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

In the matter of an application for Substitution under Section 760A of the Civil Procedure Code and Rule 38 of the court of appeal (Appellate Procedure) Rules of 1990.

Horagalage Sopinona
No. 400, Porikiyahena,
Pitipana South,
Homagama.

Substituted Plaintiff-Respondent-Appellant

S. C. Appeal No. 49/2003
S. C. (Spl.) L. A. No. 01/2003
C. A. No. 631/98/F
D. C. Homagama Case No. 247/P

-VS-

3(a) Kumara Ratnakeerthi Pitipanaarachchi
No. 364,
Pitipana South,
Homagama.

3(b) Ramya Chandrakumari
Pitipanaarachchi
No. 364,
Pitipana South,
Homagama.

Substituted Defendants-Appellants-Respondents

41. Matarage Menchinona,
No. 363,
Porikiyahena,
Pitipana South,
Homagama.

Defendant-Appellant-Respondent

BEFORE	:	Dr. Shirani A. Bandaranayake, J; Saleem Marsoof, P.C., J. and J. de S. Balapatabandi, J.
COUNSEL	:	Nihal Jayamanne, P.C., Noorani Amarasinghe with Dilhan de Silva for Appellant. Rohan Sahabandu for Respondents.
ARGUED ON	:	13.01.2009
WRITTEN SUBMISSIONS	:	2.2.2009
DECIDED ON	:	3.2.2010

MARSOOF, J.

Over four decades ago, on 29th January 1969 the original Plaintiff-Respondent-Appellant, Welapahala Arachchige Remanis, of Pitipana South, Homagama, instituted action in the District Court of Colombo seeking to partition a land called "Porikehena", in extent 3 roods and 11 perches and situated in the village of Pitipana in the Hewagam Korale then falling within the Colombo District. The action was contested only by the 1st, 3rd and 19th Defendants, out of the 40 persons named as Defendants in the plaint. The land sought to be partitioned was described in the schedule to the plaint by reference to Plan No. 167058 dated 2nd July 1895 authenticated by D. G. Mantale, Surveyor General, and referred to in Crown Grant No. 30258 dated 28th December 1895 (P1), by which the said land was granted to Remanis's grandfather Pitipana Achachchige Jeeris jointly with another person named Thantirige Haramanis, of the same village. The said Jeeris had four children, one of whom was Sethuhamy, who was admittedly the mother of the original Plaintiff, Remanis.

It must be mentioned at the outset that this case has had a long and checkered history, despite the fact that after the initial steps that necessarily take time in partition cases, the trial had commenced and was concluded on 24th March 1975. Since Remanis had died prior to the said trial date, his widow, Poragalage Sopinona (hereinafter referred to as "the Appellant") who had been substituted in his place, and another witness, Thantirige Carolis, testified on behalf of the Appellant. On behalf of the contesting Defendant-Appellant-Respondents (hereinafter referred to as the "Respondents"), Pitipana Arachchige Tikonis, the original 1st Defendant, and Matarage Menchinona, who had been substitued as the 41st Defendant in place her deceased husband Pitipana Arachchige Obias, gave evidence. However, before the judgement was delivered in this case, the case was transferred to the newly established District Court of Homagama and trial commenced *de novo* on 23rd April 1992.

At the commencement of the fresh trial before the District Court of Homagama on 23rd April 1992, the parties admitted that the land described in the schedule to the plaint is

shown in the Preliminary Plan No. 255 dated 6th July 1970 and certified by A.P.S Gunawardene, Licenced Surveyor, and that Emis, Sadiris, Charlis and Sethuhamy are the heirs of Jeeris. It is noteworthy that the said Preliminary Plan bearing No. 255 depicts two lots marked as 'A' and 'B' respectively in extent 2 roods and 26.8 perches and 1 rood and 30.05 perches, which add up to a land extent of 1 acre and 16.85 perches. This is far in excess of the corpus as described in the schedule to the plaint which is only 3 roods and 11.9 perches. The Respondents, although admitting that the land described in the schedule to the plaint is shown in the Preliminary Plan No. 255, had alluded to this discrepancy at paragraph 20 of their answer, and asserted that after the death of Jeeris, the land called Porikehena which he had possessed by virtue of the Crown Grant, was amalgamated with two other lands separately owned by him namely, Indipitiya and Mahakele Mukalana, and Plan No. 1868 dated 27th July 1940 certified by D.A. Goonatilleka, Licenced Surveyor (3D1) was prepared to amicably divide the amalgamated land amongst his heirs Emis, Sadiris, Charlis and Sethuhamy. It was the case of the Respondents that accordingly, lot 'A' of the said Plan was allotted to Charlis, while lots 'B' and 'E' were allotted to Emis, and lots 'C' and 'D' respectively were allotted to Sadris and Sethuhamy, and that they continued to possess the said lots as defined and divided portions of land for the exclusion of all others.

The issues that were raised at the commencement of the trial are set out below.

On behalf of the Appellant

(1) Are the parties mentioned in the plaint entitled to the land described in the schedule to the plaint by virtue of the pedigree set out in the plaint and prescription?

On behalf of the Defendant

(2) Did Jeeris Appu possess the land which is the subject matter of this case and two other lands, namely, Indipitiya and Mukalana situated adjoining the said land as one piece of land (එක ඉඩමක් වශයෙන්)?

(3) Did Jeeris Appu's children Emis, Sadiris, Charlis and Sethuhamy possess the aforesaid three lands as one piece of land?

(4) Did the aforesaid four persons after possessing the aforesaid three lands as one amicably partition of the said lands among themselves by Plan No. 1868 dated 27th June 1940?

(5) Accordingly, did Sethuhamy possess lot 'D', Sadiris possess lot 'C', Emis possess lots 'B' and 'E' and Charlis possess lot 'A' of the said Plan?

(6) Did Sethuhami sell her rights to lot 'D' to the Plaintiff (who is her son and the present Appellant) by Deed No. 1845 dated 3rd February 1950?

