

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

In the matter of an appeal
against the Judgment of the
Court of Appeal dated 21st
July, 2015 under and in terms
of Chapter LVIII of the Civil
Procedure Code.

1. Niranjan Naganathan
2. Yogendran Naganathan
Both of
312/1, Hendala Road,
Wattala.
3. P. Sudarshan
57, Senanayake Mawatha,
Bandarawela

Plaintiffs

SC Appeal No. 96/2016
SC SPL LA No. 159/2015
C.A. No. 1214/99(F)
D.C. Matale No. 1928/P

Vs.

1. Alangara Naganathan
2. Somasekaran
Shanmuganathan
Of Mandandawela,
Matale.

Defendants

AND BETWEEN

2. Somasekaran
Shanmuganathan

Of Mandandawela,
Matale.

2nd Defendant-Appellant

Vs.

1. Niranjan Naganathan
2. Yogendran Naganathan
Both of
312/1, Hendala Road,
Wattala.
3. P. Sudarshan
57, Senanayake Mawatha,
Bandarawela

Plaintiff-Respondents

AND NOW BETWEEN

1. Niranjan Naganathan
2. Yogendran Naganathan
Both of
312/1, Hendala Road,
Wattala.
3. P. Sudarshan
57, Senanayake Mawatha,
Bandarawela

**Plaintiff-Respondent-
Appellants**

Vs.

2. Somasekaran
Shanmuganathan
Of Mandandawela,
Matale.

**2nd Defendant-Appellant-
Respondent.**

In the matter of an appeal from the Judgment dated 21-07-,2015 of the Court of Appeal in C.A.1214/99(f) in terms of Article 128 of the Constitution.

1. Niranjan Naganathan
2. Yogendran Naganathan
Both of
312/1, Hendala Road,
Wattala.
3. P. Sudarshan
57, Senanayake Mawatha,
Bandarawela

Plaintiffs

SC Appeal No. 97/2016
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Vs.

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 2. Yogendran Naganathan
Both of
312/1, Hendala Road,
Wattala.
 3. P. Sudarshan
57, Senanayake Mawatha,
Bandarawela
- Plaintiff-Respondents**

AND NOW BETWEEN

2. Somasekaran
Shanmuganathan
Of Mandandawela,
Matale.
- 2nd Defendant-Appellant-
Appellant**

Vs.

1. Niranjan Naganathan
 2. Yogendran Naganathan
Both of
312/1, Hendala Road,
Wattala.
 3. P. Sudarshan
57, Senanayake Mawatha,
Bandarawela
- Plaintiff-Respondent-
Respondents**

BEFORE : VIJITH K. MALALGODA, P.C., J.
A.H.M.D. NAWAZ, J.
ACHALA WENGAPPULI, J.

COUNSEL : Geoffrey Alagaratnam, PC with Luwie
Ganeshanathan for the 1st to 3rd Plaintiff-
Respondent-Appellants in S.C. Appeal No.
96/2016.
H. Withanachchi with Shantha Karunadara for
the 2nd Defendant-Appellant-Respondent in S.C.
Appeal No. 96/2016.

H. Withanachchi with Shantha Karunadara for
the 2nd Defendant-Appellant-Appellant in S.C.
Appeal No. 97/2016.

Geoffrey Alagaratnam, PC with Luwie
Ganeshanathan for the 1st to 3rd Plaintiff-
Respondent-Respondents in S.C. Appeal No.
97/2016.

ARGUED ON : 01st June, 2023

DECIDED ON : 02nd August, 2024

ACHALA WENGAPPULI, J.

The 1st to 3rd Plaintiffs instituted a partition action in the District Court of *Matale* naming the 1st and 2nd Defendants as Defendants seeking to partition a land. After trial, the District Court held with the devolution of title pleaded by the Plaintiffs and granted only a $\frac{1}{4}$ share of the estimated value of the building that stood on the *corpus* to the 2nd Defendant. The 2nd Defendant preferred an appeal against the said

judgment to the Court of Appeal. With its judgment, the Court of Appeal altered the judgment of the District Court, making the 2nd Defendant entitled to a ½ share of the building along with soil rights it covered over the *corpus*. The 1st to 3rd Plaintiffs sought special leave to appeal against the judgment of the Court of Appeal in SC/CA/SPL/LA 159/2015 while the 2nd Defendant also sought special leave to appeal in SC/CA/SPL/LA 160/2015.

