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

In the matter of an application for Leave to Appeal to the Supreme Court against a Judgement delivered on 01.06.2016 in appeal bearing number SP/HCCA/GA/0054/2009 (F) in appeal from DC Galle Case No. P 10014.

Walakada Gamage Munidasa,
No. 17/1,
Pepiliyana Mawatha,
Nugegoda.

Plaintiff

SC APPEAL No. 46/2018
SC/HCCA/LA No. 338/2016
SP/HCCA/GA/54/2009 (F)
DC GALLE NO: P/10014

Vs.

1. Amarasena Amarasiri Jayasinghe,
   Rukattanagahawatte, Nagoda.

2. Wimalawathie Wijeratne,
   Rukattanagahawatte, Nagoda.

3. Tissa Amarasiri Jayasinghe,
   Mulana, Keppettiyagoda, Nagoda.

4. Dasan Amarasiri Jayasinghe, (Deceased)
   Vando Street, Fort, Galle.

4A. Gotabhaya Amarasiri Jayasinghe,
Vando Street, Fort, Galle.

5. Theodora Grace Jayasinghe,(Deceased)
Godewatte Walauwa, Nagoda.

5A. Sujatha Jayasinghe,
Godewatte Walauwa, Nagoda.

6. Walakada Gamage Sirisena,
Kanahenkanda, Kurupanawa, Nagoda.

7. Walakada Gamage Wimalasiri, (Deceased)
Nagoda.

7A. Walakada Gamage Pathmasiri,
Kurupanawa, Nagoda.

8. Walakada Gamage Isak alias Issac,
(Deceased)
"Aruna", Nagoda.

8A. Walakada Gamage Aruna Deepal,
"Aruna", Nagoda.

9. Walakada Gamage Gunawathie,
Uhanowita, Mattaka, Pitigala.

10. Walakada Gamage Karunawathie,
Kurupanawa, Nagoda.

11. Sujatha Jayasinghe,
Godewatte Walauwa, Nagoda.

12. H.G. Sirisena,
Kurupanawa, Nagoda.

13. Victor Amarasiri Jayasinghe,

Mulanagoda, Keppittiyagoda,
Nagoda.

14. Kumarasiri Amarasiri Jayasinghe,
No. 44, Peralanda Road, Ragama.
Defendants

AND THEN BETWEEN

Sujatha Jayasinghe,
Godewatte Walauwa, Nagoda.
5A/11th Defendant-Appellant

Vs.

Walakada Gamage Munidasa,
No. 17/1,
Pepiliyana Mawatha,
Nugegoda.
Plaintiff-Respondent

1. Amarasena Amarasiri Jayasinghe,
Rukattanagahawatte, Nagoda.

2. Wimalawathie Wijeratne,
Rukattanagahawatte, Nagoda.

3. Tissa Amarasiri Jayasinghe, (Deceased)
Mulana, Keppettiyagoda, Nagoda.

3A. Victor Amarasiri Jayasinghe,
Mulanagoda, Keppettiyagoda, Nagoda.

4A. Gotabhaya Amarasiri Jayasinghe,
Vando Street, Fort, Galle.

6. Walakada Gamage Sirisena,
Kanahenkanda, Kurupanawa,
Nagoda.

7A. Walakada Gamage Pathmasiri,
Kurupanawa, Nagoda.

8A. Walakada Gamage Aruna Deepal,
"Aruna", Nagoda.

9. Walakada Gamage Gunawathie,
(Deceased)
Uhanowita, Mattaka,
Pitigala.

9A. Janaka Athukorala,
No. 19, Sawsiripaya,
Heenatiyangala Road,
Kalutara South.

10. Walakada Gamage Karunawathie,
Kurupanawa, Nagoda.

12. H.G. Sirisena, (Deceased)
Kurupanawa,
Nagoda.

12A. Bovitantiri Nandawathie,
Kurupanawa,
Nagoda.

13. Victor Amarasiri Jayasinghe,
Mulanagoda, Keppittiyagoda,
Nagoda.

14. Kumarasiri Amarasiri Jayasinghe,
No. 44, Peralanda Road,
Ragama.

Defendant-Respondents

AND NOW BETWEEN

Sujatha Jayasinghe,
Godewatte Walauwa, Nagoda.
5A/11th Defendant-Appellant-Appellant

Vs.

Walakada Gamage Munidasa,
No. 17/1, Pepiliyana Mawatha,
Nugegoda.
Plaintiff-Respondent-Respondent

1. Amarasena Amarasiri Jayasinghe,
   Rukattanagahawatte, Nagoda.

2. Wimalawathie Wijeratne,
   Rukattanagahawatte, Nagoda.

3A. Victor Amarasiri Jayasinghe,
   Mulanagoda, Keppettiyagoda, Nagoda.

4A. Gotabhaya Amarasiri Jayasinghe,
   Vando Street, Fort, Galle.

6. Walakada Gamage Sirisena,
   Kanahenkanda, Kurupanawa,
   Nagoda.

7A. Walakada Gamage Pathmasiri,
   Kurupanawa, Nagoda.

8A. Walakada Gamage Aruna Deepal,
   "Aruna", Nagoda.

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Kurupanawa, Nagoda.

13. Victor Amarasiri Jayasinghe,
Mulanagoda, Keppittiyagoda,
Nagoda.

14. Kumarasiri Amarasiri Jayasinghe,
No. 44,
Peralanda Road,
Ragama.
Defendant-Respondent-Respondents

Before: Buwaneka Aluwihare, P.C., J.
E.A.G.R. Amarasekara, J.
Mahinda Samayawardhena, J.

Counsel: Dr. Sunil Cooray for the 5A/11th Defendant-Appellant-Appellant.
Anura Gunaratne for the Plaintiff-Respondent-Respondent.

Written submissions: 5A/11th Defendant-Appellant-Appellant -on,
17.01.2019 and 19.05.2021.

Plaintiff-Respondent-Respondent - on 12.03.2020.

Argued on : 17.08.2021

Decided on: 23 .03.2023

ALUWIHARE PC, J

I had the benefit of reading the judgements written by my brother judges, His Lordship Justice Amarasekara and His Lordship Justice Samayawardhena. I would like, however, to express my own view on this matter. As their Lordships have succinctly dealt with the factual background to the case, I shall be referring to the facts to the extent necessary to address the legal issues involved.

The contesting defendants in this partition action were the 5th and the 11th Defendants [mother and daughter respectively]. They sought a dismissal of the Plaintiff's action. The learned District Judge, however, accepted the pedigree of the Plaintiff and rejected the pedigree put forward by the aforesaid Defendants. Although the 5th and the 11th Defendants canvassed the legality of the District Judge's findings before the High Court of Civil Appeals, they were not successful in their endeavour. The 5th Defendant passed away at a point in the course of the proceedings and 11th Defendant was substituted in her place as the '5a' Defendant. As the learned District Judge had considered the claim of the 5th Defendant in her judgment, for the purpose of clarity I shall continue to refer to the 5th Defendant in this judgement.

It is the Appeal of the said Defendant's [5th and the 11th] that this court considered on the following questions of law.

1. *Has the High Court and the District Court erred in law by failing to appreciate that the pedigree of title put forward by the 5th and the 11th defendants proved that they were the sole owners of the corpus for partition?*
2. *In any event, whether the 5th and the 11th defendants and their predecessors have acquired prescriptive title to the land sought to be partitioned by long possession?*

Although it may not be directly relevant to the issues at hand, it would be pertinent to refer to the following facts;

The Plaint described the corpus a *'Kahatagaha addara owita, alias Kahatagaha liyadda also known as Bakmadala watte alias Bakmadala owita'* in extent of 8 *Kurunis*. The Preliminary Plan No.120 dated 01.01.1990 was prepared by surveyor G.B.S Bandula De Silva, which was marked and produced as X. In 1996, the Plaintiff by an amended plaint changed the name of the land *as "bakmadala owita alias, Kahatagahaliyadda alias Kahatagaha addara Owita which is a part of Bakmadala watte".* The boundaries, however, remained the same.

