

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

1. Welikadage Amarawathie Boteju,
No. 96, Madiwala, Kotte.
2. Malwattage Jinasena Pieris,
No.18/12, Obahena Road,
Madiwala, Kotte.
3. Niranjan Ekanayake, Kalyapahana,
No.126, Stanley Thilakaratne
Mawatha, Nugegoda.
Plaintiffs

SC/APPEAL/42/2018

CA NO. 252/98 (F)

DC MOUNT LAVINIA 54/94/P

Vs.

1. Labugamage Diyonis Perera,
No. 67/7, Sigera Mawatha,
Madiwala, Kotte.
2. Labugamage Karolis Perera,
No. 506, Thalpathpitiya Road,
Madiwala, Kotte.
3. Labugamage Kristina Perera,
No. 513/1, halapathpitiya Road,
Madiwala, Kotte.
4. Labugamage Selo Perera,
No. 516, Thalpathpitiya Road,
Madiwala, Kotte.

5. Labugamage Sisiliyana Perera,
No. 33/3, Sigara Road, Madiwala,
Kotte.
 6. Labugamage Charlotte Perera,
Sigara Road, Madiwala, Kotte.
 7. Jamuregoda Gamachchilage
Siripala, No.32, Madiwala, Kotte.
 8. Labugamage Somalatha Perera,
No. 324, Thalpathpitiya Road,
Madiwala, Kotte.
 9. Upul Paranawithana,
No. 145, Ranpath Road,
Ethul Kotte.
 10. Mangala Senaratne,
No. 16/10, Praja Road,
Madiwala, Kotte.
 11. Suraweera Arachchige Don Idinona,
No. 16/10, Praja Road,
Madiwala, Kotte.
 12. W.N.I.S.P. Rohan Fernando
 13. W. Malini Fernando
Both of 20/2, Praja Road,
Madiwala, Kotte.
 14. A. P. C. Malani Zoisa, No. 57,
Obahena Road, Madiwala, Kotte.
- Defendants

And now between

Jamuregoda Gamachchilage

Siripala (Deceased)

7A. Dickwella Withanage Nandaseeli

7B. Jamuregoda Gamachchilage
Achala Thusari,

7C. Jamuregoda Gamachchilage

Pasan Kalhara,

All of No. 32, Madiwala, Kotte.

7th Defendant-Appellant-Appellant

Vs.

1. Labugamage Diyonis Perera
(Deceased)

1A. Labugamage Sirimathie Perera

1B. Labugamage Rupadewa Nimala
Perera

1C. Liyanage Bastiyan Perera

All of No. 67/7, Sigera Mawatha,
Madiwala, Kotte.

2. Labugamage Karolis Perera,
No. 506, Thalpathpitiya Road,
Madiwala, Kotte.

3. Labugamage Kristina Perera
(Deceased)

3A. Liyanage Don Indradasa
No. 513/1, halapathpitiya Road,
Madiwala, Kotte.

4. Labugamage Selo Perera,
No. 516, Thalpathpitiya Road,
Madiwala, Kotte.
5. Labugamage Sisiliyana Perera,
No. 33/3, Sigara Road,
Madiwala, Kotte.
6. Labugamage Charlotte Perera,
Sigara Road, Madiwala, Kotte.
8. Labugamage Somalatha Perera,
No. 324, Thalpathpitiya Road,
Madiwala, Kotte.
9. Upul Paranawithana, No. 145,
Ranpath Road, Ethul Kotte.
10. Mangala Senaratne (Deceased)
- 10A. Nagahallage Dona Premalatha
Silva, No. 16/10, Praja Road,
Madiwala, Kotte.
11. Suraweera Arachchige Don Idinona,
No. 16/10, Praja Road,
Madiwala, Kotte.
12. W.N.I.S.P. Rohan Fernando
(Deceased)
- 12A. W.N.A Niransha Dewmal
Fernando, No. 20/2, Praja Road,
Madiwala, Kotte.

13. W. Malini Fernando
No. 20/2, Praja Road,
Madiwala, Kotte.

14. A. P. C. Malani Zoisa
No. 57, Obahena Road,
Madiwala, Kotte.
Defendant-Respondent-
Respondents.

1. Welikadage Amarawathie Boteju
(Deceased)
- 1A. Perera Mudiyanseelage Mangalika
Nagasena,
- 1B. Perera Mudiyanseelage
Chandrika Nagasena (Deceased)
- 1B1. George Kinsley Silva
Patabandige Kurukulasooriya,
- 1B2. Prasanna Kamalawathie Silva
Kurukulasooriya
All of No. 68A, Talawathugoda
Road, Wijithapura, Kotte.

- 1C. Perera Mudiyanseelage
Ranjithpriya (Deceased)
- 1C1. Dingiri Bandage Anulawathie
- 1C2. Perera Mudiyanseelage Aravinda
Santhapriya Nagasena
- 1C3. Perera Mudiyanseelage
Madushanthapriya Nagasena
All of Primaduwa, Sivalakulama.

2. Malwattage Jinasena Pieris
(Deceased)
- 2A. Malwattage Saman Kumara
Malwatta Pieris,
No.18/12, Obahena Road,
Madiwala, Kotte.
3. Niranjan Ekanayake Kalyapahana,
No.126, Stanley Thilakaratne
Mawatha, Nugegoda.
Plaintiff-Respondent-Respondents.

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.
Sampath B. Abayakoon, J.

Counsel: K.V. Sirisena for the 7th Defendant-Appellant-Appellant in
SC/APPEAL/42/2018.

Dilip Obeysekere for the substituted 12A and 13th
Defendant-Respondent-Appellants in
SC/APPEAL/43/2018.

Dr. Sunil Coorey with Ms. Sudarshani Coorey for the 11th
Defendant-Appellant-Appellant in SC/APPEAL/44/2018.

Ms. Sudarshani Coorey for the substituted 8A Defendant-
Respondent-Respondent in SC/APPEAL/44/2018.

Upendra Walgampaya for the 9th Defendant-Respondent-
Respondent.

Yuwin Matugama with Ms. Tharushi Bethmage and Ms.
Oshadi Fernando for the substituted 10A Defendant-
Appellant-Appellant in SC/APPEAL/45/2018.

Shiral Lakthilaka with Chathuranga Hathurusinghe for the
substituted 1st Plaintiff-Respondent-Respondent.

V. Kulatunga with Shiraz Hassan for the substituted 2nd
Plaintiff-Respondent-Respondent.

Argued on: 20.02.2026

Post argument written submissions:

by the substituted 1st Plaintiff-Respondent-Respondent on
10.03.2026.

by the 9th Defendant-Respondent-Respondent on
27.02.2026.

by the substituted 12A Defendant-Respondent-Appellant
and 13th Defendant-Respondent-Appellant on 09.03.2026.

Decided on: 13.05.2026

Samayawardhena, J.

Introduction

The three Plaintiffs instituted this action on 11.03.1994 in the District Court of Mount Lavinia against the 1st to 6th Defendants seeking partition of the land described in the schedule to the plaint. Following the preliminary survey, the 7th to 14th Defendants, who are in possession of the land, intervened in the action. Although the Fiscal reported that the 5th and 6th Defendants had passed away, the Plaintiffs did not take steps to substitute their heirs. The 1st to 6th Defendants did not file statements of claim, as they have no rights to the land. The 7th to 14th Defendants sought dismissal of the action on the basis that there was no common ownership to the land to maintain a partition action, and that they were in possession of defined and separate portions of the land without disturbance.

