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

In the matter of an Appeal against an Order of the Civil Appellate High Court of the North Western Province holden in Kurunagala.

Weherage Joan Rohini Peiris
Nilwala Estate, Akkara Panaha,
Kimbulapitiya Road, Negombo.

Plaintiff

Vs.

SC Appeal No. 79/2017
SC/HCCA/LA No. 572/2016
NWP/ HCCA/KUR/59/2012(F)
DC Puttlam Case No. 95/08/P

1. Weherage Herbert Stanely Peiris
2. Weherage Helan Chandani Peiris
3. Chakrawarthige Dona Mary Inoka
   all of Palawiya, Puttlam
4. Hatton National Bank
   No.482. T.B. Jaya Mawatha,Colombo.
5. Weherage Christy Lionel Peiris
6. Weherage Roy Maxwell Peiris
   Palawiya, Puttlam.

Defendants

AND

Weherage Christy Lionel Peiris
Palawiya, Puttlam.

5th Defendant- Appellant

Vs.

Weherage Joan Rohini Peiris
Palawiya, Puttlam.

Plaintiff-Respondent

1.Weherage Herbert Stanly Peiris
2.Weherage Helan Chandani Peiris
3.Chakrawarthige Dona Mary Inoka Dilrukshi
Both of Palawiya, Puttlam.
4.Hatton National Bank
No.482. T.B.JayaMawatha,Colombo.
5.Weherage Roy Maxwell Peiris
Palawiya, Puttlam.

Defendants – Respondents

AND NOW BETWEEN

Weherage Joan Rohini Peiris
Palawiya, Puttlam.

Plaintiff-Respondent-Petitioner/Appellant

Vs.

Weherage Christy Lionel Peiris
49/5, Palawiya,
Colombo Road, Palawiya, Puttlam.

5th Defendant-Appellant-Respondent

1.Weherage Herbert Stanly Peiris
No.41, Colombo Road, Palawiya, Puttlam.

2.Weherage Helan Chandani Peiris
No.41, Colombo Road, Palawiya, Puttlam.

3.Chakrawarthige Dona Mary Inoka Dilrukshi.
No.40, Colombo Road, Palawiya, Puttlam.

4.Hatton National Bank
No.482. T.B.Jaya Mawatha,Colombo

5.Weherage Roy Maxwell Peiris
No.189, Chillaw Road, Daluwatotawa,
Kochchikade

Defendants-Respondents- Respondents

Before: Buwaneka Aluwihare, PC J
L.T.B. Dehideniya, J and
Murdu N.B. Fernando, PC J.

Counsel: Ravindranath Dabare with S. Ponnamperuma for the
Plaintiff- Respondent-Appellant
M. Wanniappa for the 5th Defendant-Appellant-Respondent
1st to 4th Defendants-Respondents-Respondents absent and unrepresented

Argued on: 31.01.2020

Decided on: 11.11.2021

Murdu N.B. Fernando, PC. J.

The Plaintiff-Respondent-Petitioner/Appellant ("the plaintiff/appellant") came before this Court being aggrieved by the judgement of the Civil Appellate High Court of the North Western Province, holden in Kurunegala ("the High Court").

By the said judgement, the High Court upheld the appeal of the 5th Defendant-Appellant-Respondent ("the 5th defendant/respondent") and set aside and dismissed the judgement entered by the District Court of Puttlam, permitting the partitioning of the land as prayed for by the plaintiff.

To state the facts of this appeal in brief, the plaintiff filed action in the District Court of Puttlam, in the year 2008, seeking to partition a divided southern portion of a land called and

known as Amanakkangkadu in Kuruvikulam, Puttlam, in extent 0A 2R 4P described morefully and referred to in schedule 'B' to the plaint.

The land was to be partitioned among the plaintiff, the 1st, 2nd and 3rd defendants in the following manner.

