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

In the matter of an Appeal to the Supreme Court in terms of Section 5 C of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 as amended by the High Court of the Provinces (Special Provisions) (Amendment) Act No.54 of 2006.

Galdeniyalage Ukkuwa

of Polpitiya,Metikumbura

Plaintiff

S.C.Appeal No.77/2013

SC/HCCA/LA Application

No. .60/2013 **Vs.**

NWP/HCCA/KURU/129/2001(F)

D.C. Kurunegala, Case No. 3188/P

01. Galdeniyalage Podina
02. Parapayalage Devadasa
03. Parapayalage Karunawathie

All of Polpitiya, Metikumbura

Defendants

AND BETWEEN

01. Galdeniyalage Podina **(deceased)**

01.a). Parapayalage Devadasa

01.b). Parapayalage Karunawathie

All of Polpitiya, Metikumbura

Substituted-Defendant-Appellants

02. Parapayalage Devadasa

03. Parapayalage Karunawathie

All of Polpitiya, Metikumbura

2nd & 3rd Defendant-Appellants

Vs.

Galdeniyalage Ukkuwa(**deceased**)

Galdeniyalage Jasintha

of Polpitiya,Metikumbura

Substituted-Plaintiff-Respondent

AND NOW BETWEEN

01. Galdeniyalage Podina(**deceased**)

01a). Parapayalage Devadasa

01b). Parapayalage Karunawathie

All of Polpitiya, Metikumbura

SubstitutedDefendant-Appellant-Appellants

02. Parapayalage Devadasa

03. Parapayalage Karunawathie

2nd & 3rd Defendant-Appellant-Appellants

Vs.

Galdeniyalage Ukkuwa(deceased)

Galdeniyalage Jasintha

of Polpitiya,Metikumbura

Substituted-Plaintiff-Respondent-Respondent

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BEFORE : MURDU N.B. FERNANDO, PC, J.
K.K. WICKREMASINGHE, J.
ACHALA WENGAPPULI, J.

COUNSEL : Lakshman Perera PC with Radeena Gunawardena for the Substituted-Defendant-Appellant-Appellants and 2nd and 3rd Defendant-Appellant-Appellants
Sudarshani Cooray for the Substituted-Plaintiff-Respondent-Respondent.

ARGUED ON : 03rd February, 2021

DECIDED ON : 21st January, 2022

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ACHALA WENGAPPULI, J.

The Plaintiff-Respondent-Respondent (later substituted Plaintiff-Respondent- Respondent and hereinafter referred to as the "Plaintiff") instituted this action in the District Court of *Kurunegala*, seeking to

partition a land called *Udawattehena* in an extent of three seers of *Kurakkan,* according to the pedigree and the share entitlement of each party, as described in paragraph 11 of his second amended plaint of 12.12.1996. The Plaintiff, whilst claiming an entitlement of ½ share of the corpus to himself on paternal inheritance, allocated ¼ share each to the 2nd and 3rd Defendant-Appellant-Appellants and conceding only to a life interest of the 1st Defendant-Appellant-Appellant (later substituted by 1a and 1b Defendant-Appellant-Appellants and 2nd and 3rd Defendant-Appellant- Appellants, and hereinafter referred to as the 1st, 2nd and 3rd Defendants respectively).

It is averred by the Plaintiff that the original owners of the corpus are *Ukku Naide* and *Punchi Naide* who transferred their rights of the corpus to *Kirihapuwa* by deed No. 11680 of 05.06.1885. When *Kirihapuwa* died without a will, his title to the corpus had devolved on his two sons, *Singna* ("සිංඤ") and *Amangira,* who inherited ½ share each thereof. The Plaintiff claimed his ½ share from *Singna* on paternal inheritance. In describing the devolution of title of the 2nd and 3rd Defendants in the plaint, the Plaintiff averred that one *Menika* had acquired a ½ of the remaining ½ share of the corpus from *Amangira* on deed No. 15854 of 05.08.1938 and had thereafter transferred that ¼ share of the corpus to the 1st Defendant, on deed No. 43039 of 23.07.1954. The 1st Defendant had later transferred her title in favour of the 3rd Defendant on deed No. 6118 of 28.06.1984, subject to her life interest. The other ¼ share of the corpus was inherited by *Juwanis* alias *Jeewa* from *Amangira. Juwanis* had thereupon transferred his ¼ share to the 2nd Defendant, on deed No. 6117 of 28.06.1984.

The said three Defendants, by their common Statement of Claim, conceded that *Singna* and *Amangira* have inherited ½ share each of the

corpus from *Kirihapuwa*. They did not dispute the identity of the corpus. However, they sought dismissal of the partition action instituted by the Plaintiff on the basis that, contrary to the claim of the Plaintiff, *Singna* had mortgaged his ½ share, which had subsequently been bought over by *D.B. Welagedara* and *M.D.Banda* at an auction. The Defendants further claim that it was these two, who placed the 1st Defendant in possession of the corpus, sometime in 1972. The 1st Defendant had thereupon claimed she had acquired prescriptive title over the rights of the Plaintiff by long possession. They also assert that the Plaintiff never was in possession of the land.

The parties have suggested a total of twelve points of contest. Of the eight points of contest suggested by the 1st to 3rd Defendants, only points of contest Nos. 7 and 11 had been formulated in relation to the rights of the 1st Defendant. Point of contest No. 7 is in effect of whether lot Nos. 1 and 2 depicted in the preliminary plan were cultivated and possessed by her, while point of contest No. 11 was to the effect whether the plaint should be dismissed upon the acquisition of prescriptive title by the 1st Defendant against the right of the Plaintiff, which had devolved through *Singna.*

The trial Court had answered both these points of contest, i.e. Nos. 7 and 11, against the 1st Defendant as she did not prove any ouster. In delivering its judgment, the Court had allocated ½ share of the corpus to the Plaintiff, whilst allocating ¼ share each to the 2nd and 3rd Defendants, upon acceptance of the pedigree, as averred in the plaint. The 1st to 3rd Defendants, have thereupon preferred an appeal against the said judgment to the High Court of Civil Appeal, before which they unsuccessfully challenged the said judgment solely on the basis that the Plaintiff had failed to establish that he is the '*legitimate son*' of *Singna*.

They further contended that since parties are subjected to *Kandyan* law and in the absence of proof that the marriage between the Plaintiff's parents, namely, *Singna* and *Kiribindu* was registered, that factor would make the Plaintiff an '*illegitimate*' child of *Singna*. On that account, the 1st to 3rd Defendants contend that the Plaintiff has no entitlement to inherit his father's *Paraveni* property.

In dismissing the appeal of the 1st to 3rd Defendants, the High Court of Civil Appeal had held that since the 1st Defendant had failed to put in an issue on the question of legitimacy of the Plaintiff and therefore the trial Court was not called upon to determine that claim. It also held that the Plaintiff is the son of *Singna* and *Kiribindu* and the 1st Defendant, who contracted a *Deega* marriage, is not entitled to any rights over the corpus. Court further concluded that she had failed to establish her claim of acquisition of prescriptive title.

Being aggrieved by that judgment, the 1st to 3rd Defendants have moved this Court, seeking leave to appeal on several questions of law.

