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

A. S. de. S. Haegoda,
No. 30/7, Stanley Tillakaratne
Mawatha,
Nugegoda.

Plaintiff

S.C. Appeal No. 60/2004
S.C. (S.P.L.) L.A. No. 140/2002
C.A. No. 613/92(F)
D.C. Mount Lavinia Case No. 2175/L

Vs.

M. Gunaratne Perera,
No. 131, Subadrarama Road,
Gangodawila,
Nugegoda.

Defendant

AND BETWEEN

M. Gunaratne Perera,
No. 131, Subadrarama Road,
Gangodawila,
Nugegoda.

Defendant – Appellant

Vs.

A. S. de. S. Haegoda,
No. 30/7, Stanley Thilakaratne
Mawatha,
Nugegoda.

Plaintiff – Respondent

AND NOW BETWEEN

A. S. de. S. Haegoda
No. 30/7, Stanley Thilakaratne
Mawatha,
Nugegoda.
(Deceased)

Plaintiff – Respondent – Appellant

1(a). Ratnavali Chandrika Haegoda,
No. 30/7, Stanley Thilakaratne
Mawatha,
Nugegoda.

Substituted Plaintiff – Respondent – Appellant

Vs.

1. M. Gunaratne Perera
No. 131, Subadrarama Road,
Gangodawila,
Nugegoda.
(Deceased)

Defendant – Appellant – Respondent

1(a). Hewa Malaviarachchige Dona
Dayaseeli Dhammika,
No. 131, Subadrarama Road,
Gangodawila,
Nugegoda.

Substituted Defendant – Appellant – Respondent

Before: Hon. P. Padman Surasena, J.

Hon. Kumudini Wickremasinghe, J.

Hon. Janak De Silva, J.

Counsels: Harsha Soza, P.C., with Srihan Samaranayake for Plaintiff – Respondent – Appellant

Mohan Walpita with C. C. P. Balasuriya for Substituted Defendant – Appellant – Respondent

Written Submissions: 20.10.2004, 30.06.2006 and 18.07.2006 by Plaintiff – Respondent – Appellant

16.11.2004, 18.07.2006 and 16.11.2006 by Defendant – Appellant – Respondent

Argued on: 21.11.2023

Decided on: 21.03.2025

Janak De Silva, J.

The Plaintiff-Respondent-Appellant (Appellant) instituted this action against the Defendant-Appellant-Respondent (Respondent) seeking a declaration that he is entitled to an undivided 1/8th share of the property described in the schedule to the plaint including buildings bearing assessments Nos. 135 and 135A situated thereon and an order of ejectment against the Respondent and all those holding the said property under him.

According to the Appellant, Vesta Wijeratne, who was the original owner of the corpus, had by deed No: 104 dated 13.09.1971 (P1) gifted the corpus to her son Lakshman Gamini Wijeratne subject to her life interest. This is admitted by the Respondent.

The Appellant claims that the said Lakshman Gamini Wijeratne had transferred an undivided 1/8th share of the corpus, including buildings bearing assessments Nos. 135 and 135A situated thereon, to the Appellant by deed No. 03 dated 18th November 1982 (P2) attested by Neelamani Malawisuriya, Notary Public.

According to the schedule to P2, the Appellant was granted an undivided 1/8th share of Lot A depicted in plan No. 512 prepared by Walter E. Lucas, Licensed Surveyor dated 12th December 1926.

The Appellant admitted that the Respondent also had received a transfer of the corpus from the said Lakshman Gamini Wijeratne by virtue of deed No. 4925 dated 13.12.1979 (P3) attested by M.D.C. Senaratne, Notary Public.

According to the schedule to P3, the Respondent was transferred a divided portion consisting of Lot A depicted in plan No. 512 prepared by Walter E. Lucas, Licensed Surveyor dated 12th December 1926.

The Appellant claimed priority of title on the strength of his deed having been registered in the correct folio in the Land Registry. It was his contention that although P3 was registered earlier to P2, it was registered in the wrong folio in the Land Registry.

The Learned Additional District Judge of Mount Lavinia entered judgment as prayed for by the Appellant.

Aggrieved by the said judgement, the Respondent appealed to the Court of Appeal which set aside the judgment of the learned Additional District Judge and dismissed the action of the Appellant with costs.

