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

SC Appeal No. 89/2014
SC Special L.A. No 56/2013
CA. Appeal No. 1196/A B/1996 (F)
D.C. Horana No. 2779/P

Watte Waduge Nalani Ranaweera,
6/13, Old Quarry Road,
Mt.Lavinia.

Plaintiff
Vs.

1. Govinda Waduge Mendis,
Udugammana, Anguruwatota.

2. Gonvida Waduge Darlin Nona,
Udugammana, Anguruwatota.

3. Govinda Waduge Arlin Nona,
Udugammana, Anguruwatota.

4. Loku Acharige Chandrasiri,
Udugammana, Anguruwatota.

5. Loku Acharige Wimalasiri,
Udugammana, Anguruwatota.

6. Govinda Waduge Jayasiri,
Udugammana, Anguruwatota.

7. Kalupahana Maithrige Maginona Wickrematilaka,
Near Hotel Kalido, Kalutara North.

8. Rannulu Gilman Seneviratne,
Near the Police Station,
Anguruwatota (deceased)

8A. Rannulu Timesu Kanweera Seneviratne,
Maha Yala, Anguruwatota.

9. Kevitiyagala Liyanabadalge Martin Silva,
Udugammana, Anguruwatota. (deceased)

9A. P.W. Darlin Nona,
Udugammana, Anguruwatota.

10. Arumasinghe Punyawathie de Silva,
Ethagama, Kalutara.

11. Arumasinghe Kulawathie de Silva,
Pepiliyana Road, Nedimala.

12. K.D. Mahendra Lalith Perera,
13/6, Old Quarry Road,
Mt. Lavinia.

13. Kevitiyagala Liyanabadalge Kusumsiri,
Udugammana, Anguruwatota.

14. Bellana Mesthrige Siriwardena,
Udugammana, Anguruwatota.

15. Puwakdandage Loku Acharige Jayasena,
Udugammana, Anguruwatota.

Defendants

And

Watte Waduge Nalani Ranaweera,
6/13, Old Quarry Road,
Mt. Lavinia.

Plaintiff-Appellant

Vs

1. Govinda Waduge Mendis,
Udugammana, Anguruwatota.

2. Govinda Waduge Darlin Nona,
Udugammana, Anguruwatota.

3. Govinda Waduge Arlin Nona,
Udugammana, Anguruwatota.

4. Loku Acharige Chandrasiri,
Udugammana, Anguruwatota.

5. Loku Acharige Wimalasiri,
Udugammana, Anguruwatota.

6. Govinda Waduge Jayasiri,
Udugammana, Anguruwatota.

7. Kalupahana Maithrige Maginona Wickrematilaka,
Near Hotel Kalido, Kalutara North.

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Near the Police Station,
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13. Kevitiyagala Liyanabadalge Kusumsiri,
Udugammana, Anguruwatota.

14. Bellana Mesthrige Siriwardena,
Udugammana, Anguruwatota.

15. Puwakdandage Loku Acharige Jayasena,
Udugammana, Anguruwatota.

Defendants- Respondents

AND NOW BETWEEN

Watte Waduge Nalani Ranaweera,
Presently of Udugammana,
Anguruwatota.

Plaintiff-Appellant-Petitioner/Appellant

Vs.

Ranulu Timesu Kanweera Seneviratne,
Maha Yala, Anguruwatota.

8A Defendant-Respondent-Respondent

Before: **B.P. Aluwihare PC. J.,**
M.N.B. Fernando PC. J. and
Yasantha Kodagoda PC. J.

Counsel: Dr. Jayatissa de Costa PC with Chanakya Ekanayake for the Plaintiff-Appellant-Appellant
R.C. Gooneratne for the 8A Defendant-Respondent-Respondent

Argued on: 07-02-2023

Decided on: 03-10-2023

Murdu N.B. Fernando, PC. J.,

The Plaintiff-Appellant-Appellant ("the plaintiff") preferred this appeal against the judgement of the Court of Appeal dated 28th January, 2013 and obtained leave from this Court on four questions of law.

