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

SC/Appeal/134/12

SC/HCCA/LA/118/2011

WP/HCCA/Mt./03/02(F)

DC/Moratuwa/21/P

Shirley Anthony Fernando
14A, 8th Lane, Borupana, Ratmalana
Place of employment
Colonne Filling Station, Galle Road, Ratmalana

4th Defendant - Appellant – Appellant

Vs

Hewa Narandeniyage Jinadasa
No.164/D,1/2 De Zoysa Flats,
Galle Road,
Moratuwa

Plaintiff – Respondent – Respondent

1. Paragahadurage Ratnapala
164/D, Galle Road, Angulana
Moratuwa.
2. Nageshwari Thambiah
3. Rita Thambiah
Both of No.2/40, Dunbrune Street, Hulsto, Poric, New South Wales, 2193, Sydney, Australia.
5. Pathirage Indika Anuradha Delwita Perera
14, 8th Cross Lane, Ratmalana

Defendants – Respondents-Respondents

Before : Hon. Priyasath Dep PC, CJ

Hon. B.P. Aluwihare PC, J &

Hon. L.T.B. Dehideniya, J

Counsel : Rohan Sahabandu, PC with Ms. Hasitha Amarasinghe for the

4th Defendant – Appellant – Appellant

W. Dayaratne, PC with Navinda Pathirage for the

Plaintiff – Respondent – Respondent

Argued on : 23rd March 2018

Decided on : 23rd July 2018

Priyasath Dep, PC, CJ

This is an appeal preferred against the judgment of the High Court (Civil Appellate) held in Mount Lavinia dated 07/03/2011 affirming the judgment of the District Court of Moratuwa in Case No. 21/P/ which ordered partition of the land as prayed for by the Plaintiff and rejected the claim made by the 4th Defendant-Appellant-Appellant (hereinafter sometimes referred to as the "Appellant") that he had prescribed to the land.

The Plaintiff – Respondent – Respondent (hereinafter sometimes referred to as the "Plaintiff-Respondent") instituted action in the District Court of Moratuwa seeking inter alia to terminate the co-ownership and partition amongst the Plaintiff and the 1st. 2nd and 3rd Defendants the allotment of land marked Lot B depicted on Plan 11 dated 27.09.1955 made by S. Kumaraswamy, Licensed Surveyor described morefully in the Second Schedule to the plaint dated 17/12/1993. The extent of the land is given as A0.R1.P0.

In this action, the Plaintiff is claiming 10 perches, 1st Defendant 16/18 shares less 10 perches and 2nd and 3rd Defendants 1/18 shares each. 2nd and 3rd Defendants are living abroad. Though summons were served through the Foreign Ministry they did not participate in the proceedings. The 5th Defendant was cited as he is alleged to have encroached a portion of the land. He also did not participate in the proceedings. There was no contest between the Plaintiff and the 1st Defendant.

4th Defendant (Appellant) filed his statement of claim seeking to dismiss the action and claimed prescriptive title to the corpus of the case. Further the 4th Defendant contested the genuineness/validity of the deeds that the Plaintiff was relying on to prove his title to the land. At the trial Plaintiff raised issues No. 1- 5 and issues No.6 – 9 were raised by the 4th Defendant. Issues No.10 and 11 were subsequently raised by the 4th Defendant after conclusion of evidence.

The trial commenced on 18/05/1998 and following admissions were recorded

(1) Jurisdiction
(2) Land proposed to be partitioned is referred to in the second schedule of the Plaint.
(3) Paragraph 1 of the Plaint admitted.
(4) There was a case in District Court of Mr. Lavinia Case No.2184/L between the 1st Defendant and the 4th Defendant. The 1st Defendant withdrew the case with liberty to file a fresh case and the case was dismissed.

The Plaintiff raised 5 issues at the trial in the District Court and they are as follows:

Issue No. 1.

Are the parties entitled to the undivided shares of the land as averred in paragraph 14 of the Plaint?

Issue No. 2.

Has the Plaintiff and the 1st to 3rd Defendants acquired prescriptive title to the corpus as stated in para 15 of the plaint?

Issue No. 3

(a) Has the deeds referred in the plaint registered at the land registry

(b)If so can the Plaintiff has a right to claim priority by registration?

Issue No. 4

On what basis the entitlement of parties to the buildings and the plantations referred to in the preliminary plan be determined.?

Issue No. 5

If the Issue Nos. 1 to 4 are answered in the affirmative, is the Plaintiff, entitled to the reliefs prayed for in his plaint to partition the land?

