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

In the matter of an Application for Leave to Appeal from the Judgment of their Lordships of the Civil Appellate High Court of the Central Province holden at Kandy dated 18/12/2013 made in Case No. CP/HCCA/KANDY/80/2008(F), under and in terms of Article 127 of the Constitution read together with Section 5C of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC Appeal No. 93/2015

SC/HCCA/LA/40/14

CP/HCCA/KANDY/80/2008(F)

DC Matale Case No. 2951/L

Meezan Estates Limited

No. 8 and 10,

Harrison Jones Road,

Matale.

Plaintiff

Vs.

Seayed Ismail Mohamed Mohideen
(Deceased)

Ahmed Faisal
No. 166. Main Street,

Matale.

Presently at

No. 24/A, Pallidora Road,

Kawdana,

Dehiwala.

Substituted Defendant

And Between

Ahmed Faisal

No. 166, Main Street

Matale

Presently at

No. 24/A, Pallidora Road,

Kawdana,

Dehiwala.

Substituted Defendant – Appellant

Vs.

Meezan Estates Limited

No. 8 and 10,

Harrison Jones Road,

Matale.

And Now Between

Meezan Estates (Private) Limited

No. 392, Main Street

Matale

Plaintiff – Respondent – Petitioner

Vs

Ahmed Faisal

No. 166, Main Street

Matale

Presently at

No. 24/A, Pallidora Road,

Kawdana,

Dehiwala.

Substituted Defendant- Appellant Respondent

Before : Sisira J. de Abrew J

S. Thurairaja PC, J,

E. A. G. R. Amarasekara J

Counsel : Gamini Marapana PC with Nalin Marapana PC, Saumya Amarasekara PC, Keerthi Sri Gunawardena and Shihan Gunawardena for the Plaintiff – Respondent – Appellant.

Amarasiri Panditharathne instructed by K. K. Farouq for the Substituted Defendant – Appellant – Respondent.

Argued on : 25/02/2020

Decided on : 31/05/2021

E. A. G. R. Amarasekara J

The plaintiff – respondent – petitioner (hereinafter sometimes referred to as the plaintiff or plaintiff- petitioner) which is a limited liability company instituted an action in the District Court of Matale on 8th October 1981, seeking a declaration of

title to the land more fully described in the second schedule to the plaint, and ejectment of the defendants and damages as stated in the plaint.

The defendant by his answer dated 15th October 1981 sought a dismissal of the action of the plaintiff.

As per the plaint dated 08.10.1981, the plaintiff company's position was that;

- The original owner of the land more fully described in the 1st schedule to the plaint, namely Ihalagedarawatte and Nithulgahagedarawatte of one rood and 8.8 perches in extent and depicted in plan no. 1128 dated 24.08.1928 of S.S. Kandasamy licensed surveyor, was one Maulana.
- Said Maulana by deed no. 1292 dated 02.07.1933 had transferred the same to one Junus Lebbe, who then transferred the same by deed No. 1475 dated 19.01.1940 to one S.A.C.H. Mohammadu Mohideen.
- Said Mohammadu Mohideen by deed No. 1054 dated 01.02.1975 transferred the same to the plaintiff company.
- The plaintiff has prescriptive title owing to undisturbed, independent possession of the corpus for over 50 years.
- The defendant without any title, from 01.10.1981, has forcibly taken a portion towards the south of the said land to his possession on the strength of a purported deed no.4902 dated 17.01.1976 executed by the aforesaid Moulana's children, who did not have any right to execute such a deed since Moulana already had transferred the land by the aforesaid deed no.1292.
- The extent of land in the forcible possession of the defendant is more fully described in the 2nd schedule to the plaint which is 9 perches in extent as shown in plan no. 288 dated 29.10.1975 of K. S. Samarasinghe, licensed surveyor, and the said plan 288 had been made using the details extracted from the aforesaid plan no. 1128 of S.S Kandasamy, licensed surveyor.

It is pertinent to note here that the plaintiff company has not taken a stance in its plaint that the original owner Moulana had separated 2/3rd of the land called Ihalagedarawatte and amalgamated it with Nithulgahagedarawatte.

The defendant in his answer admitted that aforesaid Moulana was the original owner of the land described in the 1st schedule to the plaint and inter alia stated;

- That the aforesaid Moulana did not transfer the entirety of the said land called Ihalagedarawatte and what he had in fact sold was only a 2/3rd share of the said Ihalagedarawatte which is more fully described in the 1st schedule to the answer.
- That with the demise of the said Moulana in 1964, the remaining 1/3rd share (9 perches) of the land devolved on his children.
- The aforesaid children by deed no. 4902 dated 17.01.1976 attested by S. Theivanayagam Notary public, transferred the aforesaid 1/3rd share to the defendant which is more fully described in the 2nd schedule to the answer.
- That the defendant is entitled to the aforesaid land described in the 2nd schedule to the answer by prescriptive possession from 1947.
- That the defendant, exercising his right to 1/3rd of the land, had already constructed a garage on it and denied that the plaintiff's position that he was attempting to make a garage or any building on the said land.

Thus, the defendant prayed for the dismissal of the plaint. However, in the 1st schedule to the answer, it is stated that the plaintiff's 2/3rd is shown in the aforesaid plan no.1128 and as per the body of the answer and 2nd schedule to it, it is indicated that defendant's 1/3rd is shown in the aforesaid plan no.288. It can be noted that nothing is mentioned in the answer relating to an existing co-ownership.

