

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

In the matter of an appeal with Leave to Appeal granted from the order of the High Court of the Civil Appeal of the Western Province (Holden in Gampaha) dated 19.02.2013, under and in terms of Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

Munasinghe Achchi Lekamlage
Emalin Munasinghe,
"Chandrakanthi", Mandawala.

S.C. Appeal No. 80/2014
S.C. (HCCA) L.A. No. 124/2013
WP/HCCA/GPH/104/2003/(F)
D.C. Gampaha Case No.
38666/P

Plaintiff

Vs.

1. Munasinghe Achchi Lekamlage
Somasiri, Pathaha Road,
Udugampola.
2. Munasinghe Achchi Lekamlage
Gunasekera, Pathaha Road,
Udugampola.
3. Munasinghe Achchi Lekamlage
Piyasena, Pathaha Road,
Udugampola.
4. Munasinghe Achchi Lekamlage
Karunaratne, Pathaha Road,
Udugampola.
5. Udugampola Piyananda Thero,
Saddharma Guptha Pirivena,
Dombawala, Udugampola.
6. Munasinghe Achchi Lekamlage
Jayasekera (Deceased), Pathaha
Road, Udugampola.

- 6A. Munasinghe Achchi Lekamlage
Gunasena, Pathaha Road,
Udugampola.
7. Ranamuka Kankanamalage
Kusumawathie,
283, Pathaha Road,
Udugampola.
8. Sumanawathie Attanayake
(Deceased),
283, Pathaha Road,
Udugampola.
- 8A. R. K. Kusumawathie,
283, Pathaha Road,
Udugampola.
9. Ranamuka Kankanamalage Ekmon
Weerakkody, 283, Pathaha Road,
Udugampola.
10. Dassanayake Hemachandra
Dasanayake, Pathaha Road,
Udugampola.
11. Dayawathie Gunawardena (nee
Dayawathie Kalpage), Kirindiwita
Road, Gampaha.

Defendants

And Between

Dayawathie Gunawardena (nee
Dayawathie Kalpage), Kirindiwita
Road, Gampaha.

11th Defendant-Appellant

Vs.

Munasinghe Achchi Lekamlage
Emalin Munasinghe,
"Chandrakanthi", Mandawala.

Plaintiff-Respondent

1. Munasinghe Achchi Lekamlage
Somasiri (Deceased), Pathaha Road,
Udugampola.
- 1A. Munasinghe Achchi Lekamlage
Senaadhi Upul Shantha
Munasinghe, Pathaha Road,
Udugampola.
2. Munasinghe Achchi Lekamlage
Gunasekera, Pathaha Road,
Udugampola.
3. Munasinghe Achchi Lekamlage
Piyasena (Deceased), Pathaha Road,
Udugampola.
- 3A. Munasinghe Achchi Lekamlage
Gunasekera, Pathaha Road,
Udugampola.
4. Munasinghe Achchi Lekamlage
Karunaratne, Pathaha Road,
Udugampola.
5. Udugampola Piyananda Thero,
Saddharma Guptha Pirivena,
Dombawala, Udugampola.
6. Munasinghe Achchi Lekamlage
Jayasekera (Deceased), Pathaha
Road, Udugampola.
- 6A. Munasinghe Achchi Lekamlage
Gunasena, Pathaha Road,
Udugampola.

7. Ranamuka Kankanamalage
Kusumawathie (Deceased),
283, Pathaha Road,
Udugampola.
8. Sumanawathie Attanayake
(Deceased),
283, Pathaha Road,
Udugampola.
- 8A. R. K. Kusumawathie (Deceased),
283, Pathaha Road,
Udugampola.
9. Ranamuka Kankanamalage Ekmon
Weerakkody, 283, Pathaha Road,
Udugampola.
10. Dasanayakage Hemachandra
Dasanayake, Pathaha Road,
Udugampola.

Defendant-Respondents

And Now Between

Munasinghe Achchi Lekamlage
Emalin Munasinghe,
"Chandrakanthi", Mandawala.

Plaintiff-Respondent-Appellant

Vs.