Special Leave to Appeal was granted on the following questions:

1. Did the Court of Appeal err in refusing the declaration of title to the Appellant in respect of the 1/8th share in terms of Deed marked P2?
2. Did the Court of Appeal err in coming to a finding that the Appellant has failed to prove the due execution of the Deed marked P2?
3. In any event can the Appellant seek relief by way of ejectment of the Respondent in view of the interests of the Respondent as contained in terms of Deed P3?

I shall first address Question No. 2 as Question No. 1 will not arise unless the execution of P2 has been proved.

Due Execution

One of the grounds on which the Court of Appeal held against the Appellant was the failure to prove due execution of P2.

Question No. 2 relates to authenticity. According to Coomaraswamy [E. R. S. R. Coomaraswamy, The Law of Evidence, Vol. II, Book I (Stamford Lake Publication, 2022), page 70], authenticity usually means proof that the document was written or executed by the person who purports to have done so.

In ***Robins v. Grogan*** **[43 N.L.R. 269 at 270]** it was held that a document cannot be used in evidence until its genuineness has been either admitted or established by proof which should be given before the document is accepted by the Court. Where there has been no admission as to the execution of a document which has been produced, it becomes necessary to prove the handwriting.

According to Section 67 of the Evidence Ordinance, if a document is alleged to have been signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Sections 68 to 72 of the Evidence Ordinance explain how the due execution of certain documents may be proved.

Section 68 of the Evidence Ordinance states that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

The Appellant contended that the Court of Appeal erred in law in requiring proof of due execution of P2 inasmuch as the Respondent had failed to challenge its due execution in his answer. In any event, the Appellant contended that although P2 was marked subject

to proof, it was not objected when read in evidence at the close of his case and as such it must be considered as proved. Reliance was placed on the decision in ***Sri Lanka Ports Authority and Another v. Jugolinija-Boal East*** **[(1981) 1 Sri.L.R. 18]**.

The Respondent countered that for the Appellant to come within Section 7(1) read with Section 7(4) of the Registration of Documents Ordinance No.23 of 1927 as amended (Ordinance), he had to prove that P2 was executed in terms of Section 2 of the Prevention of Frauds Ordinance read with Section 68 of the Evidence Ordinance. Accordingly, it was submitted that the Appellant was obliged to call at least one of the attesting witnesses **[*Bandiya v. Ungu* (15 N.L.R. 263)]**. Although the Notary Public who executed P2 was called to testify by the Appellant, none of the attesting witnesses were called.

The Respondent conceded that the Notary Public is as much an attesting witness as the two subscribing witnesses **[*Thiyagarasa v. Arunodayam* (1987) 2 Sri.L.R. 184]**. But in order to do so, the Notary Public should have known the executant **[*Marian v. Jesuthasan* (59 N.L.R. 348); *The Solicitor General v. Ahamadulebbe Ava Umma* (71 N.L.R. 512 at 515 to 516)]**. The Notary Public who executed P2 had stated in the attestation that she did not know the executant.

No doubt that P2 was required by Section 2 of the Prevention of Frauds Ordinance to be attested. Hence Section 68 of the Evidence Ordinance is engaged.

During the pendency of this appeal, the Supreme Court delivered a divided judgment on the application of Section 68 of the Evidence Ordinance and the decision in ***Sri Lanka Ports Authority*** **(supra)** to deeds in ***Kugabalan v. Ranaweera and Another*** **[S.C. Appeal No. 36/2014, S.C.M. 12.02.2021]**. This was followed by a few other judgments which either followed the majority or minority view in ***Kugabalan*** **(supra)**. The resulting position was not clear.

In view of this position, Civil Procedure Code (Amendment) Act No. 17 of 2022 (Act) was enacted and a new Section 154A was introduced to the Civil Procedure Code. In addition, Section 3 (a)(ii) of the Act reads as follows:

> *"3. Notwithstanding anything contained in section 2 of this Act, and the provisions of the Evidence Ordinance,* ***in any*** *case or* ***appeal pending on the date of coming into operation of this Act*** *–*
>
> *(a) …*
>
> *(ii)* ***if the opposing party has objected to it being received as evidence on the deed*** *or document* ***being tendered in evidence but not objected at the close of a case when such document is read in evidence****,*
>
> *the* ***court shall admit such deed*** *or document as evidence* ***without requiring further proof:"*** (emphasis added)

The Act came into operation on 23.06.2022. In this appeal, special leave to appeal was granted on 17.09.2004 and arguments concluded, and judgment reserved on 21.11.2023. Thus, *this appeal was pending as at 23.06.2022* and *the Act applies*.