On 16.05.2016, after hearing parties in both these applications, this Court granted special leave to appeal on the following questions of law:

- a. Did the Court of Appeal err in law in misconstruing the uncontroverted documentary evidence in holding that the 2nd defendant is entitled to an undivided ½ share of the house depicted as “A” in the Plan marked “X” and especially in disregarding the amended Plaint and the points of contest framed by the District Court?
- b. Did the Court of Appeal err in law in failing to appreciate the impracticality of granting rights in a house without any rights to the soil?
- c. Did the Court of Appeal err in law in failing to consider that the 2nd Defendant who has no soil rights is not recognised as a co-owner under the law?
- d. Did the Court of Appeal misdirect itself by not applying the principles in relation to question of prescription in favour of the 2nd Defendant based on the evidence adduced in his testimony?
- e. Whether the 1st to 3rd Plaintiffs could have and maintain this action for partition on the footing that they were entitled to the

entirety of the *corpus* as pleaded in their amended Plaintiff and also by raising points of contest on that basis?

At the hearing of the two appeals, the contesting parties agreed that a consolidated judgment could be pronounced by this Court as the two appeals arose out of a single judgment of the District Court as well as of the Court of Appeal.

The Plaintiffs instituted the partition action in the District Court of *Matale* against 1st and 2nd Defendants to partition a land depicted in Final Partition Plan No. 2172 of 29.04.1959 as Lot No. Y. It was their claim that their predecessors in title became entitled to the *corpus* by the final decree in that partition action, namely No. P582 of the same Court. The land to be partitioned is in extent of one rood and twenty-four perches in total. The land also had a building consisting of two parts, standing on it, shown in the said plan as “A” and “B”, bearing assessment No. 790.

In their 3rd amended Plaintiff, the Plaintiffs have claimed that *Alangara Ammal*, *Aiyanadan Kanagammal*, *Aiyanadan Somasegaram*, *Aiyanadan Nathanagan* and *AiyanadanThiyaganathan*, were some of the defendants in the partition action No. P582 of District Court of *Matale*. They were allocated the *corpus* by the said final partition decree. Each of them became entitled to 1/5th undivided share of the *corpus*. Thereupon, *Alangara Ammal* transferred her 1/5th undivided share of the *corpus* to *Iyanathan Nathanagan*, by executing Deed No. 117 on 28.11.1960, retaining her entitlement to the building. Upon her death, her rights over the building were devolved equally among her four children. The Plaintiffs also claimed that *Iyanathan Kanagammal* and *Iyanathan Somasegaram* have

transferred their shares in favour of their father, *Iyanathan Nathanagan* by execution of Deed No. 2916 on 07.11.1973. Thus, it is claimed by the Plaintiffs that their father *Iyanathan Nathanagan* became entitled to the entirety of the land and also to a $\frac{3}{4}$ undivided share of the house, which devolved on them after his passing. The Plaintiff allocated only a $\frac{1}{4}$ share of the house to the 2nd Defendant, which was accepted by the District Court in the instant partition action.

The 2nd Defendant, in his amended Statement of Claims, denied the devolution of title pleaded by the Plaintiffs and averred that his father had built a house on it in 1976, as depicted in the preliminary plan as "A". He averred that his father built the new house, after demolishing a building that stood on that land. It was further averred by the 2nd Defendant that his father *Iyanathan Somasegaram*, by execution of Deed of Gift No. 904 of 13.03.1970, transferred his $\frac{1}{4}$ undivided share of the *corpus* to the 2nd Defendant, who, by having possessed the house in its entirety had acquired prescriptive rights to the house, by exclusion of others. He further claims that he is also entitled to a $\frac{1}{4}$ share of the *corpus* as well. In Point of Contest No. 6, the 2nd Defendant sought a determination of his rights to the house, on the basis that he had acquired same by prescription.

Parties proceeded to trial on a total of seven points of contest. At the conclusion of the trial, the District Court held with the Plaintiffs. With regard to the entitlement of the 2nd Defendant, Court granted only a $\frac{1}{4}$ share of the house. The Court then ordered the 2nd Defendant be compensated by payment of $\frac{1}{4}$ of the value of the building in consideration of the practical limitations in the exercise of his entitlement.

In determining the appeal preferred by the Plaintiffs, against the judgment of the District Court, the Court of Appeal found that the 2nd Defendant is entitled to a $\frac{1}{2}$ share of the building marked "A" along with soil rights of the area covered by that building. The appellate Court arrived at the said conclusion on the basis that, after having accepted the 1st Plaintiff's evidence, the District Court should have allocated the said $\frac{1}{2}$ share of the house to the 2nd Defendant, as he himself conceded to a $\frac{1}{2}$ share of the house to *Iyanathan Somasegaram*.

Learned President's Counsel for the Plaintiffs submitted before this Court that the 2nd Defendant in his evidence accepted the signature of his father appearing in the Deed of Transfer No. 2916 of 07.11.1973 (P2). It is by this deed, his father, *Iyanathan Somasegaram*, transferred his $\frac{1}{5}$ th undivided share of the *corpus* in favour of the 1st Plaintiff's father *Iyanathan Nathanagan*. It was also contended by the learned President's Counsel that the 2nd Defendant did not dispute the validity of the said Deed of Transfer during the trial and therefore Deed P2 gets priority over the Deed of Gift No. 904 of 13.03.1970 (2V2), on which the 2nd Defendant relied on, in claiming his entitlement to the *corpus*. With regard to the 2nd Defendant's claim of prescription, learned President's Counsel contended that *Iyanathan Somasegaram* was only entitled to a $\frac{1}{4}$ share, but his claim of prescription has no basis as the building, depicted as "A" in the preliminary plan, is not a newly constructed one. He further submitted that it was only renovated from time to time and the 2nd Defendant had failed to establish his claim of prescription against other co-owners, as correctly held by the District Court.

It was also contended by the learned President's Counsel that the Court of Appeal, in arriving at its impugned finding, had overlooked or disregarded the amended Plaintiff and the Points of Contest on which the parties proceeded to trial but acted only on what the 1st Plaintiff said in evidence, totally disregarding the entitlement decided by the District Court, after undertaking a careful investigation of title of each party. In support of his contention learned Counsel relied on the judgment of *Richard and another v Seibel Nona and Others* (2001) 1 Sri L.R. 1, where it was emphasised that the duty of the District Court to investigate title and not to on admissions. Challenging the legality of the conclusion reached by the Court of Appeal in conceding to soil rights of the 2nd Defendant in relation to the land on which the house stood on, learned President's Counsel submitted that the District Court had correctly held that he is only entitled to compensation for the building as he is not entitled to any soil rights as the judgment of *Katherina v Jandiris* (1904) 7 NLR 133, held that a house built on a co-owned land becomes property of the soil owners and the builder is only entitled to compensation.

Learned Counsel for the 2nd Defendant, in his reply submissions, advanced an argument that the Deeds P1 and P2 were executed by the executants; while retaining their rights over the buildings "A" and "B" and, as these buildings included the soil covered by them, they accrue to the soil as well. Therefore, he contended what was transferred are the soil rights over the land, excluding soil rights over the area covered by the said building. Therefore, he contended that the District Court was in error in determining the rights of the parties. He also added that there was neither compliance of the provisions of Section 12(1) of the Partition Law nor of

Section 16(3). It is his submission that the Court of Appeal should have proceeded to set aside entire proceedings before the District Court rather than modifying it.

The devolution of title pleaded by the Plaintiffs is not a complicated one. Since the core dispute between the contestants is related to the rights of the building, I shall consider their respective rights over same, after the question of devolution of title to the *corpus* is considered.