I do not see any significance in changing the description of the corpus referred to above, as the learned Counsel representing the 5th and the 11th defendants had taken up the position that the question of the identity of the corpus will not be challenged. Thus, the only issue that remains to be addressed is the devolution of title.

Subsequent to the survey carried out by Surveyor Bandula De Silva on which the Preliminary Plan No.120 [X] was prepared, another plan [No. 4131] was also prepared on a commission [moved by the 5th and the 11th Defendants] by licensed Surveyor Garvin De Silva, which was marked and produced as "Y".

I wish to stress the fact that the District Courts should desist from the practice of issuing an alternative commission to survey the corpus after the issuance of a commission to survey the corpus for the purpose of preparing the Preliminary plan. There are series of decisions by the appellate courts to the effect that, after the preliminary survey is carried out, any further commissions in terms of Section 16(2) of the Partition Law should be issued to the **same surveyor who did the original Commission** in terms of Section 16(1) of the said Law. There appears to be a misapprehension that in certain local jurisdictions that such a *cursus curiae* has been established. This belief

is contrary to the settled law. This is certainly not the case, and I am of the view that it would be prudent on the part of the district judges to desist from this practice unless the District Judge takes a considered view that such a step is essential for the adjudication of the matter before the court. The exceptions to the rule in my view would be in an instance where, either the Surveyor who carried out the Preliminary Survey is dead or under the circumstances, his services can no longer be obtained.

This principle is articulated in the case of **Hettige Don Tudor and others v. Hettige Don Ananda Chandrasiri** SC Appeal 134 of 2016 [SC minutes of 19.02.2018] and also by Justice Salam in the case of **Sumanasena v. Premaratne** CA/1336 and 1337 CA minutes 06.03.2014. In recent times, Justice Laffar in the case of **Premalal Vidana Arachchi v. T.A. Annie Nona Siriwardena and others**, CA /DFC/768/99 CA minutes 26.07.2021, had made the same observation.

Coming back to the issues at hand, it should be noted that the case before the District Court was prosecuted, not by the Plaintiff, but by the 6th and the 8th Defendants. The 6th to the 10th Defendants happen to be the siblings of the Plaintiff. The Plaintiff, however, gave evidence in the case.

The case for the 5th and the 11th Respondents

It was contended on behalf of the 5th and the 11th Defendants that both the learned District Judge as well as the Hon. Judges of the Civil Appellate Court failed to appreciate the pedigree of title put forward by the 5th and the 11th defendants. Hence, it would be necessary to consider this aspect in order to determine whether in fact, the District Court and/or the High Court of Civil Appeals erred when considering this matter.

According to the 5th and the 11th Defendants, the original owner of the land in question was Don Elias Amarasiri Jayasinghe [hereinafter Elias Jayasinghe].

Both, said Elias Jayasinghe and his wife Dona Francinahamy executed a joint last will dated 06-02-1890. An English translation of the said will was marked and produced as 5V14 and the inventory filed in the testamentary case was filed as 5V13.

It is the position of the 5th and the 11th Defendant's that the entire land in question is item no. 27 in the inventory and the sole ownership of the land was bequeathed to Munidasa Amrasiri Jayasinghe and he in turn by deed No. 32 dated 18-07-1912 [5V3] conveyed the land to Dharmadasa Amarasiri Jayasinghe. After the demise of Dhrmadasa Amrasiri Jayasinghe, his intestate estate was administered in DC Galle case No. T/7769 and the letters of administration were issued to Mahaweera Jayasinghe [5V11] and it was the position of the 5th and the 11th Defendants that the land in question was item No 18 in the inventory [5V12] filed in that case. It was also the position of the said Defendants that all the siblings of Mahaweera Jayasinghe, by deed No. 411 on 16-01-1941 [5V2] conveyed all their interest in the said land to Mahaweera Jayasinghe, and he became the sole owner of the corpus.

Finally, the 5th and 11th Defendants take up the position that in the year 1941, by deed No. 1045 [5V1] Mahaweera Jayasinghe conveyed the corpus to the 5th Defendant, and she became the sole owner of the land which was to be partitioned.

From the foregoing it is clear that the 5th and the 11th Defendant's pedigree pivots on the joint last will purported to have been executed by Elias Jayasinghe and his wife Francinahamy. As referred to by His Lordship Justice Samayawardena, the 5th and 11th Defendant's position was that, the joint last will of the couple, dated 02.06.1980 was proved in the testamentary action 2970/T in the District Court of Galle, which was, however, not admitted by the Plaintiff. Furthermore, the paragraph 1 of original last will which was in

Sinhala, [5V15] states that "the joint last will dated 06.02.1890 is hereby revoked."

One of the grounds for dismissing the appeal of the 5th and the 11th Defendants by the High Court of civil Appeals was; that the last will in Sinhala [5V15] and the English translation of the purported last will [5V14] contain contradictory contents. It should be noted that the 5th and the 11th Defendants in their original statement of claim, refer to a last will dated 02.10.1891 as the last will by which Elias Jayasinghe and his wife Francinahamy devised the property in question to one of their sons; Munidasa. The said Defendants, however, when tendering the amended statement of claim [17.12.1996] had relied on the testamentary case No. DC2970 but no reference was made to the date of the last will they were relying on.

The learned district judge in considering the devolution of title put forward by the 5th and the 11th Defendants had referred to the fact that the said defendants had based their entitlement on the strength of the transfer deed executed by Mahaweera Jayasinghe who had claimed that he derived title to the corpus consequent to his father Dharmadasa Amarasinghe getting title from the testamentary case No2970. The learned District Judge had observed that, although it was claimed that Dharmadasa Amerasinghe derived title to the impugned property consequent to the last will of Elias Amarasiri Jayasinghe, no material had been placed [by the 5th and the 11th Defendants] to establish that fact.[Pages 21 and 22 of the DC judgement].

Considering the material placed before the trial court and the applicable legal principles, I cannot fault the learned District Judge regarding the observation referred to above. The success of the claim of the 5th and the 11th Defendants pivots on the last will of Elias Amarasiri Jayasinghe. What was produced is an English translation of the will executed in 1890 and further, paragraph 1 of

the original will which was in Sinhala states that the joint last will executed in 1890 is revoked.

It is trite law that, testamentary proceedings in the District Court do not consider title to the property and only consider whether the testator has executed the last will on his own free will and a suitable person has been appointed to be granted letters of administration. The Indian Supreme Court observed in the case of **Krishna Kumar Birla v. Vijaya C. Gurshaney** [2008] 4 SCC 300; " a testamentary court is only concerned with finding out whether or not the testator executed the testamentary instrument of his free will. It is settled law that the grant of a probate or letters of administration does not confer title to property. They merely enable administration of the estate of the diseased". Justice H.N.G. Fernando, in the case of **Rosalin Nona v. Herat,** 65 C.L.W 55 observed that; "the court does not in the Testamentary proceedings, have jurisdiction to determine the dispute as to title in respect of such property between the administrator and the third party".

As far as the title to the corpus is concerned, the positions of the respective parties can be summarised as follows; the 5th and the 11th Defendants, claim that the entirety of the corpus at one point was owned by Don Elias Amarasiri Jayasinghe and on the strength of his and his wife's joint last will, subsequent testamentary proceedings and Notarial conveyance, the title to the entire land passed to Mahaweera Jayasinghe from whom the 5th Defendant asserts she purchased the land. whereas the position of the Plaintiff is that Elias Amarasiri Jayasinghe was entitled to only 2/3rd of the corpus, based on the two title deeds produced as 8V1 and 8V2.

The learned District Judge having considered the evidence placed before court, had come to a firm finding of fact that, both the Plaintiff as well as the 5th and the 11th Defendants have established that Elias Jayasinghe had title to

2/3 of the corpus, but the 5th and the 11th Defendants have failed to establish that Elias Jayasinghe possessed the balance 1/3 of the corpus and had derived title by prescription to the balance portion [page 22 of the judgement]. This is a finding of fact by the trial judge and I do not think this finding can be upset unless there is clear material indicative of the fact learned District Judge having misdirected herself. I do not find any such material and in the circumstance, I answer both questions of law on which leave was granted in the negative.