On 11.02.1982, issues nos. 1 to 6 were raised by the Plaintiff and 7 to 14 were raised by the defendant and during the trial on 16.02.2006, issues nos. 15 to 21 were raised on behalf of the substituted defendant and issues nos.22 and 23 were raised for the plaintiff. However, issues nos. 15 and 16 were not allowed by the original court. As per the issues raised at the beginning of the trial, the plaintiff's contention was that the land in the second schedule to the plaint is a portion of the land in the 1st schedule to the plaint and the plaintiff is entitled to the said land on the strength of the deeds referred to in the plaint and by prescription, and the defendant was in forcible occupation disputing its entitlement in the manner explained in the plaint. The defendant's contention through issues at the commencement of the trial was that he was entitled to the prescriptive title of the land in the 2nd schedule to the plaint and however, the plaintiff company only got undivided 2/3rd share of the land named Ihalagedarawatte from the original owner Moulana and, the defendant became entitled to the balance 1/3rd of the

Ihalagedarawatte as a co-owner through the deed no. 4902 executed by the children of Moulana.

The issues raised later on during the trial queried whether the plaintiff had already transferred the subject matter and as such, not the owner of the land as averred in the plaint by that time or whether the plaintiff had re-acquired the land by deed no. 7053 and whether the plaintiff could maintain the action and further, whether the district court had ordered on 26.08.2003 that the plaintiff could proceed with plaint only to recover damages. Anyway, such transfer by the plaintiff has not been proved which caused the framing of said issues during the trial and thus, as found by the learned High Court Judges trial judges answers to those issues cannot be faulted.

As per the plaint and the issues raised by the plaintiff, the action filed in the district court can be identified as a rei vindicatio action since the position of the plaintiff was that it is the title holder and the defendant has to be evicted from the possession of the portion of the land which is unlawfully and forcibly occupied by the defendant without any right. It is trite law that in a rei vindication action, the plaintiff must prove his title to get the reliefs prayed and defendant need not prove anything until that burden is satisfied.[1] Thus, the burden in proving that the land in the 2nd schedule to the plaint is a portion of the land in the 1st schedule to the plaint and that the plaintiff has the title to the land in the 1st schedule to the plaint including the land in the 2nd schedule to the plaint was on the plaintiff. Subsequent to the trial, the learned district judge delivered the judgment on 21.01.2008, in favour of the plaintiff company.

As mentioned above, this court observes that the defendant in his answer, on one hand claimed prescriptive title to the 1/3rd of Ihalagedarawatte and on the other hand, it appears contradictorily claim coownership to the said land based on his entitlement to an undivided one third. If he claims co-ownership with the plaintiff, he cannot claim prescription against the plaintiff. However, in the issue no.7 raised, he claims prescriptive title generally but has not specifically claimed against the plaintiff. Thus, it may be a claim of prescription as a co-owner generally against the 3rd parties but not against the other co-owners. However,

[1] Abeykoon Hamine V Appuhamy 52 NLR 49, Peeris V Savunhamy 54 NLR 207, De Silva V Goonetilake (1931) 32 NLR 217, Wanigaratne V Juwanis Appuhamy 65 N L R 167

since this is a rei vindicatio action, the plaintiff must first prove its title to the land it claims.

Being aggrieved by the aforesaid Judgment of the learned district Judge, the substituted defendant preferred an application to the civil appellate high court of Kandy. The judgment of the civil appellate high court of Kandy was delivered on 18.12.2013 in favour of the defendant, setting aside the Judgment of the learned district judge of Matale and dismissing the action of the plaintiff company.

Being aggrieved by the said judgment of the high court, the plaintiff preferred a leave to appeal application to this court and this court, as per the journal entry dated 19.05.2015, granted leave on the following questions of law as set out in paragraph 16 (i) to (vii) of the petition dated 24.01.2014;

"(i). Are the statements of their Lordships stating that,

"a party is not entitled to plead legal or paper title and prescriptive title together in the same action" and the statement in the Judgment after quoting S.3 of the Prescription Ordinance wherein Their Lordships state "It is clear from the above provisions that one cannot plead prescriptive title against one's own legal or paper title" accurate statements of law?

(ii). Have Their Lordships of the Civil Appellate High Court erred in Law by failing to recognize the fact that the original owner of the lands called Nithulgahagederawatte and Ihalagederewatte namely the said Moulana was entitled to demarcate and depict in Plan 1128 dated 28.8.1928 (P2) an amalgamated block of land comprising of the entirety of Nithulgahagederawatte and 2/3rd of Ihalagederewatte?

(iii). Thus was the finding of Their Lordships that "a co-owner cannot without the consent of the other co-owners or by instituting partition proceedings bring the co-ownership to an end" was without any factual basis in the present case?

(iv). Have Their Lordships of the Civil Appellate High Court erred in Law and misunderstood the point in dispute in the said case by stating that "the main question for determination here is whether "Ihalagederewatte" still remains co-owned or by the amalgamation of the two lands as stated in the schedules to the title deeds the co-ownership to "Ihalagederewatte" came to an end"?

(v). Have Their Lordships misdirected themselves in stating "it is not clear whether the property means the land described in the 1st Schedule to the Plaint or the entire Ihalagederewatte and the entire Nithugahagedarawatte"?

(vi). Have Their Lordships erred in Law in holding that the Petitioner who was claiming title to a defined extent of land so defined and divided by the original owner of the land himself had to prove an ouster against anyone else claiming a portion of the same land when it was nobody's case that there was any question of co-ownership involved?