(7) If answer to the above question is in the affirmative, can Plaintiff act in a manner inconsistent with the amicable partition effected by Plan No. 1868?

(8) Are lots 'A' and 'E' of Plan No. 1868, the same as the lot 'A' and 'B' of Plan No. 255 prepared for this case?

(9) Are any portion of the aforesaid two lands own by the Plaintiff or other parties mentioned in his pedigree?

Apart from these issues certain additional issues were also formulated on the suggestion of Counsel for the Appellant and Counsel for the Respondents as issues (10) to (14) which seek to further clarify the matters on which parties were at variance. While at the trial *de novo* the same witnesses, Sopinona and Carolis, testified on behalf of the Appellant, since the original 1st Defendant Tikonis had passed away, the original 3rd Defendant, Pitipana Arachchige Cornelis alone gave evidence on behalf of the Respondents. The question that loomed large at the trial was whether Jeeris had possessed the land sought to be partitioned to the exclusion of Haramanis, and in particular whether the amalgamation of the said land with his other lands Indipitiya and Mahakele Mukalana, and the allotment of distinct portions of the amalgamated land to Emis, Sadiris, Charlis and Sethuhamy as set out in the Plan No. 1868 dated 27th June 1940 (3D1), constituted evidence of ouster.

The learned District Judge, held with the Appellant, and in the course of her judgement dated 4th September 1998, agreed with the submissions made on behalf of the Appellant that Jeeris or Jeeris' heirs, who are entitled only to an undivided half share of the land, cannot prescribe to the other undivided half share of Haramanis since a co-owner cannot in law prescribe against his other co-owner in the absence of proof of ouster. The learned District Judge observed that-

> "තරඟ කරන විත්තිකරුවන්ගේ හිමිකම් ප්‍රකාශයෙන් පීරිස් අප්පුට පැමිණිල්ලේ උපලේඛණයේ සඳහන් ඉඩම අයිති වූ පදනම පැහැදිලි නොකරයි. කෙසේ වෙතත් එම හිමිකම් ප්‍රකාශයේ 02 වෙනි ඡේදය අනුව පීරිස් අප්පුට පැමිණිල්ලේ උපලේඛණයේ සඳහන් ඉඩමේ එකම අයිතිකරු වශයෙන් බුක්ති විඳ කාලාවරෝධී අයිතිය ලබා ඇති අතර හරමානිස් ක්‍රියා කළා නම් ක්‍රියා කලේ පීරිස් අප්පුගේ නියෝජිතයෙක් වශයෙන් බව ප්‍රකාශ කරයි. එබැවින් හරමානිස්ටද මෙම දේපලෙන් 1/2 කොටසක අයිතිය තිබී ඇති බැවින් ඔහු එම දේපල බුක්ති විඳීමෙන් පමණක් ඔහුගේ අයිතිය පීරිස් අප්පුට පැවරෙන්නේ නැත. පීරිස්ට එම අයිතිය පැවරෙන්නේ හරමානිස් තම අයිතිය අතහැර නොගොස් එනම් හරමානිස්ට එරෙහිව කාලාවරෝධී අයිතියක් පැවරෙන්නේ නම් ***නෙරපා හැරීමක්*** (ouster) පෙන්නුම් කළ යුතුය. එනම් මෙම නඩුවේ එවැනි නෙරපා හැරීමක් මත හවුල් අයිතිය හිමිවී ඇති ආකාරයක් නොදක්වයි. එබැවින් හවුල් අයිතිය නීතිය පවතින ආකාරයට හරමානිස්ට එසේම නොබෙදූ 1/2ක කොටසකට තිබිය යුතුය. පීරිස්ගේ උරුමය සම්බන්ධයෙන් තර්කයක් නැත. තරඟ කරන විත්තිකරුවන් හරමානිස්ගේ අයිතිය ප්‍රතික්ෂේප කර ඇති අතර ඔහුගේ අයිතිය ඇත්තේ හෝ ඇත්නම් එය පීරිස්ගේ නියෝජිතයෙක් ලෙස පමණක් බව හිමිකම් ප්‍රකාශයේ සඳහන් කර ඇත."

Accordingly, the Learned District Judge answered issue No. 1 raised by the Appellant in her favour, and refrained from answering any of the other issues on the basis that they did not arise. I quote below the final paragraph of the said judgment-

> "ඒ අනුව ඉදිරිපත් කර ඇති ඔප්පු හා සාක්ෂි අනුව තන්තිරිගේ හරමානිස් මෙම ඉඩමේ හවුල් අයිතිකරුවෙකු වශයෙන් සිටි බව පිළිගත යුතුය. ඉහත පීරිස් අප්පු සමඟ මෙම බෙදීමට යෝජිත ඉඩම මුලින්ම හවුල් අයිතිකරුවෙකු වශයෙන් සිටි බව පිළිගත යුතුය. හරමානිස්ගේ එම අයිතිය ඔහු පහ කිරීමකින් නැතිවී නැත.

එබැවින් මෙම ඉඩමේ ඔප්පු සියල්ලම සළකා බැලීමේදී අධිකරණය සෑහීමකට පත් වී ඇත්තේ පැ. 1 දරණ රජයේ පත්‍රය මගින් පීරිස් අප්පුට හා හරමානිස්ට මෙම බෙදීමට යෝජිත ඉඩමෙන් නොබෙදූ 1/2 ක කොටස බැගින් හිමිවී ඇති අතරම එම බෙදීමට යෝජිත ඉඩම අංක 255 දරණ සැලැස්මෙන් පෙන්නුම් කර ඇතත් එම බෙදීම හරමානිස් ගේ එකඟත්වය ඇතිව කරන ලද බෙදීමක් නොවන අතර කම්බි ගසා වෙන් කරන ලදුව සාදන ලද බෙදීමක් ද නොවන අතර එම බෙදීමෙන් පෙන්නුම් කරන ඉඩම එනම් අංක: 1868 දරණ සැලැස්ම මෙම නඩුවට අදාළ සැලැස්ම ලෙස ඔවුන්ගේ පිළිගැනීම් වලින්ම ප්‍රතික්ෂේප වී ඇත. ඒ අනුව පාර්ශවකරුවන්ට ඔවුන්ගේ කොටස් හිමිවිය යුත්තේ පැමණිල්ලේ සඳහන් පෙළපත අනුව යැයි මම තීරණය කරමි. ඒ අනුව මෙම නඩුවේ පැමණිල්ල විසින් 15 වෙනි ඡේදයේ පෙන්නුම් කර ඇති ආකාරයට පාර්ශවකරුවන්ට තම කොටස් හිමිවිය යුතුයැයි මා තීරණය කරමි. විසඳනාවන් වලට මෙසේ පිළිතුරු දෙමි.

