

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

In the matter of an application for leave to appeal under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5C of the High Court of the provinces (Special Provisions) Act No. 19 of 1990, as amended by Act No. 54 of 2006.

SC/Appeal No. **SC/APP/60/2021**
SC/LA/Application No.
SC/HCCA/LA/432/2019
Civil Appellate High Court of
Gampaha Case No.
WP/HCCA/GPH/138/2009(F)
DC Gampaha Case No. **35884/P**

Madurapperuma Appuhamilage Nimal,
Madurapperuma of Bathgangoda,
Ambepussa,

PLAINTIFF

vs

1. Dissanayake Gamage Dharmasena of
Maveehena, Ambepussa.
2. Meerigama Multi-Purpose Co-operative
Society,
Main Road, Meerigama.

DEFENDANTS

And Between

Madurapperuma Appuhamilage Nimal,
Madurapperuma of Bathgangoda,
Ambepussa,

PLAINTIFF - APPELLANT

vs

1. Dissanayake Gamage Dharmasena of Maveehena, Ambepussa.
2. Meerigama Multi-Purpose Co-operative Society,
Main Road, Meerigama.

DEFENDANTS – RESPONDENTS

AND NOW BETWEEN

Madurapperuma Appuhamilage Nimal,
Madurapperuma of Bathgangoda,
Ambepussa,

**PLAINTIFF – APPELLANT –
PETITIONER – [APPELLANT]**

vs

1. Dissanayake Gamage Dharmasena of Maveehena, Ambepussa.

**1st DEFENDANT – RESPONDENT –
RESPONDENT – [RESPONDENT]**

2. Meerigama Multi-Purpose Co-operative Society,
Main Road, Meerigama.

**2nd DEFENDANT – RESPONDENT –
RESPONDENT – [RESPONDENT]**

BEFORE

: Mahinda Samayawardhena, J.

Arjuna Obeyesekere, J.
M. Sampath K. B. Wijeratne, J.

COUNSEL : S. N. Vijithsingh instructed by Mr. Dilhan for the
Plaintiff- Appellant- Appellant- Appellant.

Chamara Nanayakkarawasam instructed by
Dimuthu Upeksha Fernando for the 1st
Defendant – Respondent – Respondent -
Respondent.

ARGUED ON : 17.09.2025

DECIDED ON : 27.05.2026

M. Sampath K. B. Wijeratne J.

Introduction

The Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the “Plaintiff-Appellant”) instituted this action in the District Court of Gampaha against the Defendant-Respondent-Respondent-Respondent (hereinafter referred to as the “Defendant-Respondent”) seeking the partition of the land called and known as “*Ambagahawatta*”.

After the preliminary steps were taken, a commission was issued to Mr. A. Rupasinghe, Licensed Surveyor, for the preparation of a preliminary plan. Upon executing the commission, the Commissioner tendered preliminary Plan No. 40/94 dated May 22, 1994 (marked “X”), together with the corresponding report (marked “X1”).

The *corpus* surveyed by the Commissioner and depicted in Plan “X” was not disputed by any of the Defendants-Respondents. However, as it is the duty of the learned District Judge in a partition action to satisfy himself as to the identity of

the *corpus*, the learned District Judge considered the extent and boundaries of the *corpus* and, upon analysis, correctly concluded that the land sought to be partitioned is that depicted in Plan “X”. The learned District Judge determined that the 1st Defendant-Respondent was entitled to a one-half undivided share of the land, leaving the remaining half of the land claimed by the Plaintiff-Appellant, unallotted.

The learned High Court Judges, sitting in appeal against the judgment of the learned District Judge dated June 25, 2009, affirmed the findings of the learned District Judge on the issue of the *corpus* in their judgment dated June 18, 2015.

Subsequently, upon an application made by the 1st Defendant-Respondent under Section 771 of the Civil Procedure Code seeking a re-hearing of the appeal, the learned High Court Judges delivered a fresh judgment on October 2, 2019, in favour of the 1st Defendant-Respondent.

It is against the said judgment that the present appeal has been preferred, and this Court has granted leave on the following questions of law:

- i. The said judgment of the Provincial High Court is contrary to the law and is against the weight of evidence led at the trial?*
- ii. Did the learned Judges of the Provincial High Court err in holding that the Petitioner had failed to file his written submissions in court thus failing to support his case with material facts while overlooking the fact that the Petitioner had already filed his written submissions in court on 05.05.2015 for the purposes of disposing of the appeal on the previous occasion and hence the said judgment is bad in law?*

At the very beginning, it must be emphasized that, in light of the aforementioned facts, this Court need not labour over the question of the identity of the *corpus*. It is the pedigree pleaded by the Plaintiff-Appellant that calls for consideration.

