. Rosalin and S.Charlie** who jointly held a 11/45th share in the land and later transferred that share to L.D Hendrick De Silva by Deed No. 1848 dated 28th May 1946 [“පැ15”], who then transferred that share to S. Jai Appu by Deed No.3434 dated 01st March 1948 [“පැ16”], who transferred the aforesaid 11/45th share together with the 1/12th share referred to hereinbefore to S.Roslin by the aforesaid Deed No. 150 marked “පැ11”, whose aforesaid 11/45th share together with the 1/12th share referred to hereinbefore, devolved on her two heirs, namely Ebert Jayasinghe and Sarath Jayasinghe, who together transferred the said 11/45th share and 1/12th share to Dayawathie Ramanayake by the aforesaid Deed No. 3760 marked “පැ12”, who then transferred the said 11/45th share and 1/12th share to K.P.Aaron Singho by the aforesaid Deed No. 18336 marked “පැ13”, who then **transferred the said 11/45th share to the plaintiff** [together with the 1/12th share referred to hereinbefore] by the aforesaid Deed No. 18441 marked “පැ14”; (d) and fourthly, **another undivided 1/12th share and undivided 11/45th share originating from the title of S. Ranis Appu** who held a 1/12th share and 11/45th share in the land and later transferred that 1/12th share and 11/45th share to the plaintiff by Deed No. 3670 dated 27th October 1983 [“පැ17”], who then transferred that 1/12th share and 11/45th share to Irene Jayaratne by Deed No.5501 dated 02nd August 1988 [“පැ18”], who later **re-transferred the said 1/12th share and 11/45th share to the plaintiff** by the Deed No. 5575 dated 24th September 1988 [“පැ19”].

To sum up, the plaintiff claimed an undivided 11/90th share upon the deeds marked “පැ1” to “පැ6”, an undivided 1/12th share upon the deeds marked “පැ7” to “පැ14”, an undivided 11/45th share upon the deeds marked “පැ15” and “පැ16”

and “පැ11” to “පැ14”, finally, *another* undivided 1/12th share and 11/45th share upon the deeds marked “පැ17” to “පැ19”. The aforesaid 11/90th share, 1/12th share, 11/45th share and the further 1/12th share and 11/45th share add up to the 560/720th share of the land claimed in this action, by the plaintiff.

In the plaint, the plaintiff states that, the 1st defendant claims to be entitled to a 160/720th share of the land. The plaintiff goes on to aver that he is unaware of the manner in which the 1st defendant claimed her alleged entitlement.

The plaintiff also pleads that, the 2nd Defendant-Respondent-Respondent [“the 2nd defendant”] is not entitled to any part of the land but is in possession of a part of the land. The plaintiff pleads that, the 3rd Defendant-Respondent-Respondent [“the 3rd defendant”] is also not entitled to any part of the land though a deed has been executed in her favour. Accordingly, the plaintiff made the 2nd and 3rd defendants parties to the action.

In her Statement of Claim, 1st defendant pleaded that, the land was originally owned by Lokuge Don Adiriyana De Silva who died leaving a Last Will which was proved in D.C.Galle Testamentary Case No. 3268 and that the land was part of the estate of the late Lokuge Don Adiriyana De Silva which was administered in the said case. The 1st defendant pleaded that, pursuant to the administration of the estate of the late Lokuge Don Adiriyana De Silva in that case, the land devolved upon the following three persons in the manner set out below:

- (i) G.V. Don Bastian De Silva Waidyaratne Jayasundera - 1/2 share.
- (ii) G.V. Don Charlis De Silva Waidyaratne Jayasundera - 1/4 share.
- (iii) Lokuge Don Hendrick De Silva - 1/4 share.

The 1st defendant pleaded that, upon the death of the aforesaid G.V. Don Bastian De Silva Waidyaratne Jayasundera, his 1/2 share in the land devolved upon his six children – namely, Carlinahamy, Helenahamy, Emalihamy, Dona Catherina, Francinahamy and Peter – in 1/12th shares. The 1st defendant claimed that, upon the death of the aforesaid Francinahamy, her 1/12th share devolved on her five children – namely, Asilin Nona, Ariyadasa, Karunadasa, Pemwathie and Piyaseeli - who jointly transferred that 1/12th share to S.Karonchihamy by Deed No. 487 dated 17th July 1961 [which was produced at the trial marked “1ඒ3”], who then **transferred that 1/12th share to the 1st defendant by Deed No. 129 dated 02nd June 1971** [“1ඒ4”]. The 1st defendant next claimed that, upon the death of the aforesaid Peter, his 1/12th share devolved on his only daughter – namely, Adlin Waidyaratne Jayasundera - who transferred that **1/12th share to the 1st defendant by Deed No. 10193 dated 30th June 1969** [“1ඒ5”].

