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

In the matter of an application for Leave to Appeal in terms of Sec:5(c)(1) of the High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006

SC Appeal No. 30/2013

SC/HCCA/LA/380/2012

CP/HCCA/KAN No. 88/2009 [f]

DC Kandy Case No. P/14028

Manthree Aludeniya,
Karalliadde Walawwa,
Teldeniya.

PLAINTIFF

Vs.

1. Pearl Karalliadde, No. 74/2, Jaya Road, Udahamulla, Nugegoda.
2. Saddhatissa Bandara Karalliadde, No. 71, Rajapihilla Mawatha, Kandy.
3. Kawan Tissa Bandara Karalliadde, Madapola, Karalliadde, Teldeniya.
4. Karalliadde Walawwe Anula Karalliadde, Karalliadde, Teldeniya.
5. Swarna Kumarihamy Karalliadde, Karalliadde, Teldeniya.
6. Ekanayake Mudiyanselage Kande Walawwe Jayantha Karalliadde, Karalliadde, Teldeniya.

7. Ekanayake Mudiyanselage Kande Walawwe Ranjith Karalliadde, Karalliadde, Teldeniya.

8. Ekanayake Mudiyanselage Kande Walawwe Sarath Karalliadde, Karalliadde, Teldeniya.

9. Ekanayake Mudiyanselage Kande Walawwe Lalinda Karalliadde, Karalliadde, Teldeniya.

10. Sriyani Kularatne

11. Sarath Kularatne
    Both of Teldeniya, Karalliadde

1st to 11th DEFENDANTS

AND BETWEEN

Ekanayake Mudiyanselage Kande Walawwe Jayantha Karalliadde, Karalliadde, Teldeniya.

6th DEFENDANT APPELLANT

Vs.

Manthree Aludeniya,
Karalliadde Walawwa,
Teldeniya

PLAINTIFF RESPONDENT

1. Pearl Karalliadde, No. 74/2, Jaya Road, Udahamulla, Nugegoda.

2. Saddathissa Bandara Karalliadde, No. 71, Rajapihilla Mawatha, Kandy.

3. Kawan Tissa Bandara Karalliadde, Madapola, Karalliadde, Teldeniya.

4. Karalliadde Walawwe Anula Karalliadde, Karalliadde, Teldeniya.

5. Swarna Kumarihamy Karalliadde, Karalliadde, Teldeniya.

7. Ekanayake Mudiyanselage Kande Walawwe Ranjith Karalliadde, Karalliadde, Teldeniya.

8. Ekanayake Mudiyanselage Kande Walawwe Sarath Karalliadde, Karalliadde, Teldeniya.

9. Ekanayake Mudiyanselage Kande Walawwe Lalinda Karalliadde, Karalliadde, Teldeniya.

10. Sriyani Kularatne

11. Sarath Kularatne
    Both of Teldeniya, Karalliadde

DEFENDANT RESPONDENTS

AND

Manthree Aludeniya,
Karalliadde Walawwa,
Teldeniya

PLAINTIFF RESPONDENT PETITIONER

Vs.

Ekanayake Mudiyanselage Kande Walawwe Jayantha Karalliadde, Karalliadde, Teldeniya.

6th DEFENDANT APPELLANT RESPONDENT

1. Pearl Karalliadde, No. 74/2, Jaya Road, Udahamulla, Nugegoda.

2. Saddathissa Bandara Karalliadde, No. 71, Rajapihilla Mawatha, Kandy.

3. Kawan Tissa Bandara Karalliadde, Madapola, Karalliadde, Teldeniya.

4. Karalliadde Walawwe Anula Karalliadde, Karalliadde, Teldeniya.

5. Swarna Kumarihamy Karalliadde, Karalliadde, Teldeniya.

7. Ekanayake Mudiyanselage Kande Walawwe Ranjith Karalliadde, Karalliadde, Teldeniya.

8. Ekanayake Mudiyanselage Kande Walawwe Sarath Karalliadde, Karalliadde, Teldeniya.

9. Ekanayake Mudiyanselage Kande Walawwe Lalinda Karalliadde, Karalliadde, Teldeniya.

10. Sriyani Kularatne

11. Sarath Kularatne
Both of Teldeniya, Karalliadde

1st to 5th and 7th to 11th DEFENDANT RESPONDENT RESPONDENTS

Before : Hon. B.P. Aluwihare, PC., J.
Hon. S. Thurairaja, PC., J.
Hon. E.A.G.R. Amarasekara, J.

Counsel : Ranjan Suwandaratne, PC with Anil Rajakaruna & Ineka Hendawitharana for the Plaintiff-Respondent-Petitioner-Appellant

Kushan D' Alwis, PC with Milinda Munidasa and Sashendra Mudannayake for the 4th and 5th Defendant-Respondent-Respondent

Sunil Abeyratne with Thashira Gunathilake for the 1st Defendant-Respondent- Respondent.

Samantha Ratwatte, PC with Upendra Walgampaya for the 6th Defendant-Appellant-Respondent

Upendra Walgampaya for the 7th, 8th and 9th Defendant-Respondent-Respondents.

Argued on : 27. 07.2020

Decided on : 03.10.2023

E.A.G.R Amarasekara, J.

