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

In the matter of an application for Leave to Appeal under section 5(c) of the High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006 read with Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal 239/16
SC /HCCA/LA No. 82/2015
WP/HCCA/KAL/37/2007(F)
DC Horana Case No.6001/P

Pulukkutti Ralalage Karunaratne
Baduwila Road
Kidelpitiya.

Plaintiff-Appellant- Appellant

Vs.

1. Pulukkuttiralalage Dhanapala
Baduwila Road,Kidelpitiya.

2. Lawaris Gunathilaka
Baduwila Road,Kidelpitiya.

2A. Payagala Maha Liyanage Don
Kawanis.KidelpitiyaWelmilla
Junction, Bandaragama.

2B Yogama Widanalage Somawathie of
112/C. Saddatissa Mawatha
Kidelpitiya Welmilla Junction.

3. David Gunathilake
Baduwila Road, Kidelpitiya.

3A. Payagala Maha Liyanage Don
Kawanis, Kidelpitiya Welmilla
Junction, Bandaragama.

3B. Yogama Widanalage Somawathie of
112/C. Saddatissa Mawatha
Kidelpitiya Welmilla Junction.

4. Adlyn Gunathilake
Baduwila Road, Kidelpitiya.

4A. Yogama Widanalage Somawathie of
112/C. Saddatissa Mawatha
Kidelpitiya Welmilla Junction.

5. Pulukkuttiralalage Sirisena
Baduwila Road, Kidelpitiya.

6. Pulukkuttiralalage Thepanis alias
Daniel, Baduwila Road,
Kidelpitiya.

7. Payagala Mahaliyanage Don Victor,
Baduwila Road, Kidelpitiya .

7A. Payagala Mahaliyanage Don Nihal,
Baduwila Road, Kidelpitiya .

New Address
No. 166/D,Sri Wimalarama
Mawatha, Kidelpitiya, Welmilla
Junction.

8. Payagala Mahaliyanage Don
Hemawathie, Baduwila Road,
Kidelpitiya . Junction. Welmilla.

9. Payagala Mahaliyanage Don Gomis,
Baduwila Road, Kidelpitiya .

9A. Payagala Mahaliyanage
Hemawathie,
No. 168/B In front of the Temple
Welmilla, Kidelpitiya.

10. Payagala Maha Liyanage Don
Kavanis. Kidelpitiya, Bandaragama.

New Address
No.112/C, Saddatissa Mawatha
Kidelpitiya, Welmilla Junction.

10A. Yogama Widanalage Somawathie of
112/C. Saddatissa Mawatha
Kidelpitiya Welmilla Junction.

11. Surage David
Baduwila Road, Kidelpitiya .

12. Surage Nathoris
Baduwila Road, Kidelpitiya .

12A. Buddarage Jayanthimala Perere
No. 136, Saddatissa Mawatha
Kidelpitiya ,Welmilla Junction.

13. Surage Nomis
Baduwila Road, Kidelpitiya

13A. Amarasinghe Arachchilage
Kulawathi of No. 09, Senapura,
Kidelpitiya Welmilla Junction.

14. Hapuarachchige Charlott Nona
Kotuwegedera, Kidelpitiya,
Welmilla.

15. Us-hettige Badrawathi Perera
5/3, Kuda Edanda Road,
Waththala.

16. Ushettige Silawathi Perere
No. 38, Kuda Edanda Road,
Waththala.

17. Hettiarachchige Don Karunasena
No. 70, Helapitiwela, Ragama.

18. Pitiyage Hemarathne Perere
Kothalawala Junction, Raigama,
Bandaragama.

19. Dickson Premarathne Pererea
Wathsala Stores, Welmilla,
Kidelpitiya, in front of the Temple.

New Address
No. 163/B, In front of the Temple,
Kidelpitiya, , Welmilla Junction.