For the reasons set out above, I am of the view, the appeal should be dismissed.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J.

I had the privilege of reading the judgment written by my brother Judge Honourable Justice Samayawardhena in its draft form. With all due respect to the views expressed by His Lordship in coming to the conclusions he made, I would prefer to dissent and express my views as elaborated below in this separate judgment.

The Plaintiff – Respondent – Respondent (hereinafter referred to as the Plaintiff) instituted this action in the District Court of Galle by plaint dated 18.11.1986 seeking to partition the land described in paragraph 2 thereof as Kahata Addara Owita alias Kahawe Liyadda alias Bathmadala Watte alias Bathmadala Owita in extent of about 8 kurunis of paddy sowing among the Plaintiff and the 1st – 10th Defendants named therein the plaint. Thereafter, the Plaintiff filed an amended plaint dated 14.08.1996 amending the original plaint on the pretext that the devolution of the 3rd Defendant's share had not been properly pleaded – vide proceedings dated 13.05.1996. The 6th and 8th

Defendants filed their joint statement of claim dated 30.08.1995 and finally amended it by joint amended statement of claim dated 01.10.1997. They agreed with the amended plaint as to how the shares should be allocated for partition. At the trial 6th and 8th Defendants prosecuted this action instead of the Plaintiffs.

The 5th and 11th Defendants (mother and daughter respectively) filed their joint statement of claim dated 11.01.1995 and thereafter filed an amended joint statement of claim dated 17.12.1996. The 5th and 11th Defendants by their statement of claim contested the identity of the land to be partitioned as well as the pedigree of title set out by the Plaintiff. Accordingly, the 5th and 11th Defendants prayed for the dismissal of this action and for a declaration that the corpus for partition belonged to the 5th Defendant and for the recovery of damages caused by obtaining an enjoining order and an injunction. During the course of the trial the 5th defendant died and the 11th defendant was substituted in her place.

Subsequent to the trial Learned District Judge delivered the judgment dated 18.05.2009 and by the said judgment points of contest were answered in favor of the 6th and 8th Defendants and against the 5A/11th Defendant. The Learned District Judge decided to partition the subject matter of the action as per the shares allocated in the judgment. Followings are among the reasons given by the Learned District Judge in arriving at her conclusions.

- The 8th Defendant has given clear evidence as to the pedigree they relied on and the original Plaintiff also has given evidence to corroborate that without contradictions and thus have proved their pedigree.

- 5A Defendant failed in proving that the last will was a last will of Don Elias Amarasiri Jayasinghe and that he further failed in proving

that the whole land was possessed by the said Elias Amarasiri Jayasinghe along with his wife Francina, even though the Plaintiff has confirmed at one time that 2/3 was owned by the said Elias Amarasiri Jayasinghe.

- There is no proof to indicate that the said Elias Amarasiri Jayasinghe became the owner of balance 1/3 by prescription but it was proved that the said 1/3 was in the possession of one Abraham who was the father of the original Plaintiff, and the 8th Defendant. One Hemasara, a retired officer of the Agrarian Department had given evidence in support of the said possession and as per the said evidence, the 8th Defendant and the Original Plaintiff had come to the possession after the demise of said Abraham. According to the evidence given by the said witness, nothing was revealed as to the possession of the 5th Defendant. Even though the said witness Hemasara is a relative of the original Plaintiff and the 8th Defendant, he came on summons and his evidence can be relied upon.

- Even though the original Plaintiff and the 8th Defendant admitted in evidence that the aforesaid Elias Amarasiri Jayasinghe had daughters other than the sons disclosed in their pedigree, and Mahasena, one of the sons of said Elias, had 8 children where only 3 have been revealed in their pedigree, since no one has come forward to intervene in the partition action, it cannot be decided that there are parties not revealed by the Plaintiff. Contesting 5th Defendant has not taken any attempt to add them if there are other heirs.

- 5A and 11th Defendant failed in proving that the title to the whole corpus devolved on the 5th Defendant.

Being aggrieved by the said judgment the 5A/11th Defendant appealed to the Civil Appellate High Court of Galle. Subsequent to the arguments made by both the parties learned Civil Appellate High Court Judges delivered its judgment dated 01.06.2016 and by the said judgment learned High Court Judges dismissed the appeal with costs. Among other things following reasons have been expounded by the learned High Court Judges.

a) 5V 15 and 5V14, namely Sinhala copy of the last will and English translation of the last will are two documents containing contradictory contents.
b) 5th and 11th Defendants' position is that said Elias and his wife devised the subject matter to Munidasa by last will dated 06.02.1890 but item 1 of 5V 15 indicates that the last will dated 06.02.1890 was cancelled.
c) The 5th and 11th defendants failed to produce letters of probate of T2970 as evidence at the trial.
d) Munidasa by executing 5V3, had transferred only what he has inherited and not what he has got through a Last Will. As such, it defeats the stance taken up by the 5th and 11th Defendants.

The 5A/11th Defendant sought leave to appeal from this court against the said Judgment of the Civil Appellate High Court, and this court was inclined to grant leave on the following questions of law as formulated by learned counsel for the appellant at the stage of supporting for leave: (-Vide Journal Entry dated 09.03.2018)

1. Have the High Court and the District Court erred in law by failing to appreciate that the pedigree of title put forward by the 5th and the 11th defendants proved that they were the sole owners of the corpus for partition?

2. In any event, whether the 5th and the 11th defendants and their predecessors have acquired prescriptive title to the land sought to be partitioned by long possession?

Before the original court there had been a pedigree dispute as well as a dispute relating to the identification of the corpus between the contesting parties.

The original plaintiff Walakadagamage Munidasa filed the partition action in the District Court of Galle to get the land described in the original plaint which was named as Kahataaddara Owita alias Bathmadalawaththa alias Bathmadala Owita alias Kahaweliyadde partitioned. However, it can be observed that some of the deeds found in original plaintiff's pedigree that describe the corpus also as Bathmadalawatta alias Bathmadala Owita were executed very close to the filing of the partition action in the District Court on 18/11/1986- vide deeds no. 2276 and 2267 and 376. However, on 13.05.1996, on a request made by the plaintiff to amend the pedigree to show the devolution of title downwards from one Tissa Jayasinghe named in the Plaintiff's pedigree, the District Court has granted permission to tender an amended plaint but, it appears that the amended plaint dated 14.08.1996 tendered on this permission has changed the description of the land to indicate that it is not Bathmadalawaththa or Bathmadala Owita but only as a portion of said Bathmadalawaththa or Bathmadala Owita which is not even in accordance with the description found in the aforesaid deeds executed close to the filing of the partition action. Perhaps this might have happened due to an afterthought since the plans made and available at the time of filing the original plaint, old deeds as well as relevant old entries in the land registry do not describe this land as Bathmadalawaththa or Bathmadalaowita.

Even though, the original Plaintiff did not prosecute the partition action, the 6th and 8th defendants who prosecuted the partition action have relied on the same description of the land as per their statement of claim and the amended statement of claim. The 5th and the 11th Defendants, who contested the

position taken by the original plaintiff as well as the position of the 6th and 8th defendants who prosecuted the partition action, in their statement of claim as well as in the amended statement of claim have described the corpus only as Kahataliyadde alias Kahataaddra Owita. Accuracy of such description is confirmed by the old deeds, plans and old entries in the land registry, some of which were marked or even relied on by the original Plaintiff and the 6th and the 8th Defendants- vide 8v1,8v2,5v1,5v2,5v3,5v5,5v6,5v10.