The Plaintiff Respondent Appellant (herein after sometimes referred to as Plaintiff) instituted partition action no. P14028 in the District Court of Kandy for the partition of the land shown as Lot 1 in plan no.3356P made by Mr. S.C.K.R. Misso, licensed surveyor. The aforesaid plan was made for the purpose of a previous partition action no. P3908 instituted in the same District Court. It is common ground that even though the said Lot 1 was initially surveyed as part of the

corpus of the said partition case no. P3908, it was later excluded from the corpus that was partitioned in the said case. As per the amended plaint dated 18.01.2002, the Plaintiff and first to fifth Defendant Respondent Respondents (herein after referred to as first to fifth Defendants) were given one sixth each from the corpus sought to be partitioned in the matter at hand. The said first to fifth Defendants had no contest with the Plaintiff. However, the fifth Defendant claimed a right of way over the land sought to be partitioned in the present action, which right of way was depicted from X to Y on the preliminary plan no.2213 made by B.P. Rupasinghe L.S marked X at the trial. Sixth Defendant Appellant Respondent (herein after referred to as Sixth Defendant.) sought a dismissal of the action while claiming title to the entire land sought to be partitioned in the matter at hand.

The learned District Judge after trial decided to partition the corpus of the present partition action as prayed for in the plaint. Being aggrieved by the said decision, Sixth Defendant appealed to the Civil Appellate High Court of Kandy and the learned High Court Judges set aside the judgement of the learned District Judge and dismissed the action of the Plaintiff while refusing to grant a declaration of title in favor of the Sixth Defendant to the corpus. Being aggrieved by the said decision of the Civil Appellate High Court, the Plaintiff filed a leave to appeal application before this court and this court granted leave on the questions of law set out in paragraph 48 (a) (b) (c) and (d) of the petition dated 4.8.2012. The said questions of law will be referred to in the latter part of this judgement.

As per the amended plaint, among other things the Plaintiff has averred;

a. That the name of the land sought to be partitioned is “Kekiriwel lande watta” and “Gamagedara walawwe watta” – vide paragraph 1 of the amended plaint. (It must be observed here that irrespective of the name used to describe the land, as per averments 6 to 11 of the amended plaint, it is clear that the land sought to be partitioned is the land described in the schedule (b) of the plaint as lot 1 of plan no.3356P of Mr. Misso L.S. which is filed of record in the previous partition action no.3908)

b. That the land described in schedule (a) of the amended plaint was the subject matter of the previous partition action no. P3908 and lot 1 of the said plan no.3356P was excluded from the corpus of the said partition action and lots A, B, C of the same plan were given to Jayatilake Banda Karalliadde, Tikiri Banda Karalliadde and Abeyratna Banda Karalliadde respectively by the final decree of the said partition action – vide paragraph 2 to 6 of the amended plaint.

c. That the aforesaid Jayatilake Banda Karalliadde possessed the said lot 1 excluded in that action after the said final decree for 10 years without any interruptions or disturbance and became entitled to said lot 1 by prescription due to his adverse

possession – vide paragraph 7 of the amended plaint. (However, it is not revealed against whose title the said adverse possession took place)

d. That said Jayatilake Banda Karalliadde died and the Plaintiff and the 1st to 5th Defendants inherited the said lot 1 which is the corpus of this action – vide paragraph 8 of the amended plaint.

e. That the Plaintiff and the 1st to 5th Defendants adversely possessed this land without any interruptions or disturbances for more than 10 years. – vide paragraph 9 of the amended plaint. (Here also the plaintiff has not disclosed against whose title they possessed the land adversely.)

f. That the 6th to 9th Defendants without any title or entitlement started various activities and was getting ready to put up a building – vide paragraph 12 of the amended plaint. (Here the Plaintiff's position seems to be that sixth to nineth Defendants do not have any right to the property in issue and are intruders against their title which they have acquired as aforesaid. Thus, it is clear that Plaintiff was not presenting a case to indicate that he and the other purported co-owners had an adverse possession against the true ownership of or paper title of 6th to 9th Defendants but they entered into the property owned by them from the time of their predecessor, their father.)

Even though it is clear that the land sought to be partitioned is Lot 1 of plan no. 3356P made for the previous partition action, in schedule (b) of the amended plaint, the Plaintiff has named it as "Kekiriwel lande watta" and "Gamagedara walawwe watta". The trial at the District Court has commenced on 10.06.2003 and no admission has been recorded to indicate that the land sought to be partitioned bears the name as stated in the schedule (b) to the plaint. In fact, dispute based as to the name of the land has been raised by the point of contest no.14 recorded on the said date. After recording the said point of contest no.14, the learned District Judge has recorded that there is a dispute as to the name of the land – vide page 291 of the brief. As per the stance of the 6th Defendant in his amended statement of claim, the name of the land sought to be partitioned is "Gamawalawwe watte". It must be noted that the land partitioned in the previous partition action no. P3908 bears the same name given in the plaint, namely "Kekiriwel lande watta" and "Gamagedara Walawwe watta" – vide schedule (a) of the amended plaint and the final partition decree found at page 996 of the brief. As per the boundaries given in the schedule (a) to the plaint there is no other land with the same name described as a boundary. Even as per the plan no.3356P made in the said partition case no. P3908 the corpus partitioned in that case consists of lot A, B and C of the said plan and lot 1 of the said plan which is the corpus of this case is the Lot excluded from the corpus. According to the said plan, corpus of the present case is adjoining to the partitioned corpus of the previous case. When one says that a portion of land is excluded

from corpus of a partition action, the first impression that comes to one's mind is that the excluded portion does not belong to the land sought to be partitioned. If so, the question arises whether the Plaintiff correctly named the land sought to be partitioned in the present case as it bears the same name as one partitioned in the previous case. If the land sought to be partitioned is not properly named in the present case, then the registration of Lis pendens, steps relating to public notice of institution of partition action as pre-trial steps may become defective. On the other hand, there are certain circumstances an excluded portion from a corpus of a partition action may bear the same name of the partitioned portion as explained below.