The 1st Defendant did not raise any issue. There is no contest between the Plaintiff and the 1st Defendant. The 4th Defendant raised 4 issues at the commencement of the trial.

Issue No. 6

Has the 4th Defendant prescribed to Lot 1 depicted in the Plan No. 11?

Issue No. 7

Are the Deeds referred in paragraph 6 and 7th of the statement of claim of the 4th Defendant are forged?

Issue No. 8,

Is the dispute between 1st Defendant and 4th Defendant stands as res-judicata.

Issue No. 9

If all or some of the above issues are answered in the affirmative is the 4th Defendant/Appellant entitled to the reliefs prayed for in his statement of claim.

After the conclusion of evidence the 4th Defendant raised additional issues numbered 10 and 11.

Issue No 10

Is the preliminary plan attached to the plaint does not depict the land referred to in the schedule to the plaint?

Issue No. 11

If it is so, could the Plaintiff maintain this action to partition the land referred to in the plaint?

The Plaintiff commenced his case giving evidence to establish his title to the shares claimed by him. He produced several deeds to prove the pedigree and also produced plans and other documents and called witnesses from the land registry and the Municipality. In the

course of his evidence the Plaintiff marked document P1 to P16 subject to proof and the document marked 'P 17' (a police entry made by the 1st Defendant) through a police officer who gave evidence for the Plaintiff, which document the Court allowed to be marked without further proof.

The Plaintiff Respondent states that Suppaih Thambyah was the original owner of the land which is morefully described in the 1st schedule of the plaint which is in extent of one Rood (A0 R1 P0). He became the owner of this land under and by virtue of Deed No. 203 dated 19.03.1953 attested by T. Sri. Ramanadan, Notary Public. (marked as P1).The said Suppaih Thambiah caused this land surveyed and subdivided into two allotments as Lot A and Lot B by Plan No. 11 dated 27/09/1955which is marked as P2 made by S. Kumaraswamy Licensed Surveyor.(Being a subdivision of lot No 217 in Plan No.33 dated 25th December1952 made by S.Ambalavaner licenced surveyor) The said Suppaiah Thambyah died on or about 27/05/1958 and his estate devolved on his wife namely Yvonne Thambyah and 9 children. (including 2nd and the 3rd Defendant/Respondents). Thus Yvonne Thambyah, the wife of deceased Suppaih Thambyah became entitled to undivided 9/18 shares and nine children became entitled to 1/18 shares each. The intestate estate was duly administered in DC Colombo Case No. 24736/T and the said property morefully described in the 1st schedule was devolved among the heirs.

The said Yvonne Fernando as administratrix of the intestate estate by deed No.332 dated 20th September 1970 attested by C.V. Wigneswaran marked P3 transferred 9/18 shares unto herself and 1/18 shares each to the children. The said Yvone Thambyah and seven children other than 2nd and 3rd Defendants transferred their 16/18th share to Hazel Elsie Joachim under and by virtue of Deed No. 2572 dated 10/07/1973 attested by E. Gunarathne Notary Public which is produced marked P4.The said Hazel Elsie Joachim transferred the same to one Manel de Silva by Deed No. 2649 dated 10/12/1973 attested by the same Notary marked P5.The said Manel de Silva transferred the same to the 1st Defendant by Deed No. 51 dated 21/07/1989 marked P6 attested by Tissa Yapa Notary Public. The 1st Defendant under and by virtue of Deed No. 38 dated 05/08/1993 marked P7 transferred undivided 10 perches to the Plaintiff-Respondent. Therefore, according to paragraph 14 of the Plaint the Plaintiff is entitled to undivided 10 perches. The 1st Defendant /Respondent be entitled to 16/18th share less 10 perches, and 2nd and 3rd Defendants/Respondents be entitled to 1/18th share each.

Dudley Rajapakse of the Land Registry produced the extracts of the register marked P8 and P9 to prove that deeds marked P1, P3, P5, P6, and P7 are duly registered at the Land Registry.

It was revealed that deed No. 2572 dated 10/07/1973 marked P4 was registered on 31/12/1979 six years after the execution of the deed. Deed No. 2649 dated 10/07/1973 marked P5 was registered on 20/07/1989 nearly 16 years after the date of execution.

Deed No. 51 marked P6 attested by Tissa Yapa Notary Public under which Manel de Silva transferred the land to the 1st Defendant was dated 21/07/1989, a day after the registration of P5.

