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

C.A. Case No. 1005/1997 (F)

D.C. Kandy Case No. 11568/P

1. Jayasinghage Premarathna Jayasinghe
2. Jayasinghage Nanda Jayasinghe
3. Jayasinghage Dharmaratne Jayasinghe
4. Jayasinghage Jayasinghe

All of Menikdiwela, Kotaliyagoda.

PLAINTIFFS

-Vs-

1. Kotaliyagoda Dharmawansa Thero
2. Jayasinghage Ruperathna
3. Jayasinghage Abeysuriya
4. Jayasinghage Sirisena
5. Rupasarage Jayasena
6. Mailagahawatte Gedara Ukku Amma
7. Jayasingha Gedara Dayarathna

All of Menikdiwela, Kotaliyagoda.

DEFENDANTS

AND NOW

3. Jayasinghage Abeysuriya
6. Mailagahawatte Gedara Ukku Amma (Deceased)

6a. Jayasinghage Abeysuriya

(Substituted 6(a) Defendant-Appellant)

7. Jayasingha Gedara Dayarathna

All of Menikdiwela, Kotaliyagoda.

3rd, 6th and 7th DEFENDANT-APPELLANTS

-Vs-

1. Jayasinghage Premarathna Jayasinghe
2. Jayasinghage Nanda Jayasinghe (Deceased)

2a. Premarathna Jayasinghe

All of Menikdiwela, Kotaliyagoda.

(Substituted 2(a) Plaintiff-Respondent)

3. Jayasinghage Dharmaratne Jayasinghe (Deceased)

3a. Thushara Malinda Jayasinghe

No.25A, Manikdiwela, Kotaliyagoda.

(Substituted 3(a) Plaintiff-Respondent)

4. Jayasinghage Jayasinghe

All of Menikdiwela, Kotaliyagoda.

PLAINTIFF-RESPONDENTS

AND

1. Kotaliyagoda Dharmawansa Thero (Deceased)

1a. Jayasinghage Ruperathna

(Substituted 1(a) Defendant-Respondent)

2. Jayasinghage Ruperathna
5. Rupasarage Jayasena (Deceased)

5a. R. Ananda Jayawickrama
All of Menikdiwela, Kotaliyagoda.
(Substituted 5(a) Defendant-Respondent)
1st, 2nd and 5th DEFENDANT-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Thilan Liyanage with Sudesh Fernando for the 3rd, 6a & 7th Defendant-Appellants
D. Akurugoda for 1st to 4th Plaintiff-Respondents

Decided on : 30.07.2018

A.H.M.D. Nawaz, J.

The Plaintiff-Respondents (hereinafter sometimes referred to as "the Plaintiffs") instituted this action in the District Court of Kandy seeking *inter alia* a partition of the subject-matter known as *Mantharakaragedera Waththa* more fully described in the schedule to the plaint-*see* the amended plaint at page 40 of the appeal brief. The original owner of the *corpus* was one *Jayasinghage Sarana* (hereinafter described as *Sarana*) and the 3rd, 6th and 7th Defendants in the case who have preferred this appeal to this Court (hereinafter sometimes referred to as "the Appellants") make a claim to their share of the land on the basis of devolution of title to them through the 4th Defendant-*Sirisena* who traces his own title back to the original owner *Sarana*. The devolution as claimed by the Appellants goes as follows *vis-à-vis* the Plaintiff-Respondents.

The Plaintiffs claimed that the original owner *Sarana* had three children namely *Sirimala*, *Sethuwa Weda* and *Santhara Weda*. *Sethuwa Weda* had among his sons one *Rankira Weda alias Rankira*. Was the 4th Defendant-*Sirisena*-the son of *Rankira*? This is the

question before this Court. Whilst the 4th Defendant asserted that he was *Rankira*'s son, the Plaintiffs denied that position.

The contention of the 4th Defendant was that he inherited the share of his father *Rankira* who was one of the sons of *Sethuwa Weda*. *Sethuwa Weda* inherited his share from the original owner *Sarana*. It is this inheritance that allegedly devolved on the 4th Defendant-the predecessor in title of the 3rd, 6th and 7th Defendants (the Appellants in the case). The claim of the Appellants before the District Court was that there was among *Sethuwa Weda*'s issues one *Rankira Weda alias Rankira* who fathered his only son *Sirisena*-the 4th Defendant. After the death of *Rankira*, his rights in the corpus devolved on his only son *Sirisena*-the 4th Defendant who by a deed of transfer bearing No. 356 and dated 26th November 1959 sold his rights to his wife *Ukku Amma*-the 6th Defendant. *Ukku Amma* passed her rights to her son the 3rd Defendant-Appellant.

