

SC Appeal No-144/2015

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

Wickremagedera Ranhamy
NO-25, Megamma Road,
Wattegama. (Deceased)

PLAINTIFF

Wickremagedera Ukkumenika
No.25, Meegamma Road,
Wattegama.

SUBSTITUTED PLAINTIFF

Wickremagedera Karunaratne
Wickremage, No.25, Meegamma
Road, Wattegama.

1st DEFENDANT-SUBSTITUTED-PLAINTIFF

SC Appeal No:- 144/2015

SC/HCCA/Kandy/54/2007

DC Kandy/11607/P

V.

2.Wickremagedera Abeysinghe

3.Wickremagedera Wickremaratne

4.Wickremagedera Indra

Wickremaratne,

5.Wickremagedera Pragmarathna

6.Gunarathna Manike, All of

Temple Road,Meegamma,

Wattegama.

7.M.G.NettiKumara, No 51,

Meegamma, Wattegama.

DEFENDANTS

AND

M.G.Netti Kumara, No 51.

Meegamma, Wattegama.

7th DEFENDANT-APPELLANT

7A.Kuragoda Gamlathge Gnanawathie

7B.N.M.G.Menaka Ranjan Netikaumara

7C.N.M.G.Kushan Chandana Nettikumara

7D.D.N.M.G.Venulin Sandya Nettikumara

All of No.51, Meegamma, Wattegama.

SUBSTITUTED 7TH DEFENDANT-APPELLANTS

V.

Wickremagedera Karunarathne Wickremage

No-25, Meegamma Road, Wattegama.

1st DEFENDANT-SUBSTITUTED-PLAINTIFF-RESPONDENT

2.Wickremagedera Abeysinghe

3.Wickremagedera Wickremaratne

4.Wickremagedera Indra Wickremaratne

5.Wickremagedera Pragnarathna

6.Gunarathna Menike

All of Temple Road, Meegamma.

DEFENDANTS-RESPONDENTS

AND BETWEEN

Wickremagedera Karunarathne Wickremage

No.25, Meegamma Road, Wattegama.

**1st DEFENDANT-SUBSTITUTED-PLAINTIFF-
RESPONDENT-APPELLANT**

V.

7A.Kuragoda Gamlathge Gnanawathie

7B.N.M.G.Menaka Ranjan Nettikumara

7C.N.M.G. Kushan Chandana Nettikumara

7D.N.M.G.Venulin Sandya Nettikumara

All of No. 51, Meegamma, Wattegama.

SUBSTITUTED 7TH DEFENDANT-APPELLANT-RESPONDENTS

- 2.Wickremagedera Abeysinghe
- 3.Wickremagedera Wickremaratne
- 4.Wickremagedera Indra Wickremaratne
- 5.Wickremagedera Pragnarathna
- 6.Gunarathna Menike,

All of Temple Road, Meegamma.

DEFENDANT-RESPONDENT-RESPONDENTS

BEFORE:- PRIYASATH DEP, PC, CJ.

PRIYANTHA JAYAWARDENA, PC, J.

H.N.J.PERERA, J.

COUNSEL:-Samantha Ratwatte, PC, with R.de Rafayal instructed by
Ms.U.H.K.Amunugama for the 1st Defendant-Substituted
Plaintiff-Respondent-Appellant

Lal Wijenayake for the 7th Defendant-Appellant-Respondent

ARGUED ON:- 28.08.2017

DECIDED ON:- 20.10.2017

H.N.J.PERERA, J.

The plaintiff (deceased) instituted this Partition action in the District Court of Kandy to partition the amalgamated lands called “Polgahakumbura” and “Polgahakumburawatta” more fully described in the schedule to the plaint. The land described in the schedule to the plaint is lots 1 & 2 depicted in plan No 5204 dated 07.02.1991 made by Licensed Surveyor G.R.W. M. Weerakoon. 2 to 7 defendants intervened in the case.