Defendants-Respondents-Respondents

Before	:	Jayantha Jayasuriya, PC, CJ
		B.P. Aluwihare, PC, J.
		S. Thurairaja, PC, J.
Counsel	:	Sunil Cooray for the Plaintiff-Appellant-Appellant.
		Philip Chandraratne for the 19th Defendant-Respondent-Respondent.
Written submissions		
filed on	:	12.06.2017 by the Plaintiff-Appellant-Appellant.
		08.08.2017 and 25.02.2022 by the 19th Defendant-Respondent-Respondent
Argued on	:	03.02.2022
Decided on	:	10.08.2022

Jayantha Jayasuriya, PC, CJ

Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as "appellant") instituted a partition action in the District Court of Horana. The corpus described in the schedule of the plaint is a land called "a portion of millagahawatta" "(millagahawatta kattiya)" which is ½ an acre in extent. According to the schedule of the plaint the said land is registered in folios B 14/344 and B 63/82 at the land registry in Panadura. The said land is further described in the plaint as a distinct portion of a larger land of eight acres. It is further pleaded that the said larger

land is possessed as several distinct divided portions. The appellant further claimed that he and several defendants were in possession of one such distinct portion, that is more fully described in the plaint.

The 19th Defendant-Respondent-Respondent, (hereinafter referred to as "19th respondent"), who is a son of the 8th Defendant-Respondent-Respondent was added as a party, on an application by the appellant after the plaint was filed. Initially appellant sought an enjoining order against him from the court while the trial was pending to prevent him from the construction he commenced in the corpus after the partition action was instituted. Thereafter, the 19th respondent in his statement of claim took up the position that he does not accept the corpus. He claimed that a portion of the larger eight acre land was never possessed as "distinct and divided portion of the larger land" at any stage, as claimed by the appellant. He further disputed the pedigree of the appellant. The 19th respondent claims his rights based on a deed executed in 1999, three years after the plaint was filed in court. Two defendants, namely the 8th and 9th defendants by this deed had conveyed interests they would accrue to the corpus from the judgment of the trial court – contingent interests - to the 19th respondent.

The 10th Defendant-Respondent-Respondent (hereinafter referred to as "10th respondent") in his initial statement of claim filed in the year 1999 pleaded his line of succession very much similar to the line of succession pleaded in the plaint subject to a few variations. However, in his amended statement of claim filed in the year 2001, while disputing the claims of the appellant, accepted the statement of claim of the 19th respondent. He also disputed the appellant's contention that the land sought to be partitioned is a divided lot from the larger 8-acre land called Millagahawatte. He further contended that the land sought to be partitioned was never possessed as a distinct divided lot.

It is pertinent to note that only three parties actively took part in the proceedings before the trial court. They were the plaintiff (appellant) and two of the defendants, namely 10th and 19th defendants (10th and 19th respondents). The trial proceeded on two admissions and twelve points of contest. One of the admissions recorded was that the preliminary plan 2266 depicts the corpus in this matter. Appellant raised four points of contest and the first three of them relate to the pedigree. The 10th respondent had not raised any points of contest but had associated with the eight points of contest raised by the 19th respondent. They relate to the pedigree and the proper

registration of the *lis pendens*. No point of contest had been raised on the identity of the corpus or whether the corpus is a distinct divided portion of the larger land. The appellant, 10th respondent, 19th respondent and one other witness had testified at the trial.

At the conclusion of the trial, the learned District Judge dismissed the action of the appellant and proceeded to declare that 7th, 10th and 19th respondents are entitled to shares as determined by him.

Being aggrieved by the said judgment, the appellant preferred an appeal to the High Court of Civil Appeal of Western Province holden at Kalutara seeking inter alia to set aside the aforesaid judgment of the District Court and grant relief as prayed for in the plaint.

The learned High Court Judges by judgment dated 28.01.2015, held that the action is liable to be dismissed for the reason that the corpus is not properly identified as the entire corpus of eight acres is not depicted in the preliminary plan marked X. Accordingly the impugned judgment of the District Court was set aside and the plaint was dismissed.

