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

S.C. Appeal 113/2019

S.C./ HCCA/ LA/ 302/2018

SP/HCCA/RAT/FA/58/2017

D.C. Rathnapura Case No. 18509/P

In the matter of an Application for Leave to Appeal in terms of Section 5(C)1 of the High Court of the Provinces (Special Provisions) (Amendment) Act No.54 of 2006.

Liyana Kankamalage Munasinghe.

Panukerapitiya, Hidellana.

Plaintiff

Vs.

1.Kandegedara Ralalage Podimanike.

2.Tepulangoda Mudiyanselage Sudesh Prasanna.

3.Tepulangoda Mudiyanselage Sujith Prasanna

All of Nugagahadeniya, Godella, Panukerapitiya, Hidelllana.

4.A. G. Kusumawathie.

Tepulangoda, Hidellana.

5.Sujith Lakshman Muthumala.

6.Indrani Muthumla.

7.Nilani Muthumala.

8.Pradeepa Muthumala.

All of Tepulangoda, Hidellana.

Defendants

And Between

1.Kandegedara Ralalage Podimanike.

2.Tepulangoda Mudiyanselage Sudesh Prasanna.

3.Tepulangoda Mudiyanselage Sujith Prasanna

All of Nugagahadeniya, Godella, Panukerapitiya, Hidelllana.

Defendant-Appellant

Vs.

Liyana Kankamalage Munasinghe.

Panukerapitiya, Hidellana.

Plaintiff-Respondent

1.A. G. Kusumawathie.

Tepulangoda, Hidellana.

2.Sujith Lakshman Muthumala.

3.Indrani Muthumla.

4.Nilani Muthumala.

5.Pradeepa Muthumala.

All of Tepulangoda, Hidellana.

Defendant- Respondents

And now between

Liyana Mudiyanselage Munasinghe.

Panukerapitiya, Hidellana.

Mistakenly referred to as

Liyana Kankamalage Munasinghe.

Plaintiff-Respondent-Appellant

Vs.

1.Kandegedara Ralalage Podimanike.

2.Tepulangoda Mudiyanselage Sudesh Prasanna.

3.Tepulangoda Mudiyanselage Sujith Prasanna

All of Nugagahadeniya, Godella, Panukerapitiya, Hidelllana.

1st to 3rd Defendant-Appellant-Respondents

1.A. G. Kusumawathie.

Tepulangoda, Hidellana.

2.Sujith Lakshman Muthumala.

3.Indrani Muthumla.

4.Nilani Muthumala.

5.Pradeepa Muthumala.

All of Tepulangoda, Hidellana.

Defendant- Respondents- Respondents

Before : Buwaneka Aluwihare PC, J.

E. A. G. R. Amarasekara J and

Janak De Silva J.

Counsel : R.M.D Bandara with Ms. Lilanthi De Silva for the Plaintiff- Respondent-Appellant.

Ms. Sudharshani Cooray for 1-3rd Defendant-Appellant- Respondent.

Parakrama Agalawatta with Manodya Gopayage for the 4th to 6th Defendant- Respondent- Respondent.

Argued on : 01.11.2021

Decided on : 13.11.2023

E.A.G.R. Amarasekara J

The Plaintiff – Respondent – Petitioner (hereinafter referred to as Plaintiff) instituted the partition action No. 18509/P in the District Court of Ratnapura on 13/01/2003 to partition a land called "Nugagahadeniya Godella" in extent of 120 perches, which is described in the schedule to the plaint.

As averred in the plaint, the Plaintiff's position is that;

i. The original owner of the undivided 1/3rd of the corpus was Nalla Gamage Albert. The said Nalla Gamage Albert purchased said undivided 1/3rd share upon deed No. 5903 dated

25/8/1924. Thereafter, through deeds No. 17634, dated 26/09/1929, 15362 dated 26/2/1931 and 2342 dated 15/5/1974 executed by predecessors in title referred to in the pedigree of the Plaintiff, the Plaintiff became entitled to the said 1/3rd share. As per the said deeds said Albert had conveyed his rights to M.A. Richard Senaviratne and M.M. Don Andiris and said Senaviratne had conveyed his rights to said Andiris and at the end said Andrias has conveyed his rights to the Plaintiff.

ii. Plaintiff is not aware of the original owners of the remaining 2/3rd share or how that share devolved upon other co-owners.

iii. 1st, 2nd and 3rd Defendants were made parties as they are in occupation of the land claiming that they have rights to it, but the Plaintiff is unaware as to how they gained such rights.

iv. Though it was revealed through a search in the land registry that certain deeds have been executed in relation to the corpus, he could not ascertain how the rights in the corpus devolved on the executants of those deeds or their heirs.

