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

In the matter of an Appeal in terms of Section 5C(1) of the High Court of the Provinces (Special Provisions) Amendment) Act No. 54 of 2006 against the Judgment of the Civil Appeal High Court of Avissawella.

Udage Arachchige Wijayadasa,

Kudagammana, Giriulla.

Plaintiff

Vs.

S.C. Appeal No. 211/2015

(SC/HCCA/LA No. 154/2015)

Civil Appeal High Court Avissawella

Case No. WP/HCCA/AV 1305/12/(F) &

1306/12/ (F)

D.C. Pugoda Case No. 551/P

1. Malawi Pathirennehelage David Singho (Now Deceased)

1A. Malawi Pathirennehelage Vajira Malkanthi

No.67, Iddamaldeniya, Dompe.

2. Udage Arachchige Sirimal Kanthi Wickramasinghe

Wanaluwawa, Gampaha.

3. Udage Arachchige Lavinis Singho (Now Deceased)

3A. Udage Arachchige Sirimal Kanthi Wickramasinghe

No.6/1, Wanaluwawa, Gampaha.

4. Udage Arachchige Jayanthi Chandani Siriyalatha

No.6/1, Wanaluwawa, Gampaha.

5. Udage Arachchige Christi Terrance Rupasinghe

No.6/1, Wanaluwawa, Gampaha.

6. Udage Arachchige Karunaratne Tony Rupasinghe

No.6/1, Wanaluwawa, Gampaha.

Defendants.

AND BETWEEN

1A. Malawi Pathirennehelage Vajira Malkanthi

No.67, Iddamaldeniya, Dompe.

1A Defendant-Appellant

Vs.

Udage Arachchige Wijayadasa,

Kudagammana, Giriulla.

Plaintiff-Respondent

2. Udage Arachchige Sirimal Kanthi Wickramasinghe

Wanaluwawa, Gampaha.

3. Udage Arachchige Lavinis Singho (Deceased)

3A. Udage Arachchige Sirimal Kanthi Wickramasinghe

No.6/1, Wanaluwawa, Gampaha.

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No.6/1, Wanaluwawa, Gampaha.

Defendant-Respodents.

AND NOW BETWEEN

2. Udage Arachchige Sirimal Kanthi Wickramasinghe

Wanaluwawa, Gampaha.

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No. 6/1, Wanaluwawa, Gampaha.

6. Udage Arachchige Karunaratne Tony Rupasinghe

No.6/1, Wanaluwawa, Gampaha.

Defendant-Respondent- Appellants

Vs.

1A. Malawi Pathirennehelage Vajira Malkanthi

No.67, Iddamaldeniya, Dompe.

1A Defendant-Appellant-Respondent

Udage Arachchige Wijayadasa,

Kudagammana, Giriulla.

Plaintiff-Respondent-Repondent

BEFORE : **MURDU N.B. FERNANDO, PC, CJ**
KUMUDINI WICKREMASINGHE, J.
ACHALA WENGAPPULI, J.

COUNSEL : S.A.D.S. Suraweera for the 2nd - 6th Defendant-Respondent-Appellants
Seevali Amithirigala, PC with Pathum Wijepala instructed by Ms. Manoja Gunawardhana for the Plaintiff-Respondent -Respondent.
Kamal Suneth Perera for the 1A Defendant-Appellant-Respondent

ARGUED ON : 14th June, 2024

DECIDED ON : 25th July, 2025

ACHALA WENGAPPULI, J.

The Plaintiff-Respondent-Respondent (hereinafter referred to as the "Plaintiff") instituted the instant action, seeking to partition a land called *Kahatagahawatta* alias *Kiriwanagalawatta* in total extent of four acres and five perches, described in the Schedule to the Plaint and held in common. The pedigree relied on by the Plaintiff, if accepted by Court, made him entitled to a ½ share of the *corpus* while remainder allocated to the 1st substituted Defendant-Appellant-Respondent, (hereinafter referred to as the "1st Defendant").