(vii). Are the findings of Their Lordships in conflict with the following statement in the Judgment which states "however, it is not clear whether Moulana was entitled to the entirety of "Ihalagederewatte""

The main reliefs prayed for in the petition of appeal are to vacate the judgment of the civil appeal high court and to affirm the judgment of the learned district judge. To see whether the learned high court judges erred or whether the district court judgment can be restored it is necessary to see first the viability and correctness of the reasons given by or the findings of the learned district court judge.

As per the answer to issue no. 8 given by the learned district judge, he has come to a finding that Moulana was the original owner of the land called Ihalagedara watte. I do not find any dispute as to the original ownership of the said land among the parties as per the evidence led at the trial. Even the stance taken on behalf of the defendant was that undivided 2/3rd of the said land was transferred to the predecessors of title of the plaintiff by Moulana and the balance 1/3rd was transferred to the original defendant by the heirs of Moulana, and the defendant's argument on co-ownership apparently is not based on the fact that there are other people who has co-ownership to this land but owing to their stance that Moulana transferred only undivided 2/3rd of the said Ihalagedarawatte to the predecessors of the plaintiff creating a co-ownership between them. The plaintiff also appears to argue that, since Moulana was the original owner, it had the right to separate 2/3rd of the Ihalagedarawatte[2] and transfer it along with the other land, namely Nitulgahagedarawatte as per the plan no.1128 marked P2 and as such, there is no co-ownership and the plaintiff is

[2] Vide paragraph 47 of the written submission tendered on 29.06.2015

entitled to the entirety of the amalgamated land depicted in the said plan without any co-ownership attached to it. One of the plaintiff's witnesses has stated in evidence that Moulana was the original owner of the land described in the 1st schedule to the plaint.[3] Thus, it is common ground between the parties that Moulana was the original owner of the Ihalagedarawatte. Thus, the finding of the learned district Judge that Moulana was the original owner of Ihalagedarawatte cannot be assailed.

Issue no.1 raised at the trial query whether the land in the 2nd schedule to the plaint is part of the land in the 1st schedule to the plaint and the learned district judge has answered it in the affirmative. This finding of the learned district judge also cannot be faulted as it is clear from the evidence led at the trial that the land in the 1st schedule is the land depicted in plan no 1128 marked P2 and land in the 2nd schedule is the land depicted in plan no.288, marked P1 and the latter was made without a survey on the ground but using details extracted from the P2. Further K.S. Samarasinghe, the licensed surveyor who made the plan marked P1 has clearly admitted in his evidence that entirety of P1 falls within P2 and P1 is the south end of P2.[4]

This being a rei vindicatio action, the plaintiff company to be successful, as per its stance taken through its pleadings and the issues, it has to prove that it has title to the entire land shown in plan marked P2 through deeds or prescription or at least to the land shown in plan marked P1 through deeds or by prescriptive possession.[5] Otherwise, plaintiff shall fail in establishing its case. However, no deed that the plaintiff relies on has any reference to plan marked P1. In fact, the defendant has got that plan prepared for him.[6] If the plaintiff is successful in establishing its title to the disputed land, then only the defendant needs to establish better title or his right to remain in the land. In this context, the crucial issues raised at the trial were issues no. 2,3, 9, 10, 13 and 14. Issues no.2and 3 raised by the plaintiff query whether the land in the 2nd schedule of the plaint belongs to the plaintiff on deeds cited in the plaint or by prescriptive possession while issues no.9 and 10 raised by the defendant query whether the plaintiff is

[3] Vide page 486 of the brief.
[4] Vide pages 480 and 481 of the brief.
[5] Vide plaint and the issues no. 1 to 3 raised by the plaintiff.
[6] Vide evidence at page 481 of the brief.

entitled to the entirety of Ihalagedarwatte as claimed in the plaint or whether the plaintiff is entitled only to an undivided 2/3 share of the Ihalagedarawatte as stated in the answer. Issues no.13 and 14 query whether parties are co-owners and if so, whether the defendant could be evicted. It must be noted that there is no clear averment in the plaint where the plaintiff claims entitlement to the entirety of Ihalagedarawatte but it has claimed title to the entirety of amalgamated land shown in plan marked P2 which consists of 2 allotments of land Nitulagahagedarawatte and Ihalagedarawatte.

As per the judgment, the learned District Judge has answered issues no. 1and 2 in the affirmative indicating that the plaintiff is entitled to the land depicted in P2 and the 1st schedule to the plaint by deeds as well as by prescription, and has answered the issues no. 9 and 10 to say that the plaintiff has got an undivided 2/3rd of Ihalagedarawatte as a divided 2/3rd portion as per the plan. Issue no.13 and 14 has been answered rejecting the stance that parties are co-owners and giving the plaintiff entitlement to damages. As per the answers given, it appears that the learned district judge has come to the conclusion that what the plaintiff is entitled from Ihalagedarawatte was a divided 2/3rd as per the plan. It appears the plan refers here in these answers by the learned district judge is plan no. 1128 marked as P2. It is necessary to peruse why the learned district judge came to the said findings contained in the said answers to issue no.2,3,9,10,13 and 14 as evidenced by the contents of the district court judgment and see whether they are supported by acceptable evidence given by the witnesses or documents tendered at the trial. In this regard, it appears the learned district judge has come to certain inferences. Those inferences and this court's observations with regard to those inferences are mentioned below;

- **Inference 1**; The original owner Moulana had retained the service of S. Kandasamy licensed surveyor to prepare the plan no 1128 dated 24.08.1928, marked P2 and by making the said plan he had amalgamated two adjoining lands namely, Nithulagahagedarawatte of 21.6 perches and Ihalagedarawatte of 27.2 perches.[7]
- **Inference 2**; As per the deed no.1592 dated 02.07.1933, marked P4, executed after the making of aforesaid plan Moulana had sold the amalgamated land to

[7] Vide page 6 of the said judgment.