1. Munasinghe Achchi Lekamlage
Somasiri (Deceased), Pathaha Road,
Udugampola.
- 1A. Munasinghe Achchi Lekamlage
Senaadhi Upul Shantha
Munasinghe, Pathaha Road,
Udugampola.

2. Munasinghe Achchi Lekamlage
Gunasekera (Deceased), Pathaha
Road, Udugampola.
- 2A. Munasinghe Achchi Lekamlage
Padma Kumari Nilakshi, 283/B,
Pathaha Road, Udugampola.
- 2B. Munasinghe Achchi Lekamlage
Chitra, 283/B, Pathaha Road,
Udugampola.
- 2C. Munasinghe Achchi Lekamlage
Shirani, 283/B, Pathaha Road,
Udugampola.
3. Munasinghe Achchi Lekamlage
Piyasena (Deceased), Pathaha Road,
Udugampola.
- 3A. Munasinghe Achchi Lekamlage
Gunasekara (Deceased), Pathaha
Road, Udugampola.
- 3B. Munasinghe Achchi Lekamlage
Padma Kumari Nilakshi, 283/B,
Pathaha Road, Udugampola.
- 3C. Munasinghe Achchi Lekamlage
Chitra, 283/B, Pathaha Road,
Udugampola.
- 3D. Munasinghe Achchi Lekamlage
Shirani, 283/B, Pathaha Road,
Udugampola.
4. Munasinghe Achchi Lekamlage
Karunaratne, Pathaha Road,
Udugampola.
5. Udugampola Piyananda Thero,
Saddharma Guptha Pirivena,
Dombawala, Udugampola.

6. Munasinghe Achchi Lekamlage Jayasekera (Deceased), Pathaha Road, Udugampola.
- 6A. Munasinghe Achchi Lekamlage Gunasena, Pathaha Road, Udugampola.
7. Ranamuka Kankanamalage Kusumawathie (Deceased), 283, Pathaha Road, Udugampola.
- 7A. Kanuwana Pathirannehelage Nimal Pathmanie, 283, Pathaha Road, Udugampola.
- 7B. Kanuwana Pathirannehelage Seetha Nalanie, 283, Pathaha Road, Udugampola.
- 7C. Kanuwana Pathirannehelage Mala Kanthi, 283, Pathaha Road, Udugampola.
8. Sumanawathie Attanayake (Deceased), 283, Pathaha Road, Udugampola.
- 8A. R. K. Kusumawathie (Deceased), 283, Pathaha Road, Udugampola.
- 8B. Kanuwana Pathirannehelage Nimal Pathmanie, 283, Pathaha Road, Udugampola.
- 8C. Kanuwana Pathirannehelage Seetha Nalanie, 283, Pathaha Road, Udugampola.

- 8D. Kanuwana Pathirannehelage Mala Kanthi,
283, Pathaha Road,
Udugampola.
9. Ranamuka Kankanamalage Ekmon Weerakkody, 283, Pathaha Road,
Udugampola.
10. Dasanayakage Hemachandra Dasanayake,
Pathaha Road,
Udugampola.

**Defendant-Respondent-
Respondents**

Dayawathie Gunawardena (nee Dayawathie Kalpage), Kirindiwita Road, Gampaha.

Presently at,
No. 105B, Pahalagama, Ja-Ela Road,
Gampaha.

**11th Defendant-Appellant-
Respondent**

Before: Hon. Vijith K. Malalgoda, P.C., J.

Hon. A. H. M. D. Nawaz, J.

Hon. Janak De Silva, J.

Counsel:

W. Dayaratne, P.C. with R. Jayawardena for Plaintiff-Respondent-Appellant

S. N. Vijithsinghe with N. Perera for the 11th Defendant-Appellant-Respondent

Written Submissions:

27.07.2023 and 15.07.2016 by the Plaintiff-Respondent-Appellant

04.07.2023 and 11.12.2014 by the 11th Defendant-Appellant-Respondent

Argued on: 10.05.2023

Decided on: 06.08.2024

Janak De Silva, J.