The appellant being aggrieved by the aforesaid judgment of the Civil Appellate High Court, invoked the jurisdiction of this Court and special leave was granted on the following questions:

1. Have the Learned High Court Judges erred in law in holding that parties to the action did not satisfy the corpus of the partition action in as much as all contesting parties had admitted the corpus as having been shown in the Preliminary Survey Plan (P2) [Marked and produced as 'X' at the trial].

2. Have the Learned High Court Judges erred in holding that:
   (a) "Eight acre larger land was not divided into separate lots"
   (b) "Without showing eight acre land, instituting a partition action for a small portion (1R) of such a larger land is not permitted in law"
   (c) "Therefore, it appears to this Court that the entire corpus (eight acres) is not depicted in plan X"
   (d) "The corpus is not properly identified"

3. Have the Learned High Court Judges erred in law when they failed to apply the rationale of the authorities *Girigoris Perera vs Rosalin Perera* (1952) 53 NLR 536 and / or *Marshal Perera and other vs Dona Aginis and other* (1988) 1 SLR 248 into the present case in deciding on the issues at their hands even though the said authorities were brought to the notice of the Court by the written submissions of the Petitioner.

4. Have the Learned High Court Judges erred in law and facts in holding that the land sought to be partitioned has not been identified;
    (a) Where in the instant case all contesting parties have admitted the corpus and the land sought to be partitioned has been surveyed and depicted in the preliminary survey plan and also;

    (b) Where the surveyor who carried out the preliminary survey has confirmed in his report that the land described in the plaint was the same land that he surveyed on the preliminary survey.

I will now proceed to consider questions 1,2 and 4 mentioned above together as they primarily revolves on the issue whether the corpus had been identified or not.

It is the contention of the appellant before this court, that sufficient evidence had been led in the District Court to substantiate that the corpus described in the plaint is a separate distinct portion of the larger land called Millagahawatte and the said land Millagahawatte is eight acres in extent. It was further contended that a portion of land in the extent of two roods was registered in a different folio as a separate and distinct portion from the larger land called Millagahawatte since 1938 and that all parties admitted at the trial that the land sought to be partitioned is depicted in the preliminary survey plan marked 'X'. It was further contended that the learned High Court judges erred when they held that the eight-acre larger land was not divided into separate lots. Furthermore, it was contended that the learned High Court Judges erred when they held that the partition action could not have been filed for a smaller portion of a larger land in the context of the facts peculiar to this case. It was further contended that they erred when they dismissed action on the basis that the entire corpus is not depicted in the preliminary plan. On behalf of the appellant it was submitted that there was no need to survey the larger land in preparing the

preliminary plan as no party claimed that the said larger land was jointly possessed or co-owned by the parties in the case.

In this regard it is pertinent to observe that the 10th respondent who was present at the preliminary survey had objected for surveying a portion of the eight-acre land on the basis that he is entitled to shares from the larger land. However, he along with the appellant had showed the boundaries of the portion of the land in extent one rood and four point three zero decimal perches in extent, depicted as lot no 1 in the preliminary plan 2266. It is also pertinent to observe that both 10th and 19th respondents who disputed appellant's claim that the eight acre larger land was possessed as distinct divided portions had admitted that the corpus is depicted in the preliminary plan 2266, when recording admissions.

The appellant's pedigree and his claims to the land were based on four deeds that were produced as evidence. They are, deed 1027 dated 21 December 1970 (P2), deed 1050 dated 12 January 1971 (P3), deed 3239 dated 27 July 1982 (P1) and deed 288 dated 19 August 1985 (P4).

Pedigree relied on by the 10th and 19th respondents was based on five deeds. They are deed 9952 dated 20th July 1938 (19V6), deed 1420 dated 01 May 1943 (19V7), deed 7162 dated 28 September 1954 (10V1), deed 697 dated 30 May 1992 (19V5) and deed 2443 dated 01 October 1999 (19V4).

When all these deeds are examined in the context of identifying the corpus, it is pertinent to observe that deed bearing no. 9952 executed in 1938 (19V6), deed 14230 executed in 1943 (19V7), deed 7162 executed in 1954 (10V1), deed 288 executed in 1985 (P4) and, deed 697 executed in 1992 (19V5) refer to a portion of Millagahawatte as the land in relation to which each of those deeds had been executed. The extent of such portion is described as ½ an acre in deeds 19V6, 19V7, 10V1, and 19V5. In the deed P4, the extent of the land is described as 2 roods. Therefore, in the context of the extent of the land concerned, all those deeds are similar. In relation to boundaries, Eastern and Southern boundaries are described as a by road and main road respectively. Northern and Western boundaries are described as portions of Millagahawatte. Names of the persons who are in possession of such portions are same in 19V6, 19V7, 10V1 and 19V5. However P4 gives names of different parties. When boundaries mentioned in the aforementioned deeds are compared with the boundaries of the corpus as described in the

preliminary plan marked 'X' and the schedule of the plaint, Eastern and Southern boundaries are described as by road and main road or in similar terms, in all these documents. Northern and Western boundaries are also described as portions of Millagahawatte. However, the extent of the corpus as described in the preliminary plan (x) is one rood and four point three zero perches whereas in other documents, including the plaint the extent is described as ½ an acre or two roods. It is the appellant's contention that the acquisition of a part of the land for the development of the main road is the reason for this discrepancy.

It is also important to note that the learned trial judge at no stage had held that the corpus had not been identified. The learned trial judge having examined all the evidence presented by the appellant as well as by the 19th respondent had held that a separate and distinct portion of land in extent of two roods had been in existence out of the eight-acre larger land. In contrast to the decision of the learned Civil Appellate High Court, the learned trial judge's decision to dismiss the plaint **is not** on the ground that the corpus was not identified.

When all these factors are considered together with the admission of the parties at the trial on the identity of the corpus, in my view the learned High Court judges had failed to appreciate all items of evidence and the findings of the trial court and therefore had erred when they held that the corpus had not been identified.

In view of this finding and the evidence presented relating to the identity of the corpus as described hereinbefore, three of the four questions on which special leave was granted, namely questions 1,2 and 4 should be answered in the affirmative. Therefore in my view the judgment of the Civil Appellate High Court should be set aside.

The remaining main submission of the learned counsel for the appellant before this court is that the learned trial judge erred by failing to apply the jurisprudence developed in *Girigoris Perera vs Rosalin Perera* (1952) 53 NLR 536 and / or *Marshal Perera and other vs Dona Aginis and other* (1988) 1 SLR 248 in favour of the appellant, when he dismissed the plaintiff's case. The legal question no. 3 on which this court had granted leave is formulated on this basis. However, in my view it is pertinent to examine the learned trial judge's decision to allocate shares to 7th, 10th and 19th respondents, before proceeding to examine this specific legal issue, as the learned

trial judge had accepted the pedigree of the 19th respondent having dismissed the appellant's case.

The judgment of the learned trial judge reflects that reasons for the learned trial judge's decision to dismiss the appellant's case are twofold. First, the learned trial judge had held that the plaintiff's pedigree was not proved. Second, the learned trial judge had held that the portions of Millagahawatte as described by the plaintiff and the 19th respondent do not tally and fail to correspond to each other. It was the trial judge's view that the portion of the land as reflected in the deeds presented in support of the 19th respondent, correspond to the corpus described in the plaint. The learned trial judge had therefore proceeded to allocate shares of the corpus to 7th, 10th and 19th defendants (respondents) based on the deeds marked in favour of the 10th and 19th respondents, having dismissed the plaint.