- plaintiff – 13/14th share of the land less 30.70 perches
- 1st defendant – 1/14th share of the land
- 2nd defendant - 23.94 perches
- 3rd defendant - 06.76 perches

The plaintiff's case was that by a **deed bearing No. 1457 dated 01-01-1985**, executed by A.M.M. Abdul Cader N.P., the plaintiff became entitled to an undivided 13/14th share of the land to be partitioned, which is morefully described in schedule 'B' to the plaint.

Out of the said undivided land, 30.70 perches was transferred by the plaintiff to her sister, the 2nd defendant. The 2nd defendant transferred 06.76 perches of the said portion of land to her daughter the 3rd defendant and the 3rd defendant, mortgaged the undivided portion of land in extent 06.76 perches, to the 4th defendant bank.

The plaintiff further pleaded, that prior to the execution of the aforesaid deed in 1985, **in the year 1963, the total extent of the land was transferred to the plaintiff** by one George Leopold de Silva Wikkramatilake by a deed bearing No. 9736 dated 04-07-1963 executed by S.M.M. Cassim N.P. and the plaintiff and her family was in possession of the said land, from such date.

In 1968, upon the plaintiff's father's request, this land was transferred to the plaintiff's father by the plaintiff in order to raise a loan. In 1973, the plaintiff's father died interstate and the rights to the land vested on the heirs, namely the plaintiff's mother and the seven siblings. The said heirs, except, the 1st defendant, in 1985, transferred their entitlement to the plaintiff by the deed bearing No. 1457 dated 01-01-1985 referred to earlier. Thus, the plaintiff became entitled to 13/14th share of the said land morefully referred to in schedule B to the plaint. The plaintiff thereafter, from her share entitlement transferred an undivided portion of the land to the 2nd defendant, as referred to earlier.

The plaintiff in 2008, filed the instant partition action in the District Court of Puttlam and the 1st defendant [who did not part with his entitlement of 1/14th share to the land] did not oppose the application. The 2nd and 3rd defendants accepted the plaintiffs title and moved that the land be partitioned as prayed for by the plaintiff. The 4th defendant bank in its statement of claim referred to the chain of title of the parties *viz-a-viz* the mortgaged land.

The 5th and 6th defendants who are siblings of the plaintiff and who were also executors to the aforesaid deed No 1457 dated 01-01-1985, filed a joint statement of claim. The 6th defendant claimed the property and the house built therein, on the ground of prescription and the 5th defendant claimed Rs.1.5 million for improvements, in the event the land is partitioned as prayed for by the plaintiff.

Thus, this application was opposed only by the 5th and 6th defendants. At the trial, the plaintiff, the Surveyor and the Notary Public who attested the aforesaid deed bearing No. 1457 gave evidence. The 5th and the 6th defendants failed to give evidence or lead any documentary evidence to establish the plea of prescription or the claim for improvements, taken up by the said defendants.

Having considered the evidence led and being satisfied that the plaintiff has proved the chain of title and established the identity of the land, the District Court permitted the partitioning of the land as prayed for by the plaintiff. The issues pertaining to prescription and improvements raised by the 5th and 6th defendants were answered in the negative and the 5th defendant's monetary claim was rejected by the District Court.

Being aggrieved by this judgement, the 5th defendant invoked the jurisdiction of the High Court and urged that the district judge has failed to investigate title in the said case.

It is a matter of interest, that the 5th defendant who did not claim an entitlement to the land to be partitioned, filed appeal papers and took up an entirely new ground and abandoned the claim for improvements pleaded before the District Court. The 6th defendant who jointly filed a statement of claim with the 5th defendant at the trial court, did not pursue the appeal to the High Court nor associate himself with the 5th defendants appeal.

The High Court accepted the contention of the 5th defendant pertaining to the title and upheld the appeal and the case of the plaintiff was dismissed with costs and the judgement and the interlocutory decree entered by the District Court was set aside.