01. ඔව්.

ඉහත සඳහන් විසඳනාවට පැමණිල්ලේ වාසියට පිළිතුරු ලැබී ඇති බැවින් අනෙක් විසඳනාවන්ට පිළිතුරු දීම අවශ්‍යය නැත."

Aggrieved by this decision, the 3rd and 41st Respondents appealed to the Court of Appeal. It was submitted on behalf of the Respondents that the learned District judge had not considered all the documentary and other evidence tendered on behalf of the Respondents and had thereby failed to discharge her duty to properly investigate title. In allowing the appeal, Andrew Somawansa, J., in the course of his judgement dated 22nd November 2002 with which N.E. Dissanayake, J. concurred, noted that while 5 deeds were marked by the Appellant and 9 marked by the Respondents, the learned District Judge had considered only 4 of the said deeds. Somawansa, J. held that the learned District Judge had seriously erred in seeking to dispose of the whole case through his answer to issue No. 1. his Lordship observed that-

> 'Here again, I am of the view that she has erred in not answering the balance issues. For issue No. 1 is based not only on devolution of title but also on prescription. Therefore it becomes necessary to consider and analyse the evidence to ascertain whether parties disclosed in the plaint had prescribed which the learned District Judge has failed to do."

Accordingly, Somawansa, J. concluded that-

> "Had she answered them, this Court would be in a position to consider her findings on the said issues. However, as she has failed to answer the rest of the issues, though with reluctance, I am compelled to set aside the judgement of the learned District Judge and send the case back for re-trial."

This Court has granted special leave to appeal against the said judgement of the Court of Appeal on the following questions of law:-

"(a) Whether in law there was sufficient investigation of title of the parties by the original court;

(b) Whether all issues need be answered by the District Judge when the answer to one issue alone sufficiently determines the title of the parties to the land both on deeds and on prescription;

(c) Whether, if the answer to a single issue, in effect is a complete answer to all the contents in the action, whether it is necessary and incumbent on the District Judge to give specific answers to the other issues. Specially, if in arriving at the answer to the issue the Learned District Judge has considered and dealt with the matters raised in the other issues."

Identity of the Corpus

Before dealing with the first substantial question of law on which special leave has been granted by this Court in this appeal, it is necessary to deal with the question of identity of the land sought to be partitioned, which is a matter of vital importance in any partition case. Without proper identification of the corpus it would be impossible to conduct a proper investigation of title. As G.P.S. de Silva, J. (as he then was) emphasized in the course of his judgement in *Wickremaretne v. Albenis Perera* [1986] 1 Sri LR 190 at 199, in a partition action, "there are certain duties cast on the court quite apart from objections that may or may not be taken by the parties" and this includes the "supervening duty to satisfy itself as to the identity of the corpus and also as to the title of each and every party who claims title to it." In *Jayasooriya v Ubaid* 61 NLR 352 at 353 Sansoni, J. observed that "there is no question that there was a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it was always open to him to call for further evidence in order to make a proper investigation." This is because clarity in regard to the identity of the corpus is fundamental to the investigation of title in a partition case.

In this connection, it is necessary to observe that in the plaint filed in this case, the original Plaintiff Remanis sought to partition the land described as Porikehena in extent 3 roods and 11 perches. However, as already noted, the Preliminary Plan No. 255 covers a much larger extent of 1 acre and 16.85 perches, which is far in excess of the land described in the schedule to the plaint and covered by the Crown Grant No. 30258, dated 28th December 1895 (P1) from which the Appellant claims to have derived title. Despite the said discrepancy in the extent of land being adverted to in paragraph 20 of the answer filed by the contesting Respondents, at the commencement of the trial *de novo* on 23rd April 1992 all parties to the action admitted that the said Plan depicts the land described in the scheduled to the plaint and sought to be partitioned, and no point of contest or issue was raised in regard to the identity of the corpus. However, when Carolis Singho gave evidence on 21st August 1997 he spoke about the discrepancy in the land extent, and his Counsel moved to raise two more issues in regard to the failure to properly register *lis pendens*, which application was turned down by the learned District Judge on the ground that this aspect of the matter should have been taken up before the commencement of the trial.

There exists a lack of clarity, even amongst each of the parties themselves, with regard to the description of the corpus described in the schedule to the plaint as Porikehena in extent 3 roods and 11 perches by reference to Plan No. 167058 dated 2nd July 1895 authenticated by D. G. Mantale, Surveyor General. This Plan was not produced in court by any of the parties. It must be noted, that lots 'A' and 'E' of Plan No. 1868 dated 27th July 1940 and prepared by Licensed Surveyor M. D. A. Goonatilleka (3D1) showing parts of Porikehena which were subjected to the amicable partition amongst

Jeeris's heirs, also add up to an extent of 3 roods and 11 perches, and a superimposition of the said lots 'A' and 'E' of the said Plan on the Preliminary Plan No. 255 dated 11th October 1970 prepared by Licensed Surveyor A. P. S. Gunawardena clearly shows that the said Preliminary Plan depicts a land extent of 1 acre and 16.85 perches which *exceeds the land claimed by the Appellant as well as by the Respondents by approximately 1 rood and 5.85 perches.* The Respondents, in their evidence and submissions at the various stages of this case, have sometimes seemingly admitted the corpus as described in the plaint to be Porikehena, despite the aforesaid disparity, and at other times sought to challenge this position. The parties have not shown consistency in this regard, and failed in their preliminary duty to describe adequately and with clarity the corpus being the subject matter of these proceedings.