The 1st defendant pleaded that, upon the death of the aforesaid G.V. Don Charlis De Silva Waidyaratne Jayasundera, his 1/4 share in the land devolved upon his four children – namely, Baby Nona, Punchi Nona, Jane Nona and Bertram Carl – in 1/16th shares. The 1st defendant claimed that, upon the death of the aforesaid Punchi

Nona, her 1/16th share devolved on her two children – namely, Mabel and Oliver - who transferred that **1/16th share to the 1st defendant by the aforesaid Deed No. 10193 marked “1B5”**. The 1st defendant further claimed that, upon the death of the aforesaid Jane Nona, her 1/16th share devolved on her six children – namely, Wilfred, Grace, Jeslin, Neville, George and Lilian - who jointly transferred that 1/16th share to S.Karonchihamy by Deed No. 330 dated 21st April 1962 [“1B7”], who then **transferred that 1/16th share to the 1st defendant by the aforesaid Deed No. 129 marked “1B4”**. The 1st defendant also claimed that, the aforesaid Bertram Carl transferred his 1/16th share to S.Karonchihamy by Deed No. 7710 dated 07th September 1965 [“1B8”], who then **transferred that 1/16th share to the 1st defendant by the aforesaid Deed No. 129 marked “1B4”**.

The 1st defendant went on to plead that, upon the death of the aforesaid Lokuge Don Hendrick De Silva, his 1/4 share in the land devolved upon his daughter, Lokuge Darlin Waidyaratne who transferred that **1/4th share to the 1st defendant by Deed No. 3137 dated 07th July 1991 [“1B810”]** which was executed after the institution of this action.

The 1st defendant only admitted that, the plaintiff was entitled to the aforesaid undivided 1/12th share originating from the title of G.V.Carlinahamy, which was claimed in the plaint upon the deeds marked “B7” to “B14”.

On the aforesaid basis, the 1st defendant prayed for a partition decree dividing the land between the 1st defendant and the plaintiff in the following shares:

The plaintiff	-	04/48 th share
The 1 st defendant	-	29/48 th share
Unallotted	-	<u>15/48th share</u>
		48/48
		=====

In their joint Statement of Claim, the 2nd and 3rd defendants claimed that the 3rd defendant was entitled to a 3/64th share of the land. They also pleaded that, the 2nd and 3rd defendants were in possession and occupation of a part of the land and claimed the right to the two of the buildings and some of the trees on the land.

During the trial, the 4th to 7th Defendants-Respondents-Respondents were added as parties to the action. However, they did not appear at or participate in the trial.

At the trial, only the plaintiff, the 1st defendant and the 2nd and 3rd defendants appeared and were represented by Counsel. The *corpus* was admitted by all parties, as being depicted in Preliminary Plan No. 186 dated 13th November 1990 prepared by the Court Commissioner, which was produced in evidence marked “X”. The accompanying Report was marked “X1”. The land is A: 0 R: 3 P:18.32 in extent. There were three small houses and two other small temporary structures on the

land. Thereafter, the plaintiff, the 1st defendant and the 2nd and 3rd defendants raised points of contest based on their pleadings.

The plaintiff gave evidence and closed his case leading in evidence the documents marked “පැ1” to “පැ21”. The defendants did not object to the production of any of these documents in evidence.

The 1st defendant gave evidence and produced the documents marked “1වි1” to “1වි10”. When learned counsel for the plaintiff cross examined the 1st defendant, the answers and an amended answer filed by 1st defendant in previous D.C.Galle Case No. P/8908 and P/9344 and the proceedings in the previous D.C.Galle Case No. P/6130 in which the 1st defendant gave evidence, were produced by the plaintiff in evidence marked “පැ21අ”, “පැ22”, “පැ 22අ”, “පැ 23” “පැ 24”, “පැ 24අ” and “පැ 24ආ”. The 1st defendant also led the evidence of the officer in charge of the Record Room of the District Court of Galle who stated that, the case record of District Court of Galle Testamentary Case No. 3268 had perished and that, therefore, it was not possible to ascertain whether probate had issued in this case.