In his amended plaint dated November 1, 1994, the Plaintiff-Appellant sought the partition of the land in equal shares between himself and the 1st Defendant-

Respondent. The 2nd Defendant-Respondent was added as a party to the amended plaint, as he holds a mortgage over the 1st Defendant-Respondent's half share.

The 1st Defendant-Respondent filed an amended statement of claim denying that Senayake Achchige Podihami *alias* Babahamy, the mother of Senayake Achchige Seda Nona, the Plaintiff-Appellant's predecessor-in-title, owned a half share of the *corpus*. The 1st Defendant-Respondent further denied that Senayake Achchige Seda Nona is the child who derived title from Podihami *alias* Babahamy.

Accordingly, the 1st Defendant-Respondent denied the title of the Plaintiff-Appellant and claimed title to the entire *corpus*, one-half share on the basis of his title deed, and the entirety upon prescription.

According to the Plaintiff-Appellant, Senayake Achchige Juwanis Appu and Senayake Achchige Podihamy *alias* Babahamy were the original owners of the *corpus*, each holding an equal half share. Upon the death of Babahamy, her child, Senayake Achchige Seda Nona, succeeded as her sole heir.

Senayake Achchige Seda Nona gifted her half share to her nephew, Madurapperuma Appuhamilage Nimal Madurapperuma, the Plaintiff-Appellant, by Deed of Gift No. 2182 dated November 18, 1979, attested by P. de Vas, Notary Public (marked "P2").

According to the Plaintiff-Appellant, Senayake Achchige Juwanis Appu, the owner of the remaining half share of the *corpus*, transferred his undivided half share to Senayake Achchige Romel Singho by Deed No. 1072 dated December 6, 1915 (marked "P3"), attested by D. B. P. Karunaratna, Notary Public.

Upon the death of Romel Singho, he was survived by his wife, Elisahamy, and his children, including Senayake Achchige Nandasena, together with his other children, namely Wijedasa, Lusihamy, Alpinona, and Carolis Singho, who became his heirs.

Thereafter, Elisahamy and the other siblings of Carolis transferred their respective rights to him by Deed of Transfer No. 13663 dated December 24, 1956

(marked “V9/P4”), attested by B. V. Dharmadasa, Notary Public, thereby vesting Carolis Singho with the undivided half share of the *corpus*.

Subsequently, the said Carolis Singho transferred his undivided half share to Athapattu Pathiranalage Nandawathie by Deed No. 1607 dated January 8, 1961 (marked “V10/P5”), attested by T. R. S. Gunawardhana, Notary Public.

The said Nandawathie transferred her undivided half share to the 1st Defendant-Respondent, Dahanayake Gamage Dharmasena, by Deed No. 278 dated October 18, 1987 (marked “V11/P6”), attested by Kotuwelle Wijesundara Ekanayake Mudiyansele Nandasena, Notary Public.

The 1st Defendant-Respondent mortgaged his half share to the 2nd Defendant-Respondent, namely the Meerigama Multi-Purpose Co-operative Society, by Mortgage Bond No. 896 dated April 7, 1993, attested by T. P. Ranjani Ashoka, Notary Public. However, according to the extracts of the Land Registry (marked “P8”), the said mortgage bond was discharged on October 13, 1998.

The learned District Judge, having analysed the evidence relating to the aforementioned pedigree, held that the 1st Defendant-Respondent is entitled to a half share of the *corpus*, but that the prescriptive title claimed by the 1st Defendant-Respondent through Athapattu Pathiranalage Nandawathie had not been established.

However, the learned District Judge held that the Plaintiff-Appellant failed to establish the source from which Podihamy *alias* Babahamy derived her half share, and that the first title deed relating to the said half share was executed only in 1979, under which the Plaintiff-Appellant claims title through Seda Nona.

On the aforementioned grounds, the learned District Judge held that no title passed to the Plaintiff-Appellant under the deed marked “භූ1” and, accordingly, allotted a half share to the 1st Defendant-Respondent, leaving the remaining half share unallotted¹.

¹ *Vide* page 247 and 248 of the Appeal brief.

The learned District Judge based his conclusion on an isolated answer given by the Plaintiff-Appellant in cross-examination to the effect that Babahamy may have inherited the property from her father² who was not disclosed in the pedigree set out by the Plaintiff- Appellant.

However, the birth certificate of Seda Nona, marked “P1”, confirms that her mother is Senayake Achchige Babahamy. Accordingly, in the absence of any evidence to the contrary, it is reasonable to conclude that Seda Nona has inherited from her mother, Babahamy.