I must state that, although the 7th to 14th Defendants were in possession of the land, some of them having constructed houses and residing thereon, the Plaintiffs failed to make them parties to the action at the time of institution, notwithstanding that, in terms of section 5 of the

Partition Law No. 21 of 1977, as amended, they were legally bound to name them as necessary parties.

It is also to be noted that the Declaration in terms of section 12(1) of the Partition Law does not appear to have been filed by the Plaintiffs. There is no such document in the case record, nor is there any journal entry evidencing compliance with that requirement.

After trial, the learned District Judge, by judgment dated 08.12.1997, ordered the partition of the land among the parties from the 1st to the 14th Defendants, including the deceased 5th and 6th Defendants. No share was allotted to the 10th Defendant, notwithstanding that he had filed a statement of claim, on the basis that he had failed to produce his title deed at the trial.

Being dissatisfied with the said judgment, the 7th, 8th and 11th Defendants, the 10th Defendant, and the 12th and 13th Defendants preferred three separate appeals to the Court of Appeal. By its judgment dated 20.02.2013, the Court of Appeal affirmed the judgment of the District Court and dismissed the appeals.

Hence these appeals to this Court by the 7th Defendant, the 10th Defendant, the 11th Defendant, and the 12th and 13th Defendants. This Court amalgamated the four appeals (SC/APPEAL/42/2018 to SC/APPEAL/45/2018) and granted special leave to appeal on the following questions of law. All the parties agreed to abide by the Judgment delivered in this appeal (SC/APPEAL/42/2018) in respect of the remaining three appeals.

1. *Whether there were two original owners, namely Karalina and Pabilis, or only one original owner, namely Pabilis?*
2. *If Pabilis was the sole original owner, whether his heirs, namely the 1st to 6th Defendants, entered into an amicable partition and*

thereafter alienated their respective rights to the 7th to 14th Defendants?

3. *Whether the 7th to 14th Defendants acquired prescriptive title to their respective lots, namely: the 7th Defendant to Lot 3; the 8th Defendant to Lot 5; the 9th Defendant to Lot 07; the 10th Defendant to Lot 1; the 11th and 14th Defendants to Lot 6; and the 12th and 13th Defendants to Lot 2?*

Pedigree dispute

There is no dispute that the land described in the Preliminary Plan No. 699 marked X depicts the land which is the subject matter of this action.

According to the Plaintiffs, Labugamage Carlina Perera and Labugamage Pabilis Perera were the original owners of the land, each being entitled to an undivided $\frac{1}{2}$ share. Upon the death of Carlina Perera, her $\frac{1}{2}$ share devolved on her son, Walikadage Davith Botheju, who is the father of the 1st Plaintiff. Thereafter, by Deed P2 dated 06.11.1949, Davith Botheju conveyed that share to the husband of the 1st Plaintiff, and upon his death, leaving a last will, the 1st Plaintiff became entitled to the said $\frac{1}{2}$ share by executor's conveyance dated 20.10.1960, marked P2.

Just eleven days prior to the institution of this action, the 1st Plaintiff, by Deeds marked P3 and P4 executed on the same date before the same Notary, purported to transfer undivided $\frac{1}{3}$ shares each out of her $\frac{1}{2}$ share to the 2nd and 3rd Plaintiffs. The evidence clearly indicates that Deeds P3 and P4 were not supported by valuable consideration and were executed for the purpose of instituting this partition action.

The 1st Plaintiff stated that the $\frac{1}{2}$ share of the original owner, Pabilis Perera, devolved on his six children, namely the 1st to 6th Defendants.

The case of the 7th to 14th Defendants, in brief, was that Labugamage Pabilis Perera was the sole owner of the land, and that upon his death the entirety devolved on his six children, namely the 1st to 6th Defendants.

It was their position that these Defendants, having prepared an amicable partition plan and a partition deed, alienated defined portions of the land to the 7th to 14th Defendants by deeds, and that the Plaintiffs had no right or title to the land.

The District Court accepted the version of the Plaintiffs in preference to that of the Defendants, and the Court of Appeal affirmed that decision. I find myself unable to agree with the two judgments for the reasons which I shall set out hereinafter.

Amicable Partition Plan and Partition Deed

The land described in the schedule to the plaint is Lot E in Plan No. 877 dated 10.06.1934, in extent 2 roods and 37.6 perches. Both the District Court and the Court of Appeal have accepted that this is the same land described in the legend to Plan No. 1492 dated 05.11.1973 (7V1) as Lot E of Plan No. 873 dated 10.06.1934. Both Courts have treated the discrepancy in the Plan numbers as a clerical error, particularly since both Plans refer to the same surveyor and bear the same date. It is also relevant to note that Plan No. 1492 was marked as 7V1 through the 1st Plaintiff in the course of cross-examination.

Plan 7V1 is an amicable partition plan prepared by the six children of Pabilis Perera, namely the 1st to 6th Defendants. The amicable partition deed executed on 02.08.1979 in terms of Plan 7V1 was marked 7V2.

The manner in which Pabilis Perera became entitled to the land depicted in Plan 7V1 is set out in the said deed. According to 7V2, Pabilis Perera was allotted Lot E in Plan No. 873 dated 10.06.1934 in lieu of his undivided 8/40 share of the larger land.

It appears that not only Plan 7V1, but also Plan No. 873 dated 10.06.1934 (referred to as Plan No. 877 in the plaint), is an amicable partition plan. This is evident from the boundaries of Lot E as depicted in Plan 7V1. According to Plan 7V1, Lot E of Plan No. 873 is bounded on

the North by Lot C of the same plan/property of L.C. Perera, on the East by Lot F of the same plan, on the South by a road, and on the West by Lot D of the same plan.

Further, the reference to an undivided 8/40 share of Pabilis Perera, coupled with the sub-division of the larger land into several lots, indicates that there had been more than two original owners, notwithstanding the contention of the Plaintiffs that there were only two original owners, namely Carlina Perera and Pabilis Perera.

It is also significant that, in Plan 7V1, the northern boundary of Lot E is described as Lot C/property of L.C. Perera. It appears that L.C. Perera refers to Labugamage Carlina Perera, whom the Plaintiffs identify as one of the original owners of Lot E. According to the Plaintiffs, Carlina Perera and Pabilis Perera are siblings. This circumstance suggests that Lot E had been allotted to Pabilis Perera, while Lot C had been allotted to Carlina Perera.

It is to be noted that Plan No. 877 dated 10.06.1934 was not produced by the 1st Plaintiff in evidence, notwithstanding that the action was instituted seeking the partition of Lot E depicted in that plan. The 1st Plaintiff stated that she had the said plan, but subsequently misplaced it.

The evidence of the 1st Plaintiff relating to the preparation of plans is far from clear. Her testimony on this matter was inconsistent and, at times, confusing. In cross-examination, she referred to a plan prepared about 30 years ago, by which the land had been divided into two portions, one half being allotted to Pabilis Perera and the other half to Carlina Perera. However, no such plan was produced in evidence (vide pages 11–13 of her evidence dated 28.01.1997).

The 1st Plaintiff further stated that her parents and her grandmother, Carlina Perera, were residing on the land prior to her birth. She was 73 years of age at the time she gave evidence, yet her testimony was that

she herself had not been in possession of the land for a period of 73 years (vide pages 6 and 8 of her evidence dated 28.01.1997).

