IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

SC/APPEAL/184/14

SC (HCCA) LA No. 498/2012

SG/HCCA/RAT Appeal No. 80/08 (F)

District Court of Ratnapura

Case No. 7251/L

Gallage Saummehammy alias Somawathie,

Gallage Mandiya,

Doloswala, Nivithigala.

Plaintiff.

Vs.

I. A. Dharmapala,

Gallage Mandiya,

Doloswala, Nivithigala.

Defendant.

AND BETWEEN

I. A. Dharmapala,

Gallage Mandiya,

Doloswala, Nivithigala.

Defendant - Appellant

Vs.

Gallage Saummehammy alias Somawathie,

Gallage Mandiya,

Doloswala, Nivithigala.

Plaintiff - Respondent.

AND NOW BETWEEN

Gallage Saummehammy alias Somawathie,

Gallage Mandiya,

Doloswala, Nivithigala.

Plaintiff – Respondent - Petitioner.

Vs.

I. A. Dharmapala,

Gallage Mandiya,

Doloswala, Nivithigala.

Defendant –Appellant – Respondent.

Before: Priyantha Jayawardena, PC, J.

Vijith K. Malalgoda, PC, J.

E.A.G.R. Amarasekara, J.

Counsel: B.O.P. Jayawardena with Oshada Rodrigo for the Plaintiff – Respondent – Petitioner.

Arosha Silva instructed by Ms. Sheela Jayawardena for the Defendant - Appellant – Respondent.

Argued on: 10.12.2019

Decided on: 08.09.2022

E. A. G. R. Amarasekara J

Introduction

The Plaintiff – Respondent – Petitioner (hereinafter referred to as the Plaintiff – Petitioner or the Plaintiff) instituted an action in the District Court of Ratnapura against the Defendant – Appellant – Respondent (hereinafter referred to as the Defendant – Respondent or the Defendant) by her plaint dated 08.02.1985, inter alia praying for a declaration of title to the land described in the schedule 'B' and for ejectment of the Defendant and his servants and agents etc. from the land described in the schedule 'C' of the plaint which is a portion of the land described in the schedule 'B'. The said plaint was amended thrice, and by the final amended plaint dated 02.02.2001, the Plaintiff inter alia prayed for a declaration of title to the land described in the schedule 'A', for the ejectment of the Defendant and others claiming under him from the land described in the schedule 'C' to the plaint and for damages. However, the position of the Plaintiff is that this prayer for declaration of title to the land described in schedule 'A' to the final amended plaint was an obvious oversight- vide her written submissions dated 13.11.2014. As per the paragraphs 6,7 and 10 of her final amended plaint, in fact she has claimed a declaration of title to the land described in schedule 'B' and 'C' to the amended plaint and land described in 'C' has been described as a part of land described in schedule 'B' to the plaint. The land in schedule 'B" has been described as a separated portion of the land in schedule 'A' of the said amended plaint with the consent of other co-owners, from the latter part of 1964.

<u>The stance taken by the Plaintiff in her final amended Plaint.</u>

The plaintiff in her final amended plaint inter alia averred that;

- The land described by the schedule 'A' to the amended plaint was owned by Gallage Pinhami, Gallage Mithuruhami and Gallage Dingirihami in equal proportions, namely 1/3rd each.
- Subsequent to the demise of Pinhami his undivided 1/3rd share to the land was devolved on his sons namely, Appuhamy and Mudalihamy in equal proportions.