Describing the devolution of title to the land sought to be partitioned, the Plaintiff averred that the original owners of the said land were *Hewakankanamalage Punchi Nona* and *Udage Arachchige Davith,* who became entitled to that land upon a final decree of partition entered in case No. 3817/P of the District Court of *Gampaha*. *Davith* had transferred his ½ share in favour of *Malavipatirennehelage David Singho,* after execution of deed No. 8173 (1V1) on 24.09.1967, whereas *Punchi Nona* and her husband had transferred the remaining ½ share, in favour of the Plaintiff by execution of deed No. 606 (P2) on 18.01.1972.

The Plaintiff had named the 2nd and 3rd Defendants in the partition action not because they are co-owners, but as persons who challenge his rights to the *corpus*. The 4th, 5th and 6th Defendants were also added as parties when they sought to intervene into the instant action.

The Statement of Claim of the 4th to 6th Defendant-Respondent- Appellants (hereinafter referred as the 4th to 6th Defendants") indicate that the 3rd Defendant has acquired the prescriptive rights over the *corpus* by uninterrupted possession

from the year 1976. They also allege that the deed No. 606 is a forgery, as the executant was totally paralysed by 1972 and therefore could not have executed the said deed, on which the Plaintiff claimed title.

A similar position was taken by the 2nd and 3rd Defendant-Respondent-Appellants (hereinafter referred to as the 2nd and 3rd Defendants") in their joint Statement of Claim. They further claimed that the 3rd Defendant exclusively holds the land since 1976 against the rights of the others and acquired prescriptive title to the land.

Parties have settled to a total of 18 points of contest before the trial Court and proceeded to trial. The 2nd to 6th Defendants were jointly represented before the trial Court.

At the conclusion of the trial, the District Court dismissed the Plaintiff's action, primarily on the basis that he had failed to prove his title to a ½ share to the *corpus*. The trial Court justified the said conclusion on the premise that the due execution of the deed No. 606 was not proved by the Plaintiff by calling the Notary and the Witnesses, as the 2nd to 6th Defendants have objected to the admissibility of a certified copy of the said deed, which was tendered 'subject to proof' and that they have reiterated the said objection at the close of the Plaintiff's case. The trial Court also held that the due execution of the title deed, relied on by the 1st Defendant too was not proved.

Turning to the other Defendants, trial Court also found that the points of contest raised by the 2nd to 6th Defendants that the deed No. 606 is a forgery as not proved, while determining the Point of Contest No. 15, which was raised on the claim of prescriptive acquisition of title, as "*does not arise*".

Only the Plaintiff and the 1st Defendant have preferred appeals against the judgment of the trial Court for dismissing the Plaint. Despite the fact that the claim of acquisition of prescriptive title over the *corpus* being determined as "*does not arise*", none of the 2nd to 6th Defendants sought to challenge that finding, even when they were served with notices of appeal by the Plaintiff and the 1st Defendant. Neither they made any application under Section 772(1) of the Civil Procedure Code.

At the hearing before the High Court of Civil Appeal, all parties have agreed to have the two appeals consolidated.

The appellate Court identified that "*the only question to be considered in this appeal is whether the plaintiff failed to prove the due execution of the deeds marked P2 and 1V1 at the trial*". The appellate Court, in allowing the appeal, held that the burden of proving the allegation of forgery, in respect of both these deeds, was on the 2nd to 6th Defendants, who failed to adduce sufficient evidence to establish that claim and therefore the trial Court misdirected itself in holding that the Plaintiff failed to prove due execution of the two deeds.

The 2nd to 6th Defendants sought leave to appeal from this Court against the said judgment of the High Court of Civil Appeal. After affording a hearing to the Counsel, this Court decided to grant leave to appeal on the following questions of law, by its order made on 17.12.2015.

> Did the learned Judges of the Provincial High Court err in law in only considering the legality of the judgment of the District Court of Pugoda and allowing the appeal without taking into consideration of the fact that as to whether the alleged paper title of the Plaintiff

and the 1st Defendant have been superseded by a prescriptive title as averred by the Defendant-Respondent-Appellants?

Did the learned Judges of the Provincial High Court err in law in their failure to consider the applicability of the special provisions contained in Section 68 of Partition Law but and in only considering the provisions of section 90 of the Evidence Ordinance ?