The learned trial judge had held that the undivided shares of the 7th, 8th, 9th 10th and 22nd respondents as described in the statements of claim of 10th and 19th respondents had been confirmed by evidence (19 වී 1 දරණ ලේඛනයේ සඳහන් පරිදි 19 විත්තිකරුගේ සාක්ෂිය අනුව ලිස්පෙන්ඩනය බී 63/82 හි ලියාපදිංචිව ඇත. 7, 8, 9, 10 සහ 22 විත්තිකරුවන් ගේ හිමිකම් ප්‍රකාශයන් සලකා බලා ඔවුන්ගේ නොබෙදූ අයිතිවාසිකම් සාක්ෂිවලින් තහවුරු වී ඇති හෙයින් පහත සඳහන් පරිදි නොබෙදූ කොටස් හිමි වේ.) and proceeded to allocate shares to 7th, 10th and 19th respondents.

It is trite law that a court has a duty to inquire into the title of all concerned parties before entering a decree in a partition action.

In **Golagoda v Mohideen** 40 NLR 92 at 94, the court held that;

> *"It is hardly necessary to consider the earlier authorities which have all been summarized in the case of Goonaratne v. The Bishop of Colombo (53 NLR 337). As Lyall-Grant J. said in the course of his judgment, "it is the duty of the Court before entering a decree to satisfy itself that the parties appearing before it have a title to the land". He quoted from the judgment of Bonser C. J. in Peris v. Perera (1 NLR 362), where it was laid down that the Court should not enter a decree unless it was perfectly satisfied that the persons in whose favour it makes the decree, are entitled to the*

property. The Court should not regard these actions as merely to be decided on issues raised by and between the parties, and must satisfy itself that the plaintiff has proved his

title, and he must prove his title strictly". In the Full Bench case of Mather v. Thamotheram Pillai (6 NLR 246), it was laid down that a paramount duty is cast by the Ordinance upon the District Judge to ascertain who are the actual owners of the land before entering up a decree which is good and conclusive against the world".

In **Cooray *et. al.* v Wijesuriya**, 62 NLR 158 at 160, describing the duty of the court in a partition action it was observed;

"It is unnecessary to add that the Court before entering a decree should hold a careful investigation and act only on clear proof of the title of all the parties. It will not do for a plaintiff merely to prove his title by the production of a few deeds relying on the shares which the deeds purport to convey".

The duty of a court in a partition action as described above by courts, is set out in section 25 of the Partition Law No 21 of 1977 in following terms:

"the court 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…"

Therefore, it is an inalienable duty on the trial court to embark on a thorough inquiry before allocating any shares in a partition action.

According to the pedigree pleaded by the appellant in the trial court, the first owner of the corpus was one Bempy Appuhamy alias Alisandiri (who was a father of nine children) and the corpus was devolved on seven of his children upon his demise as two of his children had predeceased him. Thereafter, it is claimed that shares of four of those seven children of Bempy Appuhamy did devolve on the appellant through the line of succession he pleaded. Deeds relevant to those transactions were produced marked P1, P2, P3 and P4 at the trial.

However, 19th respondent contested this claim. According to the line of succession pleaded by him, the first owner of the corpus - the distinct portion of 8-acre land - was one of the daughters of Bempy Appuhamy alias Alisandiri namely Nona Silva and her spouse Charlis Silva. It is his contention that the rights of the said particular daughter and her spouse, does not devolve on the appellant. Therefore, he claims that the appellant has no rights to the corpus. It is pertinent to observe according to the line of succession set out in the pedigree pleaded by the appellant, the appellant does not derive any rights from the daughter of Bempy Appuhamy through whom the 19th respondent claims his rights. Therefore, the main dispute between the two pedigrees and the statements of claim of the appellant and the 19th respondent is on the identity of the first owner of the corpus. In this regard, it is important to note that the 19th respondent concedes that the first owner of the larger land – the 8 acre land – was Bempy Appuhamy. However he claims that the first owner of the corpus (the distinct portion of the larger land) is the daughter of said Bempy Appuhamy. To the contrary, the appellant claims it is Bempy Appuhamy who is the first owner of the corpus (the distinct portion of the larger land) too.

