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

1. Caroline Meriah Weeragunarathna
   Sahabandu of Kalahe, Wanchawala.

2. Don Claude Abeywardena
   Deniyawatte, Godakanda, Galle.

3. Don Herbert Abeywardena
   Badra Timber Sales Store,
   Indibedda, Moratuwa.

4. Don Gamini Abeywardene
   207/10, 1st Floor,
   Panchikawatta, Colombo 10.

5. Don Tissa Abeywardene
   No. 2, Guold, Perera Mawatha,
   Raththanapitiya, Boralesgamuwa.

PLAINTIFF

C.A 123/1992(F)
D.C. Galle P7089/P

Vs.

1. Obada Mudalige Ariyaratne Gunasinghe
   No. 94/4A, Thalakotuwawatte,
   Colombo 5.

2A. Don Herbert Abeywardena
   Badra Timber Sales Stores,
   Indibedda, Moratuwa.

3A. N. G. W. Madanayake
   Church Side, Kalahe, Wanchawala.

4A. Somawathie Weeraratne
   Church Side, Kalahe, Wanchawala.

5. Melegoda Gamage Piyananda
   Church Side, Kalahe, Wanchawala.

6. The Government Agent,
   The Government Agent's Office
   Galle.

7. Ceylon Electricity Board,
   Regional Office, Galle.

DEFENDANTS

AND NOW BETWEEN

3A. N. G. W. Madanayake
Church Side, Kalahe, Wanchawala.
(Deceased)

3A DEFENDANT-APPELLANT

3B. Don Keerthirama Tissa Abeywardena
Lewella, Kandy.

3B SUBSTITUTED-DEFENDANT-APPELLANT

3C. Don Jayantha Abeywardena
Church Side, Kalahe, Wanchawala.

3C SUBSTITUTED-DEFENDANT-APPELLANT

3D. Don Olson Abeywardena
Church Side, Kalahe, Wanchawala.

3D SUBSTITUTED-DEFENDANT-APPELLANT

3E. D. R. Abeywardena
Church Side, Kalahe, Wanchawala.

3E SUBSTITUTED-DEFENDANT-APPELLANT

3F. D. V. Abeywardena
Church Side, Kalahe, Wanchawala.

3F SUBSTITUTED-DEFENDANT-APPELLANT

3G. D. H. Abeywardena

3G SUBSTITUTED-DEFENDANT-APPELLANT

Vs.

1. Caroline Meriah Weeragunarathna
Sahabandu of Kalahe, Wanchawala.

2. Don Claude Abeywardena
Deniyawatte, Godakanda, Galle.

3. Don Herbert Abeywardena
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207/10, 1st Floor,
Panchikawatta, Colombo 10.

5. Don Tissa Abeywardene
No. 2, Guold, Perera Mawatha,
Raththanapitiya, Boralesgamuwa.

PLAINTIFF-RESPONDENTS

6. Obada Mudalige Ariyaratne Gunasinghe
No. 94/4A, Thalakotuwawatte,
Colombo 5.
(Ddeceased)

1ST DEFENDANT-RESPONDNET

7. Dehiwala Liyanage Gunadasa
Liyanage Trade Centre,
Kurundugaha Hethakma, Elpitiya.

1A DEFENDANT-RESPONDNET

8. Dehiwala Liyanage Ruchira Arunodaka
Liyanage Trade Centre,
Kurundugaha Hethakma, Elpitiya.

1B DEFENDANT-RESPONDNET

9. Don Herbert Abeywardena
Badra Timber Sales Stores,
Indibedda, Moratuwa.

2A DEFENDANT-RESPONDENT

9. Somawathie Weeraratne
Church Side, Kalahe, Wanchawala.

4A DEFENDANT-RESPONDENT

11. Melegoda Gamage Piyananda
Church Side, Kalahe, Wanchawala.

5TH DEFENDANT-RESPONDENT

12. The Government Agent,
The Government Agent's Office
Galle.

6TH DEFENDANT-RESPONDENT

13. Ceylon Electricity Board,
Regional Office, Galle.

7TH DEFENDANT-RESPONDNET

BEFORE: Anil Gooneratne J.

COUNSEL: Ananda Kasturiarachchi with Y. Wijesundera and Janaka Ratnayake for the 3A Defendant-Appellant

Vidura Ranawaka with Chinthaka Kohomban For the Plaintiff-Respondents

Nawan de Silva for the Substituted 1st Defendant-Respondent

ARGUED ON: 02.11.2012

DECIDED ON: 04.03.2013

GOONERATNE J.

