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

In the matter of an application for leave to Appeal to the Supreme Court in terms of Section 5C (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

David Chandrasena Nanayakkara (deceased)
No. 92, Sunanda Mawatha,
Welegoda, Matara.

Plaintiff

Case No: SC/L/A/ 293/2013.
HCCA Case No. SP/HCCA/MA/29/2010
DC. Case No. P/12141.
S.C. APPEAL NO.123/13

Susantha Nanayakkara,
No. 92,
Sunanda Mawatha,
Welegoda, Matara.

Substituted Plaintiff

1. Mitiyala Kankanamage Jimona (Deceased)
Epitawatta, Welegoda.

1A. Mallika Vidanaarachchige Gunaseeli
Epitawatta, Welegoda.

2. Jayasinghe Arachchige Jayasinghe
(Deceased)
No.30, Sunanda Mawatha,
Welegoda, Matara.

2A. Jayasinghe Arachchige Shantha Rohana,
No. 1/30,

Ananda Mawatha,
Welegoda, Matara.

3. Jayasinghe Arachchige Edi
(Deceased)
No. 1/30,
Welegoda, Matara.

3A. Chandralatha Panditharathna (Deceased)
No. 1/30,
Vidanearachchigewatta, Welegoda,
Matara.

3B. Jayasinghe Arachchige Lakshmi
No. 1/30, Vidanearachchigewatta,
Welegoda, Matara.

4. Devundara Liyanage Sugathadasa.
No. 1/30, Vidanearachchigewatta,
Welegoda, Matara.

4A. Devundara Liyanage Nimal,
Vidanearachchigewatta,
Welegoda, Matara.

5. Jayasin Arachchgie Lakshmi
No. 1/30, Vidanearachchigewatta,
Welegoda, Matara.
New: Sirisunanda Mawatha,
Welgoda, Matara.

6. Mirissa Hewage Wijedasa,

7. Mirissa Hewage Bandusena,
Both are at: No. 134,
Abhaya Mawatha,
Borupana Road, Rathmalana.

8. Parana Hewage Seetha Nona,
Welegoda, Matara.

9. Bandula Nanayakkara,
Perakoratuwa,
Walgama, Matara.

10. Aruna Kumudu Nanayakkara,
Perakoratuwa,
Walgama, Matara.

11. Parana Hewage Susan Nona,

12. Ananda Nanayakkara,

13. Keerthi Nanayakkara,

14. Mahinda Nanayakkara,

15. Asoka Nanayakkara,
All are at: No. 14,
Market Side, Anuradhapura.

16. Hewa Manage Aminona.

17. Dharmapriya Nanayakkara,
Both are at: No. 92,
Welegoda, Matara.

18. Subawickrama Malika Vidana Arachchige
Upul Nishantha.

19. Subawickrama Malika Vidana Arachchige

Gunasiri.
Both are at: No. 34/1,
Epitawatta, Welegoda, Matara.

Defendants

And

Susantha Nanayakkara,
No. 92,
Sunanda Mawatha,
Welegoda, Matara.

Substituted Plaintiff – Appellant

Vs.

1A. Malika Vidanaarachchige Gunaseeli
Epitawatta, Welegoda.

2A. Jayasinghe Arachchige Shantha Rohana.
No. 1/30, Ananda Mawatha,
Welegoda, Matara.

3B. Jayasinghe Arachchige Lakshmi
No. 1/30, Vidanearachchigewatta,
Welegoda, Matara.

4A. Devundara Liyanage Nimal,
Vidanearachchigewatta,
Welegoda, Matara.

5. Jayasin Arachchige Lakshmi
No. 1/30, Vidanearachchigewatta,
Welegoda, Matara.
New: Siri Sunanda Mawatha,

Welegoda, Matara.

6. Mirissa Hewage Wijedasa,

7. Mirissa Hewage Bandusena,
Both are at: No. 134,
Abhaya Mawatha,
Borupana Road,
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8. Parana Hewage Seetha Nona,
Welegoda, Matara.

9. Bandula Nanayakkara,
Perakoratuwa,
Walgama, Matara.

10. Aruna Kumudu Nanayakkara,
Perakoratuwa,
Walgama, Matara.

11. Parana Hewage Susan Nona,

12. Ananda Nanayakkara,

13. Keerthi Nanayakkara,

14. Mahinda Nanayakkara,

15. Asoka Nanayakkara,
All are at: No. 14, Market Side,
Anuradhapura.

16. Hewa Manage Aminona.

17. Dharmapriya Nanayakkara,

Both are at: No. 92,

Welegoda, Matara.