Thereafter, the 1st defendant closed her case leading in evidence the documents marked “1වි1” to “1වි10”. The plaintiff and the 2nd and 3rd defendants did not object to the production of any of these documents in evidence.

The 3rd defendant did not give evidence since she was not in Sri Lanka. Her sister, who held a Power of Attorney executed by the 3rd defendant, gave evidence and produced the documents marked “3වි1” to “3වි4” and closed the 3rd defendant’s case.

In her judgment, the learned District Judge upheld the plaintiff’s claim to the aforesaid 11/90th share of the land originating from S.V.A.Peter and set out in the deeds marked “පැ1” to “පැ6” and also referred to the fact that, the defendants did not dispute these deeds at the trial. In this connection, the learned District Judge concluded “ඉහත කී කරුණු අනුව මෙම ඉඩමෙන් නොබෙදූ 11/90 අංශුවක් පැ1 සිට පැ6 ඔප්පු මත පැමිණිලිකරුට හිමි වන බව පිළිගනිමි”. Next, the learned District Judge upheld the plaintiff’s claim to the aforesaid 1/12th share of the land originating from G.V.Carlinahamy and set out in the deeds marked “පැ7” to “පැ14” and also referred to the fact that, the defendants did not challenge these deeds at the trial and that the 1st defendant had admitted the plaintiff’s claim to this 1/12th share. In this connection, the learned District Judge concluded “එබැවින් මෙම නඩුවට අදාළ ඉඩමේ නොබෙදූ 1/12 අංශුව පැමිණිලිකරුට හිමි වන බවට තීරණය කරමි”. Thereafter, the learned District Judge upheld the plaintiff’s claim to the aforesaid 11/45th share of the land originating from S. Andiris, S. Rosalin and S.Charlie and set out in the deeds marked “පැ15” and “පැ16” and “පැ 11” to “පැ14”. In this connection, the learned District Judge concluded “..... ඉහත කී මෙම නඩුවේ නොබෙදූ 11/45 පැමිණිලිකරුට හිමි වන බව පෙනී යයි ”.

However, with regard to the plaintiff's claim to the aforesaid further 1/12th share and 11/45th share originating from the title of S. Ranis Appu in respect of which the plaintiff had produced the deeds marked "පැ17" to "පැ19", the learned District Judge held that, the plaintiff has *not* proved that, S.Ranis Appu had title to the said 1/12th share and 11/45th share .

Thus, the learned District Judge has expressly held that, the plaintiff had established his entitlement to the 11/90th share originating from S.V.Peter, the 1/12th share originating from G.V.Carlinahamy and the 11/45th share of the land originating from S. Andiris, S. Rosalin and S.Charlie, as averred in the plaint and upon the deeds marked "පැ1" to "පැ16".

With regard to the 1st defendant, the learned District Judge observed that, unlike the plaintiff who had not traced his ownership back to an owner of the entire land, the title claimed by the 1st defendant could be traced back to a single owner of the entire land - namely, the aforesaid Lokuge Don Adiriyana De Silva who had died leaving the Last Will produced marked by the 1st defendant marked "1වි2". The learned District Judge held that, the evidence established that this Last Will had been administered in D.C.Galle Testamentary Case No. 3268 and that the Inventory marked "1වි1" established that, the land which is the subject matter of this case was part of the estate of the late Lokuge Don Adiriyana De Silva which had been administered in that case. The learned District Judge did comment on the fact that, the 1st defendant failed to prove that probate had issued in D.C.Galle Testamentary Case No. 3268 and that the 1st defendant failed to lead evidence to establish the manner in which the properties which formed the estate were dealt with or distributed. However, the learned District Judge appears to have taken the view that, since the case record had perished, the Court was entitled to proceed on the assumption that, the land which is the subject matter of this case had come to the three heirs named in the Last Will in the manner set out earlier - *ie*: 1/2 share to G.V. Don Bastian De Silva Waidyaratne Jayasundera, 1/4 share to G.V. Don Charlis De Silva Waidyaratne Jayasundera and 1/4 share to Lokuge Don Hendrick De Silva.