P10 is a statement dated 18.5.1990 made to the police by the 1st Defendant against the 4th Defendant complaining that the 4th defendant had forcibly entered the land.P11 is the statement made by the 4th Defendant dated 21-5-1990 stating that one H.S. Perera permitted him to occupy the land.P12 is a statement dated 14.05.1990 made by the 4th Defendant regarding house breaking and theft of jewellery.
P13, P13 A,B,C are extracts produced to prove that the 4th Defendant and his wife's names were included in the Electoral Register under Raja Mawatha Road, Moratuwa which is a different address for the years 1984. 1985 and 1986. P14 and 14A are the extract of the electoral register which shows that in the years 1990 and 1991 the 4th Defendants name was entered under No. 12, 8th Cross Street.(present address.)

The Plaintiff led the evidence of H. Gayani attached to Dehiwela- Mt. Lavinia Municipal Council to prove that the 1st Defendant submitted a Plan to construct a house within the land depicted in Plan No. 11 dated 27.09.1955made by S.Kumaraswamy licensed Surveyor and the plan was approved on 8th November 1989.

Witness Neville Dammika Perera, Clerk attached to Dehiwela-Mt. Lavinia Municipal Council who produced receipts for the payment of rates for the premises bearing assessment Nos. 14A 8th Cross Street, Ratmalana for the years 1989- 1990 marked P15 A and B. Payments were made by T. Manel de Silva and P.D. Ratnapala (1st Defendant) . Rates register was marked as P16 wherein P.D. Ratnapala/T. Manel de Silva' names are entered as claimant.

P17 is a statement date 13.05.1990 made by the 1st defendant to the police for his future reference that unknown persons have constructed a hut in his land and that he intends to demolish it. Plaintiff closed his case reading in evidence P1-P17.

The 4th Defendant filed his statement of claim seeking the dismissal of the action and further has challenged the genuineness of the Deeds referred to in paragraph 9,10,11 in the Plaint, and in his evidence stated that he has prescribed to the Lot B morefully described in the 2nd schedule of the plaint.

The Learned District Judge delivered judgment on 20/12/2001 in favour of the Plaintiff- and made order to partition the land as prayed for by the Plaintiff. Accordingly the Plaintiff is entitled to 10 perches of the land shown in the 2nd Schedule to the plaint and the 1st Defendant is entitled to 16/18th less 10 perches and the 2nd and 3rd Defendants are entitled to 1/18th share each.

The 4th Defendant being aggrieved by the said order made an appeal to the Court of Appeal and the said appeal was subsequently transferred to the High Court (Civil Appellate) held in Mount Lavinia and the learned judges of the High Court on 07/03/2011 dismissed the appeal.

The honorable High Court Judges held that the corpus to be partitioned has been properly identified given that the Plaintiff has clearly described the corpus as lot B in Plan No.11 dated 27/09/1955 where boundaries are clearly divided and defined. This Plan is notably more than 30 years old at the time of the action.

Further the Appellant in his statement of claim has not referred to any other plan to describe the land he claimed prescription and has only relied on the aforementioned plan.

The honorable High Court Judges have also noted that in the preliminary plan marked 'X' the Court Commissioner has surveyed the land described in the 2nd Schedule and that during the course of the trial, the Appellant has also admitted the fact that the land to be partitioned is the land described in the 2nd schedule to the plaint.

Being aggrieved by the judgment of the High Court (Civil Appellate), the 4th Defendant Appellant filed a Special Leave to Appeal Application and obtained leave from this court on the following questions of law:

a) Did the District Court and the High Court err in law in holding that, the corpus has been identified?

b) Are the inferences drawn on a consideration of inadmissible evidence and after excluding admissible evidence and relevant evidence?
c) Are the inferences drawn by the High Court and the District Court supported by legal evidence?
d) Are the conclusions drawn from relevant facts rationally possible and or perverse?
e) In any event was the question of the prescriptive rights of the 4th Defendant considered in the correct perspective?
f) Are the two judgments in the High Court and the District Court made according to law?
g) Did the High Court err in law in stating that, the non-answering of issues 10 and 11 did not cause material prejudice to the 4th Defendant?

4th Defendant- Appellant-Appellant was permitted to raise the following additional issue:

"Did the High Court erroneously place the burden of proof to prove the deeds on the Defendant?"

When considering the issues raised at the trial and the questions of law raised in the appeal this Court has to consider the following matters:

1. Whether land proposed to be partitioned is properly identified or not?
2. Whether the 4th Defendant had prescribed to the land or not ?
3. Whether the failure of the trial judge to answer issue No. 10 or 11 is a serious omission that affects the validity of the Judgement?.
4. Are the inferences drawn on a consideration of inadmissible evidence and not supported by legal evidence ? Did the trial Judge properly examine the title?