18. Subawickrama Mallika Vidana Arachchige Upul Nishantha.

19. Subawickrama Malika Vidana Arachchige Gunasiri.
Both are at: No. 34/1,
Epitawatta, Welegoda, Matara.

Defendant – Respondents

And Now Between

Susantha Nanayakkara,
No. 92, Sunanda Mawatha,
Welegoda, Matara.

Substituted Plaintiff- Appellant- Petitioner

Vs.

1A. Malika Vidanaarachchige Gunaseeli
Epitawatta, Welegoda.

2A. Jayasinghe Arachchige Shantha Rohana.
No. 1/30, Ananda Mawatha,
Welegoda, Matara.

3B. Jayasinghe Arachchige Lakshmi
No. 1/30, Vidanearachchigewatta,
Welegoda, Matara.

4A. Devundara Liyanage Nimal,
Vidanearachchigewatta,
Welegoda, Matara.

5. Jayasin Arachchgie Lakshmi
No. 1/30, Vidanearachchigewatta,
Welegoda, Matara.
New: Siri Sunanda Mawatha,
Welegoda, Matara.

6. Mirissa Hewage Wijedasa,

7. Mirissa Hewage Bandusena,
Both are at: No. 134,
Abhaya Mawatha,
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8. Parana Hewage Seetha Nona,
Welegoda, Matara.

9. Bandula Nanayakkara,
Perakoratuwa,
Walgama, Matara.

10. Aruna Kumudu Nanayakkara,
Perakoratuwa,
Walgama, Matara.

11. Parana Hewage Susan Nona,

12. Ananda Nanayakkara,

13. Keerthi Nanayakkara,

14. Mahinda Nanayakkara,

15. Asoka Nanayakkara,
All are at: No. 14,
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16. Hewa Manage Aminona.

17. Dharmapriya Nanayakkara,
Both are at: No. 92,
Welegoda, Matara.

18. Subawickrama Malika Vidana Arachchige
Upul Nishantha.

19. Subawickrama Malika Vidana Arachchige
Gunasiri.
Both are at: No. 34/1,
Epitawatta, Welegoda, Matara.

Defendant – Respondent - Respondents

Before : L.T.B. Dehideniya, J
S. Thureiraja, PC, J
E.A.G.R. Amarasekara, J.

Counsel : Shiran Ananda with Ruwini Dantanarayana for the
Substituted Plaintiff-Appellant-Appellant
Upul Kumarapperuma with Muzar Lye for the 2A
Defendant – Respondent – Respondent.
Gamini Premathilake with Sunil Wanigatunga &

Samanthi Rajapaksha for the 3B Defendant – Respondent - Respondent.

Argued On : 06.02.2019

Decided On : 14.11.2019.

E.A.G.R. AMARASEKARA, J

The original Plaintiff (Hereinafter sometimes referred to as the Plaintiff) instituted a partition action in the District Court of Matara to partition a land of 31.29 perches, named and described as divided Lot B of Amukanatte Watta Alias Vithane Arachchige Watta of plan no 2156 dated 27.03.1899 made by J.A Byser, Licensed Surveyor. The Plaintiff's position in his plaint as well as in his amended plaint was that the aforesaid plan was made by the then co-owners to amicably partition the land called Amukanatte Watta alias Vithane Arachchige Watta and as a result original owner described in the amended plaint, namely Don Andiris Nanayakkara was given the said lot B and became the original owner by prescriptive possession (vide paragraph 3 of the amended plaint dated19.01.1998). As per the pedigree of the original plaint, only the plaintiff and the 1st defendant have title to the land to be partitioned. The other Defendants starting from the 2nd Defendant onwards are defendants who were made parties to the case after the filing of the original plaint. However, the Plaintiff had filed an amended plaint later on with an amended pedigree giving rights to some of the defendants named in the caption among 8th to 16th defendants. This indicates that the Plaintiff was not personally aware of the complete pedigree that he relied upon at the time he filed the original plaint. The

preliminary survey and evidence establish that some of the defendants, namely original 2nd and 3A defendants, who do not gain any right under the plaintiff's pedigree, lived within the purported corpus and claimed certain buildings and plantations within it without any counter claim from the Plaintiff or anyone who has rights as per the purported pedigree of the amended plaint. The plaintiff had not explained or revealed their presence in the corpus in any manner in his amended plaint. This shows that the Plaintiff filed the action concealing possible claimants to the corpus.