The corpus sought to be partitioned is 36.6 perches in extent (“lot No. 6”). It was part of a larger land which was partitioned previously in D.C. Gampaha Case No. 22827/P. According to the final decree dated 5th December 1994 entered therein, lot No. 6 was left unallotted. The judgment did not specify the reasons for lot No. 6 being left unallotted.

The 11th Defendant-Appellant-Respondent (“Respondent”) was the Plaintiff in that action. The 2nd, 7th, 8th and 10th Defendant-Respondent-Respondents were respectively the 7th, 10th, 12th and 2nd Defendants therein.

Plaintiff-Respondent-Appellant (“Appellant”) instituted this action on or about 21st June 1995 to partition lot No. 6.

Pedigree of the Appellant

The original owner of lot No. 6 was Ranamuka Kankanamlage Sanchi Appu. He transferred an undivided 1/3 share to each of his children, Baronchi Appuhamy, Davith Appuhamy and Juwanis Appuhamy by deed No. 19040 dated 26.01.1893 attested by J. M. P. Samarasekera, Notary Public.

The rights of Baronchi Appuhamy and Davith Appuhamy were given to their heirs in D.C. Gampaha Case No. 22827/P. According to the Appellant, the unallotted lot No. 6 should be partitioned among the parties deriving title from Juwanis Appuhamy.

Juwanis Appuhamy died intestate and his undivided $\frac{1}{3}$ share devolved upon his children Ranamuka Kankanamlage Simon Singho ($\frac{1}{15}$), Ranamuka Kankanamlage Milinona ($\frac{1}{15}$), Ranamuka Kankanamlage Garlin Nona ($\frac{1}{15}$), Ranamuka Kankanamlage Edwin Singho ($\frac{1}{15}$) and Ranamuka Kankanamlage Vipulasena ($\frac{1}{15}$).

Milinona transferred an undivided $\frac{1}{2}$ share from her $\frac{1}{15}$ share ($\frac{1}{30}$) to Munasinghe Achchi Lekamlage Gunasekera (2nd Defendant-Respondent-Respondent) by deed No. 19321 dated 01.11.1973 attested by D. A. S. Wijayasinghe, Notary Public. According to the Appellant, the balance undivided $\frac{1}{30}$ share of Milinona was left unallotted in D.C. Gampaha Case No. 22827/P since the Appellant and the Defendant-Respondent-Respondents (“Defendants”) did not come forward in that case.

Edwin Singho gifted an undivided $\frac{1}{2}$ share from his $\frac{1}{15}$ share ($\frac{1}{30}$) to Hewawasam Attanayake Mudalige Erolis Ranamuka Kankanamlage Appuhamy by deed No. 4483 dated 06.10.1945 attested by D. W. Biyanwila, Notary Public. The balance undivided $\frac{1}{30}$ share of Edwin Singho devolved upon his siblings Simon Singho, Milinona, Garlin Nona and Vipulasena since he died intestate leaving no heirs. Hence the four of them got an additional undivided $\frac{1}{120}$ share each of the corpus.

Therefore, Milinona held an undivided $\frac{5}{120}$ share ($\frac{1}{30} + \frac{1}{120}$). She died intestate and her rights devolved on her children seven (7) children, Munasinghe Achchi Lekamlage Somasiri ($\frac{5}{840}$), Munasinghe Achchi Lekamlage Gunasekera ($\frac{5}{840}$), Munasinghe Achchi Lekamlage Piyasena ($\frac{5}{840}$), Munasinghe Achchi Lekamlage Jayasekera ($\frac{5}{840}$), Munasinghe Achchi Lekamlage Karunaratne ($\frac{5}{840}$), Piyananda Thero ($\frac{5}{840}$) and Munasinghe Achchi Lekamlage Emalin Nona ($\frac{5}{840}$).

Simon Singho died intestate and his undivided $\frac{1}{120}$ share devolved on his only child, Ranamuka Kankanamlage Kusumawathie, the 7th Defendant-Respondent-Respondent.

The undivided $\frac{1}{120}$ share of Vipulasena devolved upon his only child, Ekmon Weerakkody, the 9th Defendant-Respondent-Respondent.