On the aforesaid basis, the learned District Judge concluded that, the Last Will marked "1වි2" and Inventory marked "1වි1" proved that, Lokuge Don Adiriyana De Silva was the sole owner of the land and that, the land was thereafter, transferred to his heirs, G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva, in the aforesaid shares. Thereafter, the learned District Judge held that, the deeds produced by the 1st defendant marked "1වි3" to "1වි10" established that, the 1st defendant had become entitled to the 29/48th share of the land which the 1st defendant prayed for in her Statement of Claim.

Although, as set out above, the learned District Judge had previously determined that, the plaintiff had established his entitlement to a 11/90th share, 1/12th share and

a 11/45th share upon the deeds marked “පැ1” to “පැ16”, the learned District Judge finally held that, the plaintiff was entitled to only the 4/48th [ie:1/12th share] originating from G.V.Carlinahamy, which the 1st defendant had admitted. The learned District Judge also held that, the 2nd and 3rd defendants had failed to establish rights to any share of the land.

Thus, in her judgment, the learned District Judge entered judgment as prayed for in the 1st defendant’s Statement of Claim and directed that, the land be partitioned in the following manner:

The plaintiff	-	04/48 th share
The 1 st defendant	-	29/48 th share
Unallotted	-	<u>15/48th</u> share
		48/48
		=====

The plaintiff appealed to the High Court of Civil Appeal of the Southern Province holden in Galle. Only the plaintiff and the defendant were represented when the appeal was argued.

In appeal, the learned High Court Judges observed that, although the learned District Judge had first determined that, the plaintiff had established his entitlement to a 11/90th share originating from S.V.Peter, 1/12th share originating from G.V.Carlinahamy and a 11/45th share originating from S. Andiris, S. Rosalin and S.Charlie, upon the deeds marked “පැ1” to “පැ 16”, the learned District Judge had proceeded to later hold that, the plaintiff was entitled only to the 4/48th [ie:1/12th share] originating from G.V.Carlinahamy, which the 1st defendant had admitted.

The learned High Court Judges held that, the 1st defendant’s claim in this action was based entirely on the 1st defendant’s position that, the Last Will marked “1වි2” and the Inventory marked “1වි1” established that Lokuge Don Adiriyana De Silva was the sole owner of the land and that, upon his death, the land devolved upon his heirs, G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva, in the aforesaid shares in the manner set out in the Last Will marked “1වි2”. The learned High Court Judges held that, however, the mere production of the Inventory marked “1වි1” did not prove that the land which is the subject matter of the action was the land described in the Inventory since the Inventory did not contain a description of the metes and bounds of the land. The learned High Court Judges further observed that there was a discrepancy between the name of the land as stated in the pleadings and the name of the lands listed in the Inventory since the *corpus* is identified in the present action as the land called “Kiramawaththaaddara Ketakalagahawatta also known as Kahatagahawatta” while the Inventory marked “1වි1” lists *one* land named “Kiramawatta addera Ketakalagahawattte” and *another* land “Ketakalagahawatta alias Kahatagahawatta”. Further, it should be mentioned here that, the Last Will

marked “1වි1” does not mention the land which is the subject matter of this action or, for that matter, mention any immovable property by name or description.

The learned High Court Judges went on to hold that, the 1st defendant’s failure to produce the probate which is said to have been issued in D.C.Galle Testamentary Case No. 3268 and the 1st defendant’s failure to even lead secondary evidence to establish that a probate had been issued in the manner set out in the Last Will, led to the conclusion that the 1st defendant has failed to prove that, the heirs of Lokuge Don Adiriyana De Silva – namely, G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva – became entitled to the land in the aforesaid shares in the manner set out in the Last Will marked “1වි2. In this connection, the learned High Court Judges referred to the case of **DAVOODBHOY vs. FAROOK** [63 NLR 97] where Basnayake CJ held (at p.107) “*There being no proof that the Will No. 418 (P2) has been admitted to Probate it cannot be acted on as the Last Will of the deceased.*” In this connection, it is relevant to observe that, the certified copies of the Last Will marked “1වි2” and Inventory marked “1වි1” produced by the 1st defendant have been issued by the District Court in 1991 and 1987 – *ie*: a relatively short period before this action was filed. In that background, a question arises as to why the 1st defendant did not obtain and produce a certified copy of the probate.