The identity of the corpus is also a matter of fundamental importance in ensuring that all persons who have any claim to it to participate in the partition action, which ultimately confers title *in rem*. The Partition Act No 16 of 1951, that was applicable at the time of the institution of the action in 1969, provided for the registration of *lis pendens* and other steps which had as their objective the proper investigation of title. It appears from the original record maintained in the District Court which was called for by this Court, that *lis pendens* was registered in terms of Section 6 of the Partition Act on 13th February 1969 in folio G 384/48 at the Land Registry with respect to the land referred to in the schedule to the plaint in extent 3 roods and 11 perches. However, an examination of the journal entries in the original record maintained in the District Court in this case (from 18th April 1989, being the date of the reconstruction of the record after the original record was destroyed by fire) did not show any evidence that *lis pendens* was registered for the larger extent of land depicted in the Preliminary Plan No. 255 in extent 1 acre and 16.85 perches, and the fact that learned Counsel for Carolis Singho on 21st August 1997 sought to raise two additional issues in this regard suggests that in fact that there was no such registration.

It has been expressly provided in Section 23(3) of the Partition Act of 1951 that where a survey made on a commission issued by court in a partition case "discloses that the land described in the plaint is only a portion of a larger land which should have been made the subject matter of the action, the court shall specify the party to the action by whom, and the date on or before which, an application for the registration of the action as a *lis pendens* affecting that larger land shall be filed in court" to enable the filing of *lis pendens* showing the larger land and taking other mandatory steps under the Act, which are necessary to ensure that all interested parties are before court. The District Court has ordered the partitioning of the said larger portion of land depicted in Preliminary Plan No. 255 consisting of 1 acre and 16.85 perches, which far exceeds the land described in the schedule to the plaint, and in the absence of material to show that Section 23 of the Partition Act was complied with, raises serious doubts as to the regularity and legality of the impugned decision of the District Court in this case.

Sufficiency of Investigation of Title

The first substantial question of law on which special leave to appeal was granted against the decision of the Court of Appeal is whether in law there was sufficient investigation of title by the original court. Learned President's Counsel for the

Appellant strenuously contended that there was, and learned Counsel for the Respondents argued with equal force that there was not.

It is trite law that, in a partition suit which is instituted to bring an end to co-ownership of land through a decree which is binding not only on the parties to the suit but *in rem* over the entirety of society, the dispute is not to be settled on issues alone, but on any points of interest that the court sees fit in discharging its sacred duty for the full investigation of title. As was observed by Layard, C.J. in *Mather v. Thamotharam Pillai* 6 NLR 246 at pages 250 to 251,

> "…..the question to be decided in a partition suit is not merely matters between parties which may be decided in a civil action; the Court has to decide in every such suit matters in respect of which the parties need not necessarily be in dispute and on which in this particular suit they are not at issue, viz., *that the land is held in common by the plaintiff and defendants, and they solely have title to the land sought to be partitioned*. The Court has not only to decide the matters in which the parties are in dispute, but to safeguard the interests of others who are no parties to the suit, who will be bound by a decree for partition made by the Court under the provisions of the Ordinance." *(Italics added)*

Layard, C.J. was there interpreting the *Partition Ordinance* No. 10 of 1863, which has since been repealed, but the same obligation is cast on the court by the provisions of the Partition Act No. 16 of 1951 which applied at the time of institution of the action from which this appeal arises. In fact, *dicta* from the judgement of Layard, C.J. were quoted with approval by G.P.S de Silva, C.J. in *Gnanapandithen and Another v. Balanayagam and Another* [1998] 1 Sri LR 391 which was decided under the provisions of the current legislation on the subject, namely, the *Partition Law* No. 21 of 1977, as subsequently amended, which replaced the Partition Act of 1951. A basic principle in all the enactments is that where there has been no proper investigation of title, any resulting partition decree necessarily has to be set aside.

In the context of the stringent legal provisions of the relevant legislation, learned Counsel for the Respondent submitted the Appellant has failed to establish that the land is held in common by the Appellant and Respondents, and that the Respondents solely have title to the land sought to be partitioned. He submitted that it was clear from the evidence that Haramanis never possessed Porikehena, that Jeeris and his heirs alone possessed the entirety of Porikehena along with the two adjoining lands called Indipitiya and Mahakele Mukalana and had in fact, over the course of 30 years of exclusive possession, prescribed to Porikehena as against the said Haramanis. It was submitted by learned Counsel for the Respondents that any instance at which Haramanis had acted in relation to Porikehena is explicable on the basis that he functioned as an agent of Jeeris. He explained that when Jeeris died leaving as his heirs Emis, Sadiris, Charlis and Sethuhamy who continued to possess all three lands in common, they put an end to their common ownership by amalgamating and amicably divided the said lands among themselves by Partition Plan No. 1868 dated 27th July 1940 certified by D.A. Goonatilleka, Licenced Surveyor (3D1). Learned Counsel for the Respondents submitted that the said lots 'A' and 'E' were by the said Plan marked 3D1, apportioned to Charlis and Emis respectively, and that lot 'A' was subsequently

transferred to Obies (the original 13th Defendant) whose widow Matarage Menchinona (the 41st Substituted Defendant) now contests the Appellant's case along with the issue of Pitipana Aratchige Cornelis (the 3rd Defendant) who it was submitted gained title to Lot 'E' from Emis.