On 29.05.2013, this Court having afforded a hearing to the parties, thought it fit and proper to grant leave to appeal against the judgment of the High Court of Civil Appeal, on several questions of law, as set out in paragraph 10(i), (ii) and (iii) of the petition of the Defendants, dated 18.02.2013.

The questions of law, that had been formulated by Defendants, as contained in sub paragraphs 10(i),(ii) and (iii) of their petition, are as follows:

1. Has the High Court of Civil Appeal erred and misdirected itself in law as regards a burden of proof in relation to the title of the Plaintiff?

2. Has the High Court of Civil Appeal failed to consider that the Learned District Judge has failed to investigate the title of the Plaintiff as per the provisions of the Partition Law?
3. Has the High Court of Civil Appeal misdirected itself on the question of whether the said property is *Paraveni* Property or not in view of the provisions of section 10(1)(a) of the Kandyan Law Declaration and Amendment Act?

At the hearing of the appeal, learned President's Counsel for the Defendants contended that with the death of *Singna* without a will, his ½ share entitlement to the corpus has become *Paraveni* property as per the statutory provisions contained in section 10(1)(a) of the *Kandyan* Law Declaration and Amendment Act. He further contended that, since the parties are subject to *Kandyan* law, if the Plaintiff were to succeed to that ½ share of the *Paraveni* property of his late father, he must first prove that he is the *'legitimate'* son of *Singna* by producing his birth certificate.

Learned President's Counsel, having referred to the evidence that indicate *Singna* and *Amangira* were in an associated marriage relationship with the mother of the Plaintiff Kiribindu, contended that therefore it was incumbent on the trial Court to properly investigate into the claim of title that had been laid before the trial Court by the Plaintiff. In determining the Plaintiff's entitlement to paternal inheritance, it ought to have inquired into the validity of the Plaintiff's parents' marriage and his legitimacy, by applying the relevant legal principles. It was submitted by the learned President's Counsel that the Plaintiff is not entitled to inherit any *Paraveni* property due to his

illegitimacy and the failure of the trial Court to investigate into that aspect of the title of the Plaintiff, despite being obligated to do so under section 25 of the Partition Act, tainted the judgment entered in his favour. Similarly, the judgment of the High Court of Civil Appeal, in holding the said erroneous judgment in affirmation, also had fallen into error and therefore the Defendants seeks that both these judgments be set aside.

Learned Counsel for the Plaintiff submitted that the contention of the Defendants on the legitimacy of the Plaintiff was raised for the first time in the High Court of Civil Appeal and had been made without a point of contest being raised on that question of fact and in the absence of any item of evidence in support of such a contention. She further submitted that the Respondents are now seeking to advance a new argument, which is based purely on the fact that the Plaintiff is without a birth certificate. She claimed that owing to this reason, the Plaintiff was unable to refute the position put to him by the Defendants that he cannot state clearly who his father was, as his mother *Kiribindu,* who admittedly had a polyandrous relationship with the two brothers *Singna* and *Amangira*.

She further contended that the mere absence of a birth certificate does not necessarily make the Plaintiff an illegitimate child. She also submitted that the Defendants, by making that submission, have attempted to 'confuse' the issue by interweaving the question of legitimacy into the question of paternity, by simply placing reliance on the inability of the Plaintiff to state as to who his father is, since he could not produce a birth certificate at the trial. According to learned Counsel these are two independent and sperate factors altogether.

In the circumstances, undoubtedly it would be a profitable exercise, that the applicable principles of *Kandyan* law on marriage and inheritance are identified and referred to at the outset of this judgment, which would then facilitate this Court in discharging the task of determining the several questions of law and related questions of fact, after undertaking a careful consideration of the material presented before the trial Court.

It is a well-documented historical fact that, in the *Kandyan* kingdom, there were instances of polyandrous marriage relationships, generally referred to as associated marriages or joint marriages, following a customary practice that was prevalent during the 18th and 19th centuries, generally between brothers of one family, who had opted to co-habit with one wife. The Legislature, by enactment of several statutory provisions contained in Ordinance Nos. 13 of 1859 and 3 of 1870, made it obligatory on all persons subject to *Kandyan* law to register their marriages. Only such registered monogamous marriages were conferred with legal validation, whilst enacting specific provisions to prohibit the aforesaid customary practice of contracting polyandrous and polygamous marriages as practiced by some of the inhabitants of the *Kandyan* provinces.

Sections 14 and 15 of the *Kandyan* Law Declaration and Amendment Ordinance No. 39 of 1938, defined the terms '*legitimacy*' and '*illegitimacy*' of children, depending on the fact whether the marriages of their parents were registered or not. Only the issues of a registered and thus 'valid' marriages are considered as legitimate. The legal impact on the children of such customary marriages, created by the enactment of these statutory provisions, is that the children who were born to parents with polyandrous marriages have thus become

illegitimate children along with the children of any unregistered, monogamous marriages which in turn had an adverse impact on their rights on paternal inheritance, in relation to *Paraveni* property. *Paraveni* property had been defined in section 10(1)(a) of the said Ordinance. That section made immovable property to which a deceased person was entitled to by succession to any other person who has died intestate as *Paraveni* property.

Learned Counsel for the Plaintiff had quoted from the text of ***Sinhala Laws and Customs*** by *H.W. Tambiah*, where the learned author states (at p.125) that " … *the children of such associated marriage were regarded as the legitimate children of all the associated husbands*." This had been the position under *Kandyan* law, as practiced in the kingdom, before the statute law had specifically altered its applicability. At one point of time, Courts were of the view that the legality of a marriage has no direct impact on the principles of inheritance of the *Kandyan* customary law, as practiced in the *Kandyan* kingdom, following the judgment of *De Sampayo* J, in the case of ***Raja v. Elisa***, reported in Modeler's *Kandyan* Law page 510, 1 S.C. Civ. Min, 27.05. 1913., which stated that "*British legislation has, no doubt, provided a uniform and compulsory form of marriage for the Kandyans, but the principles of inheritance to be found in the ancient Kandyan law remain unaffected*". Learned Counsel for the Plaintiff may have relied on the above cited quotation from the text of ***Sinhala Laws and Customs*** (supra), in view of this judgment.

The extended application of this statement, beyond the context in which it was stated, was subsequently restricted by a full bench, which had authoritatively laid down its determination, in the judgment of ***Kuma v. Banda*** (1920) 21 NLR 294. The contention that had been

advanced before their Lordships was "*… in spite of the Kandyan Marriage Ordinance, No. 3 of 1870, the mutual rights of inheritance between parents and children do not depend upon the question whether the union of the parents was registered as a marriage under that Ordinance, but rather upon the question whether that union was in accordance with the principles of Kandyan customary law*". In rejecting that contention, *Bertram* CJ made the following pronouncement in law, on the questions of validity of a *Kandyan* marriage and legitimacy of its issues, in view of the statutory provisions contained in the said Ordinances:

> *"Ordinance No. 3 of 1870 abrogates the old laws of marriage and makes registration the sole test of the validity of marriage and consequently of legitimacy. There was no necessity to state in express terms that such registration was to be the sole test of legitimacy. Illegitimacy is involved in the conception of an invalid marriage. Even if the Kandyan idea of illegitimacy was different, we are here dealing with an Ordinance of 1870, and must give the words used by the legislator the ordinary meaning that they bear in British legislation. That the Legislature intended to make legitimacy depend on registration is indicated by the provisions of sections 24 and 30."*

Thus, when the Plaintiff instituted the instant partition action in 1988, the law had already been clearly laid down by the superior Courts and therefore his right to paternal inheritance over any *Paraveni* property of his father, who died without leaving a will, is dependent on the former's legitimacy, which in turn depended on the validity of the marriage of his parents.