The High Court, in its judgement held, that the District Court failed to perform its obligations in terms of Section 25(1) of the Partition Law No 21 of 1997 as amended ("the Partition Act") and repeatedly pronounced that *the district judge failed to address its judicial mind to the mode of acquisition of title of Leopold De Silva Wikkramatilake the alleged predecessor in title of the plaintiff.*

Being aggrieved by this judgement, the plaintiff invoked the jurisdiction of this Court and obtained Leave to Appeal on five questions of law.

The said questions referred to in paragraph 27(a) (b) (c) (d) and (i) of the Petition of Appeal are as follows: -

a) Did the High Court err in deciding that examination of title is only examining paper title excluding the title gained by prescription?
b) Did the High Court err by failing to consider that the 5th Defendant- Appellant-Respondent is estopped in raising doubts in the title of the Plaintiff- Respondent-Petitioner as he was also a party who executed the title deed in favor of the Plaintiff-Respondent- Petitioner?
c) Did the High Court err in failing to appreciate the fact that no other party other than the 5th Defendant- Appellant- Respondent had appealed against the Order of the District Court of Puttlam?
d) Did the High Court err in deciding that the evidence given in prescriptive rights accrued by the Plaintiff- Respondent- Petitioner and her predecessors cannot be considered as a title valid before the law?
i) Did the High Court err in deciding that paper title more than 50 years and prescriptive title more than 50 years is insufficient to establish the title and ownership of a land?

I wish to consider the above referred five questions of law, under two segments.

Firstly, the 1st, 2nd, 4th and 5th questions of law which pertains to the plaintiff's right and entitlement to the land to be partitioned; and

Secondly, the 3rd question which refers to the appeal filed by the 5th defendant and his right to challenge the interlocutory decree and the judgement given by the District Court in the instant application.

The four questions in the first segment in my view are interwoven and revolve around the title and investigation of such title *viz* paper title and prescriptive title, and goes to the root of a partition action.

Hence, I wish to analyze the questions of law raised before this Court, pertaining to title *viz-a-viz* the provisions of the Partition Act, with special emphasis on investigation of title by a court of law, as laid down in Section 25(1) of the Act.

Section 25(1) of the Partition Act reads as follows: -

> *".... 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****...."* (emphasis added)

The aforesaid provision in the present Partition Act, as well as similar provisions in the earlier Partition Act of 1951 and the Partition Ordinances have been extensively analyzed by this Court on numerous occasions and the duty of a court to examine and investigate title has been repeatedly emphasized. **[see Juliana Hamine v. Don Thomas (1957) 59 NLR 546; Cooray v. Wijesuriya (1958) 62 NLR 158; Jane Nona v. Dingiri Mahathmaya (1968) 74 NLR 105]**

With the far reaching effects of the provisions of Section 48 of the Act, which speaks of final and conclusiveness of a partition decree, this Court has observed, that in the event the investigations are defective, a decree could be set aside in appeal. [**see Mohamedaly Adamjee v. Hadad Sadeen (1956) 58 NLR 217**]

Whilst observing the sacred duty of court to investigate title, the Appellate Courts have held, that no higher standard of proof is required in a partition action than in any other civil suit, where balance or preponderance of probability is the standard of proof and that the court could investigate title, only within the limits of pleadings, admissions and issues and evidence led before court and cannot go on a voyage of discovery **[see Cynthia de Alwis v. Marjorie de Alwis and others [1997] 3 Sri LR 113; Karunaratne v. Sirimalie (1951) 53 NLR 444; Thilagaratnam v. Athpunathan and others (1996) 2 Sri LR 66]**

Similarly, our Courts have emphatically held that clarity with regard to the identity of corpus is a fundamental factor to be considered in a partition application. **[see SopiNona v. Pitipanaarachchi and others (2010) 1 Sri LR 87]**

With regard to a person who pivots his title on 'adverse possession' and claims prescription, this Court has held that such adverse possession should be established by clear and unequivocal evidence and the burden is on the party who invokes prescription to establish such fact. Where a person's possession was originally not adverse but subsequently, became adverse, onus is on the person who claims that fact to prove such fact. **[see De Silva v. Commissioner General of Inland Revenue (1973) 80 NLR 292; Sirajudeen and others v. Abbas [1994] 2 Sri LR 365]**

Having referred to the legal position, pertaining to proof of title and chain of title, let me now examine the said legal provisions, in the light of the factual matrix of this case.