None of the deeds produced in court describe the manner in which the larger land (the 8 acre land) devolved on seven children of Bempy Appuhamy or on any one of them. Furthermore, there is no evidence to establish that Bempy Appuhamy transferred a distinct portion of the larger land to a particular child. The 19th respondent eventhough claims that the original owner of the corpus – the distinct portion of the larger land - is one of the daughters of the original owner of the larger land, there is no evidence to substantiate this claim. Therefore, the only inference that can be drawn is that the rights and title of the original owner of the larger land, should have been devolved on all seven children of Bempy Appuhamy in equal shares, making all seven of them co-owners upon the demise of the original owner. The appellant's line of succession is based on such proposition. The 19th respondent in his testimony admitted that the original owner of the larger land at no stage transferred his rights of the entire land or of a portion of it to any particular child. Furthermore, he admits that rights of Bempy Appuhamy should devolve on all of his children. However, it is his claim that the line of succession he pleaded to the corpus – the distinct portion of the larger land – is on the basis of possession. In

this regard, it is pertinent to note that there is neither any evidence available to establish the circumstances under which the corpus – the distinct portion of the larger land – was created or established nor any evidence to establish the exact time period in which it was established. It is trite law that possession of a distinct portion of a larger land by a single co-owner does not exclude the rights of the remaining co-owners to the distinct portion unless there is cogent evidence of ouster.

In **Githohamy *et. al.* v Karanagoda *et. al.*** 56 NLR 250 at 252-253 it was held that,

> *"The possession of a co-owner would not become adverse to the rights of the other co-owners until there is an act of ouster or something equivalent to ouster. In the absence of ouster possession of one co-owner ensures to the benefit of other co-owners. It was so held by the Privy Council in Corea v. Iseris Appuhamy [(1911) 15 N. L. R. 65]. It is true that ouster can be presumed from exclusive possession in special circumstances as was decided in the case of Tillekeratne v. Bastian [(1918) 21 N. L. R. 12.]. The special circumstance which was recognized in that case was the fact that the co-owner who claimed a prescriptive title was proved to have excavated valuable plumbago on the land during a lengthy period of time. Such excavation of plumbago during a protracted period would naturally diminish the value of the land. Therefore if the other co-owners did not protest when the land was being possessed in a manner hat its value would be considerably diminished, it is fair to presume an ouster, but if a co-owner only takes the natural produce of the trees for a long time no such presumption would arise. Sadiris and his successors in title have executed a large number of deeds for lot B. There is no evidence nor is there any reason to think that the other co-owners were aware that such documents were being executed. In Kobbekadduwa v. Seneviratne [(1951) 53 N. L. R. 354.], it was held that the mere fact that a co-owner who was in occupation of the common property purported to execute deeds for a long period on the basis that he was the sole owner, did not lead to the presumption of an ouster in the absence of evidence that the other co-owners had knowledge of the transactions".*

In **Simon Perera v Jayatunga *et. al.*** 71 NLR 338 at 339-340, Thambiah J held that;

*"The question as to whether a co-owner has prescribed to a particular lot is one of fact in each case. The rule laid down by Their Lordships of the Privy Council in Corea v. Appuhamy**[**(1911) 15 N. L. R. 65. **]** and in Brito v. Mutunayagam**[**(1918) A.C. 895, 20 N. L. R. 327.**]** that if possession is referable to a lawful title it cannot be treated as adverse, is however modified by the theory of counter presumption set out in Tillekeratne v. Bastian **[**(1918) 21 NLR 12.**]** by a Full Bench of this Court. In Tillekeratne v. Bastian (supra) Bertram C.J. succinctly stated the principle as follows (at page 24):-*

" It is, in short, a question of fact, wherever long-continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable, in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten years before action brought."