Junus Lebbe and as per the said deed what has been amalgamated with Nithulagahagedarawatte as shown in the said plan was 2/3rd of the said Ihalagedarawatte and both lands have become one land of 1 rood 8.08 perches.[8]

- **Inference 3;** Moulana being the sole owner at that time, had all the rights to separate 2/3 of Ihalagedarawatte and to make a plan accordingly and make one land as amalgamated in plan marked P2.[9]
- **Inference 4;** Due to the execution of deeds marked P4 and P5, title to the land shown in P2 passed from Moulana to Junus Lebbe and then to Mohamadu Mohideen and the description of the land is same in the schedules of P4 and P5, and by deed marked P6 title devolved on the plaintiff company.[10]
- **Inference 5;** If, as per what the defendant states, Moulana had 1/3rd after transferring 2/3rd it should be situated outside the land in P2.[11]

Observations of this Court; The notes on the plan marked P2 does not state that it was made on the request of Moulana. In fact, there is no reference to Moulana on the face of it. Neither Moulana nor S. S. Kandaswamy, licensed surveyor has given evidence to say that it was Moulana who got the plan made through the said surveyor, S. Kandaswamy.; K. Kumaraswamy, licensed surveyor, son of aforesaid S. Kandaswamy, licensed surveyor was only 59 years old when he gave evidence, and he was the only witness born prior to the making of plan marked P2. He would have been about 5 years old when his farther made P2 and however, nowhere in his evidence has he stated that his farther made P2 on the request made by Moulana and his farther in making the said plan amalgamated an identified 2/3rd of Ihalagedarawatte with the other land Nithulagahagedarawatte on a request made by said Moulana. K. S. Samarasinghe, licensed surveyor who has given evidence for the plaintiff has not revealed any knowledge with regard to the making of P2. What he has stated in evidence is that he used P2 in making his plan no.288 marked P1. Police officer Karunaratne is a witness who went for the inspection after a complaint made to the police but has not stated anything

[8] Vide page 6 of the said judgment.
[9] Vide page 8 of the said judgment.
[10] Vide pages 6 and 7 of the said judgment.
[11] Vide page 9 of the said judgment.

with regard to the making of P2. Other lay witnesses who gave evidence for the plaintiff were born after 1950 as per their age at the time they gave evidence for the plaintiff in 1982 and as per P14.[12] Hence, none of the plaintiff's witness can state from their personal knowledge that in 1928, Moulana separated an identified 2/3rd of Ihalagedarawatte and amalgamated it with Nithulagahagedarawatte and got the service of S. Kandaswamy, licensed surveyor to make the plan marked P2 accordingly. Further, none of them have said that Moulana got the service of S. Kandasamy, licensed surveyor to amalgamate divided 2/3rd of Ihalagedarawatte with Nithulagahagedarawatte and accordingly to make the plan marked P2. None of the witnesses of the defendant has stated that Moulana got the service of S. Kumarasamy, licensed surveyor to amalgamate divided 2/3rd of Ihalagahagedarawatte with Nithulagahagedarawatte. Defendant's stance as said before is that only undivided 2/3rd of Ihalagahagedarawatte was sold to Junus Lebbe, one of the plaintiff's predecessors in title but not that the said plan marked P2 contains an identified 2/3rd of Ihalagedarawatte.

The certified copy of plan marked P2 found at page 384 of the brief, which appears to have been initialed by the trial judge when it was marked, only indicates that it was made by S. Kandaswamy, licensed surveyor in 1928, and it shows an amalgamated two allotments of land, one called Nitulagahagedarawatte and the other called Ihalagedarawatte. Nowhere does it state that only 2/3rd of Ihalagedarawatte was amalgamated in making the said plan. It is also observed that the total extent given in the plan is 1 Rood and 8.8 Perches, in other words 48 perches. As per the diagram, the portion shown as Nitulgedarawatte is 21.6 perches and the portion shown as Ihalagedarawatte is 27.2 perches. The said certified copy of plan P2 shows a protruded portion towards South, and as per the evidence that area seems to be the disputed area in the action filed in the district court. (However, there is a photo copy of the original of the same plan found at page 433 of the brief which is not initialed by the trial judge indicating that it was not the one marked at the trial. Anyhow, for the purpose of this decision this court has to consider the copy that appears to have been initialed by the trial judge). It appears that, prior to filing of the plaint, the plaintiff's witness K.

[12] Vide their age mentioned prior to the recording of evidence and P14 where witness Sihabdeen Ahamed Mohideen had revealed his age.

Kumarasamy, licensed surveyor, had surveyed a part of the amalgamated land on 11.12.1978, and made the plan no.7597 marked P3 which depicts the relevant area including the protruded portion but P3 indicates that the extent as 35 perches. In this plan, the surveyor has inserted a "clitch" mark to indicate that the protruded portion to the south is part of the portion shown to the north. K. Kumarasamy, licensed surveyor has admitted that he did not do a superimposition of P3 with the plan marked P2. Thus, the increase of the extent may be due to the change of location of the boundaries. However, it is evidenced from this plan that even though the plaintiff had put up buildings on the northern part, it has not done any construction on the disputed area though they claimed that they have possessed it. Hence, the possession of the parties of the disputed area has to be decided on other evidence.