This is an appeal from a partition case where judgment was delivered by the learned District Judge on or about 20.2.1992. It is very unfortunate that several years lapsed without reaching any finality to the case itself, though the Court of Appeal by its judgment of 17.12.1996 dismissed the appeal and affirmed the judgment of the learned District Judge. However at the hearing of the appeal (as recorded) on 17.12.1996, the Appellant was absent and unrepresented, and counsel appeared for the Respondent. In that judgment, Justice Ranaraja, states that the District Judge has held that the devolution of title set out in the plaint prevails over that set out by the 1st and 4th Defendants in their statement of claim. It is also

recorded in the judgment that the 3rd Defendant who was later substituted by his son, in the statement of claim accepted the devolution of title set out in the statement of claim of the 1st & 4th Defendants. Justice Ranaraja had considered the merits and dismissed the appeal, but the Supreme Court had granted special leave to appeal from the judgment of the Court of Appeal and had set aside the judgment of the Court of Appeal dated 17.12.1996 on the basis that judgment was entered without hearing the parties and remitted the case back to the Court of Appeal on or about 19.2.1998.

This court observes that apart from the oral hearing of this appeal on 2.11.2012 parties have filed written submissions more than once in the Appeal Court, and previously argued the case and concluded each others oral submissions. Having perused the written submissions of 11.6.2011 the Appellant focus mainly on a question whether the trial judge who pronounced the judgment could have done so because he has retired from service but the Judicial Service Commission had appointed retired Judge C.P.L. Alwis to hear and conclude the case. Several case laws and constitutional provisions are cited. Written Submissions of Appellant of 28.8.2008 is a detailed submission where 3rd Defendant-Appellant's position, Plaintiff's version, deed P8 and points of contest 1 – 17 have been dealt with by the Appellant from his point of view. Those submissions

consider inter alia several lapses in the judgment of the District Court. In the oral and written submissions (7.1.2012) the learned counsel for the Appellant contends inter alia that there is no analysis of evidence. Oral evidence have not been considered. Very briefly the following points are urged.

(a) Court has not considered Defendant's documents. 1st – 4th Defendants have not tendered their documents. Appellant state any party is entitled to rely on documents of another Defendant. But at the trail 1V1 to 1V7 was produced. There is some confusion as the Appellant point out that by Journal Entry 87/88 when 1st – 4th Defendants tendered documents to court.

(b) Delay in delivering judgment – Delay of 23 months (almost 2 years)

(c) Answer to points of contest No. 11 Res Judicata – Plea of Res Judicata must be expressly pleaded and put in issue.

The judgment of retired District Judge is no doubt a bare judgment but the judge has in his own way attempted and answered all the points of contest. I do agree with the learned Counsel for Appellant that the judgment is not strictly in conformity with Section 187 of the Civil Procedure Code. Points of contest No 1 & 2 are answered in the affirmative based only on documentary evidence. It refer to deed P8, P6 (plaint) and deed 1V1. Trial Judge has also considered deed P5, P6 (plaint) and given his mind to same and also state fiscals transfer by deed 1V1 not disputed by parties.

The admissions recorded in the case indicates that lots 5 & 6 as described in the amended plaint and in it's pedigree, Bodara Gamage

Abraham Gunasekera became entitled to same in 1925. It is also admitted that on the death of the said person his son was appointed as administrator to his father's estate as in case No. 6196 (D.C. Galle). Deed P8 was relied upon by Plaintiff and gives details of devolution of title. In deed p8 it is stated that the above B.G.A. Gunasekera purchased the property in question and held it in trust for Don Carolis Abeywardena until the purchase price was paid to Gunasekera by Don Carolis Abeywardena. The said Don Carolis Abeywardena paid the purchase price and the amount due, but Bodara Gamage Abraham Gunasekera died intestate before transferring the land to Don Carolis Abeywardena. The learned District Judge having considered P6 (Plaint) has answered points of contest No.1 in the affirmative. Also points of contests 2 & 3 in the affirmative. In arriving at this decision the trial judge may or may have not relied upon oral evidence. As such by P8, P7, P6, P5, those points of contests 1 – 3 seems to be answered in the affirmative though the description and details given by the trial judge is confined to documentary proof. Trial judge is entitled to arrive at such a decision. However Appellant is critical as regards points of contest No. 3 and it's answer by court. In this regard the learned District Judge also refer to deed 1V1 and states there is no dispute on same.

P7 is the Decree Nisi and Decree Absolute in case No. 34935 Galle. Based on P7 alone points of contest 3 & 4 answered in the affirmative (without a contest). Even points of contest 5 had been answered in the affirmative. This is so in view of the answer given to points of contest No. 3. Deed P8 an administrative conveyance had been utilized to answer points of contest No. 6. I do not think that it is arguable that in the absence of oral evidence being considered the answer given by the trial judge to points of contest 1 – 6 need to be or could be rejected. The documents give details and no doubt build the case of the Plaintiff. All the documents of Plaintiff were marked in evidence without any objections, and as such documents and deeds over 30 years above can be admitted as proof.

At this point I wish to observe that exclusions of oral by documentary evidence as in Section 91 – 99 of the Evidence Ordinance is a rule a court often has to consider. The extent to which the document operates so as to exclude oral testimony on matters to which the document relates are important matters for a court of law to keep in mind so long as a trial is in progress. Therefore the trial judge's approach cannot be rejected in toto. There is a long line of decided cases where extrinsic evidence is inadmissible to supercede a document 21 NLR 234;17 NLR 56; 24 NLR

487; 41 NLR 512; 45 NLR 532. However I observe that there are exception to the rule in Section 91, 92etc of the Evidence Ordinance.

There is something very important in this partition suit, which the trial judge has given his mind, i.e the question whether the administrators conveyance (P8) or the fiscal conveyance No. 20396 has validity. In this regard I would incorporate that part of the judgment for purposes of clarity.

A Fiscals conveyance is consequent to the Decree in D.C Galle Case No. 31661 filed in respect of a Mortgage Bond. The court considers the Mortgage Bond and liabilities of parties. But in case No. 34935 the issue was one of ownership. That was between Carolis Abeywardena and Abraham Gunasekera and the action was registered in D353/237 in May 1936. (Lis Pendens). The Fiscal's Conveyance is dated 16.9.1936 and the purchaser should have been aware long before that, there was no title in favour of Abraham Gunasekera to be purchased after seizure and sale on the Mortgage Bond. Deed No. 20596 conveyed therefore no title and was not worth the paper written upon. Points of contest 7 and 8 and answered in the affirmative in favour of Plaintiff.

I have expressed views above as to how a document need to be considered and the exclusion of oral evidence. However, I am unable to agree to the answer to points of contest No. 7 & 8. Does the conveyance on a mortgage case take priority over a case based on deed, being No. 24935?

This court is mindful of points of contest No. 8, based on prescriptive rights of parties. Such an issue cannot be considered lightly. A party may succeed on paper title but that alone may not suffice. Any court

need to consider the ingredients of Section 3 of the Prescription Ordinance in relation to each parties rights and decide whether evidence by way of each parties rights are established by strong evidence to satisfy the matters needed to be established under Section 3 of the Prescription Ordinance. In the context of the said Section 3 strong oral evidence should never be ignored or be sacrificed for documentary proof. I will demonstrate this aspect by reference to the following case law, which has influenced my decision which runs contrary to the trial judge's answer to points of contest No.8.

Prescription. The foundation of prescription is that one man has the right to possession while another enjoys the possession without right. If the former having the right to interfere fails to do so within the time limited by law, the latter acquires by prescription the right to that which he has so long without right enjoyed. Per Wendt, J. 9 N.L.R at 271. There are two points regarding the law of prescription that should be always well-borne in mind; the first that a possessor is always presumed to hold in his own right and as proprietor until the contrary is established, the second that, the contrary being once established and it being shown that the possession commenced by virtue of some other title such as that of tenant or planter then the possessor is presumed to continue to hold on the same terms until he distinctly proves that his title has been changed. 1860-62 Ram. 145. See 10 N.L.R 183 F.B.; 7 N.L.R. 91 P.C. By ten years prescriptive possession the possessor acquires not merely the right to continue holding the land against the person who had the dominium when that possession began but a title of which he can only be divested in one of the modes recognized by law. Once a prescriptive title is acquired the consideration whether the holder of it is or is not in possession is as immaterial as if the title was by deed. 7 N.L.R. at 175. Prescription can be established not only by direct possession but also by possession through a lessee. 26 N.L.R 87. In all cases of prescription there must be a denial of title, an exclusion of the contesting owner and an adverse possession. 6 C.W.R. at 225.

This court observes that the question of prescriptive rights of parties cannot be established on paper title alone, if oral evidence has been placed before court on adverse and independent possession, by the Defendant party. This is something the trial judge should have examined and given his mind and given cogent reasons to support his answer to points of contest No. 8.

Points of contest 9 and 10 refer to plan and building in the manner pleaded. A mechanical process should not be adopted to answer those points of contest without relevance to oral testimony. The oral testimony need to be analysed and if necessary compared with documentary proof, even if the trial judge is inclined to favous Plaintiff's version. In this judgment this court is compelled to comment on both oral and documentary evidence since in a partition suit a court is obliged to investigate title of each party, by both oral and documentary evidence. What happened to Defendant's documents? Does by examination of deed 1V1 any rights pass to deeds P8 to P16? The 3rd Defendant's oral testimony need to have been considered as regards occupation of the house. Was any consent given by Plaintiff to 3rd Defendant to occupy the house? What about deed 3D1. (Report X 3, plantation claimed by 3rd Defendant). Trial judge should have considered whether the 3rd Defendant is entitled to half share of lot 5 and the

share to the building and plantation and given reasons, to reject or accept. Bare answers entertain doubts.

As regards points of contest 11, 12 - 13 – 17 has been answered as does not arise. Such answers are provided by the trial judge in view of his answer to points of contest 1 – 10. However the doubt that arise is whether the trial judge had properly examined, title of each party?

The learned counsel for Plaintiff-Respondent supported the judgment of the learned District Judge and relied in his submissions to the several answers given by the trial judge to the several points of contest. He also contended that even though a delay in delivering the judgment is observed that judgment cannot be faulted in any material aspect. I have considered the submissions of learned counsel who supported the judgment of the District Judge.

There has been much emphasis of a retired judge writing the judgment. Perusal of the proceedings indicate that judge, C.P.L de Alwis had the opportunity to hear evidence and good part of the trial was before him. However having reached the age of retirement the trial judge was not in service when he wrote the judgment. There had been numerous instances where retired judges were invited by the Judicial Service Commission to hear cases on an acting basis. I do not wish to do any research on any

constitutional aspect but on this ground the judgment should not be set aside. However what troubles this court is the delay of almost 2 years to pronounce the judgment. I have to consider such delay and this court is bound to follow and adopt the dicta in the following case laws:

Kulatunga v. Samarasinghe 1990 (1) SLR 244..

A judgment delivered two yeas and four months after the tender of written submissions cannot stand. The case depended on the oral testimonies of witnesses. The impression created by the witnesses on the judge is bound to have faded away after such a long delay. The learned judge was bound to have lost the advantage of the impressions created by the witnesses whom he saw and heard and his recollections of the fine points in the case would have faded form his memory by the time he comes to write the judgment.

Saravanamuttu Vs. Saravanamuttu 61 NLR 01

In a case which turns on the impressions created by the oral evidence of witnesses it is important that the trial Judge should write his judgment without undue delay.

Edwin Vs. De Silva 62 NLR 44

At pg. 46...

Learned counsel for the respondent urged that we should adopt the course of sending this case back to the lower court so that the Judge may pronounce and date the judgment in accordance with the requirements of the Civil Procedure Code as the trial had extended over a period of nearly two years and it would cause hardship to the parties if a retrial is ordered at this stage. We are unable to accede to that request, for quite apart form the legal defect there is the very unsatisfactory feature that the judgment was written by the Judge who heard the case more than fifteen moths after the termination of the trial. Even

if the Judge refreshed his memory of the facts by reading the typescript of the evidence after such a long interval of time he is bond to have lost the advantage of seeing and hearing the witnesses give evidence and the impression created by them could no longer be vivid in his mind. A judgment of a Judge of first instance based on a mere reading of the typescript is not of the same value to this court as a judgment delivered while the recollection of the trial and of the demeanor and attitude of the witnesses and the impression created by them on him are fresh in his mind. In our view the judgment must be set aside and the case should go back for a retrial. We accordingly set aside the judgment and decree and direct that the case should be sent back for a trial de novo

When I perused the docket I found that at a certain stage – vide journal entry of 28.2.2003 all parties agreed to a certain formula and thought it fit to settle this case and agreed to have even deeds being prepared pending partition, and the 3rd Defendant-Appellant would consider the withdrawal of the appeal. It is unfortunate that this settlement had not gone through. In a case that had a history and the evidence led at the trial would indicate that original deeds had been executed all most nearing a century ago. To litigate in this manner in a partition case may not be something novel, but that may be the aspiration of parties to cling on to portions of land where even their next generation would be at a disadvantage.

Nevertheless the judgment delivered though identified a vital point, does create some doubts as to whether in fact title was properly and correctly investigated. It is incumbent on court in a partition suit under

Section 25(1) of the Partition Law to examine the title of each party, and the right, share or interest of or in the land of each party. Even to compromise, an investigation would be necessary. In Faleel Vs. Agreen and Others C.A 102/93 F. It was held. It is the obligation of the trial judge to investigate title first and having been satisfied that the parties before it alone have interest in the land and thereafter allow the parties to compromise their dispute vide 43 NLR 265.

In all the above facts and circumstances of this case I am reluctantly compelled to set aside the judgment of the trial judge and send the case back to the District Court. The District Judge need to explore the possibility of reaching a compromise between parties prior to commencing trial de nova. Judgment set aside – case sent back to the District Court.

Re-trial ordered.

JUDGE OF THE COURT OF APPEAL