This appeal stems from an action instituted by the plaintiff in the District Court of Horana in terms of the Partition Act No 21 of 1977 as amended.

The plaintiff in her plaint to the District Court, named eight defendants. Whilst the trial was proceeding seven others were added on as defendants totaling fifteen defendants. On 27th August, 1996 the learned District Judge delivered Judgement and allotted shares to the plaintiff and some of the defendants and further granted relief by way of entitlement to the cultivation for the plaintiff and certain defendants as morefully stated in the judgement.

Being aggrieved by the District Court judgement, the plaintiff and the 13th defendant preferred appeals to the Court of Appeal.

The Court of Appeal upheld the judgment of the District Court and dismissed the appeal of the plaintiff and a variation of allotment of shares were made regarding the appeal of the 13th defendant.

Being aggrieved by the aforesaid judgement of the Court of Appeal, the plaintiff came before this Court, naming only the 8A defendant-respondent-respondent ("the 8A defendant") as a party to this appeal.

Its observed that the 8A defendant was substituted in the room and place of the deceased 8th defendant whilst the trial was pending. In the plaint filed in 1985 the plaintiff categorically avers that the 8th defendant is only made a party to the partition action, as he has been disputing the possession of the plaintiff and has no entitlement to the land to be partitioned, namely 'Pathagewatta' alias 'Nikaketiyawatta', in extent approximately four acres, as more fully referred to in the schedule to the plaint.

Contrary to the said assertion of the plaintiff, the 8A defendant in his statement of claim took up the position that the 8th defendant is entitled to 4/35 shares of the land in issue, having purchased a portion of the said land at a fiscal sale in the year 1937 and obtained the fiscal conveyance in 1958 and has been in possession of the said land, in extent of approximately one acre (lot 2 of the preliminary plan) independent and undisturbed for a period in excess of 10 years against the plaintiff and others and also claimed prescriptive title to the said extent of land.

It is observed that by the plaint, the plaintiff in addition to partitioning of the land [prayer (a)], moved for injunctive relief against the 8th defendant [prayer (b)], preventing him from felling down trees and removing trees already cut down in the land in dispute and also an interim

injunction and an enjoining order. Thus, the plaintiff's main grievance is against the 8th defendant, though the plaintiff failed to disclose in the plaint, that a portion of the land (lot 2) was mortgaged to a 3rd party and subsequently sold by way of a fiscal sale to the 8th defendant. Nevertheless, the plaintiff in her evidence-in-chief admitted such fact.

Upon reading of the judgement of the learned District Judge, it is apparent, that the learned judge has considered the evidence led at the trial, examined the title in detail and made order allotting shares to the plaintiff, the 8th defendant and some of the other defendants.

Regarding the bone of contention between the plaintiff and the 8th defendant, the learned judge at the commencement of the judgement itself, had considered the events that led to the fiscal sale *i.e.*, one of the co-owners, Dinoris had mortgaged the property in issue (lot 2 of the preliminary plan) and on his failure to redeem the mortgage, the mortgagor instituted an action in the District Court of Kalutara, consequent to which the said allotment was sold by fiscal sale.

Thus, the District Court has come to the finding that the plaintiff who claims intestate title from Dinoris is not entitled to any right or title to such allotment of land, subsequent to the fiscal conveyance and exiting from the property *vis-â-vis* the 8th defendant, the purchaser of the allotment of land at the fiscal sale in 1937 and the subsequent fiscal conveyance executed in 1958.

It was also the finding of the District Court, *firstly*, that the plaintiff is entitled to the cultivation on the said allotment together with the other co-owners for the trees that are older than 35 years (standing on the land as well as the trees felled and disposed of and the money deposited in court) and *secondly*, the plaintiff has purchased the rights of other co-owners subsequent to a preliminary survey of the land in 1992 and has made improvements by way of an unauthorized construction (whilst the trial was pending and defying the order of court) and thus the plaintiff is not entitled to claim compensation for the two buildings standing on the disputed land. Nevertheless, the court directed, when partitioning the land to endeavor to allot land where the said buildings stand to the plaintiff.