Thus, the Plaintiff prayed for a partition decree to get his 1/3rd share partitioned.

1st, 2nd and 3rd Defendant Appellant Respondents (hereinafter referred to as the 1st,2nd and 3rd Defendants) filed their statement of claim and stated inter alia that;

I. Tepulangoda Mudiyanselage Oushadahamy was the original owner of the land by virtue of his possession for a long period.

II. As aforesaid Tepulangoda Mudiyanselage Oushadahamy died intestate leaving his estate requiring no administration, his son Tepulangoda Mudiyanselage Ratranhamy became the sole owner.

III. As said Tepulangoda Mudiyanselage Ratranhamy died leaving his estate requiring no administration, his son T.M. Kirimudiyanse became the owner of the entire corpus.

IV. As aforesaid T.M. Kirimudiyanse died intestate leaving his estate requiring no administration, his children Tepulangoda Mudiyanselage Ariyapala, Sumanawathie, Dayawathie, Karunadasa, Sumanapala, Leelawathie, Karunawathie, Seelawathie and Dharmadasa became the heirs but by a settlement among the family members, siblings of aforesaid Ariyapala renounced their rights for the benefit of said Ariyapala. Thus, said Ariyapala became the sole owner.

V. Aforesaid Tepulangoda Mudiyanselage Ariyapala died intestate leaving his estate requiring no administration and his wife 1st defendant Kandegedara Ralalage Podimenike and children Sudesh Prasanna (2nd Defendant) and Sujith Prasanna (3rd Defendant) became his heirs.

Thereby 2nd and 3rd Defendants became entitled to undivided ½ share of the corpus subject to the life interest of the 1st Defendant.

VI. Aforesaid Defendants and their predecessors have possessed the corpus undisturbed and uninterrupted for more than 10 years and they have got prescriptive rights in terms of Prescription Ordinance and they own the structure and plantation depicted in the plan No. 437.

1st, 2nd and 3rd Defendants prayed for the dismissal of the action or to partition the land between 2nd and 3rd Defendants subject to the life interest of the 1st Defendant.

A.G Kusumawathie, 1st Defendant Respondent Respondent who was the 4th Defendant before the District Court (hereinafter referred to as the 4th Defendant) filed her amended statement of claim on 29/10/2015 and stated inter alia that;

I. Tepulangoda Mudiyanselage Punchirala was the original owner of the land and he died intestate leaving his estate requiring no administration. Thus, his son Tepulangoda Mudiyanselage Mudalihamy alias Mudiyanse became the owner.

II. Aforesaid Mudalihamy alias Mudiyanse died intestate leaving his estate requiring no administration and his children Tepulangoda Mudiyanselage Punchimahaththaya, Mohottihamy, Appuhamy, Dingiri Menike and Podimenike each became entitled to undivided 1/5th share.

III. Aforesaid Appuhamy, out of his 1/5th conveyed 1/20th of the corpus to T.A. Haramanis Appu, W.A. Luis Appuhamy and to aforesaid Podimenike by deed No.11642 dated 22.06.1927.

Thereafter, the 4th Defendant in her amended statement of claim proceeded to describe her pedigree while referring to some family arrangements to indicate that she is entitled 23/30 of the corpus. This Court observes that the 4th Defendant originally filled her statement of claim along with 5th to 8th Defendants in the original Court who are the 2nd to 5th Defendant Respondent before this Court. In the said original statement of claim, there was no reference to the aforesaid Deed No.11642.

Action proceeded to trial on one admission and 13 points of contest recorded on 02.06.2009. The only admission so recorded clearly indicates that there was no dispute as to the identity of the corpus and the corpus is depicted in plan no.437 made by S.N. Senaratne L.S.

The Plaintiff gave evidence and marked all the deeds referred to in his pedigree in evidence as P1, P2, P3 and P4. Those deeds were marked without any objection. As per section 68 of the Partition Law, formal proof of the execution of any deed is not necessary where the genuineness of such deed is not impeached.