The plaintiff's position was that the original owner of the subject matter was one Ranmal Hamy and he by deed marked P1 transferred his rights to one Siyathu. Upon the said Siyathu's death Ranhamy the original plaintiff and Kaluhamy inherited the said rights since the female children of Siyathu had been married in deega before the death of Siyathu. In proof of this the judgment entered in the District Court of Kandy in case No. P 9216 was produced marked P4 in respect of Siyathu's estate where the position of deega marriage had been established. It was the plaintiff's position that Ranhamy thereafter purchased the half share of Kaluhamy by deed marked P2 and transferred an undivided share to the 1st defendant. The original plaintiff sought a division of the subject matter between him and the 1st defendant.

The 6th defendant claimed that she had purchased rights from the deega married children of Siyathu upon the deed marked 6V2. The 7th defendant claimed that lot 1 of the preliminary plan marked X is a different land while claiming title to the entirety of lot No. 2 of the Preliminary plan by inheritance and prescriptive title.

The 7th defendant sought an exclusion of lot 1 of the preliminary plan on the basis that it was not a part of the land sought to be partitioned but a separate land called Polgaskumbure Wanatha. The 7th defendant further sought a declaration that lot 2 in the said preliminary plan is devolved on the 7th defendant as stated in the statement of claim.

The learned District Judge after trial delivered his judgment on 21.11.2006 holding that only lot 2 in the preliminary plan consists of the corpus and excluded lot 1 in the preliminary plan as it does not form part of the corpus. The learned trial judge also held that the 7th defendant has failed to establish that he had prescribed to lot 2 in the preliminary plan. It was also held that the original plaintiff is entitled to 3/8th share and the 1st defendant to 3/8 share of the corpus. It was also held that the 2nd to

6th defendants have failed to establish their right in respect of lot 2 in the preliminary plan.

Being aggrieved by the said judgment the 7th defendant appealed to the Court of Appeal and the said appeal was subsequently transferred to the Civil Appellate High Court of the Central province. The 1st defendant substituted-plaintiff too preferred a cross appeal in terms of section 772 of the Civil Procedure Code and both appeals were considered by the Civil Appellate High Court of the Central province.

The Civil Appellate High Court on 25.05.2011 allowed the appeal of the 7th defendant and rejected the cross appeal preferred by the 1st defendant substituted plaintiff. Aggrieved by the said judgment of the Civil Appellate High Court dated 25.05.2011 the 1st defendant substituted-plaintiff-Respondent-Appellant has preferred this leave to appeal application to this court and this court granted Leave to appeal on the following questions of law raised by the 1st defendant-substituted plaintiff-respondent-Appellant.

- (1) Could a party to a partition action claim legal right to $\frac{1}{2}$ share of the Land and claim the balance $\frac{1}{2}$ share on prescriptive rights without Proving ouster?
- (2) Could a party to a partition action claim a share on the basis of co-ownership in the District Court by way of a points of contest and thereafter claim ownership in appeal on the basis of transfer of rights and possessing against the rights of the vendees and thereby claim Prescriptive rights?
- (3)(a) In any event has the 7th defendant claimed rights only to the Eastern $\frac{1}{2}$ share of the subject matter before the District Court?

(b) If so, could the entirety of the subject matter be claimed by the 7th defendant by way of prescription?

(4) Is lot 1 in the preliminary plan a part of the corpus?

(5) In the circumstances pleaded is the judgment of the High Court According to law?

(6) Has the 7th defendant claimed prescriptive title to the entirety of the subject matter under issue 24 raised in the District Court?

The original plaintiff's position was that one Ranmalhamy was the original owner of the subject matter and that he by deed marked P1 transferred his rights to one Siyathu. Upon Siyathu's death it was Ranhamy the original plaintiff and Kaluhamy who had inherited since the female children of Siyathu had been married in deega before the death of Siyathu. In proof of this position the judgment in case No P 9216 Kandy District Courts marked P4 was produced. This document clearly established the fact that Siyathu's female children were given on deega marriage during the life time of Siyathu. The 6th defendant claimed that she had purchased rights from the deega married children of Siyathu upon deed marked 6V2. The learned District Judge has clearly held that the 6th defendant is not entitled to any rights on that basis. The 6th defendant has not appealed against the said decision.