After the final partition decree in the District Court of *Matale* No. P 582, *Alangara Ammal*, *Aiyanadan Kanagammal*, *Aiyanadan Somasegaram*, *Aiyanadan Nathanagan* and *Aiyanadan Thiyaganathan* became entitled to an undivided 1/5th share each on the land depicted in Plan No. 2172A and also to the building that stood on it, depicted as "A" and "B". It appears from the said plan, what is depicted therein as "A" and "B" are two sections of a one building with a common wall between them. *Alangara Ammal*, before her death, transferred her 1/5th undivided share to one of her sons, *Aiyanadan Nathanagan*, by executing Deed No. 117 (P2), while retaining her rights over the building. *Aiyanadan Thiyaganathan* by executing Deed No. 3717 (P3), transferred his 1/5th share to *Aiyanadan Nathanagan*, whose name erroneously appears therein as *Alangara Nathanagan*. Thereafter, remaining siblings of *Aiyanadan Nathanagan*, namely *Aiyanadan Kanagammal* and *Aiyanadan Somasegaram*, also have transferred their rights in favour of *Aiyanadan Nathanagan*, by execution of Deed No. 2910 (P2). With these notarial executions *Aiyanadan Nathanagan* became the sole owner to the *corpus*.

However, the 2nd Defendant tendered a Deed of Gift No. 904 (2V1), through which he claimed that his father *Aiyanadan Somasegaram* had gifted his rights over the *corpus* to him. Thus, it is clear that *Aiyanadan Somasegaram*, who executed P2 in favour of *Aiyanadan Nathanagan*, also executed 2V2 in favour of his son, the 2nd Defendant. The trial Court investigated into these two conflicting notarial executions. After having observed that the Deed No. 2910 (P2) was executed on 07.11.1973, whereas the Deed of Gift No. 904 (2V2) was executed three years later on 13.03.1976, it had rightly concluded that the 2nd Defendant is not entitled to any rights over the *corpus* on deed 2V2. It is clear from the evidence that when *Aiyanadan Somasegaram* executed deed 2V2 in favour of his son, the 2nd Defendant, he already had alienated his rights over the land in favour of his brother *Aiyanadan Nathanagan* and had no residual entitlement to the *corpus* was retained. The trial Court also considered the discrepancy that appeared in the folio of the Land Registry in which the details of these notarial executions were entered. The folio indicates only *Aiyanadan Kanagammal* made the transfer, while the Deed No. 2910 (P2) contained the signature of *Aiyanadan Somasegaram*, in addition to the signature of *Aiyanadan Kanagammal*. The undivided share component that was transferred by that deed also indicates as 2/5th as *Aiyanadan Kanagammal* only had 1/5th share to transfer. The notarial certificate too confirms that *Aiyanadan Somasegaram* too had signed on that instrument as one of the executants. I therefore concur with the conclusion reached by the District Court that, the absence of the name of *Aiyanadan Somasegaram* in the folio of the Land Registry, in all probability was due to a clerical error, which has no adverse impact on the rights that were conveyed through the said

notarial execution. The 2nd Defendant admitted his father's signature on P2 and did not contest its authenticity. Thus, the finding of the District Court that the 2nd Defendant is not entitled to any share of the *corpus* in Deed 2V2 is a correct finding.

Now I turn to consider the share entitlement of the 2nd Defendant over the building on his claim of prescription.

The 2nd Defendant had claimed acquisition of prescriptive rights to the building over his entitlement to a $\frac{1}{4}$ share to same and to the land covered by it and suggested a Point of Contest before the trial Court. Point of Contest No. 6 was framed to the effect whether the 2nd Defendant had acquired a prescriptive title over the entire building and to the $\frac{1}{4}$ share of the land, upon being in exclusive and adverse possession thereof for over ten years.

During cross examination, the 1st Plaintiff admitted that since 1975, the 2nd Defendant is in possession of the front part of the building shown as "A" in the preliminary plan "X". It is his position that the two parts of the building as per Plan No. 2172A, still exists, although certain renovations were made to it from time to time. The 2nd Defendant, in his evidence relied on a plan (2V4), approved by *Matale* Municipal Council, in support of his claim of prescription that his father *Aiyanadan Somasegaram* had built a new house on the property after demolishing the old building without any protest by others. During his cross examination by the Plaintiffs, the 2nd Defendant identified his claim to the land as a $\frac{1}{4}$ share. He also claimed full ownership to the house. The 2nd Defendant also conceded to the suggestion by the Plaintiffs that he has no evidence to

present before Court that his father built a new building on the land sought to be partitioned.