As per the decision in **Sri Lanka Ports Authority and Another V Jugolinija Boal East (1981) 1 Sri L R 18,** the documents for which the objections were not reiterated at the close of the opponent's case become evidence for all the purposes of the case. Moreover, section 3 of the Civil Procedure Code (Amendment) Act No.17 of 2022 confirms that such deeds not objected by the opposite party shall be admitted as evidence without further proof. The oldest deed P4 was executed in 1924. As per the evidence given by the Plaintiff, it appears his position is that even though he does not occupy the corpus he has enjoyed his rights by getting his share through produce of the corpus as well as when trees were sold taking the money according to his share. The Plaintiff has further stated that Ariyapala, father of the 1st, 2nd and 3rd Defendants, when putting up his house, cut Jak trees and due to his close friendship, he gave permission to cut those trees. The four boundaries found in the Schedules of the said deeds tally with the Corpus of this case. Thus, it is clear that the Plaintiff had placed sufficient evidence to show his paper title to 1/3rd of the Corpus through the evidence given before the District Judge.

The Position of the 1st, 2nd and 3rd Defendants as per their statement of claim seems to be that one Oushadahamy, the person they claimed as the original owner acquired title by long possession, in other words by prescription, and thereafter, others in their pedigree got title through succession. Section 3 of the Prescription Ordinance is the section that enables a party to an action get a decree on his prescriptive rights. Thus, a Plaintiff, a Defendant or an Intervenient may get a decree on his or her prescriptive title but it is questionable whether a Court can decree that a person who was not a party acquired prescriptive title somewhere in the past. [**see Punchi Rala V Andris Appuhami 3 SCR 149, K.D. Edwin Peeris V Kirilamaya 71 N L R 52, Terunnanse V Menike 1 N L R 200, Timothy David V Ibrahim 13 N L R 318, Kirihamy Muhandirama V Dingiri Appu 6 N L R 197, Raman Chetty et al V Mohideen 18 N L R 478**]. However, I do not intend to say that a party cannot tag on to the possession of his predecessors to claim prescriptive title. In fact, a party can. [see **Terunnanse v Menike 1 N L R 200, Wijesundara and others V Constantine Dasa and Another (1987) 2 Sri L R 66, Kirihamy Muhandirama V Dingiri Appu 6 N L R 197**]. What I wish to say is that it is doubtful, whether in terms of section 3 of the Prescription Ordinance, a Court can decree that the so-called original owner, Oushadahamy acquired title by prescription as part of its decree. Anyway, this Court need not go deep into this issue as there was no evidence acceptable before the learned District Judge to say that Oushadahamy was the sole original owner and his grandson Kirimudiyanse became the sole owner through inheritance after Rathranhamy, the son of Oushadahamy, as per the pedigree stated by the 1st to 3rd Defendants.

As per the statement of claim of the 1st to 3rd Defendants, Kirimudiyanse was the grandfather of 2nd and 3rd Defendants and father-in-law of the 1st Defendant. Dangaswela Pathirannehalage Piyasena and Nissanka Arachchilage Dhanapala, (the sons – in – law of aforesaid Kirimudiyanse) and 2nd Defendant, Sudesh Prasanne had given evidence on behalf of 1st, 2nd and 3rd Defendants. Dangaswela Pathirannehalage Piyasena in his evidence has clearly stated that aforesaid Kirimudiyanse was entitled only to 1/5th share of the corpus and that he does not know who is entitled to the balance 4/5th share. He was 80 years old when giving evidence and was the eldest among the witnesses for the 1st to 3rd Defendants. The 2nd Defendant was only 37 years when he was giving evidence. Though he has stated that said Piyasena, his own witness, had given false evidence (at page 143 of the brief), he admits that Piyasena had a better knowledge than him regarding the entitlements to the Corpus and what Piyasena had stated may be correct as he is elder than him- vide page 149 of the brief. The 2nd Defendant further states in his evidence that the Plaintiff and his father, Ariyapala had a relationship and he does not have knowledge regarding any arrangements with regard to property and transactions between them- vide pages 151 - 153 of the brief. Aforesaid Dhanapala while giving evidence admits that he knows only about the possession and not about the pedigree- vide page 164 of the brief, and he does not know regarding the rights of Kirimudiyanse. None of these witnesses of the 1st to 3rd Defendant has placed any acceptable evidence regarding the sole original ownership of Oushadahamy or thereafter of his son Ratharanhamy. In fact, due to the evidence of aforesaid Piyasena with regard to the ownership of 1/5th share of Kirimudiyanse, which is contrary to sole ownership of Kirimudiyanse at one time, it is difficult to accept the purported pedigree starting from original sole ownership of Oushadahamy as presented by the 1st to 3rd Defendants in their statement of claim as true. Even though, there is evidence to show that 1st to 3rd Defendants have occupied the corpus, due to the evidence relating to 1/5th share of Kirimudiyanse and lack of knowledge with regard to the relationship between Plaintiff and the father of the 2nd and 3rd Defendants regarding the property, it is difficult establish adverse possession to prove prescriptive title as claimed by the 1st to 3rd Defendants, where there is no evidence to show that there is something similar to ouster in relation to the other co-owners. The 1st to 3rd Defendants cannot claim prescriptive title in the abstract, it must be by possession adverse to the true ownership [see **Fernando V Wijesooriya et al. 48 N L R 320** and **I. De Silva V Commissioner General of Inland Revenue 80 N L R 292**]. True ownership revealed through evidence is the paper title of the Plaintiff and the co-ownership claimed by the 4th Defendant through a deed and inheritance which will be referred to later in this judgment. Now it seems that the 1st -3rd Defendants attempt to argue before this court that there was no proof of co-ownership by the Plaintiff. If they challenge the Co-ownership established through paper title, it is questionable