It was also the plaintiff's position that Ranhamy thereafter had purchased the rights of Kaluhamy by the deed marked P2 and transferred a share to the 1st Defendant. Therefore the original plaintiff and the 1st defendant claims the entire land on the basis that they own ½ share each.

The 7th defendant claimed that lot 1 of the preliminary plan is a different land and sought an exclusion of lot No 1, while claiming rights by inheritance and prescriptive title to lot No. 2 in the preliminary plan.

The land described in the schedule to the plaint as two contiguous lands called “Polgahakumbura” and “Polgahakumbura Watta’ in extent 10 lahas. The preliminary plan X depicts the two lands as lots 1 and 2. Lot 1 above the main road is ‘Polgahakumbura Watta” and below the road “Polgahakumbura”. The 7th defendant claimed sole ownership to lot 1 on the basis of the title set out in the statement of claim and on the basis of prescription. The 7th defendant also claimed title to lot 2 with others on the basis of paper title set out in the statement of claim and further on the basis of prescription claimed ownership to the whole of lot 2.

The surveyor in his evidence states that the boundaries of the land set out in the schedule to the plaint tallies with the boundaries and extent of lot 2. The 1st defendant admitted in evidence that in deed P1, P2 and P3 produced by him to prove his title the said land is described as “Polgahakumbura” and the northern boundary of the said land is “Polgahakumbura Watta Ella”.

Schedule 1 in the said deed P1 refers to Eastern one half share of the paddy field called “Polgahakumbura”. The schedule 2 of the said deed marked P1 refers to Western one half share of the paddy field called “Polgahakumbura.” Therefore it is very clearly seen that the said Ranmalhamy had transferred the Eastern one half share and the Western one half share of the land called “Polgahakumbura” to Siyathu by deed P1. In the deed marked P1 the said Ranmalhamy has stated that he became entitled to the land described in the two schedules by deed No 4398 of 1916 and by deed No 11 of 1928. The said deed 4398 had been marked as P6 at the trial. P6 is a deed of exchange of lands. On perusal of the said deed it is clearly seen that owners of several

contiguous of lands had exchanged amongst each other certain lands they own. And Neththikumaranehelage gedera alias Malhabaralegedera Ukkumenika, Neththikumarnehelage gedera alias Malhabaralegedera Appuhamy, Neththikumaranehelage alias Malhabaralegedera Tikiri Menika, and Neththikumarahelage gedera alias Malhabaralegedera Ranmalhamy has exchanged land amongst themselves and the lands described in the schedule D has been given to the said Ranmalhamy. The second land described in the said schedule is the Western $\frac{1}{2}$ share portion of land called Polgahakumbura.

Neththikumaranehelage gedera alias Malhabaralegedera Appuhamy was given the lands described in the schedule B of the said deed and he became the owner of land called Eastern half share portion of "Polgahakumbura". The said Appuhamy by the deed marked P7 transferred his rights to one Sumanasara Thero in 1920.

And by deed No 11 of 1928 marked P8 Neththikumarehelagegedera alias Malhabaralegedera Ran Malhamy became the owner of the land described in the 1st schedule that is a divided half share on the East out of the field called Polgahakumbura about 5 lahas. Therefore it is very clearly established that Ranmalhamy became the owner of the two allotments of lands called Western half share portion and the Eastern half share portion from the said deeds marked P6, P7 and P8. And by deed No 1342 marked P1 the said Ran Malhamy had transferred the said rights to Wickremagedera Siyathu in 1941. Therefore it is very clear from the said deeds that Wickremagedera Sithu became the owner of the entirety of the land called Polgahakumbura in 1941 (both Western and Eastern portions).

It was the original plaintiff's position that upon the death of Siyathu , Wickremage Ranhamy and Wickremage Kaluhamy inherited the said land and that Wickremage Ranhamy thereafter purchased the share of

Kaluhamy by the deed marked P2. On perusal of the said deed marked P2 it is clearly seen that Kaluhamy has transferred only the rights he had to the land called Western half share of the field called Polgahakumbura. In the said schedule to the deed marked P2 the boundary to the East is the remaining portion of the same land. By the said deed P2 Ranhamy only became owner of the balance portion of the Western half share which Kuluhamy inherited after the death of Siyathu.