The undivided 1/120 share of Garlin Nona devolved upon her only child, Sumanawathie Attanayake, 8th Defendant-Respondent-Respondent.

According to the Appellant, the 10th Defendant-Respondent-Respondent and the 11th Respondent do not have any rights to the corpus. The 11th Respondent was made a party as she was in possession of part of the corpus.

According to the pedigree pleaded by the Appellant, the devolution of shares are as follows:

Appellant	undivided 5/56
1 st Defendant-Respondent-Respondent	undivided 5/56
2 nd Defendant-Respondent-Respondent	undivided 5/56
3 rd Defendant-Respondent-Respondent	undivided 5/56
4 th Defendant-Respondent-Respondent	undivided 5/56
5 th Defendant-Respondent-Respondent	undivided 5/56
6 th Defendant-Respondent-Respondent	undivided 5/56
7 th Defendant-Respondent-Respondent	undivided 7/56
8 th Defendant-Respondent-Respondent	undivided 7/56
9 th Defendant-Respondent-Respondent	undivided 7/56
10 th Defendant-Respondent-Respondent	No shares
Respondent	No shares

The 1st to 9th Defendant-Respondent-Respondents admitted the pedigree pleaded by the Appellant.

Pedigree of the Respondent

The Respondent denied the pedigree pleaded by the Appellant. It was contended that although the Appellant and the 1st to 9th Defendant-Respondent-Respondents were parties in D.C. Gampaha 22827/P, they did not make any claim to lot No. 6. The Respondent whilst admitting that the original owner of lot No. 6 was Ranamuka Kankanamlage Sanchi Appu, claimed that an undivided 1/30 share of Milinona was left unallotted in the said action. According to the Respondent, she has prescribed to lot No. 6 against Milinona and sought a declaration that she is the owner of lot No. 6.

Parties admitted the identity of the corpus and that lot No. 6 was left unallotted in D.C. Gampaha 22827/P.

The Appellant led the evidence of the 7th and 10th Defendant-Respondent-Respondents, the Registrar of the Magistrates Court of Gampaha and the Record Keeper, District Court of Gampaha.

At the conclusion of the trial, the learned District Judge accepted the pedigree pleaded by the Appellant and delivered judgment on 14.10.2003 allotting lot No. 6 according to the shares set out in the plaint.

The Respondent preferred an appeal seeking to set aside the judgment of the District Court and to enter a decree in her favour. The learned judges of the Civil Appellate High Court of Gampaha delivered judgment setting aside the judgment of the District Court and dismissed the plaint. They held that there is no evidence to establish that the unallotted share, lot No. 6, was the shares of Milinona and Edwin, and that there is no certainty as to whose rights have been left unallotted.

Leave to appeal was granted on the following questions of law:

- (a) Has the judgment of the Civil Appellate High Court become nullity as during the pendency of this case before the Civil Appellate High Court of Gampaha the 7th and 8A Respondent died and no steps have been taken to effect substitution in

the room and the place of the deceased 7th and 8A Respondents prior to the delivery of the judgment?

- (b) Was not there a valid Petitioner of Appeal to hear and determine by the Civil Appellate High Court for the reason that the 11th Respondent has not named all the relevant parties in the Petition of Appeal filed by her, although in the District Court of Gampaha substitution has been effected in the room and the place of the deceased 6th and 8th Respondents and since substituted parties were not named as parties in the Petition of Appeal, the Petition of Appeal filed by the 11th Respondent had become defective?
- (c) Did their Lordships err in Law when their Lordships allowed the appeal where the 11th Respondent claimed that she acquired prescriptive title against the rights of Milinona since their Lordships of the Civil Appellate High Court of Gampaha has come to a finding that there is an uncertainty as to whose rights have been unallotted?
- (d) Have their Lordships of the Civil Appellate High Court failed to consider that neither the 11th Respondent gave evidence nor did she summon any witness or produce any document in support of her prescriptive rights which is a mandatory requirement and therefore the 11th Respondent has failed to establish her prescriptive rights to the land to be partitioned?
- (e) Have their Lordships of the Civil Appellate High Court failed to consider that the Appellant has proved her pedigree as set out in her plaint when she has established the same by oral and documentary evidence?
- (f) Did their Lordships of the Civil Appellate High Court err in law when their Lordships held that the Appellant has failed to produce certain deeds which have been marked in the previous partition action bearing No. 22827/P and thereby failed to prove her pedigree which are not relevant to the instant case as both parties admitted the corpus as lot No. 6 of the final decree in the said partition action?