- Subsequent to the demise of Appuhamy his undivided 1/6th share devolved on his son Gallage Rathranhamy only, owing to the fact that Appuhami's daughters contracted deega marriages.
- Said Rathranhamy transferred the undivided 1/6th share owned by him to his daughter, the Plaintiff, subject to his life interest by deed of gift No. 403 dated 18.05.1964. Subsequent to the demise of Rathranhamy plaintiff became entitled to undivided 1/6th share.
- Thereafter, with the consent of the other co-owners to the land the Plaintiff separated a part from the said land and built a house therein. Said separated land possessed by the plaintiff is depicted in Plan No. 3078 prepared by Ramakirishnan, Licensed Surveyor which is described in schedule 'B'.
- The Plaintiff and her predecessors were in prescriptive possession in the land described in the schedule 'B' for a period of more than 10 years and has acquired prescriptive title to the said land.
- On or around February 1984 the defendants who had no right whatsoever to the land described in the schedule 'B' entered into a portion in the southern side of the said land stating that it is part of Brahmanagewatte and started unlawful possession of that part causing damages. Said portion unlawfully possessed by the defendant is depicted as 2A in the plan No. 3078 A and is described in schedule 'C'.
- Lots No. 13 and 15 along with lot No.2A of the said plan No. 3078A were in the possession of the Plaintiff for more than 10 years and she has acquired prescriptive title to them.

The stance taken by the Defendant.

The Defendant filed his answer dated 25.02.1988 and amended the same on 21.01.1997. In the amended answer the defendant inter alia stated that;

- Although the Plaintiff has stated that she got her undivided 1/6th share separated from the land described in the schedule 'A' to the amended plaint, which is of nearly 3 acres in extent, with the consent of the other co-owners and started possessing the said separated block of land of 1A:0R:1Perch, the other co-owners never agreed to such separation.

- The Plaintiff claims that she became entitled to the said land by deed of gift No. 403. However, no plan depicting the said 'Meneriwatta' or 'Meneri Owita' mentioned in the said deed has been tendered. The plan produced by the plaintiff is a plan prepared by the Land Reform Commission which has no connection with neither the Plaintiff nor the Defendant, and the Plaintiff has superimposed the said plan with a part of plan no. 1291 produced by the Defendant. Anyhow, there is no land called 'Meneriwatta' or 'Meneri Owita' found in the said plan no.1291.

- Without prejudice to what is stated above, being a co-owner, the Plaintiff cannot claim a divided specific portion of land from this action.

Further replying to the plaint, the Defendant has set out a pedigree starting from Brahmanage Mithruhamy and Mudalihamy as the original owners to a land called Brahamanagewatte and Owita which is described in the schedule to the amended answer. As per the said pedigree he has shown his entitlement to 1/15th of the said land and his position is that, for that 1/15th share, he is in possession of lot 15 of plan no.1291 dated 19.11.1993 made by Sirinanda Pasquel, Licensed Surveyor to the said land. It appears that, as per the stance taken up by the Defendant, the Defendant's contention is that by superimposing a plan made by Land Reform Commission with the said plan the Plaintiff has attempted to claim a portion from said Brahmanagewatta and owita as part of Mineriwatte alias Mineriowita. Accordingly, the Defendant – Respondent claimed undivided rights to a land called 'Brahmanagewatta' alias 'Owita' and prayed for the dismissal of the action filed by the Plaintiff. The Defendant has claimed damages for his plantation in case the court decides in favour of the Plaintiff.

The Plaintiff filed a replication replying to the claim in reconvention made by the Defendant refuting the claim of the Defendant to plantations.

Trial

After filing of the pleadings, the trial has proceeded on 15 issues raised and out of them 1st – 6th issues were made on behalf of the plaintiff and 7th to 15th issues were made on behalf of the Defendant. Through their respective issues, the Plaintiff has attempted to focus on his alleged title to the land named Lot 2 of Minneriwatte alias Minneriowita of plan no.563 made by L. U. Kannangara L.S and more fully

described in the schedule 'B' to the final amended plaint and to the portion allegedly encroached by the defendant from the said land described in schedule 'B' which is described in the schedule 'C' to the plaint as lot 2A of plan no. 3078 made by S. Ramakrishnan L.S, while the Defendant has attempted to claim title to a land named Brahmanagewatte and Owita as per his amended answer.