Although the learned District Judge has expressed in her judgment that the 5A and 11th Defendant in her evidence in cross examination had admitted that the land is also described as part of Bathmadala Owita, it appears that the said Defendant in her evidence had not made such an admission but had clearly said that there are no other names to this land other than Kahatagaha Liyadde and Kahatagahaaddara Owita. What she had admitted in her evidence is that in the plaint, the Plaintiff has described it as Bathmadalawatta and Bathmadala Owita. She has clearly denied these additional names used by the Plaintiff- vide pages 415,416,418. The Counsel for the 5A and 11th Defendant Appellant has indicated in his written submissions that the Appellant does not intend to pursue the question of the identity of the corpus in this appeal anymore. If the corpus is identified as per the boundaries, it does not matter even if some of the parties use additional names to describe the land, but what is stated above indicates that the original Plaintiff as well as the 6th and 8th defendants were not even conversant with the name of the land. Other than the names used by the 5th and 11th Defendants, they have, in aforesaid recent deeds, used two other names, namely Bathmadalawatta and Bathmadalaowita and during the pendency of the action have changed the position to describe the corpus as part of Bathmadalawatta or Bathmadalaowita. It also poses the question, if it is a part of a bigger land as per their stance, whether one can maintain a partition action without establishing that it became a separate land from the bigger land.

As far as the pedigree dispute is concerned, the Original Plaintiff and the 6th and 8th Defendants in their amended pleadings relied on the same pedigree, and the 13th and the 14th Defendants in their statement of claim have stated that the share given to the 3rd Defendant as per the pedigree shown by the 6th and the 8th Defendants should devolve on them indicating that they also rely on the pedigree shown by the 6th and the 8th Defendants. As per the said pedigree, Corpus was originally owned by Karolis (1/3 of the corpus), K.G. Punchihamy, W. Elias, W. Seetu, W. John, W. Dingo, W. Nero (1/3 of the corpus) and Walakadagamage Abraham (1/3 of the Corpus). The said pedigree further indicates that 1/3 of the aforesaid Walakadagamage Abraham was devolved on the Plaintiff and the 6th to 10th Defendants and the other 2/3 was sold to Don Elias Amarasiri Jayasinghe by the aforementioned original owners by deeds no. 3565 and 2530 marked as 8v1 and 8v2 at the trial. It must be noted here that said Don Elias Amarasiri Jayasinghe is one of the original owners referred to by the 5th and 11th Defendants in their Pedigree. As per the pedigree relied by the Original Plaintiff and 6th and 8th Defendants, 2/3 of said Don Elias Amarasiri Jayasinghe had devolved on his sons Jinadasa, Mahasena, and Munidasa. According to the position taken by the original Plaintiff and the 6th and 8th Defendants in their pedigree, at the end, Jinadasa's share has passed to 1st,2nd, 13th ,14th Defendants and the original Plaintiff; Mahasena's share has passed to the original Plaintiff and the 4th Defendant while Munidasa's share has passed to the 5th Defendant through the deeds No. 32, 411 and 1045 executed in the years 1912,1941 and 1941 respectively. It appears, as mentioned before, the deeds written in favour of the original Plaintiff by the descendants of Jinadasa and Mahasena were executed very close to the date of filing the partition action, namely within 3 months prior to the filing of the action.

The 5th and 11th Defendants claimed title to the whole land and their position was that the land originally belonged to said Don Elias Amarasiri Jayasinghe

and his wife Nagoda Gamage Francinahamy, and as per the joint last will proved in the case No. 2970 in the Galle District Court, it devolved on one of the sons of the testators, namely Munidasa and further, through aforesaid deeds No. 32,411 and 1045, 5th Defendant became the owner of the entire land. Thus, they prayed for a dismissal of the partition action.

The learned District Judge has accepted the version of the original Plaintiff and the 6th and the 8th Defendants with regard to the pedigree dispute, and the learned High Court Judges in appeal have confirmed the findings of the learned District Judge.

It appears, with regard to the pedigree dispute even the learned High Court Judges have held that the 5th and 11th defendants failed to prove their position with regard to the proof of the last will in DC case no. T 2970.

However, it appears that the learned High Court Judges failed to see whether there was sufficient evidence to prove the pedigree relied on by the Plaintiff and others. As per the evidence led, it is clear that there was no dispute that at one time 2/3 was with the said Elias Amarasiri Jayasinghe. As such, one dispute as to the pedigree would be whether the balance 1/3 was with Abraham, the father of the original Plaintiff and of the 8th Defendant, or whether that was also subject to the alleged testamentary case as one of the properties included in the Last Will of said Elias and his wife. The other dispute as to the pedigree was whether the said 2/3 owned by said Elias was devolved upon the parties as per the pedigree of the original Plaintiff and the 6th and 8th Defendants or whether it along with balance 1/3 was subject to the testamentary action no. DC2970 as one of the properties of said Elias and his wife, and whether it devolved on the 5th Defendant as per the pedigree of the 5th and 11th Defendants. In other words, whether the whole corpus was subject to the testamentary case or whether the pedigree of the original Plaintiff is fully or partly relevant to the corpus.

Now I would prefer to see whether the findings with regard to the alleged Last will and the Testamentary Action DC 2970 by the courts below were satisfactory.

In the original statement of claim filed by the 5th and 11th Defendants, they have mentioned the Last Will dated 02.10.1891 as the relevant Last Will by which said Elias and his wife devised the property in question to one of their sons, namely Munidasa- vide paragraph 5 of the said statement of claim. However, when they tendered an amended statement of claim dated 17.12.1996 they have not referred to the date of the Last Will in the body of the statement of claim but have referred to the testamentary case no. DC 2970- vide paragraph no.7 of the amended statement of claim of the 5th and 11th Defendants. However, in the pedigree attached to the said amended statement of claim, the date of the Last Will is mentioned as 06.02.1890. Anyhow, through the evidence led at the trial, the 5A and the 11th Defendant have marked the purported last will proved in Testamentary case No. DC 2970 as 5V14 (see pages 406 and 407of the brief) and again it has been referred to as the certified translation of the Last Will proved in Testamentary case no. DC 2970 -vide page 413 of the brief. 5V15 has been marked as the document in Sinhala relevant to 5V14 and further it has been referred as the Sinhala copy of the original Last Will- vide page 413 of the brief. Neither of these documents were objected or marked subject to proof when they were marked in evidence, and no such objection was reiterated when the 5th and 11th defendants closed their case. Thus, they became evidence for all purposes of the case. Once documentary evidence is tendered, even if a lay witness introduces and gives it a name as he understands it, it is the duty of the court to see what it is and what it contains as evidence. The secretary of the District Court of Galle has issued 5V14 on 10.04.48 certifying it as a true copy of the translation of the Last Will in D.C.2970- vide 5V14A. It appears that up to item 5 of the original document was considerably torn even at the time of it was issued. 5V15 is also a certified copy issued by the secretary of District

Court of Galle and it appears to have been issued on 12.04.48 just two days after the date of issue of 5V14. The secretary has certified 5V15 as a true extract of the Last Will in D C 2970 indicating that it is not the complete document but an extract. It contains only the introductory part and items 1 to 4 of the document. As up to item 5 was considerably torn as per the English translation marked 5V14, 5v 15 might have been taken to complement the missing parts in the 5V14. 5v14 as well as 5v15 have been issued in the middle part of the 20th century, many years prior to the institution of the partition action and filing of the statement of claims by the 5th and 11th Defendants. These are certified copies issued by a court and they were not marked subject to any objection and as said before, they are evidence for all purposes of the case. Thus, no one can assume that they are fraudulent documents prepared for the present case. Further, when section 61, 63,64,65(5),74(i)(ii),76 and 77 of the Evidence Ordinance read together, it can be considered that 5V14 and 5 V15 were proved as part of the case record in Testamentary case D C 2970. Under such circumstances a court cannot just ignore such evidence. Following observations also indicate that these two documents are not contradictory but complementary.

As per 5V15, it is a joint Last Will of Galaboda Liyanage Don Elias Amarasiri Jayasinghe Mudiyanse and his wife Dona Francina Hamina. By that, it appears,

1. They have revoked their previous Joint Will dated 06.02.1890

2. Have appointed the survivor (if one dies) as the executor of the Will.

3. Have given life interest to the survivor on the immovable and movable property (It appears this is so given if there is no other direction in the will)

4. After the said life interest, certain properties were to be devolved on the named 5 sons as explained in the item no. 4, namely the properties described

in items 5,6, -, -,9,10,11 and 20 (rest of the Sinhala copy is not available and as explained above this is only an extract of the Last Will).