In the amended plaint it is asserted that upon the death of *Singna,* who enjoyed a ½ share of the corpus, his rights were devolved on his son, the Plaintiff. The Defendants, in their joint amended statement of claim, have denied this statement. Thus, it was incumbent upon the Plaintiff to prove what he asserted, in relation to his claim based on paternal inheritance.

The parties, at the commencement of the trial, have admitted that the title of the corpus was devolved on *Kirihapuwa*, upon acquisition of title through deed No. 11880 of 05.06.1885 from *Punchi Naide* and *Ukku Naide,* who they accept as the original owners. Thereafter from *Kirihapuwa,* who died intestate, his sons, *Singna* and *Amangira* inherited title to the corpus on equal shares. They also agreed that the rights of *Amangira* had devolved on the 2nd and 3rd Defendants through his heirs.

The Plaintiff had suggested four points of contest while the Defendants have suggested eight. The trial proceeded on the acceptance of these twelve points of contest. It is significant to note that there was no admission by the parties that they are subjected to *Kandyan* law nor have they suggested a point of contest on that issue.

The Plaintiff gave evidence on his behalf and the 1st and 2nd Defendants have given evidence on behalf of the Defendants. The real contest was between the Plaintiff and the 1st Defendant, since the devolution of title to the 2nd and 3rd Defendants, as averred in the amended plaint, was not contested by the 1st Defendant. The Plaintiff claimed that he is the only son of *Singna* and since the 1st Defendant was given in *Deega* marriage, she is not entitled to any paternal inheritance.

The position that was taken in the amended statement of claim by the Defendants, that the ½ share of *Singna* was sold at an auction and

had been bought over by *D.B. Welgedera* and *M.D. Banda* and the Plaintiff therefore had no right over the corpus, was neither raised as a point of contest nor was established by presenting evidence. The Defendant had not confronted the Plaintiff with it during cross examination either.

The Plaintiff, in support of his claim that the 1st Defendant was given in *Deega* had produced her marriage certificate which confirmed that fact. When she initially denied her blood relationship to the Plaintiff, she was confronted with her evidence before Court in case No. 2297/P, in which she had admitted him as her elder brother. The 2nd Defendant also had admitted that the Plaintiff, being the eldest in the family, is the elder brother of his mother, the 1st Defendant.

The trial Court, having proceeded to trial on the points of contest already accepted and, on the evidence, placed before it by the parties, pronounced its judgment in favour of the Plaintiff by allocating a divided ½ share of the corpus to him upon acceptance of his pedigree, and conferred the other divided ½ share of *Amangira* on the 2nd and 3rd Defendants, as per the same pedigree.

It is relevant to note here that the Defendants have challenged the allocation of ½ share to the Plaintiff only on the basis that he is unable to say whether his father was *Singna* or *Amangira* since he had no birth certificate to produce. The questions whether *Singna* and *Kiribindu* have registered their marriage, whether there is a marriage certificate in conformation of that marriage or whether the Plaintiff is the legitimate son of *Singna* was never raised before the trial Court by the Defendants by suggesting points of contest or taking up that position at least in their evidence. Owing to that reason the issue of legitimacy has not

been presented as a disputed fact in issue or was considered by the trial Court.

It is only to the High Court of Civil Appeal, that the Defendants have raised the question of legitimacy of the Plaintiff for the first time as a ground of appeal in their petition of appeal. Learned President's Counsel had relied on this solitary ground of appeal in his written submissions that had been tendered to the appellate Court. In that submission, he contended that the Plaintiff has failed to prove that he is the *'legitimate'* son of *Singna.*

In view of the contention had been presented by the Defendants before this Court, it appears that their contention is founded on the premise that it was incumbent upon the Plaintiff in the instant partition action, not only to prove that he is a son of *Singna* but also his legitimate son, which in turn dependent on the validity of his parents' marriage. Earlier on in this judgment, the validity of this contention was accepted.

It is evident from the proceedings that during his cross examination, the Plaintiff admitted that he had no birth certificate to produce in support of his assertion that his father is *Singna.* When it was put to the Plaintiff that, without a birth certificate, he is unaware as to the name of his father, he did not reply. Based on this item of evidence, it was submitted to this Court that, as *Singna* and *Amangira* were in an associated marital relationship, and such forms of customary marriages were not caught up with the term married "*according to law*", as stated in section 14 of the Ordinance No. 39 of 1938. In view of the illegality of such a polyandrous relationship, clearly the Plaintiff could not be considered as a legitimate son and therefore he had failed in establishing that fact.

In the absence of any point of contest raised by the parties before the trial Court, learned President's Counsel contended that it was up to that Court to apply the law and raise the question whether the Plaintiff is the legitimate son of *Singna,* as an additional trial issue. It is his submission that in view of the evidence, the trial Court should have dismissed the Plaintiff's action seeking partition.

In view of the submissions of the parties as referred to above, it is convenient to examine them under the following considerations.

a. whether the Plaintiff had sufficiently discharged his evidentiary burden under the instant partition action to prove that he is not only the son of *Singna* but also his 'legitimate' son and,

b. whether the trial Court, in view of the material placed upon it, is obligated to inquire into the legitimacy of the Plaintiff, under section 25 of the Partition Law, since the legitimacy is a factor which in turn would determine his rights on paternal inheritance to *Paraveni* property under the principles of *Kandyan* Law, over the corpus.

In dealing with the first segment of the contention as referred to above, it is the Defendant's position that the Plaintiff had failed to prove that he is *Singna's 'legitimate'* son. learned Counsel for the Plaintiff termed this contention as an attempt to 'confuse' Court since the Defendants, in their cross examination, have capitalised on the Plaintiff's inability to prove his relationship to *Singna* by producing his

birth certificate. They never raised the issue of his legitimacy on the premise that there is no proof of a valid marriage.

Thus, this Court first examine the relevant evidence on the point. Relevant section of the proceedings is reproduced below, which indicate the line of cross examination adopted by the Defendants.

It is noted that despite the fact the Plaintiff's father's name was mentioned in the amended plaint as Singna (සිංඤා), his name has been erroneously recorded in the proceedings as Singho (සිංඤෝ).

ප්‍ර : තමා කියන හැටියට අමංගිරා හා සිංඤෝ එක පවුලේම හිටියද?

උ : ඔව්.

ප්‍ර : ඒ ඉන්න කොට තමයි පොඩිනා ඉපදුනේ?

උ : මම ඉස්සෙල්ලා ඉපදුනේ.

ප්‍ර : ඒ අනුව තමන්ට කියන්න බැහැ නේද, තමංගේ තාත්තා අමංගිරාද සිංඤෝද කියා?

උ : සිංඤෝ කසාද බැඳලා සිටි නිසා, මගේ තාත්තා සිංඤෝ බව මට කියන්න පුළුවන්.