The Plaintiff and one Dingirimahaththaya had given evidence for the Plaintiff's case and the Plaintiff had closed her case reading in evidence the documents marked P1, P1a, P2, P2a, P3 and Z and no objections were raised or reiterated to the said documents at the close of the plaintiff's case-vide journal entry dated 28.06.2007. The Defendant had given evidence and closed his case reading in evidence the documents marked V1, V1a, V2, and V3. The Defendant's documents also were not objected at the close of the Defendant's case. Hence, all the afore-mentioned documents can be considered as evidence for all the purposes of the case at hand. Further, the learned District Judge has referred to the deed marked P4 in his judgment. Even though there is no reference to such marking of the said deed in evidence, no party has taken up the position that the learned District Judge had considered a document that was not tendered in evidence. In fact, the Plaintiff has given evidence with regard to the contents of the said deed no.403 on 12.09.2001. Perhaps, due to a clerical error the marking of the said deed has not gone into the proceedings.

District Court Judgment

Subsequent to the trial, learned District Judge delivered the judgment on 19.06.2008 answering the issues in favour of the Plaintiff and allowing the prayer of the plaint inter alia for the following reasons;

- As per the plaintiff's stance, the original owners to the land named Mineriowita alias Mineriwatta, the land claimed by the Plaintiff, were Pinhamy, Mudalihamy (Correct name as per evidence shall be Mithuruhamy) and Dingihamy and after the death of Pinhamy his 1/3rd share devolved upon Mudalihamy and Appuhamy. On the death of Appuhamy, his 1/6th share devolved upon Rathranhamy due to the deega marriage of his sisters. Rathranhamy was the father of the Plaintiff and he conveyed his 1/6th share to the Plaintiff. Thus, the Plaintiff became entitled to 1/6th share by deed No. 403, marked P4 and the defendant had not shown that this evidence relating

to the plaintiff's rights cannot be accepted. Thus, it can be accepted that the plaintiff is entitled to 1/6th share.

- The defendant claims his entitlement to Brahmanagewatta and Owita but his stance that Gallage clan and Brahmanage clan amicably partitioned and possessed 1/2 each of the said Brahmanagewatta cannot be accepted since the Defendant resides, as per his address, in Gallage Mandiya that belongs to Gallage People.
- The chain of title stated by the defendant to the land he claimed lacks clarity and therefore failed to establish the devolution of title to him.
- However, in a declaration of title case, the Plaintiff must prove his title.
- As the evidence of both parties is compatible as to the time the Plaintiff came to reside in the land, it can be accepted that the Plaintiff came to reside in the land somewhere close to 1981 (it appears it was wrongly typed as 1918 when it should be 1981 as per the reference to the relevant item of evidence -vide paragraph 2 of the page 7 of the District Court Judgment.).
- As per the evidence led by both parties, it is clear that the dispute has arisen owing to the lack of clarity relating to the boundary between the lands they claimed, and the disputed portion of land of 4.8 perches is depicted in plan no.3078 made by S. Ramakrishnan, marked P1.
- Even though there is evidence to show Defendant's occupation in the land he claimed for a very long time, the Defendant has failed to establish that the defendant acquired prescriptive rights over the disputed portion of land as part of the said land he claimed by adducing substantial evidence.
- The plan no.1291, marked V1 to show the land claimed by the Defendant, cannot be used reliably in deciding the rights as it was prepared at the instance of the Defendant without the participation of the Plaintiff and the southern boundary of lot 13 of that plan, which is described as the Plaintiff's land by the Defendant, is an undefined boundary. However, as per the superimposition plan marked P2, made by S. Ramakrisnan L.S, the disputed portion shown as lot 2A in Plan marked P1 is found within lot 15 of V1 for which the Defendant claim possession and title and the dispute is that the Defendant has encroached and has been in the possession of Lot 2A claimed by the Plaintiff.

- Plan No. 563 made by L. U. Kannangara L S, produced by the Plaintiff marked Z can be preferred over the Defendant's plan marked V1 since the said plan Z had been prepared by an independent source, long before the present dispute arose. As per the said plan, it is proved that the Lot 2 of the said plan is Meneriwatta which belongs to the Plaintiff. The Plaintiff claims that lot 2 is in her possession in lieu of 1/6th share she has. Even the Plaintiff has described schedule B of the Plaint using this Plan. Lot 4 of this plan, which is below lot 2, is Brahmanagewatta claimed by the Defendant. Even plan P1 depicts the lot 2 of this plan marked Z and the superimposition plan marked P2 has shown lot2 of P1 in green. Thus, it is established that disputed portion of land, namely lot 2A falls within the Plaintiff's land Mineriwatta but now it has gone into the land of the defendant. Hence, it is established that the disputed portion of land of 4.8 perches belongs to the Plaintiff.
- The Plaintiff has not led evidence with regard to the compensation and even though, the Defendant has claimed compensation for the plantation he has not led evidence as to the plantation within the disputed area and its value.