*In Hameedu Lebbe v. Ganitha **[**(1920) 27 N. L. R. 33.**]** it was contended that the ruling in Tillekeratne v. Bastian (supra) was inconsistent with the decision in Brito v. Mutunayagam (supra). However, in that case, the Divisional Court held that there was no inconsistency in the principles laid down in these two cases. Where a co-owner seeks to establish prescriptive title against another co-owner by reason of long and continued possession it is a question of fact depending on each case for a court to decide whether it is reasonable to presume an ouster from the exclusive possession by a co-owner for a long period of time. This principle had been applied in Rajapakse v. Hendrick Singho [(1959) 61 NLR 32].*

*The limits of the rule that possession by a co-owner is not adverse possession was defined in Cully v. Deod Taylerson **[**(1840) 11 Ad. & E. 1088 ; 9 L. J. Q. B. 288 ; 3 P.&D.539] as follows:*

" Generally speaking, one tenant-in-common cannot maintain an ejectment against another tenant-in-common, because the possession of one tenant-in-common is the

possession of the other and to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But where the claimant, tenant-in-common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there has been an ouster **. . . . . .** *and if the jury finds an ouster, then the right of the lessor of the plaintiff to an undivided share will be decided exactly in the same way as if he had brought his Ejectment for an entirety."*

This dictum was cited with approval by Viscount Cave who delivered the opinion of the Privy Council in the case of Varada Pillai v. Jeevarathnammal ***[*** *(1919) A. I. R. (P. C.) 44 at 47.****]***"

In **Angela Fernando v Deva Deepthi Fernando *et. al.*** [2006] 2 SLR 188 at 194 the Supreme Court observed that:

"*It is a common occurrence that co-owners possess specific portions of land in lieu of their undivided extents in a larger corpus. This type of possession attributable to an express or classic division of family property among the heirs is sufficient to prove an ouster provided that the division is regarded as binding by all the co-owners and not looked upon solely as an arrangement of convenience. This position was accepted and acted upon in Mailvaganam vs. Kandiah [1915 1 CWR 175] - [Obeysekem vs. Endoris [66 NLR 457] - Simon Perera vs. Jayatunga [71 NLR 338] and Nonis vs. Peththa [73 NLR 1].*

Ouster does not necessarily involve the actual application of force. The presumption of ouster is drawn in certain circumstances when exclusive possession has been so long continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time in the distant past there was in fact a denial of the rights of the other co-owners.

It has to be reiterated that the decision in Tillakeratne vs. Bastian (supra) recognizes an exception to the general rule and permits adversity of possession to be presumed in the presence of special circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period.

The presumption that possession is never considered adverse if it can be referable to a lawful title may sometimes be displaced by the counter presumption of ouster in appropriate circumstances. Nevertheless this counter presumption should not be invoked lightly. "It should be applied if, and only if, the long continued possession by a co-owner and his predecessors in interest cannot be explained by any reasonable explanation other than that at some point of time in the distant past the possession became adverse to the rights of the co-owners", (vide Abdul Majeed vs. Ummu Zaneera [61 NLR 361 at 374]."

When the above *curses curiae* is considered in the context of the claim of the 19th respondent, it is necessary to examine the nature of evidence available to establish whether the particular daughter of Bempy Appuhamy derived exclusive rights to the distinct portion of the larger land ousting all other six siblings who derived co-ownership to the larger land on the demise of their father, Bempy Appuhamy. Availability of such evidence is necessary for the 19th respondent to derive rights to the corpus through the line of succession he pleaded at trial. It is such an inquiry the learned trial judge had to embark on, when deciding the claim of the 19th respondent. One other important factor revealed through the deeds produced by the appellant is that the heirs of children of Bempy Appuhamy through whom the appellant's rights are claimed had not acknowledged the existence of distinct portion exclusively possessed by heirs of the daughter of Bempy Appuhamy whom the 19th respondent claims as the original owner of the corpus. In deed 1027 (P2) executed in 1970 and deed 1050 (P3) executed in 1971 it is undivided shares from the entire larger land of 8 acres that had been conveyed to the appellant. No specific portion of the said larger land was excluded. A fact which has a bearing in examining whether there is an act of ouster in favour of the line of succession claimed by the 19th respondent. However, the learned trial judge had proceeded to hold in favour of the 19th respondent and reject the claim of the appellant purely by examining the details of registration of the deeds that were produced as evidence. The learned trial judge had merely observed that evidence had established / confirmed the undivided rights of the 7th, 8th, 9th 10th and 22nd respondents.

It is pertinent to observe that the learned trial judge has not examined the evidence presented in court in the context of the legal principles discussed hereinbefore, when deciding to hold in favour of the 19th respondent and the two other respondents based on the line of succession the

19th respondent pleaded in court. Therefore, in my view the learned trial judge had failed to discharge the duty imposed on him by section 25 of the Partition Law. In this regard it is also important to note that the 19th respondent in his testimony had said that they do not want to partition the corpus and further claimed that it is more appropriate to allocate shares from the 8-acre land. In paragraph 8 of the statement of claim of the 19th respondent it is pleaded that he derived undivided rights from the 8-acre land and not from the ½ an acre land.

In view of my findings as discussed hereinbefore, I am of the view that the learned trial judge had erred when he decided in favour of the 19th respondent and two other respondents without taking into account all relevant factors and engaging in a full inquiry as required under section 25 of the Partition Law. Furthermore, I observe that the learned trial judge had reached two contradictory conclusions on an important issue. At one stage the learned trial judge had concluded that according to the documentary and oral evidence of the appellant, it is not possible to accept that the corpus is a separate piece of land but a part of a larger land of eight acres in extent. (පැමිණිල්ලේ ලේඛනවලින් ද සාක්ෂිවලින් ද මෙම මැන පෙන්වා ඇති ඉඩම වෙනම ඉඩමක් ලෙස සැලකීමට කරුණු නොමැත. තහවුරු වී ඇත්තේ එය අක්කර අටක විශාල ඉඩමකින් කොටසක් බවයි.) However, thereafter the learned trial judge concludes that the evidence of the 19th respondent and the evidence of the plaintiff confirms that the land in extent of two roods remained a separate portion for a long period of time (ඒ අනුව දීර්ඝ කාලීනව එකී රූඩ් දෙකක ඉඩම වෙන්ව පැවතුණු බව 19 විත්තිකරුගේ සාක්ෂියෙන් ද පැමිණිල්ලේ සාක්ෂිවලින් ද තහවුරු වේ.) Taking into account all these factors I am of the view that the judgment of the learned trial judge dated 26.03.2007 should be set aside. However, taking into account the fact that the learned trial judge erred by failing to engage in a proper inquiry, I am of the view that justice will be served by ordering a re-trial enabling a trial judge to consider all the evidence that would be presented before court by all parties afresh and enter a judgement after fully complying with all requirements including section 25 of the Partition Law.

In view of this decision I am further of the view that the legal question No. 3 should be left unanswered enabling all parties to present necessary evidence and invite the trial court to determine this matter based on the evidence presented at the re-trial.

Therefore, the judgment of the Civil Appellate High Court of Western Province holden at Kalutara dated 28th January 2015 in WP/HCCA/KAL37/2007(F) and the judgment of the District Court of Horana dated 26.03.2007 in Case No. 6001 Partition are set aside and a re-trial is ordered. The learned District Judge of the District Court of Horana is directed to expeditiously conclude proceedings in the fresh trial.

Chief Justice

B.P. Aluwihare, PC, J.
I agree.

Judge of the Supreme Court

S. Thurairaja, PC, J.
I agree.

Judge of the Supreme Court