1st Defendant, later on the substituted 1a Defendant, 2nd Defendant and 3rd Defendant, later on the 2nd Defendant and substituted defendants for the 3rd defendant(3A Defendant and 3B Defendant) and 4th Defendant (who bears the respective Defendant Respondent numbers in the caption to this appeal and hereinafter sometimes may be referred to as 1st Defendant, 1a Defendant, 2nd Defendant, 3rd Defendant, 3A Defendant and 3B defendant and 4th Defendant when necessary) had filed their respective statements of claims or amended statements of claims. Though the parties had raised points of contests on several occasions, on their request the trial was commenced de novo on the points of contest recorded on 15.08.2000. As per the said proceedings, no admission was recorded and but the points of contests raised by the parties indicate that while the 1a Defendant relied on the stance taken by the Plaintiff, the 4th Defendant claimed and or wanted to exclude lot 3 of plan No. 2480 dated 20.06.1986 from the purported subject matter of the action.

The 2nd Defendant and the 3rd Defendant including the Substituted Defendants for the 3rd Defendant challenged the corpus which was sought to be partitioned as

an undivided portion of a larger land and accordingly their position was that it cannot form the subject matter of the present partition action. They also contested the pedigree of the plaintiff while relying on a pedigree commencing from an original owner named Jasin Arachchige Babun Appu to a larger land of 2 acres in extent and further claimed prescriptive title to the said land.

Though a right of way was also claimed by the 1A Defendant in his statement of claim, no point of contest was raised in that regard and it appears that alleged right of way does not fall within the purported corpus proposed to be partitioned by the plaint.

Subsequent to the institution of the action, when the preliminary survey was carried out, it was evidenced that, though the Northern, Eastern and the Southern boundaries of the purported corpus of partition was shown by the Plaintiff as it appears on the ground, the purported west boundary was ascertained only by superimposing the plan No.2151 dated 27.03.1897, marked as “P 6” of the appeal briefs. It should be noted that the number of the old plan used for the superimposition differs from the number given in the plaint or the amended plaint which is No. 2156. The Preliminary plan No.2787 of Mervin Wimalasooriya, Licensed Surveyor and its report marked as X and X1 in the brief, thus depicts the purported corpus to be partitioned with the help of the said superimposition. The said preliminary plan and report also evidenced that some of the buildings within the purported corpus extend beyond the superimposed western boundary. It is also evidenced from the said report that no one, who gets title or rights according to the plaintiff’s pedigree or 1st Defendant’s pedigree, had claimed plantation, buildings or possession of any part before the commissioner. As per the said report

the age of the said plantation at the time of survey ranged from 4 to 70 years. All these plantations and the buildings were claimed by 2nd and 3rd defendants who were new claimants at the preliminary survey. Hence, the preliminary survey itself shows that the purported corpus was not in existence as a separate land on the ground at the time of survey and it was enjoyed by the people in possession with the adjoining lot to the west as part of one unit; Only the superimposition of the " P 6" gave it a separate identity on the Preliminary plan.

The Plaintiff had led the evidence of one Piyabandu Nanayakkara, one of his predecessors of title, who was born around 1942 as per his age given while giving evidence and one Wilson, a coconut plucker, who said to have plucked coconut in the purported corpus. The Plaintiff had closed his case relying on the documents marked as P1 to P6. The 2a Defendant had given evidence in support of his case and closed his case reading in evidence the documents marked as 2v1 to 2v24 while the 3rd Defendant closed his case relying on the documents marked 3v1 to 3v13 without calling any witnesses. The other Defendants had not led any evidence at the trial.

Learned District Judge delivered his judgment dated 16.12.2009 dismissing the plaintiff's action. As per the reasons given by the learned District judge it appears that he had come to the conclusion that even though there is a plan surveyed and drawn in 1897, the plaintiff failed in proving the existence of the purported land to be partitioned as described in the plaint. In other words, learned District Judge was in doubt whether there was a proper partition of the larger land terminating the co-ownership and giving a separate identity to the purported partitioned portion as described in the plaint. Thus, the Plaintiff failed in proving that the land sought

to be partitioned is a properly divided portion from the bigger land which could be considered as a new unit devoid of the co-ownership that existed with regard to the larger land that was there prior to the partition.