Based on the reasons elaborated above, the learned District Judge of Rathnapura decided that the Plaintiff is entitled to the land described in the schedule B to the plaint and to the plantations and buildings standing thereon and further to eject the Defendant and everyone under him from the land described in the schedule C to the plaint and to restore the possession of it to the Plaintiff with costs of the action.

Judgment of the Provincial High Court of Civil Appeal

Being aggrieved by the said judgment the Defendant preferred an appeal to the Provincial High Court of Civil Appeals of Sabaragamuwa Province holden at Ratnapura. Subsequent to the hearing, Learned High Court judges by their judgment dated 03.10.2012 dismissed the action of the Plaintiff inter alia on the following grounds;

- As stated in the plaint, evidence and the written submissions of the plaintiff, even though it is clear that the Plaintiff has basically claimed entitlement only to 1/3rd share of the land described in the schedule A to the plaint, she has stated in the plaint that the Defendant is a trespasser and she filed this action

for a declaration to the effect that she is the owner of the land more fully described in the schedule A to the plaint.

- Even though, an owner of an undivided share of a land can obtain a judgment in favour of him to evict a trespasser and to have his title to the undivided share declared, he cannot obtain a judgment in favour of him for a declaration of title to the whole land and for the eviction of the trespasser without making the other co-owners parties to the case. Therefore, the petitioner cannot maintain this case. Further, if a co-owner wants to institute an action to evict a trespasser from a co-owned land, he is able to do so only if he prays for a declaration of title to his undivided share and accordingly prays to evict the trespasser (In this respect, the learned High Court Judges have referred to certain decision of our superior courts, namely **Hevawitharana V Dangan Rubber Company 17 N L R 49, Sura V Fernando 1 A C R 95, Unus Lebbe V Zayee 1893(3) S C R 56, Arnolisa V Dissan 4 N L R 163** etc.)
- Section 12 of the CPC allows a plaintiff to file an action only for his undivided shares.
- The Plaintiff while claiming entitlement to 1/3 share of the land cannot maintain an action to declare title to the entire land and therefore, there is a reason to dismiss the Plaintiff's action.

On the footing of the aforementioned reasons, the learned High Court Judges have dismissed the plaint without costs. Even though there is no declaration as to the allowing or dismissal of the appeal made to it, the outcome of the above decision amounts to an allowing of the appeal made to it since the judgment of the High Court of Civil Appeal overturns the Judgment of the learned District Judge referred to above.

Appeal to this Court

Being aggrieved by the judgment delivered by learned High Court Judges the Plaintiff preferred an appeal to this court. The matter was supported before this court on 03.10.2014 and this court was inclined to grant leave to appeal on the grounds laid down in paragraph 18 subparagraphs (i), (ii), (iii), (iv) and (v)of the petition dated 12.11.2012 (Vide journal entry dated 03.10.2014). Thereafter, this matter was taken up for argument on 10.12.2019 and on that date, parties have

agreed before this court to confine this appeal to the questions of law set out in paragraph 18 subparagraphs (iv) and (v) of the petition dated 12.11.2012 (vide journal entry dated 10.12.2019) which are as follows;

> "(iv) Have the Learned High Court Judges erred in law when they decided that a co-owner cannot have and maintain an action to eject a trespasser without making other co-owners, parties to the action?
>
> (v) Have the Learned High Court Judges erred in law when they decided that the District Court has no authority to declare a co-ownership to the corpus in the action?"

Moreover, this court raised the following question of law arising from the judgment of the Civil Appellate High Court dated 03.10.2012;

> "Did the High Court erred in law by holding that a co-owner of a land is not entitled to claim for a declaration to the entire land?"