In the instant appeal, the plaintiff sought to partition the land in issue, between four parties, namely, the plaintiff and the 1st, 2nd, 3rd defendants who co-owned the property in suit and there was no contest by the said parties with regard to the partitioning of the land, identity of the corpus and the chain of title.

As discussed earlier, the plaintiff's case was that she became entitled to the entire land to be partitioned in extent 0A 2R 4P depicted in schedule B to the plaint, initially in the year 1963 and possessed the land from then onwards. The said land was transferred in the manner described earlier in this judgement and in 1985 the plaintiff became entitled to an undivided 13/14th shares

of the said land out of which the plaintiff transferred an undivided portion of the land to the 2nd defendant as described.

Hence, the Plaintiff's case was, that the land morefully described in schedule B to the plaint be partitioned as prayed for in the plaint between the plaintiff, 1st, 2nd and 3rd defendants subject to the mortgage of the 4th defendant.

Thus, I cannot see any error in the judgement of the district judge permitting the partitioning of the land in the manner prayed for by the plaintiff, after investigating the title and being satisfied of the identity of the land and the chain of title. In fact, the district judge in the judgement, had referred to each and every deed, in the chain of title of the plaintiff as well as the 1st, 2nd, 3rd defendants respectively.

Similarly, the district judge cannot be faulted in disallowing the 5th and 6th defendant's claims made in the partition action either. The 5th defendant did not lead any evidence, oral or documentary to substantiate his claim for improvements or the 6th defendant with regard to his claim on prescription. Thus, even with regard to the contention of the 5th and 6th defendants, I am of the view, that the district judge properly investigated their claims and rejected same.

Moreover, it is observed that both the **5th and 6th defendants were executants to the deed bearing No. 1457 dated 01-01-1985**. This is the deed by which the plaintiff obtained title to 13/14th shares of the corpus, [when plaintiff's mother transferred her 1/2 share and the plaintiffs seven siblings (excluding one) transferred their individual 1/14th share (1/7th of 1/2 share), being the intestate rights and entitlements flowing from the plaintiff's deceased father.

Thus, it is ironic that the 5th defendant who transferred his share entitlement to the plaintiff in 1985 and had no interest in the land, preferred a claim against the plaintiff, in the event the land was partitioned, for a sum of Rs.1.5 million and thereafter failed to pursue such claim before the trial court. The 6th defendant too, did not pursue his claim on prescription. Further it is observed, that the 5th and 6th defendants did not challenge the chain of title of the plaintiff either, at the trial.

Hence, in my view, the district judge quite rightly rejected the 5th defendants claim and answered the issues raised by the 5th defendant as well as the 6th defendant, in the negative.

However, it is not necessary for me to delve further into this aspect of prescription and improvements in this appeal, since the 5th defendant's principal ground of appeal before the High Court was that the District Court failed to examine the title to the land in issue. It is observed that the High Court judge upheld the appeal upon this basis, paying much attention to the fact that *the learned District Judge failed to address the acquisition of title by the plaintiff's predecessor.*

Thus, the High Court went a step ahead and investigated the plaintiff's predecessor's title not at the time of the transfer of the land in 1963, but many years earlier and with regard to the manner of acquisition of title by the plaintiff's predecessor. It is also a matter of concern that the High Court did not examine the 1985 deed by which the 5th defendant and other siblings transferred title to the plaintiff or the fact that the plaintiff, having obtained title upon the 1963 deed, held and possessed the land to be partitioned for a period of 45 years.

In the light of the findings of the High Court, I would now move on to examine the plaintiff's title in detail.

The land to be partitioned is in extent 0A 2R 4P and is described and referred to in schedule B to the plaint. This land is said to be a divided and defined portion of a larger land in extent 2A 2R 20P. The larger land is referred to and described in schedule A to the plaint.

The plaintiff relied on three deeds to establish the chain of title and the identity of the land to be partitioned.

The said deeds were;

1. **Deed No.9736 executed on 04-07-1963 (P1),** whereby the plaintiff became entitled to the entire land to be partitioned, in extent 0A 2R 4P (Schedule B);
2. Deed No. 12062 executed on 06-08-1968 (P2) whereby the said extent of land was transferred by the plaintiff to plaintiff's father; and

3. **Deed No. 1457 executed on 01-01-1985 (P4)** wherein the plaintiff's mother and her six siblings [excluding the 1st defendant] transferred their entitlement, totaling 13/14th share to the plaintiff. The 5th and 6th defendants were also executants to this deed.

The metes and bounds and the extent of the land referred to in the two schedules, A and B of the plaint, correspond with the schedules referred to in the three deeds mentioned above.

The **Plan and the Surveyors Report prepared on a Commission issued by the District Court** tallies with the description of the land and gives the extent and the metes and bounds as at that date. No party to the partition action, including the 5th defendant disputed the identification of the land, the extent and description of the land to be partitioned either by producing oral or documentary evidence or by challenging the evidence given by the plaintiff or on behalf of the plaintiff by the Surveyor or the Notary Public or any other witnesses. Thus, the identity of the land to be partitioned in my view, was not in dispute before the trial court. Similarly, the prescriptive possession of the plaintiff was also not challenged before the District Court and that too was not in dispute.

The plaintiff also marked in evidence, the three deeds referred to above without a challenge or objection being raised by any of the defendants, including the 5th defendant. Thus, the said deeds which refer to the plaintiff's entitlement and the chain of title was led unhindered and unchallenged.

Upon perusal of the aforesaid three deeds and the dates of execution, it is observed that the chain of title clearly runs back to the year 1963, i.e., 45 years prior to filling of the partition action.

By the deed (P1) executed in the year 1963, the title to the said corpus in extent 0A 2R 4P (morefully referred to in schedule B to the plaint) was transferred to the plaintiff by one George Leopold de Silva Wikkramatillake, (i.e. plaintiff's predecessor) and the said **George Leopold De Silva Wikkramatilake held and possessed the said land by right of inheritance from his mother Mary Girtrude,** widow of William Moses de Silva Wikkramatilake.

The deed P1, further indicates that Mary Girtrude, the mother of plaintiff's predecessor, held and possessed a larger land in extent 2A 2R 20P (morefully referred in schedule A to the plaint), by virtue of a deed executed on 05-07-1904 bearing No. 915. The land to be partitioned or the corpus in extent 0A 2R 4P was carved out from the southern portion of the larger land. Thus, the paper title of the land to be partitioned can be traced back to 1904, a period exceeding 100 years, prior to filling of the instant partition action.

The plaintiff, also led in evidence a communique received from the Puttlam Land Registry to establish that the aforesaid deed executed in 1904 had decayed. In the District Court judgement, reference is also made to the said fact which prevented the plaintiff to mark in evidence the deed of 1904 to establish the chain of title of the plaintiff running back to 100 years or the beginning of the 20th century.

Thus, it is observed that the district judge took cognizance of the aforesaid facts in investigating the title of the plaintiff and came to the correct conclusion, that the chain of title was proved by the plaintiff, with regard to the corpus in issue.

However, as stated earlier, the High Court upheld the appeal of the 5th defendant, upon the basis, that *the plaintiff has failed to address the* ***acquisition of title by the plaintiff's predecessor.***

It is observed that the High Court judge when coming to the above conclusion held, in the light of the ratio in **Cooray v. Wijesinghe** (supra) that the plaintiff failed to adduce clear and unequivocal evidence to prove the following factors.