Whenever a pedigree is to be proved in Court, it is well recognized that Courts are inclined to accept hearsay evidence relating to pedigree. This is because a pedigree extending over a long period of time is, by its very nature, often beyond the direct knowledge or lifetime of any single witness.

In *P. M. Cooray vs M. A. P. Wijesuriya*³ (S.C.), the relevance and admissibility of such evidence, commonly referred to as hearsay evidence, in partition actions was considered.

Per Sinnetamby, J.

“The relevant provisions of the Evidence Ordinance in regard to a Proof of a pedigree are to be found in section 32(5), Section 32(6) and section 50 (2). I am omitting for the moment proof by the production of birth, death and marriage certificates. It almost always happens that birth and death certificates of persons who have died long ago are not available: in such cases the only way of establishing relationship is by hearsay evidence. Section 32 (5) of the Evidence ordinance renders a statement made by a deceased person admissible.”

Further, when a partition action is instituted, the Plaintiff-Appellant, being required to commence the pedigree from some point, must necessarily cite an

² At page 84 of the Appeal brief.

³ *P.M Cooray vs M.A.P. Wijesuriya* 62 NLR 158.

original owner. However, in reality, such a person may not be the very first owner of the land, as there may have been earlier and successive owners. Such situations are not uncommon in partition actions.

Indeed, there are instances where the Defendants-Respondents disclose original owners one or more generations prior to the ancestor cited by the Plaintiff-Appellant in the pedigree. In such circumstances, Courts, in partition actions, adopt a practical and contextual approach in determining the original owner of the land.

This approach was duly considered by Gunawardena J. in *Magilin Perera vs Abraham Perera*⁴(CA), where it was observed that ‘*When a partition action is instituted the plaintiff must perforce indicate an original owner or owners of the land. A plaintiff having to commence at some point, such owner or owners need not necessarily be the very first owner or owners and even if it be so claimed such claim need not necessarily and in every instance be correct because when such an original owner is shown it could theoretically and actually be possible to go back to still an earlier owner. Such questions being rooted in antiquity it would be correct to say as a general statement that it could be well-nigh impossible to trace back the very first owner of the land. The fact that there was or may have been an original owner or owners in the same chain of title, prior to the one shown by the plaintiff if it be so established need, not necessarily result in the case of the plaintiff failing. In like manner if it be seen that the original owner is in point of fact someone lower down in the chain of title than the one shown by the plaintiff that again by itself need not ordinarily defeat the plaintiff’s action. Therefore, in actual practice it is the usual, and in my view sensible, attitude of the Courts that it would not be reasonable to expect proof within very high degrees of probability on questions such as those relating to the original ownership of land. Courts by and large countenance infirmities in this regard, if infirmities they be, in an approach which is realistic rather than legalistic, as to*

⁴ *Magilin Perera vs Abraham Perera* [1986] 2 Sri L.R. 208 at page 210 and 211

do otherwise would be to put the relief given by partition decrees outside the reach of very many persons seeking to end their co-ownership.”

The same principle was followed by Abdus Salam J. in ***Gunasinghe vs Podiamma and Others (CA)***⁵.

However, in the impugned judgment, the learned High Court Judges, rightly held that the learned District Judge erred in concluding that the Plaintiff-Appellant’s title had not been proved and that such finding was against the weight of the evidence. Accordingly, the learned High Court Judges held that the Plaintiff-Appellant is entitled to the remaining half share of the *corpus*.

Further, the learned High Court Judges, in the same impugned judgment, affirmed the finding of the learned District Judge and held that the 1st Defendant-Respondent had failed to establish adverse possession against the Plaintiff-Appellant and, accordingly, had also failed to establish prescriptive title to the entire *corpus*.

It is noteworthy that the learned District Judge held that the 1st Defendant-Respondent had failed to establish his claim of prescriptive title to the entire *corpus*, without setting out a proper analysis of the evidence presented before the District Court.

It is trite law that the possession of one co-owner is deemed to be the possession of the other co-owners. In ***Corea vs Appuhamy***,⁶ it was held that “*A co-owner’s possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result*”.

In such circumstances, if a co-owner is to succeed in a claim based on prescription, the claimant must establish possession to the exclusion of the other co-owners by some overt act. In ***Maduanwela vs Ekneligoda***⁷(S.C.), Bonser C.J. observed that “*A person who is let into occupation of property as a tenant or as*

⁵ *Gunasinghe vs Podiamma and Others* [2009]1 Sri L.R. 174.