Although the Respondent objected when P2 was tendered in evidence, no objection was taken when it was read in evidence at the close of the case for the Appellant. Therefore, P2 must be admitted as evidence.

It is also observed that in any event, the vendor of both parties, namely Lakshman Gamini Wijeratne has in paragraph 3 of his answer dated 25.03.1985 filed in D.C. Mount Lavinia Case No. 815/ZL admitted that he transferred as undivided 1/8th share of the corpus together with boutiques Nos. 135 and 135A to the Appellant by P2.

According to Section 70 of the Evidence Ordinance, the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, although it is a document required by law to be attested.

I answer Question of Law No. 2 in the affirmative.

Declaration of Title

The Court of Appeal appears to have taken the view that the Appellant cannot maintain an action for declaration of title to an undivided portion of the corpus and that his remedy was to institute a partition action.

In ***Hevawitarane v. Dangan Rubber Co. Ltd.*** **(17 N.L.R. 49)** it was held 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.

This principle has been subsequently approved in ***Hariette v. Pathmasiri*** **[(1996) 1 Sri.L.R. 358 at 362]**, ***Rosalin Hami v. Hewage Hami and Others*** **[S.C. Appeal No. 15/2008, S.C. M. 03.12.2010]**, ***Punchiappuhamy v. Dingiribanda*** **[S.C. Appeal No. 04/2010, S.C.M. 02.11.2015]** and ***Pinto and Others v. Fernando and Others*** **[S.C. Appeal No. 57/2016, S.C.M. 11.09.2023]**.

In ***Geris Appu v. Silva*** **(18 N.L.R. 219 at 221)** Pereira J. held that there is no objection to one co-owner suing another to have his title declared to a certain share of the property owned in common, and for damages sustained by him by reason of the wrongful enjoyment of his share by the other co-owners.

Accordingly, it is clear that the Appellant is entitled to maintain this action against the Respondent to obtain a declaration that he is entitled to an undivided $1/8^{th}$ share of the corpus.

Priority

The Appellant claims that although P2 was executed in 1982 after P3 was executed in 1979, P3 gets priority by registration.

Section 7(1) of the Registration of Documents Ordinance No. 23 of 1927 as amended (Ordinance) reads as follows:

> *"7(1) An instrument executed or made on or after the 1st day of January, 1864, whether before or after the commencement of this Ordinance shall, unless it is duly registered under this Chapter, or, if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in section 26 of that Ordinance, be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly registered under this chapter or if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in Section 26 of that Ordinance."*

The legal effect of due registration in terms of the Ordinance has been expounded on several previous instances.

In examining the effect of registration under Ordinance No. 8 of 1863, the previous legal regime, Clarence, J. in ***Silva v. Sarah Hamy*** **[(1883) Wendt's Reports 383 at 384],** explained the legal position as follows:

> *"When an owner of land conveys it to A for value, and subsequently executes another conveyance of the same land in favour of B also for value, it is true that at the date of the second conveyance the owner has nothing left in him to convey, but, by the operation of the Ordinance, B's conveyance overrides A's, if registered before it. Unless the Ordinance has this effect, it has none at all, and this seems the actual construction of the enactment"* (emphasis added).

In ***Massilamany v. Santiago*** **(14 N.L.R. 292*)*** it was held that the only effect of registration was to give priority to the subsequent deed. The earlier deed is not affected in any way, save that it has to take second place.

In ***Lairis Appu v. Tennakoon Kumarihamy*** **(61 N.L.R. 97 at 105)** Sinnetamby, J., held that:

> *"Our Registration Ordinance provides for* ***the registration of documents and not for the registration of titles****. If it had been the latter, then, from whatever source the title was derived, registration by itself would give title to the transferee. When, however, provision is made only for the registration of documents of title, the object in its simplest form, is to safeguard a purchaser from a fraud that may be committed on him by the concealment or suppression of an earlier deed by his vendor.* ***The effect of registration is to give the transferee whatever title the vendor had prior to the execution of the earlier unregistered deeds."*** (emphasis added).