- *the corpus was 1/5th part of the larger land;*
- *Mary Girtrude was the sole owner of the larger land;*
- ***Mary Girtrude sold and transferred*** *an undivided 1/5th share of the larger land to George Leopold de Silva Wikkramatilake the "alleged predecessor" in title of the plaintiff; and*
- *the "alleged predecessor" of the plaintiff, acquired exclusive title by prescription to the corpus, to the exclusion of other co-owners and therefore became the sole owner of the portion of land referred to in schedule B to the plaint.*

It is further observed, that the High Court judge elaborated the above factors at great length and came to the finding, that the plaintiff could succeed in the partition action, only if the plaintiff could establish the entire pedigree beginning from Mary Girtrude and continuously used the term *"alleged predecessor"* when referring to George Leopold de Silva Wikkramatilake, contrary to the contents and wording in the 1963 deed (P1) which clearly denotes him being the vendor and the plaintiff's predecessor.

Similarly, the High Court also failed or did not venture to examine or consider the evidential value of the deed executed in the year 1963 by the plaintiff's predecessor or the rights and entitlements flowing from the said deed, especially the prescriptive rights and possession of the plaintiff of the said land from the year 1963 running into a period of 45 years.

In any event, the High Court did not examine or consider the effect and consequences of the other deeds, executed after 1963 and marked in evidence at the trial and especially the deed bearing No. 1457 executed on 01-01-1985 (P4) by which the 5th defendant himself (the appellant before the High Court) transferred his share entitlement together with his siblings to his own sister, the plaintiff. The High Court failed to evaluate the stand of the 5th defendant at the trial court i.e., not to challenge the partition action but only to obtain a monetary sum in the event the land was partitioned.

Further, it is observed, having failed to refer to the aforesaid deeds and its effects on the title of the plaintiff's pedigree, *viz* plaintiff paper title and prescriptive title to the land from 1963, the High Court Judge repeats, *ad nauseam* and harps on the fact that *the learned district judge has totally failed and not given his judicial mind to investigate title and obligations imposed on him under Section 25(1) of the Partition Act* and only emphasizes on the fact that the acquisition of title by the plaintiff's predecessor has not been proved before the trial court.

This Court in **Cooray v. Wijesuriya** (supra) and other cases discussed earlier in this judgement, observed that Section 25(1) of the Partition Act imposes an obligation on the court to examine the title of each party to, of, or in the land, to which the action relates.

In the instant application, the trial court referred to the title of each party to, of, or in the land to which the action relates, during the last 45 years, i.e. the deed executed in 1963 (P1), the

deed executed in 1985 (P4), the deed executed by the plaintiff when transferring an undivided portion to the 2nd defendant, the deed executed by the 2nd, 3rd and 4th defendants respectively.

The High Court on the other hand, did not refer to the district judges examination of title, especially in relation to the deeds marked P1, P2 or P4, but faulted the trial judge for not examining the acquisition of title of the plaintiff's predecessor, which would have taken place very much prior to the execution of the 1963 deed (P1).

Thus, in my view the High Court did not refer to the District Court finding on the corpus, the ownership and title of the land in issue or the legal status of the parties before court, but ventured to examine the position prior to 50 years i.e. prior to execution of the 1963 deed (P1). The High Court paid more emphasis on the status of the plaintiff's predecessor and his exclusive title to the corpus, to the exclusion of other co-owners, who are not parties to this action. The said co-owners have no interest in the corpus nor are parties who challenged or intervened in this action. The High Court also failed to address its mind to the prescriptive possession of the plaintiff or the rights accrued by the plaintiff from 1963 to the date of partition action i.e. a period of 45 years, but went onto hold that the plaintiff's pedigree should begin from, George Leopold de Silva Wikkramatilake's mother, Mary Girtrude and plaintiff should establish that Mary Girtrude sold and transferred the land to George Leopold de Silva Wikkramatilake.

In **Karunaratne v. Sirimalie** (supra) and **Thilagaratnam v. Athpunathan and others** referred to earlier in this judgement, the Appellate Courts observed, that no higher standard of proof is required in a partition action than in any civil proceeding and the court could investigate title, only within a limited sphere and cannot go on a voyage of discovery. Thus, the standard of proof is the balance of probability with regard to the evidence led before the trial court.