6. In the said 5v 14 purported translations of the Last Will, as said before, from the introduction to item 1 to 4 seems to be considerably torn but what remains corresponds with the Sinhala copy. For example,

a. In the introductory part, the words "Galaboda", "Jayasinghe", "wife", "Nagoda", "Hamine" can be found in both copies.
b. Under item 1 "we do hereby" may relate to the revocation of previous Will in Sinhala copy.
c. Under item 2, "we do hereby…… the survivor …… of our estate" can relate to the appointment of the survivor as the executor in the Sinhala copy.
d. Under item 3, "the survivor…. Life time all" may relate to the granting of life time interest to the survivor in the Sinhala copy.
e. Item 4 cannot be separately identified in the English copy. Maybe it was torn when the certified copy of the translation was issued, but parts of the names of the 5 sons are found in the English copy along with the reference to item 11 and 20 of the Last Will which correspond with the item 4 of the Sinhala copy.
f. Items 5,6,7,8,9,10,11 and 20 found in the English copy which is not available in the Sinhala copy bequeath properties to the 5 sons in accordance with the item 4 of the Sinhala copy.

Thus, my view is that there was evidence before the learned District Judge to indicate that,

- There was a joint last will of aforesaid Elias Amarasiri Jayasinghe and his wife Francina which was the subject matter of D C Galle 2970.

- 5V15 is an extract of the Will which contained up to item 5 and 5v14 was the English translation of the said Last Will, of which up to item 5 was considerably torn and 5v15 and 5v 14 are complementary and not contradictory.

Now it is necessary to see whether this Will was proved in DC No. 2970 and probate was issued,

i. Inventory marked 5V13 is a certified copy of the inventory in the said case DC 2970, tendered to Court on 16.06.1892 by the surviving testator who was the executor named in the joint Will; it has been explained to the executor by the interpreter and countersigned by the District Judge. It has been issued as a certified copy on 03.05.1949. Since the District Judge has counter-signed, it cannot be an inventory tendered with the Petition but the inventory that had to be filed by the executor after his appointment. Nowhere in the document it is mentioned that it had been submitted by a temporary executor. Executor is appointed when the Will is proved. Thus, 5V13 contains secondary evidence to show that the Will was proved and probate was issued.

ii. 5V14, certified copy of the English translation of the Will, contains a heading to say that it was a translation tendered for the purposes of accounting. Accounting starts with the proof of Will and the issuance of probate. So, this is also secondary evidence to show that the Will was proved and the probate was issued in DC 2970.

I agree that the best proof of probate was the letters issued in that regard after the proof of Will but the document marked 5V14 indicates that the case record was in dilapidated condition even in 1948/1949. I think if the original Court record is destroyed, one can prove the proof of Will and the probate through secondary evidence. I would like to bring to the attention the meaning of probate as per K.D.P. Wickremesinghe in 'Civil Procedure in Ceylon' at page 354 and 355.

""probate" is an English term signifying the proof of the Will of a deceased person in a competent Court as required by Law. The term probate in its strictest sense signifies the copy of the Will which is given to the executor, together with a certificate granted under seal of the Court, and signed by the secretary of the Court certifying that the Will has been proved, and this probate constitutes the executor's title to act. In a wider sense, the word indicates the process and results of proving a Will."

If we take the strict interpretation, there is only secondary evidence to say that in DC 2970, the Will was proved, the executors were appointed and the letters of probate were issued. On the other hand, if we take it in its wider sense, in my view, there is material to show that a joint Will was proved in that case (of course not the one executed on 06.02.1890 but the one dated 02.10.1891). It must be kept in mind the original documents were made in the 19th century and the certified copies were issued in the middle part of the 20th century, many years prior to the institution of the partition action in the latter part of the 20th Century. As pointed out above, certified copies can be used to prove the contents of the case record DC 2970 Galle, and as mentioned before, these documents were not objected or marked subject to proof. As per the items marked as 5V 14 B and 5V14 C on the document marked 5V 14, the relevant property had been bequeathed to Munidasa, one of the sons of said Don Elias Amarasiri Jayasinghe.

As per the deed No.32 marked 5V3 and land registry extracts marked 5V6, said Munidasa had transferred 8 Kuruni land known as Kahateliyadde to Dharmadasa Amarasiri Jayasinghe. The said Munidasa in the said deed has stated the property had been held, enjoyed and possessed by him by right of inheritance. In my view, merely because he had used the term 'by right of inheritance', one cannot come to the conclusion it was not his entitlement gained through the last will as succession can be testate or intestate. If he had only an undivided share coming through intestate succession, he could have

indicated a transfer of an undivided share in the schedule to the said deed but he had mentioned transfer of whole 8 Kuruni Land in the schedule in the said deed written in 1912. Said 5V3 supports the stance taken by the 5th and 11th Defendants. Further, documents marked 5V11 and 5 V12 are the letters of administration and the inventory respectively in the testamentary case No.7769, filed with regard to the intestate estate of the said Dharmadasa Amarasiri Jayasinghe vendee of said 5V3. Item No.18 of 5V12 has been marked as 5V12A. 5V12A also indicates that even the administrator of said Dharmadasa Amarasiri Jayasinghe included the whole land in the inventory of the said Testamentary case as part of said Daramadasa Amarasiri Jayasinghe's estate. Thus, documents marked with regard to the testamentary case relating to the joint last will of Elias Amarasiri Jayasinghe and Francinahamy, 5V3 and documents relating to the testamentary case of Dharamadasa Amarasiri Jayasinghe show that people belonging to 3 generations in the 5th and 11th Defendants' pedigree from latter part of the 19th century to the middle part of the 20th century considered the whole property as their property only.

I would also like to refer to page 460 of Laws of Ceylon, Walter Pereira to indicate that with the death of the testator, property specifically devised vest in the devisee immediately. But the title is imperfect as it is subject to administration by the executor. In the case at hand, after the testamentary case relating to the joint last will of Elias Amarasiri Jayasinghe and Francina, the devisee named in the last will (see 5V14B and 5V14C) has dealt with the property indicating that it was not sold otherwise for the administration of that estate but it came to the hands of the named devisee.

A joint Will generally is considered as a separate Will of the relevant testators, but if the Will disposes the property on the death of the survivor, or, as it is sometimes expressed, that the property is consolidated into one mass for the purpose of joint disposition or the survivor adiates what was given by the co-

testator, the survivor has to abide by the joint Last Will – see Walter Pereira's Laws of Ceylon page 401 and 405. In the case at hand it appears, after the death of Francinahamy, the testamentary case was filed with regard to the estate covered by the joint last will and the said Elias Amarasiri Jayasinghe, the survivor accepted the executorship created by their joint last will and further the devisee who was named for the subject matter had later dealt with the subject matter by 5V3. This indicates that the said Elias abided by the joint last will. Further, as indicated above life interest has been given to the survivor indicating that the property was to be disposed to the named devisee only after the death of the survivor.

No one has taken a position that, for the purpose of administration of the intestate estate of the Vendee of 5V3 Dharmadasa Amarasiri Jayasinghe, the subject matter was sold to other parties. 5A and 11th Defendant has stated in evidence that after the demise of Dharmadasa Amarasiri Jayasinghe, subject matter was devolved upon Alfred, Biatris, Chandrawathie, Victor, Cyril and Mahaweera Amarasiri Jayasinghe. Said Alfred, Biatris, Chandrawathie, Victor and Cyril by executing deed no.411 have conveyed the property to aforesaid Amarasiri Jayasinghe who by executing deed no.1045, again conveyed it to the 5th Defendant. Thus, there appears to be considerable evidence supporting the version of 5th and 11th Defendants to indicate that;

- There was a joint last will by Elias Amarasiri Jayasinghe and his Wife, Francina which was admitted to probate in the Testamentary Case No. DC 2970, Galle District Court.

- 5v15 was a certified extract of the Sinhala copy of the said Last Will which contained up to item 5 of the Will, and 5V14 is the certified copy of the English translation of the said Will, of which up to item 5 was considerably torn.