As per the direction parties also have filed written submissions.

Analysis

First of all, it must be noted that the action filed in the District Court was not an action against the other co-owners but an action to evict the purported trespasser, namely the Defendant. Thus, other co-owners are not bound by the said judgment. In the last amended plaint, the Plaintiff has averred that he was a co-owner to the land described in the schedule A to the plaint and got the land described in the schedule B to the plaint separated in lieu of his entitlement to the share in land described in the schedule A and became the owner of that portion of the land described in the schedule B of the plaint and the Defendant is in unlawful and forcible possession of the land described in the schedule C of the plaint which is a portion of the land described in the schedule B to the plaint. The Plaintiff has even claimed exclusive title by prescription to the said separated portion of land described in the schedule B to the plaint. The alleged cause of action is based on violation of his rights emanating from his title to the land described in the said schedule B to the plaint by the said encroachment triggering his entitlement for a declaration of title to said portion of land described in schedule B to the plaint and eviction of the defendant from the land described in schedule C to the plaint with damages claimed in the plaint- vide paragraphs 2 to 10 of the amended plaint dated

02.02.2001. It appears even the issues raised on behalf of the plaintiff on 12.09.2001 were based on the same premise as averred in the body of the plaint- vide issues no. 1 to 6. Thus, it appears that the prayer no. 1 for a declaration of title to the land described in the schedule A to the plaint is a mistake as the body of the plaint contains a cause of action based on the Plaintiff's sole title to the land described in the schedule B to the plaint. However, I do not think this mistake itself is sufficient to dismiss the Plaintiff's action since, if there is an error in the prayer no.1, the Court may decline to grant relief under prayer no.1 and consider the possibility of granting relief in prayer no.2 to 4 if the cause of action is proved. Further, as decided in the cases **Dharmasiri V Wickrematunga (2002) 2 Sri. L. R 218** and **Jayasinghe V Tikiri Banda (1988) 2 CALR 24**, in a declaration of title action, absence of a prayer for declaration of title does not prevent the relief of ejectment, if in the body of the plaint title is pleaded and issues were framed and accepted by the court accordingly, and the title of the plaintiff is proved. Thus, in a declaration of title and ejectment case or in a *rei vindicatio action* what is necessary is to prove title to the disputed portion of land and its unlawful possession by the Defendant. Therefore, in the case at hand, to grant reliefs under prayers no 2 to 4, it is sufficient to prove title to the land in schedule B to the plaint and the unlawful possession of the Defendant in the portion of land in schedule C to the plaint which is a portion of land in schedule B to the plaint along with the damages caused, even if it is assumed that there is an error in the prayer no.1 when it is read with the body of the plaint. However, learned District judge has not granted damages prayed for as no assessment of damages was placed before the District Court.

As per the answer given to the issue no.3 raised at the trial and the reasons given by the learned District Judge it is clear that even the learned District Judge did not consider that the Plaintiff has established exclusive title of the Plaintiff by prescription to the land described in the schedule B to the Plaint, but both the judgments of the courts below have considered that the evidence led at the trial has established the Plaintiff's co-ownership to the land described in schedule A to the Plaint. Even the Plaintiff while giving evidence has admitted there are other co-owners. Hence it is a correct finding that the Plaintiff has not proved her sole prescriptive title to purported separated portion in schedule B of the plaint, but due to P4 and oral evidence the plaintiff had given, it is clear that at least she should be a co-owner to the land in schedule A. Thus, her co-ownership to the portion

described in schedule B also has to be considered as established since it becomes a part of the land in schedule A. The learned District Judge in his judgment at page 4 has indicated why he accepted that the Plaintiff had 1/6th share in the land described in schedule A to the plaint. Even though the Plaintiff is in possession of the land described in the schedule B to the plaint except the disputed portion she, as explained above, has not established that she acquired prescriptive title to the said separated portion described in schedule B to the Plaint against the other co-owners. Then as said above she at least remains a co-owner to the land described in the schedule A and B to the plaint. Even the learned High Court Judges have not found fault with the learned District judge for his conclusion that the Plaintiff is still a co-owner of Minneriwatte, and it does not appear to be in dispute even before us.