It was further submitted by the learned Counsel for the Respondents that the Appellant, only had title to parts of Lot 'D' of Plan No. 1868 (3D1) through Sethuhamy and Sethuhamy's son, Welapahala Arachchige Remanis, her late husband who was the original Plaintiff. It was his contention that the exclusive, undisturbed and uninterrupted possession by the Respondents of defined and divided lots along with the other parties to the 1940 division, prior to, or at least, from the date of the said division, defeated through prescription the co-ownership established by the initial Crown Grant. It was also submitted by learned Counsel for the Respondents that the Appellant's case was doomed to fail as the identity of the corpus was in grave doubt, and additionally, as the land known as Porikehena ceased to exist as a distinct land its following amalgamation in 1940 with Indipitiya and Mahakele Mukalana. Learned Counsel for the Respondent stressed that the Appellant is legally bound by this division as Sethuhamy, the mother of Remanis, who had participated in the division had executed Deed No. 1845 marked as 3D3, whereby she conveyed lot 'D' of Plan No. 1868 (3D1) to Remanis. He contended that by accepting the said conveyance, Sethuhamy precluded herself as well as her successors-in-title, from disputing the validity of 3D1. He submitted that the Appellant, who is the widow of Remanis, by claiming title based on the said Deed No. 1845 (3D3) and her own testimony in court, had admitted the said amalgamation and division, vitiating her right to claim otherwise.

Learned President's Counsel for the Appellant submitted that the original court has adequately discharged its obligation of satisfying itself that the land described in the schedule to the plaint (1) was held in common; and (2) that that title devolved on the parties in the manner and to the extent as set out in the plaint. He submitted that by virtue of Crown Grant No. 30258, dated 28th December 1895 (P1), Pitipana Arachchige Jeeris and one Thantirige Haramanis, became entitled to equal shares in the land sought to be partitioned called Porikehena, in extent 3 roods and 11 perches. He further submitted that the said Haramanis and Jeeris owned two lands in common, namely, Porikehena, the corpus sought to be partitioned in the action which led to this appeal, and Kirigaldeniya. It was his contention that while Jeeris lived on Porikehena and Haramanis lived on Kirigaldeniya, neither did Jeeris give up his rights to Kirigaldeniya nor did Haramanis give up his rights to Porikehena. He submitted that this position is evidenced by the fact that the heirs of Jeeris had sold rights in Kirigaldeniya on Deed No. 7066 dated 15th August 1922 attested by D.T.S.S. Jayatilake, Notary Public (P4) to the heirs of Haramanis and that some heirs of Haramanis had in turn sold by Deed No. 1874, dated 17th October 1967 (P2), rights in Porikehena to the heirs of Jeeris, including the original Plaintiff, Welapahala Arachchige Remanis. He submitted that the District Court had examined all relevant evidence carefully, and was justified in upholding the claim of the Appellant for a 21/48th share of Porikehena under the said purchase from the heirs of Haramanis, and a further 1/56th share of Porikehena under the birth right of her deceased husband Remanis, as an heir of Jeeris.

Learned President's Counsel for the Appellant emphasised that Jeeris and Haramanis, being co-owners, their undivided rights cannot be prescribed by each other, in the absence of clear evidence of ouster or something equivalent to ouster. He relied on the decisions of our Court in *Corea v. Appuhamy* 15 NLR 65 and *Tillekeratne v. Bastian* 21 NLR 12, and also refered to the decision in *Maria Fernando and Another v. Anthony Fernando* (1997) 2 Sri LR 356, in which at page 360 Wigneswеran, J. observes as follows:

> "Whether ouster may be presumed from long, continued, undisturbed, and uninterrupted possession depends on all the circumstances in each case. (*vide, Siyadoris v. Simon* 30 CLW 50)."

It is a well established principle in the Roman-Dutch Law that "the possession of one co-owner is, in law, the possession of the other." G.L. Pieris, *The Law of Property in Sri Lanka Vol. 1* at p. 359. In the celebrated case of *Corea v. Appuhamy* (*supra*) the Privy Council laid down in unequivocal terms that every co-owner must be presumed to be possessing in the capacity of co-owner, and that as Lord MacNaghten put it at page 78 of his judgement -

> "His possession was in law the possession of his co-owners. It was 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 *Tillekaratne v. Bastian* (*supra*) a Full Bench of the Supreme Court drawing from the principles of the common law in Ceylon, as it then was, and in England, from where our Prescription Ordinance has drawn much influence, Bertram, C.J. set out that our law on prescription, both in situations arising out of co-ownership and otherwise, must be approached by equating the previously unknown and abstract term "ouster" to a simple question as to whether the possession in question was or has become "adverse". At page 18 of his judgement, Betram, C.J. observed that -

> "What, then, is the real effect of the decision in *Corea v. Appuhamy* (*supra*) upon the interpretation of the word "adverse" with reference to cases of co-ownership? It is, as I understand it, that for the purpose of these cases the word "adverse" must, in its application to, any particular case, be interpreted in the light of three principles of law:-
>
> (i) Every co-owner having a right to possess and enjoy the whole property and every part of it, the possession of one co-owner in that capacity is in law the possession of all.
>
> (ii) Where the circumstances are such that a man's possession may be referable either to an unlawful act or to a lawful title, he is presumed to possess by virtue of the lawful title.
>
> (iii) A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity."

While the first of the above principles is one of substantive law, the second and third principles are presumptions, and thus, principles of the law of evidence. It is the applicability of the third of these principles, which has been the basis of our decisions on this difficult area of law, and must decide question of the ownership of Porikehena. The effect of this principle is that, where any person's possession was originally not adverse, and he claims that it has become adverse, the onus is on him to prove it. In doing so, he is required not only to prove an intention on his part to possess adversely, but also a *manifestation of that intention to the true owner* against whom he sets up his possession. Considering recent decisions such as *Maria Fernando v. Anthony Fernando* (*supra*), authorities remain prone today as they were in 1918 as observed by Bertram, C.J., to emphasize the definite and heavy burden cast upon the assertor to prove "an overt unequivocal act."