The learned District Judge by his judgment dated 28th November 1997 rejects the devolution by which the Appellants alleged they derived their title and it is against this finding that the instant appeal has been preferred by the 3rd, 6th and 7th Defendant-Appellants.

It was contended on behalf of the Appellants (the 3rd, 6th and 7th Defendants) that the 4th Defendant-*Sirisena* first transferred his rights which had devolved on him through his paternal inheritance, to his wife-the 6th Defendant. This was by a deed of transfer bearing No. 356 and dated 26th November 1959 for a consideration of Rs. 200-*see* page 340 of the appeal brief.

Sirisena-the 4th Defendant himself giving evidence stated that he was the son of *Rankira Weda alias Rankira*, who had passed away when he was three months old. In order to show the connection between him and *Rankira*, *Sirisena* produced a previous plaint, which had been filed by *Samara Jayasinghe*-the father of the Plaintiffs in this case, in an anterior partition action over the same land. In the 16th paragraph of that plaint *Samara Jayasinghe*-the father of the Plaintiffs in this case, points out that *Sethuwa Weda*-one of the

sons of the original owner *Sarana* had a son called *Rankira. Samara Jayasinghe*-the father of the Plaintiffs in this case, further points out in that plaint that *Rankira* and he were brothers. In other words, according to that previous plaint, *Rankira* whom the 4th Defendant alleged was his father becomes a paternal uncle of the Plaintiffs in this case. Though the 4th Plaintiff was reluctant to admit this in the course of his evidence, later on in cross-examination he had to concede that *Sethuwa Weda* had a son called *Rankira*-*see* pages 92, 92, 93, 94, 95 and 96 of the Appeal Brief.

Was *Rankira Sethuwa*'s son?

According to *Sirisena*-the 4thDefendant, *Rankira* was his father. *Sirisena* gave evidence on behalf of his son the 3rd Defendant-Appellant. The aforesaid plaint which manifested the nexus between *Sethuwa Weda and Rankira* was marked as **3V1** at the trial. As I have outlined above, apart from the admission in Court on the part of the 4th Plaintiff that *Rankira* was the son of *Sethuwa Weda*, the previous plaint of the current Plaintiffs' father too establishes this fact. As I said before, this plaint had been filed by the father of the Plaintiffs *Jayasingedera Samara Jayasinghe* in June 1972 to partition the same land and this case was withdrawn subsequently-*see* the plaint at page 336 of the appeal brief. In fact as was pointed out before, *Jayasingedera Samara Jayasinghe*-the father of the Plaintiffs in this case describes *Rankira* as his brother.

Thus there is the admission on the part of the predecessor in title of the Plaintiffs namely *Samara Jayasinghe* that *Rankira* and he were sons of *Sethuwa Weda*. The admission of their privy to the paternity of *Sethuwa Weda* (one of the original owners) over *Rankira* would bind the Plaintiffs. Apart from this admission of his father in a previous plaint, the 4th Plaintiff too admitted this nexus between *Sethuwa Weda* and *Rankira* in Court. Thus there are two admissions as to the paternity of *Sethuwa Weda* over *Rankira*. One was made out of court by the father of the Plaintiffs in a previous plaint. The other admission to the same effect was made by the 4th Plaintiff in the instant case.

In addition *Sirisena*-the 4th Defendant claimed that *Rankira* was his father.

In other words the assertion of the 3rd, 6th and 7th Defendants that *Sethuwa Weda* had a son called *Rankira* has been established. The admission coming through the plaint in the previous partition action is admissible against the Plaintiffs under Section 17 (1) of the Evidence Ordinance, since it is their father who had made this admission.

An admission is defined in Section 17(1) as follows:-

> An admission is-
>
> (a) a **statement**, oral or documentary,
>
> (b) which suggests any **inference** as to a fact in issue or relevant fact, and
>
> (c) which is made by any of the persons **mentioned in Sections 18 to 20**, and
>
> (d) which is **made in the circumstances** mentioned in Sections 18 to 20.