With regard to the deeds marked “1වි3” to “1වි10” produced by the 1st defendant in support of her claim, the learned High Court Judge observed that, although the Last Will marked “1වි2” is dated 04th November 1896 and Inventory marked “1වි1” is dated 23rd March 1899, the oldest deed produced by the 1st defendant is “1වි3” which is dated 17th July 1961. The learned High Court Judge further observed that, none of the deeds produced by the 1st defendant could be connected, on the face of these deeds, to the title which the 1st defendant claims was originally held by Lokuge Don Adiriyana De Silva and, after his death, devolved upon his heirs - G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva.

On the aforesaid basis, the learned High Court Judges held that, the 1st defendant had failed to prove her entitlement to the 29/48th share she claimed and that the learned District Judge had erred when she entered judgment as prayed for in the 1st defendant’s Statement of Claim.

With regard to the plaintiff’s claim, the High Court held that, the plaintiff had established his entitlement to the 11/90th share originating from S.V.Peter, 1/12th share originating from G.V.Carlinahamy and a 11/45th share originating from S. Andiris, S. Rosalin and S.Charlie, upon the deeds marked “පැ1” to “පැ16” and that, the 1st defendant had not succeeded in disputing or disproving that entitlement. Accordingly, the learned High Court judges held that, the learned District Judge had erred when she failed to allot to the plaintiff the said 11/90th share, 1/12th share and

11/45th share in the land. It is relevant to mention here that, as stated earlier, the learned District Judge had first upheld the plaintiff's claim to these shares. With regard to the plaintiff's claim for a further 1/12th share and 11/45th share originating from S.Ranis Appu, the High Court held that the learned District Judge correctly determined that the plaintiff failed to prove S.Ranis Appu had title to the said 1/12th share and 11/45th share. Accordingly, the learned High Court Judges affirmed the learned District Judge's determination that, the said 1/12th share and 11/45th share should remain unallotted.

With regard to the 1st defendant's claim, the learned High Court Judges held that, although the 1st defendant had failed to establish her title in the manner set out in her Statement of Claim, she was nevertheless entitled to the 160/720th share which was set out in the plaintiff's pedigree.

Finally, the learned High Court Judges held that, the learned District Judge correctly determined that the 2nd and 3rd defendants had failed to establish any entitlement to the land.

Accordingly, the learned High Court Judges set aside the judgment of the District Court and directed that, the land be partitioned in the following manner:

The plaintiff	-	560/720 – (1/12 + 11/45)	-	324/720 th share
The 1 st defendant	-		-	160/720 th share
Unallotted	-		-	<u>237/720th</u> share
				720/720
				=====

The 1st defendant filed an application in this Court seeking leave to appeal from the judgment of the High Court. This Court has given leave to appeal only on the following question of law:

- (i) Did the learned High Court Judges err in law by not considering the documents marked in evidence by the 1st Defendant-Petitioner at the trial and basing their decision entirely on the absence of proof of the Last Will marked “1ඒ2”?

The manner in which the aforesaid question of law has been framed suggests that, the High Court Judges' determination that Last Will marked “1ඒ2” had not been proved by the 1st defendant, is not in issue in this appeal. In any event, it is appropriate to observe here that, the 1st defendant based her claim in this action on her position that, Lokuge Don Adiriyana De Silva was the sole owner of the land and that, the land was thereafter, transferred to his heirs - G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva - in the aforesaid shares in the manner set out in the Last Will marked “1ඒ2” and Inventory marked “1ඒ1”. Therefore, it was incumbent on the 1st defendant to prove that, Lokuge Don Adiriyana De Silva was, in fact, the sole owner of the land and that, the land was thereafter, transferred to his