Further, it was the finding of the District Court, that the plaintiffs entitlement to allocation of shares is based upon subsequent purchase of allotment of shares of the disputed land, i.e., after 1992, but not on intestate succession of her ancestor Dinoris, who lost his right and title to the disputed land, consequent to the fiscal sale.

In determining the relevant date for the change of status between the plaintiff and the 8th defendant, and the payment of compensation for the cultivation, the learned Judge correctly considered the date of execution of the fiscal conveyance *i.e.*, December 1958 and not the date of the fiscal sale in July 1937. It is observed that there had been a delay of approximately 21 years to obtain the fiscal conveyance, consequent to the fiscal sale and the learned judge has correctly added the said period to the entitlement of the plaintiff for the cultivation, by determining the age of trees to be older than 35 years.

The plaintiff appealed to the Court of Appeal against the judgement of the District Court on two grounds, namely, allocation of shares to the 8th defendant based upon the fiscal conveyance and entitlement to the cultivation for the trees which were younger than 35 years. The Court of Appeal dismissed the said appeal and upheld the findings of the District Court, subject to a minor varion in allotment of shares to the 13th defendant, based upon the 13th defendant's appeal to the Court of Appeal.

The plaintiff came before this Court against the judgement of the Court of Appeal and obtained leave on the following questions of law:-

a) that the Court of Appeal failed to make a determination in respect of the prescriptive title of Dinorishamy, which was claimed by the appellant and thereby misdirected in law;
b) that the Court of Appeal erred in law by affirming the judgement of the District Judge who held "that Dinorishamy had not acquired a valid prescriptive title to the undivided share that was the subject of mortgage", when the learned District Judge had failed to consider the oral evidence led at the trial, and specially the documentary evidence placed before court which affirmatively established that Dinorishamy had prescribed to the land;
c) that the Court of Appeal failed to consider the failure of the learned District Judge to determine that the transferee had no preferential rights over the judgement debtor who possessed the land until his death and thereafter his children when during the period July 1937 (mortgage sale) to 1965 the land had been possessed by Dinorishamy and his children and prescribed to 4/35 shares of the land; and

d) that the Court of Appeal failed to consider the failure of the District Court to hold that mandated provisions regarding delivery of possession in a hypothecary action had not been complied by the fiscal of court, thereby a distinct portion of the land was not given to the 8th defendant-respondent.

From the foregoing questions of law it is apparent, that the plaintiff/appellant's main contention is that the appellant's entitlement to the disputed land (lot 2) is based upon prescription against the 8th defendant/respondent, notwithstanding the fiscal conveyance, and in any event the delivery of possession of the land in dispute to the 8th defendant by the fiscal is not in compliance with the law governing hypothecary action.

Nevertheless, when this appeal was taken up for hearing before this Bench, the appellant's principle and only contention was that the judgement of the District Court was *per se* bad in law, as the learned District Judge failed to answer the issues raised before the District Court. The learned President's Counsel relied upon the judgements of Shirani Bandaranayake, J. (as she then was) and Marsoof, J. in the case of **Sopinona V. Pitipanaarachchi and two others** reported in **2010(1) Sri LR 87** to substantiate its argument.

In response the contention of the learned Counsel for the Respondent was, if in the judgement, the learned District Judge has explained his determination in detail then answering of the issues in the affirmative or negative is immaterial since the purpose of an issue is to come to a finding regarding the matter in issue or the point of contest.

Thus, I wish to consider the afore said submission raised before this Court, in the first instance. Namely, **the failure of the learned judge to answer the issues raised before the District Court in its judgement.**

Let me begin by examining the proceedings before the District Court.

The trial began on 03-03-1993 by calling the plaintiff to give evidence [vide-pages 155 to 167 of the brief] It is seen that no admissions were marked nor issues raised prior to the leading of evidence of the plaintiff. The title deeds, P1 to P14, 1D 1 to 1D 8, 13D 1, 2D 1 to 2D 4 and 8D 1 to 8D 6 were all led through the plaintiff to establish the title of all parties, to the land to be partitioned. Thus, there was no contest as far as the title was concerned, between the plaintiff and the 8th defendant. The plaintiff by specifically admitting the fiscal conveyance in her

evidence- in-chief (though not referred to in the plaint), accepted that the 8th defendant obtained title to the land in issue, *i.e.*, lot 2, in 1958.

