

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

Etin Epitawela of "Bambaraudula"  
Of Temple Road,  
Mahawewa - 61200.

**Plaintiff - Appellant**

**CA No. 684/97 (F)**

**D.C. Marawila Case No. 249/P**

**Vs**

Embuldeniyage Dona Susilawathie  
Wickremanayake  
Of Temple Road  
Mahawewa - 61220

**Defendant-Respondent**

**BEFORE**

: Deepali Wijesundera J.

M.M.A. Gaffoor J.

**COUNSEL**

: Bimal Rajapaksha with Muditha

Perera for the Plaintiff-Appellant

Sudarshani Cooray for the

Defendant-Respondent

**ARGUED ON**

: 07<sup>th</sup> September, 2015

**DECIDED ON**

: 03<sup>rd</sup> February, 2016

**Deepali Wijesundera J.**

The appellant had filed a partition case to partition a land described in the schedule to the plaint in the District Court of Marawila. The appellant had claimed an undivided 21/32 shares of the corpus and the respondent had claimed ½ share of the land. After trial the learned District Judge has delivered his judgment on 04/04/1997 dismissing the plaintiff's action. The plaintiff appellant has filed the instant application against the said judgment.

The appellant referring to the decided cases argued that the learned District Judge failed to observe that the respondent relied upon an amicable partition without a partition plan signed by all the co-owners consenting to such decision. Citing the judgments of ***Githohamy vs Karanagoda 56 NLR 250 and Dias vs Dias 61 NLR 116 and Maria Perera vs Albert Perera 1983 2 SLLR 399***, the appellant stated that there were no deeds of partition or cross deeds exchanged between the parties being co-owners to the corpus. He stated that the deed submitted to the District Court shows that the predecessors in title to land had no intention of terminating co-ownership.

The appellant submitted that the lots 1 and 2 in plan marked X in the District Court is not separated by a distinct boundary and that the fence shown is a travelling fence and stated that the appellant was subjected to lengthy cross examination on these issues at the trial. He further stated that the respondent in evidence stated the fence was ten to fifteen years old and her husband has stated it was over twenty years and may be forty to fifty years old but the surveyor in evidence stated that the trees framing the boundary was four to five years old.

The learned counsel for the defendant respondent argued that the defendant respondent possessed a divided portion of the corpus which is lot 1 in plan marked X and that her possession is undisturbed and uninterrupted for a period of more than ten years. The defendant respondent stated that she moved for prescriptive title to the said lot 1 and to prove it deeds V3 and V4 were produced which showed that the defendant owned ½ share of the disputed land.

The respondent citing the judgments in **Selenchi Appuhamy vs Livinia 9 NLR 59** and **Mensin Nona vs Nimal Hamy 10 LLR 159** submitted that a partition action is not maintainable if there was no common possession between the co-owners and the land possessed by

each co-owner for a period of over ten years entitles that co-owner to claim prescriptive title to the said partition of land.

On perusal of the learned District Judge's judgment it could be seen that he has only taken into consideration the deeds **V3 and V4** marked by the defendant respondent at the trial. If the defendant respondent had title deeds and possessed an undivided share for more than ten years there should have been a partition plan to show the land divided between the parties. There was contradicting evidence regarding the boundary which the respondent claimed divided the two blocks of land. The District Judge has failed to consider the evidence regarding the division. If the District Judge relied on an amicable portion he should have called for a partition plan signed by the co-owners. The evidence and the surveyor's report and plan shows that the parties occupies two separate blocks of land but this does not mean they occupied the land after the said land was amicably partitioned. The plaintiff appellant had filed the partition action to partition the corpus. The learned District Judge has failed to consider the plaintiff appellant's evidence and only considered the defendant respondent's evidence in his judgment. The evidence placed before the District Judge has not been properly evaluated which amounts to a miscarriage of justice.

For the afore stated reasons I decide to vacate the judgment of the learned District Judge of Marawila dated 04/04/1997 and order a re trial.

**JUDGE OF THE COURT OF APPEAL**

**M.M.A. Gaffoor J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**