Being aggrieved by the said judgement of the Learned District Court Judge the Substituted Plaintiff preferred an appeal to the High Court holden in Matara exercising civil appellate jurisdiction. The High Court affirmed the judgement of the District Court stating and reasoning as follows;

- *The learned District Judge dismissed the partition action on the ground that the land sought to be partitioned is not a divided portion of a larger land.*
- *The main issues to be considered were;*
    1. *Whether the land described in the schedule to the plaint and the land surveyed and shown in the preliminary plan was a divided portion of a larger land;*
    2. *Or after preparing the plan No. 2151 which was marked as "P6", the intended parties agreed to divide the land shown in plan no. 2151(P6) and had possessed the land as shown in the division in plan no.2151 for more than 10 years.*
- *Western boundary of the proposed corpus of the present partition action was not a defined boundary and it was identified by superimposing the plan no.2151(P6) and there is no evidence to show that the surveyor had taken steps to demarcate the undefined Western boundary with boundary marks which could not be easily removed as laid down in S. 18 (1) of the partition Law No. 21 of 1977.*

- *The surveyor who prepared the preliminary plan marked as "X" had not certified that he surveyed the correct land to be partitioned. The surveyor had failed to demarcate the undefined boundary correctly for the action to continue (It should be noted that as per section 18(1)(a)(iii) of the Partition Act, the Commissioner should state in his report whether or not the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint).*
- *The Plaintiff failed in proving that, after preparing the plan marked as 'P6' (purported amicable partition plan No. 2151), the allottees possessed the land as demarcated by 'P6' for more than 10 years. {In this regard the learned High Court Judge had highlighted* ***Dona Cecilia V Cecilia Perera (1987) 1 SLR 235, Abeysinghe V Abesinghe 46 NLR 509*** *to indicate that a undivided portion of a larger land cannot be partitioned but where a land was divided by the co-owners who acquiesced in the division and possessed their divided lots exclusively showing an intention to partition the land permanently and not just for convenience of possession, they can, with ten years of possession, acquire prescriptive title to their respective lots.}*

Being aggrieved by the said judgement of the High Court of Civil Appeal, the Substituted Plaintiff sought leave to appeal from this Court and leave to appeal was granted on the following questions of law;

(I). Did the honourable High Court err and/or misdirect and/or non-direct in law when interpreting the ratio of **Dona Cecilia v Cecilia Perera 1987(1) SLR 235**?

(II). Did the honourable High Court in affirming the judgement of the Learned District Judge err in law in holding that, the mere preparation of plan NO. 2151 was not enough to validly give effect to an amicable partitioning of a larger land unless such plan was followed by the execution of partition deeds? – (vide written submissions of the 2A Defendant Respondent Respondent dated 06.03.2019 and 08.04.2014 and written submissions of the Substituted Plaintiff Appellant Appellant dated 07.11.2013).

It appears that the position of the Substituted Plaintiff Appellant Appellant (hereinafter sometimes referred to as the Substituted Plaintiff) is that, by the time the Plan 'P6" was prepared, there were 5 co-owners and they amicably partitioned the land in accordance with the said plan marked as ' p6' and placed their signatures to the said plan after it was prepared. On some occasions he submits that those facts were not in dispute- vide paragraph 5.01(i) of his written submission dated 07.11.2013. However, it is clear that there was a corpus dispute as well as a dispute with regard to the pedigree. As per the plaint and the amended plaint, purported corpus sought to be partitioned is lot B of plan no. 2156 dated 27.03.1987 made by J. A. Byser, Licensed Surveyor. The amended plaint states that the larger land shown in that plan had been amicably partitioned by the then five co-owners, namely Jasin Arachchige Babun Appu, Don Andrias Nanayakkara Police Officer, Kumareppurama Arachchige Diyonis, Kumarapperuma Arachchige Andiris and Kumarapperuma Arachchige Karolis and thereafter, said Andiris Nanayakkara Police Officer came in to the possession of the aforesaid lot B and became the original owner of said lot B. As said before the position of the 2nd and 3rd defendant is that what is sought to be partitioned is a portion of a larger land and the original owner of the said land including the portion shown as land sought to