However, it must not be forgotten that Bertram, C.J. himself acknowledged that there can be no hard and fast rules in this regard, and in particular, the evidentiary principle that a person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity, might become unreal or "artificial" if it is accepted without qualification. In the course of his judgement in *Tillekaratne v. Bastian* (*supra*) at pages 20 to 21 he observed that-

> "…….presumptions of the law of evidence should be regarded as guides to the reasoning faculty, and not as fetters upon its exercise. Otherwise, by an argumentative process based upon these presumptions, we may in any particular case be brought to a conclusion which, though logically unimpeachable, is contrary to common sense. It is the reverse of reasonable to impute a character to a man's possession which his whole behaviour has long repudiated. If it is found that one co-owner and his predecessors in interest have been in possession of the whole property for a period as far back as reasonable memory reaches; that he and they have done nothing to recognize the claims of the other co-owners; that he and they have taken the whole produce of the property for themselves; and that these co-owners have never done anything to assert a claim to any share of the produce, it is artificial in the highest degree to say that such a person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession. Where it is found that presumptions of law lead to such an artificial result, it will generally be found that the law itself provides a remedy for such a situation by means of counter-presumptions. If such a thing were not possible, law would in many cases become out of harmony with justice and good sense."

It is evident in this *dictum* that not only has this Court recognized the strong logical underpinnings for a counter-presumption of "ouster", but it has also laid down guidelines under which such a presumption may be made. With further reference to a line of cases beginning from the seminal judgement in *Corea v. Appuhamy (supra),* all of which have been analyzed in the leading decision of this Court in *Gunasekera v. Tissera and Others* [1994] 3 Sri LR 245, along with numerous references to be found in the

Roman-Dutch law authorities, the case for declaring the principle to be part of our law was well established. Accordingly, in my view it is not only legitimate but necessary, wherever long-continued exclusive possession by one co-owner is proved to have existed, to delve into the question whether it is just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some point of time more than ten years before action brought.

It is in this light that one has to consider the submission made with great force by the learned President's Counsel for the Appellant that the amicable partition said to have been effected by Plan No. 1868 (3D1) by the heirs of Jeeris does not bind Haramanis or his heirs as they were not aware of the said Plan, and additionally, as no Partition Deed to which all co-owners were parties had been entered into to give effect to the said Plan. In this context, learned President's Counsel invited the attention of court to the following *dictum* of Gunasekara, J. (with Gratiaen, J. concurring) in *Kobbekaduwa v. Seneviratne* 53 NLR 354, at page 359:

> "…….the mere fact that one co-owner was in occupation of the entirety of a house which is owned in common and purported to execute deeds in respect of the entirety for a period of over ten years does not lead to the presumption of an ouster in the absence of evidence to show, that the other co-owners had knowledge of the transactions."

In my opinion, while the question whether Haramanis and his heirs were aware of the partition effected by Plan No. 1868 (3D1) is most material, an important consideration that might affect the rights of the co-owners to the land is whether they acquiesced in the division effected thereby for a period of more than 10 years after it was implemented. As M.D.H. Fernando, J. in *Gunasekera v. Tissera and Others* [1994] 3 Sri LR 245 observed at page 258-

> "If the division is not by all the co-owners, but is based on a plan prepared by one co-owner without the knowledge of the other co-owners, his possession of divided allotment is not adverse *(Githohamy v. Karanagoda* 56 NLR 250, 252), but prescriptive title can be acquired by virtue of possession for such a period and in such circumstances that the counter presumption applies"

It appears from the evidence led by the parties that Haramanis and Jeeris owned two lands in common, namely, Porikehena, the corpus sought to be partitioned in the action which led to this appeal, and Kirigaldeniya which was situated about half a mile away from Porikehena. The version of the Responents' that there existed an arrangement between Haramanis and Jeeris for the former to hold Kirigaldeniya and the latter to possess Porikehena exclusively, if accepted, would explain the logic behind the amicable partition alleged to have been effected in 1940 through Plan No. 1868 (3D1) whereby Porikehena along with Indiketiya and Mahakele Mukalana owned by Jeeris were put together and divided amongst his heirs. It is clear from the evidence led by both parties, that in 1940 when Porikehena was amalgamated with the said two adjacent lands and divided into 5 distinct lots, a significant *de facto* change in the manner of possession of the said land occurred. Following the division effected in

1940, wire fences had been erected and constructions were made on the said lands (as depicted in Preliminary Plan No. 255) by the new holders, which was also admitted in her testimony by the Appellant Sopinona, who stated that the two houses on the land were occupied by Menchinona, the widow of Obias, and Cornelis, both grandsons of Jeeris. Furthermore, the Appellant's mother-in-law, Sethuhamy, directly participated in the division effected by Plan No. 1868 (3D1) in 1940 and conveyed, by Deed No. 1845 (3D3) executed on 23rd February 1950, the entirety of lot D of the said Plan No. 1868 (3D1) to Remanis, the deceased husband of the Appellant.

This court cannot also ignore the fact that the testimony of Carolis, who is the only descendant of Haramanis to testify in this case, goes more to establish the case of the Respondent. He stated in evidence that he lived in part of Kirigaldeniya, and that he used to go to Porikehena and "Charley Mama", who was one of Jeeris' sons and who was in occupation of the land picked coconuts and breadfruit and gave them to him as well as to other members of his family, acknowledging their rights as co-owners of Porikehena. It is noted that Carolis stated in evidence that he went to Porikehena with his grandmother: "මගේ ආච්චි සමඟ මම පොල් දෙල් එහෙම කඩා ගෙන එනවා'" Although the point of time at which Carolis collected such produce from Porikehena was not elicited by Counsel for the Appellant, he has given a clue about the approximate date in his answers to questions put to him in cross-examination:

"ප්‍ර : පොරිකියාහේනට තමා ගොස් තිබෙද ?

උ : ඔව් කුඩා කාලයේ ගියා.

ප්‍ර : කුඩා කාලයේ ගියාට පසුව තමා අද වන තුරු එම ඉඩමට ගියේ නැහැ ?

උ : අවුරුදු 15 තරම ගියාට පසුව ගියේ නැත."

It is relevant to note that at the time when Carolis testified in 1997 he was 72 years old, which means that he was born in 1925, and he *would have been 15 years old in 1940, the year in which the amicable partition was effected by Plan No. 1868 (3D1).* This gives credence to the testimony of Cornelis, the sole witness for the Respondents at the second trial, who testified that he was in possession of lot 'E' of 3D1 but he did not know Carolis and that he never exercised any rights of co-ownership over Porikehena.