against whose true ownership they claimed prescriptive title. As per section 3 of the Prescription Ordinance it has to be through adverse possession to the title claimed by the opposite party. It must be further observed that the 2nd Defendant while giving evidence before the District Court, first had tried to avoid admitting that 4th Defendant Kusumawathie is a relative but later has admitted that 4th Defendant Kusumawathie belongs to the same Family indicating close relationship – vide page 141 of the brief. Perhaps, his attempt to hide the relationship may be an attempt to hide coownership. The learned District Judge has given the 1st to 3rd Defendants shares from the 1/5 share which was once belonged to Kirimudiyanse as revealed by their own witness Piyasena. As they are physically occupying the corpus, their possession must relate to a lawful right. Only lawful right that is seen from the evidence is the inheritance to the rights of said Kirimudiyanse.

The 4th Defendant giving evidence, has stated that the Plaintiff and she are co-owners and she has no objection for allotting 1/3rd share to the Plaintiff. She has also stated that the predecessors in title of the Plaintiff had rights in the corpus – vide pages 241 and 242 of the brief. She in her evidence refers to occasions where parts of produce were given to her and also to a dispute arose between 1st,2nd and 3rd Defendants and her regarding cutting of coconut trees- vide page 194 of the brief. The 4th Defendant has attempted in his evidence to establish a pedigree commencing from one Thepulangoda Mudiyanselage Punchirala and has marked a deed no.11642 dated 22.06.1927 relating to a share of 1/20th of the corpus. While giving evidence 4th Defendant has stated that Podimenike and Appuhamy in her pedigree had 1/5th each at one time.

The learned District Judge after the conclusion of the trial has delivered the judgment on 29/03/2017, allotting shares to the Plaintiff, 1st,2nd ,3rd and 4th Defendants as follows;

The Plaintiff -	1/3	=	60/180
1st Defendant -	1/90	=	2/180
2nd Defendant-	1/180	=	1/180
3rd Defendant-	1/180	=	1/180
4th Defendant-	13/60	=	39/180
Unallotted Shares;			
For Kirimudiyanse's children except Ariyapala	8/45	=	32/180

For two vendees in deed No.11642, namely Dingiri Menike(Sic) and Louis Appuhamy 2/60 = 6/180

Not proved for anyone 39/180

In her judgment, the learned District judge has found that;

- There is no dispute with regard to the identification of the corpus among the parties and it is depicted as Lot 1 in plan No.437 made by S.N. Senaratne, marked X.
- As per the contents of P4 which is a very old deed, at one time 1/3rd of the Corpus belonged to one Kukule Kankamalage Arnold Hamine and the said 1/3rd share devolved on the original owner mentioned in the pedigree of the Plaintiff, namely Nallagamage Albert due to the execution of deed marked P4. Thereafter, due to the execution of deeds marked P1, P2 and P3 said 1/3rd share now belongs to the Plaintiff.
- There is no evidence to establish that the original owner as described in the plaint, namely Oushadahamy had sole ownership to the corpus.
- Although 1st, 2nd and 3rd Defendants claimed that they have prescriptive rights to the entire corpus, witness Piyasena who gave evidence on behalf of them has stated that Kirimudiyanse who was the grandfather of 2nd and 3rd Defendants was entitled only to 1/5th share and the evidence clearly establishes that 4/5th share of the corpus belongs to others. They have not established that they have prescriptive rights to the corpus in entirety since there is no evidence of 10 years possession in terms of section 3 of the Prescription Ordinance after something similar to ouster regarding the other co-owners. Deeds No. 39617 and deed no. 31 establishes that Kirimudiyanse the predecessor of 1st to 3rd Defendants had a title to the corpus. Hence 1st, 2nd and 3rd Defendants are co-owners of the corpus and they get the 1/9th from the 1/5th share of Kirimudiyanse which was devolved on Ariyapala who was one of the 9 children Kirimudiyanse had. The balance 8/9th of the 1/5th of Kirimudiyanse's entitlement has to be kept unallotted for the other siblings of Ariyapala.
- There is a lack of acceptable evidence to come to a decision that at one time, Punchirala who has been described as the original owner by the statement of claim of the 4th Defendant was the sole owner of the corpus. However, Podimenike and Appuhamy in the said pedigree of the 4th Defendant had 1/5th each and Said Appuhamy had transferred 1/20th of the corpus to said Podimenike by deed No. 11642 marked 4V2. Hence, said Podimenike is entitled to 13/60th share