Section 17 of the Evidence Ordinance makes it clear that the only characteristics which a statement must possess in order to constitute it an admission are *(1)* that it suggests an inference as to a relevant fact or a fact in issue, and *(2)* that it must be made by one of the persons and in the circumstances "*hereinafter mentioned*". The fact that *Rankira* was an issue of *Sethuwa Weda* was relevant to the fact in issue in this case because without that connection *Rankira* could not have inherited the rights of *Sethuwa Weda* in the corpus. *Rankira* could not have later passed his rights to *Sirisena* (the 4th Defendant) without the paternity of *Sethuwa Weda* over him. It is axiomatic that the paternity of *Sethuwa Weda* over *Rankira* would enable *Rankira* to pass his paternal inheritance to his son *Sirisena*-4th Defendant. *Rankira*'s own brother *Jayasingedera Samara Jayasinghe* who was also the father of the Plaintiffs in this case, in an admission made in his plaint dated June 1972 stated that *Rankira* and he were children of *Sethuwa Weda*. The link between *Sethuwa Weda* (the father) and *Rankira* (the son) is thus admitted in an out of court statement made by the father of the Plaintiffs in that plaint dated June 1972. This hearsay statement made by the father of the Plaintiffs is admissible against his sons (the Plaintiffs) under an

exception to the hearsay rule which is contained in Section 17 (1) of the Evidence Ordinance.

In this context Section 21 of the Evidence Ordinance is also applicable.

> *"Section 21 of the Evidence Ordinance permits all admissions to be proved as against the maker or his representative in interest"-see* H.N.G. Fernando, J. (as His Lordship then was) in ***Emjay Insurance Co. Ltd. v. James Perera*** (1957) 61 N.L.R. 145.

Section 18 (3) of the Evidence Ordinance could also be equally invoked to admit the admission in the plaint.

So the statement in the previous plaint is provable against the Plaintiffs and I would once again reiterate that this relevant and admissible evidence is strengthened by the fact that even in Court the 4th Plaintiff admitted that *Sethuwa* was the father of *Rankira.* Despite the fact that *Sethuwa*'s interest would devolve on *Rankira* owing to the relationship of father and son between *Sethuwa* and *Rankira*, I emphasize the fact that another son of *Sethuwa Samara Jayasinghe* admitted in his plaint of June 1972 that *Rankira* was his brother. This admission was no doubt against the proprietary interest of *Samara Jayasinghe* but yet he admitted that *Rankira* was his brother. If someone makes a statement against his proprietary interest, the statement is provable against him and his successors in title. This is the effect of Sections 18 (3)(a) and 21 of the Evidence Ordinance.

Sections 18 (3)(a) and 21 of the Evidence Ordinance enact rules as to admission by a party to the proceeding or his predecessor in title as follows:-

> 18 (3) Statements made by-
>
> (a) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested; or
>
> (b) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions if they are made during the continuance of the interest of the persons making the statements.

In my view the statement made by the father of the Plaintiff-Respondents to this appeal in his plaint dated June 1972 falls fair and square under Section 18 (3) of the Evidence Ordinance. It is admissible against the Plaintiffs under both heads-Sections 18 (3)(a) and 18 (3)(b) of the Evidence Ordinance. Section 21 would render the admission in the plaint of June 1972 provable against the Plaintiffs of this case since it is their father's binding admission against them. Section 21 of the Evidence Ordinance in its chapeau begins thus:-

> *"Admissions are relevant and may be proved as against the person who makes them or* ***his representative in interest****, but they cannot be proved by or on behalf of the person who makes them or by his representative in interest."*

I have said that the out of court statement of the father of the Plaintiffs in this case in his plaint of 1972 would fall under Section 18 (3)(b) of the Evidence Ordinance as well.

Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit. (Section 18(3)(b))

In terms of the subsection two conditions must be present:-

(i) Statements of persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions if they are made during the continuance of the interest of the persons making the statements.

(ii) It should have been made at a time when the maker had an interest in the property in question (S.18(3)(b)).