The journal entry of 10.05.2023 indicates that parties have agreed that questions of law (a) and (b) need not be answered.

Judgment of the Civil Appellate High Court

The learned High Court Judges begins the analysis by re-stating the rule embodied in Section 25 (1) of the Partition Law, namely that it is the duty of the trial judge to investigate the title of the parties. In doing so, they specifically refused to be bound with the position taken by the Respondent in the statement of claim that the rights of Milinona were unallotted in the earlier case.

However, after examining the devolution of title, the learned trial judges held that the Appellant has failed to establish that the unallotted shares are of Milinona and hence the Appellant was not entitled to proceed with the partition action.

Legal Effect of Unallotted Share

The position in law of an unallotted portion of land in a partition action was considered in ***Yoosuf and Others v. Muttaliph*** [13 C.L.Rec. 171]. The corpus in issue was part of a larger land which at one time belonged to three persons. The whole of that land was the subject matter of a partition action. However, the corpus in issue was left unallotted. The question arose as to the legal status of the portion left unallotted. The District judge proceeded on the basis that the effect of the partition decree was to vest in each of the persons to whom portions in severalty had been allotted rights of user over the portion which was left unallotted as appurtenant to their ownership of the lots allotted to them in severalty.

However, Garvin, J. (at page 172) held:

“the decree does no such thing. In terms it allots to each of the original co-owners certain specific portions of land and in fact makes no references whatsoever to the portion coloured in pink. That portion therefore remains unallotted. The title to that remained in the original co-owners and that title

is in no respect affected by the partition decree. The predecessors in title of the plaintiff and of the defendants remained co-owners of that portion and were entitled to use it as co-owners might in law.”

In ***Ismail Lebbe v. Haniffa*** [51 N.L.R. 299 at 301] Nagalingam J. held that if no party is able to establish to the satisfaction of the Court within a reasonable time of the receipt of the record in that Court as may be specified by the District Judge that a person is alive or, if he be dead, who his heirs are, his share would remain unallotted and the Court will proceed to enter partition decree in respect of the remaining shares among the other co-owners.

The decision in ***Ismail Lebbe*** [supra.] indicates that in a partition action, there can be situations where an unallotted share may in fact be the only undivided share left after allotting all other undivided shares amongst the co-owners. Upon such co-owners being allocated divided portions of land by the final decree, the co-ownership to the partitioned portion comes to an end. As to whether the unallotted portion of land remains co-owned property or not depends on the facts and circumstances of each case.

Unallotted Shares in D.C. Gampaha Case No: 22827/P

One of the fundamental issues which arise for determination in this case is to ascertain as to whose rights were left unallotted in the earlier partition action in D.C. Gampaha Case No: 22827/P. The case for the Appellant is that it is an undivided 1/30 share of Milinona [paragraph 6 of the plaint dated 21.06.1995].

The Respondent denies this position and bases her arguments in all forums on this premise. Nevertheless, she has at paragraph 8 of her statement of claim dated 15.12.1999 filed in this action admitted this position. It reads as follows:

“08. එකී අංක. 22827/බෙ. දරණ නඩුවේ තීන්දුව පිට රණමුක කන්කානමලාගේ මිලිනෝනා ගේ අයිතිවාසිකම් (1/30 පංගුවක්) නොපවරා තබන ලදී. එකී කොටස සඳහා එකී

මිලිනෝනාගේ එකී අංක. 22827/බෙ. දරණ නඩුවේ පැමිණිලිකාරියට ප්‍රමාණානුකූල නඩු ගාස්තු සහ මිනින්දෝරු ගාස්තු අය විය යුතු වේ.”