It is for the purpose of convenience; I wish to consider the second question of law first.

The Plaintiff relied on Deed of Transfer No. 606, executed in his favour by his parents, to satisfy Court that he had derived title to his ½ share, claimed from the *corpus.* During the Plaintiff's case, and whilst giving evidence, the Plaintiff tendered a certified copy of the said deed, marked as P2. The 2nd to 6th Defendants objected and the said document was marked to subject to proof. Similarly, when the Plaintiff tendered a certified copy of the Deed of Transfer No. 8173 marked as 1V1, through which the 1st Defendant derived title from the original owner *Malavipatirennehelage David Singho,* to establish his own title to the remaining ½ share of the *corpus,* the same objection was raised and that document too was marked subject to proof.

Neither the Plaintiff nor the 1st Defendant called the respective Notaries and the witnesses, who attested these deeds, as witnesses. At the close of the Plaintiff's case the 2nd to 6th Defendants once again raised their objection to the deeds P2 and 1V1 as not proved. The District Court, by its judgment dismissed the Plaint. In appeal the High Court of Civil Appeal held that the burden of proving the allegation of forgery in respect of both these deeds was on the 2nd to

6th Defendants who failed to adduce sufficient evidence to establish their position and therefore the trial Court misdirected itself in holding that the Plaintiff failed to prove due execution of the two deeds.

Points of Contest Nos. 10, 11 and 12, that were raised by the 2nd to 6th Defendants have placed the very act of signing the two deeds as a disputed fact in issue. Particularly, Points of Contest No. 11 was framed to the effect whether the deed Nos. 8173 and 606 are forgeries, as the respective executants were not physically capable of executing those deeds due to their extreme ill health. The High Court of Civil Appeal allowed the appeal as the 2nd to 6th Defendants have failed to adduce sufficient evidence to establish that they are forgeries, the position which they averred, to the required degree of proof. Perusal of the proceedings indicate that it is so.

Since the appellate Court was called upon to determine a solitary ground of appeal, namely "*the only question to be considered in this appeal is whether the plaintiff failed to prove the due execution of the deeds marked P2 and 1V1 at the trial*", it appears that the basis on which the High Court of Civil Appeal made the impugned determination, does not only hinges on this ground of appeal, but are connected to the issue Nos. 10, 11 and 12.

Learned Counsel for the 2nd to 6th Defendants contended that the High Court of Civil Appeal misdirected itself, in not directly determining the inadmissibility of the title deeds P2 and 1V1, but by determining the appeal on a different basis. In relation to the question of law under consideration, it was his submission that, the failure of the Plaintiff and the 1st Defendant to establish that the two title deeds were duly executed, particularly when an objection was taken for the admissibility on that very ground by an opposing party in terms of

Section 68 of the Evidence Ordinance, the District Court had no other option but to dismiss the Plaint.

Learned President's Counsel, who represented the Plaintiff and the learned Counsel, who represented the 1st Defendant have contended that the admissibility of the documents in a partition action is not only governed by Section 68 of the Evidence, but also by Section 90 of that Ordinance, as the latter Section confers a presumption on such documents that they are duly executed. They also relied on Section 68 of the Partition Law, in support of that contention. In view of these applicable statutory provisions, it was further contended by the learned Counsel that the error committed by the trial Court, in its failure to consider that vital factor, which in turn resulted in the dismissal of the Plaint, had been cured by the appellate Court by acting on the said presumption.

The relevant part of the text of Section 90 of the Evidence Ordinance applicable to this appeal reads "*Where any document purporting or proved to be thirty years old is produced from proper custody which the Court in the particular case considers proper, the Court may presume … in the case of a document executed or attested, that it was duly executed or attested by the persons by whom it purports to be executed and attested.*"

Of the two title deeds, P2 was executed on 18.01.1972 and the partition action was instituted on 25.10.2000. The title deed P2 does not qualify to the presumption under Section 90 of the Evidence Ordinance, but the deed 1V1, which was executed on 24.09.1967 does. This is particularly so, when the 1st Defendant presented uncontradicted evidence before the trial Court that the Notary, who executed 1V1, the two witnesses who attested the said deed, have all died. One of the witnesses *Malavipatirennehelage Norbert* died on 19.06.2007 at

Dompe District Hospital whereas the other witness *H.W. Nomis* too had died on 07.05.2007 also at Dompe District Hospital. Thus, it was impossible for the substituted 1st Defendant to call any of them to prove the due execution of the said deed.