- The corpus in the present action was included in the said Joint last will and the devisee was one Munidasa Amarasiri Jayasinghe.

- Said Munidasa Amarasiri Jayasinghe transferred the corpus to Dharmadasa Amarasiri Jayasinghe by executing 5V3.

- After Dharmadasa Amarasiri Jayasinghe, the corpus devolved upon Alfred, Biatris, Chandrawathie, Victor, Cyril and Mahaweera Amarasiri Jayasinghe, and due to the execution of deeds No. 411 (5V2) and 1045(5V1) the corpus became the property of the 5th Defendant.

Only defect in the 5th and 11th Defendants' position is that, though they mentioned the date of the joint last will admitted to probate in D C 2970 as 06.02.1890 in their pedigree annexed to the amended statement of claim, in fact, Last Will dated 06.02.1890 is the one cancelled by the joint last will dated 02.10.1891 which was admitted to probate in D C 2970. The stance of the 5th and 11th defendants was that the corpus was originally owned by aforesaid Elias Amarasiri Jayasinghe and his wife, Francina and they executed a joint last will which was admitted to probate in DC 2970 and then it came to the ownership of the 5th Defendant as per the pedigree shown in her statement of claim. When there is evidence to establish that stance, merely because there is an error in mentioning the date of relevant joint last will, in my view, a judge cannot ignore the rights of the party who made an error or a mistake in mentioning the date of the last will. On the other hand, for the sake of argument, even if one goes to the extreme and argues that change in the date of the joint last will is a change of stance and the 5th and 11th defendants cannot take up the position that their entitlement flows from the last will marked in evidence, in my view, learned District Judge still could not have approved the pedigree of the original Plaintiff or of the 6th and 8th Defendants which does not flow from the said joint last will which as per the evidence led was admitted to probate in DC 2970, as such evidence indicates that there is a different pedigree involved as to the rights in the corpus, at least in respect of the undisputed 2/3 share of Elias Amarasiri Jayasinghe, who was one of the testators in the said joint last will. (Evidence with regard to the

balance 1/3 will be discussed later in this judgment). In this regard, I would like to stress that, this is a partition action and the investigation of title is the duty of the District Judge – vide **Kularatne v Ariyasena (2001) B L R 6, Chandrasena V Piyasena (1999) 3 Sri L R 201**. By this I do not mean that the judge should go on a voyage of discovery in investigating title. The judge may have to do it within the limits of pleadings, admissions, points of contests, evidence both oral and documentary – vide **Thilagaratnam V Athpunathan (1996) 2 Sri L R 66**. It must also be noted that in **Golagoda V Mohideen 40 N L R 92** it was held that the court should not enter decree in a partition action unless it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property. If the Learned Judges of the courts below were vigilant enough, they could have observed the available evidence in favour of the 5th and 11th defendants that I referred to above. In a partition action, even if the pedigree or part of the pedigree proposed by a party is wrong, if the evidence/documents led at the trial proves title through a different pedigree, the judge has to consider the pedigree proved through evidence. In my view, in a partition action, what is more important is not the pedigree of which party is more acceptable on balance of probability, but as per the evidence/documents led at the trial what is the acceptable pedigree on balance of probability. Thus, in a partition action sometimes pedigree of any of the party may not be totally correct, but the evidence and documents tendered by all parties may establish a more probable pedigree when compared to the pedigrees tendered by individual parties. This is further established by certain decisions of the superior courts which indicate that in investigating title, judge is not bound even by the points of contests raised by the parties. Basically, the points of contests reflect the stances taken by parties in contesting the case. The said cases are **Peris V Perera 1 N L R 362, Nona Baba V Namohamy 3 N L R 12, Weerappa Chettiar V Rambukpotha Kumarihamy 45 N L R 332**

As said before, it is apparent that the judges in the courts below failed to appreciate the evidence available for the benefit of the 5th and 11th Defendants or against the stance of the original Plaintiff and the 6th and the 8th Defendants in evaluating evidence.

The learned District Judge in holding in favour of the original Plaintiff's pedigree has indicated that there is clear evidence to establish that pedigree as per the evidence given by the original Plaintiff and the 8th defendant. In my view, the fallacy of this finding is evinced by what is mentioned below;

• Firstly, as explained before, the learned District Judge failed to appreciate that undisputed 2/3 of Elias Amarasiri Jayasinghe could not have devolved upon as per the pedigree of the Plaintiff due to the evidenced placed before the District Court, since Elias Amarasiri Jayasinghe was one of the testators of the joint will which was admitted to probate in DC 2970. Even if the date of the Last Will was not 06.02.1890 but 02.10.1891, there was evidence to show that the latter was admitted to probate in D C 2970 and for a pedigree to be accepted it should have a link to those testamentary proceedings and the said Last Will.

• Secondly, the 8th Defendant while giving evidence, in cross examination, has admitted certain facts indicating that the pedigree presented by them including the original Plaintiff is not correct. In relation to that he has admitted that Elias Amarasiri Jayasinghe had daughters other than the sons revealed in their pedigree and they should also inherit. This was done only after denying that there were daughters, and later he admits that he knew about the said daughters even at the time of the institution of the action -vide pages 228 to 231 of the brief. Further, he has admitted that Mahasena Amarasiri Jayasinghe who appears in their pedigree had eight children even though they have shown only 3 children in their pedigree. He has even revealed the names of some of the children not shown in their pedigree when questioned in cross examination. However, again, in re-examination tries to

deny that he had any knowledge about the daughters of Elias. At one point, it appears that he had the knowledge with regard to the testamentary proceedings that existed at the time of the death of Elias Amarasiri Jayasinghe- vide page 239 of the brief. If so, it appears that this witness has evaded revealing such testamentary proceedings in their pedigree. Further, it can be observed that he had evaded in answering some of the questions relating to the pedigree. The learned District Judge should have observed the incoherent and unreliable nature of the evidence given by this witness, namely the 8th Defendant in relation to the pedigree they rely on. However, after observing the said admissions made by the 8th defendant while giving evidence, the learned District Judge has come to the conclusion that there cannot be other parties who have not been revealed as no other party has intervened. Said conclusion cannot be condoned since some of the names have been revealed by the 8th defendant in his evidence. If what has been revealed by the 8th defendant in cross examination is correct, share allocation could not have been done according to the pedigree relied by the original Plaintiff and the 8th Defendant. Further, the Learned District Judge says, if there are others, the 5th and 11th Defendants could have taken steps to add them. 5th and 11th Defendants' position was that this action should be dismissed since the subject matter belongs to them, I cannot understand this reasoning as to why the learned District Judge find fault with parties, who do not seek to partition the land but claim the land as a whole, for not taking steps to add others. They need not even reveal any parties as per their stance.

- Thirdly, the original Plaintiff in his evidence has revealed certain facts which are inimical to his as well as the 6th and 8th defendants' stance, which are highlighted below; Such statements also stand against the findings in their favour by the learned District Judge.

    - The original Plaintiff states that from 1960 he came to know that his father Abraham had 1/3 of the corpus-vide page 313 of the brief.

However, in 1986 he has bought from one Gunasena Amarasiri Jayasinghe 1/2 of the corpus or what belongs to said Gunasena Amarasiri Jayasinghe- vide deed no. 2267 marked 8V4. If their version of pedigree in the plaint is correct Gunasena Amarasiri Jayasinghe could not have 1/2 of the corpus but only 2/27 since they admit that only 2/3 was with Elias Amarasiri Jayasinghe. Further, if Mahasena Amarasiri Jayasinghe had more than 3 children as stated by the 8th Defendant, Gunasena Amarasiri Jayasinghe's share has to be further reduced. The Plaintiff tries to explain that it was so bought as 1/2 of the corpus, as per his knowledge at the time 8V4 was executed. If 1/3 was with Abraham and 2/3 was with said Elias, and he knew their pedigree was correct, he should have known that said Gunasena Amarasiri Jayasinghe could not have 1/2 of the corpus. This indicates that his statement that Abraham had 1/3 and he came to know it in 1960 cannot be relied upon. To buy 1/2 of the corpus from said Gunasena, he appears to have believed in 1986 that Gunasena's predecessors had more than he had shown in his pedigree in his plaint. At least this shows he was not aware of the correct pedigree when he bought from Gunasena Amarasiri Jayasinghe. Then his evidence in courts relating to pedigree must be false or based on some knowledge he gained from some unexplained sources after the execution of 8V4 which may amount to hearsay.