Accordingly a statement of a person from whom the Plaintiffs have derived their interest is admissible. An illustration is found in case law: An Insurance Company sought to repudiate a claim made by the administrator of the estate of a deceased holder of a policy of life insurance on the ground that the deceased had made a false or incorrect declaration, being the basis of the contract, as to the state of his health at the

time of the declaration. The issue was whether this declaration could be proved as an admission. It was held that a statement made by the deceased subsequently, but to the effect that he had been suffering from certain symptoms at or about the time of the declaration, was an 'admission' provable under Section 18 and 21 of the Evidence Ordinance-*see* ***Emjay Insurance Co. Ltd. v. James Perera*** *(supra).*

In the above case, H.N.G. Fernando, J. having cited English cases on the point of admissibility of statements made by deceased persons as admissions against representatives in interest, was of the opinion that, *"I am satisfied from reference to the English cases that the English Law rendered an "admission" by a deceased person receivable without regard to the question whether it fulfilled the requirements which are mentioned in our section 32, and that accordingly it would be wrong to suppose that there was any intention to restrict the scope of section 18 only to statements of persons who are alive".*

H.N.G. Fernando, J. further held that Sections 17 to 21 and Section 32 respectively constitute independent heads of admissibility in regard to the reception of statements of deceased persons and therefore the conditions set out in Section 32 do not have to be fulfilled in the case of such statements which are within the terms of Sections 18 and 21 of the Evidence Ordinance-Also see a perceptive article by P.B. Carter entitled *Hearsay, Relevance and Admissibility: Declarations as to State of Mind and Declarations against Penal Interest* 103 L.Q.R 106.

Thus, admissions may be made in the first instance by a *party to the proceeding* himself, or it may be an admission falling into one of the categories of *vicarious admissions.* Sections 18 of the Evidence Ordinance gives one of the instances of vicarious admissions in that it indicates that not only an agent but also a predecessor in title of a party to a suit can vicariously bind such party to the proceedings, by virtue of an admission which has been made out of court.

Thus no birth certificate is necessary to prove the first link in the devolution of title that the Defendant-Appellants alleged-namely *Sethuwa Weda* and *Rankira* were father and

son. The plaint dated June 1972 establishes that nexus and the 4th Plaintiff in this case himself conceded this link in the course of the trial.

The purpose of the above discussion is to demonstrate as to how the same items of evidence in a case (the two admissions I have pinpointed above) may become relevant and admissible under various provisions of the Evidence Ordinance, which are inclusionary in nature.

We have now looked at the relationship between *Sethuwa Weda* and *Rankira. Rankira* no doubt inherits *Sethuwa Weda*'s interest in the land. *Sethuwa*'s interest would also devolve on *Jayasinghe*-the father of the Plaintiffs. The next question in this case is whether *Rankira*'s interest passed on to *Sirisena* (the 4th Defendant). *Sirisena* asserted that he was a son of *Rankira* who passed his rights to him.

The nexus between *Rankira* and *Sirisena*

This question pertains to the 2nd link in the chain of devolution. Did *Rankira* pass on his rights to *Sirisena*-the 4th Defendant in the case? Was *Rankira* the father of *Sirisena*? There was no out of court statement made by *Rankira* that comes to the rescue of *Sirisena*-the 4th Defendant.

It is the 4th Defendant-*Sirisena* who has asserted that *Rankira* was his father. He testified that *Rankira*'s share devolved on him and he passed it on to his wife (the 6th Defendant) from whom their son 3rd Defendant inherited it.

Sirisena-the 4th Defendant asserted in evidence that *Rankira*'s rights passed on to him because he was *Rankira*'s only son. Was *Sirisena*-the 4th Defendant in fact *Rankira's* son? This is the pivotal question in the case because as it turns out *Sirisena* himself effected a transfer of his alleged paternal inheritance to his wife *Ukku Amma* (the 6thDefendant) in 1959. *Sirisena* could have passed on his rights to his wife *Ukku Amma* (6th Defendant in the case) only if he had inherited the rights of *Rankira* to transfer.

It is the argument of the Plaintiffs that since *Sirisena* did not establish the paternity of *Rankira* over him, he could not have passed *Rankira*'s rights to *Ukku Amma*.

I must observe that it was around this issue that much of the arguments in the appeal took place. It transpired in evidence that *Sirisena* did transfer his alleged paternal rights to his wife *Ukku Amma*-the 6th Defendant in the case by **6V1**.