Whether land proposed to be partitioned is properly identified or not?

According to the Second Schedule of the deed marked P1 refers to Lot No. 217 of Plan No. 33 dated 25th December 1952 made by S. Ambalavaner Licensed Surveyor. The original owner Suppaiah Thambyah caused this lot 217 subdivided into Lot A and Lot B by Plan No. 11 dated 25th September 1955 made by S. Kumaraswamy , Licensed Surveyor. Each block consists perches 20.20. After the demise of Suppaiah Thambyah his wife Yvonne Thambayah by administratrix conveyance transferred land to herself and her children as

heirs of Suppaiah Thambayah. The schedules to subsequent Deeds marked as P3-P7 refers to the same plan No. 11 dated 27-9-1955 made by Kumaraswamy .

When the surveyor visited the land to prepare the preliminary plan, the Plaintiff, 1st and the 4th Defendant showed the boundaries of the land. The Surveyor made use of Plan No.11 dated 25th September 1955 to prepare the preliminary plan. He superimposed his plan marked X on plan No.11 dated 25th September1995 and found that the boundaries tallied. The difference in the extend is P 00.20 which is negligible. Due to encroachment over the years there is a possibility of extend being reduced. (The 5th Defendant was included as a Defendant as it was alleged that he had encroached a portion of the land). The surveyor was satisfied that the land he surveyed is the land referred to in plan No.11 dated 27th September 1955 (P 2).

The trial judge had carefully considered this matter and came to a finding that the corpus is the land which was referred to in plan No.11 dated 25th September 1955 and the land was properly identified. I am of the view that the land is properly identified.

Whether the 4th Defendant had prescribed to the land ?

It is the position of the 4th Defendant that he entered this land prior to 1980 at the request of his brother and since then he was in occupation of this land.

The 4th Defendant got his name registered under a different address in the years 1985-1987. Plaintiff produced extracts of the electoral register marked P13, P13 A,B,C, to prove that the 4th Defendant and his wife's names were included in the electoral register under Raja Mawatha Road, Moratuwa which is a different address for the years 1985,1986 and 1987. 4th Defendant stated that he did so to get his children admitted to a school in Moratuwa. P14 and 14A are the extracts of the electoral register which shows that only in the years 1990 and 1991 the 4th Defendants name was entered under No. 12, 8th Cross Street.(present address.)

The 1st Defendant in his statement to the police dated 18.5.1990 marked P10 made a complaint against the 4th defendant that he had forcibly entered the land. The 4th Defendant in his statement dated 21-5-1990 which is marked as P11stated that one H.S. Perera permitted him to occupy the land. He stated that he made this statement under duress. In his

evidence 4th defendant stated that his brother who was in occupation of this land requested him to occupy this land. Further he has not paid taxes in relation to this land. He applied for electricity only in 1991.Therfore it is established that he entered the land in 1990 as alleged by the Plaintiff. 4th Defendant failed to establish that he had independent and adverse possession of the land for more than ten years. The trial judge had correctly rejected his claim that he had prescribed to the land proposed to be partition.

Whether the failure of the trial judge to answer issue No. 10 or 11 is a serious omission that affects validity of the Judgement?.

Issue No 10

Is the preliminary plan attached to the plaint does not depict the land referred to in the schedule to the plaint?

Issue No. 11

If it is so could the Plaintiff maintain this action to partition the land referred to in the plaint?

These issues 10 and 11 were raised after the conclusion of the evidence.. The learned judge considered in his judgement whether the land was properly identified or not and came to a finding that the land was properly identified. . Further the 4th Defendant in the admissions admitted the corpus. The trial judge had accepted the evidence given by the surveyor. Though trial judge did not answer this issue specifically he had considered this issue As these issues were properly considered the failure to specifically answer issues No. 11 and 12 did not cause any prejudice to the 4th Defendant

Are the inferences drawn on a consideration of inadmissible evidence and not supported by legal evidence. Did the trial judge properly examine the title?

In a partition case a duty is cast on the trial judge to properly examine the title. Question that arises is whether he discharged his duty. The trial judge is required to act on admissible evidence when deciding whether the title is proved or not. Therefore it is necessary to consider sections 25, 68 of the Partition Act and section 68 of the Evidence Ordinance.

Section 25 of the Partition Act states thus:.