1. If the excluded portion is a different land bearing the same name. (However as explained before no adjoining land was described using the same name – vide schedule (a) of the amended plaint and description of the main land in the final decree of the case no. P3908 marked as P2.)

2. If the exclusion is done due to the fact someone has acquired title to that portion of the same land by prescription. (No such evidence has been placed before the District Court.)

3. The parties to the action agree to exclude a portion from the corpus in favour of someone. (No such evidence has been placed before the District Court)

However, there is no such evidence available in the present action that the exclusion of Lot 1 of Misso's plan no. 3356P was due to the reasons mentioned above. If they were the reasons for the land sought to be partitioned in this case to bear the name of the land partitioned in the previous case, such person or people who owned or in whose favour those portions were excluded or their descendants etc. should have been made parties to this partition action to claim prescriptive title against them. No such party or parties have been revealed in the amended plaint or through evidence. No evidence has been placed before court to show that the said exclusion of lot one was done in favor of the predecessor in title of the Plaintiff and the purported co-owners, namely their father. If it was excluded in their father's favour, they would have naturally pleaded that and tendered the necessary evidence such as Judgment and interlocutory decree etc. For some reason, the judgment and interlocutory decree which should reveal the reason for exclusion of Lot 1 of plan no.3356P of Misso L.S. were not tendered in evidence. Even though the learned District Judge in answering the point of contest no.14 in the negative has refused to accept the name given to the corpus of this action by the Sixth Defendant, it is not sufficient. First the learned District Judge must satisfy himself that the land sought to be partitioned in the present action had been correctly named. No doubt it is the lot 1 of plan no.3908P. However, if it is not correctly named, it might have affected the proper registration of Lis pendens and pre-trial publication of notice and naming the correct parties. It appears that the learned District Judge whose duty was to investigate title has not given his thoughts to the above facts observed by this court in relation to the identification of the purported corpus sought to be partitioned in this case by its name.

The fifth Defendant who stands with the Plaintiff to get the purported corpus partitioned, in her oral evidence has twice stated that there is no specific name to the corpus. The learned District Judge has failed to appreciate that one of the old deeds, which is older than the final decree of the previous partition action, namely deed no.1525 in the chain of title of the sixth Defendant contains a land named "Gama Walawwe Watta" as described by the sixth Defendant in his statement of claim and the deeds written after that on the strength of the title gained through that deed also have described the land dealt by those deeds as Lot 1 of plan 3365P of case no. P3908. Thus, there were material to think that the exclusion was done in the previous partition action since Lot 1 was a different land as described by the 6th Defendant. In my view mere attempts to show certain errors of the learned High Court Judges through the questions of law raised will not suffice if the Plaintiff Appellant fails to satisfy this court that the substantial rights were affected by the dismissal of their case by the High Court. The Plaintiff's substantial rights are affected by the dismissal made in the High Court only if the District Judge had come to the correct finding to partition the corpus.

However, for the reasons discussed below in this judgement, I am of the view that the learned High Court Judges were correct in coming to their conclusion to allow the appeal before them and to dismiss the plaint as the learned District Judge erred in deciding to partition the purported corpus of this action.

It must be stated here that the Roman Dutch law of acquisitive prescription ceased to be in force after Regulation no.13 of 1882 and that the Prescription Ordinance is the sole law governing the acquisition of rights by virtue of adverse possession. The common law of acquisitive prescription is no longer in force except as regard the crown. [See **W.Perera v C. Ranatunge (1964) 66 N L R 337 at 339**, also see **Dabare v Martelis Appu 5 N L R 210, Terunnanse v Menike 1 N L R 200 at 202**, **Fernando v Wijesooriya et al 48 N L R 320 at 325**, **I.L.M**. **Cadija Umma and Another v S. Don Manis Appu and Others 40 N L R 392 at 395**].

Since it is the Prescription Ordinance that governs the acquisitive prescription in relation to immovable property, it is worthwhile to quote section 3 of the said ordinance here.

"3. *Proof of undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation*

thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs:

provided that the said period of ten years shall only begin to run against the parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute."

As per the above section, it is through an action filed in court one gets a decree in his favour based on prescriptive title. Aforesaid section contemplates three categories of people who can get a decree based on prescription in their favour namely;

1. Defendant can claim prescriptive title by proof of undisturbed and uninterrupted possession for 10 years by a title adverse or independent of that of the claimant or plaintiff.