The Defendant supports the position taken by the learned High Court judges which was to the effect that even though a co-owner can seek a declaration for his co-ownership as well to eject a trespasser, a co-owner cannot claim the ownership for the entire property without making other co-owners parties to the case, and therefore he cannot maintain this case. Thus, the Defendant does not challenge the co-ownership of the Plaintiff but he challenges the judgment of the District Court on the ground that the Plaintiff as a co-owner cannot file and maintain this action claiming title to the entire property without making other co-owners parties to the action. On the other hand, the Plaintiff challenges the conclusions reached by the learned High Court judges.

Without shifting away from the inference made above that prayer no.1 in the plaint is an error as per the contents of the body of the Plaint which should not be considered in granting relief, even if it is considered as a correct prayer, it is relevant to see whether the Plaintiff has prayed there to declare him as the sole owner of the entire land described in the schedule A to the Plaint as it appears to be one of the conclusions of the learned High Court Judges for their decision to dismiss the Plaint. What is prayed in Sinhala in prayer no. 1 is as follows;

“ මෙහි පහත ‘අ’ උපලේඛනයේ සඳහන් ඉඩමේ සහ එහි වගාවේ සහ ගොඩනැගිලිවල හිමිකම් පැමිනිලිකාරිය සතු බව ප්‍රකාශ කරන ලෙසටත්”

What is prayed there was not that he be declared as the sole owner but to declare his title or entitlement to the land described in schedule A to the plaint. A co-owner

has title or entitlement to every grain of sand in the entire land along with the other co-owners to the extent of his share. Nowhere in the body of the plaint the Plaintiff has referred to the sole ownership of land described in the schedule A to the plaint. The prayer has to be understood in accordance with his stance in the body of the plaint. Thus, it appears the learned High Court Judges misread the prayer no. 1 as one claiming sole ownership to the land described in schedule A to the plaint. As per the plaint, she has claimed exclusive prescriptive title to portion in schedule B of the plaint which she failed to establish and evidence only proved her co-ownership.

Even though the Plaintiff failed in proving her sole ownership to the land in schedule B of the plaint in the manner stated in the body of the amended plaint, she has proved that at one time she became an owner of $1/6^{th}$ share of the land in schedule A of the plaint which is the bigger land. When the court found that she failed to prove her exclusive title to the carved out smaller portion in schedule B, her status would remain as a co-owner to the larger land as well as to the carved out smaller portion in schedule B. Disputed portion described in schedule C to the plaint has been described as part of schedule B of the plaint. Now it becomes pertinent to see:

- Whether a co-owner needs to add other co-owner/s as a party / parties to such an action filed to eject the trespassers, and
- Whether a claim of sole ownership to a portion of land by a co-owner disqualified him/her from being successful in obtaining relief to eject a trespasser from the said land.

Unus Lebbe V Zayee (1893) 3 S C R 56 was decided as far back as 1893 and it was held that one of several owners of a land may maintain an action against a trespasser without making his co-owners parties to the suit. **Arnolisa V Dissan 4 N L R 163** was an action filed by some of the co-owners against another set of co-owners. There it was sent back to the original court to add other co-owners. However, in the course of the Judgment Bonser C.J referring to a previous decision by Phear C. J. and Berwick A. J. reported in 2 S.C. C. 148 had stated that an action of that sort could not be maintained unless the other co-sharers were made parties to it, and that, while it might be competent to one of several co-owners to bring an action against a mere transgressor who interfered with his possession without

joining the other co-owners as co-plaintiffs, it was not competent, where the defendant was not a mere trespasser, but was a co-owner, to maintain such an action in the absence of some of the co-owners. **Geeta V Fernando (1905) 4 Bal.100** is another example to show that a joint owner need not join the other co-owners to sue for the ejectment of a trespasser. Thus, it is clear that our law even as far back as early 19th century accepted the competency of a co-owner to sue a trespasser without making the other co-owners parties to his action against the trespasser. Though not directly related to the ejectment of a trespasser, In **Rockland Distilleries V Azeez 52 NLR 490** it was held that a co-owner can institute an action for damages caused to the common property without joining the other co-owners as parties to the action.