It appears that the learned District Judge has heavily relied on the contents of the schedules in the deeds relied on by the plaintiff and interpreted the said schedule to come to his conclusions.[13] In fact, he has quoted a part of the said schedule in the deed marked P4 by which Moulana transferred the land as described in the said schedule to Junus Lebbe. The learned high court judges have quoted all the relevant parts of the said schedule in their judgment and even the plaintiff's counsel too have quoted the said schedule in their written submissions tendered to this court on 29.06.2015. The relevant schedule is quoted below and the portion quoted by the learned district judge is highlighted in bold letters for easy perusal.

"THE SCHEDULE REFERRED TO

1. *All that land called and known as Nithugahagedarawatte bearing assessment no. 57(a) and (b) containing in extent one seer kurakkan sowing situated at Gongawela within Urban District Council limits Matale Town Matale district Central province aforesaid and bounded on the east by the garden called Nitulgahagedarawatte belonging to Wappu Lebbe south by limit of Nithulgahagedarawatte belonging to Kandu Umma and Neina Tamby west by the stone fence of the land belonging to Mohammado Tamby Vidane aratchy and others and the wall of Thakya and on the north*

[13] Vide page 124 and 125 of the brief and page 6 and 7 of the district court judgment

by deweta now high road together with the houses plantations and everything thereon and

2. An undivided two thirds share (2/3) of the land called and known as Ihalagedarawatte in extent one Seer kurakkan sowing bearing assessment No.56 situated at Gongawela aforesaid and bounded to the east by the jak fence of Sinnetamby's garden now Gogawela road south by the fence of Mohammado Tamby Vidane aratchy's garden and Koopa Thambi Neina Tamby's garden and on the west and north by the limit of the garden of Sinnado pulle Pakir Tamby Lebbe now on the west by the limit of Nithulagahagedarawatte (Land No.1 above) and the limit of Ismail Lebbe's and his brother's property and on the North by Harrison Jones road

Which said premises adjoining each other now form one property of the extent of one rood eight perches and eighty upon hundred of a perch (0-1.8 80/100) and bounded on the north by Thakkya and Harrison Jones road east by Gongawela road west by the land of Deen Usman and others and south by the land of H.M.M.Ibrahim do Ismail and do Cassim and land of P.T.L. Mohamed Thamby Vidane and another, according to the plan of survey No.1128 dated 24th August 1928 made by S.S. Kandasamy Licensed Surveyor annexed hereto." (highlighted by bold letters by me***)***

The second part of the afore quoted schedule clearly indicates what was contemplated there is an undivided 2/3rd of Ihalagedarawatte. Nowhere in the afore quoted schedule or in the body of the deed, it is stated that Moulana separated the said undivided 2/3rd share to a divided portion of the land and made the plan referred to therein the later part of the schedule. However, it appears that the learned district judge quoting the afore quoted highlighted portion, has interpreted the deed to indicate that what had been transferred by the deed is a one land as depicted by the said plan 1128(P2) and as such Moulana had given away a divided 2/3rd portion of the land called Ihalagedarawatte which 2/3rd formed the one land contained in the said plan along with Nithulagahagedarawatte.[14] It is pertinent to see whether the

[14]Vide pages 6 and 7 of the district court judgment.

phraseology "***Which said premises adjoining each other now form one property of the extent ……..according to the plan of survey No.1288…….***" can be interpreted to give the meaning given by the district judge without any supporting evidence in that regard. There is no doubt that the words "**which said premises adjoining each other"** refers to the premises described in the part 1 and part 2 of the schedule. In interpreting the schedule, now it is important to recognize the premises described in those two parts of the schedule. There cannot be any ambiguity that the premises described in the 1st part of the schedule is Nithulagahagedarawatte within the four boundaries described therein as it is an identifiable land described therein the 1st part of the schedule. However, the second part of the schedule refers to an undivided 2/3rd of Ihalagedarawatte and boundaries to Ihalagedarawatte has been mentioned there in the second part of the schedule. When it refers to an undivided 2/3rd, it does not indicate an identifiable portion of a land. Thus, an unidentifiable portion cannot mean a premises that can be amalgamated with another property to form one property. Only premises that can be identifiable in the second part of the schedule is the land called Ihalagedarawatte mentioned therein with the four boundaries to identify it. Thus, this court opines that what is meant by the words "**Which said premises adjoining each other now form one property of the extent ……..according to the plan of survey No.1288……."** is that Nithulagahagedarawatte and Ihalagedarawatte now form one property as depicted in plan 1288. To give another meaning to say that Moulana separated undivided 2/3rd as a divided 2/3rd and get it to form one land by amalgamating it with the other land called Nithulagahagedarawatte as depicted in plan 1288 amounts to an addition of words which are not there in the schedule. Thus, the interpretation given by the learned district judge to the schedule of the said deed cannot be accepted and the learned district judge erred in understanding and interpreting the schedule of the said deed.

As observed above there was no other oral or documentary evidence acceptable to court that Moulana separated divided 2/3rd from Ihalagedarawatte and amalgamated it with Nithulagahagedarawatte and got S.S. Kandasamy, licensed surveyor to depict in his plan as one land.