Having considered the aforesaid judicial pronouncements and the evidence led and the documents marked at the trial in the instant matter, I am convinced that the district judge investigated the title of each and every party before court, i.e. the plaintiff and the 1st to 6th defendants with regard to the corpus and came to a correct conclusion.

On the other hand, the High Court, in my view went on a voyage of discovery and upheld the appeal, paying much attention of the plaintiff's predecessor, George Leopold de Silva

Wikkramatilake's title, his mother Mary Girtrude's title and the plaintiff's failure to adduce evidence with regard to plaintiff's predecessor acquiring title to the corpus way before 1963, an event which would have occurred 50 years prior to the plaintiff initiating partition proceedings before the District Court.

In a partition action, according to judicial pronouncements discussed at the beginning of this judgement, what is required from a trial court is to investigate and examine title of each party to the land to which the action relates. In the instance matter, as discussed above, the plaintiff's chain of title together with prescriptive title running back to 50 years, in my view, has been clearly and fairly established. Similarly, no party has raised or adverted to any adverse possession or prescriptive rights as against the rights and interests of the plaintiff. Thus, I see no merit in the submission made by the 5th defendant before this Court.

Nevertheless, in view of the finding of the High Court that acquisition of the plaintiff's predecessors title is the most crucial element in a partition action, I wish to delve into the said fact now.

The land to be partitioned in extent 0A 2R 4P (the land referred to in schedule B to the plaint) was transferred to the plaintiff by George Leopold de Silva Wikkramatilake by deed bearing No.9736 executed on 04-07-1963 (P1).

The recital to the deed reads:

> *"that the vendor sold and transferred the land and premises held and possessed by the said vendor* ***by right of inheritance from his mother Mary Girtrude*** *wife of William Moses de Silva Wickramatileke late of Puttlam who held same under and by virtue of deed No 915 dated 05-07-1904..."*

The schedule of the deed reads;

> *"that of all that land called and known as Amankkangkadu situate at Kuruvikulam in Puttlam Pattu [....] bounded on [....] containing in extent 2A 2R 20P,* ***in lieu of an undivided ⅕ share a divided***

southern portion of the aforesaid land divided with the mutual consent of the other co-owners *containing in extent 2R 4P and bounded on [....]".*

The plain reading of the above narrative in the deed executed in 1963 (P1), appears to be that,

- the larger land referred to in schedule A to the plaint was owned and possessed by Mary Girtrude by virtue of a deed executed in the year 1904 [i.e. the deed that is now decayed - vide (P1a), the communique issued by the Puttlam Land Registry];
- George Leopold de Silva Wikkramatilake held and possessed the said land, **upon the right of inheritance of his mother, Mary Girtrude,** together with other beneficiaries and thus co-owned the said land;
- George Leopold de Silva Wikkramatilake's entitlement to the said co-owned land was 1/5th share;
- in lieu of George Leopold de Silva Wikkramatilake's 1/5th share to the said larger land, **with the mutual consent of the other co-owners**, a portion to the south of **the land was carved out and such carved out area was held and possessed by George Leopold de Silva Wikkramatilake;**
- the said carved out portion of the land is defined by metes and bounds and is in extent of 0A 2R 4P and is the land referred to in schedule B to the plaint; and
- the said defined portion of the land was transferred by George Leopold de Silva Wikkramatileke (plaintiff's predecessor) to the plaintiff by deed bearing No 9736 executed on 04-07-1963 (P1).

Thus, in my view, the said deed executed in 1963 establishes the title of the plaintiff's predecessor to the land to be partitioned. This deed (P1) was led in evidence without any objection at the trial and the district judge pivoted the chain of title of the plaintiff with reference to this deed.

Similarly, there was no challenge to the prescriptive right of the plaintiff who held and possessed the said land, from the date of execution of the deed (P1) i.e. from 04-07-1963 for a

period of 45 years. Undisputedly, by the deed executed in 1985 (P4), the 5th defendant himself granted his share of interest in the land to the plaintiff and did not put forward a case of adverse possession *viz-a-viz* the plaintiff.