The 1st Plaintiff admitted that she was aware that third parties had purchased portions of the land and were in possession thereof, and that she had observed houses constructed by them. She further stated that she saw some of these houses at the time of the preliminary survey in 1995. This position is difficult to reconcile with her claim to ownership of an undivided ½ share of the land. The land is not situated in a remote area but, according to the preliminary plan, abuts the Thalpathpitiya-Madiwela main road. While Plan 7V1 prepared in 1973 depicts only a single building on the land, the preliminary plan and its report disclose the existence of several permanent dwelling houses constructed by the 7th to 14th Defendants, who claim to be *bona fide* purchasers.

Although the 1st Plaintiff stated that about five or six coconut trees had been planted on the land through one Sugathan, he was not called as a witness. She further alleged that those trees were cut by the Defendants. However, no complaint or other material was produced to substantiate such an assertion.

During cross-examination, the 1st Plaintiff admitted the possession of the 7th to 14th Defendants, including that of the 8th Defendant. The 8th Defendant is the daughter of the 2nd Defendant and is the only direct descendant among the said Defendants from the children of Pabilis Perera, the others being third parties who had purchased defined portions from the remaining children of Pabilis Perera. In relation to the possession of the 2nd and 8th Defendants, the 1st Plaintiff categorically stated that Lot 5 in the preliminary plan had been in the possession of the 2nd Defendant and the 8th Defendant since at least 1988 (vide page 21 of her evidence dated 28.01.1997).

As I stated previously, the Plaintiffs deliberately did not make the 7th to 14 Defendants who are in possession of the land parties to the action but

made even dead people (the 5th and 6th Defendants) as parties to the case. This shows the conduct of the Plaintiffs.

Lot E and its sub-division as E1 to E7

The District Court concluded that the 1st Plaintiff became entitled to an undivided $\frac{1}{2}$ share of the land primarily on the basis of Deed P1 dated 06.11.1949 and the executor's conveyance marked P2 dated 20.10.1960. Although Deed P1 recites that Carlina Perera was entitled to an undivided $\frac{1}{2}$ share of Lot E in Plan No. 877 dated 10.06.1934, the amicable partition deed marked 7V2 indicates that Lot E had been allotted to Pabilis Perera. The learned District Judge accepted Deed P1 solely on the basis that it was the oldest deed produced at the trial and that there was no reason to reject it. However, the District Court failed to consider Deed P1 in conjunction with the amicable partition plan marked 7V1 dated 05.11.1973 and the amicable partition deed marked 7V2 dated 02.08.1979. He disregarded them without assigning any reason, notwithstanding that they were not marked subject to proof. In my view, this constitutes a fundamental error in the evaluation of the evidence.

Even assuming that, at the time Deed P1 was executed in 1949, Lot E was owned by Carlina Perera and Pabilis Perera in equal shares, there is no satisfactory evidence that the 1st Plaintiff, her husband, or her grandmother, Carlina Perera, was ever in possession of Lot E.

Let me now consider the case from the standpoint of the Plaintiffs on the footing that there was no amicable partition in 1934 by which Lot E was exclusively allotted to Pabilis Perera.

With the preparation of the amicable partition plan marked 7V1 in 1973 and the amicable partition deed marked 7V2 in 1979, the children of Pabilis Perera, whom the 1st Plaintiff asserts are entitled only to an undivided $\frac{1}{2}$ share, made it manifest that they claimed ownership of the entirety of Lot E to the exclusion of all others.

According to the said plan, Lot E was sub-divided into seven lots, namely Lots E1 to E7. In terms of the amicable partition deed, Lot E1 was allotted to the 4th Defendant, Lot E2 to the 6th Defendant, Lot E3 to the 2nd Defendant, Lot E4 to the 1st Defendant, Lot E5 to the 5th Defendant, Lot E6 to the 3rd Defendant, and Lot E7 was set apart as a road reservation.

Those lots have remained separated since that time, and such separation continues to exist on the ground, as is evident from the preliminary plan and its report. They constitute distinct and defined portions. Lot E1 in Plan 7V1 corresponds to Lot 1 in the preliminary plan, Lot E2 to Lot 2, Lot E3 to Lot 5, Lot E4 to Lot 3, and Lot E5 to Lot 6.

Alienation of Lots E1 to E6

Thereafter, the 1st to 6th Defendants sold their respective lots to third parties for valuable consideration.

Accordingly, the 4th Defendant sold Lot E1 by Deed No. 4890 dated 15.09.1979 to a third party, and that vendee, in turn, conveyed the same by Deed No. 795 dated 03.02.1992 to the 10th Defendant. This corresponds to Lot 1, on which there was a house at the time of the preliminary survey in 1994.

The 6th Defendant sold Lot E2 by Deed marked 12V1 dated 18.09.1980 to a third party, and thereafter that lot changed hands by Deeds marked 12V2 to 12V4. Ultimately, the 12th and 13th Defendants, who are husband and wife, purchased the said lot by Deed marked 12V5 dated 31.03.1993. This corresponds to Lot 2, on which there was a house at the time of the preliminary survey in 1994. The 12th Defendant, who gave evidence, stated that their possession of Lot 2 had not been opposed by anyone, and that the 2nd Plaintiff had even assisted him in digging a well on the lot. He was not cross-examined on these matters, and his evidence remained unchallenged.

The 2nd Defendant gifted Lot E3 to her daughter, the 8th Defendant, by Deed marked 8V1 dated 09.07.1988. At the trial, the 8th Defendant gave evidence stating that her father, who was about 70 years old and bed-ridden, and she herself had been in possession of the said lot since her birth. She further stated that there had been no opposition to their possession and that she did not know the 1st Plaintiff. Her evidence was not challenged in any manner. Lot E3 corresponds to Lot 5.

The 1st Defendant sold Lot E4 to the 7th Defendant by Deed marked 7V3 dated 01.09.1980. This corresponds to Lot 3, on which there was a house at the time of the preliminary survey in 1994. There was also a building on Lot E4 at the time Plan 7V1 was prepared in 1973. The 1st Plaintiff did not state that the said building belonged to her predecessors in title.

The 5th Defendant sold Lot E5 to the 11th Defendant by Deed marked 14V1 dated 22.10.1979. The 11th Defendant thereafter sold the said lot by Deed marked 14V2. Subsequently, he re-purchased the same lot by Deed marked 14V3. Thereafter, he conveyed an undivided $\frac{1}{2}$ share of the said lot to the 14th Defendant by Deed marked 14V4. Lot E5 corresponds to Lot 6, on which there was a house at the time of the preliminary survey in 1994. The 14th Defendant gave evidence, which remained unchallenged.

The 3rd Defendant sold Lot E6 to the 9th Defendant by Deed marked 9V1 dated 06.02.1981. This corresponds to Lot 7. As the 9th Defendant was overseas at the time of the trial, his father-in-law gave evidence on his behalf.

Lot E7 in Plan 7V1 has been set apart as a road reservation.

Plaintiffs had no possession

All the Defendants who gave evidence stated, in unison, that neither the Plaintiffs nor any other person had disturbed their possession of their respective lots. This evidence relating to possession was not challenged

in cross-examination. Indeed, the proceedings reveal that there was virtually no cross-examination of the Defendants who testified.