In the deed of transfer which was effected by *Sirisena* in favour of his wife **(6V1)**, an recital is made that *Sirisena* was transferring his paternal rights to his wife-the 6th Defendant-*see* the deed of transfer **(6V1)** bearing No. 556 and dated 26th November 1959 which recites that *Sirisena* was transferring rights which had devolved on him by right of inheritance from his deceased father *Jayasingedera Rankira Weda-see* page 340 of the Appeal Brief. The deed of transfer marked as **6V1** further recites that the 4th Defendant was in possession of the land which had devolved on him by right of inheritance from his deceased father *Jayasingedera Rankira Weda-see* page 340 of the Appeal Brief. The deed was executed on 26th November 1959. The plaint was filed in this case almost 25 years later in 1985. The assertion of title had thus been made long before the litigation arose between the parties. The deed **(6V1)** was indeed ***ante litem motam***. According to Black's Law Dictionary (9th Edition) p 107, the expression *ante litem motam* would mean "before an action has been raised" *i.e.*, at a time when the declarant had no motive to lie. This phrase was generally used in reference to the evidentiary requirement that the acts upon which an action is based occur before the action is brought.

The learned Counsel for the Plaintiff-Respondents argued that the statement in the deed was insufficient to establish that *Sirisena*-the 4th Defendant in the case was fathered by *Rankira*. He contended that *Sirisena*-the 4th Defendant must have produced his birth certificate to show his filial connection to *Rankira*.

I hasten to point out that he certainly placed evidence at the trial against the proprietary interest of the Plaintiffs and the deed was not challenged at all by raising the routine objection "subject to proof" on the part of the Plaintiffs when it was marked

as **6V1**-*see* page 160 of the Appeal Brief. *Sirisena* was parting with an interest he alleged he had derived from his father *Rankira* who was admittedly the uncle of the Plaintiffs and the fact remains that the Plaintiffs permitted this deed to be marked and led against them without any demur or objection. *Sirisena* claimed in this deed that *Rankira* was his father and certainly that representation was made long before the litigation arose between the parties. Is the representation in the deed relevant and admissible? Before I deal with this issue, the question that one would have to pose is whether there was not any other evidence at all that was led to prove that *Rankira* was *Sirisena*'s father.

In fact when *Sirisena* gave evidence, it was put to him by the Plaintiffs in cross-examination that there was no birth certificate available with him to establish the fact that *Rankira* fathered him-*see* page 171 of the Appeal Brief.

In the appeal before me even the learned Counsel for the Plaintiff-Respondents argued that the birth certificate was the only mode of proof of the paternity of *Rankira* over *Sirisena*. In Sri Lanka, no doubt a certified copy of or a certified extract from a registration entry in the registers of births or deaths shall be received as *prima facie* evidence of the birth or death-*see* Section 57 of Births and Deaths Registration Ordinance. A birth certificate affords *prima facie* evidence of the matters stated therein but it is not the only mode of proof of paternity or maternity. It is not conclusive of the facts stated therein and Sections 32(5), 32(6) and 50 of the Evidence Ordnance are also relevant to ascertain the relationship of one person to another.

Let me first begin with Section 50 which is an exception to the rule against opinions.

Opinion evidence is relevant and admissible under Section 50 of the Evidence Ordinance, which states as follows:-

> *"When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:*

Illustrations to the Section go as follows:-

a) *The question is, whether A and B were married. The fact that they were usually received and treated by their friends as husband and wife is relevant.*

b) *The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family is relevant.*

This section provides an exceptional way of proving a relationship. It makes admissible as evidence the opinion of a person who could testify as to the relationship. Opinion evidence is usually excluded as inadmissible but if such opinion could be brought under Sections 45 to 51, it becomes relevant and admissible.

In order to establish the paternity of *Rankira* over *Sirisena* (the 4th Defendant), Section 32 of the Evidence Ordinance too could be invoked. Section 32 is an exception to the rule against hearsay. An out of court statement made by a person is led in evidence under Section 32 of the Evidence Ordinance. Usually out of court statements are shut out as hearsay but if such out of court statements fall under exceptions to hearsay rule, which are set out in Sections 17 to 39 of the Evidence Ordinance, they become relevant and admissible. Those statements, when led under these exceptional sections, could be acted upon by courts as substantive evidence. In other words Courts can act on the truth contained in those out of court statements.

Then under what section of the Evidence Ordinance would the statement made by *Sirisena* in his deed fall?

Clause (5) of Section 32 is to the following effect 'When an out of court statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised then that statement becomes relevant and admissible. The Court can act on its truth.