ප්‍ර : තමාට උප්පැන්නයක් තියෙනවා ද?

උ : මට උප්පැන්න සහතිකයක් නැහැ.

ප්‍ර : ඒ අනුව තමාගේ උප්පැන්නයට දාලා තියෙන්නේ, පියා වශයෙන් සිංඤෝද අමංගිරාද කියන්න තමා දන්නේ නැහැ නේද?

උ : උත්තරයක් නැත.,

The same position is reflected further down during cross examination of the Plaintiff:

,ප්‍ර : ඇත්ත වශයෙන්ම, තමාගේ පියා සිංඤෝ බව පෙන්වන්න ඔප්පු කරන්න උප්පැන්න සහතිකයක් නැහැ නේද?

උ : නැහැ..,

Before venturing into consider whether the Plaintiff had failed to discharge the evidentiary burn on him to prove that he is the *'legitimate'* son of *Singna,* it is relevant to examine the nature and the extent of the

burden of proof that had been imposed on a plaintiff in a partition action by reference to judicial precedents.

This Court, in the judgment of ***Abubuker v. Fernando*** (1987) 2 Sri L.R. 225 at p.230 stated that it is his burden to prove that he has rights in the land which he seeks to partition. The question as to how he should prove his title is answered in the case of ***Appuhamy v. Punchihamy*** (1914) 17 NLR 271 at 274 with the statement that he must "*prove his title from the original owner of the land*". He is also expected "*… to establish his pedigree by legally admissible evidence*" per ***Cooray et al v. Wijesuriya*** (1958) 62 NLR 158 at 163, and, in addition, must prove "*the title of those parties to whom he has given shares*" ***Mudiyanse v. Ranaweera*** (1975) 77 NLR 501 at 505. If he relies on any deeds, in proof of his title, then he must prove them by adducing proof of due execution per ***Sabaratnam et al v. Kandavanam*** (1956) 60 NLR 35 at 38, and should place "*clear proof as to how the executant of a deed was entitled to the share which the deed purports to convey*" per ***Fernando v. Fernando and Others*** (2006) 2 Sri L.R. 188 at 192. However, it is not essential for a plaintiff to prove that "*common possession is inconvenient*" (***Perera and Others v. Fernando*** (1956) 60 NLR 229 at 232).

Thus, it is amply clear that the evidentiary burden on a plaintiff in a partition action is different from his counterpart, who had instituted an action under section 5 of the Civil Procedure Code, since the former is bound to prove his own title as well as the title of each of the defendant, as described in his pedigree. This he is expected to do by placing legally admissible evidence, in relation to the points of contest suggested by the parties. His failure to do so, particularly in relation to establishing his own title, would invariably result in the dismissal of his action as it had been stated by *Layard* CJ in ***Mather v. Tamotharam***

Pillai (1908) 6 NLR 246 at 250"… *unless he makes out his title, his suit for partition must be dismissed*" as " *it has been repeatedly held by this Court that the District Judge is not to regard the partition suit as merely to be decided on issues raised by and between the parties to the suit, and that the plaintiff must strictly prove his title, and, only when he has done so to the satisfaction of the Court, has he established his right to maintain such action*."

The words used by *Layard* CJ, "*… the plaintiff must strictly prove his title, …"* in describing the Plaintiff's duty to establish his title to the commonly held property and the pedigree through which he seeks to prove that title had been considered by *Gratian* J in ***Karunatatne v Sirimalie*** (1951) 53 NLR 444 (at 445), in view of the judgment of ***Golagoda v Mohideen*** **(**1937) 40 NLR 92, where the said statement was emphasised, in following terms;

> "*In accordance with this principle, the Court should not enter a partition decree unless, if I may adopt Fernando J's phrase in Golagoda's case, it is " perfectly satisfied " that the rights of possible claimants who are not parties to the proceedings have not been shut out accidently or by design. Subject however to this important qualification, the fact remains that a partition action is a civil proceeding, and I do not understand the authorities to suggest that, where all possible claimants to the property are manifestly before the Court, any higher standard of proof should be called for in determining the question of title than in any other civil suit.*"

In the instant partition action, the Plaintiff relies on the principles of *Kandyan* law, in support of his claim to ½ share of the corpus, which had devolved on him through paternal inheritance, as well as to

disinherit his sister on the basis she had contracted *Deega* marriage. That being his assertion, he also must prove that he is the legitimate son of *Singna* as rightly contended by the learned President's Counsel for the Defendants.

The preferred method of proving that fact is to present the best evidence of his parentage, through presentation of his birth certificate. But he didn't. He told Court that he does not have one. The High Court of Civil Appeal was of the view that "*being a partition case makes any difference because it has been decided that there is no additional burden of proof in a partition case to prove births, deaths and marriages, the production of relevant certificates is not mandatory*."

Under these circumstances, should the partition action of the Plaintiff be dismissed upon his mere failure to tender the birth certificate, in proof of his relationship to his father, through whom he claims paternal inheritance?

In view of the evidence that had been placed before the trial Court, I do not think it should. The reasons are as follows.

The Plaintiff, when cross examined on his failure to produce the birth certificate, stated that he does not have one. He was 74 years old when he gave evidence in 1998 and therefore may have been born in or around 1924. It could well be that his birth may or may not have been registered as his parents were in an associated marital relationship at

the time of his birth. In the absence of a birth certificate and in the absence of both his parents to offer direct evidence of his birth, the Plaintiff had thereupon relied on the evidence of family relationship, elicited through his sister, the 1st Defendant. She admitted in her evidence that *Signa* is her father and the Plaintiff is her elder brother. The 2nd Defendant too had admitted in his evidence of the family relationship of the Plaintiff to his mother.

To insist upon production of a birth certificate, in proof of the parentage of a person in such circumstances, as in the instant action, seemed an unreasonable proposition, in view of the statutory concession granted to such a party. Whilst it is always prudent and advisable to insist on formal proof of a birth, marriage or a death, with the production of the applicable certification, being the best evidence in support of a family relationship that had become a relevant fact in issue, at the same time it is important to note that there are statutory provisions contained in the Evidence Ordinance, which are meant to cater for such situations, when a party is unable to produce best evidence in support of such relationship, by providing with an alternative method of proof.

In a situation where a party on whom the burden of proof lies to prove that fact in issue, but has no formal proof available in the form of best evidence, in support of a family relationship, could therefore rely on hearsay evidence, in proof of that relationship, subject to fulfilment of certain pre conditions and thereby, facilitating a Court to form an opinion as to the existence of such a relationship. It must be stressed

here that proof of such a family relationship by placing reliance on statements of others, in the absence of best evidence in proof of such relationships, could effectively be countered by another party by producing evidence counter to such a claim and thus diminishing the reliability and weightage attached to such statements.

Sections 32(5) and (6) of the Evidence Ordinance, in order to cater for such situations, have recognised certain instances to admit statements made by others as an exception to hearsay rule, and had accordingly permitted admission of such statements as legal evidence, in proof of "*any relationship by blood, marriage, or adoption*", made by a person who, although not available as a witness, but had special means of knowledge of that fact and made that statement before the dispute arose (per ***Cooray et al v. Wijesuriya***(1958) 62 NLR 158 at 160)**.** Section 50 of the said Ordinance, in turn, had allowed a Court to form an opinion as to the existence of such family relationship of one person to another, upon yet another's opinion or conduct.