The first deeds executed by the Defendants pursuant to the amicable partition plan 7V1 and the partition deed 7V2, with the exception of 8V1, had been executed well over ten years prior to the institution of this action. There is no evidence that any objection was raised to the 7th to 14th Defendants, who are subsequent purchasers, constructing houses and coming into occupation of their respective lots. There are no police complaints or complaints to the Grama Niladhari in respect of the preparation of the amicable partition plan, the execution of the partition deed, the subsequent execution of multiple deeds, or the construction of houses by the new owners.

The partition deed and the other notarially executed deeds had been duly registered in the Land Registry, and the Plaintiffs cannot be heard to say that they were unaware of them. At the very least, when the new owners constructed houses on the land, the Plaintiffs ought to have become aware of the sub-division and the transfers effected thereunder. These are not secret acts. Where third parties construct houses on valuable land in respect of which the 1st Plaintiff claims an undivided $\frac{1}{2}$ share, it is the natural course of conduct to make inquiries as to the basis of such occupation, to verify how they came into possession, and to search the Land Registry in respect of the deeds executed. The 1st Plaintiff did not do so. Moreover, she failed to make the persons in possession parties to the action and did not, it appears, file the Declaration in terms of section 12(1) of the Partition Law.

This constitutes an ouster of the 1st Plaintiff and her predecessors by a series of overt acts on the part of the Defendants, whereby they clearly manifested to the Plaintiffs and their predecessors that they did not acknowledge any rights of any other person to the land, if any such rights existed.

Notwithstanding such long and uninterrupted possession, coupled with the surrounding circumstances referred to earlier, the 1st Plaintiff, all of a sudden, executed two deeds marked P3 and P4 just twelve days prior to the institution of this action, and thereafter instituted this action claiming that the three Plaintiffs are each entitled to an undivided 1/6 share of the land.

Learned Counsel for the Plaintiffs contended that the amicable partition plan and the amicable partition deed are secret acts and that, notwithstanding such arrangements, the Plaintiffs and their predecessors have continued to execute deeds conveying undivided rights. I have already referred to those deeds.

Where one or more parties assert that the co-owners, by agreement, divided the land amicably, not merely for convenience but as a permanent arrangement to terminate the co-ownership, and thereafter entered into possession of such divided portions, it is not necessary that such division be evidenced by a plan followed by a formal deed of amicable partition. Such a division may be effected even by oral agreement. Where parties have, in fact, possessed the land in severalty in accordance with such arrangement over a long period of time, the mere execution of subsequent deeds referring to undivided shares does not, by itself, render a prescriptive claim invalid.

In this regard, it is pertinent to refer to the judgment of Ranasinghe J. (as he then was) in *Ponnambalam v. Vaitialingam* [1978-79] 2 Sri LR 166, where it was held:

The question whether a co-owner has prescribed to a divided lot as against the other co-owners is one of fact and is to be determined by the circumstances of each case. The mere reference to undivided shares in deeds executed after the alleged date of division does not have the effect of restoring the common ownership of a land which has been dividedly possessed and where such divided portions have become distinct and separate entities. The learned trial Judge

had in this case correctly found that the corpus had been divided and separately possessed to the exclusion of the other co-owners for about 30 to 40 years prior to this action and accordingly dismissed the action holding that at the time of its institution the corpus was not owned in common.

Prescription among co-owners and ouster by overt act

My discussion under this sub-heading proceeds on the footing that Lot E was not allotted to Pabilis Perera by way of an amicable partition among the co-owners in 1934 and that, accordingly, the 1st to 6th Defendants were co-owners of the land together with Carlina Perera and her successors, including the 1st Plaintiff.

It is a settled principle of law that the possession of one co-owner enures to the benefit of all other co-owners. Accordingly, in respect of co-owned land, it is not necessary that all co-owners be in actual possession in order to preserve their undivided rights. The necessary corollary is that it is not easy for one co-owner to claim prescriptive title against the other co-owners merely on the basis that he alone has been in possession to the exclusion of the other co-owners.

In *Sediris Appuhamy v. James Appuhamy* (1958) 60 NLR 297 at 302-303, Sinnetamby J. explained the rationale behind this principle in this manner:

Every co-owner is in law entitled to his fractional share of everything in the co-owned property including the soil as well as the plantations, but in practice it is not possible for every co-owner to enjoy his fractional share of every particle of sand that constitutes the common property and every blade of grass and every fruit from trees growing on the land without causing much inconvenience to himself as well as the other co-owners. To avoid this, for the sake of convenience, co-owners possess different portions of the common

land often out of proportion to their fractional shares merely because of improvements they have effected.

The possession of defined portions of co-owned property for purposes of convenience does not suffice to support a claim for prescriptive title, as such possession is not adverse to the other co-owners. However, this does not mean that a co-owner can never prescribe against the others.

In the celebrated case of *Corea v. Iseris Appuhamy* (1915) 15 NLR 65, the Privy Council held that “A co-owner’s possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result.” Accordingly, it is recognised that a co-owner may acquire prescriptive title against the others, not by any secret intention, but by establishing ouster, manifested by an overt act or a series of acts and the continuance of such adverse possession for the requisite period of ten years as prescribed in section 3 of the Prescription Ordinance.

This decision was cited with approval by the Privy Council in *Brito v. Muttunayagam* (1918) 20 NLR 327.

It must be understood that the law relating to prescription among co-owners is governed by section 3 of the Prescription Ordinance and not by any different principle. The requirement of ouster by an overt act is judge-made law, and the term “ouster” in this context denotes adverse possession as contemplated by that section.

Section 3 of the Prescription Ordinance, insofar as relevant to the present purposes, reads as follows:

Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession

unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs.

It must be emphasised that ouster or adverse possession is not synonymous with possession acquired or maintained through violent acts. A possessor who resorts to violence cannot claim prescriptive title, as such possession would not be undisturbed and uninterrupted for the requisite period. The necessity of resorting to violence itself indicates that the possession has been subject to disturbance and interruption.

What is meant by adverse possession? Simply stated, adverse possession is possession in a manner incompatible with the title of the true owner. The parenthetical clause of section 3 of the Prescription Ordinance provides a statutory definition of adverse possession: “*that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred.*” The Privy Council in *Cadija Umma v. Don Manis Appu* (1938) 40 NLR 392 at 396 observed that although “*the clause is no mere illustration, it is not so completely successful an attempt to achieve the full and self-contained definition as might be wished.*” However, in *Nonis v. Peththa* (1969) 73 NLR 1 at 3, the Privy Council stated that it constitutes a complete definition, rather than merely an illustration. Whether or not it is a complete definition, this definition underscores that for possession to be adverse, it must be exclusive, continuous and exercised as of right, without any recognition of the ownership of another.

In *Fernando v. Wijesooriya* (1947) 48 NLR 320 at 325, Canekeratne J. expounded the nature of adverse possession in the following manner:

There must be a corporeal occupation of land attended with a manifest intention to hold and continue it and when the intent plainly is to hold the land against the claim of all other persons, the possession is hostile or adverse to the rights of the true owner. It is the intention to claim the title which makes the possession of the holder of the land adverse; if it be clear that there is no such intention there can be no pretence of an adverse possession. It is necessary to inquire in what manner the person who had been in possession during the time held it, if he held in a character incompatible with the idea that the title remained in the claimant to the property it would follow that the possession in such character was adverse. But it was otherwise if he held in a character compatible with the claimant's title—his possession may be on behalf of the claimant or may be the possession of the claimant (p. 396 of 40 NLR) or from the conduct of the party's possession an acknowledgment of a right existing in the claimant could fairly and naturally be inferred. To prevent the operation of the statute, a parol acknowledgment of the adverse possession by the person in possession must be such as to show that he intends to hold no longer under a claim of right; but declarations made merely with a view to compromise a dispute are not sufficient—Angel on Limitation p. 388.