The 2nd to 6th Defendants objected to the admissibility of the deed 1V1 on the basis that the execution of the said deed was not the act of the executant. They raised points of contest on that basis. However, as pointed out by the learned President's Counsel for the Plaintiff, the 2nd and 4th Defendants have "*admitted, accepted and acquiesced*" the deed 1V1, in their evidence before the trial Court. The 2nd Defendant, who is a grandson of the executant, accepted the signature that appear on the said deed as the executant, is a signature "similar" to his grandfather's.

He further admitted that after the execution, the executant continued to occupy the land, a factor which has no significance as the parties to the instant action are either offspring of the original owners or their grandchildren. It is not uncommon in our society that an elder of a family, who transferred his rights to a his own child, to continue to wield his authority of that property, despite the legal implications of such a transfer would entail and the transferor, on his part would silently await patiently without exercising his newly acquired rights over the land .

The 2nd Defendant admitted that his grandfather, *Davith* who died in 1975, gave two parcels of land each to the Plaintiff and to the 1st Defendant. He further admitted that he is unable to say whether the disputed deeds were genuine or not, but added that, to his knowledge, the Plaintiff was given only one land by *Davith*, which is the land subject to this partition action. He also conceded that

there was no complaint made to police alleging forgery despite the fact that they came to know of the execution of the said two deeds. The 4th Defendant, after admitting that he had seen his grandfather signing on other documents, admitted the signature of the executant in 1V1 is similar to the one of his grandfather *Davith.* The 4th Defendant thereafter recants from that position, but when suggested that on order to secure right over the *corpus* he had falsely accused that the said deed is a forgery, the witness had no answer to offer.

According to *Coomaraswamy*, (The Law of Evidence, Vol. I, pages 647-648), the authenticity of a document may be proved in any one or more of the following ways: (a) The evidence of the party who signed or wrote the document; (b) The evidence of a person who saw him sign or write it; (c) The evidence of someone who is acquainted with his handwriting. He further states in relation to (c) that, this can be in one of the three ways set out in the explanation to Section 47 of the Evidence Ordinance; (a) By the evidence of an expert who compares the writing with some other writing known to be that of the signatory; (b) By proof of the admission by the writer; (c) By comparison by the court under Section 73 of the Evidence Ordinance; (d) Circumstantial evidence arising from the intrinsic evidence of the contents or by presumptions."

Moreover, Section 68 of Partition Act states thus

> "*It shall not be necessary in any proceedings under this Law to adduce formal proof of the execution of any deed which, on the face of it, purports to have been duly executed, unless the genuineness of that deed is impeached by a party claiming adversely to the party producing that deed, or unless the court requires such proof.*"

In relation to the instant appeal, the genuineness of the deed 1V1 could be assessed by applying one of the ways, as identified by *Coomaraswamy,* i.e. by assessing the circumstantial evidence arising from the intrinsic evidence of the contents or by presumptions. The presumption that can be drawn in the circumstances adverted to in the preceding chapters in terms of Section 90 of the Evidence Ordinance was not rebutted by any of the 2nd to 6th Defendants and the trial Court should have accepted that evidence in the investigation of the title in relation to the 1st Defendant and allocated shares accordingly. In ***Sangarakkita Thero v Buddharakkita Thero*** (1951) 53 NLR 457, *Rose* CJ observed (at p.459) where the relevant witnesses were called " *[T]here is, of course, a presumption that a deed which on its face appears to be in order has been duly executed, and it seems to me that the mere framing an issue as to the due execution of the deed, followed in due course by a perfunctory question or two on the general matter of execution, without specifying in detail the omissions or irregularities which are relied upon, is insufficient to rebut that presumption."*

This observation made by the *Rose* CJ, has a direct relevance to the instant appeal. The trial Court already determined that the 2nd to 6th Defendants have failed to impeach the genuineness of the deed 1V1, which they sought to achieve by doing nothing, other than simply objecting to its reception as evidence and that too, as a mere tactical tool, to gain an advantage over the other litigants. In my view, adoption of this approach to determine the genuineness of the deed would not offend the *Explanation* to Section 154(3) of the Civil Procedure Code, which deals with the first question referred to in that section.