aforesaid three heirs in the shares and in the manner set out in the Last Will marked “1වී2”. In these circumstances, the 1st defendant should have produced a copy of the probate which is said to have been issued in D.C.Galle Testamentary Case No. 3268. It should be mentioned here that, a copy of this probate is said to have been produced in evidence in D.C.Galle Case No. 6130/P to which the 1st defendant was a party, as evidenced by the proceedings of that case which were marked “ඡූ24”. However, the fact that, the probate was produced in the earlier case no. 6130/P did not absolve the 1st defendant from the obligation to produce the probate in the present case. It should also be mentioned here that, the proceedings marked “ඡූ24” show that, the plaintiff in the earlier case no. 6130/P produced a Deed No. 3123 dated 23rd November 1988 by which Lokuge Don Adiriyana De Silva obtained title to the land named “Thalakoratuwa” which was the subject matter of that case. However, the 1st defendant failed to produce such a deed in the present case to prove that Lokuge Don Adiriyana de Silva had sole title to the land which is the subject matter of the action.

Further, in light of the discrepancy between the name of the land which is the subject matter of this case and the names of two separate lands in the Inventory marked “1වී2”, the absence of proof that Lokuge Don Adiriyana De Silva had title to the land which is the subject matter of this case and the absence of the probate, it is not possible to assume that, land which is the subject matter of this case devolved to G.V. Don Bastian De Silva Waidyaratne Jayasundera and G.V. Don Charlis De Silva Waidyaratne Jayasundera in the manner set out in the Last Will marked “1වී2” of Don Adiriyana De Silva *unless* there is other evidence to show that it was so.

In the light of these possibilities, if the 1st defendant wished to succeed in her claim, she was obliged to lead other evidence to establish that, Lokuge Don Adiriyana De Silva was the owner of the land and that, the land was thereafter, transferred to his heirs, G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva, in the aforesaid shares in the manner set out in the Last Will marked “1වී2”. If the 1st defendant could not produce the probate, she could have produced the Executors Conveyance (or a certified copy of it), which, in the usual course of events, is likely to have been executed in favour of G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva if the land had come to them in the manner set out in the Last Will marked “1වී2”. The 1st defendant could have produced the records at the Land Registry which could have established that, Lokuge Don Adiriyana De Silva was the owner of the land and that, the land was thereafter, transferred to his heirs, G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva. The 1st defendant has done none of that.

In these circumstances, it is evident that, the learned High Court Judges correctly held that, that the 1st defendant had failed to prove that Lokuge Don Adiriyana De Silva was the owner of the land and that the land was thereafter, transferred to his

heirs, G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva, in the aforesaid shares in the manner set out in the Last Will marked “1වී2”.

What remains to be considered in terms of the aforesaid question of law is whether the deeds produced by the 1st defendant marked “1වී3” to “1වී10”, prove her claim to be entitled to a 29/48th share of the land.

At this point, it is significant to note that, the evidence established that the plaintiff has been in possession of the major part of the land for a long period of time without any dispute from any of the defendants. It was also established in evidence that the 1st defendant did not have possession of the land. In this connection, the learned District Judge held that the Surveyor’s Report established that the plaintiff was in possession and that, the 1st and 3rd defendants had admitted the plaintiff had been in possession of the land.

The learned District Judge also held that, the 1st defendant had not been in possession of the land. Thus, it appears from the evidence led at this trial that, the 1st defendant has not made any claims to the land until this action was instituted, despite the plaintiff being in possession for many years.

To get back to considering whether the 1st defendant had proved her claim to a 29/48th share of the land, it is seen that, the 1st defendant claims a **1/12th share** upon the deeds marked “1වී3” and “1වී4”. “1වී3” is deed no. 487 dated 17th July 1961 by which Walgama Wellalage Asilin Nona, Walgama Wellalage Ariyaratne, Walgama Wellalage Karunadasa and Walagama Wellalage Piyaseeli have transferred a 1/12th share in the land to S.Karonchihamy. “1වී4” is deed no. 129 dated 02nd June 1971 by which S.Karonchihamy transferred that 1/12th share [together with two 1/16th shares] to the 1st defendant. Although the 1st defendant has stated that, the four transferors named in the deed no. 487 marked “1වී3” were the heirs of Francinahamy and that she was one of the children and heirs of the aforesaid G.V. Don Bastian De Silva Waidyaratne Jayasundera who held a 1/2 share of the land following the death of Lokuge Don Adiriyana De Silva, the deed marked “1වී3” does not refer to any of those facts claimed by the 1st defendant. The 1st defendant has failed to produce any other evidence to support her claims. It is also to be noted that, although in paragraph [8] of her Statement of Claim, the 1st defendant has stated that, Francinahamy also had a daughter named Pemawathie, that daughter is not named as a transferor in the deed marked “1වී3”. It is also to be noted that, the deed marked “1වී3” has been executed over sixty years after the death of Lokuge Don Adiriyana De Silva and there is no evidence with regard to when G.V. Don Bastian De Silva Waidyaratne Jayasundera died and the manner in which his estate was administered. On the other hand, the plaintiff has produced deeds which establish the aforesaid three chains of title claimed by him which stretch back to the 1920s and 1940s and the plaintiff has been in possession of the land for many years. In these circumstances and in the absence of evidence that the aforesaid transferors