Therefore on perusal of the said deeds marked and produced by the plaintiff it is clearly seen that Kaluhamy continued to be the owner of the balance half share of the Eastern half share portion of the land called Polgahakumbura.

Therefore the plaintiff became the owner of the entire Western half share of the land called Polgahakumbura and was only entitled to half share of the land called Eastern half share of the said land. The other $\frac{1}{2}$ share of the Eastern half share of the land called Polgahakumbura was owned BY Wickremage Kaluhamy. It is the heirs of Wickremage Kaluhamy who are entitled to the balance portion of the eastern half share of the land called Polgahakumbura. Therefore the Plaintiff has very clearly failed to establish that he became the sole owner the two allotments of lands called Western half share and the Eastern half share of the land called Polgahakumbura. The learned trial judge had therefore very correctly held that the plaintiff and the 1st defendant is entitled to only $\frac{3}{8}$ share each to the corpus and the balance $\frac{2}{8}$ should go to the heirs of Kaluhamy and be kept un-allotted.

It is very clearly seen that the said deed marked P1 relates only to the western half share and the Eastern half share of Polgahakumbura. The northern boundary of the said two lands are referred to as the Ella of Polgahakumburewatta. What had been dealt by the said deeds marked by the plaintiff in this case relates only to the Western half share and the

Eastern half share of the land called Polgahakumbura. Therefore it is quite obvious that the other land called "Polgahakumbure Watta" is situated north to the land called 'Polgahakumbura". And further that there was the Ella of Polgahakumbura Watta as a boundary. The deeds marked by the plaintiff P1, P2, P3 and P6 refers to a land called "Polgahakumbura". Nowhere in the said deeds the said the land Polgahakumbura is referred to as "Polgahakumburawatta".

On perusal of the deed marked P5 it is clearly seen that schedule 3 of the said deed refers to a land called Polgahakumbura". And the northern boundary of the said land is referred as "Polgahakumburewatte Ella". The 6th schedule in the said deed P5 refers to a land called "Polgahakumburewatta" and the Southern boundary is "Polgahakumbure Ella". The deed marked P5 very clearly refers to two separate lands called "Polgahakumbura" and "Polgahakumbure Watta". The Polgahakumbure ella is given as northern boundary of the land called "Polgahakumbura". And the polgahakumbure ella is given as the Southern boundary of the land called "Polgahakumbure Watta". Therefore it is very clearly seen that the said Polgahakumbure Ella separates the two adjoining lands "Polgahakumbura" and "Polgahakumburawatta". The boundaries of Lot 2 in the said preliminary plan marked X clearly resembles the schedule given in the deed marked P1, P2 and P3 of the land called "Polgahakumbura.

The 7th defendant had claimed the lot 1 in the said preliminary plan as the land called Polgahakumbura Wanatha" and sought an exclusion of lot 1 in the said preliminary plan marked X as it is a separate land called "Polgahakumbure Wanatha." In my view the 7th defendant has not been able to establish that the lot 1 in the said preliminary plan marked X is land called "Polgahakumbure Wanatha". But the evidence led in this case clearly establish that it is another separate land called Polgahakumbure Watta". The learned trial Judge in his judgment dated 21.11.2006 has

held that only lot 2 in the preliminary plan consists of the corpus and had excluded lot 1 in the preliminary plan marked X as it does not form part of the corpus. When an application is made to exclude a lot from a preliminary plan, the court if satisfied from the evidence that it does not form a part of the corpus, can act under section 839 of the Civil Procedure Code to exclude the said lot from the land sought to be partitioned. But the trial judge is not empowered to examine the title of the said lot but should only proceed to exclude the said lot from the land sought to be partitioned. Hevavitharana V. Themis de Silva 63 N.L.R 68. It is the view of this court that the learned District Judge was correct when he made the order to exclude the said lot 1 from the corpus. The deeds tendered by the plaintiff in this case clearly relate only to lot 2 of the preliminary plan and what the court has to consider in this case is the rights of parties to the said lot 2 in the preliminary plan marked X. The Judges of the Civil Appellate High Court too had held that having perused the reasoning of the learned trial Judge relating to his finding that lot 1 is not a part of the land sought to be partitioned that the said Court is of the opinion that his findings are not worthy to be disturbed.