The 2nd date of trial was 13-05-1993 [vide-pages 169 to 178 of the brief] on which date the plaintiff's evidence-in-chief was continued. Midway through leading of evidence, it is seen that the Counsels for the plaintiff and the 8th defendant moved court to raise issues or points of contest in relation to the cultivation and the improvements (*i.e.*, the construction of the two buildings) made to the disputed land and the court permitted raising of such issues at that juncture.

Whilst the plaintiff by way of three issues, claimed exclusive right to the cultivation and the improvements, *i.e.*, the trees and buildings standing on lot 2, the 8A defendant's five points of contest were that the 1st defendant, 8A defendant and heirs of another co-owner were entitled to the cultivation on the disputed land in equal shares; the two buildings on lot 2 should be demolished without payment of compensation; the 8th defendant is entitled to the money deposited in court in respect of the sale of felled trees; and the 8th defendant is entitled to the entire cultivation on lot 2 consequent to the fiscal sale.

Upon reading of the judgement of the District Court, it is apparent that the issues raised by the plaintiff and the 8A defendant have not been answered individually *i.e.*, one by one, by stating 'yes' or 'no' or 'does not arise' by the learned District Judge.

Nevertheless, the learned District Judge has considered in detail, the said points of contest in relation to the cultivation and the improvements *i.e.*, trees and buildings, and categorically held, *firstly*, that the buildings are unauthorized constructions put up defying a court order and therefore the plaintiff is not entitled to the said buildings and *secondly*, that the plaintiff is entitled only to the cultivation, namely the trees standing on the land and trees felled (and disposed off and money deposited in court) in so far as the trees are older than 35 years.

The learned judge has come to the finding on the age of the trees, having reckoned that the plaintiff was entitled to possess the land until 1958, at which point the fiscal conveyance was executed. Thus, the learned judge has not given credence to the year in which the fiscal sale took place but correctly considered the date of the execution of the fiscal conveyance and determined the age of the trees.

If I may digress at this juncture, the questions of law raised before this Court (which will be considered later in this judgement) revolves around the plaintiff and her ancestors rights and title to the disputed land upon prescription, *vis-â-vis* the rights and title of the 8th defendant based upon a fiscal sale. There is no contest between the parties relating to the final allotment of shares between the plaintiff and the 8th defendant.

Coming back to the one and only point of contest put forward at the hearing, *viz.*, the learned judge's failure to answer the issues raised individually, in the affirmative or in the negative, I now wish to consider the legal provisions relating to same.

Firstly, the provisions of the Civil Procedure Code.

Section 187 of the Civil Procedure Code reads thus:-

"187. The judgement shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision …."

In my view, the judgement of the District Court is in conformity with the above provision. The criteria and ingredients referred to therein are complied with. The judgement contains a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. The eight issues raised during the plaintiff's evidence-in-chief regarding the plaintiff's entitlement to cultivation and the improvements (consequent to the plaintiff's admission of the title) in my view, are the points for determination which have been examined and answered in detail in the body of the judgement. Moreover, it is apparent that the finding of the learned judge is substantiated with reasons.

Secondly, it is a matter of interest, that the main contention relied upon by the appellant before us *i.e.*, failure to answer issues, was neither taken up in the Court of Appeal nor challenged or referred to in the petition of appeal filed in the Court of Appeal or in this Court and appears to be an after thought.

The learned President's Counsel for the appellant, in formulating the primary contention pertaining to the learned District Judge's failure to answer issues, relied upon the pronouncements of this court in **Sopinona's case** referred to earlier. Thus, I wish to consider the said case now.