What the evidence led at the trial indicate is that the original owner Moulana transferred to Junus Lebbe entirety of Nithulagahagedarawatte and undivided

2/3rd of Ihalgedarawatte from the amalgamated land of Nithulagahagedarawartte of 21.6 perches and Ihalgedarawatte 27.2 perches but not the entirety of Ihalagedarawatte and, Moulana used the plan made in 1928 by S. Kandasamy, licensed surveyor to described the main land when he transferred as aforesaid to Junus Lebbe in 1933. It is true that plan marked P2 depicts an amalgamated land of the two lands mentioned above but there is nothing to say that it was only 2/3rd of Ihalagedarawatte contained in plan forming the amalgamated land. If 1/3rd of Ihalagedarawatte was left out in making that, one boundary adjoining Ihalagedarwatte in the said plan should have been described as the remaining part of Ihalagedarawatte belonging to Moulana but such description is not found among the description of boundaries in P2. Description of boundaries in the plan marked P2 around the land identified as Ihalagedarawatte tallies with the boundaries given to Ihalagedarawatte in the second part of the schedule quoted above indicating that there cannot be any left out 1/3rd portion of Ihalagedarawatte adjoining the land depicted in P2.

Thus, certain matters contained in the inferences of the learned district judge mentioned above are not supported by evidence led at the trial. Especially the parts of the said inferences that indicate that Moulana got the service of the said surveyor to separate an identified 2/3rd of Ihalagedarawatte to form a one property with Nithulagahagedarawatte and the balance 1/3rd of Ihalagedarawatte shall lie outside the land shown in plan marked P2 are mere conjectures and surmises which are not supported by the evidence led. If the said plan was made to transfer Nithulagedarawatte and identified 2/3rd of Ihalahedarawatte to Junus Lebbe, it is very unlikely to have a five-year gap between the plan and the transfer deed. Thus, it is the view of this Court that Moulana transferred the entirety of Nithulagahagedarawatte in plan marked P2 and an undivided 2/3rd only of Ihalagedarawatte shown in P2 to Junus Lebbe by P4. Anyway, it appears from the contents of P4 that Moulana had mortgaged the same property to Junus Lebbe in 1928 and certain payments were pending and the vendor and vendee agreed to execute a conditional transfer of the property as per P4, but there is no sufficient material to decide that in 1928 for the purpose of the mortgage Moulana separated 2/3rd of Ihalagedarawatte and made the plan P2.

It is true that, as the learned district judge observed, Moulana being the sole owner had the right and capacity to transfer a divided portion of Ihalagedarawatte but as per the documents, what he had transferred to Junus Lebbe was an undivided 2/3rd share. By that Moulana remained a co-owner to the land named Ihalagedarawatte even after he executed P4. Hence, through the other deeds marked by the plaintiff company, namely P5 to P6 the plaintiff company only gets title to Ihalagedarawatte as a co-owner along with Moulana and with his demise along with his heirs. As per the documentary evidence placed before the district court, plaintiff has been able to prove only a co-ownership to the land called Ihalagedarwatte.

The defendant claim title to 1/3rd owing to a deed of transfer no. 4902 from the children of Moulana which was marked as P10. It must be noted that there was no dispute that vendors of that deed were children of Moulana. Even the plaintiff's stance in paragraph 6 of their plaint was that the defendant claims title through the said deed marked P10 executed by the children of Moulana where those children had no right to execute such a deed. No issue had been raised challenging P10 as a deed not executed by the children of Moulana. Hence, the learned district judge's comment that it was not proved that vendors of P10 are the children of Moulana is irrelevant as it was not a matter that parties were at variance, even to raise an issue. Further, one of the plaintiff's witnesses had admitted in evidence that P10 was executed by Moulana's children.[15] Thus, as per the documents tendered in evidence parties were co-owners to Ihalagedarawatte. One co-owner cannot file a rei vindication action to evict another co-owner since all the co-owners have title to the land and since rei vindicatio is an action based on title. Even the learned high court judges have correctly stated that a co-owner cannot successfully maintain an action against another co-owner.[16] Thus, unless the plaintiff company could prove prescriptive title to the disputed area or to the whole land named Ihalagedrawatte found in P2, its action should fail.

[15] Vide page488 of the brief.

[16] Vide page 7 of the High Court Judgment.

One co-owner's possession is the possession of other co-owners,[17] and if one's possession may be referable to a lawful title, it can be presumed that it/he/she possess by virtue of that lawful title and further, if one entered in to possession in one capacity, it is presumed that it/he/she continue to possess in the same capacity. A co-owner cannot put an end to the co-ownership by a secret intention in his mind.[18] Hence, the plaintiff company being a co-owner as per its paper title, has to prove ouster or something equivalent to ouster and adverse possession for ten years to claim prescriptive title. It has to prove an overt act or circumstances that a happening of an overt act could be presumed along with adverse possession over 10 years from such an event. Since this is a rei vindicatio action this court has to first see whether the plaintiff was successful in proving his case first. As indicated above he failed in proving exclusive title to Ihalagedarawatte on deeds. Therefore, now it is important to consider whether the plaintiff had proved its title by prescription against the defendant. The two surveyors and the police officer who came for inspection after the police complaint were not competent to give any evidence regarding ouster or of an overt act as they had come to give evidence on the plans they made and the inspection done as per the said police complaint respectively. Other lay witnesses called by the plaintiff, namely Mohomad Nasar Mohideen, Yathi Samul Huk Mohideen and Siabdeen Ahamaed Mohideen do not speak of any ouster or of an overt act or any adverse possession against the plaintiff. Some of them had just stated that before the dispute started, they possessed the disputed portion.[19] However, they do not reveal how they possessed the disputed area. Such mere statements of possession are not sufficient to prove even possession of the disputed area. As said before as per the plan marked P3, it is visible that there are no buildings constructed by the plaintiff on the disputed area and one witness of the plaintiff has stated in evidence that the disputed area is barren.[20] Hence there is no construction or plantation by the plaintiff to prove its possession with regard to the disputed area. The learned district judge has referred to V2, entries in the land registry, and has stated that the plaintiff