The trial Court rejected the claim of the 2nd Defendant that he had acquired prescriptive title to $\frac{1}{4}$ share of the land and to the building, in its entirety. In coming to the said conclusion, the trial Court considered the fact that the plan, said to be approved by the Municipal Council is dated 09.04.1976, whereas the Deed of Gift No. 904 (2V1) was executed on 13.03.1976, and as such there could not have been any new building in existence when *Aiyanadan Somasegaram* gifted his rights to the 2nd Defendant. In order to succeed in his claim of prescription over the “new” building, the 2nd Defendant was to establish that his father, by demolishing a building and made a new construction on the land to be partitioned, in terms of Section 3 of the Prescription Ordinance. He claimed prescription against his own relatives and should have presented cogent evidence in support of his claim. In the absence of any such evidence that the present building was built, only after the old one, to which the Plaintiffs had an entitlement, was demolished adverse to their interests, the trial Court was right to hold that he is not entitled to the full rights over the building on prescription as he is only entitled to a $\frac{1}{4}$ share.

In view of these considerations, I am inclined to agree with the conclusion reached by the trial Court that the 1st to 3rd Plaintiffs, being the heirs of *Aiyanadan Nathanagan*, are entitled to the title of the land sought to be partitioned in its entirety. The conclusion reached by the trial Court that the 2nd Defendant has no soil rights to the area covered by the building, although he is entitled only to a $\frac{1}{4}$ share of that building too is supported by authority. The judgment of *Katherina v Jandiris* (supra) was in relation

to a house built by a co-owner, who transferred his entitlement to the co-owned land to other co-owners but remained in possession of that house. When his creditor seized that house in execution of decree, it was held (at p. 134) following the *ratio* of *De Silva v Haramanis* (1895) 3 NLR 160, that the house in question was the property of the soil owners and the former co-owner had only a right to compensation, which by then had prescribed.

Turning to consider the actual share entitlement of the 2nd Defendant in relation to the building, it must be observed at the outset that the deeds P2 and P3, by which the executants have transferred their shares over the land to be partitioned, indicate they expressly retained and reserved their rights over the building “A” with them. After the death of *Alangara Ammal*, her 1/5th undivided share over the building, which she retained after transferring her 1/5th share to *Aiyanadan Nathanagan*, was devolved on her four children, making their entitlement to a 1/4 share of the building to each. When *Aiyanadan Somasegaram*, transferred his entitlement to the land in favour of *Aiyanadan Nathanagan*, he too retained his 1/4 share to the building, which now devolved on the 2nd Defendant, while the balance 3/4 share was inherited by the Plaintiffs. Therefore, the conclusion reached by the District Court on the entitlement of the 2nd Defendant of a 1/4 share over the building is based on the evidence and was determined after an investigation into his title. This conclusion is in line with the principle enunciated in the judgment *Hamidu v Gunasekera* (1922) 24 NLR 143, where it was held (at p. 145) “[A]s a matter of fact a person entitled merely to an interest in a building on a land which has become the subject of a partition action can only obtain compensation for the interest in the building and cannot get any share of the land in the partition.”

The decision of the Court of Appeal to alter the judgment of the District Court was made merely on the basis that the 1st Plaintiff in his oral evidence had accepted the 2nd Defendant's entitlement and is not a finding arrived at after an investigation, as did by the District Court. It is factually correct that the 1st Plaintiff conceded that *Aiyanadan Somasegaram* is entitled to $\frac{1}{2}$ share of the building and also to a $\frac{1}{2}$ share of the land on which the said building stood. Interestingly, the 2nd Defendant too, in his oral evidence restricted his share to $\frac{1}{4}$ even after the 1st Plaintiff conceded to a $\frac{1}{2}$ share and if one were to determine rights on the admissions, still the conclusion reached by the District Court is correct. The appellate Court had accepted oral evidence of the 1st Plaintiff and opted to act only on that evidence but preferred to ignore the oral evidence of the 2nd Defendant, who conceded that he is only entitled to $\frac{1}{4}$ share.