The father of the 7th defendant, Appuhamy became the owner of the divided half share on the East out of the field called "Polgahakumbura" by deed No 4398 of 1916 marked P6. He by deed NO 8614 Of 1920 transferred the said rights to Sumanasara Thero. Thereafter the original plaintiff Ranmalhamy purchased the said rights from Sumasara Thero in 1928. Although the 7th defendant had claimed that his father was a co-owner of the land to be partitioned, it is very clear from the evidence led in this case that the 7th defendant's father sold his rights to Sumanasara Thero in 1920. Appuhamy, the 7th defendant's father was the owner of the said allotment of land called Eastern half share of Polgahakumbura only for a period of four years. It was sold to Sumanasara Thero in 1920 and thereafter Ranmalhmay became the owner of the Said lot in 1928.

The said Ranmalhamy became the owner of the entire land called Polgahakumbura in 1928. The said Ranmalhamy who was the owner of the entire land called "Polgahakumbura" transferred his rights to Siythu by deed No 1342 marked P1, in the year 1941. Although the 7th defendant had claimed to be a co-owner of the said land called "Polgahakumbura" under his father, the evidence in this case clearly show that his father Appuhamy had sold his rights to the said land in 1920 to Sumanasara Thero and thereafter seized to be a co-owner of the said land.

The evidence led in this case clearly establish the title of the original plaintiff. The original plaintiff and the 1st defendant are both entitled to 3/8 share each to the corpus to be partitioned in this case (lot No 2). The other un-allotted 2/8th share must go to the heirs of Kaluhamy.

The learned District Judge held that the 7th defendant has failed to establish prescriptive title to the Said lot 2 in Plan X. The learned Judges of the Civil Appellate High Court was of the view that there was sufficient evidence to prove prescriptive title of the 7th defendant to lot 2 of the preliminary plan marked X.

All the evidence led by the 7th defendant in this case show that his father was residing and he too was born in the house shown in lot 1 of the said preliminary plan marked X. The said lot 1 has been excluded from the corpus to be partitioned in this case. No doubt there is evidence to show that the father of the defendant the said Appuhamy and thereafter the 7th defendant had continued to live and possess the said lot 1 in the preliminary plan marked X. But what the court has to examine and see in this case is whether in fact the 7th defendant has prescribed to lot 2 of the preliminary plan which is the corpus of this case.

It is clearly seen that the Said lot No 2 is a paddy field. There must be cogent evidence to prove that the 7th defendant has cultivated enjoyed

and possessed the said paddy field. No buildings had been put up in lot 2. The only item of evidence that the 7th defendant had exercised some right in lot 2 is the fact that the grave of the 7th defendant's mother is in lot 2. The evidence indicate that the mother of the said 7th defendant has been buried in 1982. This action has been filed in 1985. Just prior to three years from the date of filing of this action the defendant's mother had been buried in lot 2. This is the only isolated act of the 7th defendant to prove prescriptive title to the said lot 2.

In *Sirajudeen V. Seyyed Abbas* 1994 2 SLR 365 it was held mere general statements by a party that he possessed was not sufficient to acquire prescriptive rights. It was further held in the said case that there should be specific acts of possession such as planting etc.

Further in *Hassan V. Romanishamy* 66 C.L.W Vol. LX VI at page 112 it was also held that mere statements of a witness, "I possessed the land" or "We possessed the land" and "I planted plantain bushes and vegetables", are not sufficient to entitle him to a decree under section 3 of the Prescription Ordinance, nor is the fact of payment or rates by itself proof of possession for the purposes of this section.

By his amended statement of claim the 7th defendant claimed one Koskolapitiye Wimala was the original owner of the land described in the schedule to the plaint and she transferred it to the four children who had executed a deed of Exchange. It was claimed that Eastern ½ share of the land described in the schedule to the plaint was given to one Appuhamy and the said Appuhamy was the father of 7th defendant. The 7th defendant had clearly tried to show that he was a co-owner of the Eastern and Western ½ of the subject matter but had thereafter proceeded to claim the entire land on prescriptive title. As stated before the evidence led in this case very clearly establish that the said Appuhamy who was the 7th defendant's father seized to be a co-owner

of the lot 2 in view of the deed marked P7 when he transferred his rights to Sumanasara Thero in 1920.