It is appropriate at this stage to refer to the wise words of Bertram C.J. in *Alwis v. Perera* (1919) 21 NLR 321 at 326, where it was held that when a witness testifying on prescriptive possession states “I possessed” or “We possessed”, the Court must insist that such statements be explained by reference to the nature and extent of the acts of possession relied upon.

The judgment of Walter Pereira J. in *Ayanahamy v. Silva* (1913) 17 NLR 123 at 125 is an important decision. In that case, the eminent Judge observed that where a person is in occupation of property in the *bona fide*, albeit mistaken, belief that the property is his own and belongs to no other, such person possesses the *detentio animo domini*, and is

thereby entitled to claim prescriptive title on the basis of adverse possession, as such conduct falls within the meaning of adverse possession as contemplated in section 3 of the Prescription Ordinance.

As regards the second point pressed, it seems to me that the fact that the defendant was not, at the time of his possession of the land in claim, aware that it belonged to the plaintiff, rather strengthens his claim based upon prescription. He was a bona fide possessor, and while a mala fide possessor might, just as well as a bona fide possessor, maintain a claim by prescription, it is manifest in the case of the latter, that the possession was a possession on his own account. It has been argued that the possession of a person possessing in the belief that the thing possessed is not the property of another is not adverse possession, and English authorities have been cited. We have nothing to do with the definition in English law of either the term "possession" or the term "adverse possession." Both these terms are fully discussed in the Encyclopaedia of Laws, vol. I., p. 160, and vol. X., p. 228 (1st edition), and it will be found that there are points of essential difference in what is laid down there and our own conception of the terms. Possession under the Roman-Dutch law is either possessio civilis or possessio naturalis. Possessio civilis is detentio animo domini. It is this possession that is necessary to be proved where a person seeks either any of the possessory remedies or to establish a claim by prescription. Where a person is in occupation of property in the bona fide (albeit mistake) belief that the property is his own and belongs to nobody else, clearly he has the detentio animo domini. The next question is whether his possession is adverse. As to that we have to look for guidance within the four corners of our own Ordinance relating to prescription of actions. The words in section 3—"A possession unaccompanied by payment of rent or produce or performance of service or duty or by any other act by the possessor from which an acknowledgment of a right existing in another person would fairly

and naturally be inferred”—have been held by this Court to contain not an illustration, but a definition of “adverse possession” (see Daniel v. Markar Ram. 1843-55, 2, Vand. Rep. 44, Carrim v. Dholl 2 CLR 12). The possession by the defendant in the present case manifestly answers to the description given in the definition mentioned above.

In *Rajapakse v. Hendrick Singho* (1959) 61 NLR 32, an action for the partition of land was instituted in 1953. The evidence disclosed that, from as early as 1922, the Defendants had been in exclusive occupation of the land, appropriating its produce to the exclusion of the Plaintiffs and their predecessors in title, without rendering any share of the produce or profits, paying rent, or performing any act amounting to an acknowledgment of the Plaintiffs’ rights. In these circumstances, it was held that the evidence established an ouster of the Plaintiffs by the Defendants, which had continued uninterrupted for a period exceeding ten years.

The question whether a co-owner has established prescriptive possession is a question of fact to be determined in the light of the facts and circumstances of each case.

On the facts and circumstances of this case, even assuming that the 1st Plaintiff and her predecessors were unaware of the amicable partition plan 7V1 and the amicable partition deed 7V2, there is ample evidence to conclude that the 1st to 6th Defendants had been in adverse possession of the land as against the other co-owners for a period exceeding ten years prior to the institution of the action.

Presumption of ouster

Ouster by an overt act being a *sine qua non* for establishing prescriptive possession among co-owners, there may be instances where a co-owner asserting prescription is unable to prove the precise overt act marking the commencement of adverse possession, owing to the lapse of time as

it goes beyond reasonable memory reaches. In such circumstances, depending on the facts and circumstances of the case, an ouster may be presumed to have occurred at some point subsequent to the original entry, which was not adverse.

Following the Full Bench decision of the Supreme Court in *Tillekeratne v. Bastian* (1918) 21 NLR 12, this principle has come to be recognised as the presumption of ouster. Bertram C.J. at page 24 explained this principle in the following manner:

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.

It must be emphasised that long possession, by itself, is insufficient to give rise to a presumption of ouster. It is long possession in conjunction with other circumstances that may justify such a presumption. As Bertram C.J. observed at page 23:

It is open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner has since become adverse.

It is also important to bear in mind that a presumption of ouster may be drawn only where the overt acts, or the commencement of adverse possession, are alleged to have occurred at a time beyond the reach of reasonable memory. It cannot be invoked where the co-owner claiming prescription is in a position to adduce evidence as to the commencement of such adverse possession. Bertram C.J. explained, at pages 20–21, the artificiality of insisting on proof of a specific overt act where possession extends beyond the limits of reasonable memory in the following terms:

If it is found that one co-owner and his predecessors in interest have been in possession of the whole property for a period as far back as reasonable memory reaches; that he and they have done nothing to recognize the claims of the other co-owners; that he and they have taken the whole produce of the property for themselves; and that these co-owners have never done anything to assert a claim to any share of the produce, it is artificial in the highest degree to say that such a person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession. Where it is found that presumptions of law lead to such an artificial result, it will generally be found that the law itself provides a remedy for such a situation by means of counter-presumptions. If such a thing were not possible, law would in many cases become out of harmony with justice and good sense.

It is also relevant to note that a person claiming prescriptive title may tack on to his possession the possession of his predecessors in title. This principle is recognised under Roman law, Roman-Dutch law, as well as under section 3 of the Prescription Ordinance. In terms of that section, for the purpose of computing the period of ten years, a party may add to his own possession the possession of “those under whom he claims.” Section 3 provides: “*Proof of the undisturbed and uninterrupted possession by a Defendant in any action, or by those under whom he claims...*”

The presumption of ouster is an exception to the general rule and must be applied with great caution. This was emphasised in *Abdul Majeed v. Ummu Zaneera* (1959) 61 NLR 361, where the party who was alleged to have originated the adverse possession, namely the 13th Defendant, was alive at the time of the trial, and there was therefore no necessity to draw a presumption of ouster.

Indeed, Bertram C.J. himself underscored that this principle must be applied with caution in *Kirimenika v. Menikhamy* (1921) 22 NLR 510, where he observed at pages 511–512 as follows:

When members of a family make an informal but definite partition of their lands, and each party enters into possession of his share, then no doubt the possession of the several shareholders becomes adverse from the date of their doing so and title by prescription can be acquired, but I do not take it that the arrangement in this case was as definite as that. The learned Commissioner is, I think, correct in describing it as a permissive arrangement. On that footing each co-owner must be deemed as possessing on behalf of himself and the others, unless the arrangement continues so long that on equitable grounds it is presumed that at some point it became adverse. Such a presumption is only drawn upon a consideration of all the circumstances of the case. I do not think that a Court could justly draw it in a case like the present where the arrangement related to two lands, and it has already been disturbed in regard to one of them by the voluntary act of the party who now sets up the presumption.