- The original Plaintiff at page 343 and 345 of the brief attempts to state that aforesaid Elias got his entitlement to the lands in the village through his marriage and his wife Francina had 1/9 of the corpus. As per their pedigree Elias has bought 2/3 from others. Thus, this reference to entitlements of Elias through his marriage and Francina's entitlement for 1/9 is more in favour of the stance taken by the 5th and 11th defendants since, as per their version Elias and his wife Francina were the original owners and as per the 6th,8th Defendants' and the

original Plaintiff's stances Francina did not have any rights to this land. However, after referring to the entitlements of Elias that he got through his marriage and Francina's 1/9 share in the corpus, original Plaintiff has expressed that his reference to Francina's entitlement was a mistake due to old age- vide pages 345,346 and 347. Anyhow, due to such contradictory statements, his evidence cannot be considered as reliable, since he might have tried to explain his reference to Francina's entitlement for 1/9 as a mistake as he suddenly realized such statement is inimical to their stance. In fact, it appears that he himself has referred 2/9 entitlement that came from Francina to Elias prior to that. If there were entitlements that came to Elias through his marriage or if 1/9 of the corpus was with Francina, original Plaintiff's or 6th and 8th Defendants' stance that Abraham had 1/3 of the corpus cannot be correct as there was no dispute that Elias got 2/3 from other sources through deeds marked 8V1 and 8V2. Further, this original Plaintiff has stated that Abraham got his 1/3 from his father Walakada Gamage Appune and Appune had another child, a daughter named Wilisina – vide pages 348. If Appune had 1/3 and he had two children, Abraham cannot have entitlement to 1/3 of the corpus, as Appune's entitlement should devolve on both of them. As per his evidence, he first has denied his knowledge with regard to the children of Wilisina but later states that she had 3 or 4 children and admits that if Appune had rights, it should also devolve on Wilisina.

- Fourthly, the 8th Defendant in his evidence has tried to convince the court that his father Walakadagamage Abraham was the owner of 1/3 of the corpus and he possessed and cultivated sugar cane during his time and after his demise his children are possessing the land and 1/2 of the extent is in their possession – vide page 239 of the brief. No documentary evidence was produced to show any dealing relating to cultivation of sugar cane. On the other hand, if they are in possession of the land, the natural response during

the preliminary survey would be the showing of the area in their possession to the surveyor to include that in the plan and the report. However, preliminary plan and report marked X and X1 do not show any area in the possession of the children of Abraham except for a cross claim made by the original Plaintiff to 9 trees against the claim made by the 11th Defendant on behalf of the 5th Defendant for all the trees and a tomb on the land. Anyhow, as per the superimposition plan and report marked Y and Y1, no one has claimed the trees other than the 5th and 11th defendants even though some of the children of Abraham, namely the Plaintiff, 6th ,7th, 8th, and the10th Defendants were present at that survey. Thus, the cross claim made on the first instance of the survey is questionable since they did not claim when the claim was made on behalf of the 5th Defendant while they were present when it was surveyed again for the superimposition. Even though, as mentioned before, it was said that after demise of Abraham they are in possession, no area has been shown in the preliminary plan or in the superimposition plan where they were in possession.

- Fifthly, it appears that the Learned District Judge heavily relied on the evidence given by one of the witnesses for the original Plaintiff and the 6th and 8th defendants, namely Walakada Gamage Hemasiri. It does not seem that he has given evidence using official records as an ex-officer. The Learned District Judge has accepted his evidence stating even though he is a relative of the original Plaintiff and the 6th and 8th Defendants, he came to give evidence on summons. The Learned District Judge has further stated that nothing has come to light from this witness about the possession of the 5th Defendant, but this witness had revealed that after Abraham, his children including original Plaintiff and the 6th and 8th Defendants, came to the possession of the land. However, when one goes through his evidence it can be observed that he is not an impartial witness but one who tried to hide the possession of the 5th and 11th Defendants at the early part of his evidence. In this regard following would be relevant.

- As per his evidence, he resides close to the subject matter of this case and it was Abraham who cultivated sugar cane and other crops in this corpus who died about 25 years ago to the date he gave evidence. He had never seen that 5th and 11th Defendants were in the possession of the corpus-– vide evidence in chief of the said witness. He admits that 6th and 8th Defendants are his close relatives-vide cross examination at page 265 of the brief. He has seen Abraham was in possession when he was passing through the nearby road- vide page 268 of the brief. No one other than Abraham and his sons possessed this corpus and 5th Defendant never had the possession of this land – vide page 271 of the brief. It is Abraham's children who possess this corpus – vide re-examination at page 270. However, this witness admits that he does not know whether Abraham had any title to the corpus- vide page 270. When questioned about the tea plants claimed on behalf of the 5th Defendant as per the survey report, this witness first says that he did not see such plants and changed his evidence to say that Abraham possessed only a separated portion – vide pages 273 to 275. No such separated portion in the possession of Abraham's children is shown in the preliminary survey.
- If this witness is a truthful witness, the portion enjoyed by Abraham or his children must have been revealed in the preliminary plan. As said before, survey reports marked at the trial clearly indicates that on behalf of the 5th Defendant there was a claim to the whole plantation and with a cross claim to some trees by the original Plaintiff which cross claim was not made in the survey report for the superimposition plan. Further, the original Plaintiff admits that he prayed for an injunction when the 5th and 11th Defendants took steps to build for weekly fair arranged by the Gramodaya Mandalaya. Moreover, the 5A and the 11th Defendant in her evidence has revealed that she removed the plantation including the tea plants. In the circumstances, it is clear that,

being a person living close to the corpus, the said Hemasara had attempted to hide the possession of the 5th and the 11th Defendants and was a witness partial to the original Plaintiff and the 6th and the 8th Defendants. Whatever it is, his evidence at most can be considered as evidence that speaks of cultivation of crops and sugar cane by Abraham in the corpus but by his evidence it is clear that he cannot vouch for that such cultivation was done as a co-owner who was entitled to 1/3 of the corpus. The 5A and the 11th Defendant has clearly stated in her evidence about her and her predecessor's possession of the corpus. The Learned District Judge has refused to accept that the balance 1/3 was owned by Francina when, as mentioned before, from the latter part of the 19th century 3 generations have dealt with the corpus as their own as per the pedigree of the 5th and 11th Defendants, but the Learned District Judge has accepted that 1/3 was owned by Abraham when the evidence given on behalf of the original Plaintiff and the 6th and the 8th Defendants lacks integrity and was not reliable in that regard as indicated above. On the other hand, mere possession or enjoyment of a portion of unknown extent of the land which is not depicted on a plan cannot establish that Abraham was entitled to 1/3 of the corpus.

- Sixthly, the 8th Defendant has admitted that he was prosecuting the action as per the amended Plaint tendered by his brother, the original Plaintiff – vide page 197 of the brief. However, the original Plaintiff, when further probed in cross-examination with regard to the contradictory facts revealed through his evidence as to the pedigree, has stated that as per the advice given by lawyers, he filed the action and the lawyers makes the case in a manner feasible to prosecute.

Thus, as per the evidence led, I wonder how the Learned District Judge allocated shares as per the shares allocated in the plaint. In my view the Learned District Judge failed in properly appreciating the evidence placed

before the District Court. Since there was a testamentary case where a Last Will was proved, 2/3 belonged to Elias could not have devolved as per the pedigree relied upon by the original Plaintiff and the 6th and the 8th Defendants. There was no clear evidence to show that 1/3 was owned by the Abraham. In fact, the evidence placed by the party who prosecuted the plaint and the original Plaintiff indicates that the pedigree they relied on was incomplete. Further, certain statements made by the original Plaintiff support the stance of the 5th and 11th Defendants that the other 1/3 also was with Francina, the wife of Elias and also that, in any case, Abraham could not have 1/3 of the corpus. Hence, the original Plaintiff and the 6th and 11th defendants failed in proving their case to get the corpus partitioned.