The fact that the 7th defendant lived with his father in lot 1 and continued to possess the said lot 1 is not disputed by the parties in this case. But whether the 7th defendant's father and thereafter the 7th defendant acquired prescriptive title to the adjacent land which was to the South of the lot 1, which is depicted as lot 2 in the said preliminary plan is the main issue to be looked into in this case.

The learned Judges of the Civil Appellate High Court too has held that it is clear that consequent to the execution of the deed marked P7 dated 19.01.1920 Appuhamy's co-ownership was terminated. And that he cannot be treated as a co-owner of the property thereafter. The Judges of the Civil Appellate High Court has further held that although the said Appuhamy's co-ownership was terminated resultant to the deed marked P7 executed in 1920 it is manifest that he never surrendered his possession to the vendee or any other person and continued to possess the said land as a co-owner.

The said Court has further held that it is abundantly clear that the 7th defendant's party had possessed the land for more than 65 years prior to the bringing of the action in 1985. Further the learned Judges of the Civil Appellate High Court has held that the 7th defendant is entitled to track on to his father's possession for the purpose of establishing such claim based on prescription. In my view the evidence led by the 7th defendant in this case does not support that position.

The 7th defendant-respondent has given evidence and stated that his father lived in lot 1 and that he too was born in the said house in lot 1 in plan X. The survey plan marked X and report mark X1 clearly shows that there are buildings which were claimed by the 7th defendant. The 7th defendant's age at the time he gave evidence before the District Court in this case on 12.06.2006 was 56 years. Therefore he was born only in the year 1950. He in his evidence has admitted that in 1916 by the deed

marked P6 his father Appuhamy became the owner of the allotments of lands described in the schedule D of the said deed and thereafter by deed marked P7 transferred the lot No. 2 in the preliminary plan X to Sumanasara Thero in 1920. i.e the ½ share of the Eastern portion of the land called Polgahakumbura. The said Sumanasara Thero thereafter transferred the said rights to Ranmalhamy by deed marked P8 in 1928. The said father of the 7th defendant-respondent therefore had seized to be a co-owner of the said land called Polgahakumbura in 1920. That is about 36 years prior to the birth of the 7th defendant. But the 7th defendant's father continued to live in lot 1 of the preliminary plan marked X and the 7th defendant-respondent was born in the house in the said lot 1 and continued to live there with his father until his father's death in 1958. Thus it is very clear from the evidence of the 7th defendant that he was only 8 years old at the time of his father's death. The brother of his father, Ranmalhamy has died in 1960 two years after the death of Appuhamy. Therefore the 7th defendant evidence clearly shows that he has remained in the house of Appuhamy as a child and he and the other family members of Appuhamy continued to live and possess lot 1 in the said preliminary plan after the death of Appuhamy. It is clear from the evidence given by the 6th defendant that the 7th defendant thereafter demolished his ancestral home which was situated in lot 1 of the preliminary plan and built a new up stair house in the same location and continued to possess the same. The 7th defendant's father Appuhamy became a co-owner of the land called Polgahakumbura only in the year 1916 by deed marked P6 and seized to be a co-owner of the said land after 1920 when he sold his rights to Sumanasara Thero in 1920. All these things happened thirty years prior to the birth of the 7th defendant in 1950. Therefore the evidence of the 7th defendant that his father possessed and acquired prescriptive title to the said Eastern ½ portion of the lot 2 in the preliminary plan and he too continued to possess and

acquired prescriptive rights to lot No 2 cannot be accepted and acted upon. In my view clearly there is no cogent independent evidence to prove that the said Appuhamy continued to possess the Eastern ½ portion of the said land as a co-owner after 1920 and continued to possess the entirety of the said land and acquired prescriptive title to lot 2 in plan X.

It was contended on behalf of the plaintiff-Appellant that the learned High Court Judges erred in law by holding that the law with regard to vendee occupying a land after having transferred the entirety was applicable to the facts of this case when there was no such position taken up by the 7th defendant in the original court by way of points of contest.