Accordingly, priority by registration is received only where the source of title is one and the same person. In this appeal, both P2 and P3 have been executed by Lakshman Gamini Wijeratne.

In order to obtain priority based on due registration, P2 should have been registered in the correct folio. The burden of proving that P2 is registered in the correct folio and that P3 is registered in the wrong folio was on the Appellant.

The Appellant led the evidence of an officer for the Land Registry who gave evidence at length. He testified that the name of the land in question in this case is "Ganelanda" and that the correct prior registration reference for deed **P2** is **M 743/36**. That is, it is registered in the Land Registry Office Division M, Volume 743 and Folio 36. **P1** the common source deed from which the rights set out in both P2 and P3 originate was **also registered in Division M, Volume 743 and Folio 36**. But **P3** on the face of it said to have

been registered as **M 745/36**. Learned Additional District Judge of Mt. Lavinia found that it was registered in Volume 1251 and Folio 92.

In ***Diyes Singho v. Herath*** **(64 N.L.R. 492 at 494)**, it was also observed that the question of whether an instrument has been duly registered, as required by the Ordinance, is a mixed question of law and fact. The Respondent did not seek to assail this finding on the mixed question of fact and law. Neither did the Court of Appeal.

The Respondent has in the written submissions submitted priority by registration applies only to paper title and not any rights derived otherwise such as prescriptive title. One of the important limitations on the consequences of registration was explicitly adverted to in ***Appuhamy v. Goonetilleke*** **(18 N.L.R. 469)** where it was held that prescription is a mode of acquisition independent of any documentary title which the possessor may at the same time has, and although documentary title may be defeated by the operation of the Registration Ordinance, the other remains unaffected.

Hence where a party derives title from both a deed as well as prescription, although his deed may have been registered later, his prescriptive title remains unaffected if he can establish prescriptive title against the other party who claims priority by registration.

However, the Respondent did not claim any prescriptive title against the Appellant in the answer. Neither was any issue raised on any alleged prescriptive title of the Respondent. Special Leave to Appeal was not granted on any question dealing with the prescriptive rights of the Respondent. In these circumstances, I am not inclined to consider any issue of the Respondent's prescriptive rights.

Valuable Consideration

One of the grounds on which the Court of Appeal held against the Appellant is the failure to prove that there was valuable consideration passing in respect of P2.

In ***Fernando v. Fonseka*** **(1 C.L.R. 82)** it was held that the term 'valuable consideration' is a well-known term with a well-defined meaning it is money, marriage or the like, which the law esteems as an equivalent given for the grant.

The Appellant submitted that the Respondent had not raised the absence of valuable consideration for P2 either in his answer or by way of an issue.

In ***Diyes Singho v. Herath*** **(64 N.L.R. 492)** it was held that although no issue was raised by either party in respect of the passing of valuable consideration for the subsequent instrument, the absence of such an issue could not have the effect of absolving the plaintiff from proving that valuable consideration was given.

In the attestation clause in P2, Neelamani Malawisuriya, Notary Public who attested P2 clearly states that no consideration passed before here. She confirmed this during her testimony.

In ***Diyes Singho*** **(supra)** it was held that proof of the existence of a statement in the deed by the Notary that consideration was paid is not sufficient to establish the truth of the payment of such consideration. Similarly, in ***Munasinghe v. Vidanage and Another*** **(69 N.L.R. 97)** the Privy Council held that the statements of the Notary in the attestation clause of a deed of sale are admissible evidence, and may well be important evidence, regarding consideration, but are not conclusive.

However, the position appears to be different when a vendor makes a statement in the relevant deed on the passing of valuable consideration. In ***Perera v. Premawathie*** **(74 N.L.R. 302)** it was held that, the statement of the vendor contained in the deed that she had received the full consideration for the transfer was sufficient to prove that the interest that passed on the deed was for valuable consideration. The court was mindful that the impugned deed in that case is more than seventy years old and that the parties and the witnesses to the deed are all dead. The Court sought to distinguish the decision

in ***Diyes Singho*** **(supra)** on the basis that there the Court was not considering the effect of a statement contained in the deed by a vendor who was dead. Nevertheless, there is no evidence on the record as to whether the said Lakshman Gamini Wijeratne was alive at the time the trial in this action was proceeding.