The Learned District Judge who wrote the Judgment heard only the latter part of the evidence of 5A Defendant. Thus, she was not in a better position to evaluate the rest of the evidence than a judge sitting in appeal as she also had to rely on what was recorded and submitted as evidence.

As per the reasons given above, it is my view that on balance of probability, the answer to question of law no.1 and 2 should be in the affirmative, and in any event, even if the sole ownership of Elias and his wife is considered as not proved, the original Plaintiff and or the 6th and the 8th Defendants who prosecuted the partition case have failed to prove a reliable pedigree to get the land partitioned. Thus, in my view, the partition action should have been dismissed.

Thus, I allow the appeal with costs.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J

The plaintiff filed this action in the District Court of Galle to partition the land depicted in the Preliminary Plan, among the plaintiff and the 1st-10th defendants. The only contesting defendants were the 5th and 11th defendants, mother and daughter respectively, who sought dismissal of the plaintiff's action on the basis that the 5th defendant was the sole owner of the land. During the course of the trial the 5th defendant died and the 11th defendant was substituted in her place. After trial the District Court accepted the pedigree of the plaintiff and rejected the 5th and 11th defendants' pedigree and entered judgment accordingly. The appeal filed against this judgment by the 5A/11th defendant (appellant) was dismissed by the High Court of Civil Appeal. Hence this appeal to this court. This court granted leave to appeal on the following two questions of law as formulated by learned counsel for the appellant at the stage of supporting for leave:

(i) *Has the High Court and the District Court erred in law by failing to appreciate that the pedigree of title put forward by the 5th and the 11th defendants proved that they were the sole owners of the corpus for partition?*

(ii) *In any event, whether the 5th and the 11th defendants and their predecessors have acquired prescriptive title to the land sought to be partitioned by long possession?*

What is the pedigree unfolded by the appellant? The acceptance or refusal of the appellant's pedigree depends on the acceptance or refusal of the alleged joint last will executed by Elias Amarasiri Jayasinghe and his wife Francina Hamine. In the pedigree attached to the statement of claim dated 17.12.1996 (submitted to the District Court) and paragraphs 9 (i)-(ii) of the written submissions dated 17.01.2019 and paragraphs 10(i)-(ii) of the written submissions dated 19.05.2021 (submitted to this court), the appellant states

that Elias Amarasiri Jayasinghe and his wife by their joint last will dated 06.02.1890 which was proved in DC Galle case No. 2970/T bequeathed the entire land which is the subject matter of this partition action to their son Munidasa Amarasiri Jayasinghe; and he by deed marked 5V3 of 1912 transferred it to Dharmadasa Amarasiri Jayasinghe; and after his death, Mahaweera Amarasiri Jayasinghe became entitled to the land by deed marked 5V2 of 1941; and he transferred it to the appellant by deed marked 5V1 of 1941.

The plaintiff does not admit that there was a joint last will as alleged by the appellant which was admitted to probate. According to the appellant the original last will which is in Sinhala was marked 5V15 and the English translation of it was marked 5V14.

However, as the High Court has observed, paragraph 1 of the original last will states that the joint last will dated 06.02.1890 (which the appellant says was admitted to probate) is thereby revoked. If the last will dated 06.02.1890 was revoked, the appellant's pedigree based on the said last will shall fail.

Having realised this predicament, the appellant in paragraph 36 of the written submissions dated 19.05.2021 states "*In the original Sinhala last will marked 5V15 paragraph 1 states that a previous last will of 06.02.1890 is being revoked. Paragraph 1 in 5V15 appears to have revoked a last will of 1890 and not the last will which was proved in the testamentary action 2970/T and which is dated 02.10.1891.*" This is contradictory to the earlier position taken up by the appellant from the District Court up to the Supreme Court that what was proved in case 2970/T was the last will dated 06.02.1890. The appellant cannot take up a new position before the Supreme Court for the first time on a question of fact which goes to the root of the case. A partition case is no exception.

There is no date of execution of the original last will 5V15. 5V14 dated 02.10.1891 is undoubtedly not the English translation of the original last will 5V15. Having realised this, the appellant in paragraph 35 of the written submissions dated 19.05.2021 takes up the position that "*Documents 5V14 and 5V15 complement each other and they must be read together.*" I am unable to agree. The original and its translation cannot complement each other. The translation is not intended to supplement the original. There is no last will acceptable to court. There is no probate before court. The appellant argues that the inventory marked 5V13 proves that the last will was admitted to probate. Which last will? On the other hand, an inventory tendered in a testamentary case is not conclusive proof that the deceased testator was the absolute owner of all the properties stated therein.

It is also relevant to note that after the above-mentioned testamentary proceedings were over, when Munidasa Amarasiri Jayasinghe transferred the land to Dharmadasa Amarasiri Jayasinghe by 5V3, he traces his title to the property to "right of inheritance". He makes no reference to the last will or any executor conveyance. The appellant argues that the recital in 5V3 is entirely correct. I have my reservations. When someone acquires property by a last will admitted to probate, there is no reason for him not to refer to the last will or the executor conveyance executed in terms of the last will as the source of title in the recital of the subsequent deed.

The appellant then argues that whether it is by inheritance or last will, nothing flows from it to the benefit of the plaintiff. This is not correct. Munidasa Amarasiri Jayasinghe is also in the plaintiff's pedigree. According to the plaintiff's pedigree, Munidasa Amarasiri Jayasinghe being one of the three children of Eliyas Amarasiri Jayasinghe is only entitled to 2/3 x 1/3 = 2/9 or 24/108 share. But according to the appellant, Munidasa Amarasiri Jayasinghe was entitled to the entire land on the strength of the last will.

The appellant admits in evidence that by deed 8V1 of 1865 and 8V2 of 1878 produced by the plaintiff, Elias Amarasiri Jayasinghe became entitled to only 2/3 of the land, not the entirety. This is prior to the alleged last will. How he became entitled to the balance 1/3, the appellant does not know. She thinks by prescription.

I am not satisfied, as the learned District Judge and the learned Judges of the High Court were, that there was a last will admitted to probate by which Elias Amarasiri Jayasinghe and his wife, being the lawful owners of the entire land subject to partition, bequeathed it to Munidasa Amarasiri Jayasinghe. If this is not proved, the subsequent deeds tendered on that assumption need not be scrutinised since what could have been transferred by those deeds was only what was entitled to the transferors and nothing more.

I answer the 1st question of law in the negative.

The next question relates to prescriptive possession. I do not think the appellant vigorously pursued such claim in the District Court, the High Court or before this court. In the District Court an incomplete issue (issue No.16) has been raised on prescription. In the High Court, the appeal has not been argued on prescription but only on identification of the corpus and devolution of title based on the aforesaid last will. In that backdrop it is my considered view that the appellant cannot try to establish a prescriptive claim as a main ground of appeal in the Supreme Court because it is a mixed question of fact and law if not a pure question of fact.

If there was no last will the appellant also becomes a co-owner of the land. Proof of prescriptive title is difficult. Proof of prescriptive title among co-owners is more difficult. Long possession of the co-owned land by one co-owner does not establish prescriptive possession unless it is established by cogent evidence that adverse possession commenced by way of an overt act continued for over 10 years. In this case evidence has been led that, apart

from the appellant, others who come under the plaintiff's pedigree also possessed the land. There are no buildings or valuable plantation on the land. No cogent evidence has been led to prove that the appellant is entitled to the entire land by prescription based on adverse possession against the other co-owners. This maybe because the appellant claimed the entire land on deed 5V1 based on the aforesaid last will. If a person claims title to a property as the absolute owner on paper title, in my view, he cannot in the same breath make a prescriptive claim to the same property because a prescriptive claim is based upon adverse possession against the true owner of the property.

I answer the 2nd question of law also in the negative.

The appeal is dismissed but without costs.

JUDGE OF THE SUPREME COURT