be partitioned in the preliminary plan was Jasin Arachchige Babun Appu who had prescriptive title to the same. No admission was recorded at the trial stating that the 5 persons named in "p6" (Plan No 2151) or in the plaint as aforesaid were the original owners of the larger land and they amicably partitioned the larger land in accordance with the said plan marked as 'P6". Hence, the substituted Plaintiff's position that it was not disputed that there were 5 co-owners to the larger land and they amicably partitioned is factually incorrect. Thus, the burden was on the plaintiff to prove that the above named 5 persons were the co-owners of the larger land and they amicably partitioned the larger land as per the said plan 2156(as per the plaint) or plan marked as P6 dated 27.03.1987. In this regard the Plaintiff had called one of his predecessors in title, namely one Piyabandu Nanayakkara who was born around 1942. Surely, he could not have any personal knowledge of the people or their possession to the larger land in 1897 as it was many years prior to his birth. No deed of partition of the larger land or cross conveyance after the purported partition plan was produced in evidence. No deed referring to such amicable partition executed by any of the said purported 5 co-owners was submitted in evidence. Even though the deeds marked as P1 to P4, which were written after 80 to 93 years from the making of P6, refer to a divided lot B, they do not refer either to plan No.2156 or 2151 or any amicable partition plan. In contrast, the deed marked as 1v1,1v2 and 1v3 through the plaintiff's witness, which were written in between 1957 and 1962 to prove the pedigree relied by the plaintiff and to give shares of the purported land to be partitioned to the 1st defendant do not refer to the amicable partition as per the aforesaid plan No.2151 marked as "P6" but to a different amicable partition of 1/3 share to the west and 2/3 share to the east and those deeds relates to a land of about ½ an acre. These deeds (1v1,1v2 &1v3)

indicate that at the time they were written the people in the plaintiff pedigree did not consider P6 as a partition plan or the purported lot B of P6 (plan No.2151) or plan No 2156 as a land with a separate identity or existence. The other witness of the Plaintiff was the coconut plucker who was 54 years old when he gave evidence in 2007.He did not relate any evidence with regard to the amicable partition of the larger land and on the other hand he cannot possess any personal knowledge of such partition that purportedly had taken place in 1897. However, if there was evidence to show that it was only the people who get rights under the plaintiff's pedigree are in possession of the land identified as the land sought to be partitioned by the superimposition of the old plan, the court below could have presumed that there had been an amicable partition some time ago in the past as stated in the plaint, but the preliminary survey report marked as X1 shows neither the plaintiff nor anyone who gets rights under the plaintiff's pedigree claimed any rights to the plantation or the buildings in the purported corpus. There is nothing in that report to assert that anyone who gets right under the plaintiff's pedigree possesses any part of the purported corpus. The aforesaid witness of the plaintiff had casually stated that the contesting defendants were given their planter's share and they are licensees of his grandfather. No planter's share agreement or any other agreement relating to plantation were submitted in evidence. He had not stated when the contesting defendant came to the land as licensees or under any other agreement. However, he had further admitted that his knowledge with regard to the land was about 30 years. The X1 report shows that the contesting defendants had claimed plantation which are 60-70 years old without any counter claim. Thus, this witness cannot have any personal knowledge with regard to how the contesting defendants came to the land. On the other hand, the plaintiff had

not taken any stance in his amended plaint that the contesting defendants are licensees or reside there under any other agreement. If it is the true position the Plaintiff could have revealed it and shown the contesting defendants' rights in his amended plaint. This seems to be a new stance based on an afterthought.

The coconut plucker was called to state that he plucked coconut in the purported land for the Plaintiff, but he could not identify the purported land by its name or boundaries. He does not know who reside there in the purported corpus. He speaks of a land with one house and a garage but as per plan marked X and its report X1 there are number of buildings which includes at least 2 houses and no garage was shown or described therein. Thus, the coconut plucker's evidence does not support the plaintiff's stance with regard to the identity of the purported corpus. On the other hand, the reports of the plans made and produced in evidence in this case confirms the possession of the 2nd and 3rd defendants or their successors.

The substituted Plaintiff relies on the aforesaid old plan No.2151 marked as P6 during the trial and its superimposition on the preliminary plan marked as X. As mentioned before, the plaint and the amended plaint in describing the purported corpus sought to be partitioned refers to a plan No.2156 of the same surveyor bearing the same date. This is indicative of the fact that either there is a defect in the plaint as well as in the amended plaint in describing the old plan and the purported corpus to be partitioned or wrong plan had been used to do the superimposition. This itself stands against the substituted plaintiff's position that the corpus was properly identified. It is true P6 (plan no.2151) contains the names of the 5 persons referred to by the Plaintiff as the co-owners of the larger land and it had allocated the five allotments to the said 5 persons. However, it is worthy to

note that in the copies given to the brief only 3 of them had signed while one appeared to have placed a mark, indicating only four of them had consented to the proposed partition by “P6”. It appears that the purported original owner of the plaintiff pedigree to the purported corpus sought to be partitioned, namely Don Andris Nanayakkara had not signed or placed his mark on “P6” expressing his consent to the proposed partition and allocation of lots in “P6”.