The Clause (5) of Section 32 lays down two conditions, which qualify its scope. The two vital conditions are:-

(1) The statement must be one made by a person having special means of knowing the relationship to which it relates, and

(2) It must have been made *ante litem motam*, i.e., made by him before the question in dispute was raised.

In regard to condition (1) above, Sinnetamby J. in ***Cooray v. Wijesuriya*** (1958) 62 N.L.R. 158, states that:-

> *"Apart from proof of a pedigree by the production of birth, death and marriage certificates, the relevant provisions of the Evidence Ordinance in regard to proof of a pedigree are to be found in sections 32(5), 32(6) and 50(2)(sic). It is under this provision of law (section 32(5)) that oral evidence of pedigree is generally sought to be led. What practitioners and the Court sometimes lose sight of is the fact that before such evidence can be led there must be proof that the hearsay evidence sought to be given is in respect of a statement made by a person* ***having special means of knowledge,*** *furthermore, it must have been made* ***ante litem motam.*** *Where the statement is made by a member of the family, such knowledge may be inferred or even presumed, but where it is a statement made by an outsider proof of special means of knowledge must first be established."*

Two further points may be observed. *(i)* Although Section 32(5) applies to hearsay evidence of oral statements made by persons having special means of knowledge, the Courts of Ceylon have adopted the attitude that relatively greater weight can be attached to written statements made by such persons. *(ii)* A statement as to pedigree admissible under Section 32(5) has some probative value, but its effect is tentative, in view of the possibility of rebuttal.

In ***Silva v. Silva*** (1942) 43 N.L.R. 572, Soertsz J. held that, *"the statements in a birth certificate afford prima facie proof of the fact of birth, of the date of birth, the place of birth and the identity of the person registering the birth. Where the declaration is made by the father it has a*

genealogical value under section 32(5) of the Evidence Ordinance. But, of course, in regard to both these matters, they are open to rebuttal, and, therefore, the next question is whether there has been satisfactory rebuttal".

A special knowledge is to be presumed in the case of members of the family. Statements made by deceased members of a family are admissible in evidence to prove pedigree if they are made before there was anything to throw doubt upon them. The statement must have been made before any controversy arose-*ante litem motam*-see ***Clarice Fonseka v. Winifred Perera*** (1957) 59 N.L.R. 364.

So in a nutshell let me once again advert to the two sections under which *Sirisena* could establish his filial relationship with *Rankira*.

The head note to the case of ***Cooray v. Wijesuriya*** 62 N.L.R. 158 states the following:-

> "*Apart from proof by the production of birth, death and marriage certificates, the relevant provisions of the Evidence Ordinance in regard to proof of a pedigree are to be found in sections 32(5), 32(6) and 50 (2) of the Evidence Ordnance.*"

Sinnetamby J. (with whom Basnayake, C.J concurred) stated at page 161:-

> "*It almost always happens that birth and death certificates of persons who have died very long ago are not available; in such cases: the only way of establishing relationship is by hearsay evidence.*"

Whilst Sections 32(5) and 32(6) are exceptions to hearsay evidence, Section 50 contains an exception to the exclusionary rule on opinion evidence.

It is to be noted that Section 50 differs from Section 32(5) in the following respects:-

(a) What is admissible under Section 32(5) is the statement giving the opinion of a deceased person or a person who cannot be produced, whereas under Section 50, the relevant fact is the opinion of persons, alive or dead, expressed by conduct, the qualification of special means of knowledge being common to both provisions.

(b) Under Section 32(5), the statement must be made *ante litem motam*, but under Section 50 the opinion may have been expressed before or after the controversy arose.

So where does the statement in *Sirisena*'s deed fall? Is it under Section 32 or 50? With regard to this point, the observations made by Sinnetamby J. in ***Cooray v. Wijesuriya*** 62 N.L.R, 158 at page 162 would be overwhelmingly persuasive and directly in point. To quote from page 162 of the said judgment of the Supreme Court which is as follows:-

> *"Indeed such written statements are accepted without question especially when they happen to be contained in deeds. It is a practice with some notaries to recite the vendor's title in the deed they attest. For instance, a deed may recite that the vendor's title to a share is derived by inheritance from a deceased father and the father's name is given. Such a recital being a statement made by a deceased vendor having special means of knowledge and made ante litem motam would be admissible to establish relationship: in fact it would be very strong evidence of the family relationship."*

In this case *Sirisena* (the 4th Defendant) made a statement long before the controversy arose to the notary that he was the son of *Rankira*. The notary recorded it in the deed. There was no challenge to this deed at the trial. The statement was one which was made out of court to the notary.