> "ඔහු කියන පිඹුරේ දකුණු පැත්තට ලොට්. E අක්ෂරය දරන කොටසේ අයිතිය තිබුනේ මට. 1940 සිට මා බුක්ති විඳ තියනවා. මා එහි ජදිංචිවී ඉන්නවා. මේ නඩුවේ කරෝලිස් කියා කෙනෙක් පැමිණිල්ලට සාක්ෂි දුන්නා මතකයි. කරෝලිස් හා තව කට්ටියක් අත්සන් කර ඔප්පුවක් ඉදිරිපත් කලා 3D1 කියා. කරෝලිස් මේ ඉඩමේ කවදාවත් පොල් කොස් බුක්ති විඳින්න ආවේ නැහැ. ඒ අය ඉඩම අවට ඉන්න කට්ටිය නෙමෙයි. කිට්ටුව නැහැ. මේ ඉඩමට ලඟ පාත අය නෙමෙයි. මා අයිතිවාසිකම් කියන කොටස වෙන කවුරුත් බුක්ති විඳ නැහැ."

It is possible to reconcile the apparent conflict in the testimony of Carolis and Cornelis on the basis of the period of time during which rights of co-ownership were allegedly exercised by the heirs of Haramanis including Carolis. The only conclusion that one can reasonably arrive on the basis of the testimony of these witnesses is that none of the heirs of Haramanis excercised any rights over Porikehena after the amalgamation of that land with two other lands and the amicable partition effected by Plan No. 1868 (3D1) in 1940. In fact, the totality of the evidence point to the fact that none had

contested the separate possession established in 1940, and all respected the separation effected in 1940 and entered into various subsequent transactions on that basis.

It is important to note that the only other witness for the Appellant was Sopinona herself, who admitted in her testimony that she knew nothing herself about the manner in which Jeeris and Haramanis exercised rights over Porikehena, nor did she know personally about the amicable partition alleged to have been effected in 1940 through Plan No. 1868 (3D1). In fact, in the course of her testimony she admitted in cross examination that after 1940, the parties to the said Plan had abided by the division made thereunder. She answered a vital question as follows:

"ප්‍ර : මම යෝජනා කරනවා තමන් කියපු ඔප්පු වලින් මේ ඉඩමේ අයිතිවාසිකම් 3D1- කියන පිඹුර අනුව ඔය කියපු එක 1, 2, 3, 19 යන විත්තිකරුවන් අරගෙන තියෙනවා කියලා ?

උ : ඔව්"

In the context of all this evidence, the conclusion is irresistible that land named Porikehena which was referred in the scheduled to the plaint lost its separate identity by reason of the amalgamation and partition effected by Plan No. 1868 (P1) in 1940. It also transformed the character of the possession of Jeeris's heirs from one consistent with co-ownership into what we may call "adverse" possession, which is essential for the acquisition of prescriptive title. By 1950, such possession had crystallized into ownership, which made it lawful for Sethuhamy to covey lot D of 3D1 to Remanis by Deed No. 1845 (3D3) in 1950. Furthermore, it is important to note that the heirs of Jeeris and Haramanis, who live not too far apart mainly in Porikehena and Kirigaldeniya respectively, have refrained from asserting rights of co-ownership in relation to the land held by the other, be it Porikehena or Kirigaldeniya, for a long time until coaxed into action by Remanis, who in 1967, perhaps as a prelude to the institution of this partition action, purported to buy from certain heirs of Haramanis rights in Porikehena under Deed No. 1874 (P2) in October 1967. It has to be observed that these heirs of Haramanis had themselves acquiesced in the division that had been effected by Plan No. 1868 (P1) in 1940, and the said division had has remained substantially the same changing hands from parent to child or vendor to vendee for a period in excess of five decades at the point of time Sopinona, Carolis and Cornelis gave evidence at the second trial in 1996 and 1997.

There are two major difficulties that arise in the stand taken by the Appellant in this case. The first is that the claims of the Appellant for a share of Porikehena under a purchase from the heirs of Haramanis effected by Deed No. 1874 dated 28th October 1967, and a further share of Porikehena under the birth right of her deceased husband Remanis, as an heir of Jeeris, are mutually inconsistent. The contradiction arising from the juxtaposition of these two claims is that in order to assert a "birth right" to the co-ownership of Porikehena as an heir of Jeeris, she has to disassociate herself from Plan No. 1868 (3D1), which she can ill afford to do as the ownership to the divided lot D of the said Plan sought to be conveyed by Deed No. 1845 (3D3) is expressed in the deed itself to be based on the said amicable partition effected in 1940 and prescription.

Secondly, the Appellant has an even more serious problem in regard to the total extent of land that was taken to constitute the corpus sought to be partitioned in the impugned judgment of the District Court. The Appellant has failed to explain to this Court the basis on which Porikehena, which according to the plaint, and the evidence led in the case, consisted of 3 roods and 11 perches as stated in Crown Grant No. 30258 (P1) increased in size and extent to 1 acre and 16.85 perches as shown in the Preliminary Plan No. 255. The problem here is that there is no evidence of any paper title that establishes co-ownership between Jeeris and Haramanis to the extent beyond 3 roods and 11.9 perches covered by the Crown Grant.

In my view, the Learned District Judge has considered the relations between Jeeris and Haramanis as co-owners of the land they acquired through the Crown Grant of 1895 (P1) but her examination of the material relating to the amalgamation and amicable partition effected in 1940 and subsequent dealings and transactions that took place thereafter is lacking in depth. I am of the opinion that the evidence relating to the enjoyment and use of the property by the heirs of Jeeris and Haramanis over a period of at least 29 years leading up to the institution of the action in 1969 has not been adequately examined and analyzed by the learned District Judge. Accordingly, I answer question (a) on which special leave was granted in the negative, and hold that the original court has not conducted a sufficiently investigate of title as required by law.