Furthermore, “P6” plan is only a graphical representation of a partition of a larger land which can be done even in an office of a Surveyor. To give separate identity to separate lots depicted therein one has to demarcate boundaries on the ground as per the prepared plan. The witnesses of the plaintiff who were born after many decades of the making of “P6” cannot have any personal knowledge to say such demarcation was done on the ground and the relevant person came into the possession of the lot allotted to such person. Thus, the witnesses of the plaintiff were not capable of asserting that the purported original owner came into the purported corpus sought to be partitioned in this action. As there are other persons, namely who claim under 2nd and 3rd Defendants, who do not get rights under the plaintiff’s pedigree, are now in possession in the purported corpus sought to be partitioned and the witnesses of the Plaintiff are not capable witnesses to prove that they came into possession under or through persons found in the plaintiff’s pedigree, there was not sufficient material before the courts below even to presume that there had been an amicable partition and the original owner in the Plaintiff’s pedigree came and possess the purported corpus sought to be partitioned in this action as a separate block of land.

On the other hand, the learned High Court Judges have correctly found that even for the present action there is no evidence to show that superimposed boundary was demarcated on the ground and it is only by superimposition the surveyor has shown the purported corpus. It is essential to demarcate the boundary found by superimposition on the ground. Otherwise, the persons affected by the new boundary line will not get notice of the new boundary to claim or assert their rights or challenge the finding of the surveyor by the said superimposition. In this action this court observe as said before that there is difference between the old plan number referred in the amended plaint and the plan used for superimposition.

What have been stated above demonstrates that;

- There was no acceptable evidence to establish that the 5 persons referred to in the purported amicable partition plan marked as P6 were the co-owners of the larger land at the time the said plan was made.
- There was no acceptable evidence to establish that all 5 persons referred to in the said plan consented to the amicable partition depicted by the said plan.
- There was no acceptable evidence to establish that the boundaries were laid on the ground as per the aforesaid amicable partition and the purported original owner of the purported corpus sought to be partitioned as per the plaint started possessing it as a portion of land with a separate identity.
- There is no acceptable evidence, even for the present partition action, that the boundary found by purported superimposition was demarcated on the ground to identify the corpus sought to be partitioned on the ground.

- The plan used for superimposition bears a different number when compared to the number used in the amended plaint to describe the corpus sought to be partitioned.

Hence it is the view of this court that there was no sufficient material before the courts below to establish a separate existence of the corpus sought to be partitioned and the identity of the same. Thus, this court cannot find fault with the lower courts dismissing the Plaintiff's action.

However, the Substituted Plaintiff strenuously argue that the learned High Court Judges erred;

- In applying and interpreting the ratio decidendi of **Dona Cecilia Vs Cecilia Perera (1987) 1 SLR 235** to the case at hand and,
- In holding that mere preparation of plan 2151 was not enough to validly give effect to an amicable partitioning of a larger land unless such plan was followed by the execution of partition deeds.

The Substituted Plaintiff's contention appears to be that when all the co-owners sign the amicable partition plan made for the larger land, neither the execution of a partition deed nor 10 years prescriptive possession is needed to terminate the co-ownership to the respective lots allocated by the amicable partition plan. In other words, an amicable partition plan signed by all the co-owners of the larger land itself is sufficient to terminate co-ownership among them in relation to each lot allocated by that amicable partition plan.

Now it is pertinent to look at the ratio of the aforesaid **Dona Cecelia and Cecilia Perera** case. The following extract from the aforesaid judgment will highlight the issue which was to be decided in that case and the decision.