It was contended that the 7th defendant did not claim that his father Appuhamy in fact transferred his rights but continued to be in possession against the transferee. It was contended on behalf of the plaintiff-appellant that no such position was taken up in the original court and evidence to counter such a position was therefore not led in the original court.

In *Candappa v. Ponnambalampillai* 1993(1) S.L.R 184 it was held that a party cannot be permitted to present in appeal a case different from that presented in the trial court where matters of fact are involved which were not in issue at the trial, such case not being one which raises a pure question of law.

Further in *Setha V. Weerakoon* 49 N.L.R 225 it was held that a new point which was not raised in the issue or in the course of trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more.

In the cases of Weerappa Chettiar V. Rabukpotha Kumarihamy 45 N.L.R 322, and Karuaratne V. Sirimalie 53 N.L.R 444, it was held that even in a partition case where parties raise points of contest, Court is only obliged to look in to the said contest raised and the parties cannot be permitted to go beyond those issues by relying on section 25 of the Partition Law.

It is very clear from the issues raised on behalf of the 7th defendant that it was claimed that his father Appuhamy became the owner of the Eastern ½ and thereafter prescribed to it. The 7th defendant did not claim that his father Appuhamy transferred the balance to a 3rd party and claimed prescriptive rights against a third party after such a transfer. Therefore it is very clear the 7th defendant has taken up a completely different position in the Appeal before the Civil Appellate High Court which should have been rejected by the Civil Appellate High Court.

Therefore the plaintiff-appellant's complain that the learned Civil Appellate High Court Judges went beyond the points of contest and thereby committed an error of law is of some merit.

The evidence led in this case clearly shows that the 7th defendants father Appuhamy and the 7th defendant lived and possessed lot No1 in the preliminary plan X. The Civil Appellate High Court Judges have been influenced by the fact that the 7th defendant's father and the 7th defendant had continued to occupy and possess the said lot 1 in plan X in coming to the conclusion that the 7th defendant had prescribed to the said lot 2 in the preliminary plan X. But when one consider the said evidence given by the 7th defendant it is very clear that there is no clear cogent evidence to establish the fact that, in fact, the 7th defendant possessed and prescribed to the said lot No.2 in plan X. There is no evidence to show that he had built anything in lot No.2 or done any other specific acts to hold that he had acquired prescriptive title to the said lot No.2 in plan X.

The learned District Judge had very correctly held in his judgment that the 7th Defendant-Respondent has failed to prove prescriptive title to lot No.2 in preliminary plan marked X.

In *Sirajudeen and Others V. Abbas* [1994] 2 Sri.L.R 365, it was held that:-
“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 squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive title.”
As regards mode of proof of prescriptive possession, mere general statements of witnesses that the defendant 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.

One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be such character as is incompatible with the title of the owner.

In my view in the present case there is significant absence of clear and specific evidence on such acts of possession as would entitle the 7th defendant-appellant to a decree in favour in terms of section 3 of the Prescription Ordinance. The findings of facts by the learned District Judge are mainly based on the trial Judge’s evaluation of facts. I have considered the entire judgment and see no reason to interfere and the trial Judge has given cogent reasons. The trial Judge has arrived at a correct conclusion. An Appellate Court should not without cogent reasons interfere with primary facts.

For the above reasons I see no reason to disturb the judgment of the learned District Judge.

Accordingly I answer questions of law raised in the instant case in the following manner.

No. 1 & 2 in the negative.

No. 3(a) in the affirmative
(b) in the negative.

No. 4, 5 & 6 in the negative in favour of the Plaintiff-Appellant.

Accordingly I set aside the judgment of the Civil Appellate High Court dated 22.05,2011 and affirm the judgment of the learned District Judge dated 21.11.2006. The appeal of the 1st defendant-Substituted-Plaintiff-Respondent-Appellant is partly allowed. I make no order for costs.

JUDGE OF THE SUPREME COURT

PRIYASATH DEP, PC, CJ.

I agree.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PC,J.

I agree.

JUDGE OF THE SUPREME COURT

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