There is no dispute as to the identity of the corpus, as determined by the trial Court. In fact, the 2nd to 6th Defendant's claim of acquisition of prescriptive title to the different lots, which they presented before the surveyor, during the

preliminary survey, were upon the identification of their respective boundaries that separated them.

The resultant position in the acceptance of the deed 1V1 by the High Court of Civil Appeal, as a title deed that confers ½ share of the *corpus* to the 1st Defendant, not only made it a commonly held land and thereby bringing it withing scope of Partition Law, but also make the 1st Defendant a 'plaintiff', who could thereupon proceed with the partition action, when the Plaintiff failed to prove his title to the share claimed by him.

Turning to the consideration of the first question of law, did the learned Judges of the High Court of Civil Appeal err in law in only considering the legality of the judgment of the District Court of *Pugoda* and allowing the appeal without taking into consideration of the fact that as to whether the alleged paper title of the Plaintiff and the 1st Defendant have been superseded by a prescriptive title, as averred by the Defendant-Respondent-Appellants, neither need no detailed analysis of the evidence presented before the trial Court nor requires an scholarly treatment of the jurisprudence developed thus far by the Courts on acquisition of prescriptive rights over someone else's property.

Except for an order made under Section 66 of the Primary Courts Procedure Act on 25.08.2000, which placed the father of the 2nd Defendant in possession, which he must have held for the last two months, and the claims made before the surveyor, there are no other documentary evidence presented by the 2nd to 6th Defendants, in support of their collective position other than verbally asserting various claims of enjoying fruits of the land sought to be partitioned.

Learned President's Counsel for the Plaintiff submitted to this Court that the 2nd to 6th Defendants have abandoned their claim of prescriptive acquisition of title to the land to be partitioned.

Having failed to agitate the finding made by the trial Court over their only claim over the *corpus*, and, conceding to restrict the appellate jurisdiction of the High Court of Civil Appeal, only to the question "*whether the plaintiff failed to prove the due execution of the deeds marked P2 and 1V1 at the trial"* at the hearing of the consolidated appeal preferred by the Plaintiff as well as the 1st substituted Defendant, the 2nd to 6th Defendants appear to have indeed abandoned the prosecution of that claim.

Given the fact that the parties are closely related to each other and, some of them, in the absence of P2 and 1V1 (as they claim), become co-owners to the land, and therefore needed to establish the starting point of the claim of prescription among co-owners by an overt act. The focus on this vital consideration got lost in the multiple pages of proceedings containing long cross-examination of the Plaintiff and the 1st Defendant, as the 2nd to 6th Defendants have failed to elicit material during that process, in support of their claim of prescription. Other than making bare claims that "*I was in possession*" and "*I tapped rubber*" the 2nd to 6th Defendants failed to present any evidence of ouster. The Plaintiff called two witnesses *Somasiri* and *Jayatilake* in support of his claim of possessing the land after the deed P2 was executed.

Somasiri is the person employed by the Plaintiff to look after the land, who sold its produce on behalf of his employer. *Somasiri* claimed that from the early 1970s he was looking after the property on behalf of the Plaintiff. He knew the cases instituted by the parties over this land from time to time. The suggestion

put to him that *Lavanis Singo,* the 3rd Defendant and a brother of the Plaintiff, was occupying the house that stood on the land to be partitioned, he totally denied. The witness added that the said house remained abandoned after the passing of the Plaintiff's parents, until it was demolished by him a few years ago.