" The only matter argued before us was that there was no proof of an amicable division of the land in 1935 as depicted in plan 205, It was submitted that all the co-owners at the time had not signed the plan signifying their consent to the division of the land into the lots A,B and C. The case of ***Githohami V. Karanagoda (1954) 56 NLR 250*** *was strongly relied on by learned counsel for the appellant. There it was held that a plan made at the instance of a co-owner purporting to cause a division of the common land of which the other co-owners apparently had no notice does not form the basis of divided possession. Exclusive possession on the footing of such plan does not terminate the co-ownership of the land, and no presumption of an ouster can be inferred from such possession. When a land is amicably partitioned among co-owners it is usual to execute cross deeds among themselves or at least the co-owners should sign the partition plan.*

In that case apart from the plan, there was no evidence to show that the land was in fact partitioned on the occasion the plan was prepared. There was also no evidence that all the co-owners had acquiesced in the preparation of the plan, nor were aware of its preparation. Besides, the evidence of exclusive possession led in the case was insufficient to establish a prescriptive title in the co-owners to their several lots. Learned counsel also cited the case of ***Dias Vs Dias (1959) 61 NLR 116****, which held that where a co-owner conveys his interest by reference to a particular portion or Koratuwa of which he has been in possession the deed can be considered as effective in law to convey his undivided interest in the whole land. But in that case the division took place without the knowledge of all the co-owners.*

Separate possession on the grounds of convenience cannot be regarded as adverse possession for the purpose of establishing prescriptive title. In ***Simpson V Omeru Lebbe (1947) 48 NLR 112*** *relied upon by counsel for the appellant, there was no documentary evidence of any division of the land as in the present*

case, and on the other hand, according to the 3rd Defendant all the co-owners of the land were present at the time of the plan was made. They were herself and her husband Jusey, Isebella, Ushettige Cecilia Perera and Theodorisa. The 3rd Defendant and her husband were allotted Lot A, Jeramias Lot B, and others Lot B. The Plaintiff's vendors on P1 were not called to testify to the contrary. The learned trial judge has accepted the 3rd Defendant's evidence and found that there was an amicable division of the land in 1935.That finding has not disturbed by the court of appeal. After the division, live fences were erected along the boundaries separating one lot from the other. At the time the preliminary plan X was prepared in 1968, the surveyor found fences separating the lots and has depicted them in the plan. This evidence has been accepted by the learned trial judge. Although the plan 205 was not signed by the co-owners the evidence clearly showed that they were present and were aware of the division of the land and acquiesced in it. Thereafter they had possessed their divided lots exclusively and had taken the produce. Everything pointed to an intention on their part to partition the land permanently and not just for convenience of possession.

Where land is divided with the consent of all the co-owners but no cross conveyances are executed in respect of the lots, co-ownership terminates only after undisturbed, uninterrupted and exclusive possession of the divided lots for a period of over 10 years."

The above quoted passages from the **Dona Cecilia Vs Cecilia Perera** decision shows that the issue that had to be decided in the said case was whether there was an amicable division of the land in 1935 as per a plan marked in that case when all the co-owners had not signed the partition plan to signify their consent to the division as well as when there was no partition deed written in accordance with the said plan. The court had decided that there was evidence to show the co-owners were present and aware when the plan was made and they after the division had erected fences to separate the lots which fences were found by the surveyor when preparing the preliminary plan for that case. It also appears that the exclusive

possession of divided lots and enjoyment of the produce of such divided lots were also established in that case. As such this court in that case had decided that, even though the co-owners did not sign the partition plan, the co-owners were present, aware of the division and they acquiesced in it. Thus, other evidence available had been taken into account to consider the consent, agreement, knowledge or acquiescence of the division by the co-owners when they have not signed the plan or executed a partition deed. Had they signed the plan it could have been considered as a consent or agreement to or acknowledgement of the division proposed by the plan or an overt act or something similar to that to commence adverse possession from there onwards. The issues of law proposed at the case at hand concern with whether mere placing of signatures on the purported partition plan by co-owners itself terminates the co-ownership without a partition deed or cross conveyance or ten years prescriptive possession of relevant lots.

The placing of a co-owner's signatures on a partition plan may evidence his consent or agreement to the division proposed by the said plan or his acknowledgment of the same but it cannot establish whether the boundaries set out in the plan were demarcated on the ground and parties commenced possession of units of land separated in accordance with the said amicable partition plan.

Section 2 of the Prevention of Fraud ordinance reads as follows;

" No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting such object, or establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovables property, and no notice, given under the provisions of the Thesawalamai Pre-emption

Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common ownership, shall be of force or avail in law unless the same shall be in writing and signed by the party making the same ,or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses."