2. Like manner a plaintiff can bring an action for the purpose of being quieted in his possession of immovable property, or to prevent encroachment or usurpation or to establish his claim in any other manner to such property by proof of possession as mentioned above and can pray for a decree in his favour.

3. An intervenient party to an action also by proof of possession as mentioned above can pray for decree in his favour.

Thus, it is clear that it is a party to an action, whether it be a plaintiff, defendant or an intervenient, who can ask for a decree based on prescriptive title. The said section 3 does not provide for a party to get a decree from court in favour of a person who is not a party before the court to say that the said person has got prescriptive title to the subject matter of the action. By this I do not intend to say that one in possession cannot tack on to his predecessor's possession. In fact, one may. {See **Terunnanse V Menike 1 N L R 200 at 201, Wijesundera and Others V Constantine Dasa and Another (1987) 2 Sri L R 66, Kirihamy Muhandirama V Dingiri Appu 6 N L R 197**}. However, the plaintiff, the Defendant or the intervenient, as the case may be, must pray for a decree on prescriptive title in their favour. The Plaintif and others standing with him in this action pray for a declaration or a finding that their father even prior to the alleged intrusion by the 6th Defendant acquired title by prescription without revealing adverse to whose title it was acquired.

It is the position of the Plaintiff that their father acquired title by prescription and he and the 1st to 5th Defendants became co-owners on his demise by inheritance. In fact, points of contest number one and two have been raised at the beginning of the trial on this basis. The learned High Court Judges have come to the conclusion that as per the aforesaid section 3 of the Prescription Ordinance and section 2 of the Partition Act, the court cannot decree that the predecessor in title

of the Plaintiff and the 1st to 5th Defendants, who is not a party to the action, acquired title by prescription. Even in **Punchi Rala v Andris Appuhami (1886) 3 SCR 149**, it was held that it is not competent for a party to set up a third person's title under section 3 of the Prescription ordinance. It is stated in the judgment that the Prescription Ordinance contemplates possession by a party getting judgment, a plaintiff, a defendant or intervenient, - his own possession or that of his predecessors in title and it is to be a judgment declaratory of the right of property in a party to the action. [In this regard also see **K. D. Edwin Peeris v Kirilamaya 71 NLR 52**, **Terunnanse v Menike 1 NLR 200**, **Timothy David v Ibrahim 13 NLR 318**, **Kirihamy Muhandirama v Dingiri Appu 6 NLR 197, Raman Chetty et al., v Mohideen 18 NLR 478**]. As per the stance taken by the Plaintiff and his siblings, only if they can get a decree in favour of their father who is dead and gone and not a party to the action, they become co-owners. Otherwise, evidence shows that some of them live far away from the purported corpus. Unless they can prove co-ownership, they cannot say one who possess represents the possession of the other co-owners. Anyway, it appears that the 6th Defendant was there in possession as confirmed by a 66 application.

It appears that one of the grounds for the Learned High Court judges to allow the appeal and dismiss the partition action was that the predecessor in title to the Plaintiff and his siblings, namely their father was not a party to the action which debars a court in terms of section 3 of the Prescription Ordinance from decreeing that he acquired prescriptive title which in turn debars a declaration that the Plaintiff and his siblings are co-owners.

As a decree on prescriptive title can only be given in favor of a party to the action, in my view the aforesaid conclusion of the learned High Court Judges is correct. It must be noted that no direct question of law has been proposed through the petition or thus, allowed by this court with regard to the said conclusion of the learned High Court Judges. Therefore, in a way the said conclusion remains unchallenged. For completeness, I quote the relevant portions of the High Court judgement below which refer to aforesaid section 3 of the Prescription Ordinance and section 2 of the Partition Act respectively.

(Referring to section 3 of the Prescription Ordinance)

"*The above provisions confer a right on the possessor who has been in undisturbed and uninterrupted possession of a land to bring an action for the purpose of being quieted in possession or for a defendant who is sued in ejectment to take up the defense that he has acquired title to the land in dispute by prescriptive possession but these provisions do not permit a person who is in possession of land to bring an action for partition on the basis that his predecessor in title had acquired title to the land by prescription*. "

(Referring to section 2 of the Partition Act)

"*In view of the provision of the section 2 above a person must be a co-owner of land to be partitioned to bring an action for partition. A person who is not a co-owner cannot bring an action for partition. The plaintiff cannot expect for the court to decide whether a so called predecessor in title had acquired title for the corpus by prescription and then proceed to investigate the title*

of the parties to the action. The plaintiff came to court on the basis that his father acquired title by prescription and that he and first to fifth defendants inherited from the father. The court in a partition action cannot declare that the predecessor in title of the plaintiff and first to fifth defendants acquired title by prescription specially when the person sough to be declared so entitled is now deceased."

In short, the learned High Court Judges have tried to point out that in terms of section 3 of the Prescription Ordinance a Court cannot decree a person who is not before court has acquired title by prescription. As per the stance taken by the Plaintiff, the Plaintiff and the parties stand with him cannot proceed ahead without getting such a declaration or decree.