The rationale behind the enactment of the statutory provisions that are contained in sub sections (5) and (6) of section 32 of the Evidence Ordinance has been described by *Weerasoorya* J in ***Wijesekera v. Weliwiligoda*** (1958) 61 NLR 133 at 137 as follows:

> "*The provision is an exception to the rule against hearsay and has been enacted primarily to meet a situation where the matter sought to be established involves remote facts of family history, which are incapable of direct proof. In the words of Lord Blackburn in* ***Sturla v. Freccia*** *(1879) 5*

> *A.C. 623 at 641 'that the ground is that they were matters relating to a long time past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice* ".

The approach that should be adopted by Courts, in considering such infirmities in the evidence adduced by a plaintiff of a partition action in proof of the 'original owner' of the corpus, has been clearly stated by *G.P.S. de Silva* J (as he was then) in ***Perera v. Perera*** (1986) 2 Sri LR. 208 at 211. In view of the fact that "*it would not be reasonable to expect proof within very high degrees of probability on questions such as those relating to the original ownership of land*" his Lordship stated that:

> "*Courts by and large countenance infirmities in this regard, if infirmities they be, in an approach which is realistic rather than legalistic, as to do otherwise would be to put the relief given by partition decrees outside the reach of very many persons seeking to end their co-ownership*."

In instituting the instant action, the Plaintiff clearly averred that he is entitled to a divided ½ share of the corpus upon paternal inheritance, being the "*only male child*" of *Singna*. It is correct that the Plaintiff did not describe himself as the only '*legitimate*' son of *Singna.* But when he averred in the plaint that he is the "*only male child*" of *Singna* and claims paternal inheritance, what in fact he expects the Court is to consider that he is the only legitimate son of *Singna*.

The question that arises here is, did he prove that fact?

Having referred to the 1st Defendant's disqualification to any inherited rights from their father by stating that she was given in a *Deega* marriage, the Plaintiff had clearly relied on *Kandyan* law principles of succession to assert his rights on paternal inheritance and accordingly presented his amended plaint on that premise. Point of contest No. 2 had been suggested by the Plaintiff to the effect whether the rights of *Singna* should devolve only on the Plaintiff indicates that it had been his position that he is entitled to paternal inheritance being the only legitimate son of *Singna.*

In its judgment, the trial Court had answered the point of contest No. 2 in the affirmative and in favour of the Plaintiff but focused its attention more on the only dispute presented for its determination, namely, whether the 1st Defendant is entitled to any share of the corpus, either on paternal inheritance or by prescription. The Court had decided against her on paternal inheritance, in view of the fact that she was given in a *Deega* marriage as per the Copy of Entry of Marriage in the *Kandyan* Marriage Register Book (P3) and her own admission of that fact, in a previous Court proceeding. The Court also concluded that she had failed to establish acquisition of prescriptive title.

The evidence presented before the trial Court clearly indicate that the Plaintiff and the 1st Defendant are elder brother and younger sister respectively and that the 2nd and 3rd Defendants are the children of the

1st Defendant. In the Copy of Entry (P3) one *Galadeniyalage Ukkuwa* had been a witness to the marriage of the 1st Defendant and the name appearing in the plaint as the Plaintiff too is *Galadeniyalage Ukkuwa.* The Plaintiff is the eldest child among six siblings, while the 1st Defendant was the 2nd child. It was elicited from the birth certificate of the 1st Defendant (1V1) that her father is *Galadeniyage Singna.* None of the Defendants ever challenged the status of the Plaintiff, who instituted the instant partition action claiming paternal inheritance, by confronting him with the allegation that he had instituted the instant action by falsely claiming to be a son of *Singna* and therefore is a total stranger to their family. Nor did they suggest that he is a son of *Amangira.* On the contrary, the 1st and 2nd Defendants have admitted that the Plaintiff is the eldest child in the 1st Defendant's family, headed by her father *Singna*.

The 1st Defendant, when referring to the Plaintiff as her elder brother, was probably relying on what she was told of her relationship to the Plaintiff by her late parents, as she was born after the Plaintiff. Owing to that reason, she could not have known as to who his parents are, on her own. Obviously, their parents, in introducing the Plaintiff's relationship to the 1st Defendant, had relied on their own direct knowledge of that relationship. Thus, her admission that the Plaintiff is the eldest in her family is qualified to be admitted as legal evidence and to have acted upon under section 32(5) of the Evidence Ordinance. In view of these evidence, I am of the considered view that the fact the Plaintiff is *Singna's* son had been clearly established, even in the absence of a birth certificate in support of that fact.

Producing a birth certificate at the trial by the Plaintiff would not have significantly contributed to resolve the issue of legitimacy, as contended by the Defendants, since legitimacy is dependent on the validity of the marriage of their parents. The validity of a marriage between persons subject to *Kandyan* law had to be decided upon application of relevant legal principles in *Kandyan* law, in the absence of a marriage certificate. The refence to the status of the parents reflected as 'married' as indicated in the birth certificate, is not conferred with the status of '*prima facie evidence*' of the validity of such marriage, as per section 57 of Births and Deaths Registration Act, as amended.

Hence, the remaining part of his assertion, whether the evidence did point to the fact that he is the legitimate son of *Singna* needed to be considered.

Learned President's Counsel's contention, that there was no proof of a valid marriage and therefore the Plaintiff is an illegitimate child, is entitled to succeed only if the evidence available as to the nature of the marriage relationship of the Plaintiff's parents points only to an associated marriage, which they may have commenced sometime before 1924, the year the Plaintiff was born. Clearly by then such form of customary marriages could not have been registered and thus have become illegal, rendering any offspring of such unions, illegitimate.

But that is not the only evidence before Court. It transpired from the evidence that *Singna* and *Amangira* were initially in an associated marriage relationship with the mother of the Plaintiff. In addition, it also transpired from evidence that the said polyandrous relationship did not persist for long and *Singna* and *Kiribindu* have thereafter married, a fact even the 1st Defendant had accepted.

The Plaintiff, having admitted that there was an associated marriage relationship of his parents with *Amangira,* however had thereafter stated in his evidence that his father *Singna* had '*married*' (කසාද බැන්දා) his mother *Kiribindu*. The term "කසාද බැන්දා" is generally used in vernacular to denote a formal marriage and the terms "දික්කසාදෙ" or "කසාදෙ කටු ගෑවා" indicate its formal dissolution. The 1st and 2nd Defendants also have testified that the associated marriage relationship of *Singna, Amangira* and *Kiribindu* were disrupted at a subsequent stage as the two brothers have parted their ways after a shooting incident. This has happened when the 1st Defendant was a young child. In conformation of that fact, the 1st and 2nd Defendants state that the rights of *Amangira* were devolved on the three children whom he had considered to have fathered, while the Plaintiff, the 1st Defendant and another sister (who did not wish to claim any share of the corpus), were left to claim inheritance under *Singna.* The associated marriage would not have survived for that long. What is important is that both Plaintiff and 1st Defendant have clearly stated in their evidence that their parents, namely *Singna* and *Kiribindu,* have thereafter "කසාද බැන්දා".

The identical words used by the two contesting siblings to describe the status of the '*marriage*' of their parents, "කසාද බැන්දා", in itself indicate that they speak of this event with their own knowledge, a factor in line with their evidence that the associated marriage was disrupted after the youngest of the six children was born. Therefore, the subsequent '*marriage*' of *Singna* and *Kiribindu* must have taken place, when they were old enough to understand its significance. Their evidence on this matter does not create an impression that they learnt of the said '*marriage*' from others who had come to know from their

parents. This evidence also indicates that once the customary marriage was effectively terminated at a subsequent point of time, *Singna* and *Kiribindu* have thereafter '*married*' to form a monogamous relationship and treated the Plaintiff as well as the 1st Defendant and her sister, as children fathered by *Singna*.

However, neither party produced any certificate of marriage, which would have been the best evidence of such a marriage. The evidence that *Singna* and *Kiribindu* were married at a later point of time however, remains as a fact not assailed by any of the Defendants. The acceptance of that fact also explains as to why the Defendants did not raise an issue on legitimacy of the Plaintiff during the trial. It must have been an accepted fact among the family members. Instead, the Defendants only utilized the evidence of the associated marriage only to highlight that the Plaintiff, in the absence of a birth certificate, is unable to say who his father is, only after the trial Court had rejected the 1st Defendant's claim of prescription. However, the subsequent marriage of *Singna* and *Kiribindu* had altered the status of the Plaintiff, the 1st Defendant and the other sister as legitimate children of apparently a valid marriage.

In delivering the judgment of the Court, in ***Ukku v. Kirihonda*** (1902) 6 NLR 104 at 107 (decided after Ordinance No.3 of 1870), *Moncrieff* CJ stated:

> *"… I am inclined to think that subsequent registration does date back to the original beginning of the connection between the parties, although it is quite true that the provisions of section 30 for rendering legitimate children procreated before*

> *registration might suggest that the intention of the Legislature was different. I therefore think there was in this case, and was intended to be by registration under section 31 of the Ordinance, a validation of what had been before a void marriage-a validation dating from the time the void marriage was entered into, and a validation also of the legitimacy of the children.*

Legislative provisions reflecting this reasoning are found in the proviso to section 14 of the *Kandyan* Law Declaration and Amendment Ordinance and section 7 of the Marriage and Divorce (Kandyan) Act No. 44 of 1952 as amended.

Withers J in the judgment of ***Ahugoda Ukku Etana et al v. Dombegoda Punchirala et al*** (1897) 3 NLR 10 at 11, had applied the presumption of legitimacy to fill in a situation, where insufficient details of a *Kandyan* marriage that had said to have taken place prior to Ordinance No. 3 of 1870 was available before that Court. *In* ***Maniapillai v Sivasamy*** (1980) 2 Sri L.R. 214, *Sosa* J refers to the '*presumption of legitimacy*' that had arisen upon the evidence presented under section 32(5) and 50 of the Evidence Ordinance, by a statement contained in a deed that had been relied upon by a party in a *Rei Vindicatio* action, had effectively been rebutted by the opposing party by production of a marriage certificate containing a clear contrary position.

In this instance too, with the unqualified admission of the subsequent monogamous '*marriage*' of *Singna* and *Kiribindu* by the contesting parties, the presumption of legitimacy arises in favour of the three children said to have been fathered by *Singna*, including the Plaintiff and the 1st Defendant.

These factors made the legitimacy issue settles in favour of the Plaintiff as even if at the time of his birth, his parents were not married "*according to law*", by subsequent registration of their union, as indicative from the term "කසාද බැන්ද", made him a legitimate child of those parents.

Thus, in the instant partition action, the decision of the trial Court, to hold with the Plaintiff on the basis that he had established that he is the son of *Singna* and also the fact that *Singna* had later '*married*' his mother, is well justified, in view of the evidence available before it and especially in the absence of any evidence in support of a contrary view. The parentage of the Plaintiff is sufficiently established by him in proof of his entitlement to a ½ share, by eliciting the evidence of the subsequent 'marriage' of his parents, through the 1st Defendant, which in turn had established his legitimacy. Since the claim of '*marriage*' of his parents is admitted by the Defendants in their evidence, the trial Court is well justified in accepting his right to paternal inheritance to the ½ share of the *Paraveni* property, on the basis that he is the only legitimate son of *Singna*. The High Court of Civil Appeal too was of the view that the Plaintiff did establish that fact when it stated in the judgment that "*… the 1st Defendant as well as the Respondent being in agreement that Singna was married to Kiribindu and not Amangira makes it possible for the Court to find that both 1st Defendant and Respondent are natural heirs of Singna who was validly married to Kiribindu*".

In view of the above reasoning, it is clear that the High Court of Civil Appeal had correctly decided the solitary ground of appeal that had been presented before it by the Defendants, in challenging the entitlement of the Plaintiff, on the available evidence and in latter's favour.

The other contention presented before this Court by the Defendants, in addition to what had already been raised before the High Court of Civil Appel, is that the trial Court had fallen into error in its failure to frame an additional point of contest on the question of the paternity and legitimacy of the Plaintiff and thereby failed to fulfil the statutory duty to investigate the validity of the title, as imposed by section 25 of the Partition law. The question, whether the trial Court should have raised an additional point of contest under these circumstances, in the absence of such a point of contest suggested by a party, needed to be answered, in the light of the applicable principles of law as well as the relevant judicial precedents relating to the statutory duty imposed on an original Court under section 25 and the instances in which a trial Court could act under section 149 of the Civil Procedure Code.

In this context, it is helpful to refer to the statutory provisions contained in section 25(1) of the Partition law at this point.

Section 25(1) of the Partition law reads thus:

> "*On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the Court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made.*"

This Court, in the judgment of ***Sopinona v. Pitipanaaracchi & Others*** (2010) 1 Sri L.R. 87, had reiterated the collective reasoning of a long line of judicial precedents, which have described the scope of the duty that had been imposed on a trial Court under section 25, with the statement that" … *in a partition action, it would be the prime duty of the Trial Judge to carefully examine and investigate the actual rights and titles to the land, sought to be partitioned. In that process it would be essential for the Trial Judge to consider the evidence led on points of contest and answer all of them, stating as to why they are accepted or rejected*".

The statement of Court that "… *it would be essential for the Trial Judge to consider the evidence led on points of contest and answer all of them*", refers to an important aspect of the duty of a trial Court under section 25. Section 25 made it obligatory for the trial Court "*shall hear and receive evidence*", in support of the title of each party and shall also try and determine all questions of law and fact arising in that action in regard to the right, share and interest of each party. This Court had therefore expressed its view that a trial Court must investigate the title of each party, not by undertaking an investigation on its own terms, but "*on the evidence led on points of contest*". This aspect highlights the requirement that it incumbent upon the respective parties to suggest their points of contest, along the lines on which they are at variance with the facts and law, relating to the respective positions taken up by each party. Once the points of contest are settled and accepted by the Court, to place evidence in support as well as in its opposition, in support of their respective individual rights, shares and interests. In ***Juliana Hamine v. Don Thomas*** 59 NLR 546, it had been stated that (at p. 549) "*it is indeed essential for parties to a partition action to state to the Court the points of*

contest interne and to obtain a determination on them…". But the Court also added that however "*the obligations of the Court are not discharged unless the provisions of section 25 of the Act are complied with quite independently of what parties may or may not do."*

Hence arises the question, whether the trial Court should, in this particular instance, have framed a point of contest on the question of legitimacy on its own, in the absence of a point of contest to that effect, in its investigation of title of the Plaintiff.