who are said to be grandchildren of G.V. Don Bastian De Silva Waidyaratne Jayasundera obtained and continued to have title to the land in 1961, the mere production of the deed marked “1ව්3” cannot lead to an assumption that the transferors named in that deed had title to the land in 1961 when this deed was executed. Accordingly, it cannot be said that, the deeds marked “1ව්3” and “1ව්4” prove that the 1st defendant is entitled to a 1/12th share of the land.

Next, the 1st defendant claims a **87/864 share** upon the deed no. 10193 dated 30th June 1969 marked “1ව්5” by which Mabel Alwis Wijesiri Gunawardena, Oliver Alwis Wijesiri Gunawardena and Adilin Waidyaratne transferred a 87/864th share in the land to the 1st defendant. Although the 1st defendant has stated that, the first and second transferors named in the deed marked “1ව්5” were the two children and heirs of Punchi Nona who was one of the heirs of the aforesaid G.V. Don Charlis De Silva Waidyaratne Jayasundera who is said to have held a 1/4 share of the land following the death of Lokuge Don Adiriyana De Silva and the third transferor named in the deed marked “1ව්5” was the only child and heir of Peter who was also one of the heirs of the aforesaid G.V. Don Bastian De Silva Waidyaratne Jayasundera, the deed marked “1ව්5” makes no statements to that effect other than mentioning that the land had come to the first and second transferors by maternal inheritance and to the third transferor by paternal inheritance. The 1st defendant has failed to produce any other evidence. Further, the birth certificate marked “1ව්6” states that, Oliver Alwis Wijesiri Gunawardena was the son of one Lucy Waidyaratne Jayasundera and not Punchi Nona De Silva Waidyaratne Jayasundera as claimed by the 1st defendant. The other facts mentioned in the preceding paragraph with regard to the absence of evidence as to when G.V. Don Bastian De Silva Waidyaratne Jayasundera died and the manner in which his estate was administered and with regard to the plaintiff's chain of title and the plaintiff being in possession of the land, are equally relevant *mutatis mutandis* in this case too. In these circumstances and in the absence of evidence that the aforesaid transferors who are said to be grandchildren of G.V. Don Charlis De Silva Waidyaratne Jayasundera and G.V. Don Bastian De Silva Waidyaratne Jayasundera obtained and continued to have title to the land in 1969, the mere production of the deed marked “1ව්5” cannot lead to an assumption that the transferors named in that deed had title to the land in 1969 when this deed was executed. Accordingly, it cannot be said that, the deed marked “1ව්5” proves that the 1st defendant is entitled to a 87/864th share of the land.

Thereafter, the 1st defendant claims a **1/16th share** upon the deeds marked “1ව්7” and “1ව්4”. “1ව්7” is deed no. 330 dated 21st April 1962 marked “1ව්7” by which Wilfred Wijeratne, Grace Senaratne *nee* Wijeratne, Jeslin Alwis *nee* Wijeratne and Neville Wijeratne transferred a 1/16th share in the land to S.Karonchiamy. “1ව්4” is the aforesaid deed no. 129 by which S. Karonchiamy transferred that 1/16th share to the 1st defendant [along with the aforesaid 1/12th share and another 1/16th share]. Although the 1st defendant has stated that, the four transferors named in the deed marked “1ව්7” were children and heirs of Jane Nona who was one of the heirs of the