Even though the Plaintiff's and the 1st to 5th Defendants' position is that their father acquired the prescriptive title and they inherited the property as co-owners at the demise of their father, the paragraph 9 of the amended plaint as well as the point of contest number 3 raised at the trial focus on whether the Plaintiff and the 1st to 5th Defendants acquired prescriptive title along with their predecessor in title. Thus, it is necessary to see whether they have proved their prescriptive title to the corpus as co-owners. It is already stated above if the court cannot hold that their father acquired prescriptive title, it cannot hold that they are co-owners through inheritance as per their stance.

It must be reiterated that the position of the Plaintiff was that the father of the Plaintiff and the 1st to 5th Defendants entered into the lot 1 of plan no.3356P after it was excluded from the corpus of the partition case no. P3908 and acquired prescriptive title to it and Plaintiff and his siblings got their right through inheritance. Since the 6th and 9th Defendants without any title acted in violation of their rights, they want to get the land partitioned. Thus, the case was not presented to say that the Plaintiff and his siblings along with the possession of their predecessor adversely possessed it against the title of the 6th to 9th Defendants and they acquired prescriptive title against the 6th to 9th Defendants. It is presumed that if a person enters into a possession in one capacity, he continues to possess it in the same capacity unless he changes the nature of the possession by an overt act. Adverse possession means a possession incompatible with the title of the true owner or the title holder. (See **Fernando v Wijesooriya et al., 48 NLR 320**). To acquire ownership or dominion of a property, the adverse possession must be against the true ownership of the property in a manner denying the said ownership. Thus, if one claims prescriptive title to gain ownership of a property, he must reveal against whose ownership the adverse possession was exercised. In **I. De Silva V Commissioner General of Inland Revenue 80 N L R 292,** it was held that, "*The Principle of law is well established that a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In order to constitute adverse possession, the possession must be in denial of the title of the true owner. The acts of the person in possession should be irreconcilable with the rights of the true owner; the person in possession must claim to be so as of right as against the true owner. Where there is no hostility*

to or denial of the title of the true owner, there can be no adverse possession. In deciding whether the alleged acts of the person constitute adverse possession, regard must be had to the animus of the person doing those acts."

No evidence was led to show who was the true owner of lot 1 of plan no. 3365P at the time of purported entry to possess it by the Plaintiff's father. The interlocutory judgement of the previous partition action has not been tendered for the court to see why the said lot 1 was excluded or in whose favor it was excluded. If it was excluded in favor of the Plaintiff's father the Plaintiff or the people who want to partition the corpus would have marked it to support their case. Non -production of the said judgment of the previous partition case which should contain the reasons for exclusion of said Lot 1 should have been considered as a factor that prompts a court to presume that the production of said evidence would have been not favourable to the Plaintiff's stance. For example, the reason could have been that it was a different land as described by the old deeds of the 6th Defendant's chain of title as mentioned above. However, the stance taken in the plaint was that the Plaintiff's father acquired prescriptive title even prior to the alleged infringing acts of the 6th to 9th Defendants but without revealing against whose title he acquired prescriptive title.

If this is a case to evict the 6th to 9th Defendants based on their alleged infringing acts for the purpose of being quieted in his possession by the Plaintiff, it would have been a different scenario altogether. In that situation the Plaintiff has to prove his adverse, uninterrupted and undisturbed possession for ten years against the 6th to 9th Defendants against any title they claim. In my view, section 3 of the Prescription ordinance contemplates such situation. A claim of prescription by a party against another party in an action filed in court and not a situation of claiming prescriptive title against whole world. However, for some reason, the Plaintiff has chosen to file a Partition action which is an action in Rem and claim prescriptive title accrued to their father prior to his death which is also prior to the alleged infringing acts of the 6th to 9th Defendants. The Plaintiff has taken the arduous task of proving title against whole world without revealing against whose title their father acquired prescriptive title. In my view one cannot prove prescriptive title without revealing against whom he claims prescriptive title and without giving that person an opportunity to respond. Furthermore, as per section 3 of the Prescription Ordinance itself, the time does not start to run against parties claiming rights in remainder or reversion and section 13 of the same ordinance has created certain limitations to claims on prescription based on certain disabilities. Thus, indicating the person against whom the prescriptive claim is made in evidence is essential for a court to decide on prescriptive title. When the Plaintiff and his siblings take up a position that their father acquired prescriptive title even prior to the alleged infringing acts by the 6th to 9th Defendants, it is questionable and unascertainable against whose true ownership he acquired prescriptive title.

The learned High Court Judges have referred to **Sirajudeen and Two Others v Abbas (1994) 2 SLR 365** in their judgement where it was held that when a party invokes provision of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to an immovable

property, the burden of proof rests squarely and fairly on him[1] to establish a starting point of his or her acquisition of prescriptive rights and a facile story of walking into an abandoned premises after the Japanese air raid constituted materials far too slender to found a claim based on prescriptive title. Similarly in the matter at hand, the burden of proof rests on the Plaintiff and the Parties who rely on the same stance to prove prescriptive title. Even here, the position taken is that father of the plaintiff commenced possession of the land after the exclusion of lot 1 of plan no.3356P in the previous partition act. The basis for such commencement of purported possession and against who's right it was commenced or the animus (intention) of their father have not been revealed through evidence. By referring to the said decision in **Sirajudeen and Two Others V Abbas**, the learned High Court Judges have attempted to point out that the commencement of adverse possession was not proved. Basically, the reasons given by the High Court Judges while referring to the section 3 of the Prescription Ordinance and section 2 of the Partition Act and the commencement of purported possession was to indicate that the partition action filed by the Plaintiff is misconceived in law and even the purported possession of the Plaintiff and 1st to 5th Defendants and their father cannot be conceded as a possession containing sufficient materials to prove prescriptive title. If their father's possession was not proved as an adverse possession, the Plaintiff and her siblings, if they have any possession, also continue in the same capacity as no overt act to change the nature of possession was revealed. It must be noted that the said part of the judgment of the High Court is not directly and clearly challenged through the questions of law suggested by the petition and accepted by this court when granting leave. The said reasoning is sufficient to dismiss the partition action filed by the Plaintiff