It is accepted by the full bench decision of ***Peiris v. Perera*** (1906) 10 NLR 41 at 43 that the framing of issues is a "*judicial decision"* and such issue need not necessarily be arising out of pleadings, per *Bertram* CJ in ***Silva v. Obeyesekera*** (1923) 24 NLR 97 at 107. It is also accepted that the parties could frame additional issues before the pronouncement of the judgment, as stated in ***Mohammed v. Lebbe & Others*** (1996) 2 Sri L.R. 62 at 65. Why it is important to have all the relevant issues before the Court during a trial is best explained by a quotation from a judgment of the High Court of *Gujarat*, inserted by *Prasanna Jayawardena* J, in an unreported judgment of this Court (***Seylan Bank Ltd v. Epasinghe and two Others*** S.C. Appeal No. SC CHC 39/2006 –S.C. minutes of 01.08.2017). His Lordship had, cited the following statement of an Indian Judge with approval, in dealing with the scope of framing of issues in a trial Court:

> "*... issues are backbone of a suit. They are also the lamp-post which enlightens the parties to the proceedings, the trial Court and even the appellate Court – as to what is the controversy, what is evidence and where lies the way to truth and justice*."

Thus, it is seen that the parties have an important role in framing the issues on the relevant contest points, by assisting a trial Court, in identifying and suggesting the points at which the parties are at variance and contest and thereby enabling the Court to rightly determine the dispute presented before it. This assumes a greater significance in partition actions as the trial Courts "*shall examine the title of each party*".

Section 19(1)(a) of the Partition Law requires any defendant to file a statement of claim along with a pedigree showing the devolution of title, "*if he disputes any averment in the plaint relating to the devolution of tile*". The Defendants, in their statement of claim, have collectively sought the dismissal of the Plaintiff's action. They would have easily achieved their desired objective, if the legitimacy of the Plaintiff was taken up when they filed their statement of claim. This was the opportunity for the 1st Defendant to present an alternative pedigree by disqualifying the Plaintiff on the basis of his illegitimacy. But due to a reason best known to the Defendants, they did not. Even the 1st Defendant, who should have had sufficient knowledge of such a disqualification on the part of the Plaintiff to claim title on paternal inheritance, did not aver that important factual position in her statement of claim. Even at the late stage of the trial she could have either amended her statement of claim in line with that challenge or at least could have suggested a point of contest on that basis, when she elicited from the Plaintiff that he had no birth certificate to prove who his father is and their parents were living in an associated marital relationship with *Amangira*.

It is clear that the Defendants have mounted their challenge on the Plaintiff's assertion that he is the son of *Singna* only on the basis of the absence of a birth certificate and that his parents were in an associated marriage. Therefore, the Defendants contend that the trial Court should have acted on that evidence in fulfilling its duty to investigate title of the Plaintiff and thereupon should have applied the relevant legal principle by framing an additional issue as to the legitimacy, in determining the Plaintiff's entitlement. The Defendants added that since the trial Court had failed in that task, and the resultant error in the judgment made it untenable.

In relation to the question, whether the Plaintiff did establish that he is the legitimate son of *Singna,* I have already dealt with the evidence that were placed before the trial Court and the justifiability of the conclusion reached by the Courts below on that issue. The evidence highlighted by the Defendants points out that *Singna* was in an associated marriage relationship which may have made the Plaintiff an illegitimate child, but the evidence also points to the subsequent monogamous '*marriage*' of *Singna* with the mother of the Plaintiff, which had erased that disqualification with the operation of law. If the evidence presented before the trial Court *prima facie* points to the fact that the Plaintiff is the legitimate son of *Singna,* in the absence of any challenge and any evidence pointing to a contrary position, the Court is justified in acting on that evidence. Dealing with the burden of proof in civil cases, *Coomaraswamy* in his text of The Law of Evidence, states (Vol. II Book I at p. 293) that "*Generally the initial burden to prove a prima facie case is on the plaintiff. The Defendant adduces rebutting evidence. After the entire evidence is led, if the tribunal is not in a position to decide which*

version is true, the tribunal must hold that party on whom the burden lay did not discharge it. Otherwise, the burden recedes into the background."

In these circumstances, I am not inclined to agree with the contention advanced by the learned President's Counsel that the trial Court should have raised an additional issue on its own under section 149, in relation to the legitimacy of the Plaintiff, in the absence of any evidence, warranting such an investigation. In fact, it is observed that the trial Court had raised an additional issue, though not in explicit terms, based on the available evidence and made a determination on it, when it decided that the parties are governed by *Kandyan* law.

The Court had taken that step when none of the parties did suggest such a point of contest nor made an admission as to the applicability of a personal law. Nonetheless, the trial Court had correctly decided that the parties are governed by *Kandyan* law and accordingly determined the rights of the parties by applying those principles of law. That course of action is amply justified as the Plaintiff, as averred in his amended plaint, had presented both oral and documentary evidence in support of the point of contest whether he '*alone*' is entitled to paternal inheritance, and the evidence so presented has clearly revealed that the 1st Defendant had contracted a *Deega* marriage and therefore is not entitled to any rights based on paternal inheritance of *Paraveni* property.

The trial Court, at that instance, had acted in line with the principle laid down in the full bench decision of ***Attorney General v. Punchirala*** (1919) 21 NLR 51 at 58 where *De Sampayo* J stated that "… *no*

Court should refuse to apply statute law, even though there be no formal issue stated on the point. If necessary, the Court should, in pursuance of the provision of the Civil Procedure Code in that behalf, frame an issue before delivering judgment."

In relation to question of the Plaintiff's legitimacy, there was no evidence which tend to touch upon the legal invalidity of the monogamous '*marriage*' of *Singna* and *Kiribindu* and that particular fact of their '*marriage*' therefore remains as an accepted and uncontested fact between the Plaintiff as well as the 1st Defendant. There was no further probe by the 2nd and 3rd Defendants, when the Plaintiff and the 1st Defendant claim their parents have "**කසාද බැන්ද**" and left the question of their marriage on that. This aspect had already been considered earlier on in this judgment in detail.

Even if the trial Court were to raise an additional point of contest on the question of legitimacy, without any evidence, the Defendants did not offer an explanation in their submissions as to why the trial Court should limit that question of legitimacy only to the Plaintiff. The evidence is clear that both *Singna* and *Amangira* were in an associated marriage with *Kiribindu*. If Plaintiff is an illegitimate son of *Singna* because of that '*invalid*' marriage, so are the descendants of *Amangira* namely *Juwanis/Jeewa* and *Menika,* through whom the 2nd and 3rd Defendants have derived their title to a ½ share of the corpus, respectively. If that is the case, then they too are not entitled to any rights devolved on paternal inheritance over *Paraveni* property on their predecessors in title. The trial Court is duty bound to investigate the right, title or interest claimed by all the parties before it and the Defendants are not exempted from that investigation simply because

there was no contest by the Plaintiff in his pedigree as to their rights. The Defendants, without disputing that fact, cannot seek to impose an additional burden on the Plaintiff of proving that he is not disqualified to bring in the instant action for want of a valid title, in seeking to partition a commonly held immovable property.