Sopinona's case was a partition action where the District Judge answered only the 1st issue raised by the plaintiff based on the pedigree tendered in her favour and refrained from answering any of the other 13 issues raised by the defendants upon the basis that they 'do not arise'. The defendants therein, being aggrieved by the said judgement appealed to the Court of Appeal. The appellate court set aside the said judgement and sent the case back for re-trial. Against the said Order, the plaintiff therein, appealed to this court and obtained special leave on three questions of law. The said questions of law are reproduced *in verbatim* below, as it would enable us to understand **Sopinona's** judgement in its correct perspective.

i) *Whether in law, there was **sufficient investigation of title of the parties** by the original court;*

ii) *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 prescription;** and*

iii) *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.* (emphasis added)

Thus, it is apparent the matter in issue or the points of contest as referred to in the said **Sopinona's case**, was in respect of the 'rights and title to the land' sought to be partitioned.

In the said background, Bandaranayake J., at page 97 determined as follows:-

> *"Accordingly, in a partition action, it would be **the primary duty of the trial judge to carefully examine and investigate the actual rights and titles to the land**, sought to be partitioned. In that process it would be **essential for the trial judge to consider the evidence led on points of contest and answer all of them**, stating as to why they are accepted or rejected"*
>
> *"..... it would be necessary for the District Court to take up this matter de novo to carefully **examine the devolution of title on the** basis of oral and documentary evidence on the allocation of shares and take steps to answer all*

the points of contest raised as issues, as otherwise there could be a miscarriage of justice." (emphasis added)

Marsoof J., too, in a separate judgement in the very same case, regarding, the 'duty to answer all issues' opined,

> *"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 issues*** *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****."* (page 125) (emphasis added)

The learned Counsel for the appellant also drew our attention to the judgement of **Juliana Hamine v. Don Thomas 59 NLR 121** to justify the importance of answering issues in a partition case by quoting the observations of L.W. de Silva J., in the following manner:-

> *"While it is indeed essential for parties to a partition action to state to the court the points of contest inter se and to obtain a determination on them, the obligation of the courts are not discharged unless the provisions of section 25 of the Act are complied with quite independently of what parties may or may not do"*

Whilst appreciating the aforesaid judicial dicta in respect of a partition action, which recognise the bounden duty of an original court judge to answer the issues raised before court and to investigate title in accordance with the provisions of section 25 of the Partition Act, I am of the view, that the facts of the instant case can be distinguished from the facts in the **Sopinona's case** and **Juliana Hamine's case** referred to above.

In the case in issue, the appellant has no qualms about the learned judge's determination relating to examining and investigation of the rights and title to the land and/or the allocation of shares between the parties and specifically between the plaintiff and the 8A defendant. The appellant's only grievance is regarding her entitlement to the cultivation and the learned judge's failure to give credit for the period 1958 onwards, *i.e.*, the appellant should have been given an exclusive entitlement or a preferential right to the cultivation, the trees which are even younger than 35 years standing on lot 2, as the appellant had prescribed to the property at a earlier point

of time vis-â-vis the 8th defendant, whose claim to the cultivation is based only on the 1958 fiscal conveyance.

In the instant case the devolution of rights and title is not the point of contest. The allocation of shares is also not the point of contest. The point of contest is only in respect of the cultivation and the improvements.

Therefore, in my view the judicial dicta relied upon by the appellant, which pronouncements opine, that the primary duty of the trial judge is to carefully examine and investigate the 'actual right and title to the land' sought to be partitioned and in the process, to consider the 'evidence led on points of contest' and answer them stating as to why they are accepted or rejected, is distinct to the matter in issue in the instant case. Thus, the said dicta cannot be applied in toto to this appeal and the said judicial dicta has to be considered in relation to the facts of the said cases.

In the appeal under consideration, no issues or points of contest were raised with regard to rights or title to the land to be partitioned nor devolution of rights on the plaintiff and the 8th defendant. Hence, it is apparent that the dicta in **Sopinona's case** and **Juliana Hamines case** (supra) cannot be blindly followed in this instance.