Because of the above reasons, it appears that the learned High Court Judges have not gone into analyze the evidence led by the Plaintiff in detail. Even if it is considered for the sake of argument that a proper action has been filed, the reasons given below will show that the learned District judge erred in evaluating evidence led at the trial to get the land partitioned.

If one wants to establish prescriptive title, he has to prove his adverse possession to an identified land or to an identified portion of a land and that possession must satisfy requirements contemplated in the prescription ordinance. As explained above, there is no reference to any overt act and they continue in possession, if they had any, in the same capacity as their father. The lack of evidence to show that their father's possession was adverse to a true owner is sufficient to dismiss any claim of prescription by the Plaintiff and his siblings. Even to consider it as an adverse possession to the 6th Defendant, since the position of the Plaintiff is that the 6th Defendant came to the land after the demise of their father, the parties relying on prescriptive title along with Plaintiff must show facts that indicate an adverse possession against the predecessors in title of the 6th Defendant by the father of the Plaintiff. As said before, no basis for commencement of possession was revealed and no evidence as to any act by the Plaintiff's

[1] See also S.K. Chelliah v M. Wijenathan et al., 54 N L R 337,342 and Mithrapala and Another V Tikonis Singho (2005) 1 Sri L R 206

father or even by the Plaintiff and his siblings that rejects the title of the predecessors in title of the 6th Defendant has been revealed through evidence. Thus, it can be presumed, that if they had any possession, they continued the possession of their father which was not proved as an adverse possession.

On the other hand, the plaint states that the 6th Defendant has no right or title to the land sought to be partitioned and the name of the corpus used by the 6th Defendant also is challenged, indicating that the paper title claimed by the 6th Defendant is not relevant to the corpus. If so, it is questionable against whose title the Plaintiff and her siblings claim adverse possession.

Pahalawatte Gedara Sumanawati, Edwin Jayasuriya, Ekanayaka Mudiyanselage Ran Banda, Batagolle gedara Simon, who gave evidence for the Plaintiff, had worked or had been employed by the Plaintiff's father or one of his offspring. Even though they speak of plucking pepper or coconut, having a threshing floor, cow shed, place to tether the elephants, parking of vehicles etc., they do not identify the corpus referring to the boundaries or to the plan. The preliminary plan no 2213 has not identified any place where a threshing floor or garage or cow shed or a place where elephants were tethered in the past. Further it is evinced from the said plan that certain portions shown by the Plaintiff for the survey do not belong to the corpus (For example Lots 4 to7) and Lot 2 has been identified through superimposition. Thus, the evidence of the aforesaid witnesses with regard to the possession cannot be ascertained with certainty whether it relates to the whole land identified as the corpus or only to certain areas shown by the Plaintiff as the corpus. Some of them have indicated that they do not have knowledge of the corpus. Therefore, their evidence alone is not sufficient to say that the evidence given by them with regard to the possession refers to the corpus as identified by the preliminary plan. Even if it is considered that they were giving evidence regarding the possession of the corpus, no material was revealed through them with regard to the nature of the possession that the father of the Plaintiff had over the corpus to decide whether it was adverse or whether it was permissive possession. Since the Plaintiff and the 1st to 5th Defendants rely on the possession of their father and the continuation of the same possession without referring any overt act to change the nature of the possession, it has to be presumed that if the Plaintiff's father had possession, the nature of that possession remains the same. As indicated above nothing has been revealed by the aforesaid witnesses with regard to proof of an adverse possession.

Evidence of Bernard P. Rupasinghe L.S called by the plaintiff relates to the survey of the corpus and the preparation of the plan done by him. He is not a person who has knowledge of prescriptive possession of the Plaintiff and 1st to 5th Defendants or their predecessor.

Edirisinghe Mudiyanselage Rana Raja Banda and Karunanayake Mudiyansalage Tissa Kotinkaduwa are court officers who gave evidence regarding the previous partition case and 66 application respectively. They too cannot have knowledge of prescriptive possession relating to the corpus. Through these witnesses, nothing has been revealed to indicate that lot 1 of MR.

Misso L.S plan was excluded for the benefit of the Plaintiff's father. However, it was said in evidence that the disputed land in the 66 application was given to the 6th Defendant on the basis that the 6th Defendant was in possession at the date of filing of that application.

Ananda Lekam is a relative of the parties who had come to the Walawwa on several occasions and stayed there even. Wallawwa is not within the corpus. He has given evidence with regard to the access road he used to visit Wallawwa. He has also stated about some cultivation of crops around said road but do not indicate whose cultivation was that. However, he too does not state facts sufficient to decide that the possession of Plaintiff and 1st to 5th Defendants and their predecessor was adverse to the title of the true owner who is unknown or to the 6th to 9th Defendants.