aforesaid G.V. Don Charlis De Silva Waidyaratne Jayasundera who is said to have held a 1/4 share of the land following the death of Lokuge Don Adiriyana De Silva, the deed marked “137” makes no statement to that effect other than mentioning that the several properties which are the subject matter of the deed are held by the vendors by paternal and maternal inheritance. The 1st defendant has failed to produce any other evidence. It is also to be noted that, although in paragraph [14] of her Statement of Claim, the 1st defendant has stated that, Jane Nona also had two other children named George and Lilian, they are not named as transferors in the deed marked “137”. The other facts mentioned in the preceding paragraphs are relevant in this case too. In these circumstances and in the absence of evidence that the aforesaid transferors who are said to be grandchildren of G.V. Don Charlis De Silva Waidyaratne Jayasundera continued to have title to the land in 1962, the mere production of the deed marked “137” cannot lead to an assumption that the transferors named in that deed had title to the land in 1962 when this deed was executed. Accordingly, it cannot be said that, the deed marked “137” proves that the 1st defendant is entitled to a 1/16th share of the land.

Next, the 1st defendant claims another **1/16th share** upon the deeds marked “138” and “134”. “138” is deed no. 2210 dated 07th September 1965 by which Bertram Carl De Silva Waidyaratne transferred a 1/16th share in the land to S.Karonchihamy. “134” is the aforesaid deed no. 129 by which S. Karonchihamy transferred that 1/16th share to the 1st defendant [along with the aforesaid 1/12th share and 1/16th share]. Although the 1st defendant has stated that, the transferor named in the deed marked “138” was one of the children and heirs of the aforesaid G.V. Don Charlis De Silva Waidyaratne Jayasundera who is said to have held a 1/4 share of the land following the death of Lokuge Don Adiriyana De Silva, the deed marked “137” makes no statement to that effect other than a mention that the land had come to the transferor by paternal inheritance. The 1st defendant has failed to produce any other evidence. Here too, the other facts mentioned in the preceding paragraphs are relevant. In these circumstances, the mere production of the deed marked “138” cannot lead to an assumption that the transferor named in that deed had title to the land in 1965 when this deed was executed. Accordingly, it cannot be said that, the deed marked “138” proves that the 1st defendant is entitled to a 1/16th share of the land.

Finally, the 1st defendant claims a **1/14th share** upon the deed no. 3137 dated 07th July 1991 marked “1310” by which Lokuge Darlin Waidyaratne transferred a 1/4th share in the land to the 1st defendant during the pendency of this action. Although the 1st defendant has stated that, the transferor named in the deed marked “1310” was the only child and sole heir of the aforesaid Lokuge Don Hendrick De Silva, the deed marked “1310” makes no statement to that effect other than stating that the several properties which are the subject matter of that deed had come to the transferor by paternal inheritance. The 1st defendant did not lead the evidence of the transferor – namely, Lokuge Darlin Waidyaratne. Thereafter, when the 1st defendant

gave evidence, she said that, Lokuge Don Hendrick De Silva had two other children. Those persons were not parties to the action. In these circumstances, a question arises as to whether Lokuge Darlin Waidyaratne was entitled to the 1/4th share which she purported to transfer to the 1st defendant by the deed marked “1ඒ10”. The situation is further complicated by the deed no. 3434 dated 01st March 1949 produced by the plaintiff marked “ඒ16”. By this deed marked “ඒ16”, Lokuge Don Hendrick De Silva has transferred his rights in the land to S.Jai Appu from whom the land has subsequently come to the plaintiff in the manner set out in the plaintiff’s chain of title. In these circumstances, it cannot be said that, the deed marked “1ඒ10” proves that the 1st defendant is entitled to a 1/4th share of the land.

In the light of the aforesaid conclusions, the only question of law for determination in this appeal - *ie*: whether the learned High Court Judges erred in law by not considering the documents marked in evidence by the 1st Defendant-Petitioner at the trial and basing their decision entirely on the absence of proof of the Last Will marked “1ඒ2” - has to be answered in the negative.

Accordingly, the judgment of the High Court is affirmed. This appeal is dismissed. The 1st defendant will pay the plaintiff a sum of Rs.20,000/- as costs in this Court.

Judge of the Supreme Court

I agree
Sisira J. De Abrew, J.

Judge of the Supreme Court

I agree
Upaly Abeyrathne J.

Judge of the Supreme Court