'On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made'.

When acting under this section trial judge should act on legally admissible evidence. The main issue is whether the trial judge had acted on legally admissible evidence to establish the title to the land and thereby ordering the partition of the Land.

It was decided in series of cases that Section 25 of the Partition Law imposes on the Court the necessity and the obligation to examine the title of each party and shall hear and receive evidence in support of the claim.

In the case of *Peiris vs Perera* 1NLR 246, the Supreme Court held that:

"the Court should not regard a partition suit as one to be decided merely on issues raised by and between the parties and it ought not to make a decree, unless it is perfectly satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned. After the court is satisfied that the Plaintiff has made out his title to the share claimed by him.

In the case of *Mather Vs Thamotharam Pillai* 6 NLR 246 it was held that

"a partition suit is not a mere proceeding inter-parties, to be settled of consent, or by the opinion of the Court upon such points as they chose to submit to it in the shape of issues. It is a matter in which Court must satisfy itself that the Plaintiff has made out his title, and unless he makes out his title his suit for partition must be dismissed."

"In partition proceedings the paramount duty is cast by the Ordinance upon the District Judge himself to ascertain who are the actual owners of the land. As collusion between the parties always possible, and as they get their title from the decree of the Court, which is made good and conclusive as against the world, no loopholes should be allowed for avoiding the performance of the duty so cast upon the Judge".

Layard CJ stated the principle in the following terms :-

"Now 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 not only to decide the matters in which the parties are in dispute but to safeguard the interest of others who are not parties to the suit, who will be bound by a decree for partition".

Layard CJ stressed the importance of the duty cast on the Court to satisfy itself "that the Plaintiff has made out a title to the land sought to be partitioned and that the parties before the court are those solely entitled to such land"

In the case of "*Gnanapandithen and Another Vs. Balanayagam and Another* 1998 (1) SLR 391, G.P.S.Silva CJ cited with approval the case of *Mather Vs Thamotharam Pillai* (supra)decide as far back as 1903.G.P.S. De Silva CJ observed that "it seems to me that this is not a case where the investigation of title by the trial judge was merely inadequate. In my opinion there was total want of investigation of title. The circumstances were strongly indicative of a collusive action in the result there was a miscarriage of justice……..".

The next issue is whether the Plaintiff proved the deeds in accordance with the provisions of section 68 of the Partition Act and section 68 of the Evidence Ordinance.

> Section 68 of Evidence Ordinance reads thus:
> "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution , if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence".

Section 68 of the Partition Act reads thus:

'It shall not be necessary in any proceedings under this law to adduce formal proof of 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'

It is relevant at this stage to refer to two cases which deals with the identical issue.

In *Muthumenika et al Vs Appuhamy* (1948.50.N.L.R 162) Dias J, at p.165 stated:-

"It is next contended that there was no proper investigation of title in the partition action, and that consequently the final decree is not conclusive. Assuming that the deeds produced in that action have not been proved by calling the notary and one attesting witness as required by the Evidence Ordinance, the onus was still on the appellants to show that the oral evidence adduced did not establish title. For example the claimants in a partition action may have no deeds or documents. Their title may be based exclusively on prescriptive possession and inheritance. It cannot be assumed in the absence of proof that the evidence led was defective. It was for the appellants to produce certified copies of the evidence led in the partition case to show that there was no proper investigation of title. In the absence of such evidence it cannot be said that they have succeeded in rebutting the presumption of regularity attaching to judicial acts.

In *Perera V Elisahamy* 65 C.L.W. 59 which is a Partition action where deeds adduced in proof of title were impeached as being a forgery. Basnayake C.J. held that:

"As both attesting witnesses are dead in the instant case, there should be evidence that the attestation of, at least, one attesting witness is in his handwriting and that the signature of the person executing the document is in her handwriting. Marcus Perera has not stated nor does his evidence prove that the attestation of one attesting witness to the deed P3 is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. As its genuineness was impeached by the Appellant the document P3 should not have been used as evidence in the case without formal proof. Section 68 of the Partition Act is of no avail in the instant case as that section does not apply to cases in which the genuineness of a deed is impeached or the Court requires its proof. Although no objection was taken to the document at the time when its contents were first spoken to by the witness, the fact that its genuineness was impeached rendered formal proof necessary regardless of whether objection was taken or not. A Court cannot act on facts which are not proved in the manner prescribed in the Evidence Ordinance."