After considering some of the cases referred above, in **Hevawitarane V Dangan Rubber Co. Ltd. 17 N L R 49** Pereira J. Stated as follows;

"I *have always understood the law, both before and after the coming into operation of Civil Procedure Code, to be that the owner of an undivided share of land might sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land, the reason for this latter right being that the owner of the undivided share has an interest in every part and portion of the entire land*."

Thus, it is clear a co-owner gets this right as a vindication of his title in every part and portion of the entire land, which title he holds in common with the other co-owners. Even if other co-owners are not made parties to the action, a co-owner should have to be permitted to sue the trespasser when such an act of trespass violates his rights of ownership or title. In the case presented by the plaint, the cause of action was based on violation of the plaintiff's rights as the owner of the land described in the schedule B to the plaint. Even it is proved that she is not the sole owner but a co-owner, violation relates to her rights as an owner.

It is worthy to refer to **Hariette V Pathmasiri (1996) Sri L R 358** where the plaintiff of that case appeared to have co-ownership to the land in schedule 1 of that case and ejectment of the defendant was sought from the land in schedule 2 of that case which was a part of the land in said schedule 1 with a declaration of title to said land in schedule 2, and where defendant claimed prescriptive title to said land in schedule 2 against the claim of plaintiff that the license given to the defendant was

terminated. The plaintiff in that case did not give evidence and it appears that the plaintiff in that case was only able to prove his rights to the undivided share in the land in schedule 1 of that case and evidence of termination of the license was not reliable to be acted upon. Even though the learned justices in that case had referred to the afore-mentioned **Hevawitarane V Dangan Rubber Co.Ltd.** decision and afore quoted paragraph from the said judgment, they came to the conclusion that the plaintiff in that case had not sought a declaration of title to the undivided share to the land in schedule 1 of that case and for the ejectment of the defendant but had pleaded that she possessed the land in schedule 2 in lieu of her undivided share and sought for the ejectment of the defendant from that land, and as thus, she cannot stop at adducing evidence of paper title to an undivided share but it was her burden to adduce evidence of exclusive possession and the acquisition of prescriptive title by ouster in respect of the smaller land described in schedule 2. It appears that the said case was decided against the plaintiff in that case since she failed to prove the case formulated by her.

I must admit that there are certain similarities between the present case at hand and the said **Harriet V Pathmasiri**, since even in this case the Plaintiff had averred that she had once entitled to undivided share in the land in schedule A to the plaint and in lieu of that she had prescribed to land in schedule B to the plaint. However, the said **Harriet V Pathmasiri** can be distinguished from this irrespective of the other reasons given in that decision since the termination of license was not proved, the cause of action based on unlawful possession as a trespasser could not have been succeeded. With regard to the other reasons stated in that decision, I observe that it has not been considered in that decision the entitlement of a plaintiff to get a lesser relief than what he has prayed for in the plaint- see **Allis V Seneviratne and Others (1989) 2 Sri L R 335**. However, in that backdrop, it is pertinent to discuss the decision in **Attanayake V Ramyawathie (2003) 1 Sri L R 401**. Her ladyship Bandaranayake J (as she then was) has delivered the judgment while His lordship Yapa J and His Lordship S N Silva CJ who wrote the judgment in the above **Harriet V Pathmasiri** case agreeing to her judgment. The afore referred **Hewavitharana V Dungan Rubber Company Ltd, Harriet V Pathmasiri and Allis V Senavirathna** were among the previous decisions that have been considered in the said Judgment of **Attanayake V Ramyawathie**. The plaintiff in said **Attanayakae V Ramayawathie** sued the defendant not as a co-owner but as the owner for a

declaration of title to the land in suit and ejectment of the defendant. Defendant also claimed title to the same land. The said plaintiff lost his case due to the fact he failed to prove title to the land she was claiming in the said case. The court further observed that the defendant in that case remained as a licensee. However, with regard to the question whether a co-owner of a land who sues a trespasser for a declaration of title and ejectment is entitled to maintain the action if he institutes the action as the sole owner of the premises, the court held as follows;