In this regard, it is important to note that the Point of Contest suggested by the Plaintiffs was whether the Plaintiffs are entitled to $\frac{3}{4}$ share of the building and the 2nd Defendant is entitled to the remaining $\frac{1}{4}$ share. The trial Court after having undertaken an investigation of title of each party had arrived at the finding it eventually did. In oral evidence, a party may correctly state his entitlement, overstate or even would concede to an entitlement due to many reasons, but after an investigation into their respective titles was conducted that evidence might not found to be corrected. Section 25(1) of the Partition Law imposes a mandatory duty on a trial Court that it "... shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share or interest of each party

to, of, or in the land to which the action relates, ...". In *Juliana Hamine at al v Don Thomas et al* (1957) 59 NLR 546, it was emphasised (at p.549):

"... that a partition decree cannot be the subject of a private arrangement between parties on matters of title which the Court is bound by law to examine. While it is indeed essential for parties to a partition action to state to the Court the points of contest inter se and to obtain a determination on them, the obligations of the Court are not discharged unless the provisions of section 25 of the Act are complied with quite independently of what parties may or may not do."

Learned Counsel for the 2nd Defendant, in relation to the Question of Law whether the Plaintiffs could have and maintain this action for partition on the footing that they were entitled to the entirety of the *corpus* as pleaded in their amended Plaint and also by raising points of contest on that basis, submitted that the 2nd Defendant should be recognised as a co-owner by them since he has soil rights over the area covered by the building. This particular Question of Law was raised by the 2nd Defendant, on the basis that the District Court has held that no soil rights could be accrued to him as his entitlement is restricted to the building only. Learned President's Counsel's submission on this issue was Section 5 of the Partition Law is wide enough to cover the inclusion of the 2nd Defendant as he could either be considered as a party "*claimed to be entitled*" to any right, share or interest etc., or to "*any improvement made or effected on or to the land*" and therefore could properly be named as a defendant in the partition action. He also relied on the interpretation given to the "co-owner" in Section 83 of the Partition Law. The District Court has

held that the 2nd Defendant had no soil rights and his entitlement is restricted only to the building, after an investigation into his title and until that determination, the 2nd Defendant's status of co-owner is based on his own Statement of Claim, which made him to be cited as a defendant, in terms of Section 5 of the Partition Law.

In view of the afore stated reasoning, I proceed to answer the Questions of Law on which these two appeals were proceeded in the following manner

1. Did the Court of Appeal err in law in misconstruing the uncontroverted documentary evidence in holding that the 2nd defendant is entitled to an undivided $\frac{1}{2}$ share of the house depicted as "A" in the Plan marked "X" and especially in disregarding the amended Plaint and the points of contest framed by the District Court? Yes
2. Did the Court of Appeal err in law in failing to appreciate the impracticality of granting rights in a house without any rights to the soil? Yes
3. Did the Court of Appeal err in law in failing to consider that the 2nd Defendant who has no soil rights is not recognised as a co-owner under the law? 2nd Defendant has no soil rights over the *corpus*
4. Did the Court of Appeal misdirect itself by not applying the principles in relation to question of prescription in favour of the 2nd Defendant based on the evidence adduced in his testimony? No

5. Whether the 1st to 3rd Plaintiffs could have and maintain this action for partition on the footing that they were entitled to the entirety of the *corpus* as pleaded in their amended Plaint and also by raising points of contest on that basis? Yes, the 2nd Defendant coupled his prescriptive claim with his entitlement for a $\frac{1}{4}$ undivided share to the *corpus*.

The impugned judgment of the Court of Appeal is accordingly set aside, and the Judgement of the District Court is hereby restored. The Appeal of the Plaintiffs (SC Appeal No. 96/2016) is allowed, and the Appeal of the 2nd Defendant (SC Appeal No. 97/2016) stands dismissed. Parties will bear their costs.

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