It has been held in a long line of cases that separate possession for convenience cannot be regarded as prescriptive possession, particularly where the other co-owners are also in possession of other allotments of the same land. In such circumstances, long possession by itself is insufficient, and there must be additional circumstances to establish adverse possession as against the other co-owners.

Sediris Appuhamy v. James Appuhamy (1958) 60 NLR 297 is one case in which this principle was adverted to where Sinnetamby J. observed at pages 301–302 as follows:

As pointed out by the learned Judge the mere taking of the natural produce of the co-owned land by one co-owner such as the produce of trees has never been regarded as a circumstance from which

ouster may be presumed. This is particularly so where other co-owners are in possession of other parts of the common property. The Courts have recognised other circumstances from which a presumption of ouster may be drawn but that has never been done where the only circumstance consists of long continued, possession where the other co-owners are also in possession of other allotments of the same land. The position is different where one co-owner is in possession of the entire common land and does not account for or share with his co-owners the income derived therefrom. (.....) In the present case the only evidence is that there has been possession for a period of about 50 years or more by Andiris and his heirs of lots A, B and C. There are also very old fences. These facts alone will not justify a presumption of ouster. The Deeds of the contesting Defendants on the other hand deal with the entire land as co-owned property and there are some Deeds signed or witnessed by members of Andiris's family which also describe the land as undivided. There are no special circumstances which would justify a presumption of ouster. Very clear and strong evidence of ouster among co-owners is called for and separate possession on grounds of convenience cannot be regarded as adverse possession for purposes of establishing prescriptive title—Simpson v. Omeru Lebbe (1947) 48 NLR 112.

In *Abeyesinghe v. Abeyesinghe* (1946) 47 NLR 509 at 511, Keuneman J. stated that “A further point of importance is that co-owners are all members of one family, and very strong evidence of exclusive possession was necessary to establish prescription.”

In *Seetiya v. Ukku* [1986] 1 Sri LR 225, the Court followed *Sediris Appuhamy's* case (*supra*) to hold that the Defendants cannot claim prescriptive possession. Dheeraratne J. stated at page 228:

The facts of the instant case find no room for invoking the presumption of ouster referred to in Tillekeratne's case. The co-

owners, who separately planted the land from about 1939, with the exception of the 2nd Plaintiff, who died during the pendency of the case, are all alive and all of them gave evidence at the trial. Direct evidence from these co-owners being available in this case, the only matter we have to consider is whether the 1st and 4th Defendant-respondents have, by their direct evidence proved ouster or something equivalent thereof so as to make their possession adverse. There is no evidence in this case of an amicable division of the property with the common consent of all co-owners. The area in which the corpus is situated, being an area falling within what is popularly known as “the coconut triangle”, the co-owners, naturally planted coconuts in this common land in separate portions. (.....) The only evidence which found acceptance by the learned trial judge in this case is mere long possession by the co-owners in separate lots, having planted them to say that the possession of the 1st and 4th Defendant-respondents was adverse. I would have expected some additional circumstances. The presence of old fences, apparently erected to protect the plantations, are not in my mind such an additional circumstance, which would make the possession of the co-owners adverse to each other.

In *Hamidu Lebbe v. Ganitha* (1925) 27 NLR 33, a Divisional Bench of this Court decided that “*where a co-owner of land seeks to establish a prescriptive title against another by reason of long-continued exclusive possession, it depends on the circumstances of each case whether it is reasonable to presume an ouster from such exclusive possession.*”

The principle that long possession, by itself, is insufficient for a co-owner to establish prescriptive title was highlighted in *Maria Perera v. Albert Perera* [1983] 2 Sri LR 399:

An amicable partition can be a starting-point of prescription even though no Deed of partition or cross Deeds or other documents have been executed. But inclusive possession by a co-owner for a period

of 10 years alone cannot give rise to prescriptive title. There must be the further important element of a change of circumstances from which an inference could reasonably be drawn that such possession is adverse to and independent of all other co-owners. There must be proof of circumstances from which a reasonable inference could be drawn that such possession had become adverse at some date ten years before action was brought. Mere exclusive possession for 20 years (by taking the natural produce of the land) on a Plan not signed by any of the co-owners to whom the Plaintiff claimed lots were allotted cannot constitute proof of ouster. 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.

As held in *Githohamy v. Karannagoda* (1954) 56 NLR 250, a plan made at the instance of a co-owner, purporting to effect a division of the common land without the knowledge of the other co-owners, cannot form the basis of divided possession.

Similarly, in cases such as *Ummu Ham v. Koch* (1946) 38 NLR 47, *Sideris v. Simon* (1945) 46 NLR 273, and *Kobbekadduwa v. Seneviratne* (1951) 53 NLR 354, it has been held that the mere execution of deeds claiming more than what one is entitled to, or even claiming the entirety of the land, without the knowledge of the other co-owners, does not establish ouster.

What is material is the intention of the parties, and not merely the execution of documents purporting to deal with the land. This position is further illustrated in *Dona Cecilia v. Cecilia Perera* [1987] 1 Sri LR 235, where the Supreme Court observed:

Where a land is divided with the consent of all the co-owners but no cross conveyances are executed in respect of the lots, co-ownership terminates only after undisturbed, uninterrupted and exclusive possession of the divided lots for a period of over ten years.

Where a land was divided in the presence of all the co-owners who acquiesced in the division and possessed their divided lots exclusively taking the produce thereof everything points to an intention to partition the land permanently and not just for convenience of possession and although the Plan of division was not signed by the co-owners and no cross conveyances were executed, with ten years of such possession the co-owners would acquire prescriptive title to their respective lots. The successor to a co-owner could tack on the period of possession of his predecessor in proving his prescriptive title.

In *Subramaniam v. Sivarajah* (1945) 46 NLR 540 the Court presumed an ouster from the fact that one co-owner was in possession of the entire land and took the profits exclusively and continuously for a period of over 60 years without accounting to the other co-owners who lived in close proximity under circumstances which indicated a denial of a right to the other co-owners to take or receive them.

In *Walpita v. Dharmasena* [1980] 2 Sri LR 183, Wimalaratne J. held that on the facts and circumstances of that case “*a presumption of ouster could be drawn from long continued possession for a period of well over 40 years.*”

In the Privy Council decision of *Nonis v. Peththa* (1969) 73 NLR 1, in consequence of an informal partition of a number of lands which belonged to three co-owners in equal 1/3 undivided shares, the 1st respondent, who was one of the co-owners, was in exclusive possession for 10 years thereafter of a specified land which was allotted to him under the informal document. When one of the co-owners filed the partition action to partition the said land it was held that the partition is not possible as the 1st respondent had acquired prescriptive title to the specified land as against the other co-owners. In the course of the Judgment, the Privy Council referred to *Mailvagaman v. Kandaiya* (1915) 1 C.W.R. 175 where De Sampayo J. had stated:

There is no physical disturbance of possession necessary—it is sufficient if one co-owner has to the knowledge of the others taken the land for himself and begun to possess it as his own exclusively. This sole possession is often attributable to an express or tacit division of family property among the heirs, and the adverse character of exclusive possession may be inferred from circumstances.

In *Simon Perera v. Jayatunga* (1967) 71 NLR 338, the land was owned in common by members of one family. An undivided 1/3 share of it was purchased by an outsider, who was already the owner of the adjoining land. Thereafter, there was an amicable division among the co-owners in pursuance of which this outsider possessed a divided lot exclusively for nearly 30 years in lieu of her undivided share. She had not only annexed this defined portion to her own adjoining land but had also separated it off from the rest of the common land by erecting a parapet wall of a permanent nature.