In the appeal under consideration, the eight issues or the points of contest were limited to appellant's entitlement to cultivation and to the buildings. In order to examine, whether the learned trial judge evaluated the core issues before the trial court, the issues raised in the District Court *in verbatim* are re-produced below:-

<u>By the plaintiff:</u>

1. මෙම නඩුවට ගොනු කර ඇති X පිඹුරේ පෙනෙන අංක 2 දරණ කට්ටියේ ඇති වගාව පැමිණිලිකාරියට අයිතිද?
2. එකී කට්ටියේ ඇති අංක 14 සහ 15 දරණ ගොඩනැගිලි පැමිණිලිකාරියට හිමි ද?
3. මෙම නඩුවේ බැරට පැමිණිලිකාරිය විසින් නඩුවට අදාල ඉඩමේ ගස් විකුනා තැන්පත් කර ඇති මුදල් ආපසු ලබා ගැනීමට පැමිණිලිකාරියට අයිතිවාසිකම් ඇද්ද?

   අ. එසේ නැතහොත්, 8 වෙනි විත්තිකරුට අයිතිවාසිකම් ඇද්ද?

By the 8th defendant

4. කට්ටි අංක 2 පිහිටා ඇති සියලු වගාව, X 1 වාර්තාවේ සඳහන් පරිදි, 1/3 ක් 1 වෙනි විත්තිකරුටත්, 1/3 ක් 8 වෙනි විත්තිකරුටත්, 1/3ක් එලිසහාමිගේ උරුමයටත් හිමි විය යුතුද?
5. මෙම ඉඩමේ අංක 14 සහ 15 දරණ ගොඩනැගිලි, මෙම නඩුවේ 1991.07.24 වෙනි දින නියෝගයට පටහැනිව සාදන ලද ඒවාද?
6. එසේ නම්, එකී ගොඩනැගිලි වන්දි රහිතව කඩා ඉවත් කල යුතු බවට නියෝගයක් ලැබිය යුතුද?
7. කට්ටි අංක 2 හි කපා ඇති වගාව සම්බන්දයෙන් අධිකරණයේ තැන්පත් කර ඇති මුදල් 8 වෙනි විත්තිකරුට ලැබිය යුතුද?
8. කෙසේ වෙතත් 8 වෙනි විත්තිකරුට පිස්කල් වෙන්දේසියේ ලබා ගත් අයිතිය උඩ එකී වගාවන් හිමි විය යුතුද?

Upon reading of the District Court judgement, it is pertinent to note that the learned judge had considered the said issues with regard to the cultivation and the improvements, examined the oral and documentary evidence led and had come to a correct finding on the points of contest. The learned District Judge may not have answered each and every issue individually and separately, but in the body of the judgement has given reasons as to why he arrived at the said findings.

Therefore, though it would have been prudent to have answered each and every issue individually, I am of the view, in the instant matter no miscarriage of justice has taken place. The finding of the learned judge is legally sound and is in accordance with the provisions of the law and specifically the law relating to improvements and cultivation.

In the said circumstances, the judgement of the learned District Judge upheld by the Court of Appeal, cannot be challenged merely on the dicta in **Sopinona's case**. In my view **Sopinona's case** has no relevance to the instant appeal and can be distinguished.

Thus, I see no merit in the argument of the learned President's Counsel for the appellant, that based on the judicial pronouncements in **Sopinona's case** alone, this appeal should be allowed. I am of the view that the appellant has failed to convince this Court, that the judgment

of the District Court is *per se* bad in law, only for the reason that the learned judge has failed to answer the issues raised individually.

As stated earlier in this judgement, the above discussed contention *i.e.*, the failure to answer issues, was the only argument put forword by the Appellant, at the hearing of this appeal before this Court to challenge the findings of the District Court. The said judgment was upheld by the Court of Appeal and the plaintiff's appeal was dismissed.

Therefore, I am of the view that the appellant has failed to establish that the judgment of the Court of Appeal should be set aside based upon the aforesaid contention. Hence, this appeal should stand dismissed on the said ground alone.

Nevertheless, in the interest of justice, I wish to consider the questions of law for which special leave was granted by this Court.