Duty to Answer All Issues

It is now necessary to turn to the other two questions on which leave to appeal has been granted by this Court. Question (b) arising on this appeal is whether all issues need be answered by the District Judge when the answer to one issue alone sufficiently determines the title of the parties to the land both on deeds and on prescription. It is quite obvious that the duty of formulating issues is a responsibility of Court, and it is the duty of court to answer all issues arising in the case. As Lord Devlin observed in *Bank of Ceylon v. Chelliah Pillai* 64 NLR 25 (PC) at page 27, "…a case must be tried upon the issues on which the right decision of the case appears to the court to depend and it is well settled that the framing of such issues is not restricted by the pleadings…." In *Peiris v. Municipal Council, Galle* 65 NLR 555 at page 556, Justice Tambiah remarked that even where the plaintiff fails to raise a relevant issue, it is the duty of the judge to raise the necessary issues for a just decision of the case. *A fortiori,* it follows that it is the duty of the judge to answer at the end of the trial *all* the issues raised in the case.

The only exception to this cardinal principle is found in Section 147 of the Civil Procedure Code wherein courts have been vested with a degree of discretion, where it is of the opinion that a particular matter may be decided on the issues of law alone, to try the issues of law first. In *Mohinudeen and Another v. Lanka Bankuwa, York Street, Colombo 01* [2001] 1 Srl LR, 290 at 299 Hector Yapa, J., cited with approval the following *dicta* of Wijeyaratna, J. in *Muthukrishna v. Gomes and Others* [1994] 3 Sri LR at page 8:

> "Judges of original courts should, as far as practicable, go through the entire trial and *answer all the issues* unless they are certain that a pure question of law without the leading of evidence (apart from formal evidence) can dispose of the

case." *(Emphasis added)*

Making a further exception which will enable judges to avoid answering one or more of *issues of fact* - such as issues (2) to (9) in this case - on the basis that the answer to one of them will effectively disposes of all questions regarding which the parties are at variance, might be somewhat imprudent as they could lead to disastrous results. In fact, a careful examination of the issues formulated at the commencement of trial in this case shows that there was no way in which the court could have avoided answering all the issues raised at the commencement of the trial, and it is ironic that the learned trial Judge had gone through the entire trial but had chosen not to answer only issue (1). Indeed, if the learned Judge had focused even for a moment on the other 13 issues, she may have answered issue (1) differently.

The final question [question (c)] on which leave to appeal was granted in this case, is whether, if the answer to a single issue is in effect a complete answer to all the issues arising for determination in this action, whether it is necessary and incumbent on the District Judge to give specific answers to the other issues. In this context, it is relevant to note that in terms of Section 187 of the Civil Procedure Code, a judgement should contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. As was observed by court in *Warnakula v. Ramani Jayawardena* [1990] 1 Sri L.R. 206 at 208, "bare answers to issues without reasons are not in compliance with the requirements of Section 187 of the Civil Procedure Code." The Judge must evaluate and consider the totality of the evidence, giving a short summary of the evidence of the parties and witnesses and stating the reasons for his preference to accept the evidence of one party as opposed to that of the other. The learned District Judge in this case has totally failed to discharge this duty by failing to even attempt answering all of the very material ssues raised on behalf of the Respondents, and has also failed to explain why, in her view, it was not necessary to answer the other very important issues.

I have no difficulty in answering questions (b) and (c) in the negative and in favour of the Respondents.

Conclusion

In the context of all these facts, I conclude that the learned District Judge has not only failed to carefully examine questions relating to the identity of the corpus and the adequacy of the *lis pendens* registered in the case, but also failed to properly investigate title and in particular examine the issues relating to prescription with the intensity that is expected in a partition case. Although for these reasons, I agree with the decision of the Court of Appeal that the judgement of the District Court cannot stand and should be set aside, I have also given anxious consideration to the question whether this case should be sent back to the District Court for trial *de novo*.

I have carefully consider the evidence led at the second trial before the District Court, and am of the opinion that on this evidence, it is clear that the possession of Jeeris's heirs became adverse to Haramanis's heirs after an amicable partition was effected through Plan No. 1868 (3D1) in 1940, and the persons to whom lots 'A' and 'E' of the

said Plan were allocated, and their successors in title, had possessed the said lots exclusively up to the time of institution of action in 1969 by Remanis. It is manifest that Porikehena, the land sought to be partitioned in this action and is described in the schedule to the plaint, which coincides with the said lots 'A' and 'E', had lost the character of co-owned property long before Remanis instituted the partition action from which this appeal arises, more than 40 years ago. Accordingly, I am of the firm opinion that the learned District Judge should have dismissed the action on the basis that the *corpus* sought to be partitioned was not co-owned property.

I am also firmly of the opinion that, in any event, no useful purpose would be served by sending this case back to the original court for trial *de novo*, as directed by the Court of Appeal. This would constitute a third trial of this case more than four decades since the matter was first brought before the District Court. This fact in itself raises serious doubts regarding the possibility of securing witnesses with first hand knowledge of the material facts, considering the time which has already elapsed and the further time such fresh trial would take to make its way through the courts yet again. I note that Sopinona, Carolis and Cornelis, the witnesses presented before the courts in the second trial before the District Court of Homagama, would by now be more than 80 years old if they are living, and their descendants may not know about the facts of this case even to the extent Sopinona, Carolis and Cornelis knew.

Considering therefore all the circumstances of this case, and in particular, the uncertainty regarding the identity of the *corpus*, the failure to register *lis pendens* for the larger land of 1 acre and 16.85 perches, the weakness in the case of the Appellant as presented at the trial, the difficulty of finding witnesses who can testify at a fresh trial, and the evidence led at the trial which show that the land sought to be partitioned was not co-owned property, I am of the opinion that it is appropriate to make order setting aside the judgement of the Court of Appeal dated 22nd November 2002 as well as the judgement of the District Court dated 4th September 1998, and substitute therefore an order that the action filed in the District Court by the substituted Appellant should stand dismissed. I do not make any order for costs in all the circumstances of this case.

JUDGE OF THE SUPREME COURT