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

1. W. Missilin
   Aramanagolla
   Horana
   1st Defendnt-Appellant

Vs

C.A.NO.1068/98 (F)
D.C.HORANA CASE NO.4993/P

1. W. D. Wilbert Appuhamy
   Temple Road, Yalagala
   Haltota
   Plaintiff-Respondent

2. W. Dayawathie
   Adhistana Nursery, Aramanagolla
   Horana
   Deceased 2nd Defendant-Respondent

2A. Danwaththa Liyanage Wales Perera
   Adhistana Nursery,
   Aramanagolla,
   Horana **and others**
   Substituted-Defendant-Respondents

3. Somapala Rodrigo
   Kandanhena, Horana.
   3rd Defendant-Respondent

BEFORE	:	**K.T.CHITRASIRI, J.**
COUNSEL	:	Daphne Peiris with Champika Rodrigo for the 1st Defendant-Appellant Chathura Galhena with Manoja Gunawardana for the Plaintiff-Respondent
ARGUED ON	:	05. 02. 2014
WRITTEN SUBMISSIONS FILED ON	:	03.04.2014 by the 1st Defendant-Appellant Not filed by the respondents
DECIDED ON	:	29.04.2014

CHITRASIRI, J.

This is an appeal filed by the 1st Defendant-Appellant (hereinafter referred to as the appellant) seeking to set aside the judgment dated 25.9.1998 of the learned District Judge of Horana. In the petition of appeal, no other substantive relief is sought by the appellant except for the claim as to the costs of this appeal. However, in the written submissions dated 03.04.2014, learned Counsel for the appellant has invited this Court to make an order granting due relief to the appellant considering her prescriptive rights. (vide at last page of the submissions)

This is a case where the plaintiff sought to have the land referred in the Plan bearing No.2575 dated 19.01.1994, marked "X", partitioned. At the commencement of the trial, parties to the action have admitted that the land sought to be partitioned is the land depicted in the aforesaid Plan marked "X". (vide at page 96 in the appeal brief) Admittedly, the original owner of the land in suit was Bando Singho who is the father of the plaintiff, the 2nd defendant-respondent and of the 1st defendant-appellant. 3rd defendant-respondent is the son of the appellant. Aforesaid Bando Singho became entitled to the land sought to be partitioned by virtue of the decree entered in the partition action 3507/P filed in the District Court of Panadura. He has transferred 1/2 share of the land with the house found thereon, to the plaintiff by deed 969 marked P2. The balance 1/2 share had devolved on to his wife and to the six children. Two of his children namely, Seelin and Karunawathie had transferred their entitlement

to their sister who is the 2nd defendant by deed 580 marked 2V1. The 2nd defendant Dayawathie had transferred her entitlement that derived from her father's rights to the 3rd defendant by deed 223 marked 3V1. Another child of Bando Singho has transferred 1/2 of her entitlement to the plaintiff by deed 7717 marked P3. Remaining share of the land also had been purchased by the plaintiff by deed 461 marked P4. Accordingly, the plaintiff became entitled to 20/24 shares of the land whilst the balance 4/20 shares had devolved on to the 1st, 2nd and the 3rd defendants in the following manner.

1/24 to the 1st defendant,

2/24 to the 2nd defendant,

1/24 to the 3rd defendant.

The said devolution of title has not been disputed and accordingly the learned District Judge has allocated the shares in the manner referred to above.

At this stage, it is necessary to note that the only issue before the learned trial judge had been the claim made by the appellant to the building found on the corpus and to the plantation found thereon, as opposed to the claim by the plaintiff-respondent to the said building and to the plantation. Accordingly, the issue bearing No.7 had been raised on behalf of the appellant and the 3rd defendant-respondent, who are the mother and the son, in order to have an order in their favour in respect of the said building and the plantation. **They have not claimed before the learned District Judge any prescriptive rights to the land sought to be partitioned. Not even an issue had been raised by**

them to claim prescriptive rights to the land sought to be partitioned. In the circumstances, it is clear that the parties to the action, particularly the plaintiff-respondent had conducted the case to meet the aforesaid issue raised by the respective parties with regard to the house and the plantation and not to meet a prescriptive claim of the appellant.

Under those circumstances, it is clear that the parties were not required to elicit evidence as to a claim of prescription. In the absence of such evidence, it is incorrect for this Court to have reviewed the impugned decision at this appeal stage, looking at a claim of prescription without giving an opportunity for the opposing parties to meet such a claim. The appellant cannot set up a case at this appeal stage different to the case that she has made out in the trial court. However, even the appellant, in her evidence has not uttered a word claiming prescriptive title to the land sought to be partitioned. Hence, this Court exercising an appellate jurisdiction cannot consider a claim of prescription that had not been set up in the lower Court.

The aforementioned position in law had been exhaustively discussed in the case of Gunawardena V. Deraniyagala and others. [2010 (1) S L R 309] In that decision, it was held thus by the Supreme Court.

"It is not open to a party to put forward a ground for the first time in appeal, if the said point has not been raised at the trial under the issues so framed.

The appellate Court may consider a point raised for the first time in appeal, where the point might have been put forward in the Court below under one of the issues raised and where the Court has before it all the material that is required to decide the question."

In Somawathie V Wilmon and others, [2010 (10 S L R 128] once again the Supreme Court has held as follows.

1) A new ground cannot be considered for the first time in appeal, if the said new ground has not been raised at the trial under the issues so framed. However, the Appellate Court could consider a point raised for the first time in appeal if the following requirements are fulfilled.

a) The question raised for the first time in appeal, is a pure question of law and is not a mixed question of law and fact.

b) The question raised for the first time in appeal, is an issue put forward in the Court below, under one of the issues raised, and

c) The Court which hears the appeal has before it all the material that is required to decide the question.

In the circumstances, the authorities referred to above does not permit this Court, it being an appellate Court to grant relief to the appellant relying upon her prescriptive claim because it is not a matter that has been raised as an issue in the Court below. Hence, I am not inclined to allow this appeal.

However, as an academic exercise, I have perused the evidence of the appellant and of the 3rd defendant-respondent, in order to ascertain whether there is evidence to establish the purported claim of prescription of the appellant. The appellant, in her evidence-in-chief has claimed only the house and the plantation found on the land. Even though such a claim has been made at this appeal stage, she has failed to support such a claim in her evidence. Her evidence in respect of the said house claimed by her was that it was built by her father who is the father of the plaintiff and the 2nd defendant-respondents as well. She also has admitted that two rooms of that house built by the father are still in existence though she has renovated the same subsequently. Such evidence certainly will not help the appellant to claim prescriptive rights even to the house. Even the 3rd defendant-respondent who is the son of the appellant has not given evidence to support the appellant's claim of prescription. To the contrary, he in his evidence has admitted that the plaintiff became entitled to a share of this land by the deed marked P4. (*vide proceedings at page 164 in the appeal brief*).

More importantly, it must be noted that the appellant, being a co-owner to the land sought to be partitioned should establish an overt act evicting the other co-owners, if she is to claim prescriptive rights to the land. Admittedly, no evidence is forthcoming to establish an overt act. Therefore, the appellant in any event, cannot maintain a claim of prescription to the land sought to be partitioned in the absence of such evidence.

For the aforesaid reasons, I am not inclined to grant relief to the appellant relying upon the law of prescription. Furthermore, nothing was argued as to the correctness of the share allocation of the learned District Judge. Accordingly, I do not see any merit in this appeal.

For the aforesaid reasons, this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL