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

1. E. Kalyanawathie,
   "Saman", Yamanmulla,
   Akuramboda.
2. Athpatiyawe Gedara Jinadasa,
   Yamanmulla, Akuramboda.
3. Athpatiyawe Gedara Narasinghe,
   (Deceased)
   Yamanmulla, Akuramboda.

3A. Tusaratunga Narasinghe,

3B. Ihala Wahunpurage Ciciliyana,

3C. Senani Indra Narasinghe,

3D. Sunethra Nilmini Narasinghe,
   All of Yamanmulla, Akuramboda.

4. Athpatiyawe Gedera Seelawathie,
   Yamanmulla, Akuramboda.
   Defendant-Appellants

CASE NO: CA/891/2000/F

DC MATALE CASE NO: 1821/P

Vs.

1. Pesharatne Patakara Gedera
   Wijesiri,
   Ruksevana,
   Akuramboda,
   Matale.

2. Pesharatne Patakara Gedera
Sirineris,
Dalalande, Ruksevana,
Akuramboda, Matale.
Plaintiffs-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Eraj de Silva for the Defendant-Appellants.

Upendra Walgampaya for the Plaintiff-Respondents.

Decided on: 21.01.2019

Samayawardhena, J.

The two plaintiffs instituted this action against the four defendants seeking to partition the land described in the schedule to the plaint between the two plaintiffs and the 1st defendant—undivided 1/3rd share to the two plaintiffs and undivided 2/3rd share to the 1st defendant. After trial the learned District Judge entered the Judgment granting undivided 1/3rd share to the plaintiffs but left the balance 2/3rd share unallotted. It is against this Judgment the defendants have preferred this appeal.

There is no corpus dispute and the 1st defendant in her evidence admitted that the land to be partitioned is depicted in the Preliminary Plan marked X.[1]

[1] Vide page 131 of the Brief.

The learned District Judge has accepted the position of the plaintiffs that by virtue of the Final Order made under the Waste Lands Ordinance and published in the Gazette marked P4, *Rathnapata Berakara Gedara Siriya* became entitled to 1/3rd share of the corpus and *Athpatiyawe Gedara Devaya* became entitled to the balance 2/3rd share. The 1st plaintiff at the trial produced deeds to show how *Siriya's* rights devolved on them.

In the joint statement of claim of the 1st-4th defendants, they first relied on paper title, and then claimed the entire land on prescription, and sought dismissal of the plaintiffs' action. If they claimed the entire land on deeds, I cannot understand how they could thereafter claim prescriptive title to the land as one cannot claim prescription against himself.

According to the statement of claim of the 1st-4th defendants, they are the children of *Athpatiyawe Gedara Devaya*. However, only the 1st defendant participated at the trial, and the 1st defendant in her evidence stated that 2nd-4th defendants never came to Court and they do not claim any rights from the land.[2]

The 1st defendant in her evidence has clearly admitted the Gazette P4 and stated that *Athpatiyawe Gedara Devaya* referred to therein and who was declared entitled to 2/3rd share of the land was her father.

The pivotal argument of the learned counsel for the defendant-appellants before this Court is that the learned District Judge was wrong to have admitted the Gazette P4 published under the Waste Land Ordinance as the primary document of title because a

[2] Vide page 133 of the Brief.

Settlement Officer cannot decide the question of ownership. This argument is not entitled to succeed in view of the Full Bench decision of the Supreme Court in *Appuhamy v. Martin*[3] where it has been held:

> *Proceedings under the Ordinance relating to Claims to Forest, Chena, Waste and Unoccupied Lands, No. 1 of 1897, are proceedings in rem, and an order embodying an agreement or admission and falling under section 4(2) of that Ordinance gives to the claimants mentioned in the order a title good against all others, including the claimants who failed to appear before the Special Officer.*

The learned counsel for the appellants next drawing attention to *Jane Nona v. Dingiri Mahatmaya*[4] moves to dismiss the plaintiffs' action on the ground that the plaintiffs have failed to disclose a full pedigree in the plaint. In my view, the plaintiffs have, to the best of their knowledge and ability, disclosed a pedigree. The relevant parties to the action, after P4, shall be the successors in title of *Siriya* and *Devaya*. They have been made parties to the action.

The learned District Judge has refused to grant undivided 2/3rd share to the defendants (despite the plaintiffs stating so in the plaint itself) as there was no proof before the learned Judge that the defendants are the children of *Devaya*. This being a partition action, it is on that basis, the 2/3rd share has been left unallotted, which, in my view, is flawless. That does not mean that the defendants are disentitled to 2/3rd share. They can, if so advised, make a proper application before the District Court claiming the

[3] (1945) 46 NLR 481
[4] (1968) 74 NLR 105

unallotted shares. Vide *David Danthanarayana v. Nonahamy*[5], *Sapin Singho v. Luwis Singho*[6].

In terms of section 26(2)(d) of the Partition Law, No. 21 of 1977, as amended, the District Judge, after trial *inter alia* can "*order that any portion of the land representing the share of any particular party only shall be demarcated and separated from the remainder of the land*", and in terms of section 26(2)(g) can "*order that any share remain unallotted*". Hence the argument of the learned counsel for the appellants that the purpose of filing a partition action, i.e. to end co-ownership, is not achieved by the Judgment of the District Court and therefore the Judgment shall be set aside is unsustainable.

The rejection by the learned District Judge of the claim of prescription by firstly the 1st-4th defendants and then at the trial only by the 1st defendant is justifiable in the facts and circumstances of the case. No co-owner has been in exclusive physical possession of this land. Both parties have led evidence to say that during rainy seasons they did some chena cultivation. According to the Preliminary Plan and the Report marked X and Y respectively, nobody is living on the land and there are no buildings—temporary or permanent—on the land. There are, according to the Report marked Y, 2 *Mara* trees, 1 *Damba* tree, 1 *Teak* tree, 1 *Midella* tree and 7 pepper plants on the entire land. By the very nature of those trees (may be except pepper), they seem to have grown on their own. The claim of payment of Acreage Taxes to the land by the 1st defendant, even if admitted, do

[5] (1978) 79(2) NLR 241
[6] [2002] 3 Sri LR 271

not prove exclusive possession. Vide *Sirajudeen v. Abbas*[7], *De Silva v. Commissioner of Inland Revenue.*[8] I need hardly emphasize that prescription among the co-owners cannot be established by such fragile evidence.

For the aforesaid reasons, I affirm the Judgment of the District Court and dismiss the appeal with costs.

Judge of the Court of Appeal

[7] [1994] 2 Sri LR 365 at 369-370
[8] (1978) 80 NLR 292 at 296