The circumstances in which Section 32 (5) would admit the recital in the deed of *Sirisena* (the 4th Defendant) into a case are as plain as a pikestaff. The vendor or the transferor of the deed must have been dead at the time of trial or more specifically when the deed is sought to be produced at the trial. But here *Sirisena* was indeed available at the trial. He testified in behalf of the Defendants. Since he was available at the trial, the recital in the deed cannot be classified as a statement made by a person who cannot be called as a witness-see how Sir James Fitzjames Stephen the primogenitor of the Indian Evidence Act and our own Evidence Ordinance begins Section 32 under the rubric- *"Statements by persons who cannot be called as witnesses"*.

So when the deed was produced at the trial on 29.01.1997, it was through *Sirisena* himself (the vendor in the deed) that the deed was led as evidence. The recital in the deed dated 26.11.1950 ran as follows:-

> *"the said premises have been held and possessed by me by right of inheritance from my deceased father Jayasingedera Rankira Veda."*

Though *Sirisena* made this representation to the notary, out of court in 1950, he himself produced this deed at the trial. He was available to testify in 1997 and as he was not an absent witness, the recital cannot fall within Section 32(5), which contemplates an out of court statement of a deceased or an absent witness. What in effect *Sirisena* produced at the trial was a prior statement which he had made to the notary. At this stage it is crucial to bear in mind the immortal words of Honorable L.M.D. de Silva (with Lord Radcliffe and Lord Tucker agreeing) in an appeal from Supreme Court of Malaya on the definition of hearsay in ***Subramaniam v. Public Prosecutor*** (1956) 1 W.L.R 965 (PC) at p 970.

> *"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."*
>
> A question of hearsay only arises when the words spoken are relied on 'testimonially'...establishing some fact narrated by the words. (***Ratten v. R*** [1971] 3 W.L.R 930 (PC) pp. 933-4)

The crucial difference is that the maker of the recital *Sirisena* was called to give evidence and it is him who produced the deed. Therefore the recital cannot constitute hearsay and therefore Section 32 (5) which is an exception to the hearsay rule cannot apply to the recital. Then how else does this Court treat this item of evidence?

It would fall within Section 50 of the Evidence Ordinance as his special means of knowledge about his father translated itself into the conduct of making a

representation to the notary in 1950. Moreover the witness was available for cross-examination on his prior statement of 1950 but he was not impeached at all on this statement in the deed. The absence of cross-examination of the vendor *Sirisena* as to his assertion in the deed shows his consistency *per se* and there is no evidence to rebut the position that *Rankira Weda* was his father. But the learned District Judge of Kandy insists on a birth certificate and on that account he excluded the Appellants from any entitlement to shares in the land. This constitutes in my view a misdirection of law.

Moreover, *Sediris Wijesinghe*, a 78 year old witness gave evidence that *Sirisena* (the 4th Defendant-the predecessor in title of the Appellants) was the son of *Rankira Weda*. This evidence went unchallenged at the trial and this testimony too would come within the ambit of Section 50 of the Evidence Ordinance. I must observe that the learned District Judge of Kandy misdirected himself in the teeth of this evidence and this is an abdication of a comprehensive investigation that is imperatively required in partition cases. Thus there is a resultant miscarriage of justice.

Accordingly I conclude that the judgment dated 28.11.1997 should be set aside and I proceed to set aside the judgment of the learned District Judge of Kandy dated 28.11.1997. In the circumstances I order a re-trial directing the learned District Judge of Kandy to fully investigate the title claimed by the Appellants as they have established on a preponderance of evidence that they too co-own the land in question.

I hasten to point out that a mis-appreciation of law and facts has resulted in an inordinate delay and parties are not yet in sight of a final vindication of their rights in the subject-matter. I allow the appeal of the Appellants and direct the learned District Judge of Kandy to afford priority to this case and conclude it as expeditiously as he could. He could invoke Section 33 of the Evidence Ordinance in order to achieve an expeditious resolution of this long-drawn out litigation.

The appeal is accordingly allowed and the judgment is set aside with a direction for a re-trial.

JUDGE OF THE COURT OF APPEAL