Section 150 of the Civil Procedure Code states that the party having the right to begin shall state his case, giving the substance of the facts which he proposes to establish by his evidence. Although the reference here is only to the party having the right to begin the case, the explanation provided thereunder reflects that there are rules which govern how all parties in presenting their respective case.

Explanation 2 states that the case enunciated must reasonably accord with the party's pleading, i.e., plaint or answer, as the case may be. *And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet.* And the facts proposed to be established must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings.

I am mindful that there are only a few sections in the Partition Law No. 21 of 1977 as amended (“Partition Law”) which makes specific references to provisions in the Civil Procedure Code (“Code”). Section 4 brings in the particulars required to be in a plaint. Section 7 protects the right of a Court to reject the plaint on the grounds set out in Section 46 of the Code. Section 14 makes the provisions of the Code relating to service of summons applicable to the service of summons in a partition action. Section 77 makes the provisions in the Code relating to the execution of service of writs, warrants and other processes of court to apply in such matter in a partition action.

Nevertheless, Section 79 stipulates that in any *matter or question of procedure* not provided for in the Partition Law, the procedure laid down in the Code in a like matter or question shall be followed by the Court, if such measure is not inconsistent with the provisions of the Partition Law.

Hence, the provisions of the Code cannot be applied where the Partition Law contains the relevant rules. Thus, in ***Samarakoon v. Punchi Banda* [78 N.L.R. 525]** it was held that the provisions of Section 337 of the Code do not apply where a party to a partition action applies to Court for an order to put him in possession of the lots allotted to him in the final decree. The correct procedure that should be adopted is set out in Section 52 of the Partition Law. Similarly, in ***Dingiri Amma Vs. Appuhamy* [72 N.L.R. 347]C** it was held that the provisions of the Code relating to the consequence and cure of defaults in appearing have no application at all to a partition action instituted under the Partition Law.

Nonetheless, Courts have not hesitated to apply relevant provisions in the Code to partition actions where the Partition Law does not provide procedural rules for situations. Thus, in ***Sivanandan v. Sinnapillai* [77 N.L.R. 300]** it was held that Section 356 of the Code should have been followed in serving notice on a disclosed party.

I am of the view that the Partition Law does not contain any provision which is inconsistent with the rules embodied in Section 150 of the Code. Accordingly, the Respondent is not entitled to deny that the unallotted lot No. 6 contains the undivided 1/30 share of Milinona in view of the position taken in paragraph 8 of her answer dated 15.12.1999.

The relevant common law rule is expounded in the maxim *Allegans contraria non est audiendus* (He who alleges contrary things is not to be believed/A party is not to be heard to allege the contrary). Scrutton, L.J. in ***Verschures Creameries Limited vs. Hull & Netherland Steamship Co. Ltd.* [(1921) 2 KB 608 at 612]** held as follows:

"A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage. This is to approbate and reprobate the transaction."

Samarakoon C.J. in *Visuvalingam v. Liyanage* [(1983) 1 Sri.L.R. 203 at 227] adopted the principle with a different formulation by stating that one "cannot blow hot and cold."

In *Ranasinghe v. Premadharma and Others* [(1985) 1 Sri.L.R. 63 at 70] Sharvananda C.J. held:

"In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. When the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one, he cannot afterwards assert the other; he cannot affirm and disaffirm."

The Respondent contends that a partition action cannot be decided entirely upon the admission of the parties as there is a duty on Court to investigate the title. Nevertheless, where parties have taken up certain positions in their pleadings, they cannot thereafter present a case which is contrary to the pleaded position.

Accordingly, I hold that the Respondent cannot now be allowed to contend that the unallotted undivided 12/360 share in D.C. Gampaha case No. 22827/P is not of Milinona.

Accordingly, question of law (c) is answered in the affirmative.