Due to the provisions of the aforesaid section, any agreement to transfer or renounce once co-ownership rights in relation to an immovable property has to be in writing and executed before a notary. In the case at hand there was no notarially executed instrument renouncing or transferring the co-owned rights in the divided lots allocated to one of the co-owners by the other co-owners. In other words, there was no cross conveyances or a partition deed. If there was such an instrument or instruments, the co-ownership should have extinguished with the execution of such instrument. However, mere signatures of the co-owners placed on a plan does not falls within the instrument, writing or deed executed by a notary as contemplated in Section 2 of the Prevention of Fraud Ordinance. Thus, such placement of signatures itself is not sufficient to terminate co-ownership in relation to the divided portions depicted in the plan. Such placement of signature can only be construed as co-owner's expression of consent and willingness to transfer or renounce their rights in relation to the lots allocated to the other co-owners but such plan itself cannot be construed as an instrument or writing renouncing or transferring such co-owned rights.

One other mode of acquisition of rights is prescription. As far as another co-owner's rights are concerned following extracts from the judgment **Githohamy Vs Karanagoda (1954) 56 NLR 250** is relevant.

" The possession of a co-owner would not become adverse to the rights of other co-owners until there is an act of ouster or something equivalent to ouster. In the absence of ouster possession of one co-owner ensures to the benefit of other co-owners. It was so held by the Privy Council in ***Corea Vs Iseris Appuhamy [1(1911) 15 NLR 65]****. It is true that ouster can be presumed from exclusive possession in special circumstances as we decided in the case of* ***Tillekeratne V Bastian [2(1918) 21NLR 12****]. The special circumstances which was recognized in that case was the fact that the co-owner who claimed a prescriptive title was proved to have excavated valuable plumbago on the land during a lengthy period of time. Such excavation of plumbago during a protracted period would naturally diminish the value of the land. Therefore, if the other co-owners did not protest when the land was being possessed in a manner that its value would be considerably diminished, it is fair to presume an ouster, but if a co-owner only takes the natural produce of the trees for a long time no such presumption would arise."*

Accordingly a placement of signature on an amicable partition plan by a co-owner consenting to the partition can be treated as an expression against his own rights as a co-owner and exclusive possession of each allottee of the allotment given to such allottee there onwards can be considered as adverse to the co-ownership rights that existed to the larger land and ten years of such possession will give prescriptive title to the allotted lot. In other words, special circumstances of signing of the amicable partition plan and starting exclusive possession of the allotted lot can be considered as the overt act or its equivalent, the starting point of the adverse possession. On the other hand, as decided in the aforesaid **Dona Cecilia V Cecilia Perera** case even where the co-owners did not sign the partition plan other evidence may provide material to decide the starting point of adverse possession of allotted lots. As stated in **Ponnambalam V Vaitialingam (1978-79) 2 Sri. L.R 166** the question whether a co-owner has prescribed to a particular divided lot as

against the other co-owners is one of fact, to be determined by the circumstances of each case.

In the case at hand there was no acceptable evidence before the lower court judges to conclude that after the making of purported amicable partition plan, division by demarcation of the boundaries was done on the ground as well as the purported original owner of the purported corpus to be partitioned started possession to the exclusion of others.

The Substituted Plaintiff in his written submission dated 7th November 2013 has stated that there are other modes of acquisition under Roman Dutch Law such as Occupatio and Accession which does not involve conveyance as contemplated by Section 2 of the Prevention of Fraud Ordinance. This appears to be in support of his argument that as co-owners have signed the plan there is no need of a notarially executed deed or evidence of prescriptive title. However, the Plaintiff while filing his amended plaint, neither had pleaded any other mode of acquisition under Roman Dutch Law nor he had led evidence in that regard. In his amended plaint dated 19.01.1998 at paragraph 3, the plaintiff had clearly relied on an amicable partition and prescriptive title acquired by the purported original owner of his pedigree, namely Andris Nanayakkara. The Plaintiff failed in proving prescriptive title of the said purported original owner as pleaded in his amended plaint.

For the forgoing reasons this court cannot hold that the Learned High Court Judges erred or misdirect or non-direct them in interpreting the Ratio of aforesaid case **Dona Cecilia V Cecilia Perera** as well as erred in holding mere preparation of a partition plan No.2151 was not enough to validly give effect to an amicable

partitioning of a larger land unless such plan was followed by the execution of partition deeds since there was no acceptable evidence to prove prescriptive title. Thus, afore mentioned issues of laws are answered in the negative. Furthermore, for the reasons elaborated above it is clear that the Plaintiff failed in proving the existence and identification of the purported corpus sought to be partitioned. Hence this appeal is dismissed with costs.

Judge of the Supreme Court

L.T.B. Dehideniya, J

I agree.

Judge of the Supreme Court

S. Thureiraja, PC, J

I agree.

Judge of the Supreme Court