[17] Corea V Appuhamy !5 N L R 65
[18] Ibid and Tilekaratne V Bastian 21 N L R 12
[19] Vide pages 486,488,497 and 503 of the brief.
[20] Vide page 489 of the brief.

had mortgaged the land in dispute in 1972, and it establishes that plaintiff exercised its rights and possession to the entire land. However, it appears V2 also refers to a mortgaging of undivided 2/3rd of Ihalagedarawatte, and such execution of a deed cannot consider as an ouster or an evidence of an overt act which might have taken place in an office of a Notary. Thus, there is no sufficient evidence even to prove possession of the disputed area by the Plaintiff. In such circumstances, a court cannot come to a conclusion that there was ouster or an overt act that changed the nature of possession of the plaintiff in relation to the disputed area.

On the other hand, the defendant claim he possessed the disputed area. The defendant, in his answer has claimed prescriptive possession from 1947 and the learned district judge has criticized this as the defendant got title through a deed in 1976, but the learned district judge has not considered that when one claim prescriptive possession that he can add the possession of his predecessors in title. However, the defendant being a co-owner as per the deeds, he also cannot claim prescriptive title against the plaintiff without proving ouster and adverse possession. As per P7 and P8 police complaints, the witnesses of the plaintiff company had complained to the police with regard to the premises 107 and the police officer who came to give evidence for the plaintiff had stated in his evidence that he went to the premises 107 for inspection and the disputed portion was in front of a house and there was no separate number for the disputed portion where the garage was made. Assessment clerk of the Matale Municipal Council who gave evidence for the defendant had stated that assessment number 107 was in the name of the defendant, and the witness Abdul Assis had stated that his residence is 107/1 and 107 is close to his premises and it was in the possession of the defendant and not with the plaintiff. However, even the defendant had not disclosed the manner he enjoyed the possession of the disputed portion prior to the dispute. It is true that there are certain weaknesses and contradictory stances in the defendant's case. As per the answer, the defendant had not taken a position that he is a co-owner but appears to have claimed a separated 1/3rd portion of Ihalagedarawatte and he appears to have admitted the plaintiff's

entitlement to separated 2/3rd of Ihalagedarawatte.[21] Nevertheless, when issues were raised, the defendant has queried whether he is a co-owner and no objection has been taken against the relevant issues. Issues of a civil action need not be limited to the pleadings. Once issues are raised the pleadings recede to the background and the court has to hear and determine the case as crystalized in the issues.[22] Through the issues co-ownership of parties has been put in issue.

The counsel for the plaintiff tried to point out that as per the schedules of the answer the land claimed by the defendant is outside the plan marked P2. However, as the defendant has referred to the plan no.288 which is made from details extracted from the plan referred to in the schedule 1 and also due to the manner, the boundaries are described in the both schedules, this argument cannot be accepted. What the defendant had attempted to express in those schedules is to describe the 2/3rd portion and 1/3rd portion as separate entities. On the other hand, whatever may be the weaknesses in the defendant's case, as this is a rei vindicatio action, the burden to prove its title is with the plaintiff. The plaintiff had failed in proving exclusive title to the land called Ihalagedarawatte by deeds or by prescription but had proved that it was only a co-owner to an undivided 2/3rd of the land called Ihalagedarawatte and there was sufficient evidence to indicate that the defendant is the other co-owner. Hence, the learned district judge could not have entered the judgment in favour of the plaintiff. Thus, it appears that the final conclusion of the learned high court judges to allow the appeal and enter a judgment dismissing the plaint is correct. In that backdrop, now this court would consider the questions of laws allowed at the support stage.

The 1st question of law queries whether the statement made by the learned high court judges that "a party is not entitled to plead legal or paper title and prescriptive title together in the same action" is an accurate statement of law; This court also observes a misstatement of law here. A person who has paper title possesses the land as the owner and in a manner adverse to others without accepting anyone else as the owner, there cannot be any obstacle for

[21] Vide the averments and the schedules of the answer.
[22] Vide Haniffa V Nallamma (1998) 1 Sri L R 73.

him to plead prescriptive title coupled with the paper title. Even if his paper title fails for some reason such as technical or defect in the title, if he has possessed the property as the owner against others without accepting anyone else as the owner for 10 years or more, he may be successful in his claim on prescriptive title. Further, it is also queried whether the statement of the learned high court judges which connote that as per section 3 of the Prescription Ordinance that one cannot plead prescriptive title against one's own legal or paper title is an accurate statement of law. It is pertinent to note that, said section 3 does not contemplate a situation where a person claims prescriptive title against his own paper title. It contemplates where a defendant claim prescription on a title adverse to the plaintiff or a claimant and in the like manner a plaintiff or an intervenient party claims on a title adverse to the others. In fact, if one has paper title, his possession relates that title and it can be an adverse possession against others but not against his own paper title. On the other hand, if one has paper title, he needs not plead prescription against his own title. In the case at hand, plaintiff has not pleaded prescription against its own title but has pleaded it coupled with paper title against the defendant. Thus, making the said statement it appears that the learned high court judges have misunderstood the pleading of the plaintiff. However, as for the reasons indicated in the discussion above, this misstatement or misunderstanding cannot make the final conclusion of the learned high court judges faulted. Thus, the answer to the 1st question of law is "yes there seems to be a statement which is inaccurate and a statement made without proper understanding of the pleadings but the final conclusion need not be varied or set aside due to them".