In ***Nambuwasan v. Deonis Appu and Others*** **(65 N.L.R. 353)** it was held that where a transaction embodied in a deed is on the face of it a sale, the deed itself constitutes prima facie evidence of passing of valuable consideration. Weerasooriya S.P.J. opined that in ***Diyes Singho*** **(supra)**, the Court had not given its mind to whether, apart from the statement of the notary regarding the passing of consideration, the deed itself did not constitute prima facie evidence of what is purported to be, namely a deed of sale. However, Weerasooriya S.P.J. went on to hold that even where a transaction embodied in a deed is on the face of it a sale, and notwithstanding a statement in the attestation that consideration passed, it is open to a Court to hold that the surrounding circumstances negative a genuine sale and point to the transaction being merely a colorable one.

Thus, the position is that the statement in the attestation clause of a deed of sale on whether valuable consideration passed or not is not conclusive on that issue. Similarly, the statement of the vendor in the deed that valuable consideration was received is also not conclusive. A court must consider all the attendant circumstances before concluding whether or not there was valuable consideration.

In this action, there is the following evidence on the payment of consideration. On page 1 of P2, there is a statement by the vendor, Lakshman Gamini Wijeratne that he accepted a sum of Rs. 17,000/= which was the consideration for P2. In this regard, it is observed that the consideration for P3 executed 3 years earlier for the full corpus is Rs. 25,000/=.

Moreover, the Appellant testified that he had bought the corpus from said Lakshman Gamini Wijeratne [Appeal Brief pages 115 and 127]. He stated so for the second time [at page 127] during his cross-examination. Moreover, the counsel for the Respondent cross-

examined the Appellant [Appeal Brief page 131] premised on the fact that he had **bought** the corpus. Nevertheless, the Counsel for the Respondent failed to challenge this part of the evidence of the Appellant during cross-examination.

The established common law rule is that where a party intends to lead evidence that will contradict or challenge the evidence of an opponent's witness, it must put that evidence to the witness in cross-examination. It is essentially a rule of fairness. A witness must not be discredited without having had a chance to comment on or counter the discrediting information. It also gives the other party notice that its witness' evidence will be contested and further corroboration may be required.

In ***Browne v. Dunn*** **[(1893) 6 R 67]** it was held that if in the course of a case, it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact by cross-examination showing that the imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him, unless it is otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of his story.

The legal effect of the failure to do so was considered in ***Edrick De Silva v. Chandradasa De Silva*** **(70 N.L.R. 170 at 174)** where H.N.G. Fernando, C.J., observed that where the plaintiff has in a civil case led evidence sufficient in law to prove a *factum probandum*, the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the plaintiff. There is then an additional "matter before the Court", which the definition in Section 3 of the Evidence Ordinance requires the Court to take into account, namely that the evidence led by the plaintiff is uncontradicted [See ***Gnanapala Weerakoon Rathnayake v. Don Andrayas Rajapaksa and Another*** **(S.C. Appeal No. 120/2009, S.C.M. 01.08.2017 at page 5)**].

However, in ***MMBL Teas (Pvt) Ltd. v. British Ceylon Produce Export (Pvt) Ltd.*** **[S.C. Case No. SC/CHC/35/2008, S.C.M. 17.12.2021]** Aluwihare, PC, J., (at page 17) was of the view that failure to challenge evidence by cross examination *by itself may not be sufficient to hold that a particular fact had been proved within the meaning of Section 3 of the Evidence Ordinance*. It might, however, be a factor to be taken into account in accepting such evidence. Once the evidence is received, independent of such reception, the court should give its mind to the evidence so received, and consider whether such evidence is sufficient to establish the fact, sought to be proved.

In ***Sarwan Singh v. State of Punjab*** **[AIR 2022 SC 3652]** the Supreme Court of India held that it is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted.

I have adopted this approach in ***Southern Group Team Holdings (Pvt) Ltd. v. Ceylon Comany Group (Pvt) Ltd.*** **[S.C. (C.H.C.) Appeal 11/2004, S.C.M.24.07.2024]**.