⁶ *Corea vs Appuhamy* [1911] 15 NLR 213.

⁷ *Maduanwela vs Ekneligoda* 3 NLR 213.

a licensee must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in another capacity. No secret act will avail to change the nature of his occupation.

Furthermore, in ***Chaminda Abeykoon vs Anthony Fernando and Others***⁸ SC minutes dated 02.10.2018 (S.C), it was held that, after undertaking an analysis of the judicial precedents relating to the presumption of ouster, particularly in respect of a claim of prescription by a licensee, Prasanna Jayawardena J. stated that “ ... *the requirement that the possession of one co-owner is the possession of the other co-owners and that an overt act in the nature of ouster must occur to demonstrate a change of the character of that possession and start running of prescription in favour of one co-owner, applies with equal force to instances where a licensee or an agent possesses a property in a subordinate character. In such instances, an overt act must occur to demonstrate change in the character of that possession and start the running of prescription in favour of the erstwhile licensee or agent*”, after rejecting the submission of the licensee that, “*the requirement of an overt act applies only in the case of claims of prescription between co-owners.*”

However, in the instant case, the 1st Defendant-Respondent has failed to establish any such overt act. On the contrary, the 1st Defendant-Respondent admits that the Plaintiff-Appellant constructed a house on the corpus in 1981. However, it is stated that such construction was carried out with the permission of the 1st Defendant-Respondent’s mother.⁹

Be that as it may, the 1st Defendant-Respondent admits that when his father made preparations to construct a house on the *corpus* in 1982, Plaintiff-Appellant objected, and the attempt was consequently abandoned.¹⁰

In light of the aforementioned evidence, although the learned District Judge arrived at the finding on prescriptive title without an extensive analysis of the

⁸ *Chamindu Abeykoon vs Anthony Fernando and Others* SC Appeal No. 54A/ 2008

⁹ *Vide* page 187 and 211 of the appeal brief.

¹⁰ *Vide* page 220 of the appeal brief.

evidence, I am of the view that, on the material available before the court, the conclusion reached, that the 1st Defendant-Respondent failed to establish prescriptive title, ought to be affirmed. I further observe that, although the learned High Court Judges in the impugned judgment noted that the learned District Judge had erred in not properly considering the 1st Defendant's claim of prescriptive title, they also observed in the same breath that the 1st Defendant had not appealed against that finding. Consequently, the said observation of the High Court Judges cannot be accorded any weight.

Now, I will deal with the observations made by the learned High Court judges regarding the written submissions filed by each party. The judgment of the Civil Appellate High Court dated October 2, 2019 set aside the judgment delivered by the same Court on June, 18 2015, subsequent to an application made by the 1st Defendant-Respondent under Section 771 of the Civil Procedure Code, and after a rehearing of the appeal.

At the rehearing, the parties agreed to dispose of the appeal by way of written submissions. However, although the 1st Defendant-Respondent filed written submissions (*vide* page 44 of the Civil Appeal High Court brief), the Plaintiff-Appellant failed to file written submissions as agreed. Nevertheless, the Civil Appellate High Court proceeded to consider the appeal and delivered its judgment dated October 2, 2019.

It is true that the Plaintiff-Appellant had filed written submissions on May 6, 2015, prior to the judgment delivered by the Civil Appellate High Court on June 18, 2015. However, those submissions were not filed in relation to the rehearing that culminated in the impugned judgment dated October 2, 2019.

Conclusion

In view of the above analysis, the Plaintiff and the 1st Defendant are each entitled to an undivided half share of the *corpus*.

Further, I hold that the learned High Court Judges did not err in observing that the Plaintiff-Appellant had failed to file written submissions for the rehearing.

Accordingly, I answer the questions of law on which leave to appeal was granted as follows:

- i. *The said judgment of the Provincial High Court is contrary to the law and is against the weight of evidence led at the trial?*

Yes.

- ii. *Did the learned Judges of the Provincial High Court err in holding that the Petitioner had failed to file his written submissions in court thus failing to support his case with material facts while overlooking the fact that the Petitioner had already filed his written submissions in court on 05.05.2015 for the purposes of disposing of the appeal on the previous occasion and hence the said judgment is bad in law?*

No.

The judgments of both the District Court and the High Court are varied in terms of the judgment of this Court, and the learned District Judge is directed to enter an interlocutory decree accordingly. The Plaintiff-Appellant is entitled to the costs of both the lower courts and this Court.

Appeal is allowed.

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena, J.

I agree.

JUDGE OF THE SUPREME COURT

Arjuna Obeyesekere, J.

I agree.

JUDGE OF THE SUPREME COURT