Thus, I see no reason to cast any doubt with regard to the plaintiff's predecessor's title or to burden the plaintiff to establish the manner upon which the plaintiff's predecessor acquired title.

I am of the view that the judges of the High Court erred with regard to this factor, when it held, in order for the plaintiff to succeed, the "*plaintiff should establish the entire pedigree beginning from Mary Girtrude and that Mary Girtrude was the sole owner of the larger land and that Many Girtrude had sufficient title vested in her to sell and transfer1/5th share or part therefrom to George Leopold de Silva Wikkramatilake."*

The High Court, further erred when it proclaimed *"that the plaintiff should establish that George Leopold de Silva Wikkramatilake acquired or prescribed to 1/5th share of the larger land, to the exclusion of other co-owners who owned 4/5th share"* and *"if the deed executed in 1904 was decayed, that the plaintiff should have led encumbrance sheets maintained at Puttlam Land Registry"* and *"the failure to prove the pedigree would inevitably result in the dismissal of the plaint."*

I find the above reasoning of the High Court erroneous, misconceived, incomprehensible and outrageous and with respect, I cannot agree with the said finding.

The obligation imposed on a court by the Partition Act, I emphasize, is to examine the title of each party to, of, or in the land to which the action relates *viz* identification of corpus and chain of title and the District Court has full-filled such obligation and allotted shares accordingly.

The High Court sitting in appeal has not considered the relevant legal position and case law relating to such factors, but gone on a voyage of discovery, chartering through archaic history and going beyond the pleadings, to dismiss an application based on the failure to investigate acquisition of plaintiff's predecessor's title and has thus, in my view missed the wood for the trees.

This Court has time and time again held, that a party cannot be permitted to present in appeal, a case different from that presented before the trial court where matters of fact are involved which were not in issue at the trial. **[see Candappa nee Bastian v. Ponnambalampillai (1993) 1 Sri LR 184; Setha v. Weerakoon (1948) 49 NLR 225]**

Civil Procedure Code in the explanation to Section 150 of the Code states, that a case enunciated must reasonably accord with the party's pleadings.

Thus, the basis upon which the 5th defendant filed appeal papers and the extent to which the High Court judge traversed to uphold the appeal, in my view is not in accordance with the law and specifically the provisions of the Partition Act, which only requires a trial court to consider relevant and material evidence with regard to title of each party to the land to which the action relates.

Therefore, in my view, the High Court erred in its determination pertaining to examination of title of parties in the instant case.

In the aforesaid circumstances, I answer the 1st, 2nd,4th and 5th Questions of Law raised before this Court in the affirmative and in favour of the appellant.

Similarly, there is not an iota of doubt, that it was only the 5th defendant who went up in appeal against the judgement of the District Court and the 5th defendant did not claim any share of the land to be partitioned or any right in the District Court. Hence, the 3rd Question of Law raised before this Court, is also answered in the affirmative and in favour of the appellant.

Thus, I answer all five Questions of Law raised before this Court in favour of the appellant.

Therefore, for reasons enumerated herein, the judgement of the Civil Appellate High Court holden in Kurunegala dated 13th October, 2016 is set aside.

The judgement of the District Court of Puttlam dated 23rd April, 2012 is upheld. The Order allowing the partitioning of the land described in schedule B to the plaint, in the manner referred to in the said judgement of the District Court is also affirmed.

In the aforesaid circumstances this Court further holds, that the Plaintiff-Respondent-Appellant is entitled to a sum of Rs. 100,000/= payable by the 5th Defendant-Appellant-Respondent. This sum is payable to the Plaintiff-Respondent-Appellant in addition to the costs of the courts below.

Appeal is allowed with costs.

Judge of the Supreme Court

Buwaneka Aluwihare PC, J

I agree

Judge of the Supreme Court

L.T.B. Dehideniya, J.

I agree

Judge of the Supreme Court