These authorities show that the failure to put one's case in cross-examination to the witness on a material point allows a court to conclude that the evidence tendered on that material point should be accepted. Whether that is sufficient by itself to hold that material fact had been proved within the meaning of Section 3 of the Evidence Ordinance depends on the facts and circumstances of each case. There may well be cases where it is sufficient by itself. There may be other cases where court must give its attention to other important evidence.

In this action, there was no issue raised whether there was valuable consideration for P2. There was a statement made by the vendor in P2 that he received valuable consideration. The Appellant testified, both in evidence-in-chief and under cross-examination, that he had paid the consideration for P2. This part of his evidence was not challenged by the counsel for the Respondent during cross-examination. All this evidence taken in

conjunction establishes a strong foundation for a finding to be made that there was valuable consideration for P2.

For the foregoing reasons, I hold that the Appellant has proved that valuable consideration passed on P2.

Fraud

The Respondent has also drawn our attention to Section 7(2) of the Ordinance which states that fraud or collusion in obtaining such subsequent instrument or in securing the prior registration thereof shall defeat the priority of the person claiming thereunder.

The Respondent had, in the prayer to his answer, sought a declaration that P2 is a fraudulent document. However, no issue was raised on P2 being a fraudulent document. It is trite law that trial proceeds on the issues. In ***Hanaffi v. Nallamma*** **[(1998) 1 Sri.L.R. 73]** it was held that once issues are framed, the case which the court has to hear and determine becomes crystallised in the issues and the pleadings recede to the background.

Moreover, special leave to appeal has not been granted on this ground.

For all the foregoing reasons, I hold that this is not a ground that the Respondent is entitled to raise in now.

The Appellant has proved due execution of P2. He has also proved that there was valuable consideration. According to P2, the Appellant is the owner of an undivided $1/8^{th}$ share of the corpus and is entitled to obtain a declaration to that effect.

I answer Question of Law No. 1 in the affirmative.

Co-ownership

In addition to the declaration of title, the Appellant sought an order of ejectment against the Respondent and all those holding the corpus under him. This was granted by the

District Court. The Court of Appeal took the view that the Appellant is not entitled to an order of ejectment against the Respondent.

The Respondent by P3 obtained title to the full corpus. By P2, the Appellant obtained an undivided 1/8th share of the corpus.

In ***Jayawardena v. Menike*** **[S.C. Appeal 32/2009, S.C.M. 04.03.2010]** it was held that priority by registration applies to co-owned property as well. There the appellant was entitled to obtain 1/2 share by priority as that was all what he received by the deed which had priority.

Accordingly, in view of the priority of registration, the title of the Appellant to 1/8th undivided share of the corpus takes priority over the title of the Respondent to the corpus. But that only affects 1/8th undivided share of the corpus. The other 7/8th share of the corpus received through P3 remains with the Respondent. Section 7(1) of the Ordinance does not apply to the said undivided 7/8th share.

In ***Gunasekera v. Silva*** **(58 N.L.R. 83)** it was held that an order of ejectment will not be made against a co-owner on the application of another co-owner. This was confirmed in ***Waris Perera v. Pubilinahamy*** **(66 N.L.R. 88 at 90)**, where H.N.G. Fernando, J. (as he was then) held that it is trite law that until co-ownership is dissolved by partition or by prescription, it is not open to one co-owner to exclude another from any particular portion of the land.

Hence, the learned Additional District Judge of Mt. Lavinia erred in law in granting the Appellant an order of ejectment ejecting the Respondent from the corpus. The Court of Appeal was correct in law in setting that part of the judgment aside.

I answer Question of Law No. 3 in the negative.

For the foregoing reasons, I allow this appeal in part. The Appellant is entitled to a declaration that he is the owner of an undivided 1/8th share of the property described in the schedule to the plaint. The order of ejectment he has sought must be rejected.

The judgment of the Court of Appeal dated 31.05.2002 is set aside to the extent specified above. The judgment of the District Court of Mt. Lavinia dated 12.11.1992 is amended to the extent set out above.

The learned District Judge of Mt. Lavinia is directed to enter decree accordingly.

Appeal is partly allowed with costs fixed at Rs. 50,000/=.

JUDGE OF THE SUPREME COURT

P. Padman Surasena, J.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J.

JUDGE OF THE SUPREME COURT