Proof of Title

Pursuant to Section 25 (1) of the Partition Law, it is the prime duty on the trial judge in a partition action to investigate into the title of each party. Although there is a duty to investigate title, the Court can do so only within the limits of pleadings, admissions, points of contest and evidence both documentary and oral presented by parties. The Court cannot go on a voyage of discovery tracing the title and finding the shares in the corpus for the parties.

Let me examine the evidence led on behalf of the Appellant to ascertain whether sufficient evidence has been led to establish the title to the unallotted lot No. 6.

To begin with, there is a critical discrepancy in the case pleaded by the Appellant in the plaint and the position taken up on her behalf in the evidence and written submissions. Although the Appellant claimed in the plaint that the unallotted shares were of Milinona, the 7th Defendant-Respondent-Respondent (whose evidence was led by the Appellant), in evidence claimed that the unallotted shares were of both Milinona and Edwin.

Moreover, the evidence indicates that there are at least three deeds, namely deed Nos. 435, 4483 and 19321 which form part of the devolution of title of Milinona. They were marked in evidence in the previous case in D.C. Gampaha case No. 22827/P. Nevertheless, they were not tendered in evidence in this action. The learned judges of the High Court have correctly concluded this to be a deficiency in the proof of title by the Appellant.

For the foregoing reasons, I answer the questions of law (e) and (f) in the negative.

In view of my conclusions that the Appellant has failed to tender the relevant deeds in this case, I must refer to the decision in ***David Danthararyana v. Nonahamy* [79(II) N.L.R.241 at 243]** where it was held that a practice has evolved in our Courts for allotting unallotted shares on proof of title even after interlocutory decree has been entered. Before that is done there should be clear proof of title and the party claiming title to such unallotted share should generally be called to lead evidence in proof of his title. This decision was subsequently cited with approval in ***Tambavitage Don Tepelis v. Thambavitage Don Albert* (CA No. 352/92), C.A. No. 868/92 (C.A.M. 14. 10. 1993 - DC Mt Lavinia No. 13732/P)** and ***Sapin Singho v. Luwis Singho and Others* [(2002) 3 Sri.L.R. 271]**.

The Appellant must bear the consequences for the failure to make the claim for the unallotted lot No. 6 in D.C. Gampaha case No. 22827/P itself as sanctioned by law. The failure to tender the relevant deeds would not have arisen as they were marked in those proceedings.

Prescription

The learned High Court judges allowed the appeal of the Respondent. The resulting position is that they appear to have upheld the claim of prescriptive title of the Respondent. In my view, there is no material to hold that the Respondent has prescribed to the unallotted lot No. 6.

To begin with, the Respondent claimed prescriptive title to the entire land, including the unallotted lot No. 6, in D.C. Gampaha case No. 22827/P. This plea of prescriptive title was not upheld. Hence any prescriptive rights can only be claimed after the date of the final decree in the said case, namely 5th December 1994. However, this action was filed on 21st June 1995.

Furthermore, after execution of the final decree in case No. 22827/P, a dispute had arisen regarding the possession of lot No. 6 which was left unallotted. Consequently, an action was filed under Section 66 of the Primary Courts Procedure Act, No. 44 of 1979 before the Magistrate's Court of Gampaha bearing No. 22129/95. At the conclusion of the proceedings, the Magistrate's Court made an order on 05.12.1995 to handover possession of the corpus to the 10th Defendant-Respondent-Respondent.

Moreover, the Respondent did not testify at the trial. In these circumstances, there is no material whatsoever to hold that the Respondent has prescribed to the unallotted lot No. 6.

For the foregoing reasons, I answer question of law (d) as follows:

The High Court erred in law in holding that the Respondent has acquired prescriptive title to the unallotted lot No. 6.

For all the foregoing reasons, I hold that the Appellant has failed to prove the title to unallotted lot No. 6.

In summary, the Respondent has failed to establish her prescriptive rights to the unallotted lot No. 6. The Appellant has failed to prove the pedigree to the unallotted lot No. 6.

The judgment of the High Court dated 19.02.2013 is partly amended to that extent.

Appeal is partly allowed.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.

I agree.

Judge of the Supreme Court

A. H. M. D. Nawaz, J.

I agree.

Judge of the Supreme Court