The issue of legitimacy of the Plaintiff was introduced for the first time only at the appeal stage when it was taken up by the Defendants before the High Court of Civil Appeal by placing reliance upon a section of evidence relating to an associated marriage that had existed at some point of time while conveniently ignoring the rest, and thereby effectively denying the Plaintiff of any opportunity to put across his version, in countering that allegation. Strangely, there was no objection raised by the Plaintiff for raising this question of law mixed with facts at that stage.

Returning to the question whether a trial Court on its own should frame additional issues, it is accepted that section 149 of the Civil Procedure Code does provide for such a course of action to a trial Court. Section 149 reads that a "… *Court may, at any time before passing a decree, amend the issue or frame additional issues on such terms as it thinks fit*." However, in the judgment of ***Seylan Bank Ltd v. Epasinghe and two Others*** (supra), this Court considered the legality of a trial Court, framing issues on its own before the judgment, but without affording an opportunity to the parties to present additional evidence and to address Court. *Prasanna Jayawadena* J had quoted from the judgment of ***Hameed v. Cassim*** (1996) 2 Sri L.R. 30 where *Dr. Ranaraja* J, defined the scope of section 149 of the Civil Procedure Code, in the light of the judgment of ***Silva v. Obeysekara*** (supra) as follows:

> *"The provisions of section 149 considered along with the observation of Bertram C.J. certainly do not preclude a District Judge from framing a new issue after the parties have closed their respective cases and before the judgment is read out in open court. It is not necessary that the new issue should arise on the pleadings. A new issue could be framed on the evidence led by the parties orally or in the form of documents. The only restriction is that the Judge in framing a new issue should act in the interests of justice, which is primarily to ensure the correct decision is given in the case. It also means that the Judge must ensure that when it is considered necessary to hear parties to arrive at the right decision on the new issue, that they be permitted to lead fresh evidence or if it is purely a question of law, that they be afforded an opportunity to make submissions thereon."* (emphasis added)

His Lordship was of the view that "… *while a trial judge does have the jurisdiction to frame additional issues at the stage of the judgment, that is a discretion which would, usually, be exercised sparingly and only in the circumstances where it is necessary to do so to ensure that justice is done and the correct decision is reached by the Court*." If the issue of legitimacy of the Plaintiff was not raised by the Defendants as a relevant fact in issue with which they are at variance and the pleadings does not require framing of such an issue by the Court at the commencement of the trial, then there must be legally admissible evidence that had sprung up during the trial, upon which a trial Court could justifiably act under section 149 of the Civil Procedure Code, either to amend an already settled issue or to frame an additional one based on that evidence.

It is obvious that the issue of legitimacy of a party in a partition action is not a pure question of law but a mixed question of law and fact. This is because the validity of the contention of the Defendants is depend on the body evidence presented before the trial Court, concerning the parentage of the Plaintiff, the validity of the marriage of his parents and also of his legitimacy, upon the application of the principles of *Kandyan* law on that evidence. But the body of evidence that had been presented before the trial Court does not warrant it to act under section 149 and to frame an additional point of contest in relation to the legitimacy of the Plaintiff, in the presence of the evidence already referred to and absence of any other evidence pointing to a contrary view. I derive support in forming that view as it has been stated in ***Nagubai Ammal v. Shama Rao*** (1956) AIR SC 593 at p.598 (a judgment quoted in ***Seylan Bank Ltd v. Epasinghe and two Others***) that " *the true scope of the rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence …".*

In view of the contention of the Defendants that it was the responsibility of the trial Court to have investigated into the legitimacy of the Plaintiff in fulfilling its statutory duty under section 25 of the Partition Law, and the reasoning contained in the preceding paragraphs, I am of the view that the following observations of *Anandacoomaraswamy* J, made in the judgment of ***Thilagaratnam v. Athpunadan & Others*** (1996) 2 Sri L.R. 66 are equally relevant to the instant appeal as well.

> *"We are not unmindful of these authorities and the proposition that it is the duty of the Court to investigate title in a partition action, but the Court can do so only within the limits of pleadings, admissions, points of contest, evidence both documentary and oral. Court cannot go on a voyage of discovery tracing the title and finding the shares in the corpus for them, otherwise parties will tender their pleadings and expect the Court to do their work …"*

Having reached the last segment of this judgment, it is also relevant to examine the proceedings, in order to satisfy whether the parties have acted in collusion before the trial Court to supress the disqualification of the Plaintiff as highlighted by the Defendants only in their appeal.

If the Plaintiff, being an illegitimate child, born out of an unregistered union of persons subjected to *Kandyan* law, in fact has had that disqualification to inherit *Paraveni* property, it is reasonable to expect the 1st Defendant to seek dismissal of the partition action instituted by the former on that very basis. As already noted, she should have personal knowledge of such a disqualification which could have been utilized to challenge the Plaintiff's status in instituting the instant action. The 1st Defendant in her evidence had initially denied any blood relationship with the Plaintiff and also denied that she was given in a *Deega* marriage. When confronted with her evidence in another action as to her relationship with the Plaintiff and the production of an extract of the Register of *Kandyan* marriages only she

did admit the relationship. Given the obviously strained relationship with her brother, as indicated by her conduct before the trial Court, it is highly improbable for her to conceal such a disqualification on the part of the Plaintiff, if that really existed.

There was no discernible reason for the 1st Defendant to concede that her parents have 'කසාද බැන්ද., a factor in favour of the Plaintiff, who had offered a limited evidentiary support of his claim. But instead of highlighting the said latent disqualification of her brother to inherit ½ share of the corpus, the 1st Defendant had acted contrary to her own position by tacitly admitting the devolution of title as described by the Plaintiff through paternal inheritance and claimed only acquisition of prescriptive against the title acquired by him through inheritance. This is significant, when the Plaintiff, in his amended plaint, had raised a disqualification to the 1st Defendant's claim of paternal inheritance on the basis that she is not entitled to any rights over the corpus as she had married in *Deega.* No point of contest was suggested on the legitimacy nor did the Defendants make any submissions on that point before the trial Court.

Clearly the issue of the legitimacy of the Plaintiff was not raised at the trial, because of a private arrangement that existed between the contesting parties. This situation is more in line with the proposition that the Defendants, including the 1st Defendant, have accepted the Plaintiff as a legitimate son of *Singna* and have acted on that premise up to the institution of the instant partition action. Their joint statement of claim, that had been tendered to Court on instructions to their Attorney, who would have advised them of the applicable law, is indicative of the said family belief that the Plaintiff had no such disqualification to begin with.

In view of the above, I answer all three questions of law, on which leave was granted, in the negative and against the Defendants. Accordingly, the judgments of the High Court of Civil Appeal as well as the District Court of *Kurunegala* are affirmed.

Accordingly, the appeal of the Defendants is dismissed with costs both here and in the High Court of Civil Appeal.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

K.K. WICKREMASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT