DISSANAYAKE
v
DISSANAYAKE AND OTHERS

COURT OF APPEAL
SOMAWANSA, J.
MS. EKANAYAKE, J.
C.A NO. 962/2000(F)
D.C.GAMPAHA 28231/P
MARCH 9, 26, 2004

Partition Law , 21 of 1977 section 12 – Ouster – Speculative purchaser – Evaluation of Evidence – Evidence Ordinance Section 3 – Section 50 – Relevancy – Opinion as to relationship – applicability – Co-owner's possession – Partition Act, No.16 of 1951 – Sections 20, 25, 61 – Is the declaration under section 12 a procedural step only?

Held

"*Per* Somawansa, J.

"While conceding that the learned District Judge has failed to evaluate the evidence placed before him on the question of prescriptive right of the contesting defendants, it appears that on an examination of totality of evidence, he has come to a correct finding."

(i) Section 25 of the Act makes it obligatory on the court to scrutinize, quite indepently of what may or may not do, the title of each party before any share is allotted to him.

(ii) The contention that extracts from the Land Registry should have been produced in order to enable court to effectively investigate title and that section 12 declaration does not furnish conclusive proof of the matters stated therein cannot be accepted. The action should not be dismissed merely because the extracts from the Land Registry have not been produced – reliance could be placed on the section 12 declaration.

(iii) "A co-owner's possession is in law the possession of his co-owners, it is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."

APPEAL from the District Court of Gampaha

Cases referred to:

1. *Corea* v *Appuhamy* – 15 NLR–65
2. *Tillekaratne* v *Bastian* – 21 NLR 12
3. *Hamidu Lebbe* v *Ganitha* – 27 NLR 33
4. *Dias Abeysinghe* v *Dias Abeysinghe and Two others* – 34 CLW 60
5. *Juliana Hamine* v *Don Thomas* – 59 NLR 546

Harsha Soza for 20th defendant-Appellant

Athula Perera for plaintiff-respondent

S.A.D.S Suraweera for the 1st-6th, 8th-15th defendant-respondents

Cur. adv. vult

June 25, 2004

ANDREW SOMAWANSA, J.

This is an appeal from the judgment of the learned District Judge of Gampaha dated 10.11.2000 by which he ordered the partition of lot A of the land called and known as 'Millagahawatte' as prayed for in the plaint. The position of the plaintiff-respondent was that one Rosa Nona and Don Podisingho Dissanayake became entitled to the said lot A of Millagahawatta by virtue of the final decree entered in District Court Colombo case No. 21273/P. The said Rosa Nona and Podisingho Dissanayake by 4 deeds marked P2, P5, P6, and P8 executed in 1933 transferred their right and title

in the corpus to their 4 children Mili Dissanayake, Abraham Dissanayake, Simon Dissanayake and Serpinu Dissanayake and as per the pedigree pleaded in the plaint the rights and title of the aforesaid 4 children devolved on the plaintiff-respondent and 1st to 15th defendants-respondents accepted the pedigree as set out by the plaintiff-respondent and sought a partition of the corpus.

The contesting 20th defendant-appellant and the 7th, 18th, 19th, 21st and 22nd defendants-respondents by their statement of claim and the 7th defendant-respondent's amended statement of claim while denying the pedigree as set out by the plaintiff-respondent took up the position that irrespective of the aforesaid final decree entered in case No.21273/P the aforesaid Abraham Dissanayake and Serpiyanu Dissanayake by their continued possession did acquire prescriptive right to the entire corpus, that the said Abraham Dissanayake who by virtue of deed no.15808 marked P5 became entitled to 9 perches of the corpus transferred the same to the 7th defendant–respondent that the contesting defendents having possessed the said 9 perches as a separate land sought to have the said 9 perches excluded from the corpus, that on the death of Abraham Dissanayake and Serpinu Dissanayake their right to the balance portion of the corpus (less 9 perches) devolved on the 18th to 21st and 22nd defendants-respondents and the 20th defendant-appellant. The contesting defendants also denied that the 11th to 15th defendants-respondents are the children of Serpinu Dissanayake.

Parties went to trial on 16 points of contest and at the conclusion of the trial the learned District Judge by his judgment dated 10.11.2000 held with the plaintiff-respondent. It is from the said Judgement that the 20th defendant-appellant has preferred this appeal.

At the hearing of this appeal, one of the matters contended by the counsel for the 20th defendant–appellant was that the learned District Judge has not properly evaluated the evidence led in this case on the question of possession in that he has failed to appreciate that there is sufficient evidence of ouster. Counsel contended that ever since 08.03.1933 on which day the deeds marked P2, P5, P6 and P8 were executed the entire corpus has been possessed by Abraham and Sarpinu Dissanayake to the

exclusion of other co-owners namely Millie and Simon Dissanayake. He submitted that the plaintiff-respondent in his evidence does not say that all the co-owners together possessed the corpus but only says he knows the land for about 30 to 40 years and concedes under cross-examination that his vendors did not have possession and that he filed this case to get possession. He also conceded that he has no right to the buildings and that they belong to the 7th defendant-respondent and her children, 18th to 22nd defendants-respondents. He also submitted that the plaintiff-respondent was a speculative purchaser, for his evidence reveals that the extent of 22 perches of land he bought for Rs.1000/- was worth Rs. 3500/- in 1981. He also submitted that the 12th defendant-respondent did not give evidence regarding possession but the 20th defendant-appellant testified to the possession of the corpus by his father Abraham Dissanayake and his uncle Serpinu Dissanayake and stated that other than the two of them the corpus has been possessed prescriptively by the 7th defendant-respondent and her children 18th,19th,21st and 22nd defendants-respondents and the 20th defendant-appellant. Further, counsel states that despite the 7th,18th,19th, 21st, 22nd defendants-respondents and the 20th defendant-appellant placing their claim to right in the corpus by prescription in the forefront of their case none of the other parties challenged them or their claim to prescriptive right and that none of the other contesting parties claimed any right on the basis of prescription. Thus he points out that there is cogent evidence of ouster in the instant case and that the admission by the plaintiff-respondent enumerated above would add a new factor within the definition of 'proved' in section 3 of the Evidence Ordinance. However, I am unable to agree with the above submission of counsel for the 20th defendant-appellant. His observation that the plaintiff-respondent is a speculative purchaser is mere surmise and conjecture.

It is common ground that as per the pedigree shown in the plaint the original owners of the corpus were Rosa Nona and Podisingho Dissanayake. Their right, title and interest in the corpus had been transferred to their 4 children in the year 1933. There is no dispute about this . According to the evidence of the plaintiff-respondent Abraham Dissanayake was given only 9 perches of the corpus together with the boutique facing the main road subject to the life

interest of Rosa Nona and Podisingho Dissanayake. Milinona Dissanayake, Serpinu Dissanayake and Simon Dissanayake also have been their right subject to the life interest of the said original owners Rosa Nona and Podisingho Dissanayake. Thus it appears at the time of execution of the said 4 deeds the original owners Rosa Nona and Podisingho Dissanayake were in possession of the land and this contravenes the position taken by the 7th, 18th, 19th, 21st and 22nd defendant-respondents and the 20th defendant-appellant. For their position is that irrespective of the final decree in the aforesaid case No. 21273/P Abraham and Serpinu Dissanayake were in exclusive possession of the corpus. In fact the contesting defendants neither in their statement of claim nor anywhere in the evidence say as to when Abraham and Serpinu Dissanayake commenced possessing the land independently and adversely to the other co-owners. In fact when Abraham Dissanayake executed the conditional transfer of his 9 perches to one Kirinelis by deed No. 23603 dated 04.03.1943 he refers to deed No. 15808 marked P5 as the deed by which he got title to the said 9 perches thereby accepted the title of Rosa Nona and Podisingho Dissanayake.

It is also to be seen that in all the deeds produced by the contesting defendants the northern and eastern boundaries of the said 9 perches is referred to as balance portion of the same land owned by S.D.S.Dissanayake. If as the contesting defendants say Abraham Dissanayake possessed the balance portion of the same land he could have described the northern and eastern boundaries of the said 9 perches as balance portion of the same land owned by Abraham and Serpinu Dissanayake. Furthermore even deed No. 30271 marked 7v8 executed in 1949 indicates that Simon Dissanayake together with Rosa Nona have dealt with their right in the corpus which they derived on deed No.15809 marked P6.

It is interesting to note what the Surveyor had to say in his report marked X1. The Counsel for the 20th defendant-appellant seems to find fault with the contesting parties for not questioning the plaintiff-respondent as well as the 20th defendant-appellant on the contents of the Surveyor's report. I am unable to understand as to how counsel could take up such an argument when in fact the 20th defendant-appellant did give evidence and counsel for the 20th

defendant-appellant himself could have questioned the 20th defendant-appellant as well as the plaintiff-respondent on the contents of the Surveyor's report. Having failed to do so now he cannot be heard to complain on only lapse on the part of the contesting parties. According to the Surveyor's report marked X1 he had first gone to the corpus on 29.05.86 about 8 months after the institution of the action and the following is his observation as to the condition of the land.

(ඇ) නියම කරගත් පරිදි 1986. 09. 25 දින මැනීම සඳහා ගියෙමි. මායිම් පරීක්ෂා කලෙමි. "ඒ"අක්ෂරය දරන කැබැල්ලේ නැගෙනහිර මායිමට අගලක් ඇත. දකුණු මායිම කඩවතට යන වැඩඩ පාරයි. මෙම පාර අයිනේ මැතකදී නිවසක් තනා තිබුණි. එම නිවස අවට සම්පූර්ණ ඉඩම කටු පඳුරු සහිත ලඳු කැලෑවෙන් වැසී තිබුණි. "ඒ" අක්ෂරය දරණ කැබැල්ලේ බටහිර මායිමට කිසිම මායිම් සලකුණක් පොළවේ නොතිබිනි. මායිම පැරණි පිඹුර අනුව සොයා ගැනීමටද තද ලඳු කැලෑව කැපීමට සිදුවිය.

(ඈ) කටු පඳුරු සහිත ලඳු කැලය කැපීම ඉතා දුෂ්කර විය. එමෙන්ම නීති විරෝධී ලෙස මෙම කැලය මැද හැලි අරක්කු පෙරීම කර ගෙන ගිය හෙයින්, එම නීති විරෝධී වැඩවල යෙදෙන තරුණයන් කිහිප දෙනෙක් අවට ගැවසෙන්නටද විය.

(ඉ) මෙදින මායිම් සුද්ද කර නිම කිරීමට නොහැකි විය. ඒ සඳහා වෙනත් දිනයක පැමිණිය යුතු විය.

His observation reveals that except for a recently built house on the southern boundary facing the public road there was no other building on the land and that except where the house stood the entire corpus was covered with thorny bushes and shrub jungle. He further says that there were unidentified people engaged in brewing illicit liquor. These observations would clearly point to the irresistible conclusion that in the year 1986 there was no one in occupation or possession of the land except may be for the occupant of the recently built house the rest of the land was abandoned and covered with jungle. As the Surveyor could not survey the land he had gone again to the land on 14.06.89 and having surveyed the land on that day he described the buildings and plantation on the land as follows.

ගොඩනැගිලි අංක 15 පොල් පරාල සහිත රට උළු සෙවිලි වහලය. ගඩොල් සහ තාප්ප බිත්ති සිමෙන්ති පොලව කාමර තුන සාලය සහිත ස්ථිර නිවස අවුරුදු 10 ක් පමණ වයස වේ. පැරණී නිවස තිබූ තැන අළුතෙන් මෙය තනා ඇත. 7 වන විත්තිකාරිය අයිතිවාසිකම් තියයි.

අංක 2: ඇස්බැස්ටෝස් තහඩු සෙවිලි පොල් පරාල සහිත වහලය තාප්ප සහ වරිච්චි බිත්ති වලින් ග්‍රිල් ස්ථිර කුස්සිය. වයස අවුරුදු 25 ක් පමණි.

අංක : 3 : සිමෙන්තියෙන් බැඳි බොන ලිඳ , වයස අවුරුදු 03 ක් පමණි. 7 වන විත්තිකාරියගේ අයිතිය කියයි.

අංක : 4 : කපරාරු නොකළ ගඩොල් බිත්ති කොන්ක්‍රීට් වහලය, මත වතුර ටැංකිය සහිත ස්ථිර නාන කාමරය වයස අවුරුදු 3ක් පමණි.

අංක : 6 : ඇස්බැස්ටෝ තහඩු සෙවිලි සිමෙන්ති බිත්ති. ස්ථිර වැසිකිලිය. මැතකදී තනා ඇත. වයස අවුරුද්දක් පමණි. 7 වන විත්තිකාරිය අයිතිය කියයි.

අංක : 5 : අතු සෙවිලි නාන මඩුව. 7 වන විත්තිකාරිය අයිතිය කියයි. 170

අංක : 7 : තමන්ම ගල් බිත්ති සහ අතු සෙවිලි සාදගෙන යනු ලබන නිවස. 7 වෙනි විත්තිකාරියගේ පුතෙක් වන එස්.ඩී.සාන්ත දිසානායක මෙහි බලෙන් තනා ඇත.

අංක : 8 : නාන ලිඳ එස්.ඩී.සාන්ත දිසානායක බලෙන් තනා ඇත. මුල් දින වන 1986.05.27 දින ඉඩමට ගිය අවස්ථාවේදී අංක 1 දරණ නිවස තනමින් තිබුනි. අංක 2 දරණ පැරණී කුස්සිය තිබුනි. එම නිවස වටේ හැර සෙසු ඉඩම සම්පූර්ණ ලදු කැලෑව සහිත වේ. එහි තිබූ සම්පූර්ණ වගාවට පොදුවේ අයිතිවාසිකම් කියා සිටියා. 7 වන විත්තිකරු ද එය පිළිගත්තාය. ඉඩම මනින අවස්ථාවේදී ඉඩමේ සමහර කොටස් එළිකර තිබුනි. තාවකාලිකව වගාවද කර තිබුනි.

7 වන විත්තිකාරිය අයිතිය කියන වගාව : (මුල් දිනට පසුව සිටුවා ඇත.)

අවුරුදු 01 ක් වයසැති පොල් පැල	29	180
අවුරුදු 03 ක් වයසැති පොල් පැල	08	
අවුරුදු 03 ක් වයසැති කරාබු ගස්	01	
කලින් සිට තිබූ පොදු වගාව:		
අවුරුදු 60 ක් පමණ වයසැති පොල් ගස්	01	
අවුරුදු 40 ක් පමණ වයසැති පොල් ගස්	03	
අවුරුදු 25 ක් පමණ වයසැති පොල් ගස්	01	
අවුරුදු 50 ක් පමණ වයසැති කොස් ගස්	01	
අවුරුදු 10 ක් පමණ වයසැති කොස් ගස්	01	
අවුරුදු 25 ක් පමණ වයසැති කජු ගස්	04	
අවුරුදු 20 ක් පමණ වයසැති අඹ ගස්	01	190
අවුරුදු 15 ක් පමණ වයසැති රඹුටන් ගස්	01	
අවුරුදු 40 ක් පමණ වයසැති අඹ ගස්	01	

(මෙම වගාව පොදුවේ අයිති වියයුතු බව මුල් දින 7 වෙනි විත්තිකාරියද පිළගත් නමුත්, මනින අවස්ථාවේදී ඇය මෙම වගාවටද අයිතිවාසිකම් කියා සිටියාය.)

It is to be seen that except for improvements 1 and 2, the rest of the improvements viz; item 3 to 7 have been made within a period of 3 years from the date of the survey on 14.06.89.He also states that on the second occasion when he went to survey the land some areas had been cleared and a temporary plantation was to be seen. It appears according to his report that the7th defendant-respondent who on 29.05.86 accepted the claim of the other parties that plantation should go in common receded from the said stand and claimed the entire plantation to the exclusion of the other parties on 14.06.89.

With reference to the surveyor's observations that except where the house stood the entire corpus was covered with thorny bushes and shrub jungle, the Counsel for the 20th defendant-appellant submits that the Surveyor had gone to the land about 8 months after the action was instituted and that there is a common tendency amongst the people to neglect land in respect of which there is litigation. I cannot agree with this submission for on the contrary they would do everything possible to manifest their rights to the land. Counsel also submitted that the list of the plantation on the land which the Surveyor has given at pages 231 and 232 of the brief belies his statement earlier that the entire corpus was covered with thorny bushes and shrub jungle. Here again, I am unable to agree with the aforesaid submission for the reason that at the earlier occasion the *corpus* was not surveyed because the entire corpus was covered with thorny bushes and shrub jungle. Only when the land was cleared that the Surveyor was able to do a survey and one cannot expect the Surveyor to creep through the thorny bushes and shrub jungle and count the number of trees on the land. Also his submission that the 7th defendant-respondent's statement that the plantation should go in common could well mean that it has to be shared between the 7th defendant-respondent and her family members is untenable for the reason that according to the Surveyor when the other parties claimed the plantation in common the 7th defendant-respondent had accepted their claim. The indication is clear that the plantation should go in common as between the 7th defendant-respondent and the other parties to the action and not between the 7th defendant and his family members. I would say that the Surveyor's report marked X1 is clear and precise and could be relied upon.

As stated above, the main complaint of the Counsel for the 20th defendant-appellant is that the learned District Judge has not evaluated the evidence on the question of possession and that he has in about 9 sentences disposed the question of prescriptive possession by merely stating that prescription must be established by more cogent evidence, that he has failed to appreciate the plaintiff-respondent's admission and the 20th defendant-appellant's unchallenged evidence which established ouster. While conceding that the learned District Judge has failed to evaluate the evidence placed before him on the question of prescriptive rights of the contesting defendants, it appears to me that on an examination of the totality of evidence, he has come to a correct finding. For the Surveyor's report clearly shows that except for the recently built house on the southern boundary facing the road the rest of the land was abandoned, neglected and not possessed by any of the parties to the instant action including the contesting defendants. It must be noted that the occupant of the recently built house could only set up a claim to the house but not to the rest of the land which was abandoned but used by some unidentified person to brew illicit liquor.

It is to be seen that the plaintiff-respondents, as well as the 1st to 6th and 8th to 15th defendants-respondents had paper title to the land to be partitioned and the 7th defendant-respondent too had paper title to 9 perches of the corpus. The 18th, 19th, 21st and 22nd defendants-respondents and the 20th defendant-appellant though they were children of the 7th defendant-respondent did not have any paper title to the corpus. They sought to rely on prescriptive title of their father Abraham Dissanayake. However there is no sufficient evidence to establish this fact except the *ipsi dixit* of the 20th defendant-appellant. In the circumstances, the only conclusion would be that Abraham Dissanayake and Serpinu Dissanayake along with Simon and Milli Dissanayake who were co-owners dealt with their shares separately as set out in the plaintiff-respondent's pedigree Accordingly the 7th defendant-respondent being a co-owner and if she and her children are to succeed in their claim to the corpus based on prescription the burden is on them to prove their exclusive and adverse possession against other co-owners and it appears the contesting defendants have failed to discharge the said burden.

In the well known case of *Corea* v *Appuhamy*[1] the head note reads:

"Possession by a co-heir enures to the benefit of his co-owners.

A co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind Nothing short of ouster or something equivalent to ouster could bring about that result" 280

In *Tillekeratne* v *Bastian*[2] the head note reads:

"It is open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner has since become adverse.

It is a question of fact, wherever long-continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten years before 290 action brought."

Also in *Hamidu Lebbe* v *Ganitha*[3] the head note reads:

"Where a co-owner of land seeks to establish a prescriptive title against another by reason of long-continued exclusive possession, it depends on the circumstances of each case whether it is reasonable to presume an ouster from such exclusive possession".

In *Dias Abeysinghe* v *Dias Abeysinghe and Two Others*[4] held:

"(i)That, where a co-owner erects a new building on the common land and remains in possession thereof for over ten 300 years, he does not acquire a prescriptive right to the building and the soil on which it stands as against the other co-owners merely by such possession.

(ii) That where the co-owners are members of one family very strong evidence of exclusive possession is necessary to establish prescription."

In *Juliana Hamine* v *Don Thomas*[5] held:

In an action instituted under the Partition Act No.16 of 1951-

"That section 25 of the Act makes it obligatory on the Court to scrutinize, quite independently of what the parties may or may not do, the title of each party before any share is allotted to him. Where a party fails to produce his material documents of title, or omits to prove his title, the procedure prescribed in sections 20 and 61 of the Act should be followed.

Held further, that when a witness giving evidence of prescriptive possession states "I possessed" or "We possessed", the Court should insist on those words being explained and exemplified".

Applying the principles laid down in the aforesaid decisions to the facts of the instant action, I would hold that the contesting defendants have failed to establish their claim based on prescription.

Another matter raised by the counsel for the 20th defendant-appellant is that the learned trial Judge has failed to investigate title of parties properly in that Milli Dissanayake and Thomas Perera got rights on deed No. 15807 marked P2 is patently wrong. But he submits that this was the plaintiff-respondent's evidence as well as the learned trial Judge's finding and that both the evidence and the findings are clearly erroneous. Evidence of the plaintiff-respondent found on pages 108 and 109 of the brief is as follows:

"එකී රෝස නෝනා යන ඉහත කී පොඩිසිංඤෙදු දිසානායක 1933 අංක 15807 (පැ.2. දරණ ඔප්පුවෙන් අක්කර දෙකක (02) බිම් ප්‍රමාණයක් මිලි සහ තෝමස්ට පැවරුවා. එකී මිලි මිය ගියා. එම හිමිකම් දරුවන් වන මෙම නඩුවේ 3 වන විත්තිකාරී කුසුමාවතී, හතරවෙනි විත්තිකාර මැගිලින් නෝනා, 5 වන විත්තිකාර ඇලන් නෝනා, 6 වෙනි විත්තිකාර සිරියාවතී සහ රොමානිස්ට හිමිවුනා."

ඉහත කී කොටස ඔහුගේ හිමිකම් 1966 අංක. 355 (පැ.4 ඔප්පුවෙන් උපලේඛණයේ අන්තිම ඉඩම් පැ.4 අ වශයෙන් ලකුණු කරයි.)

මෙම නඩුවේ පළවන විත්තිකාර ප්‍රේමරත්නට සහ දෙවන විත්තිකාර කරුණාරත්නට පවරා තිබෙනවා."

The learned trial Judge in his Judgement says as follows at page 167 of the brief;

"රෝස නෝනා සහ පොඩි සිංඤේදුගේ මෙම හිමිකම් වලින් පැ. 2 දරණ ඔප්පුවෙන් අක්කර 2ක් මිලි දිසානායක සහ තෝමස් පෙරේරාට හිමි වී, එම හිමිකම් හිමිකම් වලින් කොටසක් 3, 4, 5, 6 විත්තිකරුවන්ට හිමිවී ඇත. එසේම පැ.3 ඔප්පුවෙන් එකී හිමිකම් වලින් කොටසක් පැමිනිලිකරුට ලැබී ඇත. "පැ4" ඔප්පුවෙන් 1, 2 විත්තිකරුවන්ට ද, එම හිමිකම් වලින් කොටසක් ලැබී ඇත. "

From the aforesaid evidence, it appears that possession of the plaintiff-respondent is that by deed No 15807 two acres of land had been transferred to Milli Dissanayake and Thomas Perera and Thomas Perera by deed No. 355 marked P4 transeferred 1 acre to the 1st and 2nd defendants-respondents. However as per the said deed marked P2 it is seen that 2 acres had been transferred only to Milli Dissanayake. Hence the evidence and the finding that by virtue of deed marked P2 Thomas Perera also became entitled to a share in the corpus is incorrect. However in terms of deed No. 355 marked P4 by which the said Thomas Perera transferred his rights to the 1st and 2nd defendants-respondents it is to be noted that in the 4th schedule to the said deed it is specifically stated that what he is transferring are the rights he inherited from his deceased wife Milli Dissanayake. There is no reference in the said deed to any rights the said Thomas Perera got from deed marked P2 .Thus it is to be seen that on the death of Milli Dissanayake, Thomas Perera who was the husband of Milli Dissanayake became entitled to 1/2 of the rights of Milli Dissanayake and the balance 1/2 devolved on their children who were the 1st to 6th defendants-respondents and one Romanis Perera. Each became entitled to 1/7 share and 1/7 th share of Romanis Perera was transferred to the plaintiff-respondent by deed No. 2328 marked P3 and the said Thomas Perera by deed marked P4 transferred his rights which he inherited from his wife Milli Dissanayake to 1st and 2nd defendants-respondents who in addition to 1/7 share they inherited from their mother also became entitled to 2 roods. This is the basis on which the shares have been allotted to the plaintiff-respondent and the 1st to 6th defendants-respondents. Not on the basis that Thomas Perera became entitled to 1 acre in terms of the deed marked P2.

Counsel for the 20th defendant-appellant again referred to another instance where the learned trial Judge had failed to

investigate title. He submits that by deed No. 30271 dated 23.05.49 marked 7V8 Simon Dissanayake has executed a conditional transfer of his shares in favour of one Rosaline Kariyapperuma which has not been redeemed and there is no evidence of its redemption. Hence the subsequent purported transfer by Simon Dissanayake by deed No. 34616 of 24.07.61 marked P7 passes no title no the 8th and 9th defendants-respondents. Furthermore, he submits there is reference to a redemption of the said conditional transfer and Simon Dissanayake bases his title on the said deed No.15809 marked P6 bases his title on the said deed No.15809 marked P6.

It is to be noted that during the argument counsel for the plaintiff-respondent sought to produce deed No. 26027 dated 04.05.52 in order to show that the said conditional transfer had been redeemed which was objected to by counsel for the 20th defendant-appellant on the basis of violation of accepted standards of fair procedure and contended that Court should not consider the said deed or attach any weight whatsoever to it and should reject the said deed totally out of consideration. If not for the objection taken by counsel for the 20th defendant-appellant this issue could have been laid to rest by examining the said deed. However it is to be seen that no issue has been raised on this point at the trial stage. Also the declaration under section 12 of the Partition Law, No. 21 of 1977 has been filed and if any rights of the said Rosalin Kariyapperuma did exist at the time of the institution of the action, it would have certainly come to light and she would have been added as a party to the instant action. The relevant provision in Section 12 of the Partition Law is as follows;'

> 12.(1) "After a partition action is registered as a *lis pendens* under the Registration of Documents Ordinance and after the return of the duplicate referred to in section 11, the plaintiff in the action shall file or cause to be filed in court a declaration under the hand of an Attorney-at-law certifying that all such entries in the register maintained under that Ordinance as relate to the land –
>
> constituting the subject matter of the action have been personally inspected by that Attorney-at -law after the registration–

of the action as a *lis pendens*, and containing a statement of the name of every person found upon the inspection of those entries –

to be a person whom the plaintiff is required by section 5 to include in the plaint as a party to the action and also, if an address of that person is registered in the aforesaid register, that address.

12.(2)(a) 'if the aforesaid declaration discloses any person who is not mentioned in the plaint as a party to the action but who should be made such a party under section 5, an amended plaint including therein that person as a party to the action, which amended plaint shall be deemed for all purposes to be the plaint in the action."

It was contended by the Counsel for the 20th defendant-appellant that the declaration under section 12 is no more than a procedural step in the institution and prosecution of a partition case. The Court therefore in considering the evidence before it does not consider the matters stated in section 12 declaration and section 12 declaration does not furnish conclusive proof of the matters stated therein. In the circumstances he contends that extracts from the Land Registry should have been produced in order to enable Court to effectively investigate title and that if the material for a proper investigation of title is not placed before Court the action should be dismissed.

Be that as it may, I do not agree that this action should be dismissed merely because the extract from the Land Registry have not been produced. For in the circumstances I would rely on the section 12 declaration. In any event, the 20th defendant-appellant is not prejudiced by non addition of Rosalin Kariyapperuma as a party to the action for they do not claim any rights, title or interest from her but relies solely on prescriptive possession. Furthermore, deed No. 30271 dated 23.05.49 marked 7V8 had been in the custody of the 7th defendant-appellant and it was the 20th defendant-appellant who produced it at the trial. The fact that Simon Dissanayake had executed a conditional transfer in favour of Rosalin Kariyapperuma Hamine was within the knowledge of the 7th defendant-respondent as well as the 20th defendant-appellant.

However as stated above they did not venture to raise an issue on this point nor did they disclose the rights of the said Rosalin Kariyapperuma Hamine or take necessary steps to add her as a necessary party of the action. The only logical conclusion would be that as disclosed by section12 declaration she was not entitled to any rights in the corpus. Also the reason why the Notary who attested deed No. 34616 marked P7 makes no mention of a deed of redemption may well be that the conditional transfer executed by deed marked 7V8 had been redeemed.

I might also say that by producing the said deed No. 30271 dated 23.05.49 marked 7V8 itself contradict the position taken by the contesting defendants and the 20th defendant-appellant, that Abraham and Serpinu were in exclusive possession of the corpus for according to the said deed Simon Dissanayake and his mother Rosanona were in possession of the corpus in 1949.

Another matter raised by the counsel for the 20th defendant-appellant is that the 11th to 15th defendants-respondents do not get any rights in the corpus because they have failed to prove that the 11th, 12th and 13th defendants-respondents and Charlotte Nona (who was the mother of the 14th and 15th defendants-respondents) are the legitimate children of Serpinu Dissanayake and the 10th defendant-respondent Rosaline Nona. The 12th defendant-respondent gave evidence but did not produce his birth certificate instead produced what is called a doubtful certificate of age marked 12V 7 which serves no purpose but only valid for examination and employment purposes nor were the birth certificates of the 11th, 13th defendants-respondents and of Charlotte Nona produced. Also the marriage certificate of the 10th defendant-appellant and Serpinu Dissanayake marked 12VI is of no help because it only evidences their marriage on 23.12.77.

The learned District Judge fell into a grave error in accepting that the 11th,12th,13th defendants-respondents and Charlotte Nona are the children of the 10th defendant Rosalin Nona, Serpinu Dissanayake and awarding the 11th, 12th, 13th defendants-respondents and the 14th and 15th defendants-respondents who are the children of Charlotte Nona shares in the corpus.

On an examination of the evidence, it is to be seen that the plaintiff-respondent in his evidence has accepted the fact that 11th to 15th defendants-respondents are the heirs of Serpinu Dissanayake and 10th defendant-respondent and that all the relations, neighbours and the villagers accepted them as children of Serpinu Dissanayake. The 12th defendant-respondent stated in his evidence that he along with the 11th, 13th defendants-respondents and Charlotte Nona are the children of Serpinu and the 10th defendant. In addition, to the marriage certificate of Serpinu Dissanayake and 10th defendant-respondent dated 23.12.1977 which was marked 12V1, the 12th defendant-respondent also produced Electoral Register extracts for the years 1966,1967, 1968,1970 and 1971 marked 12V2 to 12V6 respectively. These documents would show that at least from 1966 they were living together with the children in one house as a family. As observed by the learned District Judge, it is quite possible that Serpinu and Rosalin Nona did not register their marriage at the beginning. However for reasons best known to them they have in the year 1977 decided to register their marriage.

It is to be seen that 12th defendant-respondent has produced proceeding in two partition actions D.C. Gampaha case No. 28232/P marked 12V8 and D.C.Gampaha case No.28233/P marked 12V9. These two partition cases dealt with adjoining lands and no party to the said two action denied that the 11th 13th defendants-respondents and Charlotte Nona are heirs of Serpinu Dissanayake and 11th to 15th defendants-respondents were parties to both these actions. Though there was no contest and 7th defendant-respondent was not a party to the said actions still the parties to the said two actions have accepted the 11th and 13th defendants-respondents and Charlotte Nona as children of Serpinu. If as the 7th,18th,19th,21st,and 22nd defendants-respondents and the 20th defendant-appellant that Serpinu Dissanayake's rights devolved on them, they should have intervened and set up their claims in the said two partition actions. The 20th defendant-appellant in the course of his evidence produced a birth certificate of one Serpinu born in year 1930. It appears that the 20th defendant-appellant produced the said birth certificate in order to establish that the 10th defendant-respondent was married to one Simon earlier. However as submitted by the

counsel for the plaintiff-respondent in the marriage certificate of 10th defendant-respondent and Serpinu Dissanayake dated 23.12.1977 marked 12V1 the 10th defendant-respondents age is given as 55 years and when counting backwards she would have been born in the year 1922. Hence the 10th defendant-respondent was only 8 years in the year 1930 and could not have given birth to a child. On the other hand, age of the 10th defendant-respondent given in 12V1 tallies with the age of 11th, 12th, and 13th defendants-respondents as stated by 12th defendant-respondent.

At this point it would be relevant to refer to section 50 of the Evidence Ordinance which reads as follows;

"When the Court has to form an opinion as to the relationship of person to another, the opinion, expressed by conduct, as to the existence of such relationship of any person who as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Illustration (a) the question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife is relevant.

(b) The question is, whether A was the legitimate son of B.

The fact that A was always treated as such by members of the family is relevant,"

In the circumstances,it appears that the 11th to 15th defendants-respondents have established the fact that they are the legal heirs of Serpinu. On an examination of the evidence and the judgment of the learned District Judge it appears to me, that the learned District Judge has on a balance of probability come to a correct finding. Accordingly. I see no basis to interfere with the judgement of the learned District Judge. The appeal will stand dismissed with costs fixed at Rs. 5000/-

MS. EKANAYAKE, J. - I agree.

Application dismissed.