of the corpus which at the end has devolved on the 4th Defendant. The 2/60th conveyed to other two donees of 4V2, namely, Haramanis and Louis Appuhamy has to be unallotted for them or people who claims under them. (It appears that the name of Haramanis has been incorrectly mentioned in the share list contained in the Judgment as "Dingiri Menike")

- The balance 39/180th share has to be kept unallotted as entitlement of that share was not proved in favour of anyone.

Being aggrieved by the said Judgment, the 1st, 2nd, 3rd Defendants appealed to the Civil Appellate High Court of Rathnapura stating inter alia that:

- The learned District Judge has not investigated the title properly,
- Learned District Judge has not considered the evidence which established that 1st to 3rd Defendants have prescribe to the entire land.
- Learned District Judge has not evaluated the evidence properly,
- Learned District Judge has not considered the fact that when the pedigrees are different and when the parties claim on different original owners, possession by one owner cannot be considered as the possession by the other owners.

The 1st to 3rd Defendants prayed for to set aside the judgment dated 29/3/2017 and to grant the relief prayed for by them in their statement of claim or alternatively to order trial de novo.

The Civil Appellate High Court of Rathnapura delivered its judgment on 25/07/2018 setting aside the judgment of the learned District Judge dated 29/03/2018 and dismissed the partition action. Honourable High Court Judges have stated in his judgement inter alia that;

- It is clear that the Plaintiff, 1st to 3rd Defendants and 4th Defendant have claimed title to the Corpus in three separate pedigrees.
- The plaintiff has not disclosed who the original owner of the corpus was and a devolution of title from the Original Owner. He has shown a pedigree only for 1/3rd share of the Corpus. He has failed to show the common ownership among the Plaintiff and the Defendants.
- The Plaint has not complied with the sections 2,4, and 5 of the Partition Act and therefore, plaint should be rejected *in limine* in terms of section 7 of the Partition Act.
- Acceptance of 3 different pedigrees by the learned District Judge to order partitioning of the corpus is erroneous.

Further, the High Court held as follows;

"*The 1st, 2nd, 3rd Defendants and 4th Defendant have shown a relationship up to the Defendants but they were unable to establish their relationship and its connection to the land in partition by evidence. Although they stated that they were in possession it is uncertain whether it is permissive or prescriptive*".

As a result, the High Court decided that this land cannot be partitioned in accordance to the partition law and set aside the District Court judgment dated 29/03/2017 and dismissed the partition action but refused to grant reliefs "b" and "c" of the petition of appeal of the 1st to 3rd Defendants which prayed for a re-trial and relief as prayed for in their statement of claim.

Being aggrieved by the judgment of the Civil Appellate High Court, the Plaintiff sought leave to appeal from the Supreme Court and, on 25.06.2019 leave was granted on the four questions of law. The said questions of law will be mentioned in the latter part of this Judgment.

Even the learned High Court Judges have come to the conclusion that it is uncertain whether the possession of 1st to 3rd Defendants is permissive or prescriptive. In other words, they also have come to the conclusion that 1st to 3rd Defendants failed in proving prescriptive possession. 1st to 3rd Defendants have not appealed against this finding. On the other hand, as mentioned before, evidence given by their own witness has shown that Kirimudiyanse, the grandfather of the 2nd and 3rd Defendants, under whom they claim title to the whole land, had only 1/5th share in the corpus. No acceptable evidence has been placed to show that there was ouster or something similar to ouster in relation to the other co-owners who held the other 4/5th of the Corpus or in relation to the Plaintiff and the 4th Defendant who had shown common ownership through deeds, and thereafter, 1st to 3rd Defendants or their predecessors had commenced adverse possession and continued it for ten years. Neither have they shown that they or their predecessors came to the land in a subordinate character and through an overt act change the nature of their possession and commenced adverse possession and continued it for ten years. Thus, it is clear that the claim of title to the corpus through prescription by the 1st to 3rd Defendants cannot hold water.