The second question of law queries whether the learned Civil Appellate High Court Judges erred in law by failing to recognize the fact that the original owner of the lands called Nithulgahagederawatte and Ihalagederewatte namely the said Moulana was entitled to demarcate and depict in Plan 1128 dated 28.8.1928 (P2) an amalgamated block of land comprising of the entirety of Nithulgahagederawatte and 2/3rd of Ihalagederewatte. In this regard as observed above by this court, there was no acceptable evidence to say that Moulana separated 2/3rd of Ihalagedarawatte and made the plan marked P2 other than he used the said plan which amalgamated those two lands to

describe the main land that contained what was transferred by P4. It is true that the original owner was entitled to separate identified 2/3rd of one land and to amalgamate it with the other but what was lacking was evidence to establish that. Hence this court cannot find that the learned high court judges erred in that regard. Thus, the answer to 2nd question of law is in the negative.

The 3rd question of law queries whether the finding of the learned high court judges that "a co-owner cannot without the consent of the other co-owners or without instituting partition proceedings bring the co-ownership to an end" was without any factual basis in the present case. As per the observation made above by this court, the plaintiff failed in proving that he got a divided portion of 2/3rd of Ihalagedarawatte and failed to prove prescriptive title to the disputed area. Thus, there is a factual basis for this statement as the plaintiff remained a co-owner. Thus, answer is in the negative.

The fourth question of law queries whether the civil appellate high court erred in Law and misunderstood the point in dispute in the said case by stating that "the main question for determination here is whether "Ihalagederewatte" still remains co-owned or by the amalgamation of the two lands as stated in the schedules to the title deeds the co-ownership to "Ihalagederewatte" came to an end. As per the observations and discussion made above by this court, it is clear that co-ownership was put in issue by the issues raised and the evidence also indicate that the co-ownership still exists. Thus, answer for this question of law is in the negative.

The 5th question of law asks the question whether the learned high court judges misdirected themselves in stating "it is not clear whether the property means the land described in the 1st Schedule to the plaint or the entire Ihalagederewatte and the entire Nithugahagedarawatte". The property described in the 1st schedule to the plaint was the land in plan marked P2. As observed and elaborated above by this court, there is no evidence to indicate that land in P2 contains only a divided portion 2/3rd of Ihalagedarawatte along with the other land. Thus, P2 appears to contain entire Ihalagedarawatte and Nithulagahagedarawatte. Hence there cannot be any difference in the 1st schedule to the plaint and the amalgamation of entire

Nithulagahagedarawatte and entire Ihalagedarawatte as per the evidence led. On the other hand, said statement in the high court Judgment refers to the word "Property" in the 5th paragraph in the plaint. When it is read with the previous paragraphs it is clear that the said word refers to the land in the 1st schedule to the plaint. Thus, the answer to the 5th question of law is 'yes, there seems to be some confusion".

The 6th question of law questions whether the high court erred in Law in holding that the petitioner who was claiming title to a defined extent of land so defined and divided by the original owner of the land himself had to prove an ouster against anyone else claiming a portion of the same land when it was nobody's case that there was any question of co-ownership involved. As mentioned before, in the original court, issues have been raised with regard to the co-ownership and issues need not be limited to the pleadings. No objection has been raised against such issues. Thus, now no one can say that it was no body's case. However, evidence was not available to state that the original owner transferred a defined lot of land of Ihalagedarawatte. Thus, the learned high court judges did not err when they mentioned the need to prove ouster. As such the answer to 6th question of law is in the negative.

The question of law no.7 queries whether the findings of the learned high court judges are in conflict with the following statement in the Judgment which states "however, it is not clear whether Moulana was entitled to the entirety of "Ihalagederewatte. It appears that the learned high court judges came to the conclusion that 1/3rd of Ihalagedarawatte belongs to the defendant and 2/3rd of the same belongs to the plaintiff and they are co-owners. Both sides get their title from Moulana or his heirs. Thus, there seems to be a conflict, but as observed before, learned district judge's decision cannot be allowed to stand and the final conclusion to set aside that judgment and to dismiss the plaintiffs action by the learned high court judges is correct. Thus, the answer is 'yes there seems to be a conflict between the said statement and the findings, but it does not warrant the setting aside of the final conclusion reached by the high court'.
As indicated above there are some misstatements, misunderstandings, and conflicting statements in the learned high court Judges' judgment but the

finding of the learned high court judges that the plaintiff cannot maintain a rei vindicatio action against another co-owner is valid and sufficient to vacate the original court judgment and dismiss the plaintiff's action. This court also shall not intervene in appeal when the substantial rights are not affected by the parties by the lower court judgment, even though there are obvious errors.

Hence this appeal is dismissed with costs.

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Judge of the Supreme Court

Sisira J de Abrew, J.

I agree.

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Judge of the Supreme Court

S. Thurairaja, PC, J.
I agree.

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Judge of the Supreme Court