In the circumstances it was held that the question whether one of the co-owners has acquired prescriptive title to a divided lot is one of fact and has to be determined by the circumstances of each case and that there was sufficient evidence of ouster and the said outsider who later became a co-owner had acquired, as against the other co-owners, prescriptive title from the time of ouster in respect of the lot which she possessed exclusively in pursuance of the amicable division.

In *Siriyawathie v. Alwis* [2002] 2 Sri LR 384, the plaintiff sought to partition the land in question, while the 9th defendant-appellant sought dismissal of the action on the basis that she had acquired prescriptive title to the entirety of the land. The appellant had been adopted by the original owner without a formal order of adoption, and following his death in 1969, his widow left the house, leaving the appellant in possession and thereafter residing with her nephew, the plaintiff-respondent. The Court held that the appellant's long, continuous, and undisturbed

possession of the corpus, coupled with acts demonstrating exclusive control, including cultivation, improvements, residence, leasing portions of the property, and payment of rates and taxes, constituted sufficient overt acts to establish adverse possession. These circumstances gave rise to a presumption of ouster against the true owner and her successors, notwithstanding that the possession had originally commenced in a subordinate capacity. Accordingly, the Court concluded that the trial judge had erred in rejecting the evidence of prescriptive possession and allowed the appeal with costs.

In *Sideris v. Simon* (1945) 46 NLR 273 at 275, Howard C.J. emphasised “*It is a question of fact in each case and the question as to whether from long continued, undisturbed and uninterrupted possession ouster may be presumed depends on all the circumstances of the case*”.

Possession by a stranger and ouster by overt act

Where a stranger enters into possession of the entirety of a co-owned land, or of a defined allotment thereof, claiming to be the sole owner, it is not necessary for such person to establish a separate overt act of ouster, as the very act of entry into possession by a stranger asserting exclusive title constitutes ouster. This is subject to the qualification that such entry is not made with knowledge that the vendor was only a co-owner of the land. If he had such knowledge, he too becomes a co-owner, and must establish ouster of the other co-owners by an overt act and continue such possession for ten years in order to claim prescriptive title.

Where one co-owner conveys the entire premises held in common and the grantee enters into possession under the conveyance claiming title to the whole premises, it was held in *Punchi v. Bandi Menika* (1942) 43 NLR 547 that the possession of the grantee was adverse to the other co-owners.

In *Sellappah v. Sinnadurai* (1951) 53 NLR 121 it was held that “*Where one of several co-owners sells the entirety of the common property to a*

person who is a stranger and not a co-heir and who purchases it without any knowledge or belief that any other party is entitled to any interest in the property, the possession of the purchaser is not the possession of the co-owners. In such a case, Corea v. Iseris Appuhamy (1911) 15 NLR 65 or Britto v. Muttunayagam (1918) 20 NLR 327 is inapplicable, and the purchaser acquires title to the entire property after adverse possession for ten years.”

In *Marshall Appuhamy v. Punchi Banda* [1986] 1 Sri LR 399 at 404, the Supreme Court held:

A stranger who enters into possession of the entirety of co-owned property in the belief that he is the sole owner need not prove ouster or something equivalent to ouster but only adverse possession for a period of 10 years in order to acquire a prescriptive title to it.

In *Fernando v. Podi Nona* (1955) 56 NLR 491, on 22.08.1871, Cornis, who in fact held legal title to only an undivided 1/10 share, entered into a notarial agreement with a stranger, Maththa. By this agreement, Cornis, purporting to be the sole owner, employed Maththa to plant the entire land with coconuts and other crops. Maththa was to cultivate the land as planter for a period of six years ending on 21.08.1877, after which Cornis undertook to separate one half of the land and convey it to Maththa by formal deed. Although no such deed was executed upon the expiry of the six-year period, the land was in fact divided into two allotments, A and B, and Lot B, together with the plantations thereon, was thereafter exclusively possessed by Maththa from 1877 without disturbance.

The learned District Judge rejected the prescriptive claim in respect of Lot B on the basis that Maththa could have prescribed only to an undivided 1/20 share of the entire land, being one half of the 1/10 share to which Cornis had legal title, and that Maththa, having derived his title from a co-owner, could not prescribe against the other co-owners unless

the presumption laid down in *Corea v. Iseris Appuhamy* could be rebutted.

Gratiaen J., however, was not inclined to agree with the judgment of the District Judge. He observed at pages 492–493 as follows:

With great respect, I think that it is permissible to take a more realistic view of the legal position resulting from the continuous, exclusive occupation of lot B (or at least a defined part of it) by Maththa and his family ever since 1877. In the facts of this case, the same consequence follows whether or not Cornis, in terms of his contractual obligation, had executed a formal conveyance to Maththa of a separated portion of the land and plantations in consideration of services rendered by the latter as planter. In either event, what is significant is that in 1877 Maththa went into possession claiming as of right to enjoy a defined portion of the land ut dominus, whereas Cornis and his co-owners were content to exercise proprietary rights over lot A alone.

The ratio decidendi of Corea v. Appuhamy (supra) is that a person entering as a co-owner into possession of the common property cannot, by merely forming a secret intention which has not been communicated to his other co-owners either by express declarations or by overt action, alter the character of his possession and thereby acquire title to their shares by prescription. This principle is, of course, subject to the rule of common sense that, in appropriate cases, an ouster may be presumed to have taken place at some point of time after the date of entry which was originally not adverse. Tillekeratne v. Bastian (1918) 21 NLR 12, Hamidu Lebbe v. Ganitha (1925) 27 NLR 33.

There is, however, no room for the application of presumptions or of counter-presumptions where a man had from the inception entered into possession of the land unequivocally claiming title to the entirety. In such a situation, his possession is at every stage

adverse to the true owner or to his true co-owners (as the case may be), and in the latter event the other co-owners cannot be heard to say that his possession was merely in support of their common title.

In *Kanapathipillai v. Meerasaibo* (1959) 58 NLR 41 at 42, Sansoni J. observed that where a stranger enters into possession with knowledge that his vendor was only a co-owner of the land, such person stands in the position of a co-owner, and the principles governing prescription among co-owners would apply to him:

The rule is well settled that when a co-owner conveys the entire land held in common to a stranger, and the latter enters into possession of the entire land under the conveyance, he can, by possession adverse to all the co-owners for ten years, acquire a prescriptive title. But where such a stranger is aware, at the time he obtains the conveyance, that his vendor was only a co-owner and was not the sole owner of the land, ten years possession by him will not give him a prescriptive title. Such a purchaser cannot be said to have entered into possession as sole owner, for he had knowledge that there were others who owned shares in the land, and he will be presumed to have possessed the land as a co-owner. The ordinary rule which applies to possession by co-owners will then apply, viz., that before one can prescribe against the others there must be an ouster or something equivalent to an ouster. Hence prescriptive possession will begin to run in his favour against those others only if there has been an ouster or its equivalent, such as notice to those other co-owners that he was setting up a title adverse to them.