In the case before us, the 4th Defendant alleged that the deeds marked and produced as P1, P3 –P7 are forgeries. In the statement of claim, the 4th Defendant had taken up the same position P1 is a deed attested in 1953 which is more than 30 years old. All the other deeds are less than 30 years. The Plaintiff produced copies of the deeds and also led evidence of the officials of the Land Registry to establish that deeds were registered. However, the Plaintiff failed to prove that those deeds are duly executed. When objections are taken as to the genuineness of the deeds, the plaintiff should have taken steps to prove that it is duly executed. As these deeds are not proved in accordance with the provisions of the Evidence Ordinance these documents will be inadmissible and irrelevant.

The Plaintiff is seeking to establish his title to the land based on deeds. If these deeds are excluded, the Plaintiff cannot establish his title and his action will necessarily fail. In view of the allegations made by the 4th Defendant it will be necessary to examine the sequence of events. Under and by virtue of Deed No 2649 marked P5, Manel de Silva became the owner Though the said deed was executed on 10/12/73 was registered in the Land Registry on 20/07/1989, 16 years later. The 1st Defendant purchased this land from Manel de Silva very next day by deed no 51 dated 21/07/1989 which is marked as P6. There is no evidence to establish that Manel de Silva was in possession of the land.

The 1st Defendant on 18/05/1990 made a complaint against the 4th Defendant for illegally entering his land. The 4th Defendant denied the allegations and stated that the matter has to be decided by a court of law. Thereafter 1st Defendant made a statement dated 13.05.1990

for his future reference to the police that unknown persons have constructed a hut in his land and that he intents to demolish it.

Failing in his attempt to obtain possession, the 1st Defendant filed an action in District Court of Mt. Lavinia for declaration of title and also to evict the 4th Defendant. However, he withdrew this action stating that as there are other owners an action will be filed by including the other owners. It is to be observed that a co-owner can institute action against a trespasser without including other co-owners as a co-owner has an interest in the whole undivided land. By deed No. 38 dated 05/08/ 1993 marked P7 1st Defendant sold 10 perches of undivided land to the Plaintiff who happens to be his brother-in-law. Thereafter brother-in-law instituted this partition action on 17-12-1993. In the partition action there was no contest between the Plaintiff and the 1st Defendant. 2nd and 3rd Defendants were living abroad and they did not participate in this action. The conduct of the 1st Defendant appears to be suspicious. This Court has to consider whether this action is a collusive action or not. The first defendant after obtaining the paper title resorted to various methods to obtain the possession of the land. Having failed in his endeavors sold 10 perches of the undivided property to his brother in law (Plaintiff) who filed this partition action.

There is no evidence to establish that the Plaintiff or predecessors in title, the 1st defendant and Manel de Silva were in possession of the land. Therefore the issue raised by the Plaintiff that the Plaintiff and the other co-owners prescribed to the land should be answered in the negative.

It should be observed that the 1st Defendant and Manel de Silva ,predecessor in title who could have explained the material facts did not give evidence.

Hence following observations could be drawn from the evidence of this case. The Plaintiff was remis in not calling attesting witness to prove the deeds when it was specifically challenged by the 4th Defendant. Plaintiff's as well as 1st Defendant's title depend on the proof of the deeds. Therefore an adverse inference could be drawn under section 114 of the Evidence Ordinance which states ' The evidence which could be and is not produced would if produced, be unfavourable to the person who withhold it;

In a partition case the burden is on the plaintiff to establish title to obtain a decree for partition. The trial judge is required to properly examine the title as this is an action in rem. Partition action is different from an action to set aside a deed on grounds such as duress,

fraud etc. In such a case burden of proof lies in the person who allege fraud or duress. In this case the 4th defendant impeached the genuineness of the deeds. Therefore section 68 of the Partition Act is irrelevant and Court has to act under section 68 of the Evidence Ordinance. It has to consider the admissibility and credibility of the evidence.

If the execution of the deeds are not proved it has to be disregarded. The learned trial judge as well as the learned High Court judges did not address their minds to this important issue.

I am of the view that the Plaintiff failed to prove the deeds marked P1, P2-P7 to establish title to the land. Therefore, he is not entitled to an order to partition this land.

Therefore, I set aside the judgment of the District Judge to partition the land and also the judgement of the High Court which affirmed the judgement of the District Court. Accordingly partition action filed in the District Court stand dismissed.

The Appeal allowed. No costs.

Chief Justice

B.P. Aluwihare, PC. J,

I agree.

Judge of the Supreme Court

L.T.B. Dehideniya.

I agree.

Judge of the Supreme Court