5th Defendant Swarna Karalliadde and the Plaintiff have given evidence to indicate that the threshing floor, cow shed, garage and the place where the elephants were tethered were within the lot 1 of the plan no, 3356P excluded from the previous partition action. However certain areas shown by the Plaintiff to the commissioner does not fall within the corpus identified by the commissioner in making the preliminary plan no.2213 and Lot 2 was identified as part of the corpus through superimposition. It is observed that the Plaintiff and the parties who wanted to partition the corpus based on prescriptive rights have not taken any steps to indicate that those places referred to by the witnesses to prove their possession were within the corpus as identified through the preliminary survey by showing those places to the court commissioner. If the 5th Defendant and the Plaintiff rely on those facts relating to the existence of a garage threshing floor, cow shed etc. in the past, they could have shown those areas where they were to the court commissioner during the survey. Even if it is presumed that they were within the area identified as the corpus by the preliminary survey, it itself does not prove that the possession was adverse. It has to be presumed that the nature of the possession of their father continued. As said before there is no material to established that their father's possession was adverse. It is necessary to prove the possession of their father was adverse to the true owner of the corpus when he entered into the said corpus sought to be partitioned. However, when the 5th Defendant gave evidence in 2003, she was 42 years old. Thus, she was born in 1961 and when the Plaintiff gave evidence, she was 58 years of age in 2005 indicating that she was born in 1947. Final partition plan and final decree of the previous partition action were made in 1953 and 1954 respectively. Thus the 5th Defendant was born after the final decree and the Plaintiff appeared to be a child of very mild age when the said final decree of the previous partition action was entered. If, as per their stance, their father entered into the excluded lot 1 after the said partition decree of the previous partition action, 5th Defendant cannot have any personal knowledge or the Plaintiff cannot have well informed knowledge with regard to the animus (intention) of their father when he commenced his possession or whether he entered with permission of someone else or whether it was adverse to someone else's title.

5th Defendant as well as the Plaintiff through their evidence tried to convince court that their father took the crops from the land sought to be partitioned and cultivated it and thereafter,

they possessed it. But as per the report of the preliminary plan marked X1, no one has preferred a claim to the plantation found within the portion identified as the corpus. The Plaintiff's position is that the 6th to 9th Defendants entered the land only in 1995. If so, it is questionable why the Plaintiff and his siblings did not claim the old plantation within the corpus during the preliminary survey. During the evidence called on behalf of the 6th Defendant, several documents have been marked subject to proof but such objections were not reiterated at the close of the 6th Defendant's case. Thus, those documents can be considered as evidence. The plan No.1457 made by Mawalagedara L.S marked 6V27 and its report marked 6V28 have been so tendered in evidence. As per the said report 6th Defendant as well as Plaintiff have shown the boundaries to prepare the said plan. As per Item No. vii in 6V28 there seems to be some difference between the boundaries shown by them, but it is clear lot 2 of the said plan marked 6V27 belongs to the corpus as per their own showing of the boundaries of the excluded portion of the previous partition action for the preparation of the said plan. However, as per the report marked 6V28 it was only the 6th Defendant who has claimed plantation within said lot 2 and no cross claim before the surveyor has been made by the Plaintiff or any other party who rely on the Plaintiff's pedigree. If their father was in possession and they acquired prescriptive title, it is questionable why the Plaintiff or her siblings did not claim the plantation in lot 2 in the said plan and allowed the 6th Defendant to claim some old plantation in the area shown by her as the corpus without any cross claim. This too questions the nature of possession of the Plaintiff and his predecessors as well as their story presented to court.

Dr. Laxman Karalliadde, one of the predecessors in title of the 6th Defendant, and one time power of attorney holder of Dr. Laxman Karalliadde, Ranjith Abeyratne have given evidence with regard to the land claimed by the 6th Defendant. They explained how the land was given to various people including plaintiff's relatives to be looked after on behalf of Dr. Laxman Karalliadde as he was abroad. Through those witnesses, 6th Defendant has marked several communications (see 6v3, 6v11, 6v12,6v13, etc.). Those communications indicate that some of the Plaintiff's siblings who have been given shares in the Plaintiff's pedigree has communicated with Dr. Laxman Karalliadde in a manner admitting his title to the land. It must be noted one of these communications contain a sketch of the land and some refers to the path leading to Wallawwa which show on balance of probability that communications were done in relation to the land in dispute.