However, in *Danton Obeysekere v. Endoris* (1962) 66 NLR 457, Sansoni J. reached a different conclusion on the facts of that case, where a stranger claimed prescriptive title. There, a 2/3 share of a co-owned land, in extent about two roods, had been possessed separately for over twenty years by the 1st Defendant and his predecessors in title. The evidence disclosed that such possession was not for mere convenience, but as a

permanent mode of enjoyment following a purchase by an outsider from two of the co-owners. In those circumstances, Sansoni J. held at page 460:

Separate possession of that share for over 20 years has been clearly proved, and those who possessed it are entitled to claim that they have acquired prescriptive title to it. I do not think this is a case where a lot was separated off for mere convenience of possession and as a temporary arrangement. It is much more likely to have been intended as a permanent mode of possession, and the lot so separated off would, with the lapse of time and exclusive possession, cease to be held in common with the rest of the land. Each case must be considered in the light of the proved circumstances, and the mere mention of undivided shares in subsequent Deeds will not affect the true position.

When this principle is applied to the facts of the present case, it becomes evident that, with the exception of the 8th Defendant, who is the daughter of the 2nd Defendant, the 7th to 14th Defendants, and their predecessors in title, who purchased defined portions from the 1st to 6th Defendants, entered into possession as strangers claiming title to specific and defined allotments as absolute owners. There is no material to suggest that they entered into possession with the knowledge that their vendors were merely co-owners of the land. On the contrary, the surrounding circumstances indicate that they treated the allotments as distinct and separate properties and possessed them accordingly. In such circumstances, their possession is referable to a claim of exclusive ownership and is adverse in character from its inception. Accordingly, they stand in a more advantageous position than a co-owner who seeks to establish prescriptive title against other co-owners, as the requirement of proving ouster assumes a different dimension in the case of a stranger entering into possession under a claim of exclusive title.

Analysis of evidence by the District Judge

Upon a consideration of the trial proceedings and the judgment, it appears to me that the learned District Judge approached this matter more as an ordinary land case than as a partition case. In the judgment, the learned District Judge faulted the 7th to 14th Defendants for failing to call the 1st to 6th Defendants to give evidence, particularly to explain the preparation of Plan 7V1 and Deed 7V2 and related matters. On that basis, the learned District Judge refused to engage in a proper and meaningful evaluation of the evidence led on behalf of the 7th to 14th Defendants. In my view, this approach is erroneous.

The 1st to 6th Defendants had divested themselves of their rights long prior to the institution of the action and therefore had no real interest in the proceedings. The Plaintiffs themselves averred in paragraph 9 of the plaint that the 5th and 6th Defendants were deceased. The 8th Defendant, in her evidence, stated that her father, the 2nd Defendant, who was about 70 years of age, was in a feeble condition and unable to attend court. The father-in-law of the 9th Defendant stated in his evidence that he was unaware whether the 3rd Defendant was alive. In these circumstances, it would appear that the 1st to 6th Defendants were either deceased, untraceable, or otherwise incapable of giving evidence.

Although the system of justice adopted in Sri Lanka is adversarial, as opposed to inquisitorial, in the hearing of partition actions the role of the Judge assumes an inquisitorial character. This duty is imposed on the Judge by section 25(1) in peremptory terms, having regard to the finality and conclusiveness attached to a decree in a partition action under section 48 of the Partition Law and its binding effect. Unlike an ordinary land case, which is an action *in personam* binding only on the parties and their privies, a partition action is in the nature of an action *in rem*, and a decree entered therein binds not only the parties to the action but the whole world.

Section 25(1) of the Partition Law provides as follows:

On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, 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, and shall consider and decide which of the orders mentioned in section 26 should be made.

This section mandates the learned District Judge to examine the title of each party independently of what the parties to the action may or may not assert.

In the present case, Plan 7V1 was marked through the evidence of the 1st Plaintiff without objection, and Deed 7V2 was not marked subject to proof. If the learned District Judge was of the view that the 1st to 6th Defendants ought to have been called to give evidence in relation to 7V1 and 7V2, he could have indicated to Counsel for the Defendants that any one or more of those Defendants be called, so as to enable the Court to obtain a clear understanding of the circumstances in which 7V1 and 7V2 were prepared. Had those documents been marked subject to proof, I would not have made this observation.

On behalf of the Defendants, issue No. 5 was raised on the basis of prescription. However, the learned District Judge did not consider that issue in its proper perspective. At page 11 of the judgment, the learned District Judge states that the Plaintiffs and the Defendants have acquired prescriptive possession to their undivided shares. Prescriptive title cannot be acquired in respect of undivided rights; it can be claimed only in relation to defined and specific portions of land. There has thus been no proper application of the law relating to prescription among co-owners to the facts of this case.

Regrettably, the Court of Appeal also failed to appreciate the prescriptive claim advanced by the Defendants. The Court of Appeal stated that “*in*

the absence of proof emanating from ouster by an overt act the 1st to 14th Defendants should necessarily be presumed to have continued as co-owners.” In the light of the facts and circumstances of this case, such a conclusion is wholly unacceptable. In my view, the 7th to 14th Defendants have established that they acquired prescriptive title to the respective lots identified by them before the surveyor and in their statements of claim. Even if some of them fall short of the requisite ten-year period, they are entitled in law to tack on to their own possession the possession of their predecessors in title, reckoned from the point at which ouster was manifested by the series of overt acts referred to earlier.

Section 2 of the Partition Law provides as follows:

Where any land belongs in common to two or more owners, any one or more of them, whether or not his or their ownership is subject to any life interest in any other person, may institute an action for the partition or sale of the land in accordance with the provisions of this Law.

When the Plaintiffs instituted this action on the basis of the deeds relied upon by them, there was, in fact, no co-owned land available for partition. The 7th to 14th Defendants and their predecessors in title had been in possession of defined portions of the land, as described in the preliminary plan well over ten years prior to the institution of this action. A partition action lies only where common ownership subsists. Where no such co-ownership exists, a partition action cannot be maintained.

This principle was emphasised by this Court in *Angela Fernando v. Devadeepthi Fernando* [2006] 2 Sri LR 188. In that case, the District Court dismissed the Plaintiff's action without investigating title on the basis that there was no co-owned land to partition. On appeal, the Court of Appeal ordered a retrial directing the District Court to investigate title. Weerasuriya J., at page 192, set out the applicable principles as follows:

It is a prerequisite to every partition action that the land sought to be partitioned must be held in common as seen from the provisions of section 2(1) of the Partition Law. What is understood as common ownership is where persons do not hold on separate and distinct titles or where land is not held as separate and divided lots. When land is not held in common but exclusively by a party even though under prescriptive title, no action can be maintained to partition such land.

It is imperative that the investigation of title must be preceded by a careful examination of the preliminary issue whether the land sought to be partitioned is commonly owned as required by section 2(1) of the Partition Law. Learned District Judge having carefully examined this question had correctly held that the land was dividedly possessed as from 1938 and proceeded to dismiss the action without resorting to a full and exhaustive investigation as to the rights of the parties, which in the circumstances was lawful and justified.

Conclusion

I answer the 3rd question of law, on which leave to appeal was granted, in the affirmative. In view of that answer, it is unnecessary to consider the 1st and 2nd questions of law. The judgments of the District Court and the Court of Appeal are set aside, and the Plaintiffs' action is dismissed. The 7th to 14th Defendants are entitled to recover their costs in all three Courts from the 1st to 3rd Plaintiffs, jointly and severally.

The parties in SC/APPEAL/43/2018, SC/APPEAL/44/2018, and SC/APPEAL/45/2018 shall be bound by this judgment.

Judge of the Supreme Court

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court

Sampath B. Abayakoon, J.

I agree.

Judge of the Supreme Court