Among the grounds given by the learned High Court Judges to set aside the Judgment of the District Court and dismiss the partition action, it is stated that the Plaint has not complied with the section 2,4 and 5 of the Partition Act and the Plaintiff has failed to reveal an original owner and devolution of title that flows from the original owner. Even the counsel for the 1st to 3rd Defendants in his written submissions has stated that it seems that the Plaintiff has complied with the said sections- vide paragraph 8 of the written submissions dated 14.12.202021. Thus, I need not elaborate much on those grounds. However, it is

worthwhile to make few observations on those grounds. It appears that no challenge has been made before the District Court on the ground that the Plaint was defective -vide points of contests raised on 02.06.2009. In K. **Vethavanam and Two Others V J Retnam 60 N L R 20**, which refers to a similar provision in a previous Partition Act, it was held that once a plaint is accepted and it is not exfacie defective, the Court has no power to reject it subsequently under section 7, read with section 4 of the Partition Act No.16 of 1951. It must be observed that in the present Partition Act, even when the Plaintiff does not show due diligence to prosecute the action, the Court may endeavour to compel the parties to bring the action to a termination and even permit a Defendant to prosecute the action as the Plaintiff- vide section 70(1). It shows that the scheme contemplated in the Act is to reach a finality whenever possible once an action is filed without dismissing based on the failures of the Plaintiff. As admitted by the Counsel for the 1st to 3rd Defendants' Counsel in his written submissions, there does not seem to be any exfacie defects in the plaint.

Section 2 of the Partition Act states that where any land belongs in common to two or more owners, any one or more of them, may institute an action for partition or sale of the land in accordance with the provisions of Law. Thus, any co-owner of a land can institute a partition action. The Plaintiff in his plaint has referred to the chain of deeds by which he claims 1/3rd of the land showing that he has only a share in the land and he has not revealed the entitlement to the balance 2/3rd of the land. He has made the Defendants who are there in the land parties to the action. The contents of the plaint clearly indicate that the Plaintiff claims him to be a co-owner but he does not know how the balance 2/3rd devolve on the other co-owners. I do not see any defect as far as section 2 is concerned.

Section 4(1)(c) of the Partition Act requires the Plaintiff to include in the plaint the names and addresses of all persons who are entitled to or claim to be entitled to any right, share, or interest to, of, or in that land or to any improvements made or effected on or to that land and the nature and extent of any such right, share or improvements, **so far as such particulars are known to the plaintiff or can be ascertained by him.** Section 4(1)(d) requires the Plaintiff to include in the plaint a statement setting out the devolution of title of the Plaintiff, and, **where possible**, the devolution of title of every other person disclosed in the plaint as a person entitled or claiming to be entitled to the land, or to any right, share or interest to, of, or in that land. Section 5 requires the Plaintiff to include in his plaint as parties to the action **all persons who to his knowledge** are entitled or claim to be entitled to any right, share, or interest to, of or in the land or to any improvement. The phrases that I have highlighted above indicate that what is expected from the Plaintiff is to reveal what he knows or what he can ascertain. The sections referred to above do not require

the Plaintiff to include in the plaint a devolution of title that commences from an original owner who had the sole ownership to the corpus or from original owners who had ownership to the entire corpus. It must be mentioned here that it is impractical and impossible to mention an original owner/ original owners who held the property in its entirety many generations ago unless such facts can be found on documents such as deeds or land registry entries because any other reference to such an original owner or original owners has to be depend on hearsay evidence and not on personal knowledge of the fact, and as such, on such occasions the Plaintiff may face difficulties in proving his pedigree. With regard to what is discussed above it is pertinent to note that Law does not compel one to do impossible things (Lex *non cogit ad impossiblia*). If one applies the said principle to the case at hand, law does not expect the Plaintiff to reveal what the Plaintiff does not know or cannot ascertain. Now I would prefer to refer to some case laws that has some relevancy to what was discussed above even though some of them were decided in terms of the Partition Ordinance which had similar provisions.

In **Sinchi Appu V Wijegunasekara 6 N L R 1,** it was held that a person claiming to be the owner of an undivided share of a land and to be therefore entitled to possession of it, is competent to maintain an action to have that partitioned. **Gunawardene V Baby Nona 47 N L R 31** also have expressed the same view. In **Appuhamy V Samaranayaka 19 N L R 403 at 405**, Sampayo J has expressed that section 2 of the Ordinance which requires the Plaintiff or Plaintiffs to state certain particulars in the plaint, including the names and residences of all the co-owners and mortgagees, expressly provides that this shall be done so far as the said matters or things or any of them shall be known to him or them.

It is important to state what was expressed in **Magilin Perera V Abraham Perera (1986) 2 Sri L R 208 at 210**.

"*When a partition action is instituted, the plaintiff must perforce indicate an original owner or owners of the land. A Plaintiff having to commence at some point, such owner or owners need not necessarily be the very first owner or owners and, even if it be so claimed, such claim need not necessarily and in every instance be correct because when such an original owner is shown it could theoretically and actually be possible to go back to still and earlier owner. Such questions being rooted in antiquity it would be correct to say as a general statement that it could be well nigh impossible to trace back the very first owner of the land. The fact that there was or may have been an original owner or owners in the same chain of title, prior to the one shown by the plaintiff if it be so established need not necessarily result in the case of the plaintiff failing. In like manner if it be seen that original owner is in point of fact someone lower down in the chain of title than the one shown by the plaintiff that again by itself need not ordinarily defeat the*

plaintiff's action. Therefore, in actual practice it is the usual, and in my view sensible, attitude of the Courts that it would not be reasonable to expect proof within very high degrees of probability on question such as those relating to the original ownership of land. Courts by and large countenance infirmities in this regard, if infirmities they be, in approach which is realistic rather than legalistic, as to do otherwise would be to put the relief given by partition decrees outside the reach of very many persons seeking to end their co-ownership."

The above show that with regard to matters relating to original ownership, Courts have to take a sensible and realistic approach. In the matter at hand, the Plaintiff has shown an original ownership for the 1/3rd he claims. It is not realistic to expect him to reveal what he does not know. He has made the 1st to 3rd Defendants who occupy the corpus as they may have a claim. The claim presented by the said 1st to 3rd Defendants is based on inheritance and prescription. Reasonable Court cannot expect that the Plaintiff could have ascertained the pedigree that gives them rights as it is not recorded anywhere. It must be noted that the partition Act provides for registration of *lis pendens*, public notice of institution of the action and notices for the claimants before the surveyor etc. to give notice of the action for anyone who has an interest in the corpus to come and present his claim.

In that backdrop, I do not find that said grounds that the plaint is not in accordance with the section 2,4 and 5 of the Partition Act and the Plaintiff has failed to disclose an original owner and devolution of title from the said original owner cannot be considered as viable grounds to hold that the decision of the High Court is correct. Partition action is intended to terminate the co-ownership. If the Plaintiff can prove that he is a co-owner and his share in the corpus through a pedigree presented to court, it is sufficient to get his share partitioned. It is not necessary to prove that co-ownership exist among Plaintiff and all the Defendants.

It is true that as learned High Court Judges have stated in their judgment that the Plaintiff,1st to 3rd Defendants and the 4th Defendants have claimed title to the corpus through three separate pedigrees but the finding of the learned High Court Judges that the learned District Judge accepted three different pedigrees cannot be considered as correct because the learned District judge has not accepted a pedigree commencing from the Oushadahamy or Punchirala who are the original owners in 1st to 3rd Defendants' pedigree and 4th Defendant's pedigree respectively. If the pedigree as presented by the 1st to 3rd Defendant and 4th Defendant were accepted then there could have been a conflict between pedigrees. Learned District Judge has accepted the pedigree of the Plaintiff for 1/3rd share which is based on title passed through deeds marked P1 to P4, which deeds were not challenged when tendered in evidence.

Thus, the learned District Judge has accepted the complete pedigree of the Plaintiff for the 1/3rd share he claims and found that Plaintiff is a co-owner in the corpus. Thus, there is a balance of another 2/3rd share in the corpus. Moreover, the learned District Judge, while denying the pedigree commencing from Oushadahamy to the whole land and prescriptive rights claimed by the 1st to 3rd Defendants, on the evidence before the court, has found that at one time, Kirimudiyanse was an owner for 1/5th share of the corpus as a co-owner. Aforesaid 1/5th share belongs to Kirimudiyanse could be accommodated within the aforesaid balance 2/3rd share. Considering the evidence placed before the District Court, similarly learned District Judge has not accepted the original ownership of Punchirala as per the pedigree of the 4th Defendant. Instead, the learned District Judge has come to the conclusion that at one time, Appuhamy and Podimenike mentioned in the pedigree of the 4th Defendant were entitled to 1/5th share each and at one time, they were co-owners. Aforesaid 2/5th share belonged to Appuhamy and Podimenike could be accommodated within the aforesaid balance 2/3rd share along with the 1/5th share belonged to Kirimudiyanse as a co-owner at one time. After considering the evidence placed before the District Court learned District Judge has decided that 1st to 3rd Defendants have inherited certain shares as mentioned in the District Court judgment. Thus, Part of the entitlement of Kirimudiyanse have devolved on the 1st to 3rd Defendants through Ariyapala, one of the children of Kirimudiyanse and rest of the share of Kirimudiyanse has been kept unallotted for the other children of Kirimudiyanse to be claimed by them or people who gain rights through them. Similarly, while taking into considering of the execution of deed marked 4V2 by Appuhamy, the learned District Judge has decided that 1/60 from the Corpus has been devolved on aforesaid Podimenike making her share entitlement 1/5+1/60= 13/60. The learned District Judge has decided that said 3/60th has devolved on the 4th Defendant through inheritance. The learned District Judge has kept the shares that should go to the other vendees in 4V2 unallotted in their name to be claimed later by them or people who gain rights through them. The learned District Judge has kept 39/180 share unallotted which includes the balance belonged to aforesaid Appuhamy after executing 4V2 and the share for which no original co-owner was proved. Thus, in my view, it is incorrect to say that the Learned District Judge has accepted three separate Pedigrees. What the learned District Judge has done was to allot shares as per the proved co-ownership and proved entitlements. In other words, the learned District Judge has accepted the original ownership for 1/3rd of one Arnoldhamine who was the predecessor in title to the original owner mentioned in the plaint and also accepted the Plaintiff's pedigree through which co-ownership for that 1/3rd share devolve on the Plaintiff. Further, it appears that the learned District Judge has considered on evidence before him that, at one time, Kirimudiyanse, Appuhamy and Podimenike had 1/5th each as original co-owners. Thus, the learned District Judge has decided to

allocate shares in the manner described in the Judgment of the District Court based on the proved co-ownership and share entitlements. This cannot be interpreted as acceptance of three different pedigrees as stated in the Judgment of the High Court.

The 1st to 3rd Respondents in their written submissions taken up the position that the Plaintiff failed to prove common ownership of the land. As mentioned before in this judgment, the Plaintiff has proved his pedigree and paper title to the corpus. The deeds (P1 to P4) he marked in that regard were not objected. As explained before in this judgment these deeds become evidence for all the purposes of this case and the said deeds establish that the Plaintiff has paper title to the corpus. As explained above, the prescriptive claim of the 1st to 3rd Defendants should fail. Thus, the Plaintiff's entitlement to the undivided 1/3rd has been established and hence his right to possess is also established – see **Leisha and another V Simon and another (2002) 1 Sri L R 148.** This evidence is sufficient to prove that the Plaintiff is a co-owner. It is not the task of the Plaintiff to prove who are the other co-owners, because by proving his entitlement is only to an undivided 1/3rd , the facts itself indicates that he is a co-owner with owners of other undivided 2/3rd of the corpus. However, the learned District Judge based on evidence has found that 1st to 3rd and 4th Defendants are co-owners to the Corpus.

For the reasons given above, the questions of law allowed by this Court on 25.06.2019, namely questions of law as mentioned in paragraph 16 (a)(e)(f) and (g) of the Petition dated 30.08.2018 can be answered as follows.

a) Is the determination of the High Court that the plaint should have been rejected *in limina* as Plaintiff has not complied with sections 2,4,5 and 7 of the Partition Act, is perverse and erroneous in law?

A. Answered in the affirmative.

e) Have the High Court Judges erred in law and in facts when the court decided that "the land cannot be partitioned as the Plaintiff has not disclosed the original owner of the land sought to be partitioned and devolution of title from the original owner?

A. Answered in the affirmative.

f) Have the High Court Judges erred in law and facts when they decided that learned District Judge erroneously accepted all three different devolutions of title to partition the land?

A. Answered in the Affirmative.

g) Has the High Court erred in law and facts when they decided that Plaintiff cannot maintain this action, in spite of the fact that Plaintiff has established that he has dominium to undivided 1/3rd share?

A. Answered in the Affirmative.

Hence, this Court decides to set aside the Judgment dated 25.07.2018 of the Civil Appellate High Court of Ratnapura while restoring the Judgment of the District Court.

This appeal is allowed with costs.

Judge of the Supreme Court

Buwaneka Aluwihare PC, J.

I agree.

Judge of the Supreme Court

Janak de Silva, J.

I agree.

Judge of the Supreme Court