The Plaintiff in her amended plaint has concealed the fact that there was a testamentary case after the death of her father. The list of properties in the said testamentary case has been marked during the evidence and the corpus which is two roods in extent cannot be found in the said list. The 5th Defendant has tried to indicate that a one-acre land included in the said list is the corpus of this case. Most probably the one-acre land included in the list could be the one-acre and nine perches land the Plaintiff's father got through the previous partition action. On the other hand, the fifth Defendant who twice said that there is no specific name to the land sough to be partitioned in this action cannot say the one-acre land listed as Gamagedara Watta alias Kekiri

welland alias Wallawwe watta in the said list of properties is the corpus of this action. If this corpus was considered as the Plaintiff' father's land at the time of his demise, it would have been naturally included in the said list. Even the third Defendant who stands with the Plaintiff in his statement of claim has claimed a right of way over the corpus. Servitude is a right over someone else's property. If he is a co-owner of the property, he has a right to every grain of sand in the property. Other co-owner's possession becomes his possession too. If one enjoys or uses the property, one has to presume that it is based on his legal right. Therefore, by claiming a servitude he admits the property belongs to someone else on which he does not have title. Not only that the Order in the 66-application matter, marked 6v2 also indicate that Swarna Karalliadde's (5th Defendant in the present action) claim before that court was for a right of way over the disputed land. These indicate that some of the siblings who are indicated as co-owners in the Plaintiff's pedigree have acted in a manner accepting that they are not the owner but they have a servitude over the corpus of someone else. Along with what is revealed through the aforesaid communications, there were material to show this claim was over the property that belonged to Dr. Lakshman Karalliadde. When some of the purported co-owners acted in a manner admitting the title was with someone else or Dr. Karalliadde, one of the predecessors in title of the 6th Defendant, how can a court rely on a stance that they as co-owners acquired prescriptive title to the corpus.

Furthermore, this court has to consider whether the so-called long possession generates a presumption that ouster has taken place and the possession is adverse. However, the 3rd Defendant's claim for a servitude, 5th Defendant's position before the primary court as revealed by the order of the primary court, the communications between Plaintiff's siblings and Dr. Karalliadde, claims made by the 6th Defendant without cross claim to the plantation, and Plaintiff or her siblings making no claims to the old plantation during the preliminary survey deter the court making such a presumption in favour of the Plaintiff and her siblings.

The above observations made by this court indicate, the learned District judge erred in evaluating the evidential materials before him.

However, it must be noted that the appeal of the 6th Defendant was allowed not because the learned High Court Judges accepted the claim made by the 6th Defendant to the whole area identified as the corpus. In fact, the learned High Court Judges did not grant the relief prayed by the 6th Defendant for a declaration that he is entitled to the entire corpus identified as the subject matter. The learned High Court Judges allowed the appeal and dismissed the partition action due to the reasons mentioned below;

1. Because it was found that the partition action filed by the Plaintiff and claim based on the prescriptive title of the predecessor in title who was not a party to the action is misconceived in law.

2. Even if it is considered that the action is not misconceived in law, the Plaintiff and the parties who wants to partition the corpus failed in proving prescriptive title in terms of section 3 of the prescription ordinance.

As mentioned before, the reason mentioned in item no.1 above has not been properly challenged through suggesting an appropriate question of law in the Petition. However, the reason mentioned in the item no.1 above is in accordance with the law as explained above.

Following are the only questions of law suggested by the Petition and accordingly allowed by this court.

a) Have the Hon. High Court Judges erred in Law by failing to consider the fact that the 6th Defendant Appellant Respondent in the said District Court case as well as in the said appeal has attempted to claim rights in relation to the subject matter of the said case no. P14028 by using a devolution of title of a completely different land which even the boundaries and extents differs in comparing the corpus of the said partition action?
b) Have the Hon. High Court Judges misdirected themselves in evaluating and considering the evidence led at the trial on behalf of the Petitioner as well as evidence led on behalf of the 6th Defendant Appellant Respondent in arriving the brief conclusion?
c) Have the Hon. High Court Judges completely misdirected themselves and also erred in law by dismissing the said appeal by taking certain extraneous matters which has no bearing on the main issue of identification of the property in arriving at their said judgment?
d) Have the Hon. High Court Judges erred in law by overturning the said well-considered judgment of the learned Trial Judge for the mere reason that the Petitioners at the stage of the appeal had attempted to produce new evidence without proper permission by the Court without considering the well-considered judgment of the Trial Judge which is based on the evidence led at the trial by the parties?

They are answered as follows;

a) They have not granted relief as per the claim made by the 6th Defendant, but allowed the appeal since the action was misconceived and even if considered as a proper action, the prescriptive title claimed by the Plaintiff and her siblings was not proved in terms of section 3 of the Prescription Ordinance. Hence the question is answered in the negative.
b) They did not involve in analyzing the evidence led at the trial in detail since the reasons given by them were sufficient to allow the appeal and dismiss the partition action. As explained above even a detailed analysis would have proved that there was no material to show that the possession was adverse to establish a claim on prescriptive title as contended by the plaintiff and her siblings. Thus, this question also has to be answered in the negative.

c) The appeal was not dismissed but it was allowed by the learned High Court Judges. Thus, the question of law was not properly formulated. Even if it is considered an error and if one replaces the words 'by dismissing the said appeal' with the words 'by allowing the said appeal', as per the reasons given above, the appeal was not decided on the issue of identification of the corpus but on valid reasons explained in the Judgment of the High Court. This question also has to be answered in the negative.

d) The learned High Court Judges correctly refused to accept new evidence tendered without permission and that attempt to produce new evidence was not the reason to overturn the District Court Judgment. Thus, the question of law is answered in the negative.

Therefore, this appeal is dismissed with costs.

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Judge of the Supreme Court

B.P. Aluwihare PC, J.

I agree.

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Judge of the Supreme Court

S. Thurairaja, PC, J.

I agree.

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Judge of the Supreme Court