Questions (a) and (b) are in respect of prescriptive title of Dinoris which was claimed by the appellant. The specific question raised is that Dinoris acquired a valid prescriptive title to the undivided share that was subject to a mortgage.

Whilst highlighting that the plaintiff in her plaint, failed to indicate that a portion of the land to be partitioned was mortgaged in the year 1925 which subsequently led to a hypothecation action, a fiscal sale in 1937 and a fiscal conveyance in 1958, it's some what ironic that the appellant has now come before this Court claiming prescriptive title to the undivided share that was subject to a mortgage.

Furthermore, the appellant in the preliminary written submissions filed before this Court, refers to **Section 289** of the Civil Procedure Code and contends *"that although Dinoris did not have title from 1937 to the disputed land, that he and his successors i.e., the appellant, had acquired prescriptive title to lot 2 having possessed the said land for a period of 30 years uninterruptedly from 1937 to 1967 until the appellant left the land"*.

The appellant further contends in the said written submissions that *"the learned district judge has not considered the evidence relating to prescriptive possession of Dinoris and his successors, on the mistaken belief that the fiscal conveyance confers an absolute title to the purchaser, the deceased 8th defendant, completely ignoring that there was no bar to Dinoris*

and his successors to prescribe to lot 2 against the purchaser and other co-owners from 1937 to 1958"

The appellant did not pursue this argument at the hearing before us and possibly abandoned same. However, since the 1st and 2nd questions of law are based upon prescription, the submissions of the appellant in *verbatim* are quoted above, in order to appraise the questions of law raised.

As discussed earlier in this judgement, the plaintiff failed to aver in the plaint, that the land in issue *i.e.,* lot 2, was mortgaged by the plaintiff's predecessor and upon failure to redeem same, a hypothecalry action was filed which resulted in an auction and a fiscal sale and thereafter execution of a fiscal conveyance.

The plaintiff is now claiming prescriptive title for the said time period, when the disputed land was subjected to a mortgage. In my view, the plaintiff is approbating and reprobating.

Section 3 of the Prescription Ordinance unequivocally contemplates an 'overt act' for undisturbed and uninterrupted possession to begin to run. The plaintiff has failed to establish such a fact or lead any evidence in respect of an 'overt act' at the trial court. Without an overt act, a claim on prescription cannot stand.

In my view, the aforestated contention of the appellant referred to in the written submissions, is flawed and is against the rudiments of law. I do not wish to go into an academic exercise to discuss the pros and cons of such argument relating to prescription at this stage. Suffice is to state, that the contention of the appellant relating to the 1st and 2nd questions of law have no merit and therefore has to be answered in the negative.

The 3rd question of law raised before this Court is a consequential question to the 1st and 2nd questions and should also be answered in the negative.

The 4th question of law, pertaining to delivery of possession is a new proposition taken up before this Court. However, no submissions were made before us relating to such contention. Thus, the said question of law too, in my view has no merit and should be answered in the negative.

In the aforesaid circumstances, I answer all four questions of law for which leave was granted by this Court in the negative and dismiss the appeal.

Further, I see no merit whatsoever, in the principal contention of the appellant placed before this Court at the stage of the hearing, namely that the judgement of the District Court is *per se* bad in law.

The failure of the learned District Judge to answer the issues raised before the trial court in my view, does not create a miscarriage of justice when the overall picture of the case in issue is taken into account. The learned District Judge has discharged his duty holistically with regard to the material points of contest, correctly and fairly and in accordance with the law. Thus the said judgement cannot be challenged, whatsoever, on the aforesaid ground alone.

Hence, for reasons more fully adumbrated in this judgment, I uphold the judgement of the Court of Appeal dated 28th January, 2013 and dismiss the appeal of the Plaintiff-Appellant-Appellant with costs fixed at Rs. 25,000.

Appeal is dismissed with costs.

Judge of the Supreme Court

B.P. Aluwihare PC. J.,

I agree

Judge of the Supreme Court

Yasantha Kodagoda PC. J.,

I agree

Judge of the Supreme Court