Learned Counsel for the 2nd to 6th Defendants addressed this Court on the issue of proscription. He relied on the electoral registers (2V2 to 2V5) and the recital in the Deed of Gift No. 2660 (2V11), executed by the 3rd Defendant, few months before the institution of the instant partition action, gifting a three-acre, twenty-one perch land he claimed to have inherited from his father, in favour of his four children. The address of the executant is given in as "*6/1, Vanaluwawa*" similar to the one that appear on the electoral registers. This evidence was in support of the position that the 3rd Defendant was residing on the *corpus*. Other than the verbal assertion that "*6/1, Vanaluwawa*" in fact refers to the *corpus,* there was no evidence presented through any official witness supporting that claim.

Learned President's Counsel pointed out that despite the executant stating the said address in the recital, the Schedule in which the land is described, there is no such reference other than a reference to a non-existent partition action No. 31312/P, connecting the two lands.

The surveyor, in the preliminary plan identified as house standing on Lot No. 1 of the *corpus,* consisting of a total of six lots, as an "*abandoned house*" and in his evidence said that the 3rd Defendant, who claimed to him that he lives there, only occupied it only in the previous night. Both, the Plaintiff and the 3rd Defendant claimed the plantation and the abandoned house before the surveyor. This is the evidence placed before the District Court that the 3rd Defendant was in uninterrupted and continued adverse possession against other co-owners. The

reference made in the judgment of the District Court that the Plaintiff admitted the 2nd Defendant's possession since 1978, is not supported by evidence and the clear evidence to his occupation of the *corpus* emerges only after the '66 action', in which an order was made by Court only on 25.08.2000, placing the daughter of the 3rd Defendant in possession.

The 2nd to 6th Defendants, being members of the 2nd and 3rd generation of the direct descendants of the original owners, and when they accepted the fact that they were given different lands by *Davith* away from the land under partition, conceded to the fact that the Plaintiff and the 1st Defendant too were similarly given lands by their father and particularly the land given to the Plaintiff is the land to be partitioned. They further conceded that they knew that the deeds P2 and 1V1 were executed over twenty years ago and they never made any complaint to police accusing forgery the said group of Defendants have failed to satisfy the trial Court that they are entitled to that recognition.

The answer to Point of Contest No. 15 "*does not arise*" cannot be taken to mean that the trial Court did not consider their claim of prescription at all. The erroneous observation made by the trial Court that in view of the fact that the 3rd Defendant's position that he was in possession for the last 22 years, was accepted by the Plaintiff, coupled with his failure to establish his title to the land, made the trial Court to dismiss the partition action seem to suggest that the Court did not want to make a positive pronouncement on that aspect.

The Plaintiff had withdrawn a partition action, in 1989, which he instituted in the same year (2V4). During cross-examination, it was erroneously suggested by his Counsel that since 1978 the 2nd Defendant was in possession, instead of

1988, which the trial Judge mistakenly taken into consideration as his possession over the *corpus* since 1978.

In view of these considerations, I proceed to answer the points of contest No. 5 raised by the 1st Defendant in the affirmative, and the point of contest No. 15, raised by the 3rd Defendant that whether he had prescribed to the *corpus* since 1978, in the negative with the answer "not proved" by replacing the answer of the trial Court to the same, "*does not arise*".

The two questions of law, referred to earlier on in this judgment and argued before this Court, are therefore answered in the negative. However, in consideration of the fact that only the 1st Defendant had established the ½ share of the *corpus*, acting in terms of Section 26(2)(g) of the Partition Act, this Court orders that the remaining ½ share of the *corpus* to remain unallotted. The deed P2 cannot claim the benefit of the presumption under Section 90 of the Evidence Ordinance, for it does not satisfy the required time period. The Plaintiff therefore is not entitled to any share allocation, in the absence of any acceptable proof of title. The 2nd to 6th Defendants are entitled to be compensated for, only on satisfying the Court of any improvements, made on the land.

The judgment of the High Court of Civil Appeal, by which the judgment of the District Court was set aside is therefore affirmed, but subject to the said variation. The instant partition action is herewith restored and, in these circumstances, the District Court is directed to enter interlocutory decree accordingly and proceed to partition the land, depicted in the preliminary plan "X", in terms of the law.

In view of the orders made by this Court, the appeal of the 2nd to 6th Defendants is partly allowed.

Parties will bear their costs.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, CJ

I agree.

CHIEF JUSTICE

KUMUDINI WICKREMASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT