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

Meththananda Ponnamperumage
Dahanayake,
Niladeniya, Hapugala,
Galle.

Case No. 1340/99(F)

SUBSTITUTED-PLAINTIFF-APPELLANT

D.C. Galle No. 9372/P

Vs.

1A. Nanayakkarawasam Kalupahana
Liyanage Susantha Dias,
Sri Lanka Army Engineer Regiment,
Army Camp, Polgasowita, Maththegoda.

1B. Nanayakkarawasam Kalupahana
Liyanage Chamari Dias,
Assistant Engineer,
Ceylon Water Board, Supply Division,
Ratmalana.

1C. Nanayakkarawasam Kalupahana
Liyanage Thusitha Dias,
No. 29/1, Vijanada Mawatha, Weliwita,
Galle.

SUBSTITUTED-DEFENDANTS-RESPONDENTS

2. Kariyawasam Majuwanage Agnas alias Karunawathie,

   Hapugala,

   Galle.

3. L. Kalansooriya,

   'Lalitha',

   Batuwantudawa,

   Wakwella.

DEFENDANTS-RESPONDENTS

Before: M.M.A. Gaffoor J.

Janak De Silva J.

Counsel: Rohan Sahabandu P.C. with Surekha D. Withanage for Substituted-Plaintiff-Appellant

Vidura Gunaratne with M.D.J. Bandara for 2nd Defendant-Respondent

Written Submissions tendered on: Substituted-Plaintiff-Appellant on 2nd October 2017

2nd Defendant-Respondent on 1st July 2013, 2nd October 2017

Argued on: 2nd August 2017

Decided on: 14th November 2017

Janak De Silva J.

The original plaintiff (hereinafter referred to as "plaintiff") Herbert Colin Dahanayake filed the above action in the District Court of Galle seeking to partition the land called Rukattana Gaha Henabedda alias Beraliyadolawatta half portion containing in extent A.7 R. 2 P. 0 situated at Hapugala in the district of Galle.

The parties did not dispute the identity of the corpus. It was admitted that the corpus is depicted as lots 2 to 6 in plan no. 35 prepared by licensed surveyor Sisira Amendra. The dispute revolved on the title to the corpus.

The plaintiff claimed paper title and submitted that 1120/1200 share of the corpus should be allotted to him while the balance 80/1200 share should be allotted to the original 1st defendant, Nanayakkarawasam Kalupahana Liyanage Cyril Dias (hereinafter referred to as "1st defendant"). He further stated that the 2nd defendant-respondent (hereinafter referred to as "2nd defendant") is made a party to the action to give notice of the action as she is in unlawful occupation of the corpus.

The 2nd defendant claimed that she was in possession of the corpus from 1948 and thereby claimed prescriptive title. She sought a dismissal of the plaintiff's action.

The learned District Judge of Galle held that the 2nd defendant had established prescriptive title to the corpus and dismissed the action with costs. Hence this appeal by the plaintiff. The plaintiff moves that the judgment of the learned District Judge dated 7th July 1999 be set aside and judgment be entered as prayed for in the plaint.

Two grounds have been urged on behalf of the substituted-plaintiff-appellant (hereinafter referred to as "appellant") to assail the judgment of the learned District Judge. Firstly, it is submitted that it is a perfunctory judgment which fails to comply with Section 187 of the Civil Procedure Code. Secondly, it is submitted that the learned District Judge has failed to investigate title as required by law.

Perfunctory Judgment

The appellant submits that the learned District Judge has failed to comply with Section 187 of the Civil Procedure Code. This mandates that a judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. Bare answers to issues or points of contest-whatever may be the name given to them-are insufficient unless all matters which arise for decision under each head are examined.[1] Evidence germane to

[1] L.W. De Silva A.J. in *Dona Lucihamy v. Ciciliyanahamy* 59 N.L.R. 214 at 216

each issue must be reviewed or examined.[2] Answering only points of contest raised by one party in a partition action and failing to consider the points of contest raised by other parties amounts to denial of justice to the latter parties for no fault of theirs. Failure to consider the deeds and other documents produced by the respondents at the trial leads to the conclusion, considering the rights of the respondents, there had in fact been a miscarriage of justice.[3]

The appellant submitted that the learned District Judge erred in answering issues 1, 2 and 3 in the negative. Those issues are as follows:

1. මෙම නඩුවට අදාළ ඉඩමේ මුල් අයිතිකරු ප්‍රැන්සිස් ඒලියස් විජයසිංහ අබේසේකර ද?
2. ඔහුගේ හිමිකම් පැමිණිල්ලේ සඳහන් පරිදි පැමිණිලිකරුට හා 1 වෙනි විත්තිකරුට සාරෝපණය වී ද?
3. පැමිණිලිකරු සහ 1 වෙනි විත්තිකරුගේ කාලාවරෝධී හිමිකම්?

The learned District Judge has answered all three issues in the negative. However, the judgment does not contain any reasons for such findings. It may well be that they were answered in the negative as the learned District Judge was of the view that the prescriptive title pleaded by the 2nd defendant was proved. However, the case of the 2nd defendant is that she has prescribed to the corpus having possessed it from 1948. Hence the earliest that the 2nd defendant could have claimed prescriptive title was from 1958. But the case of the appellant is that his title begins with Francis Eliyas Wijayasinghe Abeysekera who transferred his rights by deed no. 1878 dated 31st May 1903 to Jane Wijayasinghe Abeysekere, Gerad Upatissa De Alwis, Mervyn George Henry De Alwis, and Rosabel Neeta De Alwis. The learned District Judge has not examined this chain of title pleaded by the plaintiff. The learned District Judge should have at least evaluated the evidence, including the relevant deeds, some of which were marked in evidence without objection. Thereafter, if he found that the 2nd defendant has prescribed to the corpus, the above issues should have been answered "Yes. But the 2nd defendant has prescribed to the corpus."[4] Furthermore, as set out below the learned District Judge has failed to evaluate the requirements and evidence in support of the prescriptive title pleaded by the 2nd defendant.

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[2] *Warnakula v. Ramani Jayawardena* (1990) 1 Sri.L.R. 206
[3] *Sopinona v. Pitipanaarachchi* (2010) 1 Sri.L.R. 88
[4] *Leisa and Another v. Simon and Another* (2002) 1 Sri.L.R. 148

In the circumstances, I am of the view that there is merit in the submission that the judgment is perfunctory and fails to comply with Section 187 of the Civil Procedure Code. Is that a ground by itself to set aside the judgment?

The proviso to Article 138(1) of the Constitution states that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice. Therefore, even where there is a failure to comply with Section 187 of the Civil Procedure Code, if it is evident on a close examination of the totality of the evidence that the learned District Judge is correct in pronouncing judgment in favour of the 2nd defendant, there is no prejudice to the substantial rights of the parties or occasioned a failure of justice and the judgment of the learned District Judge should not be disturbed.[5]

Hence, I will now consider whether the learned District Judge was correct in concluding that the 2nd defendant has prescribed to the corpus. In doing so, I am mindful of the statement of Marsoof J. in *Francis Samarawickrema v. Hilda Jayasinghe*[6] *and another* where he stated:

> "The Court of Appeal has in this case failed to observe the time tested principle enunciated by James L. J. in The *Sir Robert Peel,* [(32)] at 322 which was quoted with approval by Viscount Sankey L. C in *Powell and Wife V. Streatham Manor Nursing Home,*[(33)]at 248, that an appellate court -
>
> "will not depart from the rule it has laid down that it will not over-rule the decision of the Court below on a question of fact in which the Judge has had the advantage of seeing the witnesses and observing their demeanour unless they find some governing fact which in relation to others has created a wrong impression."[7]

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[5] *Victor and Another v. Cyril De Silva* (1998) 1 Sri.L.R. 41
[6] (2009) 1 Sri.L.R. 293
[7] Ibid. page 335

However, the demeanor of witnesses' pale into insignificance in this case as the learned District Judge who pronounced the judgment observed only the evidence of the son of the 2nd defendant who testified that much of his knowledge derived from statements made by the 2nd defendant. In any event, the learned District Judge has not referred to his evidence in the judgment. The material witnesses, namely Herbert Colin Dahanayake (plaintiff), Cyril Gunawardena and Kariyawasam Majuwana Gamage Agnes (2nd defendant) testified before two other judges.

Investigation of Title

Section 25(1) of the Partition Law requires the court to examine the title of each party and hear and receive evidence in support thereof. It has been consistently held that it is the duty of the Court to examine and investigate title in a partition action, because the judgement is a judgement *in rem.* In *Gnanapandithen and another v. Balanayagam and another*[8] G.P.S. De Silva C.J. explained this duty as follows:

> "Mr. Samarasekera cited several decisions which have, over the years, emphasized the paramount duty cast on the court by the statute itself to investigate title. It is unnecessary to repeat those decisions here. For present purposes it would be sufficient to refer to the case of *Mather v. Thamotharam Pillai* (2) decided as far back as 1903, where Layard, CJ. stated the principle in the following term: - "Now, the question to be decided in a partition suit is not **merely matters between parties which may be decided in a civil action**; . . . The court has not only to decide the matters in which the parties are in dispute, **but to safeguard the interests of others who are not parties to the suit**, who will be bound by a decree for partition . . . "Layard, CJ. stressed the importance of the duty cast on the court to satisfy itself "that the plaintiff has made out a title to the land sought to be partitioned, **and that the parties before the court are those solely entitled to such land.**" (emphasis added). "[9]

[8] (1998) 1 Sri.L.R. 391
[9] Ibid. page 395

The plaintiff claims paper title. The chain of title set out in the plaint begins with Francis Elias Wijayasinghe Abeysekere as the original owner. He transferred his rights by deed no. 1878 dated 31st May 1903 to (a) Jane Wijayasinghe Abeysekere, (b) Gerad Upatissa De Alwis, (c) Mervyn George Henry De Alwis, and (d) Rosabel Neeta De Alwis. The four of them transferred their shares to Cyril Gunawardena by deed no. 615 dated 23rd September 1947 (පැ.2) who in turn transferred an undivided 2 roods by deed no. 493 dated 23rd December 1958 to Cyril Dias who was the 1st defendant in the partition action and the balance 3/5 share to the plaintiff by deed no. 2866 dated 5th July 1984(පැ.3). It was further claimed that Cyril Gunawardena transferred the balance 2/5 share to the plaintiff by deed no. 2898 dated 20th July 1984 (පැ.4).

Cyril Gunawardena testified that he bought the corpus in 1947 by deed no. 615 dated 23rd September 1947(පැ.2). Thomas Dias, who is sometimes referred to as "Ralahamy" in the evidence, was a witness to this deed. Thomas Dias was the cousin of Cyril Gunawardena as their mothers were sisters. Cyril Gunawardena later married a daughter of Thomas Dias. Thus, there was a close family relationship between Thomas Dias and Cyril Gunawardena built on trust. This came out as follows during his cross examination by the counsel for the 2nd defendant:

ප්‍ර: 1947 දී මෙම දේපල මිලයට ගත්තට පස්සේ, මෙම දේපල බලාකියා ගත්තේ තමන්ගේ මාමණ්ඩි?

උ: ඔව්.

(Appeal Brief page 176)

ප්‍ර: ඇත්ත වශයෙන් තමන්ගේ මාමණ්ඩිගේ කීම පිට මෙම දේපල ගත්තේ?

උ: ඔව්.

ප්‍ර: තමන්ගේ මාමණ්ඩි කෙරෙහි කොච්චර විශ්වාසයක් තිබුණාද කීවොත්, මාමණ්ඩිගේ කීම පිටයි දේපල ගත්තේ?

උ: ඔව්.

(Appeal Brief page 178)

ප්‍ර: කොටින් කියනවා නම්, තමන්ගේ මාමණ්ඩි වන තෝමස් ඩයස් කෙරෙහි කොපමණ විශ්වාසයක් තිබුණද කීවොත්, කසාද බඳින්න පෙර රු. 9000ක් සල්ලි දුන්නා. ඔප්පුව සහතික කිරීම පිළිබඳව තමන් ගියේ නැහැ. තමන් සම්පූර්ණ විශ්වාස කළා මාමණ්ඩි ඒ සේරම කරයි කියා?

උ: ඔව්.

(Appeal brief page 180)

Cyril Gunawardena testified that Thomas Dias looked after the corpus and gave him a portion of the income and that Thomas Dias brought the 2nd defendant and her husband to the corpus to look after it.

Upon perusal of the deeds marked in this action and the evidence, it is clear that Cyril Gunawardena bought the corpus in 1947 and gave possession to his cousin (later father-in-law) Thomas Dias to look after it. The line of cross examination by counsel for 2nd defendant is premised on this footing. The plaintiff derives title from Cyril Gunawardena. In this context the question is whether the 2nd defendant had acquired prescriptive title by possession of the corpus as claimed.

In *D.R. Kiriamma v. J.A. Podibanda and 8 others*[10] Udalagama J. adverted to some important points to be borne in mind in considering a claim of prescriptive title:

> "Onus probandi or the burden of proving possession is on the party claiming prescriptive possession. Importantly, prescription is a question of fact. Physical possession is a factum probandum. I am inclined to the view that considerable circumspection is necessary to recognize the prescriptive title as undoubtedly it deprives the ownership of the party having paper title. It is in fact said that title by prescription is an illegality made legal due to the other party not taking action. It is to be reiterated that in Sri Lanka prescriptive title is required to be by title adverse to an independent to that of a claimant or plaintiff. "[11]

[10] 2005 B.L.J. 9
[11] Ibid. 11

Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property the burden of proof rests fairly and squarely on him to establish the starting point for his or her acquisition of prescriptive rights.[12] The 2nd defendant claims that she possessed the corpus from 1948. Was this the beginning of adverse possession?

Clearly there was a close family relationship between Cyril Gunawardena and Thomas Dias. In our society family relationships are considered important and attracts a certain degree of trust. A family member is trusted more than an outsider. Courts appear to have taken this into consideration on the question of adverse possession in a claim of prescriptive title. In *De Silva v. Commissioner General of Inland Revenue*[13] Sharvananda J. (as he was then) stated that:

> "The principle of law is well established that a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In order to constitute adverse possession, the possession must be in denial of the title of the true owner. The acts of the person in possession should be irreconcilable with the rights of the true owner; the person in possession must claim to be so as of right as against the true owner. Where there is no hostility to or denial of the title of the true owner there can be no adverse possession. In deciding whether the alleged acts of the person constitute adverse possession, regard must be had to the animus of the person doing those acts, and this must be ascertained from the facts and circumstances of each case and the relationship of the parties. **Possession which may be presumed to be adverse in the case of a stranger may not attract such a presumption, in the case of persons standing in certain social or legal relationships. The presumption represents the most likely inference that may be drawn in the context of the relationship of the parties. The Court will always attribute possession to a lawful title where that is possible.** Where the possession may be either lawful or unlawful, it must be assumed, in the absence of

[12] Gratiaen J. in *Chelliah v. Wijenathan* 54 N.L.R. 337 at 342
[13] 80 N.L.R. 292

evidence, that the possession is lawful. Thus, where property belonging to the mother is held by the son, the presumption will be that the enjoyment of the son was on behalf of and with the permission of the mother. Such permissive possession is not in denial of the title of the mother and is consequently not adverse to her. It will not enable the possession to acquire title by adverse possession. **Where possession commenced with permission, it will be presumed to so continue until and unless something adverse occurred about it. The onus is on the licensee to show when and how the possession became adverse. Continued appropriation of the income and payment of taxes will not be sufficient to convert permissive possession into adverse possession, unless such conduct unequivocally manifests denial of the permitter's title.** In order to discharge such onus, there must be clear and affirmative evidence of the change in the character of possession. The evidence must point to the time of commencement of adverse possession. **Where the parties were not at arms length, strong evidence of a positive character is necessary to establish the change of character.**"[14] (emphasis added)

This principle has been applied in a contest between brother and sister.[15] Taking into consideration the evidence led in this case, I have no difficulty in applying the principle to the relationship between Cyril Gunawardena and Thomas Dias. It is true that Thomas Dias was not a party to the partition action (Thomas Dias and the 1st Defendant Cyril Dias are not the one and the same as submitted by the appellant in his written submissions) and did not claim prescriptive title against the plaintiff's predecessor in title. However, the evidence of the 2nd defendant is that she became the mistress of Thomas Dias around 1949 by which time her husband had deserted her due to this relationship. They had three children from this relationship and Thomas Dias was named as their father.

[14] Ibid. page 296
[15] *Leisa and another v. Simon and Another* (2002) 1 Sri.L.R. 148

Mere general statements of witnesses that a party possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court.[16] The 2nd defendant stated that she came to vanrooyen estate, which adjoined the corpus, in 1947 with her husband, children and her father and in 1948 they cleared the corpus and came into possession. I am of the view that her evidence does not establish that the 2nd defendant began adverse possession of the corpus in 1948 as claimed. On the contrary her evidence is more akin to a facile story of walking into abandoned premises after the Japanese air raid which material is far too slender to found a claim based on prescriptive title.[17] Her claim to possession in 1948 is more compatible with the position of the plaintiff that she and her family were placed in possession by Thomas Dias who was the licensee of Cyril Gunwardena. At the most the commencement of the possession of the 2nd defendant in 1948 is as a licensee of Thomas Dias.

A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity. Bertram C.J. in *Tillekeratne v. Bastian*[18] explained the effect of this principle as follows:

> "The effect of this principle is that, where any person's possession was originally not adverse, and he claims that it has become adverse, the onus is on him to prove it. And what must he prove? He must prove not only an intention on his part to possess adversely, but a manifestation of that intention to the true owner against whom he sets up his possession. The burden he must assume is, in fact, both definite and heavy, and the authorities have been accustomed to emphasize its severe nature. Thus, it is sometimes said that he must prove an " overt unequivocal act " (per Wendt J. in *Perera v. Menchi Nona*)."[19]

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[16] *Sirajudeen and 2 Others v. Abbas* (1994) 2 Sri.L.R. 365
[17] Ibid.
[18] 21 N.L.R. 12
[19] Ibid. page 19

Has the 2nd defendant fulfilled this heavy burden? The 2nd defendant stated that Thomas Dias paid taxes for the corpus until his death in 1979. She further stated that at the time of his death Thomas Dias was living with her in the house situated on the corpus. The admission that Thomas Dias paid taxes for the corpus until 1979 is indicative of the 2nd defendant's possession been based on her relationship with Thomas Dias who in turn was a licensee of Cyril Gunawardena. The corpus consists of both high and paddy. An extract of a paddy land register was marked as ඕ. 5 which shows that it was issued on 25.02.1987. There the tenant cultivator is identified as Thomas Dias and the landlord as Cyril Gunawardena, the plaintiff's predecessor in title. The 2nd defendant accepted that the document related to part of the corpus.

The preliminary survey report prepared by Sisira Amendra licensed surveyor in 1985 refers to a few constructions including wells, toilet and house. However, no evidence is available as to when they were constructed. The 2nd defendant claimed that there were no constructions on the corpus when she came into possession in 1948. Her evidence is incompatible with the details in the schedule to deed no. 615 dated 23rd September 1947 (ඕ.2) by which Cyril Gunawardena obtained title to the corpus. There is a reference to buildings in that schedule. This evidence is compatible with the evidence of Cyril Gunawardena who testified that there was a large house on the corpus when he bought it.

The earliest point of time which can be referred to adverse possession beginning in favour of the 2nd defendant is 1976 when Cyril Gunawardena made a complaint to the Conciliation Board against the 2nd defendant. The complaint was that the 2nd defendant was occupying a house illegally. The partition action was filed in 1984, eight years from the date of complaint. This is not sufficient to establish prescriptive title.

For the foregoing reasons I am of the view that the learned District Judge erred in concluding that the 2nd defendant had established prescriptive title to the corpus.

I am of the opinion that justice will not be served by sending this matter back to the District Court for trial *de novo*. Action was filed in 1984 more than 33 years ago. The main witnesses who can testify on prescription are Herbert Colin Dahanayake (plaintiff), Cyril Gunawardena and Kariyawasam Majuwana Gamage Agnes (2nd defendant). Herbert Collin Dahanayake is dead. Cyril Gunawardena and Kariyawasam Majuwana Gamage Agnes (2nd defendant), if alive, will both be 89 years old. In these circumstances, in the interests of justice, I will consider whether the partition action can be determined on the available evidence.

Section 2 of the Partition Law No. 21 of 1977 provides for a partition action to be filed where any land belongs in common to two or more owners. The plaintiff in this case pleaded that the 1st defendant Cyril Dias was the owner of an undivided 2 roods of the corpus by virtue of deed no. 493 dated 23rd December 1958. Hence the maintainability of the partition action depends on establishing title of the 1st defendant to the said undivided 2 roods or at least establishing that an undivided 2 roods of the corpus is owned by a third party.

The 1st defendant did not file a statement of claim or take part at the trial. During the evidence of the plaintiff there was an attempt to mark in evidence deed no. 493 dated 23rd December 1958 as 1වි1. This is how the proceedings of 1992.02.10 reads:

"එසේ හිමිකම් ලැබූ සිරිල් විජේසිරි ගුණවර්ධණ හෙවත් සිරිල් විජේවික්‍රම ගුණවර්ධණ මෙම ඉඩමෙන් නොබෙදූ රූඩ් දෙකක බිම් ප්‍රමාණයක් 1958.12.23 වෙනි දින හා අංක: 493 දරණ මා 1වි1 වශයෙන් සලකුණු කර ඉදිරිපත් කරන ඔප්පුව මත 1 වෙනි විත්තිකරුට විකුණා ඇත. (මේ අවස්ථාවේ දී නීතිඥ තිලකරත්න මහතා එම ඔප්පුව ලකුණු කිරීමට විරුද්ධ වෙමින් කියා සිටින්නේ 1 වෙනි විත්තිකරු උත්තරයක් ඉදිරිපත් කරලා නැහැ. 1 වෙනි විත්තිකරු හෝ පැමිණිලිකරු හෝ අංක: 493 දරණ ඔප්පුව ලැයිස්තුගත කරලා සාරාංශ ගත කරලා නැහැ.)

(Appeal Brief, page 107)

The appellant submitted that deed no. 493 dated 23rd December 1958 was in fact marked as 1වි1 and is evidence in view of Section 154 of the Civil Procedure Code. It was submitted that the learned District Judge erred in not calling for and taking custody of it. Reliance is placed on *Podiralahamy v. Ran Banda*[20] where it was held that there is a duty on Court to take the documents tendered and marked at the trial to its custody and keep them filed of record and that documents marked in evidence become part of the record.

I am unable to accept that deed no. 493 dated 23rd December 1958 marked as 1වි1 was in fact admitted in evidence. The mere marking of a document during evidence does not necessarily mean it has been admitted as evidence. The explanation to Section 154(3) of the Civil Procedure Code dictates that whether a document is admitted or not it should be marked as soon as any witness makes a statement with regard to it and if not earlier marked on this account, it must, at least, be marked when the court decides upon admitting it. What has happened on 1992.02.10 is that deed no. 493 dated 23rd December 1958 was marked as 1වි1 as soon as the plaintiff made reference to it. At that point the counsel for the 2nd defendant objected to it been marked for the reasons set out in the proceedings. It appears that thereafter no further steps were taken to get deed no. 493 dated 23rd December 1958 marked 1වි1 admitted as evidence. Strictly speaking the learned District Judge should have ruled on its acceptance in evidence by addressing his mind to the two questions set out in the explanation to Section 154(3) of the Civil Procedure Code. However, his failure to do so does not amount to it having been admitted in evidence. This is clear as the original case record does not contain 1වි1. Furthermore, it was not led in evidence at the close of the case for the plaintiff on 8th July 1994. Accordingly, *Podiralahamy v. Ran Banda*[21] has no application to the circumstances of this case. In the above circumstances the plaintiff has failed to establish that an undivided extent of 2 roods of the corpus was transferred to the 1st defendant.

[20] (1993) 2 Sri.L.R. 20
[21] Ibid.

The only question left to be considered is whether the plaintiff has at least established that an undivided 2 roods of the corpus is owned by a third party. Jane Wijayasinghe Abeysekere, Gerad Upatissa De Alwis, Mervyn George Henry De Alwis, and Rosabel Neeta De Alwis transferred their shares to Cyril Gunawardena by deed no. 615 dated 23rd September 1947 (පැ.2). The schedule to the deed sets out the extent of Rukattana Gaha Henabedda alias Beraliyadolawatta half portion, the corpus in the partition action, as A.7 R. 2 P. 0. Cyril Gunawardena transferred a balance 3/5 share to the plaintiff by deed no. 2866 dated 5th July 1984(පැ.3). The schedule thereto identifies the extent so transferred as "නොබෙදූ අක්කර බාගයක බිම අත්හැර". Cyril Gunawardena transferred the balance 2/5 share to the plaintiff by deed no. 2898 dated 20th July 1984 (පැ.4). The schedule thereto also identifies the extent so transferred as "නොබෙදූ අක්කර බාගයක බිම අත්හැර". This establishes that the plaintiff obtained title to Rukattana Gaha Henabedda alias Beraliyadolawatta half portion except for "නොබෙදූ අක්කර බාගයක බිම". This evidence proves that the corpus is co-owned although, for the reasons stated earlier, the ownership to the balance portion of "නොබෙදූ අක්කර බාගයක බිම" is not established. In the circumstances, the plaintiff has only established that he is entitled to an undivided 1120/1200 share of the corpus while the balance portion of "නොබෙදූ අක්කර බාගයක බිම" should be left unallotted.

For the foregoing reasons, I allow the appeal and set aside the judgment of the learned District Judge of Galle dated 7th December 1999. I further hold that the plaintiff is entitled to 1120/1200 share of the corpus while the balance 80/1200 should be left unallotted. The learned District Judge of Galle is directed to enter interlocutory decree accordingly and take further steps as prescribed by law.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I agree.

Judge of the Court of Appeal