"*I am of the firm view that, if an appellant had asked for a greater relief than he is entitled to, the mere claim for a greater share in the land should not prevent him, having a judgment in his favour for lesser share in the land. A claim for a greater relief than entitled to should not prevent an appellant from getting a lesser relief. However, it is necessary that the appellant adduces evidence of ownership for the portion of land he is claiming for a declaration of title. It is amply clear that the appellant in the instant case has not been able to adduce such evidence.*

In such circumstances the question raised by the counsel for the appellant is answered in the following terms. A co-owner of land who sues a trespasser for a declaration of title and ejectment is entitled to maintain the action even if he instituted the action as the sole owner of the land and premises. The fact that an appellant has asked for a greater relief than he is entitled to, should not prevent him from getting the lesser relief which he is entitled to. However, in such a situation, there is a burden on such person who makes the claim, to adduce evidence of ownership to the allotment of land."

What has been referred above establish that in our law a co-owner need not add other co-owners as parties to the action filed to eject a trespasser but he has to prove his title/ownership to the land he claims and further that a claim of sole ownership to a portion of land by a co-owner does not disqualify him/her from being successful in obtaining relief to eject a trespasser from the said land.

For the foregoing reasons I am of the view that even though the learned high court judges referred to some relevant decided cases they erred in law when coming to the conclusions they reached.

The learned District Judge has correctly found that the Plaintiff is still a co-owner to the main land described in the schedule A to the plaint, and has not established his prescriptive title to the purported separated portion of the said land depicted

in schedule B to the plaint. He has given sufficient reasons to say why he accepts that disputed portion depicted in schedule C belongs to the land claimed by the plaintiff, namely Minneriwatte alias Meneriowita, referring to the relevant plans and superimpositions done. The land claimed by the Defendant is Brahmanage watte. Though, there is evidence to show that there had been a dispute for a considerable period of time in relation to the disputed area and the boundary separating the two lands, the Defendant has failed in establishing that he had adverse possession to the identified portion as the disputed area for more than ten years.

Thus, I answer the questions of laws as follows;

1. Have the Learned High Court Judges erred in law when they decided that a co-owner cannot have and maintain an action to eject a trespasser without making other co-owners, parties to the action?

Yes

2. Have the Learned High Court Judges erred in law when they decided that the District Court has no authority to declare a co-ownership to the corpus in the action?

Yes, however, it is not necessary to have a prayer for declaration if the title is averred and proved.

3.Did the High Court erred in law by holding that a co-owner of a land is not entitled to claim for a declaration to the entire land?

Yes. Even if he has claimed ownership to the entire land, lesser relief declaring that he is only a co-owner can be granted by the court. On the other hand, prayer for a declaration of title is not a must in a vindicatory action, if the title is averred and proved. As per our law even a co-owner is entitled to obtain the relief of ejectment of a trespasser. However, even though it is proved that plaintiff is a co-owner to the land in schedule A to the plaint, it is not proper to grant the relief in prayer (1) to the plaint when the Plaintiff herself takes up the position that it is a prayer made by mistake. It appears the learned district judge has not granted relief as per prayer (1) to the plaint. The learned District Judge in his judgment at page 12, second paragraph, has stated the Plaintiff has title to the land described in the schedule B to the plaint and to the buildings and plantation standing thereon. As per the

reasons given in the judgment of the learned District Judge and above in this judgment, it has to be understood as the title she has as one of the co-owners of the said land.

For the reasons given above, we set aside the judgment dated 03.10.2012 of Civil Appellate High Court of Ratnapura and affirm the judgment dated 19.06.2008 of the District Court of Ratnapura.

The Appellant is entitled to the costs in this court as well as to costs in courts below.

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Judge of the Supreme Court

Priyantha Jayawardena, PC, J

I agree.

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Judge of the Supreme Court

Vijith K. Malalgoda, PC, J

I agree.

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Judge of the Supreme Court